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REPORT
117–270

FORCED ARBITRATION INJUSTICE REPEAL ACT OF 2022

MARCH 11, 2022.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. NADLER, from the Committee on the Judiciary, submitted the following

R E P O R T

together with

MINORITY VIEWS

[To accompany H.R. 963]

The Committee on the Judiciary, to whom was referred the bill (H.R. 963) to amend title 9 of the United States Code with respect to arbitration, having considered the same, reports favorably thereon with an amendment and recommends that the bill as amended do pass.

CONTENTS

The amendment is as follows:

Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Forced Arbitration Injustice Repeal Act of 2022" or the "FAIR Act of 2022".

SEC. 2. PURPOSES.

The purposes of this Act are to—

(1) prohibit predispute arbitration agreements that force arbitration of future employment, consumer, antitrust, or civil rights disputes; and

(2) prohibit agreements and practices that interfere with the right of individuals, workers, and small businesses to participate in a joint, class, or collective action related to an employment, consumer, antitrust, or civil rights dispute.

SEC. 3. ARBITRATION OF EMPLOYMENT, CONSUMER, ANTITRUST, AND CIVIL RIGHTS DISPUTES.

(a) IN GENERAL.—Title 9 of the United States Code is amended by adding at the end the following:

"CHAPTER 5—ARBITRATION OF EMPLOYMENT, CONSUMER, ANTITRUST, AND CIVIL RIGHTS DISPUTES

"§ 501. Definitions

"In this chapter—

"(1) the term 'antitrust dispute' means a dispute—

"(A) arising from an alleged violation of the antitrust laws (as defined in subsection (a) of the first section of the Clayton Act) or State antitrust laws; and

"(B) in which the plaintiffs seek certification as a class under rule 23 of the Federal Rules of Civil Procedure or a comparable rule or provision of State law;

"(2) the term 'civil rights dispute' means a dispute—

"(A) arising from an alleged violation of—

"(i) the Constitution of the United States or the constitution of a State;

"(ii) any Federal, State, or local law that prohibits discrimination on the basis of race, sex, age, gender identity, sexual orientation, disability, religion, national origin, or any legally protected status in education, employment, credit, housing, public accommodations and facilities, voting, veterans or servicemembers, health care, or a program funded or conducted by the Federal Government or State government, including any law referred to or described in section 62(e) of the Internal Revenue Code of 1986, including parts of such law not explicitly referenced in such section but that relate to protecting individuals on any such basis; and

"(B) in which at least one party alleging a violation described in subparagraph (A) is one or more individuals (or their authorized representative), including one or more individuals seeking certification as a class under rule 23 of the Federal Rules of Civil Procedure or a comparable rule or provision of State law;

"(3) the term 'consumer dispute' means a dispute between—

"(A) one or more individuals who seek or acquire real or personal property, services (including services related to digital technology), securities or other investments, money, or credit for personal, family, or household purposes including an individual or individuals who seek certification as a class under rule 23 of the Federal Rules of Civil Procedure or a comparable rule or provision of State law; and

"(B)(i) the seller or provider of such property, services, securities or other investments, money, or credit; or

"(ii) a third party involved in the selling, providing of, payment for, receipt or use of information about, or other relationship to any such property, services, securities or other investments, money, or credit;

"(4) the term 'employment dispute' means a dispute between one or more individuals (or their authorized representative) and a person arising out of or related to the work relationship or prospective work relationship between them, including a dispute regarding the terms of or payment for, advertising of, recruiting for, referring of, arranging for, or discipline or discharge in connection with, such work, regardless of whether the individual is or would be classified as an employee or an independent contractor with respect to such work, and including a dispute arising under any law referred to or described in section 62(e) of the Internal Revenue Code of 1986, including parts of such law not explicitly referenced in such section but that relate to protecting individuals on any such basis, and including a dispute in which an individual or individuals

seek certification as a class under rule 23 of the Federal Rules of Civil Procedure or as a collective action under section 16(b) of the Fair Labor Standards Act, or a comparable rule or provision of State law;

"(5) the term 'predispute arbitration agreement' means an agreement to arbitrate a dispute that has not yet arisen at the time of the making of the agreement; and

"(6) the term 'predispute joint-action waiver' means an agreement, whether or not part of a predispute arbitration agreement, that would prohibit, or waive the right of, one of the parties to the agreement to participate in a joint, class, or collective action in a judicial, arbitral, administrative, or other forum, concerning a dispute that has not yet arisen at the time of the making of the agreement.

"§ 502. No validity or enforceability

"(a) IN GENERAL.—Notwithstanding any other provision of this title, no predispute arbitration agreement or predispute joint-action waiver shall be valid or enforceable with respect to an employment dispute, consumer dispute, antitrust dispute, or civil rights dispute.

"(b) APPLICABILITY.—

"(1) IN GENERAL.—An issue as to whether this chapter applies with respect to a dispute shall be determined under Federal law. The applicability of this chapter to an agreement to arbitrate and the validity and enforceability of an agreement to which this chapter applies shall be determined by a court, rather than an arbitrator, irrespective of whether the party resisting arbitration challenges the arbitration agreement specifically or in conjunction with other terms of the contract containing such agreement, and irrespective of whether the agreement purports to delegate such determinations to an arbitrator.

"(2) COLLECTIVE BARGAINING AGREEMENTS.—Nothing in this chapter shall apply to any arbitration provision in a contract between an employer and a labor organization or between labor organizations, except that no such arbitration provision shall have the effect of waiving the right of a worker to seek judicial enforcement of a right arising under a provision of the Constitution of the United States, a State constitution, or a Federal or State statute, or public policy arising therefrom.".

(b) TECHNICAL AND CONFORMING AMENDMENTS.—

(1) IN GENERAL.—Title 9 of the United States Code is amended—

(A) in section 1 by striking "of seamen," and all that follows through "interstate commerce" and inserting in its place "of individuals, regardless of whether such individuals are designated as employees or independent contractors for other purposes";

(B) in section 2 by striking "chapter 4" and inserting "chapter 4 or 5";

(C) in section 208 by striking "chapter 4" and inserting "chapter 4 or 5"; and

(D) in section 307 by striking "chapter 4" and inserting "chapter 4 or 5".

(2) TABLE OF CHAPTERS.—The table of chapters of title 9 of the United States Code is amended by adding at the end the following:

"5. Arbitration of Employment, Consumer, Antitrust, and Civil Rights Disputes ..... 501".

SEC. 4. EFFECTIVE DATE.

This Act, and the amendments made by this Act, shall take effect on the date of enactment of this Act and shall apply with respect to any dispute or claim that arises or accrues on or after such date.

SEC. 5. RULE OF CONSTRUCTION.

Nothing in this Act, or the amendments made by this Act, shall be construed to prohibit the use of arbitration on a voluntary basis after the dispute arises.

Purpose and Summary

H.R. 963, the "Forced Arbitration Injustice Repeal Act of 2022" or the "FAIR Act of 2022," would prohibit the enforcement of mandatory, pre-dispute arbitration ("forced arbitration") provisions in contracts involving consumer, employment, antitrust, and civil rights disputes. This critically important measure would restore access to justice for millions of Americans who are currently locked out of the court system and are forced to settle their disputes against companies in a private system of arbitration that often favors the company over the individual. H.R. 963 is supported by a

broad coalition of public interest and advocacy organizations, including Public Citizen, Consumer Reports, the American Association for Justice, and the Leadership Conference on Civil and Human Rights.[1]

Background and Need for the Legislation

Over the past several decades, forced arbitration clauses have become virtually ubiquitous in everyday contracts.[2] Often buried deep within the fine print of employment and consumer contracts, forced arbitration deprives millions of Americans of their day in court to enforce state and federal rights.[3] Because arbitration lacks the transparency and precedential guidance of the justice system, there is no guarantee that the relevant law will be applied to these disputes or that fundamental notions of fairness and equity will be upheld in the process.[4]

Unlike the judicial system—in which courts' decisions are generally public and, by building on precedent, cumulatively create a body of law—the results of arbitration disputes are often kept secret.[5] For example, the arbitration protocols for the American Arbitration Association state that arbitrators of consumer disputes must "maintain the privacy of the hearing to the extent permitted by applicable law."[6]

Forced arbitration also lacks many of the procedural safeguards of the justice system.[7] For example, in forced arbitration, a company may increase the expense of bringing a claim,[8] limit discovery,[9] or eliminate protections related to the geographic proximity of the resolution forum,[10] formal civil procedure rules, access

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[1] Letter from Remington Gregg, Couns., Pub. Citizen, et al., to Hon. Jerrold Nadler, Chairman, H. Comm. on the Judiciary & Hon. Jim Jordan, Ranking Member, H. Comm. on the Judiciary (Oct. 27, 2021), https://docs.house.gov/meetings/JU/JU00/20211103/114212/HMKP-117-JU00-20211103-SD004.pdf.

[2] Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking Deck of Justice*, N.Y. TIMES (Nov. 1, 2015), https://nyti.ms/2k6cZ1z ("By inserting individual arbitration clauses into a soaring number of consumer and employment contracts, companies . . . devised a way to circumvent the courts and bar people from joining together in class-action lawsuits, realistically the only tool citizens have to fight illegal or deceitful business practices.").

[3] CONSUMER FIN. PROT. BUREAU, ARBITRATION STUDY REP. TO CONG., PURSUANT TO DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT § 1028(a) (2015), http://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf.

[4] *See, e.g.*, Myriam Gilles, *The Day Doctrine Died: Private Arbitration and the End of Law*, 2016 U. ILL. L. REV. 371 (2016).

[5] *Justice Denied: Forced Arbitration and the Erosion of our Legal System: Hearing on H.R. 963, H.R. 7109, and H.R. 2631 Before the Subcomm. on Antitrust, Commercial, and Admin. Law of the H. Comm on the Judiciary*, 116th Cong. 3–4 (2019) (statement of Gretchen Carlson; statement of Professor Myriam Gilles, Paul R. Verkuil Chair in Pub. Law, Benjamin N. Cardozo Sch. of Law, at 10).

[6] Consumer Due Process Protocol, Principle 12.2, Am. Arbitration Ass'n, https://www.adr.org/sites/default/files/document_repository/Consumer&fxsp0;%20Due&fxsp0;%20Process&fxsp0;%20Protocol&fxsp0;%20(1).pdf.

[7] *Id*.

[8] Arbitration clauses may impose high costs on consumers, such as requiring travel to a distant forum or selection of a high-fee arbitrator—possible expenses which a plaintiff filing in a local court would not have to incur. *See* Lisa B. Bingham, *Control over Dispute-System Design and Mandatory Commercial Arbitration*, 67 LAW & CONTEMP. PROBS. 221, 234–35 (July 31, 2004).

[9] *See* Katherine Palm, Note, *Arbitration Clauses in Nursing Home Admission Agreements: Framing the Debate*, 14 ELDER L.J. 453, 478 n.172 (2006).

[10] *See* Ziva Branstetter, *Nursing Home Policy Challenged*, TULSA WORLD (Mar. 4, 2002), https://www.tulsaworld.com/archives/nursing-home-policy-challenged/article_6131212f-481c-59c4-af51-7c2a188&fxsp0;e37f9.html (Oklahoma nursing home's arbitration clause requires residents to travel to New Mexico at their own expense for arbitration proceeding).

to counsel,[11] and the right to bring similar claims jointly.[12] Additionally, the company imposing arbitration often selects the presiding arbitrator or arbitration provider,[13] creating a conflict of interest in which the purportedly neutral arbitrator may be motivated by the prospect of obtaining repeat business from the company rather than focused on fairly assessing the claim.[14]

As a result of the decline of enforcement of state and federal statutory protections, forced arbitration makes it more likely that corporate harms and abuse will go unchallenged. As Professor Myriam Gilles testified last Congress, many companies' arbitration clauses specifically identify federal protections that arbitration make unenforceable in court, such as rights under the Civil Rights Act of 1964 and the Family Medical Leave Act.[15] In this respect, as Professor Gilles observes, "forced arbitration is not an alternative regime for resolving claims, it is a means of suppressing legal claims altogether."[16] Judge William G. Young, who was appointed by President Ronald Reagan, likewise stated that the proliferation of forced arbitration clauses means that "business has a good chance of opting out of the legal system altogether and misbehaving without reproach."[17] Deepak Gupta, a leading public interest attorney, similarly testified that forced arbitration has undermined the enforcement of statutory rights.[18] He explained:

> As the U.S. Supreme Court has itself acknowledged, the presence of a forced arbitration clause often means that Americans will have no effective method of asserting their rights or getting justice under federal laws that could otherwise have been enforced in a court—consumer protection or antitrust laws, for example, or prohibitions on sex or race discrimination. If Congress passes laws that can't be enforced in the real world, what good are those laws?[19]

Although proponents claim that arbitration decreases litigation costs for consumers, consumers often do not receive any benefit of

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[11] The lower probability of victory and legal fees may discourage some attorneys from representing individuals in arbitration proceedings. *See* Charles L. Knapp, *Taking Contracts Private: The Quiet Revolution in Contract Law*, 71 FORDHAM L. REV. 761, 783–84 (2002).

[12] *See* Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 WM. & MARY L. REV. 1, 6 (2000).

[13] The major arbitration providers include the American Arbitration Association and JAMS, which set their own procedures, contract with agencies and companies to arbitrate future disputes, and provide arbitrators and panels to hear disputes. KATHERINE V.W. STONE & ALEXANDER J.S. COLVIN, ECON. POLICY INST., THE ARBITRATION EPIDEMIC: MANDATORY ARBITRATION DEPRIVES WORKERS AND CONSUMERS OF THEIR RIGHTS 17 (EPI Briefing Paper No. 414, 2015), https://www.epi.org/publication/the-arbitration-epidemic/.

[14] *See* Carrie Menkel-Meadow, *Do the "Haves" Come Out Ahead in Alternative Judicial Systems?: Repeat Players in ADR*, 15 OHIO ST. J. ON DISP. RESOL. 19, 35–37 (1999).

[15] *Justice Denied: Forced Arbitration and the Erosion of our Legal System: Hearing on H.R. 963, H.R. 7109, and H.R. 2631 Before the Subcomm. on Antitrust, Commercial, and Admin. Law of the H. Comm on the Judiciary*, 116th Cong. 7 (2019) (statement of Myriam Gilles, Paul R. Verkuil Chair in Pub. Law, Benjamin N. Cardozo Sch. of Law).

[16] *Arbitration in America: Hearing Before the S. Comm. on the Judiciary*, 116th Cong. 1 (2019) (Responses to Questions for the Record of Professor Myriam Gilles, Paul R. Verkuil Chair in Pub. Law, Benjamin N. Cardozo Sch. of Law).

[17] Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking Deck of Justice*, N.Y. TIMES (Oct. 31, 2015), https://nyti.ms/2k6cZ1z ("By inserting individual arbitration clauses into a soaring number of consumer and employment contracts, companies . . . devised a way to circumvent the courts and bar people from joining together in class-action lawsuits, realistically the only tool citizens have to fight illegal or deceitful business practices.").

[18] *Justice Denied: Forced Arbitration and the Erosion of our Legal System: Hearing on H.R. 963, H.R. 7109, and H.R. 2631 Before the Subcomm. on Antitrust, Commercial, and Admin. Law of the H. Comm on the Judiciary*, 116th Cong. 2 (2019) (statement of Deepak Gupta, Founding Principal, Gupta Wessler PLLC).

[19] *Id.*

reduced costs through forced arbitration.[20] Instead, arbitration clauses appear to dissuade consumers from adjudicating disputes altogether.[21] Moreover, the lower probability of victory and the meager legal fees associated with forced arbitration may also discourage attorneys from representing individuals in arbitration proceedings.[22] As Justice Stephen G. Breyer explained:

> What rational lawyer would have signed on to represent the [plaintiffs] in litigation for the possibility of fees stemming from a $30.22 claim . . . ? The realistic alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for $30.[23]

Supporters of forced arbitration also argue that doing away with it would lead to more class action lawsuits, the costs of which would ultimately be passed onto consumers.[24] For example, Alan Kaplinsky, a senior counsel and former Practice Leader of the Consumer Financial Services Group at Ballard Spahr LLP, who testified before the Senate Judiciary Committee on April 2, 2019,[25] cited a Consumer Financial Protection Bureau (CFPB) study estimating that a proposed rule limiting arbitration clauses would cost financial services providers between $2.62 and $5.23 billion over a five-year period.[26] Professor Gilles, however, rejected this concern, noting that large companies that do not use forced arbitration in their consumer contracts—such as Capital One and Bank of America—have not experienced significant upticks in litigation.[27] Furthermore, businesses concerned with additional liability risk could address this concern by adhering to state and federal law.

In sum, forced arbitration has transferred the rights of workers and consumers to a secretive, closed, and private system designed by corporate interests to evade oversight and accountability.[28] Unsurprisingly, 84% of Americans across the political spectrum support ending forced arbitration in employment and consumer disputes.[29]

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[20] CONSUMER FIN. PROT. BUREAU, ARBITRATION STUDY REP. TO CONG., PURSUANT TO DODD–FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT § 1028(a), at § 10 (2015), http://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf ("Using two measures of credit offered, we did not find any statistically significant evidence that companies that eliminated arbitration provisions reduced the credit they offered.").

[21] *Justice Denied: Forced Arbitration and the Erosion of our Legal System: Hearing on H.R. 963, H.R. 7109, and H.R. 2631 Before the Subcomm. on Antitrust, Commercial, and Admin. Law of the H. Comm on the Judiciary*, 116th Cong. 3–4 (2019) (statement of Deepak Gupta, Founding Principal, Gupta Wessler PLLC).

[22] *See* Charles L. Knapp, *Taking Contracts Private: The Quiet Revolution in Contract Law*, 71 FORDHAM L. REV. 761, 783–84 (2002).

[23] AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 365 (2011) (Breyer, J. dissenting).

[24] Alan S. Kaplinsky & Mark J. Levin, *The CFPB's Final Arbitration Rule Run Amok*, THE REG. REV. (Sept. 11, 2017), https://www.theregreview.org/2017/09/11/kaplinsky-levin-cfpb-arbitration-rule/.

[25] *Arbitration in America: Hearing Before the S. Comm on the Judiciary*, 116th Cong. 6 (2019) (statement of Alan S. Kaplinsky, Partner, Ballard Spahr LLP).

[26] *Id.* at 4.

[27] *Justice Denied: Forced Arbitration and the Erosion of our Legal System: Hearing on H.R. 963, H.R. 7109, and H.R. 2631 Before the Subcomm. on Antitrust, Commercial, and Admin. Law of the H. Comm on the Judiciary*, 116th Cong. 11 n.59 (2019) (statement of Professor Myriam Gilles, Paul R. Verkuil Chair in Pub. Law, Benjamin N. Cardozo Sch. of Law).

[28] Jessica Silver-Greenberg & Robert Gebeloff, *In Arbitration, A 'Privatization of the Justice System,'* N.Y. TIMES (Nov. 1, 2015), https://www.nytimes.com/2015/11/02/business/dealbook/in-arbitration-a-privatization-of-the-justice-system.html.

[29] *See* Guy Molyneux & Geoff Garin, *National Survey on Required Arbitration*, HART RESEARCH ASSOCS. (Feb. 28, 2019), https://www.justice.org/sites/default/files/2.28.19%20Hart%20poll&fxsp0;%20memo.pdf. &fxsp0;

I. RECENT CASE LAW IGNORES THE LEGISLATIVE INTENT OF THE FEDERAL ARBITRATION ACT

On February 12, 1925, Congress codified the use of arbitration through the Federal Arbitration Act (FAA).[30] The FAA was adopted to put arbitration agreements on equal footing with other contracts in certain disputes.[31] The legislative history of the FAA suggests that the law was intended to narrowly apply to disputes between merchants, not between a business and its consumers or workers.[32] In 1967, the Supreme Court characterized the FAA as "plainly designed" to include protections against "captive customers or employees."[33] The Court noted that it was clear from congressional debate on the Act that Congress did not intend for parties with unequal bargaining power to be forced to arbitrate claims on a "take-it-or-leave-it basis":

> On several occasions [Members of Congress] expressed opposition to a law which would enforce even a valid arbitration provision contained in a contract between parties of unequal bargaining power. Senator Walsh cited insurance, employment, construction, and shipping contracts as routinely containing arbitration clauses and being offered on a take-it-or-leave-it basis to captive customers or employees. He noted that such contracts "are really not voluntarily (sic) things at all" because "there is nothing for the man to do except to sign it; and then he surrenders his right to have his case tried by the court." He was emphatically assured by the supporters of the bill that it was not their intention to cover such cases.[34]

Furthermore, the Court emphasized that not only was the Act intended to apply only to merchant disputes, but it was also intended to narrowly apply to "simpler questions of law" involving the routine performance of contracts, such as the passage of title or the existence of warranties.[35] Arbitration would not resolve questions of statutory law, which would remain within the clear purview of courts.

Indeed, the drafters of the FAA had made clear that arbitration was not appropriate for substantive questions of law. Julius Henry Cohen, the law's architect, emphasized that it was "not the proper method for deciding points of law of major importance involving constitutional questions or policy in the application of statutes."[36]

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[30] Pub. L. No. 68–401, 43 Stat. 883 (1925) (codified at 9 U.S.C. §§ 1–16 (2019).

[31] H.R. REP. No. 68–96, at 1 (1924) ("The purpose of this bill is to make valid and enforcible [sic] agreements for arbitration . . . in the Federal courts.").

[32] *See, e.g.,* H.R. REP No. 68–96, at 1 (1924); Christopher R. Leslie, *The Arbitration Bootstrap,* 94 TEX. L. REV. 265, 305 (2015) ("The most important fact about the testimony, hearings, and reports leading up to congressional enactment of the FAA is that every witness, every Senator, and every Representative discussed one issue and one issue only: arbitration of contract disputes between merchants.").

[33] Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 414 (1967).

[34] *Id.* (quoting *Sales and Contracts to Sell in Interstate and Foreign Commerce, and Federal Commercial Arbitration: Hearing on S. 4213 and S. 4214 Before the Subcomm. of the S. Comm. on the Judiciary*, 67th Cong. 6 (1923) [hereinafter *1923 Hearing on S. 4213 and S. 4214*] (statement of Senator Walsh)).

[35] Prima Paint Corp., 388 U.S. at 415 n.13 (quoting Julius Henry Cohen & Kenneth Dayton, *The New Federal Arbitration Law*, 12 VA. L. REV. 265, 281 (1926)).

[36] Andrea Cann Chandrasekher & David Horton, *Arbitration Nation: Data from Four Providers*, 107 CAL. L. REV. 1, 11 n.67 (2019) (quoting Julius Henry Cohen & Kenneth Dayton, *The New Federal Arbitration Law*, 12 VA. L. REV. 265, 281 (1926)).

Arbitration was also rarely invoked in state courts because it was widely considered not to preempt state law.[37] This consensus was supported by the FAA's legislative history. During hearings on the measure, Cohen testified that "there is no disposition therefore by means of the Federal bludgeon to force an individual State into an unwilling submission to arbitration enforcement."[38]

In a series of decisions beginning in the 1980s,[39] however, the Supreme Court drastically expanded the applicability of the FAA to arbitration clauses in everyday contracts, "push[ing] arbitration into the mainstream."[40] The Court has upheld the enforcement of arbitration clauses even when doing so prevents an individual from vindicating a state or federal statutory right.[41] Furthermore, by imposing arbitration on a "take-it-or-leave-it" basis, large companies have eviscerated the congressional intent of arbitration as a voluntary process agreed to between parties of equal bargaining power.[42]

With respect to labor unions, the Supreme Court held in *Epic Systems Corp.* v. *Lewis* that the National Labor Relations Act (NLRA), which guarantees workers the right to organize unions and utilize collective bargaining, does not reflect a clearly expressed congressional intent to displace the FAA and to prohibit class and collective action waivers.[43] The Court held that arbitration agreements must be enforced as written, and that "[w]hile Congress is of course always free to amend this judgment, we see nothing suggesting it did so in the NLRA."[44] Justice Ginsburg, in a dissent joined by Justices Breyer, Sotomayor, and Kagan, said the majority was "egregiously wrong," and noted that the decision "subordinates employee-protective labor legislation to the Arbitration Act . . . . Congress, when it enacted the NLRA, likely meant to protect employees' joining together to engage in collective litigation."[45]

II. FORCED ARBITRATION UNDERMINES THE RIGHTS OF CONSUMERS

Forced arbitration is now widespread in consumer contracts.[46] In many cases, consumers are unaware of forced arbitration clauses in

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[37] David Horton, *The Federal Arbitration Act and Testamentary Instruments*, 90 N.C. L. REV. 1027, 1039 (2012).

[38] *Id.* at 1039 n.55 (citing *Arbitration of Interstate Commercial Disputes: Joint Hearings on S. 1005 and H.R. 646 Before the Subcomms. of the Comms. on the Judiciary*, 68th Cong. 40 (1924)).

[39] *See, e.g.*, Moses H. Cone Mem'l Hosp. v. Mercury Constr., 460 U.S. 1 (1983); *Justice Denied: Forced Arbitration and the Erosion of Our Legal System: Hearing on H.R. 963, H.R. 7109, and H.R. 2631 Before the Subcomm. on Antitrust, Commercial, and Admin. Law of the H. Comm. On the Judiciary*, 116th Cong. 25–29 (2019) (statement of Deepak Gupta, Founding Principal, Gupta Wessler PLLC).

[40] Andrea Cann Chandrasekher & David Horton, *Arbitration Nation: Data from Four Providers*, 107 CAL. L. REV. 1, 12 (2019).

[41] *See, e.g.*, Preston v. Ferrer, 552 U.S. 346, 349 (2008) ("When parties agree to arbitrate all questions arising under a contract, the [Federal Arbitration Act] supersedes state laws . . . ."); Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265 (1995); Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991).

[42] During the passage of the Federal Arbitration Act, Congress did not even intend to allow binding arbitration agreements on individuals if the contracts were between parties of unequal bargaining power. *Prima Paint Corp.*, 388 U.S. at 414 (1967) (Black, J., dissenting) (citing 1923 *Hearing on S. 4213 and S. 4214*).

[43] Epic Sys. Corp. v. Lewis, 138 S.Ct. 1612, 1622–25 (2018).

[44] *Id.* at 1632.

[45] *Id.* at 1633, 1641 (Ginsburg, J., dissenting).

[46] *Justice Denied: Forced Arbitration and the Erosion of our Legal System: Hearing on H.R. 963, H.R. 7109, and H.R. 2631 Before the Subcomm. on Antitrust, Commercial, and Admin. Law of the H. Comm on the Judiciary*, 116th Cong. 1–2 (2019) (statement of Deepak Gupta, Founding Principal, Gupta Wessler PLLC).

the contracts of commonly used goods and services.[47] These clauses are sometimes hidden inside of envelopes,[48] delivery boxes,[49] and privacy policies.[50] Because nearly 90% of mobile phone services contain a forced arbitration clause, it is virtually impossible to avoid them and still use a mobile phone.[51] This is also true for many financial services and products, such as student loans and credit cards.[52] As a result, if the consumer wants to use the service or product, accepting the arbitration clause is mandatory.[53]

In 2015, the CFPB released a congressionally-mandated study on forced arbitration in financial products and services.[54] The study, which is the most comprehensive empirical study of arbitration to date,[55] found "[n]o evidence of arbitration clauses leading to lower prices for consumers."[56] Instead, the CFPB found that arbitration has undermined the ability of consumers to seek redress for abusive, anti-consumer practices.[57] Richard Cordray, then-Director of the CFPB, explained that based on this research, the CFPB had concluded that "any prospect of meaningful relief for groups of consumers is effectively extinguished by forcing them to fight their legal disputes as lone individuals."[58] As he stated, in recent years "many businesses have sought to use arbitration clauses not simply as an alternative means of resolving disputes, but effectively to insulate themselves from accountability by blocking group claims," exceeding the original purpose of the Federal Arbitration Act.[59]

Heidi Shierholz, president of the Economic Policy Institute, notes that "not only do companies win the overwhelming majority of

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[47] *See* Wash. Mut. Fin. Grp. v. Bailey, 364 F.3d 260, 264–66 (5th Cir. 2004) (holding that an arbitration agreement was enforceable against illiterate consumers, even though they had no knowledge of the arbitration requirement); Am. Gen. Fin. Servs., Inc. v. Griffin, 327 F. Supp. 2d 678, 683 (N.D. Miss. 2004) (upholding arbitration agreement even though blind consumer had no knowledge of agreement); Marsh v. First USA Bank, N.A., 103 F. Supp. 2d 909, 916–18 (N.D. Tex. 2000) (finding that inserting an arbitration clause in monthly billing statements constituted sufficient notice).

[48] *See* Ting v. AT&T, 319 F.3d 1126, 1134 (9th Cir. 2003).

[49] *See* Hill v. Gateway 2000, Inc., 105 F.3d 1147, 1148 (7th Cir. 1997).

[50] *See* Stephanie Strom, *When 'Liking' a Brand Online Voids the Right to Sue*, N.Y. TIMES (Apr. 16, 2014), https://www.nytimes.com/2014/04/17/business/when-liking-a-brand-online-voids-the-right-to-sue.html.

[51] Brian Hardingham, *The FCC Should Stop Cell Phone Giants from Using Forced Arbitration Clauses as a Get out of Jail Free Card*, PUB. JUSTICE: BLOG (Jan. 13, 2017), https://www.publicjustice.net/fcc-stop-cell-phone-giants-using-forced-arbitration-clauses-get-jail-free-card/.

[52] *Credit Card Practices: Fees, Interest Rates, and Grace Periods: Hearing Before the Permanent Subcomm. on Investigations of the S. Comm. on Homeland Sec. and Governmental Affairs*, 110th Cong. (2007) (statement of Alys Cohen, Staff Att'y, Nat'l Consumer Law Ctr.).

[53] Critics of arbitration label it "mandatory," "compelled," or even "cram down" arbitration. *See, e.g.*, Carrie Menkel-Meadow, *Do the "Haves" Come Out Ahead in Alternative Judicial Systems?: Repeat Players in ADR*, 15 OHIO ST. J. ON DISP. RESOL. 19, 39 (1999).; David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33 (1997); Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637, 638 (1996).

[54] CONSUMER FIN. PROT. BUREAU, ARBITRATION STUDY REP. TO CONG., PURSUANT TO DODD–FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT § 1028(a) (2015), http://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf.

[55] *Justice Denied: Forced Arbitration and the Erosion of our Legal System: Hearing on H.R. 963, H.R. 7109, and H.R. 2631 Before the Subcomm. on Antitrust, Commercial, and Admin. Law of the H. Comm on the Judiciary*, 116th Cong. 15 (2019) (statement of Deepak Gupta, Founding Principal, Gupta Wessler PLLC).

[56] CONSUMER FIN. PROT. BUREAU, FACTSHEET, CONSUMER FINANCIAL PROTECTION BUREAU STUDY FINDS THAT ARBITRATION AGREEMENTS LIMIT RELIEF FOR CONSUMERS 3 (Mar. 10, 2015), https://files.consumerfinance.gov/f/201503_cfpb_factsheet_arbitration-study.pdf.

[57] *Id.* at 2.

[58] Richard Cordray, Dir., Consumer Fin. Prot. Bureau, Remarks at Field Hearing on Arbitration Clauses (May 5, 2016), https://www.consumerfinance.gov/about-us/newsroom/prepared-remarks-cfpb-director-richard-cordray-field-hearing-arbitration-clauses/.

[59] *Id.*

claims when consumers are forced into arbitration—they win big."[60] Strikingly, in arbitration involving financial institutions, "[b]ecause consumers win so rarely, the average consumer ends up *paying* financial institutions in arbitration—a whopping $7,725."[61]

III. FORCED ARBITRATION DEPRIVES EMPLOYEES OF FUNDAMENTAL PROTECTIONS

According to a 2017 report by the Economic Policy Institute, 60.1 million workers—the majority of non-union employees in the private sector—have signed away their rights through forced arbitration clauses.[62] As this report notes, this trend has "weakened the position of workers whose rights are violated, barring access to the courts for all types of legal claims, including those based on Title VII of the Civil Rights Act, the Americans with Disabilities Act, the Family and Medical Leave Act, and the Fair Labor Standards Act."[63]

When employees work under forced arbitration clauses, they are less likely to win in disputes with their employers,[64] or even to bring them at all.[65] Workers that do enforce their rights in the workplace receive less in damages in arbitration than would have been available in court.[66]

IV. FORCED ARBITRATION DEPRIVES AMERICANS OF THEIR CIVIL RIGHTS

According to an analysis of corporate legal settlements of civil rights complaints, U.S. corporations have paid more than $2.7 billion since 2000,[67] although the cases that reach settlement may only represent "the tip of [the] iceberg of corporate abuses."[68] Many victims of civil rights violations are unable to pursue their claims in court due to forced arbitration provisions imposed on them as a condition of employment or for using everyday goods and services.[69] The Leadership Conference on Civil and Human Rights, a coalition representing more than 200 civil rights groups,[70] explains:

> Civil and human rights are especially vulnerable to the dangerous impact of forced arbitration. Forced arbitration clauses often preclude consumers and employees joining together to form a class action to enforce their civil rights, which results in claim suppression. Moreover, forced arbitration does not allow public scrutiny of alleged discrimi-

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[60] HEIDI SHIERHOLZ, ECON. POLICY INST., FORCED ARBITRATION IS BAD FOR CONSUMERS (2017), https://www.epi.org/publication/forced-arbitration-is-bad-for-consumers/.
[61] *Id.*
[62] ALEXANDER J.S. COLVIN, ECON. POLICY INST., THE GROWING USE OF MANDATORY ARBITRATION 2 (2017), https://www.epi.org/files/pdf/135056.pdf.
[63] *Id.* at 1.
[64] *Id.* at 3.
[65] *Id.* at 5–6.
[66] *Id.*
[67] Michelle Chen, *Corporations Have Paid Out at Least $2.7 Billion in Civil-Rights and Labor Lawsuits Since 2000*, THE NATION (Feb. 1, 2019), https://www.thenation.com/article/corporations-lawsuits-civil-rights/ (citing PHILIP MATTERA, GOOD JOBS FIRST, BIG BUSINESS BIAS: EMPLOYMENT DISCRIMINATION AND SEXUAL HARASSMENT AT LARGE CORPORATIONS (2019), https://www.goodjobsfirst.org/sites/default/files/docs/pdfs/BigBusinessBias.pdf).
[68] *Id.*
[69] HEIDI SHIERHOLZ, ECON. POLICY INST, FORCED ARBITRATION IS BAD FOR CONSUMERS (2017), https://www.epi.org/publication/forced-arbitration-is-bad-for-consumers/.
[70] *Our Common Purpose*, LEADERSHIP CONF. ON CIVIL & HUMAN RIGHTS (last visited on Mar. 7, 2021), https://civilrights.org/about/the-coalition/.

> nation, nor does it allow for the creation of judicial opinions that help develop the law and provide further guidance on emerging trends. As a result, landmark civil rights laws such as those protecting employees from race, gender, and age discrimination have been rendered meaningless.[71]

In addition to precluding the enforcement of the civil rights laws, the opacity of forced arbitration prevents others from learning of widespread misconduct. As Terri Gerstein, the Director of the State and Local Enforcement Project at the Harvard Law School Labor and Worklife Program, noted, the secretive nature of arbitration "has allowed outrageous violations, in some cases years of sexual harassment and predation, to remain hidden from view and therefore to continue."[72]

V. FORCED ARBITRATION UNDERMINES THE ENFORCEMENT OF THE ANTITRUST LAWS

Forced arbitration clauses have also undermined the enforcement of the antitrust laws.[73] As Deepak Gupta noted during the ACAL Subcommittee's hearing on forced arbitration last Congress, "[t]roublingly, firms that possess monopoly power can enact a sort of 'double punch' by imposing arbitration terms that insulate their abuse of that same power."[74] In 2013, the Supreme Court dictated this result in *American Express Co.* v. *Italian Colors Restaurant*.[75] In that case, a small but successful restaurant in Oakland, California banded with fellow merchants in a class-action lawsuit to challenge the alleged anticompetitive conduct of American Express, including its exorbitantly high and hidden fees—as much as 30% more than other card companies.[76] The small businesses alleged that American Express' conduct violated Section 1 of the Sherman Act.[77] In response, American Express moved to compel individual arbitration under the Federal Arbitration Act.[78]

Notwithstanding the establishment of a private right of action in the Clayton Act, the Court held that the Federal Arbitration Act required the arbitration of claims under the antitrust laws.[79] As the Court noted, the antitrust laws do not '"evince an intention to preclude a waiver' of class-action procedure."[80] Justice Elena Kagan, in a dissent joined by Justices Ginsburg and Breyer, warned that the majority's interpretation of the FAA allows the monopolist "to use its monopoly power to insist on a contract effec-

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[71] Letter from Leadership Conf. on Civil & Human Rights to U.S. Senators (Feb. 3, 2016), http://civilrightsdocs.info/pdf/Arbitration-Letter.pdf.

[72] Terri Gerstein, *Forced Arbitration is Unjust and Deeply Unpopular. Can Congress End It?*, SLATE (Mar. 1, 2019), https://slate.com/news-and-politics/2019/03/congress-forced-arbitration-fair-act.html.

[73] *Justice Denied: Forced Arbitration and the Erosion of our Legal System: Hearing on H.R. 963, H.R. 7109, and H.R. 2631 Before the Subcomm. on Antitrust, Commercial, and Admin. Law of the H. Comm on the Judiciary*, 116th Cong. 21 (2019) (statement of Deepak Gupta, Founding Principal, Gupta Wessler PLLC).

[74] *Id.* at 20.

[75] Am. Express. Co. v. Italian Colors Rest., 570 U.S. 228, 231 (2013) (holding that the Federal Arbitration Act compels the enforcement of a contractual waiver of a plaintiff's claim under a federal statute).

[76] Luke Tsai, *Supreme Court Rules Against Oakland Restaurant in AmEx Suit*, EAST BAY EXPRESS (June 25, 2013), https://www.eastbayexpress.com/WhatTheFork/archives/2013/06/25/supreme-court-rules-against-oakland-restaurant-in-amex-suit.

[77] Italian Colors Rest., 570 U.S. at 231.

[78] *Id.*

[79] *Id.* at 234.

[80] *Id.* (quoting Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth, Inc., 473 U.S. 614, 628 (1985)).

tively depriving its victims of all legal recourse."[81] As she explained, the Court's decision would have sweeping ramifications for the vindication of rights established by statute:

> In the hands of today's majority, arbitration threatens to become . . . a mechanism easily made to block the vindication of meritorious federal claims and insulate wrongdoers from liability. The Court thus undermines the FAA no less than it does the Sherman Act and other federal statutes providing rights of action.[82]

Critics of the *Italian Colors* decision similarly note that it has "created the possibility that an entity engaging in monopolistic behavior could encourage and strengthen such behavior" by implementing forced arbitration clauses with merchants.[83] Now that such clauses are enforceable, entities engaged in monopolistic behavior can insulate themselves from virtually any risk of antitrust liability.[84] As Mr. Gupta explained at the ACAL Subcommittee's hearing on forced arbitration, this behavior has two consequences.[85] First, antitrust enforcement suffers as a whole due to the decline of private enforcement.[86] Second, this decline also results in a wealth transfer from low-income to high-income individuals in the absence of open and competitive markets.[87]

Alan Carlson, the owner of the Italian Colors Restaurant and the lead plaintiff in the case, urged Congress in 2019 to "pass the FAIR Act to restore equal access to justice for small businesses and consumers."[88] As he observed, forced arbitration "makes it impossible for businesses to hold large corporations publicly accountable."[89] The FAIR Act, he concluded, "would give back to small businesses the right to go before a judge and jury against big corporations instead of being locked into a forced arbitration system that is too expensive to use."[90]

A coalition of antitrust law professors have similarly noted that the FAIR Act is essential to protecting consumers and small businesses by restoring the private enforcement of the antitrust laws. They explained:

> Billions of dollars are lost by U.S. consumers and businesses to criminal antitrust conspirators, many of which are foreign corporations . . . . While criminal enforcement is important for punishing and deterring antitrust conspiracies, private enforcement provides virtually the only way to compensate businesses and consumers that are victims

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[81] Italian Colors Rest., 570 U.S. at 240 (Kagan, J., dissenting).
[82] *Id.* at 253.
[83] Robert Ward, Note, *Divide & Conquer: How the Supreme Court Used the Fed. Arbitration Act to Threaten Statutory Rights & the Need to Codify the Effective Vindication Rule*, 39 SETON HALL LEGIS. J. 149, 162 (2015).
[84] *See id.*
[85] *Justice Denied: Forced Arbitration and the Erosion of our Legal System: Hearing on H.R. 963, H.R. 7109, and H.R. 2631 Before the Subcomm. on Antitrust, Commercial, and Admin. Law of the H. Comm on the Judiciary*, 116th Cong. 21 (2019) (statement of Deepak Gupta, Founding Principal, Gupta Wessler PLLC).
[86] *Id.*
[87] *Id.*
[88] *Justice Denied: Forced Arbitration and the Erosion of our Legal System: Hearing on H.R. 963, H.R. 7109, and H.R. 2631 Before the Subcomm. on Antitrust, Commercial, and Admin. Law of the H. Comm on the Judiciary*, 116th Cong. 6 (2019) (statement of Alan S. Carlson, Owner, Italian Colors Rest.).
[89] *Id.* at 5.
[90] *Id.* at 5–6.

> of antitrust violations. . . . The FAIR Act would protect consumers and small businesses from being forced into individual, private arbitration for antitrust disputes. It would help preserve the strong private enforcement scheme that Congress established to protect competition and allow honest businesses to thrive.[91]

The American Antitrust Institute and a coalition of other public interest organizations added that in the absence of legislation to end forced arbitration, "the proliferation of class action waivers in mandatory arbitration clauses will destroy a wide swath of the private antitrust rights afforded to the most vulnerable economic actors in the United States."[92]

Hearings

For the purposes of clause 3(c)(6)(A) of House Rule XIII, the following hearing was used to consider H.R. 963:

On February 11, 2021, the ACAL Subcommittee held an oversight hearing entitled "Justice Restored: Ending Forced Arbitration and Protecting Fundamental Rights." The Majority witnesses at the hearing were: Myriam Gilles, Professor of Law, Paul R. Verkuil Chair in Public Law, Benjamin N. Cardozo School of Law; Gretchen Carlson, Journalist and Advocate; and Jacob Weiss, Founder and President, OJ Commerce. The Minority witness at the hearing was G. Roger King, Senior Labor and Employment Counsel, HR Policy Association. There, Ms. Carlson testified about the use of forced arbitration to silence victims of systemic sexual harassment.[93] In her testimony, Professor Gilles similarly explained how forced arbitration "perpetuates the exploitation of women in the workplace by shunting victims into a private system where each is unaware of the other and where the arbitration provider (who is chosen and paid by the employer) lacks authority to remedy systemic and recurring workplace abuse."[94] Several of the witnesses urged passage of the FAIR Act.

In addition, the following related hearing was held: On November 16, 2021, the Committee on the Judiciary held a hearing entitled "Silenced: How Forced Arbitration Keeps Victims of Sexual Violence and Sexual Harassment in the Shadows." The Majority witnesses at the hearing were: Eliza Dushku, Actor, Producer, and Graduate Student; Tatiana Spottiswoode, Law Student, Columbia Law School; Andowah Newton of New York, NY; Lora Henry of Canton, OH; and Professor Myriam Gilles, Professor of Law, Paul R. Verkuil Chair in Public Law, Cardozo School of Law. The Minority witnesses at the hearing were: Anna St. John, President and General Counsel, Hamilton Lincoln Law Institute; and Sarah Parshall Perry, Legal Fellow, Edwin Meese III Center for Legal

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[91] Letter from Robert H. Lande, Professor, University of Baltimore School of Law, et al., to Reps. Jerrold Nadler (D–NY), Chair, & Doug Collins (R–GA), Ranking Member, Comm. on the Judiciary (Sept. 5, 2019) (on file with Majority staff of the H. Comm. on the Judiciary).

[92] Letter from the American Antitrust Institute, et al., to Reps. Jerrold Nadler (D–NY), Chair, & Doug Collins (R–GA), Ranking Member, H. Comm. on the Judiciary (Sept. 6, 2019) (on file with Majority staff of the H. Comm. on the Judiciary).

[93] *Justice Restored: Ending Forced Arbitration and Protecting Fundamental Rights Before the Subcomm. on Antitrust, Commercial, and Admin. Law of the H. Comm. on the Judiciary,* 117th Cong. 1 (2021) (statement of Gretchen Carlson).

[94] *Id.* at 9 (statement of Professor Myriam Gilles, Paul R. Verkuil Chair in Pub. L., Benjamin N. Cardozo Sch. of L.), https://docs.house.gov/meetings/JU/JU05/2019&fxsp0;0516/109484/HHRG-116-JU05-Wstate-GillesM-201&fxsp0;90516.pdf.

and Judicial Studies, The Heritage Foundation. During the hearing, survivors of sexual harassment or sexual assault testified about how forced arbitration clauses blocked their ability to seek justice and hold wrongdoers accountable and shielded this misconduct from public scrutiny.[95]

Committee Consideration

On November 3, 2021, the Committee met in open session and ordered the bill, H.R. 963, favorably reported with an amendment, by a rollcall vote of 23 to 14, a quorum being present.

Committee Votes

In compliance with clause 3(b) of House Rule XIII, the following rollcall votes occurred during the Committee's consideration of H.R. 963:

1. An amendment by Mr. Bentz of Oregon to amend the bill's date of enactment failed by a rollcall vote of 15 to 20. The vote was as follows:

[95] *Silenced: How Forced Arbitration Keeps Victims of Sexual Violence and Sexual Harassment in the Shadows Before the Subcomm. on Antitrust, Commercial, and Admin. Law of the H. Comm on the Judiciary,* 117th Cong. 1 (2021) (statement of Professor Myriam Gilles, Paul R. Verkuil Chair in Pub. L., Benjamin N. Cardozo Sch. of L.).

Roll Call No. 2 **Date:** 11/3/21

COMMITTEE ON THE JUDICIARY

House of Representatives
117th Congress

Amendment # 1 (ANS) to HR 963 offered by Rep. Bentz

☐ PASSED
☒ FAILED

	AYES	NOS	PRES.
Jerrold Nadler (NY-10)		✓	
Zoe Lofgren (CA-19)		✓	
Sheila Jackson Lee (TX-18)		✓	
Steve Cohen (TN-09)			
Hank Johnson (GA-04)		✓	
Ted Deutch (FL-22)			
Karen Bass (CA-37)		✓	
Hakeem Jeffries (NY-08)			
David Cicilline (RI-01)		✓	
Eric Swalwell (CA-15)			
Ted Lieu (CA-33)		✓	
Jamie Raskin (MD-08)		✓	
Pramila Jayapal (WA-07)		✓	
Val Demings (FL-10)		✓	
Lou Correa (CA-46)			
Mary Gay Scanlon (PA-05)		✓	
Sylvia Garcia (TX-29)		✓	
Joseph Neguse (CO-02)			
Lucy McBath (GA-06)		✓	
Greg Stanton (AZ-09)		✓	
Madeleine Dean (PA-04)		✓	
Veronica Escobar (TX-16)		✓	
Mondaire Jones (NY-17)		✓	
Deborah Ross (NC-02)		✓	
Cori Bush (MO-01)		✓	
	AYES	NOS	PRES
Jim Jordan (OH-04)	✓		
Steve Chabot (OH-01)	✓		
Louie Gohmert (TX-01)			
Darrell Issa (CA-50)	✓		
Ken Buck (CO-04)			
Matt Gaetz (FL-01)		✓	
Mike Johnson (LA-04)	✓		
Andy Biggs (AZ-05)	✓		
Tom McClintock (CA-04)	✓		
Greg Steube (FL-17)			
Tom Tiffany (WI-07)	✓		
Thomas Massie (KY-04)	✓		
Chip Roy (TX-21)	✓		
Dan Bishop (NC-09)	✓		
Michelle Fischbach (MN-07)	✓		
Victoria Spartz (IN-05)	✓		
Scott Fitzgerald (WI-05)	✓		
Cliff Bentz (OR-02)	✓		
Burgess Owens (UT-04)	✓		
	AYES	NOS	PRES.
TOTAL	15	20	

2. An amendment by Mr. Fitzgerald of Wisconsin to exclude from the bill a person in any industry affected by labor shortages or supply-chain disruptions failed by a rollcall vote of 16 to 22. The vote was as follows:

Roll Call No. 3 **Date:** 11/3/2021

COMMITTEE ON THE JUDICIARY

House of Representatives
117th Congress

Amendment # 2 (ANS) to HR 963 offered by Rep. Fitzgerald

☐ PASSED
☒ FAILED

	AYES	NOS	PRES.
Jerrold Nadler (NY-10)		✓	
Zoe Lofgren (CA-19)		✓	
Sheila Jackson Lee (TX-18)		✓	
Steve Cohen (TN-09)		✓	
Hank Johnson (GA-04)		✓	
Ted Deutch (FL-22)		✓	
Karen Bass (CA-37)		✓	
Hakeem Jeffries (NY-08)			
David Cicilline (RI-01)		✓	
Eric Swalwell (CA-15)			
Ted Lieu (CA-33)		✓	
Jamie Raskin (MD-08)		✓	
Pramila Jayapal (WA-07)		✓	
Val Demings (FL-10)		✓	
Lou Correa (CA-46)			
Mary Gay Scanlon (PA-05)		✓	
Sylvia Garcia (TX-29)		✓	
Joseph Neguse (CO-02)		✓	
Lucy McBath (GA-06)		✓	
Greg Stanton (AZ-09)		✓	
Madeleine Dean (PA-04)		✓	
Veronica Escobar (TX-16)		✓	
Mondaire Jones (NY-17)			
Deborah Ross (NC-02)		✓	
Cori Bush (MO-01)		✓	
	AYES	NOS	PRES
Jim Jordan (OH-04)			
Steve Chabot (OH-01)	✓		
Louie Gohmert (TX-01)	✓		
Darrell Issa (CA-50)	✓		
Ken Buck (CO-04)	✓		
Matt Gaetz (FL-01)		✓	
Mike Johnson (LA-04)	✓		
Andy Biggs (AZ-05)	✓		
Tom McClintock (CA-04)	✓		
Greg Steube (FL-17)			
Tom Tiffany (WI-07)	✓		
Thomas Massie (KY-04)	✓		
Chip Roy (TX-21)	✓		
Dan Bishop (NC-09)	✓		
Michelle Fischbach (MN-07)	✓		
Victoria Spartz (IN-05)	✓		
Scott Fitzgerald (WI-05)	✓		
Cliff Bentz (OR-02)	✓		
Burgess Owens (UT-04)	✓		
	AYES	NOS	PRES.
TOTAL	16	22	

3. An amendment by Mr. Fitzgerald of Wisconsin to expand the bill to include collective bargaining agreements failed by a rollcall vote of 15 to 21. The vote was as follows:

Roll Call No. 4 **Date:** 11/3/2021

COMMITTEE ON THE JUDICIARY

House of Representatives
117th Congress

Amendment # 3 (ANS) to HR 963 offered by Rep. Fitzgerald

☐ PASSED
☒ FAILED

	AYES	NOS	PRES.
Jerrold Nadler (NY-10)		✓	
Zoe Lofgren (CA-19)		✓	
Sheila Jackson Lee (TX-18)		✓	
Steve Cohen (TN-09)		✓	
Hank Johnson (GA-04)		✓	
Ted Deutch (FL-22)		✓	
Karen Bass (CA-37)		✓	
Hakeem Jeffries (NY-08)			
David Cicilline (RI-01)		✓	
Eric Swalwell (CA-15)			
Ted Lieu (CA-33)		✓	
Jamie Raskin (MD-08)		✓	
Pramila Jayapal (WA-07)		✓	
Val Demings (FL-10)		✓	
Lou Correa (CA-46)		✓	
Mary Gay Scanlon (PA-05)		✓	
Sylvia Garcia (TX-29)		✓	
Joseph Neguse (CO-02)			
Lucy McBath (GA-06)		✓	
Greg Stanton (AZ-09)		✓	
Madeleine Dean (PA-04)		✓	
Veronica Escobar (TX-16)		✓	
Mondaire Jones (NY-17)			
Deborah Ross (NC-02)		✓	
Cori Bush (MO-01)		✓	
	AYES	NOS	PRES
Jim Jordan (OH-04)			
Steve Chabot (OH-01)	✓		
Louie Gohmert (TX-01)	✓		
Darrell Issa (CA-50)	✓		
Ken Buck (CO-04)	✓		
Matt Gaetz (FL-01)	✓		
Mike Johnson (LA-04)	✓		
Andy Biggs (AZ-05)			
Tom McClintock (CA-04)	✓		
Greg Steube (FL-17)			
Tom Tiffany (WI-07)			
Thomas Massie (KY-04)	✓		
Chip Roy (TX-21)	✓		
Dan Bishop (NC-09)	✓		
Michelle Fischbach (MN-07)	✓		
Victoria Spartz (IN-05)	✓		
Scott Fitzgerald (WI-05)	✓		
Cliff Bentz (OR-02)	✓		
Burgess Owens (UT-04)	✓		
	AYES	NOS	PRES.
TOTAL	15	21	

4. The motion to report H.R. 963, as amended, favorably was agreed to by a rollcall vote of 23 to 14. The vote was as follows:

Roll Call No. 5 **Date:** 11/3/21

COMMITTEE ON THE JUDICIARY

House of Representatives
117th Congress

Final Passage on: HR 963

☒ PASSED
☐ FAILED

	AYES	NOS	PRES.
Jerrold Nadler (NY-10)	✓		
Zoe Lofgren (CA-19)	✓		
Sheila Jackson Lee (TX-18)	✓		
Steve Cohen (TN-09)	✓		
Hank Johnson (GA-04)	✓		
Ted Deutch (FL-22)	✓		
Karen Bass (CA-37)	✓		
Hakeem Jeffries (NY-08)			
David Cicilline (RI-01)	✓		
Eric Swalwell (CA-15)			
Ted Lieu (CA-33)	✓		
Jamie Raskin (MD-08)	✓		
Pramila Jayapal (WA-07)	✓		
Val Demings (FL-10)	✓		
Lou Correa (CA-46)			
Mary Gay Scanlon (PA-05)	✓		
Sylvia Garcia (TX-29)	✓		
Joseph Neguse (CO-02)	✓		
Lucy McBath (GA-06)	✓		
Greg Stanton (AZ-09)	✓		
Madeleine Dean (PA-04)	✓		
Veronica Escobar (TX-16)	✓		
Mondaire Jones (NY-17)	✓		
Deborah Ross (NC-02)	✓		
Cori Bush (MO-01)	✓		
	AYES	NOS	PRES
Jim Jordan (OH-04)			
Steve Chabot (OH-01)			
Louie Gohmert (TX-01)		✓	
Darrell Issa (CA-50)		✓	
Ken Buck (CO-04)		✓	
Matt Gaetz (FL-01)	✓		
Mike Johnson (LA-04)		✓	
Andy Biggs (AZ-05)		✓	
Tom McClintock (CA-04)		✓	
Greg Steube (FL-17)			
Tom Tiffany (WI-07)			
Thomas Massie (KY-04)		✓	
Chip Roy (TX-21)		✓	
Dan Bishop (NC-09)		✓	
Michelle Fischbach (MN-07)		✓	
Victoria Spartz (IN-05)		✓	
Scott Fitzgerald (WI-05)		✓	
Cliff Bentz (OR-02)		✓	
Burgess Owens (UT-04)		✓	
	AYES	NOS	PRES.
TOTAL	23	14	

Committee Oversight Findings

In compliance with clause 3(c)(1) of House Rule XIII, the Committee advises that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of House Rule X, are incorporated in the descriptive portions of this report.

Committee Estimate of Budgetary Effects

Pursuant to clause 3(d)(1) of House Rule XIII, the Committee adopts as its own the cost estimate prepared by the Director of the Congressional Budget Office pursuant to section 402 of the Congressional Budget Act of 1974.

New Budget Authority and Congressional Budget Office Cost Estimate

Pursuant to clause 3(c)(2) of House Rule XIII and section 308(a) of the Congressional Budget Act of 1974, and pursuant to clause (3)(c)(3) of House Rule XIII and section 402 of the Congressional Budget Act of 1974, the Committee has requested but not received from the Director of the Congressional Budget Office a budgetary analysis and a cost estimate of this bill.

Duplication of Federal Programs

Pursuant to clause 3(c)(5) of House Rule XIII, no provision of H.R. 963 establishes or reauthorizes a program of the federal government known to be duplicative of another federal program.

Performance Goals and Objectives

The Committee states that pursuant to clause 3(c)(4) of House Rule XIII, H.R. 963 improves access to justice for millions of Americans by allowing parties in employment, consumer, antitrust, or civil rights disputes to elect arbitration after a dispute has arisen.

Advisory on Earmarks

In accordance with clause 9 of House Rule XXI, H.R. 963 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9(d), 9(e), or 9(f) of House Rule XXI.

Section-by-Section Analysis

The following discussion describes the bill as reported by the Committee.

Sec. 1. Short Title. Section 1 sets forth the short title of the bill as the "Forced Arbitration Injustice Repeal Act of 2022" or the "FAIR Act of 2022."

Sec. 2. Purposes. Section 2 states that the purposes of the FAIR Act are to: (1) prohibit pre-dispute arbitration agreements that force arbitration of future employment, consumer, antitrust, or civil rights disputes, and (2) prohibit practices that interfere with the right of individuals and small businesses to participate in joint class or collective action related to an employment, consumer, antitrust, or civil rights dispute.

Sec. 3. Arbitration of Employment, Consumer, Antitrust, and Civil Rights Disputes. Section 3(a) amends Title 9 of the United States Code by adding at the end "Chapter 5—Arbitration of Employment, Consumer, Antitrust, and Civil Rights Disputes."

New Section 501 defines various terms used under new chapter 5. For example, it defines "antitrust dispute" as arising from an alleged violation of the antitrust laws, as defined in the first section the Clayton Act or State antitrust laws, and in which the plaintiffs seek certification under Rule 23 of the Federal Rules of Civil Procedure or a comparable state law.

The term "civil rights dispute" is defined as a dispute "arising from an alleged violation of the Constitution of the United States or the constitution of a State" or any Federal, State or local law that prohibits discrimination on the basis of "race, sex, age, gender identity, sexual orientation, disability, religion, national origin, or any legally protected status in education, employment, credit, housing, public accommodations and facilities, voting, veterans, health care, or a program funded or conducted by the Federal Government or a State Government," in which at least one party is alleging a violation, including seeking class certification under Federal or State law.

The term "consumer dispute" is defined as a dispute between one or more individuals who "seek or acquire" "real or personal property, services . . . securities or other investments, money, or credit for personal, family, or household purposes," including individuals seeking class certification under Federal or State law, and a "seller or provider" of such listed services, or a "third party involved" in the "selling, providing of, payment for, receipt or use of information about, or other relationship to any such property, services, securities or other investments, money, or credit."

The term "employment dispute" means a dispute between one or more individuals and a person "arising out of or related to the work relationship or prospective work relationship," regardless of "whether the individual is or would be classified as an employee or an independent contractor with respect to such work." Section 501 concludes by defining "pre-dispute arbitration agreement" as an agreement to arbitrate a dispute before the dispute has arisen, and "pre-dispute joint-action waiver" as an agreement that would waive the right of one of the parties to participate in a joint, class or collective action.

New section 502 first provides that no pre-dispute arbitration agreement or pre-dispute joint-action waiver shall be valid or enforceable relating to disputes described within the chapter. It further provides that a court, and not an arbitrator, shall determine whether this chapter applies to an agreement to arbitrate, and the enforceability of that agreement. Section 502 specifies that chapter 5 does not apply to any arbitration provision between an employee and a labor organization or between labor organizations.

Section 3(b) makes a series of technical and conforming amendments.

Sec. 4. Effective Date. Section 4 provides that the legislation applies to any dispute or claim that arises or accrues on or after the date of enactment of the legislation.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italics, and existing law in which no change is proposed is shown in roman):

TITLE 9, UNITED STATES CODE

CHAPTER 1—GENERAL PROVISIONS

* * * * * * *

§ 1. "Maritime transactions" and "Commerce" defined; exceptions to operation of title

"Maritime transactions", as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce", as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment [of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce] *of individuals, regardless of whether such individuals are designated as employees or independent contractors for other purposes*.

§ 2. Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract or as otherwise provided in chapter 4 *or 5*.

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CHAPTER 2—CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

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§ 208. Application

Chapter 1 applies to actions and proceedings brought under this chapter to the extent that chapter is not in conflict with this chapter or the Convention as ratified by the United States. This chapter applies to the extent that this chapter is not in conflict with chapter 4 *or 5*.

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CHAPTER 3—INTER-AMERICAN CONVENTION ON INTERNATIONAL COMMERCIAL ARBITRATION

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§ 307. Application

Chapter 1 applies to actions and proceedings brought under this chapter to the extent chapter 1 is not in conflict with this chapter or the Inter-American Convention as ratified by the United States. This chapter applies to the extent that this chapter is not in conflict with chapter 4 *or 5*.

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CHAPTER 5—ARBITRATION OF EMPLOYMENT, CONSUMER, ANTITRUST, AND CIVIL RIGHTS DISPUTES

§ 501. Definitions

In this chapter—

(1) the term "antitrust dispute" means a dispute—

(A) arising from an alleged violation of the antitrust laws (as defined in subsection (a) of the first section of the Clayton Act) or State antitrust laws; and

(B) in which the plaintiffs seek certification as a class under rule 23 of the Federal Rules of Civil Procedure or a comparable rule or provision of State law;

(2) the term "civil rights dispute" means a dispute—

(A) arising from an alleged violation of—

(i) the Constitution of the United States or the constitution of a State;

(ii) any Federal, State, or local law that prohibits discrimination on the basis of race, sex, age, gender identity, sexual orientation, disability, religion, national origin, or any legally protected status in education, employment, credit, housing, public accommodations and facilities, voting, veterans or servicemembers, health care, or a program funded or conducted by the Federal Government or State government, including any law referred to or described in section 62(e) of the Internal Revenue Code of 1986, includ-

ing parts of such law not explicitly referenced in such section but that relate to protecting individuals on any such basis; and

(B) in which at least one party alleging a violation described in subparagraph (A) is one or more individuals (or their authorized representative), including one or more individuals seeking certification as a class under rule 23 of the Federal Rules of Civil Procedure or a comparable rule or provision of State law;

(3) the term "consumer dispute" means a dispute between—

(A) one or more individuals who seek or acquire real or personal property, services (including services related to digital technology), securities or other investments, money, or credit for personal, family, or household purposes including an individual or individuals who seek certification as a class under rule 23 of the Federal Rules of Civil Procedure or a comparable rule or provision of State law; and

(B)(i) the seller or provider of such property, services, securities or other investments, money, or credit; or

(ii) a third party involved in the selling, providing of, payment for, receipt or use of information about, or other relationship to any such property, services, securities or other investments, money, or credit;

(4) the term "employment dispute" means a dispute between one or more individuals (or their authorized representative) and a person arising out of or related to the work relationship or prospective work relationship between them, including a dispute regarding the terms of or payment for, advertising of, recruiting for, referring of, arranging for, or discipline or discharge in connection with, such work, regardless of whether the individual is or would be classified as an employee or an independent contractor with respect to such work, and including a dispute arising under any law referred to or described in section 62(e) of the Internal Revenue Code of 1986, including parts of such law not explicitly referenced in such section but that relate to protecting individuals on any such basis, and including a dispute in which an individual or individuals seek certification as a class under rule 23 of the Federal Rules of Civil Procedure or as a collective action under section 16(b) of the Fair Labor Standards Act, or a comparable rule or provision of State law;

(5) the term "predispute arbitration agreement" means an agreement to arbitrate a dispute that has not yet arisen at the time of the making of the agreement; and

(6) the term "predispute joint-action waiver" means an agreement, whether or not part of a predispute arbitration agreement, that would prohibit, or waive the right of, one of the parties to the agreement to participate in a joint, class, or collective action in a judicial, arbitral, administrative, or other forum, concerning a dispute that has not yet arisen at the time of the making of the agreement.

§ 502. No validity or enforceability

(a) IN GENERAL.—Notwithstanding any other provision of this title, no predispute arbitration agreement or predispute joint-action

waiver shall be valid or enforceable with respect to an employment dispute, consumer dispute, antitrust dispute, or civil rights dispute.

(b) APPLICABILITY.—

(1) IN GENERAL.—An issue as to whether this chapter applies with respect to a dispute shall be determined under Federal law. The applicability of this chapter to an agreement to arbitrate and the validity and enforceability of an agreement to which this chapter applies shall be determined by a court, rather than an arbitrator, irrespective of whether the party resisting arbitration challenges the arbitration agreement specifically or in conjunction with other terms of the contract containing such agreement, and irrespective of whether the agreement purports to delegate such determinations to an arbitrator.

(2) COLLECTIVE BARGAINING AGREEMENTS.—Nothing in this chapter shall apply to any arbitration provision in a contract between an employer and a labor organization or between labor organizations, except that no such arbitration provision shall have the effect of waiving the right of a worker to seek judicial enforcement of a right arising under a provision of the Constitution of the United States, a State constitution, or a Federal or State statute, or public policy arising therefrom.

Minority Views

H.R. 963 is the Democrats' latest effort to gut arbitration agreements. It makes predispute arbitration agreements unenforceable in all sorts of contexts—in employment disputes, consumer disputes, antitrust disputes, and civil rights disputes. The bill invalidates millions of current—and completely legal—contracts that could save Americans time and money. By cutting off the option to resolve disputes in arbitration, the bill will push more people into the courts. More lawsuits, in turn, will ultimately mean higher prices and fewer jobs.

The bill starts with misleading rhetoric. It claims to be targeting "forced" arbitration agreements, but forced or involuntary agreements are already illegal.[1] In reality, predispute arbitration agreements are voluntary agreements between people who want to resolve their future disputes out of court. It is these voluntary agreements to use alternative dispute resolution that the bill actually voids. Representative Cliff Bentz warned during the Committee's consideration of H.R. 963 that "confusing contracts of adhesion . . . with negotiated agreements that this bill would prevent and also wipe out is simply not appropriate; [it] shouldn't be done." But the bill does exactly that.

There are many reasons why people might rather agree to resolve future disputes using arbitration. Arbitration is often less expensive and faster than litigation, and it offers more flexibility in terms of process and scheduling.[2] It tends to be less adversarial,

[1] *See* AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 339 (2011) (explaining that "agreements to arbitrate [may] be invalidated by 'generally applicable contract defenses, such as fraud, duress, or unconscionability'" (citation omitted)); Shearson/Am. Exp., Inc. v. McMahon, 482 U.S. 220, 226 (1987) (noting that an arbitration agreement may be invalidated if it "resulted from the sort of fraud or excessive economic power that 'would provide grounds for the revocation of any contract'" (citation omitted)).

[2] *See* H.R. REP. NO. 97–542, at 13 (1982).

which allows parties to maintain ongoing and future relationships.[3] The benefits are not limited to process and logistics, either. Studies have shown that plaintiffs in employment and consumer disputes win more often and recover more money in arbitration than they do in litigation.[4]

Despite all of these benefits, the bill will effectively take the option to arbitrate off the table. In theory, people could agree after a dispute arises to resolve it in arbitration.[5] In practice, though, that never happens. After there is a dispute, emotions are running high, and lawyers have a financial incentive to recommend litigation.[6] Once an actual dispute arises, parties will develop a strategy to resolve that dispute, rather than looking for a resolution option that benefits both parties. When analyzing a specific dispute, one of the parties is more likely to see some strategic advantage in court.

With no real option to arbitrate, the bill will either push more Americans into court—where they will pay more and possibly recover less—or prevent them from having their claims heard at all.[7] American job creators will feel these effects, too. Lawsuits generally cost more than arbitration, and this bill will lead to more of them. Increased litigation will raise costs for employers, who are already dealing with through-the-roof inflation and a supply-chain crisis. During the Committee's business meeting, Representative Scott Fitzgerald offered an amendment that would have carved out employers in industries affected by labor shortages or supply-chain disruptions. Democrats rejected the amendment and chose to pile yet another expense onto these employers. To deal with the higher litigation costs, employers will likely raise prices and hire fewer employees.

Some plaintiffs will find that it is simply too expensive to pursue their claims in court, and others will find that class action lawsuits are their only option. But class actions are not always a good option for consumers. Even when class actions are successful, sometimes only a small percentage of the class members claim their relief,[8] and those individual members who do claim their relief "often

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[3] *See id.; Justice Denied: Forced Arbitration and the Erosion of our Legal System, Hearing Before the Subcomm. on Antitrust, Commercial, and Administrative Law of the H. Comm. on the Judiciary*, 116th Cong. (2019) (Testimony of Mr. Phil Goldberg, at 4), https://docs.house.gov/meetings/JU/JU05/20190516/109484/HHRG-116-JU05-Wstate-GoldbergP 20190516.pdf.

[4] Nam D. Pham & Mary Donovan, *Fairer, Faster, Better: An Empirical Assessment of Employment Arbitration*, NDP ANALYTICS 5 (May 2019), https://instituteforlegalreform.com/research/fairer-faster-better-an-empirical-assessment-of-employment-arbitration/; Nam D. Pham & Mary Donovan, *Fairer, Faster, Better II: An Empirical Assessment of Consumer Arbitration*, NDP ANALYTICS 4 (Nov. 2020), https://instituteforlegalreform.com/new-study-consumers-win-more-money-more-often-and-more-quickly-in-arbitration-than-in-court/.

[5] *See* H.R. 963, 117th Cong. § 5 (2021) ("Nothing in this Act, or the amendments made by this Act, shall be construed to prohibit the use of arbitration on a voluntary basis after the dispute arises.").

[6] *See Justice Denied: Forced Arbitration and the Erosion of our Legal System, Hearing Before the Subcomm. on Antitrust, Commercial, and Administrative Law of the H. Comm. on the Judiciary*, 116th Cong. (2019) (Testimony of Mr. Andrew Pincus, at 9), https://docs.house.gov/meetings/JU/JU05/20190516/109484/HHRG-116-JU05-Wstate-PincusA-20190516.pdf.

[7] *Id.* at 6 ("A key obstacle to pursuing an individualized, small-value claim in court is the cost of hiring counsel. Unrepresented parties have little hope of navigating the complex procedures that apply to litigation in court, yet a lawyer's hourly billing rate may itself exceed the amount at issue in many claims. Many lawyers, especially those working on a contingency basis, are unlikely to take cases when the prospective of a substantial payout is slim.").

[8] Alison Frankel, *FTC's comprehensive study finds median consumer class action claims rate is 9%*, REUTERS (Sept. 10, 2019) ("The Federal Trade Commission has just published a staff report on what it believes to be the most comprehensive study ever conducted on consumers" response to class action settlements. Its marquee finding, after collating data on 149 consumer class actions from seven different claims administrators: The median claims rate in these cases

. . . recover little or nothing of value."[9] Further, class actions are "expensive, raising costs to consumers in the long run . . . ."[10]

A surge in lawsuits will not help everyday Americans or small businesses, but it will help the plaintiffs' lawyers.[11] It is thus no surprise that Democrats have been pushing this attack on arbitration agreements for years.[12] Notably, Democrats have consistently carved out certain agreements in union contracts. As Representative Fitzgerald explained during the Committee's business meeting, "[i]nstead of setting one standard and having everyone play by the same rules, the Democrats have singled out unions for favorable treatment." When he offered an amendment to "remove th[is] blatant inconsistency," the Democrats rejected it.

The bill's defects are not limited to the host of issues to come—it also creates a big problem right now. The bill immediately voids existing contracts. Every Member should be alarmed when the Federal government sets out to intervene in private contracts and rewrites private agreements to benefit political interests. Representative Bentz offered an amendment that would have fixed this problem, but Democrats, again, rejected it. In fact, Chairman Jerrold Nadler admitted that "the whole point of the bill is to invalidate all those [existing] arbitration agreements." Democrats want to undermine the rule of law by rewriting millions of private contracts by government fiat.

This bill micromanages private relationships and puts the priorities of the plaintiffs' bar and union bosses above the interests of hardworking Americans and small businesses. It prevents private parties from agreeing to resolve disputes the way they want to, and it signals—loud and clear—that big government knows best. The Committee should instead focus on legislation that protects freedom and gives Americans more, not less, power to make their own decisions.

JIM JORDAN,
Ranking Member.

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is 9%. The weighted mean claims rate, which takes into account the number of class members who received settlement notifications, is 4%."), https://www.reuters.com/article/us-otc-claimsrate/ftcs-comprehensive-study-finds-median-consumer-class-action-claims-rate-is-9-idUSKCN1VV2QU.

[9] Ted Frank, *Class Actions, Arbitration, and Consumer Rights: Why Concepcion Is a Pro-Consumer Decision*, MANHATTAN INSTITUTE 4 (Feb. 19, 2013), https://media4.manhattan-institute.org/pdf/lpr_16.pdf.

[10] *Id.*

[11] Regina Thomson, Commentary, *Democrats' war on arbitration only benefits trial lawyers*, FORTUNE (Dec. 1, 2021, 11:26 AM) ("[A] [Democrat] supporter of [another bill that would invalidate predispute arbitration agreements in certain contexts] . . . admitted during the recent markup of this bill that [it] 'is important to the trial bar.'"), https://fortune.com/2021/12/01/democrats-workplace-arbitration-trial-lawyers-reconciliation-bill/.

[12] *See, e.g.*, H.R. 1423, 116th Cong. (2019); H.R. 1374, 115th Cong. (2017); H.R. 2087, 114th Cong. (2015).