

December 16, 2013

The Honorable Patrick J. Leahy, Chairman
The Honorable Charles Grassley, Ranking Member
U.S. Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

Re: Support for the Arbitration Fairness Act of 2013, S. 878

Dear Chairman Leahy and Ranking Member Grassley:

We, the undersigned organizations, strongly support the Arbitration Fairness Act of 2013 (or “AFA”), S. 878, introduced in the Senate by Senator Al Franken (D-MN). This important legislation would end the growing predatory practice of forcing non-union employees, consumers, and small businesses to sign away their Constitutional rights to legal protections and access to federal and state courts. Predispute binding mandatory (or forced) arbitration clauses are proliferating in employment contracts (including minimum wage-workers, whistleblowers, servicemembers, and executives), and in everyday consumer contracts for products and services such as credit cards, child care, cell phones, car loans, home construction, student loans, rent-to-own products, payday loans, health insurance policies, and nursing homes.

Specifically, the AFA would make forced arbitration unenforceable in civil rights, employment, antitrust, and consumer disputes. It would also restore the congressional intent behind the Federal Arbitration Act (FAA), which was enacted in 1925 to facilitate arbitration of disputes between commercial entities of similar sophistication and bargaining power.

A series of decisions by the U.S. Supreme Court have broadly interpreted the FAA to allow corporations to insert arbitration clauses in one-sided, non-negotiable contracts. The Court further expanded the FAA’s meaning to effectively overcome other federal laws, including those that exhibit a clear congressional intent to preserve consumers’ rights, and make it significantly more difficult to challenge even the most abusive forced arbitration clauses.

Consumer and employment contracts with arbitration clauses are often non-negotiable, and erode traditional legal safeguards.

Corporations that place forced arbitration clauses in their standard contracts with consumers and non-union employees shield themselves from accountability for wrongdoing. The contracts typically specify who the arbitrator will be, under what rules the arbitration will take place, the state the arbitration will occur in, and the payment terms for the arbitration. Arbitration clauses are often contained in non-negotiable contracts and a person has no choice but to acquiesce or forgo the goods, services, and/or employment altogether.

None of the safeguards of our civil justice system are guaranteed for persons attempting to enforce their employment, consumer, antitrust, and civil rights in forced arbitration. There is no impartial judge or jury, but rather arbitrators who rely on major corporations for repeat business. With nearly no oversight or accountability, businesses or their chosen arbitration firms set the rules for the secret proceedings, often limiting the procedural protections and remedies otherwise

available to individuals in a court of law. In addition, the often exorbitant arbitration fees are prohibitive for most individuals.

Forced arbitration also weakens the value of federal and state laws intended to protect consumers and employees by removing their ability to enforce those laws in court.

Laws at risk include provisions of the Civil Rights Acts of 1964 and 1991, the Age Discrimination in Employment Act, the Americans with Disabilities Act, the Family and Medical Leave Act, the Fair Labor Standards Act, the Equal Pay Act, the Uniformed Services Employment and Reemployment Rights Act (USERRA), the National Labor Relations Act, the Sherman Antitrust Act, the Securities Act of 1933, the Securities Exchange Act of 1934, the Sarbanes-Oxley Act, the Dodd-Frank Wall Street Reform and Consumer Protection Act, the Servicemembers Civil Relief Act, the National Defense Authorization Act for Fiscal Year 2013 (amending the Military Lending Act), the Lilly Ledbetter Fair Pay Act of 2009, the Telephone Consumer Protection Act, the Fair Debt Collection Practices Act, the Credit Repair Organizations Act, the Electronic Fund Transfer Act, the False Claims Act, the Fair Credit Reporting Act, the Right to Financial Privacy Act, the Real Estate Settlement Procedures Act, the Truth in Lending Act, and the civil provisions of the Racketeer Influenced and Corrupt Organizations Act.

In April 2011, the U.S. Supreme Court dealt a blow to consumers and employees, ruling that companies can ban class actions in the fine print of contracts. In *AT&T Mobility, LLC v. Concepcion*, the Court held that corporations may use arbitration clauses to ban consumers and employees from exercising their right to join together through class actions to hold powerful corporations accountable. As a result, thousands of valid legal claims by consumers and employees that expose clear abuses and corporate misconduct have been suppressed and prevented from being brought in court. In addition, many class actions have been dismissed and sent to arbitration on an individual basis even when judges state that the cases may be best suited to proceed as class actions.

The Supreme Court further expanded corporations' ability to evade the enforcement of critical federal laws with its decision in *American Express v. Italian Colors Restaurant* (June 2013). In this case, small businesses sought a class action to pursue their claims that Amex had violated federal antitrust laws. The Court held that the class action ban and forced arbitration clause in the contracts were enforceable—even in cases where the cost of individual arbitration would, as a practical matter, prevent the vindication of rights under federal law. The arbitration clause in the Amex contract with the merchants prevented the sharing of costs that a class action would allow. Consequently, these contract terms enable companies to insulate themselves from liability even where they have in fact violated the law.

The AFA would allow consumers and employees to choose arbitration after the dispute arises.

The impact of recent Supreme Court precedent should add urgency for Congress to pass the AFA to enable individuals and small businesses to decide how to resolve disputes, after the dispute arises.

The AFA does not seek to eliminate arbitration and other forms of alternative dispute resolution agreed to voluntarily after a dispute arises. Nor would it affect collective bargaining agreements that require arbitration between unions and employers. The AFA would restore transparency and access to our civil justice system and preserve important civil rights, employment, antitrust, and consumer protections.

Congress has passed laws to ban forced arbitration for disputes involving auto dealers, poultry and livestock producers, certain employees of federal contractors, and servicemembers for some credit and loan products. The time has come for Congress to outlaw forced arbitration for all America's consumers and workers.

We urge you and the other members of Congress to pass S. 878.

Sincerely,

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AARP

AFL-CIO

Alliance for Justice

American Association for Justice

American Association of University Women

American Civil Liberties Union (ACLU)

American Federation of State, County and Municipal Employees (AFSCME), AFL-CIO

Americans for Financial Reform

Bazelon Center for Mental Health Law

Center for Justice & Democracy

Center for Responsible Lending

Citizen Works

Committee to Support the Antitrust Laws

Consumer Action

Consumer Federation of America

Consumer Watchdog

Consumers for Auto Reliability and Safety

Consumers Union

ConsumersCount.Org

D.C. Consumer Rights Coalition

Home Owners for Better Building

Homeowners Against Deficient Dwellings

Legal Aid Justice Center

Maryland Consumer Rights Coalition

MFY Legal Services, Inc.

NAACP

National Association of Consumer Advocates

National Consumer Voice for Quality Long-Term Care

National Consumer Law Center (on behalf of its low income clients)

National Consumers League

National Employment Law Project

National Employment Lawyers Association (NELA)
National Partnership for Women & Families
National Women's Law Center
NC Justice Center
People For the American Way
Public Citizen
Reserve Officers Association (ROA)
The Leadership Conference on Civil and Human Rights
U.S. Public Interest Research Group
West Virginia Citizen Action Group