

Congress of the United States

Washington, DC 20515

December 13, 2023

The Honorable Rohit Chopra
Director
Consumer Financial Protection Bureau
1700 G Street NW
Washington, D.C. 20552

Dear Director Chopra:

As members of Congress who care deeply about consumers, we applaud your leadership and continued commitment to consumer protection. Since the CFPB's founding 12 years ago, the Bureau has worked tirelessly to protect American consumers, by holding repeat offenders accountable through hundreds of enforcement actions, launching efforts to save Americans billions of dollars in junk fees, and partnering with other agencies to ensure that new technologies comply with existing consumer protection laws.

Unfortunately, many regulations and laws intended to protect consumers continue to be undermined and rendered meaningless by provisions jammed into fine print, such as forced arbitration clauses. Though Congress has limited the use of forced arbitration for certain sectors and cases,¹ the Bureau is best positioned to issue a rulemaking on forced arbitration for financial products and services. We therefore write to urge the Bureau to issue a much-needed forced arbitration rulemaking, as authorized by both § 553(e) of the Administrative Procedure Act as well as § 1028 of the Dodd-Frank Wall Street Reform and Consumer Protection Act.² Earlier this fall, more than 100 consumer advocacy, labor, and racial justice groups submitted comments to the Bureau supporting such a rulemaking.³ Eighteen veteran and military service organizations also submitted a letter urging the Bureau to “protect our nation’s servicemembers by issuing this much needed rulemaking on forced arbitration.”⁴

The Bureau issued a rule limiting class action waivers in contracts for certain financial products and services in 2017.⁵ That rulemaking was overturned through the Congressional Review Act

¹ Public Law 117-90. The “Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021” allows sexual assault and sexual harassment survivors to choose to file a case in court rather than be forced into arbitration.

² 12 U.S.C. § 5518.

³ “Comments of Over 100 Organizations Supporting the Recently Submitted Petition for Rulemaking to Require Meaningful Consumer Consent to Arbitration,” November 14, 2023, <https://www.regulations.gov/comment/CFPB-2023-0047-0022>.

⁴ Veterans of Foreign Wars (VFW) and numerous Veteran and Military Service Organizations, Comment Letter on Petition to Require Meaningful Consumer Consent Regarding the Use of Arbitration to Resolve Disputes Involving Consumer Financial Products and Services, November 14, 2023, <https://www.regulations.gov/comment/CFPB-2023-0047-0029>.

⁵ Consumer Financial Protection Bureau, “CFPB Issues Rule to Ban Companies From Using Arbitration Clauses to Deny Groups of People Their Day in Court,” press release, July 10, 2017, <https://www.consumerfinance.gov/about->

(CRA) by the tie-breaking vote of then-Vice President Mike Pence.⁶ Since then, corporations' use of forced arbitration has only increased, too often leaving consumers with no pathway for accountability when they have been hurt by financial institutions.⁷ Studies on forced arbitration released after 2017 show that consumers who are Black, indigenous, people of color (BIPOC) or female are more likely than white men to be forced into arbitration.⁸

The CFPB retains statutory authority to issue a rule on forced arbitration so long as it is not in "substantially the same form" as the rule Congress disapproved.⁹ In September 2023, a group of consumer advocate organizations filed a Petition for Rulemaking with the CFPB, asking the Bureau to prohibit the use of pre-dispute arbitration clauses in consumer contracts, in favor of clauses that would permit consumers to choose between arbitration and litigation only after a dispute has arisen.¹⁰ Over 160 law professors submitted a letter in support, explaining that such a rule "is well within the CFPB's authority," because it "is not substantially the same as the earlier regulation."¹¹ As Professor David Vladeck reiterated, "Congress' razor-thin disapproval of the CFPB's first forced arbitration rule did not somehow erase the underlying statutory mandate under which the CFPB continues to operate."¹²

Companies hide forced arbitration clauses in the fine print, take-it-or-leave-it terms accompanying many financial products and services.¹³ These fine print traps prohibit consumers from accessing the civil justice system to resolve disputes with financial services companies. Instead, consumers are forced into a non-transparent, private system in which their position is inherently unequal relative to the company. In such an unfair playing field, with no ability to

[us/newsroom/cfpb-issues-rule-ban-companies-using-arbitration-clauses-deny-groups-people-their-day-court/](https://www.consumerfinance.gov/newsroom/cfpb-issues-rule-ban-companies-using-arbitration-clauses-deny-groups-people-their-day-court/).

⁶ United States Senate, "Roll Call Vote on the Joint Resolution (H. J. Res. 111)," October 24, 2017, https://www.senate.gov/legislative/LIS/roll_call_votes/vote1151/vote_115_1_00249.htm.

⁷ American Association for Justice, "Forced Arbitration in a Pandemic: Corporations Double Down," October 27, 2021, <https://www.justice.org/resources/research/forced-arbitration-in-a-pandemic>.

⁸ Center for Progressive Reform, "Private Courts, Biased Outcomes: The Adverse Impact of Forced Arbitration on People of Color, Women, Low-Income Americans, and Nursing Home Residents," Marcha Chaudry, Michael C. Duff, Sidney A. Shapiro, and Thomas McGarity, February 9, 2022, <https://progressivereform.org/publications/private-courts-biased-outcomes-forced-arbitration-rpt/>; American Association for Justice, "Where White Men Rule: How the Secretive System of Forced Arbitration Hurts Women and Minorities," June 2021, <https://www.justice.org/resources/research/forced-arbitration-hurts-women-and-minorities>.

⁹ 5 U.S.C. § 801(b)(2).

¹⁰ "Petition for Rulemaking: To Require Meaningful Consumer Consent Regarding the Use of Arbitration to Resolve Disputes Involving Consumer Financial Products and Services," September 13, 2023, https://www.consumerfinance.gov/wp-content/uploads/sites/14/2023/09/Petition_CFPB_1028Rulemaking092023.pdf.

¹¹ Jeff Sovern, Comment Letter on Petition to Require Meaningful Consumer Consent Regarding the Use of Arbitration to Resolve Disputes Involving Consumer Financial Products and Services, November 14, 2023, <https://www.regulations.gov/comment/CFPB-2023-0047-0014>; Reuters, "Law pros, business groups spar over proposed consumer arbitration ban," Alison Frankel, November 16, 2023, <https://www.reuters.com/legal/transactional/column-law-profs-business-groups-spar-over-proposed-consumer-arbitration-ban-2023-11-15/>.

¹² National Law Journal, "Forced Arbitration: How the Consumer Protection Bureau Can Step in to Fulfill Congress' Mandate," David C. Vladeck, October 03, 2022, <https://www.law.com/nationallawjournal/2022/10/03/forced-arbitration-how-the-consumer-protection-bureau-can-step-in-to-fulfill-congresss-mandate/>.

¹³ Consumer Reports, "Forced Arbitration: A Clause for Concern," Scott Medintz, January 30, 2020, <https://www.consumerreports.org/mandatory-binding-arbitration/forced-arbitration-clause-for-concern/>.

appeal decisions, it is no surprise that consumers rarely prevail over financial services providers.¹⁴ And yet, most consumers are unaware that they are relinquishing their fundamental right to access the court system when they sign up for a financial service or use a financial product.

A recently released University of Michigan law and psychology study from social psychologist Dr. Roseanna Sommers confirms what the CFPB highlighted in 2015¹⁵: consumers have both a lack of awareness of the existence of forced arbitration clauses and a lack of understanding about their effect.¹⁶ For example, 48% of the 1,000 consumers surveyed mistakenly thought they had never agreed to arbitration. In reality, 99% of these consumers had been locked into forced arbitration through the fine print in contracts for common products and services such as mobile payment applications, cell phone companies, and streaming services.¹⁷ Given the lack of consumer awareness and understanding about forced arbitration, and the fundamental consumer rights at stake, the Bureau must act swiftly to rein in forced arbitration.

Consumers must be given a meaningful opportunity to choose how to proceed when disputes arise. Take-it-or-leave-it terms and conditions imposed in a consumer contract, through use of a product, or by signing up for a service does not allow that opportunity. Restoring consumers' ability to make the choice about how they wish to exercise their rights is important for a fair, stable, and robust financial marketplace. Given the recent findings on the lack of understanding and awareness of forced arbitration, coupled with the worsening corporate tactics stemming from forced arbitration, we urge the Bureau to issue a rule addressing forced arbitration. We also encourage other federal agencies to consider actions to rein in corporate abuse of fine print traps like forced arbitration provisions.

¹⁴ Data from the American Arbitration Association, the world's largest private forced arbitration provider, reveal that over a five-year period, from 2017-2021, only 237 out of 13,179 individuals won monetary awards against banks and other financial services providers, with a win rate of just 1.8 percent. *See* American Association for Justice, "Forced Arbitration and Big Banks: When Consumers Pay to Be Ripped Off," September 2022, <https://www.justice.org/resources/research/forced-arbitration-big-banks>.

¹⁵ Consumer Financial Protection Bureau, "Arbitration Study: Report to Congress, pursuant to Dodd-Frank Wall Street Reform and Consumer Protection Act § 1028(a)," March 2015, https://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf.

¹⁶ University of Michigan Law School, "What Do Consumers Understand About Predispute Arbitration Agreements? An Empirical Investigation," Roseanna Sommers, July 25, 2023, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4521064.

¹⁷ *Id.*

Thank you for your important work protecting consumers.

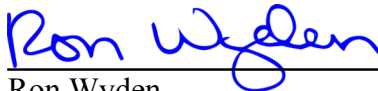
Sincerely,




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United States Senator



Henry C. "Hank" Johnson, Jr.
Member of Congress



Ron Wyden
United States Senator



Raphael Warnock
United States Senator



Bernard Sanders
United States Senator



Sheldon Whitehouse
United States Senator



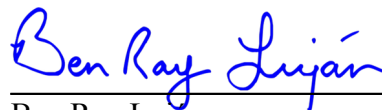
Jack Reed
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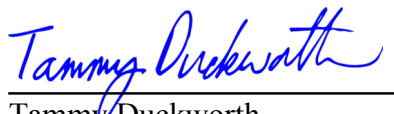
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Chris Van Hollen
United States Senator



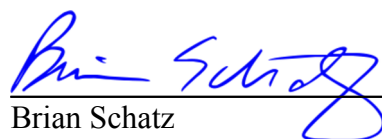
Tammy Duckworth
United States Senator



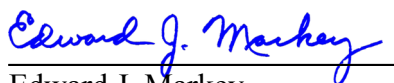
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Tina Smith
United States Senator



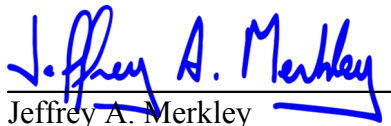
Brian Schatz
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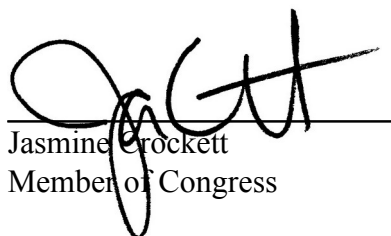
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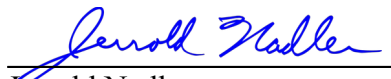

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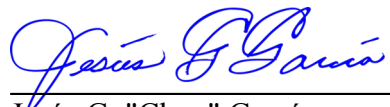

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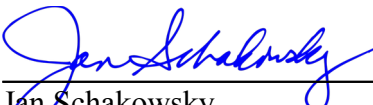
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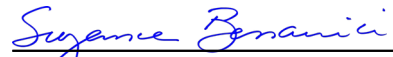
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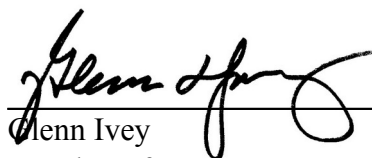
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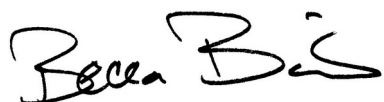
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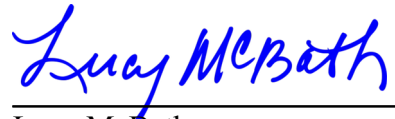
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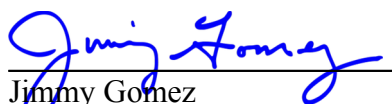
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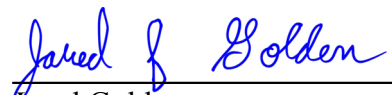


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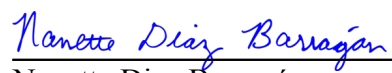

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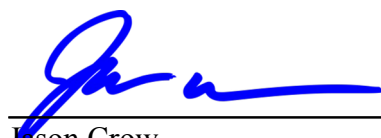
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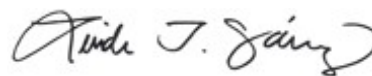
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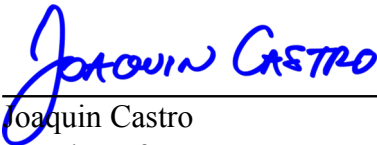
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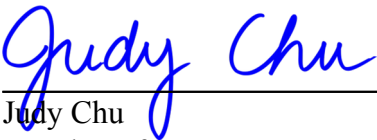
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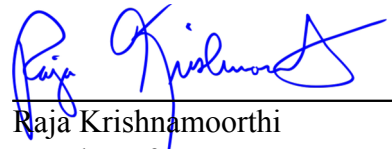
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Robert J. Menendez
Member of Congress



Judy Chu
Member of Congress



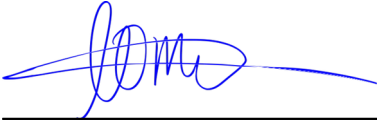
Raja Krishnamoorthi
Member of Congress



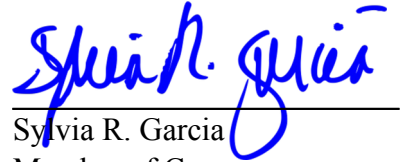
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United States Senator



Joyce Beatty
Member of Congress



Ilhan Omar
Member of Congress



Sylvia R. Garcia
Member of Congress



Val Hoyle
Member of Congress



Jim Tokuda
Member of Congress



Lori Trahan
Member of Congress

CC:
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