# Congress of the United States
## House of Representatives

November 16, 2015

The Honorable Bob Goodlatte
Chairman, Committee on the Judiciary
2138 Rayburn House Office Building
Washington, DC

Dear Chairman Goodlatte:

We write to call your attention to the recent publication of *Beware the Fine Print*, a groundbreaking investigative series in *The New York Times* examining the alarming use of pre-dispute ("forced") arbitration in millions of contracts, and request that you convene hearings on the relevant issues as they relate to arbitration matters within the Judiciary Committee's jurisdiction.

According to this three-part series, forced arbitration falls woefully short as a fair and just system for parties of unequal bargaining power.[1] Part one of the series documents the rise and dramatic spread of forced arbitration clauses.[2] The series reveals that forced arbitration has enabled companies to disable "consumer challenges to practices like predatory lending, wage theft and discrimination."[3] U.S. Judge William G. Young, who was appointed by President Ronald Reagan, states that the dramatic upward trend of forced arbitration "is among the most profound shifts in our legal history," providing business with "a good chance of opting out of the legal system altogether and misbehaving without reproach."[4]

Examining thousands of court records and conducting hundreds of interviews with lawyers, judges, arbitrators, corporate executives, and plaintiffs, *The New York Times* also found that the process for forced arbitration is secretive and discriminatory, undermining the rights of untold American consumers, workers, and small businesses. Part two of the series examines

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[1] Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, N.Y. TIMES, Oct. 31, 2015 at A1, http://nyti.ms/1MyX60l ("This is the first installment in a three-part series examining how clauses buried in tens of millions of contracts have deprived Americans of one of their most fundamental constitutional rights: their day in court.").

[2] *Id.*

[3] *Id.*

[4] *Id.*

how the practices of forced arbitration often occurs behind closed doors, without due consideration of the rules of evidence or applicable law:

> Behind closed doors, proceedings can devolve into legal free-for-alls. Companies have paid employees to testify in their favor. A hearing that lasted six hours cost the plaintiff $150,000. Arbitrations have been conducted in the conference rooms of lawyers representing the companies accused of wrongdoing. Winners and losers are decided by a single arbitrator who is largely at liberty to determine how much evidence a plaintiff can present and how much the defense can withhold. To deliver favorable outcomes to companies, some arbitrators have twisted or outright disregarded the law, interviews and records show.[5]

In the final installment of this series, *The New York Times* explores the far-reaching power of forced arbitration clauses by investigating the use of arbitration in religious tribunals involving secular claims like wrongful death or financial fraud.[6] As the investigation notes, while religious tribunals have traditionally been reserved for non-secular claims, courts have upheld religious arbitration of even non-secular claims because "the terms of arbitration are detailed in binding contracts signed by both parties."[7]

Simply put, this private, secretive, and abusive system of institutionalized discrimination and corporate immunity is inimical to the foundations of the American justice system.[8] Enshrined in the Seventh Amendment to the Constitution, the Framers adopted the right to a civil jury trial to ensure an open, fair, and impartial justice system.[9] In stark contrast, *The New York Times* has resoundingly demonstrated that forced arbitration is a closed, unjust, and discriminatory system.

The House Judiciary Committee has jurisdiction over this matter. Accordingly, we strongly believe that these issues warrant review by the Committee, and that hearings are the appropriate means for a careful review of this subject.

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[5] Jessica Silver-Greenberg & Michael Corkery, *A 'Privatization of the Justice System'*, N.Y. TIMES, Nov. 1, 2015, at A1, http://nyti.ms/1N4UNfI.

[6] Michael Corkery & Jessica Silver-Greenberg, *When Scripture Is the Rule of Law*, N.Y. TIMES, Nov. 3, 2015, at A1, http://nyti.ms/1izsuOf.

[7] *Id.*

[8] Martha Nimmer, *The High Cost of Mandatory Arbitration*, 12 CARDOZO J. CONFLICT RESOL. 183, 206 (2010) ("Allowing a single individual, who may not be attuned to the concerns of the claimant, to have so much power over the future of Americans' civil rights was not intended by the Constitution's Framers or by the drafters of the Civil Rights Act, and strikes right at the heart of those protections.").

[9] Dimick v. Schiedt, 293 U.S. 474, 485-86 (1935) ("The right of trial by jury is of ancient origin, characterized by Blackstone as 'the glory of the English law' and 'the most transcendent privilege which any subject can enjoy' . . . and, as Justice Story said . . . the Constitution would have been justly obnoxious to the most conclusive objection if it had not recognized and confirmed it in the most solemn terms.' With, perhaps, some exceptions, trial by jury has always been, and still is, generally regarded as the normal and preferable mode of disposing of issues of fact in civil cases at law as well as in criminal cases."); *see* Jean R. Sternlight, *Mandatory Binding Arbitration and Demise of the Seventh Amendment Right to a Jury Trial*, 16 OHIO ST. J. ON DISP. RESOL. 669, 671 (2001).

Sincerely,

Henry C. "Hank" Johnson, Jr.
Ranking Member
Subcommittee on Regulatory Reform,
Commercial and Antitrust Law
Committee on the Judiciary

John Conyers, Jr.
Ranking Member
Committee on the Judiciary