



## **Access to Justice Memorandum to Biden Transition November 12, 2020**

Access to the civil justice system is a fundamental right. However, over the past several decades, Congress and the U.S. Supreme Court have chipped away at people’s ability to seek redress in court. This document proposes executive actions and legislative solutions to restore and expand peoples’ access to the civil justice system, in furtherance of the Biden-Harris promise to strengthen “America’s commitment to justice.”<sup>1</sup>

### **ACTION 1: Combatting Forced Arbitration**

Forced arbitration is the abusive corporate practice of using provisions in take-it-or-leave-it contracts to block consumers and workers from accessing the courts. Forced arbitration substitutes a privatized dispute resolution system for public courts that consumers and workers must use to challenge all predatory or illegal behavior, such as hidden fees, fraud, and workplace discrimination. Arbitration agreements frequently ban class actions by requiring claims to be pursued on an individual basis only, making it financially impractical to bring many claims. Forcing individuals into arbitration is now a favorite technique of corporate America. The Obama-Biden administration worked tirelessly to protect workers, consumers, patients, and students from forced arbitration clauses, but most of that hard work has been undone by the Trump administration. And the U.S. Supreme Court has also struck down many challenges to the use of forced arbitration, including an important workers’ rights case.

In the 2018 decision *Epic System vs. Lewis*, the Supreme Court held that employers can enforce agreements that prohibit workers from banding together in a class action and instead require individual arbitration, contrary to National Labor Relation Board (NLRB) precedent that such prohibitions would violate Section 8(b) of the National Labor Relations Act. In her dissent, the late-Justice Ruth Bader Ginsburg said:

If these untoward consequences stemmed from legislative choices, I would be obliged to accede to them. But the edict that employees with wage and hours

---

<sup>1</sup> Biden For President, The Biden Plan for Strengthening America’s Commitment to Justice, *available at* <https://joebiden.com/justice/#>.

claims may seek relief only one-by-one does not come from Congress. It is the result of take-it-or-leave-it labor contracts harking back to the type called “yellow dog,” and of the readiness of this Court to enforce those unbargained-for agreements. The FAA demands no such suppression of the right of workers to take concerted action for their “mutual aid or protection.”<sup>2</sup>

### Forced Arbitration in Consumer Financial Products and Services

In 2016, the U.S. Consumer Financial Protection Bureau (CFPB) proposed a rule to restore consumers’ right to join together to hold the financial industry accountable when it breaks the law. The rule had broad support from the public, advocacy organizations, and Democrats in Congress.<sup>3</sup> As promulgated by the CFPB in 2017, the rule prevented financial institutions from enforcing arbitration agreements that ban class actions. Shortly thereafter, the Republican-led majority in Congress used the Congressional Review Act (CRA) to pass a joint resolution of disapproval, which President Trump signed.<sup>4</sup> The resolution nullified the rule, allowing the consumer finance industry to continue to shield itself from class actions. Under the CRA, an agency cannot promulgate a rule that is “substantially the same” as one that Congress has disapproved.<sup>5</sup>

### Forced Arbitration in Education

In 2016, the Obama-Biden administration finalized a rule, known as the Borrower Defense rule, to protect students against paying back loans to schools that defrauded them. The rule also prevented schools that participated in federal student loan programs from sticking forced arbitration provisions and class action bans into their contracts with students. When the rule was challenged in court, the Trump Department of Education used the lawsuit as a pretext for delaying implementation of key provisions of the rule and ultimately for rewriting the rule to eliminate the prohibition on forced arbitration and class action bans.<sup>6</sup>

### Forced Arbitration for Investors

The Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank) gave the U.S. Securities and Exchange Commission (SEC) the authority to restrict forced arbitration clauses.<sup>7</sup> Despite the SEC’s ability to rein-in forced arbitration, the opposite has happened. In recent years, investors who favor the use of arbitration for ideological reasons have urged companies to amend

---

<sup>2</sup> 584 US \_ (2018).

<sup>3</sup> Public Citizen, CFPB Arbitration Rule Receives Strong and Widespread Support, *available at* <https://www.citizen.org/news/cfpb-arbitration-rule-receives-strong-and-widespread-support/>.

<sup>4</sup> Sylvan Lane, *The Hill*, Trump Repeals Consumer Arbitration Rule, Wins Banker Praise (Nov. 1, 2017), *available at* <https://thehill.com/policy/finance/358297-trump-repeals-consumer-bureau-arbitration-rule-joined-by-heads-of-banking>.

<sup>5</sup> *See* 5 U.S. Code § 801(b)(2).

<sup>6</sup> The Century Foundation, DeVos Borrower Defense Rule Reverses Critical Student and Taxpayer Protections, *available at* <https://tcf.org/content/commentary/devos-borrower-defense-rule-reverses-critical-student-taxpayer-protections/?agreed=1>.

<sup>7</sup> *See* Dodd-Frank, Public Law 111–203, Sec. 921 (2010).

their bylaws to add forced arbitration provisions to their governing documents, thereby preventing investors from accessing the civil justice system. While investors have so far resisted the move, investor-ideologues will likely continue to challenge this issue in court. Therefore, without action by the SEC to decisively stop the practice, there is likely to continue to be a fight in the courts for the foreseeable future.<sup>8</sup>

#### Forced Arbitration for Discrimination and Harassment by Federal Contractors

In 2017, the Trump administration reversed an Obama-era executive order that prohibited forced arbitration clauses by federal contractors for sexual harassment, sexual assault or discrimination claims. Forced arbitration clauses have been used frequently to silence systemic harassment and discrimination.

#### Forced Arbitration in Nursing Home Agreements

In 2016, the Obama-Biden administration issued a regulation prohibiting long-term care facilities, such as nursing homes, that receive federal funding from employing forced arbitration provisions in its customer contracts. The nursing home industry almost immediately sued the Centers for Medicare & Medicaid Services (CMS). Shortly thereafter, the Trump administration sought to revise the rule in a variety of ways including by weaken the forced arbitration provisions. Through Public Citizen's leadership, we and our coalition partners convinced the agency to decline to make some of the most drastic changes they proposed in their revised rule. In 2019, CMS released a final rule that was better than the 2017 proposed rule, but worse than the 2016 Obama-era rule.<sup>9</sup> A group of nursing homes is currently challenging the rule in court seeking to set aside the limited protections it provides patients against being coerced to sign arbitration agreements.

#### **Recommendation for Day One**

- The Biden-Harris campaign supports prohibiting forced arbitration clauses.<sup>10</sup> Therefore, one of the administration's first acts should be to issue a presidential memorandum specifying that it is the policy of the administration to disfavor the use of forced arbitration clauses and direct the Director of the Office of Management and Budget to work with agencies to begin the process of banning the use through rulemaking.

---

<sup>8</sup> Alison Frankel, *Reuters*, New Battleground In The Fight Over Mandatory Shareholder Arbitration: Intuit's Annual Meeting (Jan. 16, 2020), available at <https://www.reuters.com/article/us-otc-arbitration/new-battleground-in-the-fight-over-mandatory-shareholder-arbitration-intuits-annual-meeting-idUSKBN1ZF2VQ>.

<sup>9</sup> American Bar Association, *Practice Points*, CMS Issues New Arbitration Rule for Nursing Homes, available at <https://www.americanbar.org/groups/litigation/committees/alternative-dispute-resolution/practice/2020/cms-issues-new-arbitration-rule-for-nursing-homes/>.

<sup>10</sup> Biden For America, The Biden Plan for Strengthening Worker Organizing, Collective Bargaining, And Unions, available at <https://joebiden.com/empowerworkers/>

## **Recommendations for First 100 Days**

- Encourage the Director of the CFPB to initiate a rulemaking to prohibit companies under its jurisdiction from employing forced arbitration clauses and/or class-action bans. Because the 2017 rule that was only prohibited class action bans (and did not prohibit forced arbitration agreements entirely), this new rule would not be “substantially the same.”
- Direct the Secretary of Education to initiate a rulemaking to prohibit colleges and universities that receive federal funding from employing forced arbitration clauses and class action bans.
- Encourage the SEC to take action to restrict the use of forced arbitration clauses in investor-related documents.
- Reimpose the Obama-era federal contractor executive order.
- Direct the Secretary of the Department of Labor and Director of the Office of Management and Budget to initiate rulemaking proceedings to ban federal contractors from using forced arbitration, and identify other agencies that have contracting requirements so that those agencies may begin rulemaking to ban federal contractors from using forced arbitration.
- Direct the CMS Administrator to consider rulemaking to reimpose the 2016 nursing home arbitration rule.

## **Recommendation for Legislative Action**

- While executive action would help considerably to protect workers, consumers, and patients, forced arbitration will continue to be a problem until Congress once and for all prohibits the practice. Therefore, the Biden-Harris administration should advocate for passage of the Forced Arbitration Injustice Repeal (FAIR) Act, which would prohibit enforcement of pre-dispute arbitration agreements for employment, consumer, antitrust, and civil rights disputes.

## **ACTION 2: Addressing Systemic Inequalities**

### Protecting Fair Housing Opportunity

In 2013, the Department of Housing and Urban Development (HUD) issued a rule addressing the Fair Housing Act’s prohibition on discrimination in housing. That rule adopted the well-accepted approach that claims based on disparate impact may be brought as a tool to tackle structural barriers that unfairly lock people out of housing and lending opportunities. In 2015, the U.S.

Supreme Court upheld the application of disparate impact claims to challenge practices by housing providers, financial institutions, and insurance companies that create structural barriers to fair housing opportunities.<sup>11</sup> Nonetheless, in September 2020, HUD issued a new rule that will make it nearly impossible for victims of discrimination to bring claims over practices that have a disparate impact, absent evidence of discriminatory intent.

#### Making Diversity in Nominations to Judicial Posts and Executive Branch Positions a Priority

The Biden-Harris administration is committed to advancing racial equity in America.<sup>12</sup> However, we cannot truly address issues of systemic racism and institutional bias if policymakers do not understand the interconnection of these issues. Donald Trump has filled his administration with corporate insiders<sup>13</sup> who, once in government, have put corporate interests above the interests of individuals in health, safety, and a clean environment.<sup>14</sup>

Similarly, nominees to the federal bench are long been chosen overwhelmingly from corporate backgrounds, large law firms, and prosecutors' offices. Today, the federal bench is less diverse than it has been in years.<sup>15</sup> A federal bench with a diversity of experience and expertise ensures more informed decisions and public confidence in an impartial judicial system.

#### **Recommendations for First 100 Days**

- The 2020 HUD new rule on disparate impact in housing should be rescinded, and the 2013 rule restored.
- The Biden-Harris administration should commit to bringing greater diversity of experiences and expertise to the executive branch, especially hiring those who have worked in the public interest for positions that impact access to justice issues, such positions in the Department of Justice's Office of Legal Policy, Federal Trade Commission's Bureau of Consumer Protection, Consumer Financial Protection Bureau, and Legal Services Corporation.
- The Biden-Harris administration should commit to bringing greater diversity to the federal bench by nominating lawyers with experience working in non-profits and public

---

<sup>11</sup> Texas Department of Housing & Community Affairs v. The Inclusive Communities Project, Inc., 576 U.S. 519.

<sup>12</sup> Barbara Sprunt, *NPR*, Biden Details Proposal To Advance Racial Equity In America (July 28, 2020), *available at* <https://www.npr.org/2020/07/28/896132054/biden-details-proposal-to-advance-racial-equity-in-america>.

<sup>13</sup> Public Citizen, Trump's Corporate Cabinet, *available at* <https://www.citizen.org/article/corporatecabinet/>.

<sup>14</sup> Zachary Clopton & David Noll, *Slate*, Trump Labor Officials Are Secretly Using Forced Arbitration to Get Corporations Off the Hook (May 10, 2019), *available at* <https://slate.com/news-and-politics/2019/05/trump-labor-officials-forced-arbitration.html>.

<sup>15</sup> Jennifer Bendery, *Huff Po*, The Good Ol' Boys: 2 Years In, Trump Is Making Our Courts A Lot Less Diverse (April 24, 2019), *available at* [https://www.huffpost.com/entry/trump-courts-white-male-judges\\_n\\_5cb61c86e4b0ffefe3b835a6](https://www.huffpost.com/entry/trump-courts-white-male-judges_n_5cb61c86e4b0ffefe3b835a6).

defenders, as well as racial minorities, LGBTQ individuals, and other lawyers with diverse backgrounds.

### **ACTION 3: Protecting the Civil Rights of All People**

In June 2020, the Trump administration issued a rule that interprets the Affordable Care Act’s (ACA) prohibition against discrimination based on sex – embodied in section 1557 of the Act – *not* to apply to gender identity and sex-stereotyping. The rule also allows health care providers to discriminate against people based on sexual orientation.

For years, the courts have held that religious employers may not be held accountable under antidiscrimination laws for adverse employment actions against “ministers.” The “ministerial exception” was narrow because it is “extraordinarily potent: It allows an employer to discriminate because of race, sex, pregnancy, age, disability, or other traits protected by law when selecting or firing their ‘ministers,’ even when the discrimination is wholly unrelated to the employer’s religious beliefs or practices.”<sup>16</sup> For example, in June 2020, the U.S. Supreme Court in *Our Lady of Guadalupe School v. Morrissey-Berru* held that this exception foreclosed a claim of workplace discrimination brought by a math teacher fired by a religious school, even though the teacher’s had no ministerial responsibility.<sup>17</sup> The scope of this exception continues to be litigated in the courts. The Department of Justice and U.S. Equal Employment Opportunity Commission (EEOC) under the Trump administration have supported very broad applications of the ministerial exception, arguing that it frees religious institutions from a wide range of anti-discrimination, fair wage, and other laws.

#### **Recommendations for First 100 Days**

- Direct the Secretary of Health and Human Services to promptly take steps to rescind the 2020 rule on ACA’s section 1557 and to restore the prior rule.
- Direct the Department of Justice and encourage the chair of the EEOC to advocate a narrow reading of the ministerial exception, that appreciates religious institution’s legitimate interest in religious freedom, while giving due weight to the important public interests embodied in our anti-discrimination laws, fair wage laws, and other workplace protections.

---

<sup>16</sup> *Our Lady of Guadalupe School v. Morrissey-Berru*, 591 U.S. \_\_\_\_ (2020).

<sup>17</sup> *Id.*

## **ACTION 4: Articulate Administration Policy against Preemption of Strong State Laws**

### Protecting Consumers through a Comprehensive Data Privacy Law

A patchwork of federal laws address privacy issues that are sector specific, but we have no comprehensive federal privacy law. At the same time, many states have enacted safeguards that protect individuals from identity theft, financial fraud, and cyberattacks. Congress continues to consider a comprehensive federal data privacy law, including the extent to which a federal law should preempt state laws.

### Ensuring that Self-Driving Cars are Safe

In recent years, both the U.S. House of Representatives and U.S. Senate have discussed legislation that would create a federal framework for autonomous vehicles, also known as self-driving cars.<sup>18</sup> These pieces of legislation, however, have been opposed by consumer safety groups because the bills do not adequately address safety.<sup>19</sup> At least one bill would prohibit individuals injured by a self-driving car from suing in court and would preempt strong state laws and regulations that protect consumer safety.<sup>20</sup>

### Undoing Corporate Immunity Laws

Over the past few decades, Congress and the courts have immunized numerous industries from liability to consumers, patients, and workers, eliminating individuals' ability to obtain redress and decreasing companies' incentive to make their products, services and workplaces safe. For example, the U.S. Supreme Court in *Riegel v. Medtronic, Inc.* held that a patient cannot sue a medical device manufacturer for injuries caused by a device that was defective or had inadequate warnings if the device had received premarket approval from the Food and Drug Administration. As another example, the Protection of Lawful Commerce in Arms Act, signed by President George W. Bush in 2005, protects gun manufacturers and dealers from civil liability, even for failure to take reasonable steps to ensure safe use of their products. As a result of years of corporate lobbying, manufacturers in several other industries also are immune from liability for harm they cause to patients or consumers.

### Bolstering the Safety of Generic Drugs

Over the past 30 years, sales of generic drugs have constituted the majority of all prescriptions filled. Unlike brand-name manufacturers, however, generic-drug manufacturers are not permitted to update product labeling to reflect newly discovered information about safety risks, unless the

---

<sup>18</sup> Maggie Miller, *The Hill*, Wheels Begin To Turn On Self-Driving Car Legislation (Dec. 1, 2019), <https://thehill.com/policy/transportation/automobiles/472341-wheels-begin-to-turn-on-self-driving-car-legislation>.

<sup>19</sup> Catherine Chase et. al, *The Hill*, AV START Threatens Public Safety And Driverless Car Potential (Dec. 14, 2018), <https://thehill.com/blogs/congress-blog/technology/421367-av-start-threatens-public-safety-and-driverless-car-potential>.

<sup>20</sup> Matt McFarland, *CNN Business*, Loophole Would Protect Self-Driving Car Companies From Lawsuits (March 14, 2018), available at <https://money.cnn.com/2018/03/14/technology/self-driving-car-senate-loophole/index.html>.

brand-name manufacturer has done so or the FDA orders a change. In 2013, the FDA issued a proposed rule to allow generic drug manufacturers to take advantage of the same procedures for updating labeling that are currently available to brand-name manufacturers. Such a rule would both make the drugs safer, and enable patients injured because of inadequate warnings to seek relief in court. The rule was never finalized, and the Trump Administration withdrew the proposal.

### **Recommendations for First 100 Days**

- Direct the Director of the Office of Management and Budget to issue a Statement of Administration Policy detailing that the administration will only support legislation that preserves a person's access to the courts and does not preempt strong state laws and regulations.
- Direct the Administrator of the Food and Drug Administration to issue a rule to allow generic drug manufacturers to update product labeling when they become aware of undisclosed safety risks.

### **Recommendations for Legislation Action**

- Urge Congress to pass comprehensive federal privacy legislation that sets a floor, not a ceiling, on protections—making explicit that states may set stronger standards.
- Make clear that any legislation that the administration supports must mandate that the relevant federal agencies enact robust safety standards before self-driving cars can hit the marketplace.
- Advocate for, and prioritize as an administration legislative priority, overturning legislation that preempts state-law damages claims against business in industries including:
  - Gun manufacturers
  - Medical device manufacturers
  - Cruise ship companies
  - Motor carriers
  - Generic drug manufacturers
  - Airlines

### **ACTION 5: Strengthening Access to the Civil Justice System**

Over the past two decades, a series of court decisions and federal agency actions have blocked individuals from accessing the courts to seek remedies for harm. These barriers to the civil courts

make a mockery of our nation’s commitment to a civil justice system that provides a meaningful avenue to remedy wrongdoing.

### Protecting LSC

The Legal Services Corporation (LSC) funds more than one hundred civil legal aid programs around the country for people who cannot afford to pay for legal representation. However, it is continually imperiled by insufficient funding. In fact, the Trump administration’s fiscal year 2021 budget sought to eliminate LSC.<sup>21</sup> COVID has shown how so many individuals are just one paycheck away from eviction or food insecurity. As eviction moratoriums and other protections end, it will be vital that to ensure that every person has access to high quality legal representation.<sup>22</sup> LSC must be provided with adequate funding to serve the significant need for its services.

### **Recommendation for First 100 Days**

- The civil justice system serves as a last line of defense against corporate wrongdoing.<sup>23</sup> Yet, Black and Brown people are often at a disadvantage because they more frequently do not have legal representation. For example, “African Americans are 2.5 times more likely to file pro se than whites.”<sup>24</sup> The Biden-Harris administration should prioritize through the president’s budget request robust funding for LSC’s important work.

## **ACTION 6: Making Strong Consumer Protection an Administration Priority**

### Exhibiting Leadership to Prioritize Access to Justice for All People

The best way for the administration to signal its commitment to expanding access to the civil justice system for all people, and especially to ensure that Black and Brown people are given a fair chance in the courts, is to show early president commitment to the issue, similar to the way the Obama-Biden administration made climate change a priority by creating the White House Office of Energy and Climate Change Policy.

### An “Abusiveness” Standard that Protects Consumers More than Industry

In Dodd-Frank, Congress gave the CFPB the power to use its supervisory and enforcement authority to, among other things, protect consumers from companies engaging in “unfair,

---

<sup>21</sup> Caroline Spiezo, *Reuters*, IN BRIEF: Trump Budget Again Aims To Defund Legal Services Corp (Feb. 10, 2020), available at <https://www.reuters.com/article/usa-lawyer-legal-services-corp/in-brief-trump-budget-again-aims-to-defund-legal-services-corp-idUSL1N2AA1OM>.

<sup>22</sup> Legal Services Corporation, LSC Briefing: Evictions and the COVID-19 Pandemic, available at <https://www.lsc.gov/media-center/blog/2020/06/25/lsc-briefing-evictions-and-covid-19-pandemic>.

<sup>23</sup> Daniel Wilf-Townsend, *Boston Review*, The Urgent Need for Civil Justice Reform (April 21, 2020), available at <http://bostonreview.net/law-justice/daniel-wilf-townsend-urgent-need-civil-justice-reform>.

<sup>24</sup> Amy Myrick et. al, *Legislation and Public Policy*, Race And Representation: Racial Disparities In Legal Representation For Employment Civil Rights Plaintiffs, fn. 31, available at <https://nyujlpp.org/wp-content/uploads/2013/01/MyrickNelsonNielsen-Race-and-Representation.pdf>.

deceptive, or abusive act practice.”<sup>25</sup> Responding to industry lobbying for a narrow standard,<sup>26</sup> the CFPB in January 2020 issued an industry-friendly policy.

### Working on Behalf of Data Breach Victims

When a data breach occurs, the personal information of thousands or even millions of individuals may be exposed to malicious actors. Along with the loss of privacy, data breaches increase the risk that consumers will suffer economic harm through identify theft. Consumers who become aware that their personal information has been compromised reasonably may choose to expend time and resources to protect themselves against potential economic harm, such as purchasing credit monitoring services, freezing their credit, and closing accounts and opening new ones. At the time the data breach occurs, however, it is usually difficult to predict which consumers will experience economic harm from the breach. Some courts have held that a consumer lacked standing to sue the company whose negligence allowed the data breach because the consumer could not show that his or her personal information had (yet) been used by a hacker.

### **Recommendation for Day One**

- The Biden-Harris administration should establish a White House Office for Consumer Protection and Access to Justice. The Office would be responsible for developing policies that protect consumers; coordinating among agencies that enforce consumer protection statutes; and working with Congress and across the administration to strengthen the civil justice system.

### **Recommendation for Year One**

- Encourage the Director of the CFPB to withdraw the CFPB policy statement on abusive acts and practices, and to issue a new policy statement that prioritizes the interests of consumer financial protection.

### **Recommendations for Legislative Action**

- The administration should work with Congress as it drafts federal privacy legislation to ensure bills’ findings clearly outline the harms caused to consumers from data breaches.

---

<sup>25</sup> U.S. Consumer Financial Protection Bureau, Statement of Policy Regarding Prohibition on Abusive Acts or Practices, *available at* [https://files.consumerfinance.gov/f/documents/cfpb\\_abusiveness-enforcement-policy\\_statement.pdf](https://files.consumerfinance.gov/f/documents/cfpb_abusiveness-enforcement-policy_statement.pdf).

<sup>26</sup> Jeff Sovern, *Consumer Law & Policy Blog*, Take the Abusiveness Challenge: Identify a Valuable Consumer Financial Product Not Offered Because of Uncertainty About Whether It Is Abusive (Sept. 17, 2019), *available at* <https://pubcit.typepad.com/clpblog/2019/09/take-the-abusiveness-challenge-identify-a-valuable-consumer-financial-product-not-offered-because-of.html>.

## **ACTION 7: Bolstering Enforcement of Civil Statutes**

### Advancing Federal “Citizen Suits”

To bolster enforcement of federal law, individuals should be permitted and encouraged to sue on behalf of the federal government in circumstances where the law allows the federal government to recover a civil penalty through a civil action.

### Providing Attorney Fees to Prevailing Parties

In 2001, in a case called *Buckhannon Board & Care Home v. West Virginia Department of Health and Human Services*, the Supreme Court reversed longstanding appellate court precedent applicable to scores of federal fee-shifting statutes. The Court held that statutes that provide for an award of attorney fees to a prevailing plaintiff do not authorize a fee award based on the catalyst theory—that is, the theory that the lawsuit achieved the desired result by prompting the defendant to change its conduct.

### **Recommendations for Legislative Action**

- Express early support of a general statutory provision that establishes a legal claim, in the name of the government, for failure to comply with the enabling statute.
- Urge Congress to pass legislation providing that, in statutes that provide for an award of attorney fees to the prevailing plaintiff, the plaintiff may be deemed prevailing when the lawsuit acted as a catalyst in bringing about a goal sought in litigation.

\*\*\*

We are excited to work with your administration to ensure that every person has full and equal access to the civil justice system.