

**Consumer Action
Consumer Federation of California
Consumer Watchdog
Consumers for Auto Reliability and Safety
Courage Campaign
Housing and Economic Rights Advocates
Public Good**

March 8, 2017

Honorable Dianne Feinstein
United States Senate
Senate Hart Office Building, Room 331
Washington, DC 20510

RE: Nomination of Judge Neil Gorsuch to U.S. Supreme Court

Dear Senator Feinstein:

On behalf of the organizations listed above, which together represent millions of California consumers and workers, we strenuously urge you to question Judge Gorsuch in detail regarding his commitment to upholding the United States Constitution *in its entirety, including the Seventh Amendment*, which guarantees the right to a civil trial by jury; and unless he fully and openly commits to preserving that right, that you OPPOSE his nomination.

Many companies that profit tremendously from California's vast consumer market have engaged in widespread patterns of illegal activities, costing California consumers billions of hard-earned dollars and eroding their privacy, while evading accountability due to forced arbitration clauses that deprive their customers and employees basic, precious Constitutional rights.

Wells Fargo alone cost millions of its customers hundreds of millions of dollars in illegal charges, including over 2 million Californians, and also harmed over 650 members of the United States Armed Forces serving our nation at a time when we face very serious and real threats at home and abroad.

When Wells Fargo victims attempted to seek justice, that justice was denied under decisions rendered by a sharply divided 5-4 Supreme Court. To this day, Wells Fargo refuses to allow its consumer victims and whistleblowers who were fired when they reported wrongdoing, to have their day in court – even regarding accounts that were established without the consumers' knowledge or permission, through identity theft, forgery, and fraud.

Companies that engage in widespread illegal activity stand to benefit at the expense of the American public if Judge Gorsuch is confirmed. That is because he is likely to perpetuate the anti-

Seventh Amendment imbalance on the Court. Those who advance his nomination hail him for being “in the mold of the late Justice Antonin Scalia,” who is notorious for penning the decisions in highly controversial, anti-consumer cases such as *AT&T Mobility vs. Concepcion* and *Italian Colors vs. American Express*, denying access to justice for consumers, small business owners, and workers.

Judge Scalia’s opinions were radical, extreme departures from settled law. It was disgraceful and extremely harmful for the Republican-appointed majority on the Supreme Court to render those decisions. The 1925 Federal Arbitration Act was clearly and plainly intended to apply solely to businesses and other entities that had equal bargaining power, not to disputes between individual consumers and employees versus giant corporations.

As the current Chairman of the United States Senate Judiciary Committee, Senator Charles Grassley (R-Iowa), stated in presenting legislation in Congress to restore protections from forced arbitration for auto dealers, granting them a special exemption from the Federal Arbitration Act and restoring their right to sue whomever they please:

“When mandatory binding arbitration is forced upon a party, for example when it is placed in a boiler-plate agreement, it deprives the weaker party the opportunity to elect another forum. As a proponent of arbitration I believe it is critical to ensure that the selection of arbitration is voluntary and fair. The purpose of arbitration is to reduce costly, time-consuming litigation, not to force a party to an adhesion contract to waive access to judicial or administrative forums for the pursuit of rights under State law.

“This legislation will go a long way toward ensuring that parties will not be forced into binding arbitration and thereby lose important statutory rights. I am confident that given its many advantages arbitration will often be elected. But it is essential for public policy reasons and basic fairness that both parties to this type of contract have the freedom to make their own decisions based on the circumstances of the case.”¹

Clearly the same principles apply to individual consumers and workers, who have vastly unequal bargaining power when entering into contracts with corporations, particularly when they need a product or service, or a job, to survive. However, as the *Sacramento Bee* editorialized last December:

“As if the rip-off of some 2 million customers weren’t enough for Wells Fargo & Co., it turns out that the bank is trying to deprive its victims of their days in court....Wells Fargo has been arguing in federal and state courts that the wronged customers should have to argue their cases, not in public, but in private arbitration.

“It’s a cynical ploy, and destructive to the public trust and the legal system. Forced private arbitration...often tilts contractual arrangements in favor of corporate interests and deprives the public of important consumer information and case law.

“Companies like it because it keeps bad publicity out of the public record, stymies potential class actions and improves the odds of favorable decisions; private paid judges know that companies often give repeat business to arbitrators who give favorable rulings. Consumers are at a disadvantage in what has come to amount to a shadow system of civil justice....

¹ Statements on Introduced Bills and Joint Resolutions, United States Senate, June 29, 2001. Statement by Senator Grassley of Iowa.

“In the Wells Fargo case, the push is particularly reprehensible...the bank claims that those [arbitration] waivers apply to the legitimate accounts, and to the fake ones, even though the signatures were forged in many cases. It’s a scam on top of a scam...”²

It is important to note that California has more to lose than any other state. Under Proposition 64, which passed thanks largely to support by former Governor Schwarzenegger, the ability of non-profits who had been able to hold lawbreakers accountable was severely curtailed. Budget cuts and numerous pressing priorities also limit the resources our Attorney General, City Attorneys, and District Attorneys have to provide protections to consumers and workers. With rare exceptions, consumers, workers, and small businesses are on their own. Yet because of Judge Scalia’s radical decisions, they are barred from being able to assert their rights, even for flagrant and blatant violations of the law, due to forced arbitration.

Among the millions of your constituents who are victimized by forced arbitration:

- Employees who are victims of discriminatory pay schemes, based on race, gender, age, or other protected characteristics
- Employees who are victims of wage theft and overtime pay theft
- Employees who are victims of sexual harassment or gender discrimination
- Employees who are fired for being whistleblowers
- Military Servicemembers and their families who are denied protections afforded by the Servicemembers Civil Relief Act
- Consumers who are victims of fraud, forgery, and identity theft
- Consumers who are victims of unfair and deceptive acts and practices
- LGBT people who are denied protections under the law, including basic human rights
- Others who are victims of illegal discrimination
- Students in private schools who are denied protections under state and federal law
- Elderly and disabled people who enter nursing home facilities
- Consumers who use cell phones or other consumer products
- Consumers who purchase new or used vehicles from auto dealers who engage in odometer fraud, violate the warranties, or engage in forgery, “loan packing,” or other illegal acts / fraud
- Patients of doctors who engage in illegal activity, including assaulting them while they are sedated
- Credit-card users whose privacy is violated and whose identities are stolen due to security breaches arising from corporate negligence
- Small business owners who are victims of anti-trust violations

As former Justice (and Reagan appointee) Sandra Day O’Connor observed, even before the post-2005 conservative bloc stretched the law to its current extremes, the Court has “abandoned all pretense” of faithfully applying the text and legislative history of the Federal Arbitration Act, “building instead ... an edifice of its own creation.”³

2 Editorial: “Wells Fargo victims deserve day in court,” *Sacramento Bee*, December 9, 2016. Posted at: <http://www.sacbee.com/opinion/editorials/article119768343.html>

3 “I continue to believe that Congress never intended the Federal Arbitration Act to apply in state courts, and that this Court has strayed far afield in giving the Act so broad a compass....over the past decade, the Court has abandoned all pretense of ascertaining congressional intent with respect to the Federal Arbitration Act, building instead, case by case, an edifice of its own creation.” Justice Sandra Day O’Connor, *Allied-Bruce Terminix Cos. v. Dobson* (93-1001), 513

The late Justice Scalia himself revealed the dubious motivation behind the conservative bloc's contorted, activist doctrine —condemning “class arbitration” because it “greatly increases risks to [corporate] defendants.” That is precisely why class litigation is needed. Otherwise, crime pays.

In sum, we strongly urge that you raise these important issues in your questioning of Judge Gorsuch, including whether he believes that victims of illegal practices should have the freedom to assert their right under the Seventh Amendment of the Constitution of the United States to have their day in court; and that unless he fully commits to preserving that right, you OPPOSE his nomination.

Our nation needs and deserves to have a more balanced court, not one that continues to tilt in favor of the powerful interests that subvert our laws, at the expense of working people, consumers, and the American public.

Thank you for your consideration of your views. Should you or your staff have any questions regarding this matter, please do not hesitate to contact us directly, by contacting Rosemary Shahan, President of Consumers for Auto Reliability and Safety, based in Sacramento.

Sincerely,

Consumer Action
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Consumers for Auto Reliability and Safety (CARS)
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