U.S. CHAMBER
Institute for Legal Reform

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The Honorable Jerrold Nadler
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20510

The Honorable Doug Collins
Ranking Member
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20510

Dear Chairman Nadler and Ranking Member Collins:

The U.S. Chamber Institute for Legal Reform ("ILR") and the U.S. Chamber of Commerce strongly oppose H.R. 1423, the "Forced Arbitration Injustice Repeal (FAIR) Act." The FAIR Act would effectively eliminate the use and availability of pre-dispute arbitration agreements as a means to fairly resolve antitrust, employment, civil rights, and consumer disputes. The ultimate goal of this bill is to promote expensive class action litigation that does little to help businesses, consumers and employees and serves principally to benefit the attorneys who file class action lawsuits.

Arbitration is a fair, effective, and less expensive means of resolving disputes compared to going to court. Multiple empirical studies demonstrate that claimants in arbitration do just as well, or in many circumstances, considerably better, than in court. For example, a recent study by ILR found that employees prevailed three times more often, recovered twice as much money, and resolved their claims more quickly in arbitration than in litigation.[1] Studies have also shown that class action settlements frequently provide only a pittance – or many times, nothing at all – to class members while millions of dollars are paid to their attorneys.

Since 1925, the Federal Arbitration Act has protected the enforceability of agreements to resolve disputes through arbitration, including agreements made before any disputes arise, because Congress recognized the very substantial benefits provided by arbitration's less formal procedures. The FAIR Act would radically alter these longstanding principles and threatens the validity and enforceability of millions of contracts while imposing new, intolerable burdens on our already overcrowded courts.

Proponents of this bill attempt to justify those consequences by distorting or ignoring the fairness and due process protections built into the design of consumer and employment arbitration systems. The American Arbitration Association (AAA), the country's largest arbitration provider, imposes detailed fairness protocols for employment and consumer arbitrations, and will not accept a case unless the arbitration agreement complies with those standards. These requirements mandate that arbitrators must be neutral and disclose any conflict

[1] See *Fairer, Faster, Better: An Empirical Assessment of Employment Arbitration* (May 2019) available at https://www.instituteforlegalreform.com/research/fairer-faster-better-an-empirical-assessment-of-employment-arbitration.

of interest and give both parties an equal say in selecting the arbitrator; limit the fees employees and consumers must pay to $300 – less than the filing fee in federal court; empower the arbitrator to order any necessary discovery; and require that damages, punitive damages, and attorneys' fees be awardable to the claimant to the same extent as in court. And the AAA rules require that consumers be given the option of resolving their dispute in small claims court. JAMS, another leading arbitration provider, requires similar protections.

The courts provide another layer of oversight. If an arbitration agreement is unfair, courts can and do step in to declare those arbitration agreements unconscionable and unenforceable. Arbitration clauses that provide for biased arbitrators, impose unfair procedures or limit awards of damages or attorneys' fees, or require arbitration in out-of-the-way places are routinely held unenforceable.

Courts also invalidate arbitration agreements that purport to impose a "gag order." Many courts have ruled that arbitration agreements cannot prevent consumers or employees from publicly discussing claims or filing complaints with government agencies, nor can arbitrators' decisions be kept secret. Furthermore, state laws require arbitral forums such as the AAA to disclose arbitration outcomes in all consumer and employee arbitrations, and courts consistently hold that either party may disclose the results of arbitration proceedings.

The opponents of pre-dispute arbitration agreements also ignore the critical reality that, if enacted, the FAIR Act would eliminate the only realistic opportunity for consumers and employees to obtain a remedy for the vast majority of grievances that they have. Most consumer and employee disputes are not eligible to be resolved through a class action and involve amounts too low to attract an attorney to take the case. Arbitration empowers consumers and employees by giving them the only realistic avenue for obtaining relief for such claims. The only real beneficiaries of H.R. 1423 would be the class action lawyers who would be able to bring lawsuits to enrich themselves while providing little or no benefit to class members.

Accordingly, we urge you to oppose H.R. 1423.

Sincerely,

Harold Kim

cc: Members of the Committee on the Judiciary

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