Testimony of

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On behalf of
The U.S. Chamber Institute for Legal Reform

Before the
U.S. SENATE COMMITTEE ON THE JUDICIARY

Hearing on
"Arbitration in America"

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Chairman Graham, Ranking Member Feinstein, and Members of this distinguished Committee, thank you for your most gracious invitation for me to testify today about pre-dispute arbitration agreements.

By way of background, for over 50 years, I have worked in and with our litigation system. I was privileged to do plaintiffs' work for over a decade and defense work for over 30 years. I have been a law professor and served as dean of the University of Cincinnati College of Law. I am co-author of the most widely used torts casebook in the United States, *Prosser, Wade & Schwartz's Torts: Cases and Materials* (13th ed. 2015). Currently, I am a partner at the law firm of Shook Hardy & Bacon, L.L.P. and co-chair the firm's Public Policy Group.

Today, I have the honor of testifying on behalf of the U.S. Chamber Institute for Legal Reform (ILR). ILR is the legal reform affiliate of the U.S. Chamber of Commerce. ILR's mission is to make our nation's legal system simpler, fairer, and faster. As has been true each time I have testified before this distinguished Committee, the views expressed are my own.

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On the previous occasion in which I testified before this Committee on the topic of pre-dispute arbitration, I began with a quote from the wisest minister I have ever known, Albert Sikkelee, who once said in a sermon that "something not placed in context is pretext." While Reverend Sikkelee was speaking of selective uses of portions of the *Bible*, his words ring true with respect to the topic of pre-dispute arbitration agreements. To evaluate these agreements properly,

they must be placed in the context of our civil justice system. With that mind, I thought it would be helpful to explain some of the benefits of pre-dispute arbitration agreements as means of dispute resolution as compared to civil litigation, as well as address some of the myths about these agreements to help provide a more complete context for the Committee.

Key Benefits of Binding Pre-Dispute Arbitration

A principal benefit of pre-dispute arbitration agreements, and arbitration generally, is that it provides consumers, employees, and other claimants with an efficient means to obtain redress for a large number of claims in which litigation is impractical. Pursuing a lawsuit can be a costly and time-consuming endeavor for anyone, and may simply be an unrealistic option where an alleged injury is of an individualized nature and too modest in potential value to attract the assistance of a lawyer.

For instance, some studies indicate that even around 20 years ago lawyers often would not take a case unless the expected value of the claim was at least $60,000.[1] More recent reports suggest that some plaintiff's lawyers will not take a case valued at less than $200,000.[2] This is totally understandable. Although some lawyers put economics aside on occasion, the reality for many claimants is that the only path to pursue a civil action is to hire a plaintiff's lawyer under a contingency fee agreement. These lawyers are paid only if they win, and even a recovery of a one-third or more in a case may not be enough to warrant their participation given the expected time, effort, and risk involved. Plaintiff's lawyers are not paid by the hour and generally do not take

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[1] *See, e.g.,* Elizabeth Hill, *AAA Employment Arbitration: A Fair Forum at Low Cost*, 58 Disp. Resol. J. May-Jul. 2003, at 8, 10-11.

[2] *See, e.g.,* Minn. State Bar Ass'n, *Final Report: Recommendations of the Minnesota Supreme Court Civil Justice Task Force* 11 (Dec. 23, 2011), *available at* http://www.mncourts.gov/mncourtsgov/media/assets/documents/reports/Civil_Justice_Ref_Task_Force_Dec_2011_Rpt.pdf.

cases they do not expect to win; they are capitalists and must make wise investments to make a living.

Arbitration, in comparison, allows claimants to bypass the costs of the litigation system. Claimants, in general, can have their disputes adjudicated more quickly and more cheaply than in the courts. For example, under the American Arbitration Association's employment procedures, employees cannot be asked to pay more than $300 in total arbitration costs; employers must shoulder all the remaining fees.[3] In many instances, claimants pay nothing at all in arbitration.[4] In the litigation system, the court fees alone to initiate a case may be $400 or more, and that is before the payment of any fees to a lawyer who agreed to take the case.

The more costly litigation path is also plagued with problems that can significantly delay any adjudication and potential redress of a claim. Many state courthouses – which is where most civil claims are filed – are, quite simply, overburdened. Entire court systems may be grappling with significant budget cuts that stretch already scarce judicial resources and result in reduced services and lengthy delays. As the Committee is likely aware, many federal district courts have likewise experienced high caseloads and lengthy delays. Arbitration, on the other hand, can potentially shave months or even years off the resolution time of a claim.

In addition, claimants using arbitration benefit from a simpler, more convenient method of dispute resolution. As the U.S. Supreme Court has explained: "The advantages of arbitration are many: it is usually cheaper and faster than litigation; it can have simpler procedural and evidentiary rules; it normally minimizes hostility and is less disruptive of ongoing and future

[3] Am. Arbitration Ass'n, *Employment/Workplace Fee Schedule: Costs of Arbitration* (Oct. 1, 2017), *available at* https://www.adr.org/sites/default/files/Employment_Fee_Schedule.pdf.

[4] *See, e.g.,* Elizabeth Hill, *Due Process at Low Cost: An Empirical Study of Employment Arbitration Under the Auspices of the American Arbitration Association*, 18 Ohio St. J. on Disp. Resol. 777, 802 (2003).

business dealings among the parties; it is often more flexible in regard to scheduling of times and places of hearings and discovery devices."[5] The Court has further recognized that "the informality of arbitral proceedings is itself desirable, reducing the cost and increasing the speed of dispute resolution."[6]

Such flexibility at lower cost can make real differences in claimants' lives. As the eminent jurist Learned Hand wisely observed nearly a century ago, a person "should dread a lawsuit beyond almost anything short of sickness and death."[7] A claimant pursuing arbitration, in comparison, may never need to take time away from family or work to meet with a lawyer, sit for a deposition, or even make a personal appearance in a matter to obtain a recovery. Arbitration proceedings often require far less information than would be exchanged in traditional civil discovery and may be adjudicated on the basis of something as simple as a telephone call. In a world of increasingly busy lives, these are important benefits.

The combination of benefits gained from arbitration with respect to lower costs, greater efficiency, and increased availability of redress are reinforced by the fact that the arbitral process provides claimants with a fair, reliable, and effective means of dispute resolution. Numerous studies demonstrate that claimants receive even-handed justice in arbitration proceedings.[8] As a

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[5] *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 280 (1995) (quoting H.R. Rep. No. 97-542, at 13 (1982)).

[6] *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 345 (2011).

[7] Learned Hand, *The Deficiencies of Trials to Reach the Heart of the Matter*, Address Before the N.Y. City Bar Ass'n (Nov. 17, 1921), in 3 Lectures on Legal Topics 89, 93 (1926).

[8] *See, e.g.,* Christopher R. Drahozal & Samantha Zyontz, *An Empirical Study of AAA Consumer Arbitrations*, 25 Ohio St. J. on Disp. Resol. 843 (2010); Michael Delikat & Morris M. Kleiner, *An Empirical Study of Dispute Resolution Mechanisms: Where do Plaintiffs Better Vindicate Their Rights?*, 58 Disp. Resol. J. 56 (Nov. 2003 - Jan. 2004); Theodore Eisenberg & Elizabeth Hill, *Arbitration and Litigation of Employment Claims: An Empirical Comparison*, 58 Disp. Resol. J. 44, 45, 47-50 (Nov. 2003-Jan. 2004); Hill, *supra* note 4, at 802; Elizabeth Hill, *AAA Employment Arbitration: A Fair Forum at Low Cost*, 58 Disp. Resol. J. 9, 13 (May/July 2003).

study published in the Stanford Law Review explained, one commonality in its analysis of reports that suggested otherwise was that "the assertions of many arbitration critics were either overstated or simply wrong."[9] It concluded "there is no evidence that plaintiffs fare significantly better in litigation" than arbitration, and "[i]n fact, the opposite may be true."[10]

The less formal nature of arbitration proceedings compared to traditional civil litigation does not mean that the independence of arbitrators is somehow relaxed. These individuals are professionals who take an oath to render objective decisions, not unlike a judge or other court officer. Many arbitrators are, in fact, former judges. The nation's leading arbitration providers, such as the American Arbitration Association (AAA) and JAMS, also have comprehensive rules and procedures to ensure independence among arbitrators and due process for claimants. The result is a system with significant advantages over the litigation system that benefit all involved.

Myths about Binding Pre-Dispute Arbitration

There are probably more myths about binding pre-dispute arbitration agreements than one can find in Aesop's fables. I would like to address six myths that I believe are particularly unhelpful to a thoughtful discussion of this topic, yet are often repeated.

Myth #1: Pre-dispute arbitration agreements are categorically unfair because they are entered into by consumers, employees, or other individuals with unequal bargaining power.

Despite opponents' rhetoric that pre-dispute arbitration agreements are "forced arbitration," it is important to appreciate that we are talking about contracts entered voluntarily by consumers, employees, and others. If a person feels strongly enough that he or she would not want

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[9] David Sherwyn et al., *Assessing the Case for Employment Arbitration: A New Path for Empirical Research*, 57 Stan. L. Rev. 1557, 1567 (2005).

[10] *Id.* at 1578.

to participate in arbitration should a disagreement arise, he or she can choose to not purchase the product or service at issue or pursue different job opportunities.

In many instances, though, there will be a marketplace alternative. For example, in a *National Law Journal* article published last week discussing the use of pre-dispute arbitration agreements among law firms, the article stated that a number of large law firms require new attorneys to enter such agreements as a condition of employment whereas others do not.[11] Attorney applicants have the option of not seeking employment with firms that include such agreements if so inclined. The same rationale applies to consumer agreements; a consumer is free to seek out (and presumably pay a premium for) products or services that do not include a pre-dispute arbitration agreement. If this is indeed something in which individuals place value, actors in a competitive marketplace will typically adjust and offer that option.

The notion that a voluntary contract is unfair just because it includes a provision on a "take it or leave it" basis ignores the fact that an individual can just "leave it." Countless agreements include terms that are offered on such a basis; pre-dispute arbitration provisions are hardly unique in this regard.[12] Prohibiting or otherwise limiting the use of pre-dispute arbitration provisions based on unequal bargaining power alone would do more harm to individuals in the aggregate by "forcing" them to face greater burdens, costs, and delay in seeking access to justice and experience worse outcomes – in essence, "forced litigation."

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[11] *See* Karen Sloan, *Big Law Is Targeted—In Person—By Law Students Opposing Mandatory Arbitration*, Nat'l Law J., Mar. 26, 2019, at https://www.law.com/nationallawjournal/2019/03/26/big-law-is-targeted-in-person-by-law-students-opposing-mandatory-arbitration/.

[12] *Cf. Concepcion*, 563 U.S. at 346-47 ("the times in which consumer contracts were anything other than adhesive are long past").

Myth #2: Pre-dispute arbitration provisions are unsound because they are often written in "legalese" and "buried" in legal agreements.

The same point expressed previously that individuals should be accountable for the contracts they enter voluntarily bears repeating. This personal accountability extends to reading a contract and making an effort to understand its contents. Individuals should not be able to benefit from choosing to rush through and execute an agreement without reading it first and then use that decision as a basis for invalidating all or part of the agreement. If a contract's terms are overly burdensome, oppressive, or deceptive, individuals generally have a legal basis to challenge that provision. Contract terms are subject to an unconscionability analysis, and courts have invalidated various types of pre-dispute arbitration provisions on this basis.[13] The mere inclusion of a provision such as a pre-dispute arbitration provision, however, should not be rejected out-of-hand as unfair where a consumer has a reasonable opportunity to review it.

Myth #3: Pre-dispute arbitration agreements are unjust because they require confidential adjudication that denies claimants a public forum.

An arbitration proceeding does not necessarily foreclose public awareness of a dispute. Claimants are free to discuss their claims publicly and to report alleged wrongdoing to law enforcement officials.[14] If an arbitration agreement purported to impose a "gag order," that

[13] *See, e.g., Chavarria v. Ralphs Grocery Co.*, 733 F.3d 916 (9th Cir. 2013) (refusing to apply provision that required employee to pay unrecoverable portion of arbitrator's fees "regardless of the merits of the claim"); *Willis v. Nationwide Debt Settlement Grp.*, 878 F. Supp. 2d 1208 (D. Or. 2012) (refusing to apply provision requiring arbitration to take place in inconvenient location in another state); *Adler v. Fred Lind Manor*, 103 P.3d 773 (Wash. 2004) (refusing to apply provision that unreasonably shortened statute of limitations).

[14] *See* Christopher C. Murray, *No Longer Silent: How Accurate are Recent Criticisms of Employment Arbitration*, 36 Alternatives to the High Cost of Litigation 65, 78 (2018).

restriction would be invalidated in court.[15] State laws further require disclosure of arbitration outcomes by arbitral forums such as the AAA,[16] and courts consistently hold that the results of arbitration proceedings may be disclosed by either party.

To the extent arbitration proceedings are private, arbitration is by no means unique in limiting public awareness of a dispute. As this Committee is aware, many claims filed in civil court settle, and a settlement can result in less public disclosure than arbitration. Judges may also issue orders without written explanation of their reasoning, which may similarly result in less public exposure compared to an arbitration proceeding.

In addition, claimants may prefer arbitration precisely because the adjudication takes place in a less public setting than civil litigation. Many claimants choose not to pursue litigation in the courts because of the potential toll it might take on them within their community, or on their loved ones, if the dispute plays out in the "court of public opinion." Thus, confidentiality can be something all parties welcome.

Myth #4: If there are benefits to binding pre-dispute arbitration agreements, consumers should be permitted to choose for themselves whether to resolve a dispute through post-dispute arbitration or civil litigation.

The notion of supplanting pre-dispute arbitration agreements with post-dispute arbitration ignores the fact that parties' incentives change dramatically in the post-dispute setting. Unlike the pre-dispute arbitration context where both parties – regardless of position and strength of case relative to each other – agree to arbitrate any dispute, each party in the post-dispute context will insist on either arbitration or litigation where it provides the greatest expected benefit to them and

[15] *See, e.g.*, *Davis v. O'Melveny & Myers*, 485 F.3d 1066 (9th Cir. 2007), *overruled on other grounds by Kilgore v. KeyBank, Nat'l Ass'n*, 673 F.3d 947 (9th Cir. 2012); *Longnecker v. Am. Express Co.*, 23 F. Supp. 3d 1099 (D. Ariz. 2014).

[16] *See, e.g.,* Cal. Code Civ. Proc. § 1281.96.

them alone. Consequently, the adversarial parties are unlikely as a practical matter to agree on the same method of dispute resolution. This is why post-dispute arbitration agreements are virtually non-existent in the "real world."

For example, if a company believes an individual's claim is below a certain amount that will make it difficult for that individual to obtain legal representation, the company would be less likely to agree to post-dispute arbitration because holding out would prevent the individual from pursuing the claim. Conversely, if the company believed the individual's claim might result in a substantial judgment, the company would probably prefer arbitration whereas the individual might be more inclined to pursue civil litigation in the hopes of obtaining a large jury award.

The benefit of binding pre-dispute arbitration is that both parties are on the "same page" regardless of the particulars of any subsequent dispute.

Myth #5: Businesses prevail at greater rates in arbitration proceedings, which suggests these proceedings are biased and "stack the deck" against claimants.

As discussed previously, empirical studies demonstrate that claimants are often better off having disputes adjudicated pursuant to pre-dispute arbitration agreements.[17] Reports suggesting arbitration is biased in favor of businesses have been debunked or otherwise had flawed methodology exposed.[18] In fairness to these efforts, designing a study to analyze outcomes in arbitration as compared to civil litigation is a challenging task. Simply looking at "win rates" for individuals or businesses in claims under either system in isolation may not tell the full story – one needs to compare apples to apples to get an accurate picture.

For instance, there can be significant differences in the types of claims brought in arbitration versus civil litigation. As discussed, the use of pre-dispute arbitration agreements may

[17] *See supra* note 8.

[18] *See supra* note 9.

provide an individual a forum to bring a modest claim of questionable value that, as a practical matter, would never see the light of day if pursued through the civil litigation system because no lawyer would take the case. A lawyer might decline to do so either because of the modest amount of recovery at issue or the questionable nature of the claim (or both). Here, the availability of arbitration is a testament to greater access to justice for the individual even though the defendant business may prevail in a comparatively greater number of these types of cases.

Settlement of claims brought in both civil litigation and arbitration is another factor that can muddy any direct comparison of "win rates." Parties may settle civil cases as well as cases in arbitration for reasons that have little to do with a claim's actual merits (e.g. nuisance value), which can distort what this information reveals. Businesses also have a strong incentive to settle claims in arbitration because they are on the hook for all the fees, and these settlements would not be captured in "win rates."

What is clear, though, is that the empirical evidence that has developed over the decades-long study of the use of pre-dispute arbitration agreements supports the continued use of these agreements as a positive alternative to civil litigation.

Myth #6: Pre-dispute arbitration provisions unfairly preclude individuals from bringing class actions that allow for small damages claims to be aggregated for adjudication.

The argument that pre-dispute arbitration agreements inappropriately preclude claimants from accessing justice through the class action device is, in my view, overblown. Class actions in our civil litigation system are available only in discrete situations where people sustain injury in the same way at the same time (and can satisfy other requirements of Federal Rule of Civil Procedure 23 or analogous state rules). Class actions are not permitted where claims are highly individualized. Accordingly, a class action is generally not available for most employment or

consumer disputes, such as those involving a physical injury or particularized alleged economic harm (e.g. overcharge or improper payment) that pertains to a specific person.

Class actions are also not as beneficial to consumers as opponents of the use of pre-dispute arbitration agreements may suggest. Class actions are often enormously complex and expensive. They also typically take many years to revolve. These are all problems upon which arbitration improves.

In addition, members of a class action frequently end up receiving little or no benefit at the end of the litigation. The history of class action litigation in America is replete with examples of consumer class actions in which the vast majority of the class members remain absent and recover nothing at all.[19] For example, an analysis prepared by the Consumer Financial Protection Bureau (CFPB) reported a "weighted average claims rate" in class actions of just 4%.[20] Other studies report even lower rates of class member involvement.[21]

These studies indicate that the true beneficiaries of class action litigation are not consumers or other claimants, but rather the plaintiff's lawyers who bring these cases and collect substantial attorney fees. Therefore, the notion that pre-dispute arbitration agreements have a major adverse impact on the ability of individuals to obtain redress for comparatively small claims is simply false. As explained, the evidence shows that these individuals fare better through arbitration; it is the

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[19] *See* U.S. Chamber Inst. for Legal Reform, *Unstable Foundation: Our Broken Class Action System and How to Fix It* 3-5 (Oct. 2017), *available at* https://www.instituteforlegalreform.com/uploads/sites/1/UnstableFoundation_Web_10242017.pdf (analyzing studies of recoveries under class actions and discussing specific case examples).

[20] *See* Consumer Fin. Pro. Bureau, *Arbitration Study: Report to Congress 2015* 30 (Mar. 2015).

[21] *See, e.g.,* Mayer Brown LLP, *Do Class Actions Benefit Class Members? An Empirical Analysis of Class Actions* (Dec. 11, 2013), *available at* https://www.mayerbrown.com/files/uploads/Documents/PDFs/2013/December/DoClassActionsBenefitClassMembers.pdf.

plaintiff's lawyers who do not, which is why they are leading efforts to bar or limit the use of binding pre-dispute arbitration agreements.

Conclusion

Everyone knows the universal truth: nothing is perfect. Pre-dispute arbitration is not perfect, but I can assure this Committee that the litigation system is not perfect either. On balance, though, the benefits of pre-dispute arbitration agreements far outweigh any perceived concerns when the full picture is provided. The alternative of barring the use of pre-dispute arbitration agreements is not sound public policy. To the extent any bad apples exist in the marketplace, they should not spoil the entire bunch and can be addressed. Prohibiting the use of binding pre-dispute arbitration agreements would make worse off the very individuals such proposals seek to protect. These individuals would face greater burdens and costs in seeking access to justice, experience worse outcomes, and have disputes resolved at a far slower rate.

Thank you for the opportunity to testify today and I look forward to your questions.