UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON EDUCATION AND LABOR

Hearing Before the Subcommittee on Health, Employment, Labor, and Pensions

"Closing the Courthouse Doors: The Injustice of Forced Arbitration Agreements"

November 4, 2021

Testimony of G. Roger King[1]

[1] Mr. King is a graduate of Miami University (1968) and Cornell University Law School (1971). Mr. King is a member of the District of Columbia and Ohio Bar Associations, and his professional experience includes serving as a legislative staff assistant to Senator Robert Taft Jr. and professional staff counsel to the United States Senate Labor Committee (1971-1974), associate and partner with Bricker & Eckler (1974-1990), partner and of counsel at Jones Day (1990-2014), and Senior Labor & Employment Counsel at HR Policy Association (2014-Present). Mr. King's testimony is being presented on his own behalf and not on behalf of any other party.

Chairman DeSaulnier, Ranking Member Allen, and Members of the Subcommittee:

Thank you for the invitation to testify this morning. I have been involved professionally in the field of arbitration my entire professional career. I have had considerable experience during this 50-year period in drafting arbitration agreements, serving as counsel in arbitration hearings, and analyzing arbitration issues from a policy perspective. I have also served as counsel to employers in class and collective action litigation. Additionally, I have closely followed the discussions and debates in this body and the United States Senate regarding the FAIR Act and related legislative proposals. Earlier this year, I testified before the House Judiciary Committee regarding the FAIR Act and arbitration related issues. A copy of my testimony to that Committee is attached to this testimony.

H.R. 4841 and similar proposals have two primary objectives: (1) to prohibit all pre-dispute arbitration agreements of work disputes and (2) to prohibit all class action waiver agreements between employees and employers UNLESS such agreements have been entered into between labor unions and employers. This is a radical approach to pursue as it precludes any pre-dispute arbitration procedure, including class-oriented pre-dispute procedures. It also inappropriately discourages or prohibits innovative alternatives to class action dispute resolution procedures from being developed and utilized by employees, consumers, and employers. The approach taken by H.R. 4841 should be rejected.

- H.R. 4841 is in conflict with decades of well-established U.S. Supreme Court arbitration precedent and incorrectly attempts to overturn the Court's most recent decisions in the consolidated cases of *Epic Systems, Ernst & Young,* and *Murphy Oil*.[2]

- The proposed legislation and related theories to completely ban pre-dispute arbitration are based on the false premise that pre-dispute arbitration agreements are inherently bad and that class action and collective action litigation should be the preferred approach to resolve disputes in the workplace.

- H.R. 4841 also incorrectly attempts to eliminate well-established definitions of independent contractor status under the National Labor Relations Act and classifies all workers as employees. The definition of independent contractor

[2] *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018).

status and various classification policy issues associated with this important matter should be separately considered by this Subcommittee and the United States Senate. This issue should not be dealt with in an indirect manner in this legislation.

- H.R. 4841 is internally contradictory by attempting to completely prohibit pre-dispute arbitration and class action waivers between employees and employers but concurrently permitting employers and labor organizations to continue to negotiate such agreements. This approach not only defies common sense but is also contrary to Supreme Court precedent.[3]

- H.R. 4841 fails to recognize the increasing trend to resolve workplace disputes through nonjudicial alternative dispute resolution procedures, including well-established, individualized arbitration procedures.

- The post-dispute arbitration procedures set forth in H.R. 4841 are unnecessarily complex, will lead to disputes and protracted litigation, and simply will prove to be unworkable – they are a poorly disguised attempt to severely limit, if not eliminate, all individualized arbitration of workplace disputes. Indeed, the legal system in this country is built upon the establishment of pre-dispute procedures such as the Federal Rules of Civil Procedure, similar state judicial procedure rules, and American Arbitration Association rules – that is how courts and arbitrators hear and decide cases.

- Post-dispute resolution procedures, to the extent H.R. 4841 even would permit them, are largely unachievable as the dispute in question already has arisen, and parties have significant disincentives to mutually agree upon procedures to resolve their disputes. Accordingly, to the extent H.R. 4841 relies upon post-dispute procedures to substitute for the complete elimination of pre-dispute procedures, it is flawed, and this approach should be rejected.

- H.R. 4841 would not only significantly increase class action litigation but also increase litigation under the National Labor Relations Act by creating new unfair labor practice charges against employers. The bill would also increase litigation by creating a private right of action for employees to file

[3] *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 258 (2009) ("Nothing in the law" [however] "suggests a distinction between the status of arbitration agreements signed by individual employee and those agreed to by a union representative.").

lawsuits against employers who establish or continue to have class action waiver agreements in place. The establishment of unfair labor practice charges against employers is particularly troubling given the pending proposal in the budget reconciliation bill to create, for the first time under the NLRA, civil monetary fines against representatives of employers.[4]

- Finally, as a practical matter, our nation's courts simply are not in a position to expeditiously resolve the thousands of cases currently being decided by pre-dispute arbitration. The arbitral system in this country also is not in a position to efficiently accept, process, and decide the additional heavy volume of class arbitration filings that would occur if pre-dispute arbitration is eliminated.

Mr. Chairman, before proceeding further regarding the specific flaws of H.R. 4841 and its underlying premises, I would like to attempt to level set our discussion this morning. I am not here to defend arbitration agreements obtained through fraud, coercion, or duress. Such agreements should not exist in the workplace or elsewhere. Additionally, any type of such improper agreements can be set aside as they are subject to revocation under the Federal Arbitration Act (FAA) and substantial precedent established in state and federal courts.

Further, I am not here this morning to defend hostile workplace situations, including especially incidents of sexual harassment. Such situations have unfortunately, however, served as a misleading "stalking horse" to support total elimination of pre-dispute arbitration procedures. Often the real issue in such situations is the presence of improper or overbroad nondisclosure agreements (NDA's) that are included in the terms of the arbitration agreement and the secrecy required by such provisions. Such secrecy requirements prohibiting transparency of the arbitration process should be addressed but the misuse of NDA's is not a sound basis to completely eliminate pre-dispute arbitration.

Additionally, to the extent that the opponents of pre-dispute arbitration can make a case at all to attack the system that has been in place for decades to informally resolve employment and consumer disputes, a more informed discussion would be to explore ways to ensure procedural due process protections in all arbitration procedures – not the complete elimination of pre-dispute arbitration. Simply put, H.R. 4841 is an extreme overreach and a product of extensive lobbying efforts by the plaintiffs' trial bar to further their economic interests. Employees, employers,

[4] A similar proposal is also included in the PRO Act, currently pending in the Senate.

and the general public will not benefit from legislative proposals such as H.R. 4841. The only beneficiaries will be class action lawyers.

Finally, I would agree that class and collective actions may be appropriate in certain situations, but individualized arbitration procedures also have an important place in addressing and solving workplace issues. It is insightful and instructive that the proponents of H.R. 4841 are unwilling to concede to this obvious conclusion. Perhaps such intransigence provides an accurate picture of their extreme position in this area. One would hope they would at least entertain the inescapable conclusion that individualized arbitration agreements and corresponding class action waivers have been and continue to be an important part of solving workplace disputes.

Mr. Chairman, Ranking Member Allen, and Members of the Subcommittee, I would like to expand on certain objections I noted above.

- **Courts and experienced arbitrators already have overcrowded dockets and are not in a position to expeditiously and efficiently handle the increased docket that would occur if pre-dispute arbitration procedures are prohibited.**

Currently, many state and federal courts are already overburdened with significant case backlogs. This backlog has only been further worsened by the ongoing COVID-19 pandemic, which caused many courts to temporarily close down and continues to prevent in-person case handling in many areas. Courts simply are not in a position to take on the increased burdens that would be placed on them if all pre-dispute arbitration procedures are prohibited.

Additionally, there is a shortage of seasoned arbitrators in the country who are available to handle the increased docket of class proceedings that would occur if pre-dispute arbitration is completely eliminated. Indeed, many qualified arbitrators are either not experienced in the class area or would refuse to accept complicated and complex class proceedings. Finally, as a practical matter, even those arbitrators that have the requisite experience and are willing to accept such assignments, may not have the necessary administrative support staff or research capability to successfully and expeditiously handle such cases.

- **Alternative dispute resolution procedures and due process protections for existing arbitration procedures should be the focus of this Subcommittee.**

H.R. 4841 and similar proposals go in the wrong direction. Instead of providing consideration for numerous alternatives to expeditiously and efficiently settle workplace disputes, they take the extreme approach of simply making unlawful both pre-dispute individualized arbitration and class action waivers under the National Labor Relations Act. I submit that a more thoughtful approach would be to consider requiring basic due process protections in any type of arbitration proceeding to ensure that employee and consumer interests are protected. Further, in this context, the Subcommittee should consider exploring and researching alternative dispute resolution procedures that are rapidly evolving to settle workplace disputes. These procedures and initiatives come in many forms, including the use of ombudsmen, mediation, peer review panels, expedited fact finding, early case assessments, "mini" trials, and numerous other expedited methods to obtain verbal or "bench rulings" from an experienced mediator or arbitrator. An examination of these approaches would provide a more informed and thoughtful discussion regarding how workplace disputes should be resolved.

- **Class proceedings in court and in arbitration have numerous procedural and substantive disadvantages**

Class litigation under Rule 23 of the Federal Rules of Civil Procedure (FRCP) have many procedural requirements that can quickly result in a "procedural morass." For example, Rule 23(a) requires a court to find that a proposed class satisfies commonality, typicality, numerosity and adequate representation requirements before a class can be certified and proceed to merits litigation.[5] Opt-in and opt-out rights of class members must be resolved depending on which statutory claims are being advanced in the proceeding. Numerous notice requirements must also be met with respect to class members. Protracted and expensive litigation often occurs in all of the above areas before the alleged merits of the dispute are addressed. These civil procedure requirements have led many commentators to conclude that class actions are arguably the most controversial of all judicial avenues for remedying cases of employment discrimination.[6]

Further, Rule 23 (b) of the Federal Rules of Civil Procedure provides that:

> [a]n action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition: (1) the prosecution of separate

[5] *See, e.g. General Tel Co. v. Falcon*, 457 U.S. 147, 157-58 (1982) ([Employment discrimination cases "…like any other class action, many only be certified if the trial court is satisfied, **after a rigorous analysis**, that the prerequisites of Rule 23 (a) have been satisfied." (emphasis added)).

[6] *See, e.g.*, Herbert B. Newberg et al., Newberg on Class Actions, § 1.01(3d ed. 1992).

> actions by or against individual members of the class would create a risk of (a) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class; or (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy…[7]

The complexity and legalese of this Section speaks for itself.

In addition, Rule 23 (b)(2) of the FRCP provides additional requirements for injunctive and declaratory relief in class litigation cases. Further, in addition to Rule 23 procedural requirements for class actions, other federal statutes have different class litigation procedural requirements. For example, under the Fair Labor Standards Act (FLSA), the Equal Pay Act, and the Age Discrimination in Employment Act (ADEA), class actions are known as "collective actions" and are covered by Section 216 (b) of the FLSA. Different procedural requirements are applicable under this Section of the FLSA, including requirements for individuals that wish to be part of a class to "opt-in" to participate in and be bound by any judgment that may issue. Again, there has been substantial litigation in interpreting and applying Section 216 procedural requirements. Mr. Chairman, this Subcommittee would have to spend literally weeks, if not months, to review the case law developments that have occurred in federal and state class action procedure cases before members could have a complete and accurate picture of the procedural complexity that occurs in this area.

In summary, "fine print and legalese" in consumer and employee arbitration agreements certainly can be challenging in certain cases – BUT the substantial class procedural requirements in the courts, as noted above, can be even more confusing to the layperson. Indeed, class action procedural requirements that are applicable in these types of cases require consumers and employees to retain

[7] Fed. R. Civ. P. 23(b)

lawyers to interpret, apply, and in many cases litigate the meaning of such requirements - all of course at their expense.

Finally, I am aware of arguments by some that group grievances can be successfully pursued in arbitration.[8] This is no doubt true. Indeed, many of these types of arbitrable proceedings do not have the procedural requirements outlined above under Rule 23 and Section 216. However, as I noted previously, dockets of experienced arbitrators are quite crowded. Finding a mutually agreed upon and experienced arbitrator can be difficult. Further, some arbitrators simply may not have the requisite administrative and research support capability to handle class action cases. In any event, the fact that qualified arbitrators can be located and will agree to hear class action cases does not dictate that class action procedures should be the preferred method to address workplace disputes.

- **There are many positive attributes to individualized arbitration procedures as compared to class litigation**

U.S. Supreme Court Justice Stephen Breyer summarized the many positive attributes of arbitration as follows:

> [Arbitration] is usually cheaper and faster than litigation; it can have similar procedural and evidentiary rules; it normally minimizes hostility and is less disruptive of ongoing and future business dealings among the parties; [and] it is often more flexible in regard to scheduling of times and places of hearing and discovery devices.[9]

As Justice Breyer noted, such positive attributes include:

  - **Speedy resolution of claims**

The old saying "justice delayed is justice denied" is particularly applicable to class action litigation compared to individualized dispute resolution. Indeed, class action cases take years to resolve, particularly if appeals are pursued. By contrast, individualized dispute resolution, including arbitration of such claims, can in many

[8] Brief for the National Academy of Arbitrators as Amicus Curiae Supporting Respondents, *Epic Sys. v. Lewis*, 138 S. Ct. 1612 (2018).
[9] *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 280 (1995) (quoting H.R. Rep. No. 97-542, at 13 (1982)).

instances also be resolved in less than 180 days from the selection of the arbitrator to the issuance of a decision.[10]

- **Less Expense**

Arbitration that proceeds on an individualized basis does not have to devote time to class identification, class certification, class notice procedures, discovery protocols, and many other related procedural issues. Such procedural requirements of class litigation are expensive and time consuming. Correspondingly, individualized arbitration can be far more cost effective given the minimal number of procedural requirements that are involved.

- **Better outcomes for claimants**

Contrary to a recent plaintiff trial lawyers commission study,[11] many other detailed analyses have found that consumers and employers receive far better outcomes under individualized arbitration procedures than in class action procedures.[12] For example, "A 2015 study by the Consumer Financial Protection Bureau found that only 13 percent of class actions resulted in a payout for consumers. And even then, the average award for consumers is about $32, while plaintiffs' attorneys got about $1 million." *The Mass Arbitration Racket: Unscrupulous Abuse of the Arbitration Ecosystem*, U.S. Chamber Inst. for Legal Reform (Dec. 18, 2020).

- **Better attention to claimants' individualized situations**

In class action litigation, an individual's situation is subordinated to the homogenized interest of class members. A claimant's personal situation and circumstances are not considered. In individualized arbitration proceedings, employees can have their specific circumstances addressed and remedies tailored to such.

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[10] *See Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 686 (2010) ("In bilateral arbitration, parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes.").

[11] *Forced Arbitration in a Pandemic: Corporations Double Down*, (Am. Assoc. for Justice – The Association for Trial Lawyers, October 27, 2021) (https://www.justice.org/resources/research/forced-arbitration-in-a-pandemic).

[12] See, e.g. a statistical analysis conducted in 2019 that found that "employee-plaintiffs who brought cases and prevailed in arbitration won approximately double the monetary award that employees received in cases won in court." Nam D. Pham & Mary Donovan, FAIRER, BETTER, FASTER: AN EMPIRICAL ASSESSMENT OF EMPLOYMENT ARBITRATION 5 (2019).

- **Better understanding by claimants of the procedure involved and the outcome**

The complexity of class action procedures, particularly in the judicial arena, lead to frequent disagreements, even among lawyers. Attempting to have nonlawyers understand such protocols and procedure is almost an unsurmountable task to achieve. By contrast, individualized arbitration procedures can be much more easily explained to claimants. Arbitrators hear the individualized situation of the claimant, and explain not only the procedure involved, but also the decision that is reached.

- **Less adversarial in nature**

Informal approaches to dispute resolution, including individualized arbitration, provide much better opportunities for employers and claimants to speak to one another, explain their positions, and to explore solutions. Time that would otherwise be spent in procedural disputes in class action litigation and discovery can be more productively used in individualized arbitration proceedings.

- **Claimants retain concerted activity rights**

Finally, as noted in Petitioner's *Epic Systems* and *Murphy Oil's* brief to the Supreme Court, employees that enter into individualized arbitration agreements retain considerable rights:

> Class waivers leave employees free to work together at every step of the judicial or arbitral process. Employees may cooperate in hiring a lawyer, drafting their complaints, developing their legal strategies, finding and preparing witnesses, writing briefs, and seeking appellate review. They may even pool their financial and legal resources and present the exact same case in the exact same way for every plaintiff. Indeed, the other side cannot point to a single activity that employees can engage in "concerted[ly]" by litigating as a class that they cannot engage "concerted[ly] by litigating individually with the support and assistance of their colleagues.[13]

- **H.R. 4841 is in conflict with decades of U.S. Supreme Court precedent in the arbitration area, ignores the clear intent of Congress in the enactment of the Federal Arbitration Act favoring arbitration**

[13] Brief for Petitioner at 40, *Epic Sys. v. Lewis*, 138 S. Ct. 1612 (2018).

procedures agreed to by the parties, and fails to recognize the retention of statutory rights for employees and consumers in any form of dispute resolution.

The FAA was enacted by Congress in 1925, and no Congress since its enactment has amended the statute. The intent behind the FAA has been clearly identified in numerous interpretations by the Supreme Court and lower courts. The recurring point that such courts have made is that the FAA was enacted to eliminate the judicial hostility toward arbitration.[14] Such court decisions provide that there is an emphatic federal policy in favor of arbitrable dispute resolution.[15] In fact, the Supreme Court has specifically stated that "courts must rigorously enforce arbitration agreements according to their terms, including terms that specify with whom the parties choose to arbitrate their disputes, and the rules under which that arbitration will be conducted."[16]

The Supreme Court has also specifically upheld the rights of employers and employees to avoid pursuing class proceedings in resolving workplace disputes. Indeed, the FAA prohibits courts from "invalidat[ing] arbitration agreements on the grounds that they do not permit class arbitration" or class proceedings in court.[17]

It is also important to understand that access to class action is a procedural right, not a substantive right. As the Supreme Court stated, "the right of a litigant to employ Rule 23 [Class Action Procedure] is a procedural right only ancillary to the litigation of substantive claims."[18] Additionally, it is important to note that it is a well-established matter of law that employers cannot preclude in arbitration agreements employees and consumers from pursing their statutory rights.

Finally, proponents of the total elimination of pre-dispute arbitration frequently fail to note that federal and state regulatory agencies continue to have oversight over employee and consumer rights and are not bound by any constraints that may be placed on employees and consumers in arbitration agreements. Indeed, such regulatory agencies can and do vigorously pursue class relief for consumers and employees.[19]

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[14] *EEOC v. Waffle House, Inc.,* 434 U.S. 279, 289 (2002).
[15] *KPMG LLP v. Cocchi*, 132 S. Ct. 23, 25 (2011).
[16] *American Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2309 (2013).
[17] *Id.* at 2308.
[18] *Deposit Guar., Nat'l Bank of Jackson v. Roper*, 445 U.S. 326, 332 (1980).*See also Circuit City Stores, Inc. v. Admb*, 532 U.S. 105, 122-23 (2001); *Amchem Prods, Inc. v. Windsor*, 521 U.S. 591, 612 -13 (1997).
[19] See *EEOC v. Waffle House, Inc*., 534 U.S. 568 (1983).

The considerable precedent noted above and the statutory rights retained by employees who may otherwise be precluded by their employment agreements to participate in class action litigation correctly led the Court to its decision in the consolidated *Epic Systems, Murphy Oil* and *Ernst & Young* cases. Specifically, the Court's holding that it was not a violation of the NLRA for an employer and employee to enter into class action waiver agreements was correct both as a matter of law and as a matter of policy. H.R. 4841 is not only an effort to overrule the *Epic Systems* consolidated cases, but also an attempt to undermine decades of Supreme Court case law in the arbitration area. Such an attempt should be rejected.

Concluding Thoughts

Finally, Mr. Chairman, Ranking Member Allen, and Members of the Subcommittee, I would like to complete my testimony by making certain suggestions as to how the future of arbitration should be discussed. I want to emphasize that these are my personal recommendations, and they are not being made on behalf of any entity.

- Secrecy in arbitration proceedings should, unless mutually agreed upon by all parties, be eliminated. This lack of transparency, especially in hostile work and sexual harassment cases, has unfairly detracted from the many positive attributes of arbitration. Specifically, the overuse of nondisclosure agreements should be reviewed. Indeed, some state jurisdictions have enacted legislation that prohibits or limits the use of NDA's.[20]

- A thorough Congressional review should be undertaken regarding class and collective actions, particularly as class action litigation has proceeded under Federal Rule of Civil Procedure 23 and Section 216 (b) of the Fair Labor Standards Act (and also similar class procedures in state jurisdictions). I submit that if an objective review is undertaken of this area, a number of misuses and abuses of class and collective action procedures may be uncovered.

- This Subcommittee and other Congressional committees that have jurisdiction over arbitration issues should invest time and resources to

[20] California, New Jersey, Tennessee, Vermont, and Washington have all enacted legislation prohibiting or otherwise limiting the use of NDAs in certain contexts. There may, however, be federal preemption issues presented by such statutes, depending on their scope and whether they arguably conflict with the FAA.

identify and incentivize the use of alternative dispute resolution procedures to resolve workplace and consumer issues. These procedures can be informal in nature and can produce positive results. They also can provide relief for the dockets of our nation's courts. Finally, such procedures can also permit matters to be thoughtfully and expeditiously addressed without stakeholders incurring substantial legal fees.

Mr. Chairman, that concludes my testimony. I will be happy to respond to questions of the Subcommittee.

STATEMENT OF G. ROGER KING[1]

"Justice Restored: Ending Forced Arbitration and Protecting Fundamental Rights"

HEARING BEFORE THE SUBCOMMITTEE ON ANTITRUST, COMMERCIAL, AND ADMINISTRATIVE LAW OF THE HOUSE COMMITTEE ON THE JUDICIARY

February 11, 2021

Mr. Chairman, and Ranking Member Buck, and Members of the Subcommittee:

Thank you for the invitation to testify this morning. I have been involved professionally in the field of arbitration my entire professional career. I have had considerable experience during this 50-year period in drafting arbitration agreements, serving as counsel in arbitration hearings, and analyzing arbitration issues from a policy perspective. I have also served as counsel to employers in class action litigation. Finally, I have closely followed the discussions and debates in this body and the United States Senate regarding the FAIR Act and related legislative proposals.

I have also included a number of supplemental materials in an appendix to my testimony that I would request be made part of the record for today's hearing.

A summary of my testimony regarding the issues before the Subcommittee today is perhaps best captured in part by a quote by U.S. Supreme Court Justice Stephen Breyer, where he stated as follows:

> [Arbitration] is usually cheaper and faster than litigation; it can have similar procedural and evidentiary rules; it normally minimizes hostility and is less disruptive of ongoing and future business dealings among the parties; [and] it is often more flexible in regard to scheduling of times and places of hearing and discovery devices.[2]

[1] Mr. King is a graduate of Miami University (1968) and Cornell University Law School (1971). Mr. King is a member of the District of Columbia and Ohio Bar Associations, and his professional experience includes serving as a legislative staff assistant to Senator Robert Taft Jr. and professional staff counsel to the United States Senate Labor Committee (1971-1974), associate and partner with Bricker & Eckler (1974-1990), partner and of counsel at Jones Day (1990-2014), and Senior Labor & Employment Counsel at HR Policy Association (2014-Present). Mr. King acknowledges the assistance of Gregory Hoff, Associate Counsel, HR Policy Association in the preparation of his testimony. Mr. King's testimony is being presented on his own behalf and not on behalf of any other party.

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

Justice Breyer's opinion[3] emphasizes certain of the numerous constructive features of arbitration. I hope that the Subcommittee would consider his thoughts and that of his fellow justices, and also carefully examine the important role that arbitration plays in our nation's jurisprudence and conflict resolution system. Arbitration from both a legal policy and practical administrative law perspective has tremendous merit and has served all stakeholders – except perhaps plaintiff class-action attorneys – exceedingly well. Unfortunately, there are a number of myths, misunderstandings, and erroneous assumptions associated with arbitration. Some of these involve the inappropriate intertwining of confidentiality and nondisclosure agreement issues in the discussion of the merits of arbitration. Confidentiality and nondisclosure agreement discussions present separate and distinct matters. Unfortunately, such discussions are being used as "weapons" to inappropriately undermine the numerous favorable aspects of arbitration. I will address confidentiality requirements, including review of the use of nondisclosure agreements, in my testimony.

In addition to the numerous positive aspects of arbitration, I endorse the inclusion of due process rights for claimants following the procedures that have been adopted by the American Arbitration Association, JAMS, and other arbitration service providers. Notably, contrary to what some have argued, current law permits public disclosure of discrimination, harassment, retaliation, and sexual abuse practices, and regulatory filings with the appropriate federal and state agencies. Many arbitration agreements expressly guarantee these rights. And this approach has been utilized for a considerable period of time in settlement agreement language between claimants and employers.

I would also urge the Subcommittee to review the increasingly important emergence of alternative dispute resolution procedures ("ADR") in addressing consumer, employee, and other claimants interests in dispute resolution. Finally, the Subcommittee should prioritize a review of the issues associated with class action litigation, which touch upon many of the issues associated with mandated arbitration being examined by the Subcommittee.

[3] Other Supreme Court Justices of the so-called "liberal wing" of the Court have similarly expressed support for arbitration and the wide scope of the FAA. For example, in *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S. Ct. 1421 (2017), the Court upheld arbitration agreements and invalidated state laws imposing restrictions on such agreements. The majority opinion for this case was written by Justice Kagan and joined by Justices Breyer, Kennedy, Ginsburg, Sotomayor, Alito, and Roberts. The majority of these justices have also written or joined majority opinions in other Supreme Court cases upholding arbitration agreements, including *DIRECTV, Inc., v. Imburgia* 136 S. Ct. 463 (2015).

- **Positive attributes of arbitration cannot objectively be dismissed.**

The evidence is overwhelming that there is merit in mandated arbitration. Even the harshest critics of arbitration appear to accept certain of its various virtues, including the ability of arbitration procedures to flexibly address individualized grievances and complaints, its ability to resolve disputes expeditiously, its cost-effective structure as compared to court litigation, and the equitable results that it provides to all stakeholders. These attributes have been recognized from a wide spectrum of sources. A limited sampling of support for arbitration includes the following quotes from Supreme Court justices and excerpts from research studies and scholarly sources:

  - "The point of affording discretion in designing arbitration processes is to allow for efficient, streamlined procedures tailored to the type of dispute…and the informality of arbitral proceedings is itself desirable, reducing the cost and increasing the speed of dispute resolution. *AT&T Mobility LLC v. Concepcion,* 563 U.S. 333, 344-45 (2011).
  - "In bilateral arbitration, parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes." *Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp.,* 559 U.S. 662, 686 (2010).
  - "Arbitration…does not require the 'time consuming procedures that must be adhered to in court proceedings,' instead allowing for a more customizable, abbreviated process that is more directly tailored to the type of dispute." Miles B. Farmer, *Mandatory and Fair? A Better System of Mandatory Arbitration,* 121 YALE L.J. 2346, 2353 (2012).
  - "[Banning mandatory arbitration] would…undermine the central efficiency advantage that such arbitration provides. Banning mandatory arbitration would also create an additional burden for federal courts…could disincentivize international commerce with the United States…and could create problems regarding the enforceability of current arbitration agreements." Miles B. Farmer, *Mandatory and Fair? A Better System of Mandatory Arbitration,* 121 YALE L.J. 2346, 2363 (2012).
  - A statistical analysis conducted in 2019 found that "employee-plaintiffs who brought cases and prevailed in arbitration won approximately double the monetary award that employees received in cases won in court." NAM

D. PHAM & MARY DONOVAN, FAIRER, BETTER, FASTER: AN EMPIRICAL ASSESSMENT OF EMPLOYMENT ARBITRATION 5 (2019).

- **Justice delayed – or eliminated – is justice denied.**

The increased burden that could be placed on our already strained court system by elimination of mandated arbitration should be considered. Any member of Congress favoring the elimination of mandated arbitration should visit, for at least a week, courthouses in their districts and states. Such visits would provide the unfortunate picture of overcrowded dockets, ongoing discovery disputes, delayed and continued hearings and trials, and mountains of electronic and paper filings. Judges, magistrates, court clerk officials, and other judicial representatives would readily attest in such visits to the constant and at times overwhelming pressures on our nation's judicial system. Examples of such conditions include the following:

- As of March 2020, the number of civil cases pending more than three years is nearly 30,000. DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE U.S. COURTS, MARCH 2020 CIVIL JUSTICE REFORM ACT REPORT (2020).
- Dating back to 2015, monthly case filings in federal district courts increased by the tens of thousands in four of the last five years, including an increase of 150,000 between 2019 and 2020 alone. U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS (2020).
- As of September 30, 2020, more than 650,000 cases were pending in federal district courts. U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS (2020).
- Between 2019 and 2020, the total number of civil filings in federal district and circuit courts increased by more than 40 percent. U.S. COURTS, STATISTICAL TABLES FOR THE FEDERAL JUDICIARY – JUNE 2020 (2020).
- "Delay is one of the largest problems in our legal system. In the last several decades, the state and federal courts have seen increasing caseloads and have resolved disputes at slower and slower rates…the median civil case no takes over seven months to be resolved, and many cases take more than three years to reach a resolution." Miles B. Farmer, *Mandatory and Fair? A Better System of Mandatory Arbitration*, 121 YALE L.J. 2346, 2352 (2012).

The elimination of mandated arbitration will certainly compound the problems faced by our court system, as the courts will have to deal with an increased number of disputes, particularly in the class action area. Time periods between filing of complaints and resolution of the same will be even greater than the delays already faced by litigants. Unfortunately, these types of delays of justice have only increased due to the current pandemic. Such delays of justice will increase litigation expenses and harm all stakeholders, including especially individuals who need to have their complaints expeditiously resolved.

Further, as a practical matter, elimination of mandated arbitration will deprive many individuals of any opportunity to have their complaints resolved. Numerous studies clearly establish that a vast majority of disputes are individualized grievances that do not fit into even liberally defined "commonality" and "numerosity" class certification standards. Further, many of such individualized disputes for low and middle income individuals will not attract qualified legal representation, and as noted by Professor Samuel Estreicher, such individuals will have little or no "consumer protections" and be the unfortunate victims of the so-called arbitration reform movement.[4]

- **The Supreme Court and other courts have consistently upheld mandated arbitration agreements.**

Arbitration issues have been thoroughly litigated and reviewed in numerous precedent-setting Supreme Court decisions. The Court has extensively examined the legislative history of the Federal Arbitration Act ("FAA" or "the Act") and the issues associated with the interpretation and enforcement of the Act. In virtually every case involving arbitration issues, the Court has not only upheld the enforcement of the arbitration agreement in question, but also broadly endorsed policies supporting the use of arbitration arrangements. A sampling of these court decisions includes the following:

  - *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407 (2019) (holding that under the FAA an ambiguous agreement cannot provide the necessary contractual basis for concluding that the parties agreed to submit to class arbitration).

[4] *See* Samuel Estreicher, *Saturns for Rickshaws: The Stakes in the Debate over Predispute Employment Arbitration Agreements*, 16 Ohio St. J. on Disp. Resol. 559, 563 (2001).

- *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018) (holding that nothing in the NLRA overrides the FAA's protection of the enforceability of class waivers in arbitration agreements).
- *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S. Ct. 1421 (2017) (holding that a state law imposing more stringent requirements for a power of attorney to enter into an arbitration agreement than required for other contracts was preempted by the FAA).
- *DIRECTV, Inc., v. Imburgia* 136 S. Ct. 463 (2015) (holding that a state law interpretation of choice of law that invalidated an arbitration agreement was preempted by the FAA).
- *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013) (holding that the Sherman Act does not override the FAA's protection of the enforceability of class waivers in arbitration agreements).
- *Marmet Health Care Ctr. v. Brown*, 132 S. Ct. 1201 (2012) (holding that a state law rule invalidating arbitration agreements involving wrongful death and personal injury claims was preempted by the FAA).
- *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011) (holding that the FAA bars states from refusing to enforce arbitration agreements that contain class action waivers).
- *Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758 (2010) (holding that an arbitrator cannot read a class arbitration requirement into an arbitration agreement absent an explicit agreement by the parties to such a requirement).
- *Gilmer v. Interstate/Johnson Lane Corp.*, 111 S. Ct. 1647 (1991) (holding that nothing in the ADEA precluded an individual's termination-of-employment claim under the ADEA from being subjected to compulsory arbitration under the FAA).

It is thus clear from the above decisions that the Supreme Court not only supports an expansive interpretation of the FAA, but also the right of parties to retain the benefits of their bargain, including the often-required utilization of arbitration procedures. Indeed, these decisions of the Court reflect support from a wide spectrum of judicial philosophy, including support from Justices Breyer, Kagan, and Kennedy. The Subcommittee should not ignore the strong precedent established by such decisions and the positive public policy considerations in such decisions. Further, the Subcommittee should acknowledge the Congressional

endorsement of arbitration as evidenced in the enactment of the FAA and the substantial, decades-long precedent of leaving the Act intact – without amendment – since its passage in 1925.

- **Bad facts make bad laws, and emphasis on bad arbitration procedures lead to bad arbitration policy.**

Critics of mandated arbitration rely on procedures that have in the past, in certain situations, imposed onerous requirements on claimants. Such critics are correct to point out these deficiencies – consumers, employees, and others have, in certain instances, not been treated properly by the imposition of some mandated arbitration approaches. Such deficiencies in mandated arbitration can and should be addressed. Arbitration agreements should contain due process protections for claimants and should not contain limitation on public disclosure of issues being addressed. Specifically, as noted above, it may be best practice for arbitration agreements to provide language that reiterates existing law that claimants may report, communicate, and disclose disposition of Title VII discrimination claims, as well as harassment, retaliation, and sexual abuse claims. Further, best practices for drafters of arbitration claims should include language that is found in settlement agreements that reminds claimants of the existing legal right to communicate with appropriate federal and state agencies and file charges of discrimination and other violations of employee rights and protections with the same.

Leading arbitration dispute entities in the country have already proceeded in this direction. For example, the American Arbitration Association requires the following due process procedural safeguards in its proceedings, among others:

- Arbitrators must be neutral and disclose any conflict of interest
- Both parties have an equal say in selecting the arbitrator
- Employees and consumers' fees are limited to $300 and $200 respectively
- Arbitrators are empowered to order any necessary discovery
- Damages, punitive damages, and attorneys' fees are awardable to the claimant to the same extent that they would in traditional litigation
- Claimants have the right to choose their own representation

- Claimants have access to all information reasonably relevant to their claims[5]

JAMS and other arbitral providers have incorporated other similar due process requirements.[6] Thus, due process protections for claimants exist in the majority of arbitration proceedings, and should be applied to all such proceedings.

- **Federal and state courts provide protection from arbitration agreements that infringe upon claimants' rights.**

The text of the FAA itself provides protections for consumers and/or employees against enforcement of unfair arbitration agreements, with a "savings clause" that preserves common law defenses to contractual agreements such as fraud, duress, or unconscionability. Specifically, Section 2 of the FAA provides that arbitration agreements are enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract." Thus, claimants have recourse in federal and state courts for inequitable arbitration agreements. Indeed, the courts have not hesitated to invalidate those arbitration agreements that unfairly impair the claimants' rights.[7] To the extent that certain arbitration agreements may unfairly impair the rights of consumers and employees, such rights are adequately protected by federal and state courts. Accordingly, there is not a proper legal premise upon which to proceed to justify the entire elimination of mandated arbitration procedures.

- **Confidentiality-related arguments to support the elimination of mandated arbitration are without merit.**

One of the most frequent criticisms of mandated arbitration pertains to the so-called secretive nature of arbitration and the perceived lack of public transparency in such proceedings. Such arguments are erroneous. While nonparties can be excluded from arbitration hearings and arbitrators and arbitration service providers cannot disclose information regarding such proceedings, there is nothing to prevent claimants from disclosing the issues addressed in the proceeding and the resolution of their claims. Claimants can also disclose to regulatory authorities, law

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[5] *Employment Arbitration under AAA Administration*, AMERICAN ARBITRATION ASSOCIATION, https://adr.org/employment (last visited Feb. 9, 2021).

[6] *See JAMS Policy on Employment Arbitration Minimum Standards of Procedural Fairness*, JAMS, (https://www.jamsadr.com/employment-minimum-standards/) (last visited Feb. 9, 2021).

[7] *See, e.g. Ziglar v. Express Messenger Sys.* 2017 U.S. Dist. LEXIS 220460 (D. Ariz. 2019); *Ramos v. Superior Ct.*, 28 Cal. App. 5th 1042 (2018); *Kinkel v. Cingular Wireless LLC*, 857 N.E.2d (2006); *see also* Stephanie Greene & Christine Neylon O'Brien, *New Battles and Battlegrounds for Mandatory Arbitration After Epic Systems, New Prime, and Lamps Plus* 56 Am. Bus. L.J. 815, 830-38 (2019).

enforcement officials, co-workers and friends, and the media the issues that were presented for resolution and the disposition of same. Indeed, in this internet/platform world we all now live in, dissemination of such information can occur quickly and receive wide attention. Further, California, for example, requires arbitration service providers to publish certain aspects of arbitration proceedings.[8] So-called "gag orders" attempting to prevent public disclosure of such information considered in an arbitration proceeding, including reporting relevant information to regulatory agencies and law enforcement officials, can be set aside in court.[9]

Another area in the arbitration discussion that merits attention is the utilization of nondisclosure agreements ("NDAs"). First, it needs to be understood that the utilization of NDAs and the use of same should not be confused with the question of whether mandated arbitration should be permitted to continue. These are two entirely different issues. NDAs are ancillary in nature to the underlying arbitration agreement. They are the result of negotiations between parties and are self-imposed by such parties. To the extent that such agreements raise confidentiality issues, such issues should be separately discussed. Further, such agreements are often secured between the parties with enhanced economic sums to claimants in return for confidentiality. Indeed, in certain instances, it may be the desire of all parties to have the issues in dispute be kept confidential.

Finally, as noted above, if criminal conduct, or egregious patterns of conduct such as widespread sexual harassment, are uncovered in arbitration proceedings, such NDAs can be set aside by the courts or safeguards can be incorporated into mandated arbitration agreement procedures that would permit the claimant, the arbitrator, or a court to void or disregard the NDA in question. Indeed, many states have already taken action on this issue, passing laws limiting the use of NDAs in employment agreements or otherwise providing protections against potentially problematic use of NDAs, making the discussion of NDAs as they relate to wider arbitration issues perhaps moot in these jurisdictions.[10]

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[8] California Code of Civil Procedure 1281.96 requires arbitration service providers to publish quarterly reports containing information related to arbitration proceedings.

[9] *See, e.g.*, *Davis v. O'Melveny & Myers*, 485 F.3d 1066, 1078 (9th Cir. 2007) (overruled on other grounds), *Longnecker v. Am. Express Co*., 23 F. Supp. 3d 1099, 1110 (D. Ariz. 2014); *DeGraff v. Perkins Coie LLP*, No. c 12-02256 JSW, 2012 WL 3074982, at *4 (N.D. Cal. July 30, 2012).

[10] California, New Jersey, Tennessee, Vermont, and Washington have all enacted legislation prohibiting or otherwise limiting the use of NDAs in certain contexts. There may, however, be federal preemption issues presented by such statutes, depending on their scope and whether they arguably conflict with the FAA.

- **Do not discard the positive experience of mandated arbitration in employment dispute settings.**

For the approximate 6% of the country's private sector employees that work under collective bargaining agreements, mandated arbitration has been in place for decades. These procedures have worked relatively well and have successfully served the interests of employees, unions, and employers. Lessons can be learned from this successful model and should be considered by the Subcommittee.[11]

Additionally, many employers that operate on a union-free basis have successfully implemented mandated arbitration procedures or similar protocols. Indeed, some of these approaches include peer review panels and various labor-management problem solving procedures that expeditiously and successfully resolve workplace conflict issues. The success of these types of approaches should also be studied by the Subcommittee as it analyzes arbitration and dispute resolution issues.

- **Increased development and use of ADR procedures is the desirable policy path to follow.**

Significant positive advancements have been made in the development and implementation of ADR procedures in the last ten years. These ADR concepts involve such procedures as implementation of user-friendly complaint filing systems, expedited fact finding, early case assessments, neutral case evaluation, utilization of ombudsmen, mediation, conciliation, mini-trials, and other options.[12] As noted in the comprehensive Harvard Negotiation Law Review article by Professor Thomas J. Stipanowich and Professor J. Ryan Lamare:

> Businesses were motivated [to move towards implementing these types of dispute resolution procedures] not only by the risk of excessive judgments or settlements, but also by significant transaction costs, including the expenses of legal counsel, supporting experts, preparation time and discovery – costs that were often a multiple of the settlement amount.[13]

[11] The previously proposed FAIR Act (H.R. 1423) exempted the restriction of use of mandated arbitration found in collective bargaining agreements. This approach appears to be inconsistent with the prohibition of mandated arbitration in any other setting. This inconsistent approach also appears to show that proponents of the FAIR Act clearly recognize, at least in part, the benefits of mandatory arbitration, but also unfortunately evinces an apparent bias towards increasing class action litigation in all disputes arising out of any area except collective bargaining situations.

[12] Thomas J Stipanowich & J. Ryan Lamare, *Living with ADR: Evolving Perceptions and Use of Mediation, Arbitration, and Conflict Management in Fortune 100 Corporations*, 19 Harv. Negotiation L. Rev. 1 (2014).

[13] *Id*. at *9.

These types of ADR options are not mutually exclusive of the use of mandated arbitration models. Indeed, incorporation of such ADR approaches in a layered or integrated manner, with ADR options to be pursued in succeeding steps prior to the potential need for mandated arbitration, should be encouraged. Such an approach should provide significant opportunities for settlement without ever reaching the alleged negative aspects of mandated arbitration.

- **Reform of class action procedures is needed and elimination of mandated arbitration will impede such efforts.**

Misuse and abuse of the class action system in our courts in this country is well documented and troubling. For example, consider the following observations from research studies, scholarly articles, and statements from members of Congress:

  - "Class-action settlements are more effective in transferring money from the defendant to class counsel than in compensating class members…class action settlements may be at best problematic on deterrence grounds." Jason Scott Johnston, *High Cost, Little Compensation, No Harm to Deter: New Evidence on Class Actions under Federal Consumer Protection Statutes*, 2017 COLUM. BUS. L. REV. 1, 7 (2017).
  - "A 2015 study by the Consumer Financial Protection Bureau found that only 13 percent of class actions resulted in a payout for consumers. And even then, the average award for consumers is about $32, while plaintiffs' attorneys got about $1 million." *The Mass Arbitration Racket: Unscrupulous Abuse of the Arbitration Ecosystem*, U.S. CHAMBER INST. FOR LEGAL REFORM (Dec. 18, 2020), https://instituteforlegalreform.com/the-mass-arbitration-racket-unscrupulous-abuse-of-the-arbitration-ecosystem/.
  - "Too many class actions are litigated today such that the victims of unlawful conduct often receive only pennies on the dollar, if anything at all, when their trial lawyer representatives amass millions of dollars in compensation. Many times, the damages in class action lawsuits are so tiny that it is impossible to even identify the victims. In many such cases, awards are given to entities that are not part of the lawsuit whatsoever." *Examination of Litigation Abuses: Hearing before the Subcomm. on Const. and Civil Just. of the H. Comm. on the Judiciary*, 113th Cong.

(2013) (statement of Rep. Trent Franks, Chairman, Subcomm. on Const. and Civil Just. of the H. Comm. on the Judiciary).

- "The unfortunate continuing irony, however, is that in many class actions, particularly those that go on in state courts, the plaintiffs are not the real winners in the case. A number of high-profile cases continue to result in class members 'winning' coupons worth maybe a few dollars while the lawyers walk away with millions." *Class Actions: A Distortion of Justice and Continued Threat to America's Prosperity*, U.S. CHAMBER INST. FOR LEGAL REFORM (May 16, 2011), https://instituteforlegalreform.com/class-actions-a-distortion-of-justice-and-continued-threat-to-americas-prosperity/.
- In one study, the average time of class action litigation from filing to settlement was found to be three years. Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. EMPIRICAL LEGAL STUDIES 811, 820 (2010).
- "The data principally show that (i) only a small fraction of class members receive any monetary benefit at all from the settlements; (ii) class counsel are often given very large attorneys' fee awards even when class members receive little to no monetary recovery." *An Empirical Analysis of Federal Consumer Fraud Class Action Settlements (2010-2018)*, JONES DAY (2020).

The Subcommittee should examine these concerns and explore solutions to this unfortunate type of "procedural coercion" of employers in the country. The direction that the Subcommittee took in the last Congress, and the direction that the majority is apparently taking in this Congress to eliminate mandated arbitration is troubling, as it fails to focus on the connection between eliminating mandated arbitration and the expected corresponding increase in class action filings. This is a bad result for all stakeholders.

Even a cursory review of class action procedures by non-lawyers readily discloses the problems with our current system. For example, class members in a certified class often receive notification of the litigation issues being contested through documents that are written in "legalese" and that are difficult to understand and follow. If the class action is an "opt-in" proceeding, many class members simply discard the notice and never pursue the matter further. Even in "opt-out" situations, when class members receive notice of their "winnings," the procedures to follow to either receive such payments or procedures to follow to opt out of the settlement

are exceedingly difficult to understand or too onerous to follow. Presented with these obstacles, and given the frequent de minimis nature of the financial payment for class members, they often decide never to participate in the "settlement."[14] The only "winners" in this litigation lottery system, as noted above, are the trial lawyers bringing such class actions. While the "inside the beltway" political influence of such attorneys may be strong, they no doubt do not make up the majority of constituents in your districts or represent their best interests. Reform of the class action system in this country should be the priority of this Subcommittee, not the elimination of mandated arbitration.

Finally, the criticism directed at employers for including class action waivers in arbitration agreements is misguided. Such criticism misses the primary reason for inclusion of such waivers – the goal is to prevent the numerous deficiencies and inequities as outlined above in the class action litigation process from becoming integrated into the arbitration process. It simply is not rational to permit such a flawed system to be incorporated into the arbitration process. In addition to such flaws, the considerable expense involved in defending against such protracted litigation is also another valid reason for excluding class action options in arbitration procedures. Finally, as a practical and administrative matter, arbitrators and related arbitration procedures in general do not lend themselves well to the various administrative and procedural requirements of class action litigation. As Justice Scalia has noted, "the switch from bilateral to class arbitration sacrifices the principal advantage of arbitration – its informality – and makes the process slower, more costly, and more likely to generate procedural morass than final judgment."[15]

Concluding Thoughts

The Subcommittee should undertake a bipartisan policy approach to discuss and resolve mandated arbitration issues. This discussion should involve an emphasis on the inclusion of due process protections in arbitration agreements. Strict elimination, however, of mandated arbitration procedures, especially if done on a retroactive basis, will adversely and unnecessarily disrupt untold numbers of established and well-functioning dispute resolution systems, including contractual arrangements that provide for such procedures. This extreme approach does not protect claimants and should be rejected. Entities that desire to continue, at least in

[14] *See, e.g. Consumers and Class Actions: A Retrospective and Analysis of Settlement Campaigns*, FTC (2019); *An Empirical Analysis of Federal Consumer Fraud Class Action Settlements (2010-2018)*, JONES DAY (2020); *Securities Class Actions in the United States*, MORGAN LEWIS (2016).
[15] *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 348 (2011).

part, mandated, due process-oriented arbitration procedures, should be permitted to do so while concurrently encouraging the development of effective ADR programs. Finally, the Subcommittee should prioritize a thorough examination of the increasingly discredited class action litigation system in this country. As noted above, this system does not benefit class members, places unnecessary and excessive litigation costs on employers, and only unjustly enriches class action plaintiff-oriented law firms.

Mr. Chairman, thank you again for the opportunity to testify. I would be happy to answer any questions you or other members of the Subcommittee may have.