U.S. CHAMBER
Institute for Legal Reform

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November 12, 2019

The Honorable Roger Wicker
Chairman
Committee on Commerce, Science and Transportation
United States Senate
Washington, DC 20510

The Honorable Maria Cantwell
Ranking Member
Committee on Commerce, Science and Transportation
United States Senate
Washington, DC 20510

Dear Chairman Wicker and Ranking Member Cantwell:

The U.S. Chamber Institute for Legal Reform ("ILR") and the U.S. Chamber of Commerce strongly oppose the Markey-1 Amendment that has been proposed to S. 2789, the "Satellite Television Access Reauthorization Act of 2019." The Markey-1 Amendment would eliminate the use and availability of pre-dispute alternative dispute resolution agreements (including arbitration clauses) as a means to fairly resolve disputes arising under millions of contracts for internet access services, voice services, commercial mobile services, commercial mobile data services, and services provided by a multichannel video programming distributor. The ultimate goal of this amendment is to promote expensive class action litigation that does little to help businesses and consumers while serving 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. 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 Markey-1 Amendment 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.

Opponents to arbitration clauses attempt to justify those consequences by distorting or ignoring the fairness and due process protections built into the design of consumer arbitration systems. The American Arbitration Association (AAA), the country's largest arbitration provider, imposes detailed fairness protocols for 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 of interest and give both parties an equal say in selecting the arbitrator; limit the fees consumers must pay to $200 – 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. 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 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 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 language contained in the Markey-1 Amendment would eliminate the only realistic opportunity for consumers to obtain a remedy for the vast majority of grievances that they have in the agreements covered by the amendment. Most consumer 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 by giving them the only realistic avenue for obtaining relief for such claims. The only real beneficiaries of the Markey-1 Amendment would be the lawyers who would be able to bring forward cases under the limited fact patterns that would allow for class actions; a situation that will allow the lawyers to enrich themselves while providing little or no benefit to consumers and class members.

Accordingly, we urge you to oppose the Markey-1 Amendment.

Sincerely,

Harold Kim

cc: Members of the Committee on Commerce, Science and Transportation