CHAMBER OF COMMERCE
OF THE
UNITED STATES OF AMERICA

NEIL L. BRADLEY
EXECUTIVE VICE PRESIDENT &
CHIEF POLICY OFFICER

1615 H STREET, NW
WASHINGTON, DC 20062
(202) 463-5310

October 27, 2021

The Honorable Jerrold Nadler
Chair
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

The Honorable Jim Jordan
Ranking Member
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

Dear Chair Nadler and Ranking Member Jordan:

The U.S. Chamber of Commerce strongly opposes H.R. 963, the "Forced Arbitration Injustice Repeal Act." The FAIR Act would effectively eliminate the use and availability of pre-dispute arbitration agreements as a means to fairly resolve antitrust, employment, civil rights, and consumer disputes. The ultimate goal of this bill is to promote expensive class action litigation that does little to help businesses, consumers and employees. Such litigation serves principally to benefit the attorneys who file class action lawsuits.

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

Since 1925, the Federal Arbitration Act has protected the enforceability of agreements to resolve disputes through arbitration, including agreements made before any disputes arise. The FAIR Act would radically alter these longstanding principles. It threatens the validity and enforceability of millions of contracts while imposing new, intolerable burdens on our already overcrowded courts.

Proponents of this bill attempt to justify those consequences by distorting or ignoring the fairness and due process protections built into the design of consumer and employment arbitration systems. The American Arbitration Association (AAA), the country's largest arbitration provider, imposes detailed fairness protocols for employment and consumer arbitrations. They 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, give both parties an equal say in selecting the arbitrator, limit the fees employees and consumers must pay to $300 and $200 respectively, 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

---

[1] See Fairer, Faster, Better: An Empirical Assessment of Employment Arbitration (May 2019) available at https://www.instituteforlegalreform.com/research/fairer-faster-better-an-empirical-assessment-of-employment-arbitration; and Fairer, Faster, Better II: An Empirical Assessment of Consumer Arbitration (November 2020) available at https://instituteforlegalreform.com/new-study-consumers-win-more-money-more-often-and-more-quickly-in-arbitration-than-in-court/.

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, limit awards of damages or attorneys' fees, or require arbitration in out-of-the-way places are routinely held unenforceable. Furthermore, claimants are free to discuss their claims publicly and to report alleged wrongdoing to government officials.

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

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

Accordingly, we urge you to oppose H.R. 963.

Sincerely,

Neil L. Bradley

cc: Members of the House Committee on the Judiciary