

CHAMBER OF COMMERCE  
OF THE  
UNITED STATES OF AMERICA

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TO THE MEMBERS OF THE UNITED STATES CONGRESS:

The U.S. Chamber of Commerce strongly opposes H.R. 963 / S. 505, the “Forced Arbitration Injustice Repeal (FAIR) Act.” The FAIR Act would effectively eliminate the use and availability of pre-dispute arbitration agreements as a means to fairly resolve antitrust, employment, civil rights, and consumer disputes. The ultimate goal of this bill is to promote expensive class action litigation that does little to help businesses, consumers and employees and serves principally to benefit the attorneys who file class action lawsuits. **Members who do not cosponsor this legislation will receive credit for the Leadership component of their “How They Voted” rating.**

Arbitration is a fair, effective, and less expensive means of resolving disputes compared with going to court. Multiple empirical studies demonstrate that claimants in arbitration do just as well, or in many circumstances, considerably better, than they do 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.<sup>1</sup> Other studies have shown that class action settlements frequently provide only a pittance – or many times, nothing at all – to class members while millions of dollars are paid to their attorneys.

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

Proponents of this legislation attempt to justify those consequences by distorting or ignoring the fairness and due process protections built into the design of consumer and employment arbitration systems. The American Arbitration Association (AAA), the country’s largest arbitration provider, imposes detailed fairness protocols for employment and consumer arbitrations, and will not accept a case unless the arbitration agreement complies with those standards. These requirements mandate that arbitrators must be neutral and disclose any conflict of interest; give both parties an equal say in selecting the arbitrator; limit the fees employees and

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<sup>1</sup> See *Fairer, Faster, Better: An Empirical Assessment of Employment Arbitration* (May 2019) available at <https://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/research/fairer-faster-better-ii-an-empirical-assessment-of-consumer-arbitration/>.

consumers must pay to \$300 and \$200 respectively – less than the filing fee in federal court; empower the arbitrator to order any necessary discovery; and require that damages, punitive damages, and attorneys’ fees be awardable to the claimant to the same extent as in court. And the AAA rules require that consumers be given the option of resolving their dispute in small claims court. JAMS, another leading arbitration provider, requires similar protections.

The courts provide another layer of oversight. If an arbitration agreement is unfair, courts can and do step in to declare those arbitration agreements unconscionable and unenforceable. Arbitration clauses that provide for biased arbitrators, impose unfair procedures, 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 have invalidated arbitration agreements that purport to impose a “gag order.” Many courts have also 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. Additionally, some state laws even require arbitral forums such as the AAA to disclose arbitration outcomes in all consumer and employee arbitrations, and courts consistently hold that either party may disclose the results of arbitration proceedings.

The opponents of pre-dispute arbitration agreements also ignore the critical reality that, if enacted, the FAIR Act would eliminate the only realistic opportunity for consumers and employees to obtain a remedy for the vast majority of grievances that they have. 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, and 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. Thus, the only real beneficiaries of this bill would be the class action 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 / S. 505.

Sincerely,



Neil L. Bradley