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November 19, 2009

**Via U.S. Mail**

Hon. Russell D. Feingold  
U.S. Senate  
Committee on the Judiciary  
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Washington, DC 20510-6275

Hon. Patrick J. Leahy  
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Hon. John Conyers  
U.S. House of Representatives  
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Hon. Henry Johnson  
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**Re: Arbitration Fairness Act of 2009 (S. 931; H.R. 1020)**

Dear Senators Leahy and Feingold and Congressmen Conyers and Johnson:

We submit this letter on behalf of the International Institute for Conflict Prevention and Resolution (CPR) to voice our concern over the Arbitration Fairness Act of 2009 (the "Act"). Long considered a pioneer in the field of alternative dispute resolution ("ADR"), during the past 30 years CPR has earned the reputation of being a premier "think tank" comprised of many of the nation's, and the world's, leading thinkers

on conflict resolution. Since its inception in 1979, CPR's membership includes General Counsels and senior lawyers of Fortune 1,000 organizations, partners of hundreds of well-respected law firms, sitting and retired judges, government officials and leading academics. CPR has long been known as a leading international non-profit educational institution focused on promoting effective alternative approaches to the resolution of public and private disputes. Its intellectual contributions are also viewed as establishing a standard of excellence in the dispute resolution field. Its public service initiatives include:

- Ethics Initiatives: The CPR-Georgetown Commission on Ethics and Standards of Practice in ADR promulgated several groundbreaking documents, including a set of Provider Principles for organizations involved in ADR and a Model Rule for lawyers serving as neutrals. The impact of the CPR-Georgetown Commission on the field has been tangible.
- Law School Curriculum Reforms: CPR received a grant from the Soros Foundation to conduct a review of law school curricula to promote problem-solving in the legal profession. The CPR Advisory Council on Problem Solving and Legal Education released its Report and Recommendations in 2001.
- CPR Judicial Project: CPR was instrumental in providing training and guidance to federal and state courts when they first established court-annexed ADR programs. CPR continues to work with the judiciary through its Judicial Project program.
- CPR Awards Program: Through its Awards Program, CPR focuses public attention on groundbreaking ADR initiatives in both the public and private sectors. Among CPR Award recipients for their work in the public service area of dispute resolution are former Senator George J. Mitchell, Hon. Janet Reno and Chief Justice Thomas J. Moyer (Supreme Court of Ohio). CPR also honors new books and articles that are likely to have an impact on the theory and practice of dispute resolution.
- CPR Public Policy Projects: Through its active Public Policy Projects program, CPR serves as a resource for third-world countries exploring ADR, as well as a resource for initiatives in developed countries. Most recently,

CPR launched a new Commission on Facilities for the Resolution of Mass Claims, which is co-chaired by Kenneth R. Feinberg, of the Feinberg Group.

As a public service, CPR also developed and maintains a wide range of tools to assist in the management of conflict, including published guidelines and rules for the resolution of conflict. CPR has assembled several Panels of Distinguished Neutrals -- over 500 highly qualified mediators and arbitrators, including more than 110 retired state and federal judges -- who may be retained to resolve significant disputes involving major corporations, highly individualized conflicts in specialty areas, and issues of public sensitivity. Importantly, CPR does not share fees with listed neutrals; the latter individuals contract directly with parties for arbitration or mediation.

CPR derives the great majority of its income from annual contributions, grants, training and publication revenues, and an annual awards dinner. While CPR occasionally provides very limited administrative support for business-to-business arbitrations, it does not perform such services with respect to disputes under consumer contracts and does not derive any fees from such sources. At the same time, CPR and the lawyers, judges and scholars who are active on its committees are perhaps the single richest source of intellectual and practical know-how regarding arbitration and other forms of dispute resolution. CPR offers a dispassionate perspective on the inherent problems with the arbitration bills.<sup>1</sup>

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<sup>1</sup> The Senate Bill (S 931) was introduced by Senator Feingold on April 29, 2009 and the House Bill (HR 1020) was introduced by Congressman Johnson on February 12, 2009. Both seek to prohibit pre-dispute arbitration agreements in the context of employment, consumer, franchise and civil rights disputes.

**The CPR Commission on the Future of Arbitration and Due Process Protections**

In the area of private dispute resolution, CPR has continually set a high bar. CPR has always required under its Arbitration Rules that all arbitrators be “independent and impartial” and that awards issued by arbitrator(s) contain a reasoned explanation. CPR has always been an objecting voice to any deviation from a fair, impartial arbitration process.

In addition to the CPR-Georgetown Commission, CPR also exercised foresight when it created the CPR Commission on the Future of Arbitration in 1998 to identify and improve areas in business-to-business arbitration. Among the bedrock principles emerging from the Commission’s work is that arbitrator(s) must be impartial and independent and preside over a process that ensures all parties’ due process rights are fully protected.

**CPR Comments on the Pending Legislation**

As a dedicated proponent and leader in the ADR field, which throughout its 30-year history has undertaken initiatives aimed at ensuring the highest standards of integrity and fairness in all ADR processes (including arbitration), CPR has serious concerns about the pending legislation to amend the Federal Arbitration Act.

**I. Congress and U.S. Courts Have Long Supported a Policy Favoring the Use of Pre-dispute Arbitration as an Alternative to Litigation**

Arbitration is almost as old as recorded history with roots in ancient legal codes and in the Bible. The founding father George Washington had such confidence in the process that he included an arbitration provision in his last will and testament.<sup>2</sup> Abraham Lincoln advocated a number of matters in arbitration and acted as an arbitrator.<sup>3</sup> Today it is the cornerstone of international commerce and, in the United States and 144 other countries that are signatories to the 1958 Convention on the Recognition and Enforcement of Arbitral Awards (“the New York Convention”), the enforceability of pre-dispute arbitration agreements is an inviolate treaty obligation. With respect to domestic arbitration, the Act would be the first major reversal of policy in almost 85 years of thoughtfully developed arbitration law. It embraces an unnecessarily draconian approach which eliminates the potential benefits of arbitration in many categories of contracts involving consumers, employees and franchisees. It will also produce serious negative consequences for business-to-business arbitration agreements that are wholly outside the apparent intended purview of the statute.<sup>4</sup>

The Act would reverse a pro-arbitration policy in effect since 1925, when the Federal Arbitration Act (“FAA”) was signed into law. In fact, the FAA, a federal statute

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<sup>2</sup> See John Feerick, “*ADR: Worthy of the Appellation ‘Justice’*”, Into the 21st Century: Thought Pieces on Lawyering, Problem Solving and ADR (CPR, 2001).

<sup>3</sup> See 4 The Papers of Abraham Lincoln; Legal Documents and Cases 207-208 (Daniel W. Stowell, et al, eds., 2008).

<sup>4</sup> Thomas J. Stipanowich, *Arbitration: the “New Litigation”*, 2010 U. Ill. L. Rev. 1, 50-53 (forthcoming Jan. 2010), available at <http://ssrn.com/abstract=1297526>.

requiring courts to enforce arbitration clauses in the same manner as any other contract provision, was developed for the very *purpose* of establishing an effective alternative to litigation. The Senate Judiciary Committee at that time found that arbitration “allowed parties to avoid the delay and expense of litigation, and thus it appealed to both individuals and businesses.”<sup>5</sup> Since the passage of the FAA, Congress over the past 85 years has developed a policy of encouraging arbitration.<sup>6</sup> The U.S. Supreme Court, consistent with Congress’ view, has upheld the enforceability of pre-dispute binding arbitration agreements and the finality of arbitral awards.<sup>7</sup>

The American Bar Association has more than 400,000 members and, on August 3-4, 2009 its House of Delegates adopted a Resolution that, among other things,

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<sup>5</sup> S. Rep. No. 68-536, at 3 (1924).

<sup>6</sup> In 1999, Congress reaffirmed that arbitration was a desirable alternative to litigating in the courts because of the inaccessibility of courts and the complexity and expense of litigation. Y2K Act, Pub. L. No. 106-37, section 2(a)(3)(B)(iii), 13 Stat. 185 (1999). In 1982, a House of Representatives Committee found that arbitration is usually cheaper and faster than litigation, can have simpler procedural and evidentiary rules, and normally minimizes hostility and disruption. H.R. Rep. No. 97-542 (1982). Jon O. Shimabukuro, et. al., *The Federal Arbitration Act: Background and Recent Developments*, June 17, 2002, at 3, available at [https://www.policyarchive.org/bitstream/handle/10207/1191/RL30934\\_20020617.pdf?sequence=1](https://www.policyarchive.org/bitstream/handle/10207/1191/RL30934_20020617.pdf?sequence=1).

<sup>7</sup> See, e.g., *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 109 (2001) (holding that the FAA applies to arbitration agreements in employment contracts); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) (holding that claims under the Age Discrimination in Employment Act were subject to pre-dispute arbitration); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985) (holding that antitrust claims were arbitrable and, “as with any other contract, the parties’ intentions control, but those intentions are generously construed as to issues of arbitrability”); *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24-25 (1983) (holding that the FAA requires that questions of arbitrability be addressed “with a healthy regard for the federal policy favoring arbitration” and that “any doubts concerning the scope of arbitrable issues ... be resolved in favor of arbitration”).

opposed the enactment of any federal legislation that would either invalidate pre-dispute agreements to arbitrate international commercial disputes or protect discrete classes by amending the FAA, Chapter 1. The Act as drafted would do both without appreciation of the damage that would be done, in this era of financial distress, to U.S. business and the U.S. economy. Those who argue, possibly without the benefit of actual experience resolving disputes, that the Act does not “forbid arbitration clauses” and that parties may still opt to arbitrate post-dispute are wrong and they ignore the economic and psychological pressures that develop after a dispute arises. Parties generally act out of anger – a desire to inflict injury on the other side – when faced with an actual dispute. Either party can then turn to a judicial forum that will delay the proceedings, significantly increase the cost of legal representation and lead to the threat of a war of attrition over 5 years or more, favoring a corporate litigant, or the risk of a runaway jury verdict in a class action, often favoring an individual litigant and leading to unwarranted settlements or costly appeals. Neither alternative is desirable for a society that favors the just resolution of disputes in a relatively inexpensive, speedy proceeding and neither alternative is possible when the parties have signed a valid, pre-dispute arbitration agreement. Indeed, a study showed that in the absence of a pre-dispute arbitration agreement, parties are often unwilling to invest the time or resources in planning for arbitration, since either party is free to go to court and the arbitration proceeding may not occur.<sup>8</sup>

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<sup>8</sup> Amy J. Schmitz, *Consideration of “Contracting Culture” in Enforcing Arbitration Provisions*, 81 St. John’s L. Rev. 124, 130 (2007).

The Congressional debate over the Act appears to be taking on unfortunate partisan overtones. The non-partisan experience in the U.S. Supreme Court ought to be instructive. Justice William Brennan, one of the Court's most liberal members, wrote in Moses H. Cone Mem'l Hospital v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983) that there is:

“ . . . a liberal federal policy favoring arbitration agreements, notwithstanding any state substance or procedural policies to the contrary.”

Twenty-three years later, in Buckeye Check Cashing Inc. v. Cardegna, 546 U.S. 440 (2006), Justice Scalia, writing for a 7-1 majority, re-affirmed the Court's confidence in the arbitration process when it held that the FAA applied in state courts and that arbitrators are to decide whether a contract is valid –not the court - when the contract contains an enforceable arbitration agreement.<sup>9</sup>

The adverse effect of the Act is dramatically compounded by a clause providing that “the validity or enforceability of an agreement to arbitrate shall be determined by the court, rather than the arbitrator.” This provision applies to any kind of arbitration agreement, without regard to the sophistication of the parties or the way in which the agreement to arbitrate was struck. The practical result is to deny enforcement to provisions, now ubiquitous in domestic as well as international commercial arbitration procedures, which promote efficiency by vouchsafing enforcement and “jurisdictional”

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<sup>9</sup> Justice Thomas generally dissents in the majority of arbitration-related decisions, regardless of the issue, because of his view that the FAA does not apply in state courts.

questions to arbitrators.<sup>10</sup> The impact of this provision is rendered far greater by a materially ambiguous provision that gives courts initial authority to address not only “challenges to the arbitration agreement specifically” but also challenges to the arbitration provision “in conjunction with other terms of the contract containing such agreement.” This provision might be interpreted to overturn, within the purview of the proposed statute, the principle first enunciated in *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*<sup>11</sup> and recently reiterated in *Buckeye Check Cashing Co. v. Cardegna*,<sup>12</sup> to the effect that pre-dispute arbitration agreements are separable from the contracts of which they are a part for the purposes of assessing their enforceability under the terms of the FAA.<sup>13</sup>

## **II. Arbitration Offers Benefits that Litigation Does Not**

Both individuals and businesses disfavor resolving disputes in heavily congested courts. As a result of the rising number of lawsuits, courts have become increasingly

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<sup>10</sup> See, e.g., AAA COMMERCIAL ARB. R. & MEDIATION PROC. R-7 (2007).

<sup>11</sup> 388 U.S. 395 (1967).

<sup>12</sup> 546 U.S. 440 (2006).

<sup>13</sup> This legislation has been criticized in the Washington Post, see Editorial, *A Good Arbitrator: Congress considers new laws regulating the resolution of disputes between businesses and consumers*, WASH. POST, Apr. 12, 2008, at A14, and the Wall Street Journal, see Editorial, *No Lawyers, Please*, WALL ST. J., Apr. 5, 2008 (reporting poll that found 82% of respondents preferred arbitration to court for resolution of disputes with companies).

congested over the years, and this trend will continue.<sup>14</sup> The Report of the Administrative Office of the U.S. Courts for the 12 month period ending June 30, 2008 revealed that in a 12 month period from July 1, 2007 to June 30, 2008, over 170,000 civil cases were filed in U.S. District Courts. If enacted, the Act would increase the number of court filings in areas where parties previously were free to agree to enforceable, pre-dispute arbitration clauses. Although the precise number of additional filings is difficult to predict, it is safe to assume that the impact on the courts would be significant in terms of additional resources needed to address the new caseloads in a fair and efficient manner. Such an undertaking is particularly onerous at a time where the “impact of the deteriorating economy is already being felt by the courts . . . . We also anticipate an impact on our criminal and civil workload as a result of the economic downturn . . . . The resulting litigation has the potential to dwarf the savings and loan crisis, when the federal courts experienced a significant workload increase associated with the failure . . . . the financial hardship that many are facing also could result in a rise in crime.” Statement of Honorable Julia S. Gibbons, Chair, Committee on the Budget of the Judicial Conference before the Subcommittee on Financial Services and General Government of the Committee of Appropriations of the U.S. House of Representatives, March 19, 2009, at 2-3. Only about 2 percent of pending federal civil cases were tried in court, and the median average time interval from filing to disposition was approximately 2 years. In more heavily congested cities, however, the median time interval for disposition was significantly higher: 36 months in Washington, D.C. and 29 months in the Southern

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<sup>14</sup> Fulbright and Jaworski LLP, *Fifth Annual Litigation Trends Survey Findings: Direction and Dynamics* (2008).

District of New York. Not surprisingly, parties seeking to resolve employment, consumer, franchise and civil rights disputes have increasingly turned to arbitration.

The generally acknowledged advantages of arbitration apply to all four categories addressed by the Act: Consumer/Securities, Franchise, Civil Rights and Employment.

They are:

- Flexibility - the parties can design the process or choose well-established institutional rules.
- Efficiency - arbitration is demonstrably faster and cheaper than court litigation and it limits, appropriately, the intrusive and exceedingly expensive discovery available to parties in the courts.
- Subject matter expertise - the parties can choose arbitrators with subject matter expertise; parties have no such right in the courts.
- Finality - judicial review of arbitral awards is limited to fundamental issues of procedural fairness, jurisdiction and public policy. By contrast, court appeals extend over 1-2 years and can exhaust the resources of an individual claimant.
- Privacy - arbitral hearings are private, unlike public court proceedings. Similar to the U.S. Supreme Court deliberations, which also are private, disputes can be resolved in a dispassionate nature, which can be an important consideration for both sides.
- Preservation of Relationships - lawsuits fracture relationships, e.g., employees must resign, securities customers' accounts are closed, franchises

are no longer supplied by their franchisors. Arbitration often permits the parties to continue a relationship during the proceeding.

There are some specific aspects of each of the four types of disputes that merit attention in any debate focused on the process of arbitration:

**Consumer/Securities Disputes** - A 2007 study by the Securities Industry and Financial Markets Association (“SIFMA”) demonstrated that cases are resolved 40% more quickly in arbitration (approximately 15 months from filing to an award) than in litigation, and cost \$12,000 less.<sup>15</sup> SIFMA’s study concluded that litigating claims of less than \$10,000 is usually not cost effective to the investor, and because 25% of investor claims fall into this category, the arbitration alternative is critical. Many opponents of pre-dispute arbitration emphasize the importance of having a judge or jury decide their case. However, investors claims are much more likely to be heard on the merits in arbitration: 20% of arbitration claims are decided by arbitrators, while only 1.5% of civil claims are ever heard by a judge or jury in court. In addition, customers prevail in 45-50% of decided cases in arbitration.<sup>16</sup>

A U.S. General Accounting Office (GAO) study of 6,600 securities arbitration awards issued during a six-month period in 1992 concluded that arbitration did not affect

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<sup>15</sup> Securities Industry and Financial Markets Association (“SIFMA”), *White Paper on the Securities Industry: The success story of an investor protection focused institution that has delivered timely, cost-effective, and fair results for over 30 years, available at <http://www.sifma.org/regulatory/pdf/arbitration-white-paper.pdf>*, Appendix B p.3 (2007).

<sup>16</sup> *Securities Arbitration Alert 2009-31* (8/19/09) (FINRA STATS., p. 2).

investors' chances of receiving an award.<sup>17</sup> Approximately 60% of investors received a favorable award, which was, on average, about 60% of the amount claimed. The study also showed there was no pro-business bias in securities arbitration decisions, and the use of an industry arbitrator on the panel did not affect the results of arbitration decisions.

**Employment Disputes** - Preserving an employment relationship while resolving a dispute is often critical to an employee. Arbitration, which is private and far less contentious than litigation, allows for that relationship to continue. A California study showed that employment claims require almost two years to be resolved in court, as compared to arbitration, where the median time to resolve an employee dispute by arbitration is 104 days. The median cost of resolving employment disputes by arbitration was only \$870.<sup>18</sup> Since many employment disputes arise after the employee is terminated, the employee is generally more sensitive to the cost of retaining an attorney for litigation. Discovery costs, court fees, transcript fees, attorneys' fees and other costs in litigation are substantially higher than any such costs in arbitration.<sup>19</sup>

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<sup>17</sup> *Securities Industry and Financial Markets Association*, *supra* note 15 at 13.

<sup>18</sup> Consumer and Employment Arbitration in California: A Review of Website Data Posted Pursuant to Section 1281.96 of the Code of Civil Procedure California Dispute Resolution Institute, available at [http://www.mediate.com/cdri/cdri\\_print\\_Aug\\_6.pdf](http://www.mediate.com/cdri/cdri_print_Aug_6.pdf) (2004); National Center for State Courts, Examining the Work of State Courts, (1999-2000), available at [http://www.ncsconline.org/D\\_Research/csp/1999-2000\\_Files/1999-2000\\_Tort-Contract\\_Section.pdf](http://www.ncsconline.org/D_Research/csp/1999-2000_Files/1999-2000_Tort-Contract_Section.pdf) (2000).

<sup>19</sup> Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 Colum. Hum. Rts. L. rev. 29, 57 (1998).

The median monetary award for successful employment dispute claimants is \$100,000 in arbitration, as compared to \$95,554 in litigation.<sup>20</sup> The “win-rate” for employees is at least as favorable as an individual’s win-rate through litigation.<sup>21</sup>

**Civil Rights Disputes** - Civil rights are generally understood to include all rights protected by the U.S. Constitution, State Constitutions and all rights to obtain benefits prescribed by law. The extremely broad provisions in the Act provide no guidance to the parties or the courts as to their intended applicability. As the Act is drafted, it overturns many carefully reasoned U.S. Supreme Court decisions wiping out whole categories of claims that are presently arbitrable (e.g., antitrust, Title VII, Age Discrimination) pursuant to predispute agreements.<sup>22</sup> Because we are a country where the rule of law is firmly grounded in precedent, such a result would seriously upset the stability and predictability of laws governing our society. Moreover, civil rights disputes can overlap significantly with employment disputes in the areas of discrimination. As discussed

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<sup>20</sup> *What Does the Data Show?* The National Workrights Institute Article reviewed on workrights.org site on November 15, 2004, available at [http://www.workrights.org/current/cd\\_arbitration.html](http://www.workrights.org/current/cd_arbitration.html); Comparing Litigation and Arbitration of Employment Disputes: Do Plaintiffs Better Vindicate Their Rights In Litigation? Michael Delikat & Morris M. Kleiner American Bar Association Litigation Section Conflict Management Vol. 6, Issue 3; Winter 2003, available at [http://www.insurancejournal.com/pdf/InsuranceTimes\\_20030429\\_39125.pdf](http://www.insurancejournal.com/pdf/InsuranceTimes_20030429_39125.pdf).

<sup>21</sup> 2004 Employment Arbitration: *What Does the Data Show?* The National Workrights Institute Article reviewed on workrights.org site on November 15, 2004, available at [http://www.workrights.org/current/cd\\_arbitration.html](http://www.workrights.org/current/cd_arbitration.html).

<sup>22</sup> See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985), *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 33 (1991), *14 Penn Plaza LLC v. Pyett*, 129 S.Ct. 1456, 1474 (2009).

above, arbitration of employment disputes has proven to be a fair and efficient forum for all parties.

**Franchise Disputes** – The Act would render unenforceable all pre-dispute arbitration agreements in franchise disputes. More than 75 industries operate within the franchising format. The International Franchise Association includes over 1,000 franchisors, 7,000 franchisees and 350 suppliers. Franchise contracts govern a large part of many businesses, e.g., 56% of fast food restaurants. Many of these franchise networks are international, with sophisticated corporate parties on both sides.<sup>23</sup> Whatever may be the perceived disadvantages of arbitration for employees or consumers, they simply do not apply in the franchise arena.<sup>24</sup> The market for franchise opportunities is highly competitive, and franchisees have the option to choose between franchisors that use arbitration and those that do not.<sup>25</sup> State franchising laws and Federal Trade Commission regulations address specific issues relating to notice of arbitration clauses in franchise

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<sup>23</sup> E.g., Broussard v. Meineke Disc. Muffler Shops, Inc., 155 F.3d 331, 348 (4th Cir. 1998) (“By all lights, Meineke franchisees are independent, sophisticated, if sometimes small, businessmen who dealt with Meineke at arms’ length and pursued their own business interests.”); Franchise Rule, 64 Fed. Reg. 57,320 (proposed Oct. 22, 1999) (“Commenters note that franchising today may involve heavily-negotiated, multi-million dollar deals between franchisors and highly sophisticated individual and corporate franchisees who are represented by counsel.”)

<sup>24</sup> Christopher R. Drahozal and Quentin R. Wittrock, Is There a Flight from Arbitration?, Fall, 2008, 37 Hofstra L. Rev. 71 (2008)

<sup>25</sup> Benjamin Klein, *Market Power in Franchise Cases in the Wake of Kodak: Applying Post-Contract Hold-Up Analysis to Vertical Relationships*, 67 Antitrust L.J. 283, 286 (1999) (“Because potential franchisees have many choices available pre-contract, franchisors have no market power when negotiating franchise contracts.”).

disclosure documents made available to franchisees before they purchase the franchise.<sup>26</sup>  
The Act assume that these entities are wrong to choose pre-dispute arbitration agreements in the franchise context and would bar them from doing so.

### **III. Empirical Evidence Proves that Procedural Due Process Protocols Fully Address Concerns Underlying the Amendments**

At the center of the concerns underlying the proposed amendments to the FAA is the belief that arbitration unfairly strips parties of their right to a day in court. However, the U.S. Supreme Court has repeatedly faced this issue and determined that an arbitral forum can be an effective substitute for a public judicial forum. Moreover, there is considerable empirical evidence that supports the conclusion that it is possible for arbitration to provide a fundamentally fair forum for consumers and employees, and, indeed, a forum that may in some respects be more desirable than the judicial forum when it comes to costs and delays.

Because of the private nature of arbitration, empirical studies on the win-rates of the process have been limited. However, in recent years, several important empirical studies have been conducted. The most recent one – the Searle Civil Justice Institute Study - is the most comprehensive and one of the most unbiased studies to date.

In March 2009, the Consumer Arbitration Task Force of the Searle Civil Justice Institute released a preliminary report on Consumer Arbitration Before the American Arbitration Association (“AAA”). The AAA is a leading provider of arbitration services,

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<sup>26</sup> See supra note 24 at 87.

including arbitrations between consumers and businesses. Funding for the study comes exclusively from the initial grant establishing the Searle Center at Northwestern Law School from the Late Daniel C. Searle, longtime philanthropist and Northwestern University trustee.<sup>27</sup>

The Searle study focused exclusively on arbitration administered by the AAA under its Consumer Arbitration Procedures. These Procedures were directly based upon the extensive due process guidelines set out in the Consumer Due Process Protocol, which was promulgated in 1998 by a Task Force comprised of consumer advocates, public representatives, corporate counsel and scholars.<sup>28</sup> The Protocol sets forth minimal due process requirements for many aspects of arbitration. The Academic Reporter for the Protocol was Professor Thomas J. Stipanowich, a signatory to this letter and the former President of CPR (2001-2006).

Key among the preliminary findings of the Study is that the win-rates for businesses, “while high in absolute terms and higher than win-rates for claims brought by consumers in arbitration, appear similar to win-rates for comparable claims brought in court.” In other words, there was no evident bias against consumers in favor of businesses in an arbitration forum effectively regulated by due process guidelines establishing procedures aimed at fundamental fairness. This study shows that an effectively administered consumer arbitration program that incorporates effective due

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<sup>27</sup> Northwestern Law School, Searle Center on Law, Regulation, and Economic Growth, <http://www.law.northwestern.edu/searlecenter/>.

<sup>28</sup> American Arbitration Association, [www.adr.org](http://www.adr.org)

process standards can provide consumers with a fundamentally fair alternative to the courtroom.

By contrast, consumer arbitrations formerly administered by the National Arbitration Forum, which unfortunately have been shown to be slanted toward businesses in some instances, were conducted without a comparable due process protocol. In other words, conducting arbitration under proper due process protocols can ensure that arbitration offers a fundamentally fair alternative to litigation in court. Indeed, courts have recognized the importance of such protocols in the context of consumer disputes.<sup>29</sup>

The data from the Searle Study are reinforced by another empirical study of employment arbitration under the AAA Employment Arbitration Rules conducted by Professor Theodore Eisenberg of Cornell University and Elizabeth Hill.<sup>30</sup> Significantly, the AAA Employment Rules are also based on the terms of an earlier Due Process Protocol.

The drafters of the Consumer Due Process Protocol expressed the hope that the standards they developed would “affect the drafting of statutes and influence judicial opinions addressing the enforceability of arbitration agreements.”<sup>31</sup> CPR submits that enforcing appropriate due process safeguards in consumer and employment arbitrations

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<sup>29</sup> See, e.g., *Green Tree Fin. Cor-Alabama v. Randolph*, 531 U.S. 79 (2000)(Justice Ginsberg in dissent suggested how to address the alleged cost sharing problem for consumers by referring to the AAA Consumer Due Process Protocol).

<sup>30</sup> Theodore Eisenberg and Elizabeth Hill, “Arbitration and Litigation of Employment Claims: An Empirical Comparison,” *Dispute Resolution Journal*, 58, 4 (November 2003-January 2004).

<sup>31</sup> Consumer Due Process Protocol at 6.

provides an effective way to make arbitration a viable, even preferable alternative to litigation. As an alternative to the present proposed legislation, therefore, CPR supports amending the FAA to incorporate due process safeguards for arbitration in consumer, employment and other adhesion contract settings.

**IV. The Proposed Amendments Unreasonably Interfere with Courts’  
Safeguards of Individuals’ Rights to Arbitrate**

The Arbitration Fairness Act also appears to be based on the notions that (1) pre-dispute arbitration clauses impede the “constitutional rights of individuals,” (2) individuals “have little or no meaningful option whether to submit their claims to arbitration,” and (3) “courts have erroneously upheld even egregiously unfair mandatory arbitration clauses.” These longstanding criticisms have all been fully addressed and rejected by the U.S. Supreme Court because of the lack of any evidence supporting them. The Court has concluded that parties are free to enter into pre-dispute arbitration agreements because the law provides sufficient safeguards against abuses. However, the proposed Amendments would take these unproven notions at face-value and unreasonably interfere with parties’ rights to negotiate and enter into agreements to arbitrate.

In 1989, the U.S. Supreme Court in *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University* examined the conflict between the FAA and a California state procedural rule permitting a stay of arbitration pending litigation.<sup>32</sup>

The Court’s decision established that arbitration agreements are valid exactly as the

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<sup>32</sup> 489 U.S. 468 (1989).

parties draft them, consistent with the parties' contractual rights and expectations (in that contract, state law applied)."<sup>33</sup> Accordingly, pre-dispute arbitration clauses reflect, and do not infringe upon, individuals' constitutional rights. Rather, parties have a constitutional right *to enter* pre-dispute arbitration agreements, and legislation prohibiting the exercise of this right is most likely to be held unconstitutional.

In 1991, the Supreme Court in *Gilmer v. Interstate/Johnson Lane Corp* rejected arguments that arbitration agreements are invalid because of a defendant's economic power or because of the alleged adhesive nature of consumer contracts that include arbitration agreements.<sup>34</sup> The Court held that unequal bargaining power between employers and employees is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context, noting that arbitration panels were impartial and competent to resolve employment disputes. Parties to contracts often have unequal bargaining power, and there is no legal basis to conclude on this ground alone that their agreements to resolve disputes through arbitration are invalid.

In the event that a party challenges an arbitration clause itself on grounds of coercion or undue influence, the U.S. Supreme Court requires that the courts themselves address such an issue and not the arbitrator.<sup>35</sup> In other words, a consumer or employee would be fully protected by all of the court processes (including appeals) in the event they challenged the arbitration clause itself on grounds of coercion or undue influence.

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<sup>33</sup> *Id.* at 491 (Brennan, dissenting) (citing Scoles & Hay, *Conflict of Laws*, at 632-633).

<sup>34</sup> *See, e.g. Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 33 (1991)

<sup>35</sup> *Buckeye Check Cashing Inc. v. Cardegna*, 546 U.S. 440 (2006),

Moreover, as recently as in 2008, the Supreme Court in *Hall Street v. Mattel* held that a court can review arbitration awards in instances where arbitrators are guilty of misconduct or exceed their powers.<sup>36</sup>

### **Conclusion**

The right to enter into pre-dispute arbitration agreements is grounded in the Constitution and in case law since the U.S. Supreme Court recognized the liberty to contract. The self-correcting forces and existing law at work in arbitration and in the courts have dealt with the abuses of consumer debt collection practices and forced the National Arbitration Forum to withdraw from the consumer debt collection field. The U.S. Supreme Court has repeatedly upheld the validity of pre-dispute arbitration agreements and recognized the importance of predictable and enforceable contractual rights while acknowledging that state law defenses (including unconscionability) may provide a safety valve to balance the delicate policy equilibrium reflected in the FAA, the New York Convention, almost 85 years of recognizing the distinct advantages of arbitration (both domestic and international) and individuals' due process rights. The Arbitration Fairness Act of 2009 would reject the wisdom and experience of generations of Justices of the U.S. Supreme Court, lawyers, disputants and objective observers of the arbitration process and prohibit pre-dispute arbitration agreements.

If Congress is to play a constructive role in the protection of individual rights and society's goal of just, efficient and less expensive dispute resolution, it could focus on

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<sup>36</sup> *Mattel*, 552 U.S. at 1399.

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encompassing in a new Chapter 4 of the FAA provisions embodying a national procedural due process protocol which require fairness through procedural safeguards for individuals in arbitration, including adequate notice, an equal voice in the selection of neutral and impartial arbitrators, responsibility for limited and reasonable costs of the arbitration, an arbitral forum near the individual's home town and reasonable pre-hearing disclosure of information supporting a claim or defense.

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