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Hearing on "Mandatory Binding Arbitration – Is it Fair and Voluntary?"

House Committee on the Judiciary
Subcommittee on Commercial and Administrative Law

Chairman Cohen, Ranking Member Franks and Members of the Subcommittee. Thank you for inviting me to testify. My name is Stephen Ware, and I am a Professor of Law at the University of Kansas. I speak to you today, not on behalf of my university, but as an individual scholar who specializes in arbitration law.

I am writing my third book on arbitration and have published twenty arbitration articles in scholarly journals, as well as several arbitration-related articles in non-academic publications. Within the field of arbitration law, I have devoted special attention to arbitration involving consumers, employees and other ordinary individuals. In fact, I have devoted much of the last 16 years of my professional life to researching the law, economics and practice of such arbitration. Based on this experience, I conclude that current law is generally very good at ensuring that binding arbitration is fair and voluntary.[1] Therefore, I am very concerned about bills in Congress that would, in my view, worsen arbitration law and harm the very people they are designed to help.[2]

I begin by addressing the voluntariness of arbitration then turn to its fairness.

Arbitration Is More Voluntary Than the Alternative (Litigation)

Litigation in the court system is the default process of dispute resolution. Parties can contract into alternative processes of dispute resolution, but if they do not do so then each party retains the right to have the dispute resolved in litigation. By contrast, a dispute does not go to arbitration unless the parties have contracted to have an arbitrator resolve that dispute.[3] In other words, arbitration binds only those who contracted for it. In this important sense, arbitration is not "mandatory" but litigation is. Parties who

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[1] I have proposed some changes to the Federal Arbitration Act but these proposals generally deal with topics that have not become the subject of Congressional hearings. *See* Stephen J. Ware, *Interstate Arbitration*, in EDWARD BRUNET ET AL., ARBITRATION LAW IN AMERICA: A CRITICAL ASSESSMENT 88-126 (2006).

[2] Such bills include the Arbitration Fairness Act (H.R. 1020) and the Fairness in Nursing Home Arbitration Act (H.R. 1237). The Arbitration Fairness Act would prevent courts from enforcing pre-dispute arbitration agreements between (1) consumers and their sellers, (2) employees and their employers, and (3) franchisees and their franchisors. Similarly, the Fairness in Nursing Home Arbitration Act would prevent courts from enforcing pre-dispute arbitration agreements between a long-term care facility (such as a nursing home) and a resident of a long-term care facility or anyone acting on behalf of such a resident. I expect that enactment of these bills would largely end arbitration of disputes between such parties.

During a hearing on last year's version of The Fairness in Nursing Home Arbitration Act (H. R. 6126) Representative Hank Johnson stated that the bill "would not gut arbitration as an alternative dispute resolution; it would simply bar pre-dispute mandatory arbitration agreements in nursing home agreements." *Hearing on H.R. 6126, the "Fairness in Nursing Home Arbitration Act of 2008" Before the Subcomm. on Comm. and Admin. Law of the H. Comm. on the Judiciary,* 110th Cong. (2008) (statement of Rep. Hank Johnson), *transcript available at* 2008 WL 2381657. Respectfully, this sets up a false choice. In fact, the most likely result of barring pre-dispute arbitration agreements is to "gut" arbitration. That is because arbitration almost never occurs except as a result of pre-dispute agreements. *See infra*.

[3] Here, I am speaking of the contractual, binding arbitration that is the subject of this hearing and of the Arbitration Fairness Act and the Fairness in Nursing Home Arbitration Act. By contrast, non-contractual arbitration and non-binding, court-annexed arbitration are very different from contractual, binding arbitration. *See* STEPHEN J. WARE, PRINCIPLES OF ALTERNATIVE DISPUTE RESOLUTION §§ 2.55, 4.32 (2d ed. 2007).

never contracted to be bound by the results of litigation may be lawfully subjected to binding litigation. By contrast, parties who never contracted to be bound by the results of arbitration may not be lawfully subjected to binding arbitration.

Arbitration Arising Out of a Contract is Voluntary, Rather than Mandatory

What some call "mandatory arbitration" is better called "contractual arbitration" because it, unlike some other arbitration,[4] does not occur unless the parties have previously formed a contract stating their agreement to arbitrate the dispute. Arbitration is not mandatory when it arises out of a contract, because contracts are formed voluntarily. The rare cases in which consent to a contract is involuntary--as when "A grasps B's hand and compels B by physical force to write his name" to the signature line of a contract,[5] or when A puts a gun to B's head and says "sign or I'll shoot"--result in contracts that are voidable on the ground of duress so courts do not enforce them. By contrast, in the absence of duress it is inaccurate to say that a contract containing an arbitration clause results in arbitration that is "involuntary" or "mandatory."

What critics of contractual arbitration object to is not duress. They object to arbitration clauses in form contracts presented take-it-or-leave-it to consumers, employees, and other ordinary individuals. For instance, Section 2(3) of the Arbitration Fairness Act says that many parties to form contracts are unlikely to read or understand the arbitration clause and may not even know that there is an arbitration clause on the form.[6]

That is a valid point and it is a point that applies to a wide range of contracts, not just to contracts with arbitration clauses. Form contracts have long outnumbered custom-drafted contracts.[7] For many generations, courts and commentators have debated a variety of legal doctrines focused on form contracts.[8] All that has been said in that ongoing debate applies to form contracts with arbitration clauses just as much as it applies to form contracts without arbitration clauses.

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[4] *Id.*

[5] RESTATEMENT (SECOND) OF CONTRACTS § 174 cmt. a, illus. 1 (1979).

[6] Section 2(3) of H.R. 1020 says: "Most consumers and employees have little or no meaningful option whether to submit their claims to arbitration. Few people realize, or understand the importance of the deliberately fine print that strips them of rights; and because entire industries are adopting these clauses, people increasingly have no choice but to accept them. They must often give up their rights as a condition of having a job, getting necessary medical care, buying a car, opening a bank account, getting a credit card, and the like. Often times, they are not even aware that they have given up their rights."

[7] *See, e.g.*, W. David Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529, 529 (1971) (estimating that 99% of all contracts were standard form agreements).

[8] *See, e.g.*, Nathan Isaacs, *The Standardizing of Contracts*, 27 YALE L.J. 34 (1917); Edwin W. Patterson, *The Delivery of a Life Insurance Policy*, 33 HARV. L. REV. 198 (1919); Friedrich Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629 (1943); KARL N. LLEWELLYN, THE COMMON LAW TRADITION DECIDING APPEALS 362 (1960); Randy E. Barnett, *Consenting to Form Contracts*, 71 FORDHAM L. REV. 627 (2002); Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203 (2003) .

Importantly, those who argue against enforcement of some clauses on form contracts do so because they believe the clauses are too one-sided (substantively unconscionable) or because the clauses generally do not receive the *knowing* consent of the non-drafting party, but not because the contracts containing the clauses are mandatory or involuntary. The non-drafting party is always free, in the absence of duress, to simply walk away from the proposed contract.

This is true even if the form contracts of an entire industry all have many of the same clauses. An example is the mortgage (or security interest), a common clause of loan agreements and what enables the lender to take collateral from the borrower if the borrower defaults on the loan. A few years ago, I borrowed $220,000. The lender insisted that I grant it a mortgage on my home. This clause was non-negotiable, take-it-or-leave-it. I am confident that other lenders, when faced with my request for a loan of that amount, would also have insisted on this same non-negotiable clause. I am also confident that the vast majority of other people borrowing that amount of money would have no choice but to accept this clause as well. Does that make my mortgage involuntary or mandatory? Of course not. I could have rented a home or perhaps bought a smaller home without borrowed funds. There are always alternatives, albeit more and less attractive ones. I consented, in the absence of duress, to a contract containing the lending industry's take-it-or-leave-it clause, just as I and many other people consent, in the absence of duress, to contracts containing take-it-or-leave-it arbitration clauses. Calling the results of these routine transactions "mandatory arbitration" is no more appropriate than referring to "mandatory mortgages." Both the arbitration and the mortgage are entirely voluntary.

In short, to call arbitration arising out of form contracts "mandatory" is inaccurate rhetoric. As the leading scholarly treatise on federal arbitration law explains, this use of the term "mandatory" "is extremely confusing language because it ignores altogether the consensual element in contracts."[9]

A related reason for referring to arbitration arising out of form contracts as "contractual," rather than "mandatory," is that doing so reserves the word mandatory for arbitration that really is mandatory--arbitration that occurs even though the parties have not contracted for it. For example, the Federal Insecticide, Fungicide, and Rodenticide Act requires chemical manufacturers to arbitrate certain disputes with each other even though neither of them contracted for arbitration.[10] That is truly mandatory arbitration. Arbitration arising out of a form contract is not.

In sum, contractual arbitration is voluntary, not mandatory. A form contract's arbitration clause is no more mandatory than that form contract's other clauses. No one seriously suggests modern society can do without form contracts by making them unenforceable unless parties invest the time to become knowledgeable about all their terms. Commerce would slow to a snail's pace. So courts will continue to enforce form

[9] IAN R. MACNEIL, RICHARD E. SPEIDEL, THOMAS J. STIPANOWICH, G. RICHARD SHELL, FEDERAL ARBITRATION LAW § 2:36 n.5 (1995).
[10] *See* STEPHEN J. WARE, PRINCIPLES OF ALTERNATIVE DISPUTE RESOLUTION § 2.55(b)(1) (2d ed. 2007).

contracts voluntarily entered into even though the party who did not draft the form (such as a consumer or employee) is not knowledgeable about all the terms. Lack of knowledge about terms on form contracts raises important issues but they are not issues of voluntariness or duress. They are issues of fairness or unconscionability, the issues to which I now turn.

Current Law is Generally Well-Suited to Ensuring That Binding Arbitration is as Fair as the Alternative (Litigation)

In assessing the fairness of binding arbitration as it is currently practiced in this country, one must avoid the temptation to compare arbitration to some hypothetical ideal process of dispute resolution. Instead, the current reality of arbitration should be compared to the current reality of litigation. Those are the two options parties now have for binding dispute resolution.

A comparison of arbitration and litigation should consider at least two factors: outcomes and process costs. The outcomes include who wins a case (e.g., consumer or business) and how much money is awarded to the winner. Process costs are the costs of getting to the outcome, such as the time and legal fees spent on pleadings, discovery, motions, trial or hearing, and appeal.

In comparing the outcomes and process costs of arbitration and litigation, we should examine careful empirical studies of large numbers of cases, rather than be led astray by anecdotes about a handful of (potentially unrepresentative) cases. Unfortunately, however, even careful empirical studies cannot provide definitive answers.

> Empirical studies can tell us the relative levels of awards and process costs in arbitration and litigation, but that does not mean they can tell us the relative levels of awards and process costs in arbitration and litigation *in comparable cases*. The probative value we give to empirical studies should turn on our level of confidence that the studied cases going to arbitration are comparable to the studied cases going to litigation. And, in reality, nobody knows whether the cases going to arbitration are comparable to the cases going to litigation. . . .
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> In other areas of study, a scholar can (to a great extent) overcome this methodological problem. Suppose, for example, that a court requires mediation of all cases with odd docket numbers, but not of cases with even docket numbers. A scholar could then compare the results of the odd cases to the results of the even cases and attribute any differences to the rule requiring mediation. With a sufficiently large sample size, we would be quite confident that the odd cases are comparable to the even cases. That is because the odd and even docket numbers are completely unrelated to anything that might plausibly affect the results of the cases.
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> In contrast, the selection of cases between arbitration and litigation is very different. [C]ases go to arbitration when, and only when, there is an

> arbitration agreement. The [parties that] use arbitration agreements may be systematically different from the [parties that] do not use arbitration agreements.[11]

In sum, "[e]mpirical studies are vulnerable to the possibility that the studied cases going to arbitration are systematically different from the studied cases going to litigation."[12] Therefore, in comparing arbitration and litigation, we must be cautious about how much weight we give empirical studies, although we should surely give them far more weight than anecdotes about a handful of (potentially unrepresentative) cases.

With this caution noted, what do empirical studies of arbitration tell us? The empirical evidence indicates that arbitration tends to have lower process costs than litigation.[13] With respect to outcomes, the empirical evidence indicates that arbitration tends to result in lower awards for some types of cases but higher awards in other types of cases and that, overall, consumers and employees fare as well as in arbitration as in litigation.[14]

In short, empirical studies do not support the notion that consumer and employment arbitration is unfair.

The Importance of Enforcing Pre-Dispute Arbitration Agreements

As noted above, litigation in the court system is the default process of dispute resolution. Parties can contract into arbitration, but if they do not do so then each party retains the right to have the dispute resolved in litigation.

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[11] Stephen J. Ware, *The Effects of Gilmer: Empirical and Other Approaches to the Study of Employment Arbitration*, 16 OHIO ST. J. ON DISP. RESOL. 735, 755-56 (2001).

[12] *Id* at 556. *See also* David Sherwyn, Samuel Estreicher & Michael Heise, *Assessing the Case for Employment Arbitration: A New Path for Empirical Research,* 57 STAN. L. REV. 1557, 1564-66 (2005).

[13] *See* Stephen J. Ware, *The Effects of Gilmer: Empirical and Other Approaches to the Study of Employment Arbitration*, 16 OHIO ST. J. ON DISP. RESOL. 735, 753-55 (2001) (citing and summarizing studies of employment arbitration); Peter B. Rutledge, *Whither Arbitration?* 6 GEO. J. L. PUB. POL'Y 549, 576-79 (2008); Peter B. Rutledge, *Arbitration – A Good Deal for Consumers: A Response to Public Citizen* 22-24 (2008) (refuting Public Citizen's charge that "Arbitration often costs consumers more than court.") That arbitration reduces process costs is confirmed by survey evidence. *See* ABA SECTION OF LITIGATION TASK FORCE ON ADR EFFECTIVENESS, SURVEY ON ARBITRATION (August 2003) at 19, *available at* http://www.abanet.org/litigation/taskforces/adr/surveyreport.pdf.

[14] Stephen J. Ware, *The Effects of Gilmer: Empirical and Other Approaches to the Study of Employment Arbitration*, 16 OHIO ST. J. ON DISP. RESOL. 735, 755-56 (2001) (citing and summarizing studies of employment arbitration); Searle Civil Justice Institute Consumer Arbitration Task Force, *Consumer Arbitration Before the American Arbitration Association*, March 2009, at 109, http://www.searlearbitration.org/p/full_report.pdf (recent study of consumer arbitration finding that consumers won some relief in 53.3% of the cases they filed and recovered an average of $19,255); Theodore Eisenberg & Elizabeth Hill, *Arbitration and Litigation of Employment Claims: An Empirical Comparison*, DISP. RESOL. J., Nov. 2003/Jan. 2004, at 44; Peter B. Rutledge, *Whither Arbitration?* 6 GEO. J. L. PUB. POL'Y 549, 560 (2008)(concluding that "most measures—raw win rates, comparative win rates, comparative recoveries, and comparative recoveries relative to amounts claimed—do not support the claim that consumers and employees achieve inferior results in arbitration compared to litigation.").

A contract for binding arbitration can be made before or after a dispute arises. In rare instances, parties agree to arbitrate a dispute that has already arisen between them. Far more often, the agreement to arbitrate is formed prior to any dispute. Contracts of all kinds include clauses obligating the parties to arbitrate, rather than litigate, disputes arising out of or relating to the contract. These are pre-dispute arbitration agreements.

Critics of pre-dispute arbitration agreements involving ordinary individuals (such as consumers and employees) argue that arbitration must be bad for such individuals if businesses obtain individuals' consent to arbitration through pre-dispute form contracts in which the arbitration clause is unlikely to be the focus of attention.[15] The argument continues by suggesting that if arbitration really was good for them, individuals would choose it post-dispute, when they have had time to consider (perhaps in consultation with a lawyer) the pros and cons of arbitration versus litigation. According to this view, only post-dispute arbitration agreements should be enforced. As explained below, this view is simplistic and erroneous.

Arbitration's Lower Process Costs Benefit All Concerned (Except Perhaps Lawyers)

As noted above, available empirical data indicates that arbitration tends to have lower process costs than litigation. (By "process costs," I refer to the time and legal fees spent on pleadings, discovery, motions, trial or hearing, and appeal.) Lower process costs obviously benefit consumers to the extent they (or their lawyers) bear those costs. Lower costs to consumer plaintiffs increase access to justice, especially in smaller cases for which it can be difficult to attract a lawyer.[16]

In addition, consumers also benefit from the lower process costs paid by businesses. That is because whatever lowers costs to businesses tends over time to lower prices to consumers. While the entire cost-savings is passed on to consumers only under conditions of perfect competition,[17] some of the cost-savings is passed on to consumers under non-competitive conditions, even monopoly.[18] The extent to which cost-savings

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[15] *See* Stephen J. Ware *The Case for Enforcing Adhesive Arbitration Agreements - with Particular Consideration of Class Actions and Arbitration Fees,* 5 J. AM. ARB. 251, 262 n.21 (2006) (citing those who make this argument).

[16] As plaintiffs' attorney Kenneth L. Connor acknowledged during a hearing last year, "lawyers are businesspeople too, and they simply, from an economic feasibility standpoint, can't handle a case that is not likely to yield back a return to the client and to the lawyer who represents him." *Hearing on H.R. 6126, the "Fairness in Nursing Home Arbitration Act of 2008" Before the Subcomm. on Comm. and Admin. Law of the H. Comm. on the Judiciary,* 110th Cong. (2008) (response of Ken Connor to question from Ranking Member Chris Cannon), *transcript available at* 2008 WL 2381657. Available research bears this out. *See, e.g.,* William M. Howard, *Arbitrating Claims of Employment Discrimination: What Really Does Happen? What Really Should Happen?*, DISP. RESOL. J., Oct.-Dec. 1995, at 40, 44 (reporting, based on survey of employment lawyers, that before accepting a case lawyers required, on average, minimum provable damages of $60,000 to $65,000 and a retainer of $3,000 to $3,600).

[17] *See, e.g.*, RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 7 (6th ed. 2003) ("The forces of competition tend to make opportunity cost the maximum as well as minimum price."); Stephen J. Ware, *Paying the Price of Process: Judicial Regulation of Consumer Arbitration Agreements*, 2001 J. DISP. RESOL. 89, 91-93.

[18] *See, e.g.*, POSNER, *supra* note 17, at 276 & Figure 9.4 ("If costs fall (unless these are fixed costs), the optimum monopoly price will fall and output will rise."), and "virtually all costs are variable in the long

are passed on to consumers is determined by the elasticity of supply and demand in the relevant markets.[19] Therefore, the size of the price reduction caused by enforcement of consumer arbitration agreements will vary, as will the time it takes to occur. But it is inconsistent with basic economics to question the existence of the price reduction.

The analogous point can be made about the effect on wages of the enforcement of employment arbitration agreements. While one can question the size or timing of the wage increase caused by this enforcement, it is inconsistent with basic economics to question the existence of it.[20] This point applies similarly with respect to arbitration agreements in other contexts as well. It is merely an example of the general insight that contract terms favorable to sellers go hand-in-hand with lower prices. "Recognition of this has been standard in the law-and-economics literature for at least a quarter of a century."[21]

In sum, the process-cost savings of arbitration are a social good, increasing the size of the pie by resolving disputes more efficiently. The only harm from process-cost savings comes to those (like lawyers) who sell process.[22]

Limiting arbitration so that only post-dispute agreements are enforced would fail to produce all the social gains produced by enforcing pre-dispute arbitration agreements. That is because arbitration will not occur nearly as often if an enforceable arbitration agreement can only be made after a dispute arises. Neither party is likely to agree, post-dispute, to arbitrate claims for which arbitration is expected to be less favorable to that party than litigation would be.[23] Thus post-dispute arbitration agreements are unlikely to occur even if both parties and their lawyers expect that the process costs (for both sides) are lower in arbitration than litigation. By contrast, pre-dispute agreements are formed at a time when both parties are uncertain about whether there will be a dispute and, if so, what sort of dispute it will be.[24] That is the time when both sides have an incentive to

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run." *Id.* at 123. A good explanation of this point is Jerry A. Hausman & Gregory K. Leonard, *Efficiencies from the Consumer Viewpoint*, 7 GEO. MASON L. REV. 707, 708-09 (1999).

[19] *See, e.g.*, Richard Craswell, *Passing on the Costs of Legal Rules: Efficiency and Distribution in Buyer-Seller Relationships*, 43 STAN. L. REV. 361, 367 (1991).

[20] Stephen J. Ware, *The Effects of Gilmer: Empirical and Other Approaches to the Study of Employment Arbitration*, 16 OHIO ST. J. ON DISP. RESOL. 735, 747-51 (2001).

[21] Stephen J. Ware, *Paying the Price of Process: Judicial Regulation of Consumer Arbitration Agreements*, 2001 J. DISP. RESOL. 89, 92.

[22] Even this is part of the overall social benefit from reducing the costs of processing cases. "To the extent that the costs of adjudication are reduced, disputes can be resolved more efficiently, *i.e.*, fewer resources need to be devoted to adjudication. Some bright young people who would have become trial lawyers enter other fields instead. Whatever those people produce is a gain to society from the cost savings of arbitration." Stephen J. Ware, *Arbitration under Assault: Trial Lawyers Lead the Charge*, CATO Institute Policy Analysis no. 433, April 18, 2002, at 9, http://www.cato.org/pubs/pas/pa-433es.html.

[23] Several commentators have made this point with respect to employment arbitration. *See* Samuel Estreicher, *Saturns for Rickshaws: The Stakes in the Debate over Predispute Employment Arbitration Agreements*, 16 OHIO ST. J. ON DISP. RESOL. 559, 567-68 (2001); David Sherwyn, *Because it Takes Two: Why Post-Dispute Voluntary Arbitration Programs Will Fail to Fix the Problems Associated with Employment Discrimination Law Adjudication*, 24 BERKELEY J. EMP. & LAB. L. 1, 57 (2003); Lewis L. Maltby, *Out of the Frying Pan, Into the Fire: The Feasibility of Post-Dispute Employment Arbitration Agreements*, 30 WM. MITCHELL L. REV. 313, 314 (2003).

[24] Christopher R. Drahozal, *"Unfair" Arbitration Clauses*, 2001 U. ILL. L. REV. 695, 746 (2001).

choose the forum that reduces process costs.

This point about arbitration generally also applies to arbitration involving consumers and employees in particular. After a consumer or employment dispute with a business arises, the business can consult its lawyers to assess whether arbitration or litigation will be more favorable to its side of the case. If litigation is more favorable than arbitration for the business then the business will not agree to arbitration if proposed by the consumer or employee post-dispute. Conversely, after a dispute arises, the consumer or employee can similarly try to consult one or more lawyers to assess whether arbitration or litigation will be more favorable to their side of the case. If they conclude that litigation is more favorable than arbitration to them then they will not agree to arbitration if proposed by the business post-dispute.

Enforcement of Pre-Dispute Arbitration Agreements is Good Policy

To reiterate, post-dispute agreements to arbitrate are unlikely to be more than rare events. This rarity is not due to any fault of arbitration. This rarity is due to litigation's status as the default process of dispute resolution. Once a dispute arises, parties are unlikely to contract out of the default process because of one party's self interest in whatever tactical advantages it can gain from litigation, whether from an easily-impassioned jury or expensive and time-consuming pre-trial discovery and post-trial appeals. Only a naively simplistic view would deny that disputing parties and their lawyers assess the case before them and try to maneuver into a process that is expected to advantage their side. That sort of self-interested maneuvering is inherent in the adversary system and lawyers might not be fully serving their clients if they did not engage in it.

In sum, the enforcement of pre-dispute agreements to arbitrate is needed to produce most of the social benefits resulting from arbitration's lower process costs. Enforcement of these agreements allows consumers and employees to compel arbitration of disputes when, post-dispute, the business would prefer litigation. Similarly, it allows businesses to compel arbitration of disputes when, post-dispute, the consumer or employee would prefer litigation. Allowing each side to compel the other to perform the contract is good policy for the same reason that enforcing contracts generally is good policy. Enforcing contracts constrains opportunistic behavior and allows people to rely on each other's promises. These policies are especially important with respect to contracts in which parties promise to use a relatively quick and efficient dispute-resolution process like arbitration.

Current Law Protects Against Unfair Arbitration Agreements

Finally, I emphasize that current law does not require courts to enforce all arbitration agreements. The Federal Arbitration Act allows courts to invalidate unconscionable arbitration agreements.[25] And this is not just a theoretical protection. Each year, there are many cases in which courts hold particular arbitration agreements

[25] 9 U.S.C. § 2 (arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.")

unconscionable.[26] For example, courts often refuse to enforce arbitration agreements that prohibit class actions or require the consumer or employee to pay a significant portion of the fees charged by the arbitrator or arbitration organization.[27] So we currently have a very sensible system in which courts determine, case-by-case, which arbitration agreements should not be enforced and which provide for a fair process and so should be enforced. As every case is different and arbitration agreements can be written in a wide variety of ways, I believe these issues are better handled on a case-by-case basis in the courts, rather than with the overly broad brush of legislation. In short, I recommend that you allow arbitration law to continue to develop in the courts, rather than enact a bill such as H.R. 1020 or H.R. 1237.

Thank you very much for your time and attention. I would be happy to answer any questions that you may have.

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[26] *See* STEPHEN J. WARE, PRINCIPLES OF ALTERNATIVE DISPUTE RESOLUTION 61-65 (2d ed. 2007) (collecting representative cases); Stephen A. Broome, *An Unconscionable Application of the Unconscionability Doctrine: How the California Courts are Circumventing the Federal Arbitration Act*, 3 HASTINGS BUS. L.J. 39, 48 (2006) (finding that unconscionability challenges to arbitration agreements in California succeeded in whole or in part in approximately 58% of cases, compared to only 11% in the non-arbitration context); Susan Randall, *Judicial Attitudes Toward Arbitration and the Resurgence of Unconscionability*, 52 BUFF. L. REV. 185, 194 (2004) (finding that arbitration agreements were found unconscionable in 50.3% of cases in 2002-2003, as opposed to 25.6% for other types of contracts).
[27] *See* STEPHEN J. WARE, PRINCIPLES OF ALTERNATIVE DISPUTE RESOLUTION 64 (2d ed. 2007).