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Testimony Before the Senate Judiciary Committee:

"The Impact of Lawsuit Abuse on
American Small Businesses and Job Creators"

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Introduction

The American civil justice system occupies a hallowed position in our nation. For most citizens, the civil justice system comprises their sole contact with the legal system, and it dispenses the law that directly affects their daily lives – resolving disputes involving contracts, property, financial issues, and personal injury. Every day and all across this country, judges in both state and federal courts review legal documents, hold hearings, empanel juries, and provide Americans an opportunity to air their grievances and seek redress through the public and open system of laws we have created and adapted over centuries. And when called upon to serve on civil juries, citizens further interact with the legal system, shaping conceptions of justice, democracy and accountability.[1]

Yet there are problems in our civil justice system – in particular, recent legal developments have placed significant constraints on access to justice, preventing citizens from bringing meritorious cases to public courts for adjudication by a jury of their peers. Rather than focus on these real problems, the Chamber of Commerce and the powerful corporate interests it represents have resuscitated the now decades-old warning of a "litigation explosion" that threatens to engulf small businesses. Rebuffed by the Advisory Committee on the Civil Rules, the Chamber seeks to end-run the rulemaking process and achieve its objectives – *e.g.*, complete insulation from legal liability – by lobbying Congress directly for legislation. Illustrative of this strategy are the recent proposals for so-called "lawsuit reform" that have passed the House and are now being considered by this body. As

[1] Andrew S. Pollis, *The Death of Inference*, 55 B.C. L. REV. 435, 490 (2014) ("We must preserve the inference-drawing function that the Seventh Amendment clearly bestows on individual citizens who participate, through jury service, in the political process.").

discussed briefly in Part III below, each of these proposals is terribly misguided, based on anecdote rather than data, and would likely increase costs and delays in the legal system.

If this body wishes to engage in substantive reforms of the civil justice system, I would urge it to consider enacting legislation such as the Arbitration Fairness Act, the Data Security and Breach Notification Act, and other measures aimed at preserving the rights of Americans to air their grievances in open, public courts governed by the rule of law. Rather than waste time on these wrongheaded proposals that serve only to place more obstacles in the path to justice, this committee should seek to increase citizens' access to courts, promote transparency and accountability in the civil justice system, and ensure that every American can vindicate her Seventh Amendment right to trial by civil jury.

I. BACKGROUND

In our legal system, citizens are vested with statutory and common law rights whose violation may be vindicated by private litigation. These causes of action allow citizens to bring legal claims against all manner of wrongdoers – large corporations, government actors, private individuals – and, if supported by facts and law, these claims will advance regardless of the identity or clout of the parties.[2] This democratic feature has made our civil justice system the envy of the world. For example, litigation helps to ensure that our financial markets are on the up-and-up, so that we may all invest with confidence. It punishes fraudulent scam artists, allowing law-abiding businesses to flourish. And it protects hard-working Americans from unscrupulous practices such as wage theft, discrimination and harassment.[3] And while state and federal agencies and officials also retain responsibility for the detection, investigation, and litigation of legal violations, limited public resources and a preference for decentralized enforcement have resulted in significant reliance placed upon private litigation as the primary means of vindicating many of our protected rights.[4]

The Founding Fathers were so cognizant that the civil justice system provided critical protection for their hard-won freedoms that they memorialized the right to a civil jury in the Seventh Amendment. In doing so, they understood that juries might sometimes get things wrong, slow things down or make things more expensive. But for the Founders, these costs more than justified the transparency and accountability they believed to be critical to the new Republic.

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[2] *See, e.g.,* Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of* AT&T Mobility v. Concepcion, 79 U. CHI. L. REV. 623, 626 ("Private involvement in public civil law enforcement is deeply embedded in our politics and culture.").

[3] *Id.* at 625-6 ("Over the past fifty years in particular, we have come to assume, quite correctly, that private actors will be the frontline enforcers in actions redressing broadscale securities fraud, consumer fraud and deceptive trade practices, antitrust violations (outside the merger context), civil rights violations, and many other areas.").

[4] *See, e.g.,* Mark E. Budnitz, *The Federalization and Privatization of Public Consumer Protection Law in the United States: Their Effect on Litigation and Enforcement*, 24 GA. ST. U. L. REV. 663, 664 (2008) ("Recognizing the resource limitations of government agencies, many consumer laws provide a private right of action so individual consumers also can litigate violations of these laws. Many of these laws also provide class actions and statutory damages which encourage consumers to act as 'private attorneys general.'").

In the over two hundred years since the Founding, we have worked to steadily improve and adapt our civil justice system to the changing needs of the nation. For example, to facilitate uniformity across the justice system and out of respect for separation-of-powers principles, Congress in 1934 enacted the Rules Enabling Act.[5] The Act authorizes the Supreme Court to adopt and amend Rules of Civil Procedure governing the operation of litigation in the federal courts.[6] At the behest of the Court, the Advisory Committee for the Civil Rules – a bi-partisan, expert group of judges, lawyers and academics – has engaged in comprehensive study and debate of proposed procedural rules. The long and arduous rulemaking process is predicated on a deep and informed understanding that "each rule is part of a complex, interlocking system of justice."[7] Accordingly, legitimate calls for reform of the civil justice system have been embraced by the Advisory Committee, while partisan, self-interested proposals have often faltered for lack of factual support, data confirmation, or public policy-based purpose.

A number of bills that recently passed by the House and are now before the Senate contain provisions which were considered and rejected by the Advisory Committee.[8] Failing that rigorous and demanding process, proponents of litigation "reform" now seek direct legislation to protect them from liability for wrongdoing. But make no mistake: the true target of the Chamber's efforts at litigation "reform" is not meritless lawsuits against businesses. It is lawsuits against businesses, period. The Chamber's litigation proposals would insulate Equifax and Wells Fargo today, just as they would have insulated WorldCom and Enron a generation ago, and god-knows-who tomorrow.

II. THE REAL PROBLEMS FACING THE CIVIL JUSTICE SYSTEM: ACCESS AND TRANSPARENCY

First, some myth-busting: the various "reform" bills under consideration by Congress all rest upon the highly disputed claim that the U.S. court system is burdened with frivolous civil lawsuits that harass corporate defendants and lead to higher prices for goods and services. The Chamber of Commerce, in particular, regularly complains about the so-called

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[5] 28 U.S.C. § 2072. *See also* Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1085-97 (1982) (providing a historical analysis of the Rules Enabling Act's allocation of power between the Supreme Court and Congress).

[6] 28 U.S.C § 2072 (a) ("The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrate judges thereof) and courts of appeals."). *See also* The Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, 102 Stat. 4642 (1988).

[7] American Bar Ass'n Letter Opposing Lawsuit Reduction Act of 2017, available at https://www.americanbar.org/content/dam/aba/uncategorized/GAO/2017feb1_lara_l.authcheckdam.pdf; *see also* Karen Nelson Moore, *The Supreme Court's Role in Interpreting the Federal Rules of Civil Procedure*, 44 HASTINGS L.J. 1039, 1062 (1993) (describing the current rulemaking process: "after proposed changes in the Federal Rules are drafted by the Advisory Committee, they are reviewed first by the Standing Committee, then by the Judicial Conference, and finally by the Supreme Court before being submitted to Congress").

[8] *See, e.g.,* COMMITTEE ON RULES OF PRACTICE AND PROCEDURE AGENDA BOOK, at 37, 260-61, June 6-7, 2016, available at http://www.uscourts.gov/rules-policies/archives/agenda-books/committee-rules-practice-and-procedure-june-2016 (considering and rejecting proposed rules changes on ascertainability and issue class actions).

"litigation explosion" and demands legislative action to stem the tide of supposedly frivolous lawsuits. But there is no data to support the claim (1) that civil filings have risen steeply, or (2) that any purported rise is due to specious claiming.[9] Moreover, there is no evidence that meritless litigation accounts for clogged judicial dockets or lengthy delays in dispensing justice.

Yet, despite the utter absence of data, the myth of the "litigation explosion" has been perpetuated for decades and a lore of "judicial hellholes" has been conjured out of decades-old isolated anecdotes. For the Chamber, the strategy of scapegoating lawyers – particularly personal injury lawyers[10] – and "greedy" plaintiffs has generated facile caricatures that prove helpful in their anti-litigation legislative campaigns.[11] But this is all just lobbying and politicking: real policy judgments must surely rest on something more substantial than mere anecdote and rumor.[12] For every example of a seemingly frivolous case that the Chamber and its supporters dig up, there are literally thousands of important and worthy lawsuits that enable victims to recover damages for accidental harm, resolve contract disputes, challenge illegal conduct, and defend their right to a fair wage.

Second, the real problem facing the civil justice system is not that there are too many frivolous lawsuits – but that *too few* meritorious claims are making their way to court. Heightened pleading standards, increased reliance on summary dismissals, restrictive views on standing to sue, among other legal developments, place often-insurmountable obstacles in the path to the courthouse.[13] But the most consequential impediment is the enforcement of forced arbitration clauses containing class action bans, which bar consumers and employees from bringing or being represented in any form of collective litigation.

Today, millions of consumers and employees are subject to these unilaterally-imposed provisions, which demand that all disputes be taken out of our public courts and resolved in

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[9] For example, the National Center for State Courts reports that the number of civil cases filed in state courts dropped seven percent between 2008 and 2012 (or 3.3% when adjusted for population growth). EXAMINING THE WORK OF STATE COURTS: AN OVERVIEW OF 2012 STATE COURT CASELOADS, NATIONAL CENTER FOR STATE COURTS, 2014. Other area-specific studies corroborate these findings. *See, e.g.,* Thomas H. Cohen, *Federal Tort Trials and Verdicts, 2002-03*, BUREAU OF JUSTICE STATISTICS, August 17, 2005, https://www.bjs.gov/content/pub/pdf/fttv03.pdf (reporting a 79% decrease in federal tort trials between 1985 and 2003); FEDERAL JUDICIAL CASELOAD STATISTICS 2014, ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, http://www.uscourts.gov/statistics-reports/federaljudicial-caseload-statistics-2014 (reporting a 9% increase in civil filings between 1986 and 2013, while the population increased over 32%).

[10] THOMAS BURKE, LAWYERS, LAWSUITS AND LEGAL RIGHTS: THE BATTLE OVER LITIGATION IN AMERICAN SOCIETY 26 (2002) ("The notoriety of tort litigation, combined with the powers of persuasion of corporate and professional interests, has put personal injury lawsuit reform at the top of the anti-litigation agenda. Yet the range of anti-litigation politics sweeps much more broadly than tort suits.").

[11] *See, e.g.,* TOM BAKER, THE MEDICAL MALPRACTICE MYTH (2007); WILLIAM HALTOM & MICHAEL MCCANN, DISTORTING THE LAW: POLITICS, MEDIA, AND THE LITIGATION CRISIS (2004).

[12] *See* Lynn Mather, *Theorizing about Trial Courts: Lawyers, Policymaking, and Tobacco Litigation*, LAW & SOC. INQUIRY (2006).

[13] Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286, 304 (2013) (stating that the Supreme Court's support of litigation reforms "seems to have placed a thumb on the justice scale favoring corporate and government defendants").

one-one-one, private arbitrations. The practical reality, of course, is that no rational consumer or employee would undertake a costly individual arbitration – nor could she hope to find a lawyer willing to represent her on a contingency basis.[14] As a result, forced arbitration provisions containing class action bans effectively immunize putative defendants against any liability for wrongful activity.

Unsurprisingly, these provisions have become standard practice in standard-form consumer contracts.[15] Equally disturbing, class action bans have bled into employment contracts, barring workers from bringing claims in court for widespread acts of discrimination, harassment, wage theft, unsafe conditions, and other workplace injuries.[16] The costs of enforcing these contractual provisions is high – and it is borne by the American citizens and small business owners who are no longer able to access courts to resolve disputes, seek redress for grievances, or enforce state and federal laws.

But there are other costs to forced arbitration that should concern us all. In particular, the lack of transparency in arbitration undercuts the values of publicity and openness that are central to our civil justice system. Publicity is key to public dispute resolution: "The state funds the court system. The public participates in a transparent conversation about legal rights. To that end, citizens have some ownership, at least in spirit, of what happens within that system [because] the whole reason for a public dispute resolution system is that it operates for the benefit of the public."[17] In stark contrast, privacy is core to the institution of arbitration and it is guaranteed, not only by commercial arbitration providers, but also by the standard terms of contemporary arbitration agreements.[18]

Accordingly, when disputes are shunted into the hermetically-sealed vault of private arbitration, there is no public, transparent decision-making process, much less stare decisis,

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[14] AT&T v. Concepcion, 131 S. Ct. 1740, 1761 (2011) (Breyer dissenting) ("What rational lawyer would have signed on to represent the Concepcions in litigation for the possibility of fees stemming from a $30.22 claim?"); *see also* Richard Cordray, *Let Consumers Sue Companies*, NY TIMES, Aug. 22, 2017 (citing CFPB Study finding that from 2010 to 2012, only 411 consumers filed individual arbitrations to resolve disputes – while nearly 10 million consumers were represented in comparable class actions during the same period); Col. Lee F. Lange, *I Served to Protect Our Rights; Don't Let Equifax Take Them Away*, Medium, available at https://medium.com/@lflange/i-served-to-protect-our-rights-dont-let-equifax-take-them-away-8de7af56be56 (reporting that "only four arbitrations have been filed against Wells Fargo in Arizona despite up to 178,972 or more fake accounts in the state").

[15] CONSUMER FINANCIAL PROTECTION BUREAU, ARBITRATION STUDY § 3, at 19 (2015), http://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf (reporting that over 88% of mobile wireless contracts and 99% of storefront payday loans are subject to forced arbitration).

[16] Alexander Colvin, *The Growing Use of Mandatory Arbitration*, Economic Policy Institute, Sept. 27, 2017, available at http://www.epi.org/publication/the-growing-use-of-mandatory-arbitration/ (reporting that 56% of private-sector, non-unionized workers are subject to forced arbitration clauses and 30% to class action bans – meaning that over 60 million workers no longer have access to the courts to protect their rights and a full quarter no longer have the right to bring a class or collective action if those rights have been violated).

[17] Erik S. Knutsen, *Keeping Settlements Secret*, 47 FLA. ST. U. L. REV. 945, 959-60 (2010).

[18] *See, e.g.*, Myriam Gilles, *The Day Doctrine Died: Private Arbitration and the End of Law,* 2016 U. ILL. L. REV. 371 (2016).

or common law development.[19] In arbitration, the public has no opportunity to "participate in a transparent conversation about legal rights" – quite the contrary, the public is barred from entry and arbitral outcomes are shrouded in secrecy.

The utter lack of transparency means, among other things, that arbitral findings are never known or communicated beyond the contractually-mandated cone of silence. For instance, if an arbitrator finds that a company has engaged in systemic wrongdoing, she can only order redress for the specific claimant who appears before her. Other potential victims of the same illegal conduct are kept in the dark, and the arbitrator is forbidden from ordering the company to reform its illegal practices more broadly.[20] Further, the standards and norms employed by arbitrators in reaching their decisions is also concealed.[21] Worse yet, arbitral decisions are not written down, recorded, or made available to other market actors – so similarly-situated entities cannot use this information to reassess their own conduct or adopt policies to avoid breaking the law.[22]

As a result of the profound secrecy it offers to entities eager to avoid both liability and bad press, forced arbitration allows wrongful conduct to continue undetected and unremedied long after such illegality would otherwise come to light. For instance, forced arbitration allowed companies like Wells Fargo[23] and Equifax[24] to block consumer lawsuits that would have exposed their misconduct far sooner. In the case of Wells Fargo, injured customers began suing the company for opening fake accounts back in 2013, but these claims were quickly

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[19] Hon. Jennifer Walker Elrod, *Is the Jury Still Out?: A Case for the Continued Viability of the American Jury,* 44 TEX. TECH L. REV. 303, 324 (2012) ("Arbitrations with no public record do not develop the law in any way."); *see also* Jessica Silver-Greenberg & Michael Corkery, *In Arbitration, a 'Privatization of the Justice System,'* N.Y. TIMES (Nov. 1, 2015), https://www.nytimes.com/2015/11/02/business/dealbook/in-arbitration-a-privatization-of-the-justice-system.html.

[20] *See, e.g.,* Myriam Gilles, *Individualized Injunctions and No-Modification Terms: Challenging "Anti-Reform Provisions in Arbitration Clauses*, 69 U. MIAMI L. REV. 469, 472 (2015) (reporting that arbitration clauses increasingly feature provisions prohibiting "an individual arbitral claimant from seeking to end a practice, change a rule, or enjoin an act that causes injury to itself and to similarly-situated non-parties").

[21] In contrast, judges in civil litigation "evaluate competing fact scenarios and apply public norms to the facts and thus guide the application of public force to resolve private party disputes." Peter L. Murray, *Privatization of Civil Justice*, 15 WILLAMETTE J. INT'L L. & DISP. RESOL. 133, 143 (2007). In this way, "judges are held accountable to the norms themselves," furthering public transparency about the nature and content of adjudication. *Id.*

[22] Elizabeth G. Thornburg, G*oing Private: Technology, Due Process, and Internet Dispute Resolution*, 34 U.C. DAVIS L. REV. 151, 200–06 (2000) (asserting that a lack of transparency in dispute resolution causes harm to the public by, among other things, allowing corporate actors to circumvent legal requirements and denying claimants their proverbial day in court).

[23] *See, e.g.,* Michael Corkery & Stacy Cowly, *Wells Fargo Killing Sham Account Suits by Using Arbitration,* NY TIMES, Dec. 6, 2016, available at https://www.nytimes.com/2016/12/06/business/dealbook/wells-fargo-killing-sham-account-suits-by-using-arbitration.html?_r=0;

[24] *See, e.g.,* Diane Hembree, *Consumer Backlash Spurs Equifax to Drop 'Ripoff Clause' in Offer to Security Hack Victims,* FORBES, Sept. 9, 2017, available at https://www.forbes.com/sites/dianahembree/2017/09/09/consumer-anger-over-equifaxs-ripoff-clause-in-offer-to-security-hack-victims-spurs-policy-change/#5cd7462e6e7e.

forced into the black box of arbitration.[25] Forced arbitration almost allowed Roger Ailes to evade revelations of decades-long sexual harassment; it was only because Gretchen Carlson "resisted the clause through a creative legal theory that her allegations were made public – unleashing a tsunami of claims of sexual harassment by Ailes and others at Fox News."[26] And it may yet turn out that Harvey Weinstein used forced arbitration to suppress allegations of his decades-long abusive conduct. By promising secrecy, forced arbitration shields all types wrongdoing, making it more difficult for victims to hold the wrongdoers accountable and allowing illegality to continue unchecked.

III. Proposed Legislation

In brief, the spate of "lawsuit reform" bills passed by the House and on deck in the Senate rests on unsupported suppositions about the civil justice system that originate with the Chamber of Commerce. Making policy on the basis of anecdotes – in particular, sui generis incidents of purported "abuse" supplied by self-interested corporate lobbyists – is no way to govern. Further, separation-of-powers principles preclude Congress from interfering in areas of judicial management. The bills at issue flout these established principles, big-footing into areas of formal judicial rule-making, as well undermining judicial discretion more generally.

A. Lawsuit Abuse Reduction Act ("LARA"), H.R. 720 and S. 237

LARA would reverse three amendments to Rule 11 adopted through the reasoned rulemaking process of the Advisory Committee and promulgated by the Supreme Court in 1993. Specifically, this legislation would:

- disregard judicial discretion and instead, force judges to impose mandatory sanctions should they determine that a claim lacks evidentiary support;
- eliminate the "safe harbor" provision, which allows parties withdraw potentially frivolous claims within 21 days of being served with a motion for sanctions; and
- require that attorneys' fees and costs be paid to the prevailing party (rather than to the court), further encouraging satellite litigation.

This bill is strongly opposed by judges, lawyers and scholars, and for good reason: we've been here before and it was an unmitigated disaster. Specifically, before the 1993 amendments, Rule 11 sanctions were mandatory, there was no safe harbor provision, and sanction motions were often motivated by the potential for hefty fee awards rather than real concerns over meritless litigation. And every study of the pre-1993 period by neutral

[25] Emily Martin, *Forced Arbitration Protects Sexual Predators and Corporate Wrongdoing*, Consumer Law & Policy Blog, Oct. 23, 2017, available at http://pubcit.typepad.com/clpblog/2017/10/forced-arbitration-protects-sexual-predators-and-corporate-wrongdoing.html.

[26] *Id.*

observers (including the Federal Judicial Center[27]) observes significant, quantitative increases in satellite litigation and judicial delays as a direct result of Rule 11, as well as a qualitative sense from judges and lawyers that the Rule had become a tool for harassment and delay.[28] In addition, empirical analyses demonstrated that sanctions were more often imposed against plaintiffs than defendants, and more often imposed against plaintiffs in certain kinds of cases – primarily civil rights and employment discrimination cases.[29]

For these reasons, and after much study and deliberation, in 1993 the Advisory Committee recommended and the Supreme Court adopted amendments to Rule 11. In the intervening years, the Committee has chosen not to revisit these issues because there is simply no credible indication of a problem that requires its attention; in short, Rule 11 is working in a balanced and fair way.

Beyond the solution in search of a problem, LARA also encroaches upon the established judicial process of promulgating and amending the Federal Rules of Civil Procedure and undermines the discretion of judges to determine whether sanctions are appropriate in the individual case. At this moment in our history, when judges are attacked whenever they issue legal rulings that thwart this Administration's policies,[30] Congress should be particularly careful to avoid further eroding judicial discretion.

B. Fairness in Class Action Litigation Act ("FICALA"), H.R. 985

This bill is, to use the President's memorable phrase, "a big, beautiful Christmas present." This time, the recipient of the lavish government subsidy is the Chamber of Commerce and its corporate membership, which have been wishing for absolute immunity from class action liability for decades. FICALA comes close to granting their wish. In main, FICALA requires courts to deny class certification where:

- there an insufficient showing "that each proposed class member suffered the same type ***and scope*** of injury";
- a class representative "is a present or former client" of class counsel;

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[27] David Rauma & Thomas E. Willging, *Report of a Survey of United States District Judges' Experiences and Views Concerning Rule 11, Federal Rules of Civil Procedure* (Federal Judicial Center, 2005), available at http://www.uscourts.gov/sites/default/files/rule1105_1.pdf.

[28] Carl Tobias, *The 1993 Revision to Federal Rule 11*, 70 IND. L.J. 171, 173-74 (1994) (noting statistics on growth in Rule 11 practice).

[29] *See* Arthur Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982, 1007-9 (2003) ("[T]he 1983 Rule was criticized for having a disproportionate impact, particularly in areas of the law considered 'disfavored' by some.").

[30] *See, e.g.,* Brent Kendall, *Trump Says Judge's Mexican Heritage Presents 'Absolute Conflict,'* WALL STREET JOURNAL, June 3, 2016, https://www.wsj.com/articles/donald-trump-keeps-up-attacks-on-judge-gonzalo-curiel-1464911442; Adam Liptak, *Donald Trump Could Threaten U.S. Rule of Law, Scholars Say*, NY TIMES, June 3, 2016, https://www.nytimes.com/2016/06/04/us/politics/donald-trump-constitution-power.html?_r=0.

- the class is not "ascertainable" – i.e., that there an insufficient showing of "a reliable and feasible… mechanism for distributing directly to a substantial majority of class members any monetary relief secured for the class";
- counsel seeks to certify an "issue class" under FRCP Rule 23(c)(4), unless the issue also "satisfies all the class certification prerequisites of Rule 23(a), and Rule 23(b)(1), Rule 23(b)(2) or Rule 23(b)(3)."

For reasons that I and others have addressed in letters to the House Subcommittee on the Judiciary and elsewhere, FICALA is aimed at destroying rather than reforming class action litigation.[31] Briefly, the requirement that the injury suffered by each class member was of the same "type and scope" as that of the class representative is both impossible and pointless. Impossible because the amount of damage or type of injury will inevitably affect class members differently. As Elizabeth Burch points out, "[w]hat's important from the standpoint of adequate representation is that a named representative will have a self-interested reason to care about the same remedial measures (damages, injunctive relief, etc.) as the class members—not that each suffers from precisely the 'same type and scope of injury.'"[32]

Worse yet, this statutory condition is pointless because the federal courts have already developed standards for applying the commonality requirement of Rule 23(a)(3) to determine when class member interests are sufficiently cohesive to warrant class-wide adjudication. For example, Justice Scalia's majority decision in *Wal-Mart Stores v. Dukes*[33] acknowledges that while class certification demands a showing that class members have suffered the "same injury," just what this means will depend greatly on the context of the legal claim – and for that reason, is best left to case-by-case determinations by judges in specific cases.[34] FICALA eviscerates Justice Scalia's nuanced conception of what constitutes "same injury" and replaces it with a terse statutory requirement. Once again, Congressional interference on core judicial functions disrespects separation of powers principles—and for no legitimate reason.

The remaining measures are no better. The conflicts-of-interest provision, which prevents a citizen from freely choosing the lawyer who will represent her interests, is

[31] Elizabeth Chamblee Burch and Myriam Gilles, *Congress's Judicial Mistrust*, BLOOMBERG LAW PRODUCT SAFETY & LIABILITY REPORTER, 45 PSLR 340, April 3, 2017, available at https://cardozo.yu.edu/sites/default/files/burchgilles.reprint0403.pdf.

[32] Elizabeth Chamblee Burch, Final Comments on the Fairness in Class Action Litigation Act of 2017, February 13, 2017, http://lawprofessors.typepad.com/files/final-comments-on-fairness-in-class-action-litigation-act.pdf.

[33] 564 U.S. 338 (2011).

[34] *Id.* at 349-50. As an example, Justice Scalia noted that Title VII "can be violated in many ways," including "by intentional discrimination, or by hiring and promotion criteria that result in disparate impact," and other ways as well. *Id.* Merely saying that each class member was injured by Title VII is insufficient to meet the "same injury" requirement. *Id.* at 350. It is likewise insufficient, Justice Scalia writes, merely to assert that each class member suffered "a disparate impact Title VII injury." *Id.* So just how narrowly must "same injury" be defined? *Dukes* leaves that question for case-by-case common law development, guided by the polestar question of whether any given definition of "same injury" would "give[]… cause to believe that all [plaintiffs'] claims can productively be litigated at once." *Id.*

unwarranted because courts and state ethics boards already monitor these potential problems, and have various means to prevent disabling conflicts. Further, this provision only applies to prevent a class action plaintiff from choosing her lawyer; corporations and other entities can use the same counsel repeatedly without interference from the federal government.

The ascertainability provision, meanwhile, would likely destroy small-value consumer cases where class members are unlikely to have documentary proof that they purchased the item in question.[35] Under this provision, even the most intentional and venal actions of consumer-facing companies are insulated from the risk of private litigation if their products are the type for which most consumers will not have a receipt (including, for example, most items one could buy in a drug store or a supermarket). Further, rigorous proof-of-purchase requirements keep compensation away from the truly injured since most people do not retain proof of purchase of inexpensive goods. And, once again, this provision invades the province of the judiciary,[36] and undermines the role of the Advisory Committee on the Civil Rules.[37]

The prohibition against certifying a Rule 23(c)(4) issue class unless the claim from which the issue arises also satisfies Rule 23(b)(3) would effectively abolish issue classes. First, the entire utility of issue classes is in cases where Rule 23(b)(3) is not satisfied, but where determining liability on a class-wide basis – with separate hearings to determine damages, if liability is proven -- would be efficient.[38] Second, circuit courts have come to a consensus on how to interpret Rule (c)(4),[39] prompting the Advisory Committee that extensively studied

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[35] Myriam Gilles, *Class Dismissed: Contemporary Judicial Hostility to Small-Claims Consumer Class Actions*, 59 DEPAUL L. REV. 305 (2010).

[36] A number of circuits have rejected the ascertainability requirement. *See, e.g.,* Mullins v. Direct Digital, LLC, 795 F.3d 654, 657-58 (7th Cir. 2015). Others, particularly the Third Circuit, have court engaged in the appropriate judicial exercise of considering and reconsidering its approach to and articulation of the ascertainability requirement, in a series of thoughtful, well-written decisions. *See, e.g.*, Marcus v. BMW of N. Am., LLC, 687 F.3d 583, 593–94 (3d Cir.2012) (adopting an implicit ascertainability requirement to deny class certification where "class members are impossible to identify without extensive and individualized fact-finding or 'mini-trials'"); Hayes v. Wal–Mart Stores, Inc., 725 F.3d 349, 355 (3d Cir. 2013) (requiring plaintiffs to "offer some reliable and administratively feasible alternative that would permit the court to determine" whether the class was ascertainable); Carrera v. Bayer Corp., 727 F.3d 300, 306-8 (3d Cir. 2013) (rejecting plaintiffs' offer of retailer records and class member affidavits attesting to purchase of diet supplement as sufficient methods of proving ascertainability in this case – but observing that ascertainability only requires the plaintiff to show that class members can be identified") (emphasis added); Grandalski v. Quest Diagnostics Inc., 767 F.3d 175, 184–85 (3d Cir. 2014) (cautioning that predominance and ascertainability inquiries are distinct because "the ascertainability requirement focuses on whether individuals fitting the class definition may be identified without resort to mini-trials, whereas the predominance requirement focuses on whether essential elements of the class's claims can be proven at trial with common, as opposed to individualized, evidence"); Byrd v. Aaron's Inc., 784 F.3d 154, 165 (2015) ("The ascertainability inquiry is narrow.").

[37] The Committee considered and rejected a proposal to adopt an ascertainability requirement to class certification. *See* COMMITTEE ON RULES OF PRACTICE AND PROCEDURE AGENDA BOOK, at 37, 260-61, June 6-7, 2016, available at http://www.uscourts.gov/rules-policies/archives/agenda-books/committee-rules-practice-and-procedure-june-2016.

[38] *See, e.g.,* Butler v. Sears, Roebuck & Co., 727 F.3d 796, 800 (7th Cir. 2013); McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 672 F.3d 482 (7th Cir. 2012); In re Deepwater Horizon, 739 F.3d 790, 804 (5th Cir. 2014).

[39] Elizabeth Chamblee Burch, *Constructing Issue Classes*, 101 VA. L. REV. 1855, 1891-92 (2015).

issue-class cases to conclude that no changes to the Rule were necessary.[40] Here again, the proposed legislation appears as a solution in search of a problem. And here again, that solution is maximalist and harsh, in this instance wiping out efficiency-enhancing tools at the disposal of federal judges.

Other onerous provisions of FICALA -- the discovery stay, the third-party funding disclosure provision, the requirement to prove causation and liability before discovery in a multi-district litigation proceeding, the fee restrictions – are also problematic and one-sided. Space limitations prevent a full discussion of these provisions here, but each—whether considered individually or collectively—would prevent meritorious cases from proceeding, or even be filed in many instances.

C. Furthering Asbestos Claims Transparency ("FACT") Act, H.R. 906

Asbestos trusts were established by federal bankruptcy courts to efficiently process compensation for tens of thousands of Americans suffering from asbestos-related diseases each year. Asbestos industry officials complain, however, that these trusts enable claimants to recover at the expense of both genuinely harmed future claimants and solvent co-defendants. In what may be the most hypocritical legislative campaign in history, the asbestos industry – infamous for concealing the dangers of asbestos exposure to its victims – has championed the FACT Act, which would force victims of asbestos-related diseases to disclose their private health, medical and legal information. Specifically, the bill would amend § 524(g) of the Bankruptcy Code to require that each asbestos trust file a report with the court every quarter that "describes each demand the trust received from, including the name and exposure history of a claimant and the basis for any payment from the trust made to such claimant."

There are so many problems with the FACT Act that it's difficult to know where to begin. First, requiring the continuous disclosure of highly personal information from victims of asbestos-related diseases is, in and of itself, a recurring privacy violation.[41] Second, there is simply no evidence or data to back up the asbestos industry's claims that victims are "double dipping" or filing specious claims. In fact, asbestos trusts were subjected to comprehensive study by the Government Accountability Office, which found no evidence of fraud. Third, the Bankruptcy Courts are fully capable of supervising these trusts to ensure

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[40] COMMITTEE ON RULES OF PRACTICE AND PROCEDURE AGENDA BOOK, at 38, June 6-7, 2016, available at http://www.uscourts.gov/rules-policies/archives/agenda-books/committee-rules-practice-and-procedure-june-2016 ("Issue classes. The Subcommittee has concluded that whatever disagreement among the circuits there may have been on this issue at one time, it has since subsided.").

[41] In a letter to the House, a victim rights group wrote: "The FACT Act would force victims seeking any compensation from a private asbestos trust fund to reveal on a public web site private information including the last four digits of our Social Security numbers, and personal information about our families and kids. This is offensive. The information on this public registry could be used to deny employment, credit, and health, life, and disability insurance. We are also extremely concerned that victims would be more vulnerable to cybercriminals, such as identity thieves, con artists, and other types of predators."

fair and efficient compensation for victims of asbestos exposure; allegations of mismanagement only serve to impugn the integrity of these courts.

The FACT Act is so divorced from fact-based reality that it's worth examining what the asbestos industry is really after in pushing this legislation, which is strongly opposed by labor, veteran, first responder, environmental, and public health groups. And the only reasonable conclusion is that asbestos defendants hope to make the asbestos trust claims process so onerous and invasive for victims that the payments will be delayed or reduced, or victims will be deterred from filing claims entirely. More devious yet, by forcing the creation a public database of information, the FACT Act would provide asbestos defendants unfettered access to settlement information that could potentially be used to offer victims less compensation in future claims.

D. Protecting Access to Care, H.R. 1215; Innocent Party Protection Act ("IPPA"), H.R. 725; Stop Settlement Slush Funds Act, H.R. 732

The House has also passed, along party lines, a broad federal medical malpractice bill capping damages and eliminating various forms of liability; a federal diversity jurisdiction bill making it more difficult to remand improperly removed state cases back to state court; and a bill to prevent federal agencies from requiring defendants to donate money to outside groups as part of settlement agreements. These proposals rely on anecdotes rather than data, invade the judicial sphere, and are poor solutions to non-problems. Most critically, and as with all the proposed legislation discussed in this Part, these bills would place further obstacles in the path of Americans who seek to remedy injustices in open court before a jury of their peers.