TESTIMONY

in support of

ALTERNATIVE DISPUTE RESOLUTION IN EMPLOYMENT

and the

U.S. SUPREME COURT'S DECISION IN CIRCUIT CITY v. ADAMS

and in opposition to

S. 931, "THE ARBITRATION FAIRNESS ACT"

before the

COMMITTEE ON THE JUDICIARY

of the

UNITED STATES SENATE

on behalf of

THE COUNCIL FOR EMPLOYMENT LAW EQUITY

by

Mark A. de Bernardo
Executive Director and President

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I. Statement of Interest

Chairman Leahy, Ranking Minority Member Sessions, and members of the Committee on the Judiciary, thank you for this opportunity to testify *in strong support of* the use of Alternative Dispute Resolution ("ADR") in employment, the use of mediation and arbitration as effective alternatives to litigation, and the U.S. Supreme Court's decision in Circuit City Stores, Inc. v. Adams,[1] and *in strong opposition to* S. 931, "The Arbitration Fairness Act," a bill which would virtually eliminate all ADR-in-employment agreements in this country.

My name is Mark A. de Bernardo, and I am the Executive Director and President of the Council for Employment Law Equity ("CELE"), as well as a Partner at the national employment law firm of Jackson Lewis. Among other activities on the ADR issue, I have authored four *amicus curiae* briefs in support of ADR – including in the Circuit City case – and have drafted ADR policies, conducted audits of ADR programs, testified before Senate and House committees and subcommittees in support of ADR, and advised employers on ADR issues for more than 20 years.

It is my firm and unequivocal belief that the use of ADR is both pro-employer *and pro-employee* and – when implemented appropriately – is a tremendous asset to both employee relations and our system of jurisprudence.

The Council for Employment Law Equity is a non-profit coalition of major employers committed to the highest standards of fair, effective, and appropriate employment practices. The CELE advocates such employment practices to the employer community; before the judicial, legislative, and executive branches of government; and to the public at-large.

Among other activities, the Council for Employment Law Equity has filed *amicus curiae* briefs on numerous occasions to the U.S. Supreme Court, including twice on ADR issues, and to other federal and state courts and the National Labor Relations Board; has filed comments during rule-making to the U.S. Department of Labor, the Department of Health and Human Services, the Office of Management and Budget, and the General Services Administration; and has been active on policy-making issues before the American Bar Association's House of Delegates.

The CELE regularly attempts to positively and constructively influence the consideration of national policy issues of importance to the employer community. ADR is one such issue.

Jackson Lewis also has a long and proud record of support for effective and equitable ADR programs as an alternative to costly, time-consuming, deleterious, and relationship-destructive litigation. Like organized labor, which has long embraced binding arbitration as a foundation of union representation, my law firm is highly supportive of ADR – and its impacts of less litigation and smaller legal fees. This is because it is what is best for many of our clients – *and for their employees* – and because it is the right thing to do.

Jackson Lewis is a national law firm of more than 565 lawyers in 43 offices, *all* of whom are dedicated exclusively to the practice of labor and employment law. No law firm has had as extensive or

[1] 532 U.S. 105 (2001).

prominent a labor practice as has Jackson Lewis over the past 50 years, and it is highly unlikely that any law firm has as much experience or expertise on ADR issues. In addition, Jackson Lewis has the highest concentration of employment lawyers in such major markets as the New York, Washington, and Los Angeles metropolitan areas.

Clearly, the CELE in particular, and the employer community in general, has a *very* strong interest in any initiative, such as S. 931, which would so drastically undermine the use of Alternative Dispute Resolution programs in employment. I am here today to provide real-world context, and to underscore that the reality is that if S. 931 were enacted, arbitration in employment effectively would be abolished in the United States in the non-union sector. Such a draconian action would be *highly* detrimental to employee relations, our judicial system, and our society overall.

ADR is an effective tool for both management and employees. The opponents of arbitration have simply not demonstrated that the drastic, sweeping changes they seek to enact are necessary and/or appropriate. To the contrary, for the average employee, the elimination of arbitration will do more harm than good.

On behalf of the CELE, I can assure you that we are *equally* committed to helping ensure true fairness in our arbitration and ADR systems for employees and employers alike as those who support S. 931 and oppose the Circuit City decision.

II. Summary of Position

The seminal question is: Should employers and employees be able to engage in mediation and mandatory binding arbitration of employment disputes as an alternative to litigation?

The seminal answer is: Absolutely. ADR in employment programs are flourishing, and when implemented appropriately, are decisively in *employees'* best interests… and yet S. 931 would effectively *deny* this option to employers and employees.

It is hard to imagine a more sweeping – and devastating – blow to mandatory binding arbitration than S. 931's language:

> (b) No predispute arbitration agreement shall be valid or enforceable if it requires arbitration of –
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> (1) an employment, consumer, or franchise dispute….[2]

Despite the refusal of some proponents of S. 931 to acknowledge the sweep of their proposal, this language would, in effect, spell the end of *all* employment arbitration in America. That is because *post*-dispute arbitration agreements are extremely rare. Once a legal claim is filed, it is very difficult for the parties to reach agreement on *anything* – even on a matter like arbitration that would benefit them both. In virtually all cases, one side or the other will find it advantageous to force the other into the more expensive realm of litigation.

[2] Section 4(4)(b)(1) of S. 931 – "Validity and enforceability."

As one legal analysis in the employment context recently concluded, without arbitration "[e]mployers will wait out most smaller claims, assuming employees will not be able to pursue them in court."[3] Conversely, plaintiffs with claims large enough to attract an attorney will be unlikely to spare defendants the often exorbitant expense of litigation – and the attendant pressure for a large settlement – once their relationship becomes adversarial. Several other prominent academic commentators in the field fully support this assessment.[4]

S. 931 would effectively *end* arbitration in America in both employment – *and* in other contexts.

ADR – a common, useful, positive, pro-active, timely, effective *and* cost-effective tool for turning employers into *better* employers and giving employees favorable resolution of their workplace problems – would essentially be eliminated from the American employment landscape after more than 80 years of sustained growth and success.[5] *Many* would lose if S. 931 were enacted; *very few* would gain.

Why is preservation of ADR in employment critically important?

The use of Alternative Dispute Resolution in employment is common and increasing as a means of avoiding litigation, addressing *more* employee issues, and resolving these concerns *more* amicably.

Given the costs, delays, and divisiveness of employment litigation, a more sensible and conciliatory option is preferable for employers *and for their employees*. The net result of the use of ADR is:

(1) More employee complaints received *and* resolved;

(2) Employee complaints resolved sooner and with less tension;

(3) Less turnover/more likely and more favorable preservation of employment relationships;

(4) Improved morale;

(5) More effective communication, and enhanced constructive input by employees into their companies; and

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[3] Theodore J. St. Antoine, *Mandatory Arbitration: Why It's Better Than It Looks*, 41 U. MICH. J.L. REFORM 783, 790 (2008).

[4] *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).

[5] The Federal Arbitration Act (Chapter 1, Title 9, United States Code) was enacted by Congress in 1925 to promote arbitration as an alternative to litigation, and to "avoid the expense and delay of litigation" S. Rep. No. 68-536, at 3 (1924).

(6) *Better* workplaces.

Appropriate ADR-in-employment programs – as they are *currently* in use – are fair, do have the requisite safeguards, and are not commonly subject to abuse.

However, *if* there are reforms which are necessary and appropriate, certainly they should be considered, and the CELE would support and welcome such reforms.

For example, an administrative approach to ensure fair and equitable application of dispute-resolution mechanisms would be appropriate. One of the hallmarks of the CELE – and of my law firm, Jackson Lewis, and many other management-side firms – is that we advise employers on the "best practices" in employment law, including on ADR.

Do it right, or not at all is our common creed. We advise management, train managers and supervisors, put on seminars, and draft policies that *are* fair, will invite manager and employee support (after all, ADR programs apply to managers as well as to rank-and-file employees – in fact it is *more* common that ADR programs apply to management, including senior management, through provisions in employment agreements), are credible, and therefore will be more fully utilized by employees, and will withstand legal challenge. We *want* employers to be fair. In the overwhelming majority of cases, they are… as they should be… and as we advise them to be.

In fact, those employers who embrace ADR programs are amongst the most sophisticated, far-sighted, and fair-minded employers in the country – they are committed to saving jobs, resolving conflicts, and ensuring better working environments and higher employee morale.

Moreover, they are consistently succeeding in this regard. Employees at companies who have ADR programs overwhelmingly support these policies and programs, as do employees overall.[6]

We advise employers to use best practices, including the use of arbitrators from the American Arbitration Association ("AAA") and/or the Judicial Arbitration and Mediation Services ("JAMS"). In fact, one appropriate approach for Congress to take on arbitration would be to simply codify the AAA Employment Due Process Protocol and/or the JAMS Minimum Standards of Procedural Fairness so as to ensure that those who choose to engage in arbitration do so to the highest standards of judicial and administrative fairness.[7]

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[6] 83 percent of employees favor arbitration. *See* Princeton Survey Research Associates, *Worker Representation and Participation Survey Focus Group Report*, Princeton, NJ (April 1994).

[7] Another approach worth considering is to ensure that the *costs* of arbitration are assumed by the employer – in whole or in large part, with some safeguards to avoid abuse of process. AAA's protocols limit the employee's financial contribution in arbitration to a maximum of $150; JAMS' procedures call for the employee to pay only an initial filing fee. The employer pays *all* other arbitration costs. In many programs, the employer pays *all* arbitration costs – period. Many of our clients even offer to pay the reasonable attorneys' fees of the individual should they wish to be represented by an attorney (and agree to forego their own representation by an attorney unless the individual first chooses legal representation).

What is *not* needed is the wholesale and retroactive dismantling of common, effective, and widespread ADR programs that work… and work well. The cost to employees and employers, and to the interests of justice and sound employee relations, would be enormous *and* extremely destructive.

III. The Circuit City Decision

This hearing is entitled: "Has the Supreme Court Been Misinterpreting Laws Designed to Protect Workers from Discrimination?"

Whatever the answer is to this question regarding Title VII and other anti-discrimination laws – and quite possibly that answer is "no" since overall there generally are at least as many U.S. Supreme Court decisions against employers as for them, and perhaps rightfully so given that the Court normally considers matters of controversy in which there is a significant split in the lower courts – the answer in regards to arbitration in employment most certainly is "no" – the U.S. Supreme Court has *not* misinterpreted the laws designed to protect workers from discrimination.

First of all, the Congressional purpose of the Federal Arbitration Act ("FAA") is *not* to protect workers from discrimination – it is to elevate arbitration agreements to the same status as "other contracts," [8] and to promote arbitration and discourage litigation[9] (both of which, in fact, the FAA *has* accomplished).

Has the FAA had a detrimental impact on the enforcement of anti-discrimination laws?

It is hard to conclude that a process that allows as many as 20 times more employee complaints to be addressed and resolved, provides an early-warning system to employers regarding conduct or policies in the workplace that need to be corrected, and improves employee morale and fosters greater workforce stability (i.e., fewer terminations, less voluntary attrition, less confrontation) somehow has a discriminatory impact on employees.

Second, assuming the question *is* valid vis-à-vis arbitration in employment, a more appropriate question would be: Has the U.S. Supreme Court over many years, and all Circuit Courts of Appeal (including the Ninth Circuit once reversed and remanded), and scores of U.S. District Courts, numerous federal agencies, and Congress itself in several enactments *all* relating to arbitration in employment over more than 80 years been consistently misinterpreting laws designed to protect workers from discrimination?

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[8] "By enacting Section 2, Congress sought to place arbitration agreements 'upon the same footing as other contracts, where [they] belong.' H.R. Rep. No. 96, 68th Cong., 1st Sess., 1 (1924)." Congressional Research Service Report for Congress *The Federal Arbitration Act: Background and Recent Developments*, August 15, 2003, page 2.

[9] "While Congress' primary motivation for drafting the FAA reflected its interest in recognizing arbitration agreements as being just as valid as other contract provisions, it also understood the potential benefits that would be provided by enactment of the FAA: It is practically appropriate that the action should be taken at this time when there is so much agitation against the costliness and delays of litigation. These matters can be largely eliminated by agreements for arbitration, if arbitration agreements are made valid and enforceable. H.R. Rep. No. 96, 68th Cong., 1st Sess., 1 (1924) at 2." Congressional Research Service Report for Congress *The Federal Arbitration Act: Background and Recent Developments*, August 15, 2003, page 3.

I don't think so. Arbitration in employment has a *long* history of acceptance, encouragement, adoption, and support from all three branches of the federal government. It works, and it works well. It is sound national policy. The Court decision in Circuit City was simply one of the latest manifestations of this principle.

What has changed to justify gutting 80-plus years of a widely accepted and endorsed national policy favoring resolution of employment disputes by mediation and arbitration – to supplant it with the long, knockdown, drag-out wars of attrition in the courtroom? How can binding arbitration, *pre-dispute* binding arbitration, so sacrosanct to the labor movement, be so cordially embraced in a union setting, and so indiscriminately jilted in the non-union sector? If S. 931 were enacted and/or Circuit City were legislatively "reversed," what policy would justify the hundreds of thousands of employees covered by arbitration-in-employment agreements in the federal public sector (discussed later in this testimony), while their private-sector counterparts are forced to dismantle such agreements (and what of the hypocrisy of such a double standard)?

We cannot afford *this* dramatic a reversal in national policy. Circuit City was narrowly – and correctly – decided, consistent with long-standing and widespread precedent, and consistent with Congressional intent.

In Circuit City, the U.S. Supreme Court built on several of its precedents, particularly Gilmer v. Interstate/Johnson Lane Corp.,[10] a 1991 decision that an agreement to arbitrate individual employment disputes is enforceable as to federal statutory discrimination claims.

In a 7-2 decision, the U.S. Supreme Court concluded that agreements to arbitrate Age Discrimination in Employment Act ("ADEA") claims are as enforceable under the Federal Arbitration Act as any other arbitration agreement. The Court said, "[h]aving made the bargain to arbitrate, the party should be held to it."[11]

The FAA exempts "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce" from the FAA's mandate.[12]

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[10] 500 U.S. 20 (1991).

[11] *Id.* at 26 (quoting Mitsubishi Motors Corp. v. Soler Chrysler/Plymouth, Inc., 473 U.S. 614 (1985)). The Court explained that "the burden is on Gilmer [as the party opposing arbitration] to show that Congress intended to preclude a waiver of a judicial forum for ADEA claims. If such an intention exists, it will be discoverable in the text of the ADEA, its legislative history, or an 'inherent conflict' between arbitration and the ADEA's underlying purposes." The Court found no such intention.

[12] 9 U.S.C. §1. In Circuit City, the U.S Supreme Court held that the FAA is available for enforcement of most arbitration agreements in the workplace and that the Act's exclusion is limited to interstate transportation workers. Thus, when Adams applied for employment, he signed an agreement to arbitrate any claims arising out of his employment and was hired. After Adams was discharged, he brought suit in state court claiming discrimination under the California Fair Employment and Housing Act and state tort claims. In federal court, Circuit City filed an FAA §4 Motion to Compel Arbitration and stay the state court proceedings. The United States District Court granted the petition and ordered Adams to arbitrate. The Ninth Circuit – the Circuit most commonly reversed by the U.S. Supreme Court *by a very wide margin* – stood alone among all Circuits in finding that the FAA was inapplicable and reversed for want of jurisdiction, based upon a broad reading of the exclusion contained in FAA §1: "[N]othing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."

The U.S. Supreme Court in Gilmer did *not* resolve the question of how broadly or narrowly this exception should be construed, since Gilmer's arbitration agreement was in a securities industry registration form rather than a "contract of employment."[13] Accordingly, after Gilmer, it technically was still an open issue as to whether an arbitration agreement in an employment contract could be enforced under the FAA.

All but one of the federal Circuit Courts of Appeal construed this FAA exemption narrowly, limiting it to contracts of employment of workers who actually move goods in interstate commerce. In cases both before and after Gilmer, many courts ruled that the FAA requires enforcement of arbitration agreements in any employment contract except for those covering workers who transport goods across state lines – in other words, workers in the transportation industry. The Ninth Circuit,[14] however, took the opposite, broad view of the exemption, ruling that the FAA can never be used to enforce an arbitration agreement in *any* employment contract.[15]

In 2001, the Court reversed the Ninth Circuit in Circuit City, holding that the broad view of the FAA exemption to all employment contracts was contrary to Congressional intent, the language of the FAA, national policy, and established practice and policy.[16]

Applying established rules of statutory construction, the Court ruled that the way Congress had phrased the FAA exemption gave it a narrow scope, covering only the employment contracts of

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Subsequently, the U.S. Supreme Court reversed the Ninth Circuit once again, holding that the exclusion contained in Section 1 must be read narrowly, with the result that the exclusion is limited to employment contracts of individuals who are engaged in interstate transportation of goods in the same way that seamen and railroad employees are so engaged. Adams, a sales clerk in a store, was not so employed, thus Circuit City (and the vast majority of employers) are entitled to rely upon the FAA to enforce agreements to arbitrate disputes arising out of employment. The Court noted:

> [F]or parties to employment contracts… there are real benefits to the enforcement of arbitration provisions. We have been clear in rejecting the supposition that the advantages of the arbitration process somehow disappear when transferred to the employment context. Arbitration agreements allow parties to avoid the costs of litigation, a benefit that may be of particular importance in employment litigation, which often involves smaller sums of money than disputes concerning commercial contracts… [If we were to adopt the position advanced by Adams, it] would call into doubt the efficacy of alternative dispute resolution procedures adopted by many of the nation's employers, in the process undermining the FAA's proarbitration purposes and breeding litigation from a statute that seeks to avoid it. The Court has been quite specific in holding that arbitration agreements can be enforced under the FAA without contravening the policies of Congressional enactments giving employees specific protection against discrimination prohibited by federal law. 532 U.S. at 122.

[13] *Supra, note 8*, at 25, n.2.

[14] The Ninth Circuit hears appeals from federal trial courts in Alaska, Arizona, California, Guam, Hawaii, Idaho, Montana, Nevada, the Northern Mariana Islands, Oregon, and Washington.

[15] Craft v. Campbell Soup Co., 177 F.3d 1083 (9th Cir. 1998), *amended by* 79 Fair Empl. Prac. Cas. (BNA) 1508 (9th Cir. 1999) (*per curiam*). At the same time, the California Supreme Court rejected the Ninth Circuit's approach, choosing instead to follow the majority rule. Armendariz v. Foundation Health Psychcare Services, Inc., 6 P.3d 669 (Cal. 2000).

[16] *Supra, note 1*.

transportation workers rather than all employment contracts.[17] Under the established rules of interpreting statutory language, where a statute contains a list of items followed by a catchall phrase, the catchall phrase is understood to mean, "or things like the things on the list." If the catchall phrase were read to mean "all contracts of employment," stated Justice Kennedy, writing for the majority, there would have been no need for Congress to include a reference to specific types of workers. Accordingly, the Court's opinion concludes, "Section 1 exempts from the FAA only contacts of employment of transportation workers."[18]

Gilmer, reinforced by Circuit City, lay to rest the general notion that arbitration is not an adequate forum for resolving questions of federal statutory rights. These decisions leave open the possibility, however, that a particular arbitration agreement might not be enforceable.

For example, citing the FAA, the Court in Gilmer observed that an arbitration agreement is only as enforceable as any other contract – meaning that is can be challenged on the same grounds as other contracts. While finding that arbitration generally provides an adequate forum for resolving statutory claims, the Court also noted the possibility that a particular arrangement might not do so, stating that "claim[s of] procedural inadequacies… [and] unequal bargaining power [are] best left for resolution in specific cases."[19]

Thus, the very concern expressed by some proponents of S. 931, and its House counterpart H.R. 1020 – that the parties to ADR agreements in employment have unequal bargaining power – *already* has been recognized and addressed by the U.S. Supreme Court – and *remains* a valid and viable cause of action by plaintiff employees.[20]

Therefore, arbitration agreements, like all other contracts, *are* subject to legal challenge regarding their enforceability based on such legal principles of contract law as whether the agreement was knowingly and willingly entered into, understood, and/or subject to undue disparate bargaining power. Plaintiffs can – *and do* – make these claims. That door already is open, and employees – as well as the plaintiffs' bar – already go through it *without* the "benefit" of Congress throwing out 85 years of precedent and hundreds of thousands of valid, appropriate, and accepted arbitration agreements.

Moreover, what of those employees who *like* their ADR agreements, who see how fair they are and how effective they can be, and who recognize that it is not in their interests to have nuisance lawsuits filed against their employer or protracted litigation economically hemorrhaging the company they own stock in, and rely on for bonuses and/or profit participation? Their rights would be trampled,

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[17] The U.S. Supreme Court held, in Circuit City, that the broad Ninth Circuit reading of the FAA §1 language runs into "an insurmountable textual obstacle" that: "any other class of workers engaged in… commerce" constitute a residual phrase, following in the same sentence, explicit reference to "seamen" and "railroad employees." The wording thus calls for application of the maxim *ejusdem generis*, under which the residual clause should be read to give effect to the terms "seamen" and "railroad employees," and should be controlled and defined by reference to those terms. See, e.g., Norfolk & Western R. Co. v. Train Dispatchers, 499 U.S. 117, 129.

[18] *Supra, note 1*, at 119.

[19] *Supra*, *note 8*, at 33.

[20] *Id.*

their knowing and voluntary contractual agreement would be invalidated, they would have "big brother" in Washington dramatically altering the employment landscape that they may have benefitted from and supported for their 10, 20, even 30 years of employment with a company that has an ADR policy.

The fact that they could voluntarily enter into *post*-dispute arbitration is of little consequence if others would not, and the process that had worked so well so long was invalidated. The costs of litigation to their employer could dramatically escalate – and for what? The workplace very likely would be no better – in fact, most likely would be worse because so many employees would be disenfranchised from the process and so many employee issues would go unaddressed and unresolved.

Arbitration in employment needs to be protected and preserved.

IV. Pre-Dispute Arbitration Agreements

Some opponents of ADR in employment claim that they do not want to prohibit arbitration of employment disputes, they simply want to prohibit it from being mandatory and pre-dispute. In other words, employees (or ex-employees) could voluntarily enter into an agreement to arbitrate after a legal claim already has been filed.

This is a canard.

There would be very, *very* few such instances where this would occur – just as there are very, *very* few instances in which it occurs now.[21]

Why? Because once a legal complaint has been filed, it is tantamount to a professional divorce – the employee does *not* want reinstatement (regardless of what his or her plaintiffs' lawyer claims), and the employer does *not* want him or her back. The filing of a lawsuit – or a charge – is in effect a declaration of war. At that point, the dispute is about money. Will the plaintiff get money, and how much?

That is why, as discussed, litigation is a job destroyer, while arbitration is a job preserver. Arbitration, with early intervention, less confrontation, faster and more amicable proceedings, and an orientation toward a favorable resolution *saves* jobs.

Once an individual has found a plaintiffs' lawyer, that lawyer is convinced that a sizeable settlement or damages can be extracted on an expedited basis, a complaint has been drafted and filed, and the individual is reconciled to doing battle with his or her employer, he or she is *not* about to reverse course and retreat to an arbitration forum where the plaintiffs' attorney's role may be diminished and the possibility of a runaway jury verdict is nil.

Post-dispute arbitration agreements do occur, but they are relatively rare, and if Circuit City is legislatively reversed and/or S. 931 is enacted, the practice of arbitration in employment will be effectively vanquished.

[21] *Supra, note 3.*

V. Summary of Advantages of ADR for Employees

The most effective – and utilized – Alternative Dispute Resolution programs are the ones in which employees "buy into" the program and recognize the distinct advantages to the individual. The advantages of ADR – for employees – include:

(1) **A faster resolution of problems** – Justice delayed *is* justice denied, and employment-related litigation now takes, on average, more than two years to resolve;[22]

(2) **A simpler, more focused, more confidential, and more dignified process** – Modern litigation is an extremely adversarial process. In employment disputes, the ideal solution is for the employee and employer to resolve their dispute so that the employee may remain as a productive member of the employer's organization. That concern is even more critical in today's economy with such a high rate of unemployment. Litigation is war, and who wants to go to war, particularly with the outcome so uncertain?;

(3) **Less disruption to career and personal life** – One of the advantages of ADR is the vastly increased chances for amicable resolution of an employment problem – the goal is to keep the employee in his or her job, and to do so in a way that the employee is happier and more productive. As mentioned earlier, litigation is a destroyer of the employment relationship; ADR is a preserver of the employment relationship;

(4) **Peace of mind** – ADR helps employers address and resolve employee issues and concerns – *before* they heat up and "come to a boil." With earlier intervention and correction, small problems do not build into big problems, and there is less psychological "wear and tear " all the way around;

(5) **The same range of remedies and higher awards** – ADR provides the very same remedies to an aggrieved employee as litigation, and monetary damages are not only awarded to the employee faster than in litigation, they are awarded on just as broad a basis and at higher levels than in litigation.[23] No financial remedy is waived by participation in the ADR process;

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[22] For example, the average time to resolve civil cases in *state* courts was 24.2 months in 2001, according to the U.S. Department of Justice, *Civil Trial Cases and Verdicts in Large Counties, 2001* at 8, available at http://www.ojp.usdoj.gov/bjs/abstract/ctcvlc01.htm. The backlog and delay in the *federal* courts for civil cases is even greater. In fiscal year 2007 alone, more than 265,000 civil cases were pending in U.S. District Courts, continuing the trend upward. U.S. Courts, 2007 Judicial Facts and Figures, Table 4.1, *U.S. District Courts. Civil Cases Filed, Terminated, and Pending*, available at http://www.uscourts.gov/judicialfactsfigures/2007/Table401.pdf.

[23] The median award for employees who prevail in arbitration and in court is very similar – $63,120 for arbitrations and $68,737 for trials. *See* Theodore Eisenberg and Elizabeth Hill, *Employment Arbitration and Litigation: An Empirical Comparison*, 2003 Pub. H. & Legal Theory Res. Paper Series 1, 14 available at http://papers.ssrn.com/co13/papers.crm?abstract_id=389780. In fact, given that in all but the relatively few *pro se* cases, the employee must subtract attorneys' fees

(6) **The same decision-making process** – Formal arbitration under an ADR program has essentially the same decision-making process as traditional litigation. The arbitrator is neutral, trained, and experienced, unaffiliated with either party, and acts very much like a judge.[24] Moreover, the decisions of the arbitrator are final and binding on *both* parties;

(7) **A far greater chance of having claims heard** – Employees who do not have the type of very large claims that can attract a plaintiffs' lawyer are often effectively barred from the courtroom, and forced to abandon their cases. A survey of the plaintiffs' bar found that they agree to provide representation to only five percent of the individuals who seek their help.[25] In addition, plaintiffs' attorneys require a minimum of $60,000 provable damages, commonly request a retainer up front, and typically require a payment of a contingency fee of between 33 and 40 percent.[26] Therefore, the door is slammed shut on 95 percent of potential plaintiffs in litigation.

In arbitration, that number is virtually zero. In fact, the National Workrights Institute found that in those arbitration cases with a stated demand, the majority (54 percent) were for a stated demand that was less than $75,000. More than a quarter involved demands for less than $25,000.[27] The bottom line is that more than twice as many employees can access the arbitration system than can access the court system because of the dollar threshold of their claims alone.

(8) **A better chance of prevailing** – Employees have a 63-percent chance of prevailing in employment arbitration, but only a 43-percent chance of prevailing in employment litigation.[28] Thus, employees have nearly a 50-percent *better* chance in arbitration than in court. This includes employment cases dismissed on Motions for Summary Judgment. Even excluding those cases dismissed, employees are more likely to prevail in arbitration than trials that are litigated to

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(capped at one-third in many jurisdictions) and costs from his or her award in litigation, *most* employees in employment arbitrations actually fare *much* better financially than in court.

[24] In fact, based on my legal practice as an employment lawyer for more than 30 years and experience as a senior Partner at a major law firm, I have absolutely no doubt that arbitrators are, in general, much *more* consistently and predictably neutral and balanced than judges are. Is there a difference between a Reagan-appointed judge and a Clinton-appointed judge? Yes, there is. The range of judicial philosophies is even greater at the state level. Going to court is the real crap shoot; going to arbitration is much more likely to achieve a fair and unbiased resolution.

[25] Elizabeth Hill, *Due Process at Low Cost: An Empirical Study of Employment Arbitration under the Auspices of the American Arbitration Association*, 18 OHIO ST. J. ON DISP. RESOL. 777 (2003). *See also Employment Arbitration: What Does the Data Show?* The National Workrights Institute, available at http://www.workrights.org/current/cd-arbitration.html.

[26] *Id.*

[27] Lewis L. Maltby, *Arbitrating Employment Disputes: The Promise and the Peril in Arbitration and Employment Disputes*, 530. (Daniel P. O'Meara ed., 2005).

[28] *Supra, note 20.*

decision – 63-to-57 percent.[29] Furthermore, nearly one-quarter (24.9 percent) of the employment cases arbitrated by the American Arbitration Association would not survive Motions for Summary Judgment, based on those arbitrations which do go to trial and are dismissed.[30] Thus, if you are an employee with a grievance, you have a better chance of winning,[31] virtually no chance of being dismissed,[32] and a higher median award[33] if you go to binding arbitration than litigation – and, in most cases, you do not have to split that award with a plaintiffs' lawyer; and

(9) **More problems raised and resolved** – An effective ADR program significantly *increases* the number of employee complaints, and that is better for everyone. More problems raised, addressed, and resolved – quickly, efficiently, and cost-effectively – means better employer-employee relations, higher morale, higher employee retention, and a more productive and enthusiastic workforce.

VI. Summary of Advantages of ADR Programs Overall

Alternative Dispute Resolution programs in employment have multiple, substantial benefits to *both* employers and employees:

- **Issues are resolved sooner** – The delays of litigation – motions, discovery, appeals, and an overall backlogged and cumbersome legal process – are avoided in favor of a short, simple, streamlined process which yields final determinations with a quick turnaround;

- **More grievances are addressed** – Given the option of an easily accessible, less confrontational, less time-consuming, and relatively cost-free means of raising

[29] *Id.*

[30] *Id.*

[31] In fact, beyond the low success rate of plaintiffs in court decisions, *most* plaintiffs' claims are dismissed on motions. One study of more than 3,400 employment discrimination cases in federal courts in which a definitive judgment was reached found that 60 percent were dispensed of by pre-trial motions, with employers the victors in 98 percent of those decisions. Lewis L. Maltby, *Employment Arbitration: Is It Really Second-Class Justice?*, Dispute Resolution Magazine, 23-24 (Fall 1999).

[32] *Id.* Typically, employers win on the motions practice in litigation, an avenue which is not open in arbitration. In fact, beyond the low success rate of plaintiffs in court decisions, *most* plaintiffs' claims are dismissed on motions. One study of more than 3,400 employment discrimination cases in federal courts in which a definitive judgment was reached found that 60 percent were dispensed of by pre-trial motions, with employers the victors in 98 percent of those decisions. Lewis L. Maltby, *Employment Arbitration: Is It Really Second-Class Justice?*, Dispute Resolution Magazine, 23-24 (Fall 1999). One *very* current example is that, an arbitrator – who is a former judge – told one of my colleagues *last week* here in D.C. that if he were still on the bench, he would have issued a Summary Judgment, but was prevented from doing so because we were in arbitration.

[33] This is further confirmed by research by the National Workrights Institute which found that, consistent with the Eisenberg study *supra, note 20*, employment arbitration provides *higher* median awards than employment litigation – $100,000 for arbitration; $95,554 for litigation. *Employment Arbitration: What Does the Data Show?* The National Workrights Institute, available at http://www.workrights.org/current/cd_arbitration.html.

workplace grievances, employees are *more* likely to raise issues at a company with an ADR program than they would in litigation – if they even *could* (the overwhelming majority of employment issues addressed in arbitration would *never* be litigated because of the relative inaccessibility of the legal process, the reluctance of plaintiffs' attorneys[34] to take on cases for which only modest recovery would be "best-case" foreseeable, courts' procedural rules disqualifying matters of relatively minor controversy, and/or employers' high success rate for prevailing on Motions to Dismiss and Motions for Summary Judgment;

- **Inappropriate workplace practices are more likely to be corrected** – With issue determinations being made by credible and objective third parties who are trained in arbitration, knowledgeable about the legal process, and carefully selected because of their expertise in the issues and their lack of bias, intervention into – and correction of – employment practices and/or manager misconduct which may be inappropriate is achieved more frequently, effectively, and expeditiously;

- **ADR is less disruptive and distractive than litigation** – Since issues get resolved in a timely and decisive manner,[35] with a minimum commitment of time and resources, and ADR process is infinitely *less* disruptive and distracting vis-à-vis the more formal, costly, protracted, and combative legal process in our courts;

- **ADR is more cost-effective than litigation** – The most effective Alternative Dispute Resolution programs are mandatory and are binding on all parties. No long, drawn-out legal battles. No litigation. No appeals. No excessive litigation costs and legal fees.[36] By achieving a fair, final, and early resolution, ADR is cost-effective; and

- **ADR is adjudicated by qualified and objective professionals** – Arbitrators certified by the American Arbitration Association ("AAA") and the Judicial

[34] *Supra, note 26.*

[35] One study found that arbitrations lasted an average of 116 days, with a median of 104 days. Kirk D. Jensen, *Summaries of Empirical Studies and Survey Regarding How Individuals Fare in Arbitration*, 60 CONSUMER FIN. L. Q. REP. 631 (2006), citing California Dispute Resolution Institute, *Consumer and Employment Arbitration in California: A Review of Website Posted Data Pursuant to Section 1281.96 of the Code of Civil Procedure* (August 2004), available at http://www.mediate.com/cdril/cdri_print_Aug_6.pdf. By contrast, the lifespan of an average employment case, according to the Federal Judiciary Center, is almost two years (679.5 days) from the time of filing until the date of resolution. Evan J. Spelfogel, *Pre-Dispute ADR Agreements Can Protect Rights of Parties and Reduce Burden on Judicial System*, 71 New York State Bar Journal No. 7, 22 (1999).

[36] Another study found that civil cases lasted between two-and-a-half and eight years to resolve depending on the nature of the case and the jurisdiction involved. *Evaluating and Using Employer Instituted Arbitration Rules and Agreements in Employment Discrimination and Civil Rights Actions in Federal and State Courts* (ADLI-ABA Course of Study, April 28-30) 875, 894 (1994). The backlog in the federal courts is significant – over 23,000 cases had been pending in U.S. District Courts for two-to-three years in 2007, and over 62,000 more had been pending between one and two years, and this does not, of course, include appeals and remands. *U.S. District Courts: Civil Cases Pending by Length of Time Pending* tbl.4.11, available at http://www.uscourts.gov/judicialfactsfigures/2006/Table 411.pdf.

> Arbitration & Mediation Services ("JAMS") are highly qualified professionals experienced in the legal process, with an established record of objectivity, and subject-matter expertise. They are reliable, credible, committed, and readily available through a highly developed and highly respected existing network. These organizations have the capacity to create, and experience in creating, specialized panels to address specific forms of arbitration – in this case, neutral arbitrators with specific knowledge and/or expertise in employment issues.

VII. Elements of an Effective ADR Program

The CELE, and the employer community as a whole, trust that Congress will recognize what we believe to be undeniable: Arbitration is a vital and necessary component of our civil-justice system.

If S. 931 is enacted, that civil-justice system will be catapulted into chaos: hundreds of thousands of arbitrations a year will be replaced by tens of thousands of new court cases;[37] *any* redress for the vast majority of individuals currently using the arbitration process will be rendered impossible as their claims will be abandoned and left homeless in the new judicial order;[38] the already overburdened and significantly backlogged court system will be swamped by a tidal wave of new cases; and millions of employees (and consumers) and thousands of companies now subject to contracts they voluntary entered into that call for mediation and arbitration of disputes will have those contracts *retroactively* voided – *a legal nightmare*.

To the extent that there are any valid concerns about ADR and the use of mandatory binding arbitration to address and resolve employment (and other) disputes, and should these concerns warrant Congress taking action, the most appropriate course of legislative action would be – as discussed earlier – to require procedural reforms, *not* to recklessly dictate that "predispute arbitration" will not be "valid or enforceable" (as stated in S. 931).

One option is to look at what CELE, and many other informed professionals in the field, commonly consider the elements of an effective ADR program, and incorporate these concepts, as appropriate, into a bill as ADR "safeguards."

The following are common components of model ADR-in-employment programs. With ADR – like most employment policies – "one size" does *not* fit all. Employers typically and appropriately tailor their ADR programs to their own company's needs, priorities, and employee-relations culture.

Nonetheless, some common elements of successful ADR-in-employment programs are:

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[37] In 2002, the American Arbitration Association *alone* handled more than 200,000 arbitrations. Deborah R. Hensler, *Our Courts, Ourselves: How the Alternative Dispute Resolution Movement is Re-Shaping Our Legal System*, 108 PENN. ST. L. REV. 165, 167 n. 11 (2003) (citing data from 2002). If S. 931 becomes law, the overwhelming majority of arbitrations currently being conducted in the United States would not occur. Many of these would be foisted on our court system. Just the AAA arbitrations – 200,000 – represent nearly 80 percent of the 259,000 cases filed in U.S. District Courts in 2006. If only five percent of these AAA cases were litigated, that's 10,000 *more* civil court cases (and 190,000 individuals left out in the cold with no legal recourse).

[38] *Supra, note 24.*

(1) **An "open-door" policy** for employees to bring concerns to their supervisors and managers;

(2) **Designation of a company executive** to serve as a confidential advisor – or "ombudsman" – should employees not want to bring a concern to their direct supervisors or managers. Ideally, the designated advisor should have some background and training in human resources and/or dispute resolution, should be available at a designated "employee hotline" telephone number, and should have credibility with employees as a fair and reasonable person;

(3) **Informal mediations** should be used to address concerns *before* they grow into problems;

(4) **Peer-review panels** also can be effective because the participation of co-workers in the process adds credibility to the evaluation and suggested resolution of employee problems;

(5) **Management-review boards** sometimes serve as a "check-and-balance" to ensure that employees are being treated fairly and consistently;

(6) **Binding arbitration** is the seminal component of a successful ADR program. The parties avoid litigation – with its inaccessibility, delays, costs, divisiveness, and unpredictability – by achieving internal resolution by a neutral arbitrator which is *binding* on both parties;

(7) **Legal assistance** sometimes is offered by employers to their employees as well. We recommend that employers consider paying for the employee's legal representation – up to, for example, a $2,500 limit per employee per year;

(8) **The use of qualified arbitrators** is vital. Typically, ADR programs use independent, professional arbitrators from the American Arbitration Association and/or the Judicial Arbitration & Mediation Services;

(9) **The maintenance of employee confidentiality**, when requested by the employee, is critically important. Employees have to trust the ADR program to use it, and company misuse undermines the program's credibility, decreases its use, and thereby helps defeat its purpose; and

(10) **A "no-retaliation" policy** also is helpful in this regard. Employees must know and expect that their forwarding of a complaint will *not* result in retaliation, and that managers who do retaliate will be disciplined.

These are the types of safeguards which the CELE – and Jackson Lewis – recommend to employers to enhance their ADR programs and to ensure employee acceptance and cooperation.

What would be *most* appropriate would be legislation that would provide incentives (such as tax credits) to employers to voluntarily implement ADR programs with the type of safeguards and "best practices" listed above.

What would be *least* appropriate would be legislation, such as S. 931, that would impose a death penalty on ADR as an employment practice.

VIII. Existing Protections For Employees In Arbitration

Under Section 2 of the Federal Arbitration Act, federal and state courts already provide effective, *case-by-case review* of individual arbitration agreements to ensure that they are fair to employees.

Courts routinely exercise their existing authority to invalidate arbitration provisions that are unfair to employees.[39]

The courts have stepped in aggressively to ensure that arbitration provisions do not impose high costs or burdensome travel, limit attorneys' fees or other statutory rights and remedies to which an individual is entitled, or create a biased process.

As described earlier, most employers have responsibly crafted ADR programs that offer benefits far beyond the baseline standards required by the courts. However, in all cases, existing law ensures that employees will be afforded due process and fairness in arbitrating their claims.

IX. Who *Loses* If S. 931 Is Enacted

If the "Arbitration Fairness Act of 2009" were enacted, the sun would still come up. However, for *millions* of Americans, their lives would be worse:

(1) **Consumers** – Consumers would be less likely to get *their* grievances addressed once they are denied the option of arbitration because, as discussed earlier, *most* plaintiffs' attorneys are unlikely to accept litigation with only a modest expectation of damages;[40]

(2) **Employees** – No mediation or arbitration means *less* accessibility to the legal process, *fewer* issues being addressed, *less* likelihood of meaningful redress/correction/improvement, *more* likelihood of the employment relationship being terminated, *less* employee communication/input into workplace policies and practices, *more* confrontations if they do pursue their claims in litigation; and – bottom line: *worse* workplaces. In addition, because the overall transaction costs in arbitration are far lower than in litigation, employers with ADR programs are currently able to pass those savings along in the form of better wages and benefits, job growth or retention, and/or investment in the company's future. Those benefits would be lost or diminished without arbitration;

(3) **Employers** – More cost, more litigation, more confrontation, less timely identification of workplace problems, less opportunity for early intervention,

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[39] *See, e.g., Alexander v. Anthony Int'l, L.P.*, 341 F.3d 256 (3d Cir. 2003); *Armendariz v. Foundation Health Psychcare Servs.*, 6 P. 3d 669 (Cal. 2000); *Hooters of America, Inc. v. Phillips*, 173 F.3d 933 (4th Cir. 1999).

[40] *Supra, note 25*.

more turnover, worse employee relations, destruction of ADR systems that have been long-standing and well-accepted – *and that work well*. The costs – both in human and financial resources – would be enormous;

(4) **The Court System** – More litigation, more backlog, more delays, less resolution, dismemberment of an alternative legal process that promotes timely and less acrimonious resolution and reduces the ever-growing pressure on our judicial system. If arbitration were effectively banned, *most* of those claims would never be addressed, but *many* would shift to the court system – a burden which no one, save the plaintiffs' bar, could afford or would appreciate;

(5) **Deserving Plaintiffs** – Nothing prevents an individual from pursuing his or her claims of employment discrimination with the Equal Employment Opportunity Commission, comparable state or local agencies, or in court. Even when subject to mandatory binding arbitration agreements, that right cannot be waived before *or* after the ADR process has been exhausted. However, without the possibility of mediation and arbitration, the courts would get further clogged, the delays would increase, the period from time of filing to time of decision would be lengthened, and the entire process would work less efficiently, less effectively, and less fairly – even for the most deserving plaintiffs;

(6) **Taxpayers** – Substantially more of a burden on our court system would require more judges, more staff, more facilities, more cost. Who would bear the cost? We would; and

(7) **The Interests of Justice** – As mentioned earlier, the maxim "justice delayed is justice denied" would be underscored. No quick and painless resolutions in ADR programs. No resolution at all in most cases. Resolution in a much longer time period through litigation, no matter how deserving, and more delays, confrontation, disruption of the employment relationship, uncertainty, and investment of time and resources. Is the destruction of ADR *really* in employees' interests? No, it is not.

X. Who *Wins* If S. 931 Is Enacted?

The obvious answer is: the plaintiffs' bar.

The American Association for Justice, formerly the American Trial Lawyers Association, *hates* arbitration – because it involves less litigation, less confrontation, lesser likelihood of runaway juries, and – *most of all* – lower attorneys' fees.

So the "trial lawyers" (plaintiffs' lawyers) would win if S. 931 became law – less harmony in the workplace, more *former* employees (rather than *current* employees) with issues, more opportunities for one-third-plus-expenses of the verdict or settlement. In short, while the trial lawyers claim to speak for employees, in reality they are proposing a measure that will force many employees with modest claims to abandon their claims, in order that the trial lawyers may seek "lotto" awards for a chosen few.

All the rest of us? *We lose*. S. 931 – and the betrayal and abandonment of ADR it represents – would be bad public policy and harmful to American justice and American society.

XI. Supporters of ADR

(1) The Judiciary Favors ADR

There can be no doubt that employment cases historically have created an unnecessary strain on the limited resources of our judicial system.

Private employment suits grew at an astronomical rate in the 1990s. In January of 1999, the Bureau of Justice Statistic published a study showing that from 1990 through 1998, private employment-related civil rights cases nearly tripled.[41] Private employment-related complaints accounted for approximately 65 percent of the overall increase in cases that flooded the U.S. District Courts in this period.[42]

The torrent of employment-related lawsuits coupled with the delays in case processing evinced a need for more effective case management. Arbitration is well-suited to meet this need.

The federal judiciary and Congress agreed. In response to this explosive growth in employment litigation, the Alternative Dispute Resolution Act of 1998[43] was passed and signed into law in October 1999 – exactly one decade ago – to promote the use of ADR in the federal court system. This law mandates that U.S. District Courts establish their own ADR programs and authorizes the use of at least one form of ADR.

Clearly, the intent of promoting ADR methods within the court system is to lighten the federal court docket.

S. 931 stands in opposition to this worthwhile goal. S. 931 would prohibit hundreds of thousands of arbitrations of employment and consumer disputes and transfer many of them to our courts, leaving litigation as the only resort – if obtainable – and exacerbating an already clogged and overburdened court system.

(2) Practicing Lawyers Favor ADR

A 2006 survey by the American Bar Association ("ABA") of the membership of the General Practice and Solo and Small Firm Division of the ABA found that 86.2 percent felt that "their clients' best interests are sometimes best served by offering ADR solutions," and nearly two-thirds (63.2 percent) thought that "offering clients ADR

[41] Marika F.X. Litras, "Civil Rights Complaints in U.S. District Court, 2000" (NCJ-193979). Employment discrimination cases increased from 8,413 filings in 1990 to a peak of 23,796 in 1997 and diminished to 21,032 in 2000 after enactment of the Alternative Dispute Resolution Act of 1998.

[42] *Id.*

[43] Pub. L. No. 105-315.

solutions is an ethical obligation as a practitioner."[44] Nearly two-thirds (66.2 percent) also predicted that "ADR use will increase in the future."[45]

(3) Employees Favor ADR

It is hard to recognize just who needs to be "protected" when it comes to ADR in employment… *not* employers, who increasingly are using ADR programs, and enthusiastically so[46]… and *not* employees – as mentioned earlier, a public opinion poll found that 83 percent of employees *favor* arbitration.[47]

(4) Parties to Arbitration Favor ADR

In a survey of more than 600 adults who had participated in binding arbitration, more than 70 percent were satisfied with the fairness of the process and the outcome, including many who had lost their arbitrations. Arbitration was viewed as faster (74 percent), simpler (63 percent), and cheaper (51 percent) than going to court, and two-thirds (66 percent) said they would be likely to use arbitration again (48 percent said they were *extremely* likely to use arbitration again).[48]

In addition, as discussed in the next section of this statement, the *Federal Government* favors ADR as well.

XII. Our Well-Established National Labor Policy Strongly Supports the Use of Arbitration Agreements in Employee Relations

It is clear that Congress's intent in enacting the Federal Arbitration Act was to encourage the use of arbitration.[49] Since its enactment in 1925,[50] and codification in 1947,[51] the use of arbitration in the private and public sectors has flourished.

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[44] *ADR Preference and Wage Report*, National Arbitration Forum, 2006 (data collected by Surveys and Ballots Inc. Available at http://www.adrforum.com/users/naf/resources/GPSoloADRPreferenceandusage report.pdf).

[45] *Id*.

[46] In a survey of more than 530 corporations in the Fortune 1000, more than 23 percent of respondents reported that they use ADR for non-union dispute resolution. Lipsky, Dawd and R. Seeber, *The Use of ADR in U.S. Corporations*: *Executive Summary* (1997). The survey was conducted by Price Waterhouse and Cornell University's PERC Institute on Conflict Resolution. Obviously, the percentage has trended up since then.

[47] *See* Princeton Survey Research Associates, *supra*, *note 4*.

[48] *Arbitration: Simpler, Cheaper, and Faster than Litigation*, U.S. Chamber Institute for Legal Reform (2005) (survey conducted by Harris Interactive) (www.instituteforlegalreform.org/resources/arbitrationstudy/final.pdf).

[49] *See, e.g., Gilmer v. Interstate/Johnson Lane Corp*., 500 U.S. 20, 24 (1991) ("[the FAA's] purpose was to reverse the long-standing judicial hostility to arbitration agreements… and to place arbitration agreements upon the same footing as other contracts."

[50] 43 Stat. 883.

A number of recent legislative and executive branch initiatives have reaffirmed our nation's commitment to, and acceptance of, ADR. Such measures include the Civil Rights Act of 1991 ("CRA"),[52] in which Congress specifically endorsed the arbitration of Title VII[53] cases. Section 118 of the CRA provides that "where appropriate and to the extent authorized by law, the use of alternative dispute resolution, including… arbitration, is encouraged to resolve disputes arising under [Title VII]."[54] Additionally, the Administrative Dispute Resolution Act ("ADRA") – passed in 1990 and subsequently amended and permanently reauthorized in 1996, and amended again in 1998 – mandates that federal agencies create internal ADR programs. The 1998 amendments to the ADRA[55] require each U.S. District Court to adopt local rules regarding the use of ADR. The ADRA's Findings and Declaration of Policy notes that:

> Alternative dispute resolution, when supported by the bench and bar, and utilizing properly trained neutrals in a program adequately administered by the court, has the potential to provide a variety of benefits, including greater satisfaction of the parties, innovative methods of resolving disputes, and greater efficiency in achieving settlements.[56]

Additionally, many government agencies have implemented ADR programs governing their own employees. The United States Department of Agriculture's ADR program, for example, has an overall resolution rate of 82 percent, and the time from request for ADR to actual mediation averages 24 days.[57] The Federal Election Commission resolved all 26 employee complaints brought to the agency's Equal Employment Opportunity director in a recent three-year period.[58] Other government agencies to benefit from ADR programs include the Department of Labor, Department of Treasury, United States Mint, Army Corps of Engineers, Navy, Air Force, Postal Service, Department of State, and Department of Veterans Affairs.

That the federal government is so widely committed to the use of ADR for its own employees emphatically underscores the appropriateness of ADR use in private-sector employment.

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[51] 9 U.S.A. §1 (1994).

[52] Pub. L. No. 102-166.

[53] 42 U.S.C. §§2000e *et seq*.

[54] 105 Stat. at 1081, *reprinted in* notes to 42 U.S.C. § 1981.

[55] Pub. L. No. 105-315.

[56] Pub. L. No. 105-315, §2(1).

[57] John Ford, *Workplace ADR: Facts and Figures from the Federal Sector*, published at http://www.conflict-resolution.net/articles/Ford3.cfm.

[58] *Id*.

XIII. Conclusion

If you want justice in America today… my advice is to go to arbitration, *not* to court.

Arbitration is more predictable and consistently fair, balanced, efficient, responsive, final, and cost-effective.

Litigation is *none* of those things: vis-à-vis arbitration, the outcome of litigation is hard to predict, the process is slow, unwieldy, and protracted, resolution often takes a great deal of time, resolution often is *not* final (with remands and appeals on technical issues common), and the process is long and expensive – and therefore cost-*ineffective*. Arbitration is more focused on the merits of the positions; litigation can be decided by who has the better lawyers. Arbitrators consistently fall into the middle of the philosophical spectrum; judges can be all over the map philosophically and politically.

Alternative Dispute Resolution is a positive, necessary, and highly appropriate component of our judicial system. ADR is increasing in use, and the *need* for ADR is increasing as well. Mandatory binding arbitration in employment is entrenched as a useful, fair, and productive fixture on our American employment landscape. It is both pro-employer *and* pro-employee.

As discussed earlier, employees are more likely to have their employment issues addressed by their increased accessibility to arbitration vis-à-vis litigation, and are more likely to prevail and to receive higher median awards in employment arbitration than in employment litigation.

To abandon this practice, to suddenly and retroactively render its use void and unenforceable, as S. 931 would do, would have far-reaching and disastrous impacts on American jurisprudence and American society.

S. 931 is a mandatory litigation bill. *That* is not the way to go.

On behalf of the Council for Employment Law Equity, and the employer community at-large, I respectfully urge you to preserve the rights of employers and employees to engage in Alternative Dispute Resolution, and to support the necessary and appropriate practice of mandatory binding arbitration in employment.

I thank you for the opportunity to express the views of the Council for Employment Law Equity here today, and I would welcome any questions which you may have and the opportunity to work together to help ensure that there is – and continues to be – fairness in arbitration in America.