**Senate Judiciary Committee – Questions for the Record from Senator John Kennedy**
**April 4, 2019**

Hearing entitled "Arbitration in America"

**Questions for Kevin Ziober, Myriam Gilles, Alan Kaplinsky, F. Paul Bland Jr., Alan Carlson, and Victor Schwartz**

1. I will be introducing the Stop Blaming Victims Act to address the problem of Nondisclosure agreements being used to protect government employees who sexually harass others. It would limit the ability of government employees to hide behind non-disclosure agreements. NDA's are dangerous because they are often mandatory elements of a settlement that prevent victims from speaking out later on when they see similar abuses repeated. How are mandatory NDA's used in forced arbitration? Are they also used to silence wronged parties who might seek to expose wrongdoing at a powerful company?

   *Kevin Ziober: Senator, having no professional expertise or firsthand experience with this subject, I respectfully decline comment at this time.*

2. Courts consistently rule that claims under the Uniformed Services Employment and Reemployment Rights Act (USERRA), which protects the employment rights of members of the armed forces, are subject to arbitration under the Federal Arbitration Act (FAA). We should be ensuring that our military men and women are adequately protected. How is it fair that an employer can fire an employee who leaves for combat and often times their only recourse is arbitration? What in your opinion needs to be done to correct this?

   *Kevin Ziober [1]: Senator, I appreciate your concerns and share your desires to better protect the employment rights of our Guard and Reserve servicemembers. As an all-volunteer force that relies heavily on the reserve component to provide strategic depth and operational support to our active duty troops, this issue has never been more important in my opinion. The diverse civilian employment skills that Reservists can immediately bring to our armed forces is invaluable, including expertise in fields such as medical, legal, law enforcement, aviation, logistics, engineering, cyber security, information technology, construction, and countless other professions. However, if the special protective employment rights that Congress has bestowed upon private citizens – who also serve our country in uniform – continues to be eroded by the courts, I believe it will become increasingly more challenging for our military leaders to rely upon and*

[1] Senator, I am sharing my own views as a private citizen and I am not speaking on behalf of any other person or institution. My statements and testimony are in my personal capacity, and the views expressed in my remarks are my own and do not necessarily reflect the official positions of the U.S. Government, the U.S. Navy, or Department of Defense. I am speaking on my own behalf and have no affiliation with public or private entities. Nor do I seek any financial or political gain by participating in this hearing.

*draw from this irreplaceable civilian talent pool which is vital to maintaining our military readiness.*

*In both the plain language of USERRA and in the legislative history, it is clear that Congress' original intent was that servicemembers who try to vindicate their employment rights under this statute cannot be required to arbitrate their claims. More specifically, when Congress unanimously passed USERRA in 1994, it stated that the law's anti-waiver provision "'would reaffirm that additional resort to mechanisms such as grievance procedures or arbitration or similar administrative appeals is not required,'" and that "'even if a person protected under the Act resorts to arbitration, any arbitration decision shall not be binding as a matter of law.'" (H.R. Rep. No. 103-65, at 20).*

*Though the text and Congressional intent behind USERRA seems abundantly clear and decisive, the courts have stated that the language remains open to interpretation and is not specific enough regarding the non-waiver provision of substantive and procedural rights. Even in my appeal to the United States Court of Appeals for the Ninth Circuit, Judge Watford stated that he had serious "doubts about whether [the Court was] reaching the right result." Ziober v. BLB Res., Inc., 839 F.3d 814, 821 (9th Cir. 2016) (Watford, J., concurring). He explained that USERRA voids any contract that "reduces, limits, or eliminates in any manner any right . . . provided by'" USERRA, and that the arbitration agreement in my case "certainly 'limits' – and for all practical purposes 'eliminates' – [my] right to litigate [my] claims in court." Id. at 821-822 (quoting 38 U.S.C. § 4302(b)).*

*Nevertheless, this judge and the three-judge panel concluded that the text of USERRA was not explicit enough in prohibiting forced arbitration, based on binding Supreme Court precedent about what Congress must say to override the Federal Arbitration Act (FAA). Id. at 821-822.*

*Thankfully, I believe there is a viable solution for Congress to correct the prevailing judicial bias towards the FAA and forced arbitration – namely The Justice for Servicemembers Act (S.646). This bill was sponsored by Senator Blumenthal and cosponsored by Senators Durbin, Whitehouse, Gillibrand, Hirono, and Franken. Its House companion bill (H.R. 2631) also has bipartisan support from 10 House members. These bills do not create any new rights. Rather, they simply clarify Congress' original position that under USERRA, servicemembers and veterans cannot be required to arbitrate their claims, unless they agree to arbitrate after the employment dispute has occurred.*

*Senator, I sincerely thank you for your leadership to help move The Justice for Servicemembers Act forward in this Committee and on the Senate floor for a vote. I hope that both parties in Congress will work together to pass this important piece of legislation for the benefit of all servicemembers and veterans, now and in the future. And if the purpose of this legislation is to truly restore servicemembers' rights to "have their day in court", as Congress originally intended when it passed USERRA in 1994, I would encourage a provision be added that allows for any case currently in forced*

*arbitration – where a final decision has not been adjudicated – to be refiled in federal district court in accordance with USERRA's statutory language (§4323(b)) and legislative history (H.R. Rep. No. 103-65, at 20). Anything less would be denying servicemembers and veterans full enforcement of their Constitutional rights and federal laws, both of which have been exploited and manipulated long enough by the courts and corporations who favor arbitration in defiance of Congress' expressed commands under USERRA.*

3. In the past couple of years, more and more companies have eliminated forced arbitration. Over the last year, Uber, Lyft, Facebook, and Google and many others have scrapped their arbitration policy. Why do you think we are seeing this uptick in companies ending their forced arbitration policy?

   *Kevin Ziober: Senator, having no professional expertise nor studied the research on this specific issue, I respectfully decline comment at this time.*