



September 6, 2019

The Honorable Jerrold Nadler
Chair, Committee on the Judiciary
2132 Rayburn HOB
U.S. House of Representatives
Washington, DC 20515

The Honorable Doug Collins
Ranking Member, Committee on the Judiciary
1504 Longworth HOB
U.S. House of Representatives
Washington, DC 20515

Re: Statement of the American Antitrust Institute and ten other organizations that support the mission of the U.S. antitrust laws re the Forced Arbitration Injustice Repeal Act, H.R. 1423, 116th Cong. (2019) (“FAIR Act”)

Dear Chairman Nadler and Ranking Member Collins:

The American Antitrust Institute (“AAI”)¹ and ten other undersigned organizations that support the mission of the U.S. antitrust laws encourage you to pass the Forced Arbitration Injustice Repeal Act, H.R. 1423, 116th Cong. (2019) (“FAIR Act”). We support the FAIR Act because it would restore the ability of consumers, workers and businesses to effectively vindicate their Sherman and Clayton Act rights. Section 3 of the FAIR Act would amend the Federal Arbitration Act (“FAA”) to invalidate contract provisions that mandate individual arbitration of antitrust disputes. Passing the bill would prevent recent Supreme Court interpretations of the FAA from allowing class action waivers inserted into must-sign contracts to serve as de facto exculpatory clauses in a large and important category of antitrust cases.

Class Actions Are Necessary for the Antitrust Laws to Work. The class action device is essential to protect antitrust victims because it is essential to private antitrust enforcement. Because of limitations on government antitrust enforcement,² private enforcement sometimes is the only available means of redressing antitrust violations.³ Moreover, even when government and private enforcement work in tandem, private enforcement remains the primary means of compensating victims, and the principal financial deterrent against future anticompetitive abuses. A recent study by the University of San Francisco School of Law and Huntington National Bank found that, since 2013, settled private federal antitrust lawsuits alone recovered \$19.3 billion on behalf of victims of antitrust violations.⁴ Over the two decades prior to 2013, empirical research supported by AAI

¹ The AAI is an independent and non-profit education, research, and advocacy organization devoted to advancing the role of competition in the economy, protecting consumers, and sustaining the vitality of the antitrust laws. For more information, see <http://www.antitrustinstitute.org>.

² See Robert H. Lande & Joshua P. Davis, *Benefits from Private Antitrust Enforcement: An Analysis of Forty Cases*, 42 U.S.F.L. Rev. 879, 906 (2008) (citing budgetary constraints, institutional incentives to pursue certain types of cases, lack of awareness about industry conditions, institutional suspicion of competitor complaints, higher turnover among government attorneys, and political realities).

³ See *id.*; Spencer Weber Waller, *Symposium: Private Law, Punishment, and Disgorgement: The Incoherence of Punishment in Antitrust*, 78 Chi.-Kent. L. Rev. 207, 211 (2003).

⁴ Huntington National Bank & Univ. of San Francisco School of Law, 2018 Antitrust Report: Class Action Filings in Federal Court (May 2019), available at <http://ssrn.com/abstract=3386424>; see also American Antitrust Institute & Univ. of San

shows that (1) conservatively, private antitrust enforcement led to the recovery of at least \$33.8 billion in damages,⁵ and (2) the deterrent effect of private enforcement likely outweighed the deterrent effect of even criminal enforcement by the Department of Justice.⁶

While it may be technically accurate, as a divided Supreme Court recently declared, that “the antitrust laws do not guarantee an affordable procedural path,”⁷ an affordable procedural path to claims aggregation is essential to an effective antitrust law regime and thus to the maintenance of a competitive free market economy. Without a procedural mechanism for aggregating claims, antitrust violations often will go uncompensated, under-deterred, or altogether un-remedied. Worse, private victims can be forced to forgo their rights and remedies unknowingly and involuntarily when forced arbitration requirements and class action waivers are surreptitiously inserted into standard form adhesion contracts.

Forced Arbitration Effectively Extinguishes the Antitrust Rights of Those Who Need Them Most. Since the Supreme Court’s controversial 5-4 decision in *AT&T Mobility v. Concepcion*,⁸ class action waivers embedded in adhesive, mandatory arbitration clauses have grown increasingly pervasive in small business and consumer products and services contracts.⁹ After the Court’s 5-4 decision in *Epic Systems Corp. v. Lewis*,¹⁰ the same will be true of adhesive employment contracts governing workers who fall victim to the scourge of no-poaching provisions and other forms of anticompetitive employer behavior.¹¹ Indeed, as Professor Myriam Gilles has explained, a corporate attorney arguably would commit malpractice if she failed to advise a client to employ class action waivers in such contracts.¹²

Francisco School of Law, Commentary on the 2018 Antitrust Annual Report: Class Action Filings in Federal Court (May 14, 2019), available at <https://www.antitrustinstitute.org/work-product/aai-usf-commentary/>.

⁵ See Joshua P. Davis & Robert H. Lande, *Towards an Empirical and Theoretical Assessment of Private Antitrust Enforcement*, 36 Seattle U. L. Rev. 1269, 1272 (2013).

⁶ See Robert H. Lande & Joshua P. Davis, *Comparative Deterrence from Private Enforcement and Criminal Enforcement of the U.S. Antitrust Laws*, 2011 B.Y.U. L. Rev. 315, 347 (2011).

⁷ *American Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2309 (2013).

⁸ 131 S. Ct. 1740 (2011).

⁹ See Consumer Financial Protection Bureau (CFPB), Arbitration Study, Report to Congress, pursuant to Dodd–Frank Wall Street Reform and Consumer Protection Act § 1028(a) (March 2015), available at https://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf. Among other things, the CFPB found that class action waivers in mandatory arbitration clauses are now nearly ubiquitous in the consumer financial services industry, and that in, for example, the checking account market, they tend to be imposed only by the largest banks. See *id.*

¹⁰ 138 S. Ct. 1612 (2018).

¹¹ See Alexander J.S. Colvin, *The Growing Use of Mandatory Arbitration*, Econ. Policy Inst. (Apr. 6, 2018) (survey data shows that 39.5% of employers who adopted mandatory employment arbitration did so during the 5 years after *Concepcion*, and that 41.1% of employees covered by mandatory arbitration procedures were also subject to class action waivers); see also Randy M. Stutz, *The Evolving Antitrust Treatment of Labor-Market Restraints: From Theory to Practice* 7-14, Am. Antitrust Inst. (July 31, 2018), <https://www.antitrustinstitute.org/wp-content/uploads/2018/09/AAI-Labor-Antitrust-White-Paper-0-1.pdf> (reviewing empirical studies suggesting that no-poaching and non-compete agreements pose serious competitive problems in U.S. labor markets).

¹² See *The Federal Arbitration Act and Access to Justice: Will Recent Supreme Court Decisions Undermine the Rights of Consumers, Workers, and Small Businesses?: Hearing Before the S. Comm. on the Judiciary*, 113th Cong. 31 (2013) (testimony of Myriam Gilles, Prof. of Law, Benjamin Cardozo School of Law), available at <https://www.judiciary.senate.gov/imo/media/doc/CHRG-113shrg89563.pdf>; see also *Justice Denied: Forced Arbitration and the Erosion of Our Legal System: Hearing Before the H. Subcomm. on Antitrust, Commercial, and Administrative Law*, 116th Cong. (2019) (written testimony of Myriam Gilles, Prof. of Law, Benjamin Cardozo School of Law, at 9, n.33), available at <https://www.judiciary.senate.gov/imo/media/doc/Gilles%20Testimony.pdf>.

Without legislative action, the proliferation of class action waivers in mandatory arbitration clauses will destroy a wide swath of the private antitrust rights afforded to the most vulnerable economic actors in the United States. Consumer and small business antitrust cases very often involve high-volume, low-dollar frauds and price fixing in which perpetrators “deliberately cheat large numbers of [victims] out of individually small sums of money.”¹³ Consequently, individual victims’ claims often are small in absolute value or small in relation to the significant expenses of developing and prosecuting an antitrust case. Because such claims pose a negative value proposition for an individual claimant, they are financially irrational pursuits absent class procedures that allow for aggregation of claims and pooling of resources.

When class proceedings are unavailable, many small business and worker antitrust claims are similarly negated by the practical realities of economic dependency. For obvious reasons, small businesses that rely on powerful customers or suppliers make for reluctant antitrust plaintiffs individually. Directly challenging an important trading partner is fraught with business risk—especially when the trading partner has market or monopoly power, as antitrust violators typically do.

When large numbers of individual businesses forgo claims because aggregation is unavailable, the U.S. economy often suffers acute harm. The antitrust perpetrators that target business victims often are multinational conglomerates, whose violations not only raise prices and diminish output in the United States, but also effectuate large wealth transfers from the U.S. economy to a foreign economy. The class actions challenging the criminal price fixing alleged in the sprawling auto parts and capacitors cartels emanating from Asia, which to date have led to combined private settlement recoveries of over \$500 million for American businesses and entrepreneurs alone, and nearly \$2 billion for all U.S. victims, illustrate the stakes.¹⁴

American workers are perhaps the worst equipped of all to take on powerful firms without a claims aggregation device. For many, antagonizing an employer by filing an individual antitrust claim puts not only their personal income at risk, but possibly access to affordable health insurance for themselves and their families. A lack of viable employment alternatives owing to labor-market concentration, exploitative employer practices involving non-compete requirements and no-poaching agreements, the high search costs (and two-sided matching) required to change jobs, lock-in created by healthcare and other essential employment benefits, or other barriers to mobility can encumber workers’ individual antitrust claims with excessive personal and financial risk.¹⁵ Without a claims aggregation process, many employer antitrust violations will simply go unchallenged.

The Court’s Rulings Are Irredeemable on Other Policy Grounds. The new status quo engendered by the Supreme Court’s recent arbitration jurisprudence is not only problematic as antitrust and competition policy, but also as contract policy. Courts enforce standard form adhesion contracts based on a legal fiction that a consumer, worker, or small business owner has assented to pages-long terms and conditions, often via a mouse-click, which she almost certainly has not even read, much less understood for their legal implications. Courts employ this fiction on the premise that procedural and substantive unconscionability doctrine will encourage businesses to incorporate

¹³ *Concepcion*, 131 S. Ct. at 1761 (Breyer, J., dissenting) (internal quotation and alteration omitted).

¹⁴ See American Antitrust Institute & Univ. of San Francisco School of Law, Commentary on the 2018 Antitrust Annual Report: Class Action Filings in Federal Court, *supra* note 4, at 10-12.

¹⁵ See White House Council of Economic Advisors, Issue Br., Labor Market Monopsony: Trends, Consequences and Policy Responses 3-7 (Oct. 2016), *available at* https://obamawhitehouse.archives.gov/sites/default/files/page/files/20161025_monopsony_labor_mrkkt_cea.pdf.

only efficiency-enhancing terms and not exploitative terms in their standard form contracts.¹⁶ Yet contract terms that exculpate a party for harm caused intentionally have been widely recognized as unconscionable.¹⁷ If standard form contract terms that exculpate defendants for intentional antitrust violations are enforceable simply because they are embedded in arbitration clauses, then unconscionable contracts are not only being permitted but *encouraged*. This result is both illogical and undesirable.¹⁸

The Court has described the goal of the FAA as “encouragement of efficient and speedy dispute resolution.”¹⁹ Yet, perversely, when an arbitration provision is permitted to act as a de facto exculpatory clause, claims are not resolved at all.²⁰ Rather, they are nullified, with plaintiffs left to incur unjustified losses and defendants left to enjoy ill-gotten gains. The Court’s recent line of arbitration rulings actually precludes dispute resolution in any form, however efficient or speedy.

For all of these reasons, we urge Congress to pass the FAIR Act and restore vindicable Sherman and Clayton Act rights to American consumers, workers and businesses.

Respectfully,

American Antitrust Institute
American Independent Business Alliance (“AMIBA”)
Committee to Support the Antitrust Laws (“COSAL”)
Consumer Reports
Economic Policy Institute
National Family Farm Coalition
Public Citizen
Public Knowledge
Ranchers Cattlemen Action Fund United Stockgrowers
Association (“R-CALF USA”)
Towards Justice
Travelers United

CC:
Members of the Senate Committee on the Judiciary

¹⁶ See Robert A. Hillman & Jeffrey J. Rachlinski, *Standard-Form Contracting in the Electronic Age*, 77 N.Y.U. L. Rev. 429 (2002).

¹⁷ See, e.g., *American Express*, 133 S. Ct. at 2313-2314 (2013) (Kagan, J., dissenting) (“courts will not enforce a prospective waiver of the right to gain redress for an antitrust injury, whether in an arbitration agreement or any other contract”) (citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U. S. 614, 637 (1985)); cf. Restatement (Second) of Contracts § 195(1)b (“A term exempting a party from tort liability for harm caused intentionally . . . is unenforceable on grounds of public policy.”).

¹⁸ See David Horton, *Unconscionability Wars*, 106 Nw. U. L. Rev. 387, 408 (2012).

¹⁹ *Concepcion*, 131 S. Ct. at 1749 (emphasis added).

²⁰ See *Justice Denied*, *supra* note 12 (written testimony of Deepak Gupta, Founding Principal, Gupta Wessler PLLC 3-5) (reviewing empirical data showing that forced arbitration typically leads to de facto claim nullification and citing CFPB study finding that, out of hundreds of millions of affected consumers, only four won affirmative relief on claims of \$1,000 or less in arbitration over two-year period).