

**Testimony of Kevin Ziober**  
**Before the United States House Subcommittee on**  
**Antitrust, Commercial and Administrative Law**  
**May 16, 2019**

Chairman Cicilline, Ranking Member Sensenbrenner, and other distinguished members of the House Subcommittee on Antitrust, Commercial and Administrative Law, thank you for affording me the opportunity to testify about my experience with forced arbitration and encourage Congress to pass legislation to protect servicemembers, veterans, and all Americans from forced arbitration.

In 2016, I testified before the Senate Committee on Veterans' Affairs in support of the Justice for Servicemembers Act of 2016, a bipartisan bill to clarify that servicemembers and veterans cannot be required to arbitrate their claims under the Uniformed Services Employment & Reemployment Rights Act ("USERRA"). USERRA is the federal law that has made it possible for millions of Americans to serve in the guard and reserves, because the law guarantees that civilian employees can take military leave and return to their civilian jobs, and be free of workplace discrimination and retaliation related to their military service. *See* 38 U.S.C. §§ 4301 *et seq.*

I offered similar testimony in April of 2019 in the Senate Judiciary Committee in a hearing organized by Chairman Lindsey Graham and Ranking Member Diane Feinstein. During that hearing, a bipartisan consensus appeared to emerge that arbitration has gotten out of control and is undermining the rights of every American under the important laws that this Congress has passed over the past century. I heard about my fellow Americans being subjected to outrageous conduct – harassment, physical assault, and fraud – only to have their rights stripped away by arbitration agreements when they had no meaningful or informed choice about whether to sign those agreements. I heard members of the Senate on both sides of the aisle coming together to identify specific areas where forced arbitration should not be permitted, including for servicemembers and veterans, harassment, and other forms of discrimination, and calling for barring all forced arbitration so that workers and consumers can decide how to enforce their fundamental rights.

I am honored to speak again today in support of millions of servicemembers and veterans whose rights are being taken away by forced arbitration when they need to invoke USERRA or the Servicemembers Civil Relief Act ("SCRA").<sup>1</sup> I am also honored to speak about how forced arbitration is jeopardizing the rights of all American workers and consumers, and to urge all members of Congress to come together to fix this growing problem.

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<sup>1</sup> Today, I am sharing my own views as a private citizen about the importance of USERRA. I am not speaking on behalf of any other person or institution. I accepted this invitation to speak and am testifying in my personal capacity. 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 the 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.

I am proud to have served my country in the United States Navy for more than a decade. Like all servicemembers, I joined the military and continue to serve because I care deeply about protecting the American people and our nation. And that is why I am here today, to seek to protect millions of servicemembers and veterans and hundreds of millions of Americans whose fundamental rights are being undermined by forced arbitration.

I also appreciate the opportunity to tell my own personal story about how on my last day of work before a one-year deployment to Afghanistan, my employer threw an office-wide party to celebrate my military service, but then fired me just before my deployment training began in violation of federal law. Almost seven years later, in large part because of forced arbitration, I am still fighting to enforce my rights and seek justice. Sadly, my story is not unique. It happens every day across America, not only to servicemembers and veterans whose rights are violated, but also to working people and consumers of all backgrounds.

Forced arbitration takes away the rights of all Americans—women and men; people of all racial, ethnic, and religious backgrounds; people with disabilities; servicemembers and veterans; consumers who buy all types of products and services; Republicans, Democrats, and Independents.

I hope that both parties in Congress will work together to reform the federal arbitration law for the benefit of all Americans. Though I have been a registered Republican for the vast majority of my life, I want to see our elected leaders find common ground to protect the rights that make our lives better—like consumer protection, civil rights, and veterans’ rights.

I would like to personally thank all of the members of this Committee who have introduced or sponsored legislation to reform our federal laws so that servicemembers and veterans can have their day in court, and several of you who filed an amici curiae brief in my case before the U.S. Supreme Court to tell the justices that Congress always intended to protect servicemembers and veterans from forced arbitration under USERRA.

I would also like to thank the countless members of Congress who have personally served in the Armed Forces or whose family members have served in the Armed Forces, and all of the members of Congress who work in a bipartisan fashion to ensure that military families get the support that they need and deserve. You know the sacrifices that servicemembers and their families routinely make so that America can remain safe and free, and you understand why our federal laws must protect those who have honorably served.

### **Balancing Civilian and Military Careers**

I grew up in California and now live in Orange County, California. After graduating from the University of Southern California with a degree in business/finance, I worked in the commercial finance, mortgage banking, and real estate industries where I enjoyed the opportunity to manage teams in sales, operations, underwriting, and production.

As my civilian career developed, I realized that my life-long desire to serve my country in the Armed Forces would soon close, due to the military’s 40-year-old age restriction. I’ve always respected the great sacrifices that our courageous servicemembers have made to defend our nation, especially after the September 11, 2001 terrorist attacks on our homeland.

In 2008, I joined the Navy Reserves to serve my country and help protect America's liberties, freedoms, and security. I chose to serve in the intelligence field, because I wanted to support those servicemembers on the front lines who literally sacrifice life and limb to keep America safe and defend our national security interests around the world.

On July 4, 2008, on the flight deck of the USS Midway, I was commissioned as an Ensign in the Navy Reserves. It was a dream come true, and one of the proudest moments of my life. In 2010, I was promoted to the rank of Lieutenant Junior Grade. In 2012, I was promoted to the rank of Lieutenant and deployed to Afghanistan. And in 2018, I was promoted to the rank of Lieutenant Commander. In my current duties, I oversee the manning, training, and mobilization readiness of a 130-member Information Warfare unit in San Diego.

When I joined the Navy Reserves in 2008, I understood that like more than 1 million reservists<sup>2</sup> I would need to balance my civilian career with a military career. I understood that on a moment's notice I could be called to active duty for weeks, months, or even years, and that my military service could take me across the United States or half-way around the globe.

Like all reservists, I hoped that my future employers would support my military service and understand that by allowing me to take military leave from my civilian job they were literally making it possible for me to serve our country in the Armed Forces. And while I believe that most employers want to do the right thing and comply with USERRA, many employers find it inconvenient when their employees take military leave, and regrettably some employers even take adverse action against reservists—such as terminating them or refusing to reemploy them after their military service is over.

Even though this type of adverse action violates USERRA, many employers believe that reservists will simply move on to the next job without taking any action to enforce their rights. And increasingly employers are requiring reservists to enforce their rights in secret arbitration proceedings that are often overseen by arbitrators selected by employers with a limited opportunity for reservists to discover the key facts in their cases. These employers hope that the secrecy of arbitration will prevent the public from learning about how they have mistreated reservists or veterans, even if it means taking away many of the key rights that Congress has bestowed upon reservists since the 1940s.

### **Fired the Day Before I Began a Deployment to Afghanistan**

In July 2010, I was hired as a manager by BLB Resources, Inc. ("BLB"), a federal contractor headquartered in Irvine, California. From 2010 to 2012, I worked hard and helped BLB to grow from a staff of 18 employees to a workforce of over 90. I enjoyed my work and took pride in it, and I planned to build a career at the company.

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<sup>2</sup> See Congressional Research Service, *Reserve Component Personnel Issues: Questions and Answers* at 3 (Oct. 4, 2018) (stating that 1,036,644 Americans are members of the Select Reserve or Individual Ready Reserve/Inactive National Guard as of July 31, 2018), available at <https://fas.org/sgp/crs/natsec/RL30802.pdf>.

Six months into my tenure at BLB, the company asked me and other employees to sign several legal documents, including an arbitration agreement as a condition of keeping our jobs. Like other employees who needed their jobs to make ends meet, I felt that I had no choice but to sign the papers. I had no intention of losing my livelihood. Plus, things were going well for me at the company, I didn't foresee any legal issues arising, and I didn't want to cause any problems, so I signed the paperwork and I moved onto doing my job to the best of my ability.

In November 2012, I received official orders from the Navy to deploy to Afghanistan for 12 months. (I had been on a short list for a mobilization for more than a year, and during that time my employer was aware that I would likely be deployed). On my last day of work on November 30, 2012, I was greeted by my colleagues with a standing round of applause. My personal office was decorated with camouflage netting and Navy colored balloons. Cards and gifts were stacked on my desk. At noon, BLB held a surprise party in my honor, where 40 of my co-workers gathered to wish me well on my deployment. There was even a large cake with an American flag decorated in red, white, and blue, with the inscription "Best Wishes Kevin." A picture of that farewell cake is attached to my testimony as Exhibit A.

Right after the party, I felt amazing. I even called my family to tell them about how moved I was that my colleagues had honored me and my military service.

Around 4:45 that same afternoon, I was summoned to a meeting in the company's human resources department. I didn't receive any advance notice of the meeting, so I didn't know what it was about. When I walked into the room, I saw three people: the director of human resources, my direct supervisor, and another person who I believe was the company's lawyer or employment consultant. I was fired on the spot and told that my position would not be waiting for me upon my return from active duty.

The shock of learning that I was being terminated from my job on the eve of my deployment to a combat zone created an unimaginable amount of concern and anxiety about how I would support myself and my family when I returned home. In the course of a few hours, I went from feeling supported, proud, and focused on serving my country, to feeling embarrassed, confused, and concerned about the well-being of my loved ones.

No servicemember who is asked to leave his family and friends to fight for our country should ever have to worry about fighting for his job when he returns home. That was the primary reason why Congress enacted USERRA and the servicemember protection laws that came before USERRA and date back to the 1940s.<sup>3</sup>

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<sup>3</sup> When Congress enacted USERRA in 1994, it stated that the purposes of the law are: "(1) to encourage noncareer service in the uniformed services by eliminating or minimizing the disadvantages to civilian careers and employment which can result from such service; (2) to minimize the disruption to the lives of persons performing service in the uniformed services as well as to their employers, their fellow employees, and their communities, by providing for the prompt reemployment of such persons upon their completion of such service; and (3) to prohibit discrimination against persons because of their service in the uniformed services." 38 U.S.C. § 4301(a).

## Forced to Arbitrate My Claims Under USERRA

I never considered myself to be a litigious person and never thought that I would be involved in a lawsuit. But when I returned home from Afghanistan in the spring of 2014, I made the decision to try to right the wrong that I believe BLB committed against me and my family when it terminated me on the eve of my deployment.

I talked to a lawyer and filed a USERRA action in federal court. Having been around the world, I am particularly grateful for the rule of law and American courts. I firmly believe that the American justice system is the fairest and most impartial system in the world, and I placed my faith in that process.

However, BLB immediately filed a motion to compel arbitration, arguing that the paperwork that I was forced to sign six months into my employment took away my right to go to court. The judge granted the motion, dismissing my case and sending it to a private arbitration company for resolution.

I was surprised and disappointed to be denied my day in court like all Americans deserve. In arbitration, I would have no access to a federal judge nominated by the President and confirmed by the Senate, I would lose my Seventh Amendment right to a jury trial, I would lose any meaningful right to an appeal, and I would lose my right to a public proceeding of any kind. Along with other servicemembers, I have fought to advance American ideals and values abroad, so it was particularly disheartening to lose these fundamental rights at home.

I appealed the decision to the United States Court of Appeals for the Ninth Circuit, which affirmed the district court's decision to compel me into arbitration. The Court "acknowledge[d] the possibility that Congress did not want 'members of our armed forces to submit to binding, coercive arbitration agreements.'" *Ziober v. BLB Res., Inc.*, 839 F.3d 814, 821 (9th Cir. 2016) (quoting *Landis v. Pinnacle Eye Care, LLC*, 537 F.3d 559, 564 (6th Cir. 2008) (Cole, J., concurring)). But it still held that I and all other reservists who work outside of the federal government could be forced to arbitrate our USERRA claims. *Id.*

One judge on the three-judge panel in my case issued a separate opinion to state that he had serious "doubts about whether [the Court was] reaching the right result." *Ziober*, 839 F.3d at 821 (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)). He also acknowledged that the Department of Labor in 2005 had issued regulations that interpret USERRA as prohibiting arbitration agreements that prevent reservists from filing actions in court. *Id.* (citing 70 Fed. Reg. 75246, 75257 (Dec. 19, 2005)). 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. *Id.* at 821-822.

I am grateful that one of the judges on the Ninth Circuit panel urged Congress to fix the law so that it makes clear that servicemembers cannot be forced to arbitrate their USERRA claims, and that he pointed to a previous case in 2008, when another appellate judge had similarly encouraged Congress to fix the law. *Id.* at 822-823 (Watford, J., concurring) (citing *Landis*, 537 F.3d at 564 (Cole, J., concurring)). As I describe below, many members of Congress have heeded these judges' calls to amend USERRA so that it will forever be clear that servicemembers and veterans cannot be forced to arbitrate their claims.

In 2017, I asked the U.S. Supreme Court to hear my case to challenge the notion that employers can force servicemembers and veterans to waive their hard-earned USERRA rights.

Many people came to my side. In fact, 20 Members of Congress from both sides of the aisle, including a number of leaders of the House Judiciary Committee, filed a friend of the court brief asking the U.S. Supreme Court to hear my case and recognize that Congress intended to prohibit forced arbitration of USERRA claims when it enacted the law in 1994. *See* Brief of Members of Congress as Amici Curiae in Support of Petitioner, *Ziober v. BLB Resources, Inc.*, No. 16-1269, 2017 WL 2376427, at \*9 (U.S. May 24, 2017) ("Amici Curiae Brief"). The members of the House of Representatives who signed the brief include House Judiciary Chairman Jerrold Nadler (D-NY), House Subcommittee Chairman David Cicilline (D-RI), former House Judiciary Committee Chairman John Conyers Jr. (D-MI), House Ethics Committee Chairman Ted Deutch (D-FL), Hank Johnson (D-GA), Jamie Raskin (D-MD), Joe Wilson (R-SC), Walter Jones (R-NJ) Rep. Jackie Walorski (R-IN). In addition, the brief was signed by Senators Richard Blumenthal (D-CT), Patty Murray (D-WA), Sheldon Whitehouse (D-RI), Sherrod Brown (D-OH), and Senator Mazie Hirono (D-HI). *See* Amicus Curiae Brief Appendix.

These Members of Congress pointed out that when Congress unanimously passed USERRA, 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." Amici Curiae Brief at 9 (quoting H.R. Rep. No. 103-65, at 20 (1993)). They also noted that in 2005 Labor Secretary Elaine Chao had recognized the same principle in the Department of Labor's regulations—that USERRA prohibits forced arbitration. *Id.* at 9-10.

Unfortunately, the Supreme Court declined to hear my case. This means that for servicemembers or veterans who work for private companies or state or local governments, their employers can require them to sign arbitration agreements as a condition of employment (or continued employment, like in my case), and they can effectively take away a range of rights—some of which exist under many laws and some of which are unique and longstanding under USERRA and its predecessor laws. On the other hand, federal employees cannot be forced to arbitrate their USERRA claims, because the Federal Circuit has interpreted the same language of USERRA to ban forced arbitration. *Russell v. MSPB*, 324 F. App'x 872, 874-875 (Fed. Cir. 2008) (per curiam). Given how many servicemembers and veterans work outside of the federal government, it is disappointing that so many men and women who have served can now be forced into arbitrating their USERRA claims.

## **Congress Should Reaffirm Servicemembers' and Veterans' Ability to Enforce Their Rights**

I am here today to ask the members of this Committee to step in where the federal courts have failed to follow Congress' clear intent to protect the rights of servicemembers and veterans against forced arbitration, and also to advocate for the principles that motivated many of us to volunteer for service in the first place: the right to choose how we go about exercising our rights and the right to access one of the greatest civil justice systems in the world.

All that Congress needs to do is to reaffirm what has been the law since the 1950s. In fact, in 1958, the Supreme Court held that servicemembers could not be required to arbitrate their reemployment rights claims under the law that later became USERRA. *McKinney v. Missouri-Kan.-Tex. R.R. Co.*, 357 U.S. 265, 268-270 (1958). As the Supreme Court wrote in *McKinney*, a person enforcing his rights under the reemployment statute “sues not simply as an employee,” “but as a veteran asserting special rights bestowed upon him in furtherance of a federal policy to protect those who have served in the Armed Forces.” *Id.* at 268-269. To require veterans to pursue private adjudication of their rights “would ignore the actual character of the rights asserted and defeat the liberal procedural policy clearly manifested in the statute for the vindication of those rights” in court. *Id.* at 269-270.

The procedures that the Supreme Court recognized in *McKinney* as contrary to arbitration include the right to file an action in any district where the employer has a place of business and that no fees or costs may be taxed against the servicemember in litigation (such as no filing fees). *See id.* at 269 n.1. Those same procedures still exist to this day under USERRA. *See* 38 U.S.C. §§ 4323(c)(2), (h)(1). But these protections are routinely undermined by arbitration agreements that require servicemembers to pursue arbitration in the specific location that the employer chooses (even if the servicemember is deployed or lives across the country) or that impose significant fees or costs on servicemembers. And there are additional protections in USERRA that are inconsistent with forced arbitration. For example, USERRA has no statute of limitations, but arbitration agreements often impose very brief limitations periods; USERRA is designed to avoid any delay in adjudicating servicemembers' rights, without any need to file a charge with an administrative agency, but arbitration agreements often require multi-step procedures to be exhausted before a person can obtain a hearing before an arbitrator.

Over the past decade, bipartisan members of the United States Senate and House of Representatives have introduced legislation to reaffirm that servicemembers and veterans cannot be required to arbitrate their USERRA claims, unless they agree to arbitrate after the employment dispute has occurred. That legislation includes the following bills.

- In 2017, Subcommittee Chairman David Cicilline (D-RI), Rep. Henry C. “Hank” Johnson (D-GA), Rep. Joe Wilson (R-SC), Rep. Walter B. Jones (D-NC), Rep. Jackie Walorski (R-IN), and other House members sponsored H.R. 2631, the Justice for Servicemembers Act of 2017. A companion bill was sponsored in the Senate by Senators Richard Blumenthal (D-CT), Richard Durbin (D-IL), Sheldon Whitehouse (D-RI), Kirsten Gillibrand (D-NY), and Mazie Hirono (D-HI).

- In 2016, Subcommittee Chairman David Cicilline (D-RI), Rep. Henry Hank Johnson (D-GA), Rep. Joe Wilson (R-SC), Rep. Walter B. Jones (D-NC), Rep. Jackie Walorski (R-IN), and other House members sponsored H.R. 5426, the Justice for Servicemembers Act of 2016. A companion bill was sponsored in the Senate by Senator Richard Blumenthal (D-CT), Senator Patrick Leahy (D-VT), Senator Richard Durbin (D-IL), and Senator Klobuchar (D-MN).
- In 2014, Senator Lisa Murkowski (R-AK), Senator Mark Pryor (D-AR), and Senator Richard Blumenthal (D-CT) sponsored S. 2392, the Servicemember Employment Protection Act of 2014.
- In 2012, Senator Robert Casey Jr. (D-PA), Senator Ron Wyden (D-OR), and Senator Mark Begich (D-AK) sponsored S. 3233, the Servicemembers Access to Justice Act of 2012.
- In 2009, Senator Robert Casey Jr. (D-PA), Senator Edward M. Kennedy (D-MA), and Senator Ron Wyden (D-OR) sponsored S. 263, the Servicemembers Access to Justice Act of 2009.

In 2016, the Senate Committee on Veterans' Affairs held a hearing to consider the Justice for Servicemembers Act of 2016. In advance of that hearing, The Military Coalition, a group of 32 military, veterans, and uniformed services organizations, endorsed the Justice for Servicemembers Act. Furthermore, all of these pieces of legislation identified above have enjoyed strong and unwavering support from the many organizations within The Military Coalition, including the Reserve Officers Association, the Military Officers Association of America, and the Military Order of the Purple Heart. Despite such strong and broad support, these bills to clarify that USERRA bans forced arbitration has never received a vote in a Committee or on the House or Senate floor.

I hope that 2019 is the year that Congress finally passes the Justice for Servicemembers Act. Millions of servicemembers and veterans who have rights under USERRA will benefit from this legislation, which will ensure that those of us who serve our country can turn to federal judges to protect our reemployment rights and benefits.

USERRA rights and enforcement are more important today than ever before. In its most recent report to Congress (covering Fiscal Year 2017), the Department of Labor's Veterans Employment and Training Service ("DOL VETS") stated that it had 1,098 pending cases in which DOL VETS was investigating USERRA complaints of servicemembers and veterans, including 944 cases that were opened in Fiscal Year 2017.<sup>4</sup> When the base where my unit is located hosted trainings on USERRA in 2017, countless commanders and members of various units had pressing questions about their USERRA rights and what they can do to ensure that their rights are protected. They were not inquiring because they wanted to file lawsuits, but because their USERRA rights help them balance their military and civilian careers and they want to ensure that their employers understand how to comply with the law and support our reservists.

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<sup>4</sup> U.S. Department of Labor, Veterans' Employment and Training Service, Annual Report to Congress Fiscal Year 2017 at 22, available at

[https://www.dol.gov/vets/media/VETS\\_FY17\\_Annual\\_Report\\_to\\_Congress.pdf](https://www.dol.gov/vets/media/VETS_FY17_Annual_Report_to_Congress.pdf).

Today, because of the increasing reliance on the Guard and Reserve to support the global activities of our Armed Forces, it is more important than ever to ensure that we have strong USERRA protections—so that Guard and Reserve members can seamlessly transition between their civilian and military positions. A recent Congressional Research Service report highlights the way in which the role of the reserve components of the Armed Forces has changed over the past several decades, especially the increasing reliance on reservists for both combat and ordinary military operations. For example, between 1986 and 1989, reservists annually contributed about 1 million duty-days, whereas in 2002 they contributed 41.3 million days, in 2005 they contributed 68.3 million days, and in 2014 they contributed 17.3 million days.<sup>5</sup>

### **Congress Should Act to Protect the Rights of All Americans**

My experience with forced arbitration stems from my status as a servicemember and the special rights that Congress has conferred upon servicemembers like me. But arbitration does not just impact servicemembers or veterans. The increasing and systemic use of forced arbitration is impacting every American and taking away our rights to enforce the federal and state laws that promote economic opportunity and security, protect our health and safety, and stamp out fraud.

Experts estimate that more than 60 million employees are bound by forced arbitration – constituting more than half of all non-union private sector employees.<sup>6</sup> Forced arbitration has grown at a rapid pace, despite the fact that the vast majority of Americans, regardless of race, age, gender, or political affiliation, prefer to have the right to decide whether to arbitrate their disputes or go to court.

Earlier this year, a poll conducted by Hart Research Associates found that 84% of Americans believe that they should have the choice of whether to resolve their legal claims through arbitration or court, rather than being required to arbitrate their claims. Republicans (84%) and independents (89%) were more likely than Democrats (83%) to support the right of workers and consumers to choose between arbitration and court enforcement.<sup>7</sup> In 2016, a Pew survey found that 90% of individuals supported being allowed to have their case heard by a judge and jury and 90% supported being able to appeal legal decisions—two things that

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<sup>5</sup> Congressional Research Service, *Reserve Component Personnel Issues: Questions and Answers* at 7-9 (Oct. 4, 2018) (stating that 1,036,644 Americans are members of the Select Reserve or Individual Ready Reserve/Inactive National Guard as of July 31, 2018), available at <https://fas.org/sgp/crs/natsec/RL30802.pdf>.

<sup>6</sup> Alexander J.S. Colvin, *The growing use of forced arbitration: Access to the courts is now barred for more than 60 million American workers*, Economic Policy Institute (Sept. 27, 2017), available at <https://www.epi.org/publication/the-growing-use-of-mandatory-arbitration/>.

<sup>7</sup> Guy Molyneux & Geoff Garin, Hart Research Associates, *National Survey on Required Arbitration* (Feb. 28, 2019) (reporting on the results of a survey of 1,201 voters that was conducted between January 16 and 28, 2019), available at <https://www.justice.org/sites/default/files/2.28.19%20Hart%20poll%20memo.pdf>.

arbitration agreements take away or severely limit.<sup>8</sup> Another Pew study found that while about half of all consumers support what arbitration advocates say are its benefits, 88 percent of consumers disapprove of arbitration when the process is explained in greater detail.<sup>9</sup> These studies demonstrate that the American people “overwhelmingly want a choice between going to court and entering arbitration.”<sup>10</sup>

There are good reasons why the vast majority of Americans believe that workers and consumers should be able to choose between a court of law and arbitration.

First, forced arbitration is incredibly unfair to ordinary people, who lack the power to decide whether to sign an arbitration agreement when starting a job or purchasing a consumer product. Employers don’t tell job applicants whether they will be required to sign an arbitration agreement. As a result, millions of workers show up on their first day of work, and they are told that they must sign an arbitration agreement or they can’t start the job. Let’s say that you’ve already resigned from your prior job to start a new job at a new company. What worker would realistically decline to sign the arbitration agreement on the first day of work at the new job, if that means leaving his or her family with no income or health care insurance? In my case, I was required to sign an arbitration agreement months after I had started my job at BLB. I had no effective choice to decide whether I wanted to sign the agreement. If I didn’t sign I would be fired. No worker starts a job thinking that he will sue his or her employer, and no worker wants to disappoint his or her employer on the first day of work by refusing to sign the forms that he or she is told to sign. In other words, the decision to sign an arbitration agreement is unfair and coercive

Based on my experience, it seems that the right time for a worker to decide whether he or she wants to agree to arbitration is *after* the dispute has occurred. When a worker realizes that his or her rights may have been violated, he or she can consult with an attorney and make an informed decision about whether it makes sense to go to court or arbitration.

Second, in arbitration, a single person—usually a lawyer, though in some cases it’s not even a lawyer—decides all of the legal and factual questions. But in court, in most cases Americans are entitled to have a jury of our peers decide the factual questions, and have an impartial judge decide the legal questions.

Third, arbitration is often conducted in confidential, secret proceedings, while our courts are open to the public. With arbitration becoming so prevalent, this means that the public is being denied important information about practices that affect so many of us and employees are routinely prevented from sharing their stories with others. For example, employees can be

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<sup>8</sup> CFPB to Act on Banking Dispute Resolution, Pew Charitable Trusts (Feb. 16, 2016), <http://www.pewtrusts.org/en/research-and-analysis/analysis/2016/02/16/cfpb-to-act-on-banking-dispute-resolution>.

<sup>9</sup> Banking on Arbitration: Big Banks, Consumers, and Checking Account Dispute Resolution, November 2012, [http://www.pewtrusts.org/~media/assets/2012/11/27/pew\\_arbitration\\_report.pdf](http://www.pewtrusts.org/~media/assets/2012/11/27/pew_arbitration_report.pdf).

<sup>10</sup> *Id.* at 7.

denied the opportunity to hear about executives – like Harvey Weinstein or Roger Ailes – who sexually harass employees. Workers can be denied information about which employers fail to pay the minimum wage or overtime, or which bosses steal their employees’ tips. The federal agencies who enforce critical laws may be denied the opportunity to learn about serious problems—like federal contractors who discriminate against reservists, fail to pay prevailing wages mandated by federal law, or jeopardize the health and safety of their employees.

Fourth, arbitration agreements often limit what information employees or consumers can discover about their claims—even though it’s usually the employer or company who possesses the key information that the worker or consumer needs to prove his claim. This is like holding a boxing match where one of the boxers has one arm tied behind his back for all 12 rounds. In comparison, our federal and state courts have consistent rules that put all parties on equal footing and that give every American the same rights to search for the truth.

Fifth, with arbitration employers dictate which arbitrators can be selected by the parties. This is the opposite of the American civil justice system, where one party cannot determine which judge will hear the case. The average worker or consumer will never arbitrate more than a single case in his or her lifetime. But large employers and companies may arbitrate hundreds or even thousands of claims. This creates an incentive for arbitrators to rule in favor of employers and companies, so that they will be selected to arbitrate future cases. This is big business for the people who serve as arbitrators. Often arbitrators earn \$8,000 to \$10,000 per day. It would be foolish for an arbitrator to be hostile to the companies who select and pay them.

Sixth, arbitration agreements usually do not permit an employee or consumer to appeal an adverse decision—even if the decision clearly misinterprets the law, overlooks key facts in the case, or does not state a basis for the decision. Although the Federal Arbitration Act allows individuals to ask a court to vacate an arbitration award under very limited circumstances, it makes it so difficult to overturn the arbitrator’s award that there effectively is no right to appeal an arbitrator’s decision. In contrast, every litigant in court – a poor person, a rich person, a small business, or a massive corporation alike – has the same right to appeal and have an appellate court decide whether the district court misinterpreted the law or misunderstood the facts.

Seventh, arbitration agreements routinely limit the amount of time that individuals have to enforce their rights—sometimes to as little as six months from when the dispute arises. This is a major problem for servicemembers and veterans, given that USERRA does not have a statute of limitations period (Congress clarified this issue in a 2008 amendment that was unanimously enacted by Congress and signed by President George W. Bush). It’s also a big problem for workers who are affected by wage theft or discrimination, given that civil rights and employment laws often provide more time for individuals to initiate their legal actions.

Finally, it is common for arbitration agreements to require employees or consumers to arbitrate their disputes in a single city or county, even if that location is far away from where the employee or consumer lives. Many federal laws allow employees or consumers to bring their legal actions in a broad range of places, in order to promote enforcement of the law and prevent companies from always litigating cases on their home turf. As I mentioned above, since the 1950s USERRA and its predecessor laws have allowed servicemembers to sue wherever the employer has a place of business, in recognition of the fact that servicemembers frequently change their place of residence or are deployed far from home.

To me, the choice is easy. I would always prefer to enforce my rights in a court of law, with a neutral judge, a jury of my peers, full and fair discovery, and a right to appeal. At the same time, I recognize that some people may prefer arbitration over court. I think that the people who prefer arbitration should have every right to make that choice. But with all due respect, I believe that I and hundreds of millions of Americans should be able to choose to go to court rather than arbitration, and we should never be forced to arbitrate our claims.

Like most people, I value the independence and freedom that I have to make my own choices, particularly when it comes to enforcing my legal rights. My employer took that freedom away from me when it required me to sign an arbitration agreement on a take-it-or-leave-it basis. Arbitration might make sense for some people in some circumstances, but every individual should be able to make the choice for himself or herself.

The Forced Arbitration Injustice Repeal Act of 2019, H.R. 1423 (and S. 610 in the Senate), would give this choice to every American employee and consumer. This vital legislation would create a simple rule that employees and consumers cannot be required to sign an arbitration agreement until the dispute occurs. And once the dispute occurs, the consumer or employee would be free to enter into an arbitration agreement if both of the parties want to arbitrate.

I thank Chairman Cicilline and Representative Hank Johnson for introducing the FAIR Act. I thank the 198 members of the House of Representatives who have sponsored the Forced Arbitration Injustice Repeal Act of 2019, including many members of the Judiciary Committee and this Subcommittee. I hope that all the other members of the House will consider sponsoring or supporting the passage of this legislation. The goal of this legislation is not to create more legal actions, but to ensure that every American has the same ability to enforce his or her rights that already exist under federal and state laws.

As a servicemember, I try to remember that our service is not on behalf of ourselves, but on the behalf of every American. And, in my opinion, no American should be denied the opportunity to have their day in court and enforce the rights that this Congress or the states have given us.

### **Conclusion**

I sincerely appreciate that the Committee is considering this important issue and legislation. Thank you very much for your time and consideration of my views.

