TESTIMONY

in support of

ALTERNATIVE DISPUTE RESOLUTION PROGRAMS IN EMPLOYMENT

and in opposition to

SUBTITLE C, THE ARBITRATION-PROHIBITION PROVISIONS

of

H.R. 5129, THE CIVIL RIGHTS ACT OF 2008

before the

SUBCOMMITTEE ON HEALTH, EMPLOYMENT, LABOR, AND PENSIONS

of the

COMMITTEE ON EDUCATION AND LABOR

of the

UNITED STATES HOUSE OF REPRESENTATIVES

on behalf of

THE COUNCIL FOR EMPLOYMENT LAW EQUITY

by

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I. Statement of Interest

Good afternoon, Chairman Andrews, Ranking Minority Member Kline, and members of the Subcommittee on Health, Employment, Labor, and Pensions of the House Education and Labor Committee. Thank you for this opportunity to testify *in strong support of* the use of Alternative Dispute Resolution ("ADR") in employment, and of the use of mediation and arbitration generally, as effective alternatives to litigation, and *in opposition to* Subtitle C, the arbitration-prohibition section of H.R. 5129, the Civil Rights Act of 2008.

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 senior Partner at the law firm of Jackson Lewis, and the Chair of the Practice Group on ADR at Jackson Lewis. Among other activities on the ADR issue, I have authored four *amicus curiae* briefs in support of ADR, have testified on ADR issues before the Subcommittee on the Constitution of the Senate Judiciary Committee, and have drafted ADR policies, conducted audits of ADR programs, and/or advised employers on ADR issues for nearly 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 to our jurisprudence system.

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 Department of Labor, the Department of Health and Human Services, the Office of Management and Budget, and the Government 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 the AFL-CIO and organized labor in general, which have 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 less legal fees – 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 450 lawyers in 34 offices, *all* of whom are dedicated exclusively to the representation of management on labor and employment issues. No law firm has had as extensive or prominent a labor practice as has Jackson Lewis over the past 50 years, and it is highly unlikely that any 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 H.R. 5129, 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 the message that "it ain't broke" so "don't fix it." ADR in employment – and in other contexts – does *not* need a "fix."

On behalf of the CELE, I can assure you that we are committed to helping ensure fairness in our arbitration and ADR systems for employees and employers alike.

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 Subtitle C of H.R. 5129 would effectively *deny* this option to employers and employees.

It is hard to imagine a more sweeping – and *devastating* – blow to mandatory binding arbitration in employment than H.R. 5129's language:

Section 423(a) of Subtitle C of H.R. 5129 reads:

> (a) Protection of Employee Rights – Notwithstanding any other provision of law, any clause of any agreement between an employer and an employee that requires arbitration of a dispute arising under the Constitution or the laws of the United States shall not be enforceable. [1]

H.R. 5129 would effectively *end* arbitration in employment in America.

ADR – a common, useful, positive, pro-active, timely, effective *and* cost-effective tool for making employers *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.[2] *Many* would lose if H.R. 5129 were enacted; *very few* would gain.

Why is preservation of ADR in employment critically important?

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[1] Section 423 of H.R. 5129 – "UNENFORCEABILITY OF ARBITRATION CLAUSES IN EMPLOYMENT CONTRACTS."

[2] 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).

The use of Alternative Dispute Resolution in employment is common and increasing as a means of avoiding litigation, addressing *more* employee issues, and resolving *more* amicably these concerns. Given the costs, delays, and divisiveness of employment litigation, a more sensible and conciliatory option is preferable for employers *and 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

(6) Better workplaces.

Frankly, I am absolutely convinced that 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.

What is *not* needed is the wholesale and retroactive dismantling of common, effective, and widespread ADR-in-employment 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. 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;[3]

[3] 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/pub/pdf/ctcvlcoi.pdf. The backlog and delay in the *federal* courts for civil cases is

(2) **A simpler, more focused, more confidential, and more dignified process** – 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. Litigation is a destroyer of the employment relationship; ADR is a preserver of the employment relationship;

(4) **Peace of mind** – ADR helps "diffuse" 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.[4] No financial remedy is waived by participation in the ADR process;

(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.[5] Moreover, the decisions of the arbitrator are final and binding on *both* parties;

(7) **A better chance of prevailing** – Employees have a 63-percent chance of prevailing in employment arbitration, but only a 43-percent chance of

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even greater. In fiscal year 2006 alone, 259,000 civil cases were filed in U.S. District Courts, continuing the dramatic trend upwards. *Fiscal Year 2006 Caseloads Remain at High Levels,* THE THIRD BRANCH: NEWSLETTER OF THE FEDERAL COURTS (March 2007), available at http://www.uscourts.gov/ttb/2007-03/fiscal/index/html.

[4] The median award for employees who prevail in arbitration and in court are 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 and costs from his or her award in litigation, *most* employees in employment arbitrations actually fare *much* better financially than in court.

[5] In fact, based on my legal practice of 29 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.

prevailing in employment litigation.[6] 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 decision – 63-to-57 percent.[7] 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.[8] Thus, if you are an employee with a grievance, you have a better chance of winning,[9] virtually no chance of being dismissed, and a higher median award[10] 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

(8) **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, more problems addressed, more problems resolved – quickly, efficiently, and cost-effectively – means better employer-employee relations, better morale, better employee retention, and a more productive and enthusiastic workforce.

IV. 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-

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[6] *See* Theodore Eisenberg, *supra, note 4.*

[7] *See id.*

[8] *See id.*

[9] 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 Maltby, *Employment Arbitration: Is It Really Second-Class Justice?*, Dispute Resolution Magazine, 23-24 (Fall 1999).

[10] This is further confirmed by research by the National Workrights Institute which found that, consistent with the Eisenberg study *supra, note 4*, 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.

free means of raising 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[11] 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, more effectively, and more expeditiously;

- **ADR is less disruptive and distractive than litigation** – Since issues get resolved in a timely and decisive manner,[12] with a minimum commitment of time and resources, the 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.[13] By achieving a fair, final, and early resolution, ADR is cost-effective; and

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[11] The minimum damages required to sustain employment litigation is $75,000, according to the National Workrights Institute. *See id.* In fact, the NWI found that in those 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. Lewis L. Maltby, *Arbitrating Employment Disputes*: *The Promise and the Peril in Arbitration and Employment Disputes*, 530. (Daniel P. O'Meara ed., 2005). 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.

[12] One broad study found that arbitrations in all contexts 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).

[13] One 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

- **ADR is adjudicated by qualified and objective professionals** – Arbitrators certified by the American Arbitration Association ("AAA"), the Judicial Arbitration & Mediation Services ("JAMS"), and the National Arbitration Forum 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.

V. Elements of an Effective ADR Program

The CELE, and the employer community as a whole, hope that Congress recognizes and fully appreciates what we believe is undeniable: Arbitration is a vital and necessary component of our civil justice system.

If H.R. 5129 were enacted, our civil justice system would be catapulted into chaos: hundreds of thousands of employment arbitrations a year would be replaced by tens of thousands of new court cases;[14] *any* redress by the vast majority of individuals currently using the arbitration process would be rendered impossible as their claims would be abandoned and left homeless in the new judicial order;[15] the already overburdened and significantly backlogged court system would be swamped by a tidal wave of new cases; and millions of employees and thousands of companies now subject to contracts they voluntary entered into that call for mediation and arbitration of disputes would have those contracts *retroactively* voided – a legal nightmare!

Course of Study, April 28-30) 875, 894 (1994). The backlog in the federal courts is significant – 23,000 cases had been pending in U.S. District Courts for two-to-three years in 2006, and another 50,000 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/Table411.pdf.

[14] For example, in 2002, the American Arbitration Association *alone* handled more than 200,000 arbitrations overall. 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 Subtitle C of H.R. 5129 were enacted, the overwhelming majority of employment arbitrations currently being conducted in the United States would not occur. Many of these would be foisted on our court system. The clear majority would result in the individual employees being left out in the cold with no legal recourse. *See,* e.g., Lewis Maltby, *supra, note 11.*

[15] A survey of the plaintiffs' bar found that they agree to provide representation to only five percent of the individuals who seek out their help. In addition, plaintiffs' attorneys require a minimum of $60,000 provable damages, commonly request a retainer fee up front, and typically require a payment of a contingency fee of between 33 and 40 percent of any award. 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). Therefore, the door is slammed shut on 95 percent of potential plaintiffs in litigation. In arbitration, that number is virtually zero.

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 to require procedural reforms, *not* to recklessly dictate that "any agreement between an employer and an employee that requires arbitration... shall not be enforceable."[16]

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:

(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. If an employee wants legal representation at a mediation or arbitration, employers should permit it. Employers also should consider

[16] Section 423(a) of Subtitle C of H.R. 5129.

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, Judicial Arbitration & Mediation Services, and/or the National Arbitration Forum;

(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** is helpful in this regard. Employees should 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 H.R. 5129, that would impose a death penalty on ADR as an employment practice.

VI. Who Loses If Subtitle C of H.R. 5129 Is Enacted

If Subtitle C of the Civil Rights Act of 2008 were enacted, the sun would still come up. However, for *millions* of Americans, their lives would be worse:

(1) **Consumers** – There would be more legal costs, more frivolous and marginal litigation, and a greater potential for legal extortion of employers by former employees, even those who most deserved their terminations. How can this be good? There would be more legal fees paid to plaintiffs' lawyers – *and* defense lawyers – and these costs go to the bottom line without producing *any* productive or profitable benefit.[17] As a consequence, the costs of products and services would be higher. Consumers would *lose* because companies would have higher costs and be forced into more litigation;

(2) **Employees** – Due to the increased level of costly litigation, and the increased "surrender" of some employers to frivolous or marginal claims

[17] I therefore am a defense lawyer who is championing a legal process – ADR – that substantially *reduces* legal fees to defense lawyers. Why? Because it is the right thing to do. Clients that Jackson Lewis advises to implement ADR programs inevitably decrease their legal fees and costs significantly in the employment area – one company by more than 80 percent.

in the name of litigation-cost avoidance,[18] Subtitle C of H.R. 5129 would cost money and detract from employers' profitability, cost jobs, negatively affect stock prices and profit-sharing, detract from possible salary and benefit increases, and/or curtail expansion/capital investment. For some companies, especially smaller businesses, enough increased litigation – the abolition of arbitration of employment disputes *would* substantially increase litigation – could impact their viability as a business entity (i.e., cause bankruptcies);

(3) **Employees** (again) – 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* communication/input into workplace policies and practices, *more* confrontations if they do pursue their claims in litigation; and – bottom line: *worse* workplaces;

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

(5) **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 of employment disputes 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;

(6) **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;

(7) **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

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[18] Given the costs of litigation, many times a "win" is not a win. Typically, it can cost an employer $300,000 to litigate a complex employment claim to decision.

(8) **The Interests of Justice** – As mentioned above, 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.

VII. Who Wins If Subtitle C of H.R. 5129 Is Enacted?

The obvious answer is: the plaintiffs' bar.

The American Association for Justice, formerly the American Trial Lawyers Association, *hates* arbitration – less litigation, less confrontation, less likelihood of runaway juries (multi-million-dollar verdicts for hot-coffee cases – which has resulted in a country full of people drinking luke-warm coffee), less of a weapon with which to intimidate the employer community, less damages, and – *most of all* – less attorneys' fees.

They claim everyone deserves "their day in court." Do they? I am not so sure (those who misuse and abuse the judicial process, those who use it for legal extortion, those who take a "lotto" mentality to litigation) – but I *am* sure that, in the employment context, individuals retain that option regardless, and no ADR program can abridge those rights.

So the "trial lawyers" (plaintiffs' lawyers) would win if Subtitle C of H.R. 5129 became law – a bigger pool of potential plaintiffs, 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.

Who else wins? Undeserving employees. People whose cases would be undeserving in the context of a fair, relatively quick, relatively inexpensive, and more predictable forum (certified arbitrators are more rational, more familiar with the law, and more experienced than any jury), but whose cases – thrust upon the court system – may be worth a "nuisance settlement."

All the rest of us? We lose. Subtitle C of H.R. 5159 – and the betrayal and abandonment of ADR in the employment context which it represents – would be bad public policy and harmful to American justice and American society.

VIII. Supporters of ADR

A. 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.[19] 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.[20]

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[21] was passed and signed into law in October 1999 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.

Additionally, Recommendation 39 of the *Long Range Plan for the Federal Courts*[22] encourages U.S. District Courts to "make available a variety of alternative dispute resolution techniques, procedures, and resources to assist in achieving a just, speedy, and inexpensive determination of civil litigation."[23] Clearly, the intent of promoting ADR methods within the court system is to lighten the federal court docket.

Subtitle C of H.R. 5129 stands in opposition to this worthwhile goal. H.R. 5129 would prohibit many thousands of arbitrations of employment 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.

B. 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 solutions is an ethical obligation as a practitioner."[24] Nearly two-thirds (66.2 percent) also predicted that "ADR use will increase in the future."[25]

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[19] Marika F.X. Litras, "Civil Rights Complaints in U.S. District Court, 1990-98" (NCJ-173427). Employment discrimination cases increased from 8,413 filings in 1990 to 23,735 in 1998.

[20] *See id.*

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

[22] See *New Law Authorizes ADR in All District Courts*, THE THIRD BRANCH, published and available at http://www.uscourts.gov/ttb/feb99ttb/newlaw.html.

[23] *See id.*

[24] *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).

[25] *See id.*

C. 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[26]... and *not* employees – a public opinion poll found that 83 percent of employees *favor* arbitration.[27]

D. 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).[28]

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

IX. 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.[29] Since its enactment in 1925,[30] and codification in 1947,[31] the use of arbitration in the private and public sectors has flourished.

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"),[32] in which Congress specifically endorsed the arbitration of Title VII[33] cases.

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[26] 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.

[27] *See* Princeton Survey Research Associates, *Worker Representation and Participation Survey Focus Group Report*, Princeton, NJ (April 1994).

[28] *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).

[29] *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."

[30] 43 Stat. 883.

[31] 9 U.S.A. §1 (1994).

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

[33] 42 U.S.C. §§2000e *et seq.*

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]."[34] 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[35] 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.[36]

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.[37] The Federal Election Commission resolved all 26 employee complaints brought to the agency's Equal Employment Opportunity director in a recent three-year period.[38] 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.

X. The Particular Injustice of Retroactivity

The retroactivity of Subtitle C of H.R. 5129 is a *big* deal.

This legislation would largely dismantle an existing and effective arbitration system, even though Subtitle C's proponents have failed to establish the necessity of this draconian action.

The sweeping and reckless impact of Subtitle C is "lowlighted" by the *retroactive* invalidation of existing pre-dispute arbitration agreements entered into by hundreds of thousands

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[34] 105 Stat. at 1081, *reprinted in* notes to 42 U.S.C. § 1981.

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

[36] Pub. L. No. 105-315, §2(1).

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

[38] *See id.*

of employees with thousands of employers. Overall, more than a million *current* employment agreements would be rendered null and void in this regard, despite the fact that they were entered into voluntarily and have existed without incident or controversy – many for decades.

XI. Why the Post-Dispute Exception Is Largely Meaningless

H.R. 5129 provides for two exceptions to its blanket prohibition of arbitration-in-employment agreements – past and future. These exceptions are for arbitrations in a union setting,[39] and post-dispute arbitrations by consent of the parties.[40]

As discussed earlier, the exception for collective bargaining agreements is obvious, necessary, and somewhat hypocritical. Why is pre-dispute arbitration so good in a union setting, but anathema in a non-union setting? Why should Congress preserve it for unionized employees, but absolutely forbid it for non-union employees (regardless of their intent and desire)?

Arbitration is a hallmark of union representation. It has been for a hundred years. Mandatory binding arbitration is so inherent to the labor movement that the AFL-CIO has made it a foundation of its democratization initiatives for workers in foreign countries, including Mexico.

As for *post*-dispute arbitration – the exclusion is all-but-meaningless. Why? The overwhelming majority of employment arbitrations are pursuant to pre-dispute ADR programs. Employers and employees *both* are disinterested in post-dispute arbitrations – and for good reason.

One recent study found that 86 percent of lawyers – including both plaintiffs' and defense lawyers – would not advise their clients to agree to post-dispute arbitration.[41] [Contrast this with the ABA study discussed earlier that found that virtually the same percentage – 86.2 percent – of lawyers felt that "their clients' best interests are sometimes best served by offering ADR solutions."[42]

Therefore, arbitration – good thing... post-dispute arbitration – bad thing... according to nearly nine-out-of-ten lawyers who practice in this area – a conclusive result.

Why do practitioners – on *both* sides – feel this way? Because once a lawsuit is filed, it is akin to a declaration of war. The employee or former employee has a plaintiffs' lawyer who was convinced enough in the merits (and/or potential damages) of the case to take on the client

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[39] Subtitle C, Sec. 423(b)(2) Collective Bargaining Agreements – Subsection (a) shall not preclude the enforcement of the rights or terms of a valid collective bargaining agreement.

[40] Subtitle C, Sec. 423(b)(1) Waiver or Consent After Dispute Arises – Subsection (a) shall not apply with respect to any dispute if, after such dispute arises, the parties involved knowingly and voluntarily consent to submit such dispute to arbitration.

[41] 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 (2000).

[42] *See, supra, note 24.*

and file the lawsuit. The *threat* of protracted litigation – with its attendant legal costs and/or unfavorable publicity – is sometimes enough to make the employer settle on favorable terms to the plaintiff and his or her contingency-feed lawyer – regardless of the merits of the case. They are *using* litigation – not arbitration – as a weapon against the employer. It is not about justice,[43] it is about money.

Collaterally, the employment relationship normally has been destroyed. Once a lawsuit has been filed, the employer does not want the individual back, and the individual does not want to be back – to return to his or her job.

This is why it is abundantly clear that lawsuits are a job *destroyer*, while arbitration (pursuant to a pre-dispute arbitration agreement, generally proceeded by mediation) is a job *preserver*.

So often, once a lawsuit has been filed, bridges have been burned. That is the reality.

Therefore, the Section 423(b)(1) exception for post-dispute arbitration is a teeny-tiny exception – it would preserve an option that now represents far less than one percent of all employment arbitrations.

XII. Conclusion

"When will mankind be convinced and agree to settle their difficulties by arbitration?"[44]

Benjamin Franklin, a founding father and the great American genius and innovator, posed this question more than 200 years ago. Perhaps he would be more than pleased to see the extent that arbitration – including arbitration of employment disputes – has taken hold in American society today.

But today we also face a significant threat to what Franklin then – and *most* Americans today (83 percent!) – support.[45]

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.

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[43] If it was, they would go to arbitration. *See, supra, notes 6-10.*

[44] Maud Van Buren. Quotations for Special Occasions. New York, Toe H.W. Wilson Company 1939. Pg 151.

[45] *See*, Princeton Survey Research Associates, *supra, note 27.*

To abandon this practice, to suddenly and retroactively render its use void and unenforceable, as Subtitle C of H.R 5129 would do, would have far-reaching and disastrous impacts on American jurisprudence and American society.

H.R. 5129 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 Council for Employment Law Equity's views 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.