January 19, 2018

Senator Dick Sears, Jr.
Chair, Senate Committee on Judiciary
Vermont State House
115 State Street
Montpelier, VT 05633-5501

RE: Opposition to S.105 regarding arbitration disputes

Dear Chairman Sears and Members of the Committee:

On behalf of CTIA, the trade association that represents the wireless communications industry, I write in opposition to S.105, which seeks to limit arbitration clauses in contracts and establishes data collection and disclosure requirements regarding arbitrations.

Arbitration provides an invaluable service, particularly to individuals who have only modest-sized claims and would have difficulty obtaining a lawyer at an affordable price. Arbitration's simplified, user-friendly procedures allow many individuals to resolve their claims even if they are unable to obtain or afford an attorney. Without arbitration, most of these individuals would be unable to navigate the complex rules of civil litigation and would have no remedy at all.

This proposed bill would conflict with recent U.S. Supreme Court decisions clarifying that arbitration agreements that are fair to consumers and employees must be enforced like any other contract.

In recent years, the U.S. Supreme Court has repeatedly held that the Federal Arbitration Act (FAA) requires enforcement of arbitration agreements according to their terms and preempts state and local laws that treat arbitration agreements differently from other contracts. In 2011, the Court held in *AT&T Mobility LLC v. Concepcion* that the FAA preempted a state-law rule holding arbitration agreements to be invalid if they waived the parties' right to bring class action lawsuits.[1] In 2013, the Court held in *American Express Co. v. Italian Colors Restaurant* that the FAA preempted a judge-made rule

[1] AT&T Mobility LLC v. *Concepcion*, 563 U.S. at 352 (2011).

declaring arbitration agreements invalid when plaintiffs sought to bring claims that are alleged to be expensive to prosecute individually.[2] And last year, in *DIRECTV, Inc. v. Imburgia*, the Supreme Court reaffirmed that state law must "place[] arbitration contracts on equal footing with all other contracts."[3]

Under the "unconstitutional conditions" doctrine, "the government may not deny a benefit to a person because he exercises a constitutional right."[4] The Constitution's Supremacy Clause makes federal law, as interpreted by the Supreme Court, the "supreme law of the land."[5] And Individuals have a right under the Supremacy Clause and federal arbitration law to enter into enforceable arbitration agreements and have them upheld, irrespective of any anti-arbitration state law.

The proposed bill will also harm the citizens of Vermont. For many consumers and employees with disputes against businesses, litigation in court is not a realistic option. They have little hope of navigating the legal system without a lawyer, yet they are unlikely to obtain legal representation when their claims are only modest in size. And even if they manage to get a lawyer, litigation in court usually involves significant delays and high cost.

In arbitration, by contrast, it is easier for consumers and employees with small claims to obtain relief. Arbitration uses streamlined procedures, making it possible for plaintiffs to represent themselves without a lawyer. The informality of arbitration also makes it cheaper and easier for plaintiffs to prosecute their cases; disputes can be decided over the phone or through paper or e-mail submissions, eliminating the need for plaintiffs to miss work or personal commitments to attend lengthy in-person proceedings. In short, arbitration provides a fair means of resolving claims that would be otherwise left without redress. Denying access to arbitration would prevent consumers and employees from a realistic opportunity to obtain relief.

Proponents of the bill may contend that arbitration requires consumers to give up their "constitutional right" to assert claims in a court of law However, the Supreme Court has recognized that, "by agreeing to arbitrate," a person "does not forgo [his or her] substantive rights. . . [he or she] only submits to their resolution in an arbitral, rather than a

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[2] *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2312 (2013).
[3] *DIRECTV, Inc. v. Imburgia*, 126 S. Ct. 463, 468 (2015).
[4] *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2594 (2013) (*quoting Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 545, (1983)).
[5] U.S. Const. art VI, cl. 2.

judicial, forum." *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 229-30 (1987). Thus, arbitration changes the *procedures* for resolving disputes, but it doesn't change a person's ability to get a fair hearing on that claim.

Proponents of the bill may complain that arbitration, which generally requires disputes to be resolved on an individual basis, prevents class actions. They claim that by creating an alternative to class actions, arbitration, "disable[s] consumer challenges" to wrongful business practices, citing a recent series of articles in the *New York Times*. But as numerous observers have pointed out,[6] the *New York Times* articles were poorly reported and painted a misleading picture of class actions. In reality, class actions primarily benefit plaintiffs' lawyers, who earn high fees while negotiating settlements that yield little or no recovery for class members (*i.e.,* their purported "clients").

Additionally, proponents are mistaken to suggest that class actions are necessary in order for individuals to vindicate their rights. As Justice Kagan has recognized in a dissenting opinion in *Amex,* "non-class options abound" for individuals with claims against businesses, including arbitrating in systems that allow individuals to coordinate informally with each other to develop claims and provide for "amelioration of arbitral expenses," such as filing fees and expert witness costs.[7] AT&T's arbitration provision contains such consumer-friendly features, and the Supreme Court observed in *Concepcion* that under that provision, consumers were "*better off* . . . than they would have been as participants in a class action."[8] Many other companies have adopted similar arbitration provisions, including many of CTIA's wireless carrier members.

Finally, proponents may suggest that arbitration is unfair to individuals, pointing to the Public Citizen report on the alleged pro-business bias of the National Arbitration Forum (NAF). But the NAF has been out of the business of consumer arbitrations since 2009, when it agreed to stop arbitrating consumer cases as part of a settlement with the Minnesota Attorney General. The NAF is not representative of arbitration providers today – which strive to be fair and impartial.

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[6] *See, e.g.*, Inst. for Legal Reform, *Dog Bites Man: New York Times Prefers Lawyer-Controlled Class Actions over Fair Arbitration that Enables Individuals to Protect Themselves*, Nov. 2, 2015, http://bit.ly/1k4YBHf; *Daniel Fisher, New York Times "Expose" of Arbitration Clauses Leaves Lawyers in the Shadows*, Forbes, Nov. 1, 2015, http://onforb.es/1NatlhV.

[7] *Italian Colors*, 133 S. Ct. at 2318-19.

[8] *Concepcion*, 563 U.S. at 351-52.

For these reasons, we urge you not to move proposed S.105 as it would run afoul of constitutional law and deprive Vermont consumers of a valuable means by which to resolve contract disputes.

Sincerely,

Lisa Volpe McCabe
Director, State Legislative Affairs