Civil Rights Groups Strongly Oppose H.R. 985

The Honorable Bob Goodlatte Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

The Honorable John Conyers, Jr. Ranking Member
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

Re: Civil Rights Advocates Strongly Oppose H.R. 985

Dear Chairman Goodlatte and Congressman Conyers,

The signatory civil rights organizations and law firms write to strongly oppose H.R. 985, the Fairness in Class Action Litigation Act of 2017. The bill will undermine the enforcement of this nation's civil rights laws and upend decades of settled class action law. This sweeping and poorly drafted legislation will create needless chaos in the courts without actually solving any demonstrated problem. In this letter, we highlight the most egregious of its many harms.

As advocates for the marginalized and often invisible members of our society, we write to remind the Committee that class actions are critical for the enforcement of laws prohibiting discrimination in employment, housing, education, and access to public areas and services. As the Supreme Court has recognized, class actions provide "vindication of 'the rights of groups of people who individually would be without effective strength to bring their opponents into court at all.'" *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 617 (1997). Courts have interpreted Rule 23 of the Federal Rules of Civil Procedure, the federal class action rule, over decades and the Advisory Committee on Civil Rules has, through its deliberative process, reviewed and amended the rule to ensure its fair and efficient operation.

H.R. 985 Adds Years of Additional Delay, Expense, and Disruption

One of the stated purposes of the bill is to "assure . . . **prompt** recoveries," yet it includes provisions that will extend the duration of cases by years and add exponentially to the expense on both sides.

- The bill allows for an automatic appeal – in the middle of every case – of the class certification order. Such appeals are extraordinarily disruptive and typically add one to three years to the life of the case. While the case sits in an appellate court, expenses and fees rise, memories fade, and injured victims remain without justice. Automatic appeals of all class certification orders will clog our already-taxed Courts of Appeals.
- The bill similarly builds in an automatic stay of discovery in the district court whenever an alleged wrongdoer files any one of a list of motions. This is an invitation for

gamesmanship and delay, and will deprive judges of the ability to properly manage their cases.

- The bill, by its terms, applies to all cases *pending* upon the date of enactment. This means that hundreds of cases that have been litigated and certified under existing law would start from scratch with new standards, new class certification motions, and new automatic interlocutory appeals. The resulting waste of judicial resources would be enormous.

Civil Rights Injuries Are Never Identical and Are Already Subject to Rigorous Judicial Review

H.R. 985 imposes a new and impossible hurdle for class certification. It requires that the proponents of the class demonstrate that "each class member has suffered the same type and scope of injury." At this early stage of a civil rights class action, it is frequently impossible to identify all of the victims or the precise nature of each of their injuries.

But even if this information were knowable, class members' injuries would not be "the same." For example, in an employment discrimination class action, the extent of a class member's injuries will depend on a range of factors, including their job position, tenure, employment status, salary, and length of exposure to the discriminatory conditions. For this reason, nearly forty years ago, the Supreme Court developed a two-stage process for such cases in *International Brotherhood of Teamsters v. U.S.*, 431 U.S. 324, 371-72 (1977). In the first stage, the court determines whether the employer engaged in a pattern or practice of discrimination. If the employer is found liable, the court holds individual hearings to determine the relief (if any) for each victim. The Supreme Court recently reaffirmed the use of the *Teamsters* model for discrimination class actions in part because of the individualized nature of injuries. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 366 (2011). Thus, this bill would overturn the approach established four decades ago to permit a class of victims of discrimination to seek effective relief.

For the same reason, the bill's limitation on "issue classes" will impede the enforcement of civil rights laws. Under current practice, the district court will decide in some cases that the best approach is to resolve the illegality of a discriminatory practice in an initial proceeding, and then allow class members to pursue individual remedies on their own. In such cases, class certification for the core question of liability (often a complex proceeding) will be tried and resolved just once for the benefit of the many affected individuals. This approach can promote both efficiency and fairness. Section 1720, however, would deprive courts of this ability that they currently have to manage class actions to ensure justice.

Requiring the Early Identification of Class Members is Unnecessary

Section 1718 seeks to impose a heightened standard for identifying class members, an approach that has been rejected by the majority of circuits to have considered the question.[1] This

[1] *See Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121, 1127-33 (9th Cir. 2017); *Sandusky Wellness Center, LLC, v. Medtox Scientific, Inc.*, 821 F.3d 992, 995-96 (8th Cir. 2016); *Rikos v.*

stringent standard would not further any interest that is not already adequately protected by Rule 23, which requires that the court consider whether the case is manageable and the class action device is the "superior" method for fairly and efficiently resolving the case.

Moreover, § 1718 would impose a nearly insurmountable hurdle in situations where a class action is the only viable way to pursue valid but low-value claims. In such cases, records of who has been affected may have been destroyed by the wrongdoer, may be incomplete, or may have never existed at all. In those cases, individual notice to all class members may be impossible. But, without class certification in these situations, class members who have valid claims and who can be identified would not be allowed to recover. The bill also ignores the important objective of deterring and punishing wrongdoing, and encourages defendants not to maintain relevant records.

Arbitrary and Unworkable Standards for Attorneys' Fees Undermine Civil Rights Enforcement

Civil rights class actions are often not about getting money to victims, but about systemic reforms that benefit the most vulnerable. In many cases, the sole remedy is an injunction to change illegal laws or practices. To ensure that non-profit legal organizations and other advocates are able to undertake these important, complex, and often risky cases, dozens of our civil rights laws incorporate fee-shifting provisions. If a case is successful, the judge awards a reasonable fee based upon the time that the advocates have spent working on the case. This method of determining attorneys' fees provides for consistent and predictable outcomes, which is a benefit to all parties in a lawsuit.

H.R. 985 would entirely displace this well-settled law with a standard long ago rejected as arbitrary and unworkable. Under the bill, attorney's fees would be calculated as a "percentage of the value of the equitable relief." § 1718(b)(3). But how is a judge to determine the cash value of an integrated school, a well-operating foster care system, the deinstitutionalization of individuals with disabilities, or myriad other forms of equitable relief secured by civil rights class actions? Asking judges to assign a price tag in such cases is an impossible task and would lead to uncertainty and inconsistency.

Non-profit organizations cannot bear the risk of these long and expensive cases if, at the end, their fees are calculated under this incoherent and capricious standard. Indeed, the bill creates an incentive for defendants to prolong the litigation so as to make it economically impossible for plaintiffs' attorneys to continue to prosecute the litigation.

These serious issues warrant, at a minimum, careful consideration and public hearings. A rush to pass such far-reaching and flawed legislation will deny access to justice for many and undermine the rule of law.

Procter & Gamble Co., 799 F.3d 497, 525 (6th Cir. 2015); *Mullins v. Direct Digital, LLC*, 795 F.3d 654, 662-72 (7th Cir. 2015).