

Civil Rights Groups Strongly Oppose H.R. 985

February 14, 2017

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 Groups Strongly Oppose H.R. 985

Dear Chairman Goodlatte and Congressman Conyers,

The 120 signatory civil rights organizations and advocates 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. No further revisions are needed at this time.

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. Appeals of

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class certification rulings are already permitted at the discretion of the Courts of Appeals. An appeal of every class certification ruling is unnecessary.

- 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.” As a simple example, those overcharged for rent will have different injuries. 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. These issue classes 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.

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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 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 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, attorneys’ 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.

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. 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).

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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.

Respectfully Submitted,



Jocelyn D. Larkin
Executive Director
Impact Fund

Signatories

1. 9to5, National Association of Working Women
2. A Better Balance
3. American Association of University Women
4. American Civil Liberties Union
5. Asian American Legal Defense and Education Fund
6. Asian Americans Advancing Justice - Asian Law Caucus
7. Asian Americans Advancing Justice - Los Angeles
8. Association of Late Deafened Adults
9. Atlanta Women for Equality
10. Baltimore Neighborhoods, Inc
11. Business and Professional Women/St. Petersburg-Pinellas
12. California Employment Lawyers Association
13. California Women's Law Center
14. Campaign for Educational Equity, Teachers College, Columbia University
15. Center for Children's Advocacy
16. Center for Justice and Accountability
17. Center for Popular Democracy
18. Center for Public Representation
19. Center for Responsible Lending
20. Central Alabama Fair Housing Center
21. Centro Legal de la Raza
22. Chet Levitt Fund for Employment Law
23. Child Care Law Center
24. Children's Law Center, Inc.
25. Children's Rights
26. Civil Rights Education and Enforcement Center
27. Colorado Cross-Disability Coalition
28. Columbia Legal Services

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29. Communities for a Better Environment
30. Community Development Project of the Urban Justice Center
31. Community Justice Project
32. Community Legal Services in East Palo Alto
33. Dade County Bar Association Legal Aid Society
34. Disability Law Center
35. Disability Rights Advocates
36. Disability Rights Education and Defense Fund
37. Disability Rights Maryland
38. Domestic Violence Legal Empowerment and Appeals Project
39. Earthjustice
40. EarthRights International
41. Empire Justice Center
42. Environmental Justice Coalition for Water
43. Equal Justice Center
44. Equal Justice Society
45. Equal Rights Advocates
46. Farmworker Justice
47. Florida Justice Institute, Inc.
48. Florida Legal Services, Inc.
49. Florida's Children First
50. Freedom Network USA
51. Heart of Florida Legal Aid Society Inc
52. Homeowners Against Deficient Dwellings
53. Human Rights Defense Center
54. Human Trafficking Pro Bono Legal Center
55. Impact Fund
56. Institute for Science and Human Values
57. Jacksonville Area Legal Aid, Inc.
58. Justice in Motion
59. Lambda Legal
60. LatinoJustice PRLDEF
61. Law Foundation of Silicon Valley
62. Lawyers Civil Rights Coalition
63. Lawyers' Committee for Civil Rights of the San Francisco Bay Area
64. Legal Aid at Work (formerly Legal Aid Society – Employment Law Center)
65. Legal Aid Justice Center
66. Legal Aid of Manasota
67. Legal Aid of Marin
68. Legal Aid Service of Broward County, Inc.
69. Legal Aid Society of NYC
70. Legal Aid Society of Palm Beach County, Inc.
71. Los Angeles Center for Community Law and Action

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72. Make the Road New York
73. MALDEF
74. Maurice & Jane Sugar Law Center for Economic & Social Justice
75. Metropolitan Washington Employment Lawyers Association
76. Mississippi Center for Justice
77. NAACP Legal Defense and Educational Fund, Inc.
78. National Advocacy Center of the Sisters of the Good Shepherd
79. National Center for Lesbian Rights
80. National Center for Transgender Equality
81. National Center for Youth Law
82. National Disability Rights Network
83. National Employment Law Project
84. National Employment Lawyers' Association
85. National Employment Lawyers' Association - New York
86. National Housing Law Project
87. National Immigration Law Center
88. National Law Center on Homelessness & Poverty
89. National Partnership for Women & Families
90. National Women's Law Center
91. New Mexico Environmental Law Center
92. North Carolina Justice Center
93. North Florida Center for Equal Justice, Inc.
94. Northwest Health Law Advocates
95. Oregon Communication Access Project
96. Prisoners' Legal Services of Massachusetts
97. Prison Law Office
98. Public Advocates
99. Public Counsel
100. Public Interest Law Project
101. Public Justice
102. Public Justice Center
103. Public Utility Law Project of New York
104. Rhode Island Center for Justice
105. San Diego Volunteer Lawyer Program, Inc.
106. Southern Center for Human Rights
107. Southern Legal Counsel, Inc.
108. Southern Poverty Law Center
109. Southwest Pennsylvania Chapter, National Organization for Women
110. Southwest Women's Law Center
111. Tenants Together
112. Texas Fair Defense Project
113. Transgender Law Center
114. Uptown People's Law Center

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115. Washington Lawyers' Committee for Civil Rights and Urban Affairs
116. Washington State Communication Access Project
117. Western Center on Law & Poverty
118. Women's Employment Rights Clinic, Golden Gate University
119. Women's Law Project
120. Workplace Fairness