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**CLASS ACTION REFORM:
CLOSING THE COURTHOUSE DOORS ON VICTIMS,
ONE LAWSUIT AT A TIME**

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INTRODUCTION	11
I. FAIRNESS IN CLASS ACTIONS ACT	12
A. <i>Procedural Background</i>	12
B. <i>Notable Class Actions</i>	14
II. FACT ACT	15
A. <i>Asbestos Exposure</i>	15
B. <i>Asbestos Trusts</i>	16
C. <i>Asbestos Litigation</i>	18
III. ACCESS TO THE COURTS AND RECENT SUPREME COURT DECISIONS	21
VI. CONCLUSION	22

INTRODUCTION

The American legal system is once again under attack by those with a vested interest in stifling access to the courts. Pursuing legal action through the courts is one of the few tools aggrieved consumers have that allows them to have a fair shot against wrongdoers with unlimited resources. Through legal mechanisms like class actions or bankruptcy trusts, injured victims are able to pool their resources together or to seek compensation for injuries caused by

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companies that may no longer exist. Unfortunately, access to a fair and effective justice system for the injured, the battered, and the disenfranchised is in grave danger due to restrictive Republican-led legislation like H.R. 1927 (the Fairness in Class Action Act) and unfavorable Supreme Court precedents.¹ The bill restricts the class certification process established under Federal Rule of Civil Procedure 23. By limiting class actions, injured consumers lose their incentive to pursue legal action. Embedded in this bill was also language aimed at toxic tort litigation, specifically asbestos-related.² This language looked to strip away any incentive for injured workers and veterans from seeking justice. It does so by making litigation cost prohibitive and exposes plaintiffs to unnecessary invasions of their privacy. The American legal system is one of the few tools the average American has to level the playing field in the search for justice, and it must be preserved.

I. FAIRNESS IN CLASS ACTIONS ACT

Former United States Supreme Court Justice William O. Douglas said “the class action is one of the few legal remedies the small claimant has against those who command the status quo.”³ A class action is often the sole means of enabling individuals, regardless of their financial means, to remedy injustices committed by powerful, multi-million dollar corporations and institutions. Class action lawsuits have been used, inter alia, by employees to remedy patterns of racial, age, or gender discrimination; to compensate homeowners affected by environmental disasters; to make whole consumers who were deceived by false advertising; to ensure manufacturers are punished for producing a prescription drug with dangerous side effects; and to assist investors who lost their savings due to fraud committed by corporate executives.

A. Procedural Background

The American legal system is an adversarial one based on a premise: a dispute involving parties with a genuine interest in the outcome will result in vigorous legal debate of the issues and this, in turn, serves not only the individual parties but also the greater public. The class action lawsuit is one of the tools used to quickly adjudicate injuries for a large number of individuals harmed in a similar manner by the same wrongdoer. Empowering individuals

¹ Fairness in Class Action Act Litigation and Furthering Asbestos Claim Transparency Act of 2016, H.R. 1927, 114th Cong. § 2-3 (2016) [hereinafter Fairness in Class Action Act].

² *Id.*

³ Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 186 (1974) (Douglas J. dissenting).

to sue in a large group is permissible under Rule 23 of the Federal Rules of Civil Procedure.⁴ Rule 23 allows someone with a claim that is too small to pursue individually to instead sue on behalf of a larger "class" of individuals who have been victimized by the same wrongdoer.⁵

Originally class members had to "opt in" to class action suits to be included in the settlement or verdict.⁶ The opt-in method placed limits on the number of plaintiffs who could seek relief, because it often meant they needed to know in advance that a class action was being pursued that could impact their interests.⁷ This is often unrealistic and impracticable, considering the large number of individuals who may have been injured. This all changed in 1966.

The 1966 amendments to Rule 23 expanded the scope of class actions by allowing judges to certify certain types of classes that presumed class member participation unless individuals formally excused themselves.⁸ This created extremely large class actions with thousands of injured parties and with substantial aggregate monetary damage claims.⁹ The result was that certified class action cases actually had teeth and put wrongdoers on notice.

Currently, to proceed as a class action under the modern rule, a court must meet the requirements under both Rules 23(a) and 23(b). First, the court must make the following findings: (1) the number of class members renders it impracticable to join them in the action; (2) the class members' claims share common questions of law or fact; (3) the claims or defenses of the proposed class representatives are typical of those for the rest of the class; and (4) the proposed class representatives will adequately protect the interests of the entire class.¹⁰

Furthermore, the court must make at least one of the following findings: (1) separate actions by or against the class members would create the risk of inconsistent rulings, or a ruling with respect to individual class members may be dispositive of other class member claims thereby "substantially impair[ing] or impeded[ing] their ability to protect their interests"; (2) the party against whom the class seeks relief "has acted or refused to act on grounds generally applicable to the class" so that injunctive or declaratory relief as to

⁴ FED. R. CIV. P. 23.

⁵ FED. R. CIV. P. 23(b)(3).

⁶ NICHOLAS M. PACE, CLASS ACTIONS IN THE UNITED STATES OF AMERICA: AN OVERVIEW OF THE PROCESS AND EMPIRICAL LITERATURE, RAND INSTITUTE FOR CIVIL JUSTICE 2 (2007), http://globalclassactions.stanford.edu/sites/default/files/documents/USA_National_Report.pdf [hereinafter PACE, CLASS ACTIONS]. See generally FED. R. CIV. P. 23(a)(3) (1938).

⁷ *Id.*

⁸ PACE, CLASS ACTIONS, *supra* note 6.

⁹ *Id.*

¹⁰ FED. R. CIV. P. 23(a).

the entire class would be appropriate; or (3) common questions of law or fact common “predominate” over class member specific questions, and that proceeding by way of class action would be “superior to other available methods” for resolving the dispute.¹¹

B. Notable Class Actions

Following the implementation of the “modern” Rule 23, plaintiffs were able to adjudicate corporate wrongs in several notable cases – cases under which the original version of the rule would not have been successful.

Thousands of commercial fishermen, cannery workers, landowners, and Alaska natives were able to obtain relief against Exxon Mobil for one of the nation’s largest oil spills.¹² The Exxon Valdez ran aground in March 1989, spilling 11 million gallons of oil into Prince William Sound.¹³

In 1996, residents of Hinkley, California obtained substantial damages against their utility provider, Pacific Gas and Electric (“PG&E”), for its illegal dumping of 370 million gallons of cancer-causing chemicals into the town’s water supply.¹⁴

In 2006, investors in Enron corporate stock were successful in a shareholder securities class action after their stock became worthless during the company’s collapse.¹⁵ Enron, an energy giant, collapsed after accounting tricks could no longer hide billions in debt or make failing ventures appear profitable. The collapse wiped out thousands of jobs, more than \$60 billion in market value, and more than \$2 billion in pension plans.¹⁶

In 2014, employees of Wal-Mart were successful in a wage class action suit against the retailer for failing to compensate them for rest breaks and all hours worked.¹⁷ The decision affected 187,000 Wal-Mart employees who worked in Pennsylvania between 1998 and 2006.¹⁸

¹¹ FED. R. CIV. P. 23(b).

¹² In re Exxon Valdez, 270 F.3d. 1215, 1242 (9th Cir. 2001).

¹³ *Id.* at 1246; Alan Taylor, *The Exxon Valdez Oil Spill: 25 Years Ago Today*, ATLANTIC, Mar. 24, 2014, <http://www.theatlantic.com/photo/2014/03/the-exxon-valdez-oil-spill-25-years-ago-today/100703/>.

¹⁴ Sedina Banks, *The “Erin Brockovich Effect”: How Media Shapes Toxics Policy*, 26 ENVIRONS ENVTL. L. & POL’Y J. 219, 228. See generally Kathleen Sharp, “Erin Brockovich”: *The Real Story*, SALON ARTS & ENT. (Apr. 14, 2000), <http://www.salon.com/2000/04/14/sharp/>.

¹⁵ In re Enron Corp. Sec., Derivative & ERISA Litig., 235 F. Supp. 2d 549, 549 (S.D. Tex. 2006).

¹⁶ Juan A. Lozano, *Skilling Sentenced to 24 Years in Prison*, WASH. POST, Oct. 23, 2006, http://www.washingtonpost.com/wp-dyn/content/article/2006/10/23/AR2006102300729_pf.html.

¹⁷ Braun v. Wal-Mart Stores, Inc., 24 A.3d 875, 875 (Pa. Super. 2011).

¹⁸ Amy Joyce, *Wal-Mart Workers Wage Suit*, WASH. POST, Oct. 13, 2006, <http://www.washingtonpost.com/wp-dyn/content/article/2006/10/12/AR2006101201608.html>.

The ability to seek redress in court—let alone settlements for plaintiffs like those in Hinkley and Enron—are under assault by both the Supreme Court and this Republican-led Congress.

II. FACT ACT

Buried within section 3 of H.R. 1927, the “Fairness in Class Action Litigation Act of 2015,” is another bill dangerous to consumers and plaintiffs—H.R. 526, the “Furthering Asbestos Claim Transparency (FACT) Act of 2015.”¹⁹

Simply put, the FACT Act is a measure designed by the asbestos industry to prevent or delay adequate compensation for victims suffering life-long consequences caused by the industry’s deadly product.²⁰ Without any factual evidence supporting the claim, there is fraud in the bankruptcy trusts. This misguided legislation would create a major hurdle for families already facing an insurmountable fight against asbestos-related diseases, while simultaneously violating their privacy through the publication of sensitive information about claimants’ medical history.

A. Asbestos Exposure

In 2011, the Government Accountability Office (GAO) reported that asbestos litigation “has been the longest-running mass tort litigation in U.S. history,” rising out of the lengthy exposure of millions of Americans to asbestos, a fibrous material used in numerous products across many industries that has been linked to serious malignant and nonmalignant diseases, including Mesothelioma and other cancers.²¹ The National Cancer Institute reports that asbestos has been used in everything from ceiling and floor tiles to crayons, roofing, and brake pads, affecting millions of Americans and veterans since the 1940s.²² In its 2011 report, the GAO notes that evidence produced by early lawsuits against asbestos manufacturers demonstrated “these manufacturers had known but concealed information about the dangers of asbestos exposure

¹⁹ Fairness in Class Action Act, *supra* note 1, at § 3.

²⁰ Alex Formuzis, *Asbestos Industry Covered Up Danger for Decades, and Evades Responsibility Today*, HUFFINGTON POST BLOG (June 6, 2016, 1:51 PM), http://www.huffingtonpost.com/alex-formuzis/asbestos-industry-covered_b_10322522.html.

²¹ U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-11-819, ASBESTOS INJURY COMPENSATION: THE ROLE AND ADMINISTRATION OF ASBESTOS TRUSTS (2011) [hereinafter ASBESTOS INJURY COMPENSATION].

²² National Cancer Institute, *Asbestos Exposure and Cancer Risk*, NATIONAL CANCER INSTITUTE (May 9, 2009), <https://www.cancer.gov/about-cancer/causes-prevention/risk/substances/asbestos/asbestos-fact-sheet>.

or that such dangers were reasonably foreseeable.”²³ The Environmental Working Group, a public-interest group, estimates that asbestos exposure results in 10,000 deaths every year.²⁴

Since the 1970s, the use of asbestos in products has either been tightly regulated or banned altogether. In 1986, for example, the Occupational Safety and Health Administration (OSHA) stated that it was “aware of no instance in which exposure to a toxic substance more clearly demonstrated detrimental health effects on humans than has asbestos exposure. The diseases caused by asbestos exposure are life-threatening or disabling.”²⁵ In 1988, the Environmental Protection Agency (EPA) found that the presence of asbestos in schools was “extremely hazardous,” and in 1990, banned the manufacture, processing, importation, and distribution of materials or products containing asbestos altogether.²⁶

B. Asbestos Trusts

Due to the extremely dangerous nature of asbestos exposure and the countless Americans affected, corporate defendants have sought to shield themselves from civil liability through the bankruptcy process. As the GAO has observed, approximately 100 companies filed for bankruptcy relief at least in part due to asbestos-related liability.²⁷ Under section 524(g) of the Bankruptcy Code, these companies may shift their asbestos liabilities to a trust fund in certain circumstances.²⁸ In doing so, these corporations are able to either restrict potential relief for asbestos claimants or isolate their core business assets from asbestos claims. Once the trust is established, it assumes all of a corporation’s liabilities for personal injury, wrongful death, or property damages allegedly caused by the presence or exposure to asbestos or asbestos-containing products.²⁹

²³ ASBESTOS INJURY COMPENSATION, *supra* note 21, at 8.

²⁴ News Release, Environmental Working Group, EWG Action Fund: New Congress Aligns with Asbestos Industry (Feb. 4, 2015), <http://www.ewg.org/release/ewg-action-fund-new-congress-aligns-asbestos-industry>.

²⁵ Occupational Exposure to Asbestos, Tremolite, Anthophyllite, and Actinolite, 51 Fed. Reg. 22612 (June 20, 1986), https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=federal_register&p_id=13570.

²⁶ U.S. ENVTL. PROT. AGENCY, EPA STUDY OF ASBESTOS-CONTAINING MATERIALS IN PUBLIC BUILDINGS (1988), https://www.mesothelioma.guide/documents/EPA_study_asbestos-containing_materials.pdf.

²⁷ ASBESTOS INJURY COMPENSATION, *supra* note 21, at 2.

²⁸ Asbestos Bankruptcy Trust Claims Transparency Act, 11 U.S.C. § 524(g) (2016).

²⁹ ASBESTOS INJURY COMPENSATION, *supra* note 21, at 8.

As of 2011, there are approximately 60 asbestos bankruptcy trusts in operation, controlling a combined total of \$36.8 billion in assets.³⁰ Trustees administering these funds are responsible for managing the trust for the sole benefit of present and future claimant beneficiaries. Claims on the trust require a careful application process, which entails a review of a claimant's medical condition, medical records, and other evidence of their exposure to asbestos products, which may include an asbestos victim's work history, employer records, Social Security records, and deposition testimony taken during any litigation.³¹

According to the GAO, 98% of the 52 trusts that it reviewed required claim auditing.³² All of these trusts, the GAO found, "incorporate quality assurance measures into their intake, evaluation, and payment processes," and are "committed to ensuring that no fraudulent claims are paid by the trust, which aligns with their goals of preserving assets for future claimants."³³ Additionally, the GAO reported that none of these audits had identified any instances of fraud on the trust by claimants or otherwise.³⁴

While there have been isolated reports of fraudulent claims over the past several decades, these instances were commonly attributed to human error. Following reports of initial claims of abuse in 2004, the Judiciary Committee conducted an oversight hearing on the issue, but no evidence of systemic fraud or abuse was found.³⁵ Additionally, an article published in the *Wall Street Journal* purporting to document "numerous apparent anomalies" regarding various asbestos claims was subsequently debunked.³⁶ In her response to this article, Joan Claybrook, the former president of Public Citizen and head of the National Highway Traffic Safety Administration, noted that there is "no evidence to support assertions of significant fraud in claims by asbestos victims," and furthermore, that "of millions of claims filed at the company asbestos trusts, the *Journal's* extensive investigation identified an error and anomaly rate of only 0.35%, much of that due to mistakes by the trusts, not the victims."³⁷

³⁰ *Id.* at 3.

³¹ *Id.* at 17-18.

³² *Id.* at 22.

³³ *Id.* at 23.

³⁴ *Id.*

³⁵ Furthering Asbestos Claim Transparency (FACT) Act, H.R. REP. NO. 112-687, at 36-37 (2013).

³⁶ Joan Claybrook, *Fraud Made the Asbestos Illness Situation Much Worse*, Letter to the Editor, WALL ST. J., May 19, 2013, at A16.

³⁷ *Id.*

Notwithstanding any evidence of fraud on asbestos trusts, section 3 of H.R. 1927 would require these trusts to: (1) file a quarterly report with the bankruptcy court and United States Trustee that includes information concerning asbestos claimants; and (2) provide any information related to payment from and demands for payment from such trust to any party to *any* action in law or equity if such action concerns liability for asbestos exposure.³⁸

As I have previously expressed during a Congressional hearing, little would stop this legislation from allowing third parties to collect and monetize claimants' medical history or using this information to discriminate against victims and their families.³⁹ The bill would undermine the privacy of asbestos victims by requiring the public disclosure of their personal information when they seek payment for injuries. The bill would require this information to be published on the bankruptcy court's case docket, which is easily accessible online.⁴⁰ Such information, once placed online and in the public domain, could be used by data collectors and other entities for purposes that have absolutely nothing to do with compensation for asbestos exposure.

While some argue that the bill specifically excludes claimants' confidential medical records or full social security number, at best, this is an admission against interest, indicating that the majority well understands the privacy risks inherent to the legislation's Asbestos Death Database. At worst, this provision would still allow for the public disclosure of an asbestos victim's name, address, work history, the last four digits of their Social Security number, photograph, information relating to their family members, and other personally identifying information. It isn't difficult to imagine what insurance companies, identity thieves, prospective employers, lenders, or anyone else who values access to large sets of personal data, could do with that information.

C. Asbestos Litigation

In addition to existing confidentiality requirements for claimant information, there are substantial costs associated with the bill's disclosure requirements. As the GAO reported, representatives for a single trust reported they incurred \$1 million in attorneys' fees alone to respond to a disclosure request for every document on every claimant.⁴¹ These unnecessary costs drain

³⁸ Fairness in Class Action Act, *supra* note 1, at § 3(a).

³⁹ *Furthering Asbestos Claim Transparency (FACT) Act of 2015: Hearing Before the Subcomm. on Regulatory Reform, Commercial & Antitrust Law of the H. Comm. on the Judiciary*, 114th Cong. 8 (2015) (statement of Henry C. "Hank" Johnson, Jr., Member, Subcomm. on Regulatory Reform, Commercial & Antitrust Law of the H. Comm on the Judiciary) [hereinafter *FACT Hearing*].

⁴⁰ Fairness in Class Action Act, *supra* note 1, at § 3(a).

⁴¹ ASBESTOS INJURY COMPENSATION, *supra* note 21, at 30.

the asbestos trusts' limited time, resources, and capital, rather than ensure a modicum of additional accountability, and in the process, cost asbestos victims and benefit corporate defendants. Trusts only have a finite amount of money available for future asbestos victims, and these unnecessary costs simply reduce the fund even more. The bill includes a meager compensation provision, entitling trusts to seek payment for reasonable costs incurred, but this will be subject to further dispute, litigation, and other costs to the asbestos trusts, resulting in less funds for asbestos victims.⁴²

Moreover, claimant information is already discoverable if relevant to a claim or defense at trial. Both state and Federal rules of civil procedure already allow a defendant to gain all relevant information about a claimant's exposure during discovery.⁴³ Rather than providing for broader transparency for both parties in litigation, as the bill purports to do, it instead creates significant hurdles for asbestos victims and their families.⁴⁴ This proposition is especially troubling when we stop to consider the equities of these actions where defendants and claimants are rarely on equal footing during discovery, or any other stage of litigation. In asbestos exposure cases, it is the defendant corporations who have control of most (if not all) of the evidence.

This section is merely a solution in search of a problem. The requirement is fundamentally unfair, imposing burdens only on asbestos trusts and easing the process for corporate defendants. Unlike government agencies, which are charged with protecting the public interest in a transparent manner, corporate defendants typically require settlement agreements to include nondisclosure agreements. These agreements prevent subsequent plaintiffs from obtaining evidence of corporate liability and harm, concealing wrongdoing from the public and other asbestos victims harmed through corporate misconduct.

In addition to efforts to pass federal legislation to benefit corporate asbestos defendants, groups like the American Legislative Exchange Council (ALEC) have aggressively pushed model legislation at the state level to further restrict asbestos trust claims.⁴⁵ As the Center for Media and Democracy notes, the ALEC legislation, entitled the Asbestos Claim Transparency Act, would allow defendants to delay lawsuits until asbestos victims file claims with any

⁴² Fairness in Class Action Act, *supra* note 1, at § 3(a).

⁴³ *See, e.g.*, FED. R. CIV. P. 26 (governing the exchange of information between parties of a case and mandating disclosure of certain details); *see also* Seymour Moskowitz, *Rediscovering Discovery: State Procedural Rules and the Level Playing Field*, 54 RUTGERS L. REV. 595, 613 (2002) ("Most state [discovery] rules follow the general outlines of federal procedure . . .").

⁴⁴ *FACT Hearing*, *supra* note 39, at 8.

⁴⁵ *See Asbestos Claims Transparency Act: Model Policy*, ALEC, <https://www.alec.org/model-policy/asbestos-claims-transparency-act/> (last updated June 28, 2013).

possible asbestos trusts – no matter how little the potential recovery may be.⁴⁶ A version of the bill introduced on the federal level actually goes a step further and puts the burden of disclosure on the victims, rather than the defendants.⁴⁷ This legislation places an automatic stay on any claim by an asbestos victim and creates cyclical delays in the litigation process. This legislation would “benefit corporations like Crown Holdings, a Fortune 500 company with over \$8 billion in annual sales that has worked with ALEC for years to legislate its way out of compensating asbestos victims, as well as ALEC member Honeywell International, which has faced significant asbestos liability in recent years.”⁴⁸ Several states have already introduced or adopted this legislation. Combined with section 3 of H.R. 1927, this measure will guarantee that the asbestos industry and its insurers pay as little to their victims as possible.⁴⁹ Even more so, the delays and burdens created by these provisions essentially delay any form of meaningful recovery for asbestos victims – many of whom are operating on borrowed time.

Asbestos victims who seek justice should receive the same privacy protections as other patients. Not a single asbestos victim supports this provision.⁵⁰ To the contrary, there have been waves of opposition to the bill, from veterans groups to asbestos victims to public interest groups.⁵¹ In fact, veterans make up a significant portion of the victims suffering from asbestos-related diseases; veterans account for 30 percent of all Mesothelioma cases despite only representing a small portion of the overall U.S. population.⁵² This is because asbestos was used extensively by the military for years in the barracks, naval ships, pipes, shipyards, vehicles, and other common military equipment.

Indeed, if we remove the unfounded rhetoric behind this legislation, all we are left with is a proposal to create an Asbestos Death Database with the sole purpose of allowing Koch Industries, other asbestos defendants, and large

⁴⁶ Brendan Fischer, *Justice Denied: 71 ALEC Bills in 2013 Make It Harder to Hold Corporations Accountable for Causing Injury or Death*, PR WATCH (July 10, 2013), <http://www.prwatch.org/news/2013/07/12172/justice-denied-71-alec-bills-2013-make-it-harder-hold-corporations-accountable-ca>.

⁴⁷ Editorial Board, *One-Sided Bill on Asbestos Injuries*, N.Y. TIMES, June 20, 2013, <https://nyti.ms/2lusR1K>.

⁴⁸ Brendan Fischer, *Wisconsin Poised to Pass ALEC's Deadly Asbestos Bill*, PR WATCH (Mar. 20, 2014), <http://www.prwatch.org/news/2014/03/12424/wi-assembly-takes-alec-led-national-effort-narrow-access-courts-asbestos-victims>.

⁴⁹ Fairness in Class Action Act, *supra* note 1, at § 3.

⁵⁰ *FACT Hearing*, *supra* note 39, at 7.

⁵¹ Press Release, Center for Justice and Democracy, *CJ&D Statement Condemning Passage of H.R. 1927* (Jan. 8, 2016).

⁵² Travis J. Tritten, *House Passes Asbestos Bill Over Veterans' Objections*, STARS & STRIPES, Jan. 8, 2016, <https://www.stripes.com/news/house-passes-asbestos-bill-over-veterans-objections-1.387802>.

asbestos insurers to easily access other asbestos corporations' lists, so they can determine if asbestos victims are getting what they view as "too much justice" and if there is a way they can nickel and dime the families they have devastated. After all, it wasn't the victims or their families who concealed the harms and existence of asbestos for decades from the public; it was the corporate defendants supporting this legislation.

Finally, for the second straight Congress, the Republican majority has specifically chosen to ignore, disregard, and cast aside the hardships of asbestos victims and families – many of whom are veterans. In fact, during the subcommittee hearing on this bill, although victims were not invited to testify on the bill, they and their families were made to suffer further insult by being asked to collectively stand and respond to questions at the majority's request.⁵³ These families did not travel to Washington to be ridiculed or made part of a legislative circus. They came here to have their voices heard on legislation that has very *real* consequences for *real* people. After retracting a promise to these families last Congress, I am disappointed to report the majority has again refused to allow these families to testify on the real effects of this bill.⁵⁴

III. ACCESS TO THE COURTS AND RECENT SUPREME COURT DECISIONS

In the early 19th century, the Supreme Court of the United States established the right of every American to free access to the court. Chief Justice John Marshall penned landmark rulings affirming the Constitution's promise of access to courts. However, over the last half century, the Supreme Court has eroded the fundamental right to access the courts, which merely exacerbates the legislative efforts we are seeing on the floor today. Chief Justice John Roberts and Justice Antonin Scalia remain the biggest modern day impediment to civil litigants seeking justice in our judiciary.

Chief Justice Roberts has refused to affirm rulings that provided unfettered access to the courts.⁵⁵ In casting these votes to limit access to the courts, Roberts has repeatedly disregarded the constitutional intent to provide a robust judiciary that would serve to protect people from unlawful action by

⁵³ See *FACT Hearing*, *supra* note 39, at 111 (recording that Congressman Darrell E. Issa asked asbestos families and victims to stand and indicate whether they all have ongoing cases or they have already settled their cases).

⁵⁴ Karen Marshall, *U.S. Approval of FACT Act Far From Transparent*, ASBESTOS.COM (Nov. 15, 2013), <https://www.asbestos.com/blog/2013/11/15/fact-act-harms-asbestos-victims/>.

⁵⁵ Adam Liptak, *Chief Justice's Report Praises Limits on Litigants' Access to Information*, N.Y. TIMES, Dec. 31 2015, <https://nyti.ms/2m9uBuw>.

the other branches of government, but he also has disregarded Supreme Court precedent repeatedly affirming that access to the courts is, as Chief Justice Marshall put it, critical to the “very essence of civil liberty.”⁵⁶

For example in *Summers v. Earth Island Institute*, in a 5-4 opinion written by Justice Scalia and joined by Chief Justice Roberts, the Supreme Court limited the ability of environmental organizations to challenge the U.S. Forest Service’s enforcement of regulations that exempted specific small projects from the notice, comment, and appeal process applicable to larger land management decisions.⁵⁷ The Court rejected the plaintiffs’ claim that the “deni[al of] the ability to file comments on some Forest Service actions constituted sufficient “procedural injury” to sue.⁵⁸ As Justice Breyer wrote in dissent, “Nothing in the record or the law justifies [the] counterintuitive conclusion” that the plaintiff environmental organizations and their members “do not suffer any ‘concrete injury’” when the Forest Service sells timber for logging on “many thousands” of small woodland parcels without following legally required procedures.⁵⁹

Chief Justice Roberts’s votes and opinions on access to the court reflect the strong view that courts are often the wrong place to seek relief for a broad array of injuries. This completely misguided theory undermines one of the basic tenants of the U.S. Constitution.⁶⁰

VI. CONCLUSION

Class actions serve several public interest goals, to “include the protection of the defendant from inconsistent obligations, the protection of the interests of absentees, the provision of a convenient and economical means for disposing of similar lawsuits, and the facilitation of the spreading of litigation costs among numerous litigants with similar claims.”⁶¹ Moreover, “the class action device saves the resources of both the courts and the parties by permitting an issue potentially affecting every [class member] to be litigated in an economical fashion.”⁶²

⁵⁶ *Marbury v. Madison*, 5 U.S. 137, 163 (1803).

⁵⁷ *Summers v. Earth Island Institute*, 555 U.S. 488, 488 (2009).

⁵⁸ *Id.* at 496.

⁵⁹ *Id.* at 501

⁶⁰ The First Amendment to the U.S. Constitution establishes the right to “petition the government for a redress of grievances.” U.S. Const. amend. I. The Fifth and Fourteenth guarantee a right to “due process of the law.” U.S. Const. amends. V, XIV. Together, American citizens are granted a right of access to the courts if their rights have been violated.

⁶¹ *U.S. Parole Comm’n v. Geraghty*, 455 U.S. 388, 402-03 (1980).

⁶² *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979).

The courts are one of the few avenues in which the average American can level the playing field against those with unlimited resources. Bills like H.R. 1927 stifle the ability of the average citizen to enjoy their constitutionally protected right to remedy wrongs through the judicial process. It and similar legislation is un-American and should not be the law of our land. I respectfully disagree with the substance of this legislation and will continue to oppose any bill that will restrict access to our courts.