U.S. Chamber of Commerce

1615 H Street, NW
Washington, DC 20062-2000
uschamber.com

January 16, 2024

Marlene Dortch
Secretary
Federal Communications Commission
45 L Street, NE
Washington, DC 20554

Re: In the Matter of Protecting Consumers from SIM Swap and Port-Out Fraud (WC Docket No. 21-341)

Dear Ms. Dortch:

This letter is submitted on behalf of the U.S. Chamber of Commerce by the Chamber Technology Engagement Center ("C_TEC") and the U.S. Chamber Institute for Legal Reform ("ILR"). The Chamber created C_TEC to promote the role of technology in our economy and advocate for rational policy solutions that drive economic growth, spur innovation, and create jobs. ILR champions a fair legal system that promotes economic growth and opportunity.

We write regarding the recent further notice of proposed rulemaking in the above-captioned matter—in particular, the portion of the notice requesting comment on whether the Commission should "require wireless providers to explicitly exclude resolution of SIM change and port-out fraud disputes from arbitration clauses in providers' agreements with customers or abrogate such clauses."[1]

The Commission should not issue an anti-arbitration rule. Such a rule—suggested by the National Consumer Law Center and the Electronic Privacy Information Center[2]—would be unlawful because the Commission has no legal authority to regulate arbitration agreements. And it would deprive consumers and the public at large of the significant advantages that arbitration provides. Agreements to resolve consumer disputes through arbitration, including disputes involving wireless services, have been common for decades. These agreements reduce transaction costs and enable fair, speedy, and efficient dispute resolution for all parties.

Our comments focus on two important points.

First, the Commission lacks legal authority to promulgate a rule declaring certain claims off-limits from arbitration or forcing wireless service providers to rewrite their arbitration clauses. Numerous judicial decisions hold that Congress's decision, embodied in the Federal

[1] Report and Order and Further Notice of Proposed Rulemaking ¶ 107.

[2] *See* NCLC and EPIC Comments, *In the Matter of Protecting Consumers from SIM Swapping and Port-Out Fraud*, WC Docket No. 21-341 (Nov. 2021), at 6-7 & n.26 ("NCLC/EPIC Comments").

Arbitration Act ("FAA"), to protect the enforceability of arbitration agreements, may be displaced only by an express contrary command from Congress. Neither the Communications Act of 1934 (as amended by the Telecommunications Act of 1996) nor any other statute relating to the Commission contains any such express command or delegation of such express authority to the Commission.

Second, even if the Commission had the authority to regulate arbitration agreements between wireless service providers and their customers—and it does not—a rule containing the restrictions on arbitration that NCLC and EPIC propose would be arbitrary, capricious, and irrational, and therefore invalid under the Administrative Procedure Act. NCLC and EPIC ignore basic empirical facts, and instead rest their argument entirely on the demonstrably false assertions that arbitration is "unfair" and "expensive" for consumers.[3]

I. The Commission Lacks The Legal Authority To Restrict The Use Of Arbitration Agreements.

NCLC and EPIC's proposal asks the Commission to issue a rule that is beyond its legal authority because of the limits imposed by the Federal Arbitration Act.[4] And as discussed more fully below, when other agencies have issued such rules, courts have found them invalid.[5]

Congress enacted the FAA in 1925 "in response to judicial hostility to arbitration."[6] The "principal purpose" of the FAA, the Supreme Court has held time and again, is to "'ensur[e] that private arbitration agreements are enforced according to their terms.'"[7]

To that end, Section 2 of the FAA specifies that a "written provision in … a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, … shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[8] If an arbitration agreement contains unfair terms, Section 2 of the FAA provides that those unfair terms are subject to invalidation under generally applicable contract defenses.[9] Otherwise, however, Section 2 mandates that courts "rigorously" enforce parties' "arbitration agreements according to their terms."[10]

To be sure, Congress may displace the FAA. But the Supreme Court has made clear that the standard for finding such displacement is very high, because courts have a "duty to interpret

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[3] *See* NCLC/EPIC Comments at 6.

[4] 9 U.S.C. §§ 1-16.

[5] *See* note 25, *infra*.

[6] *Viking River Cruises, Inc. v. Moriana*, 596 U.S. 639, 649 (2022).

[7] *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344 (2011) (quoting *Volt Information Sciences, Inc. v. Bd. of Trs. of Leland Stanford Jr. Univ.*, 489 U.S. 468, 479 (1989)); *see also Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57-58 (1995) (same).

[8] 9 U.S.C. § 2.

[9] *See Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530, 533-34 (2012) (per curiam).

[10] *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1621 (2018) (quotation marks omitted).

Congress's statutes as a harmonious whole rather than at war with one another."[11] Accordingly, the Supreme Court's decisions uniformly have required that Congress speak with "clarity"—that is, expressly in the text of the statute—to override the FAA.[12] In particular, the FAA's mandate that arbitration agreements be "enforce[d] … according to their terms" can be displaced only by a "contrary congressional command" in another statute.[13] And that command must reflect a "clear and manifest" intent by Congress to override the FAA.[14]

The Supreme Court has to date "rejected every . . . effort" to "conjure conflicts between the Arbitration Act and other federal statutes" under this demanding standard.[15] This unbroken line of cases includes ones addressing "statutes ranging from the Sherman and Clayton Acts to the Age Discrimination in Employment Act, the Credit Repair Organizations Act, the Securities Act of 1933, the Securities Exchange Act of 1934, and the Racketeer Influenced and Corrupt Organizations Act."[16]

Similarly, the Communications Act of 1934 (as amended by the Telecommunications Act of 1996)—which would presumably be the basis for any rule adopted by the Commission[17]—does not conflict with, or authorize the Commission to override, the FAA. Nothing in the statute addresses consumer arbitration at all.[18]

That textual silence is dispositive: when a federal statute is "silent on whether claims . . . can proceed in an arbitrable forum," the FAA controls.[19] Indeed, to assume that a statute overrides the FAA without "even refer[ring] to arbitration . . . 'would be to forget that Congress does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not one might say, hide elephants in mouseholes.'"[20]

By contrast, when Congress has vested federal agencies with the authority to regulate or prohibit the use of arbitration agreements in other industries, Congress has used express and

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[11] *Id.* at 1619.

[12] *CompuCredit Corp. v. Greenwood*, 565 U.S. 95, 103 (2012); *see also*, *e.g.*, *Robertson v. Intratek Computer, Inc.*, 976 F.3d 575, 582 (5th Cir. 2020) (noting "the Supreme Court's dogged insistence that Congress speak with great clarity when overriding the FAA").

[13] *Id.* at 98.

[14] *Epic*, 138 S. Ct. at 1624.

[15] *Id.* at 1627.

[16] *Id.*

[17] *See* Report and Order and Further Notice of Proposed Rulemaking ¶ 122.

[18] The sole mention of arbitration in the statute is in a very different context that has nothing to do with consumer claims. The statute **authorizes** an arbitration conducted by a State commission to resolve issues related to the negotiation of interconnection agreements between incumbent local exchange carriers and telecommunications carriers. *See* 47 U.S.C. § 252(b), (c).

[19] *CompuCredit*, 565 U.S. at 104 (emphasis added).

[20] *Santoro v. Accenture Fed. Servs., LLC*, 748 F.3d 217, 223 (4th Cir. 2014) (quoting *Gonzales v. Oregon*, 546 U.S. 243, 267 (2006)).

unambiguous statutory language.[21] For example, Congress has authorized the Securities and Exchange Commission to issue rules that "prohibit, or impose conditions or limitations on the use of, agreements that require customers or clients of any broker, dealer, or municipal securities dealer to arbitrate any future dispute between them arising under the Federal securities laws, the rules and regulations thereunder, or the rules of a self-regulatory organization if it finds that such prohibition, imposition of conditions, or limitations are in the public interest and for the protection of investors."[22] In addition, Section 1028 of the Dodd-Frank Wall Street Reform and Consumer Protection Act provides that, if certain conditions are met, the Consumer Financial Protection Bureau "may prohibit or impose conditions or limitations on the use of an agreement between a covered person and a consumer for a consumer financial product or service providing for arbitration of any future dispute between the parties."[23]

Because "[i]t is a fundamental precept of administrative law that an agency action, rule, or regulation 'cannot overcome the plain text enacted by Congress,'"[24] the Commission cannot, without express statutory authority, prohibit what the FAA protects—the right to enter into and enforce binding arbitration agreements, including agreements that require arbitration of claims involving allegations of SIM swapping or port-out fraud.

Indeed, attempts by other agencies to issue *ultra vires* rules prohibiting entities subject to an agency's jurisdiction from entering into arbitration agreements, requiring that certain claims be excluded from arbitration agreements, or prohibiting arbitration agreement provisions protected by the FAA have consistently been invalidated by the courts, including the Supreme Court.[25] Those precedents confirm that the rule suggested by NCLC and EPIC would be unlawful, and invalidated in court if the Commission were to promulgate it.

II. Adopting NCLC's And EPIC's Proposal Would Produce A Rule That Is Arbitrary, Capricious, and Irrational, And Therefore Invalid Under The APA.

Even if the Commission had the authority to adopt NCLC's and EPIC's proposal to restrict arbitration, which it does not, adopting that proposal would result in a rule that is invalid because

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[21] Even when Congress confers express authority to an agency to regulate the use of arbitration agreements, the agency may not exceed the confines of that specific authority. And the agency must also of course comply with all of Congress's directives about how and when that authority may be exercised.

[22] 15 U.S.C. § 78o(o). To the Chamber's knowledge, the SEC has not used that authority.

[23] 12 U.S.C. § 5518(b). To be clear, the Chamber maintains that the Bureau has issued or proposed to issue anti-arbitration rules that exceed its limited authority under Section 1028 of the Dodd-Frank Act. Indeed, when the Bureau previously attempted to restrict arbitration in 2017, Congress disapproved of that rule by adopting under the Congressional Review Act a joint resolution, signed by the President, declaring that the Bureau's rule "shall have no force or effect." Pub. L. No. 115-74, 131 Stat. 1243 (Nov. 1, 2017).

[24] *Sierra Club, Inc. v. Sandy Creek Energy Associates, L.P.*, 627 F.3d 134, 141 n.9 (5th Cir. 2010) (quoting *New Jersey v. EPA*, 517 F.3d 574, 583 (D.C. Cir. 2008)).

[25] *See*, *e.g.*, *Epic*, 138 S. Ct. at 1620-21; *Chamber of Commerce of United States of America v. United States Dep't of Labor*, 885 F.3d 360, 385 (5th Cir. 2018); *Am. Health Care Ass'n v. Burwell*, 217 F. Supp. 3d 921, 929-34 (N.D. Miss. 2016).

it constitutes agency action that is "arbitrary, capricious … or otherwise not in accordance with law."[26] The assertions on which the proposal rest are all demonstrably false:

- NCLC and EPIC argue that arbitration is unfair and expensive, but leading arbitration providers require fair procedures and courts invalidate unfair provisions.

- NCLC and EPIC contend that arbitration prevents consumers from obtaining meaningful relief, but arbitration does not abridge consumers' substantive rights, and studies consistently show that consumers win at least as often and recover more in arbitration than in court.

- NCLC and EPIC protest that arbitration is "secret" and its results are "non-transparent," but nothing inherent in the arbitration process imposes a gag rule on claimants, who are free to discuss their claims and the arbitrator's decision, and also to report their concerns to government authorities like the Commission. And leading arbitration providers routinely report arbitration results to several states.

- NCLC and EPIC suggest that restricting arbitration would make companies less likely to violate the law, but a recent study based on the Consumer Financial Protection Bureau's enforcement activity shows that this suggestion is false.

Courts and arbitration providers ensure fair arbitration procedures—agreements specifying unfair procedures are unenforceable.

NCLC and EPIC assert that the arbitration process is "often unfair" and suggest that arbitration offers companies the ability to set up procedures that disfavor consumer claims.[27] Not so. The legal rules governing arbitration require fair procedures. The nation's largest arbitration providers accept cases for arbitration only when the governing arbitration agreement satisfies basic fairness standards. And, most significantly, courts invalidate arbitration agreements that contain unfair provisions.

The American Arbitration Association (AAA), the country's largest arbitration provider, developed fairness rules for consumer arbitrations more than two decades ago. It will not accept a case unless the arbitration agreement complies with those rules.[28] Those rules:

- require that arbitrators must be neutral and disclose any conflict of interest and give both parties an equal say in selecting the arbitrator;

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[26] 5 U.S.C. § 706(2).

[27] NCLC/EPIC Comments at 6-7 & n.26.

[28] Am. Arbitration Ass'n, *Consumer Due Process Protocol Statement of Principles* (Apr. 17, 1998), perma.cc/VPW4-KXUV; *see also* Am. Arbitration Ass'n, *Consumer Arbitration Rules* (Sept. 1, 2014), https://adr.org/sites/default/files/Consumer-Rules-Web_0.pdf.

- limit the fees paid by consumers to $225—less than the filing fee in federal court;[29]

- empower the arbitrator to order any necessary discovery; and

- require that damages, punitive damages, and attorneys' fees be awardable to the claimant to the same extent as in court.

The AAA rules also require that consumers be given the option of resolving their dispute in small claims court. JAMS, another leading arbitration provider, imposes similar protections.[30] Moreover, both AAA and JAMS employ arbitrators of the highest caliber, including former judges and accomplished attorneys.[31]

The courts provide another layer of oversight. As with any other contract, if an arbitration agreement is unfair, courts can and do step in to declare part or all of the agreement unenforceable. Indeed, courts already invalidate provisions that would make arbitration unfair or unduly expensive for consumers, including:

- limits on recovery of damages permitted under state and federal law;[32]

- requirements that arbitration take place in inconvenient locations for claimants;[33] and

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[29] For this reason, NCLC and EPIC are flat wrong in asserting that arbitration is "often expensive" for consumers. NCLC/EPIC Comments at 6. Moreover, many companies, including many wireless service providers, go further than the rules and subsidize **all** of the costs of arbitration, including the consumer's filing fee.

[30] JAMS, *JAMS Policy on Consumer Arbitrations Pursuant to Pre-Dispute Clauses Minimum Standards of Procedural Fairness* (July 15, 2009), https://perma.cc/NBA4-4U3N.

[31] The AAA, for example, uses a thorough application process to evaluate arbitrators, selecting only those candidates with substantial expertise and qualifications. AAA, *Application Process for Admittance to the AAA National Roster of Arbitrators,* https://www.adr.org/sites/default/files/document_repository/application_process_for_admittance_to_the_aaa_national_roster_of_arbitrators.pdf.

[32] *See, e.g.*, *Alexander v. Anthony Int'l, L.P.*, 341 F.3d 256, 262-63, 267 (3d Cir. 2003) (arbitration agreement that barred punitive damages was unconscionable); *Ward v. Crow Vote LLC*, 2021 WL 5927803, at *7 (C.D. Cal. Oct. 7, 2021) (arbitration agreement that limited recovery to "out-of-pocket" charges substantively unconscionable because it limited remedies); *Cristales v. Scion Grp. LLC*, 478 F. Supp. 3d 845, 856 (D. Ariz. 2020), *appeal dismissed*, 2020 WL 6606367 (9th Cir. Sept. 23, 2020); *Ziglar v. Express Messenger Sys. Inc.*, 2017 WL 6539020, at *3 (D. Ariz. Aug. 31, 2017), *vacated on other grounds*, 739 F. App'x 444 (9th Cir. 2018) (arbitration agreement was unconscionable because it purported to prevent employees from recovering treble damages under state employment law); *Wernett v. Service Phoenix*, LLC, 2009 WL 1955612, at *5 (D. Ariz. July 6, 2009); *Bridge Fund Cap. Corp. v. Fastbucks Franchise Corp.,* 2008 WL 3876341, *9 (E.D. Cal. Aug. 20, 2008), *aff'd*, 622 F.3d 996 (9th Cir. 2010) (exempting damages for fraud and misrepresentations permitted by state law rendered agreement substantively unconscionable); *Zuver v. Airtouch Commc'ns, Inc.*, 153 Wash. 2d 293, 318 (2004) (agreement barring claimants punitive or exemplary damages for common law claims but permitting defendant to claim these damages substantively unconscionable); *Woebse v. Health Care & Ret. Corp. of Am.*, 977 So. 2d 630, 634 (Fla. Dist. Ct. App. 2008); *Armendariz v. Found. Health Psychcare Servs., Inc.*, 24 Cal. 4th 83, 121 (2000) (arbitration agreement limiting damages to the amount of backpay lost up until the time of arbitration substantively unconscionable).

[33] *See, e.g.*, *Nagrampa v. MailCoups, Inc.*, 469 F.3d 1257, 1287 (9th Cir. 2006) (travel from California to Massachusetts); *Willis v. Nationwide Debt Settlement Grp.*, 878 F. Supp. 2d 1208, 1221 (D. Or. 2012) (travel from Oregon to California); *Coll. Park Pentecostal Holiness Church v. Gen. Steel Corp.*, 847 F. Supp. 2d 807, 817-20 (D. Md.

- excessive fees for asserting a claim.[34]

This judicial oversight ensures that companies have an incentive to craft arbitration agreements that are fair to their customers—and that companies will not be able to enforce arbitration agreements that are unfair to consumers.

Arbitration provides significant benefits to consumers.

Resolution of disputes through arbitration provides many important benefits to consumers. Unlike litigation, arbitration minimizes transaction costs and facilitates speedy, efficient, and fair dispute resolution, all of which are significant advantages to consumers and the public at large.[35] And importantly, arbitration gives consumers the ability to obtain redress for harms that they could not realistically assert in court. As the Supreme Court has repeatedly recognized, an arbitration agreement "does not alter or abridge substantive rights; it merely changes how those rights will be processed."[36]

At the outset, NCLC and EPIC ignore that arbitration expands access to justice by enabling consumers to pursue claims that they would be unable to litigate in court. Most harms suffered by consumers are relatively small in economic value and are individualized, based on facts specific to the individual consumer.[37] Claims alleging SIM swapping fraud or port-out fraud fit that description precisely; each consumer's claim of alleged fraud will turn on facts specific to

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2012) (travel from Maryland to Colorado); *Acosta v. Fair Isaac Corp*., 669 F. Supp. 2d 716, 722 (N.D. Tex. 2009) (travel from Texas to California); *Hollins v. Debt Relief of Am*., 479 F. Supp. 2d 1099, 1107-08 (D. Neb. 2007) (travel from Nebraska to Texas); *Comb v. PayPal, Inc*., 218 F. Supp. 2d 1165, 1177 (N.D. Cal. 2002) (travel from California to Utah); *Bridge Fund Cap. Corp. v. Fastbucks Franchise Corp*., 2008 WL 3876341, at *10 (E.D. Cal. Aug. 20, 2008) (travel from California to Texas); *Philyaw v. Platinum Enters., Inc*., 54 Va. Cir. 364 (Va. Cir. Ct. 2001) (travel from Virginia to California).

[34] The Supreme Court has held that a party to an arbitration agreement may challenge enforcement of the agreement if the claimant would be required to pay excessive filing fees or arbitrator fees in order to arbitrate a claim. *See Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 90-92 (2000). Since *Randolph*, courts have aggressively protected consumers and employees who show that they would be forced to bear excessive costs to access the arbitral forum. *See, e.g., Lim v. TForce Logistics, LLC*, 8 F.4th 992, 1002 (9th Cir. 2021); *Shahandeh v. Smart & Final Stores LLC*, 2019 WL 8194733, at *5 (C.D. Cal. Nov. 25, 2019) (stating that "under California law, if a party is required by an arbitration agreement to pay costs she would not have to pay were she suing in court for certain claims, the arbitration clause is unconscionable.") (emphasis omitted); *Ortolani v. Freedom Mortg. Corp.*, 2017 WL 10518040, at *6 (C.D. Cal. Nov. 16, 2017); *Antonelli v. Finish Line, Inc*., 2012 WL 525538, at *5 (N.D. Cal. Feb. 16, 2012); *see also Chavarria v. Ralphs Grocery Co.*, 733 F.3d 916, 923-26 (9th Cir. 2013) (refusing to enforce an arbitration agreement that required the employee to pay an unrecoverable portion of the arbitrator's fees "regardless of the merits of the employee's claims"); *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 236 (2013) (recognizing that a challenge to an arbitration agreement might be successful if "filing and administrative fees attached to arbitration … are so high as to make access to the forum impracticable" for a plaintiff).

[35] As then-Justice Breyer observed, arbitration "is usually cheaper and faster than litigation; it can have simpler procedural and evidentiary rules; it normally minimizes hostility and is less disruptive of ongoing and future business dealings among the parties; [and] it is often more flexible in regard to scheduling of times and places of hearings and discovery devices." *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 280 (1995) (quoting H.R. Rep. No. 97-542, at 13 (1982)).

[36] *Viking River*, 596 U.S. at 653.

[37] Letter from David Hirschmann & Lisa Rickard to Monica Jackson, *Re: Notice of Proposed Rulemaking on Arbitration Agreements*, Dkt. No. CFPB-2016-0020-3941 at 3, 12-13 & Appendix A (Aug. 22, 2016).

that individual consumer, the consumer's wireless provider, and the third-party bad actor or actors who perpetrated the alleged fraud.

Litigation in court, with its formality and intricate procedures—and resulting expense—simply is not a realistic option for resolving such claims.[38] A key obstacle to pursuing individualized, small-value claims in court is the cost of hiring counsel. Because these claims are fact-specific, they are not eligible for class action treatment. Unrepresented parties have little hope of navigating the complex procedures that apply to court litigation, yet a lawyer's fee may itself exceed the amount at issue in these and other consumer claims. Many lawyers, especially those working on a contingency basis, are unlikely to take cases when the prospect of a substantial payout is slim. Studies indicate that a claim must exceed $60,000, and perhaps $200,000, in order to attract a contingent-fee lawyer.[39] The bottom line: there is no realistic way for individual consumers to assert these claims in court.

Arbitration empowers individuals, and enables them to pursue smaller claims, because they can realistically bring a claim in arbitration without the help of a lawyer. While a party always has the choice in arbitration to retain an attorney, arbitration procedures are sufficiently simple and streamlined enough that in many cases no attorney is necessary.[40]

For these reasons, restricting arbitration would not "provide meaningful additional protections to customers from SIM swap and port-out fraud."[41] To the contrary, it would instead *prevent* consumers from accessing the most viable forum for obtaining redress for any harms caused by such frauds.

Next, the most robust empirical evidence disproves NCLC's and EPIC's contention that arbitration prevents consumers from obtaining meaningful relief.[42] Consumers who arbitrate their claims win more often, win more quickly, and recover more, than consumers who pursue similar claims in court.

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[38] NCLC and EPIC complain that arbitrators do not apply the formal "rules of evidence or civil procedure" applicable in court. NCLC/EPIC Comments at 6-7. But as the Supreme Court has recognized, "the informality of arbitral proceedings is itself desirable, reducing the cost and increasing the speed of dispute resolution." *Concepcion*, 563 U.S. at 345 (citing *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 269 (2009)).

[39] 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, 783 (2003). In some markets, this threshold may be as high as $200,000. Minn. State Bar Ass'n, *Recommendations of the Minnesota Supreme Court Civil Justice Reform Task Force* 11 (Dec. 23, 2011), perma.cc/VJ8L-RPEY.

[40] Theodore J. St. Antoine, *Labor and Employment Arbitration Today: Mid-Life Crisis or New Golden Age?*, 32 Ohio St. J. on Disp. Resol. 1, 15 (2017) ("it is feasible for employees to represent themselves or use the help of a fellow layperson or a totally inexperienced young lawyer").

[41] Report and Order and Further Notice of Proposed Rulemaking ¶ 107.

[42] *See* NCLC/EPIC Comments at 6.

For example, a recent study released by ILR surveyed more than 41,000 consumer arbitration cases and 90,000 consumer litigation cases resolved between 2014 to 2021.[43] The report found that:

- Consumers who initiate cases win over 40% more frequently in arbitration than in court;[44]

- The median monetary award for consumers who prevailed in arbitration was **more than triple** the award that consumers received in cases won in court;[45] and

- On average, arbitration of consumer disputes is more than 25% faster than litigation in court.[46]

Prior studies of consumer arbitration similarly report that consumers in arbitration fare at least as well as consumers in court.[47]

If anything, these studies probably understate arbitration's advantages over litigation because of "selection effects." Arbitration allows consumers to pursue claims that are too small to attract a contingency-fee lawyer and therefore cannot be brought in court. Thus, studies that compare the average amount obtained by prevailing parties in arbitration and litigation probably tilt in favor of litigation, where claims tend to be larger. And, "relatively weaker claims … are more likely to go to an arbitration hearing on the merits than in litigation" because arbitration lacks the additional procedural hurdles present in litigation.[48] If these skewing effects were eliminated, arbitration outcomes for consumers in arbitration would be even more favorable than the results in court.

In sum, these studies support then-Justice Breyer's observation that arbitration is especially important for individuals with modest claims—abandoning arbitration would "leav[e] the typical consumer who has only small damages claims (who seeks, say, the value of only a

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[43] *See* Nam D. Pham & Mary Donovan, *Fairer, Faster, Better III: An Empirical Assessment of Consumer and Employment Arbitration* (Mar. 2022), https://instituteforlegalreform.com/wp-content/uploads/2022/03/Fairer-Faster-Better-III.pdf.

[44] *Id.* at 4-5 (41.7% in arbitration compared to 29.3% in court).

[45] *Id.* at 4-5 ($20,356 in arbitration compared to $6,669 in court).

[46] *Id.* at 4-5 (321 days in arbitration compared to 437 days in court).

[47] *See, e.g.*, Nam D. Pham & Mary Donovan, *Fairer, Faster, Better II: An Empirical Assessment of Consumer Arbitration* (Nov. 2020), https://instituteforlegalreform.com/wp-content/uploads/2020/11/FINAL-Consumer-Arbitration-Paper.pdf; Christopher R. Drahozal & Samantha Zyontz, *Creditor Claims in Arbitration and in Court*, 7 Hastings Bus. L.J. 77, 80 (2011); Christopher R. Drahozal & Samantha Zyontz, *An Empirical Study of AAA Consumer Arbitrations*, 25 Ohio St. J. on Disp. Resol. 843, 896-904 (2010); Ernst & Young, *Outcomes of Arbitration: An Empirical Study of Consumer Lending Cases* (2005); Theodore Eisenberg et al., *Litigation Outcomes in State and Federal Courts: A Statistical Portrait*, 19 Seattle U. L. Rev. 433, 437 (1996).

[48] *See* Samuel Estreicher et al., *Evaluating Employment Arbitration: A Call for Better Empirical Research,* 70 Rutgers U. L. Rev. 375, 389-93 (2018).

defective refrigerator or television set) without any remedy but a court remedy, the costs and delays of which could eat up the value of an eventual small recovery."[49]

Arbitration does not impose a gag rule on consumers or prevent them from communicating with government agencies.

Contrary to NCLC's and EPIC's assertion that arbitration is "secret" and yields "non-transparent" results, there is nothing inherent in the arbitration process itself that imposes a gag rule on claimants.[50] Most arbitration agreements do not limit the ability of consumers to discuss an arbitrator's decision or to report concerns about wrongdoing to federal, state, and local government officials. Numerous courts have invalidated arbitration agreements that provide otherwise.[51] Moreover, some state laws require disclosure of arbitration outcomes by arbitral forums such as the AAA,[52] and courts often hold that the results of arbitration proceedings may be disclosed by either party.[53]

Not only may consumers report their concerns to the Commission or other government officials, but arbitration agreements do not affect the Commission's enforcement authority. The Supreme Court has made clear that government officials may pursue claims in court—including on behalf of consumers and employees—if they wish.[54]

Arbitration does not shield companies from prompt exposure of, and significant liability for, unlawful practices.

Citing an article from two decades ago about personal injury claims, NCLC and EPIC suggest that companies that use arbitration "decrease the deterrent effect" of the law.[55] That article's unsubstantiated assertion was inaccurate at the time, but it has also been flatly refuted by recent robust empirical evidence. A recent report analyzed the Consumer Financial Protection Bureau's data from 2018-2022 regarding consumer complaints, enforcement actions by the

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[49] *Allied-Bruce*, 513 U.S. at 281.

[50] NCLC/EPIC Comments at 6-7.

[51] *See, e.g.*, *Davis v. O'Melveny & Myers*, 485 F.3d 1066, 1078 (9th Cir. 2007), *overruled on other grounds by Kilgore v. KeyBank, Nat'l Ass'n*, 673 F.3d 947 (9th Cir. 2012); *Longnecker v. Am. Express Co.*, 23 F. Supp. 3d 1099, 1110 (D. Ariz. 2014); *DeGraff v. Perkins Coie LLP*, 2012 WL 3074982, at *4 (N.D. Cal. July 30, 2012); *Ramos v. Super. Ct.*, 28 Cal. App. 5th 1042, 1067 (2018), *as modified* (Nov. 28, 2018) (provision requiring all aspects of the arbitration be maintained in strict confidence was substantively unconscionable).

[52] *E.g.*, Cal. Code Civ. Proc. § 1281.96.

[53] Courts have severed confidentiality provisions or invalidated on unconscionability grounds arbitration agreements requiring that outcomes be kept confidential. *See, e.g.*, *Larsen v. Citibank FSB*, 871 F.3d 1295, 1319 (11th Cir. 2017); *Pokorny v. Quixtar, Inc.*, 601 F.3d 987, 1002 (9th Cir. 2010); *Davis*, 485 F.3d at 1079; *Ting v. AT&T*, 319 F.3d 1126, 1151-52 (9th Cir. 2003).

[54] *See EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002) (arbitration agreements do not forbid the Equal Employment Opportunity Commission from seeking relief in court on behalf of one of the parties to the agreement).

[55] NCLC/EPIC Comments at 7 n.26 (quoting Elizabeth G. Thornburg, *Contracting with Tortfeasors: Mandatory Arbitration Clauses and Personal Injury Claims,* 67 Law & Contemp. Probs. 253, 271 (2004)).

Bureau, and estimates of the number of companies using arbitration agreements across 44 categories of financial products.[56] That report demonstrates:

- There is **no statistically significant relationship** between the use of arbitration agreements and consumer complaints in the Bureau's database.[57]

- There is also **no statistically significant relationship** between the use of arbitration agreements and enforcement actions by the Bureau.[58]

- Among companies that use AAA and JAMS, the two largest arbitration providers, to arbitrate consumer disputes, **there is no increased risk of consumer complaints or Bureau enforcement actions compared to companies that do not use arbitration**.[59]

In short, this research shows no correlation—let alone causation—between a company's use of arbitration and either consumer complaints or Bureau enforcement activity regarding the company.

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For all these reasons, the Commission should not propose any rule that restricts the use of arbitration. We would be happy to provide any additional information that would be useful to you or your staff.

Sincerely,

Matthew D. Webb
Senior Vice President, Legal Reform Policy
Institute for Legal Reform
U.S. Chamber of Commerce

Jordan Crenshaw
Senior Vice President
Chamber Technology Engagement Center
U.S. Chamber of Commerce

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[56] *See* Nam D. Pham & Mary Donovan, *A Critique of the CFPB Proposed Rule: Companies that Use Arbitration Agreements Do Not Pose Any Greater Risks to Consumers Than Those That Do Not* (Mar. 2023), https://instituteforlegalreform.com/wp-content/uploads/2023/03/CFPB-Report-Final-March-29-2023.pdf.

[57] *Id.* at 1-2, 4-7.

[58] *Id.* at 2, 8-10.

[59] *Id.* at 2, 10-11.