U.S. Chamber of Commerce

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November 14, 2023

The Honorable Rohit Chopra
Director
Consumer Financial Protection Bureau
1700 G Street, N.W.
Washington, D.C. 20552

Re: Comment Letter Regarding "Petition to Require Meaningful Consumer Consent Regarding the Use of Arbitration to Resolve Disputes Involving Consumer Financial Products and Services" – Docket No. CFPB-2023-0047

Dear Director Chopra:

This letter is submitted on behalf of the U.S. Chamber of Commerce by the Center for Capital Markets Competitiveness ("CCMC") and the U.S. Chamber Institute for Legal Reform ("ILR"). The Chamber created CCMC to promote a modern and effective regulatory structure for capital markets to function well in a 21st century economy. ILR champions a fair legal system that promotes economic growth and opportunity.

We write regarding the recent Petition for rulemaking submitted by the National Association of Consumer Advocates, Public Citizen, the American Association for Justice, Public Justice, the National Consumer Law Center, Consumer Federation of America, the UC Berkeley Center for Consumer Law & Economic Justice, Americans for Financial Reform, and Better Markets, Inc. ("Petitioners") to ban pre-dispute arbitration provisions in contracts for consumer financial services.[1]

The Bureau should deny the Petition. The rulemaking proposed in the Petition would be unlawful for multiple independent reasons. 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 consumer financial products or services, have been common for decades. Currently, there are hundreds of millions of consumer contracts that contain arbitration agreements. These agreements reduce transaction costs and enable fair, speedy, and efficient dispute resolution.

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[1] *See* Petition to Require Meaningful Consumer Consent Regarding the Use of Arbitration to Resolve Disputes Involving Consumer Financial Products and Services, https://www.regulations.gov/document/CFPB-2023-0047-0001 ("Petition").

This comment letter makes the following key points:

- The Bureau lacks legal authority to promulgate the rule that Petitioners propose. Petitioners' proposal is precluded by Congress's 2017 Congressional Review Act resolution disapproving the Bureau's previous anti-arbitration rule.

- Petitioners are also urging the Bureau to exceed its limited authority under Section 1028 of the Dodd-Frank Act—which requires, among other things, that the Bureau conduct a study and only propose a rule that is supported by the findings of such a study.

- Because Petitioners' proposal exceeds the Bureau's authority under Section 1028, it also violates the Federal Arbitration Act on the grounds that it is rooted in a discriminatory and impermissibly hostile treatment of arbitration.

- The ban on arbitration that Petitioners propose is arbitrary, capricious, and ignores basic empirical facts—resting instead on the demonstrably false premises that arbitration harms consumers and that the use of arbitration to resolve disputes makes companies more likely to violate the law.

- The U.S. Court of Appeals for the Fifth Circuit has held that the Bureau's funding structure is unconstitutional, and that question is now before the Supreme Court. Should the Court affirm the Fifth Circuit, this constitutional infirmity in the Bureau's structure provides an additional reason why the Bureau lacks the lawful authority to promulgate Petitioners' proposed rule. The Bureau should neither propose nor promulgate controversial rules prior to the Supreme Court's definitive resolution of this serious constitutional issue.

I. The Petition Proposes a Wholly Unlawful and Unjustified Attack on Arbitration Agreements.

Petitioners are asking the Bureau to engage in an illegal end-run around both the 2017 Congressional Review Act resolution rejecting the Bureau's earlier attempt to ban arbitration agreements and the limits on the Bureau's arbitration authority under the Dodd-Frank Act. Moreover, Petitioners' invitation to revive the Bureau's prior failed attacks on arbitration is independently precluded by the Federal Arbitration Act.

In addition, Petitioners propose a rule that is unjustified and arbitrary, capricious, and irrational, and therefore invalid under the APA. Petitioners principally rely on the Bureau's fundamentally flawed 2015 study and a new academic paper; neither document justifies their far-reaching proposal to outlaw pre-dispute arbitration. Petitioners' primary premise—that the use of arbitration agreements harms consumers and makes companies more likely to violate federal law—is simply false.

A. The Bureau Lacks the Legal Authority to Promulgate Petitioners' Proposed Rule.

Petitioners urge the Bureau to act in contravention of at least three congressional mandates. First, Congress clearly foreclosed the Bureau's authority to ban arbitration agreements through its Congressional Review Act resolution in 2017. Second, Petitioners' proposal exceeds the Bureau's limited authority under the Dodd-Frank Act. Third, Petitioners' proposed rule would violate the strong federal policy favoring arbitration reflected in the Federal Arbitration Act.

The Proposed Rule is prohibited by the Congressional Review Act

The CRA "was enacted in 1996 to enhance congressional oversight of executive rulemaking."[2] Once an agency rule has been invalidated under the CRA, "a new rule that is substantially the same as" that rule "may not be issued, unless the ... new rule is specifically authorized by a law enacted after the date of the joint resolution disapproving the original rule."[3]

Petitioners' proposal is "substantially the same as" the Bureau's 2017 rule invalidated under the CRA and is therefore barred by the statute's plain text.

The 2017 anti-arbitration rule would have "prohibit[ed] providers from using" arbitration agreements that waived class proceedings.[4] But individualized resolution of disputes is an essential characteristic of arbitration—as the Supreme Court has

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[2] *Citizens for Const. Integrity v. United States*, 57 F.4th 750, 754 (10th Cir. 2023).

[3] 5 U.S.C. § 801(b)(2). Petitioners cite only one clause of the statute—that a rule invalidated under the CRA "may not be reissued in substantially the same form." *Id.*; *see* Petition at 7-8. But they ignore the very next clause, which is broader—"and a new rule that is substantially the same as such a rule may not be issued." 5 U.S.C. § 801(b)(2).

[4] *See* Arbitration Agreements, 82 Fed. Reg. 33,210, 33,210 (Jul. 19, 2017).

repeatedly recognized.[5] And it was clear that the practical effect of the rule would have been to ban all pre-dispute arbitration.[6]

Facing the certainty of high litigation costs associated with class-action suits in court, businesses would no longer have been willing to take on the expense of supporting an alternative arbitration mechanism—for which businesses shoulder the lion's share of the costs. Rather than paying costs associated with two dispute resolution systems—arbitration and court—they would have dropped arbitration, because the Bureau's rule would have made it impossible to avoid court-related litigation costs.[7]

Under the CRA, a rule will not take effect if Congress issues a joint resolution within 60 days of the rule's promulgation and the President agrees with the joint resolution.[8] Congress and the President did just that—Congress disapproved the 2017 rule by adopting a joint resolution under the CRA declaring that the Bureau's rule "shall have no force or effect" and the President approved the resolution.[9]

While the courts have not definitively interpreted the "substantially the same" language in the CRA, the plain meaning of that statutory text and other relevant case law compels the conclusion that the CRA bars any subsequent rule that would have the same essential effect as the invalidated rule. As the Tenth Circuit has observed in interpreting the statutory phrase "substantially the same" in the False Claims Act's public disclosure bar, "[t]he ordinary meaning of 'substantial' is: 'concerning the essentials of something.'"[10] The "substantially the same" standard thus "requires only

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[5] *See*, *e.g.*, *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1416 (2019) (the FAA envisions "an individualized form of arbitration"); *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1621 (2018) (the FAA "seems to protect pretty absolutely" the right to arbitrate using "individualized rather than class or collective action procedures"); *Am. Express Corp. v. Italian Colors Restaurant*, 570 U.S. 228, 238 (2013); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344 (2011) (holding that any state-law rule "[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA").

[6] *See*, *e.g.*, Letter from David Hirschmann & Lisa Rickard to Monica Jackson, *Re: Notice of Proposed Rulemaking on Arbitration Agreements*, Dkt. No. CFPB-2016-0020-3941, at 62-66 (Aug. 22, 2016).

[7] *Id*. The Bureau acknowledged that several commenters confirmed this reality but minimized the likelihood that businesses would have abandoned arbitration. *See* Arbitration Agreements, 82 Fed. Reg. at 33,287, 33,411.

[8] 5 U.S.C. § 801(a)-(b).

[9] Pub. L. No. 115-74, 131 Stat. 1243 (approved Nov. 1, 2017).

[10] *United States ex rel. Reed v. KeyPoint Gov't Solutions*, 923 F.3d 729, 748 n.12 (10th

the essentials" of the two things to be the same, not a complete or "hyper-specific" overlap.[11]

Common sense and respect for the democratic process require the same interpretation of the CRA's identical text. Permitting an agency to make minor tweaks to achieve the same result as the invalidated rule would fail to accord proper respect to the judgment of the people, through their elected political representatives, to invalidate the original rule.

The rule proposed by Petitioners would have the same essential effect as the 2017 rule, and is therefore barred by the CRA, for multiple reasons.

First, Petitioners' proposal would invalidate pre-dispute arbitration agreements with class waivers—the very category of agreements covered by the 2017 rule. Critically, all, or virtually all, consumer arbitration agreements include class waivers.[12] Therefore, virtually all of the arbitration agreements that would be barred by the proposal would also have been prohibited by the 2017 rule. Two rules that would have virtually identical practical effect necessarily qualify as "substantially the same." Issuing a new rule that has essentially the same practical consequence as the 2017 rule would unlawfully circumvent Congress's and the President's disapproval of the Bureau's prior rule.

Second, Petitioners' proposal expressly bans all pre-dispute arbitration agreements. The 2017 rule reached the same result by seizing on an inherent characteristic of arbitration—individualized determinations. By banning arbitration agreements that required individualized resolution of disputes, it reached all arbitration agreements.

The Supreme Court has recognized, in interpreting the FAA's protection of arbitration agreements, that a law targeting an inherent characteristic of arbitration is the equivalent to a law targeting arbitration itself. "The [FAA] also displaces any rule

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Cir. 2019) (quoting THE NEW OXFORD AMERICAN DICTIONARY 1687 (2d ed. 2005)).

[11] *Id.*

[12] Indeed, the Supreme Court has held that arbitration agreements should be construed to bar class proceedings—in other words, to contain an implied class waiver—unless they expressly authorize them. The Court has explained that because individualized arbitration is an inherent characteristic of arbitration, "courts may not infer consent to participate in class arbitration absent an affirmative 'contractual basis for concluding that the party *agreed* to do so.' Silence is not enough; the 'FAA requires more.'" *Lamps Plus*, 139 S. Ct. at 1416 (quoting *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 684, 687 (2010)). In other words, unless parties have affirmatively contracted for class arbitration—which they essentially never do—all arbitration agreements contain either an implicit or explicit class action ban.

that covertly [prohibits arbitration] … by disfavoring contracts that (oh so coincidentally) have the defining features of arbitration agreements."[13]

Petitioners' proposal to expressly ban pre-dispute arbitration therefore is in its "essentials" the same as the 2017 rule, which accomplished essentially the same result—banning all pre-dispute arbitration agreements—by targeting a key characteristic of arbitration. For that reason, too, the two rules plainly qualify as "substantially the same," and the proposal is barred by the CRA.

Third, the equivalence of the two rules is confirmed by the explanations provided by Members of Congress and the President for their decisions to invoke the CRA to invalidate the 2017 anti-arbitration rule.[14] These statements make clear that the 2017 rule was rejected because it broadly eliminated the use of arbitration to resolve consumer disputes—which is precisely what Petitioners' proposal would do. The following are just a few examples of those statements:

- The disapproval resolution's principal sponsor in the House explained that "consumers get meaningful relief" in arbitration, yet "the CFPB has finalized a rule that would **effectively get rid of arbitration** and promote class actions as the preferred dispute resolution process. This hardly seems fair."[15]

- One of the resolution's House co-sponsors similarly criticized the Bureau's rule for threatening to "deprive consumers of a low-cost, easy way to resolve legal disputes" through arbitration.[16]

- Another of the resolution's House co-sponsors noted that "the Bureau's arbitration rule does absolutely nothing to ensure that consumers are treated fairly," including because "[t]he Bureau's own study" demonstrates "that arbitration helps consumers and that the alternatives are far less successful."[17]

- In the Senate, the resolution's principal sponsor similarly explained that the Bureau's anti-arbitration rule "could result in less effective consumer

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[13] *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 581 U.S. 246, 251 (2017).

[14] *See* Congressional Research Service, *The Congressional Review Act (CRA): Frequently Asked Questions* 20 (Nov. 12, 2021), https://sgp.fas.org/crs/misc/R43992.pdf (observing that "the CRA's sponsors appear to have envisioned that the debate over a disapproval resolution would provide some guidance to the agency on next steps").

[15] 163 Cong. Rec. H6270 (July 25, 2017) (statement of Rep. Rothfus) (emphasis added).

[16] 163 Cong. Rec. H6269 (July 25, 2017) (statement of Rep. Hensarling).

[17] 163 Cong. Rec. H6271 (July 25, 2017) (statement of Rep. Luetkemeyer).

protection and fewer remedies while simply enriching class action lawyers," and at the same time "potentially decrease the products offered to consumers while increasing their costs."[18]

- As the then-Chairman of the House Judiciary Committee summarized, the Bureau's "anti-consumer" rule "threaten[ed] to undo" the well-documented benefits of arbitration; "force [companies] into choosing whether to continue to fund their arbitration programs or, instead, to shutter those programs to preserve funds for high-dollar class action defense"; and "burden[]" freedom of contract.[19]

- The Executive Branch's Statement of Administration Policy supporting the CRA joint resolution explained that the rule would "harm consumers by denying them the full benefits and efficiencies of arbitration; and hurt financial institutions by increasing litigation expenses and compliance costs (particularly for community and mid-sized institutions). In many cases, these increased costs would be borne, not by the financial institutions, but by their consumers."[20]

Petitioners argue that their proposal is not "substantially the same" as the 2017 rule because it "does not prohibit, or even address, class-action bans."[21]

That proposed distinction is farcical. Petitioners propose to ban *all* pre-dispute arbitration agreements altogether, including those containing class-action waivers. And, because virtually all arbitration agreements ban class proceedings,[22] their new proposal simply makes explicit what the 2017 would have accomplished. The effect of the two proposals would be identical.[23]

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[18] 163 Cong. Rec. S6746 (Oct. 24, 2017) (statement of Sen. Crapo).

[19] 163 Cong. Rec. H6277 (July 25, 2017) (statement of Rep. Goodlatte).

[20] Statement of Administration Policy, H.J. Res. 111 – Disapproving the Rule, Submitted by the Consumer Financial Protection Bureau, Known as the Arbitration Agreements Rule (July 24, 2017), https://trumpwhitehouse.archives.gov/briefings-statements/h-j-res-111-disapproving-rule-submitted-consumer-financial-protection-bureau-known-arbitration-agreements-rule/.

[21] Petition at 8.

[22] *See* page 5 and note 12, *supra*.

[23] For these reasons, the rule Petitioners propose is nothing like the two situations that they cite (*see* Petition at 8 n.39), in which the agencies explained that, in their view, the new rules did not violate the CRA because they had made substantial changes to remedy the concerns that led to the invalidation of their prior rules under the CRA. For

Moreover, Petitioners make clear that their preference for class action litigation in court remains the impetus for their proposal, complaining that consumers' "efforts to seek accountability are often stymied by class-action banning forced arbitration clauses."[24] That further confirms that their proposal is "substantially the same" as the 2017 rule.

In sum, Congress rejected the Bureau's attempt to prohibit pre-dispute arbitration agreements when it exercised its authority under the Congressional Review Act to override the 2017 rule. Congress's disapproval of the 2017 rule under the CRA prohibits the Bureau from promulgating a "new rule that is substantially the same."[25] It therefore precludes Petitioners' request that the Bureau attempt once again to ban pre-dispute arbitration agreements.[26]

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example, the SEC stated that its new rule—implementing a statutory mandate to require certain disclosures in connection with the commercial development of oil, natural gas, or minerals—required much "less granular[]" and burdensome disclosures than the prior rejected rule. Securities and Exchange Commission, "Disclosure of Payments by Resource Extraction Issuers," 86 Fed. Reg. 4,662, 4,665-66 (Jan. 15, 2021) (rejecting the argument that the agency could readopt a similar rule "with only minor modifications" as "inconsistent with the plain language of the CRA"). Similarly, the Labor Department stated that it "substantially depart[ed]" from its rejected rule's "nationally uniform" and "one-size-fits-all approach" towards listing occupations that regularly engage in drug testing—instead allowing for state-specific determinations of such occupations. Department of Labor, Federal-State Unemployment Compensation Program; "Establishing Appropriate Occupations for Drug Testing of Unemployment Compensation Applicants Under the Middle Class Tax Relief and Job Creation Act of 2012," 84 Fed. Reg. 53,037, 53,038 (Oct. 4, 2019). Petitioners take the exact opposite approach, proposing a prohibition that would bar all of the arbitration agreements prohibited by the prior rule and addressing none of the concerns that led Congress and the President to invalidate the prior rule. It plainly would be prohibited by the CRA.

[24] Petition at 16.

[25] 5 U.S.C. § 801(b)(2).

[26] Both the 2017 rule and Petitioners' current proposal are limited to pre-dispute arbitration agreements, so there is no distinction between the two in that respect. *See also* 12 U.S.C. § 5518 (limiting the Bureau's authority to pre-dispute arbitration agreements). But it is also notable that post-dispute arbitration agreements would not substitute for pre-dispute arrangements, because they are as rare as a blue moon. *See*, *e.g.*, Theodore J. St. Antoine, *Making Employment Arbitration Fair and Accessible*, 12 Penn. St. Arb. L. Rev. 1, 18 (2020) ("Insisting solely on post-dispute agreements could be the death-knell for most private employment arbitration."); Scott Baker, *A Risk-Based Approach to Mandatory Arbitration,* 83 Or. L. Rev. 861, 895 (2004) (same). The

The Bureau lacks statutory authority to promulgate the proposed rule.

The Petition must be rejected for an additional, independent reason: the proposal exceeds the Commission's authority under the Dodd-Frank Act.

Congress refused to give the Bureau unlimited authority over arbitration. Instead, it chose to provide specific, limited authority under Section 1028 of the Dodd-Frank Act.[27] That provision allows the Bureau to regulate arbitration in the context of consumer financial products and services only if, **after** conducting a study,[28] the Bureau demonstrates that its regulation is "**consistent with the study** conducted under subsection (a)" and also finds that the regulation is "in the public interest and for the protection of consumers."[29]

The Bureau sought to exercise this limited authority in 2015 when it issued a study on arbitration. That study was deeply flawed—for reasons the Chamber has previously explained in detail and summarizes below.[30] And as just discussed, Congress disapproved the 2017 rule based on that study by a joint resolution under the Congressional Review Act.

By separately addressing the Bureau's authority to regulate arbitration and imposing specific requirements for the exercise of that regulatory authority (such as

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lawyers for one or both sides (assuming that the claim is large enough to attract representation) have strong incentives to induce their clients to opt for litigation in court rather than arbitration. Litigation in court—which takes much longer than arbitration and involves many more procedural hurdles—offers lawyers the opportunity to earn much higher fees than they could earn in arbitration. Consciously or not, they typically advise clients to choose a judicial forum that is really in the lawyers' own best interest.

[27] *See* 12 U.S.C. § 5518.

[28] *Id.* § 5518(a).

[29] *Id.* § 5518(b) (emphasis added).

[30] *See* U.S. Chamber of Commerce, *The CFPB's Flawed Arbitration "Study,"* https://www.uschamber.com/assets/archived/images/documents/files/cfpb_arbitration_study_critique.pdf; Letter from David Hirschmann & Lisa Rickard to Monica Jackson, *supra* note 6, at 6-11; Letter from the American Bankers Ass'n et al. to Richard Cordray, *Re: Comment on CFPB Arbitration Study* (May 21, 2015); Letter from David Hirschmann & Lisa Rickard to Monica Jackson, *Re: Request for Information Regarding Scope, Methods, and Data Sources for Conducting Study of Pre-Dispute Arbitration Agreements*, Docket No. CFPB-2012-0017—Supplemental Submission (Dec. 11, 2013); Letter from David Hirschmann & Lisa Rickard to Monica Jackson, *Re: Request for Information Regarding Scope, Methods, and Data Sources for Conducting Study of Pre-Dispute Arbitration Agreements*, Docket No. CFPB-2012-0017 (June 12, 2012).

mandating a study and specifying that any rule must be based upon the study's findings), Congress made clear that the Bureau may address arbitration only by exercising that specific authority.

Yet Petitioners do not ask the Bureau to conduct the study required by Section 1028. They instead urge the Bureau to rely on its old, flawed 2015 study, asserting that the study's purported findings "are still true" and "remain important."[31]

Section 1028 clearly requires a new study, for multiple reasons.

First, the 2015 study is plainly outdated. It is based on data that is more than ten years old—from 2011 and earlier years. For example, the study examined:

- Outcomes from arbitrations filed with the American Arbitration Association ("AAA") in 2010 and 2011;[32]
- Consumer claims filed in court between 2010 and 2012;[33]
- Class action settlements subject to final approval between 2008 and 2012;[34] and
- Public enforcement actions between 2008 and 2012.[35]

Much has changed with respect to arbitration in the interim. The 2015 study reported that relatively few consumers filed arbitrations over a decade ago.[36] Now, however, many more arbitrations are filed by consumers, totaling thousands or more each year.[37] The Bureau also lamented in the 2015 study that "very few" empirical

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[31] Petition at 7, 18.

[32] Consumer Fin. Protection Bureau, *Arbitration Study: Report to Congress 2015* section 5 (Mar. 2015), https://goo.gl/wcKw1f ("CFPB Study").

[33] *Id.* at section 6.

[34] *Id.* at section 8.

[35] *Id.* at section 9.

[36] *Id.* at section 5.

[37] For example, the AAA reports that there were 10,782 single consumer arbitration filings in 2022, a number that **excludes** mass arbitration filings. Am. Arb. Ass'n, *2022 Consumer Arbitration Statistics*, https://www.adr.org/sites/default/files/document_repository/AAA432_Consumer_Infographic_2022.pdf. The Chamber has serious concerns about the ways that plaintiffs' counsel have filed and vetted mass arbitrations, but if mass arbitrations are included, the number of filed arbitrations has skyrocketed over the past decade. *See* Institute for Legal Reform, *Mass Arbitration*

studies "have focused on consumer arbitration."[38] But since that time there have been robust empirical studies comparing arbitrations and litigations filed by consumers, and they demonstrate that consumers win at least as often and recover more in arbitration than in claims in court.[39] For that reason, Petitioners' complaint about the growth of arbitration in recent years[40] rings hollow: it rests on the false premise that arbitration harms consumers.

Resting a rule on an outdated study violates Section 1028 and, in addition, would constitute arbitrary and capricious agency action violative of the APA.

Indeed, Petitioners themselves state that their proposal is based on "developments since 2017"[41]—and cite a variety of post-study "developments" in support of their proposal.[42] If recent developments matter, that fact further confirms that the Bureau must conduct a new study reflecting that current reality before it can exercise its limited authority over pre-dispute arbitration agreements. Section 1028 authorizes the Bureau to act only based on evidence developed through an appropriate study; it cannot base a rule on Petitioners' assertions regarding the relevant facts.

Second, the deep flaws in the 2015 study independently preclude a new rule based on that study. We explained those flaws in detail in prior submissions to the Bureau.[43] We incorporate those submissions by reference and summarize them here.

The 2015 study (1) ignored the practical benefits of arbitration as compared to the court system for vindicating the types of injuries consumers most often suffer; (2) greatly exaggerated the supposed benefits of class actions; (3) ignored the government's significant role in protecting consumers; (4) failed to consider the benefits arbitration provides to injured parties when those parties are not discouraged by plaintiffs' lawyers and others from invoking arbitration; and (5) wrongly denied the reduced transaction costs resulting from arbitration, which produce lower prices for consumers. Perhaps most importantly, the 2015 study completely failed to assess what impact a ban on enforcing class-action waivers in pre-dispute arbitration agreements

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Shakedown: Coercing Unjustified Settlements 18-21 (Feb. 2023), https://instituteforlegalreform.com/wp-content/uploads/2023/02/Mass-Arbitration-Shake-down-digital.pdf (discussing hundreds of thousands of recently filed arbitration demands); *see also id.* at 30-40 (discussing abuses associated with mass arbitrations).

[38] CFPB Study at section 5.3.

[39] *See* pages 15-16 and notes 56-63, *infra*.

[40] *See* Petition at 5-6.

[41] Petition at 8.

[42] *E.g.*, *id.* at 5-6, 8-16, 17 & n. 85.

[43] *See* note 30, *supra*.

would have on providers' willingness to make arbitration available to customers. Indeed, the 2017 rule would have ended all consumer arbitration in the financial services sector, just like Petitioners' current proposal.

Unsurprisingly then, scholars concluded the 2015 study was methodologically unsound because "[s]ubstantially more and different evidence would be necessary to conclude that consumers are harmed by arbitration or that they would benefit from unleashing class action litigation more routinely."[44]

Third, Petitioners' proposal that the Bureau rest on its 2015 study is also inconsistent with Congress's determination that the 2015 study did not support the Bureau's prior attempt to ban pre-dispute arbitration. Petitioners' substantially the same proposal would likewise result in a rule that is not "consistent with the [2015] study" and therefore is in violation of the Bureau's authority.[45]

Fourth, Petitioners' proposal cannot be based on the 2015 study because that study focused on class actions—conversely, this proposal would ban all pre-dispute arbitration agreements, including with respect to individual claims, in a (misguided) effort to evade the CRA. Petitioners cannot have it both ways. If the proposal is not precluded under the CRA as "substantially the same" as the 2017 rule, that means (contrary to what we explained above) it is unrelated to an interest in promoting class proceedings. But the 2015 study focused on class proceedings and said little about individual claims. As the Bureau made clear in the 2017 rule, that rule was based on the Bureau's (inaccurate) view about the "the role of the class action device in protecting consumers" and the findings in the 2015 study purporting to support that view.[46] The 2015 study therefore cannot support a ban on pre-dispute agreements with respect to individual claims.

Indeed, what little the Bureau previously said about individual claims **supports** the use of arbitration. The Bureau previously recognized that "those consumers who do prevail [in arbitration] may obtain substantial individual awards," with an average recovery by prevailing consumers of "nearly $5,400."[47] In fact, data in the Bureau's 2015 study suggest that "arbitration seems to generate comparable or even slightly better results for individual claimants than do individual consumer lawsuits."[48] The Bureau's study concluded that individual arbitrations "proceed[] relatively

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[44] Jason Johnston & Todd Zywicki, *The Consumer Financial Protection Bureau's Arbitration Study: A Summary and Critique* 8*,* Mercatus Working Paper, Mercatus Center at George Mason University (Aug. 2015).

[45] 12 U.S.C. § 5518(b).

[46] Arbitration Agreements, 82 Fed. Reg. at 33,211.

[47] *Id.* at 33,252; *see* CFPB Study at section 5.

[48] *See* Johnston & Zywicki, *supra* note 44, at 25-27 (reviewing study data).

expeditiously"; "the cost to consumers ... is modest"; "and at least some consumers proceed without an attorney."[49]

For those reasons, the 2015 study cannot support a ban on all pre-dispute arbitration.

Petitioners' proposal impermissibly conflicts with the Federal Arbitration Act.

Because Petitioners propose a rule that fails to comply with the limits on the Bureau's authority under Section 1028 of the Dodd-Frank Act, the Federal Arbitration Act ("FAA") independently prevents the Bureau from promulgating Petitioners' proposed rule.[50]

The purpose and inevitable, intended effect of Petitioners' proposed rule is to ban all arbitration agreements in the consumer financial sector. But that hostile view of arbitration contravenes the FAA, which is "a congressional declaration of a liberal federal policy favoring arbitration agreements."[51] Contrary to Petitioners' assertions that arbitration threatens to diminish consumers' substantive rights, the Supreme Court has repeatedly recognized that "[a]n arbitration agreement does not alter or abridge substantive rights; it merely changes how those rights will be processed."[52]

Petitioners' proposal thus rests on an impermissible denigration of arbitration that squarely conflicts with the Supreme Court's repeated pronouncements "that the FAA was designed to promote arbitration" and the FAA's mandate to "place arbitration agreements on equal footing with all other contracts."[53] As the Ninth Circuit recently reiterated, "[i]n enacting the FAA, Congress intended to combat the longstanding 'hostility towards arbitration' that 'had manifested itself in a great variety of devices and formulas declaring arbitration against public policy.'"[54] Petitioners' proposal for the Bureau to declare pre-dispute arbitration against public policy is just such a "device." And the Bureau can act contrary to the FAA only if its rule falls within

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[49] CFPB Study section 5 at 29, 71-73.

[50] The Supreme Court has explained that the FAA's mandate that arbitration agreements generally be "enforce[d] ... according to their terms" can be displaced only by an express "'contrary congressional command'" in another federal statute. *CompuCredit Corp. v. Greenwood*, 565 U.S. 95, 98 (2012) (quoting *Shearson/Am. Express Inc. v. McMahon*, 482 U.S. 220, 226 (1987)).

[51] *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

[52] *Viking River Cruises, Inc. v. Moriana*, 142 S. Ct. 1906, 1919 (2022) (citing *Preston v. Ferrer*, 552 U.S. 346, 359 (2008); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 633 (1985)).

[53] *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339, 345 (2011).

[54] *Chamber of Commerce v. Bonta*, 62 F.4th 473, 483 (9th Cir. 2023).

Congress's limited grant of authority in Section 1028—but the proposed rule here does not.

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For all of these reasons, the Bureau lacks the legal authority to adopt Petitioners' proposed ban on arbitration agreements.

B. Adopting Petitioners' Proposal Would Produce a Rule that is Arbitrary, Capricious, and Irrational, And Therefore Invalid under the APA.

Even if the Bureau had the authority to adopt Petitioners' proposal, which it does not, adopting that proposal would result in a rule that is invalid because it constitutes agency action that is "arbitrary, capricious … or otherwise not in accordance with law."[55] The assertions on which the petition rests—that arbitration harms consumers and makes companies more likely to violate federal law—are demonstrably false:

- Petitioners contend that arbitration harms consumers, but studies consistently show that consumers win at least as often and recover more in arbitration than in court.

- Petitioners contend that arbitration allows companies to impose procedures that benefit them at consumers' expense, but leading arbitration providers require fair procedures and courts invalidate unfair provisions.

- Petitioners contend that banning arbitration would make companies less likely to violate the law, but a recent study based on the Bureau's own enforcement activity shows that Petitioners' assertion is false.

- Petitioners contend that class actions in court are preferable to arbitration, but most consumers' claims are individualized and unsuitable for class treatment, and the class actions favored by Petitioners provide little to no benefit to consumers.

- Petitioners contend that a new academic article shows that consumers do not understand arbitration clauses. But the study that article reports on does not test consumers' understanding at all; it instead tests only consumers' recollection of contract terms that are not in front of them.

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[55] 5 U.S.C. § 706(2).

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. And importantly, arbitration gives consumers the ability to obtain redress for harms that they could not realistically assert in court, including the small and individualized claims that the Bureau's own data show consumers raise most often.[56]

Petitioners baselessly assert that arbitration gives companies a method to evade liability and "immunize themselves against any possibility of being held accountable." The most robust empirical evidence disproves that assertion: consumers who arbitrate their claims win more often, win more quickly, and recover more, than consumers who pursue similar claims in court.

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.[57] The report found that:

- Consumers who initiate cases were over 12% more likely to win in arbitration than in court;[58]
- The median monetary award for consumers who prevailed in arbitration was *more than triple* the award that consumers received in cases won in court;[59] and
- On average, arbitration of consumer disputes is more than 25% faster than litigation in court.[60]

Prior studies of consumer arbitration similarly report that consumers in arbitration fare at least as well as consumers in court,[61] as do empirical studies in the

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[56] Letter from David Hirschmann & Lisa Rickard to Monica Jackson, *supra* note 6, at 3, 12-13 & Appendix A.

[57] *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.

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

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

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

[61] *See, e.g.*, Nam D. Pham & Mary Donovan, *Fairer, Faster, Better II: An Empirical*

employment context.[62]

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.[63] 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 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."[64]

Petitioners complain about requiring the use of informal dispute resolution channels prior to arbitration.[65] But such channels **benefit** consumers by providing them an opportunity for **cost-free** resolution of their claims. Indeed, a similar requirement was part of the clause in *AT&T Mobility LLC v. Concepcion*, in which the Supreme Court

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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).

[62] *See*, *e.g.*, Pham & Donovan, *supra* note 57, at 4-5; Michael Delikat & Morris M. Kleiner, *An Empirical Study of Dispute Resolution Mechanisms: Where Do Plaintiffs Better Vindicate Their Rights?*, 58 Disp. Resol. J. 56, 58 (Nov. 2003-Jan. 2004); Theodore Eisenberg & Elizabeth Hill, *Arbitration and Litigation of Employment Claims: An Empirical Comparison,* 58 Disp. Resol. J. 44, 45-50 (Nov. 2003/Jan. 2004).

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

[64] *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 281 (1995).

[65] *See* Petition at 13.

treated that requirement as a benefit to consumers, not a burden.[66] For example, the record in *Concepcion* indicated that AT&T representatives awarded more than **$1.3 billion** in compensation to customers during a single twelve-month period to resolve customer concerns and complaints submitted through informal resolution processes.

Finally, Petitioners also 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.[67] Litigation in court, with its formality and intricate procedures—and resulting expense—simply is not a realistic option for resolving such claims.

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 many garden-variety 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, to attract a contingent-fee lawyer.[68] 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.[69]

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[66] *See* 563 U.S. at 336-37, 352; *see also, e.g.*, *Serpa v. Cal. Sur. Investigations, Inc.*, 215 Cal. App. 4th 695, 710 (2013) (noting that a pre-arbitration notice of dispute process, with its accompanying potential for "informal" resolution, "is both reasonable **and laudable**") (emphasis added).

[67] 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).

[68] 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.

[69] St. Antoine, *supra* note 26, at 15 ("it is feasible for employees to represent themselves or use the help of a fellow layperson or a totally inexperienced young lawyer").

Indeed, a study of 200 AAA employment awards concluded that low-income employees brought 43.5% of arbitration claims, most of which were low-value enough that the employees would not have been able to find an attorney willing to bring litigation on their behalf.[70] These employees were often able to pursue their arbitrations without an attorney and won at the same rate as individuals in arbitration who had legal representation.[71]

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

Petitioners also suggest that arbitration offers companies the ability to set up procedures that disfavor consumer claims. 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.[72] 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;
- limit the fees paid by consumers to $225—less than the filing fee in federal court;
- 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

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[70] Hill, *supra* note 68, at 794.

[71] *Id*.

[72] Am. Arbitration Ass'n, *Consumer Due Process Protocol Statement of Principles* (Apr. 17, 1998), perma.cc/VPW4-KXUV.

similar protections.[73] Moreover, both AAA and JAMS employ arbitrators of the highest caliber, including former judges and accomplished attorneys.[74]

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 the provisions about which the Bureau has previously expressed concern, including:

- limits on recovery of damages permitted under state and federal law;[75]
- requirements that arbitration take place in inconvenient locations for claimants;[76] and

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

[74] 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.

[75] *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).

[76] *See, e.g.*, *Nagrampa v. MailCoups, Inc*., 469 F.3d 1257, 1287 (9th Cir. 2006) (travel from

- excessive fees for asserting a claim.[77]

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. Indeed, Petitioners concede that financial services providers have in recent years made their agreements even more friendly to their customers—such as by removing strict confidentiality requirements or further reducing arbitration costs.[78] As the Supreme Court has

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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. 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).

[77] 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).

[78] Petition at 17.

repeatedly recognized, an arbitration agreement "does not alter or abridge substantive rights; it merely changes how those rights will be processed."[79]

Finally, there is nothing inherent in the arbitration process itself that imposes a gag rule on claimants. 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.[80]

Indeed, some state laws require disclosure of arbitration outcomes by arbitral forums such as the AAA,[81] and courts often hold that the results of arbitration proceedings may be disclosed by either party.[82]

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

Petitioners charge that companies that use arbitration do so to avoid "legal accountability" and to create "more room to engage in bad practices for a longer period of time."[83] That unsupported assertion is flatly refuted by the Bureau's own data. A recent report analyzed the Bureau's data from 2018-2022 regarding consumer

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[79] *Viking River*, 142 S. Ct. at 1919. Petitioners' complaint about arbitration of claims under the Fair Credit Reporting Act (*see* Petition at 14-15) is therefore nonsensical; contrary to Petitioners' assertions, FCRA claimants can fully vindicate their statutory rights in arbitration.

[80] *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. Superior 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). Further, government officials could pursue claims in court—including on behalf of consumers and employees—if they wish. *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).

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

[82] 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).

[83] Petition at 16.

complaints, enforcement actions by the Bureau, and estimates of the number of companies using arbitration agreements across 44 categories of financial products.[84] That report demonstrates:

- There is **no statistically significant relationship** between the use of arbitration agreements and consumer complaints in the Bureau's database.[85]
- There is also **no statistically significant relationship** between the use of arbitration agreements and enforcement actions by the Bureau.[86]
- 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**.[87]

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.

Class actions provide little or no benefit to consumers,

Petitioners repeatedly criticize the fact that most arbitration agreements require resolution of disputes on an individual basis and "prohibit class actions."[88] But Petitioners' preference for our broken class-action system ignores the well-documented reality that consumers get little or no benefit from class actions. The real beneficiaries of class actions instead are the plaintiffs' attorneys who file them and receive large fees when the cases are settled, and the defense lawyers hired to defend against those lawsuits.

To begin with, most claims asserted by consumers are individualized and cannot be asserted as class actions. The Bureau's own data confirms as much: a study of

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[84] *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.

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

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

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

[88] *E.g.*, Petition at 16.

complaints made by consumers—and not by class action lawyers—found that the overwhelming majority could not be asserted in a class action.[89]

Petitioners also ignore that most class actions do not produce any recovery for absent class members. For example, the Bureau's own study on arbitration found that 87% of the class actions it studied were resolved with no benefit to class members whatsoever.[90]

Moreover, even for the class members in the small percentage of cases that settle on a class basis, the benefits are largely illusory, because most class action settlements do not involve automatic distribution of settlement proceeds and the vast majority of class members do not file claims for payment from these settlement funds. Studies by both the Bureau and the Federal Trade Commission found that lawyer-driven class actions deliver *no benefit* to 96 percent of class members, reporting a "weighted mean" claims rate in class actions of just 4%.[91] That figure comports with academic studies, which regularly conclude that only "very small percentages of class members actually file and receive compensation from settlement funds."[92] Another empirical study explains that "[a]lthough 60 percent of the total monetary award may be available to class members, in reality, they typically receive less than 9 percent of the total."[93] The author concluded that class actions "clearly do[] not achieve their compensatory goals."[94]

The Bureau's own study also demonstrates that class actions typically take significantly longer to resolve than arbitrations. That means class members must wait much longer to obtain relief. Specifically, the Bureau's study found that class actions that produced a class-wide settlement took an average of nearly two years to resolve.[95]

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[89] Letter from David Hirschmann & Lisa Rickard to Monica Jackson, *supra* note 6, at 3, 12-13 & Appendix A.

[90] *See* CFPB Study section 6.2.2.

[91] Fed. Trade Comm'n, *Consumers and Class Actions: A retrospective and Analysis of Settlement Campaigns* 11 (Sept. 2019), https://perma.cc/CM66-ZVCX; CFPB Study at section 8, page 30 (reporting a "weighted average claims rate" in class actions of just 4%).

[92] Linda Mullenix, *Ending Class Actions as We Know Them: Rethinking the American Class Action*, 64 Emory L.J. 399, 419 (2014).

[93] Joanna Shepherd, *An Empirical Study of No-Injury Class Actions* 2, 5 (Emory Univ. Sch. of L., Legal Studies Research Paper Series No. 16-402, Feb. 1, 2016), perma.cc/TU9R-UDSM.

[94] *Id.*

[95] CFPB Study at section 8, page 37.

And that two-year average duration, moreover, may not even include the time needed for class members to submit claims and receive payment *after* a settlement is reached.

In any case, the Bureau's 2017 rule already attempted to regulate arbitration on the (erroneous) view that class actions are essential to protect consumers: that rule would have allowed consumers to bring class actions notwithstanding any limitation imposed by an arbitration agreement. By invalidating that rule under the CRA, Congress clearly and expressly rejected the Bureau's preference for class actions. The Bureau cannot revive its rejected view of class actions as the justification for adopting Petitioners' proposal.

Petitioners' brand-new article cannot possibly support their proposed rule.

Finally, and perhaps because they recognize that the Bureau's 2015 study cannot support their proposal, Petitioners rely heavily on a recent article by Professor Roseanna Sommers ("Sommers Study").[96] According to the Petition, the Sommers Study "reinforces the findings of" the Bureau's 2015 study because it "demonstrates that … consumers' awareness and understanding of arbitration clauses remains extremely low."[97]

The Sommers Study demonstrates no such thing, because it suffers from the glaring defect that it tests participants' recall, rather than understanding, of contract terms—a lack of recall that is not limited to arbitration, despite the paper's slanted title and presentation.

Professor Sommers designed the study to first present a 28-page form contract to participants, and then to **take that contract away** before asking participants questions about it. After presenting and then taking away the contract, Professor Sommers first asked participants to "put down a word or phrase for five items [they] **recall**" from the contract.[98] And after being asked to recall details from a contract that was no longer in front of them, the participants were then asked about several hypothetical scenarios testing their recollection of the arbitration agreement.[99] Participants were likewise asked about their recollection of the arbitration provisions

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[96] Sommers, Roseanna, *What Do Consumers Understand About Predispute Arbitration Agreements? An Empirical Investigation* (July 25, 2023), https://ssrn.com/abstract=4521064.

[97] Petition at 9.

[98] Sommers Study at 12 (emphasis added); *see also id.* (telling participants that "[w]e would like to know what you **remember**") (emphasis added).

[99] *Id.* at 13-22.

found in the contractual terms governing popular services like Netflix, Hulu, and Venmo—again without the actual contracts in front of them.[100]

In the real world, however, consumers do not have to memorize contracts to understand them or to make use of their terms, including arbitration provisions and other dispute resolution procedures. Rather, consumers have access to their contracts (which are frequently online or e-mailed to them) and can turn back to them when needed—including if a dispute arises between the consumer and the company. By designing a study that deliberately fails to address this common-sense reality, Professor Sommers has made clear that the purpose of her study is to denigrate arbitration, not to capture consumers' real-world understanding of their contracts.

Accordingly, the Sommers Study does not support Petitioners' contention that consumers have extremely low "awareness and understanding of arbitration clauses."

In all events, Petitioners' concession that the Sommers Study purports only to "reinforce[]" the Bureau's prior 2015 study underscores why the Sommers Study cannot support their request for rulemaking. As discussed above, Congress rejected the 2015 study's findings as a valid basis for restricting the use of arbitration, so the Bureau cannot rely on those same rejected findings to issue a substantially similar rule.

II. The Bureau Lacks Authority to Promulgate Petitioners' Proposed Rule under the *Community Financial* Decision that is Currently before the Supreme Court

The Bureau lacks the authority to promulgate the Proposed Rule because the agency is unconstitutionally funded, as the U.S. Court of Appeals for the Fifth Circuit recently held in *Community Financial Services Association of America, Limited v. Consumer Financial Protection Bureau*.[101] Because "the funding employed by the Bureau to promulgate" the Proposed Rule would be "wholly drawn through the agency's unconstitutional funding scheme," the rule would be invalid.[102]

The Supreme Court heard oral argument in the *Community Financial* case on October 3, 2023, and a decision is expected by June 2024. At minimum, the Bureau should neither propose nor issue a rule burdening business prior to the Supreme Court's forthcoming resolution of this serious constitutional question.

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[100] *Id.* at 20-21, 23-24.

[101] 51 F.4th 616 (5th Cir. 2022), *cert. granted,* No. 22-448, 2023 WL 2227658 (U.S. Feb. 27, 2023).

[102] *Id.* at 643.

For all these reasons, the Bureau should deny the Petition. 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
Institute for Legal Reform
U.S. Chamber of Commerce

William R. Hulse
Senior Vice President
Center for Capital Markets Competitiveness
U.S. Chamber of Commerce