January 11, 2017

Commissioner Mignon Clyburn
Federal Communications Commission
445 12th Street, SW, Room TW-A325
Washington, DC 20554

RE: Solutions2020 Call to Action Plan

Dear Commissioner Clyburn,

The American Association for Justice (AAJ), formerly the Association of Trial Lawyers of America (ATLA), hereby submits our response to your Solutions 2020 Call to Action Plan and in particular your call to limit the abusive practice of forced arbitration by communications providers.[1]

AAJ, with members in United States, Canada and abroad, works to preserve the constitutional right to trial by jury and to make sure people have a fair chance to receive justice through the legal system when they are injured by the negligence or misconduct of others—even when it means taking on the most powerful corporations. In this capacity, AAJ strongly supports the action plan's call to eliminate forced arbitration. As noted in the plan, forced arbitration drives consumers with grievances against a company out of the court system, and into a private rigged dispute resolution system. We strongly agree that the FCC should protect consumers and use its authority to prohibit pre-dispute arbitration in all contracts for telecommunications services.

I. Forced Arbitration Clauses Are Detrimental to Consumers

Buried in the fine print of everything from credit card to nursing facility contracts, forced arbitration allows corporations to eliminate fundamental legal rights of consumers before any harm actually occurs. Perhaps the most offensive characteristic of forced arbitration is that it is something corporations require consumers to "agree" to pre-dispute (i.e. before any harm occurs). This highlights the sharp contrast in bargaining power between consumer and corporation: instead of being able to bring claims in a court of law, claims are funneled into a corporation's hand-picked

[1] *See* the Public Notice announcing the draft release of Commissioner Mignon Clyburn's #Solutions2020 Call to Action Plan at http://transition.fcc.gov/Daily_Releases/Daily_Business/2016/db1219/DOC-342689A1.pdf.

dispute mill which is rigged, secretive, and final, with limited ability to appeal. Further, forced arbitration is implemented by private arbitration companies with no government oversight or standardized rules. Under such circumstances, reaching a fully informed "agreement" to surrender fundamental legal rights in favor of a complex, secretive, and inherently biased legal process like forced arbitration is not possible.

The following are characteristics of forced arbitration clauses:

- **Pre-dispute:** The most intrinsic part of forced arbitration is that it is something always presented to customers before any harm occurs. The fact that these clauses are entered into before an individual has any knowledge of the harm they may suffer makes the "choice" to sign a pre-dispute clause uninformed and illusory. Accordingly, there is little actual choice involved in whether to "agree" to the documents presented by the service provider and customers cannot make a fully informed choice as to whether they want to waive their legal rights for any and all future claims *prior* to a harm occurring.

- **Secret Proceedings:** A second hallmark of forced arbitration is that it always occurs in secret, with no public record of the types of claims filed, what occurs in an arbitration, or an explanation of how the arbitrator makes decisions. Society benefits from an open legal process that exposes systemic and widespread violations of the law. One of the most important benefits of civil lawsuits is the discovery process, which often discloses illegal corporate practices. Forced arbitration, on the other hand, restricts customers' ability to get information and keeps harmful business practices hidden from public view. Moreover, confidentiality clauses, which always accompany forced arbitration clauses, can prevent residents from discussing events with others, including those responsible for oversight, like the FCC. Additionally, because the contents of forced arbitration proceedings are secret, other similarly situation customers are unable to learn of bad practices and take steps to adequately protect themselves.

- **Biased Repeat Players:** The third fundamental component of forced arbitration is the inherently biased nature of the system. First, the drafter of the contract—always the corporate provider—holds the power to choose the arbitrator or arbitration company. Because only the corporate provider makes this determination, there is an inherent incentive for arbitration companies to market themselves in way that ensures they will be chosen again. Similarly, all arbitrators have at the very least an indirect stake in the arbitration outcome because a favorable outcome is more likely to increase future business. Thus, there exists strong incentives for arbitration companies to favor the corporate provider over the customer. And, there is nothing to stop providers from choosing arbitration companies with a history of previously deciding cases in its favor. Yet, because forced arbitration occurs in secret, and there are no public records of previous arbitration decisions, customers have little change of uncovering an arbitrator's potential bias.

- **Costly:** Unlike the civil justice system, where the government covers the costs of most administrative fees, arbitration is a private systems where the parties must pay for everything. This includes filing fees and arbitrators' costs, which can amount to thousands of dollars. Also, arbitrators are paid hourly, so, depending on the nature and complexity of the case, the parties may be subjected to hidden or extra fees that were not disclosed at the

outset. While for many the upfront costs and ongoing fees are alone cost prohibitive, the provider is often allowed to choose the location of the arbitration, adding on travel expenses for both the parties and the arbitrator, making it even more costly for the consumer. This greatly favors providers over customers, who lack the resources to cover these costs and therefore do not bring claims at all. For those customers who do bring claims, their awards, if any, are substantially lower than they would have received in court and may not even cover the costs they incurred.

- **Hinders Development of the Law:** Since arbitration decisions are not official court proceedings, they also hinder the ability of the law itself. The growth and evolving interpretation of the law requires that cases be heard in a public court of law. However, instead of contributing to the doctrine of *stare decisis*, forced arbitration is akin to a dead end in that future judicial decisions cannot rely on arbitration outcomes regardless of the factual or policy similarities between cases. In this space, where many of the legal implications surrounding data security and breach are newly developing, the need for clear and uniform application of the law is clear. Accordingly, forced arbitration would hurt both customers and impede development of the law itself leading to uncertainty and misapplication.

II. Other Federal Agencies Have Protected Consumers By Limiting or Banning Forced Arbitration

Since the early 2000's, corporations, banks and other types of businesses began quietly stripping Americans of their rights through the use of forced arbitration. However, in the face of mounting data showing how forced arbitration lets corporations off the hook for breaking the law, many varied federal agencies are taking vital steps to curb the use of forced arbitration clauses.

a. The Department of Defense (DoD)

In 2015, in a historic move to restore the rights of service members and their families, the Department of Defense (DoD) finalized rules to strengthen and broaden the scope of the Military Lending Act (MLA). The MLA is designed to protect members of the military from predatory loans and other financial scams. The DoD rule expanded the definition of "consumer credit" under the MLA and, by doing so, it broadened the bill's ban on forced arbitration to a larger scope of financial contracts, including credit cards and other consumer financial services and products. In recognition of harm forced arbitration causes to our service members, the DoD went so far as to make it a *misdemeanor crime* for any creditor to force a service member to arbitrate under the MLA's new broadened scope. The rule recognizes the importance of restoring our service members' financial protections and ending the abusive practice of forced arbitration against our military men and women.

The negative effects of forced arbitration on service members and their families are so widespread that a 2006 Department of Defense report concluded the following: "Service members should maintain full legal recourse against unscrupulous lenders. Loan contracts to Service members should not include forced arbitration clauses or onerous notice provisions, and should

not require the Service member to waive his or her right of recourse, such as the right to participate in a plaintiff class. Waiver isn't a matter of 'choice' in take-it-or-leave-it contracts of adhesion."[2]

b. The Center for Medicare and Medicaid Services (CMS) Acts to Protect Nursing Home Residents from Forced Arbitration

Nursing homes are an important part of the long term care system, with approximately 1.4 million people living in more than 15,000 facilities nationwide. Unfortunately, forced arbitration provisions contained in the fine print of nursing facility admission forms allow facilities to eliminate residents' rights by stating that should any harm to the resident occur—even intentional abuse, sexual assault or injury resulting in death—those claims must be brought in forced arbitration. Rather than a resident or a resident's family being able to file a claim in court, their claims are funneled into a nursing facility's hand-picked arbitration dispute mill which is rigged, secretive, and final, with limited or no ability to appeal. In September, 2016 the Center for Medicare and Medicaid Services (CMS) while engaged in a broad rulemaking to update the requirements of participation for nursing homes receiving federal funding through Medicare and Medicaid banned the use of forced arbitration in nursing home admission contracts in order to better protect beneficiaries.

c. The Department of Education (ED) Acts to Protect Students from Forced Arbitration used by For-Profit Schools

In October, 2016 the Department of Education (ED) issued a final rule in the borrower's defense negotiated rulemaking. The final rule bans for-profit institutions' particularly abusive use of forced arbitration clauses against students. Forced arbitration clauses, which are buried in the fine print of for-profit college admission forms, force students' claims into arbitration – a rigged system where the for-profit college gets to pick the arbitration provider, there's almost no chance of appeal, the process is completely secret, and the right to seek justice for all types of claims is routinely denied. Given that track record of fraud and abuse committed by many for-profit institutions, protecting students' access to justice is extremely important in this context.

d. The Department of Labor (DOL) & Federal Acquisition Regulatory (FAR) Council Act to Protect Workers and Investors from Forced Arbitration

On July 31, 2014, President Obama issued a landmark Executive Order (E.O.) aimed at ensuring safe workplaces and fair pay for American workers by delineating new requirements on government contractors. As part of the E.O., the DOL and the FAR Council were granted to authority to prohibit companies with federal contracts of $1 million or more from mandating that their employees enter into forced arbitration clauses for any disputes arising out of Title VII of the Civil Rights Act or from torts related to sexual assault or harassment.

Further, on April 8 of 2016, DOL released the final version of the fiduciary rule. Specifically, the rule provides that if financial advisers and firms would like to continue to

[2] Department of Defense, "Report on Predatory Lending Practices Directed at Members of the Armed Forces and Their Dependents," p.6-7, August 9, 2006.

receive a variety of common forms of compensation that would otherwise be prohibited for a fiduciary, they must enter into a contract with investors. In that contract, financial advisors are prohibited from including provisions which limit their liability in any way or which requires the investor to waive their right to participate in a class action in court. Additionally, DOL placed limits on the use of individual forced arbitration including that arbitration may not be in a distant venue or otherwise unreasonably limit the ability of an investor to assert a claim.

e. The Consumer Financial Protection Bureau (CFPB) Acts to Protect Financial Consumers from Forced Arbitration

Forced arbitration clauses, buried in the fine print of most financial contracts, deprive Americans of the right to hold big banks accountable for breaking the law. Section 1028(a) of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 authorizes the CFPB to study the use of forced arbitration clauses in consumer financial products or services contracts and to ban the practice if it finds it is in the best interest of consumers to do so. In March 2015, the CFPB released its final report to Congress on the use of forced arbitration clauses in disputes between consumers and providers of consumer financial products. The study confirmed what consumer advocates have long known: millions of individuals are denied relief through forced arbitration. Following a SBREFA (Small Business Regulatory Enforcement Fairness Act) review process that concluded last December, the CFPB proposed to ban class action waivers and put additional limitations on the use of individual forced arbitration. The CFPB released its proposed rule on May 5, 2016. It noted that banning forced arbitration has a powerful deterrent effect, resulting in companies changing practices in ways that benefit consumers as a whole.[3]

III. The FCC Has The Authority to Restrict Forced Arbitration in Broadband Privacy Claims

a. Authority Under the Communications Act

The FCC has authority to ban forced arbitration under § 201 of the Communications Act, which requires all practices in connections with communications service to be reasonable, and that any practice that is unjust or unreasonable is prohibited. It further gives the FCC authority to prescribe regulations that are necessary in the public interest to carry out such provisions. As noted above, there are many examples of how the use of forced arbitration clauses is inherently unreasonable and unjust, and prohibiting its use in this context would be in the public interest. It is therefore clearly within the purview of the FCC's authority to ban the abusive practice of forced arbitration. It would also promote the principles of transparency and choice, which the FCC notes are key components of the § 222 framework.

[3] Consumer Financial Protection Bureau, "Arbitration Agreements," p. 104, *available at* http://files.consumerfinance.gov/f/documents/CFPB_Arbitration_Agreements_Notice_of_Proposed_Rulemaking.pdf.

Finally, under the Communications Act, it is clear that Congress contemplated a private enforcement mechanism of violations in § § 206 and 207.[4] Including a ban on forced arbitration would be in line with Congressional intent under the Act.

b. The Federal Arbitration Act is Inapplicable

Similarly, the FCC is not precluded from banning forced arbitration clauses by the Federal Arbitration Act (the "FAA") because the FAA legal analysis isn't triggered in the absence of a forced arbitration clause. The FAA supports the enforcement of written arbitration provisions in contracts. It does not, however, preclude laws or regulations that prevent a party from placing such provisions in their contracts in the first place. Therefore, the FAA confers only the right to arbitrate as provided for in the parties' agreement, but there is no free-standing legal right or entitlement to insert arbitration provisions into contracts.[5] As such, the FCC is within its legal authority to ban forced arbitration in broadband privacy claims.

IV. Conclusion

AAJ understands and appreciates the challenges faced by the FCC as the Commission crafts rules for communications providers. We believe that those rules should include a dispute resolution process that serves and protects the interests of consumers. AAJ supports post-dispute, voluntary arbitration, as well as other types of dispute resolution processes when the consumer has a clear choice of whether to take her complaint to arbitration or court, and has power over how an arbitration process should proceed. We urge the entire Commission to support the arbitration provisions of the Solutions2020 Call to Action Place and to adopt dispute resolution procedures that are open and transparent and which protect consumers' legal rights.

[4] *See* 47 U.S.C.A. § 206. Carriers' liability for damages.

[5] *See EEOC v. Waffle House, Inc.*, 534 U.S. 279, 289 (2002) ("[N]othing in the [FAA] authorizes a court to compel arbitration of any issues, or by any parties, that are not already covered in the agreement"); *Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 474-75 (The FAA "does not confer a right to compel arbitration of any dispute at any time"); *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219 (1985) ("The Act, after all, does not mandate the arbitration of all claims, but merely the enforcement-upon the motion of one of the parties-of privately negotiated arbitration agreements.").

AAJ appreciates this opportunity to submit comments in response to the Solutions2020 Call to Action Plan. If you have any questions or comments, please contact Sarah Rooney, AAJ's Director of Regulatory Affairs at (202) 944-2805.

Sincerely,

Julie Braman Kane
President
American Association for Justice