No. 23-2842

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PAULA WALLRICH, *et al.*,

Petitioners-Appellees,

v.

SAMSUNG ELECTRONICS AMERICA, INC., *et al.*,

Respondents-Appellants.

On Appeal from the United States District Court for the Northern District of Illinois, No. 1:22-cv-5506
Hon. Harry D. Leinenweber, U.S.D.J.

BRIEF FOR PUBLIC CITIZEN AS AMICUS CURIAE SUPPORTING PETITIONERS-APPELLEES AND AFFIRMANCE

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December 19, 2023

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Appellate Court No: 23-2842

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Attorney's Signature: /s/ Lauren E. Bateman Date: Dec. 19, 2023

Attorney's Printed Name: Lauren E. Bateman

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

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INTEREST OF AMICUS CURIAE[1]

Public Citizen, a nonprofit consumer advocacy organization with members in all fifty states, appears before Congress, administrative agencies, and courts to advocate for the enactment and enforcement of laws protecting consumers, workers, and the public. Public Citizen has a longstanding interest in issues concerning the enforcement of mandatory pre-dispute arbitration agreements, and it has appeared as amicus curiae in many cases involving such issues in state and federal courts. *See*, *e.g.*, *New Prime Inc. v. Oliveira*, 139 S. Ct. 532 (2019); *McGill v. Citibank, N.A.*, 393 P.3d 85 (Cal. 2017).

Public Citizen has long been concerned that agreements requiring consumers and workers to pursue small claims through costly individual arbitration impair access to justice. This case illustrates a troubling new phenomenon: When large numbers of consumers and workers subjected to alleged wrongdoing are able to surmount the barriers posed by

[1] No party's counsel authored this brief in whole or part, no party or party's counsel contributed money intended to fund the brief's preparation or submission, and no person other than amicus curiae, its members, or its counsel contributed money intended to fund the brief's preparation or submission. All parties have consented to the filing of this brief.

arbitration provisions and seek access to the forum required by the form arbitration clauses imposed on them by a corporate defendant, the defendant seeks to forestall arbitration by refusing to pay the fees required by its own chosen forum. Public Citizen submits this brief to address this growing problem and to explain that, under the Federal Arbitration Act and the rules of the American Arbitration Association, a defendant's obligation to arbitrate in accordance with its own agreement does not vanish just because it has breached that agreement by failing to pay its share of the fees for the arbitration. As the claimants in this case explain, this Court should not reach this issue here because it lacks appellate jurisdiction. But in view of the importance of the issue to consumers and workers, we address it in case the Court holds that it has jurisdiction.

SUMMARY OF ARGUMENT

Samsung's position in this case is that consumers who wish to pursue claims against it must do so in individual arbitration proceedings before the American Arbitration Association (AAA)—unless Samsung unilaterally determines that arbitration would be inconvenient for it. In those circumstances, Samsung takes the position that it may breach its

obligation to advance its share of arbitration fees and that, when AAA then closes the arbitration proceedings because it has not been paid, Samsung may not be compelled to answer the claims in the forum required by its own form contracts. Here, Samsung adopted this course of action because, in its view, too many consumers had filed claims against it.

Samsung's position rests in significant part on a misreading of a provision of the AAA Consumer Arbitration Rules—rules that *Samsung* chose to govern proceedings under the arbitration clause that *it* drafted. The AAA rule that Samsung invokes, Consumer Arbitration Rule R-1(d), 5-SA1174, does not explicitly address the consequences when the AAA closes an arbitration proceeding because of a party's breach of its obligation to pay its share of the AAA's fees. And nothing in that Consumer Arbitration Rule states or implies that a party can free itself from its contractual obligation to arbitrate by *breaching* that obligation. Samsung's contrary position is fundamentally at odds with a basic premise of the Federal Arbitration Act (FAA): that otherwise valid contracts to arbitrate are enforceable and do not vanish when a party refuses to comply with them.

To bolster its position that it should be allowed to avoid arbitration, Samsung implies throughout its brief that what Samsung refers to as "mass arbitration" is somehow improper or incompatible with the nature of arbitration under the FAA. But unlike class actions or other collective proceedings, so-called "mass arbitration" consists of nothing more than large numbers of claimants submitting to *individual* arbitration proceedings that are required by the arbitration agreements that Samsung and many other companies have chosen to impose on consumers and employees—agreements that bar class proceedings and require each consumer with a claim to file a separate demand for arbitration, each of which requires payments of fees to the arbitration provider. Proponents of arbitration have insisted for well over a decade that they prefer such individual arbitration proceedings to the aggregate proceedings available in court because of the claimed speed, efficiency, and informality available in arbitration. Cases like this one, however, reveal that some companies prefer individual arbitration only if few consumers invoke it. Samsung's regret that its arbitration provision did not deter large numbers of consumers from presenting their claims in the

manner Samsung required is not, under the FAA, a basis for refusing to enforce the provision that Samsung wrote and imposed on its customers.

ARGUMENT

I. The AAA Rules do not excuse Samsung from its obligation to arbitrate.

As the claimants' brief explains, when the AAA determined that the claimants had filed proper demands for arbitration against Samsung, Samsung became obligated under its arbitration provision and the AAA rules incorporated in that provision to pay its share of the initial administrative filing fees. *See* 5-SA1269. When Samsung refused to pay, the claimants had the *option* under the AAA rules to advance Samsung's share of the fees so that the arbitrations could proceed without the need for judicial intervention. *See* AAA Supplementary Rules for Multiple Case Filings, MC-10(d), 5-SA1263 ("If administrative fees, arbitrator compensation, and/or expenses have not been paid in full, the AAA may notify the parties in order that one party *may* advance the required payment within the time specified by the AAA." (emphasis added)). Nothing in the rules, however, suggests that consumers *must* pay the other party's fees in that situation or that they waive the contractual right to arbitrate by not doing so. Rather, the rules merely reflect that

the AAA does not have to conduct proceedings for which it has not been paid, and they give a party the chance to front the other side's fees in order to avoid having to go to court to compel payment.

If a party cannot or does not wish to bear the burden of paying the other side's fees, the rules provide that "the AAA may suspend or terminate [the] proceedings." *Id.*, MC-10(e), 5-SA1263. When the AAA takes that step, as it did in this case, a claimant aggrieved by the nonpaying party's refusal to arbitrate in accordance with the agreement may, under section 4 of the FAA, petition for and obtain an order of a court "directing the parties to proceed to arbitration in accordance with the terms of the agreement." 9 U.S.C. § 4; *see*, *e.g.*, *Abernathy v. DoorDash, Inc.*, 438 F. Supp. 3d 1062, 1065–66 (N.D. Cal. 2020). And as this Court has recognized, such an order may include a direction that a party "pay arbitrators" so that arbitration may proceed as required by the agreement. *Moglia v. Pac. Employers Ins. Co. of N. Am.*, 547 F.3d 835, 838 (7th Cir. 2008).

Samsung contends that another provision of the AAA rules provides that when the AAA terminates an arbitration because a party has refused to pay its share of fees and its opponent has declined the option

of advancing those fees, both parties are entitled to insist that the merits of the underlying dispute be resolved in court. Samsung relies on a sentence in AAA Consumer Arbitration Rule R-1(d), 5-SA-1174, which states: "Should the AAA decline to administer an arbitration, either party may choose to submit its dispute to the appropriate court for resolution." *See* Samsung Br. 21, 64. Samsung's quotation of this snippet of Rule R-1(d) fails to support its position.

To begin with, examination of the full text of the rule rather than the single sentence that Samsung quotes out of context reveals that Rule R-1(d) is not expressly aimed at determining the consequences of a party's breach of its obligation to pay its share of the required arbitration fees. Rule R-1(d) is part of a rule entitled "Applicability (When the AAA Applies These Rules)," which, as its name indicates, addresses the kinds of disputes and arbitration agreements to which the AAA will apply its Consumer Arbitration Rules. *See* AAA Consumer Arbitration Rules, R-1, 5-SA1173–75. Rule R-1(d) provides, in full, as follows:

> The AAA administers consumer disputes that meet the due process standards contained in the *Consumer Due Process Protocol* and the *Consumer Arbitration Rules*. The AAA will accept cases after the AAA reviews the parties' arbitration agreement and if the AAA determines the agreement substantially and materially complies with the due process

> standards of these Rules and the *Consumer Due Process Protocol*. Should the AAA decline to administer an arbitration, either party may choose to submit its dispute to the appropriate court for resolution.

5-SA1174. As its text indicates, Rule R-1(d) addresses the AAA's determination of whether an arbitration agreement meets the minimum standards of fairness it has established for disputes it is willing to administer, and the consequences if it determines that an agreement does not provide adequate due process protections. In such a case, the rule provides that the AAA will not accept the case and recognizes the that, given the unavailability of the arbitration that their agreement contemplated, the parties may resort to court to resolve their underlying dispute.

As the Third Circuit ruled earlier this month, in a case where the AAA has declined to administer an arbitration under Rule R-1(d) because the arbitration agreement does not meet the organization's due process standards, a court may not compel either party to arbitrate, because neither party is guilty of a "failure, neglect or refusal … to arbitrate under a written agreement" as required for a court to compel arbitration under 9 U.S.C. § 4. *Hernandez v. MicroBilt Corp.*, __ F.4th __, 2023 WL 8401682, at *2 (3d Cir. Dec. 5, 2023). Put another way, when parties

submit a dispute to a court following the AAA's refusal to administer an arbitration under an agreement that does not meet its due process standards, an order compelling arbitration is not an appropriate judicial resolution of the dispute. Rather, under the terms of the agreement itself, the dispute is not eligible for arbitration, notwithstanding both parties' attempts to pursue arbitration in compliance with the agreement, because the agreement itself does not meet the standards of the chosen arbitration forum. *See id*. at *4, *5.

This case, by contrast, does not involve a decision by the AAA declining to administer an arbitration under the circumstances identified by Rule R-1(d). The AAA did *not* determine that Samsung's arbitration agreement fails to meet AAA standards and that the claims here are ineligible for AAA administration. On the contrary, it determined that the demands for arbitration were proper and that the claims could proceed if Samsung paid its share of the fees. *See* 5-SA1269. And unlike *MicroBilt* and other cases involving the AAA's refusal to administer cases in the circumstances described in Rule R-1(d), this case is not one where both parties were in compliance with their obligations under the arbitration agreement. Here, the claimants complied with the arbitration

agreement and the AAA rules that it incorporates, while Samsung defaulted on its obligation to pay the fees it owed. That default differentiates this case from one where the AAA declines to arbitrate on the basis of due process concerns in Rule R-1(d), and it renders an order compelling Samsung to arbitrate appropriate under the FAA.

Under such circumstances, a court order compelling arbitration is fully consistent with the sentence in Rule R-1(d) saying that parties may submit their dispute to an appropriate court for resolution. That is exactly what the claimants did here: They went to court and submitted their dispute with Samsung for resolution. The resolution they sought and obtained—and that they were entitled to under section 4 of the FAA—was an order enforcing the parties' concededly valid written arbitration agreement against the party that had refused to arbitrate the dispute according to its terms. Nothing in the language Samsung cites precludes either submission of that dispute to the court or the resolution of the dispute that the district court ordered.

To be sure, the *claimants*, if they chose, could have insisted that a court decide the merits of their underlying claims rather than that it enforce their right to arbitrate under the agreement. But that

consequence follows from two circumstances that differentiate the plaintiffs from Samsung. First, unlike Samsung, the claimants had never defaulted on their obligation to arbitrate under the agreement and thus could not be subject to an order compelling arbitration under section 4 of the FAA. *See MicroBilt*, 2023 WL 8401682, at *2; *see also Forby v. One Techs., LP*, 616 F. Supp. 3d 588, 602 (N.D. Tex. 2022). Second, by refusing to pay the fees it was required to pay under its agreement in order for the arbitrations to proceed, Samsung waived any right to insist on arbitration in accordance with the agreement. *See Freeman v. SmartPay Leasing, LLC*, 771 F. App'x 926, 934 (11th Cir. 2019); *Figueredo-Chavez v. RCI Hospitality Holdings, Inc.*, 574 F. Supp. 3d 1167, 1171 (S.D. Fla. 2021). In contrast, the AAA rules permitted but did not require claimants to pay Samsung's share of the fees, so declining to do so did not waive anything. Unlike Samsung, therefore, the claimants retained the ability to seek to compel arbitration as the appropriate "resolution" of the dispute when they presented the matter in court. Put differently, Samsung's waiver of *its* right to arbitrate did not also waive the claimants' rights.

Samsung's contrary position would have perverse consequences and ones that proponents of arbitration, like Samsung and its supporting amici, would ordinarily be expected to decry. Under Samsung's reading of Rule R-1(d), claimants who did not wish to arbitrate could rid themselves of their contractual obligation to do so by filing arbitration demands en masse, refusing to pay their own share of the fees, and insisting that the defendant front the claimants' share as well as its own. On Samsung's reading of the rules, if the defendant refused to do so, and AAA declined to administer the arbitrations because it had not received the required fees, the defendant would have "waived" its right to arbitrate—and Rule R-1(d) would entitle the plaintiffs to proceed in court on the merits of their claims despite the existence of a valid arbitration agreement. The only way a defendant could avoid that result, under Samsung's theory, would be to pay all claimants' arbitration fees as well as its own. Defendants and their supporting amici would, as they do in this case, undoubtedly condemn that outcome as abusive and extortionate, but it would follow inevitably from the legal position Samsung advances here. By contrast, the proper reading of the FAA and the arbitration rules—that they permit a court to compel arbitration by

a party that has caused the failure of the arbitration process by refusing to pay its share of the required fees—would avoid this perverse consequence, just as it prevents Samsung from benefiting from its default in this case.

II. Large numbers of individual demands for arbitration are completely compatible with the nature of arbitration as contemplated by the FAA.

Samsung's brief and those of the amici curiae that support its position suggest that the policies of the FAA support its request that its own arbitration agreements not be enforced, because the claimants' resort to "mass arbitration" is "extortionate," Samsung Br. 3, and inimical to the FAA's policies. Samsung's disparagement of "mass arbitration," however, has no basis in the FAA or the policies it reflects. "Mass arbitration" is simply a label given to large numbers of demands for individual arbitration in conformity with an arbitration provision. And under the Supreme Court's FAA jurisprudence, such "bilateral arbitration [is] the prototype of the individualized and informal form of arbitration protected … by the FAA." *Viking River Cruises v. Moriana*, 596 U.S. 639, 640–41 (2022). No provision of the FAA, and no policy implicit in the FAA, is incompatible with *too much* individual arbitration,

however costly it may be to a defendant who chose individual arbitration (along with the fees inherent in arbitration), as its preferred mode of dispute resolution. As the Supreme Court recently emphasized:

> [O]ur precedents do not hold that the FAA allows parties to contract out of *anything* that might amplify defense risks. Instead, our cases hold that States cannot coerce individuals into forgoing arbitration by taking the individualized and informal *procedures* characteristic of traditional arbitration off the table.

Id. at 656. Because compelling Samsung to arbitrate in this case merely requires it to resort to the individualized procedures of traditional arbitration, the ability to compel such arbitration is not only *compatible* with the FAA as the Supreme Court has interpreted it, but "protect[ed] pretty absolutely" by the FAA. *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1621 (2018).

By contrast, in a series of recent cases, the Supreme Court has emphasized that the more formal procedures associated with court proceedings and with the class and collective actions available in court "interfere[ ] with fundamental attributes of arbitration." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344 (2011). Requiring resort to such procedures is therefore "inconsistent with the FAA," *id.*, unless parties unambiguously incorporate them in an arbitration agreement, *see Lamps*

Plus, Inc. v. Varela, 139 S. Ct. 1407, 1415, 1418 (2019). Thus, the Supreme Court has held that a genuinely collective proceeding, such as a class action in which claims belonging to multiple individuals are presented together by a representative plaintiff with a tribunal-imposed duty to represent the interests of all class members, "*requires* procedural formality" that is incompatible with arbitration. *Concepcion*, 563 U.S. at 349. But the Court has also made clear that proceedings that do *not* involve procedures incompatible with arbitration do *not* run afoul of the FAA, even if they may bear some resemblance to collective proceedings. *See Viking River*, 596 U.S. at 654–59.

"Mass arbitration" has even less in common with the kinds of collective procedures that are incompatible with arbitration than do the "representative" claims at issue in *Viking River*, which the Supreme Court held were compatible with arbitration. "Mass arbitration" no more resembles a collective proceeding than 50,000 separate lawsuits resemble a class action. As an AAA Vice President recently explained in a published interview, "mass arbitration" under the AAA rules is nothing more than "large-scale" individual arbitration. *How Has Mass Arbitration Evolved and Where Is It Going?: Interview with Neil B. Curry*,

Today's General Counsel (Oct. 2023).[2] Class arbitration and "mass arbitration" thus "are different in practice for the AAA." *Id.*

> The key difference between mass arbitration and class arbitration is that in mass arbitration the claimants all separately file demands for arbitration. Each claimant is named individually and is assigned to a separate Merits Arbitrator. It is these arbitrators who decide the ultimate merits of the case before them between that claimant and the specific respondent. Cases that proceed to the Merits Arbitrators are decided individually. There is a separate decision, or award, for each case from the Merits Arbitrator based specifically on the laws and the facts of that case.

Id. In short, "mass arbitration" has none of the features of class or collective actions that the Supreme Court has identified as incompatible with arbitration under the FAA. *See Viking River*, 594 U.S. at 654 (rejecting analogies to class proceedings that "elide[ ] important structural differences" between individual arbitration and class actions).

To be sure, the AAA's administration of "mass arbitrations" allows the parties to agree on procedures that can take advantage of efficiencies that may facilitate resolution of individual arbitration claims, and large-scale filings of individual demands for arbitration may also allow claimants' attorneys to take advantage of economies of scale. But as the

[2] Available at https://www.todaysgeneralcounsel.com/how-has-mass-arbitration-evolved-and-where-is-it-going/.

Chamber of Commerce, one of the amici curiae supporting Samsung here, has explained to the Supreme Court, the FAA is not incompatible with efforts by claimants in individual arbitrations to avail themselves of the benefits of cooperation, coordination, and economies of scale:

> [A]rbitration claimants have ready access to many other, informal means to pool resources and share common costs so that each claimant bears only a fraction of the total expense. These informal measures can play the same cost-sharing role in arbitration that class actions perform in litigation, but without all of the burdensome procedural formalities of judicial litigation.

Br. of Chamber of Commerce of U.S. at 27, *Am. Exp. Co. v. Italian Colors Rest.*, 570 U.S. 228 (2013) (No. 12-133). In particular, the Chamber asserted that the availability of class proceedings is not necessary for large numbers of small claimants to vindicate their rights in arbitration, because, "[a]lthough bilateral arbitration requires each claimant to bring a separate proceeding, nothing about arbitration prevents claimants (or their attorneys) from sharing the expenses of expert witnesses, fact investigation, and attorney preparation." *Id.* Indeed, the Chamber posited that plaintiffs' lawyers would increasingly "recognize that pursuing serial individual arbitrations … can be an economically viable business model—especially in view of the ability to reach multiple

similarly situated individuals by means of websites and social media." *Id.* at 29.

Now that this prediction has, in cases like this one, been borne out, Samsung and the amici who support it sing a different tune. But their new-found preference for the formalities of litigation in court, rather than the many individual arbitration proceedings that their own agreements require as a remedy for claims of large-scale violations of consumers' rights, is entitled to no deference under the FAA. A class action in court might, or might not, be a more rational method of resolving claims like those in this case than individual arbitration. But that debate is, under current law, moot. Having persuaded the Supreme Court that the FAA requires enforcement of agreements providing for individualized arbitration of large numbers of consumer claims that might otherwise be resolved in judicial class actions, and having imposed just such agreements on their own consumers, corporate defendants are now in no position to assert that consumers who assert claims in the required manner are engaged in extortionate or improper conduct, let alone that they are acting in a manner that undermines the policies of the FAA. On

the contrary, it is Samsung's arguments here that are incompatible with the FAA.

CONCLUSION

If it concludes that it has appellate jurisdiction, this Court should affirm the order of the district court.

Respectfully submitted,

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December 19, 2023

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and 7th Cir. R. 29 because it contains 3,761 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionately spaced typeface using Microsoft Word Century Schoolbook 14-point font.

/s/ Scott L. Nelson
Scott L. Nelson

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I hereby certify that on December 19, 2023, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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Scott L. Nelson