No. 10-948

IN THE

Supreme Court of the United States

COMPUCREDIT CORPORATION AND SYNOVUS BANK,
Petitioners,

v.

WANDA GREENWOOD *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR PETITIONERS

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QUESTION PRESENTED

Whether claims arising under the Credit Repair Organizations Act, 15 U.S.C. § 1679 *et seq.*, are subject to arbitration pursuant to a valid arbitration agreement.

PARTIES TO THE PROCEEDING

Petitioners are CompuCredit Corporation and Synovus Bank. CompuCredit Corporation was a defendant-appellant below. Columbus Bank and Trust Company, also a defendant-appellant below, is now known as and is a division of Synovus Bank, a petitioner in this case.

Respondents are Wanda Greenwood, Ladelle Hatfield, and Deborah McCleese, named plaintiffs below, on behalf of themselves and others similarly situated.

RULE 29.6 DISCLOSURE

CompuCredit Corporation is a wholly owned subsidiary of CompuCredit Holdings Corporation, a publicly held corporation.

Synovus Bank is a wholly owned banking subsidiary of Synovus Financial Corporation, a publicly held corporation.

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The decision of the court of appeals is reported at 615 F.3d 1204, and is reprinted in the Appendix to the Petition for Certiorari ("Pet. App.") at 1a-29a. The decision of the district court is reported at 617 F. Supp. 2d 980, and is reprinted at Pet. App. 30a-45a. The order denying a petition for rehearing and rehearing en banc is unreported, and is reprinted at Pet. App. 46a-47a.

JURISDICTION

The district court had jurisdiction under 28 U.S.C. § 1331. The court of appeals had jurisdiction under 9 U.S.C. § 16(a)(1)(B). The judgment of the court of appeals was entered on August 17, 2010. Pet. App. 1a. A petition for rehearing and rehearing en banc was denied on October 27, 2010. Pet. App. 46a-47a. The petition for a writ of certiorari was filed on January 24, 2011, and granted on May 2, 2011. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions of the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*, and the Credit Repair Organizations Act, 15 U.S.C. § 1679 *et seq.*, are reproduced at Pet. App. 48a-64a.

STATEMENT OF THE CASE

A. Statutory Background

1. ***Federal Arbitration Act (FAA).*** "The FAA was enacted in 1925 in response to widespread judicial hostility to arbitration agreements." *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1745

(2011). The "primary substantive provision of the Act," *id.* (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)), establishes that an agreement to arbitrate a dispute "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2.

The FAA "manifest[s] a 'liberal federal policy favoring arbitration agreements,'" *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 25 (1991) (quoting *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24), and courts therefore must "rigorously enforce agreements to arbitrate," *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1986) (quoting *Dean Witter Reynolds v. Byrd*, 470 U.S. 213, 221 (1985) (internal quotation mark omitted)). The strong federal policy favoring arbitration applies with full force "when a party bound by an agreement raises a claim founded on statutory rights." *Id.*

2. ***Credit Repair Organizations Act (CROA).*** The CROA defines a "credit repair organization" as an organization that provides services intended to "improv[e] any consumer's credit record, credit history, or credit rating." 15 U.S.C. § 1679a(3)(A)(i).[1]

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[1] Petitioners have consistently denied that they are, as a threshold matter, "credit repair organizations" subject to the CROA. Indeed, Synovus Bank, as a depository institution, is explicitly exempt from the statutory definition of "credit repair organization." *See* 15 U.S.C. § 1679a(3)(B)(iii). Neither court below ruled on this issue, and it is thus not before this Court. For the reasons explained in this brief, that question should be decided by an arbitrator rather than a court, as the arbitration agreement between the parties expressly requires, J.A. 63. *See Picard v. Credit Solutions, Inc.*, 564 F.3d 1249, 1256 (11th Cir. 2009).

The statute aims "to ensure that prospective buyers of the services of credit repair organizations are provided with the information necessary to make an informed decision regarding the purchase of such services," and "to protect the public from unfair or deceptive advertising and business practices by credit repair organizations." *Id.* § 1679(b). Congress implemented that purpose by (a) granting credit repair consumers certain specified protections and rights, (b) deeming those protections and rights nonwaivable and prohibiting attempts to secure any waiver, and (c) providing for private and administrative enforcement of the statute.

a. After preliminarily setting forth the statutory findings, purpose, and definitions, the CROA contains an initial group of substantive provisions defining the protections and rights granted to consumers. For instance, the CROA prohibits credit repair organizations from making false or misleading statements or engaging in fraudulent acts, or from receiving payment before completion of particular services. 15 U.S.C. § 1679b(a)-(b). The CROA further bars a credit repair organization from performing any service without a written contract containing, *inter alia*, (i) the terms and conditions of payment, and (ii) a detailed description of the services to be performed. *Id.* § 1679d. The CROA also grants consumers the right to "cancel any contract with any credit repair organization without penalty or obligation" within 3 business days of its execution. *Id.* § 1679e(a).

Additionally, the CROA requires a credit repair organization to provide consumers with a separate written statement disclosing certain of their "rights." 15 U.S.C. § 1679c. That disclosure provision does

not itself enact any of the "rights" subject to its disclosure mandate; rather, the CROA and related statutes elsewhere establish each of the underlying rights. Accordingly, the disclosure provision requires a credit repair organization to inform consumers, "You have a right to dispute inaccurate information in your credit report by contacting the credit bureau directly." *Id.* A separate provision establishes the associated right. *Id.* § 1681i(a). Similarly, the disclosure provision requires advising consumers, "You have a right to obtain a copy of your credit report from a credit bureau" under certain conditions, *id.* § 1679c(a), a right set forth elsewhere, *id.* § 1681j(b)-(f). The disclosure provision also requires advising consumers of the aforementioned right, established in Section 1679e, "to cancel your contract with any credit repair organization for any reason within 3 business days from the date you signed it." *Id.* § 1679c(a).

Of particular salience, the disclosure provision prescribes that the written statement to consumers state: "You have a right to sue a credit repair organization that violates the Credit Repair Organization Act." *Id.* § 1679c(a). The "right to sue" described in the disclosure provision is separately established by the CROA's "civil liability" provision. *Id.* § 1679g(a). The latter provision states: "Any person who fails to comply with any provision of [the CROA] with respect to any other person shall be liable to such person" in an amount determined under a framework set forth in the statute. *Id.*

b. Following the provisions setting forth consumer rights and protections, the CROA contains a section entitled "Noncompliance with this subchap-

ter [i.e., the CROA]." 15 U.S.C. § 1679f. Section 1679f contains an anti-waiver provision, which states: "Any waiver by any consumer of any protection provided by or any right of the consumer under" the CROA "shall be treated as void," and "may not be enforced by any Federal or State court or any other person." *Id.* § 1679f(a). Relatedly, Section 1679f deems it a violation of the CROA for "any person" to make "[a]ny attempt . . . to obtain a waiver from any consumer of any protection provided by or any right of the consumer under [the CROA]." *Id.* § 1679f(b).

c. The third and final set of provisions of the CROA govern the statute's enforcement. Those provisions include Section 1679g, the aforementioned civil liability provision, which establishes that "[a]ny person who fails to comply with any provision of [the CROA] with respect to any other person shall be liable to such person" in an amount determined under a statutorily prescribed framework. 15 U.S.C. § 1679g(a). The civil liability provision allows for recovery of both compensatory and punitive damages for CROA violations. *Id.* § 1679g(a)(1)-(2).

The CROA's enforcement provisions also allow for federal and state administrative enforcement. 15 U.S.C. § 1679h. The CROA invests the Federal Trade Commission with federal enforcement authority and establishes that, for purposes of the FTC's authority, "any violation of any requirement or prohibition imposed under [the CROA] shall constitute an unfair or deceptive act or practice in commerce in violation of section 5(a) of the Federal Trade Commission Act." *Id.* § 1679h(b)(1). The FTC possesses broad authority to bring enforcement actions against violators of the Act. *Id.* § 1679h(b)(2). States, with

certain limitations, also have authority to bring actions for violations of the CROA seeking damages and injunctive relief. *Id.* § 1679h(c).

B. Factual And Procedural Background

1. Petitioner CompuCredit marketed and serviced a credit card under the brand name Aspire Visa. Pet. App. 3a. Petitioner Synovus Bank (known at the time as Columbus Bank and Trust) issued the Aspire Visa card. Pet. App. 3.

Respondents each applied for and received an Aspire Visa card. Before obtaining the card, respondents agreed that any dispute arising from or related to their credit card account would be arbitrated. In particular, respondents received a mailing entitled "Pre-Approved Acceptance Certificate," which stated, *inter alia*:

> By signing, I request an Aspire Visa card and ask that an account be opened for me. . . . I have read and agree to be bound by the "Summary of Credit Terms" and "Terms of Offer" printed on the enclosed insert, *which insert includes a discussion of arbitration applicable to my account, and is incorporated here by reference.*

J.A. 61 (emphasis added); *see also* Pet. App. 4a, 32a.

The Terms of Offer, in turn, provided:

> IMPORTANT—THE AGREEMENT YOU RECEIVE CONTAINS A BINDING ARBITRATION PROVISION. IF A DISPUTE IS TO BE

> RESOLVED BY BINDING ARBITRATION, YOU WILL NOT HAVE THE RIGHT TO GO TO COURT OR HAVE THE DISPUTE HEARD BY A JURY, TO ENGAGE IN PRE-ARBITRATION DISCOVERY EXCEPT AS PERMITTED UNDER THE CODE OF PROCEDURE OF THE NATIONAL ARBITRATION FORUM ("NAF") OR TO PARTICIPATE AS PART OF A CLASS OF CLAIMANTS RELATING TO SUCH DISPUTE. . . .

J.A. 61-62; *see also* Pet. App. 4a, 32a-33a.

Finally, the Bank Credit Card Agreement provided:

> Any claim, dispute or controversy (whether in contract, tort, or otherwise) at any time arising from or relating to your Account, any transferred balances or this Agreement (collectively, "Claims"), upon the election of you or us, *will be resolved by binding arbitration* . . . . Upon such an election, *neither you nor we will have the right to litigate in court the claim being arbitrated*, including a jury trial . . . .

J.A. 62-63 (emphasis added); *see also* Pet. App. 5a, 33a. And that Agreement further stated:

> The term 'Claims' covered by this Arbitration Provision is to be given the broadest possible meaning, and includes by way of example and without

> limitation . . . Claims between you and our parent corporations, wholly or majority owned subsidiaries, affiliates, predecessors, successors, assigns, agents, independent contractors, employees, officers, directors or representatives arising from your Account or this Agreement[,] and . . . Claims regarding the validity, enforceability or scope of this Arbitration Provision or this entire Agreement.

J.A. 63.

2. On October 24, 2008, respondents filed a complaint against petitioners alleging that petitioners had violated the CROA in various ways in connection with the Aspire Visa card.[2] J.A. 47-58.[3] Respondents purported to represent a nationwide class of holders of the Aspire Visa card. J.A. 43.

a. On December 30, 2008, petitioners moved the district court to compel arbitration of respondents' CROA claims based on the FAA and the mandatory arbitration clause in the parties' contracts. The district court denied the motion, holding that CROA claims are not subject to arbitration. Pet. App. 30a-45a.

The district court acknowledged the need under the FAA to assess the arbitrability of CROA claims

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[2] Respondents also alleged violations of California law, which were not subject to the motion to compel arbitration, and are not at issue here.

[3] The referenced complaint is the First Class Action Amended Complaint And Jury Demand, dated November 6, 2008. J.A. 38-60.

"with a healthy regard for the federal policy favoring arbitration." Pet. App. 41a (quoting *Gilmer*, 500 U.S. at 26) (internal quotation mark omitted). The court further explained that this Court "has regularly concluded that statutory claims in a variety of contexts are arbitrable." Pet. App. 41a. In the district court's view, however, the CROA grants consumers a "non-waivable right to sue" in court, rendering respondents' arbitration agreements void and unenforceable. Pet. App. 41a-45a. Petitioners appealed pursuant to the FAA, 9 U.S.C. § 16(a)(1)(B).

b. A divided panel of the court of appeals affirmed. Pet. App. 1a-29a. The panel majority acknowledged the FAA's "'liberal federal policy favoring arbitration agreements.'" Pet. App. 7a (quoting *Gilmer*, 500 U.S. at 25). The majority further explained that a party must adhere to an arbitration agreement "unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue." Pet. App. 8a (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)) (internal quotation marks omitted). Accordingly, the "burden is on the party opposing arbitration to show that Congress intended to preclude a waiver of judicial remedies." Pet. App. 8a (citing *Gilmer*, 500 U.S. at 26).

Nevertheless, the majority found that the "plain language of the CROA" compels the conclusion that Congress precluded arbitration of CROA claims. Pet. App. 17a. The majority reasoned that the CROA's disclosure provision refers to a "right to sue," and that the "plain meaning of the phrase 'right to sue' . . . involves the right to bring an action in a court of law," not in arbitration. Pet. App. 10a.

The majority found it insignificant that the "right to sue" mentioned in the disclosure provision is established, not in that provision, but instead in the CROA's civil liability provision, 15 U.S.C. § 1679g, the language of which concededly does not preclude submission of a CROA claim to arbitration. Pet. App. 13a.

The majority also relied on the CROA's anti-waiver provision, 15 U.S.C. § 1679f(a). Pet. App. 14a-15a. That provision, the majority believed, "invalidates any waiver of the right to sue" in a court, rendering the arbitration clause in the Aspire Visa agreement unenforceable. Pet. App. 15a. The majority acknowledged that, because the anti-waiver provision bars enforcement of a waiver of CROA rights by a "court *or any other person*," 15 U.S.C. § 1679f(a) (emphasis added), the provision necessarily contemplates the resolution by an arbitrator of disputes between a credit repair organization and a consumer. Pet. App. 15a. But in the majority's view, that provision contemplates arbitration only when a credit repair organization initiates an arbitration proceeding against a consumer, not when a consumer files a lawsuit in court against a credit repair organization: According to the majority, the "'any other person' language of Section 1679f(a) assures that [the CROA's] rights and protections would be preserved in an arbitration instituted by a credit repair organization" in, for example, a collection proceeding. Pet. App. 15a.

c. Judge Tashima dissented. Pet. App. 23a-29a. He explained that, while the CROA's disclosure provision mentions a "right to sue," the provision "does not purport to create any substantive rights, includ-

ing the right to sue. Rather, its sole purpose is to set forth a disclosure statement to be communicated verbatim to consumers." Pet. App. 25a. "The 'right to sue' listed in § 1679c(a)," Judge Tashima observed, "is provided for in 15 U.S.C. § 1679g, which establishes civil liability for violations of the CROA." Pet. App. 26a. While the civil liability provision generally confers "the 'right to sue' a credit repair organization which violates the CROA," Judge Tashima explained, the statute nowhere "mandate[s] a judicial forum for enforcement of the CROA's substantive provisions." Pet. App. 26a. Moreover, "the mere mention of a 'right to sue' does not necessarily mean the right to sue *in court*, especially given the lack of other statutory language supporting this interpretation." Pet. App. 27a.

Judge Tashima rejected the majority's reliance on the CROA's anti-waiver provision, Section 1679f. The language of that provision, Judge Tashima observed, "indicates that Congress intended that CROA claims . . . be enforceable outside a judicial forum." Pet. App. 26a. That is because the provision prohibits enforcement of any waiver of CROA's protections or rights "by any Federal or State court *or any other person*." Pet. App. 26a (quoting 15 U.S.C. § 1679f(a)). "By including 'or any other person' in the same sentence that lists Federal and State courts as appropriate fora for CROA claims," Judge Tashima explained, "Congress clearly indicated that arbitrators, mediators, and other third parties may decide CROA claims." Pet. App. 27a.

SUMMARY OF ARGUMENT

This Court's "cases place it beyond dispute that the FAA was designed to promote arbitration," and the Court has "repeatedly described the Act as" establishing "a liberal federal policy favoring arbitration agreements." *AT&T Mobility*, 131 S. Ct. at 1749 (quotation omitted). Congress will be found to have overridden that strong federal policy, and to have precluded arbitration of claims under a particular statute, only if it makes its intention unmistakably clear. The burden to make that showing rests with the party opposing arbitration.

There is no basis for concluding that the CROA precludes enforcement of arbitration agreements, let alone that it does so with sufficient clarity to overcome the FAA. The CROA contains a civil liability provision allowing private suits for violation of its substantive protections; but neither that provision, nor any other CROA provision, refers to arbitration, much less expressly precludes it. In that regard, the CROA stands in stark contrast with numerous provisions in the United States Code in which Congress has expressly precluded arbitration in direct and unambiguous terms—for instance, by specifying that "no predispute arbitration agreement shall be valid or enforceable to the extent that it requires arbitration of a dispute arising under this section." 12 U.S.C. § 5567(d)(2). Those provisions demonstrate Congress's full awareness of the FAA's presumption favoring arbitration and of the corresponding need to speak clearly to overcome that presumption. Congress's conspicuous failure in the CROA to include any comparable language compels the conclusion

that claims under the CROA are subject to arbitration.

In concluding otherwise, the Ninth Circuit relied on two CROA provisions: the disclosure provision and the anti-waiver provision. The Ninth Circuit reasoned that the disclosure provision adverts to a "right to sue," which the court believed established an entitlement to a judicial (as opposed to arbitral) forum. The Ninth Circuit further reasoned that the supposed "right to sue" exclusively in court is a "right of the consumer" shielded from waiver under the anti-waiver provision. The Ninth Circuit's reasoning is unpersuasive for a host of reasons.

First, even assuming, *arguendo*, that the "right to sue" language in the disclosure provision creates an exclusively judicial remedy, nothing in the CROA's anti-waiver provision prevents parties from agreeing to an arbitral forum through a valid arbitration agreement. The anti-waiver provision prevents the waiver only of substantive rights under the CROA, not procedural rights such as the ostensible "right to sue in court."

Reading the anti-waiver provision to preclude waiver of the purported right to sue in court could lead to results that Congress would not have intended. The CROA deems it a substantive violation of the statute to *attempt* to obtain a waiver of "any right of the consumer." The Ninth Circuit's approach thus could mean that merely *tendering* a contract including an arbitration clause would constitute a violation of federal law, raising the prospect of private damages actions and FTC enforcement actions. Indeed, the Ninth Circuit's reasoning could

preclude enforcement of garden-variety settlement agreements under which plaintiffs waive their right to bring future suits under the CROA: any such settlement agreement would constitute an unenforceable waiver of the "right to sue" in court. In fact, an *offer* of settlement could constitute an attempt to obtain an illicit waiver, and hence a violation of federal law. There is no warrant for reading the anti-waiver clause to bring about those extraordinary results.

What is more, the text of the anti-waiver provision affirmatively contemplates arbitration. The provision specifically says that covered waivers "may not be enforced by any Federal or State court or *any other person*," making clear that Congress fully expected arbitrators to have a role in enforcing the CROA. If Congress counterintuitively sought to foreclose enforcement of arbitration agreements in a provision that affirmatively contemplates arbitration, Congress would have addressed the issue explicitly and unambiguously. Reading the anti-waiver provision to pertain solely to the CROA's substantive rights also would be consistent with the general structure of the CROA, and with the prevailing construction of the analogous anti-waiver provision in the ADEA. There is no basis to construe the CROA's anti-waiver provision any differently.

Finally, reading the anti-waiver provision in that manner would be consistent with the strong federal presumption in favor of arbitration. Indeed, the CROA was enacted well after this Court had repeatedly recognized that presumption and the associated need to resolve any doubts concerning arbitration in favor of enforcing arbitration agreements. Accordingly, even if there were any doubts concerning the

proper interpretation of the CROA's anti-waiver provision, those doubts must be resolved in favor of arbitration.

Second, the Ninth Circuit also erred as an antecedent matter in assuming that the "right to sue" language in the disclosure provision establishes an entitlement to an exclusively judicial forum. The disclosure provision does not itself create any "right to sue," but uses that language in reference to the CROA's civil liability provision. The latter provision thus is the appropriate place to look when determining the scope of the CROA's "right to sue." The civil liability provision does not create an exclusively judicial remedy, instead providing generally for liability for CROA violations without regard to the forum. And even if the "right to sue" language were the appropriate focus of the inquiry, to "sue" is to initiate a legal process for resolving a claim, and that understanding encompasses arbitration, particularly when considered in light of the need under the FAA to construe the CROA to accommodate arbitration rather than to preclude it. The CROA's silence concerning the forum for vindication of the statute's substantive rights dictates enforcing the parties' election of an arbitral rather than a judicial forum.

ARGUMENT

The FAA establishes a strong federal policy favoring enforcement of agreements to arbitrate claims arising under federal statutes. Nothing in the terms of the CROA overrides that long-settled policy. When Congress intends to negate the FAA and preclude arbitration of claims under a particular statute, Congress says so explicitly and unambiguously

in the terms of the statute, as it has done in a number of other statutes. The CROA, in stark contrast, contains no reference to the subject of arbitration. The sole conclusion to be drawn from that congressional silence—particularly in light of the FAA and this Court's precedents—is that Congress did not intend to preclude arbitration of CROA claims.

I. The FAA Establishes A Strong Presumption Favoring Enforcement Of Agreements To Arbitrate Statutory Claims

Congress enacted the FAA "in response to widespread judicial hostility to arbitration agreements." *AT&T Mobility*, 131 S. Ct. at 1745. Section 2 of the FAA, the statute's operative provision, states that a "written provision in . . . a contract . . . to settle by arbitration a controversy thereafter arising out of such contract . . . or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2.

"Section 2 embodies the national policy favoring arbitration." *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006). Because the FAA establishes a "liberal federal policy favoring arbitration agreements," *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 90-91 (2000) (internal quotation marks omitted), courts must "rigorously enforce agreements to arbitrate," *McMahon*, 482 U.S. at 226 (internal quotation marks omitted). *See AT&T Mobility,* 131 S. Ct. at 1749. And the liberal federal policy favoring enforcement of arbitration agreements fully ap-

plies "when a party bound by an agreement raises a claim founded on statutory rights." *McMahon*, 482 U.S. at 220.

To be sure, Congress retains the power to negate the FAA's strong presumption in the terms of a particular statute, so as to preclude enforcement of agreements to arbitrate claims arising under that statute. But Congress will be found to have set aside the FAA's policy favoring arbitration of statutory claims only if it makes that intention unmistakably clear in the statute. It is thus well-settled that "[t]he burden is on the party opposing arbitration . . . to show that Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue," *McMahon*, 482 U.S. at 227, and the analysis must be guided by a "healthy regard for the federal policy favoring arbitration," *Gilmer*, 500 U.S. at 26 (internal quotation marks omitted).

The FAA's presumption favoring arbitration is so strong that, in the past 25 years, this Court has not once denied enforcement of an agreement to arbitrate a federal statutory claim. *See, e.g.*, *Green Tree*, 531 U.S. 79 (Truth in Lending Act claims are subject to arbitration); *Gilmer*, 500 U.S. 20 (Age Discrimination in Employment Act claims subject to arbitration); *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989) (Securities Act actions subject to arbitration); *McMahon*, 482 U.S. 220 (Securities Exchange Act and Racketeer Influenced and Corrupt Organizations Act claims subject to arbitration); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985) (federal antitrust claims subject to arbitration). There is no ba-

sis to reach any different conclusion with regard to claims under the CROA.

II. Nothing In The Terms Of The CROA Precludes Enforcement Of An Agreement To Arbitrate Claims Under The Statute

Any intent by Congress to overcome the FAA's presumption favoring arbitration in a particular statute must be apparent from the statute's "text or legislative history," or "from an inherent conflict between arbitration and the statute's underlying purposes." *McMahon*, 482 U.S. at 227 (internal quotation marks omitted). This case turns exclusively on the CROA's text. Even assuming legislative history could alone afford a basis for negating the FAA, neither respondents nor the Ninth Circuit have identified any legislative history addressing the enforceability of agreements to arbitrate CROA claims. Nor have they suggested any "inherent conflict between arbitration and the statute's underlying purposes." *Id.* Rather, "so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function." *Mitsubishi Motors*, 473 U.S. at 637; *see also* Pet. App. 28a (Tashima, J., dissenting). Consequently, the sole question for the Court is whether the text of the CROA precludes arbitration with sufficient clarity to override the operation of the FAA.

The CROA's text admits of only one answer. The statutory terms contain no reference to the subject of arbitration—there is no mention of the word "arbitration" in any form—much less the enforceability of agreements to arbitrate claims under the statute.

The CROA's terms thus fall far short of "explicitly preclud[ing] arbitration or other nonjudicial resolution of claims," *Gilmer*, 500 U.S. at 29, as would be necessary to address the matter with sufficient clarity to overcome the FAA's strong presumption favoring arbitration. The only plausible conclusion to draw from Congress's silence is that it had no intention to preclude arbitration of CROA claims.

That is particularly the case because, when Congress in fact desires to override the FAA and deny enforcement of arbitration agreements, it does so expressly and unambiguously. The CROA stands in stark contrast with numerous statutes in which Congress specifically and directly bars enforcement of agreements to arbitrate statutory claims:

- 7 U.S.C. § 26(n)(2) ("No predispute arbitration agreement shall be valid or enforceable, if the agreement requires arbitration of a dispute arising under this section");
- 10 U.S.C. § 987(e)(3) ("It shall be unlawful for any creditor to extend consumer credit to a covered member or a dependent of such a member with respect to which . . . the creditor requires the borrower to submit to arbitration or imposes onerous legal notice provisions in the case of a dispute");
- 12 U.S.C. § 5567(d)(2) ("Except as provided under paragraph (3), and notwithstanding any other provision of law, no predispute arbitration agreement shall be valid or enforceable to the extent that it requires arbitration of a dispute arising under this section");

- 15 U.S.C. § 1226(a)(2) ("Notwithstanding any other provision of law, whenever a motor vehicle franchise contract provides for the use of arbitration to resolve a controversy arising out of or relating to such contract, arbitration may be used to settle such controversy only if after such controversy arises all parties to such controversy consent in writing to use arbitration to settle such controversy");
- 15 U.S.C. § 1639c(e)(1) ("No residential mortgage loan and no extension of credit under an open end consumer credit plan secured by the principal dwelling of the consumer may include terms which require arbitration or any other nonjudicial procedure as the method for resolving any controversy or settling any claims arising out of the transaction");
- 18 U.S.C. § 1514A(e)(2) ("No predispute arbitration agreement shall be valid or enforceable, if the agreement requires arbitration of a dispute arising under this section");
- American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 1553(d)(2) ("Except as provided under paragraph (3), no predispute arbitration agreement shall be valid or enforceable if it requires arbitration of a dispute arising under this section").

Alternatively, Congress sometimes references the FAA by its terms and dictates its inapplicability. *See, e.g.*, 22 U.S.C. § 290k-11(a) ("Federal Arbitration Act . . . shall not apply to enforcement of awards rendered pursuant to the Convention"); 22 U.S.C. § 1650a(a) ("Federal Arbitration Act . . . shall not

apply to enforcement of awards rendered pursuant to the [C]onvention"). Congress also may expressly delegate authority to preclude arbitration of statutory claims to an agency charged with administering the statute. *See, e.g.*, 12 U.S.C. § 5518(b) ("The Bureau, by regulation, may prohibit or impose conditions or limitations on the use of an agreement . . . providing for arbitration of any future dispute between the parties, if the Bureau finds" it "is in the public interest and for the protection of consumers"); 15 U.S.C. § 78o(o) ("The [Securities and Exchange] Commission, by rule, may prohibit, or impose conditions or limitations on the use of, agreements that require customers or clients of any broker, dealer, or municipal securities dealer to arbitrate any future dispute between them arising under the Federal securities laws, the rules and regulations thereunder, or the rules of a self-regulatory organization if it finds that such prohibition, imposition of conditions, or limitations are in the public interest and for the protection of investors").

All of those various provisions manifest Congress's keen awareness that it acts against the backdrop of the FAA's strong presumption favoring arbitration.[4] Congress thus speaks directly and unambi-

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[4] Congress also routinely demonstrates that awareness in proposed legislation. *See, e.g.*, Non-Federal Employee Whistleblower Protection Act of 2011, S. 241, 112th Cong. § 2 (bill to amend 41 U.S.C. § 4705(2)(d)(2) to ban pre-dispute arbitration clauses as to suits against government employees who are protected as "whistleblowers"); Service Members Access to Justice Act of 2009, H.R. 1474, 111th Cong. § 3(a) (bill to amend the Uniformed Service Employment and Reemployment Rights Act of 1994 to make agreements to arbitrate claims under that Act nonenforceable); Mortgage Reform and Anti-Predatory Lending

guously when it intends to deny enforcement of arbitration agreements.

"Such language is notably absent from the" CROA. *Bd. of Trustees v. Roche Molecular Sys.*, No. 09-1159, __ S. Ct. __, slip op. at 8 (June 6, 2011); *see W. Va. Univ. Hosp., Inc. v. Casey*, 499 U.S. 83, 88-92 (1991) (holding that the term "attorney's fees" in a fee-shifting statute does not include expert fees because a consistent "record of statutory usage" demonstrates that, when Congress intends to include expert fees in a fee-shifting provision, it does so explicitly). Especially when considered in light of Congress's demonstrated practice of expressly precluding arbitration when intending to do so, the conspicuous absence of any such specification in the CROA—indeed, of any mention of arbitration at all—compels giving effect to the "liberal federal pol-

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Act, H.R. 1728, 111th Cong. § 206(a) (bill to amend the Truth In Lending Act to prohibit arbitration agreements in certain mortgage loans and other credit agreements); Automobile Arbitration Fairness Act of 2008, H.R. 5312, 110th Cong. § 2 (bill to amend the FAA to ban predispute arbitration agreements arising from automobile sale or lease contracts); Fair Contracts for Growers Act of 2007, S. 221, 110th Cong. § 2 (bill to limit applicability of predispute arbitration agreements for livestock and poultry growers); Home Ownership Preservation and Protection Act of 2007, S. 2452, 110th Cong. § 706 (bill to amend the Truth In Lending Act to bar arbitration provisions in home mortgage loan documents); Borrower's Bill of Rights Act, H.R. 1643, 109th Cong. § 5 (bill to amend the Truth In Lending Act to prohibit predispute arbitration clauses in agreements for loans or extension of credit); Fair and Responsible Lending Act, H.R. 4471, 109th Cong. § 104 (bill to amend the Truth In Lending to preclude arbitration of certain claims arising out of home loan transactions).

icy favoring arbitration agreements." *Gilmer*, 500 U.S. at 25 (internal quotation marks omitted).

III. The Ninth Circuit Fundamentally Erred In Discerning In The CROA A Clear Congressional Intention To Preclude Arbitration

Notwithstanding the absence of any mention of the subject of arbitration in the CROA's text, the Ninth Circuit concluded that Congress addressed the matter with sufficient clarity in "the plain language of the CROA" to negate the FAA and preclude arbitration of CROA claims. Pet. App. 17a. The Ninth Circuit's analysis is deeply flawed.

The Ninth Circuit's reasoning proceeded in two steps. First, the court relied on the requirement under the CROA's disclosure provision to advise consumers that they have a "right to sue" for CROA violations. 15 U.S.C. § 1679c(a). Looking to that disclosure provision alone, wholly without regard to the separate provision establishing the underlying "right to sue," the Ninth Circuit concluded that the CROA unambiguously prescribes a right to a judicial rather than arbitral forum. Second, the Ninth Circuit relied on the CROA's non-waiver provision. *Id.* § 1679f(a). The court believed that the ostensible right-to-sue-in-court is one of the consumer rights as to which the non-waiver provision prohibits any waiver, including through an arbitration agreement.

While both of those steps are necessary to the Ninth Circuit's conclusion, neither withstands scrutiny. Even assuming that the CROA creates a "right to sue" in court, nothing in the CROA overrides the strong presumption that consumers can waive that

purported right by entering into a valid arbitration agreement. The Ninth Circuit was also wrong at the threshold in believing that the CROA establishes a "right to sue" exclusively in court, particularly given the need under the FAA to read the CROA to allow arbitration rather than to preclude it.

As an overarching matter, moreover, the highly elliptical manner through which the CROA supposedly demonstrates an intention to override the FAA's strong presumption favoring arbitration is decidedly out of step with Congress's established practice of specifying such an intention through express language directly addressing arbitration. There is no cause for concluding that Congress in the CROA would have "supersed[ed] the [FAA] in such a backhanded way." *Bd. of Trustees*, slip op. at 12 n.5. If Congress in fact intended to preclude arbitration of CROA claims, it would have said so far more directly, as it repeatedly has done in other statutes.

A. The CROA Does Not Preclude Parties From Agreeing To A Non-Judicial Forum Through A Valid Arbitration Agreement

The Ninth Circuit held that the CROA's disclosure provision establishes a "right to sue" exclusively in court, and further, that the supposed right to sue in court is non-waivable by virtue of the CROA's anti-waiver provision. Even assuming that the "right to sue" language in the disclosure provision establishes an entitlement to judicial resolution of CROA claims—which it does not, *see infra* Part III.B—the Ninth Circuit erred in concluding that the CROA's anti-waiver provision bars enforcement of a

waiver of that ostensible right through an arbitration agreement.

The CROA's anti-waiver provision treats as void "[a]ny waiver by any consumer of any protection provided by or any right of the consumer under" the CROA. 15 U.S.C. § 1679f(a). That provision precludes a waiver only of the CROA's *substantive* consumer protections and rights—for example, the protection against misleading statements by credit repair organizations, 15 U.S.C. § 1679b. The anti-waiver provision does not pertain to a waiver of the *procedural* "right to sue" (by hypothesis, exclusively in court) a credit repair organization.

The Ninth Circuit's contrary view, if accepted, would render arbitration agreements unenforceable under a number of statutes. *Any* cause of action in the United States Code could be characterized as a "right to sue."[5] Many statutes providing for a cause

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[5] Indeed, the statutes that this Court has held to be subject to arbitration, *see supra* Part I, all provide causes of action that are properly described as a "right to sue." *See* 15 U.S.C. § 15(a) (Sherman Act) ("[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States . . . ."); 15 U.S.C. § 77*l* (Securities Act) ("Any person who [violates particular provisions concerning securities] shall be liable . . . to the person purchasing such security from him, who may sue either at law or in equity in any court of competent jurisdiction . . . ."); 15 U.S.C. § 1640(e) (Truth In Lending Act) ("Any action under this section may be brought in any United States district court, or in any other court of competent jurisdiction . . . ."); 18 U.S.C. § 1964(c) (RICO) ("Any person injured in his business or property by reason of a violation of [the RICO statute] may sue therefor in any appropriate United States district court . . . ."); 29 U.S.C. § 626(c)(1) (ADEA) ("Any person aggrieved may bring a civil action in any court of competent

of action also include an anti-waiver provision resembling the one in the CROA. *See, e.g.*, 29 U.S.C. § 626(f)(1) ("An individual may not waive any right or claim under this chapter unless the waiver is knowing and voluntary. [A] waiver may not be considered knowing and voluntary unless at a minimum . . . (C) the individual does not waive rights or claims that may arise after the date the waiver is executed."); 29 U.S.C. § 2005(d) ("The rights and procedures provided by this chapter may not be waived by contract or otherwise, unless such waiver is part of a written settlement agreed to and signed by the parties to the pending action or complaint under this chapter."); 21 U.S.C. § 399d(c)(2) ("The rights and remedies in this section may not be waived by any agreement, policy, form, or condition of employment."); 49 U.S.C. § 20109(h) (same); 49 U.S.C. § 31105(g) (same). Under the Ninth Circuit's reasoning, each of these provisions would prohibit enforcement of an arbitration agreement, on the theory that an agreement to arbitrate effects a waiver of a cause of action in court—i.e., a "right to sue."[6]

In fact, however, the CROA's anti-waiver provision bars waiver of the statute's substantive rights and protections, not procedural rights like the ostensible "right to sue" in court. The anti-waiver provi-

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jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter."); *see also Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 318 (2007) ("Section 10(b) [of the Exchange Act] . . . affords a right of action to purchasers or sellers of securities injured by its violation.").

[6] The Ninth Circuit itself has held that one of these provisions—29 U.S.C. § 2005(d)—does not preclude enforcement of arbitration agreements. *Saari v. Smith Barney, Harris Upham & Co.*, 968 F.2d 877, 880-82 (9th Cir. 1992).

sion thus does not preclude enforcement of agreements to arbitrate CROA claims.

1. The interaction between the terms of the anti-waiver provision and the terms of closely related provisions strongly supports that conclusion. The anti-waiver provision renders void "[a]ny waiver by any consumer of any protection provided by or *any right of the consumer* under" the CROA. 15 U.S.C. § 1679f(a) (emphasis added). The immediately ensuing provision states that "[a]ny attempt by any person to obtain a waiver from any consumer of any protection provided by or *any right of the consumer* under [the CROA] shall be treated as a violation of [the CROA]." *Id.* § 1679f(b) (emphasis added). The provisions are parallel in scope, both addressing waivers of a "right of the consumer" under the CROA. If a "right of the consumer" qualifies as a "right" as to which the anti-waiver provision applies, it presumably also constitutes a "right" as to which any "attempt" to obtain its waiver would constitute a violation of the CROA.

That understanding forecloses concluding that Congress intended the anti-waiver provision to encompass the "right to sue." If the anti-waiver provision precluded waiver of the "right to sue," it could then be a violation of the CROA—potentially subject to punitive damages and FTC enforcement—merely to *offer* a consumer the option of entering into an arbitration agreement, or even to offer a standard agreement to settle CROA claims. Particularly absent a clear statement, there is no cause to believe Congress could have intended those unprecedented results.

a. If an agreement to arbitrate CROA claims qualified as a "waiver . . . of . . . any right of the consumer under" the CROA for purposes of the anti-waiver provision, 15 U.S.C. § 1679f(a), merely offering a consumer the option to enter into an arbitration agreement could then constitute an unlawful "attempt . . . to obtain a waiver . . . of . . . any right of the consumer under" that Act. *Id.* § 1679f(a), (b). The mere tender of an arbitration clause in a credit repair agreement thus could render the credit repair organization liable under the CROA, subjecting the organization to damages liability in a private action as well as an FTC enforcement action.

It is one thing to declare an arbitration agreement unenforceable, as Congress has done in certain provisions through explicit and direct language. *See supra* Part II. It is quite another to conclude that Congress intended to deem the mere existence of an arbitration agreement—indeed, the mere *offer* to enter into an arbitration agreement—a *violation of federal law* subject to damages liability and administrative enforcement. Congress would not render it a violation of federal law merely to present to a consumer the *option* to enter into an arbitration agreement without saying so unambiguously. There is no warrant for reading the CROA's anti-waiver provision in a manner that could bring about that extraordinary result, particularly given the FAA's strong policy favoring arbitration.

b. What is more, applying the anti-waiver provision to the purported "right to sue" in court could even render a garden-variety *settlement agreement* unenforceable and unlawful. An agreement to settle a dispute, either before or after the filing of suit, is

an agreement to waive the "right to sue" in exchange for something of value. This Court in fact has expressly compared waivers of the right to sue in court through an arbitration agreement with waivers of the same right through a settlement agreement: the Court has explained that, just as "parties to an arbitration agreement [can] waive the right to have their . . . claims tried in federal court and agree to arbitrate the claims," *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 385 (1996) (citing *McMahon*, 482 U.S. at 227-28), "litigants ought also to be able to waive, or 'release,' the right to litigate . . . claims in a federal forum as part of a settlement agreement," *id.*

Because a settlement agreement necessarily rests on a waiver of the right to sue, the Ninth Circuit's reading of the anti-waiver provision could mean that an agreement to settle CROA claims is unenforceable. The Ninth Circuit's reading in fact could go further, rendering even the mere *offer* of a settlement a *violation of the CROA*. As explained, Section 1679f not only renders waivers of "any right of the consumer" void, but also makes any "attempt" to obtain such a waiver a substantive violation of the Act, raising the prospect of damages liability and administrative enforcement action by the FTC. There could be no basis for concluding that Congress intended to make it a violation of federal law to offer to settle a CROA case. The better course is to recognize that the anti-waiver provision applies to substantive rights and protections, not procedural rights like the "right to sue."

2. The text of the CROA's anti-waiver provision demonstrates that Congress affirmatively contemplated arbitration of CROA claims. The provision

says that, "[a]ny waiver by any consumer of any protection provided by or any right of the consumer under [the CROA] . . . may not be enforced by any Federal or State court *or any other person*." 15 U.S.C. § 1679f(a) (emphasis added). The italicized language confirms Congress's intent that not only federal and state courts but also "other persons"—e.g., arbitrators—would enforce the CROA. A provision that affirmatively contemplates arbitration cannot rationally be read to preclude it.

The Ninth Circuit did not disagree that the "any other person" language referred to arbitrators. Nonetheless, the majority reasoned, "it is foreseeable that a credit repair organization would institute arbitration proceedings against a consumer for collection of the organization's fees under its contract with the consumer," in which "one of the other nonwaivable consumer rights or protections [under the CROA] could arise." Pet. App. 15a. Consequently, the majority submitted, "[t]he 'any other person' language of Section 1679f(a) assures that these rights and protections would be preserved in an arbitration instituted by a credit repair organization or debt collection agency." Pet. App. 15a.

The far more natural interpretation is simply that Congress generally expected arbitrators to adjudicate CROA claims, and Congress wanted to make clear that waivers of *substantive* rights and protections would be unenforceable in arbitration no less than in court. And that reading of the "any other person" language, unlike the Ninth Circuit's strained interpretation, squares with the strong federal policy favoring enforcement of arbitration agreements. Congress's demonstrated practice of

employing express and unambiguous language when intending to override that policy (*see supra* Part II) has particular salience in the context of the "any other person" language: if Congress intended to preclude enforcement of arbitration agreements in a provision that *itself contemplates arbitration*, it would take special care to do so directly and unmistakably. Congress's failure to do so in the CROA renders the Ninth Circuit's reading particularly implausible.

3. The placement of the anti-waiver provision in the statute further supports the conclusion that it applies to the CROA's substantive rights, but not to the procedural "right to sue." *See Bailey v. United States*, 516 U.S. 137, 145 (1995) ("We consider not only the bare meaning of the word but also its placement and purpose in the statutory scheme").

The CROA consists of three sets of operative provisions. *First,* after a preliminary statement of the statutory purposes and definitions, 15 U.S.C. §§ 1679, 1679a, the CROA sets forth the substantive rights and protections granted to consumers, including, *inter alia*: a prohibition against false or misleading statements or acts, *id.* § 1679b; the requirement to give consumers a written, verbatim disclosure of rights and protections granted elsewhere, *id.* § 1679c; and the establishment of a consumer's unfettered right of cancellation within three business days, *id.* § 1679e(a). *Second*, the CROA includes a section containing the anti-waiver provision and the prohibition against attempts to secure a waiver of CROA rights. *Id.* § 1679f. *Third*, the CROA sets out the methods through which it is to be enforced—by

private action, *id.* § 1679g, and by the FTC (and in some circumstances by state bodies), *id.* § 1679h.

In short, the CROA creates consumer rights and protections, deems them non-waivable, and then provides the means for their enforcement. Congress's placement of the anti-waiver provision directly after the substantive-rights-creating provisions, but before the procedural enforcement provisions, reinforces the understanding that the anti-waiver provision pertains to the substantive rights that precede it, not the civil liability provision or other procedural provisions that follow it.

4. That conclusion draws additional support from this Court's decisions. The Court has long recognized the distinction between substantive rights and the forum for vindicating those rights. As the Court has explained, "so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function." *Mitsubishi Motors*, 473 U.S. at 637.

Consistent with that understanding, this Court has previously recognized that a provision precluding waiver of "rights" does not preclude enforcement of an arbitration agreement. Shortly before this Court held in *Gilmer* that the ADEA does not preclude arbitration of claims under that statute, Congress enacted the Older Workers Benefit Protection Act (OWBPA), Pub. L. No. 101–433 (1990). The OWBPA amended the ADEA by adding a provision stating that: "An individual *may not waive any right* or claim under this chapter unless the waiver is knowing and voluntary. Except as provided in para-

graph (2), a waiver may not be considered knowing and voluntary unless at a minimum . . . (C) the individual *does not waive rights* or claims that may arise after the date the waiver is executed." 29 U.S.C. § 626(f)(1) (emphasis added).

The *Gilmer* Court specifically quoted that anti-waiver provision and observed that Congress had "recently enacted" it. 500 U.S. at 28 n.3. If the ADEA's cause of action—which certainly qualifies as a "right to sue"—were considered a "right" for purposes of the ADEA's anti-waiver provision, the latter provision would prohibit enforcement of an arbitration agreement. Yet this Court concluded that "Congress . . . did not explicitly preclude arbitration or other nonjudicial resolution of claims, *even in its recent amendments to the ADEA*." *Id.* at 29 (emphasis added). And every court of appeals to have considered the issue has held that the reference to "rights" in the OWBPA's anti-waiver provision includes only substantive rights, and does not preclude enforcement of arbitration agreements.[7]

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[7] *See Caley v. Gulfstream Aero. Corp.*, 428 F.3d 1359, 1373 n.15 (11th Cir. 2005) ("OWBPA protects against the waiver of a right or claim, not against the waiver of a judicial forum." (quotation omitted)); *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 170 F.3d 1, 13 (1st Cir. 1999) (holding that "any right" under the OWBPA applies "to substantive rights, or, at any rate, not to the right to proceed in court rather than in arbitration"); *Seus v. John Nuveen & Co., Inc.*, 146 F.3d 175, 181 (3d Cir. 1998), *abrogated on other grounds*, *Green Tree*, 531 U.S. 79 (OWBPA is "limited to the waiver of substantive rights under the ADEA"); *Williams v. CIGNA Fin. Advisors, Inc.*, 56 F.3d 656, 660 (5th Cir. 1995) ("[T]he OWBPA protects against the waiver of a right or claim, not against the waiver of a judicial forum."); *see also Saari*, 968 F.2d at 880-82 (holding that 29

Just as the ADEA's anti-waiver provision does not encompass the "right to sue" under the ADEA's express cause of action, the CROA's anti-waiver provision does not encompass the "right to sue" under that statute's civil liability provision. In both statutes, the anti-waiver provision pertains only to substantive rights. And as this Court has explained, "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." *Mitsubishi Motors*, 473 U.S. at 628. That is precisely what respondents in this case chose to do. The FAA requires courts to enforce that choice.

5. To the extent there is any remaining doubt concerning whether the CROA's anti-waiver provision precludes enforcement of an arbitration agreement, that doubt must be resolved in favor of arbitration. As this Court has instructed, the scope of the CROA's anti-waiver provision "must be addressed with a healthy regard for the federal policy favoring arbitration." *Gilmer*, 500 U.S. at 26 (quoting *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24). And "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24-25. There is no basis for concluding that the CROA's anti-waiver provision bars arbitration, much less for concluding that it does so with sufficient clarity to overcome the requirement to resolve any doubts in favor of arbitration.

U.S.C. § 2005(d), which says that the "rights and procedures provided by this chapter may not be waived," does not preclude enforcement of arbitration agreements).

Indeed, the CROA was enacted in 1996, over 70 years after the FAA, and well after this Court had repeatedly interpreted the FAA to establish a strong presumption in favor of arbitration. "Congress was, of course, aware of this presumption once it was established by this Court." *Montana v. United States*, 450 U.S. 544, 552 n.2 (1981). Yet there is nothing in the text of the CROA (or even its legislative history) indicating that Congress in fact considered precluding arbitration of CROA claims. "Congress' silence in this regard can be likened to the dog that did not bark." *Chisom v. Roemer*, 501 U.S. 380, 396, n. 23 (1991) (citing A. Doyle, Silver Blaze, in The Complete Sherlock Holmes 335 (1927)).

B. The CROA Does Not Establish An Exclusively Judicial Remedy

Even if the anti-waiver provision applies to procedural rights like the "right to sue," the CROA does not create a "right" to an exclusively judicial remedy in the first place. A consumer's agreement to arbitrate CROA claims thus does not waive any "right" under that Act.

1. The CROA's disclosure provision requires credit repair organizations to supply a written statement to consumers stating, *inter alia*, "You have a right to sue a credit repair organization that violates the [CROA]." 15 U.S.C. § 1679c(a). Based on that language alone, the Ninth Circuit concluded that the CROA establishes a "right to bring an action in a court of law," not in arbitration. Pet. App. 10a.

The Ninth Circuit's exclusive focus on the "right to sue" language in the disclosure provision disregards the most pertinent statutory text. The

CROA's disclosure provision does not create a "right to sue." Rather, that phrase appears as part of a long series of disclosures that credit repair organizations must present verbatim to consumers. 15 U.S.C. § 1679c(a). The only consumer "right" established by the disclosure provision is a right to be presented with the required written statement. The "right to sue" language in the CROA's disclosure provision thus does not *create* any right, but rather *describes* the cause of action available under a separate provision of the CROA—*viz.*, the civil liability provision, 15 U.S.C. § 1679g. It is therefore *that* provision whose language determines the scope of the "right to sue" under CROA.

The civil liability provision does not purport to create an exclusively judicial remedy. The operative language makes no mention of the forum in which a proceeding may be heard. Instead, the terms simply state that "[a]ny person who fails to comply with any provision of [the CROA] with respect to any other person shall be liable to such person" in an amount calculated through a prescribed framework. 15 U.S.C. § 1679g(a). Nothing in that provision dictates determining liability in a judicial forum, to the exclusion of an arbitral forum.

To be sure, when the civil liability provision sets forth the method of calculating the amount of any punitive damages, it makes reference to a "court." *Id.* § 1679g(a)(2)(B), (b). That passing reference to a "court" merely reflects Congress's understandable *assumption* that courts would generally serve as the default venue for the resolution of CROA claims. But when Congress seeks to *mandate* an exclusively judicial forum, it knows how to do so. *See, e.g.*, stat-

utes cited in note 5, *supra*. Congress did not do so here. *See* Pet. App. 26a (Tashima, J., dissenting); *Picard v. Credit Solutions, Inc.*, 564 F.3d 1249, 1255 (11th Cir. 2009); *Gay v. CreditInform*, 511 F.3d 369, 381-83 (3d Cir. 2007).

2. Even if one focuses on the "right to sue" language in the CROA's disclosure provision alone—wholly disregarding the terms of the separate provision creating the underlying cause of action—the CROA does not create a right to an exclusively judicial resolution, and at least does not do so with sufficient clarity to override the FAA. The Ninth Circuit reasoned that "[t]o sue is '[t]o institute a lawsuit against (another party),'" and that "lawsuit"—which the court deemed the equivalent of "suit"—means, according to legal dictionaries, "[a]ny proceeding by a party or parties against another *in a court of law*.'" Pet. App. 10a (quoting Black's Law Dictionary 905, 1473, 1475 (8th ed. 2004)) (alterations and emphasis in original). The "right to sue" language, the Ninth Circuit thus believed, establishes a right to "institute a lawsuit" in court, not in arbitration. Pet. App. 10a. That analysis is unpersuasive.

To begin with, the "right to sue" language in the disclosure provision is directed to lay consumers, not lawyers. The purpose of that language, and of the written statement required by the disclosure provision more generally, is to afford lay consumers a plain-English description of their various "rights" established elsewhere in the CROA and related statutes. And mainstream (as opposed to legal) dictionaries do not limit the word "sue" to a judicial forum. One dictionary, for example, defines "sue" to mean: "to seek justice or right from (a person) by legal

process." Webster's Ninth New Collegiate Dictionary 1179 (1987); *see also* Funk & Wagnalls Standard College Dictionary 1338 (1973) ("To institute proceedings against for the recovery of some right or the redress of some wrong."); Shorter Oxford English Dictionary 3095 (6th ed. 2007) ("Institute a suit for, make a legal claim to.").

None of those definitions forecloses an understanding of the word "sue" that would encompass arbitration. At a minimum, the term "right to sue" *can* denote the right to initiate a legal process either inside or outside of court. And given the FAA's strong presumption in favor of arbitration, the statutory language should be read to allow arbitration, not to preclude it.

Moreover, respondents should not prevail even under the Ninth Circuit's understanding of the term "right to sue." On the Ninth Circuit's view, the CROA establishes a right to "institute a lawsuit" *in court*. Pet. App. 10a. That right was not infringed in the circumstances of this case, because respondents in fact did "institute a lawsuit" in court. It was only *after* respondents instituted a court action that petitioners elected to use arbitration—as the agreement between the parties allowed them to do, J.A. 62-63—and moved the district court to compel arbitration when respondents resisted the arbitral forum. Respondents thus realized the right the Ninth Circuit believes the CROA affords them.

For those reasons, Congress's reference to a "right to sue" in the CROA's disclosure provision did not dictate the forum in which claims under the CROA would be resolved. The parties here elected

an arbitral forum rather than a judicial one. Nothing in the CROA compels a court to annul that choice. To the contrary, the FAA requires a court to enforce it.

* * * * *

When Congress desires to preclude arbitration with the clarity this Court's precedents require, it knows how to do so. *See supra* Part II. Congress did not do so here. The Ninth Circuit nevertheless held that the CROA precludes arbitration. That holding is inconsistent with the text and structure of that Act, with the "'liberal federal policy favoring arbitration agreements'" established by the FAA, *Gilmer*, 500 U.S. at 25 (quoting *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24), and with the courts' responsibility to "rigorously enforce agreements to arbitrate," *McMahon*, 482 U.S. at 226 (quoting *Dean Witter*, 470 U.S. at 221 (internal quotation mark omitted)).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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