No. 10-948

IN THE

Supreme Court of the United States

COMPUCREDIT CORP., *et al.*,

Petitioners,

v.

WANDA GREENWOOD, *et al.*,

Respondents.

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

BRIEF FOR RESPONDENTS

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QUESTION PRESENTED

Whether the plain language of the Credit Repair Organizations Act creates a non-waivable right to sue that forecloses enforcement of a predispute arbitration clause in a consumer contract.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases:

Statutes:

Legislative Materials:

Other:

STATUTORY PROVISIONS INVOLVED

The text of the Credit Repair Organizations Act (CROA), 15 U.S.C. § 1679-1679j, is set forth in the Appendix to this Brief, at 1a-16a.

STATEMENT OF THE CASE

A. The Credit Repair Organizations Act

Congress enacted CROA in 1996 to protect consumers against unfair and predatory practices by businesses claiming to assist customers with impaired credit ratings. Hearings in previous sessions had alerted Congress to abusive practices prevalent in this industry, including charging consumers excessive amounts to exercise their rights under existing laws to obtain and dispute information maintained by credit bureaus, and making false and misleading statements (or encouraging consumers to make such statements) in an effort to improve credit scores.[1] The passage of CROA reflected Congress's finding that "[c]ertain advertising and business practices of some companies engaged in the business of credit repair services have worked a financial hardship upon consumers, particularly those of limited economic means and who are inexperienced in credit matters." 15 U.S.C. § 1679(a)(2). In enacting CROA, Congress sought both "to ensure that prospective buyers of the

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[1] *See, e.g.*, *Amendments to the Fair Credit Reporting Act*: *Hearing Before the Subcomm. on Consumer Affairs and Coinage of the House Comm. on Banking, Finance and Urban Affairs*, 101st Cong., 2d Sess. (1990); *Credit Repair Organizations Act: Hearing on H.R. 458 Before the Subcomm. on Consumer Affairs and Coinage of the House Comm. on Banking, Finance and Urban Affairs*, 100th Cong., 2d Sess. (1988).

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).

In CROA, Congress pursued these goals by regulating the relationship between consumers and credit repair organizations. The Act defines a "credit repair organization" as any person who provides "any service, in return for the payment of money or other valuable consideration, for the express or implied purpose of—(i) improving any consumer's credit record, credit history, or credit rating; or (ii) providing advice or assistance to any consumer with regard to any activity or service described in clause (i)." *Id.* § 1679a(3). Excluded from the definition are 501(c)(3) nonprofit organizations, creditors assisting customers in restructuring debts, and depository institutions. *Id.*

The Act broadly prohibits credit repair organizations from engaging in fraudulent or deceptive conduct, including making false or misleading statements to credit bureaus or creditors, and advising consumers to make such statements. *Id.* § 1679b(a). It outlaws the practice of requiring payment in advance for credit repair services. *Id.* § 1679b(b). It requires credit repair organizations to use written contracts satisfying specific requirements (including specifying all payments that will be required and services to be performed), and it gives consumers a right to cancel any contract with a credit repair organization within three days of signing it. *Id.* §§ 1679d, 1679e. The Act provides that violations of CROA are also violations of the Federal Trade Commission Act, and it gives en-

forcement powers to both the Federal Trade Commission (FTC) and state governmental authorities. *Id.* § 1679h.

Three provisions of CROA are of particular importance to this case. First, the Act expressly creates a private right of action for consumers. *Id.* § 1679g. Specifically, it provides that a credit repair organization that violates any provision of CROA is liable to injured consumers for actual damages, punitive damages, and attorneys' fees, and it specifies the criteria that "the court" is to consider in awarding punitive damages in both "individual actions" and "class actions." *Id*.

Second, to ensure that consumers enter into relationships with credit repair organizations with full knowledge of their rights—including both their rights vis-à-vis credit bureaus under existing laws (which may make paying a credit repair organization for services unnecessary) and their rights under CROA itself—the Act requires that before entering into any contract with a consumer, a credit repair organization must provide a written statement notifying the consumer of her rights. The text, which is dictated by the statute, includes the following statement: "You have a right to sue a credit repair organization that violates the Credit Repair Organization Act. This law prohibits deceptive practices by credit repair organizations." *Id.* § 1679c(a). CROA's legislative history shows that this language was added to the draft bill that ultimately became CROA at the suggestion of then-FTC Chairman Daniel Oliver, who urged in a 1988 letter to Representative Frank Annunzio that the bill require disclosures in "simple, non-technical language" in order "to avoid possible obfuscation," and that the dis-

closure specifically inform consumers that they "have the right to sue" under CROA. *Hearing on H.R. 458*, *supra*, at 175.

Third, in keeping with its overall goal of protecting vulnerable consumers against overreaching by credit repair organizations, CROA explicitly prohibits credit repair organizations from requiring (or asking) consumers to sign away their rights under CROA when they seek the assistance of a credit repair organization. 15 U.S.C. § 1679f. Specifically, the Act provides that "[a]ny waiver by any consumer of any protection provided by or any right of the consumer under this subchapter—(1) shall be treated as void; and (2) may not be enforced by any Federal or State court or any other person." *Id.* § 1679f(a). The Act underscores this prohibition by providing 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 this subchapter shall be treated as a violation of this subchapter." *Id.* § 1679f(b). And it provides broadly that "[a]ny contract for services which does not comply with the applicable provisions of this subchapter—(1) shall be treated as void; and (2) may not be enforced by any Federal or State court or any other person." *Id.* § 1679f(c).

B. The Proceedings in This Case.

This case began when respondents Wanda Greenwood, Ladelle Hatfield, and Deborah McCleese filed a class-action complaint alleging violations of CROA and asserting other claims against petitioner CompuCredit and the predecessor in interest of petitioner Synovus Bank, the Columbus Bank and Trust Company, in the United States District Court for the Northern District of California. J.A. 38-60. The CROA

claims arose out of CompuCredit's marketing of the "Aspire Visa card." CompuCredit targeted the card at consumers with weak credit scores, and it held the card out to consumers as a way to "rebuild your credit," "rebuild poor credit," and "improve your credit rating." J.A. 40. Although CompuCredit told consumers that no deposit was required to take out the card and that they would receive $300 in available credit upon issuance of the card, CompuCredit (and Columbus Trust, the issuing bank) imposed charges, hidden in the fine print of their solicitations, of approximately $185 immediately upon issuance of the card, resulting in a reduction of the available credit under the card to about $115. J.A. 40-41.

The complaint alleged that CompuCredit was a "credit repair organization" because, in marketing the Aspire Visa to "rebuild" and "improve" consumers' credit, it was offering a "service, in return for the payment of money or other valuable consideration, for the express or implied purpose of … improving any consumer's credit record, credit history, or credit rating." 15 U.S.C. § 1679a(3); J.A. 42, 47. The complaint claimed that CompuCredit had violated CROA in several ways, including:

- Engaging in deceptive conduct in violation of § 1679b(a)(4) by representing that the Aspire Visa would help improve consumers' credit when, because of the high charges it imposed, it was likely to have the opposite effect, and by imposing immediate charges on consumers who took out the card, contrary to the representations that no deposits would be required and that $300 in credit would be available to consumers under the card. J.A. 47-51.

- Requiring payment in advance for credit repair services in violation of § 1679b(b). J.A. 51.
- Not providing the disclosures to consumers required by § 1679c. J.A. 52
- Not using written contracts complying with the requirements of § 1679d. J.A. 52
- Not providing the right to cancel required by § 1679e. J.A. 52.

The complaint also alleged that the issuing bank, Columbus (now Synovus), was responsible for CompuCredit's violations of CROA. J.A. 52-58.[2]

CompuCredit moved to compel arbitration of the CROA claims because the Aspire Visa credit card agreements contained arbitration clauses providing:

> 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 pursuant to this Arbitration Provision and the Code of Procedure ("NAF Rules") of the National Arbitration Forum ("NAF") in effect when the Claim is filed.

J.A. 62. The arbitration clause elaborated that:

> **Upon such an election, neither you nor we will have the right to litigate in court the claim being arbitrated, including in a jury trial, or to engage in pre-arbitration dis-**

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[2] Because the different roles of the two petitioners are not relevant to the question presented here, the remainder of this brief will refer to petitioners collectively as "CompuCredit."

> **covery except as provided under NAF Rules. In addition, you will not have the right to participate as representative or member of any class of claimants relating to any claim subject to arbitration. Except as set forth below, the arbitrator's decision will be final and binding. Other rights available to you in court might not be available in arbitration.**

J.A. 63 (bold in original). Similarly, the "terms of offer" that consumers accepted by applying for an Aspire Visa Card stated:

> IMPORTANT—THE AGREEMENT YOU RECEIVE CONTAINS A BINDING ARBITRATION PROVISION. IF A DISPUTE IS 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. OTHER RIGHTS AVAILABLE TO YOU IN COURT MAY BE UNAVAILABLE IN ARBITRATION.

J.A. 61-62.[3]

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[3] NAF, the designated arbitration provider, was a notoriously anti-consumer arbitration organization. In 2009, after the Attorney General of Minnesota filed an action alleging numerous violations of consumer-protection laws by NAF, NAF entered into a consent decree barring it from handling consumer arbitra-

(*Footnote continued*)

The district court denied the motion to compel arbitration, ruling that the arbitration clause was an unenforceable waiver of rights under CROA—specifically, the "right to sue" for violations of CROA recognized in § 1679c(a). Pet. App. 30a-45a. The court of appeals affirmed. Summing up its holding, the court stated:

> [T]he plain language of the CROA provides consumers with the "right to sue." 15 U.S.C. § 1679c. The "right to sue" means what it says. The statute does not provide a right to "some form of dispute resolution," but instead specifies the "right to sue." The act of suing in a court of law is distinctly different from arbitration. … The right to sue protected by the CROA cannot be satisfied by replacing it with an opportunity to submit a dispute to arbitration.

Pet. App. 9a-10a.

SUMMARY OF ARGUMENT

Although the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1-16, provides generally for the enforceability of agreements to arbitrate disputes affecting interstate commerce, this Court has long acknowledged that Congress may provide that federal statutory claims are not subject to arbitration by enacting legislation expressing the intention to "preclude a waiver

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tions. *See* http://pubcit.typepad.com/files/nafconsentdecree.pdf. CompuCredit's arbitration clause provides that if NAF is unavailable, CompuCredit "will substitute another nationally recognized arbitration organization utilizing a similar code of procedure." J.A. 62. The lower courts' disposition of the case made it unnecessary to consider the application of this provision to the CROA claims.

of judicial remedies for the statutory rights at issue." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985). The plain language of CROA expresses exactly that intention.

CROA provides a statutory right of action allowing injured consumers to sue credit repair organizations for violations of the Act, and it specifically designates that entitlement a "right to sue" under the Act. 15 U.S.C. §§ 1679g, 1679c(a). CROA expressly forbids waiver not only of the "protection" it offers consumers, but also of "any right" a consumer has under CROA. *Id.* § 1679f(a). In addition to offering numerous protections to consumers, CROA mentions exactly two "rights" that it gives consumers: the right to cancel a contract with a credit repair organization within three days of signing it, and the right to sue for violations of CROA. 15 U.S.C. §§ 1679e, 1679c. The words of the law make it unmistakable that the right to sue is one of the rights of which CROA prohibits waiver.

A contract under which a consumer agrees to arbitrate legal claims that may arise in the future—that is, a predispute arbitration agreement—is a waiver of the right to sue. Arbitrating and suing are two different things, in both common meaning and practical terms, and a consumer who waives the ability to proceed in court over future controversies and retains only the right to arbitrate such claims has given up the right to sue. Indeed, this Court has long used the term "right to sue" to denote the ability to proceed in court rather than in arbitration or some other nonjudicial forum. *See, e.g., Schneider Moving & Storage Co. v. Robbins*, 466 U.S. 364, 368 (1984). In using that term to describe one of the non-waivable rights under CROA, Congress made manifest an intention to pre-

vent credit repair organizations from depriving consumers of their ability to proceed in court.

Attempting to evade this straightforward reading of the statute, CompuCredit invokes the FAA's policy favoring arbitration. This Court has stated, however, that the question whether a federal statute exempts claims from arbitration is decided on the basis of ordinary methods of statutory construction, not by applying a policy favoring arbitration. *14 Penn Plaza LLC v. Pyett*, 129 S. Ct. 1456, 1470 n.9 (2009). CompuCredit argues that because Congress did not single out arbitration for mention in CROA, as it has in some very recent statutes, the Court must presume that Congress did not intend CROA's non-waiver clause to apply to arbitration. But Congress's use in CROA of language that plainly forecloses waivers of the right to sue (together with all other rights and protections under CROA) must be given effect even if Congress could have written language more narrowly targeted to arbitration that would similarly have precluded enforcement of predispute arbitration agreements.

CompuCredit's contention that CROA's non-waiver provision is limited to "substantive" rights cannot be squared with the statute's broad proscription of waiver of "any right" and its explicit designation of the entitlement to bring an action in court as a "right." CROA's language explicitly brings the right to sue, "procedural" though it may be, within the scope of the non-waiver provision, unlike the terms of other statutes whose non-waiver provisions the Court has construed to apply only to substantive rights. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20

(1991); *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220 (1987).

Similarly unavailing is CompuCredit's assertion that CROA does not in fact create a "right to sue" because the statute's reference to that right is in a provision requiring credit repair organizations to inform consumers of their rights, a provision that does not itself give rise to the rights it mentions. Leaving aside the oddity of CompuCredit's suggestion that CROA requires credit repair organizations to lie to consumers by telling them they have a right they do not in fact possess, CompuCredit's argument does not square with the statute. CompuCredit cannot dispute that CROA creates a right of action by providing that consumers may bring an action to have a court determine a credit repair organization's liability to them for violations of the Act, 15 U.S.C. § 1679g, nor that the statute describes this entitlement to bring an action as a "right to sue," *id.* § 1679c(a). Congress's use of the label "right" is highly significant because of CROA's prohibition on the waiver of "any right." *Id.* § 1679f(a). That the section that identifies the right to sue as a right is not the same section that creates it does not mean that the right does not exist or that it is not subject to the non-waiver provision.

CompuCredit's sole argument based on the actual words of the statute—that the non-waiver provision's statement that a purported waiver may not be enforced by a court or "any other person" must mean that Congress contemplated arbitration of CROA claims—is meritless. "Any other person" does not necessarily mean an arbitrator, and even if it did, there are many ways that an arbitrator might have occasion to consider whether a right under CROA had

been waived other than as a result of the enforcement of a mandatory predispute arbitration agreement. Thus, the Court need not distort the clear meaning of the non-waiver provision to give effect to the phrase "any other person."

CompuCredit briefly attempts to argue that, even if the non-waiver provision applies to the right to sue, a predispute arbitration agreement does not waive that right because either (1) the ability to arbitrate satisfies the right to sue, or (2) a consumer's ability to file a complaint in court, which will then be subject to compelled arbitration under the FAA, fulfills the right to sue. CompuCredit's first argument not only disregards the linguistic incompatibility between a "right to sue" and an ability to arbitrate, but also ignores the substantial differences between litigation and arbitration that this Court's recent decisions have described. *See, e.g*, *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1749-52 (2011).

Even more remarkably, CompuCredit asserts that even if the right to sue means a right to sue in court, a mandatory predispute arbitration agreement does not take away that right, because a claimant can always file a complaint—although the FAA will require that the claims in it be referred to arbitration. CompuCredit's argument ignores not only that this Court has consistently described arbitration as a "waive[r]" of "the right to seek relief from a court," *Pyett*, 129 S. Ct. at 1469, but also that its own documents describing its arbitration requirement tell consumers that under the arbitration clause in their contracts, "YOU WILL NOT HAVE THE RIGHT TO GO TO COURT." J.A. 61-62.

Finally, CompuCredit's suggestion that enforcing CROA's non-waiver provision here will outlaw *post-dispute* settlement or arbitration agreements involving CROA claims (or even offers to enter into such agreements) is unfounded. Although the application of the provision to post-dispute arbitration agreements is a question not presented by this case, distinguishing such agreements from predispute agreements would be consistent with the Court's longstanding recognition that post-dispute agreements stand on a different footing from agreements that purport to waive statutory rights before a controversy has arisen. *See Callen v. Pa. R.R. Co.*, 332 U.S. 625, 631 (1948). Such a distinction would also be fully consistent with CROA's focus on the protection of consumers against predatory practices by credit repair organizations. That concern is far less pressing when a consumer who has asserted a statutory claim against a credit repair organization (and is represented by counsel to pursue that claim) agrees to settle or arbitrate it rather than go forward with a suit in court. Such agreements, unlike predispute arbitration agreements, presuppose the existence of the right to sue rather than negate it. The Court should not do violence to the language of CROA's non-waiver provision by reading it not to apply to the right to sue merely out of concern for the possible effect of its decision on post-dispute agreements to arbitrate.

ARGUMENT

I. The Statutory Language Unambiguously Prohibits Waiver of the "Right to Sue" Under CROA.

This Court has emphasized that whether a federal statute creates a non-waivable right to bring an action

in court, rendering a predispute arbitration agreement unenforceable, is a straightforward question of statutory construction. The issue in such a case is "whether Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue." *Mitsubishi*, 473 U.S. at 628. "If such an intention exists, it will be discoverable in the text of the [statute], its legislative history, or an 'inherent conflict' between arbitration and the [statute's] underlying purposes." *Gilmer*, 500 U.S. at 26. It is "fidelity to the [statute's] text," not a "preference for arbitration" or a "policy favoring arbitration," that determines whether a federal statute precludes enforcement of a predispute arbitration agreement for claims arising under it. *Pyett*, 129 S. Ct. at 1470 n.9.

In this case, the statutory text unambiguously "dictates the answer to the question presented." *Id*. Three interlocking provisions of CROA establish that the statute creates a right to seek judicial remedies—a "right to sue," in the statute's words—that is not subject to waiver through a predispute arbitration agreement.

First, the statute provides consumers with a private right of action. That is, it creates an entitlement to sue for violations by providing that a violator of the statute is liable for actual and punitive damages and attorneys' fees, to be assessed by a court in an action brought by either an individual or a class. 15 U.S.C. § 1679g.

Second, CROA requires that credit repair organizations inform consumers of their "rights" when entering into transactions with them. *Id*. § 1679c. It expressly refers to the entitlement to bring an action under § 1679g as one of those "rights" by requiring

credit repair organizations to inform each customer that "[y]ou have a right to sue a credit repair organization that violates the Credit Repair Organization Act." *Id*.

Third, the statute provides that the "rights" it creates may not be waived in consumer contracts: "Any waiver by any consumer of any protection provided by or any right of the consumer under this subchapter—(1) shall be treated as void; and (2) may not be enforced by any Federal or State court or any other person." *Id*. § 1679f(a).

Thus, CROA creates an entitlement to sue, denominates that entitlement a "right," and forbids the waiver of "any right" under the statute. Together, those provisions unambiguously foreclose waiver of the right to sue.

It is axiomatic that the terms of a statute must be read together, not "as a series of unrelated and isolated provisions." *Gustafson v. Alloyd Co.*, 513 U.S. 561, 570 (1995). Moreover, as this Court has repeatedly stated, "the normal rule of statutory construction" is "that identical words used in different parts of the same act are intended to have the same meaning." *Id.*; *accord, e.g.*, *Powerex Corp. v. Reliant Energy Servs.*, 551 U.S. 224, 232 (2007); *IBP, Inc. v. Alvarez*, 546 U.S. 21, 34 (2005). These standard principles of statutory interpretation strongly underscore the straightforward reading of CROA as creating a non-waivable right to sue.

The Act's non-waiver provision uses the term "any right of the consumer under this subchapter" to describe what may not be waived, but does not itself define what constitutes a right of a consumer under CROA. 15 U.S.C. § 1679f(a). Section 1679c, however,

explicitly refers to, and lists, "rights" of a "consumer" under the statute, including the "right to sue" for a violation of CROA. Because the term "right" should mean the same thing when used in different parts of the statute, "any right of the consumer" under CROA for purposes of § 1679f(a) must, at a minimum, include a consumer "right" under CROA that is explicitly listed in § 1679c.[4] "The interrelationship and close proximity of these provisions of the statute 'presents a classic case for application of the "normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning."'" *Commissioner v. Lundy*, 516 U.S. 235, 250 (1996) (citations omitted). Indeed, because the "right to sue" language in § 1679c and the prohibition on waiver of "any right of the consumer" first appeared in the draft legislation that became CROA at the same time,[5] "[t]hat maxim is doubly appropriate here." *Powerex*, 551 U.S. at 232.

In turn, the "right to sue" recognized in § 1679c unquestionably refers to the express right of action created by § 1679g. Reading those two provisions together, as ordinary principles of statutory interpretation require, leaves no doubt that the liability created by § 1679g is what a consumer has a "right to sue" to obtain. At the same time, § 1679c's description of

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[4] Some of the rights listed in § 1679c are not rights "under this subchapter" (i.e., CROA) as specified by § 1679f(a), but under other provisions of federal law. But to the extent the entitlement to sue for a violation of CROA is a right, it is unquestionably a right *under CROA*.

[5] *Compare* H.R. 458, §§ 405 & 408, 100th Cong. (1987) (lacking this language), *with* H.R. 3596, §§ 405 & 408, 102d Cong. (1991) (adding language ultimately enacted).

§ 1679g as establishing a "right to sue" shows that Congress, in enacting CROA, conferred not only a right to the substantive liability created by § 1679g, but also a corresponding procedural right—that is, a right to "sue." And that right is necessarily protected by the non-waiver provision of § 1679f(a).

II. Compelling Arbitration Under a Predispute Arbitration Agreement Would Enforce a Waiver of the Right to Sue in Violation of CROA.

A. The Ordinary Meaning of "Right to Sue" Is a Right to Pursue a Claim in Court.

Because CROA does not define "right to sue" or "sue," the "ordinary" and "well-established" meaning of the words governs. *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 86 (2000); *FCC v. AT&T, Inc.*, 131 S. Ct. 1177, 1182 (2011). The ordinary meaning of the word "sue" is to take someone to court. The word is not commonly used or understood to include commencing a contractual arbitration proceeding. Thus, a "right to sue" is a right to proceed with an action in court as opposed to an arbitration or other private mechanism for resolving a dispute. "Sue," and associated words such as "suit," "lawsuit," "legal proceedings," and "litigation" are not conventionally used to describe arbitration. Indeed, the American Arbitration Association (AAA) describes "arbitration" not as a *form* of litigation, but as an "alternative to litigation." AAA, *Arbitration*, http://www.adr.org/arb_med.

Dictionary definitions of "sue" confirm its well-established, common meaning. Black's Law Dictionary defines "sue" as "[t]o institute a lawsuit against (another party)." Black's Law Dictionary 1473 (8th

ed. 2004). Black's in turn defines "lawsuit" as "suit," *id*. at 905, which is defined as "[a]ny proceeding by a party or parties against another in a court of law." *Id*. at 1475.

Relevant definitions in Webster's of "sue" include "to follow or go to (a court) in order to obtain legal redress"; "to seek justice or right from (a person) by legal process : bring an action against : prosecute judicially"; "to proceed with (a legal action) and follow up to proper termination : gain by legal process"; and "to take legal proceedings in court : seek in law." Webster's Third New International Dictionary, Unabridged 2284 (1986). Similarly, the Oxford English Dictionary's relevant definitions of "sue" are "[t]o take (legal action); to institute (a legal process); to plead (a cause)"; "[t]o institute legal proceedings against (a person); to prosecute in a court of law; to bring a civil action against"; "[t]o make application before a court for the grant of (a writ or other legal process): often with implication of further proceedings being taken upon the writ, etc.; hence, to put in suit, to enforce (a legal process)"; "[t]o make legal claim; to institute legal proceedings; to bring a suit." 17 Oxford English Dictionary 120 (2d ed. 1989).

CompuCredit proffers a handful of competing dictionary definitions of "sue" that it claims are generic enough to include arbitrating as well as bringing a lawsuit in a court. Even those definitions, however, incorporate the concept of initiating a "legal process" or filing a "suit," which themselves denote actions in court as opposed to private dispute resolution mechanisms. *See* Pet. Br. 37-38. Indeed, CompuCredit does not point to any common usage in which the term "sue" actually refers to arbitrating; it merely points to

a few definitions that it thinks do not absolutely exclude arbitration.

B. This Court's Opinions Have Used the Terms "Sue" and "Right to Sue" to Refer to Proceedings in Court Rather than Arbitration.

This Court's own usage is consistent with the common meaning. Thus, the Court has said that the term "sue" refers to the use of "judicial process" or "civil process incident to the commencement or continuance of legal proceedings." *FHA v. Burr*, 309 U.S. 242, 245 (1940). As this Court has noted, "[a]rbitration is not a 'judicial proceeding,'" *McDonald v. City of West Branch*, 466 U.S. 284, 288 (1984); *accord, Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 222 (1985), and those who choose arbitration agree to "forgo the legal process." *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1774 (2010). And the Court has differentiated "litigation"—that is, the process of conducting a lawsuit[6]—from arbitration, treating the two as fundamentally different in important respects. *Concepcion*, 131 S. Ct. at 1749-52 (contrasting "litigation" and "arbitration"). Similarly, in *Stolt-Nielsen*, the Court used the term "litigation" to refer to proceedings in court, as distinct from "arbitration." 130 S. Ct. at 1776.

In keeping with the understanding that to "sue" means to proceed in court, this Court has repeatedly

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[6] Black's defines "litigation" as "[t]he process of carrying on a lawsuit …, [a] lawsuit itself …." Black's Law Dictionary 952 (8th ed. 2004). As explained above, Black's defines "sue" as pursuing a "lawsuit," so the words "sue" and "litigation" are closely linked: Litigation is what results when someone sues.

used the term "right to sue" to refer to a right to seek judicial remedies rather than being compelled to arbitrate or use some similar form of nonjudicial dispute resolution. The Court's use of the term in this way dates back at least to Justice Holmes's opinion in *Rederiaktiebolaget Atlanten v. Aktieselskabet Korn-Og Foderstof Kompagniet*, where the Court described the issue presented by the petitioner as whether "arbitration is a condition precedent to the right to sue." 252 U.S. 313, 315 (1920). In *Transcontinental & Western Air, Inc. v. Koppal*, the Court again used the term "right to sue" to refer to the ability to proceed in court rather than in arbitration, when it stated that the grievance and arbitration procedures of the Railway Labor Act did not "deprive an employee of his right to sue his employer for an unlawful discharge if the employee chooses to do so." 345 U.S. 653, 660 (1953). And in *Wilko v. Swan*, the Court expressly said that an arbitration agreement "waives [the plaintiff's] right to sue in courts." 346 U.S. 427, 435 (1953).

Later opinions also use the terms "sue" and "right to sue" in contradistinction to arbitration. In *U.S. Bulk Carriers, Inc. v. Arguelles*, the Court considered the case of a seaman who had refused to pursue a claim for lost wages through a contractual grievance procedure calling for arbitration and had, in the words of the Court, "sued in the federal court instead." 400 U.S. 351, 351 (1971). The Court held that under the statutes at issue, the seaman retained his ability to sue—that is, his "right to make the claim to the court." *Id.* at 354. Similarly, in *Iowa Beef Packers, Inc. v. Thompson*, the Court described the issue as whether "employees may sue in court to recover overtime allegedly withheld in violation of the Fair Labor

Standards Act, if their complaint of alleged statutory violation is also subject to resolution under grievance and arbitration provisions of a collective-bargaining agreement," although the Court ultimately found that question not presented and dismissed the writ as improvidently granted. 405 U.S. 228, 229 (1972).

Likewise, in *Alexander v. Gardner-Denver Co.*, addressing the question whether an arbitral decision foreclosed an action in court under Title VII, the Court characterized the lower courts as having held that the plaintiff was "bound by the prior arbitral decision and had no right to sue under Title VII." 415 U.S. 36, 45 (1974). The Court went on to hold that "[t]here is no suggestion in the statutory scheme that a prior arbitral decision either forecloses an individual's right to sue or divests federal courts of jurisdiction" *Id*. at 47.

A decade later, in *Schneider Moving & Storage Co. v. Robbins*, Justice Powell, for a unanimous Court, again juxtaposed the "right to sue" with the obligation to arbitrate, framing the issue as "whether the parties to [certain] collective-bargaining agreements and … trust agreements intended to require the arbitration of disputes between the trustees and the employer before the trustees could exercise their contractual right to sue in federal court." 466 U.S. at 368. The Court's opinion later substituted the phrase "right to seek judicial enforcement" for its earlier use of "right to sue," indicating that it equated the two. *Id.* at 371.

Indeed, contemporaneously with its expansion of the types of matters that are subject to arbitration, the Court has continued to use the terms "sue" and "right to sue" to refer to proceedings in court. Thus,

in *Karahalios v. National Federation of Federal Employees*, the Court held that the Civil Service Reform Act's creation of an administrative mechanism "precludes implication of a parallel right to sue in federal courts." 489 U.S. 527, 531 (1989). In *Allied-Bruce Terminix Cos. v. Dobson*, the Court observed that § 4 of the FAA "holds the defendants to their promise to submit to arbitration rather than making the other party sue them." 513 U.S. 265, 294 (1995). And in *Gilmer*, even while holding that the right to sue under the ADEA is subject to waiver, the Court used the term "right to sue" in a way that unmistakably referred to a right to bring a suit in court when it noted that "[i]n order for an aggrieved individual to bring suit under the ADEA, he or she must first file a charge with the EEOC and then wait at least 60 days. … An individual's right to sue is extinguished, however, if the EEOC institutes an action against the employer." 500 U.S. at 27.[7]

Of course, the Court has overruled *Wilko*'s holding that the right to sue under the Securities Act of 1933 is non-waivable, *see Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 485 (1989), and it has limited *Gardner-Denver* to its facts by holding that unions may waive their members' right to sue under federal civil rights statutes. *Pyett*, 129 S. Ct. at 1466-73. But the Court has not disapproved of *Wilko*'s

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[7] *Amicus curiae* DRI cites cases where the Court has used "right to sue" to refer to rights of action that other decisions have held are arbitrable. DRI Br. 16. Each example uses the term "sue" consistently with its normal meaning of bringing an action in court. Beyond that, they shed little light here because they neither address arbitration nor involve statutes with language foreclosing waiver of the entitlement to sue in court.

and *Gardner-Denver*'s English usage. In particular, nothing in the Court's recent opinions questions the aptness of the Court's use, in those and other opinions, of the phrase "right to sue" to denote a right to proceed in court as opposed to arbitration. Nor have the Court's more recent opinions contested the common-sense notion that a predispute arbitration agreement is a waiver of any otherwise available right to sue. On the contrary, the Court's opinions have repeatedly used analogous expressions such as "waiver of judicial remedies,"[8] "waive[r]" of "the right to seek relief from a court,"[9] "waiver of [a] statutory right to a judicial forum,"[10] "waiver" of "the right to select the judicial forum,"[11] and "waiver of a judicial forum,"[12] to describe predispute arbitration agreements.

Thus, in referring to a "right to sue," the Congress that enacted CROA used a phrase that repeated opinions of this Court had used to describe a right to proceed in court as opposed to arbitration or another nonjudicial dispute-resolution mechanism. This Court typically assumes that a statute's use of a term with an established judicial meaning reflects an intent to incorporate that meaning. *Microsoft Corp. v. i4i Ltd. P'ship*, 131 S. Ct. 2238, 2245 (2011). That assumption is so powerful that statutes using terms of art may be

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[8] *Pyett*, 129 S. Ct. at 1465; *Randolph*, 531 U.S. at 90; *Gilmer*, 500 U.S. at 26; *Rodriguez de Quijas*, 490 U.S. at 483; *Mitsubishi*, 473 U.S. at 628.

[9] *Pyett*, 129 S. Ct. at 1469.

[10] *Wright v. Universal Maritime Serv. Corp.*, 525 U.S. 70, 80 (1998).

[11] *Rodriguez de Quijas*, 490 U.S. at 481.

[12] *McMahon*, 482 U.S. at 227.

given meanings that depart from the ordinary meaning of the same words. *See, e.g*, *Magwood v. Patterson*, 130 S. Ct. 2788, 2797 (2010). Where, as here, the settled judicial usage is in accord with the ordinary meaning of the words, the inference that Congress intended that meaning is even more powerful. *See, e.g.*, *Mac's Shell Serv. v. Shell Oil Prods. Co.*, 130 S. Ct. 1251, 1257 (2010) (adopting construction reflecting both "ordinary meaning" and judicially "established meanings").

C. The Statutory Context Confirms That the Right to Sue Refers to Pursuing an Action in Court.

Examining the statute as a whole confirms that the right to sue protected by CROA is a right to proceed in court. The scope of the statutory right to sue is fleshed out by the provision that creates the right of action under CROA, 15 U.S.C. § 1679g. The terms of § 1679g provide additional support for the conclusion that the statutory right to sue is not simply an entitlement to obtain a particular recovery, regardless of the forum, but a right to obtain that recovery in an action before a court.

Section 1679g repeatedly refers to a proceeding to determine the liability it creates as an "action." Thus, the statute provides that punitive damages may be allowed "in any action by an individual," *id.* § 1679g(a)(2)(A), and in "a class action," *id*. § 1679g(a)(2)(B). It further requires that the number of consumers affected by a violation be considered in awarding punitive damages in "any class action." *Id.* § 1679g(b)(4). And the statute provides for the award of costs and attorneys' fees in "any successful action." *Id*. § 1679g(a)(3). Section 1679i, which provides the

limitations period applicable to suits under CROA, similarly uses the term "action" to refer to such suits.

"Action" is a synonym for a lawsuit or other court proceeding: "[a] civil or criminal judicial proceeding." Black's Law Dictionary 31 (8th ed. 2004). As this Court has recognized, "the term 'action,' standing alone, ordinarily refers to a judicial proceeding." *BP Am. Prod. Co. v. Burton*, 549 U.S. 84, 93 (2006). And a "right of action" is "'[t]he right to bring suit; a legal right to maintain an action,' with 'suit' meaning 'any proceeding ... in a court of justice.'" *Id.* at 91 (quoting Black's Law Dictionary 1488, 1603 (4th ed. 1951)).

CROA's references to the availability of a "class action" also signify that it contemplates proceedings in court, as class proceedings are generally unavailable in arbitration. *See Concepcion*, 131 S. Ct. at 1748-53; *Stolt-Nielsen*, 130 S. Ct. at 1775-76. Class arbitration was, if not unheard of, exceedingly rare when CROA was enacted, several years before *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003), which led to the creation of class arbitration rules by major arbitration providers. *See Stolt-Nielsen*, 130 S. Ct. at 1765, 1768 & n.4. This Court's recent decisions concerning class proceedings and arbitration have generally reserved the term "class actions" to describe class proceedings in court, and used "class arbitration," "classwide arbitration" or "class-action arbitration" to describe class proceedings in arbitration. *See, e.g.*, *Concepcion*, 131 S. Ct. at 1748-53.

That § 1679g, by its terms, creates an entitlement to proceed in court is confirmed by its repeated use of the term "court" to describe the decisionmaker in actions brought to impose liability for CROA violations. The statute entitles individual plaintiffs to recover an

amount of punitive damages "as the court may allow." 15 U.S.C. § 1679g(a)(2)(A). In class actions, the amount of punitive damages that the class may receive is the sum of "the amount which the court may allow for each named plaintiff" and "the amount which the court may allow for each other class member." *Id*. §§ 1679(a)(2)(B)(i) & (ii). The statute commands that "the court shall consider" various factors in awarding punitive damages. *Id.* § 1679g(b).

In sum, § 1679g entitles plaintiffs to bring individual and class *actions* to recover amounts, including punitive damages, to be determined by a *court*. As this Court stated in *U.S. Bulk Carriers, Inc. v. Arguelles*, such statutory language "implies a right to make the claim to the court and not a duty to make it before a grievance committee or before an arbiter." 400 U.S. at 354. Even if the ability to arbitrate could conceivably be brought within the meaning of a right to sue in the abstract, CompuCredit does not argue—nor could it—that a right to pursue an "action" in a "court" is satisfied by the ability to demand resolution of a claim by an arbitrator. Of course, most statutory causes of action contemplate judicial proceedings, but CROA is distinctive in not only providing for an action to be brought in court, but also denominating the entitlement to proceed in court a right and making all rights non-waivable. The language of § 1679g, when read together with § 1679c and § 1679f(a), thus strongly reinforces that the "right to sue" recognized in § 1679c is a right to proceed in court, and that enforcement of a predispute arbitration clause would effect a waiver of that right.

III. CompuCredit's Attempts to Avoid the Statute's Clear Language Are Unavailing.

A. That CROA Does Not Expressly Refer to Arbitration Does Not Negate Its Clear Language.

Against the straightforward reading of the statute set forth above CompuCredit raises a number of objections. To begin with, CompuCredit asserts that construing the statute to create a non-waivable right to sue runs counter to the pro-arbitration policy incorporated in the FAA and given effect in decisions of this Court. But this Court has never asserted that the policy underlying the FAA can overcome a subsequent congressional choice to create a non-waivable right to a judicial forum. "Like any statutory directive, the Arbitration Act's mandate may be overridden by a contrary congressional command." *McMahon*, 482 U.S. at 226. The Court has repeatedly stated that if a statute's text evinces an intent to create such a non-waivable right, it will be given effect notwithstanding the FAA. *See, e.g.*, *Gilmer*, 500 U.S. at 26; *McMahon*, 482 U.S. at 227; *Mitsubishi*, 473 U.S. at 628. As the Court emphasized in *Pyett*, determining whether a law incorporates such an intent is a conventional matter of statutory construction, not an exercise in implementing a "preference for arbitration." 129 S. Ct. at 1470 n.9.

Nonetheless, CompuCredit argues that CROA's language making the right to sue non-waivable does not foreclose enforcement of a predispute arbitration agreement because Congress did not, as it could have, say in so many words that predispute arbitration agreements are unenforceable as to CROA claims. CompuCredit cites a number of recently enacted stat-

utes that expressly refer to arbitration and explicitly prohibit enforcement of agreements to arbitrate statutory claims. *See* Pet. Br. 19-21. The absence of such language, CompuCredit argues, precludes construing CROA to make predispute arbitration agreements unenforceable.

CompuCredit's argument rests on the fallacy that because one combination of words may achieve a particular legislative aim, any other words must mean something different, even when used in an entirely different statute. But "[b]y nature, language is simultaneously robust and precise. Different verbal formulations can, and sometimes do, mean the same thing." *Cohen v. United States*, __ F.3d __, 2011 WL 2600672, at *12 (D.C. Cir. July 1, 2011).

Moreover, CompuCredit's examples do not support its suggestion that there is some standard formulation Congress has used when it wishes to prevent enforcement of a predispute arbitration agreement. Of the nine examples CompuCredit provides of statutory provisions that either prevent enforcement of predispute arbitration agreements or authorize agencies to do so (*see* Pet. Br. 19-21), six are from a single piece of legislation, the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111-203, 124 Stat. 1376 (2010).[13] Of the remaining three,

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[13] The Dodd-Frank provisions are: 7 U.S.C. § 26(n)(2) (applicable to commodities-fraud whistleblower suits); 12 U.S.C. § 5567(d)(2) (applicable to suits by whistleblowers who report wrongdoing to the Consumer Financial Protection Bureau (CFPB)); 15 U.S.C. § 1639c(e)(1) (applicable to home mortgages); 18 U.S.C. § 1514A(e)(2) (applicable to securities-fraud whistleblower suits); 12 U.S.C. § 5518(b) (authorizing CFPB to prohibit arbitration clauses in consumer contracts); and 15 U.S.C. § 78o

(*Footnote continued*)

one dates from 2009 and prohibits arbitration of whistleblower-protection claims involving reports of misuse of economic-stimulus funds. *See* Pub. L. No. 111-5, § 1553(d), 123 Stat. 115, 301 (2009). Another was passed in 2006 to prohibit arbitration clauses in consumer-credit contracts involving active members of the armed forces and their dependents. 10 U.S.C. § 987(e)(3). The third, dating from 2002, prevents enforcement of predispute arbitration agreements in automobile dealers' franchise agreements. 15 U.S.C. § 1226(a)(2). In short, CompuCredit's examples show nothing more than how very recent Congresses have legislated with respect to arbitration in a small number of acts.

Two other examples cited by CompuCredit, 22 U.S.C. §§ 290k-11(a) & 1650a(a), have nothing to do with the words that Congress uses when it desires to "deny enforcement of arbitration agreements." Pet. Br. 19. Those two statutes provide that arbitration agreements involving investment disputes under certain international conventions *are* enforceable, and specify that the FAA does not govern arbitrations under those conventions. The language necessary to *provide for* international arbitration not subject to the FAA has no bearing on what language is necessary or sufficient to *preclude* enforcement of a predispute arbitration agreement applicable to claims under a federal statute.

That Congress has, in a handful of recent enactments, specifically exempted (or authorized an agency to exempt) certain claims from predispute arbitration

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(authorizing SEC to prohibit arbitration clauses in brokerage contracts).

agreements hardly demonstrates that the earlier Congress that enacted CROA did not achieve the same result by creating a non-waivable right to sue. In using the term "right to sue" and foreclosing "waiver" of that right, Congress chose exactly the words that this Court had, at the time Congress acted, repeatedly used to describe the type of non-waivable right to invoke judicial remedies that, if conferred by Congress, would preclude enforcement of an arbitration agreement. *See supra* 19-24. It is perfectly understandable why the Congress that enacted CROA would not have specifically mentioned arbitration and instead used a provision barring waiver of *any* right (including the right to sue): In CROA, Congress was not providing *only* that arbitration agreements are unenforceable, or *only* that waivers of the right to bring actions in court under § 1679g are void; it was providing that *any* waiver of *any* right or protection under the statute was unenforceable, and thus used the expansive language appropriate to that end. Having separately created an entitlement to sue and defined it as a right, Congress had no need to do any more to provide that waivers of that right, in common with waivers of all other rights under CROA, are void.

By contrast, in the 2002 legislation CompuCredit cites involving arbitration of automobile dealership franchise disputes, Congress was acting solely with respect to arbitration, and did not create any other rights that could have been the subject of a general non-waiver provision. *See* 15 U.S.C. § 1226(a)(2). Similarly, another recent law cited by *amicus curiae* DRI, the Department of Defense Appropriations Act, 2010, Pub. L. 111-118, § 8116(a)(1), 123 Stat. 3409, 3454 (2009), is aimed solely at preventing compelled arbitration of sexual assault and harassment claims

against large defense contractors. The provision, prompted by a single widely publicized case, creates no other rights that could be subject to a general non-waiver provision.

Several of the recent statutes CompuCredit cites, like CROA, actually reflect the concept that arbitration is a waiver of the right to sue, in that they foreclose enforcement of predispute arbitration agreements in provisions generally prohibiting waiver of rights under the statute. Thus, four of the statutes state, immediately before the language CompuCredit quotes, that "[t]he rights and remedies provided for in this section may not be waived by any agreement, policy form, or condition of employment *including by a predispute arbitration agreement*." 7 U.S.C. § 26(n)(1) (emphasis added); *see also* 12 U.S.C. § 5567(d)(1); 18 U.S.C. § 1514A(e)(1); Pub. L. No. 111-5, § 1553(d)(1) (all containing substantially identical language). In addition, 15 U.S.C. § 1639c(e), which prohibits predispute arbitration agreements in mortgages, permits *post*-dispute agreements to arbitrate claims arising out of home mortgages only to the extent that they do not operate as a "waiver of [a] statutory cause of action," and it thus prohibits post-dispute arbitration agreements that "bar a consumer from bringing an action in an appropriate … court" on a federal statutory claim. *See id.* § 1639c(e)(3). All of these provisions are fully consistent with congressional understanding that, when a statute confers a right to a federal judicial remedy, a provision precluding waiver of that right bars enforcement of a predispute arbitration agreement. That the provisions in these recent statutes also specifically mention arbitration is no doubt attributable to heightened congressional attention to the increased use of arbitration agreements in

consumer contracts resulting from this Court's recent opinions emphasizing the otherwise expansive scope of the FAA.

B. CROA's Non-Waiver Provision Is Not Limited to "Substantive" Rights.

CompuCredit rests much of its argument on the notion that CROA's non-waiver provision protects only "substantive" rights under the statute, not the procedural right to bring an action in court. CompuCredit invokes decisions of this Court holding that statutory provisions or public policies prohibiting waiver of rights under other statutes apply only to "substantive" rights and do not foreclose enforcement of predispute arbitration agreements. *See, e.g.*, *Gilmer*, 500 U.S. at 26-28 & n.3; *see also Pyett*, 129 S. Ct. at 1464 n.5; *Rodriguez de Quijas*, 490 U.S. at 480-82; *McMahon*, 482 U.S. at 227-28. But none of these cases involved a statute that both forbade waiver of "any right" and expressly denominated the right to sue as a right under the statute.

Thus, in *Gilmer*, the Court considered the Age Discrimination in Employment Act (ADEA), which requires a waiver of rights to be knowing and voluntary and prohibits advance waivers of rights. The ADEA, however, nowhere expressly provides that the entitlement to bring an action in court is a "right" within the meaning of the waiver provision, *see* 29 U.S.C. § 626, and thus the Court's holding that the ability to sue could be waived through a predispute

arbitration agreement did not conflict with the statute's express terms.[14]

Similarly, in *McMahon* and *Rodriguez de Quijas*, the Court considered whether language in the Securities Exchange Act of 1934 and the Securities Act of 1933 voiding any agreement to "waive compliance with any provision of [the Act]," 15 U.S.C. § 78cc(a); *id.* § 77n, prohibited enforcement of a predispute arbitration agreement. Although the Court had, in *Wilko*, interpreted this language to preclude waiver of the "right to sue" under the Securities Act, 346 U.S. at 435, the Court's opinions in *McMahon* and *Rodriguez de Quijas* pointed out that the statutory language actually prohibits waiver only of provisions of the statutes with which someone would otherwise have a duty to "comply"—that is, the substantive requirements and prohibitions the laws impose on participants in the securities industry.

As the Court put it in *McMahon*:

> What the antiwaiver provision of § 29(a) [of the Exchange Act] forbids is enforcement of agree-

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[14] The ADEA's waiver provision was added by the Older Workers Benefit Protection Act (OWBPA) while *Gilmer* was pending in this Court. The provision was inapplicable to *Gilmer* itself because the OWBPA provided that it did "not apply with respect to waivers that occur before the date of enactment of this Act." Pub. L. No. 101-433, § 301(a), 104 Stat. 978, 983 (1990). *Gilmer* cited the waiver provision only in a footnote and stated in passing that it did not prohibit arbitration. *See* 500 U.S. at 28 n.3, 29. The Court's later opinion in *Pyett*, however, takes as a given that the provision limits only waiver of substantive rights. *See* 129 S. Ct. at 1464 n.5 ("The right to a judicial forum is not the nonwaivable 'substantive' right protected by the ADEA."). A number of lower courts have also so held. *See* Pet. Br. 33 & n.7.

> ments to waive "compliance" with the provisions of the statute. But § 27 itself [the provision granting district courts jurisdiction over actions under the Exchange Act] does not impose any duty with which persons trading in securities must "comply." By its terms, § 29(a) only prohibits waiver of the substantive obligations imposed by the Exchange Act. Because § 27 does not impose any statutory duties, its waiver does not constitute a waiver of "compliance with any provision" of the Exchange Act under § 29(a).

482 U.S. at 228; *accord Rodriguez de Quijas*, 490 U.S. at 480-83. Because a predispute agreement to arbitrate does not waive "compliance" with the substantive obligations imposed by the securities laws, *see* 482 U.S. at 229-30, the Court in *McMahon* held that the antiwaiver provision of the Securities Act did not bar enforcement of such an arbitration agreement, *id.* at 238, and the Court in *Rodriguez de Quijas* followed suit with respect to the Exchange Act, overruling *Wilko*. 490 U.S. at 484-85.

CROA's terms, by contrast, provide the clear indication of congressional intent to foreclose waiver of the right to sue that this Court found lacking in *Gilmer*, *McMahon*, and *Rodriguez de Quijas*. Unlike the statute at issue in *Gilmer*, CROA's provision prohibiting waiver of "any right" of a consumer is backed up by a provision that explicitly states that the "right to sue" is among the rights conferred on consumers. And unlike the securities laws at issue in *McMahon* and *Rodriguez de Quijas*, CROA's non-waiver provision does not contain language indicating that it is limited to substantive protections with which credit repair organizations must "comply."

CompuCredit apparently abandons the argument from its petition for certiorari that CROA, like the securities laws, should be read to bar only waiver of compliance with CROA's substantive protections because the non-waiver provision is entitled "Noncompliance with this subchapter." 15 U.S.C. § 1679f; *see* Pet. for Cert. 21-22. That argument is, in any event, meritless. Statutory titles may be used only to "shed light on some ambiguous word or phrase in the statute itself." *Whitman v. Am. Trucking Assns.*, 531 U.S. 457, 483 (2001) (brackets and citations omitted). Here, there is a perfectly straightforward explanation for the title's reference to "noncompliance": Subsection (b) of § 1679f makes attempting to obtain an invalid waiver a form of noncompliance with CROA, and subsection (c) makes any contract that does not comply with CROA's provisions void. More importantly, because there is no ambiguity over whether the non-waiver provision applies only to substantive compliance with CROA, the title is irrelevant as an interpretive tool.

Indeed, the text of CROA's non-waiver provision forecloses the claim that it is limited to substantive rights in two ways. First, the statute explicitly forbids waiver of "any" right. 15 U.S.C. § 1679f(a). As this Court has observed, the use of the word "any" to modify a noun "suggests a broad meaning." *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 219 (2008). "Read naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" *United States v. Gonzales*, 520 U.S. 1, 5 (1997) (quoting Webster's Third New International Dictionary 97 (1976)). Reading a statutory reference to "any right of a consumer under [this Act]" to exclude a right designated as such earlier in the same statute

would hardly comport with the normal meaning of "any."

Second, the statute forbids not only waiver of "any right of a consumer," but also waiver of "any protection provided by" the Act. 15 U.S.C. § 1679f(a). The prohibition of waiver of any "protection" afforded by CROA, much like the securities laws' prohibition of waivers of "compliance," is most naturally read as referring to the substantive requirements of CROA—for example, its provisions prohibiting credit repair organizations from making untrue or misleading statements, advising consumers to change their identity to obscure unfavorable credit information, committing any fraud or deception, or requiring payment in advance from consumers, *see* § 1679b, requiring that consumers be provided with disclosures, § 1679c, and mandating the use of written contracts with specified terms, § 1679d.

Because the prohibition on the waiver of any "protection" of CROA naturally encompasses the substantive provisions of the statute (and does so more naturally than does the term "right"), interpreting "any right" to encompass only the substantive provisions of CROA would violate the well-established "canon that statutes should be read to avoid making any provision 'superfluous, void, or insignificant.'" *Milner v. Dep't of the Navy*, 131 S. Ct. 1259, 1268 (2011) (quoting *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001)). The natural reading of the term "right" would encompass those features of CROA that the statute expressly identifies as consumer "rights," of which there are exactly two: the "right to sue," § 1679c, and the "right to cancel" a contract with a credit repair organization,

§§ 1679c, § 1679d(b)(4), 1679e.[15] It would be extremely odd to interpret a statutory reference to "any right" under a statute to exclude one of only two rights mentioned in the statute.

CompuCredit's suggestion that the structure of the Act indicates that the non-waiver provision does not apply to the right to sue because the statutory right of action follows the non-waiver provision in the statute, whereas other rights and protections granted by the statute precede the non-waiver provision, is meritless for three reasons. First, the non-waiver provision refers to any protection or right "under this subchapter," § 1679f(a), and the CROA provisions following the non-waiver section, like the provisions preceding it, are part of "this subchapter." Second, the right to sue, while drawing its substance from the right-of-action provision following the non-waiver provision, is specifically declared to be a "right" under CROA in a section *preceding* the non-waiver provision, so even if § 1679f were read to refer only to rights previously mentioned in CROA, the right to sue would qualify. Third, the order of the non-waiver provision and the provision creating the statutory right of action most likely reflects not an intention to render the non-waiver provision inapplicable to the right to sue, but the common legislative practice of grouping remedial provisions near the end of a statute. Thus, § 1679g, providing for the private right of action, is immediately followed by § 1679h, concerning

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[15] As CompuCredit agrees, *see* Pet. Br. 4, the remaining rights that must be disclosed by a credit repair organization under § 1679c are not rights under CROA, but rights under other laws regulating credit bureaus.

government enforcement actions, and § 1679i, providing the limitations period applicable to both private and governmental actions.

CompuCredit protests, however, that not limiting the non-waiver provision to substantive rights would be inconsistent with all this Court's decisions allowing arbitration of federal statutory actions, because each statutory action that this Court has held arbitrable could also properly be characterized as a "right to sue." Pet. Br. 25 & n.5 (citing the Sherman Act, the Securities Act, the Truth in Lending Act, RICO, and the ADEA). In none of those instances, however, does the statute both prohibit waiver of rights and expressly characterize the entitlement to bring an action as a "right to sue," or even as a "right" at all.

CompuCredit cites a handful of statutes under which this Court has *not* considered the arbitrability of claims and asserts that they, too, contain both statutory causes of action and non-waiver provisions that might similarly prohibit waiver of the right to sue if CROA is construed to prevent waiver of that right. These few examples hardly support CompuCredit's argument that "[m]any statutes providing for a cause of action also include an anti-waiver provision resembling the one in the CROA." Pet. Br. 25-26.

Moreover, the statutes CompuCredit lists are all readily distinguishable from CROA. As already discussed, the first statute CompuCredit cites, the ADEA, differs from CROA in that it does not specify that the entitlement to sue is a protected "right." The rest of the statutes CompuCredit cites cover narrow subjects that have generated little litigation. One protects employees against misuse of polygraphs (29 U.S.C. § 2005(d)); the other three provide whistle-

blower protection to, respectively, food workers (21 U.S.C. § 399d(c)(2)), railroad workers (49 U.S.C. § 20109(h)), and motor carrier workers (*id.* § 31105(g)). The polygraph statute, unlike CROA, does not refer to a "right to sue," and its reference to the non-waivability of "procedures," in context, has been held by one court to refer to the procedures established by the statute for the use of polygraphs, not to the ability to sue. *Saari v. Smith Barney, Harris Upham & Co.*, 968 F.2d 877, 880-82 (9th Cir. 1992); *but see Harmon v. CB Squared Servs.*, 624 F. Supp. 2d 459, 467 & n.5 (E.D. Va. 2009). The three whistleblower statutes similarly do not mention a "right to sue," and their prohibition on the waiver of "remedies" may refer simply to the entitlements they create to damages and other relief rather than to the availability of a judicial forum for obtaining those remedies.[16]

The point here is not that these four statutes necessarily allow enforcement of predispute arbitration agreements. Rather, the point is that whether they do so depends on their own unique texts, which differ materially from CROA's. The possibility that the distinct language of a small number of statutes, which apparently have generated relatively little litigation, might be construed to foreclose a waiver of judicial remedies does not suggest that interpreting CROA to prohibit waiver of the right to sue would somehow open the floodgates for non-waiver provisions to bar

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[16] Indeed, 49 U.S.C. § 20109 has a subsection headed "remedies," which is limited to setting forth the types of relief the statute authorizes. A natural reading of that section's non-waiver provision may be that "remedies" refers specifically to those forms of relief.

predispute arbitration agreements under a large number of federal statutes. Congress may or may not have precluded predispute waivers of judicial remedies under the other statutes CompuCredit cites—and if it did, its instructions should be honored. But whether Congress prohibited waiver of the right to sue in those statutes is an entirely different question from whether it did so in CROA.

C. CompuCredit's Argument That CROA Does Not Create a Right to Sue Cannot Be Squared with the Statute's Terms.

Echoing the dissenting judge below, CompuCredit asserts that CROA does not create a "right to sue" at all, even though its disclosure provision makes credit repair organizations tell consumers they have one. To be sure, the disclosure provision is just that—a requirement that credit repair organizations provide information to consumers—and it does not, *by itself*, create the private right of action to enforce CROA. But that does not mean that the disclosure provision is a requirement that credit repair organizations lie to consumers by telling them they have a right they do not actually possess, for CROA does, quite expressly, create a private right of action.

Specifically, § 1679g provides that a credit repair organization that violates CROA shall be "liable" to a consumer for actual and punitive damages and attorneys' fees, and its terms expressly contemplate the bringing of "actions" in which "the court" shall determine the amount of damages. As this Court has recognized, "to say that A shall be liable to B is the *express* creation of a right of action." *Key Tronic Corp. v. United States*, 511 U.S. 809, 818 n.11 (1994) (quoting *id*. at 822 (Scalia, J., dissenting in part)). The sig-

nificance of the "right to sue" language in § 1679c is not that it *creates* the entitlement to bring a private action to enforce the statute, but that it *designates* that entitlement as one of the "rights" protected by CROA and makes clear that the right is one "to sue," not just to obtain a recovery through some other means.[17] Together, the provisions contain what this Court has elsewhere described as "explicit rights-creating terms," evincing that "Congress intended to confer individual rights upon a class of beneficiaries." *Gonzaga Univ. v. Doe*, 536 U.S. 273, 284, 285 (2002). That intent to confer a "right" is critically important because CROA makes waivers of the rights it confers void and unenforceable.

D. The Non-Waiver Provision's Use of the Term "Any Other Person" Does Not Reflect Congressional Intent to Allow Predispute Agreements to Arbitrate CROA Claims.

To bolster its argument that the statute's non-waiver provision does not foreclose enforcement of predispute arbitration agreements, CompuCredit points out that CROA provides that waivers of rights

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[17] The Court need not consider whether the "right to sue" disclosure requirement would, by itself, create both a cause of action and a non-waivable right. However, it seems more than farfetched that Congress would direct credit repair organizations to tell consumers they have a right that Congress did not intend to confer—that is, that a statute aimed at *preventing* misrepresentations to consumers would itself require providing them with false and misleading information. Congress's reference to a "right to sue," by itself, would likely suffice to demonstrate the necessary congressional intent to create a right of action. *See Alexander v. Sandoval*, 532 U.S. 275, 286-87 (2001).

or protections under the statute "may not be enforced by any Federal or State court *or any other person*." 15 U.S.C. § 1679f(a)(2). CompuCredit contends that "any other person" must refer to an arbitrator, and that the statute must contemplate that consumers can be required to arbitrate CROA claims under a predispute agreement, because otherwise an arbitrator would not be in a position to consider whether to "enforce" a waiver of some right under CROA.

CompuCredit's suggestion that the words "any other person" would be meaningless unless predispute agreements to arbitrate CROA claims were enforceable is wrong for two reasons. First, CompuCredit's assumption that "any other person" necessarily refers to an arbitrator is unfounded. The term could easily encompass an administrative agency officer, or even a private person or company attempting to enforce a waiver through litigation. The most natural reading of the language is that it expresses Congress's determination that waivers of statutory rights should not be enforceable by *anyone*. There is no basis in the text or legislative history for CompuCredit's assumption that Congress specifically intended the language to refer to arbitrators, let alone intended to signal that it approved, or even contemplated, compelling consumers to arbitrate CROA claims under predispute arbitration agreements.

Second, even if "any other person" were read to refer exclusively to an arbitrator, the possibility that an arbitrator might be in a position to decide whether to enforce a waiver of rights under CROA could arise in any number of circumstances other than compelled arbitration of a consumer's CROA claims. Nothing in CROA prohibits consumers and credit repair organi-

zations from entering into predispute agreements to arbitrate claims other than claims under CROA itself: The "right to sue" that the statute protects against waiver is only a right to sue *for violations of CROA*. *See* 15 U.S.C. §§ 1679c(a), 1679f(a). Thus, a credit repair organization could demand arbitration against a consumer to collect a payment for services allegedly due under its contract. If the consumer defended on the ground that she had exercised her right to cancel the contract under § 1679e or that the credit repair organization's contract did not comply with the requirements of § 1679d or improperly required payment in advance for services, § 1679f(a)(2)'s reference to "any other person" would operate to prevent the arbitrator from finding that the consumer had waived those statutory rights and protections.[18]

Similarly, if a consumer were required to arbitrate *non-CROA* claims against a credit repair organization under a predispute arbitration agreement and initiated an arbitration to pursue such claims, § 1679f(a)(2) would preclude the arbitrator from construing the arbitration clause also to encompass claims under CROA. Moreover, to the extent that a *post*-dispute agreement to arbitrate CROA claims is enforceable (an issue not presented here), the "any other person" language would also preclude an arbitrator in a CROA case submitted under such an agreement from finding

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[18] The likelihood of arbitration by a credit repair organization to collect a debt owed by a consumer is underscored by a statistic cited in *amicus curiae* DRI's brief in support of the petition for certiorari: Of 33,948 consumer arbitrations conducted by the NAF between 2003 and 2007, all but 15 were debt-collection proceedings. DRI Cert.-Stage Br. 5.

that the claimant had waived any right or protection under CROA.

In sum, giving meaning to the words "any other person" does not require negating the effect of the non-waiver provision by permitting compelled arbitration of CROA claims pursuant to a predispute arbitration agreement.

IV. CompuCredit's Arguments that Compelled Arbitration Under a Predispute Agreement Is Not a Waiver of the Right to Sue Defy Reality.

CompuCredit argues that, even if the statutory right to sue is among the rights protected by CROA's anti-waiver provision, a predispute arbitration agreement does not in fact waive the right to sue, notwithstanding that its enforcement would concededly prevent customers from maintaining an action in court for a violation of the Act. CompuCredit's argument is twofold: First, CompuCredit argues that to arbitrate itself falls within the scope of the statutory term "to sue," and thus if respondents can arbitrate they have not waived their right to sue. Second, CompuCredit asserts that even if the right to sue refers to the entitlement to proceed in *court*, enforcement of the arbitration clause would not have prevented respondents from suing because they still could *file* a complaint in court, although they would immediately be compelled to arbitrate their claims instead.

Both these alternative arguments are incorrect. Neither arbitration itself nor the bare ability to file a complaint in court on claims that must be referred to arbitration fulfills the right to sue under the statute.

A. Suing and Arbitrating Are Two Different Things.

To reject CompuCredit's contention that the ability to arbitrate satisfies the right to sue, the Court need look no further than the words of the statute. For the reasons already explained (*see supra* 17-26), the common meaning of the term "right to sue" is incompatible with compulsory arbitration under a predispute agreement. And the difference between the right to sue created by Congress and the ability to arbitrate that CompuCredit seeks to substitute in its place is not merely a matter of words. Behind the difference in nomenclature between suing and arbitrating lie real differences in substance that underscore that being compelled to arbitrate under a predispute agreement does not fulfill a statutory right to sue.

This Court's recent decisions in *Concepcion* and *Stolt-Nielsen* highlight the differences between litigation and arbitration. As the Court put it in *Stolt-Nielsen*, parties to an arbitration "forgo the procedural rigor and appellate review of the courts," 130 S. Ct. at 1775, and receive instead "the simplicity, informality, and expedition of arbitration." *Id*. at 1774 (quoting *Mitsubishi*, 473 U.S. at 678). The significant differences between arbitration and litigation include:

- In arbitration, "the scope of judicial review is much more limited" than in litigation, *Stolt-Nielsen*, 130 S. Ct. at 1777, and legal errors by arbitrators are not grounds for setting aside their awards, *see Hall Street Assocs. v. Mattel, Inc.*, 552 U.S. 576, 588 (2008). Thus, in arbitration, it is "more likely that errors will go uncorrected." *Concepcion*, 131 S. Ct. at 1752.

- Arbitration proceedings often do not permit the full scope of discovery offered by the Federal Rules of Civil Procedure. *See Concepcion*, 131 S. Ct. at 1747.
- Arbitrators generally do not follow rules of evidence applicable in court proceedings. *See id.*
- There is no right to a jury trial in an arbitration proceeding. *See id.*
- This Court has held that "classwide arbitration interferes with fundamental attributes of arbitration," *Concepcion*, 131 S. Ct. at 1748, because a class proceeding "*requires* procedural formality" while the defining feature of arbitration is "informality," *id*. at 1751, because a class proceeding "increases risks to defendants," *id*. at 1752, and because "arbitration is poorly suited to the higher stakes of class litigation." *Id.* Accordingly, the Court has held that a party may not be compelled to participate in class arbitration unless it has agreed to do so, *Stolt-Nielsen*, 130 S. Ct. at 1776, and that when an arbitration agreement forecloses class proceedings, states may not enforce otherwise applicable principles of contract law under which waivers of class proceedings for certain types of claims are deemed unconscionable. *Concepcion*, 131 S. Ct. at 1748.

These differences do not mean that arbitration is by nature inadequate to vindicate all statutory claims. This Court has repeatedly said otherwise and has held that the FAA reflects a congressional judgment that predispute agreements to submit claims arising between the parties to arbitration provide adequate means to resolve statutory claims—unless Congress has provided otherwise in the particular statute at is-

sue. *See, e.g.*, *Pyett*, 129 S. Ct. at 1465, 1469-71; *Gilmer*, 500 U.S. at 26; *Rodriguez de Quijas*, 490 U.S. at 483. The Court has also held that predispute arbitration agreements are generally enforceable because they do not entail waivers of *substantive* rights. *See, e.g.*, *Pyett*, 129 S. Ct. at 1470; *Gilmer*, 500 U.S. at 26; *McMahon*, 482 U.S. at 229-30; *Mitsubishi*, 473 U.S. at 628.

At the same time, the Court has recognized that "all statutory claims may not be appropriate for arbitration," *Gilmer*, 500 U.S. at 26, and that the determination whether a statutory claim requires the procedural formalities of litigation is for Congress to make. *See id.* Thus, although predispute arbitration agreements do not violate prohibitions on waiver of *substantive* rights, the matter is entirely different if Congress creates non-waivable *procedural* rights. The FAA does not provide for enforcement of a predispute arbitration agreement when a statute provides for a non-waivable right to pursue a claim in a "judicial forum." *Id.* That is exactly what CROA does by creating a non-waivable right to sue.

The substantial differences between arbitration and lawsuits provide ample reason for Congress to make such a choice. That choice is particularly understandable in a statute that, like CROA, explicitly provides for class-action recoveries, which will generally be unavailable in arbitration. Of course, the fact that a statutory scheme contemplates class actions may not be enough to render claims under the statute nonarbitrable absent a further textual indication that Congress intended to preclude waiver of judicial remedies. *See Gilmer*, 500 U.S. at 32. Nonetheless, the general unavailability of class actions in arbitration

provides a reason for Congress to prefer litigation for statutory claims for which it desires to ensure the availability of class remedies.

Here, the creation of a non-waivable right to sue reflects a congressional determination that, to fulfill CROA's consumer-protection purposes, it is appropriate to provide consumers with a non-waivable right to avail themselves of the formalities and other features of litigation rather than permitting prospective defendants to obtain the advantages they perceive from arbitration by securing advance waivers of consumers' ability to litigate. Thus, in CROA, Congress itself resolved the cost-benefit tradeoff between litigation and arbitration instead of allowing credit-repair organizations to decide the question through their form contracts. To argue that arbitration satisfies the non-waivable right to sue that Congress created is to ignore not only the words Congress chose to express its purposes, but also the substantial differences between suing and arbitrating.

B. Compulsory Arbitration Is a Waiver of the Right to Proceed in Court.

CompuCredit's fallback claim that enforcing an arbitration agreement does not give effect to a waiver of the right to sue because it does not prevent a plaintiff from filing a complaint in court—just from litigating it once it is filed—blinks reality. If the arbitration agreement here is enforceable with respect to CROA claims, a court may not adjudicate a complaint containing such claims. Rather, under the terms of the FAA, the court must, on CompuCredit's request, grant a motion to compel arbitration and, meanwhile, stay or dismiss the claims. *See* 9 U.S.C. §§ 3, 4; *Dean Witter*, 470 U.S. at 218. A party's bare ability to file a

complaint that a court *cannot* act upon is *not* a right to sue.

Moreover, although CompuCredit could not physically prevent respondents from filing a complaint asserting CROA claims, respondents would not have a *right* to take that step if CompuCredit's arbitration clause were enforceable. The clause itself expressly provides that customers have *no* such right: It says that if one party elects arbitration, "neither you nor we will have the right to litigate in court the claim being arbitrated." J.A. 63. Or, as CompuCredit's "Terms of Offer" succinctly put it: "YOU WILL NOT HAVE THE RIGHT TO GO TO COURT." J.A. 61-62. CompuCredit's assertion that the arbitration clause offers consumers a meaningful "right" to file a complaint in court flies in the face of its own description of the effect of the clause.

Indeed, where an enforceable agreement specifies that claims are subject to mandatory arbitration, a party who instead sues in court or otherwise refuses to arbitrate is in breach of the agreement. *See* 9 U.S.C. § 4; *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 400 (1967) (FAA requires court "to order arbitration once it is satisfied that an agreement for arbitration has been made and has not been honored"); *Rent-A-Center West, Inc. v. Jackson*, 130 S. Ct. 2772, 2778 (2010); *see also Associated Brick Mason Contractors v. Harrington*, 820 F.2d 31, 36 (2d Cir. 1987) (right to compel arbitration arises when "a party 'breache[s] the arbitration agreement by refusing to arbitrate'") (citation omitted). That a party may be *able* to file a complaint in breach of a contractual obligation to arbitrate (subject to being compelled to arbitrate) does not mean that she has the *right* to

do so. As this Court has recognized, a person has no "right" to violate a valid contractual obligation. *See Rousey v. Jacoway*, 544 U.S. 320, 328 (2005).

An obligation to arbitrate is thus incompatible with a right to proceed in court. This Court has therefore repeatedly characterized arbitration agreements as "waivers" of the right to seek judicial remedies. *See supra* 23. The Court's consistent characterizations of arbitration agreements as waivers foreclose any argument that the mere ability to file a complaint—subject to mandatory arbitration of the claims it contains—means that an arbitration clause is not a waiver of the right to proceed in court. If the "right to sue" means a right to pursue an action in court, the agreement at issue here unquestionably waives it.

V. Recognizing the Application of the Non-Waiver Provision to Predispute Arbitration Agreements Will Not Have Adverse Consequences.

CompuCredit complains that if a predispute arbitration agreement is a prohibited waiver of the right to sue under CROA, then merely offering a consumer a contract containing such an agreement would violate CROA. As CompuCredit points out, the statute not only makes waivers of rights void and unenforceable, but also provides 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 this subchapter shall be treated as a violation of this subchapter." 15 U.S.C. § 1679f(b). Thus, an attempt to obtain a waiver of the right to sue would, as CompuCredit says, violate the statute.

That consequence is no reason to limit the scope of the non-waiver provision. Section 1679f(b) reflects

Congress's unambiguous intent to treat attempting to obtain an invalid waiver as a violation of the statute. There is no doubt that merely proffering a contract that purports to waive the consumer's right to cancel under § 1679e or the protections of § 1679d (which requires that all credit repair contracts contain specified terms) or § 1679b(b) (which prohibits advance payment for credit repair services) violates CROA. There is no reason to place proffering a contract that asks a consumer to waive her right to sue on a different footing.[19]

Nor is it true, as CompuCredit suggests, that giving effect to the statute's prohibition on waiving the right to sue will necessarily render settlement agreements or post-dispute arbitration agreements (or offers to enter into such agreements) impermissible. This Court has long distinguished between predispute waivers of statutory rights and post-dispute settlements. Thus, in *Callen v. Pennsylvania Railroad Co.*, the Court held that a post-dispute settlement agreement does not violate the non-waiver provision of the Federal Employers' Liability Act (FELA) because "a release is not a device to exempt from liability but is a means of compromising a claimed liability and to that extent recognizing its possibility," and thus "[w]here controversies exist as to whether there is liability, and if so for how much, Congress has not said that parties may not settle their claims without litigation." 332 U.S. at 631. Similarly, in *Boyd v. Grand Trunk West-*

[19] The statute would not prohibit proffering a contract with a predispute arbitration clause that *excluded* statutory claims under CROA, because the statute prohibits only waiver of the right to sue for a violation of CROA.

ern Railroad Co., the Court held that an employee's nonwaivable FELA right to "elect judicial trial of his cause" invalidated an agreement limiting the venue in which a claim could be brought, but the Court reiterated that a "compromise enabling the parties to settle their dispute without litigation" is not an invalid waiver. 338 U.S. 263, 266 (1949). Likewise, an agreement to settle an existing CROA claim for consideration (or an agreement to settle it through arbitration), unlike a predispute arbitration agreement, does not prospectively cut off a consumer's right to sue. Rather, as the Court put it in *Callen*, a post-dispute agreement recognizes the possibility of suit by compromising a suit that could otherwise be brought.

Thus, when *Wilko v. Swan* held that the Securities Act of 1933 created a non-waivable right to sue that precluded enforcement of a predispute arbitration agreement, the Court, citing *Callen*, limited its holding to arbitration agreements made "prior to the existence of a controversy." 346 U.S. at 438. "[A] waiver in advance of a controversy," the Court stated, "stands upon a different footing" than a post-dispute agreement to arbitrate. *Id*. In *McMahon* and *Rodriguez de Quijas*, the Court rejected *Wilko*'s premise that the securities laws create a non-waivable right to sue, but noted with approval *Wilko*'s indication (followed "uniformly" by the lower courts) that even a non-waivable right to sue would not forbid submission of a *pending* dispute to arbitration. *Rodriguez de Quijas*, 490 U.S. at 480 n.*; *McMahon*, 482 U.S. at 233.

In light of this history of judicial construction of statutory non-waiver provisions, the Congress that enacted CROA would likely have understood that it was supplying the statutory terms that the Court had

found lacking in *Rodriguez de Quijas* and *McMahon* to create a non-waivable right to sue. In this way, Congress was making predispute but not post-dispute arbitration agreements unenforceable, consistent with *Wilko*'s view of the effect of a non-waivable right to sue.

Such a view of the statute is consistent with CROA's overall focus on ensuring the fairness of contracts for services between credit repair organizations and consumers and the accuracy of the representations and disclosures that lead up to those contracts. The statutory findings enacted by Congress refer to the inequality of bargaining power between credit repair organizations and "consumers, particularly those of limited economic means and who are inexperienced in credit matters." 15 U.S.C. § 1679(a)(2). CROA remedies that inequality by protecting "prospective buyers of the services of credit repair organizations." *Id.* § 1679(b)(1). The statute accordingly provides for disclosures to consumers (including the right-to-sue disclosure) before they enter into service agreements with credit repair organizations, § 1679c; prohibits advance payment for services, § 1679b(b); requires written service contracts containing specified terms, § 1679d; and gives customers the right to cancel any service contract within three days of signing it, § 1679e. Section 1679f, too, shares this focus on the contractual relations between credit repair organizations and their customers: Subsection (c) of § 1679f, which immediately follows the prohibitions on waivers and requests for waivers, provides that "any contract for services" that does not comply with CROA shall be void.

The Act's focus on the fairness of the formation and terms of consumer agreements with credit repair organizations supports reading its prohibition on waivers of the right to sue to apply to predispute arbitration agreements contained in such contracts, but not necessarily to settlements of existing disputes, including agreements to resolve them through arbitration. Predispute arbitration agreements contained in contracts of adhesion proffered to consumers—particularly the economically vulnerable consumers likely to perceive a need to repair their credit—are unlikely to reflect genuine consumer choice. *Cf. Concepcion*, 131 S. Ct. at 1750 (recognizing the adhesive nature of consumer contracts). Thus, it made eminent sense for a Congress that desired to "address[] the concerns that attend contracts of adhesion" (*id.* at 1750 n.6) to protect vulnerable consumers against signing away their future right to sue for violations of CROA in the very contracts that define their relationship with a credit repair organization.

By contrast, once a consumer comes forward with a claim that CROA has been violated, an agreement to settle that claim or submit it to arbitration is much less likely to reflect overreaching by the defendant or the effects of an uneven playing field, particularly when the claimant has counsel and the ability to go to court to seek actual and punitive damages and fees absent an agreement. A claimant in such circumstances "will submit a dispute to arbitration only when fully apprised of his rights by counsel and only if he considers it the most advantageous method for determining the particular claim." Note, *Enforceability of Arbitration Agreements in Fraud Actions Under the Securities Act*, 62 Yale L.J. 985, 996 (1953). Moreover, post-dispute arbitration submissions do not im-

pair the statutory purpose of deterring misconduct by credit repair organizations because, absent a predispute arbitration agreement, potential defendants know that their customers retain "the full battery of [statutory] remedies and forums." *Id*. In short, "the arguments and considerations which preclude the validity of an agreement to arbitrate future disputes are generally inapplicable to an agreement to arbitrate existing disputes." *Moran v. Paine, Webber, Jackson & Curtis*, 389 F.2d 242, 246 (3d Cir. 1968), *cited in McMahon*, 482 U.S. at 233.

But even if the statute were not so readily open to an interpretation differentiating predispute waivers from post-dispute submissions to arbitration, the Court should not disregard the prohibition on waivers of the right to sue out of concern for the possible consequences in cases involving post-dispute arbitration agreements. As this Court has repeatedly stated, "[i]t is well established that 'when the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms.'" *Lamie v. United States Trustee*, 540 U.S. 526, 534 (2004) (citations omitted). That a statutory provision foreclosing waiver of the right to sue might apply to post-dispute arbitration submissions would not be an absurd consequence, let alone one "so absurd" (*Heintz v. Jenkins*, 514 U.S. 291, 295 (1995)) that the Court is compelled to avoid any statutory construction that might point in that direction.

After all, applying non-waiver provisions to post-dispute agreements is not unheard of. This Court has, where the text commanded it, applied statutory non-waiver provisions to post-dispute settlement agree-

ments. *See Oubre v. Entergy Operations, Inc.*, 522 U.S. 422 (1998) (construing the waiver provision of the OWBPA, whose express terms indicate it applies to settlement of litigation, *see* 29 U.S.C. § 626(f)(2)). Even absent an express statutory non-waiver provision, the Court has held that some statutory rights (such as the right of employees to receive wages required under the Fair Labor Standards Act) may not be waived in settlement of an existing dispute. *See Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697 (1945).

Here, there is no reason to think that the ability to enter into a post-dispute agreement to arbitrate a claim under § 1679g of CROA would be of particular importance to large numbers of CROA plaintiffs. Therefore, a perceived need to preserve the enforceability of such agreements should not drive the Court's construction of the non-waiver provision. And the possibility that the Court's decision might affect post-dispute agreements does not justify the significant distortion of CROA's language that would be necessary to hold that CROA permits waiving the right to sue through a predispute arbitration agreement.

CONCLUSION

The Court should affirm the judgment of the court of appeals.

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APPENDIX

TABLE OF CONTENTS

Credit Repair Organizations Act, 15 U.S.C. § 1679-1679j

Sec. 1679. Findings and purposes

(a) Findings

The Congress makes the following findings:

(1) Consumers have a vital interest in establishing and maintaining their credit worthiness and credit standing in order to obtain and use credit. As a result, consumers who have experienced credit problems may seek assistance from credit repair organizations which offer to improve the credit standing of such consumers.

(2) Certain advertising and business practices of some companies engaged in the business of credit repair services have worked a financial hardship upon consumers, particularly those of limited economic means and who are inexperienced in credit matters.

(b) Purposes

The purposes of this subchapter are--

(1) 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

(2) to protect the public from unfair or deceptive advertising and business practices by credit repair organizations.

Sec. 1679a. Definitions

For purposes of this subchapter, the following definitions apply:

(1) Consumer

The term "consumer" means an individual.

(2) Consumer credit transaction

The term "consumer credit transaction" means any transaction in which credit is offered or extended to an individual for personal, family, or household purposes.

(3) Credit repair organization

The term "credit repair organization"—

(A) means any person who uses any instrumentality of interstate commerce or the mails to sell, provide, or perform (or represent that such person can or will sell, provide, or perform) any service, in return for the payment of money or other valuable consideration, for the express or implied purpose of—

(i) improving any consumer's credit record, credit history, or credit rating; or

(ii) providing advice or assistance to any consumer with regard to any activity or service described in clause (i); and

(B) does not include—

(i) any nonprofit organization which is exempt from taxation under section 501(c)(3) of title 26;

(ii) any creditor (as defined in section 1602 of this title), with respect to any consumer, to the extent the creditor is assisting

the consumer to restructure any debt owed by the consumer to the creditor; or

(iii) any depository institution (as that term is defined in section 1813 of title 12) or any Federal or State credit union (as those terms are defined in section 1752 of title 12), or any affiliate or subsidiary of such a depository institution or credit union.

(4) Credit

The term "credit" has the meaning given to such term in section 1602(e) of this title.

Sec. 1679b. Prohibited practices

(a) In general

No person may—

(1) make any statement, or counsel or advise any consumer to make any statement, which is untrue or misleading (or which, upon the exercise of reasonable care, should be known by the credit repair organization, officer, employee, agent, or other person to be untrue or misleading) with respect to any consumer's credit worthiness, credit standing, or credit capacity to—

(A) any consumer reporting agency (as defined in section 1681a(f) of this title); or

(B) any person—

(i) who has extended credit to the consumer; or

(ii) to whom the consumer has applied or is applying for an extension of credit;

(2) make any statement, or counsel or advise any consumer to make any statement, the intended effect of which is to alter the consumer's identification to prevent the display of the consumer's credit record, history, or rating for the purpose of concealing adverse information that is accurate and not obsolete to—

(A) any consumer reporting agency;

(B) any person—

(i) who has extended credit to the consumer; or

(ii) to whom the consumer has applied or is applying for an extension of credit;

(3) make or use any untrue or misleading representation of the services of the credit repair organization; or

(4) engage, directly or indirectly, in any act, practice, or course of business that constitutes or results in the commission of, or an attempt to commit, a fraud or deception on any person in connection with the offer or sale of the services of the credit repair organization.

(b) Payment in advance

No credit repair organization may charge or receive any money or other valuable consideration for the performance of any service which the credit repair organization has agreed to perform for any consumer before such service is fully performed.

Sec. 1679c. Disclosures

(a) Disclosure required

Any credit repair organization shall provide any consumer with the following written statement before any contract or agreement between the consumer and the credit repair organization is executed:

"Consumer Credit File Rights Under State and Federal Law

"You have a right to dispute inaccurate information in your credit report by contacting the credit bureau directly. However, neither you nor any 'credit repair' company or credit repair organization has the right to have accurate, current, and verifiable information removed from your credit report. The credit bureau must remove accurate, negative information from your report only if it is over 7 years old. Bankruptcy information can be reported for 10 years.

"You have a right to obtain a copy of your credit report from a credit bureau. You may be charged a reasonable fee. There is no fee, however, if you have been turned down for credit, employment, insurance, or a rental dwelling because of information in your credit report within the preceding 60 days. The credit bureau must provide someone to help you interpret the information in your credit file. You are entitled to receive a free copy of your credit report if you are unemployed and intend to apply for employment in the next 60 days, if you are a recipient of public welfare assistance, or if you have reason to believe that there is inaccurate information in your credit report due to fraud.

"You have a right to sue a credit repair organization that violates the Credit Repair Organization Act.

This law prohibits deceptive practices by credit repair organizations.

"You have the right to cancel your contract with any credit repair organization for any reason within 3 business days from the date you signed it.

"Credit bureaus are required to follow reasonable procedures to ensure that the information they report is accurate. However, mistakes may occur.

"You may, on your own, notify a credit bureau in writing that you dispute the accuracy of information in your credit file. The credit bureau must then reinvestigate and modify or remove inaccurate or incomplete information. The credit bureau may not charge any fee for this service. Any pertinent information and copies of all documents you have concerning an error should be given to the credit bureau.

"If the credit bureau's reinvestigation does not resolve the dispute to your satisfaction, you may send a brief statement to the credit bureau, to be kept in your file, explaining why you think the record is inaccurate. The credit bureau must include a summary of your statement about disputed information with any report it issues about you.

"The Federal Trade Commission regulates credit bureaus and credit repair organizations. For more information contact:

"The Public Reference Branch
"Federal Trade Commission
Washington, D.C. 20580".

(b) Separate statement requirement

The written statement required under this section shall be provided as a document which is separate from any written contract or other agreement be-

tween the credit repair organization and the consumer or any other written material provided to the consumer.

(c) Retention of compliance records

(1) In general

The credit repair organization shall maintain a copy of the statement signed by the consumer acknowledging receipt of the statement.

(2) Maintenance for 2 years

The copy of any consumer's statement shall be maintained in the organization's files for 2 years after the date on which the statement is signed by the consumer.

Sec. 1679d. Credit repair organizations contracts

(a) Written contracts required

No services may be provided by any credit repair organization for any consumer—

(1) unless a written and dated contract (for the purchase of such services) which meets the requirements of subsection (b) of this section has been signed by the consumer; or

(2) before the end of the 3-business-day period beginning on the date the contract is signed.

(b) Terms and conditions of contract

No contract referred to in subsection (a) of this section meets the requirements of this subsection unless such contract includes (in writing)—

(1) the terms and conditions of payment, including the total amount of all payments to be made by the consumer to the credit repair organization or to any other person;

(2) a full and detailed description of the services to be performed by the credit repair organization for the consumer, including—

(A) all guarantees of performance; and

(B) an estimate of—

(i) the date by which the performance of the services (to be performed by the credit repair organization or any other person) will be complete; or

(ii) the length of the period necessary to perform such services;

(3) the credit repair organization's name and principal business address; and

(4) a conspicuous statement in bold face type, in immediate proximity to the space reserved for the consumer's signature on the contract, which reads as follows: "You may cancel this contract without penalty or obligation at any time before midnight of the 3rd business day after the date on which you signed the contract. See the attached notice of cancellation form for an explanation of this right.".

Sec. 1679e. Right to cancel contract

(a) In general

Any consumer may cancel any contract with any credit repair organization without penalty or obliga-

tion by notifying the credit repair organization of the consumer's intention to do so at any time before midnight of the 3rd business day which begins after the date on which the contract or agreement between the consumer and the credit repair organization is executed or would, but for this subsection, become enforceable against the parties.

(b) Cancellation form and other information

Each contract shall be accompanied by a form, in duplicate, which has the heading "Notice of Cancellation'' and contains in bold face type the following statement:

> "You may cancel this contract, without any penalty or obligation, at any time before midnight of the 3rd day which begins after the date the contract is signed by you.
>
> "To cancel this contract, mail or deliver a signed, dated copy of this cancellation notice, or any other written notice to [name of credit repair organization] at [address of credit repair organization] before midnight on [date]
>
> "I hereby cancel this transaction,
>
> [date]
>
> [purchaser's signature].".

(c) Consumer copy of contract required

Any consumer who enters into any contract with any credit repair organization shall be given, by the organization—

> (1) a copy of the completed contract and the disclosure statement required under section 1679c of this title; and

(2) a copy of any other document the credit repair organization requires the consumer to sign, at the time the contract or the other document is signed.

Sec. 1679f. Noncompliance with this subchapter

(a) Consumer waivers invalid

Any waiver by any consumer of any protection provided by or any right of the consumer under this subchapter—

(1) shall be treated as void; and

(2) may not be enforced by any Federal or State court or any other person.

(b) Attempt to obtain waiver

Any attempt by any person to obtain a waiver from any consumer of any protection provided by or any right of the consumer under this subchapter shall be treated as a violation of this subchapter.

(c) Contracts not in compliance

Any contract for services which does not comply with the applicable provisions of this subchapter—

(1) shall be treated as void; and

(2) may not be enforced by any Federal or State court or any other person.

Sec. 1679g. Civil liability

(a) Liability established

Any person who fails to comply with any provision of this subchapter with respect to any other person shall be liable to such person in an amount equal to the sum of the amounts determined under each of the following paragraphs:

(1) Actual damages

The greater of—

(A) the amount of any actual damage sustained by such person as a result of such failure; or

(B) any amount paid by the person to the credit repair organization.

(2) Punitive damages

(A) Individual actions

In the case of any action by an individual, such additional amount as the court may allow.

(B) Class actions

In the case of a class action, the sum of—

(i) the aggregate of the amount which the court may allow for each named plaintiff; and

(ii) the aggregate of the amount which the court may allow for each other class member, without regard to any minimum individual recovery.

(3) Attorneys' fees

In the case of any successful action to enforce any liability under paragraph (1) or (2), the costs

of the action, together with reasonable attorneys' fees.

(b) Factors to be considered in awarding punitive damages

In determining the amount of any liability of any credit repair organization under subsection (a)(2) of this section, the court shall consider, among other relevant factors—

(1) the frequency and persistence of noncompliance by the credit repair organization;

(2) the nature of the noncompliance;

(3) the extent to which such noncompliance was intentional; and

(4) in the case of any class action, the number of consumers adversely affected.

Sec. 1679h. Administrative enforcement

(a) In general

Compliance with the requirements imposed under this subchapter with respect to credit repair organizations shall be enforced under the Federal Trade Commission Act [15 U.S.C. 41 et seq.] by the Federal Trade Commission.

(**b) Violations of this subchapter treated as violations of Federal Trade Commission Act**

(1) In general

For the purpose of the exercise by the Federal Trade Commission of the Commission's functions and powers under the Federal Trade Commission Act [15 U.S.C. 41 et seq.], any violation of any re-

quirement or prohibition imposed under this subchapter with respect to credit repair organizations shall constitute an unfair or deceptive act or practice in commerce in violation of section 5(a) of the Federal Trade Commission Act [15 U.S.C. 45(a)].

(2) Enforcement authority under other law

All functions and powers of the Federal Trade Commission under the Federal Trade Commission Act shall be available to the Commission to enforce compliance with this subchapter by any person subject to enforcement by the Federal Trade Commission pursuant to this subsection, including the power to enforce the provisions of this subchapter in the same manner as if the violation had been a violation of any Federal Trade Commission trade regulation rule, without regard to whether the credit repair organization—

(A) is engaged in commerce; or

(B) meets any other jurisdictional tests in the Federal Trade Commission Act.

(c) State action for violations

(1) Authority of States

In addition to such other remedies as are provided under State law, whenever the chief law enforcement officer of a State, or an official or agency designated by a State, has reason to believe that any person has violated or is violating this subchapter, the State—

(A) may bring an action to enjoin such violation;

(B) may bring an action on behalf of its residents to recover damages for which the person

is liable to such residents under section 1679g of this title as a result of the violation; and

(C) in the case of any successful action under subparagraph (A) or (B), shall be awarded the costs of the action and reasonable attorney fees as determined by the court.

(2) Rights of Commission

(A) Notice to Commission

The State shall serve prior written notice of any civil action under paragraph (1) upon the Federal Trade Commission and provide the Commission with a copy of its complaint, except in any case where such prior notice is not feasible, in which case the State shall serve such notice immediately upon instituting such action.

(B) Intervention

The Commission shall have the right—

(i) to intervene in any action referred to in subparagraph (A);

(ii) upon so intervening, to be heard on all matters arising in the action; and

(iii) to file petitions for appeal.

(3) Investigatory powers

For purposes of bringing any action under this subsection, nothing in this subsection shall prevent the chief law enforcement officer, or an official or agency designated by a State, from exercising the powers conferred on the chief law enforcement officer or such official by the laws of such State to conduct investigations or to administer oaths or affirmations or to compel the attendance

of witnesses or the production of documentary and other evidence.

(4) Limitation

Whenever the Federal Trade Commission has instituted a civil action for violation of this subchapter, no State may, during the pendency of such action, bring an action under this section against any defendant named in the complaint of the Commission for any violation of this subchapter that is alleged in that complaint.

Sec. 1679i. Statute of limitations

Any action to enforce any liability under this subchapter may be brought before the later of—

(1) the end of the 5-year period beginning on the date of the occurrence of the violation involved; or

(2) in any case in which any credit repair organization has materially and willfully misrepresented any information which—

(A) the credit repair organization is required, by any provision of this subchapter, to disclose to any consumer; and

(B) is material to the establishment of the credit repair organization's liability to the consumer under this subchapter,

the end of the 5-year period beginning on the date of the discovery by the consumer of the misrepresentation.

Sec. 1679j. Relation to State law

This subchapter shall not annul, alter, affect, or exempt any person subject to the provisions of this subchapter from complying with any law of any State except to the extent that such law is inconsistent with any provision of this subchapter, and then only to the extent of the inconsistency.