No. 10-948

In the Supreme Court of the United States

COMPUCREDIT CORPORATION AND SYNOVUS BANK, PETITIONERS

v.

WANDA GREENWOOD, *ET AL.*, RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR *AMICUS CURIAE* DRI—THE VOICE OF THE DEFENSE BAR IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

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

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INTRODUCTION AND INTEREST OF *AMICUS CURIAE*[1]

Under the Federal Arbitration Act ("FAA"), an agreement to arbitrate is enforceable just like any other contract. This is no less true with respect to *statutory* claims, except where Congress has demonstrated otherwise.

In light of the strong federal policy supporting arbitration, Congress knows it must speak clearly if it intends to preclude agreements requiring arbitration of statutory claims. When Congress has not made any contrary intention clear, however, parties to commercial arbitration agreements expect that their agreements will be enforced. In reliance on these expectations, countless businesses and individuals have incorporated arbitration clauses into their commercial contracts. Congress intentionally fostered this pro-arbitration climate in the FAA and would not overrule it lightly.

The Ninth Circuit's decision in this case strikes a blow against these settled expectations. The Credit Repair Organizations Act ("CROA") does not mention arbitration at all. Still, based largely on inferences drawn from its reading of the statutory phrase "right to sue," the Ninth Circuit held that claims under the CROA are not subject to arbitration. Both the outcome of this decision and the analysis underlying it

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No one other than DRI, its members, and its counsel made any financial contribution to the brief's preparation or submission. The parties have consented to the submission of this brief. Letters of consent from both parties are on file with the Clerk.

are inconsistent with the clear, pro-arbitration expectations fostered by Congress in the FAA.

Amicus curiae DRI submits this brief to discuss this important issue from the perspective of civil defense lawyers and the clients they represent. DRI is an international organization of attorneys defending the interests of businesses and individuals in civil litigation. DRI frequently participates as an *amicus curiae* in this Court and elsewhere in cases of interest to its membership. Arbitration agreements are of great importance to the business dealings of many of DRI's members and clients. In the interest of predictability—and in deference to the clear federal policy favoring arbitration—DRI urges this Court to ensure that parties to arbitration agreements continue to receive the benefits of their bargains when the claim at issue arises from a statute that evinces no clear congressional intent to preclude arbitration.

STATEMENT

Petitioners market and service a credit card called Aspire Visa. Pet. App. 3a. When consumers apply for this card, they agree to arbitrate "[a]ny claim, dispute or controversy (whether in contract, tort, or otherwise) at any time arising from or relating to" their credit card accounts. *Id.* at 5a.

In 2008, a group of cardholders brought an action in the district court alleging, among other things, violations of the CROA. Petitioners moved to compel arbitration of these claims pursuant to the parties' agreements. The district court denied the motion, holding that the CROA grants consumers the "right to sue" and provides that this right cannot be waived. *Id.* at 45a.

The Ninth Circuit affirmed. Like the district court, it relied on the CROA's disclosure provisions, which require credit repair organizations to inform consumers of their "right to sue." Pet. App. 9a (quoting 15 U.S.C. § 1679c(a)). Also like the district court, the Ninth Circuit relied on the CROA's statement that "[a]ny waiver by any consumer of any protection * * * or any right" is void. *Ibid.* (quoting 15 U.S.C. § 1679f(a)). Therefore, the Ninth Circuit reasoned, Respondents enjoyed a nonwaivable right to proceed in court. As Petitioner has shown, the Ninth Circuit's decision creates a sharp and acknowledged split of authority with the Third and Eleventh Circuits, both of which have held that claims under the CROA can be made the subject of a predispute arbitration agreement. Pet. 10-14; see also Pet. App. 17a (majority noting, "[w]e realize this decision is in conflict with that of two of our sister circuits").

Judge Tashima dissented, emphasizing that the CROA's disclosure provisions do not create any substantive rights but depend for their content on separate, substantive provisions. Pet. App. 25a. In particular, 15 U.S.C. § 1679g provides that "[a]ny person who fails to comply with any provision of this subchapter with respect to any other person shall be liable to such person." As Judge Tashima noted, however, "[n]owhere in the CROA * * * does Congress mandate a judicial forum for enforcement of the CROA's substantive provisions." Pet. App. 26a. Moreover, the "'right to sue' does not necessarily mean the right to sue *in court*." *Id.* at 27a (emphasis in original). He concluded: "We should not lightly create a circuit split on an issue of national application on the basis of the flimsy evidence on which the majority relies." *Id.* at 27a-28a.

SUMMARY OF ARGUMENT

Since the enactment of the FAA, Congress has recognized—and this Court has honored—a strong federal policy in favor of arbitration. Consistent with that policy, a wide variety of businesses have made arbitration agreements central to their commercial contracts. As with any contract, the parties to these agreements have a well-founded expectation that their agreements will be enforced.

With that strong federal policy in mind, this Court has long held that an agreement to arbitrate a statutory claim will be enforced unless Congress says otherwise. Indeed, Congress has, on several occasions, demonstrated its willingness to express such an intention. Each time, it has done so in clear and specific terms.

The CROA does not mention arbitration, much less express Congress's intention to make it unavailable. Yet the Ninth Circuit has nevertheless concluded that claims under the CROA are not subject to arbitration. Both this result and the analysis that produced it are inconsistent with this Court's precedent and Congress's policy favoring arbitration.

The Ninth Circuit's decision turns almost entirely on its reading of the statutory phrase "right to sue." But that phrase does not presume a judicial forum. In fact, the CROA's reference to a "right to sue" appears in a provision about *disclosure obligations* and refers to rights created in a separate civil liability provision that in no way precludes arbitration. Consistent with Congress's clear direction in the FAA, this Court has repeatedly enforced arbitration agreements in the face of statutory reservations of rights far more explicit than the ones at issue here—

including statutes that reserve the right to bring "a civil action in any court of competent jurisdiction." *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 29 (1991) (interpreting 29 U.S.C. § 626(c)(1)).

To be sure, a plaintiff under the CROA, like any other plaintiff asserting a federal cause of action, ordinarily enjoys a right to proceed in court under 28 U.S.C. § 1331. But this Court has repeatedly made clear that federal statutory causes of action that *could* be resolved in court may also be committed to arbitration if the parties so agree. The CROA's non-waiver provision does not support a contrary result.

In the interest of protecting the settled expectations of parties to commercial contracts, it is critical that this Court remain faithful to Congress's policy favoring arbitration. That policy necessarily impacts the interpretation of any statute that gives rise to a federal claim. To that end, DRI urges this Court to reverse the Ninth Circuit's decision.

ARGUMENT

I. As this Court has consistently recognized, Congress has adopted a strong federal policy in favor of arbitration.

Just last Term, this Court recognized once again that it is "beyond dispute that the FAA was designed to promote arbitration." *AT&T Mobility LLC* v. *Concepcion*, 131 S. Ct. 1740, 1749 (2011). In the FAA, Congress provided that an agreement "to settle by arbitration a controversy thereafter arising out of such contract or transaction * * * shall be valid, irrevocable, and enforceable." 9 U.S.C. § 2. In doing so, Congress intended "to overrule the judiciary's longstanding refusal to enforce agreements to arbi-

trate" and place arbitration agreements "'upon the same footing as other contracts.'" *Dean Witter Reynolds, Inc.* v. *Byrd*, 470 U.S. 213, 219-220 (1985) (quoting H.R. Rep. No. 96, 68th Cong., 1st Sess., 1 (1924)).

The FAA thus manifests "a liberal federal policy favoring arbitration agreements." *Moses H. Cone Mem. Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). Issues "of arbitrability must be addressed with a healthy regard for [this] federal policy favoring arbitration." *Ibid.*

This policy applies with equal force in the context of statutory claims. "Having made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue." *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985). Accordingly, "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." *Moses H. Cone*, 460 U.S. at 24-25. If the defense in question is that the statutory claims at issue cannot be arbitrated, "the burden is on the party opposing arbitration * * * to show that Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue." *Shearson/American Express, Inc.* v. *McMahon*, 482 U.S. 220, 227 (1987). The default position, then, is always in favor of arbitration.

II. Congress's endorsement of arbitration is reflected in the settled expectations of businesses and consumers alike.

With Congress's forceful endorsement as a backdrop, arbitration has become central to a wide range of commercial agreements. Businesses rely on these predispute agreements to lower their costs; arbitration procedures can be designed "to allow for efficient, streamlined procedures tailored to the type of dispute," and their informality can "reduc[e] the cost and increas[e] the speed of dispute resolution." *Concepcion*, 131 S. Ct. at 1749. This savings is then passed on to consumers, who have settled expectations of their own. Cf. *Carnival Cruise Lines, Inc.* v. *Shute*, 499 U.S. 585, 594 (1991) (stating that "passengers who purchase tickets containing a forum clause like that at issue in this case benefit in the form of reduced fares reflecting the savings that the cruise line enjoys by limiting the fora in which it may be sued"); see also Stephen J. Ware, *Paying the Price of Process: Judicial Regulation of Consumer Arbitration Agreements*, 2001 J. Disp. Resol. 89, 90 (identifying seven possible ways in which arbitration may reduce costs for businesses).

Empirical studies confirm that these agreements are widely used. According to Fulbright & Jaworski LLP, which surveyed 275 American companies across a variety of industries, about a third of the respondents preferred arbitration to litigation in domestic disputes, including over a third of the respondents in the energy, financial services, health care, and insurance industries. Fulbright & Jaworski LLP, *Fulbright's 7th Annual Litigation Trends Survey Report* 19 (2010). Another study notes that the American Arbitration Association ("AAA") closed

3,220 consumer arbitrations between 2005 and 2007. Christopher R. Drahozal & Samantha Zyontz, *An Empirical Study of AAA Consumer Arbitrations*, 25 Ohio St. J. on Disp. Resol. 843, 868 (2010). The authors estimate that consumers were claimants in 85 percent of these cases. *Id.* at 872.

Arbitration agreements are beneficial in any setting that may give rise to a dispute, and thus they are by no means confined to the consumer context. One study of franchise agreements found that nearly half of the sample contained an arbitration clause. This number has remained steady for nearly ten years. Christopher R. Drahozal & Quentin R. Whittrock, *Is There a Flight from Arbitration?* 37 Hofstra L. Rev. 71, 75 (2008). And a study of 551 employment contracts for Chief Executive Officers found that *half* contained an arbitration clause. When the sample was broken down by year, the study revealed that, but for a small dip in 2004, arbitration clauses had become more common every year since 1999, appearing in 60.4% of contracts executed in 2005. Randall Thomas et al., *Arbitration Clauses in CEO Employment Contracts: An Empirical and Theoretical Analysis*, 63 Vand. L. Rev. 959, 981 (2010). Further, twenty-seven percent of American respondents to the Fulbright & Jaworski study require arbitration of employment disputes in non-union settings. Fulbright & Jaworski, *supra*, at 43.

Arbitration is favored in part because it is generally faster and less expensive than traditional in-court litigation. According to government statistics, the median time from filing to disposition of civil cases in the twelve-month period ending March 31, 2010, was 23.3 months for cases disposed of by trial, and 8.2 months overall. Administrative Office of the

United States Courts, *Federal Judicial Caseload Statistics: March 31, 2010,* Table C-5 (2010). By contrast, according to a study of 301 AAA consumer arbitrations administered in 2007, the average time from filing to final award was 6.9 months—an improvement of nearly 20 percent over court cases resolved without trial, and a 70 percent improvement over those that are tried. Drahozal & Zyontz, *supra*, at 845.

Nor is there any doubt that a consumer's substantive rights can be vindicated in a meaningful way in an arbitral forum. According to the AAA's analysis of 987 consumer-initiated arbitrations resolved in 2006, the consumer was awarded some relief in 48 percent of the cases. *Id.* at 920. In the above-referenced study of cases from 2007, consumers won some relief in 128 of the 240 consumer-initiated cases in the sample. *Id.* at 897.[2] According to a study of arbitrations conducted by the National Arbitration Forum, consumers prevailed in 53 of 97 consumer-initiated cases that reached decision. *Id.* at 924 (citing Ernst & Young, *Outcomes of Arbitration: An Empirical Study of Consumer Lending Cases* (2004)). Another study of NAF arbitrations found that consumers prevailed in 65.5 percent of consumer-initiated cases that reached decision. *Id.* at 923 (citing Mark Fellows, *The Same Result as in Court, More Efficiently: Comparing Arbitration and Court Litigation Out-*

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[2] This study also reveals the cost-effective nature of arbitration from the consumer's perspective. In these cases, "[c]onsumer claimants seeking less than $10,000 were assessed an average of $1 in AAA administrative fees and $95 in arbitrator's fees." Christopher R. Drahozal & Samantha Zyontz, *An Empirical Study of AAA Consumer Arbitrations*, 25 Ohio St. J. on Disp. Resol. 843, 916 (2010).

comes, Metropolitan Corporate Counsel 32 (July 2006)).

In short, businesses have responded to the FAA by relying heavily on arbitration in their commercial agreements, and both businesses and consumers have enjoyed benefits as a result. Like any party to a contract, businesses expect that their agreements will be enforced. Consumers and employees share this expectation and enjoy direct and indirect benefits on that basis, including lower prices, higher pay, faster and lower-cost dispute resolution, and increased predictability. Any change in this Court's approach to arbitrability—whether in terms of the scope of arbitration clauses or in the analysis of the arbitrability of statutory claims—would disturb those longstanding and settled commercial expectations.

III. The Ninth Circuit's willingness to read the CROA to bar arbitration is at odds with the strong federal policy favoring arbitration, as expressed in the FAA and this Court's jurisprudence.

In view of this strong federal policy favoring arbitration, the Ninth Circuit's approach to the CROA cannot stand. This Court has held that a party who has agreed to arbitrate "should be held to [the agreement] unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue." *Mitsubishi Motors*, 473 U.S. at 628. And, in fact, when Congress has chosen to preclude arbitration for a particular statutory right, it has expressed that intention quite clearly.

As discussed below and in the brief by Petitioners, the CROA expresses no such intention. Although it does require credit repair organizations to disclose to

consumers that they have a "right to sue," that provision does not confer any substantive rights, nor does it require that the suit be brought in a judicial forum. Indeed, the Ninth Circuit's approach to the phrase "right to sue" is in tension with the FAA's approach of recognizing arbitration as an adequate alternative for vindicating substantive rights. And the CROA's nonwaiver provision does not change the analysis. For all these reasons, faithful adherence to the FAA and this Court's precedents on arbitration requires reversal of the Ninth Circuit's decision here.

A. Congress has made explicit reference to arbitration in other statutes, but it has made no such reference in the CROA.

Whether a statutory claim is subject to arbitration is a question of congressional intent—as expressed not only in the underlying statute but also in the FAA itself. Congress is undoubtedly "aware of existing law" when it passes new statutes, *South Dakota* v. *Yankton Sioux Tribe*, 522 U.S. 329, 351 (1998) (internal quotation marks and citation omitted), and it knows that its enactments will be interpreted in accordance with the FAA. In light of the FAA, the "burden is on the party opposing arbitration * * * to show that Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue." *McMahon*, 482 U.S. at 227.

In determining Congress's intent with respect to any particular statutory right, there is no need to guess. Congress has repeatedly demonstrated that it can and will make its "intention" clear when it prefers a judicial forum. For example, in one enactment, Congress expressly limited the ability of motor ve-

hicle franchisors and franchisees to agree on arbitration in advance:

> Notwithstanding any other provision of law, whenever a motor vehicle franchise contract provides for the use of arbitration to resolve a controversy arising out of or relating to such contract, arbitration may be used to settle such controversy *only if after such controversy arises* all parties to such controversy consent in writing to use arbitration to settle such controversy.

15 U.S.C. § 1226(a)(2) (emphasis added). This law was proposed, with substantially similar language (including the same explicit reference to arbitration), in 1998, just two years after the enactment of the CROA. Motor Vehicle Franchise Control Arbitration Fairness Act of 1998, S. 2434, 105th Cong. (1998).

Similarly, Congress has demonstrated an intent to preclude certain defense contractors from entering into predispute arbitration agreements with their employees.[3] It has required that any such contractor refrain from requiring "as a condition of employment, that the employee or independent contractor *agree to resolve through arbitration any claim* under title VII of the Civil Rights Act of 1964 or any tort related to or arising out of sexual assault or harassment, including assault and battery, intentional infliction of emotional distress, false imprisonment, or negligent hiring, supervision, or retention." Department of Defense Appropriations Act, 2010, Pub. L. 111-118, §

[3] This provision applied to a contract in excess of $1,000,000 that is awarded more than 60 days after the effective date for the Act. Pub. L. 111-118, § 8116(a), 123 Stat. 3409, 3454 (2009).

8116(a)(1), 123 Stat. 3409, 3454 (2009) (emphasis added).

In the Dodd-Frank Wall Street Reform and Consumer Protection Act, Congress included several different provisions referring explicitly to predispute arbitration agreements. Congress explicitly prohibited predispute agreements to arbitrate claims arising under Sarbanes-Oxley's whistleblower retaliation provision:

> (2) PREDISPUTE ARBITRATION AGREEMENTS.—No predispute arbitration agreement shall be valid or enforceable, if the agreement requires arbitration of a dispute arising under this section.

Pub. L. 111-203, Title IX, § 922 (a), 124 Stat. 1376, 1841 (2010) (18 U.S.C. §1514A(e)(2)).

Further, the Act explicitly grants the Consumer Financial Protection Bureau authority to restrict certain predispute arbitration agreements:

> The Bureau, by regulation, may prohibit or impose conditions or limitations on *the use of an agreement* between a covered person and a consumer for a consumer financial product or service *providing for arbitration of any future dispute between the parties*, if the Bureau finds that such a prohibition or imposition of conditions or limitations is in the public interest and for the protection of consumers.

Pub. L. 111-203, § 1028, 124 Stat. 1376, 2004 (2010) (12 U.S.C. § 5518(b)) (emphasis added). The Act grants similar authority to the SEC:

> The Commission, by rule, may prohibit * * * agreements that require customers or clients of any [broker, dealer, municipal securities dealer or investment adviser] *to arbitrate any future dispute* between them arising under the Federal securities laws * * *

Pub. L. 111-203, §§ 921(a),(b), 124 Stat. 1376, 1841 (15 U.S.C. § 78o(o), 15 U.S.C. § 80b-5(f)) (emphasis added).

Even arbitration's most vociferous opponents recognize the need to speak clearly. The proposed Arbitration Fairness Act would amend the FAA to provide that "no predispute arbitration agreement shall be valid or enforceable if it requires arbitration of an employment dispute, consumer dispute, or civil rights dispute." S. 987, 112th Cong. § 3 (2011). Accordingly, those who seek to restrict predispute arbitration agreements are not content to rely on oblique measures; they recognize that a limitation on arbitration cannot be based on a mere inference.

The numerous statutory provisions explicitly referencing arbitration demonstrate that Congress knows how to preclude agreements such as the one at issue here. But the unambiguous language in these other enactments and proposals is nowhere to be found in the CROA. Cf. *Bruesewitz* v. *Wyeth LLC*, 131 S. Ct. 1068, 1071 (2011) (explaining that a statute's failure to mention a "classic and well known" basis for liability must be a matter of "deliberate choice, not inadvertence") (internal quotation marks and citation

omitted). The CROA *nowhere* mentions arbitration, and nothing in the ordinary meaning of the words "right to sue," or in the structure of the CROA, indicates that Congress intended to bar arbitration when it passed this statute.

B. In comparison to these other statutes, the CROA—with its phrase "right to sue"—does not express a congressional intent to bar arbitration.

In sharp contrast with the statutes discussed above, the CROA says nothing at all about arbitration. Further, although the CROA requires that a consumer be told he or she has "a right to sue," it neither specifies nor implies the *forum* in which the suit must be brought. The statute's liability provision—the provision that actually confers the right to sue—does not reference a forum either.

The Ninth Circuit assumed that the words "right to sue" necessarily implied a right to a judicial forum. See Pet. App. 12a (reasoning that, if arbitration were permitted, then the CROA would "requir[e] that consumers be told a lie: that they possessed a nonexistent right"); see also Resp. Br. Opp. 17 (contending that the disclosure provision is a specific provision that controls the more general liability provision).

But even if this reading is "plausible enough in the abstract," the statute must be read in harmony with two important background principles embodied in the FAA. Cf. *Bd. of Trustees* v. *Roche Molecular Sys., Inc.*, No. 09-1159, 563 U.S. ___, slip. op. at 10 (June 6, 2011) (interpreting Bayh-Dole Act with reference to background principles). First, doubts about arbitrability must be resolved in *favor* of arbitrabili-

ty. *Moses H. Cone*, 460 U.S. at 24-25. Therefore, congressional intent to preclude arbitration must be unambiguous, at least where such intent is based on the statute's text. And second, an agreement to arbitrate "does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." *Mitsubishi Motors*, 473 U.S. at 628. Because the consumer's right to relief under the CROA is fully protected, regardless of forum, there is no reason to think that a "right to sue" requires that the consumer's claim be resolved in court.

The opinions of this Court are consistent with this interpretation of the phrase "right to sue." On its face, the phrase refers only to a right of action and is in no way inconsistent with arbitration. This Court has used the phrase "right to sue" in reference to rights of action under both Title VII and the Age Discrimination in Employment Act ("ADEA"). See *Thompson* v. *North American Stainless, LP*, 131 S. Ct. 863, 869 (2011) ("We have suggested in dictum that the Title VII aggrievement requirement conferred a right to sue on all who satisfied Article III standing."); *Federal Express Corp. v. Holowecki*, 552 U.S. 389, 403-404 (2008) ("The [ADEA] requires the aggrieved individual to file a charge before filing a lawsuit; it does not condition the individual's right to sue upon the agency taking any action."); cf. *Smith* v. *City of Jackson, Miss.*, 544 U.S. 228, 245 n.2 (2005) (Scalia, J., concurring) ("The EEOC need not take the extra step of recognizing that individuals harmed by prohibited actions have a right to sue; the ADEA itself makes that automatic."). Yet there is wide agreement that Title VII and ADEA claims may be committed to arbitration in predispute arbitration

agreements. *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 35 (1991) (holding that ADEA claims are arbitrable); *EEOC* v. *Luce, Forward, Hamilton & Scripps*, 345 F.3d 742, 748-749 (9th Cir. 2003) (en banc) (collecting cases concluding that "Title VII does not bar compulsory arbitration agreements"). In short, the words "right to sue" are consistent with a predispute arbitration agreement because they imply nothing about the forum.

Not surprisingly, this Court's prior use of the phrase "right to sue" is also consistent with the ordinary meaning of the words. The word "sue" is defined simply as "to seek justice or right from (a person) by legal process." *Webster's Ninth New Collegiate Dictionary* 1179 (1988); see also *Funk & Wagnalls Standard College Dictionary* 1338 (1973) ("To institute proceedings against for the recovery of some right or the redress of some wrong"); *Shorter Oxford English Dictionary* 3095 (6th ed. 2007) ("Institute a suit for, make a legal claim to"); *Random House Webster's Unabridged Dictionary* 1900 (2d ed. 2001) ("[T]o institute a process in law against; bring a civil action against"). Arbitration is undeniably a "legal process"; it is used to vindicate legal rights and redress wrongs, and its awards are enforceable by law. Read in this commonsense way, the guarantee of a right to sue in no way limits the forum available. See Pet. App. 27a ("the mere mention of a 'right to sue' does not necessarily mean the right to sue *in court*") (Tashima, J., dissenting) (emphasis in original); *Picard* v. *Credit Solutions, Inc.*, 564 F.3d 1249, 1255 (11th Cir. 2009) ("Although CROA requires credit repair organizations to inform consumers of their right to a private cause of action, such does not preclude arbitration under CROA."); *Gay* v. *CreditInform*, 511 F.3d

369, 377 n.4 (3d Cir. 2007) (noting that "the section does not specify the forum for the resolution of the dispute").

The context of the phrase "right to sue" in the CROA itself further confirms that it does not specify or guarantee a judicial forum. According to the CROA, a credit repair organization must provide consumers with the following disclosures:

> You have a right to dispute inaccurate information in your credit report by contacting the bureau directly. * * *
>
> You have a right to obtain a copy of your credit report from the credit bureau.* * *
>
> 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. * * *

15 U.S.C. § 1679c (emphasis added). Again, these disclosures simply have nothing to do with the *forum* for any dispute. The phrase "right to sue" is intermixed with descriptions of other substantive rights and informs the consumer only that she may personally sue to obtain a remedy if these rights are violated. Had Congress not required informing consumers of their "right to sue," the consumer might not know that he or she has a remedy at all.

This interpretation is consistent with the overall statutory structure. The disclosure provisions of the

CROA create the right to *be informed* of the right to sue; these provisions do not create the right to sue itself. The right of action itself is found in 15 U.S.C. § 1679g, which states that "[a]ny person who fails to comply with any provision of [the CROA] with respect to any other person shall be liable to such person." The statute nowhere precludes credit repair organizations from also telling consumers that, if they wish to form a contract, any suit under this provision must be brought before an arbitrator.

In requiring disclosure of a "right to sue" under the CROA, Congress was referring merely to the CROA's liability provisions, which grant consumers *a cause of action*—nothing more. There is no textual reason to conclude that consumers are also guaranteed *a judicial forum*. Substantive rights may be vindicated in arbitration just as they may be vindicated in court. Indeed, this Court has long recognized that when a party agrees to arbitrate, it "does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." *Mitsubishi Motors*, 473 U.S. at 628. Nothing in the CROA reflects any congressional judgment that an arbitral forum would somehow be inadequate for CROA claims in particular.

C. The non-waiver provision of the CROA does not prevent waiver of a consumer's ability to assert a CROA claim in court.

The non-waiver provision of the CROA does not require any different result. As the Petitioners' brief explains (at pp. 24-35), the non-waiver provision does not and cannot prevent waivers that relate only to *procedural* rights, such as the consumer's choice of

forum. And even if that were not so, a consumer's ability to file his claims in federal court is derived from federal statutes *outside* the CROA and thus is not subject to the CROA's non-waiver provision in the first place.

Although a consumer certainly *can* assert such a claim in federal court, his right to do so is the very same right enjoyed by every other federal plaintiff—a right set forth in 28 U.S.C. § 1331, which establishes federal question jurisdiction. Because this right is not created by the CROA itself, it is outside the scope of the CROA's non-waiver provision.

The CROA prohibits waiver of "any protection provided by or any right of the consumer under this subchapter." 15 U.S.C. § 1679f(a). But as the Third Circuit recognized, a plaintiff's *right to a judicial forum*, unlike the cause of action itself, "exist[s] outside of [the CROA]." *Gay*, 511 F.3d at 383 n.10. In other words, it is not a "protection provided by * * * this subchapter." 15 U.S.C. § 1679f(a). Rather, it is provided by the laws conferring and regulating the jurisdiction of the federal courts.

When Congress creates a new cause of action, it works against the background of 28 U.S.C. § 1331. This statute provides that "[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." It is this statute that empowers a plaintiff to bring his claims in federal court, because "federal courts have a 'virtually unflagging obligation' to exercise their jurisdiction." *Deakins* v. *Monaghan*, 484 U.S. 193, 203 (1988) (quoting *Colorado River Water Conservation Dist.* v. *United States*, 424 U.S. 800, 813 (1976)).

Because Congress obviously contemplated that federal courts would have jurisdiction over CROA claims, the statute's references to a "court" are not dispositive of any intent to preclude arbitration. See 15 U.S.C. § 1679g(a)(2)(A),(B) (referring to damages that "the court may allow"). If Congress were deemed to preclude arbitration whenever it contemplated that a claim *could* proceed in court, this Court's precedent would be turned on its head. Such a rule would require Congress to evince an affirmative intent *to allow* arbitration, because *all* federal claims may proceed in court. See *Gay*, 511 F.3d at 383 (noting that "identification of a court as a forum for an allegedly wronged party to seek relief adds nothing to the statute helpful to resolution of the issue before us"); see, *e.g.*, *McMahon*, 482 U.S. at 227 (statutory claim was arbitrable despite provision vesting jurisdiction in the "district courts of the United States").

In sum, for a CROA plaintiff, the only right to a *judicial* remedy comes from the background principles of 28 U.S.C. § 1331. That right is perfectly waivable because it is not a "protection provided by" or "right of the consumer under" the CROA. 15 U.S.C. § 1679f(a). Thus, the non-waiver provision of the CROA provides no impediment to an agreement to submit CROA claims to arbitration.

CONCLUSION

This Court has consistently honored the strong federal policy favoring arbitration, recognizing again and again that a claim is arbitrable unless Congress says otherwise. Both the outcome of this case below and the Ninth Circuit's approach to the issue of arbitrability of statutory claims are in conflict with this Court's precedent, as well as with Congress's en-

dorsement of arbitration. *Amicus* DRI urges this Court to reverse the decision below, preserving the settled expectations of countless parties to arbitration agreements.

Respectfully submitted.

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JUNE 2011