

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 OF *AMICUS CURIAE* CONSUMER DATA
INDUSTRY ASSOCIATION IN SUPPORT
OF PETITIONERS AND FOR REVERSAL
OF THE NINTH CIRCUIT'S JUDGMENT**

—◆—
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RULE 29.6 STATEMENT

Pursuant to Rule 29.6, the Consumer Data Industry Association (“CDIA”) provides the following disclosure.

CDIA is a trade association. No publicly held company owns 10% or more of CDIA stock.

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INTEREST OF *AMICUS CURIAE*

With the consent of all parties,¹ *amicus curiae*, the Consumer Data Industry Association (“CDIA”), submits its brief in support of petitioners, CompuCredit Corporation and Synovus Bank (*hereinafter*, collectively, “CompuCredit”).

CDIA is an international trade association, founded in 1906, and headquartered in Washington, D.C. As part of its mission to support companies offering consumer information products and services, CDIA establishes industry standards, provides business and professional education for its members, and produces educational materials for consumers describing consumer credit rights and the role of consumer reporting agencies in the marketplace. CDIA is the largest trade association of its kind in the world.

CDIA is vitally interested in the outcome of this appeal because the Ninth Circuit Court of Appeals’ (“Ninth Circuit”) decision undermines the

¹ The parties have filed blanket consent letters with the Court concerning the filing of *amicus* briefs. Therefore, under Rule 37.3(a), all parties have consented to the filing of CDIA’s *amicus* brief. CDIA understands that the parties’ blanket consent letters are on file with the Clerk of Court.

As required by Rule 37.6, CDIA states that 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 person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

enforceability of binding arbitration agreements and imposes unnecessary costs on CDIA's members in cases in which plaintiffs allege claims under the Credit Repair Organizations Act ("CROA") to avoid agreed-upon arbitration.

The court's decision directly impacts many of CDIA's members who provide credit-related information products and services (*e.g.*, credit monitoring) in interstate commerce and rely upon the enforceability of arbitration agreements subject to the Federal Arbitration Act ("FAA").



SUMMARY OF THE ARGUMENT

Left uncorrected, the Ninth Circuit's decision undermines the strong Congressional policy favoring arbitration that is expressed in the FAA. By misreading CROA's consumer notice requirement to provide consumers with a right to sue and interpreting that right to make courts the *exclusive* forum for consumers' CROA claims, the Ninth Circuit's decision prohibits the enforcement of written arbitration agreements if a plaintiff merely alleges a CROA violation. Because CROA's actual language does not preclude the waiver of court-based remedies through binding arbitration agreements, the Ninth Circuit's decision represents a return to the judicial hostility to arbitration that the FAA was enacted to overcome.

Many providers of credit-related education products and services, such as credit monitoring, rely

upon the enforceability of arbitration agreements to predictably manage their litigation costs. If those agreements cannot be enforced and if the providers must contend with the prospect of having to participate in court-based litigation to resolve consumer disputes, many providers may either exit the business or pass along the costs of these uncertainties to consumers through higher prices for their products and services. Because the federal government has recognized that the private sector is perhaps the most efficient provider of credit-related information products and services that promote consumer financial literacy,² the Ninth Circuit's decision will also harm the very consumers the Ninth Circuit purports to protect through its interpretation of CROA's anti-waiver provision.

To restore the strong federal policy favoring arbitration and to avoid the harm to consumers and to the providers of credit-related information products and services that will result from the Ninth Circuit's decision, this Court should reverse the Ninth Circuit's judgment.



² Federal Trade Commission, *Report to Congress Under Sections 318 and 319 of the Fair and Accurate Credit Transactions Act of 2003* (hereinafter, "FTC, Report to Congress") at 76-77 (Dec. 2004) available at <http://www.ftc.gov/reports/facta/041209factarpt.pdf>. *Id.* at 77.

ARGUMENT

Because the Ninth Circuit’s judgment undermines the enforceability of binding arbitration agreements relied upon by the providers of credit-related information products and services, such as credit monitoring, who rely upon the enforceability of such agreements, CDIA provides its separate brief to explain the impact of the Ninth Circuit’s decision upon businesses that have relied upon such agreements in providing valuable credit-related information products and services to consumers.

I. THE NINTH CIRCUIT’S JUDGMENT UNDERMINES THE EXPRESSED INTENT OF CONGRESS THAT ARBITRATION AGREEMENTS AFFECTING INTERSTATE COMMERCE BE ENFORCED.

This Court has described the “basic purpose” of the FAA³ as “overcom[ing] courts’ refusal to enforce agreements to arbitrate,” and Congress’ motivation for the FAA, as “first and foremost,” to change the courts’ anti-arbitration rule.⁴ More recently, this Court has made clear that: “The ‘principal purpose’

³ 9 U.S.C. § 2 (“A written provision in any . . . contract evidencing a transaction involving interstate commerce to settle by arbitration a controversy thereafter arising . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”).

⁴ *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 270-71 (1995).

of the FAA is to ‘ensur[e] that private arbitration agreements are enforced according to their terms.’”⁵ According to this Court, “in enacting the FAA, [Congress] took pains to utilize as much power as it could” under the Commerce Clause.⁶ When any federal court considers whether Congress intended to preclude arbitration, this Court explained that the court should keep in mind that “questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration.”⁷

The Ninth Circuit’s decision acknowledges that Congress “manifested a ‘liberal federal policy favoring arbitration agreements’” in the FAA,⁸ and that a party “should be held” to “the bargain to arbitrate” a dispute absent an “evinced” intention of Congress to preclude the waiver of court-based remedies.⁹ The court even recites this Court’s well-settled rule that the party opposing arbitration bears the burden “to show that Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue.”¹⁰

⁵ *AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740, 1748 (2011).

⁶ *Dobson*, 513 U.S. at 275.

⁷ *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (2000).

⁸ *Greenwood v. CompuCredit Corp.*, 615 F.3d 1204, 1207 (9th Cir. 2010).

⁹ *Id.* (quoting from *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)).

¹⁰ *Id.*

Despite the Ninth Circuit’s acknowledgment of the above interpretive principles, and its recognition that plaintiffs agreed in writing to submit their claims to arbitration,¹¹ the court nonetheless held that the parties’ arbitration agreement was void because the plaintiffs alleged CROA claims against CompuCredit.¹² For the court, plaintiffs overcame Congress’ strong policy favoring arbitration simply by alleging a CROA claim.¹³

The Ninth Circuit reached its conclusion after framing the dispositive issue in a way that could lead only to a result that is contrary to this Court’s FAA precedent and is unsupported by CROA’s actual language:

This appeal presents the question of whether the word “sue” as used in the Credit Repair Organization Act (“CROA”) means “arbitrate.” Or, perhaps the question is, as Alice put it: “whether you can make words mean many different things?”¹⁴

¹¹ 9 U.S.C. §§ 2, 3.

¹² *Greenwood*, 615 F.3d at 1210.

¹³ *Id.* Because neither the district court, nor the Ninth Circuit, reached the issue of whether CompuCredit was a credit repair organization subject to CROA, plaintiffs’ mere allegation of a CROA claim was sufficient for the Ninth Circuit to overcome Congress’ strong policy favoring arbitration as expressed in the FAA. *Id.* at 1208 n. 3.

¹⁴ *Id.* at 1205 (citing Lewis Carroll’s *Through the Looking Glass and What Alice Found There*).

The court’s errant holding necessarily followed: “We conclude that Congress meant what it said in using the term “sue,” and that it did not mean “arbitrate.”¹⁵

The Ninth Circuit’s decision represents the very “judicial hostility to arbitration agreements” that the FAA was intended to reverse.¹⁶ To avoid a result that the Ninth Circuit characterized as “unhealthy”¹⁷ – the compelled arbitration of the plaintiffs’ claims – the court undermined the Congressional policy favoring arbitration, ignored this Court’s decisions interpreting the FAA, and misinterpreted the language of CROA to create a new rule: courts are the exclusive forum for consumers’ CROA claims.

II. CROA DOES NOT PROHIBIT BINDING ARBITRATION AGREEMENTS.

This Court has explained that, to avoid compelled arbitration, the opponent must demonstrate that “Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue.”¹⁸ That intent must be “deducible” from the text of the statute, the legislative history, or from an inherent

¹⁵ *Id.*

¹⁶ *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 225 (1987).

¹⁷ *Greenwood*, 615 F.3d at 1211.

¹⁸ *McMahon*, 482 U.S. at 226-27.

conflict between arbitration and the statute's underlying purpose.¹⁹

Having concluded that the “plain language of the CROA prohibits enforcement of the arbitration agreement,” the Ninth Circuit did not consider CROA’s legislative history.²⁰ The “plain language” relied upon by the court was a single sentence found in the middle of a lengthy consumer notice required by CROA that is entitled “Consumer Credit File Rights Under State and Federal Law.”²¹ The relevant sentence informs consumers that: “You have a right to sue a credit repair organization that violates the Credit Repair Organizations Act.”²² The Ninth Circuit’s decision converts this notice language into a substantive “right” under CROA.²³ The court’s added gloss is that courts are the exclusive forum for the exercise of the consumer’s “right to sue” because CROA’s anti-waiver provision prohibits the waiver of any consumer protection or “right” provided by CROA.²⁴ For the Ninth Circuit, such a waiver occurs if a written arbitration agreement is enforced in a

¹⁹ *Id.*

²⁰ *Greenwood*, 615 F.3d at 1211 n. 4.

²¹ *See*, 15 U.S.C. § 1679c.

²² 15 U.S.C. § 1679c(a).

²³ *Greenwood*, 615 F.3d at 1210.

²⁴ *Id.* at 1209 (“The plain meaning of the ‘right to sue’ thus clearly involves the right to bring an action in a court of law.”).

lawsuit involving a consumer's CROA claim.²⁵ This Court reached a different conclusion in considering a similar issue:

By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum. It trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration. We must assume that if Congress intended the substantive protection afforded by a given statute to include protection against waiver of the right to a judicial forum, that intention will be deducible from text or legislative history. *See Wilko v. Swan*, [346 U.S. 427 (1953)]. 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.²⁶

CROA's plain language contradicts, rather than supports, the Ninth Circuit's decision. CROA's anti-waiver statute provides, in part, that:

²⁵ *Id.* at 1210 (“The extremely broad anti-waiver provision in the CROA protects the enumerated ‘right to sue’ by treating as ‘void [a]ny waiver by any consumer of any protection provided or *any right* of the consumer under [CROA].”) (emphasis in original).

²⁶ *Mitsubishi Motors*, 473 U.S. at 628.

Any waiver by any consumer of any protection provided by or *any right of the consumer* under this title –

- (1) *shall be treated as void; and*
- (2) *may not be enforced by any Federal or State court or any other person.*²⁷

The language of the anti-waiver provision (*i.e.*, “or any other person”) demonstrates that courts are not the *exclusive* forum for a consumer’s CROA claim because a person *other than* a Federal or State court – perhaps an arbitrator – may be called upon to consider the enforceability of an agreement under CROA’s anti-waiver provision, such as an agreement to arbitrate disputes. At a minimum, the “any other person” language of the anti-waiver provision was sufficient to create a doubt as to the scope of the arbitrable issue that this Court requires be resolved *in favor of*, and not against, arbitration.²⁸

By reading the language of CROA’s required consumer *notice* into the language of CROA’s anti-waiver provision, the Ninth Circuit found a Congressional “proclamation” – where none exists – that CROA prohibits arbitration.²⁹ In doing so, the Ninth Circuit acknowledged its creation of a conflict with two sister circuits, the Third Circuit Court of Appeals

²⁷ 15 U.S.C. § 1679f(a).

²⁸ *See, Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983).

²⁹ *Greenwood*, 615 F.3d at 1211.

(“Third Circuit”)³⁰ and the Eleventh Circuit Court of Appeals (“Eleventh Circuit”).³¹ According to the Ninth Circuit, her sister circuits’ decisions were unpersuasive because they “give surprisingly little regard to the ‘right to sue’ language” in CROA.³²

CROA provides a mechanism by which consumers may recover from credit repair organizations that violate CROA, a mechanism found in CROA’s civil liability provision, not in the consumer notice provision.³³ Admittedly, the civil liability provision contemplates that a consumer may bring a CROA claim in a court.³⁴ It does not, however, make courts the *exclusive* forum in which CROA claims may be brought.³⁵ Because CROA’s actual language does not prohibit arbitration or make courts the exclusive forum for such claims, the Third and Eleventh Circuits had little trouble concluding that CROA’s anti-waiver provision does not prohibit the enforcement of arbitration agreements.³⁶

³⁰ *Gay v. CreditInform*, 511 F.3d 369 (3rd Cir. 2007).

³¹ *Picard v. Credit Solutions, Inc.*, 564 F.3d 1249 (11th Cir. 2009).

³² *Greenwood*, 615 F.3d at 1211.

³³ Compare 15 U.S.C. § 1679c(a) with § 1679g(a).

³⁴ 15 U.S.C. § 1679g(a)(2)&(b) (describing the court’s discretion to award punitive damages and the factors a court may consider when making such an award).

³⁵ See, 15 U.S.C. § 1679g(a)(1).

³⁶ *Picard*, 564 F.3d at 1255; *Gay*, 511 F.3d at 381-382.

Rather than give effect to the strong Congressional policy favoring arbitration by following this Court's admonition that "questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration," the Ninth Circuit turned the requirement on its head, concluding that to enforce an arbitration agreement under such circumstances, "strikes the court as embracing an *unhealthy* regard for the policy favoring arbitration."³⁷

III. THE NINTH CIRCUIT'S JUDICIAL HOSTILITY TO ARBITRATION WILL RESULT IN THE UNNECESSARY EXPENDITURE OF LITIGANT AND JUDICIAL RESOURCES.

For the Ninth Circuit, it is irrelevant whether or not a defendant is actually a credit repair organization.³⁸ The mere allegation of a CROA claim is sufficient to defeat a motion to compel arbitration.

Under the Ninth Circuit's approach to the enforcement of arbitration agreements, discovery could reveal facts upon which a defendant could rely in a summary judgment motion to establish that it is not

³⁷ *Greenwood*, 615 F.3d at 1211 (emphasis in original); see also, *Moses H. Cone Memorial Hosp.*, 460 U.S. at 24-25 ("any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration").

³⁸ *Greenwood*, 615 F.3d at 1208 n. 3 (acknowledging that the issue of whether CompuCredit is actually a credit repair organization subject to CROA's anti-waiver provision was never reached).

a credit repair organization. In such circumstances, CROA's anti-waiver provision, as interpreted by the Ninth Circuit, could not possibly apply to the parties' arbitration agreement because the court held that a consumer's "right to sue" exclusively in a court is found in the consumer notice provision.³⁹

If this Court does not reverse the Ninth Circuit's judgment, then if summary judgment were granted to a defendant on a plaintiff's CROA claim because the defendant established that it was not a credit repair organization, the district court that previously denied a defendant's motion to compel arbitration would, under the FAA, have to stay proceedings and compel the arbitration of the consumer's remaining claims at some distant future point in the litigation, perhaps after the close of discovery and shortly before trial. Such an approach is demonstrably at odds with the Congressional policy favoring arbitration set forth in the FAA. It is also inconsistent with this Court's views concerning the desirability of agreed-upon arbitration:

The point of affording parties discretion in designing arbitration processes is to allow for efficient, streamlined procedures tailored to the type of dispute. . . . And the informality of arbitral proceedings is itself desirable,

³⁹ 15 U.S.C. § 1679c ("You have the right to sue a *credit repair organization* that violates the Credit Repair Organizations Act.") (emphasis added).

reducing the cost and increasing the speed of dispute resolution.⁴⁰

Reversing “judicial hostility to arbitration agreements” was the purpose underlying the FAA.⁴¹ This Court should reverse the Ninth Circuit’s decision to further this goal. Further, as established in the petitioners’ brief, this Court’s reversal of the Ninth Circuit’s judgment is essential to permit the parties to lawsuits involving CROA claims to attempt to settle their disputes. Absent such a reversal, a CDIA member’s offer to settle a threatened or existing CROA claim could be an “attempt . . . to obtain a waiver from a consumer” of the “right to sue” found by the Ninth Circuit in the required consumer notice. Such an “attempt” could then subject the member attempting to settle the claim to civil liability under CROA.⁴²

Absent a reversal of the Ninth Circuit’s decision, the parties to lawsuits involving CROA claims may be prevented from settling such claims. Moreover, the courts considering such claims may be required to expend their limited resources to manage cases that, pursuant to the parties’ agreement should have been referred to arbitration.

⁴⁰ *Concepcion*, 131 S.Ct. at 1749 (citing, *14 Penn Plaza LLC v. Pyett*, 129 S.Ct. 1456 (2009)).

⁴¹ *McMahon*, 482 U.S. at 225.

⁴² 15 U.S.C. §§ 1679f(b), 1679g(a).

IV. THE NINTH CIRCUIT'S DECISION HARMS THE VERY CONSUMERS CROA WAS INTENDED TO PROTECT.

To provide consumers with the tools to protect themselves from the credit-related harm caused by credit fraud and identity theft, Congress amended the Fair Credit Reporting Act in 2003 to permit consumers to place fraud alerts in their consumer reporting agency files,⁴³ block the reporting of information resulting from identity theft,⁴⁴ and require consumer reporting agencies to provide a summary of identity theft victim rights to consumers who report identity theft.⁴⁵

The value and efficacy of these consumer protection tools depends upon the consumer's ability to obtain and understand credit-related information. Making this information available to consumers or even proactively informing consumers when a review of their consumer report file could be beneficial, is a role being filled by the private sector through the provision of credit-information products, including credit monitoring.

The Federal Trade Commission, which enforces CROA and the FCRA, explained that, as consumer financial literacy improves, consumers have begun to recognize the importance of consumer report

⁴³ 15 U.S.C. § 1681c-1.

⁴⁴ 15 U.S.C. § 1681c-2.

⁴⁵ 15 U.S.C. § 1681g(c).

information, and private sector providers have responded by making credit monitoring and related products and services available to consumers.⁴⁶ Today, there are dozens of such providers. Their products can include: (1) one or more periodically updated credit scores; (2) consumer reports throughout the year; (3) identity theft prevention materials; (4) periodic email, telephone, or mail updates concerning consumer report file activity; (5) access to proprietary credit education materials; and (6) a central location providing links to governmental and industry websites providing additional credit-related information.

The businesses providing consumers with credit-related products and services are able to charge affordable prices, in part, because arbitration agreements permit them to predictably manage their litigation costs for any disputes related to their products and services. If, as the Ninth Circuit has held, the mere allegation of a CROA claim is sufficient to void an arbitration agreement, the availability of credit information products and services could be reduced or even eliminated. It will almost certainly be more expensive for consumers.

CDIA submits that, properly read, CROA's consumer notice and anti-waiver provisions should not be interpreted in a way that will harm consumers by voiding arbitration agreements with the result that the credit-related products and services relied upon

⁴⁶ FTC, *Report to Congress* at 76-77.

by consumers may be eliminated or their cost increased.



CONCLUSION

For the reasons set forth above, the judgment of the Ninth Circuit Court of Appeals should be reversed.

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