

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 *AMICI CURIAE* OF AARP AND
NATIONAL SENIOR CITIZENS LAW CENTER
IN SUPPORT OF RESPONDENTS**

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STATEMENT OF INTEREST¹

AARP and the National Senior Citizens Law Center are organizations that represent the interests of older persons. This case involves consumer protection issues that are extremely important to seniors as users of credit. Although older people have long been considered among the most frugal and resistant to consumer debt, changing economic conditions — particularly declining pension and investment income and rising costs for basic expenses such as prescription drugs, health care, housing and utilities — have forced many older people to rely increasingly on credit to make ends meet. See Craig Copeland, *Debt of the Elderly and Near Elderly, 1992–2007*, 12, EBRI Notes, Vol. 30, No. 10 (Oct., 2010).

Such debt increasingly is becoming unaffordable for many older people. As older people struggle with higher medical bills and stagnant incomes, bankruptcy filings among people age 55 and older have risen sharply in recent years, with the greatest increases among those 75 and older (up 566.7% between 1991 and 2007) and those ages 65 to 74 (a 177.8% increase). Deborah Thorne, Elizabeth

¹ Pursuant to Supreme Court Rule 37.6, counsel for *amici* represent that no counsel for a party authored this brief in whole or in part and that none of the parties or their counsel, nor any other person or entity other than *amici*, its members or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of *amicus* briefs and have filed letters reflecting their blanket consent with the Clerk.

Warren, & Teresa A. Sullivan, *Generation of Struggle*, 1, AARP Pub. Pol. Inst. (June, 2008), available at http://assets.aarp.org/rgcenter/consume/2008_11_debt.pdf. The age group experiencing the sharpest increase in bankruptcy filings in the period between 1991 and 2007 is the 50 and older group. *Id.* Health concerns triggered the majority of bankruptcies filed by older people (62.1% in 2007). David U. Himmelstein, MD, Deborah Thorne, PhD, Elizabeth Warren, JD, Steffie Woolhandler, MD, MPH, et al., *Medical Bankruptcy in the United States, 2007*, 122 Am. J. Med. 741, 743 (2009), available at http://pnhp.org/new_bankruptcy_study/Bankruptcy-2009.pdf.

Moreover, the value of assets available to sustain older people in their retirement has plummeted in recent years. Consumers are estimated to have lost about \$2 trillion of their retirement assets, or 22 percent of their nominal value, in the recent economic recession. See *In Focus: Older Americans and the Recession*, AARP Pub. Pol. Inst. (July, 2009), http://www.aarp.org/money/budgeting-saving/info-11-2008/Older_Americans_and_the_Recession.html. Nearly 30% of people facing foreclosure in 2007 were over age 50. See Allison Shelton, *A First Look at Older Americans and the Mortgage Crisis 2*, AARP Pub. Pol. Inst. (2009), available at http://assets.aarp.org/rgcenter/econ/i9_mortgage.pdf.

While older people increasingly are using credit, they tend to have low levels of financial literacy and are less familiar than are other age

groups with the vast array of complex financial products and services offered in an increasingly global and technology-driven economy. For example, older people are less knowledgeable about their credit scores than most other age groups. See U.S. Gov't Accountability Office, *CREDIT REPORTING LITERACY, Consumers Understood the Basics but Could Benefit from Targeted Educational Efforts*, 39, GAO 05-223 (March, 2005). Only 17 percent of older people, compared with 33 to 48 percent of those in all other age groups, had obtained their credit scores, and people over age 65 were less likely to say that they should check their credit reports from time to time for possible errors than all other age groups. *Id.*

Because older adults may have poor physical or emotional health and/or impaired mobility, they are highly susceptible to financial fraud and abuse. Some elders may not have the full capacity to make financial decisions due to the progression of dementias such as Alzheimer's disease. See The MetLife Study of Elder Financial Abuse, *Crimes of Occasion, Desperation, and Predation Against America's Elders*, 22 (June, 2011). Many older persons fear that they will lose their independence if anyone finds out that they may have reduced ability to manage their finances. As a result, even if they understand they have been a victim of a scam, they may not report it. See FBI, *Fraud Target: Senior Citizens*, <http://www.fbi.gov/scams-safety/fraud/seniors>. Financial insecurity and low levels of financial literacy make older people particularly

vulnerable to credit repair scams and other deceptive and misleading practices.

Older consumers suffer serious financial harm as a result of fraud and financial abuse, losing \$2.9 billion every year. MetLife Study, at 2. The fraudulent tactics of credit repair services in particular continue to be a top concern for both consumers and enforcement agencies. For example, in 2008 the Federal Trade Commission (FTC) settled for \$114 million an enforcement action arising under the Credit Repair Organizations Act, 15 U.S.C. § 1679, with Compucredit and Jefferson Capital that raised claims and alleged facts similar to those in the instant case. *See FTC v. CompuCredit Corp. and Jefferson Capital Systems, LLC*, No. 1:08-CV-1976-BBM-RGV (N.D. Ga. 2008); *see also 2010 Consumer Complaint Survey Report*, Consumer Federation of America, National Association of Consumer Agency Administrators, and North American Consumer Protection Investigators, 1 (July 27, 2011). The harm older people suffer as a result of such fraud is particularly devastating, because they often have insufficient resources to provide for their basic necessities through their retirement. Some report that they fear running out of money more than they fear dying. *See Carol Fleck, Running Out of Money Worse Than Death, Older Americans' greater fear is outlasting their savings, poll reports*, AARP Bulletin, (July 1, 2010), *available at* http://www.aarp.org/work/retirement-planning/info-06-2010/running_out_of_money_worse_than_death.html.

AARP is a non-partisan, non-profit organization representing the interests of people aged 50 and older. A major priority for AARP is to assist Americans in accumulating and effectively managing adequate retirement assets. A key to achieving this goal is helping individuals better manage financial decisions and protecting consumers from financial fraud and abuse that can erode retirement savings and financial assets. Additionally, AARP seeks to ensure that appropriate and adequate redress is available to consumers injured by misleading and deceptive practices.

The National Senior Citizens Law Center (NSCLC) is a non-profit organization whose principal mission is to protect the rights of low income older adults. For more than 35 years, NSCLC has sought to ensure the health and economic security of older persons with limited income and resources, through advocacy, litigation, and the education and counseling of local advocates. NSCLC's *Federal Rights Project* works to ensure that people retain the right to enforce basic guarantees to health care, economic security and civil rights.

SUMMARY OF ARGUMENT

A bad credit report jeopardizes access to credit as well as the availability of employment, insurance, and rental housing. Unscrupulous credit repair organizations preyed on consumers with bad credit, promising a quick fix for a high cash price. They falsely advertised that adverse information in credit

reports could be deleted, regardless of the accuracy of the negative information.

Passage of the Credit Repair Organizations Act (CROA), Pub. L. No. 104-208, 110 Stat. 3009-455 (1996) (codified at 15 U.S.C. 1679-1679i) was prompted by Congressional outrage at credit repair organizations bilking millions of dollars from financially stressed consumers, who were inexperienced in using credit, with false promises to remove negative credit histories. Congress sought to protect consumers from such misleading promises by arming them with accurate information regarding their credit reporting rights and their rights under the CROA.

The Petitioners in this case, as well as the dissent below, argue that consumers do not have a “right to sue,” even though the CROA unquestionably mandates that credit repair organizations give consumers a notice informing them that they have a “right to sue” those who violate the law. 15 U.S.C. § 1679c(a). The argument that Congress required credit repair organization to provide an inaccurate notice to consumers is baseless and contrary to well established canons of statutory construction. The statutory purpose of protecting consumers from inaccurate information is served only if the CROA is interpreted as granting a right to sue.

This Court has long recognized that notice and hearing rights are interconnected such that the right to sue has little value and cannot be enjoyed

without notice of this right. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950); *Baldwin v. Hale*, 68 U.S. 223, 233 (1863). The Court also has emphasized the importance of the accuracy of notice, requiring the “best possible” notice to “describe the plaintiffs’ rights.” *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985). A mandated notice of consumers’ rights thus denotes that such rights exist.

Basic principles of statutory construction require rejecting an interpretation of the statute that produces the absurd result of mandating a “disclosure” notice that lies. Such an interpretation would effectively emasculate the requirement to accurately inform consumers of their rights, including their right to sue. Congress clearly did not intend such an “unreasonable result.” *Brown v. Plata*, 131 S. Ct. 1910, 1931 (2011).

Moreover, the legislative history shows that the inclusion of the “right to sue” in the disclosure section was intended to “strengthen” the protection of consumers under the act. *Credit Repair Organizations Act: Hearing on H.R. 458 Before the Subcomm. on Consumer Affairs and Coinage of the Comm. on Banking, Finance and Urban Affairs*, 100th Cong. 2nd Sess., at 171, 173 (1988). The legislative history further indicates that Congress believed that the disclosures to consumers listed actual rights. S. REP. NO 103-209, at 7 (1993). Finally, the larger context of the Consumer Credit Protection Act, of which the CROA is a part, demonstrates the importance to Congress of accurate

disclosures to consumers. In this context, it is clear that Congress intended to impart to consumers a right to sue.

ARGUMENT

I. Congress Sought To Protect Unsophisticated Consumers By Providing Meaningful, Accurate Information-Based Disclosures Designed To Help Them Manage Their Credit

Congress enacted the Credit Repair Organizations Act, (CROA), Pub. L. No. 104-208, 110 Stat. 3009-455 (1996) (codified at 15 U.S.C. 1679-1679i), in the context of a series of consumer protection efforts that were also designed to strengthen the economic markets. Consumer Credit Protection Act, 15 U.S.C. §§ 1601-1693r. These efforts focused in part on providing meaningful, accurate information-based disclosures to consumers to ensure that they have the information they need to understand and manage credit.

The use of information-based disclosures to protect consumers is appealing to both policymakers and economists for several reasons:

First, information-based regulation is compatible with market forces, requiring product information to be made available in a standardized fashion without dictating how the product should be priced. Second,

disclosure-focused regulation can provide consumers information that may otherwise be missing or unclear based on product advertisement, helping them avoid unsound credit decisions. Third, disclosure regulation is unlikely to interfere with product innovation, as it does not regulate any specific product attributes. Fourth, information-based protections are easily layered on top of existing regulatory regimes, such as state interest-rate or fee caps, because they do not generally create compliance conflicts. Finally, policymakers perceive information-based protections as less costly than direct regulation.

Mark Furletti, *Federal Consumer Protection Regulation: Disclosures and Beyond*, 5, Fed. Res. Bank Of Phil. (June 10, 2005). To achieve the interrelated goals of protecting consumers and fostering strong financial markets, such disclosures must be accurate and meaningful to the unsophisticated consumers who are the intended recipients. Otherwise they are not effective and fail to protect either the consumer or the markets as intended.

In passing the CROA, Congress sought to provide financially stressed, unsophisticated consumers of credit with the information they need to better understand their credit reporting and CROA rights so they could avoid financially harmful

deceptive and misleading practices. Congress also explicitly provided consumers a disclosure informing them, *inter alia*, they have a “right to sue” those who violate the law. 15 U.S.C. § 1679(a).

This Court should hold that the disclosures Congress mandated are meaningful and accurate: they inform consumers of a right to sue for violations of the CROA.

A. Deceptive And Misleading Practices by Credit Repair Organizations Bilk Million Of Dollars From Consumers Who Are Inexperienced With Credit and Uninformed Of Their Rights

The importance of credit to the American economy is hard to exaggerate.² With the enactment in 1968 of the Truth in Lending Act (TILA), 15 U.S.C. §§ 1601–1667f, Congress recognized that “[c]onsumer credit has become an essential feature of the American way of life.” H.R. REP. NO. 90-1040, at 3 (1967), *reprinted in* 1968 U.S.C.C.A.N. 1962, 1965. Congress found that the proper functioning of the

² Levels of outstanding consumer credit demonstrate this importance. As of January, 1968, consumers had borrowed \$1.4 billion. Fed. Res. Stat. Rel., *Consumer Credit Historical Data*, http://www.federalreserve.gov/releases/g19/hist/cc_hist_r.txt. By June, 2011, outstanding consumer credit rose to \$2.47 trillion, down from its historical high of \$2.56 trillion in 2008. Fed. Res. Stat. Rel., G. 19, *Consumer Credit Outstanding* (Aug. 5, 2011), <http://www.federalreserve.gov/releases/g19/Current/>.

banking system depends on well informed consumers, and well informed consumers need “meaningful disclosures.” 15 U.S.C. § 1601(a). Specifically, Congress declared:

economic stabilization would be enhanced and the competition among the various financial institutions and other firms engaged in the extension of consumer credit would be strengthened by the informed use of credit. The informed use of credit results from an awareness of the cost thereof by consumers.

Id.

Increased demand for consumer credit led to increased reliance by lenders and others upon credit reports supplied by Credit Reporting Agencies (CRAs).³ Credit reports detailing personal credit histories and the credit scores⁴ derived from these

³ CRAs are private sector companies that receive information from businesses that offer credit and from other sources and compile this information into credit reports that are sold for a fee to consumers and other businesses. The U.S. credit reporting system is voluntary, as federal law does not require lenders and other creditors to report to CRAs. Creditors may report consumer information to one, all, or none of the CRAs, and information on individual consumers may differ among the three agencies.

⁴ The most prominent credit score model is that of the Fair Isaac Corporation (FICO). FICO credit scores range from the best score of 850 to the lowest score of 300. The score is calculated by factoring in five categories of information: 35%

reports became a prerequisite to every application for credit.

Because credit history scores can be used to measure credit risk, creditors use them, along with other measures of creditworthiness, such as collateral, income, and employment information, to determine whether to extend credit and, if so, on what terms. Credit history scores are closely aligned with the interest rates offered on loans—that is, higher scores are associated with lower interest rates.⁵

Robert B. Avery, Paul S. Calem, and Glenn B. Canner, *Credit Report Accuracy and Access to Credit* 304, Fed. Res. Bul. (Sum. 2004). See 15 U.S.C. § 1681(a)(2)–(3) (finding “An elaborate mechanism has

payment history, 30% amounts owed, 15% length of credit history, 10% new credit, and 10% types of credit used. See FICO, *How Your FICO Credit Score is Calculated*, myfico.com, <http://www.myfico.com/crediteducation/whatsinyourscore.aspx>.

⁵ An example provided by FICO demonstrates the harmful impact on a consumer of a lower compared to a higher credit score: “Take the example of borrowing \$230,000 on a 30-year mortgage. A borrower with a FICO® Score of 760 could pay \$221 less each month in interest as compared to a borrower with a FICO® Score of 630. That’s a savings of \$79,560 over the life of the loan. On a \$20,000, 48-month auto loan, the borrower with a FICO® Score of 720 could pay \$136 less each month in interest as compared to a borrower with a FICO® Score of 580. That’s a savings of \$6,528 over the life of the loan.” FICO, scoreinfo.org, <http://www.scoreinfo.org/FICO-Scores/How-FICO-Scores-Help.aspx>.

been developed for investigating and evaluating the credit worthiness, credit standing, credit capacity, character, and general reputation of consumers. Consumer reporting agencies have assumed a vital role in assembling and evaluating consumer credit and other information on consumers.”).

Credit quickly became “the lifeblood of the American consumer society.” *See* 136 CONG. REC. H5325-02 (1990) (statement of Rep. Annunzio). Credit scores came to permeate every facet of a consumer’s life, affecting not only lending decisions but also an individuals’ ability to obtain employment, insurance, and rental housing. “A poor credit history” aptly has been described as “the ‘Scarlet Letter’ of 20th Century America. Consumers with bad credit histories can find it impossible to borrow to buy a car, purchase a home, or even . . . to rent an apartment.” *Id.*

Due to lenders’ reliance on credit reports to evaluate pricing of credit based on the risk of nonpayment, *see* Pub. L. No. 108-159 § 311, an inaccurate or unfavorable credit report is potentially devastating to consumers. In 1970, Congress enacted the Fair Credit Reporting Act (FCRA), Pub. L. No. 91-508, 84 Stat. 1136 (1970) (codified as amended at 15 U.S.C. 1681-1681t), “to insure that consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer’s right to privacy.” 15 U.S.C. § 1681(a)(4). The FCRA sought to regulate consumer reporting agencies to ensure the accuracy of the information contained in a credit report and

provided consumers with the right to dispute and remove incorrect information about their credit history. The FCRA also provides that negative but accurate information cannot be removed from a credit report until the time specified has lapsed (generally, seven years after the event occurred, ten years for bankruptcy). 15 U.S.C. § 1681c.

Although designed to combat “unfair credit reporting methods,” and to “ensure accuracy,” *id.* at §1681(a)(1), the FCRA also enabled the emergence of opportunistic credit repair organizations (CROs) which took advantage of the FCRA dispute resolution procedures. CROs targeted consumers with poor credit, falsely claiming “through advertisements and oral representations . . . that adverse information in their consumer reports can be deleted or modified regardless of its accuracy.” H.R. REP. NO. 103-486, at 63; 134 CONG. REC. H6707 (1988); *see also FTC v. Gill*, 265 F.3d 944, 951 (9th Cir. 2001) (describing advertisement claiming “there literally is nothing a consumer can possibly have on a credit report that we cannot remove and we can remove it legally.”).

Being unaware that negative information cannot be removed from their credit histories, and in light of the damaging effect of a negative credit report, consumers were highly vulnerable to such advertisements. Legislation was “critically needed” to help protect consumers from CROs who “prey[ed] on consumers whose dreams of a better life and desperate situation [made] them susceptible to the false promises of unscrupulous credit repair

operators.” 136 CONG. REC. H5325-02 (statement of Rep. Annunzio); *see* 134 CONG. REC. H6707 (statement of Rep. Annunzio).

CROs removed accurate and inaccurate information in a variety of ways. For example, they:

- Advised individuals to create new credit histories by obtaining new employee numbers from the IRS. *See* Press Release, *Credit Repair? Buyer Beware! FTC, States Announce Crackdown on Scams That Bilk Consumers*, 2, Fed. Trade Comm. (March 5, 1998).
- Negotiated with creditors by offering partial payment in return for the removal of negative credit information from their clients’ credit reports. *Id.*
- “[I]nundat[ed] consumer reporting agencies with so many challenges to consumer reports that the reinvestigation system breaks down, and the adverse, but accurate, information is deleted.”⁶ H.R. REP. NO. 103-486, at 57.

“Credit repair organizations h[e]ld out the promise of a quick credit fix at a high cash price.”

⁶ This tactic was enabled by the FCRA requirement that upon receipt of a dispute, a CRA has 30 days to “reinvestigate free of charge and record the current status of the disputed information, or delete the item from the file[.]” 15 U.S.C. § 1681i(a)(1)(A). CROs would inundate agencies with a high volume of disputes in order to overwhelm the CRA and prevent timely investigations, thereby forcing negative but accurate items to be deleted.

136 CONG. REC. H5325-02 (statement of Rep. Annunzio). Such tactics did not improve a consumer's credit report, however, because accurate information would reappear once the creditor certified that the disputed information was accurate. *See* 15 U.S.C. § 1681i(a)(5)(A). Already struggling consumers suffered significant financial harm because they paid high fees upfront, while CROs provided them no assistance. "Fraudulent companies that [led] consumers to believe that the companies can 'repair' bad credit histories [] bilked consumers of millions of dollars." S. REP. NO. 103-209, at 7 (1993); *See* 134 CONG. REC. H6707 (statement of Rep. Annunzio) (describing credit repair abuse in which 9000 people lost \$2 million from CRO that charged customers up to \$2000 in exchange for a promise to remove unfavorable credit information from the individual's files, but did nothing to clear the clients' credit histories or extend their available credit).

CROs often charged high fees disguised as payment plans to consumers already in dire financial straits for services that were never provided. Consumers faced difficulty when they tried to cancel or discontinue these services and get their money back. *See In re Nat'l Credit Mgmt. Group*, 21 F. Supp. 2d 424, 435 n.22 (D. N.J. 1998) (describing CRO use of a "phone check" to repeatedly debit client accounts).

The disruptive tactics of the CROs not only harmed consumers but also jeopardized the ability of CRAs to carry out their "grave responsibilities" of

providing fair, accurate credit information, 15 U.S.C. § 1681(a)(4), by “causing credit bureaus to waste time and money on spurious disputes.” 140 CONG. REC. S5028 (1994) (statement of Sen. Reigle). In response to CRO tactics, credit bureaus began to refuse CRO dispute letters by categorizing them as frivolous or irrelevant, or by refusing to investigate on the grounds of consumer privacy, and consumers increasingly complained of significant inaccuracies in the credit reporting system. *See id.* (noting “As the industry has grown, the number of problems associated with consumer reports has also escalated. From 1990 to 1993, the Federal Trade Commission received more complaints regarding credit reporting than any other industry. Evidence presented before the Banking Committee indicates that all too many consumers have been denied credit, housing, and even employment due to errors in their credit reports.”).

In response to consumer complaints about inaccuracies and other problems with CRAs, Congress amended the FCRA. Consumer Credit Reporting Reform Act of 1996, Pub. L. No. 104-208, Div. A, Title II, Subtitle D; *see* 136 CONG. REC. H5325-02 (statement of Rep. Annunzio). Congress also addressed the deceptive practices used to prey upon financially stressed consumers who were inexperienced with their credit reporting rights by enacting the CROA.

B. The CROA Was Enacted To Provide Accurate Information To Protect Financially Stressed Consumers Who Are Inexperienced With Credit

Congress designed the CROA both to prohibit specific deceptive and misleading practices and to ensure that a financially stressed consumer has the information necessary to avoid being vulnerable to false and misleading representations about the ability to remove negative information from a credit report.⁷ Congress expressed concern especially for those of limited economic means who are inexperienced in credit matters, finding they would be the most prone to having poor credit scores and at greatest risk for being taken advantage of.⁸ 15 U.S.C. § 1679(a).

Congress required CROs to provide an explicit written disclosure to consumers entitled, “Consumer

⁷ See Respondent’s Br. at 2 - 3 for a description of the specific requirements of the CROA.

⁸ Studies conducted to evaluate consumer knowledge of credit reporting supports the validity of this concern. See U.S. Gov’t Accountability Office, *CREDIT REPORTING LITERACY, Consumers Understood the Basics but Could Benefit from Targeted Educational Efforts*, 39, GAO 05-223 (March, 2005) (finding “most consumers did not fully understand their rights in the dispute process—for example, that there is no cost to dispute inaccurate information” and that “having less education, lower incomes, and less experience obtaining credit were associated with lower survey scores, while having certain types of credit experiences—such as an automobile loan or a mortgage—were associated with higher scores.”).

Credit File Rights Under State and Federal Law.” 15 U.S.C. § 1679c(a). This disclosure must be provided prior to the formation of an agreement in a document separate from the written contract for services. *Id.* It informs consumers of their rights under the FCRA to obtain their credit reports and to dispute erroneous information. *Id.* In addition, it prohibits any payment until services are fully performed, *id.* at § 1679b(b); requires a written contract for all services, *id.* at § 1679d; and informs consumers of the right to cancel the contract within three days. *Id.* at § 1679e. Finally, of particular relevance to this case, the mandated disclosure notice provides “[y]ou have the right to sue a credit repair organization that violates” the CROA. *Id.* at § 1679c(a). Failure of a CRO to provide the required disclosure is a violation of the CROA. *Id.*

The CROA-mandated disclosures were drafted by Congress to accurately inform consumers “inexperienced with credit” that negative information cannot be removed from a credit report, and of their rights under the CROA. 15 U.S.C. § 1679(a). They were designed to enable consumers to avoid bad actors who blatantly engage in deceptive practices, as well as those who cross the “fine line, in advertising and soliciting for credit counseling services to an unsophisticated audience of lower-income debtors, between promising future rewards for creditworthiness, and implying that existing bad credit records may be prematurely expunged.” *Zimmerman v. Cambridge Credit Counseling Corp.*, 529 F. Supp. 2d 254, 275 (D. Mass. 2008), *aff’d sub nom Zimmerman v. Puccio*, 2010

U.S. App. LEXIS 15315 (1st Cir. Mass., July 27, 2010).

C. Congress Took Deliberate Steps To Ensure Consumers Would Receive Accurate Information

Importantly, Congress did not permit CROs any discretion in drafting the language of the disclosure notice “so as to avoid possible obfuscation” by the very entities whose misleading and deceptive practices they were seeking to address. *Credit Repair Organizations Act: Hearing on H.R. 458 Before the Subcomm. on Consumer Affairs and Coinage of the Comm. on Banking, Finance and Urban Affairs*, 100th Cong. 2nd Sess. (1988) (letter from Daniel Oliver, Fed. Trade Comm. Chairman); see 15 U.S.C. § 1679(c). Nor did Congress permit CROs any flexibility to alter the language of the required disclosure. *Id.*; c.f. *Milavetz, Gallop & Milavetz, P.A. v. United States*, 130 S. Ct. 1324, 1341 (2010) (finding “flexibility to tailor the disclosures to its individual circumstances, as long as the resulting statements are ‘substantially similar’ to the statutory examples” only because such flexibility is permitted under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, 11 U.S.C. § 101(12A)). Indeed, courts have found that CROs violate the CROA by changing a provision of the mandated disclosure notice. See *In re Nat’l Credit Mgmt. Group*, 21 F. Supp. 2d at 458 (finding “[t]he right to cancel set forth in the Disclosure Agreement does not comply with Section 1679e because it fails to include the specific requisite language and

because it does not comply with minimal time allotments for cancellation.”).

In addition to making it a violation of the statute to fail to provide the required disclosure notice, Congress took steps to ensure the CROs would not be able to evade the requirements of the CROA by contract. Congress explicitly provided 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.” *Id.* § 1679f(a). Use of such “broad and emphatic language found in the legislative history shows that Congress understood what it was saying.” *United States v. James*, 478 U.S. 597, 608 (1986) (finding “[i]t is difficult to imagine broader language” in construing statute providing “[n]o liability of *any* kind shall attach to or rest upon the United States for *any* damage ... at *any* place.”).

Thus, Congress took significant steps to ensure the disclosure notice consumers received accurately informed them of their rights. Congress “[said] in [the] statute what it means and means in [the] statute what it says there.” *BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 183 (2004) (citing *Conn. Nat’l Bank v. Germain*, 503 U.S. 249, 253-54 (1992)).

II. The CROA Provides Consumers Not Only With The Right To A Disclosure Notice That Lists The Right To Sue But Also With The Right To Sue

Among the rights about which Congress sought to inform consumers by including it in the disclosure notice is the “right to sue a credit repair organization that violates” the CROA. 15 U.S.C. § 1679c(a). While the liability provision of the CROA, 15 U.S.C. § 1679g, creates the private right of action, *see* Respondent’s Br. at 16-17, the disclosure provision strengthens that liability by informing consumers of their “right to sue.”

The view of judges who have advocated that consumers do not have a right to sue under the CROA cannot be squared with the statute. *Greenwood v. CompuCredit Corp.*, 615 F.3d 1204, 1215 (9th Cir. 2010) (Tashima, J., dissenting); *Rex v. CSA-Credit Solutions of America, Inc.*, 507 F.Supp.2d 788, 799 (W.D. Mich. 2007). Under such reasoning, Congress intended to provide consumers with a “disclosure” notice that would deceive them, misinforming them that they have a right they do not actually possess.

This Court should reject an approach to statutory construction which posits congressional intent to require credit repair organizations to lie to consumers about their rights. Notice could not possibly serve its intended function of informing consumers of their rights if the rights listed on the notice do not exist. Interpreting the CROA as

providing an actual right to sue as opposed to merely a piece of paper with misinformation is consistent with (1) analogous precedent establishing that the right to a hearing is coextensive with the right to notice, (2) this Court's mandate to avoid an absurd result when interpreting statutes, (3) the CROA's purpose and legislative history and (4) interpretations of other statutes within the larger scheme of the Consumer Credit Protection Act, of which the CROA is a part, that require accurate disclosure notices.

A. Because Notice And Hearing Rights Are Interconnected, The Right To Notice Indicates That Consumers Have A Right To Sue

This Court has long recognized that the right to a hearing is intertwined with the right to notice. In *Baldwin v. Hale*, 68 U.S. 223 (1863), this Court stated:

Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified. Common justice requires that no man shall be condemned in his person or property without notice and an opportunity to make his defence.

68 U.S. at 233. The right to a hearing cannot be "enjoyed" without notice of that right. As this Court explained, the "right to be heard has little reality or

worth unless one is informed” of this right. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). Notice is an integral part of the right to a hearing. Reliance upon “the vagaries of ‘word of mouth’ referral” to inform people of the availability of a hearing is insufficient to provide an opportunity to be heard. *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 14 n.14 (1978). As the Second Circuit reasoned, “in the absence of effective notice, the other due process rights afforded a benefits claimant - such as the right to a timely hearing - are rendered fundamentally hollow.” *Kapps v. Wing*, 404 F.3d 105, 124 (2d Cir. 2005). Thus, the right to a hearing is actualized by the right to a notice of that hearing.

“For more than a century, the central meaning of procedural due process” has been that notice is required to fulfill the right to a hearing. *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972). The “requirement of notice and an opportunity to be heard,” in combination, “guarantees” a fair decision making process and protects “against arbitrary deprivation of property.” *Id.* at 81. The Court’s “procedural due process cases have consistently observed” that notice and an opportunity for a hearing “are among the most important procedural mechanisms for purposes of avoiding erroneous deprivations.” *Wilkinson v. Austin*, 545 U.S. 209, 226 (2005). This Court’s jurisprudence has viewed the right to a hearing as dependent upon the notice right.

The purpose of notice is not simply to supply a piece of paper, but rather to inform individuals of rights they possess. “The purpose of notice under the Due Process Clause is to apprise the affected individual of, and permit adequate preparation for, an impending ‘hearing.’” *Memphis Light, Gas & Water Div.*, 436 U.S. at 14-15. As this Court recently stated, Due Process requires notice “reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” *United Student Aid Funds, Inc. v. Espinosa*, 130 S. Ct. 1367, 1378 (2010) (citing *Mullane*, 339 U.S. at 314). Notice serves an important function of enabling individuals to prepare for a hearing. The right to notice is not an empty right to information about a hearing that is unavailable or rights that do not exist.

Additionally, this Court has stressed the importance of the accuracy of notice of hearing rights. Far from accepting misleading or deceptive notices, this Court has held that Due Process requires “timely and accurate notice,” including a detailed explanation. *Goldberg v. Kelly*, 397 U.S. 254, 267 (1970). Such notice must be provided “at a meaningful time and in a meaningful manner.” *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965); accord *Matthews v. Eldridge*, 424 U.S. 319, 333 (1976). The notice “must be the best practicable,” and it is the role of notice to “describe...the plaintiffs’ rights.” *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985). The requirement to provide the best practicable notice cannot be fulfilled by supplying

inaccurate information, but rather, must truthfully list those rights.

Thus, the CROA's requirement to provide notice of rights clearly indicates that those rights exist. A useful analogy is the right to opt out of a class action supplied by the notice provision in the federal rules. Fed. R. Civ. P. 23(c)(2)(B) requires notice to members of (b)(3) class actions informing members that "the court will exclude from the class any member who requests exclusion." There is no other provision in the rules separately stating that class members have a right to be excluded from the class. The right to opt out is created entirely by the notice provision. Relying solely on the notice provision, this Court recently stated that in (b)(3) actions, "class members are entitled to receive the 'best notice that is practicable under the circumstances' *and to withdraw from the class.*" *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2558 (2011) (citing Fed. R. Civ. P. 23(c)(2)(B) (emphasis added)). Thus, the notice requirement in the rules not only discloses the right to opt out of the class, but also provides the right to do so. The CROA mandate to provide a notice of a right to sue similarly reflects actual rights the consumer has.

While the instant case involves statutorily required notice instead of constitutionally mandated notice or a notice requirement of the federal rules, this Court's exposition of the interconnection between hearing and notice rights is controlling precedent. The right to notice is necessary to truly provide a right to sue. Therefore, the requirement to

disclose the right to sue clearly strengthens—and cannot possibly destroy—the entitlement to sue.

B. An Interpretation Of The CROA That It Requires A “Disclosure” To Misinform A Consumer About Statutory Rights Produces An Absurd Result That Is Contrary To This Court’s Approach To Statutory Construction

The reasoning of the Ninth Circuit dissent—that the statutory requirement to provide a “disclosure” of the right to sue does not impart a right to sue—would produce a nonsensical interpretation of statutory law. The Ninth Circuit majority aptly called this “playing Humpty Dumpty with the statute.” *Greenwood*, 615 F.3d at 1209.

This Court has cautioned repeatedly against an illogical approach to statutory interpretation, stating, “Statutes should be interpreted to avoid untenable distinctions and unreasonable results whenever possible.” *American Tobacco Co. v. Patterson*, 456 U.S. 63, 71 (1982). This past term, this Court likewise concluded that “Congress did not require [an] unreasonable result.” *Brown v. Plata*, 131 S. Ct. 1910, 1931 (2011). Thus, there is no basis for interpreting the CROA to produce the absurd result of requiring a “disclosure” notice that deceives consumers. *Cf. Milavetz*, 130 S. Ct. at 1324 (2010) (rejecting expansive reading of bankruptcy statute that would produce absurd result).

Interpretation of 15 U.S.C. § 1679c(a) as requiring a notice of a right to sue but no actual right to sue would effectively emasculate the provision. This Court has consistently refused to approach statutory construction in a manner that renders statutory provisions a “dead letter.” *Ricci v. DeStefano*, 129 U.S. 2658, 2674 (2009); *U.S. v. Atlantic Research Corp.*, 551 U.S. 128, 137 (2007); *Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498, 514 (1990). A law should not be interpreted “to destroy itself;” on the contrary, statutory provisions should be interpreted to serve their “manifest purpose.” *Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 446 (1907). This is “an elementary rule of [statutory] construction.” *Citizens Bank of Maryland v. Strumpf*, 516 U.S. 16, 20 (1995). “Interpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis.” *Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 486 (2006).

This Court’s precedents informed Congress that the right to a hearing is intertwined with the right to notice of that hearing. Congress is presumed to be “aware of relevant judicial precedent.” *Merck & Co., Inc. v. Reynolds*, 130 S.Ct. 1784, 1795 (2010); accord *North Star Steel Co. v. Thomas*, 515 U.S. 29, 34 (1995). In passing the CROA in 1996, Congress understood that a right to sue articulated within a required disclosure notice comported entirely with the Court’s repeated exhortations that the mechanism for actualizing a right to a hearing is the provision of notice. An

interpretation of the statute to eviscerate the right to sue based on its inclusion in the list of required disclosures is simply absurd.

C. The Purpose And Legislative History Of CROA Establish That Congress Intended To Confer A Right To Sue, Not A Right To A Piece Of Paper With Misinformation

An interpretation of the CROA that it confers only a right to inaccurate information and not a right to sue is contrary to both the purpose and the legislative history of the statute. The CROA states that its purpose is: “to protect the public from unfair or deceptive advertising and business practices by credit repair organizations,” as well as “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.” 15 U.S.C. § 1679(b). Clearly, the public cannot be protected from deception and make informed decisions if credit repair organizations supply an *inaccurate* statement that individuals have a right to sue. The CROA’s objectives of preventing deception and ensuring the provision of all information needed to make informed decisions plainly demonstrate that Congress did not intend the notice of a right to sue to deceive consumers.

The legislative history provides further support that Congress intended to create a right to

sue, not to confer a right to a misleading piece of paper. While the CROA was enacted by Congress in 1996, hearings on the bill began in 1988. *See Credit Repair Organizations Act: Hearing on H.R. 458*. Representative Frank Annunzio opened the hearing by stating, “[C]redit repair clinics pose a threat to consumers who can least afford it...They prey on consumers.” *Id.* at 1-2. Thus, the drafters of the CROA were seeking to protect consumers, not to mislead them.

As initially drafted, the right to sue was not required to be disclosed, but was listed in separate sections regarding liability and jurisdiction. *Id.* at 153. In a hearing on the 1988 draft, the bill was criticized for failing to require a disclosure of the right to sue. Daniel Oliver, the Chairman of the FTC, sent a letter to the committee recommending that “the proposed legislation . . . be strengthened.” *Id.* at 171, 173. He urged that “to be most effective, any required disclosures be conveyed. . . in simple, non-technical language.” *Id.* at 175. Oliver suggested that the rights disclosed to the consumer include the following: “You have the right to sue a credit repair or credit improvement company that violates the Credit Repair Organizations Act.” *Id.* This legislative history demonstrates that the requirement to disclose the right to sue was intended to bolster—not detract from—the right to sue by ensuring consumers understand they have this important right.

The CROA was re-introduced as part of the Consumer Reporting Reform Act of 1994, which

would have amended the Fair Credit Reporting Act. In both the House and Senate versions of the bill, the right to sue was located in the disclosure section of the bill. H.R. 1015, 103rd Cong. § 201 (1994); S. 783, 103rd Cong. § 201 (1994). This reflects the influence of the FTC's recommendation that the bill be strengthened by incorporating the "right to sue" in the disclosure section. The Senate report includes the following explanation of the disclosure section: "the Committee bill requires credit repair organizations to provide disclosures to consumers that indicate the consumers' rights under the FCRA and under Title II of the Committee bill before signing any contract." S. REP. NO 103-209, at 7 (1993). Thus, this statement in the legislative history clearly demonstrates congressional intent to disclose to consumers rights they actually have under the CROA and that Congress understood that the disclosures to consumers listed actual rights.

The 1994 House and Senate versions of the bill both contained the identical disclosure requirement of the right to sue, but differed in other ways. H.R. 1015, 103rd Cong. § 201 (1994); S. 783, 103rd Cong. § 201 (1994). These versions were not reconciled, and so the 1994 bill was not enacted. *See id.* But the bill which became law in 1996 contained the same disclosure requirements as those in the 1994 bill. *See Omnibus Consolidated Appropriations Act, 1997.* There was no further discussion of the disclosure requirement of the right to sue in the legislative history of the 1996 legislation. *See H.R. REP. NO. 104-863, at 466-70 (1996) (Conf. Rep.)* (reintroducing the same language of the disclosure

provision as the proposed 1994 legislation). Thus, the legislative history from the 1994 bill provides the explanation of congressional intent, showing that Congress mandated disclosure of the “right to sue” in order to strengthen that right.

In sum, the contention that the requirement to disclose the right to sue was intended to mislead consumers cannot be squared with the purpose of the CROA, which seeks to protect consumers from misinformation. In addition, the legislative history demonstrates that Congress believed that it had in fact created a right to sue, not a right to a deceptive notice. The 1993 Senate Report demonstrates that the placement of the right to sue in the notice section was intended to fortify—not eliminate—the right to sue.

D. The CROA Must Be Interpreted As Part Of A Larger Scheme Of Consumer Protection Statutes That Protect Consumers By Requiring Accurate Disclosure Notices

Interpretation of the CROA should be guided not only by the clear statutory language, as discussed, but also by Congress’s deep concern with protecting consumers who were vulnerable to deceptive and misleading practices because they did not have important information they needed to protect themselves. The Court ascribes to the statutory language its plain meaning, but “the meaning of statutory language, plain or not, depends on context.” *Holloway v. U.S.*, 526 U.S. 1, 7 (1999)

(quoting *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991)). “It is a fundamental canon of statutory construction that words of a statute must be read in their context and with a view to their place in the overall statutory scheme.” *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (quoting *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 809 (1989)).

The disclosure provisions of the CROA, including the right to notice of the right to sue, were enacted to serve Congress’s deep concern with protecting consumers who were vulnerable to deceptive and misleading practices because they did not have important information they needed to protect themselves from unscrupulous credit repair organizations. This overarching purpose could not be served, and indeed would be thoroughly undermined, if the notice Congress drafted is interpreted in such a way that it provides inaccurate and misleading information regarding consumers’ rights under the statute.

As noted, the CROA is not a standalone statute, but rather is contained within the Consumer Credit Protection Act (CCPA), 15 U.S.C. §§ 1601-1693r. See *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 130 S. Ct. 1605, 1615 (2010) (“several statutes [are] collectively known as the Consumer Credit Protection Act”); *Rouse v. Law Offices of Rory Clark*, 603 F.3d 699, 706 (9th Cir. 2010) (noting that the CROA is within the “larger statutory scheme” of the Consumer Credit Protection Act). The component parts of the Consumer Credit

Protection Act are the Truth in Lending Act (TILA), 15 U.S.C. §§ 1601-1667f; the Fair Credit Billing Act (FCBA), 15 U.S.C. §§ 1666-1666j; the Consumer Leasing Act (CLA), 15 U.S.C. §§ 1667-1667f; the Federal Wage Garnishment Act, 15 U.S.C. §§ 1671-1677; the Credit Repair Organization Act (CROA), 15 U.S.C. §§ 1679-1679j; the Fair Credit Reporting Act (FCRA), 15 U.S.C. §§ 1681-1681x; the Equal Credit Opportunity Act (ECOA), 15 U.S.C. §§ 1691-1691f; the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. §§ 1692-1692p; and the Electronic Funds Transfer Act (EFTA), 15 U.S.C. §§ 1693-1693r. Because all the component statutes of the Consumer Credit Protection Act share the “common purpose” of seeking “to protect consumers with respect to financial credit,” courts of appeals have “draw[n] upon case law interpreting one statute for persuasive authority for another statute.” *Clemmer v. Key Bank Nat. Ass’n*, 539 F.3d 349, 353 (6th Cir. 2008).

The purposes of the other laws within the Consumer Credit Protection Act with regard to accurate disclosure notices were known to Congress when it drafted the CROA because it was the last statute enacted as part of the Consumer Credit Protection Act. *See* Omnibus Consolidated Appropriations Act, 1997; *see e.g.* Pub. L. No. 91-508, 84 Stat. 1128 (1970) (enacting the Fair Credit Reporting Act). Therefore, the objectives of the other parts of the Consumer Credit Protection Act are relevant to the determination of congressional intent in drafting the CROA.

When viewing the component statutes within the Consumer Credit Protection Act, this Court has held that they seek to ensure accurate disclosure. For instance, this Court explained that “Congress enacted TILA in 1968, as part of the Consumer Credit Protection Act, to ‘assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit.’” *Koons Buick Pontiac GMC, Inc. v. Nigh*, 543 U.S. 50, 53-54 (2004) (citing 15 U.S.C. § 1601(a)). Similarly, this Court found that Congress enacted the FDCPA to “eliminate abusive debt collection practices.” *Jerman*, 130 S.Ct. at 1608 (citing 15 U.S.C. § 1692(e)). The FDCPA forbids debt collectors “from making false representations as to a debt’s character, amount, or legal status.” *Id.*; 15 U.S.C. § 1692e. Those who fail to comply with statutory requirements “are liable to such person[s].” 15 U.S.C. § 1692k(a). In addition, this Court found that Congress intended that the FCRA would “assure the maximum possible accuracy” from credit reporting agencies. *TRW Inc. v. Andrews*, 534 U.S. 19, 23 (2001) (citing 15 U.S.C. §1681e(b)).

Several courts of appeals likewise have reviewed the purpose of other component statutes within the Consumer Credit Protection Act and concluded that those laws are designed to promote accurate disclosure and/or notice. The CLA was enacted to promote “a meaningful disclosure of the terms of leases.” *Miller v. Nissan Motor Acceptance Corp.*, 362 F.3d 209, 216 (quoting 15 U.S.C. 1601(b)). The EFTA shares the “common purpose of each

statute [of the CCPA] to protect consumers.” *Clemmer*, 539 F.3d at 353. The statute requires that regulations be drafted to force automated teller machine operators to “provide notice” regarding a charged fee to consumers. 15 U.S.C. § 1693b(d)(3)(A). The accuracy of notice provided is significant, as it is “undisputed that a consumer must receive some definite message” before being charged a fee. *Id.*, 539 F.3d at 355. The text of the FCBA likewise “indicates that Congress intended for the card issuer to protect the cardholder from fraud.” *DBI Architects, P.C. v. American Express Travel-Related Servs. Co., Inc.*, 388 F.3d 886, 891-92 (D.C. Cir. 2004).

Thus, findings that analogous components of the Consumer Credit Protection Act must be interpreted as requiring accurate disclosures and protecting consumers further supports an understanding that the CROA disclosure provision could not possibly have been intended by Congress to establish a requirement to provide misleading notice. In light of the objectives of the Consumer Credit Protection Act, it is clear that the CROA’s disclosure requirement actualizes the right to sue through the required disclosure notice.

CONCLUSION

Amici AARP and NSCLC respectfully urge this Court to find that the disclosure Congress drafted in the CROA to inform consumers that they have a “right to sue” is meaningful and accurate in that consumers indeed have a right to sue.

Respectfully submitted,

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