

No. 10-948

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IN THE

**Supreme Court of the United States**

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COMPUCREDIT CORPORATION AND SYNOVUS BANK,

*Petitioners,*

v.

WANDA GREENWOOD *et al.*,

*Respondents.*

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

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**BRIEF OF THE AMERICAN ASSOCIATION  
FOR JUSTICE AS *AMICUS CURIAE* IN  
SUPPORT OF RESPONDENTS**

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GARY M. PAUL  
American Association  
for Justice  
777 6th St. NW, Suite 200  
Washington, DC 20001  
(202) 965-3500

*AAJ President*

JOHN VAIL  
*Counsel of Record*  
Center for Constitutional  
Litigation, P.C.  
777 6th St. NW, Suite 520  
Washington, DC 20001  
(202) 944-2887

*Attorney for Amicus Curiae*

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## IDENTITY AND INTEREST OF *AMICUS CURIAE*

The American Association for Justice (“AAJ”) is a voluntary national bar association whose members primarily represent individual plaintiffs in civil actions. AAJ is committed to the First Amendment value of providing access to courts for the redress of grievances and the Seventh Amendment value of dispute resolution through trials by juries. AAJ appears here to address the critical differences between a right to sue and an opportunity to arbitrate.<sup>1</sup>

### INTRODUCTION AND SUMMARY OF ARGUMENT

Congress chose the words defining the rights of consumers under the Credit Repair Organizations Act (CROA), 15 U.S.C. § 1679 *et seq.* Congress gave consumers a “right to sue.”

To sue is not to arbitrate. It is not so in vernacular and it is not so in specialized usage. A suit is a matter of right, protected by the First Amendment. Arbitration is a matter of consent, a conscious waiver of the right to sue. Congress, in CROA, precluded consumers from making that waiver.

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<sup>1</sup> Letters from counsel for all parties evidencing their consent to the timely filing of *amicus curiae* briefs have been filed with the Court. Pursuant to Rule 37.6, *amicus* discloses that no counsel for a party authored any part of this brief, nor did any person or entity other than *amicus*, its members, or counsel make a monetary contribution to its preparation.

This court has described arbitration as an alternative to suit and has acknowledged vast differences between procedures used in judicial and arbitral forums. It has opined that people choose the arbitral forum for privacy, reduced formality, greater speed, and substantive commercial expertise that the arbitrator might possess. It has acknowledged that procedures available by right in court are incompatible with arbitration and can lead to differences in outcome between cases adjudicated in court or heard in arbitration. Those differences are critical here, where Congress specifically has envisioned class action suits in courts and this Court has found that arbitration is “poorly suited to the higher stakes of class litigation.” *AT&T Mobility v. Concepcion LLC*, 131 S. Ct. 1740, 1752 (2011).

By granting a right to sue, specifically granting a right to bring class actions, and precluding waiver of those rights, Congress precluded enforcement of pre-dispute agreements to arbitrate CROA claims. Whatever benefits some persons might perceive in arbitration, Congress perceived that for cases under the Act, which involve abuse of consumers, the judicial forum, administered by public servants and citizen-jurors, with class actions available, and with adjudications subject to public scrutiny and reflection, is the right forum. Class actions and transparent public adjudications advance the Congressional purpose of protecting “the public from unfair or deceptive advertising and business practices by credit repair organizations,” CROA, 15 U.S.C. § 1679(b)(2), in a way that opaque, private, individual adjudications do not.

The unambiguous text of the Act requires the result reached by the Ninth Circuit below.

## ARGUMENT

The unambiguous text of CROA requires “disclosures” to consumers, among them that a consumer has “a right to sue a credit repair organization that violates the Credit Repair Organization Act.” 15 U.S.C. § 1679c(a). Petitioner refers to this right as “ostensible” and suggests that it is merely “procedural” and subject to waiver. Pet’r’s. Br. 13. The text of the Act does not permit that interpretation. *See Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 173 (1994) (“the text of the statute controls our decision.”)

The words “right to sue” were chosen by Congress. Whether there is a right is unquestionable; Congress said there is. And Congress required that the right be disclosed. There would be no purpose in disclosing an “ostensible” right.

Whether the right is procedural or substantive is of no matter. Congress unambiguously precluded, without limitation to whether a right were procedural or substantive, “Any waiver by any consumer of any protection provided by or any right of the consumer under” CROA. 15 U.S.C. § 1679f(a). Congress effectively found that consumers would not be able to “vindicate [their] statutory cause of action in the arbitral forum,” *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 (1985) and required a judicial forum for CROA claims.

The question remaining is whether the “right to sue” includes a right to arbitrate. If it includes

only the right to initiate an action in a judicial forum, the Act's ban on waivers of rights bars enforcement of a pre-dispute agreement to arbitrate a CROA claim. The text of the Act requires a finding that the right to sue is what ordinary usage suggests: the right to go to court.

CROA grants rights to bring “individual actions” and “class actions.” 15 U.S.C. § 1679g(a)(2)(A), (B). In *BP America Production Co. v. Burton*, 549 U.S. 84, 91 (2006), this Court noted that “statutory terms are generally interpreted in accordance with their ordinary meaning” and explicated the ordinary meaning of having a “right of action.” It cited two editions of Black’s Law Dictionary. The 1951 edition called a right of action “[t]he right to bring suit; a legal right to maintain an action,’ with ‘suit’ meaning ‘any proceeding . . . *in a court of justice.*” (emphasis added). The 2004 edition “defines ‘action’ as ‘[a] civil or criminal *judicial proceeding.*” *Id.* at n.3 (emphasis added). The Court further noted that the term “damages,” which are authorized for the rights of action granted in Section 409 of the CROA, “is generally used to mean ‘pecuniary compensation or indemnity, which may be recovered *in the courts.*” *Id.* at 91-92 (quoting Black’s Law Dictionary; emphasis added by the Court). Having a right of action means having the right to ask a court to resolve a grievance. CROA precludes the waiver, inherent in a pre-dispute arbitration agreement, of that right. 15 U.S.C. § 1679f(a).

This interpretation is consistent with the Congressional purpose to protect the “vital interest” of consumers in protecting their credit data. 15 U.S.C. § 1679(a)(1). Adjudication in public courts

serves that purpose better than alternative dispute resolution by private tribunals.

Congressional insistence on a public forum is merely a default setting. The right to go to court is constitutionally protected, a matter of public right and state compulsion, protected by the First Amendment. *Borough of Duryea, Pa. v. Guarnieri*, 131 S. Ct. 2488, 2494 (2011) (“This Court’s precedents confirm that the Petition Clause protects the right of individuals to appeal to courts and other forums established by the government for resolution of legal disputes.”).<sup>2</sup> Arbitration, by contrast, results only from private agreement. See, e.g., *Rent-A-Center, West, Inc. v. Jackson*, 130 S. Ct. 2772, 2776, (2010) (it is a “fundamental principle that arbitration is a matter of contract”). Congress affects no fundamental constitutional right by precluding, in CROA, assent to arbitration. Indeed, the non-waiver provision of CROA does not even conflict with the FAA, as it acts to preclude the formation of an arbitration agreement. The FAA does not compel arbitration; it compels only a remedy, specific enforcement of consensual arbitration agreements. *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 593 (2008) (providing for specific enforcement was the “main goal” of Congress in enacting the FAA).

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<sup>2</sup> The Framers emphasized that access to courts, not just the legislative branch, came within the petition clause, replacing draft text of the First Amendment granting a right to apply to the “legislature” for redress of grievances with a right to apply to the newly created, tri-partite “government.” Julie M. Spanbauer, *The First Amendment Right to Petition Government for a Redress of Grievances: Cut From a Different Cloth*, 21 *Hastings Const. L.Q.* 15, 39-40 (1993). Providing facilities for litigation is “one of the first duties of government.” *Marbury v. Madison*, 5 U.S. 137, 163 (1803).

“Arbitration” is not defined in the Federal Arbitration Act. The American Arbitration Association defines it as “a time-tested, cost-effective alternative to litigation. Arbitration is the submission of a dispute to one or more impartial persons for a final and binding decision, known as an ‘award.’” American Arbitration Association, [http://www.adr.org/arb\\_med](http://www.adr.org/arb_med) (last visited Aug. 11, 2011). Litigation is very different. It has been described as:

a social process that uses the power of the state to require the reluctant to talk and to listen, not just to each other, but also to judge (and sometimes juries) who must in turn listen and talk to the parties. These public officials are the trustees of the community. They are given the power to decide who is right and who is wrong and, if need be, to bring the conduct of the parties into conformity with the norms of the community. The underlying hope is that if all goes well, justice will be done.

Owen M. Fiss, *Out of Eden*, 94 Yale L.J. 1669, 1672-73 (1985). Arbitration does not seek “justice” and it does not depend on compulsory state power. It seeks, primarily, quick resolutions of commercial disputes through “moral suasion.” Julius Henry Cohen & Kenneth Dayton, *The New Federal Arbitration Act*, 12 Va. L. Rev. 265, 266 (1926).<sup>3</sup> And arbitrators are

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<sup>3</sup> Cohen and Drayton, oft-cited by this Court, were primary drafters of the Federal Arbitration Act. See *Brown v. Genesis Healthcare Corp.*, --- S.E.2d ---, 2011 WL 2611327 (W. Va. June 29, 2011), text accompanying n.55.

not trustees of the community. Their duty is to follow the terms of the agreement by which they have been given power. This Court has criticized an arbitral panel for proceeding “as if it had the authority of a common-law court to develop what it viewed as the best rule to be applied,” *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 130 S. Ct. 1758, 1769 (2010), highlighting a critical difference between the two forums.

This court has catalogued the reasons persons choose arbitration over litigation—speed, informality, lower cost, the ability to choose expert adjudicators—and the things given up to gain those advantages—procedural rigor and judicial appellate review. *See, e.g., Stolt-Nielsen*, at 1775. *See also Republic Steel Corp. v. Maddox*, 379 U.S. 650, 664 (1965) (Black, J., dissenting) (“Arbitration differs from judicial proceedings in many ways: arbitration carries no right to a jury trial as guaranteed by the Seventh Amendment; arbitrators need not be instructed in the law; they are not bound by rules of evidence; they need not give reasons for their awards; witnesses need not be sworn; the record of proceedings need not be complete; and judicial review, it has been held, is extremely limited.”)

JAMS, one of the nation’s leading private dispute resolution services, similarly describes the differences between arbitration and litigation:

By agreeing to arbitration, the parties, perhaps among other things, are waiving their fundamental, constitutional right to a trial by a jury of their peers. They can have no *de novo* (second trial) after they have gone to

arbitration. Unless otherwise agreed, the decision is *legally binding* and *non-appealable*, except in extremely limited circumstances, such as in the case of fraud or collusion on the part of the arbitrator.

JAMS Arbitration, Mediation, and ADR Services, *Arbitration Defined*, <http://www.jamsadr.com/arbitration-defined> (last visited Aug. 11, 2011) (emphases in original). JAMS emphasizes speed, asserting that “most matters” that it arbitrates “are resolved within six months of the appointment of the arbitrator.” <http://www.jamsadr.com/adr-arbitration/>.

Professor Richard C. Reuben, a leading scholar of alternative dispute resolution,<sup>4</sup> describes differences between the two forums in similar fashion, and also describes consequences of the differences:

If public adjudication in the United States provides a baseline against which the democratic character of other dispute resolution processes may be measured, arbitration under the Federal Arbitration Act tends to fall short of the mark in many important respects. . . .

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<sup>4</sup> Professor Reuben is James Lewis Parks Professor of Law at the University of Missouri School of Law, was Reporter for the Uniform Mediation Act, and has published widely on alternative dispute resolution and democratic values. *See*, <http://law.missouri.edu/faculty/directory/reubenr.html>

. . . [A]rbitration provides little in terms of accountability. Arbitration awards are generally not subject to the kind of substantive review that is available for decisions in public adjudication. . . .

Similarly, transparency and rationality are not essential values of arbitration. . . . [A]rbitrators are not required to make their decisions according to rules of law . . .

Because of the enormous decisional discretion vested in arbitrators, arbitration does not, and arguably should not, provide any assurance of equal treatment of the parties, at least in the sense of the application of substantive rules. To the contrary, arbitration provides a highly individualized form of justice that is narrowly tailored to the specific circumstances presented to the arbitrator, who makes a decision according to whatever substantive standard he or she determines is appropriate under the circumstances, unless the submission to arbitration specifies otherwise. . . .

Richard C. Reuben, *The Democratic Legitimacy of Government Related Dispute Resolution*, 12(2) *Disp. Resol. Mag.* 23, 24 (Winter 2006).

These differences, particularly limited review in public courts, cause many business litigators and

corporate general counsel to avoid pre-dispute arbitration agreements. A survey of “400 business litigators in Southern California” suggested that 87 percent of the respondents preferred litigation over arbitration—and that by far the dominant reason for this preference was “the availability of appellate review.” Rebecca Callahan, *Arbitration v. Litigation: The Right to Appeal and Other Misperceptions Fueling the Preference for a Judicial Forum*, 3 n.7, 35 (2006), available at <http://law.bepress.com/expresso/eps/1248>; see also David B. Lipsky & Ronald L. Seeber, *The Appropriate Resolution of Corporate Disputes: A Report on the Growing Use of ADR by U.S. Corporations*, 26-28 (1998), <http://digitalcommons.ilr.cornell.edu/icrpubs/4/> (in survey of general counsel or chief litigators for Fortune 1000 corporations, “54% said they didn’t use [arbitration] because arbitrators’ decisions were difficult to appeal.”).

In the case of CROA, Congress did not express concern for the primary advantages—speed, finality, and alternative substantive standards for resolution—that arbitration can bring. It focused on the public values inherent in courts. Congress decided that unlike most matters, where “it is more important that the applicable rule of law be settled than that it be settled right,” *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting), under CROA it is more important that the law be decided correctly than that it be decided quickly and finally. Congress entrusted the development of the law to trustees of the public and Congress precluded consumers from placing it elsewhere.

Petitioner cites seven bullet-pointed examples of Congressional enactments in which Congress banned arbitration clauses by using ostensibly more clear language than the unambiguous language it did use in CROA. In two recent enactments that account for five of the seven cited examples, Congress, as it did in CROA, recognized rights to bring actions in court and established that arbitration agreements can constitute waivers of those rights.

The 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act provides four of the seven bullet-pointed examples Petitioner cites. It provides, immediately preceding text cited by Petitioner:

(1) Waiver of rights and remedies.—The rights and remedies provided for in this section may not be waived by any agreement, policy form, or condition of employment, *including by a predispute arbitration agreement.*

18 U.S.C. § 1514A(e)(1) (emphasis added). At subsection (b), the statute provides the right to bring a civil suit after filing a complaint with the Department of Labor that is not resolved within 180 days.

Similarly, the American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 1553(d)(1), again immediately preceding text cited by Petitioner, provides, with an exception for certain disputes arising under collective bargaining agreements:

(1) Waiver of rights and remedies.  
Except [for certain disputes arising

under collective bargaining agreements], the rights and remedies provided for in this section may not be waived by any agreement, policy, form, or condition of employment, *including by any predispute arbitration agreement.*

(emphasis added). At section (c) the statute grants the right to bring civil suit after exhaustion of administrative remedies.

Both of these statutes, like CROA, authorize suit and include the right to bring suit in court as among rights and remedies that cannot be waived. The absence of specific text in CROA referring to arbitration agreements does not negate the fact that the text of the statute unambiguously bars waiver of the right to bring suit in court. The presence of specific text in the newer statutes is better explained by Congressional awareness of and sensitivity to the twenty cases this Court has decided since the enactment of CROA in 1996 explicating the meaning of the FAA<sup>5</sup> and making clear that the statute very

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<sup>5</sup> *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011); *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 130 S. Ct. 2847 (2010); *Rent-A-Center, West, Inc. v. Jackson*, 130 S. Ct. 2772 (2010); *Stolt-Nielsen S.A. v. AnimalFeeds Int'l. Corp.*, 130 S. Ct. 1758 (2010); *Arthur Andersen LLP v. Carlisle*, 129 S. Ct. 1896 (2009); *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247 (2009); *Vaden v. Discover Bank*, 556 U.S. 49 (2009); *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008); *Preston v. Ferrer*, 552 U.S. 346 (2008); *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 1035 (2007); *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006); *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003); *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52 (2003); *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002); *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355 (2002); *E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279 (2002); *Circuit City Stores, Inc. v.*

broadly requires enforceability of arbitration agreements. *See Porter v. Nussle*, 534 U.S. 516, 528 (2002) (The Court presumes that Congress is aware of the Court's precedents when it acts).

This Court's recent decisions in *Stolt-Nielsen* and *Concepcion* make clear that procedural features of arbitration render prospects of liability different in arbitration and in litigation, particularly for the class actions specifically authorized by CROA: the forum affects outcomes. CROA not only authorizes class action litigation, it creates a special rule for punitive damages in class actions, permitting aggregate damages for the class "without regard to any minimum individual recovery." 15 U.S.C. § 1679g(a)(2)(B)(ii). Congress clearly was very sensitive to the availability of class actions and to the particular remedies available in courts to certified classes.

In *Stolt-Nielsen* this court observed, "class-action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator." 130 S. Ct. at 1775. In litigation, of course, whether a class action occurs depends on rules, not consent of the defendant. This Court's holding in *Concepcion* is premised on that point. California's rule banning class arbitration was condemned because it was a matter of law and not a

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*Adams*, 532 U.S. 105 (2001); *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79 (2000); *Cortez Byrd Chips, Inc. v. Bill Harbert Const. Co.*, 529 U.S. 193 (2000); *Wright v. Universal Maritime Svc. Corp.*, 525 U.S. 70 (1998).

matter of consent: “[C]lass arbitration, to the extent it is manufactured by *Discover Bank* rather than consensual, is inconsistent with the FAA.” *Concepcion*, 131 S. Ct. 1740, 1751 (2011).

The late Richard Nagareda, whose writings this Court found persuasive in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), discussed the then-pending *Concepcion* case and noted, “The central argument against class waivers is that they purport to do something that public legislation may do but that private contracts may not—namely, operate as exculpatory clauses by repealing, in practical effect, a private right of action contained in existing law.” Richard A. Nagareda, *The Litigation-Arbitration Dichotomy Meets the Class Action*, 86 Notre Dame L. Rev. \_\_\_\_ (forthcoming April 2011), available at [http://ssrn.com/abstract\\_id=1670722](http://ssrn.com/abstract_id=1670722). While rejecting this argument as applicable to *Concepcion*, he endorsed its application in other cases, *id.* at 9, reinforcing the idea that forum can affect outcome. CROA precludes that from happening. It protects the right to sue, which, specifically under the statute and in general under operation of law, permits class actions. Congress precluded consensual agreements that alter the specific right granted in CROA and under the default rules of courts.

In *Concepcion* this Court emphasized the outcome-determinative nature of choice of arbitral versus judicial forum in class actions:

[C]lass arbitration greatly increases risks to defendants. Informal procedures do of course have a cost: The absence of multilayered review makes it more likely that errors will go

uncorrected. Defendants are willing to accept the costs of these errors in arbitration, since their impact is limited to the size of individual disputes, and presumably outweighed by savings from avoiding the courts. But when damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once, the risk of an error will often become unacceptable. Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims. Other courts have noted the risk of “in terrorem” settlements that class actions entail, *see, e.g., Kohen v. Pacific Inv. Mgmt. Co. LLC*, 571 F. 3d 672, 677–678 (CA7 2009), and class arbitration would be no different.

131 S. Ct. at 1752. The Court concluded, “Arbitration is poorly suited to the higher stakes of class litigation.” *Id.*

Congress foretold this Court’s finding regarding the awkward fit of class actions into the arbitral forum: it granted the right to bring class actions under CROA in courts, and it precluded waiver of that right. It unambiguously stated that the arbitral forum was not appropriate for claims under the Act.

## CONCLUSION

This Court should affirm the decision below.

Respectfully submitted,

John Vail  
Center for Constitutional  
Litigation, P.C.  
777 6th St. NW, Suite 520  
Washington, DC 20001  
(202) 944-2887  
john.vail@cclfirm.com

*Counsel of Record*  
*Attorney for Amicus Curiae*

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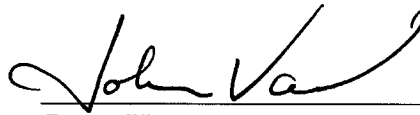
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**BRIEF OF THE AMERICAN ASSOCIATION FOR JUSTICE AS *AMICUS  
CURIAE* IN SUPPORT OF RESPONDENTS**

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**CERTIFICATE OF WORD COUNT**

As required by Supreme Court Rule 33.1(h), I, John Vail, a member of the Bar of this Court, certify that the accompanying document, Brief of Amicus Curiae of the American Association for Justice In Support of Respondents, contains 3,595 words, excluding the parts of the documents that are exempted by Supreme Court Rule 33.1(d).



JOHN VAIL

*Counsel of Record*

Center for Constitutional  
Litigation, P.C.

777 6th St. NW, Suite 520

Washington, DC 20001

(202) 944-2887

john.vail@cclfirm.com

*Attorney for Amicus Curiae*

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CURIAE* IN SUPPORT OF RESPONDENTS**

**CERTIFICATE OF SERVICE**

I, John Vail, a member of the Bar of this Court, hereby certify that on this 15th day of August, 2011, three copies of the Brief of Amicus Curiae the American Association for Justice In Support of Respondents, in the above-entitled case were sent via United Parcel Service for two day delivery, to counsel listed below. I further certify that all parties required to be served have been served.

W. Lloyd Copeland  
Steven A. Martino  
Taylor Martino, P.C.  
51 Saint Joseph Street  
Mobile, AL 36602

Jay Smith  
Adrian John Barnes  
Gilbert & Sackman, A Law Corp.  
3699 Wilshire Boulevard, Suite 1200  
Los Angeles, CA 90010

Scott L. Nelson  
(*Counsel of Record*)  
Allison M. Zieve  
Public Citizen Litigation Group  
1600 20th Street NW  
Washington, DC 20009  
snelson@citizen.org

Kasie M. Braswell  
The Braswell Firm, LLC  
11838 Halcyon Loop  
Daphne, Al 36526

Richard R. Rosenthal  
Richard R. Rosenthal, P.C.  
200 Title Building  
300 N. Richard Arrington Jr.  
Blvd.  
Birmingham, AL 35203

Gregory Hawley  
U.W. Clemon  
White Arnold & Dowd, P.C.  
2025 Third Avenue North, Suite 500  
Birmingham, AL 35203

*Attorneys for Respondents*

Sri Srinivasan  
(*Counsel of Record*)  
ssrinivasan@omm.com  
Anton Metlitsky  
Joanna Nairn  
O'Melveny & Myers LLP  
1625 Eye Street, N.W.  
Washington, D.C. 20006

Deanne E. Maynard  
Brian R. Matsui  
Morrison & Foerster LLP  
2000 Pennsylvania Ave., N.W.  
Washington, D.C. 20006

Susan L. Germaise  
McGuire Woods LLP  
1800 Century Park East  
Los Angeles, CA 90067

David L. Hartsell  
McGuire Woods LLP  
77 West Wacker Dr.  
Chicago, IL 60601

*Attorneys for Petitioners*



JOHN VAIL  
*Counsel of Record*  
Center for Constitutional  
Litigation, P.C.  
777 6th St. NW, Suite 520  
Washington, DC 20001  
(202) 944-2887  
john.vail@cclfirm.com

*Attorney for Amicus Curiae*