No. 10-948

IN THE

# Supreme Court of the United States

COMPUCREDIT CORPORATION AND SYNOVUS BANK,
*Petitioners*,

v.

WANDA GREENWOOD *et al.*,
*Respondents*.

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

## REPLY BRIEF FOR PETITIONERS


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## REPLY BRIEF FOR PETITIONERS

As respondents readily acknowledge, and as the Ninth Circuit expressly recognized in its decision below, the courts of appeals are squarely divided on the question whether claims under the Credit Repair Organizations Act (CROA), 15 U.S.C. § 1679 *et seq.*, are subject to arbitration. Respondents nevertheless oppose review on essentially three grounds. None is persuasive.

First, respondents contend that, notwithstanding the conflict among the circuits, the Court should deny certiorari because claims under the CROA do not arise with great frequency. Respondents' own figures show just the opposite, however. Moreover, respondents do not dispute that three courts of appeals, as well as numerous district courts outside those circuits, have recently considered whether CROA claims are subject to arbitration, confirming that the question is an important and recurring one.

Second, respondents assert that this case constitutes a questionable vehicle for resolving the question presented because, even if the Court were to grant certiorari and reverse the Ninth Circuit's decision, the arbitration agreement at issue may later be deemed unenforceable on remand for a reason having nothing to do with the question presented. Respondents' argument for why the agreement at issue may later be deemed unenforceable is entirely meritless. And even if there were any merit to the argument, neither court below considered it, with both courts instead squarely deciding the question presented on the assumption of the existence of a valid agreement to arbitrate. This Court should consider

the question presented on the same understanding, and its resolution of the question in petitioners' favor would necessarily compel reversal of the decision below (and of course would resolve the circuit conflict).

Third, respondents argue that the Ninth Circuit was correct in deciding that CROA claims are not subject to arbitration. Even if the Ninth Circuit's decision were correct on the merits, however, this Court's review is warranted to resolve the conflict among the courts of appeals. In any event, the Ninth Circuit fundamentally erred in holding—in conflict with the decisions of the Third and Eleventh Circuits—that claims arising under CROA are non-arbitrable. The Ninth Circuit's analysis is inconsistent with the language of CROA, with the Federal Arbitration Act (FAA), and with decisions of this Court. Judge Tashima, dissenting below, accordingly explained that the court "should not lightly create a circuit split on an issue of national application on the basis of the flimsy evidence on which the majority relies." Pet. App. 27a-28a. This Court's review is warranted.

### A. The Petition Presents a Question of National Importance Over Which the Courts of Appeals are Divided

As respondents acknowledge, the "decision of the Ninth Circuit obviously conflicts with the decisions of the Third and Eleventh Circuits." Opp. 8. *Compare Gay v. CreditInform*, 511 F.3d 369 (3d Cir. 2007) (holding CROA claims are subject to arbitration), *and Picard v. Credit Solutions, Inc.*, 564 F.3d 1249 (11th Cir. 2009) (same), *with* App. 23a (holding CROA claims are not subject to arbitration). Re-

spondents argue, however, that the Petition fails to demonstrate compelling reasons to grant certiorari because claims under the CROA do not arise with great frequency. Opp. 8-9.

Respondents are wrong, as their own data amply demonstrates. Even considering only those cases that turn up in a search of online databases, respondents' own inquiry shows there were well over 100 reported cases raising CROA claims from 2000 to 2010, with 76 cases since 2005. Opp. 9-10. Indeed, respondents' figures reinforce the importance of the particular circuit split at issue: 42% of all CROA claims, and 43% of all CROA class actions, have been filed in the Third, Ninth, and Eleventh Circuits. Opp. 9. To be sure, claims under the CROA may not arise as frequently as claims under the Truth in Lending Act or the Fair Credit Reporting Act. Opp. 11. That hardly renders the CROA—or the particular question presented here—unimportant or unworthy of this Court's review.

Moreover, three courts of appeals issued conflicting decisions on the question presented in the three-year period culminating in the Ninth Circuit's decision below. And as the Petition explains (at 14-15), a number of district courts outside those three circuits have recently confronted the question whether CROA claims are arbitrable (and have reached divergent conclusions). *See, e.g.*, *Rex v. CSA-Credit Solutions of Am., Inc.*, 507 F. Supp. 2d 788 (W.D. Mich. 2007) (CROA claims subject to arbitration); *Schreiner v. Credit Advisors, Inc.*, No. 8:07CV78, 2007 U.S. Dist. LEXIS 74014 (D. Neb. Oct. 2, 2007) (same); *Vegter v. Forecast Fin. Corp.*, No. 1:07-CV-279, 2007 U.S. Dist. LEXIS 85653 (W.D. Mich. Nov.

20, 2007) (same); *Alexander* v. *U.S. Credit Mgmt.*, 384 F. Supp. 2d 1003 (N.D. Tex. 2005) (CROA claims not subject to arbitration); *see also Ace Am. Ins. Co. v. Ascend One Corp.*, No. CCB-06-CV-3371, 2007 WL 1774495 (D. Md. June 15, 2007) (involving agreement to arbitrate CROA claims; court did not consider whether CROA claims are arbitrable); *Vertucci v. Orvis*, No. 3:05 CV 1307, 2006 WL 1688078 (D. Conn. May 30, 2006) (same); *Arnold v. Goldstar Fin. Sys., Inc.*, No. 01 C 7694, 2002 WL 1941546 (N.D. Ill. Aug. 22, 2002) (same). There is thus no serious argument that the question presented—which has divided the lower courts—fails to constitute a recurring and important question.

What is more, the question presented will only grow in importance. As the Petition explains (at 15), the number of personal bankruptcies has grown substantially in recent years; and as respondents do not dispute, the increase in the number of consumers with poor credit will result in an increased demand for the services of credit repair organizations. Respondents note that, whereas personal bankruptcies increased from 2007-2009, there was no "explosion" of CROA suits from 2007 to 2009. Opp. 10. But one of course would expect a lag period between a rise in the demand for credit repair services and an ensuing rise in the number of lawsuits against credit repair organizations. In this case itself, for instance, respondents applied for and received the Aspire Visa card in 2005, but did not file this suit until the end of 2008. At any rate, whether or not the question presented will grow in importance in coming years, it already (and readily) qualifies as sufficiently impor-

tant to warrant the Court's grant of review to resolve the conflict among the courts of appeals.

Finally, unless this Court grants certiorari, the Ninth Circuit's prohibition against arbitration of CROA claims will effectively become a nationwide rule in CROA class actions. Pet. 13-14. As respondents' data confirms (Opp. 9), CROA claims are frequently brought as class actions. In such cases, there ordinarily would be little difficulty identifying a named plaintiff who resides within the Ninth Circuit's expansive geographic bounds, enabling plaintiffs who seek to avoid enforcement of arbitration agreements to file and maintain their CROA action within that circuit. Respondents fundamentally miss the point in suggesting that "class actions that are truly forum-shopped to the Ninth Circuit" may be "transferred elsewhere under 28 U.S.C. § 1404(a)." Opp. 12. While transfer might be appropriate if the sole connection to the Ninth Circuit were the defendant's conduct of business there, respondents themselves acknowledge that "lawyers could always look for a named class-action plaintiff residing in the Ninth Circuit," Opp. 12 n.4, in which event the action would presumably remain in the Ninth Circuit. The Ninth Circuit's position on the question presented thus could largely become a national rule unless this Court grants review.

### B. The Petition Presents a Highly Suitable Vehicle for Resolving the Question Presented

The Petition presents a highly favorable vehicle for resolving the question presented because there is no dispute that the agreement between respondents

and petitioners calls for arbitration of actions like this one, *i.e.*, actions brought under the CROA. Pet. 15-16. Respondents nonetheless contend that the suitability of this case as a vehicle for resolving the question presented "is debatable" because, even if the Ninth Circuit erred in ruling that CROA claims are non-arbitrable, the arbitration agreement at issue here "may" later be deemed unenforceable for an entirely *different* reason. Opp. 13. In particular, respondents assert that the arbitration agreement may be unenforceable because the National Arbitration Forum (NAF)—the agreement's primary chosen arbitrator—no longer arbitrates consumer disputes. Opp. 4-5, 13. Respondents' argument is wholly unavailing.

To begin with, the sole question reached by both courts below was whether CROA claims are subject to arbitration. Both courts considered that question on the unchallenged assumption that the arbitration agreement at issue requires arbitration of CROA claims, and on the further assumption that the agreement is otherwise enforceable. Thus, a ruling by this Court that CROA claims are arbitrable not only would resolve the division among the courts of appeals, but also would necessarily require a reversal of the decisions below. The fact that respondents might *later* press some *independent* basis to preclude arbitration on remand—even assuming their position had any merit—would in no way affect this Court's consideration of the question presented and its resolution of the circuit conflict.*

* Respondents err in suggesting (Opp. 4) that the question presented is inaccurate in asking whether CROA claims are

In any event, there is simply no merit to respondents' contention that the arbitration agreement at issue may be unenforceable because the NAF no longer arbitrates consumer disputes. The agreement specifies that, "[i]f for any reason the NAF cannot, will not or ceases to serve as arbitration administrator, *we will substitute another nationally recognized arbitration organization utilizing a similar code of procedure*." Pet. App. 5a (emphasis added). Respondents' suggestion that there exists no other qualifying arbitration organization is specious; such organizations (*e.g.*, JAMS) plainly exist. And at any rate, the FAA itself mandates that

> "if for any … reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or in filling a vacancy, then upon the application of either party to the controversy *the court shall designate and appoint an arbitrator or arbitrators or umpire*, as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein …."

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arbitrable pursuant to "a valid arbitration agreement." The Ninth Circuit held that CROA claims are non-arbitrable even when there is a valid arbitration agreement, and the circuits are divided on that precise question. Respondents also err in objecting to petitioners' statement that "there is no dispute that the agreements between respondents and petitioners call for arbitration of actions like this one." Opp. 4 (quoting Pet. 15-16) (internal quotation marks omitted). Respondents in fact do not dispute that the arbitration agreement at issue calls for arbitration of CROA actions like this one, or that resolution of the question presented would lead to reversal of the decision below.

9 U.S.C. § 5 (emphasis added). Accordingly, even if the parties' agreement did not itself provide for a substitute arbitrator, federal law would.

Indeed, if there were any merit whatsoever to respondents' argument that the arbitration agreement is unenforceable because the NAF no longer arbitrates consumer disputes, one would have expected the court of appeals—to which the issue was fully briefed—to have at least considered it before creating a circuit conflict on an important question of federal law. Instead, the Ninth Circuit assumed that the agreement in this case would otherwise be enforceable and ruled categorically that CROA claims are non-arbitrable. As a result of that decision, the enforceability of an agreement to arbitrate a CROA claim depends entirely on the circuit in which the plaintiff elects to file suit. That state of affairs is intolerable, and this Court's review is warranted.

### C. The Court of Appeals Erred in Holding That CROA Claims Are Not Subject to Arbitration

Respondents devote the bulk of their opposition (Opp. 15-27) to arguing the merits of the question whether CROA claims are subject to arbitration. Respondents' merits arguments afford no basis for denying certiorari, and in any event are wholly unpersuasive. The Ninth Circuit fundamentally erred in holding that CROA claims are non-arbitrable.

Respondents accept this Court's repeatedly stated "presumption in favor of arbitration." Opp. 21; *see also Shearson/Am. Exp., Inc. v. McMahon*, 482 U.S. 220, 226 (1986) (explaining that the FAA institutes a "federal policy favoring arbitration" and that courts

therefore must "rigorously enforce agreements to arbitrate" (quoting *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983) and *Dean Witter Reynolds v. Byrd*, 470 U.S. 213, 221 (1985))). Respondents argue, however, that three provisions of the CROA when considered together—the "right to sue" disclosure provision of 15 U.S.C. § 1679c(a), the civil-liability provision of § 1679g, and the anti-waiver provision of § 1679f(a)—overcome this strong presumption. Opp. 15-27. Respondents are wrong.

1. Respondents' argument is predicated entirely on the proposition that the CROA disclosure provision, § 1679c(a), "confers a right to sue" a credit repair organization. Opp. 17. But the only "right" the CROA disclosure provision "confers" is the right of the consumer to receive from a credit repair organization a written disclosure, which includes the statement, "You have a right to sue a credit repair organization that violates the [CROA]." 15 U.S.C. § 1679c(a). The "right to sue" language in the required disclosure does not *create* a right; it *describes* the CROA's civil-liability provision, which establishes a damages cause of action under the CROA. Thus, the scope of the consumer's "right to sue" is established by the civil-liability provision, not the disclosure provision. And the civil-liability provision says only that "[a]ny person who fails to comply with any provision of [the CROA] with respect to any other person shall be liable to such person" in an amount determined under a framework set forth in the statute. 15 U.S.C. § 1679g(a). It says nothing about arbitration, and respondents do not contend otherwise.

Even if, as respondents argue, the "right to sue" disclosure provision did define the scope of the CROA civil-liability provision—rather than the other way around—the term "right to sue" still would not require an exclusively judicial forum. The "right to sue" language is directed to lay consumers, not lawyers. And as amicus curiae DRI explains, mainstream (as opposed to legal) dictionaries do not limit the word "sue" to a judicial process. DRI Br. 11. At the very least, the term "right to sue" *can* mean the right to initiate a legal process, either inside or outside of court. And given the presumption in favor of arbitration, the statute should be read to allow arbitration, not to preclude it.

2. Even if the civil-liability provision, read in light of the "right to sue" disclosure provision, creates an exclusive judicial remedy, that does not mean that a waiver of a judicial forum is unenforceable. On the contrary, this Court has repeatedly upheld the enforceability of agreements to arbitrate claims under statutes unambiguously creating exclusively judicial causes of action. *See, e.g.*, *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 23 (1991) (holding that claim under Age Discrimination in Employment Act—which says that "Any person aggrieved may bring a civil action in any court of competent jurisdiction," 29 U.S.C. § 626(c)(1)—is arbitrable).

Respondents thus rely on the CROA's anti-waiver provision, which declares void "[a]ny waiver by any consumer of any protection provided by or any right of the consumer under [the CROA]." 15 U.S.C. § 1679f(a). Respondents assert that a consumer's right to bring suit—by hypothesis, only in court—is a

"right of the consumer" that is non-waivable under § 1679f(a). That is incorrect. The anti-waiver provision prohibits waiver only of a consumer's substantive rights, as the provision's title—"Noncompliance with this subchapter"—makes clear. Thus, the CROA contains no prohibition against waivers of a consumer's purported right to sue in court.

Moreover, as the Petition explains (at 20-21), the text of the anti-waiver provision demonstrates that Congress *affirmatively intended* for CROA claims to be arbitrable, because it precludes enforcement of covered waivers "by any Federal or State court *or any other person*." 15 U.S.C. § 1679f(a) (emphasis added). Respondents attempt to explain the italicized language by observing that "the CROA creates non-waivable consumer rights and protections other than the right to sue, which could arise in an arbitration proceeding brought by a credit-repair organization against a consumer." Opp. 19. But even if that were one plausible explanation for the "any other person" language, the much more natural interpretation is simply that Congress generally expected arbitrators to adjudicate CROA claims no differently than claims under any other statute.

Finally, even if respondents' reading of the statute were otherwise plausible, it would still fail to overcome the strong presumption in favor of arbitration. Congress was well aware of that presumption when it enacted the CROA. If Congress had intended to overcome the presumption and preclude arbitration of CROA claims, it would have said so expressly, as it plainly knows how to do. *See, e.g.*, 7 U.S.C. § 26(n)(2) ("No predispute arbitration agreement shall be valid or enforceable, if the agreement

requires arbitration of a dispute arising under this section."). Yet there is nothing in the text of the CROA (or its legislative history) suggesting any intent whatsoever to preclude arbitration of CROA claims. Respondents thus err in their defense of the Ninth Circuit's decision. This Court should grant review to correct that decision and resolve the conflict among the courts of appeals.

## CONCLUSION

For the foregoing reasons, as well as those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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