

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 COMPUCREDIT CORPORATION, ET AL., :

4 Petitioners : No. 10-948

5 v. :

6 WANDA GREENWOOD, ET AL. :

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8 Washington, D.C.

9 Tuesday, October 11, 2011

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11 The above-entitled matter came on for oral
12 argument before the Supreme Court of the United States
13 at 11:05 a.m.

14 APPEARANCES:

15 MICHAEL W. McCONNELL, ESQ., Washington, D.C.; for
16 Petitioners.

17 SCOTT L. NELSON, ESQ., Washington, D.C.; for
18 Respondents.

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1 P R O C E E D I N G S

2 (11:05 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 next in Case 10-948, CompuCredit Corporation v.
5 Greenwood.

6 Mr. McConnell.

7 ORAL ARGUMENT OF MICHAEL W. McCONNELL

8 ON BEHALF OF THE PETITIONERS

9 MR. McCONNELL: Mr. Chief Justice, and may
10 it please the Court:

11 This Court has consistently rejected the
12 argument that Federal statutes that both create a right
13 to sue and also bar waiver of rights under the statute
14 are sufficiently explicit to override the strong Federal
15 policy in favor of arbitrability expressed in the
16 Federal Arbitration Act. In two of those cases, Gilmer
17 and Pyett, the Court construed a statute the relevant
18 language of which is virtually indistinguishable from
19 that and the Credit Repair Organizations Act that we
20 have before us today.

21 Those cases involve the ADEA. Both the ADEA
22 and CROA, as I'll call it, create a cause of action for
23 aggrieved parties to bring actions for damages. And
24 both statutes explicitly bar waiver of, quote, "any
25 right" under the statute.

1 JUSTICE SOTOMAYOR: Well, that statute
2 didn't have, as this one has, a disclosure requirement
3 that says you have a right to sue.

4 MR. McCONNELL: And that's the sole
5 distinction between the two statutes. So, let's talk
6 about --

7 JUSTICE SOTOMAYOR: Well, it could be a
8 meaningful one.

9 MR. McCONNELL: So, the -- first of all, the
10 disclosure statute is a -- describes in layman's terms,
11 gives a quick description of an operative civil
12 liability section, which is set out in 1679g and which
13 tells us exactly what Congress had in mind in creating a
14 cause of action.

15 And when you look at the language of the
16 actual operative provision, 1679g, it's almost as if
17 Congress deliberately went out of its way to use
18 language that would not preclude arbitration. That
19 language provides that a person who violates the statute
20 shall be liable to the persons --

21 JUSTICE KAGAN: Suppose it said something
22 different, Mr. McConnell. Suppose the disclosure
23 provision didn't exist at all, but that instead of that
24 liability provision, you had a provision that simply
25 said: Any person injured by a violation of this Act

1 will have a right of action or will have a right to sue
2 under this statute. And then you had the waiver
3 provision that you have in this statute. Is that
4 enough?

5 MR. McCONNELL: Justice Kagan, I think that
6 would be exactly the same, because a cause of action and
7 a right to sue are the same thing. They mean the same
8 thing. And this Court has consistently since Mitsubishi
9 held that just because Congress creates a cause of
10 action which is a right to sue does not preclude
11 arbitration, because --

12 JUSTICE GINSBURG: Mr. McConnell, you
13 started with the notion that the disclosure provision in
14 the statute is meant to apply to ordinary people, and if
15 an ordinary person not schooled in the law read "you
16 have a right to sue," wouldn't they understand that to
17 mean I have a right to sue in court?

18 MR. McCONNELL: Justice Ginsburg, in the
19 ADEA context, the government itself, the EEOC, sends
20 discriminated-against workers a right-to-sue letter that
21 tells them they have a right to sue. But this Court has
22 twice said that that does not preclude arbitration. And
23 that's because a right to sue is simply a cause of
24 action. It doesn't actually -- that doesn't mean
25 exclusively a right to be in court. It gives you rights

1 which may be vindicated, and there are various ways in
2 which they can be vindicated. And the Federal
3 Arbitration Act provides that the -- that this Court or
4 that the courts must enforce private contractual
5 agreements that provide for the vindication even of
6 statutory rights through arbitration.

7 JUSTICE ALITO: Can you imagine any
8 statutory language that would eliminate the right, the
9 ability of the parties to enter into an arbitration
10 agreement other than language that expressly prohibits
11 the waiver of the right to sue in court in favor of
12 arbitration?

13 MR. McCONNELL: Yes, Justice Alito, I can
14 imagine it. Now, Congress has to date not used it.
15 Congress knows perfectly well how to bar arbitration.
16 They've done it in a number of statutes. In fact, in
17 the very Congress that enacted CROA, there were three
18 different statutes that were proposed that would have
19 eliminated arbitration for particular statutory schemes.
20 None of them were adopted.

21 But Congress is perfectly aware of how to do
22 this. I don't think they have to use the magic words
23 "no arbitration," but -- but they certainly have to do
24 something considerably more direct than this.

25 Here they've created a statute that provides

1 that there must be liability and creates a cause of
2 action, and then they tell people in a separate
3 disclosure provision -- by the way, added very late in
4 the drafting process, right -- simply to tell people
5 that they have what is colloquially known for laymen as
6 a right to sue.

7 Now, we lawyers call things causes of
8 action. We call them things like the right to bring a
9 civil action in a court of competent jurisdiction.
10 That's lawyers' language. But when ordinary people talk
11 about this, they think that's a right to sue. But a
12 cause of action and a right to sue are exactly the same
13 thing.

14 JUSTICE KAGAN: Mr. McConnell, the cases
15 that you cite in support of your position rest on a
16 distinction between procedural rights and substantive
17 rights, which you invoke here. But where does that
18 distinction itself come from? Because it seems very
19 atextual in nature, that distinction, which does appear
20 in the cases. But when Congress talks about rights, why
21 should we think of rights as limited to substantive
22 rights rather than also procedural rights?

23 MR. McCONNELL: First of all, only our
24 waiver argument depends upon those particular cases; we
25 have a second argument. But, nonetheless, I think this

1 comes from the very long tradition, at least back to the
2 1980s in Mitsubishi, of understanding that arbitration
3 is a choice of a forum, but it must vindicate the
4 substantive rights of the particular statute.

5 So, this is the way courts have talked about
6 the relationship between arbitration and the substantive
7 statute. So, you look at the statute, and you see what
8 are the prohibitions, what are the substantive rights
9 and so forth, and the arbitrators enforce all of those,
10 but that the term rights does not include -- it does not
11 mean that there's an exclusively judicial forum, just
12 that whoever is the decisionmaker is going to enforce
13 exactly the same set of substantive rights which are in
14 the statute.

15 But, Justice Kagan, even if that were not
16 persuasive, Congress is perfectly aware that that's the
17 way that this Court had been interpreting the words,
18 because Gilmer, which interprets the very words "any
19 rights" in an anti-waiver provision as not including
20 arbitration, happened just a few years, 5 years, before
21 enactment of this statute. And we know Congress was
22 aware of Gilmer, because in -- the very same Congress
23 that passed CROA also considered a bill, considered and
24 rejected, a bill that would have reversed the decision
25 in Gilmer.

1 So, Gilmer and the very question of -- of
2 arbitration was before this Congress, and they knew that
3 the word "any rights" was interpreted by this Court the
4 way that it was in Gilmer, and they used precisely the
5 language that was interpreted that way in Gilmer.

6 And so, at this point, there's a vocabulary.
7 It's like there's a glossary. Congress is using it, and
8 even if it may not be, you know, fully textual, as you
9 say, that's -- that's the way Congress now addresses the
10 matter.

11 JUSTICE GINSBURG: But the -- the Act in
12 Gilmer did not designate court action or right to sue as
13 a right within the non-waivable provision.

14 MR. McCONNELL: That's true, Justice
15 Ginsburg, and the question is, does it matter? I would
16 say anyone looking at the ADEA's language, which says
17 that an aggrieved person may bring a civil action in
18 court, anyone would say that that is a right to sue. It
19 is surely a right.

20 And, indeed, when this Court interpreted
21 that statute in Pyett, this Court called it a right, a
22 right, to a judicial forum. Three times in the opinion,
23 the Court refers to that as a "right." And the fact
24 that our statute here refers to a right to sue, rather
25 than a right to bring a civil action, seems -- certainly

1 against the backdrop -- recall, please, that the
2 question here is whether Congress has explicitly
3 abrogated the -- specifically disavowed, specifically
4 barred the use -- the arbitrability of the -- of the
5 contracts, and that all doubts are supposed to be
6 resolved in favor of arbitrability, and the -- the
7 statutes must be interpreted with a healthy regard for
8 the policy in favor of arbitrability.

9 Considering this, and considering the paltry
10 basis in the text for -- for that conclusion, I don't
11 see how the Ninth Circuit's decision can be withstood --
12 could be upheld.

13 CHIEF JUSTICE ROBERTS: Do you think a --
14 the word "lawsuit" typically describes an arbitration
15 proceeding? If you're subject to an arbitration, would
16 you say, I'm in a lawsuit?

17 MR. McCONNELL: I do not think so.

18 CHIEF JUSTICE ROBERTS: Well, why doesn't a
19 right to sue refer to a lawsuit?

20 MR. McCONNELL: It refers to a cause of
21 action, Your Honor, you know, and we can call that a
22 lawsuit, too. I mean, often that's another layman's
23 term for a cause of action. But this Court has held I
24 don't know how many times, I believe it's at least six
25 times since -- since Mitsubishi, that just because

1 Congress creates a cause of action and says that it will
2 be in court, that does not mean that that's -- that that
3 does not preclude arbitration, that that creates a cause
4 of action.

5 And I think the -- the underlying logic of
6 this is that the existence of a cause of action or of a
7 right to sue, which I submit is a synonym for a cause of
8 action, is -- is not inconsistent with arbitration; it's
9 the precondition for arbitration. If there were not a
10 cause of action, there would be nothing to arbitrate,
11 right? So, in every case in which there's a legal
12 arbitration, there's a cause of action. It might arise
13 from contract, it might arise from a statute, but in
14 every single arbitration, there is a cause of action.
15 If this Court were to interpret --

16 JUSTICE GINSBURG: No, if this were written
17 to be read by and understood by lawyers, I think you
18 would have a stronger argument. But this is meant for
19 consumers, and they read "you have a right to sue, and
20 that right is not waivable." A right to sue -- they're
21 not going to think about cause of action. They don't
22 know what cause of action is. But they do know that a
23 right to sue is a right to bring a lawsuit.

24 MR. McCONNELL: Justice Ginsburg, again, if
25 that is so, it would apply to other cases in which the

1 language "right to sue" is used. For example, the
2 EEOC's right-to-sue letters, what could be more explicit
3 than that? But this Court has held several times that
4 just because the EEOC sends a right-to-sue letter
5 doesn't mean that Congress has --

6 JUSTICE GINSBURG: Is that in -- is that in
7 the statute? Or is it just a colloquial --

8 MR. McCONNELL: It's in the regulations,
9 Your Honor.

10 JUSTICE GINSBURG: Yes, but Title VII
11 doesn't say "right to sue." It's a name that the agency
12 uses, but it's not -- it's not in the statute. The
13 statute doesn't say you have a right to sue.

14 MR. McCONNELL: Well, what the statute says
15 is you may bring a suit in court. And so, if this
16 Court -- I do not see how the Court can say that the
17 right -- that the language "the right to sue" is
18 different from a right of action. It certainly -- it's
19 -- it is the same thing.

20 CHIEF JUSTICE ROBERTS: One way you could do
21 it is that the right to sue is more familiar
22 colloquially. If somebody, you know, hits your car and
23 you jump out angrily and say -- you can say: I'm going
24 to sue you. You're not likely to say: I'm going to
25 bring a cause of action against you.

1 (Laughter.)

2 MR. McCONNELL: We have -- there is no
3 reason to think that when Congress appended a disclosure
4 provision toward the end of the drafting of this statute
5 and simply used a colloquial version of cause of action
6 so that ordinary people would understand it, that they
7 intended to change the meaning of the operative
8 provision. The operative provision tells us, I think
9 very clearly, what Congress meant, and then in this sort
10 of quick shorthand, colloquial way, they're telling
11 people, yes, they have an action, but just like they
12 have an action -- persons have an action under the
13 Sherman Act, they have an action under RICO, they have
14 an action under the ADEA, they have an action under the
15 Truth in Lending Act. In all of these cases, people
16 have a right to sue, but this Court has held that
17 arbitration vindicates the cause of action.

18 JUSTICE KENNEDY: In a standard arbitration
19 agreement, if Smith and Jones agree to arbitrate and
20 Jones then brings suit in court, and that action is then
21 stayed pending arbitration, has there been a breach of
22 the arbitration agreement simply by bringing the suit?

23 MR. McCONNELL: I don't --

24 JUSTICE KENNEDY: I mean, doesn't that
25 happen rather often?

1 MR. McCONNELL: It does happen rather often.
2 I'm not sure what the -- I would say no. What I would
3 say is that the -- is that the question of arbitrability
4 has been put before the court, and the court will decide
5 whether to enforce the arbitration clause or not.

6 JUSTICE KENNEDY: And, of course, suits are
7 brought after arbitration to enforce the arbitration
8 award.

9 MR. McCONNELL: Exactly. Exactly. So, in
10 this sense, it's not that the cause of action goes away.
11 It's not the -- the cause of action is not being waived.
12 It's simply being vindicated in a different way, in a
13 way which Congress in the Arbitration Act has told us is
14 perfectly appropriate, just as appropriate as a -- as
15 vindication in Court and that we should leave it to --
16 and that a contract between the parties to decide which
17 of the forums for vindication of their rights would be
18 used should be enforced.

19 JUSTICE GINSBURG: Except that this is not
20 what the parties decide. These are take it or leave it
21 contracts. So, the consumer doesn't really elect
22 arbitration. It's just presented as part of the terms
23 that the consumer can take or leave and not negotiated.

24 MR. McCONNELL: That is an argument against
25 arbitration that this Court has rejected several times.

1 JUSTICE GINSBURG: It's a question of
2 whether we take that into account in -- in determining
3 what "you have a right to sue" means.

4 MR. McCONNELL: Well, Justice Ginsburg,
5 Congress -- that's a policy question, and Congress has
6 given us an answer. Recently, by the way, Congress has
7 indicated a slightly different answer which will affect
8 cases like this in the future. As part of the
9 Dodd-Frank regulatory reform bill, Congress required the
10 new Consumer Financial Protection Bureau to conduct a
11 serious study of the use of arbitration procedures in
12 consumer financial matters to find out whether things
13 like what you referred to, Justice Ginsburg, the -- the
14 types of contracts and so forth are fair to consumers.

15 So, we'll get an authoritative answer to
16 this. And Congress then vested this new bureau with
17 authority either to outlaw arbitration awards or to
18 require conditions or to reform them. But in the
19 meantime, the policy that Congress has set is the policy
20 in the Federal Arbitration Act, which is one of a strong
21 policy in favor of enforcing arbitration contracts.

22 JUSTICE KAGAN: You know, except if Congress
23 indicates otherwise and --

24 MR. McCONNELL: Unless Congress has
25 indicated otherwise.

1 JUSTICE KAGAN: And I guess that the problem
2 here is that there is this language in this disclosure
3 provision which is meant, you know, truly to inform
4 consumers about -- about their rights and about where
5 they're going to end up resolving their disputes, and it
6 says "you have a right to sue." And you're asking us
7 essentially to read that language as: You have a right
8 to bring a claim in court, but it's probably going to
9 end up in arbitration because of the nature of your form
10 contract.

11 And that seems a very different kind of
12 statement to consumers.

13 MR. McCONNELL: Justice Kagan, I do not see
14 how it would be any different from a consumer who reads
15 any of the statutes that this Court has held are subject
16 to arbitration. If, for example, in the Truth in
17 Lending Act, which this Court interpreted in the Green
18 Tree case that as part of the arbitration contract, it
19 was required to send the consumer a copy of the statute.
20 The consumer would read in the statute that there's a
21 cause of action, that they can bring suit in court to
22 enforce their rights under the Truth in Lending Act.

23 They would read that statute, and they would
24 draw exactly the same conclusion that they do from the
25 shorthand layman's language of "a right to sue."

1 But, again, even if that were so, I think as
2 a matter of -- of how -- of statutory interpretation,
3 that a disclosure provision cannot change the meaning of
4 the operative section. The operative section which
5 creates the rights and liabilities here is section
6 1679g. And not even Respondents seriously claim that
7 that section is -- shows a congressional intent to
8 prevent arbitrability. And that seems -- the fact that
9 there's a disclosure provision that uses more informal
10 language instead of the lawyers' language used in 1679g
11 does not change the meaning of the statute.

12 Unless there are further questions, I will
13 reserve the remaining part of my time for rebuttal.

14 CHIEF JUSTICE ROBERTS: Thank you, counsel.
15 Mr. Nelson.

16 ORAL ARGUMENT OF SCOTT L. NELSON

17 ON BEHALF OF THE RESPONDENTS

18 MR. NELSON: Mr. Chief Justice, and may it
19 please the Court:

20 The Credit Repair Organizations Act provides
21 consumers with what it explicitly denominates a right to
22 sue, and then it says that any right of the consumer
23 under the statute is non-waivable. As this Court has
24 said --

25 JUSTICE SOTOMAYOR: Does that mean that

1 there's a violation of the statute the minute one of
2 these organizations asks someone to sign an arbitration
3 clause?

4 MR. NELSON: There's --

5 JUSTICE SOTOMAYOR: A \$1,000 penalty for the
6 mere asking?

7 MR. NELSON: There's a -- there's a
8 technical violation in asking, because in 1679f not only
9 are waivers made unenforceable, but it is -- it is
10 prohibited to ask someone to waive their rights.

11 However, that does not mean that you
12 actually have a cause of action to go in and sue
13 somebody for that, because, remember, under 1679g, what
14 you can sue for is your money back. If somebody's asked
15 you for a waiver -- you didn't sign the contract, you
16 didn't pay them any money. Or your damages -- if
17 somebody asked you for a waiver and you never signed up
18 with them, you don't have any damages. And then
19 punitive damages in addition, which -- you know, the
20 general rule about punitive damages is you get them on
21 top of actual damages if you have actual damages.

22 So, it's -- yes, it's a technical violation.
23 If a company engaged in a pattern or practice of it, the
24 FTC could quite rightly go in and get an injunction
25 against that. But it's not a case where there would be

1 some onerous penalty imposed on a company merely for
2 asking for a waiver.

3 JUSTICE SOTOMAYOR: Well, doesn't that
4 reading, however, make suspect your claim that Congress
5 would have intended -- without any discussion in the
6 legislative history -- and our case law has said you
7 have to read the intent to bar arbitration both from the
8 language of the statute, its context, and its history.
9 I just don't see any history here that supports your
10 reading.

11 MR. NELSON: Well, Justice Sotomayor, I want
12 to take that in two parts, because the first was -- was
13 tied to the -- the attempt to procure a waiver and
14 whether that calls into question whether Congress really
15 could have meant this. It's sort of an unusual
16 provision to say not only can you not waive rights, but
17 it's a violation even to ask somebody to waive them.

18 But that's no more unusual with respect to
19 the right to sue than with respect to any other right
20 under this statute. For example, the right to cancel
21 after 3 days. Everybody would concede, I think, that
22 that's a non-waivable right under the clear language of
23 this statute. It's an unusual and perhaps onerous
24 provision to say that if somebody just suggested that
25 you waive that right to cancel and you never actually

1 waived it, they still violated the statute.

2 But, you know, that's what Congress wrote
3 here, because in this statute, it was concerned with an
4 industry that it saw as overreaching pervasively in
5 relation to the people that it was -- it was trying to
6 sign up for its services. And that's why Congress
7 wanted a very strong prohibition of waiver of rights
8 that even attempted -- that even extended to attempts.

9 Now, as to the --

10 JUSTICE KAGAN: Well, Mr. Nelson, but your
11 friend Mr. McConnell says quite rightly that the rules
12 in this area have been fairly clear, that Congress knew
13 it had to make especially clear that it wanted to void
14 arbitration agreements. So, if that's the case, why
15 didn't Congress do what it has done in a thousand other
16 statutes -- or maybe that's an overstatement -- but a
17 number of other statutes, which is to say so?

18 MR. NELSON: First of all, the -- the rules
19 are not that Congress has to be especially clear in this
20 context. And, in fact, the Court has said over and over
21 in the line of cases starting with Mitsubishi, McMahon,
22 Rodriguez de Quijas, and Gilmer that what has to be
23 discernible -- and this also gets back to Justice
24 Sotomayor's question -- it merely has to be discernible
25 from the text or the legislative history or the

1 structure and policies of the Act that -- that there's
2 an intent to preclude waiver of the right to judicial
3 remedies.

4 That's not an unmistakable plain statement
5 rule; it's not a requirement of explicitness in the
6 sense of explicitly using the term "arbitration." As
7 even my friend stated, there's no requirement of magic
8 words.

9 What this Court said, what it told Congress
10 in the years leading up to this statute is: You have to
11 express a discernible intent to preclude waiver of the
12 right to judicial remedies.

13 JUSTICE SCALIA: Right. And -- and you
14 don't need a magic word, but it seems to me you need
15 something more than a provision dealing with what you
16 have to tell to the people who -- who accept these
17 contracts. I mean it's not in the substantive part of
18 the statute. It's in the part of the statute that tells
19 you what provisions of the -- of the Act you have to
20 notify the consumer of. It's a very strange way for
21 Congress to say "no arbitration" by putting this
22 language in a section that has nothing to do with the
23 rights under the Act.

24 MR. NELSON: Well --

25 JUSTICE SCALIA: It is intended to be a

1 summary of the rights under the Act.

2 MR. NELSON: Justice Scalia, I think it's --
3 I think it's not a strange way at all but a very direct
4 way in the context here. Remember, in Gilmer, what the
5 Court was dealing with was a statute that as amended in
6 an amendment that actually wasn't before the Court in
7 Gilmer said you can't waive any right under the statute.
8 But that then raises a question: Well, what do we mean
9 by rights under this statute? And the Court concluded
10 there and reinforced in Pyett that it interpreted that
11 to mean substantive rights; in the absence of a textual
12 indication, that when Congress used the term "rights" in
13 this statute, it was intending to protect the procedural
14 right to go to court.

15 Here we have something very different.
16 Congress creates a cause of action which, as my friend
17 says, colloquially someone could call that a right if
18 they wanted to. But the cause of action says you can --
19 you can obtain this liability; the court will determine
20 it; you obtain it through an action. That certainly
21 gives you an entitlement to go to court. But Congress
22 then goes further and it denominates that one of the
23 rights under this statute, one of only two rights under
24 this statute that are so-called.

25 JUSTICE SCALIA: Do you think that Gilmer

1 would have come out differently with regard to one of
2 the procedural rights involved in that case if the
3 statute had happened to refer to that procedural right
4 as a right? Procedural rights are rights, aren't they?

5 MR. NELSON: Yes, they are definitely
6 rights, and --

7 JUSTICE SCALIA: So, and if the statute in
8 Gilmer had referred to one of the procedural rights in
9 passing as a right, you think that one would have been
10 non-waivable?

11 MR. NELSON: I think that if Congress had
12 expressly denominated something in that statute as a
13 right --

14 JUSTICE SCALIA: But procedural rights are
15 rights. I mean, to denominate it as a right is --

16 MR. NELSON: Well, but the question is:
17 Does "any right" refer to both procedural and
18 substantive rights?

19 JUSTICE SCALIA: Exactly.

20 MR. NELSON: Which is what this Court held
21 that it did not in Pyett. But when Congress -- you
22 know, it does matter what words Congress uses, and
23 "rights" is a word that can have a lot of meanings.

24 JUSTICE SCALIA: Yes, but --

25 MR. NELSON: This is a statute that --

1 JUSTICE SCALIA: But you're saying -- in
2 answer to my question, you're saying that just because
3 the statute refers to procedural rights as rights, just
4 as we do, all of a sudden, simply because the statute
5 uses our normal language, those procedural rights are
6 elevated to the level of substantive rights and can't be
7 waived. That can't be right.

8 MR. NELSON: I think if Congress makes clear
9 in the statute that what it means when it's talking
10 about rights is -- includes procedural rights, and then
11 it has a provision that says any right under this
12 statute is not subject to waiver, that creates a very
13 strong inference that Congress meant what it said. But,
14 in fact --

15 JUSTICE SCALIA: I don't think that
16 referring to a procedural right as a right creates any
17 inference at all. It is a right.

18 MR. NELSON: It is a right, and when
19 Congress has said -- I mean, many of these statutes such
20 as Title VII and TILA don't say that rights are
21 non-waivable. This statute is a unique statute in its
22 phrasing. It has a non-waiver provision applicable to
23 any right, and it has a list of rights. That's pretty
24 unusual.

25 JUSTICE GINSBURG: What else is non-waivable

1 besides the 3 days to back out?

2 MR. NELSON: Well, the other thing that this
3 statute makes non-waivable besides rights is
4 protections, and -- which is a phrase that isn't then
5 tied to anything defined in the statute. But I think
6 that, for example, all of the prohibited practices
7 listed in section 1679b, which are at pages 4a to 5a of
8 the red brief -- those would be non-waivable. You
9 couldn't waive your right not to have the credit repair
10 organization make false statements to you. You couldn't
11 waive your right under 1679b(b) not to have to make a
12 payment in advance to a credit repair organization. You
13 can't waive the right to the disclosures provided for in
14 1679c or the protection provided by those disclosures.
15 And 1679d requires written contracts and specifies those
16 terms. Those would all be subject to the provision in
17 the statute that says you can't waive any protection or
18 any right provided by the statute.

19 JUSTICE KAGAN: Do you know, Mr. Nelson,
20 whether this statute is unique in this sense: Do you
21 know of any other statute that arguably voids
22 arbitration agreements without saying that they're
23 voiding -- that it's voiding an arbitration agreement?

24 MR. NELSON: No. There's a -- sort of a
25 pending disagreement, perhaps, over whether the

1 Magnuson-Moss Warranty Act does, but that's because of
2 some very specific language in that statute about
3 informal dispute resolution mechanisms and the manner in
4 which that has been interpreted in agency regulations.
5 So, this is really the only statute that I'm aware of
6 that uses this formulation.

7 But you remind me of your earlier question,
8 which I never got to finish answering about the
9 thousands of other statutes that say specifically that
10 you can't enforce arbitration agreements. In fact,
11 there are very few such statutes. There were none at
12 the time this statute was enacted. The first one
13 appeared 6 years later. The only time that there has
14 been any number of them is in the 2010 Dodd-Frank Act,
15 which came after what I would say is a lengthy period of
16 considerable attention that had been paid by advocates
17 before Congress to the issue of arbitration that I think
18 led to the desire to use as sort of a belt and
19 suspenders approach in those statutes.

20 But what we had here in 1996, there had
21 never before been a statute that prohibited the
22 enforcement specifically of an arbitration agreement in
23 those terms. And as Mr. McConnell said, there were some
24 proposals, unenacted proposals, that had been floated at
25 that time. But I think the one thing that is clear is

1 that we don't learn how Congress does things by looking
2 at things that it didn't do. And that's all those
3 unenacted proposals were.

4 JUSTICE GINSBURG: Would your position of
5 right to a lawsuit -- would that extend to a
6 post-dispute genuinely bargained-for right to arbitrate?

7 MR. NELSON: No, I think not, Justice
8 Ginsburg, and for this reason: The -- the Court has
9 always differentiated between post-dispute settlements
10 of claims and pre-dispute waivers, and has not
11 considered agreements to settle, absent very special
12 either statutory language such as in the ADEA, which
13 does apply a waiver provision to some types of
14 settlements, and in the Fair Labor Standards Act, where
15 there's a very specific policy reason for prohibiting
16 certain kinds of settlements. But, generally, the Court
17 has not considered the settlement of a case to be a
18 waiver of the right to bring the case. And that
19 primarily came in the FELA cases that we cited in our
20 briefs.

21 But I think it was significant that in Wilko
22 v. Swan, where the Court said we're going to interpret
23 the Securities Act not to -- not to allow waivers of the
24 right to sue, the Court said: Of course, this wouldn't
25 apply to something that came post-dispute.

1 And in McMahon and Rodriguez de Quijas, what
2 the Court disagreed with Wilko v. Swan about was whether
3 the right to sue under that particular statute was
4 non-waivable. But it favorably commented on the notion
5 that, of course, even if it were, it wouldn't bar a
6 post-dispute agreement to arbitrate a claim as a way of
7 settling an actually pending dispute.

8 And that's why I think when Congress enacted
9 this statute, it would have been acting against that
10 backdrop and would not have -- no one would have thought
11 that a settlement agreement is a waiver of the right to
12 sue. A settlement agreement is a resolution of the
13 right to sue.

14 JUSTICE GINSBURG: Another argument that is
15 made, in opposition to your position, is that the
16 statute says any waiver of any protection or right may
17 not be enforced by any court or any other person. And
18 the suggestion is "any other person" must contemplate an
19 alternate dispute method that doesn't involve court --
20 court or any other person.

21 MR. NELSON: Well, I don't think that it
22 necessarily contemplates an alternative dispute
23 resolution mechanism, because I think, for example, that
24 would bar -- when someone goes to court to compel
25 arbitration, they are enforcing an arbitration agreement

1 by bringing an enforcement action. So, that would bar
2 them from doing that.

3 So, "any other person" doesn't necessarily
4 mean arbitrators. But even to the extent that it
5 comprehends arbitrators and maybe even one might have
6 thought was principally applicable to them, you've got
7 to realize that this statute -- what it prohibits is
8 only the waiver of the consumer's ability to arbitrate
9 her CROA claim. It doesn't bar a credit repair
10 organization from requiring a consumer to arbitrate the
11 credit repair organization's breach of contract action.
12 And, in fact, most -- well over 99 percent of the
13 consumer arbitrations that were handled by the
14 arbitration forum that was designated in this contract
15 were collection actions brought by a company that says
16 this consumer owes me some money.

17 So, that's kind of the norm. That's the
18 general run of arbitration cases. And if a credit
19 repair organization were to initiate an arbitration
20 against a consumer, that wouldn't violate the non-waiver
21 provision; but if the consumer then defended and said,
22 wait a second, this contract is void because I never got
23 the right to cancel, the provision would quite clearly
24 prevent the arbitrator in that circumstance from saying
25 you waived the right to cancel.

1 CHIEF JUSTICE ROBERTS: What about the
2 argument that the consumer retains the right to sue,
3 since they can go into court with their complaint, but
4 it's simply -- the rule that the court will apply is
5 that you have to proceed to arbitration?

6 MR. NELSON: Well, I think it's -- it would
7 be a remarkably crabbed notion of having a right to sue
8 that meant you could file a complaint that was
9 mandatorily subject to decision elsewhere. And, second,
10 and this goes to Justice --

11 CHIEF JUSTICE ROBERTS: But that's
12 frequently -- that's frequently the way these issues
13 come up. I mean, people --

14 MR. NELSON: Well, that's certainly --

15 CHIEF JUSTICE ROBERTS: -- who think they
16 cannot be forced to arbitrate either under the agreement
17 or any other provision, they'll bring their complaint in
18 court, and then there will be a judicial resolution of
19 whether or not the proceeding should go to arbitration.

20 MR. NELSON: But -- but all that has been
21 resolved in that -- that suit is not the plaintiff's
22 claim under CROA, which is what he has a right to sue
23 on. All that's resolved is the issue of whether he has
24 a contractual obligation to arbitrate which he has
25 breached by going into court.

1 And this goes to Justice Kennedy's question.
2 Under the FAA, you can compel arbitration when someone
3 has filed a complaint that is in breach of an agreement
4 to arbitrate.

5 So, they -- they don't actually have a right
6 to sue. You can't stop them from going and filing a
7 complaint, but once they do, you come in and say, no,
8 you have no right to -- to proceed on the merits with
9 this claim in court. And, in fact, that's -- that's
10 exactly what the arbitration --

11 JUSTICE KENNEDY: Can you get -- can you get
12 damages in the arbitration for the cost of attorney's
13 fees to go to the court to say that you had to go to the
14 arbitration?

15 MR. NELSON: No, I don't think you would
16 generally have that entitlement under any -- any rule of
17 law that is -- that is normally applicable in American
18 courts. However, if your -- if your arbitration
19 agreement provided for that -- I'm afraid I can't point
20 to any decision that would make it unenforceable, much
21 as I would regret that result.

22 So, you know, I think in a -- in a real
23 sense, the consumer has no right to -- right to sue
24 merely because they can run into court and -- and then
25 be compelled to arbitrate. And that's exactly why this

1 Court, in every one of its decisions enforcing
2 arbitration agreements or not, has referred to the
3 arbitration agreement as a waiver of the right to
4 proceed judicially. It has used that phrase over and
5 over again in McMahon, Rodriguez de Quijas, Mitsubishi,
6 and -- and Gilmer itself.

7 The -- the common recognition of all those
8 cases is that the arbitration agreement is a waiver of
9 the person's right to proceed in court.

10 CHIEF JUSTICE ROBERTS: You agree, I take
11 it, that you would lose if the statute said "you have a
12 cause of action"?

13 MR. NELSON: Yes. I -- you know, a cause of
14 action I don't think would -- would do it for us. In
15 fact, that's exactly what the ADEA says, the section
16 that creates a judicial remedy is headed "Cause of
17 Action." And so, you know, the question again is
18 "right" is a word that -- that can be used in many
19 senses. It's -- it's a word sort of like
20 "jurisdiction." It gets thrown around loosely. But
21 when Congress says a right is non-waivable, it's
22 referring to something specific. And the question is:
23 What is it referring to in a statute that uses the term
24 "right" and uses it to describe the -- the ability to go
25 to court?

1 And -- and, again, that "right to sue"
2 language is important in two ways, because it not only
3 specifies that the 1679g remedies are a right for
4 purposes of this statute, but it says something about
5 the nature of the right. It's a right to sue. It's not
6 just a right to get those damages, to get your money
7 back. And "sue," as I -- and I think my friend
8 agrees --

9 JUSTICE SCALIA: Well -- well, I guess it
10 goes further than that, your argument does, it seems to
11 me. Your argument is the waiver -- the non-waiver of
12 rights provision would normally be read to mean
13 non-waiver of substantive rights, but the notice given
14 to the consumer here, which refers to the procedural
15 right to sue as a "right," eliminates that presumption.

16 So, I presume, therefore, that your position
17 is that all procedural rights under this statute cannot
18 be waived. Because, I mean, that's what we're talking
19 about: What does "right" mean --

20 MR. NELSON: Justice --

21 JUSTICE SCALIA: -- when it says rights are
22 not waived? And our prior case law says ordinarily that
23 means only substantive rights. But here in this
24 statute, it refers to the right to sue, which is
25 certainly a procedural right, as a right. So, I presume

1 all the other procedural rights in this statute likewise
2 cannot be waived.

3 MR. NELSON: Well, I -- I'm not really sure
4 there are other procedural rights in the statute.

5 JUSTICE SCALIA: Oh, there are none?

6 MR. NELSON: I mean, unless -- the right to
7 cancel within 3 days I suppose could be called a
8 procedure in one sense, although it's -- it's -- I think
9 it -- it probably would generally be categorized as a
10 substantive right.

11 But as far as procedural rights of the
12 consumer, they are set forth in 1679g, and they are the
13 right to bring an action either on an individual or
14 class basis for the damages and attorney fees specified
15 in that section. And that's what I think is being
16 referred to as "the right to sue."

17 Now, if there were something else in the
18 statute that one might arguably call a right and
19 arguably call procedural -- I mean, it's hypothetical
20 because I don't think it's there, but I would not jump
21 to the conclusion that it was a right if it was not
22 comprehended by "right to sue," because I think what
23 that statement "right to sue" makes non-waivable is the
24 right to sue. It's not just any procedural thing in
25 this statute that one might loosely call a right.

1 JUSTICE KENNEDY: Suppose the case were
2 reversed. The liability section says you have a right
3 to sue, and the disclosure section says you have a right
4 to sue or go to arbitration. What result then?

5 MR. NELSON: Well --

6 JUSTICE KENNEDY: It seems to me that under
7 your -- well, I'll let you answer.

8 MR. NELSON: Justice Kennedy, let me divide
9 it up. If the liability section said you had a right to
10 sue and there were no disclosure -- disclosure section
11 at all, I would say that's -- that's plenty good enough.
12 If the disclosure section says, you have a right to sue
13 or to go to arbitration, I think you would have to then
14 say sensibly what is Congress talking about when it's --
15 when it's referring to this, and you would have to read
16 them together. And I would have a hard time standing up
17 here and saying that a statute that told people "right
18 to sue or arbitrate" meant right to sue only and
19 foreclosed arbitration. And -- and, you know, I think
20 -- I think that really would be a very different matter.

21 JUSTICE KAGAN: Mr. Nelson, you just said if
22 the liability section said you have a right to sue,
23 that's okay, but if it says you have a cause of action,
24 that's not okay. But the right to sue is really just a
25 colloquial way of expressing the first. So, why should

1 we draw the line between those two things?

2 MR. NELSON: Well, when you say
3 "colloquial," I'm not -- I don't want to fence with you,
4 but I think that that's selling it a bit short. This is
5 a statute where Congress prescribed a notice, prescribed
6 it in statutory terms, did it so people would have an
7 understanding of what their rights were, and did it in a
8 way that no reasonable consumer would understand meant,
9 oh, this non-waivable right is not really to sue in the
10 way that I would ordinarily understand the word, and
11 even that courts normally use it but actually to -- to
12 do something else.

13 So, I -- I don't think it's colloquial in --
14 in a disparaging sense. What it is, is something that
15 is designed to convey a clear meaning, and the clear
16 meaning that it conveys is you have a right to go to
17 court. Now, of course, even a disclosure that you have
18 a right to go to court wouldn't be enough to get you
19 over the hump if you didn't also have a provision that
20 made that right non-waivable. But, again, here what you
21 have is both.

22 And -- and in doing that, in writing that
23 statute, Congress was doing exactly what the Court had
24 told it, it didn't do in Gilmer, it didn't do in
25 McMahon, it didn't do in Mitsubishi. It created a right

1 to a judicial remedy that is not subject to waiver.

2 Unless the Court has any further questions,
3 I will --

4 CHIEF JUSTICE ROBERTS: Thank you, counsel.

5 Mr. McConnell, you have 10 minutes
6 remaining.

7 REBUTTAL ARGUMENT OF MICHAEL W. McCONNELL

8 ON BEHALF OF THE PETITIONERS

9 JUSTICE SOTOMAYOR: Mr. McConnell, can we go
10 to the issue of the class action? If we buy your
11 argument that procedural and substantive rights are
12 different, is it your position that you could seek a
13 waiver of a class action even though this statute
14 expressly contemplates class actions?

15 MR. McCONNELL: Actually, Justice Sotomayor,
16 I think this statute specifically does not require -- it
17 contemplates but does not require class actions. If you
18 look at -- at 1679g(a)(2)(B), which is the class action
19 provision -- it's on page 59a of the appendix to the --
20 to the petition -- all that it says is that in the case
21 of a class action, here is how we would -- here's how
22 the damages, the punitive damages, would be calculated.
23 It does not say that there must be class actions. It
24 doesn't make that a non-waivable right at all.

25 JUSTICE SOTOMAYOR: So, your answer to me is

1 that that is waivable. That's not a right contemplated
2 by the right to sue.

3 MR. McCONNELL: Actually, my answer to you
4 is that it's not a right to begin with.

5 JUSTICE SOTOMAYOR: Well, you have to meet
6 the prerequisites --

7 MR. McCONNELL: Whether waivable or not.

8 JUSTICE SOTOMAYOR: But you have to meet the
9 prerequisites of a class action before you are entitled
10 to seek one. But your position is that's not a
11 protected right?

12 MR. McCONNELL: May I -- if we were to
13 hypothesize that the statute did provide that there
14 shall be class provisions, which this does not -- I
15 think this statute is agnostic on that, but the
16 hypothetical statute where class actions are
17 contemplated, I would not argue that that is necessarily
18 waivable. What I would argue is that that can be
19 vindicated through arbitration, that there can be -- as
20 this Court discussed just last term in Concepcion, there
21 can be class arbitration proceedings.

22 JUSTICE GINSBURG: But you -- but this
23 arbitration agreement precludes class actions, doesn't
24 it?

25 MR. McCONNELL: Yes, it does. And, again,

1 this statute does not require that there be class
2 proceedings. I'm only addressing a hypothetical --

3 JUSTICE SOTOMAYOR: Unless --

4 MR. McCONNELL: -- statute that did.

5 JUSTICE SOTOMAYOR: Unless we read the
6 disclosure requirement of a right to sue to mean that
7 you're entitled to bring your action in court. With
8 whatever protections, procedural and substantive
9 protections, that entails.

10 MR. McCONNELL: Yes, and that seems to me
11 just a further reason not to interpret a disclosure
12 provision with a layman's language as importing, you
13 know, very specific legal notions, that -- I think this
14 simply means -- right to sue simply means cause of
15 action. And it's -- each of the rights, I should point
16 out, in the disclosure provision is -- has its actual
17 textual home elsewhere. None of them are created in the
18 disclosure provision. Each of them is created
19 elsewhere, either in this statute or another. To find
20 out exactly what they entail, you look to the
21 substantive provisions. Here, you would look to 1679g,
22 and you would see that class actions are possible but
23 not required under this particular statute.

24 CHIEF JUSTICE ROBERTS: Could you in an
25 agreement waive the provisions of 1679g(b) that specify

1 what a court shall consider in awarding punitive
2 damages?

3 MR. McCONNELL: I don't think so,
4 Mr. Chief Justice. Most lower courts treat the right to
5 punitive damages as a substantive right which would not
6 be waivable.

7 CHIEF JUSTICE ROBERTS: No, well what --
8 what if you don't want your arbitrator to consider those
9 four requirements? Could you waive particular aspects?
10 I mean, that tells you that -- first of all, it says, of
11 course, "the court shall consider"; but I take it your
12 position is when they say "the court," they mean the
13 court or arbitrator?

14 MR. McCONNELL: It means the decisionmaker.
15 Many statutes of course refer to things that courts
16 might do, even though those statutes can be vindicated
17 in arbitration. Title VII, for example, has several
18 provisions in which it says, if the court determines
19 this, then it may do that, for example, issue
20 injunctions and so forth. I -- when you import the
21 substantive provisions of a statute into an arbitration
22 proceeding, everything that would be substantively
23 available from a court becomes available from -- from
24 the arbitrator. And that's the way I would read the
25 punitive damages section here.

1 I note, by the way -- if I might just
2 respond to a few of the points made by my friend in
3 response to questions -- begin with Justice Sotomayor's
4 interesting question about the fact that the statute
5 appears to make even offering a waiver, offering an
6 arbitration clause, a violation. It's actually even
7 worse than that for two reasons.

8 One is that under their reading, a
9 settlement is surely just as much a waiver as an
10 arbitration is. Now, they say, oh, well, that only
11 means post-dispute waivers. But that is not what this
12 statute says. This statute is about all waivers. In
13 contrast to other statutes previously enacted, like the
14 ADEA, which distinguish between pre-dispute and
15 post-dispute waivers, this one does not. So, their
16 position suggests that even a settlement offer is a
17 violation of this statute.

18 JUSTICE GINSBURG: Well, Mr. Nelson just
19 said no, that their position doesn't suggest that, when
20 I asked him about post-dispute and he brought up
21 settlement as well. He said that their interpretation
22 does not exclude a settlement in which the plaintiff
23 agrees --

24 MR. McCONNELL: Well, Justice Ginsburg, that
25 was his answer, but what that tells us is that he is not

1 giving us a plain language meaning of the statute, which
2 is all that they have, right? Their entire position is
3 based upon a plain language reading of the statute.
4 Remember the way the Ninth Circuit begins its opinion by
5 quoting Alice in Wonderland. It's -- it's all about
6 plain language. But they do not offer us a plain
7 language interpretation of this statute. In order to
8 avoid absurd consequences like making settlement offers
9 a violation of the statute, they have to create
10 exceptions, unspecified exceptions, to the text.

11 It would be much easier simply to follow the
12 rules of construction that this Court had announced
13 before this statute was enacted and against which
14 Congress operated.

15 CHIEF JUSTICE ROBERTS: Well, one of those
16 rules of construction is that you don't read statutes
17 when -- to the extent they lead to absurd results. I
18 mean, I think you can still say follow the plain
19 language, but that doesn't mean you go so far as to say
20 you can't enter into a settlement.

21 MR. McCONNELL: I think it's easier, though,
22 simply to assume that Congress was using words in the
23 way that this Court used them in *Gilmer* just a few years
24 before, that that's a much more straightforward way of
25 reading the statute.

1 JUSTICE SCALIA: I'm not sure that a
2 settlement is a waiver anyway. It's a vindication. You
3 -- you vindicate your right to a settlement. I don't
4 know that you waive it.

5 MR. McCONNELL: Just as I think you can say
6 that when you go to arbitration, you vindicate the
7 substantive rights of the statute as well. And, indeed,
8 this Court has used that very language in Mitsubishi
9 with respect to -- to arbitration.

10 The -- just a couple of other small points.

11 My friend points out that this is the first
12 statute in -- or that at the time of this statute in
13 1996, that there had been no statute that explicitly
14 barred arbitration, which is historically true but I
15 think not particularly revealing. It was only in '85 in
16 Mitsubishi and then '91 in Gilmer that Congress became
17 aware that it needed to do this in statutory causes of
18 action. In -- and by 1996, they were considering bills
19 that explicitly voided arbitration clauses. They
20 weren't enacted, but this is for political reasons.
21 Remember the political composition of Congress in 1996.

22 It is not surprising that statutes voiding
23 arbitration agreements become more common when the
24 political composition of the Congress changes. This is
25 fundamentally a political choice, and ought to be -- we

1 ought to respect the choices that Congress has made.

2 Unless there are further questions, I will
3 waive the remainder of my time.

4 CHIEF JUSTICE ROBERTS: Thank you, counsel.

5 MR. McCONNELL: Unless it's an un-waivable
6 right.

7 (Laughter.)

8 CHIEF JUSTICE ROBERTS: You have no right to
9 time before the Court --

10 (Laughter.)

11 CHIEF JUSTICE ROBERTS: Thank you, counsel.

12 The case is submitted.

13 (Whereupon, at 12:00 p.m., the case in the
14 above-entitled matter was submitted.)

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