No. 21-1058

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

William T. Lyons,

Plaintiff-Appellee,

v.

PNC Bank, N.A.,

Defendant-Appellant.

On Appeal from the United States District Court
for the District of Maryland

Hon. Stephanie A. Gallagher

Case No. 1:20-cv-02234

Brief of Amicus Curiae Consumer Financial Protection Bureau in Support of Plaintiff-Appellee

Stephen Van Meter
Acting General Counsel
John R. Coleman
Deputy General Counsel
Steven Y. Bressler
Assistant General Counsel
Kevin E. Friedl
Senior Counsel
Consumer Financial Protection Bureau
1700 G Street NW
Washington, DC 20552
(202) 435-9268
kevin.friedl@cfpb.gov

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

Regulations

Other Authorities

INTEREST OF AMICUS CURIAE

The Consumer Financial Protection Bureau is an independent executive agency of the United States responsible for promulgating rules under the Truth in Lending Act (TILA), interpreting and issuing guidance regarding TILA, and enforcing TILA's requirements. *See* 12 U.S.C. § 5512(a)-(b); 15 U.S.C. § 1604.

TILA and its implementing rule, Regulation Z, restrict mandatory arbitration clauses in home loans and other agreements "relating to" home loans. *See* 15 U.S.C. § 1639c(e); 12 C.F.R. § 1026.36(h). This case involves the scope of that restriction, an issue that appears to be one of first impression in the courts of appeals.

The position urged by the defendant-bank in its appeal—that it can compel arbitration of the plaintiff-consumer's claim about his home loan because the arbitration clause was not part of the home-loan contract itself—is contrary to the text and purpose of the arbitration restriction and would create a broad loophole that would harm consumers. Accordingly, the Bureau has a substantial interest in the Court's resolution of this case.

STATEMENT

A. The Truth in Lending Act and Regulation Z

1. TILA is a landmark consumer-protection law enacted in 1968 to promote "the informed use of credit." Pub. L. No. 90-321, § 102, 82 Stat. 146 (May 29, 1968) (codified as amended at 15 U.S.C. § 1601). Since then, Congress has amended TILA numerous times, expanding its scope to provide additional protections for consumers, including in the use of mortgage loans. *See, e.g.*, Home Ownership and Equity Protection Act of 1994, Pub. L. No. 103-325, Tit. I, subtit. B, 108 Stat. 2190.

As part of its response to the financial crisis of 2007-2008, Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act. Pub. L. 111-203, 124 Stat. 1376 (2010). Title X of the Dodd-Frank Act established the Bureau to consolidate the administration and enforcement of the federal consumer financial laws in a single agency. The Act gave the Bureau primary rulemaking and interpretive authority with respect to TILA. *See* 12 U.S.C. § 5512(a), (b)(1), (4); 15 U.S.C. § 1604(a), (h).

Title XIV of the Dodd-Frank Act, known as the Mortgage Reform and Anti-Predatory Lending Act, added many new provisions to TILA in order to address problems in the origination and servicing of consumer mortgage loans that contributed to the crisis. These provisions included certain

"minimum standards for residential mortgage loans," codified in 15 U.S.C. § 1639c. Congress sought by these measures "to assure that consumers are offered and receive residential mortgage loans on terms that reasonably reflect their ability to repay the loans and that are understandable and not unfair, deceptive or abusive." *Id.* § 1639b(a)(2); *see also* H.R. Rep. No. 111-94, at 48 (2009) (these standards were meant "to reform mortgage lending practices to avert a recurrence of the current situation of unprecedented levels of defaults and foreclosure[] rates").

Under these standards, mortgage lenders must reasonably assess borrowers' ability to repay and are prohibited from requiring certain kinds of credit insurance or prepayment penalties. *Id.* § 1639c(a)-(d). Lenders are also prohibited from requiring that borrowers agree ahead of time to arbitrate or otherwise waive their ability to pursue in court certain claims. *Id.* § 1639c(e). This arbitration restriction has two main parts. Both parts apply to "residential mortgage loan[s]" as well as "extension[s] of credit under an open end consumer credit plan secured by the principal dwelling of the consumer," a category that includes home equity lines of credit (HELOCs). For brevity, this brief refers to the set of loans covered by TILA's arbitration restriction as "home loans."

First, the restriction provides, in Section 1639c(e)(1), that no home loan "may include terms which require arbitration or any other nonjudicial procedure as the method for resolving any controversy or settling any claims arising out of the transaction." (Consumers and creditors may, however, choose to settle a dispute via arbitration *after* the dispute arises. *Id.* § 1639c(e)(2).) Second, the restriction states, in Section 1639c(e)(3), that no provision of a home loan—"and no other agreement between the consumer and the creditor *relating to* the [loan]" (emphasis added)—"shall be applied or interpreted" to bar a consumer from bringing requests for relief in connection with federal claims in court.[1]

Congress provided that any "section, or provision thereof, of [the Mortgage Reform and Anti-Predatory Lending Act]"—including the arbitration restriction—"shall take effect on the date on which the final

[1] Congress addressed the use of mandatory arbitration in a number of other provisions of the Dodd-Frank Act as well. For example, it prohibited mandatory arbitration of disputes involving whistleblowers to the CFTC and SEC. Pub. L. 111-203, §§ 748, 922, 124 Stat. 1746, 1848 (codified at 7 U.S.C. § 26(n) and 18 U.S.C. § 1514A(e)); *see also Santoro v. Accenture Fed. Servs., LLC,* 748 F.3d 217, 222 (4th Cir. 2014) (holding that these provisions show a clear congressional intent to limit application of the Federal Arbitration Act). It also empowered the Bureau to issue rules governing arbitration provisions in contracts for consumer financial products or services. Pub. L. 111-203, § 1028, 124 Stat. 2003-04 (codified at 12 U.S.C. § 5518).

regulations implementing such section, or provision, take effect" (or within a set time if no such regulations had yet been issued). Pub. L. 111-203, § 1400(c)(2)-(3), 124 Stat. 2136 (codified at 15 U.S.C. § 1601 note).

2. The federal regulations implementing TILA are known as Regulation Z. *See* 12 C.F.R. pt. 1026. In 2013, the Bureau amended Regulation Z to implement the Dodd-Frank Act's new standards on mortgage loan origination, including the arbitration restriction. *See* Loan Originator Comp. Requirements Under TILA, 78 Fed. Reg. 11280 (Feb. 15, 2013). The provisions of Regulation Z implementing the arbitration restriction are found at 12 C.F.R. § 1026.36(h). The Bureau explained in promulgating this provision that it intended "to facilitate compliance with the statute" but not to "alter[] the scope of the statutory provision." 78 Fed. Reg. at 11387.

The Bureau also clarified that the scope of Section 1639c(e)(1) is not limited "to the note itself" in a home-loan transaction but instead applies to "the terms of the whole transaction, regardless of which particular document contains those terms." *Id.* at 11388 (explaining a change to the wording of 12 C.F.R. § 1026.36(h)(1), which implements Section 1639c(e)(1)). "Plainly, the prohibition [in Section 1639c(e)(1)] cannot be evaded simply by including a provision for mandatory arbitration in a

document other than the note if that document is executed as part of the transaction." *Id.* At the same time, the Bureau explained that Section 1639c(e)(1) does not apply "to agreements that are not part of the credit transaction." *Id.* The Bureau did not say or suggest that the different language in Section 1639c(e)(3) was similarly limited.

The Bureau set an effective date of June 1, 2013 for the arbitration restriction. *Id.* at 11387. In doing so, the Bureau noted that the restriction would not require significant changes to lenders' current practices because Fannie Mae and Freddie Mac had for years already declined to accept mortgage loans that required arbitration. *Id.*

B. Facts and Procedural History

Plaintiff William Lyons is a Maryland homeowner. JA15 ¶ 10. Defendant PNC Bank is a national bank. JA15 ¶ 11. Mr. Lyons had a HELOC with the bank that he took out in 2005. JA15 ¶¶ 11-12. He could draw on his HELOC through use of a card connected to that account. JA15 ¶ 13. Mr. Lyons also had two deposit accounts with the bank, which he opened in 2010 and 2014. JA44; JA231.

The contract governing the HELOC did not contain an arbitration clause. JA80-83. Some versions of the deposit account agreement governing each deposit account did. JA 63-64. The arbitration clause in

that agreement purported to apply to any claim that "arises out of or relates to" the agreement or the deposit account. JA63.

The deposit account agreement also contained a set-off provision authorizing the bank to withdraw from the deposit accounts amounts owed on "[a]ny loans, overdrafts, obligations or other indebtedness (except for debts arising out of bank credit cards … , unless permitted by applicable law)." JA59. The bank used this provision to make payments on Mr. Lyons's HELOC by withdrawing roughly $1,400 from his 2010 deposit account and roughly $1,600 from his 2014 deposit account. JA17-18 ¶¶ 17, 25; JA34-35 ¶¶ 17, 25.

Mr. Lyons filed suit under TILA, alleging that the bank violated 12 C.F.R. § 1026.12(d) when it took payment on his HELOC from funds held in his deposit accounts. JA24-25 ¶¶ 49-55. That provision bars "card issuers" from "offset[ing] a cardholder's indebtedness arising from a consumer credit transaction under the relevant credit card plan against funds of the cardholder held on deposit with the card issuer."

The bank moved to compel arbitration of Mr. Lyons's TILA claim, invoking the arbitration clause in the deposit account agreement. JA90-106. Mr. Lyons responded that TILA, as amended by the Dodd-Frank Act, barred arbitration of his claim. JA107-114.

The district court granted in part and denied in part the bank's motion. JA286-302. It sent to arbitration that portion of Mr. Lyons's claim relating to payment from his 2010 account. The court held that TILA's restriction on mandatory arbitration did not apply to that portion of Mr. Lyons's claim because the arbitration clause was put in place in February 2013, several months before TILA's restriction on arbitration took effect in June 2013. JA297-98.

The court found no similar timing problem regarding the 2014 deposit account. JA298. It held that TILA barred the bank's attempt to compel arbitration of that part of Mr. Lyons's claim. The court based its holding on both Section 1639c(e)(1) and Section 1639c(e)(3), each of which, the court concluded, independently foreclosed the bank's motion to compel arbitration. JA291-96. The bank appealed from the denial of its motion to compel arbitration and Mr. Lyons cross-appealed.

SUMMARY OF ARGUMENT

Congress amended the Truth in Lending Act in the wake of the financial crisis of 2007-2008 in order to provide consumer borrowers with a suite of important new protections. Among these, TILA now prohibits home-loan agreements from being read or applied to bar a consumer from pursuing relief in court in connection with a federal claim. By its terms, this

restriction applies not only to home-loan agreements themselves but also to any other contract between the borrower and lender "relating to" the loan.

The plaintiff in this case, Mr. Lyons, seeks to pursue in court a federal claim relating to his home loan. Specifically, he claims that the defendant, PNC Bank, violated TILA in the way it took payment on his loan, by withdrawing money from two deposit accounts he held with the bank. Because the agreement governing those accounts purported to provide the bank with a means of collecting payment on Mr. Lyons's home loan, the agreement "related to" that loan—just as much as if the agreement had expressly named the loan. Thus, the bank cannot compel arbitration of Mr. Lyons's claim based solely on the fact that the arbitration provision it seeks to invoke appeared not in the home-loan agreement itself but in a separate, related agreement.

ARGUMENT

TILA'S ARBITRATION RESTRICTION APPLIES NOT ONLY TO HOME-LOAN AGREEMENTS THEMSELVES BUT TO RELATED AGREEMENTS SUCH AS THOSE AUTHORIZING PAYMENTS ON THE LOAN

A. Lenders cannot circumvent TILA's arbitration restriction simply because an arbitration clause appears in a related agreement with the borrower.

The Truth in Lending Act provides that no home loan, and no other agreement between the consumer and creditor "relating to" the home loan, may be "applied or interpreted" to bar the consumer from pursuing in court

an action in connection with an alleged violation of federal law. 15 U.S.C. § 1639c(e)(3); *see also* 12 C.F.R. § 1026.36(h)(2). This provision bars a creditor from compelling arbitration even if the arbitration clause the creditor seeks to invoke was entered into not as part of a home-loan transaction itself but as part of a related agreement with the consumer.

The text of Section 1639c(e)(3) and its place in the broader statutory scheme make clear that it applies to attempts to compel arbitration. By its terms, Section 1639c(e)(3) prohibits interpreting or applying part of a covered contract "so as to bar a consumer from bringing an action in an appropriate district court of the United States, or any other court of competent jurisdiction … for damages or other relief … ." In ordinary usage, to force a consumer to stop pursuing his or her claim in court and instead take that claim before an arbitrator is undoubtedly to "bar" that consumer from bringing the action in court.

The section in which this provision appears is titled "Arbitration." *See* 15 U.S.C. § 1639c(e); *see generally Yates v. United States*, 574 U.S. 528, 540 (2015) (plurality op.) ("While [such statutory] headings are not commanding, they supply cues" as to Congress's intent.); *id.* at 552 (Alito, J., concurring in the judgment) ("Titles can be useful devices to resolve doubt about the meaning of a statute." (quotation marks omitted)). The

other parts of that section expressly mention arbitration. *See id.* § 1639c(e)(1)-(2). Congress described this section in general terms as "prohibit[ing] mandatory arbitration clauses." H.R. Rep. No. 111-517, at 877 (2010). So while it may be true that Section 1639c(e)(3) does not itself contain the term "arbitration"—speaking instead of "waiver" and "bar[ring] a consumer from bringing an action in … court"—it is implausible that Congress did not intend that provision to apply to arbitration.

Nor does Section 1639c(e)(3)'s application to arbitration render it redundant with Section 1639c(e)(1), which states that home loans may not "include terms which require arbitration or any other nonjudicial procedure" for resolving disputes "arising out of the transaction." 15 U.S.C. § 1639c(e)(1); *see also* 12 C.F.R. § 1026.36(h)(1). These two provisions are overlapping but not coterminous. Section 1639c(e)(3), for example, is narrower than Section 1639c(e)(1) in that it applies only to requests for relief in connection with *federal* claims. Section 1639c(e)(3) is broader than Section 1639c(e)(1) in that it covers not only mandatory arbitration clauses but also contract provisions purporting to extinguish entirely a consumer's statutory cause of action. Congress's efforts to ensure these provisions would apply broadly and to avoid evasion did not make either superfluous.

Section 1639c(e)(3) is also the broader provision in that it applies not only to any provision of a home loan but also to any other agreement between consumer and creditor "relating to" the home loan. *See Attix v. Carrington Mortg. Servs., LLC*, No. 1:20-cv-22183, 2020 WL 5757624, at *9 (S.D. Fla. Sept. 16, 2020) ("The text of the statute applies broadly to 'agreement[s] … relating to' residential mortgage loans, not strictly to residential mortgage loans themselves."), *appeal pending*, No. 20-13575 (11th Cir.). Without the "relating to" clause, TILA's arbitration restriction might be easily evaded by lenders shifting arbitration clauses into related but ostensibly separate agreements with consumers, thereby frustrating the restriction's central purpose. TILA's structure and plain language make clear that the arbitration restriction is not so easily circumvented.

B. The deposit account agreement "relates to" Mr. Lyons's home loan because it purports to provide the bank with a means of collecting payment on that loan.

Plaintiff William Lyons sued Defendant PNC Bank over his home loan. Specifically, Mr. Lyons alleges that the bank violated TILA when it made payment on his loan by withdrawing money from two deposit accounts Mr. Lyons had with the bank. The bank seeks to compel arbitration of that claim based on an arbitration clause in a separate agreement purporting to govern, among other things, how the bank could

collect payment on Mr. Lyons's home loan. That agreement clearly "relates to" Mr. Lyons's home loan and thus, under Section 1639c(e)(3), cannot be interpreted or applied to bar Mr. Lyons from pursuing his claim in court.

The Supreme Court has explained that the ordinary meaning of "relating to" "is a broad one—'to stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with or connection with.'" *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992) (quoting BLACK'S LAW DICTIONARY 1158 (5th ed. 1979)); *see also Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 739 (1985) (observing that "relate to" has a "broad common-sense meaning"; "a state law 'relates to' a benefit plan in the normal sense of the phrase, if it has a connection with or reference to such a plan") (brackets and quotation marks omitted).

The deposit account agreement in which the arbitration clause appears "relates to" Mr. Lyons's home loan because it purported to provide a means by which the bank could collect payment on the loan. The agreement states that Mr. Lyons agreed to "grant us [the bank] a security interest in the balance in the Account … to pay all loans, overdrafts or other obligations or other indebtedness now or hereafter owing to us by you." JA59. "Any loans … or other indebtedness … now or hereafter owing to us by you … may be charged in whole or in part to the Account." JA59. Surely

there would be no dispute that the agreement "related to" Mr. Lyons's home loan if this set-off provision had specifically named the loan—*e.g.*, if it had said, "You authorize us to withdraw from this account to make payment on your home equity line of credit, Loan No. XXXXX7741." The actual language of the agreement has just the same effect, and it too is enough to establish that the agreement relates to the home loan.

It makes no difference for this analysis that the agreement also governed Mr. Lyons's deposit accounts. All that shows is that the agreement "relates to" Mr. Lyons's deposit accounts at the same time that—because it included a provision about how the bank could take payments on the home loan—it also "relates to" that loan. A lender could not circumvent TILA by, for example, requiring arbitration in a standalone "dispute resolution agreement" governing all of a consumer's accounts; such an agreement would clearly relate to the consumer's loan, notwithstanding that it also related to other accounts. Nor can a lender achieve the same ends by shuffling arbitration clauses into agreements primarily governing other accounts—if those agreements also relate in some way to a consumer's home loan.

In arguing to the contrary, the bank reveals the inconsistency of its own position. The bank's basis for seeking to compel arbitration is that

Mr. Lyons's claim that the bank improperly made payment on his home loan "arises out of or relates to" the deposit agreement. *See, e.g.*, JA101 (bank's motion to compel arbitration, quoting language from arbitration clause). Yet to the same extent that Mr. Lyons's claim "relates to" the deposit agreement, that agreement "relates to" his home loan. The transfer of funds from one account to another relates to both accounts.

Two other courts have considered a similar question under Section 1639c(e)(3), and both concluded that an agreement a consumer entered into in order to make payments on his home loan over the phone was an agreement "relating to" the loan. *See Attix*, 2020 WL 5757624, at *1-2, *8-9; *Thomas-Lawson v. Carrington Mortg. Servs., LLC*, No. 2:20-cv-7301, 2021 WL 1253578, at *2-3 (C.D. Cal. Apr. 5, 2021), *appeal pending*, No. 21-55459 (9th Cir.). In *Attix*, the court concluded that the language of Section 1639c(e)(3) was "clear and unambiguous": "Making a payment on a residential mortgage loan certainly 'relate[s] to the residential mortgage loan.'" 2020 WL 5757624, at *9 (quoting 15 U.S.C. § 1639c(e)(3)). The court in *Thomas-Lawson* agreed. 2021 WL 1253578, at *3. The same is true of the agreement here. "After all," as the district court in this case observed, "what is more central to a loan than terms implicating how the creditor will be paid … ?" JA293.

On appeal, the bank addresses *Attix* but does not argue that the case was wrongly decided and does not dispute that the phone-payment agreement in that case "related to" the plaintiff's home loan. *See* Br. at 33-34. The bank instead seeks to distinguish *Attix* by arguing that the plaintiff there entered into the phone-payment agreement "to facilitate the making of payments on the [home loan]," whereas Mr. Lyons did not enter into the deposit agreement for the purpose of making payments on his loan. Br. at 34. Even assuming that is an accurate description of Mr. Lyons's subjective intent, it makes no difference for the question here: whether the deposit agreement, by purporting to give the bank an additional means of collecting payment on the home loan, "related to" that home loan. For the reasons already stated, it did.

C. The bank's other arguments why TILA's arbitration restriction does not apply are incorrect.

In addition to claiming the agreement does not relate to Mr. Lyons's home loan, the bank offers a number of other reasons why TILA does not bar arbitration of Mr. Lyons's claim about the loan payment that the bank made from his 2014 account. These arguments are mistaken.

First, the bank argues that TILA's arbitration restriction "limit[s] the use of arbitration agreements in consumer mortgage transactions" but "do[es] not apply to agreements that are not part of the credit transaction"

itself. Br. at 18, 21 (quotation marks omitted). In support of this argument, the bank cites the Bureau's explanation that Section 1639c(e)(1) applies to documents that are executed as part of a home-loan transaction but not to agreements "that are not part of the credit transaction." *See* Br. at 20-21 (quoting 78 Fed. Reg. at 11388).[2]

The Bureau, however, did not state or even imply that the same was true of Section 1639c(e)(3). *See* 78 Fed. Reg. at 11388. It is not. Instead, that provision applies not only to those documents executed as part of a home-loan transaction itself but also to any "other agreement between the consumer and the creditor *relating to* the [home loan]." The bank thus errs when it seeks to rely on the Bureau's explanation of Section 1639c(e)(1) in order to read into Section 1639c(e)(3) a limitation that is not there. So too, the bank errs when it asserts that Section 1639c(e)(1) and Section 1639c(e)(3) "apply to the same scope of agreements." Br. at 32. By their plain terms they do not.

[2] It is doubtful that the deposit agreement in this case could be considered "part of the credit transaction" for Mr. Lyons's HELOC, and thus unlikely that Section 1639c(e)(1) would bar arbitration here. The Court need not resolve that question, however, because the district court's correct assessment that Section 1639c(e)(3) bars arbitration provides an independently sufficient ground to affirm.

Second, the bank suggests that the arbitration restriction does not apply because Mr. Lyons "claims that the [deposit] Account Agreement violates TILA" and thus his claim "arises from" the deposit account agreement rather than "the HELOC Agreement." Br. at 22-23. The argument appears to be that TILA's arbitration restriction applies only to claims concerning a home loan. As an initial matter, the text of Section 1639c(e)(3) does not include any such limitation. But even assuming the bank were correct, that issue is not raised in this case because Mr. Lyons's claim (which "arises from" federal law, not the terms of any particular contract) *does* concern his home loan—specifically, the allegedly improper way the bank made payment on that loan. *See* JA24 ¶¶ 49-51.[3]

Third, the bank claims that Section 1639c(e)(3) is not a limitation on *arbitration* at all but is instead a limitation on *waiver*, and that for the bank to compel Mr. Lyons to arbitrate his claim does not mean that it has required him to waive his claim. Br. at 30-32. The bank again overlooks the text of Section 1639c(e)(3). That provision is not about waiver in the sense

[3] Because Mr. Lyons seeks to pursue a claim about his home loan, this Court's holding in *Santoro* that other arbitration restrictions should not be read to bar arbitration in contexts to which those provisions were not clearly directed has no application. *See* 748 F.3d at 223.

of an agreement to extinguish the ability to pursue a claim *in any forum*. It is instead about the ability to pursue claims in court.

Section 1639c(e)(3) states that no provision of a home loan or related agreement shall be applied "so as to bar a consumer from bringing an action in an appropriate [court] ..., for damages or other relief in connection with any alleged violation" of federal law. The bank's motion to compel arbitration seeks to do exactly that, barring Mr. Lyons from bringing his claim in court and forcing him instead to bring it before an arbitrator. As noted, it is also clear from the context in which Section 1639c(e)(3) appears—including its placement in a section titled "Arbitration"—that the provision was meant to apply to arbitration.

The cases the bank cites on pages 30-31 of its opening brief are not to the contrary: Those cases either involved waiver provisions that are materially different from Section 1639c(e)(3) or did not involve waiver provisions at all. They do not speak to the issue in this case.

The waiver provision in *CompuCredit Corp. v. Greenwood*, for example, stated that the waiver by a consumer of "any right" created under the Credit Repair Organizations Act was void. *See* 565 U.S. 95, 99 (2012) (quoting 15 U.S.C. § 1679f(a)). But the Supreme Court held that the rights created under the Act did *not* include the right to bring an action in court.

Id. at 99-101. Thus, the Court concluded, the Act's general non-waiver provision did not limit arbitration. *Id.* at 101-02. Here, in contrast, Section 1639c(e)(3) specifically prohibits the bank's efforts to bar Mr. Lyons from court by forcing his claim into arbitration.

Shearson/American Express, Inc. v. McMahon discussed an anti-waiver provision that is similarly distinguishable. 482 U.S. 220 (1987). The Securities Exchange Act of 1934 declares void any provision "binding any person to waive compliance with any provision of [the Act]." *Id.* at 227 (quoting 15 U.S.C. § 78cc(a)). The Court held that, although a different provision of the Act grants district courts jurisdiction to hear securities cases, that jurisdictional provision did not itself impose any compliance obligations, and thus an agreement to arbitrate did not conflict with the Act's anti-waiver provision. Here, again, compelling Mr. Lyons to arbitrate his claim would directly conflict with TILA's arbitration restriction.

The other two cases the bank cites are even further afield. *Gilmer v. Interstate/Johnson Lane Corp.*, involved a statutory provision that did not actually prohibit waiver but instead merely required that any waivers be "knowing and voluntary." *See* 500 U.S. 20, 28-29 & n.4 (1991). And *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), appears not to have involved a waiver provision at all—let alone one

that, like Section 1639c(e)(3), bars attempts to waive the right to bring claims in a court of law. These cases do not support the bank's erroneous argument that Section 1639c(e)(3) does not apply to arbitration.

Fourth, and finally, the bank relies on a district court decision, *CMH Homes, Inc. v. Sexton*, 441 F. Supp. 3d 1202 (D.N.M. 2020), that is also readily distinguishable. *See* Br. 27-29. The plaintiff in *CMH Homes* sued the builder and seller of his manufactured home as well as an associated finance company, alleging the home was defective. 441 F. Supp. 3d at 1205, 1206-07. The plaintiff's purchase agreement with the seller included an arbitration clause. *Id.* at 1205. The builder and seller both moved to compel arbitration and the plaintiff opposed, arguing in part that forced arbitration was barred by Section 1639c(e)(1).

The district court held that Section 1639c(e)(1) did not bar arbitration because the contract for the purchase of the manufactured home was not itself a part of the credit transaction the plaintiff entered into with the finance company. *Id.* at 1209. The district court did not, however, examine or even mention Section 1639c(e)(3), which is, as noted, broader than Section 1639c(e)(1) in certain respects and encompasses not only agreements that are part of the credit transaction itself but also related

agreements between consumer and creditor.[4] The district court's holding with respect to Section 1639c(e)(1) is thus little help to the bank here in its efforts to overcome the plain language of Section 1639c(e)(3).

CONCLUSION

The Court should affirm the district court's holding that TILA's arbitration restriction applies not only to home-loan agreements themselves but also to related agreements, such as those that provide the lender with a means of taking payment on the loan.

May 24, 2021

Respectfully submitted,

/s/ Kevin E. Friedl

Stephen Van Meter
Acting General Counsel
John R. Coleman
Deputy General Counsel
Steven Y. Bressler
Assistant General Counsel
Kevin E. Friedl
Senior Counsel
Consumer Financial Protection Bureau
1700 G Street NW
Washington, DC 20552
(202) 435-9268
kevin.friedl@cfpb.gov

[4] It appears the parties failed to bring Section 1639c(e)(3) to the court's attention. Their briefs focused solely on Section 1639c(e)(1). *See* Pl.'s Opp'n to Mot. to Compel Arbitration at 3-4, *CMH Homes*, No. 1:17-cv-00835 (D.N.M. May 3, 2019) (ECF No. 37); Defs.' Reply in Supp. of Mot. to Compel Arbitration at 3, *CMH Homes* (May 17, 2019) (ECF No. 38).

Certificate of Compliance

This brief complies with the length limits permitted by Federal Rule of Appellate Procedure 29(a)(5). The brief is 4,812 words, excluding the portions exempted by Rule 32(f).

May 24, 2021

/s/ Kevin E. Friedl
Kevin E. Friedl