No. 22-14211

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ADAM U. STEINES and MIRANDA L. STEINES, individually and on behalf of all others similarly situated,

Plaintiffs-Appellees,

v.

WESTGATE PALACE, LLC, WESTGATE RESORTS, INC., WESTGATE RESORTS, LTD., LP, CENTRAL FLORIDA INVESTMENTS, INC., WESTGATE VACATION VILLAS, LLC, CFI RESORTS MANAGEMENT, INC., and WESTGATE LAKES, LLC,

Defendants-Appellants,

On Appeal from the United States District Court
for the Middle District of Florida

BRIEF OF CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLEES AND AFFIRMANCE

Elizabeth B. Wydra
Brianne J. Gorod
Smita Ghosh
CONSTITUTIONAL
ACCOUNTABILITY CENTER
1200 18th Street NW, Suite 501
Washington, D.C. 20036
(202) 296-6889
brianne@theusconstitution.org

Counsel for Amicus Curiae

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amicus curiae* states that no party to this brief is a publicly held corporation, issues stock, or has a parent corporation.

I also hereby certify that I am aware of no persons or entities, in addition to those listed in the party and *amicus* briefs filed in this case, that have a financial interest in the outcome of this litigation. Further, I am aware of no persons with any interest in the outcome of this litigation other than the signatory to this brief and its counsel, and those identified in the party and *amicus* briefs filed in this case.

Dated: June 28, 2023 /s/ Brianne J. Gorod

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES – cont'd

Page(s)

STATUTES AND LEGISLATIVE MATERIALS

TABLE OF AUTHORITIES – cont'd

INTEREST OF *AMICUS CURIAE*[1]

Constitutional Accountability Center (CAC) is a think tank and public interest law firm dedicated to fulfilling the progressive promise of the Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and to preserve the rights and freedoms it guarantees. CAC has a strong interest in securing meaningful access to the courts, and in ensuring that statutes like the Military Lending Act are understood in accordance with their text, history, and Congress's plan in passing them. Accordingly, CAC has an interest in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

In 2006, Congress passed the Military Lending Act (MLA) to address the "real threat to our national defense" posed by predatory lending to servicemembers. *See A Review of the Department of Defense's Report on Predatory Lending Practices Directed at Members of the Armed Forces and Their Dependents: Hearing Before the S. Subcomm. on Banking, Hous., & Urban Aff.*, 109th Cong. 3 (2006) (hereinafter *2006 Senate Hearing*) (statement of Sen. Dole).

To address that threat, the MLA caps interest rates on loans to military

[1] *Amicus* states that no counsel for a party authored this brief in whole or in part, and no person other than *amicus* or its counsel made a monetary contribution to the brief's preparation or submission. Counsel for all parties have consented to the filing of this brief.

borrowers; requires lenders to disclose rates, fees, and charges on loans to military borrowers; and sets other restrictions on the terms of consumer loans offered to servicemembers. *See* 10 U.S.C. § 987(b), (c), (e), (i)(4). It also provides that a creditor may not require a servicemember to participate in arbitration in relation to a consumer loan. *See Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1626 (2018) (noting that, under the MLA, it is "unlawful" to "require[] a party to arbitrate" (quoting 10 U.S.C. § 987(e)(3))).

In 2019, while Adam Steines was on active-duty status with the U.S. Army and thus covered by the MLA, he and his wife Miranda Steines signed an agreement with Westgate, a timeshare resort company. In said agreement, the company extended credit to the couple for the purchase of a timeshare tied to a Westgate property. Despite the MLA's anti-arbitration provisions, Westgate included an arbitration clause in its agreement with the Steines. The "Arbitration Addendum" required arbitration of any "controversy between the parties . . . arising out of or relating to th[e] Agreement . . . including the validity, scope or applicability of this provision to arbitrate." J.A. 312.

In 2022, the Steines filed a putative class action against Westgate, charging that the company entered into timeshare agreements with military servicemembers and veterans that "systematically failed" to comply with the MLA by, among other things, "fail[ing] to describe the charges" imposed by the timeshare agreement and

failing to disclose the maximum interest rate permitted under the agreement. *Id.* at 112, 114-15. Westgate moved to compel arbitration under the Federal Arbitration Act (FAA), arguing that the MLA does not apply to loans financing timeshare purchases, so its provision prohibiting parties from being required to arbitrate did not override the arbitration clause in the parties' contract. *Id.* at 235. Invoking the final sentence of the Arbitration Addendum (the "Delegation Clause"), Westgate also argued that an arbitrator—not a court—should decide the initial question of whether the MLA applies. ECF No. 37, at 9. The court below rejected both arguments and ruled in the Steines' favor. *See* J.A. 235-73. Westgate appealed.

Westgate now argues that the district court should have compelled arbitration because of the Delegation Clause in the parties' agreement. Appellants' Br. 5-6. Such a clause is an "additional arbitration agreement," *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 70 (2010), and when a party challenges its validity, a "federal court must consider the challenge before ordering compliance with that agreement," *id.* at 71. Westgate contends that the Delegation Clause must be enforced "independently of the MLA," "even if the Arbitration Agreement and Purchase Agreement are unenforceable." Appellants' Br. 6, 12. This argument is wrong, as the text and history of the MLA make clear.

First, Westgate ignores the breadth of the MLA's anti-arbitration provisions. The MLA makes it "unlawful" "for any creditor to extend consumer credit to a

covered member or a dependent of such a member with respect to which . . . the creditor requires the borrower to submit to arbitration or imposes onerous legal notice provisions in the case of a dispute." 10 U.S.C. § 987(e)(3). In other words, under the MLA, a creditor cannot, in connection with an extension of consumer credit, require a borrower to undergo arbitration of any dispute. This broad prohibition plainly applies to a creditor's requirement that borrowers arbitrate threshold disputes about whether legal claims arising from a credit agreement must be arbitrated.

Second, the history of the MLA supports this reading of the statute's plain text. Congress passed the MLA in response to concerns that servicemembers were being forced to arbitrate with lenders at all, not that they were being forced to arbitrate the merits of certain claims. Lawmakers were especially concerned that military borrowers were burdened by the expense, travel, and inconvenience involved in participating in mandatory arbitration. Forcing servicemembers to arbitrate the threshold question of arbitrability would impose the very burdens that the MLA was passed to prevent.

Third and finally, Westgate's argument that the district court improperly considered the Steines' argument concerning the MLA because it is not "directed specifically to the validity of the delegation provision," Appellants' Br. 12, is wholly without merit. Westgate relies heavily on *Attix v. Carrington Mortgage Services,*

LLC, 35 F.4th 1284 (11th Cir. 2022), in which this Court enforced a delegation agreement between the parties after holding that the plaintiff's statutory challenge did not present a "cognizable challenge to the enforceability of [the] delegation agreement," *id.* at 1308. But the Steines' statutory challenge differs from the one in *Attix* because the Steines invoke a different statute than the plaintiff in *Attix* did. In *Attix*, this Court concluded that the relevant statutory language, which provided that no agreements related to residential mortgage loans "shall be applied or interpreted so as to bar a consumer from bringing an action" in federal court, 15 U.S.C. § 1639c(e)(3), only prohibited arbitration of certain legal claims, 35 F.4th at 1306-09. Here, by contrast, the MLA broadly prohibits creditors from requiring borrowers to arbitrate *any* dispute in an agreement connected to the extension of consumer credit. The threshold question of an arbitrator's jurisdiction is such a dispute.

Because Westgate's arguments are at odds with the text and history of the MLA, this Court should reject them. "Congress has shown that it knows exactly how . . . to override" the FAA's provisions, *Epic Sys. Corp.*, 138 S. Ct. at 1617, and it did just that when it passed the MLA to protect servicemembers from the burdens of arbitration. Given Congress's choice, there is no basis for this Court to require the Steines to arbitrate the threshold question of arbitrability. This Court should affirm.

ARGUMENT

I. The MLA Overrides the FAA by Prohibiting the Arbitration of All Disputes Relating to the Extension of Consumer Credit to Servicemembers.

While the FAA endeavors to "place[] arbitration agreements on an equal footing with other contracts and require[] courts to enforce them according to their terms," *Rent-A-Ctr., W., Inc.*, 561 U.S. at 67, that statute, "[l]ike any statutory directive, . . . may be overridden by a contrary congressional command," *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1987); *Walthour v. Chipio Windshield Repair*, *LLC*, 745 F.3d 1326, 1330 (11th Cir. 2014). That command is clear in the MLA, which, among other things, makes it "unlawful for any creditor to extend consumer credit to a [servicemember] with respect to which the creditor requires the borrower to submit to arbitration . . . in the case of a dispute." 10 U.S.C. § 987(e)(3).

A. In passing the MLA, Congress recognized that the "predatory practices" of "unscrupulous lenders" posed harm to "our servicemen and women," *2006 Senate Hearing*, *supra*, at 2 (Sen. Shelby), and "a real threat to our national defense," *id.* at 3 (Sen. Dole); *id.* at 15 (Sen. Martinez) (describing "folks in the military" as "so vulnerable and at the same time . . . such a target of . . . unscrupulous lenders"). Indeed, lawmakers understood that the consequences of default for military borrowers—"military sanctions, including the loss of security clearance," *id.* at 1—

could have grievous effects on servicemembers and their families, as well as the national defense.

To prevent "abusive and truly predatory practices" by lenders, *id.* at 2 (Sen. Shelby), the MLA creates a variety of requirements that creditors must follow when issuing loans to servicemembers. It imposes a ceiling on the interest rate that can be charged to servicemembers, 10 U.S.C. § 987(b); regulates when a creditor can require a servicemember to make interest payments, *id.* § 987(a); mandates that creditors provide certain disclosures, *id.* § 987(c); and imposes other limits on the terms of consumer credit loans that can be offered to military borrowers, *id.* § 987(e).

The MLA also prohibits mandatory arbitration related to consumer credit loans. First, it provides that "it shall be unlawful for any creditor to extend consumer credit to a [servicemember] with respect to which . . . the creditor requires the borrower to submit to arbitration . . . in the case of a dispute." *Id.* § 987(e)(3). Second, it states that any "agreement to arbitrate any dispute involving the extension of consumer credit" to a covered servicemember is unenforceable, "[n]otwithstanding [the FAA], or any other Federal or State law, rule, or regulation." *Id.* § 987(f)(4). It also provides that "[a]ny credit agreement . . . or other contract prohibited under this section is void from the inception of such contract." *Id.* § 987(f)(3).

B. Subsections 987(e)(3) and 987(f)(4) of the MLA—both of which explicitly

address arbitration—override the FAA. To demonstrate that Congress sought to override the FAA and prevent the enforcement of private arbitration agreements, a party must point to a statutory term that "manifest[s] a clear intention to displace the Arbitration Act." *Epic Sys. Corp.*, 138 S. Ct. at 1632.

As the Supreme Court has emphasized, a statute overriding the FAA must not do so "obtuse[ly]." *CompuCredit Corp. v. Greenwood*, 565 U.S. 95, 103 (2012); *see Walthour*, 745 F.3d at 1331 (noting that the override inquiry should "focus primarily on the statutory text"). Thus, the Court has rejected the proposition that Congress overrode the FAA by providing a generic "right to sue," *CompuCredit*, 565 U.S. at 99 (quoting 15 U.S.C. § 1679c(a)), or "the right . . . to bargain collectively," *Epic Sys. Corp.*, 138 S. Ct. at 1624 (quoting 29 U.S.C. § 157), because those provisions do not "even hint at a wish to displace the Arbitration Act—let alone accomplish that much clearly and manifestly," *id.* In those cases, the Court "stressed that the absence of any specific statutory discussion of arbitration . . . is an important and telling clue that Congress has not displaced the Arbitration Act." *Id.* at 1627.

The MLA, by contrast, contains "specific statutory discussion of arbitration," *id.*, and uses the requisite clarity necessary to demonstrate "contrary congressional command," *McMahon*, 482 U.S. at 226. Indeed, although the Supreme Court has not squarely considered whether the MLA overrides the FAA, the Court has pointed to § 987(e)(3) as evidence that "Congress has . . . shown that it knows how to

override the Arbitration Act when it wishes—by . . . explaining . . . that . . . requiring a party to arbitrate is 'unlawful.'" *Epic Sys. Corp.*, 138 S. Ct. at 1626 (quoting 10 U.S.C. § 987(e)(3)). Likewise, in *CompuCredit* and *Epic Systems*, the Court identified the language in the Motor Vehicle Franchise Contract Arbitration Fairness Act (the "MVFCAFA"), which provides that an arbitration agreement may only be used in certain circumstances, "[n]otwithstanding any other provision of law," as language that is clear enough to override the FAA. *Id.* (citing 15 U.S.C. § 1226(a)(2)); *Compucredit*, 565 U.S. at 104 (same). This makes sense, given that the use of the word "notwithstanding" in statutes "shows which provision prevails in the event of a clash." Antonin Scalia & Brian Garner, *Reading Law: The Interpretation of Legal Texts* 126-27 (2012). Section 987(f)(4) of the MLA is even more explicit than the MVFCAFA, citing the FAA directly when barring arbitration of disputes "[n]othwithstanding *section 2 of title 9*, or any other Federal or State law, rule, or regulation." 10 U.S.C. § 987(f)(4) (emphasis added).

* * *

In sum, the MLA plainly overrides the FAA. It prohibits arbitration of disputes that arise in connection with the extension of consumer credit to military borrowers. Notwithstanding this plain language, Westgate argues that it can still force the Steines to arbitrate the question of arbitrability. This is wrong, as the next Part discusses.

II. The MLA's Prohibition on Arbitration Overrides the Delegation Clause in the Steines' Agreement.

A delegation clause is a specialized type of arbitration agreement, and the FAA "operates on this additional arbitration agreement just as it does on any other," *Rent-A-Ctr*, 561 U.S. at 70, meaning that a federal court may determine if the agreement has been rendered unenforceable by clear congressional command, *id.* at 70-71 ("[i]f a party challenges the validity under § 2 [of the FAA] of the precise [delegation] agreement . . . the federal court must consider the challenge before ordering compliance with that agreement"). As the court below correctly determined, the MLA makes the Delegation Clause unenforceable.

A. Westgate contends that the MLA does not override the FAA as to the Delegation Clause because that clause "involves only arbitrability . . . and therefore remains a matter for the arbitrator." Appellants' Br. 15. This is wrong. The MLA prohibits the arbitration of even threshold arbitrability disputes, as its text and history make clear.

As explained above, § 987(e)(3) provides that it "shall be unlawful" for a creditor to "extend consumer credit to a [servicemember] with respect to which . . . the creditor requires the borrower to submit to arbitration . . . in the case of a dispute." 10 U.S.C. § 987(e)(3). "The phrase 'with respect to' means 'referring to,' 'concerning,' or 'relating to.'" *Jennings v. Rodriguez*, 138 S. Ct. 830, 856 (2018) (citations omitted)); *see Respect*, *Merriam-Webster's Collegiate Dictionary* 1061

(11th ed. 2003) (defining "with respect to"); *Respecting*, *American Heritage Dictionary* 1485 (4th ed. 2006) ("with respect to," "concerning"); *Patel v. United States Att'y Gen*., 971 F.3d 1258, 1274 (11th Cir. 2020), *aff'd sub nom*. *Patel v. Garland*, 142 S. Ct. 1614 (2022) (defining "respecting" as "cover[ing] not only its subject but also matters relating to that subject" (quoting *Lamar, Archer & Cofrin, LLP v. Appling*, 138 S. Ct. 1752, 1760 (2018))).

Thus, the plain text of § 987(e)(3) makes it unlawful for a creditor, in relation to an extension of consumer credit to a military borrower, to require the borrower to submit any dispute to arbitration. Significantly, § 987(e)(3) does not limit in any way the type of dispute covered by its arbitration prohibition. *Contra*, *e.g.*, 15 U.S.C. § 1639c(e)(1) ("no residential mortgage loan . . . may include terms which require arbitration . . . as the method for . . . settling any *claims arising out of the transaction*" (emphasis added)); 7 U.S.C. § 26(n)(2) (establishing the "nonenforceability" of pre-dispute arbitration agreements "requir[ing] arbitration of a *dispute arising under this section*" (emphasis added)); 18 U.S.C. § 1514A(e)(2) (same); 12 U.S.C. § 5567 (making agreements invalid and unenforceable "*to the extent that* [they] require[] arbitration of a *dispute arising under this section*" (emphasis added)); 15 U.S.C. § 78o(o) (authorizing agency to prohibit agreements to arbitrate disputes "*arising under the Federal securities laws*" (emphasis added)). And questions regarding who decides arbitrability are *themselves* disputes, *see, e.g.*,

Attix, 35 F.4th at 1302 (referring to the threshold question about whether an arbitration agreement was enforceable as an "arbitrability dispute"); *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 536 (2019) (discussing "disputes over the scope of the arbitrator's authority"); *BG Grp., PLC v. Republic of Argentina*, 572 U.S. 25, 34 (2014) (describing "what we have called disputes about 'arbitrability'").

Subsection 987(e)(3), alone, renders the Delegation Clause "invalid [and] unenforceable." *Attix*, 35 F.4th at 1295. But § 987(f)(4), which states that "[n]otwithstanding [the FAA] . . . [,] no agreement to arbitrate any dispute involving the extension of consumer credit shall be enforceable" against servicemembers, provides an independent reason that the Steines may not be compelled to arbitrate. "Read naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" *United States v. Gonzales*, 520 U.S. 1, 5 (1997) (quoting *Webster's Third New International Dictionary* 97 (1976)); *Any*, *Merriam-Webster's Collegiate Dictionary* 56 (11th ed. 2003) ("one or some indiscriminately of whatever kind; . . . all"). And like the phrase "with respect to," the word "involving" has generally been understood expansively. *See United States v. White*, 837 F.3d 1225, 1233 (11th Cir. 2016) (describing the "expansive interpretation of the word 'involving'" adopted by this Court and others in the context of 18 U.S.C. § 924(e)). At the time of the MLA's passage, the ordinary meaning of "involving" was to "connect." *See Involve*, *Merriam-Webster's Collegiate Dictionary* 660 (11th

ed. 2003). Subsection 987(f)(4) thus renders unenforceable an agreement to arbitrate "whatever kind" of dispute might arise after an extension of consumer credit, so long as the dispute connects to the extension of that credit. As the district court recognized, the arbitrability dispute here necessarily connects to the extension of consumer credit—it determines how disputes concerning that credit will be resolved.

B. Enforcing the Delegation Clause and requiring the plaintiff servicemembers to participate in mandatory arbitration not only disregards the breadth of the MLA's text—it also flatly contradicts Congress's plan in passing the MLA. When lawmakers sought to protect servicemembers from "predatory lending schemes," *2006 Senate Hearing* at 1 (Sen. Shelby), and other "egregious practice[s]," *id.* at 8 (Sen. Martinez), they did not merely seek to prevent arbitration of the merits of legal claims arising out of consumer debt disputes. Instead, they specifically endeavored to protect servicemembers from being forced to participate in arbitration at all.

When debating the MLA, members of Congress heard testimony describing the harms of participating in arbitration and broadly recommending that "[l]oan contracts to Service members should not include mandatory arbitration clauses." *Id.* at 39 (Statement of David S.C. Chu, Dep't of Def.); *see id.* at 39 (recommending that "[l]oan contracts to Service members should not include mandatory arbitration clauses"); *see also* U.S. Dep't of Def., *Report on Predatory Lending Practices*

Directed at Members of the Armed Forces and Their Dependents 7, 51 (2006), https://apps.dtic.mil/sti/pdfs/ADA521462.pdf (recommending a prohibition of "mandatory arbitration clauses"). For example, lawmakers reviewed the testimony of Lynn Drysdale, a staff attorney for Jacksonville Area Legal Aid, who explained that mandatory arbitration clauses are "especially burdensome to military borrowers who are not able to pay the costs associated with arbitration or travel to participate in arbitration." *2006 Senate Hearing* at 180; *see id.* at 202-03 (describing servicemembers who objected to the expense of any arbitration required by their loan contracts); *id.* at 203 (describing a servicemember whose contract "requir[ed] him to take all claims to an expensive arbitration process in Delaware even though he was solicited and signed the loan in Florida"). These objections had nothing to do with the particular disputes that servicemembers were required to arbitrate with lenders. *See Report on Predatory Lending Practices*, *supra*, at 7 (separately recommending legislation prohibiting "mandatory arbitration clauses" and agreements that "require the Service member to waive his or her right of recourse"). Rather, they evinced a concern with servicemembers' participation in mandatory arbitration at all, even when a threshold question of arbitrability was at issue.

Forcing a military borrower to arbitrate a threshold arbitrability dispute defies the purpose of the MLA's anti-arbitration provisions because it still inflicts upon the borrower the cost and burdens of arbitration. The district court's decision is thus

consistent not only with the text of the MLA, but also with Congress's plan in passing it.

C. This Court's decision in *Attix* does not compel a different result. Invoking that decision, Westgate argues that the district court improperly considered the Steines' argument concerning the MLA because it is not "directed specifically to the validity of the delegation provision." Appellants' Br. 12. This misunderstands both the Steines' argument, which makes a direct statutory challenge to the Delegation Clause, *see* ECF No. 37, at 7 (invoking the MLA's anti-arbitration provisions to challenge both the "purported arbitration agreement and the delegation clause it contains"), and this Court's precedent.

As this Court explained in *Attix*, under the "severability doctrine," a "delegation agreement is 'severable' from the primary arbitration agreement in which it is contained, *Attix*, 35 F.4th at 1303. Additionally, a party's statutory "challenge [to] the validity or enforceability of a delegation agreement" must meaningfully address "the parties' precise agreement to delegate threshold arbitrability issues," *id.* at 1304, and "explain how [the statute] bars an arbitrator from resolving that dispute," *id.* at 1308.

Attix involved a putative class action against a mortgage servicer. *Id.* at 1290. After the servicer moved to compel arbitration, *id.* at 1291, the plaintiff invoked a provision of the Dodd-Frank Act providing that a mortgage-related contract "shall

[not] be applied or interpreted so as to bar a consumer from bringing an action in an appropriate district court of the United States," *id.* at 1306 (quoting 15 U.S.C. § 1639c(e)(3)). This Court rejected the contention that the plaintiff's invocation of this provision addressed the threshold arbitrability question because, after "unpacking" the language of § 1639(e)(3), it concluded that the statute only prohibited the "enforce[ment of] an agreement to arbitrate claims *arising from the [mortgage-related] contract*," *id.* at 1308 (emphasis added). "After all," this Court reasoned, "how would one 'appl[y]' or 'interpret[]' a contract so as to 'bar' an 'action' in federal court? . . . [B]y enforcing an agreement to arbitrate claims arising from the contract . . . ." *Id.* Given that the language of § 1639(e)(3) did not directly prohibit the arbitration of arbitrability disputes, this Court concluded that the plaintiff had not "not explain[ed] how [the statute] bars an arbitrator from resolving" the threshold dispute about whether the arbitration agreement was enforceable. *Id.*; *see id.* (noting that the plaintiff "points to no language in § 1639c(e)(3) that says a court, rather than an arbitrator, must decide whether he is right").

Unlike in *Attix*, the "substantive nature" of the Steines' challenge "meaningfully goes to the parties' precise agreement to delegate threshold arbitrability issues," *id.* at 1304, because the Steines invoke a statute that forbids creditors from requiring arbitration in connection with an extension of consumer credit, including arbitration of disputes about threshold arbitrability questions. *See*

ECF No. 37, at 7 ("[T]he purported arbitration agreement and the delegation clause it contains, are unlawful under the MLA."); *id.* at 8 ("[T]he purported arbitration agreement and the delegation clause it contains, are unlawful under the MLA because they 'require' the Steines Family to submit both their MLA claims, and the arbitrability of those claims, to binding arbitration.").

Indeed, the text of the MLA's arbitration provisions makes this case very different from *Attix*. Instead of barring only the enforcement of "an agreement to arbitrate *claims* arising from the contract," *Attix*, 35 F.4th at 1308 (emphasis added), § 987(e)(3) specifically prohibits arbitration "in the case of *a dispute*," as long as the arbitration agreement "covers matters relating to" the extension of consumer credit, *see Patel*, 971 F.3d at 1274; *id.* (defining "respecting"). As discussed earlier, the plain text of the statute disallows arbitration agreements that relate to the extension of consumer credit, and it covers all disputes—not just disputes about the merits of legal claims. *See infra* Part II.B; *cf. Arabian Motors Grp., W.L.L. v. Ford Motor Co*., 775 F. App'x 216, 219 (6th Cir. 2019) (concluding that a statute prohibiting the "use of arbitration to resolve a controversy arising out of or *relating to* [a] contract" "overcomes the delegation of arbitrability" (citing 15 U.S.C. § 1226(a)(2)) (emphasis added)).

The MLA's plain text also renders these agreements "void from [their] inception," *see* 10 U.S.C. § 987(f)(3), and provides that they will be unenforceable

"notwithstanding" the FAA, *id.* § 987(f)(4). *Cf. Minnieland Priv. Day Sch., Inc. v. Applied Underwriters Captive Risk Assurance Co., Inc.*, 867 F.3d 449, 455-57 (4th Cir. 2017) (concluding that a Virginia law providing that any agreement "'[d]epriving the courts of this Commonwealth of jurisdiction in actions against [an] insurer . . . shall be void' . . . renders void delegation provisions in putative insurance contracts" governed by Virginia law (citing Va. Code Ann. § 38.2-312)). Accordingly, the MLA "divests the arbitrator of his or her power to decide" *any* dispute, including a dispute about the enforceability of an arbitration agreement. *Attix*, 35 F.4th at 1308.

* * *

"While a court's authority under the [FAA] to compel arbitration may be considerable, it isn't unconditional." *New Prime*, 139 S. Ct. at 537. In light of the text and history of the MLA, the court below was right to "decide for itself," *id.* at 537, that the MLA renders the agreement—and the Delegation Clause, specifically—invalid. This Court should affirm.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

/s/ Brianne J. Gorod
Elizabeth B. Wydra
Brianne J. Gorod
Smita Ghosh
CONSTITUTIONAL
ACCOUNTABILITY CENTER
1200 18th Street NW, Suite 501
Washington, D.C. 20036
(202) 296-6889
brianne@theusconstitution.org

Counsel for Amicus Curiae

Dated: June 28, 2023

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Fed. R. App. P. 29(d) because it contains 4,267 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6), because it has been prepared in a proportionally spaced typeface using Microsoft Word 14-point Times New Roman font.

Executed this 28th day of June, 2023.

/s/ Brianne J. Gorod
Brianne J. Gorod

Counsel for Amicus Curiae

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system on June 28, 2023.

I certify that all parties in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Executed this 28th day of June, 2023.

/s/ Brianne J. Gorod
Brianne J. Gorod

Counsel for Amicus Curiae