

In our view, the Department incorrectly takes the position that it is not barred by the Federal Arbitration Act (FAA) from adopting a rule that bans class action waivers or mandatory pre-dispute arbitration agreements. Rather, the arbitration provisions in the Department's final rule are preempted by the FAA.

Section 2 of the FAA, 9 U.S.C. § 2, mandates that arbitration agreements are “valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” The FAA was designed specifically “to reverse the longstanding judicial hostility to arbitration agreements” *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 289 (2002) (citation omitted); *accord*, *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1745 (2011) (the FAA was enacted by Congress to reverse the “widespread judicial hostility to arbitration agreements”). It embodies a liberal federal policy favoring arbitration agreements. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983). The FAA preempts inconsistent state laws and court rulings regarding arbitration. *See, e.g., Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201, 1203 (2012). In particular, the U.S. Supreme Court held in *Concepcion* that the FAA preempts state laws that declare class action waivers in consumer arbitration agreements unlawful.

Since the FAA was enacted by Congress, only Congress is authorized to enact laws that limit its application. The test for determining whether a federal statute was intended to trump the FAA was set forth in *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665 (2012). *CompuCredit* involved the Credit Repair Organization Act (CROA), 15 U.S.C. § 1679 *et seq.* The plaintiffs in *CompuCredit* alleged that the defendant violated the CROA by misrepresenting that a subprime credit card could be used to rebuild poor credit and improperly assessing fees upon opening accounts. 132 S. Ct. at 668. The defendant moved to compel arbitration pursuant to an arbitration agreement contained in the parties' contract. *Id.* The District Court and the U.S. Court of Appeals for the Ninth Circuit refused to compel arbitration. *Id.* The Ninth Circuit relied upon the facts that the CROA gave consumers the right to sue which “clearly involves the right to bring an action in a court of law” and contained a non-waiver provision prohibiting the waiver of any right under the statute. *See Greenwood v. CompuCredit Corp.*, 615 F.3d 1204, 1208, 1214 (9th Cir. 2010). The Supreme Court, in an 8-1 decision, reversed the Ninth Circuit and held that the CROA could not be read to prohibit enforcement of arbitration agreements because the statute itself did not explicitly prohibit the arbitration of CROA claims. 132 S. Ct. at 670-73. The Court stressed that the FAA establishes “a liberal federal policy favoring arbitration agreements,” and this policy applies “even when the claims at issue are federal statutory claims.” *Id.* at 669. The Supreme Court rejected the argument that the CROA's non-waiver provision precluded enforcement of the arbitration agreement because that provision only required that “the guarantee of the legal power to impose liability” be preserved and “we have repeatedly recognized that contractually required arbitration of claims satisfies the statutory prescription of civil liability in court.” *Id.* at 671 (citations omitted & emphasis in original). The Court set forth a simple bright-line test to be used when a court is faced with determining the arbitrability of a federal claim: if the federal statute does not expressly prohibit arbitration, the FAA controls and claims brought under that statute are arbitrable. *Id.* at 672-73.

Applying this test, the Department lacks the authority to regulate the use of arbitration agreements. The HEA does not expressly prohibit arbitration. Nor does the CFPB have

jurisdiction over the programs at issue, so relying on the CFPB's proposed arbitration rule also does not provide support for the Department's final rule, which is preempted by the FAA.