

No. 14-16990

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

JAMES MCCALMONT, ET AL.,

Plaintiffs-Appellants,

vs.

FEDERAL NATIONAL MORTGAGE ASSOCIATION / FANNIE MAE, ET AL.,

Defendants-Appellees.

On Appeal from the U.S. District Court for the District of Arizona
No. 2:13-cv-02107-HRH
The Honorable H. Russel Holland

**BRIEF OF *AMICI CURIAE* NATIONAL ASSOCIATION OF CONSUMER
ADVOCATES AND NATIONAL CONSUMER LAW CENTER
IN SUPPORT OF PLAINTIFFS-APPELLANTS' JAMES MCCALMONT, *ET AL.*,
AND IN SUPPORT OF REVERSING THE DISTRICT COURT'S DECISION**

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CORPORATE DISCLOSURE STATEMENT

The National Consumer Law Center (NCLC) is a non-profit, tax exempt Massachusetts corporation qualified under section 501(c)(3) of the Internal Revenue Code. NCLC does not have a parent corporation, nor has it ever issued shares or securities.

The National Association of Consumer Advocates (NACA) is a non-profit, membership organization of law professors, public sector lawyers, private lawyers, legal services lawyers, and other consumer advocates. Organized under the laws of the Commonwealth of Massachusetts, it is tax-exempt under section 501(c)(3) of the Internal Revenue Code. It has no parent corporation, nor has it issued shares or securities.

Dated: May 27, 2015

Respectfully submitted,

/s/ John Soumilas

John Soumilas

Attorney for *Amici Curiae*

STATEMENT OF INTEREST

Both Appellants and Appellees consent to the filing of this amicus brief by the National Consumer Law Center (NCLC) and the National Association of Consumer Advocates (NACA).

NCLC is a national nonprofit research and advocacy organization. NCLC draws on over forty years of expertise working on protecting the integrity of the Fair Credit Reporting Act (FCRA) rights of low-income consumers to provide information, legal research, and policy analysis to Congress, state legislatures, administrative agencies and courts. NCLC publishes *Fair Credit Reporting* (8th ed. 2013), a treatise whose focus is the FCRA. NCLC and counsel appear now in this role. The Supreme Court of the United States has cited its treatises with approval. Its interest in this appeal flows from its efforts to protect the integrity of the FCRA rights of consumers.

NACA is a national nonprofit association of attorneys and consumer advocates committed to representing consumers' interests. Its members are private and public sector attorneys, legal services attorneys, law professors and law students whose primary focus is the protection and representation of consumers. NACA's mission is to promote justice for all consumers by maintaining a forum for communication, networking, and information-sharing among consumer advocates across the country, particularly regarding legal issues, and by serving as a voice for

its members and consumers in the ongoing struggle to curb unfair or abusive business practices that affect consumers. In pursuit of this mission, making certain that corporations comply with state and federal consumer protection laws in general and the FCRA in particular has been a continuing and significant concern of NACA since its inception.

Amici curiae submit this brief in support of Plaintiffs-Appellants James and Katherine McCalmont, and in support of the thousands of consumers who will be harmed if the Ninth Circuit Court of Appeals adopts the district court's memorandum opinion excluding mortgage screening reports from federal Fair Credit Reporting Act (FCRA) coverage. This would greatly harm consumers, left with no recourse for their inability to obtain loans without higher costs, and undermine the marketplace that relies on the trustworthiness of the credit reporting system to make risk assessments. This dynamic has an especially harsh impact on low-income consumers, whose lack of financial sophistication puts them at a disadvantage in these transactions.

No party or counsel for any party in the pending action authored the proposed amicus brief in whole or in part, or made a monetary contribution intended to fund the preparation or submission of the brief, and no other person or entity made a monetary contribution intended to fund the preparation or submission of the brief, other than the *amici curiae*, their members, or their counsel.

ARGUMENT

I. Fair And Accurate Reporting Is Essential To Protecting Individuals' Rights And Credit Opportunities

Homeownership is still an important part of the American Dream, at least to 84% of people surveyed in a 2014 study.¹ Suze Orman said, “[o]wning a home is a keystone of wealth – both financial affluence and emotional security.” Congress created the Federal National Mortgage Association (Fannie Mae) in 1938, in part, to provide stability and “promote access to mortgage credit throughout the Nation . . . by increasing the liquidity of mortgage investments and improving the distribution of investment capital available for residential mortgage financing.” 12 U.S.C. § 1716. The Federal Housing Finance Agency (FHFA) was established in 2008 and regulates Fannie Mae, Freddie Mac and 12 Federal Home Loan Banks.² By helping sustain the secondary mortgage market, Fannie Mae has an active role in keeping the American Dream alive for many consumers, including low- and middle-class Americans, who may not otherwise have access to affordable mortgage loans.

¹ Merrill Lynch, *Home in Retirement: More Freedom, New Choices*, at p. 7, Fig. 5 (2015); available at <https://mlaem.fs.ml.com/content/dam/ML/Articles/pdf/AR6SX48F.pdf>.

² Housing and Economic Recovery Act of 2008, Pub. L. No. 110-289, 122 Stat. 2654 (July 30, 2008).

The Fair Credit Reporting Act (FCRA) is a federal law regulating consumer reporting agencies (CRAs), furnishers of information, and users of reports. 15 U.S.C. §§ 1681, *et seq.* Its purpose is:

to require that consumer reporting agencies adopt reasonable procedures for meeting the needs of commerce for consumer credit, personnel, insurance, and other information in a manner which is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information.

15 U.S.C. § 1681(b). The FCRA helps to support our national economy, because it provides the framework for an efficient and uniform credit reporting system which both promotes competition – ensuring potential creditors have access to the same information on potential borrowers – and helps manage risk – providing dependable credit information, without which creditors may not extend credit or may extend it at higher costs to consumers to account for the higher level of risk. *See also TRW Inc. v. Andrews*, 534 U.S. 19, 23 (2001) (“Congress enacted the FCRA in 1970 to promote efficiency in the Nation’s banking system and to protect consumer privacy.”). These objectives entitle the FCRA to a “liberal construction.” *Guimond v. Trans Union Credit Info. Co.*, 45 F.3d 1329, 1333 (9th Cir. 1995).

While many examine and debate the causes of the country’s mortgage crisis, few (if any) dispute that a large number of homeowners faced foreclosure within the last five years. To avoid losing a home to foreclosure, including all the negative credit affects that accompany foreclosures, homeowners who qualify may seek pre-

foreclosure alternatives including mortgage loan modifications, short sales, and deeds-in-lieu of foreclosure. The FHFA reports that through February 2015, approximately 1,777,412 loan modifications, 540,493 short sales and 70,917 deeds-in-lieu have been completed for homeowners with loans guaranteed by Fannie Mae and Freddie Mac. *See* Federal Housing Finance Agency, *Foreclosure Prevention Report*, at p. 4 (Feb. 2015).³ Thus, over 600,000 people (likely many more, for homes with more than one owner) left their homes and almost 2 million people retained their homes through completing foreclosure prevention actions. *Id.* Where lenders rely on accurate credit information in order to extend credit and accurately assess the risk involved in transactions, the accurate reporting of mortgage information is essential to ensure the protection of consumers' (especially low- and middle-income) FCRA rights and credit opportunities. The case at bar is one where the FCRA is meant to regulate the accurate reporting of foreclosures and short sales. The District Court's ruling undermines that purpose.

II. Mortgage Screening Companies, Like Fannie Mae, Which Sell Reports Determining A Potential Loan's Eligibility For Resale In Secondary Mortgage Markets Are Consumer Reporting Agencies

In enacting the FCRA, Congress intended to regulate the disclosure of a vast amount of personal information bearing not only on consumers' "credit worthiness,

³ Available at <http://www.fhfa.gov/AboutUs/Reports/Pages/Foreclosure-Prevention-February-2015.aspx>.

credit standing [and] credit capacity,” but also on their “character, general reputation, personal characteristics, or mode of living.” 15 U.S.C. § 1681a(d) (defining “consumer report”). Information about one’s finances is particularly sensitive. *California Bankers Ass’n v. Shultz*, 416 U.S. 21, 78-79 (1974) (“Financial transactions can reveal much about a person’s activities, associations, and beliefs”) (Powell, J., concurring). The FCRA defines “consumer reporting agency” (CRA) as:

Any person which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties. . . .

15 U.S.C. § 1681a(f). Liberally construing these broad definitions of a CRA and consumer report under the FCRA, many courts have held a company that sells consumer reports to lending institutions is a CRA even if other aspects of its business do not relate to credit reporting.

Forty years ago, the Ninth Circuit held that a check screening company is a CRA under the FCRA:

Under the Federal Fair Credit Reporting Act’s definition of a “consumer report” (15 U.S.C. s 1681a(d)), the appellant’s argument must be rejected. Not only does a report of the previous issuance of an unpayable check bear “on a consumer’s credit worthiness, credit standing, credit capacity, character, general reputation (and) personal characteristics. . .”, a check itself is, essentially, an instrument of credit.

Greenway v. Info. Dynamics Ltd., 524 F.2d 1145, 1146 (9th Cir. 1975), *certiorari denied*, 96 S. Ct. 1153. Since then, many courts have similarly found a variety of companies to be CRAs. *See, e.g., Freckleton v. Target Corp.*, ___ F. Supp. 3d ___, 2015 WL 165293 (D. Md. Jan. 12, 2015) (employment background reports); *Jarzyna v. Home Props., L.P.*, 763 F. Supp. 2d 742 (E.D. Pa. 2011) (tenant screening and debt collection organization that collected data from rental applicants and combined it with information from other CRAs assembled and compiled consumer information and was a CRA); *Adams v. LexisNexis Risk & Info. Analytics Group, Inc.*, Civ. No. 08-4708, 2010 WL 1931135 (D.N.J. May 12, 2010) (collection reports); *Valentine v. First Advantage Saferent, Inc.*, 2009 WL 4349694 (C.D. Cal. Nov. 23, 2009) (one of the largest nationwide tenant screening agencies); *Gill v. Byers Chevrolet LLC*, No. 05-982, 2006 WL 2460872, at *9 (S.D. Ohio Aug. 23, 2006) (holding plaintiff pled sufficient facts that dealership was CRA where it routinely assembled his credit information and furnished it to lending institutions); *Cisneros v. U.D. Registry, Inc.*, 39 Cal. App. 4th 548, 560-61 (1995) (tenant-screening); *Estiverne v. Sak's Fifth Avenue*, 9 F.3d 1171, 1173 (5th Cir. 1993) (check-screening); *Hoke v. Retail Credit Corp.*, 521 F.2d 1079 (4th Cir. 1975) (Texas Board of Medical Examiners evaluating application for license to practice medicine).

Similarly, *Amici* respectfully request that this Court find Plaintiffs-Appellants sufficiently pled facts to support their claims under the FCRA based upon Fannie

Mae’s policy and practice of selling Desktop Underwriter Finding Reports to lending institutions. These DU Reports assess whether loans are eligible for resale in the secondary mortgage market, and clearly evaluate consumers’ creditworthiness, credit standing and credit capacity. Otherwise, well over 600,000 people—those who left their homes after short sales or deeds-in-lieu—will not be able to invoke the FCRA to learn who reported inaccurate information about them to the lenders⁴ or to dispute those inaccuracies.⁵ For many of them, the result will be that they will pay higher costs for credit because of being inaccurately portrayed as higher risk through the “foreclosure” notation Fannie Mae included with short sales and deeds-in-lieu.⁶

CONCLUSION

In enacting and amending the Fair Credit Reporting Act, Congress intended to enhance, not weaken state law consumer and privacy protections. Fannie Mae is

⁴ 15 U.S.C. § 1681g. *See also* Appellants’ Brief at Section I(C), pp. 6-8 with citations to factual record.

⁵ 15 U.S.C. § 1681i.

⁶ “The statute has been drawn with extreme care, reflecting the tug of the competing interests of consumers, CRAs, furnishers of credit information, and users of credit information. It is not for a court to remake the balance struck by Congress, or to introduce limitations on an express right of action where no limitation has been written by the legislature.” *Nelson v. Chase Manhattan Mortgage Corp.*, 282 F.3d 1057, 1060 (9th Cir. 2002); *accord Boca Ciega Hotel, Inc. v. Bouchard Transportation Co., Inc.*, 51 F.3d 235, 238 (11th Cir. 1995) (“In short, we will not attempt to adjust the balance between competing goals that the text adopted by Congress has struck” (citation and internal quotation marks omitted)).

a consumer reporting agency, and DU Findings Reports are consumer reports, according to the statutory text, the remedial purpose of the law and this Court's prior decisions in analogous contexts. For that reason, *Amici* respectfully request that this Court reverse and remand the instant matter to the United States District Court for the District of Arizona for further proceedings.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME
LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE
REQUIREMENTS**

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 2,068 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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 this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013, Times New Roman size 14-point font.

Dated: May 27, 2015

/s/ John Soumilas
John Soumilas

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of May, 2015, I electronically filed the foregoing Brief of *Amici Curiae* with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit, with service of copies to the following counsel using the appellate CM/ECF system:

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