

Nos. 17-15807, 17-16000

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

RICHARD ZABRISKIE; KRISTIN ZABRISKIE,

Plaintiffs-Appellees

v.

FEDERAL NATIONAL MORTGAGE ASSOCIATION,

Defendant-Appellant.

Appeal from the United States District Court for the District of Arizona

Case No. 1:13-cv-02260-SRB, Hon. Susan R. Bolton

**BRIEF OF *AMICI CURIAE* NATIONAL ASSOCIATION OF CONSUMER
ADVOCATES AND NATIONAL CONSUMER LAW CENTER IN SUPPORT
OF PLAINTIFFS-APPELLEES' RICHARD ZABRISKIE, *ET AL.*, AND IN
SUPPORT OF AFFIRMING 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 hundreds 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: February 16, 2018

Respectfully submitted,

/s/ Christian Schreiber

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STATEMENT OF INTEREST

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 and elderly consumers to provide information, legal research, and policy analysis to Congress, state legislatures, administrative agencies and courts. NCLC publishes Fair Credit Reporting (9th ed. 2017), a treatise whose focus is the FCRA. 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 hundreds 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. In furtherance of that mission, NACA has participated as an amicus in hundreds of appeals, including the FCRA issues raised in *McCalmont v. Federal National Mortgage Association*, 677 F. App'x 331 (9th Cir. 2017).

Amici curiae submit this brief in support of Plaintiffs-Appellees Richard and Kristin Zabriskie, and in support of the thousands of low- and middle-income consumers who will be harmed if the Ninth Circuit Court of Appeals overturns the District Court's Order finding that Fannie Mae is a "consumer reporting agency" within the meaning of the Fair Credit Reporting Act (the "FCRA"), 15 U.S.C. § 1681a. Fannie Mae plays an essential role in the mortgage market; virtually all home-buying consumers are affected by its conduct in the market and the consumer credit information it evaluates and provides to lenders. The accuracy of information provided by Fannie Mae is thus of paramount importance to consumers. By requiring that Fannie Mae, like other consumer reporting agencies, adhere to the prescriptions of the FCRA, consumers benefit. The holding ensures that Fannie Mae is subject to the "maximum possible accuracy" requirement of the FCRA, which is intended and designed to provide consumers – and creditors – significant benefits.

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 Equitable Credit Markets For All Consumers

Despite homeownership rates that have dipped to rates not seen since the 1960s,¹ “homeownership continues to represent an important opportunity for individuals and families of limited means to accumulate wealth.”² In fact, owning a home remains central to the American Dream, according to 84% of people surveyed in a 2014 study.³ As income and wealth inequality continue to grow,⁴ the stakes for low- and middle-income consumers seeking credit opportunities have never been higher.

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

¹ See <https://www.census.gov/housing/hvs/files/currenthvspress.pdf>.

² See Joint Center for Housing Studies, Harvard University, *Is Homeownership Still an Effective Means of Building Wealth for Low-income and Minority Households? (Was it Ever?)*, Christopher E. Herbert, *et al.* (Sept. 2013) at p. 2. <http://www.jchs.harvard.edu/sites/jchs.harvard.edu/files/hbtl-06.pdf>

³ Merrill Lynch, *Home in Retirement: More Freedom, New Choices*, at p. 7, Fig. 5 (2015); available at agewave.com/wp-content/uploads/2016/07/2015-ML-AW-Home-in-Retirement_More-Freedom-New-Choices.pdf.

⁴ See <http://wid.world/country/usa/> (Piketty, *et al.*, World Wealth and Income Database).

established in 2008 and regulates Fannie Mae, the Federal Home Loan Mortgage Corporation (Freddie Mac) and the Federal Home Loan Bank System.⁵

Fannie Mae does not issue loans directly to consumers (*see* 12 U.S.C. § 1719(a)(2)(B)), but “fulfills its mission by purchasing mortgages from lenders.” *See* Appellant’s Opening Brief (AOB) at p. 5. The volume of loans purchased by Fannie Mae – it provided approximately \$570 billion in liquidity in the mortgage market in 2017⁶ – underscores how important Fannie Mae is in keeping the American Dream alive for those low- and middle-income borrowers on the wrong end of the wealth gap.

These same borrowers are also dependent upon the consumer protection laws that help ensure that their credit history is accurately reported. 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.* Congress enacted the FCRA to ensure consumer privacy and accuracy in consumer credit markets. Among its purposes, the FCRA requires:

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.

⁵ Housing and Economic Recovery Act of 2008, Pub. L. No. 110-289, 122 Stat. 2654 (July 30, 2008).

⁶ *See* http://www.fanniemae.com/resources/file/ir/pdf/quarterly-annual-results/2017/q42017_release.pdf.

15 U.S.C. § 1681(b).

The FCRA provides certainty for consumers and businesses. Its statutory framework has helped create an efficient and uniform credit reporting system: it both promotes competition, ensuring that potential creditors have access to the same information about potential borrowers; and helps manage risk by 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, e.g., 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.”); *Guimond v. Trans Union Credit Information Co.*, 45 F.3d 1329, 1334 (9th Cir. 1995) (the “purpose of the FCRA is to promote the accuracy of information in a consumer credit report.”).⁷ As such, the FCRA is liberally construed to effect its purposes. *Id.* at 1333.

⁷ “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).

The mortgage crisis that began in late 2007 rendered the consumer protections afforded by the FCRA even more essential. Hundreds of thousands of consumers lost their homes, and their wealth, due to the credit crunch brought on by the crisis. Tens of thousands more narrowly escaped foreclosure and the permanent, negative impact that it has on their credit histories. To do so, many homeowners sought 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 were 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). Thus, more than 600,000 individuals (likely many more, for homes with more than one owner) left their homes and almost 2 million people retained their homes by completing foreclosure prevention actions. *Id.*

The implications of the mortgage lending crisis have been the subject of exhaustive analysis and response by the mortgage lending industry. In many respects, however, the crisis has only underscored what was already true: lenders must rely on accurate credit information in order to assess risk reliably. Thus, accurate reporting of mortgage information is essential to ensure that consumers (especially low- and middle-income consumers) continue to have complete access

to all available credit opportunities. The accuracy of the information provided about them is a foundational element of consumer protection, individual and national economic security and the fair and efficient operation of the credit markets.

The District Court's application of the FCRA to the facts in this case is precisely the type of outcome envisioned by Congress when it enacted the FCRA. The FCRA regulates the accurate reporting of foreclosures and short sales. It requires consumer reporting agencies to "assure maximum possible accuracy" when a report is "prepared." 15 U.S.C. § 1681e(b). The FCRA does not establish a one-size-fits-all definition of "accuracy." However, the protection afforded by the FCRA's accuracy requirement ensures that consumers are protected from material errors that result in the denial of a credit opportunity. This is what the jury found here.

The District Court properly concluded that Fannie Mae was subject to the FCRA based on its conduct in the market. In doing so, the District Court properly recognized the impact of Fannie Mae's dispositive role in determining the credit opportunities, and outcomes, for low- and middle-income individuals. *See Gorman v. Wolpoff & Abramson, LLP*, 584 F.3d 1147, 1153-54 (9th Cir. 2009). As is explained immediately below, the District Court's interpretation of the FCRA is

consistent with the plain language of the statute, as well as its overriding consumer protection goals and intent.

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

The plain language of the FCRA, and the Congressional intent animating it, support the District Court's conclusion that Fannie Mae is a consumer reporting agency. The FCRA defines "consumer reporting agency" 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).

In enacting the FCRA, Congress intended to regulate the disclosure of a vast amount of personal information bearing not only on consumers' "credit worthiness, 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 an individual's finances is particularly sensitive. *California Bankers Ass'n v. Shultz*, 416 U.S. 21, 78-79 (1974) (Powell, J., concurring) ("Financial transactions can reveal much about a person's activities, associations, and beliefs.") The Ninth Circuit and its sister Circuits around the country have held that the FCRA must be liberally construed in

order to effectuate its purposes. *See Guimond, supra*, 45 F.3d at 1333; *Jones v. Federated Financial Reserve Corp.*, 144 F.3d 961, 964 (6th Cir. 1998) (citing *Guimond* and noting that “the rule of statutory construction requires us to read a statutory provision in a manner consistent with the statute’s other provisions.”); *Cortez v. Trans Union, LLC*, 617 F.3d 688, 706 (3d Cir. 2010). Consistent with the elements of a consumer reporting agency and a consumer report as defined under the FCRA, many courts have held that a company that furnishes consumer reports to lending institutions is a consumer reporting agency even if other aspects of its business do not relate to credit reporting. More than forty years ago, the Ninth Circuit held that a check screening company is a consumer reporting agency 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), *cert. denied*, 424 U.S. 936. Since then, courts have found a wide variety of companies to be CRAs. *See, e.g., Freckleton v. Target Corp.*, 81 F.Supp.3d 473, 477 (D. Md. 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 consumer reporting agency 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). Other companies, including “people search” companies that utilize modern data management techniques, have conceded the FCRA’s jurisdiction or been fined by the Federal Trade Commission for violations of its provisions.⁸ Thus, companies with non-traditional or mixed purposes are not exempt from the prescriptions of the FCRA.

⁸ See <https://www.ftc.gov/news-events/press-releases/2014/04/two-data-brokers-settle-ftc-charges-they-sold-consumer-data> (data brokers).

The District Court properly found that Fannie Mae's conduct brought it within the definition of a consumer reporting agency – first on Fannie Mae's motion to dismiss in April 2014, and then on summary judgment after Fannie Mae failed to “resort[] to any additional persuasive evidence” adduced in the intervening months of discovery. *See* ECF Dkt. 155 (Sum. Jud't Order at p. 5).

The basis for the District Court's conclusions was sound. Fannie Mae's policy and practice of furnishing Desktop Underwriter Reports to lending institutions involves the “assembly” and “evaluation” of an individual's credit profile, as those terms are used in the FCRA. The DU program assesses whether loans are eligible for resale in the secondary mortgage market, and also clearly evaluates consumers' creditworthiness, credit standing and credit capacity. The District Court also properly concluded it did so “for the purposes of” establishing a consumer's creditworthiness for later extension of credit and eligibility of such mortgage loan for sale to Fannie Mae. As the District Court noted, Fannie Mae's defense – that this information is merely “provided” by Fannie Mae but “used” by the lenders – is indistinguishable from the services provided by the “big three” credit reporting agencies, *id.* (Sum. Jud't Order at p.7, n.5.), as well as the tenant and check screening agencies that were the subjects of the cases cited above at p. 9. All of these agencies are unquestionably covered by the FCRA.

The implications of a contrary finding would be crippling for low- and middle-class borrowers and homeowners. If Fannie Mae escapes the reach of the FCRA, far more than 600,000 people—those who left their homes after short sales or deeds-in-lieu—will be excluded from the FCRA’s protections. This would leave consumers without remedy for material errors in Fannie Mae’s consumer reports; without an ability to learn who reported inaccurate information about them to the lenders; and without a way to dispute those inaccuracies, or resolve them in a timely fashion. The predictable outcome for consumers is that 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.

CONCLUSION

The District Court’s finding that Fannie Mae is a consumer reporting agency recognizes the realities of the mortgage lending market and is consistent with Congressional intent. Fannie Mae meets the statutory definition of a consumer reporting agency and should be subject to the same accuracy requirements as other businesses that evaluate consumer credit worthiness. For that reason, Amici respectfully request that this Court affirm the District Court’s Order granting Plaintiff’s Motion for Partial Summary Judgment.

Date: February 16, 2018

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**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME
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This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 2,472 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, Century Schoolbook size 14-point font.

Dated: February 16, 2018

/s/ Christian Schreiber

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CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of February, 2018, 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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CERTIFICATE IN BRIEF FOR PAPER FORMAT

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I, Christian Schreiber, certify that this brief is identical to the version submitted electronically on February 16, 2018.

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