

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, UNITED STATES PUBLIC
INTEREST RESEARCH GROUP EDUCATION FUND, INC.,
AMERICANS FOR FINANCIAL REFORM EDUCATION FUND,
CENTER FOR RESPONSIBLE LENDING, AND CONSUMER
REPORTS, IN SUPPORT OF
PLAINTIFFS-APPELLEES' RICHARD ZABRISKIE, *ET AL.*,
PETITION FOR REHEARING OR REHEARING EN BANC**

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CORPORATE DISCLOSURE STATEMENT

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.

United States Public Interest Research Group Education Fund, Inc. (U.S. PIRG Education Fund) is a nonprofit organization under section 501(c)(3) of the Internal Revenue Code. It has no parent company and issues no stock.

Americans for Financial Reform Education Fund is a nonprofit organization under section 501(c)(3) of the Internal Revenue Code. It has no parent company and issues no stock.

Center for Responsible Lending (CRL) is a non-profit organization under section 501(c)(3) of the Internal Revenue Code. CRL is a supporting organization of the Center for Community Self-Help, which is a non-profit organization under section 501(c)(3) of the

Internal Revenue Code. Neither CRL nor the Center for Community Self-Help has issued shares or securities.

Consumer Reports is a nonprofit organization under section 501(c)(3) of the Internal Revenue Code. It has no parent company and issues no stock.

Dated: March 11, 2019

Respectfully submitted,

/s/ Christian Schreiber

Christian Schreiber

Attorneys for Amici Curiae

STATEMENT OF INTEREST

The **National Association of Consumer Advocates** 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 Fair Credit Reporting Act (the "FCRA"), 15 U.S.C. § 1681a issues raised in *McCalmont v. Federal National Mortgage Association*, 677 F. App'x 331 (9th Cir.

2017).

U.S. PIRG Education Fund is a 501(c)(3) independent, non-partisan organization that works on behalf of consumers and the public interest. Through research, public education, outreach, and litigation, it serves as a counterweight to the influence of powerful special interests that threaten the public's health, safety, or well-being. U.S. PIRG Education Fund regularly participates as amicus curiae in cases that will have a substantial impact on consumers and the public interest, such as this one. U.S. PIRG Education Fund strongly supports the FCRA and has long advocated for strong enforcement of the important protections that it provides consumers.

Americans for Financial Reform Education Fund (AFREF) works in concert with a coalition of more than 200 consumer, investor, labor, civil rights, business, faith-based, and community groups to lay the foundation for a strong, stable, and ethical financial system. Through policy analysis, education, and outreach, AFREF actively engages in advocacy for stronger consumer financial protections, including the consumer credit reporting protections in the FCRA.

Center for Responsible Lending is a non-profit, non-partisan research and policy organization that works to protect homeownership

and family wealth by helping to eliminate abusive financial practices. CRL is affiliated with the Center for Community Self-Help, a non-profit community development financial institution focused on creating asset-building opportunities for low-income, rural, women-headed, and minority families, primarily through safe, affordable home loans and small business loans. CRL conducts ground-breaking research focused on consumer lending: primarily mortgages, payday loans, student debt, bank overdrafts, and auto loans. Through its research and policy work, CRL seeks to ensure a fair, inclusive financial marketplace that creates opportunities for all responsible borrowers, regardless of their income.

Consumer Reports is an expert, independent, non-profit organization, founded in 1936, that works side by side with consumers for a fair, transparent, truthful, and safe marketplace. It is the world's largest independent product-testing organization, using its dozens of labs, auto test center, and survey research department to rate thousands of products and services annually. It employs its rigorous research and testing, consumer insights, journalism, and policy expertise to inform purchase decisions, improve the products and services that businesses deliver, and drive effective legislative and regulatory solutions and fair competitive practices. Consumer Reports

has been active for decades in a wide range of policy issues affecting consumers, including consumer financial services.

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 denies Plaintiffs-Appellees' Petition for Rehearing or Rehearing En Banc and overturns the District Court's Order finding that Fannie Mae is a "consumer reporting agency" within the meaning of the FCRA, 15 U.S.C. § 1681a. *Zabriskie v. Federal Nat'l Mortg. Ass'* 109 F.Supp.3d 1178, 1184 (D. Ariz. 2014). 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. As will be explained, requiring that Fannie Mae, like other consumer reporting agencies, adheres to the prescriptions of the FCRA is essential for ensuring that consumers are appropriately protected consistent with the statute's intent. The District Court's 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 protections and benefits. The decision of a divided panel of this Court, on the other hand, would empty the field of entities responsible for ensuring the accuracy of consumer information in the mortgage lending process.

Amici submit this brief pursuant to Federal Rule of Appellate Procedure 29. Pursuant to Federal Rule of Appellate Procedure 29(a) and Circuit Rule 29-2(a), Amici certify that all parties have consented to the filing of this brief.

Pursuant to Federal Rule of Appellate Procedure 29(c)(5), Amici state that 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

Fannie Mae's inaccurate reporting of the Plaintiffs-Appellees' financial history directly resulted in their erroneously being denied mortgage financing. Unless Fannie Mae can be held accountable for this error, the same fate awaits every other consumer with a similar financial history. As explained below, Fannie Mae is a consumer reporting agency for pertinent purposes of the Fair Credit Reporting Act, and is appropriately held accountable under that Act for ensuring that information provided regarding the financial history of prospective borrowers is accurate.

I. Fair And Accurate Reporting Is Essential To Equitable Credit Markets For All Consumers

Credit markets are a key driver of social equality and economic opportunity. As income and wealth disparities continue to grow,¹ “homeownership remains the most likely way for individuals and families of limited means to accumulate wealth.”² Though

¹ See <http://wid.world/country/usa/> (Piketty, *et al.*, World Wealth and Income Database).

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>.

homeownership rates continue to languish,³ owning a home is still synonymous with the American Dream, according to 84% of people surveyed in a 2014 study.⁴ These vectors intersect in the mortgage lending market, where a fair credit market determines not just personal financial outcomes but broad social and public policy goals.

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, the Federal Home Loan Mortgage Corporation (Freddie Mac) and the Federal Home Loan Bank System.⁵

Although Fannie Mae does not issue mortgage loans directly to consumers (*see* 12 U.S.C. § 1719(a)(2)(B)), it purchases mortgages from lenders, which provides an essential underpinning to the ability and willingness of lenders to provide those loans at more affordable rates.

³ *See* <https://www.census.gov/housing/hvs/files/currenthvspress.pdf>

⁴ 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.

The volume of loans purchased by Fannie Mae – it provided approximately \$512 billion in liquidity in the mortgage market in 2018⁵ – underscores how important Fannie Mae is in keeping the American Dream alive, and particularly for low- and middle-income borrowers.

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 both accuracy and appropriate consumer privacy protection 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.

15 U.S.C. § 1681(b).

The FCRA provides certainty for consumers and businesses. Its

⁵ See http://www.fanniemae.com/resources/file/ir/pdf/quarterly-annual-results/2018/q42018_release.pdf.

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 uncertainty and risk. *See, e.g., 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.”).⁶ As such, the FCRA is liberally construed to effect its purposes. *Id.* at 1333.

In order for mortgage lenders to assess risk reliably, they must be able to rely on accurate credit information. Accurate reporting of mortgage-related credit information is essential to ensure that consumers (and especially low- and middle-income consumers)

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).

continue to have 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 is meant to ensure that consumers are protected from material errors that result in the denial of a credit opportunity.

The mortgage crisis that began in late 2007 rendered the consumer protections afforded by the FCRA even more essential. Millions of consumers lost their homes to foreclosure in the credit crunch brought on by the crisis. Millions of others lost their wealth but avoided the longer negative impact that a completed foreclosure would have on their credit histories through mortgage loan modifications,

short sales and deeds-in-lieu of foreclosure. The FHFA reports that through June 2018, approximately 2,257,644 loan modifications, 594,823 short sales and 93,865 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 (July 2018). Considering the drastic implications of a completed foreclosure on the future ability to access credit, it is crucial that mortgage loan modifications, short sales, and deeds-in-lieu are accurately reported to avoid erroneous denials of credit opportunities.

This Court grappled with how Fannie Mae fits into the statutory scheme envisioned by Congress, but a divided panel erroneously concluded that Fannie Mae fell outside of it. That holding is not only at odds with the statute's overriding consumer protection goals and intent; it ignores the outcome-determinative role Fannie Mae plays in deciding whether credit opportunities are made available to low- and middle-income individuals. See *Gorman v. Wolpoff & Abramson, LLP*, 584 F.3d 1147, 1153-54 (9th Cir. 2009).

More importantly, the holding also misinterprets Congress's intent as a matter of statutory construction. The panel majority concluded that "the FCRA itself appears to make a distinction between

Fannie Mae and consumer reporting agencies.” 912 F.3d at 1200, citing 15 U.S.C. § 1681g(g)(1)(B)(ii). Yet this reference is to one specific subsection of the FCRA, from which the distinction is made solely with respect to that one subsection. 15 U.S.C. § 1681g(g)(1)(G) (“As used *in this subsection*, the term ‘person’ does not include [Fannie Mae]”) (emphasis added). This is not indication of an intent to exempt Fannie Mae from *every* provision of the FCRA. A more straightforward reading is that the targeted exemption from one provision demonstrates that Congress understood how and where to exempt Fannie Mae from *particular* provisions of the FCRA. “[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.” *Russello v. U.S.*, 464 U.S. 16, 23 (1983).

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 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 used in lending decisions, 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."), and for that reason it is particularly important that, when disclosure of that information is authorized, it be disclosed accurately. 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.⁷

Thus, it is abundantly clear that companies with non-traditional or mixed purposes are not exempt from the prescriptions of the FCRA.

Fannie Mae's integral involvement in mortgage loan underwriting decisionmaking brings it squarely within the definition of a consumer reporting agency. 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 will be eligible for resale in the secondary mortgage market – for resale to Fannie Mae – and also clearly evaluates consumers' creditworthiness, credit standing and credit capacity. Its continuing involvement in the mortgage lending evaluations, through the secondary market decisions, makes it far different than a third-party technology company creating the DU software in question here, for use for a purpose unrelated to the technology company's business. It is not, as the panel majority believes, "a distinction without a difference." 912 F.3d at 1197.

⁷ See <https://www.ftc.gov/news-events/press-releases/2014/04/two-data-brokers-settle-ftc-charges-they-sold-consumer-data> (data brokers).

The panel majority incorrectly concluded Fannie Mae did not do so “for the purposes of furnishing a consumer report to lenders.” 912 F.3d at 1198, 1200. The principle underlying that conclusion could have disastrous implications for consumers who are forced to rely on the accuracy of DU and similar reports. This is because Fannie Mae’s conduct is well within the scope of, and every bit as integral to credit decisionmaking as, the services provided by the “big three” credit reporting agencies, as well as the tenant and check screening agencies that were the subjects of the cases cited above at p. 8.

The implications of a contrary holding in this case would be crippling for low- and middle-class borrowers and homeowners. The panel majority’s decision would have the effect of opening an exemption for every entity in the mortgage lending process, leaving nobody responsible for ensuring the accuracy of consumer information – not Fannie Mae, nor the entities buying, and of necessity relying on, the reports from Fannie Mae. One of the core purposes of the FCRA is to ensure the accuracy of the information contained in a consumer report, because accuracy is essential to the fair treatment of consumers entering the credit market.

If the panel’s decision stands, and Fannie Mae escapes the reach

of the FCRA, consumers would be left 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, or be denied credit altogether, because of being inaccurately portrayed as higher risk through the "foreclosure" notation Fannie Mae included with short sales and deeds-in-lieu.

CONCLUSION

It would be dangerous to the fair operation of credit markets in the mortgage lending world to create an exemption from the FCRA for Fannie Mae. Applying the FCRA recognizes the integral role Fannie Mae plays in the mortgage lending market and is in keeping 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 the Court grant rehearing or rehearing en banc to reconsider the panel's decision and affirm the District Court's decision.

Date: March 11, 2019

Respectfully submitted,

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

Form 8. Certificate of Compliance for Briefs

9th Cir. Case Number(s): 17-15807 & 17-6000

I am the attorney for Amici Curiae National Association of Consumer Advocates, United States Public Interest Research Group Education Fund, Inc., Americans for Financial Reform Education Fund, Center for Responsible Lending, and Consumer Reports.

This brief contains 2,783 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

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complies with the word limit of Cir. R. 32-1.

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it is a joint brief submitted by separately represented parties;

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complies with the length limit designated by court order dated _____.

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Signature: /s/ Christian Schreiber **Date** March 11, 2019

Dated: March 11, 2019

CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of March, 2019, 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 by using the appellate CM/ECF system. I certify that all the participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

/s/ Christian Schreiber

Christian Schreiber