No. 09-1142

In The

Supreme Court of the United States

FIA CARD SERVICES, N.A., PETITIONER,

v.

JOHN C. GORMAN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES:

U.S. CONSTITUTION, STATUTES & REGULATIONS:

TABLE OF AUTHORITIES – Continued

STATE LAWS:

MISCELLANEOUS AUTHORITIES:

REPLY BRIEF FOR PETITIONER

Although respondent describes this as a "glorified small claims case" (Br. in Opp. 2), his complaint seeks more than $350,000 in compensatory damages against petitioner, as well as punitive and statutory penalties, for alleged violations of Section 1681s-2(b) of the Fair Credit Reporting Act ("FCRA") and California Civil Code Section 1785.25. Dt. Ct. Dkt. 41 at 8-9.

The decision below has ramifications far beyond this case. Indeed, since the Ninth Circuit's decision, dozens of suits for compensatory and punitive damages, including class actions, have been filed against furnishers of information for alleged violations of Section 1681s-2(b) of FCRA with regard to unreported disputes,[1] alleged violations of California Civil Code

[1] *Morales v. Equifax, Inc.*, No. 2:09-CV-5687 (C.D. Cal. filed Aug. 4, 2009); *Brown v. Experian Info. Solutions, Inc.*, No. 2:09-CV-5545 (C.D. Cal. filed July 29, 2009); *Mendum v. Nationwide Relocation Servs., Inc.*, No. 2:09-CV-5329 (C.D. Cal. filed July 22, 2009); *McBrayer v. Experian Info. Solutions, Inc.*, No. 2:09-CV-3072 (C.D. Cal. filed May 1, 2009); *Tanner v. Financial Asset Mgm't Sys., Inc.*, No. 2:09-CV-1490 (C.D. Cal. filed Mar. 3, 2009); *Lund v. Road Runner Collection Servs., Inc.*, No. 37-2010-00088839 (Cal. Super. Ct. filed Mar. 30, 2010); *Augustine v. Road Runner Collection Servs., Inc.*, No. 37-2009-00104584 (Cal. Super. Ct. filed Dec. 23, 2009).

Section 1785.25,[2] or both.[3] Those complaints are now all colorable because of the Ninth Circuit's decision in

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[2] *Bernard v. CitiMortgage, Inc.*, No. 2:10-CV-1331 (E.D. Cal. class action compl. filed May 28, 2010); *Marseglia v. JP Morgan Chase Bank*, No. 3:09-CV-2857 (S.D. Cal. filed Feb. 17, 2010); *Silverstein v. Wachovia Mtg. Corp.*, No. 3:09-CV-2938 (S.D. Cal. filed Feb. 12, 2010); *Hamberg v. JP Morgan Chase Bank*, No. 3:09-CV-2860 (S.D. Cal. filed Feb. 5, 2010); *Thompson v. Chase Bank USA, N.A.*, No. 3:09-CV-2143 (S.D. Cal. filed Dec. 28, 2009); *Chaconas v. JP Morgan Chase Bank*, No. 3:09-CV-2479 (S.D. Cal. filed Dec. 11, 2009); *Soler v. Chase Bankcard Servs.*, No. 2:09-CV-7736 (C.D. Cal. filed Nov. 18, 2009); *Bae v. JPMorgan Chase & Co.*, No. 8:09-CV-1127 (C.D. Cal. filed Nov. 13, 2009); *Sun v. Countrywide Home Loans, Inc.*, No. 2:09-CV-7695 (C.D. Cal. filed Oct. 22, 2009); *Narraway v. American Express Bank, FSB*, No. 3:09-CV-1279 (N.D. Cal. filed Sept. 1, 2009); *De la Garza v. Washington Mut. Mtg.*, No. 3:09-CV-390 (S.D. Cal. 3d am. compl. filed May 1, 2009); *Nafarrete v. Bank of Am., N.A.*, No. 30-2010-00374917 (Cal. Super. Ct. filed May 24, 2010); *Schraner v. Lone Star Ass'n Mgmt., Inc.*, No. 37-2010-00088607 (Cal. Super. Ct. filed Mar. 25, 2010); *Spears v. GE Money Bank*, No. 30-2010-00344855 (Cal. Super. Ct. filed Feb. 16, 2010); *Cruz v. Midland Credit Mgmt., Inc.*, No. 37-2010-00085318 (Cal. Super. Ct. filed Feb. 11, 2010); *Palestini v. Homecomings Fin., LLC*, No. 37-2010-00084628 (Cal. Super. Ct. filed Jan. 29, 2010); *Martinez v. Wells Fargo Bank*, No. 37-2009-00104297 (Cal. Super. Ct. filed Dec. 21, 2009); *Holmes v. AT&T Commc'ns of Cal., Inc.*, No. 37-2009-00101182 (Cal. Super. Ct. class action compl. filed Oct. 26, 2009); *James v. Chase Bank USA, N.A.*, No. 3:08-CV-2220 (Cal. Super. Ct. 2d am. compl. filed Oct. 20, 2009); *Rutan v. JP Morgan Chase Bank*, No. 37-2009-00060845 (Cal. Super. Ct. filed Oct. 13, 2009), *removed*, No. 3:09-CV-2617 (S.D. Cal.) (Nov. 19, 2009).

[3] *Woods v. Experian Info. Solutions, Inc.*, No. 3:10-CV-2669 (N.D. Cal. filed June 18, 2010); *Elmore v. Federal Credit Corp.*, No. 3:10-CV-2639 (N.D. Cal. filed June 16, 2010); *Quist v. Bank of Am., N.A.*, No. 3:10-CV-1118 (N.D. Cal. filed Mar. 16, 2010); *Yasar v. Rickenbacker Grp., Inc.*, No. 3:10-CV-922 (N.D. Cal. filed

(Continued on following page)

this case. The Ninth Circuit held that Section 1681s-2(b) extends to a furnisher's failure to "echo back" disputes to a consumer reporting agency ("CRA") and that the private right of action to enforce California Civil Code Section 1785.25 is not preempted by FCRA in suits against furnishers.

It is the threat of just such suits that led Congress to limit the federal cause of action against furnishers and to preempt state causes of action. Congress was concerned that the fear of monetary liability from such suits (and the costs of the litigation itself) would make furnishers unwilling to voluntarily provide information to the Nation's banking and lending system. As reflected by the three amicus briefs supporting this Court's review, the Ninth Circuit's contrary ruling thwarts that intent and threatens the efficient extension of credit.

I. REVIEW IS NECESSARY BECAUSE THE DECISION BELOW IS OF NATIONAL IMPORTANCE, WILL HARM THE INTEGRITY OF CREDIT INFORMATION, AND REQUIRE COSTLY, FRUITLESS CHANGES TO THE CREDIT REPORTING SYSTEM

A. Respondent challenges (Br. in Opp. 1, 14-15) whether the Ninth Circuit's decision will discourage furnishers from providing critical credit information to the CRAs, and thereby injure the integrity of the

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Mar. 4, 2010); *Gomes v. Rickenbacker Grp., Inc.*, No. 5:09-CV-3190 (N.D. Cal. filed July 14, 2009); *Paysinger v. Santander Consumer USA Inc.*, No. 2:09-CV-1107 (C.D. Cal. filed Feb. 17, 2009).

credit system. But those intimately involved in the system disagree with respondent and perceive the immediate harm caused by the Ninth Circuit's decision.

First, the trade association for the CRAs, the Consumer Data Industry Association ("CDIA"), urges this Court to review and reverse the Ninth Circuit's decision. It does so even though the CRAs are not potential defendants under the causes of action recognized by the Ninth Circuit. As CDIA explains, the entire consumer reporting system is dependent on voluntary participation by furnishers, and the Ninth Circuit's decision will cause furnishers to stop providing information to the CRAs. CDIA Amicus Br. 6-7. CDIA also explains that such omissions will lead to less accurate and less complete credit reports, and describes why that is so. *Id*. at 7, 22-23.

Second, the California Apartment Association ("CAA"), which represents landlords who rent nearly two million housing units in California, observes that the Ninth Circuit's decision will deter its members from reporting unpaid rent to the CRAs. CAA Amicus Br. 3, 11-12. This will, the CAA explains, make credit records incomplete and require landlords to adopt other, more overinclusive, means of screening tenants. *Id*. at 2-3, 10-11, 13. It also will require landlords to charge the maximum security deposit in order to protect themselves against delinquencies, which will significantly increase the initial costs of renting an apartment. *Id*. at 12-13. That amicus brief confirms the views below of the National Association of Screening Agencies (Pet. 19) that an entire

swath of furnishers may stop providing information to the CRAs in light of the Ninth Circuit's decision.

Finally, the American Bankers Association ("ABA") and California Bankers Association ("CBA"), whose members are both furnishers and users of credit information, stress that a "single national standard for enforcing credit reporting obligations is essential." ABA/CBA Amicus Br. 2. They note that this is particularly true because all major financial institutions do business in California and thus will need to comply with the more onerous requirements or face California courts and juries. *Id*. at 12-13.

B. Respondent also contests (Br. in Opp. 11) that the automated system used to process over 80% of consumer disputes will need to be changed in light of the Ninth Circuit's ruling. Pet. 20-21. He suggests that the existing system must have a code permitting the furnisher to note that information has been disputed *to the CRA* by the consumer, because furnishers already have an obligation under Section 1681s-2(a)(3) of FCRA to report that information has been disputed *to the furnisher* by the consumer.

But that does not follow. The Ninth Circuit's decision reads into FCRA a new obligation requiring furnishers to report back to the CRAs that the consumer has disputed *to the CRAs* the completeness or accuracy of information. There is no existing code for such a notation in the automated system. Pet. 21; ABA/CBA Amicus Br. 9. And it is not feasible for individual furnishers to make additional "free form" entries. *Ibid*.

C. This same confusion infects respondent's response (Br. in Opp. 11-12) to petitioner's argument that requiring furnishers to "echo back" dispute information to the CRAs—the very entities that transmitted the dispute to the furnishers in the first instance—is superfluous. Section 1681s-2(a)(3), which requires that the furnisher tell the CRAs when information "is disputed to the person [*i.e.*, the furnisher] by the consumer," is not superfluous because it requires furnishers to report to the CRAs information that they do not know: that the consumer has lodged a dispute with the furnisher. Moreover, that obligation is not privately enforceable; only state and federal officials may enforce that requirement. 15 U.S.C. § 1681s-2(c) & (d). It is only the new "echo back" requirement that the Ninth Circuit read into Section 1681s-2(b) that is superfluous because it tells the CRAs nothing that they do not already know. And the Ninth Circuit has not only created that requirement out of whole cloth, but it also has made it privately enforceable.

Respondent suggests (Br. in Opp. 12) that a potential credit provider is more likely to grant credit if the credit report shows that the consumer promptly disputed the information with the furnisher. But the codes used by the automated system do not reflect the date that the consumer initially disputed the information, which would be essential to knowing whether a dispute was "prompt." If a consumer wants potential credit providers to know the date of his dispute, the consumer (not the furnisher) must invoke his

statutory right to file a statement of dispute under Section 1681i and identify the date in his statement. If the consumer files such a statement of dispute with the CRA, that statement must be noted in all subsequent reports containing the disputed information. 15 U.S.C. § 1681i(b). Thus, petitioner is wrong to suggest that the requirement created by the Ninth Circuit is not superfluous.

II. THE NINTH CIRCUIT'S EXPANSION OF PRIVATE DAMAGES ACTIONS AGAINST FURNISHERS IS CONTRARY TO CONGRESSIONAL INTENT AND WARRANTS REVIEW

A. Respondent Offers No Cogent Support In FCRA For Recognizing A Private Action For Failing To "Echo Back" A Dispute To A CRA

The Ninth Circuit's reading of Section 1681s-2 of FCRA is contrary to Congress's purpose and is in tension with the views reflected in the joint rulemaking of six federal agencies.

Congress imposed no statutory duties on furnishers for the first 26 years following FCRA's enactment. In 1996, Congress amended FCRA to define a narrow set of furnisher responsibilities, including a requirement that if the "completeness or accuracy of any information" is disputed to the furnisher by a consumer, the furnisher "may not furnish the information to any [CRA] without notice that such

information is disputed by the consumer." 15 U.S.C. § 1681s-2(a)(3).

Importantly, even with these amendments, Congress continued to insulate furnishers from all private rights of action relating to the alleged inaccuracy or incompleteness of any information furnished to the CRAs. The furnisher's obligation to furnish accurate information to the CRAs, and to correct and update any previously furnished information that is determined to be inaccurate or incomplete, is "enforced exclusively * * * by the Federal agencies and officials and the State officials indentified in section 1681s." *Id*. § 1681s-2(d). Yet the Ninth Circuit's decision authorizes a private cause of action precisely in situations where Congress chose to provide none.

Respondent's effort to support the Ninth Circuit's holding (Br. in Opp. 6) relies on Section 1681s-2(b)(1) of FCRA. But that section has nothing to do with reporting the existence of a consumer dispute to the CRAs. Rather, it relates only to the accuracy and completeness of the underlying credit information that the consumer has disputed to the CRA. Pet. 24. Nothing in Section 1681s-2(b) requires furnishers to notify the CRAs of consumer disputes or authorizes the private action that the Ninth Circuit allowed.

The Ninth Circuit's decision is also unworkable. It holds that furnishers are liable under Section 1681s-2 only if the failure to report a dispute is "materially misleading." Pet. App. 35a. According to the Ninth Circuit, a furnisher cannot be held liable

"simply for a failure to report that a debt is disputed." Pet. App. 34a. But there is no way for a furnisher to know, ex ante, whether a report of a dispute would be relevant to a potential creditor. *See* Andrew M. Smith, Peter Gilbert & Scott Johnson, *Fair Credit Reporting Act Update—2009*, 65 BUSINESS LAWYER 595, 603 (Feb. 2010).

It is for this reason that six federal agencies refused to adopt a similar standard for imposing duties on furnishers. Pet. 25-26; ABA/CBA Amicus Br. 5-8. Respondent offers no response to this determination by expert agencies of the real-world infeasibility of the Ninth Circuit's standard.

B. Respondent Offers No Substantive Response To Petitioner's Argument That FCRA's Preemption Provisions Preclude The State Law Private Rights Of Action Permitted Below

Respondent contends (Br. in Opp. 1-2, 15-16) that petitioner waived its preemption arguments. Respondent is mistaken. Respondent elides the two different preemption arguments pressed in the petition, ignores the actual decision of the court of appeals, and provides no defense of the Ninth Circuit's actual holdings. In the short time since issuance of that erroneous decision, the holding that FCRA does not preempt California's cause of action in California Civil Code Section 1785.31 for compensatory and punitive damages to enforce California Civil Code Section 1785.25 has prompted dozens of such suits,

including class actions, against furnishers. *See supra*, pages 1-2 nn.2 & 3.

1. Contrary to respondent's assertion (Br. in Opp. 15), the issue of express preemption is plainly preserved. The district court held that Section 1681t(b)(1)(F) of FCRA expressly preempted respondent's state private right of action in California Civil Code Section 1785.31 to enforce California Civil Code Section 1785.25, Pet. App. 94a-96a; petitioner as appellee defended that holding on appeal, Pet. App. 53a, 55a; and the court of appeals reversed, Pet. App. 57a.

Respondent offers no defense of the Ninth Circuit's holding on the merits. Instead, he simply paraphrases (Br. in Opp. 4) the Ninth Circuit as holding that the separately codified private cause of action in California Civil Code Section 1785.31 "go[es] along" with the unpreempted substantive requirement in California Civil Code Section 1785.25. And he claims (Br. in Opp. 8) that nothing in *the legislative history* suggests that Congress intended to preempt the remedies.

In so doing, respondent ignores the breadth of the express preemption provision. *See* Pet. 27-30; CDIA Amicus Br. 14-18. FCRA preempts any state law "respect[ing]" the "subject matter regulated" under Section 1681s-2(a). 15 U.S.C. § 1681t(b)(1)(F). And Section 1681s-2 regulates not only the furnisher's duty to furnish accurate and complete information to the CRAs, it also governs who may enforce

that duty. The plain language of Section 1681t(b)(1)(F) thus preempts state law remedies to enforce furnishers' duties.

Further, until the decision below, no other court had ever held that Section 1681t(b)(1)(F) of FCRA did not preempt state rights of action, and numerous courts had held that it did preempt such actions. Pet. 33-34. Indeed, the Ninth Circuit's holding conflicts with the First Circuit's affirmance of a judgment dismissing as preempted a private cause of action to enforce a similarly-saved Massachusetts statute. *See Gibbs v. SLM Corp.*, No. 05-1057, 2005 WL 5493113 (1st Cir. Aug. 23, 2005). There, the district court reasoned that Section 1681t(b)(1)(F) did not save the private right of action. *Gibbs v. SLM Corp.*, 336 F. Supp. 2d 1 (D. Mass. 2004). In an unpublished disposition, the First Circuit affirmed the district court "essentially for the reasons stated in its published opinion." 2005 WL 5493113, at *1. This prior consensus, and the Ninth Circuit's divergence from it, takes on special significance because Congress amended Section 1681t(b) in 2003 but did not alter its scope. CDIA Amicus Br. 18.

2. The related preemption argument—that the private right of action in California Civil Code Section 1785.31 is subject to conflict preemption—is also properly before this Court.

The Ninth Circuit devoted six paragraphs to rejecting the conflict preemption argument that petitioner raised as appellee to defend the district court's judgment. Pet. App. 57a-59a n.35. Respondent

attempts to discount the discussion as merely "reciting that [the Ninth Circuit] would not have been persuaded by [petitioner's] argument" if it had entertained it. Br. in Opp. 16. But the decision is framed in terms of a holding, not contingent musings. The Ninth Circuit states, for example, that the legislative history "supports *our holding* concerning the scope of the FCRA preemption provisions." Pet. App. 59a n.35 (emphasis added). In any event, the issue was "passed upon below," and is thus preserved for review. *United States v. Williams*, 504 U.S. 36, 41 (1992).

Respondent appears to acknowledge (Br. in Opp. 10) a split between the Ninth Circuit's decision and the Maine Supreme Court on the question of conflict preemption. But he suggests that the Maine Supreme Court's decision could be affected by FCRA's 1996 amendments. Contrary to respondent's claim (Br. in Opp. 6-7), Section 1681t(a) was neither added nor substantively amended in 1996. FCRA has contained that same preemptive language since its enactment in 1970, *see* Fair Credit Reporting Act, Pub. L. No. 91-508, § 622, 84 Stat. 1114, 1136 (1970), and the provision was merely renumbered as a subsection in 1996. Thus, respondent is wrong in contending (Br. in Opp. 6-7) that Congress in 1996 "clarif[ied]" that Section 1681t(a) of FCRA does not preempt state law, and in suggesting that the Ninth Circuit's decision does not conflict with the Maine Supreme Court. If Congress had sought to eliminate normal rules of conflict preemption, it could have

made that clear, as it has in a number of other related statutes. Pet. 32.

Permitting California money damages claims against furnishers is in conflict with FCRA. Congress sought to encourage participation by furnishers in the consumer reporting process by ensuring a nationally uniform private enforcement regime. If left standing, the Ninth Circuit's decision will defeat that objective by subjecting furnishers to a multitude of consumer claims like the one at issue here.

CONCLUSION

For the reasons set forth above and in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

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