No. 10-251

IN THE

Supreme Court of the United States

EXPERIAN INFORMATION SOLUTIONS, INC.,

Petitioner,

v.

MARIA E. PINTOS and PACIFIC CREDITORS ASSOCIATION,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF OF RESPONDENT MARIA E. PINTOS IN OPPOSITION

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QUESTION PRESENTED

Whether using a credit report to assist in collecting a disputed deficiency claim that did not arise from a "credit transaction" and does not concern an "account" qualifies as a permissible purpose within the meaning of the Fair Credit Reporting Act, 15 U.S.C. § 1681b(a)(3)(A), as it stood prior to its amendment by the Fair and Accurate Credit Transactions Act of 2003.

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STATEMENT OF THE CASE

Police ordered P&S Towing to tow a vehicle registered to respondent Maria Pintos and her son, David. P&S subsequently retained a collection agency, respondent Pacific Creditors Association (PCA), to collect on its asserted towing deficiency claim. PCA obtained Mrs. Pintos's credit report from petitioner Experian Information Solutions (Experian) and told her it would ruin her credit unless she paid the claim. PCA did not have a "permissible purpose" under the Fair Credit Reporting Act (FCRA or the Act), 15 U.S.C. §§ 1681 *et seq.* (2000), for obtaining her credit report.

1. Consumer reports, commonly referred to as "credit reports," contain information that "bear[s] on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living." 15 U.S.C. § 1681a(d)(1). They include detailed personal information such as a person's social security number, date of birth, current and former addresses, and names used (which may reveal a person's marital history). They also include detailed financial information: the businesses with which an individual has accounts, the account numbers, credit limits, available credit, payment history, bankruptcy status, charge-offs, repossessions, foreclosures, and judgments. *See generally* Craig Ball, *Cybersleuthing for People Who Still Can't Program Their VCRs*, GPSolo, June 2003, at 40 (listing information commonly found in credit reports).

Because this information is so sensitive, Congress decided that "[t]here is a need to insure that

consumer reporting agencies exercise their grave responsibilities with . . . respect for the consumer's right to privacy." 15 U.S.C. § 1681(a)(4). Accordingly, FCRA requires the agencies that compile and maintain credit reports to keep them confidential. *Id.* § 1681b(a).

To enforce its privacy objective, the Act establishes a private right of action against any party who obtains a credit report without a "permissible purpose." 15 U.S.C. §§ 1681b(f), 1681n(a), 1681o(a). It also requires "[e]very consumer reporting agency [to] maintain reasonable procedures designed . . . to limit the furnishing of consumer reports to the purposes listed under section 1681b," and makes any consumer reporting agency liable for furnishing a report "if it has reasonable grounds for believing that the consumer report will not be used for a purpose listed in section 1681b of this title." 15 U.S.C. § 1681e(a).

2. Petitioner Experian is one of three national consumer reporting agencies. These agencies compile consumer data into credit reports. Experian enters into agreements with businesses that provide Experian with detailed information about the consumers with whom they transact. As subscribers, these businesses are able to access consumers' credit reports online by entering known information – often a name and little else. Respondent PCA is an Experian subscriber.

3. In 1999, respondent Maria Pintos bought a thirteen-year-old Chevrolet Suburban for her son

David and signed the title over to him. ER 133, 135 (PCA).[1] She never drove the vehicle because it was a stick shift, which she did not know how to operate. ER 133 (PCA). In May 2002, local police directed P&S to tow the vehicle because it was parked on a public street with expired tags. ER 155 (PCA).

Neither Mrs. Pintos nor her son reclaimed the vehicle. P&S subsequently mailed Mrs. Pintos a notice informing her that the vehicle would be sold. ER 155 (PCA). California law permitted P&S to sell the vehicle and required it to apply the proceeds to the towing and storage charges. P&S asserted a deficiency claim of $1900 and hired respondent PCA – a collection agency that specializes in collecting towing debts – to collect that amount, plus interest.[2] *See* ER 128 (Experian).

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[1] Citations to "ER [page number] (PCA)" refer to pages in the record excerpts filed by respondent PCA in the court of appeals. Citations to "ER [page number] (Experian)" refer to page numbers in the record excerpts filed by petitioner Experian. Citations to "ER [page number] (Pintos)" refer to page numbers in the record excerpts filed by Mrs. Pintos. Citations to "Supplemental ER [page number] (Pintos)" refer to page numbers in the supplemental record excerpts filed under seal by Mrs. Pintos.

[2] Mrs. Pintos disputes P&S's towing deficiency claim. P&S's actions were governed by California Civil Code Sections 3067-3074. By towing a vehicle, a towing company obtains a possessory lien. It is entitled, if the owner does not reclaim the vehicle, to sell it "in a commercially reasonable manner." Cal. Civ. Code § 3072(i). If the sale price does not cover the charges for towing, storage, and conducting the sale, the company obtains a deficiency claim. But if it knowingly violates any part

In October 2002, PCA sent Mrs. Pintos a letter demanding that she "mail or bring this notice to our office with full payment." ER 128 (Experian). About a month later, when PCA had not received "full payment," it pulled Mrs. Pintos's credit report from Experian and called her at work, explaining that her report showed she had good credit, which would be ruined unless she paid its demand.

4. In 2003, Mrs. Pintos filed suit in the United States District Court for the Northern District of California. She alleged that PCA had violated FCRA by obtaining her credit report without a permissible purpose and that Experian had violated the Act by releasing the report. The defendants separately moved for summary judgment, each arguing that PCA had a permissible purpose for requesting the report under Section 1681b(a)(3)(A), which provides, in pertinent part, that reports can be provided to a person who

> intends to use the information in connection with a credit transaction involving the consumer on whom the information is to be furnished and involving the extension of

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of the statutory scheme, the company "forfeit[s] all claims." *Id.* § 3070(c), (d).

P&S asserts a deficiency claim that is precisely the full amount of its towing, storage, and sale charges. Thus, either P&S did not apply the proceeds of sale to those charges or it did not sell the vehicle in a "commercially reasonable manner." Either way, its deficiency claim – which it has never attempted to prove in court – is invalid.

> credit to, or review or collection of an account of, the consumer.

Mrs. Pintos responded that PCA had failed to satisfy the section in two respects – either of which was sufficient to violate FCRA and to allow her suit to go forward. First, PCA's request did not occur "in connection with a credit transaction" because any amount to which PCA was entitled was unrelated to credit. *See* ER 185-87 (PCA). Second, PCA's desire for payment did not arise out of a "pre-established credit account," ER 187 (PCA).

The district court granted summary judgment to both defendants. It found that "settled law in the Ninth Circuit" foreclosed Mrs. Pintos's argument that PCA lacked a permissible purpose under Section 1681b(a)(3)(A). Pet. App. 74a. The decision to which it pointed was *Hasbun v. County of Los Angeles*, 323 F.3d 801 (9th Cir. 2003), which concerned the collection of a child support judgment. The Ninth Circuit had found that the county was entitled to obtain Hasbun's credit report because "judgment creditors may utilize § 1681b(a)(3)(A) to access consumer reports." 323 F.3d at 803. In the course of reaching the conclusion that the county was attempting to collect an account within the meaning of Section 1681b(a)(3)(A), the court had remarked that "[i]n other words, collection of a debt is considered to be the 'collection of an account.'" 323 F.3d at 803.

Relying on that remark from *Hasbun*, the district court in this case held that PCA also had a permissible purpose for obtaining Mrs. Pintos's credit report because it too was trying to collect a debt. Pet.

App. 75a. Having reached that conclusion, the district court declined to reach the question whether Experian would have been liable under Section 1681e for negligently releasing Mrs. Pintos's credit report "if PCA had not had a permissible purpose." *Id.*

5. Mrs. Pintos appealed.[3] In 2007, the Ninth Circuit reversed the district court's grant of summary judgment and remanded for further proceedings. The court explained that "Section 1681b(a)(3)(A) does not provide that *all* 'account collection' is a permissible purpose for obtaining credit reports." Pet App. 58a (emphasis added). Rather, the statute authorizes the release of credit reports only "in connection with a credit transaction involving the consumer . . . *and* involving the . . . review or collection of an account." *Id.* (quoting 15 U.S.C. § 1681b(a)(3)(A) (emphasis and ellipses in original)).

Turning to the question of what constitutes a "credit transaction," the court observed that FCRA "initially did not define the term 'credit,'" Pet. App. 58a, but that the Fair and Accurate Credit Transactions Act of 2003 (FACTA), Pub. L. 108-159, 117 Stat. 1952, had expressly incorporated into FCRA the pre-existing definition of "credit" provided by the Equal Credit Opportunity Act (ECOA), 15 U.S.C. §§ 1691 *et seq.* (2000). *See* Pet. App. 58a-59a.

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[3] Experian cross-appealed from the district court's order denying its motion to seal certain documents Mrs. Pintos had attached to her cross-motion for summary judgment on the question of Experian's negligence. *See* Pet. App. 56a. The issues raised by the cross-appeal are independent of the issues before this Court.

ECOA defined "credit" as a "right . . . to defer payment." 15 U.S.C. § 1691a(d). In light of that definition, the court of appeals explained that "[n]ot all 'debt' involves a 'credit transaction.'" Pet. App. 58a, 59a. Some debts arise from circumstances other than those in which the debtor sought a right to defer payment for goods or services.

In Mrs. Pintos's case, the panel found that there had been no "'credit transaction' within the meaning of § 1681b(a)(3)(A)" because she "did not voluntarily seek credit." Pet. App. 60a, 59a. "PCA obtained Pintos's credit report for debt collection efforts unrelated to a proper credit transaction." Pet. App. 61a-62a.

The panel recognized that the district court's ruling to the contrary had relied on *Hasbun* and had applied a reading of *Hasbun* that was "not unreasonable at the time." Pet. App. 60a. But the court suggested that *Hasbun*'s expansive view of the permissible purpose provision should be "reevaluated" in light of FACTA. *Id.* Whatever the language in *Hasbun* may have suggested, the text of Section 1681b(a)(3)(A) permitted obtaining credit reports only for debts incurred "'in connection with a credit transaction involving the consumer.'" Pet. App. 58a (quoting the statute). Attempts to collect debts not arising from credit transactions fell outside its scope. *Id.*

6. Experian moved for rehearing and rehearing en banc, citing (as one ground) the panel's reliance on FACTA, which post-dated the events in question, as a reason for declining to find *Hasbun* controlling. *See* Cross-Appellant/Appellee's Petition for Panel

Rehearing and Rehearing en Banc at 6-7, Oct. 12, 2007. In light of that motion, the panel withdrew its initial opinion and issued a superseding opinion. Pet. App. 32a.

The second panel[4] again began its analysis with the text of Section 1681b(a)(3)(A). It pointed to the two requirements contained in that section. The incident giving rise to the request for a credit report "must both (1) be 'a credit transaction involving the consumer on whom the information is to be furnished' and (2) involve 'the extension of credit to, or review or collection of an account of, the consumer.'" Pet. App. 37a. The panel noted that the district court had looked only at the second of the two prerequisites – namely, that PCA was trying to collect "an account." But the district court "did not address" "whether the transaction was 'a credit transaction involving' Pintos." *Id.*

Turning to that question, the panel found that Mrs. Pintos's interaction with PCA did not involve a "credit transaction." In this case, "Pintos did not participate in seeking credit from the towing company." Pet. App. 38a. Rather, the towing company simply towed the car and then sought payment for the charges. Just because Mrs. Pintos "did something that arguably led to the creditor's claim," Pet. App. 39a, did not mean she had entered into a credit transaction. The panel found *Hasbun*

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[4] Judge Bea was assigned to the second panel after one of the judges on the initial panel resigned from the bench. *See* Pet. App. 31a n.*.

inapposite because that case involved "a *judgment* creditor" and "*court-ordered* child support," Pet. App. 40a (emphases in original). "Application of *Hasbun* to permit a credit report to be obtained to assist the collection of a claim that had not yet been adjudicated is not supported by the logic of that decision nor by our other precedents." Pet. App. 41a.

Since there had been no credit transaction in Mrs. Pintos's case, Section 1681b(a)(3)(A) "did not authorize PCA to obtain the credit report on Pintos." Pet. App. 41a. The court noted that on remand defendants were free to argue that PCA was authorized to obtain the report "under a different subsection," Pet. App. 41a n.2, as well as that Experian had not been negligent in releasing the report, Pet. App. 41a-43a.

Judge Bea dissented. He agreed with the majority that "the fact Pintos's actions resulted in P&S's claim is, alone, insufficient to justify P&S requesting her credit report." Pet. App. 49a. But, asserting that "[t]he moment P&S towed Pintos's car, P&S became Pintos's creditor,"[5] Judge Bea argued that *Hasbun* entitled P&S "to access Pintos's credit report in order to collect the debt." Pet. App. 50a.

7. Experian and PCA again petitioned for rehearing and rehearing en banc. Although neither Experian nor PCA had raised the issue, "it was suggested" during the course of the Ninth Circuit's consideration of the petitions, that FCRA Sections 1681b(c) and 1681a(m) "might shed light on the

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[5] In fact, California law is more complex. *See supra* note 2.

meaning of" Section 1681b(a)(3)(A).[6] Pet. App. 4a, 17a n.2. Accordingly the court requested supplemental briefing on that issue. After considering the question further, the court issued an order amending footnote 2 of the panel opinion to explain that those sections, "drafted at a different time and aimed at a different situation," Pet. App. 4a, had no bearing on the construction of Section 1681b(a)(3)(A). Pet. App. 3a. It explained that those provisions had been added to the Act in 1996 "to permit lenders and insurance companies to solicit for business" by acquiring prescreened lists of potential customers from credit reporting agencies. Pet. App. 4a. The footnote then observed that "[n]obody contend[ed]" that Mrs. Pintos's situation involved an offer of credit or insurance within the meaning of Section 1681b(c). Pet. App. 4a. The full court denied the petitions for rehearing en banc in an order that provided that "[n]o further petitions for rehearing may be filed." Pet. App. 5a.

Chief Judge Kozinski, joined by six colleagues, dissented from the denial of rehearing en banc. Believing that the panel had held that "a person isn't 'involved' in a credit transaction unless he 'initiates' the transaction," Pet. App. 5a, he argued that such a "holding" could not be squared with the language of Sections 1681b(c) and 1681a(m), Pet. App. 6a.

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[6] Section 1681b(c) addresses the "[f]urnishing [of] reports in connection with credit or insurance transactions that are not initiated by consumer." Section 1681a(m) defines the term "credit or insurance transaction that is not initiated by the consumer."

First, Chief Judge Kozinski thought that Section 1681b(a)(3)(A) applied even in cases where the consumer had not initiated a transaction. He found support for this conclusion in Section 1681b(c)'s special restrictions on the release of credit reports in cases involving "any credit or insurance transaction that is not initiated by the consumer." The lack of similar language in Section 1681b(a)(3)(A) meant that it applied regardless of whether the consumer had "initiate[d] anything." Pet. App. 6a.

Chief Judge Kozinski claimed in the alternative that, as a matter of law, Mrs. Pintos had in fact initiated the transaction at issue here. Section 1681a(m) excludes from the term "credit or insurance transaction that is not initiated by the consumer" the use of a credit report by a business "with which the consumer has an account . . . for purposes of . . . collecting the account." 15 U.S.C. § 1681a(m). Based on this definitional provision, Chief Judge Kozinski asserted that if a business is seeking collection of a debt, this necessarily means that an account *has* been "initiated by the consumer." Pet. App. 7a (stating that "section 1681a(m) says that Pintos initiated the transaction" simply "by owing the debt").

Judge Gould also dissented, arguing that permitting all creditors to obtain credit reports would ultimately benefit consumers. Pet. App. 8a.

REASONS FOR DENYING THE WRIT

Experian's request for summary reversal, Pet. 3, is based on the hope that this Court will eschew any serious analysis of FCRA, its purposes, or the Ninth

Circuit's actual holding in this case. Once one conducts that analysis, however, it becomes clear that this case warrants no further review at all, much less summary reversal. The Ninth Circuit properly rejected Experian's request to deviate from the text of FCRA. Reading Section 1681b(a)(3)(A) to let debt collectors pull credit reports to collect debts that neither arise from a "credit transaction" nor concern "an account" would unjustifiably restrict the scope of FCRA's privacy protections.

In any event, FACTA's enactment limits this case's significance. FACTA confirms that the Ninth Circuit correctly rejected Experian's claims of a permissible purpose.

It likewise becomes plain upon the slightest inspection that there is no conflict between the Ninth Circuit's holding and either the decisions of other courts or the guidance provided by the Federal Trade Commission (FTC).

I. FCRA Did Not Authorize PCA To Pull Mrs. Pintos's Credit Report.

A. PCA Satisfied Neither Section 1681b(a)(3)(A)'s Requirement That There Be A "Credit Transaction," Nor Its Requirement That PCA's Conduct Involve "Collection Of An Account."

Statutory interpretation "start[s], as always, with the language of the statute." *Williams v. Taylor*, 529 U.S. 420, 431 (2000) (citing *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989)). FCRA permits a consumer reporting agency to "furnish a consumer report under the following circumstances

and no other." 15 U.S.C. § 1681b(a) (emphasis added). One permissible purpose contained in that list – the only one at issue in this case – is if the user obtains the report

> to use the information in connection with a credit transaction involving the consumer on whom the information is to be furnished and involving the extension of credit to, or review or collection of an account of, the consumer.

15 U.S.C. § 1681b(a)(3)(A). Accordingly, only if PCA had obtained Mrs. Pintos's credit report *both* (1) "in connection with a credit transaction" *and* (2) for "collection of an account" was its use a "permissible purpose." *Id.*; *see also* Pet. App. 13a (noting that these are separate requirements). In fact, the plain text makes clear that neither requirement was met.

1. This case does not involve a "credit transaction." Federal law has consistently defined "credit" in various contexts as "the right granted by a creditor to a debtor to defer payment of debt or to incur debts and defer its payment or to purchase property or services and defer payment therefor." 15 U.S.C. § 1691a(d) (Equal Credit Opportunity Act); *see also* 15 U.S.C. § 1602(e) (Truth in Lending Act); 12 U.S.C. § 5481(7) (Dodd-Frank Wall Street Reform and Consumer Protection Act); 12 C.F.R. § 202.2(j) (Equal Credit Opportunity Act (Regulation B)). These statutory definitions comport with the ordinary understanding of the term, as referring to an agreement between the parties in which one party provides funds, goods, or services now in return for the other party's promise to pay later. *See, e.g.*, Black's Law Dictionary 424 (9th ed. 2009) (defining

credit as "[t]he availability of funds either from a financial institution or under a letter of credit); Ballentine's Law Dictionary 287 (3d ed. 1969) (defining credit as "[t]he antonym of cash on delivery"). These statutory definitions likewise comport with the standard definition of a consumer-credit transaction as "[a] transaction by which a person receives a loan to buy consumer goods or services." Black's Law Dictionary, *supra*, at 359.

To be sure, at the time of the events giving rise to Mrs. Pintos's lawsuit (that is, prior to the enactment of FACTA), FCRA used the term "credit transaction" without providing an explicit definition. But in the absence of any statutory definition, the "ordinary meaning" applies. *See Hamilton v. Lanning*, 130 S. Ct. 2464, 2471 (2010); *Asgrow Seed Co. v. Winterboer*, 513 U.S. 179, 187 (1995) (citing *FDIC v. Meyer*, 510 U.S. 471, 476 (1994)).

Experian has never contended that the towing and storage of the Suburban – or any other event in this case – satisfies the ordinary meaning of a "credit transaction." To the contrary, P&S and PCA always insisted on immediate "full payment." ER 128 (Experian); *see also* ER 155 (PCA). Courts have long held that such circumstances do not involve "credit." *See, e.g.*, *Shaumyan v. Sidetex Co.*, 900 F.2d 16, 19 (2d Cir. 1990) (it would be "indiscriminate" and "inappropriate" in light of ECOA to consider every contract in which "compensation for services is not instantaneous" as involving "credit"); *Hahn v. Hanks Ambulance Serv., Inc.*, 787 F.2d 543, 544 (11th Cir. 1986) (it "is not extending 'credit'" to "assess[] a charge in light of the customer's failure to pay the company at the time the service is performed").

2. Nor did this case involve "collection of an account," which is also required by Section 1681b(a)(3)(A). Like "credit," the term "account" has a longstanding common meaning: an account is "a formal business arrangement providing for regular dealings or services (as banking, advertising, or store credit) and involving the establishment and maintenance of an account." Merriam-Webster's Collegiate Dictionary 11 (Deluxe ed. 1998); *see also* Random House College Dictionary 10 (rev. ed. 1988) (defining "account" in the business, banking, and finance context as "a. an official business relation, as with a bank, store, or stockbroker, allowing a depositor, customer, or client certain banking or credit privileges. b. the money or credit available to such a depositor, customer, or client, as the amount of money deposited in a checking or a savings account at a bank. c. a banking or credit privilege or service extended by a bank, store, or the like, to customers or clients"). An account presupposes a consensual arrangement between the parties, entered into voluntarily.

Experian has never explained how this case involves an "account." To the contrary, Mrs. Pintos had no account with either P&S or PCA: there was no "formal business arrangement," they had no "regular dealings or services," and there was no "establishment" or "maintenance" of any account involved. Instead, the towing claim was a one-time charge imposed unilaterally without Mrs. Pintos's knowledge or consent – a far cry from the traditional understanding of an "account."

3. Furthermore, Experian's interpretation of Section 1681b(a)(3)(A) violates the presumption

against superfluity. FCRA should be interpreted so that "no clause, sentence, or word shall be superfluous." *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (citation and internal quotation marks omitted). Courts must "give effect, if possible, to every clause and word of a statute." *United States v. Menasche*, 348 U.S. 528, 538-39 (1955) (citation and internal quotation marks omitted). Section 1681b(a)(3)(A) uses two separate phrases – "a credit transaction" *and* "the collection of an account" – to describe the permissible purpose. Experian, however, collapses those two phrases to encompass the same thing – all debt collection. Its interpretation either ignores the conjunctive requirement of the word "and," or it renders the phrase "credit transaction" completely superfluous.

4. Experian not only writes words out of FCRA, it reads in words that simply are not there. Experian claims that FCRA's "permissible purposes include, *inter alia*, credit transactions, *debt collection*, employment, insurance, licensing, credit-risk valuation, business transactions, child support determinations, and court orders." Pet. 3 (emphasis added). Every single phrase in that list appears in some form in Section 1681b(a) *except* "debt collection," which is nowhere to be found.

Instead of dealing with the statutory language of Section 1681b(a)(3)(A), Experian quotes dicta from the Ninth Circuit's opinion in *Hasbun v. County of Los Angeles*, 323 F.3d 801 (9th Cir. 2003), as if it

were the statute.[7] In particular, Experian repeatedly fastens on the idea that "collection of a debt is considered to be the 'collection of an account,'" 323 F.3d at 803. *See, e.g.*, Pet. 5, 10, 16-17. Experian's and PCA's use of *Hasbun*'s dicta, however, incorrectly equates "debt collection" – a nonstatutory phrase – with "collection of an account." The two phrases are not synonymous. Collection of an account does involve collection of a debt, because a debt is "a specific sum of money due by agreement or otherwise." Black's Law Dictionary, *supra*, at 462. But the converse is not true. Not every collection of a debt involves the collection of an account. Many debts exist without any antecedent agreement – fines and tort judgments, for example. Experian thus commits the logical fallacy of composition: it uses the fact that some debts are credit account debts to mistakenly conclude that all debts are credit account debts.

In any event, *Hasbun* itself went beyond the language of Section 1681b(a)(3)(A). FCRA authorizes the use of credit reports for "establishing" and "determining" child-support payments, *see* § 1681b(a)(4)(A), and the Ninth Circuit thought it logical to authorize access to credit reports for

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[7] *Hasbun*'s actual holding has two parts: first, Section 1681b(a)(3)(A) permits "child support enforcement agencies attempting to collect a court-ordered judgment of child support" to access credit reports, 323 F.3d at 802-03; second, "child support enforcement agencies need not comply with the certification requirements of 15 U.S.C. § 1681b(a)(4) when seeking to collect court-ordered child support," 323 F.3d at 802.

"enforcing" such payments as well, *see* 323 F.3d at 805. No such logic applies to this case because Experian points to no statutory anchor in FCRA supplying towing lienholders with special access to credit reports.

Hasbun relied also on FTC commentary suggesting that "judgment creditors" should have access to credit reports. 323 F.3d at 803-04. This case does not involve an adjudicated claim, Pet. App. 17a; indeed, Mrs. Pintos disputes whether she owes P&S any money at all. *See supra* note 2. Experian does not defend *Hasbun*'s initial departure, yet it argues for further departure from the statutory language. This Court should decline Experian's invitation to stray from Congress's carefully considered scheme.

If Congress had wanted to let debt collectors pull credit reports to assist them in collecting on all types of "debt," it knew how to say so. Indeed, Congress has passed an entire statute named for, and directed at, the activity of "debt collection": the Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692 *et seq.* (2000). In that Act, Congress defined "debt" very broadly to include "any obligation or alleged obligation of a consumer to pay money," *id.* § 1692a(5), but it did this so that consumers would be protected against abusive debt collection practices, regardless of the type of debt, *see id.* § 1692; *see also Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 130 S. Ct. 1605, 1608 (2010). In contrast, Congress avoided the use of the term "debt" when it enumerated the permissible purposes for which a credit report may be obtained. Section 1681b(a)(3)(A) is drafted much more narrowly because Congress did

not want to authorize collection agencies to examine the credit reports of anyone who is alleged to owe a debt. The debt must arise from "a credit transaction involving the consumer" and "the extension of credit to, or review or collection of an account of, the consumer." 15 U.S.C. § 1681b(a)(3)(A).

B. Experian And PCA's Reliance On FCRA Sections 1681b(c) And 1681a(m) Is Misplaced.

Until quite recently, Experian and PCA "did not appear to view [15 U.S.C. §§ 1681b(c) and 1681a(m)] to be relevant to this case." Pet. App. 3a-4a. But now, clutching at a suggestion in Chief Judge Kozinski's dissent from denial of rehearing en banc, they argue that these sections somehow prove that the Ninth Circuit erred by "holding that § 1681b(a)(3)(A) applies only to a subset of consumer debts, *i.e.*, those resulting from a 'transaction initiated by' the consumer." Pet. 10 (quoting Pet. App. 17a).

In making their argument, Experian and PCA string together phrases from the two sections, and compare that language to phrases cherry-picked from the Ninth Circuit's decision. Their argument fails to withstand scrutiny for three reasons. First, Experian mischaracterizes the Ninth Circuit's holding. Second, Section 1681b(c) is directed at a class of transactions wholly unrelated to debt collection, and thus fails to shed any light on the permissibility of PCA's conduct. Third, Section 1681a(m) is likewise irrelevant to the issue here.

1. Experian mischaracterizes the Ninth Circuit's holding. The Ninth Circuit did not hold that Section

1681b(a)(3)(A) invariably requires that a consumer "initiate the transaction." Its actual holding was that "[b]ecause the current case involves neither a transaction for which Pintos sought credit nor the collection of a judgment debt," PCA lacked a permissible purpose under Section 1681b(a)(3)(A). Pet. App. 9a. The opinion uses the phrase "initiate the transaction" as a way of explaining what the statutory phrase "credit transaction involving the consumer" means, in the same way that it used verbs like "participate" or "sought," Pet. App. 15a, 9a, to explain why unilateral conduct resulting in a demand for immediate payment does not give rise to a permissible purpose under Section 1681b(a)(3)(A). The Ninth Circuit did not substitute the word "initiate" for the statutory language. Its focus was always on what it means for something to be a credit transaction.

2. Having insisted that the key to this case is whether Section 1681b(a)(3)(A) covers any transactions not initiated by a consumer, Experian compounds its error. It points out that Section 1681b(c)(1) identifies a class of cases falling within Section 1681b(a)(3)(A) where the transaction "is not initiated by the consumer." Pet. 11. While Experian implicitly concedes that Section 1681b(c)(1) does not apply here,[8] it contends that because Section

[8] Experian does not contend that Mrs. Pintos authorized it to provide her report to PCA. *See* 15 U.S.C. § 1681b(c)(1)(A) (providing that reports can be furnished "in connection with any credit or insurance transaction that is not initiated by the consumer" if the consumer agrees to the release). Nor, of course, has it ever suggested that PCA was extending to her "a

1681b(a)(3)(A) covers some situations in which consumers did not initiate a transaction, it must be irrelevant whether Mrs. Pintos initiated a transaction here. *See* Pet. 11-12.

Experian misunderstands the relationship between Section 1681b(a)(3)(A) and Section 1681b(c). Contrary to Experian's reading, Section 1681b(c) provides an exception to the general rule that credit reports are not available under Section 1681b(a)(3)(A) unless the consumer has sought and received credit. Section 1681b(c) permits access to a credit report for a "credit or insurance transaction that is not initiated by the consumer *only if*" either the consumer authorized the agency to provide the report, or "the transaction consists of a firm offer of credit or insurance." *Id.* § 1681b(c)(1)(B)(i) (emphasis added). As the Ninth Circuit correctly explained, Section 1681b(c) is "aimed at a different situation" entirely. Pet. App. 4a. Congress recognized that many consumers might be unaware of the availability of credit or insurance products that would benefit them, so it enacted Section 1681b(c) to accommodate two competing concerns. On the one hand, it wanted to encourage providers of credit services and insurance to make "firm offers" to new customers who would benefit from access to these services. Thus, it authorized access to credit reports

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firm offer of credit or insurance." *See id.* § 1681b(c)(1)(B)(i) (providing that reports can be furnished, under certain circumstances, for such "firm offer[s]"). If this case *were* governed by Section 1681b(c), Experian would lose because it violated that section.

under circumstances where otherwise these providers would lack any authorization given that they had no pre-existing relationship with the potential customers.

On the other hand, Congress recognized that allowing entities with whom a consumer had not entered into a relationship to access credit information about them posed substantial risks. Congress therefore decided to explicitly limit access in non-consumer-initiated pre-screening transactions to circumstances that ensure that the consumer's credit information is indeed being used to make offers of credit. Without such restrictions, the temptation for businesses to peruse consumers' credit reports in the hope that they will find information valuable to the conduct of their business is too great.

Thus, Section 1681b(c) does not suggest that Section 1681b(a)(3)(A) generally permits access to credit reports for collection of debts unconnected to a transaction for which a consumer sought credit. Indeed, it proves exactly the contrary: when Congress wanted to authorize access to a credit report for a non-consumer-initiated transaction, it said so expressly. Even then, the transaction must involve "credit."

3. PCA is likewise incorrect in adopting Chief Judge Kozinski's suggestion that Section 1681a(m) means that any time an individual owes a debt, she necessarily initiated the underlying transaction. *See* PCA Br. 15-16 (citing Pet. App. 7a). Chief Judge Kozinski reached this somewhat startling conclusion in the following way: Section 1681a(m) states that "[t]he term 'credit or insurance transaction that is not

initiated by the consumer' does not include the use of a consumer report by a person with which the consumer has an account . . . for purposes of . . . collecting the account." Chief Judge Kozinski reasoned that this meant that "[b]ecause PCA was collecting Pintos's debt, the transaction here isn't one 'not initiated by the consumer.'" Pet. App. 6a. In short, Chief Judge Kozinski wrote that "section 1681a(m) says that Pintos initiated the transaction." Pet. App. 7a.

Chief Judge Kozinski's entire argument, however, rests on a false premise – namely, that there was an account in the first place. There wasn't. *See supra* page 15. Moreover, Section 1681a(m) is directed entirely at cases falling within Section 1681b(c), which is irrelevant here. Collection of an account never falls within Section 1681b(c).

C. Experian And PCA's Policy Arguments Cannot Justify Departing From The Plain Language Of Section 1681b(a) (3)(A).

Finally, Experian makes a pure policy argument untethered to the statutory language. It asks this Court to allow debt collectors to obtain credit reports because this will help them collect debts. That consideration does not justify overturning the balance that Congress struck. FCRA is not the Debt Collectors' Assistance Act. Congress was concerned in FCRA with protecting the personal information of the millions of Americans who engage in credit transactions.

1. Experian and PCA never explain why debt collectors need information "bearing on a consumer's credit worthiness, credit standing, credit capacity,

character, general reputation, personal characteristics, or mode of living," 15 U.S.C. § 1681a(d)(1), in order to collect debts having nothing to do with credit. Giving access to the detailed personal information in a credit report to a business that does not contemplate providing any future service makes no sense. P&S, for example, clearly saw no need to obtain Mrs. Pintos's credit history before deciding to tow, store, and dispose of the Suburban.

Experian offers a different justification: debt collectors need credit reports "to track down debtors." Pet. 20. But providing sensitive personal and financial information when all the debt collector needs is an address is like using an elephant gun to shoot a flea. And often, as here, the flea is already dead: P&S and PCA had both sent letters to Mrs. Pintos at her home address months before PCA pulled her credit report. ER 155 (PCA), ER 128 (Experian).

In reality, there are two principal ways debt collectors use credit reports, neither of which justifies relaxing FCRA's strict requirements. First, a credit report helps them determine whether the consumer is worth suing, a purpose the FTC (whose commentary Experian otherwise finds persuasive, *see* Pet. 17-19) tied to the presence of a "*credit* account." *See* 16 C.F.R. pt. 600, App. § 604(3)(E) cmt. 4 (2002) (emphasis in original). Second, debt collectors use information from credit reports to tailor their collection strategies, sometimes gaining unwarranted psychological leverage over consumers, as occurred with Mrs. Pintos.

2. Experian's interpretation of the statute would severely undercut the Act's protection of consumer privacy. Under its reading, a huge range of businesses, by merely alleging they are owed money, would be entitled to intimate details about individuals with whom they come in contact. A plaintiff who subscribes to a credit reporting agency, for example, could gain access to information about its adversary's financial situation that could give it an unfair advantage during settlement negotiations. "Information is power, as any good attorney knows," *Duncan v. Handmaker*, 149 F.3d 424, 425 (6th Cir. 1998), but it is not power that Congress conferred under FCRA.

The requirement in Section 1681b(a)(3)(A) that there be an "account" provides a critical safeguard to consumers: it allows consumers to control the universe of persons who might request their credit report by choosing where to establish accounts. Experian would eliminate entirely this control. In light of Congress's clear directive to the contrary, FCRA should not be read to permit this diminution of consumers' privacy.

In the end, the Ninth Circuit's opinion in this case is quite narrow. It casts no doubt on the ability of debt collectors to obtain credit reports when they are seeking to collect on credit cards, mortgages, charge accounts, or other debts incurred as the result of a credit transaction. The Ninth Circuit held only that when they seek to collect debts incurred outside the credit system, they cannot use credit reports to do so. This holding hardly warrants the doomsday rhetoric that Experian, PCA, and their amici deploy.

II. The Question Presented Does Not Warrant This Court's Attention.

For three reasons, this case presents no question of national importance, let alone one requiring "this Court's immediate attention," Pet. 19. First, the events at issue predate FACTA's enactment in 2003, which resolved any existing uncertainty as to whether Section 1681b(a)(3)(A) permits pulling a credit report to collect on debts not involving "credit transactions." Second, the Ninth Circuit's decision has actually produced neither uncertainty nor litigation. To the contrary, Experian's approach would do so. Third, the interlocutory posture of this case counsels against review at this time.

1. Because this case involves a version of FCRA that has been amended, a decision on the merits here would affect virtually no cases. In 2003, FACTA amended FCRA to provide an express definition of the term "credit." FCRA now conclusively provides that debt collection is an impermissible purpose unless the debt arises from a transaction in which the debtor was given "a *right* to defer payment." Pet. 21 (emphasis added); *see* 15 U.S.C. § 1691a(d) ("The term 'credit' means the right granted by a creditor to a debtor to defer payment of debt."). Given the demands by P&S and PCA for immediate full payment, *see supra* page 14, this case would never qualify as a "credit transaction" under the current, post-FACTA version of FCRA.

Experian nonetheless urges this Court to decide the pre-FACTA meaning of "credit transaction." Pet. 6. But by now, there are few if any pre-FACTA cases left to decide. FCRA's statute of limitations is the

earlier of "2 years after the date of discovery" or "5 years after the date on which the violation . . . occurs." 15 U.S.C. § 1681p. Experian and its industry amici provide no data whatsoever on how many cases filed before 2008 – the expiration date for pre-FACTA claims – are still in litigation, let alone whether any of them besides Mrs. Pintos's turn on the meaning of "credit." Going forward, such disputes will not arise regardless of any decision this Court might render. Under these circumstances, construing a prior version of a statute hardly warrants this Court's attention.

If FACTA needs to be construed, this Court should await a case in which the relevant events occurred after FACTA's passage. Experian can hardly argue that this case presents an appropriate vehicle for construing FACTA given its insistence that "the FACTA amendments have no bearing on the question presented in this case" because the events at issue occurred before FACTA was enacted, Pet. 21.

Lest there be any doubt, the recent creation of the Bureau of Consumer Financial Protection further counsels against review. The Bureau was created "to implement and, where applicable, enforce Federal consumer financial law." Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1021, 124 Stat. 1376 (2010). This Court should give the Bureau a chance to sort out the implications of FCRA and FACTA and use its rulemaking authority before the Court wades into this complex statutory realm.

Experian's alternative argument that FACTA "is most naturally read to include the *unilateral* granting of a right to defer payment," Pet. 21, is equally unpersuasive. It cites *Murray v. New Cingular Wireless Services, Inc.*, 523 F.3d 719, 722 (7th Cir. 2008) for the proposition that any "provision of services before payment" involves "credit." Pet. 21. Experian's citation of *Murray* is quite misleading. *Murray* involved pre-screening and firm offers of credit within the meaning of Section 1681b(c). It did not involve the actual performance of a service and subsequent insistence on immediate payment. Surely Experian does not want this case decided on the basis of Section 1681b(c) since it did not comply with those limitations. *See supra* pages 20-22. In any event, that section is inapplicable.

2. Beyond a few citations to self-serving industry publications, *see* Pet. 19, Experian provides no basis for believing that the Ninth Circuit's decision has generated either confusion or litigation. The initial panel decision was issued in 2007. If the decision had dramatically cut back on pre-existing practices, substantial litigation or substantial changes in industry practice would by now be evident, but Experian has shown neither.[9] Indeed, PCA's own counsel published a blog post in 2008 stating that "the near hysteria which the ruling has generated in certain quarters is far out of proportion to the

[9] There are few citations of *Pintos* by other courts, and to the best of counsel's knowledge, every one refers to the case because of the Ninth Circuit's analysis of when documents should be sealed, rather than for any of its discussion of FCRA.

opinion's actual [e]ffect." *See* Mark E. Ellis, "Life After Pintos," http://www.ellislawgrp.com/article08pintos.html, last visited Dec. 1, 2010. Nothing in PCA's brief to this Court explains this inconsistency.

Although the Ninth Circuit's decision did not create confusion or litigation, adopting Experian's interpretation of Section 1681b(a)(3)(A) would create both. The pre-FACTA version of the Act, as now, contained a bright-line rule: a "consumer reporting agency may furnish a consumer report under the following circumstances *and no other*." 15 U.S.C. § 1681b(a) (emphasis added). But if this Court were to embark on a course of grafting other circumstances onto the statute, all sorts of parties might argue for extra-statutory authorizations. As a result, many consumers would have their sensitive personal information disseminated for reasons courts later hold impermissible. The ensuing litigation would serve no one's interests.

Ironically, Experian's argument in this case conflicts with the explanation of permissible purposes contained in its own policy manual at the time Mrs. Pintos's credit report was pulled. That document does not refer to "debt collection" as a permissible purpose. Supplemental ER 198 (Pintos).[10] Rather, it refers to "credit collection." *Id.* Thus, it is difficult to see why the Ninth Circuit's refusal to permit access

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[10] Although this policy manual was filed under seal, Experian has consented to Mrs. Pintos's quotation of that language here.

to credit reports for cases like Mrs. Pintos's changes the playing field in any way.

Perhaps inspired by a vigorous Ninth Circuit dissent from the denial of rehearing en banc, which is based primarily on arguments Experian never even made to the panel, Experian has decided to lobby this Court for an expansion of its entitlement to release credit reports under FCRA. Experian's desire to sell its credit reports to a larger audience hardly provides an important reason for this Court to grant certiorari.

3. This case is interlocutory for two independent reasons that counsel against review. First, the Ninth Circuit noted that "[o]n remand, [Experian] may argue that PCA was authorized to obtain Pintos's report under a different subsection." Pet. App. 3a. Second, Experian has another potential defense regardless of whether PCA had a permissible purpose; a credit reporting agency is liable under Section 1681e only if it fails to maintain appropriate safeguards to limit the furnishing of credit reports to permissible purposes. The Ninth Circuit held that there were disputed issues of material fact connected with this defense that require additional proceedings. *See* Pet. App. 19a-20a.

This Court "generally await[s] final judgment in the lower courts before exercising [its] certiorari jurisdiction." *Virginia Military Institute v. United States*, 508 U.S. 946, 946 (1993) (opinion of Scalia, J., respecting the denial of the petition for writ of certiorari) (citations omitted). Especially since Experian's statutory arguments are based on how the

various provisions of FCRA fit together, there is no reason for departing from this Court's usual practice.

III. There Is No Conflict Between The Ninth Circuit's Holding In This Case And Any Other Authority.

The Ninth Circuit's decision does not conflict with any decisions of the other courts of appeals or with the FTC's interpretation.

A. There Is No Circuit Conflict.

Experian cannot show that any other court of appeals would have decided this case in its favor.

1. Experian cites three decisions purportedly establishing the principle that "debt collection" is a permissible purpose under Section 1681b(a)(3)(A). With respect to each of these cases, Experian relies on loose language that, understood in context, in no way stands for the proposition that debt collection is always and invariably a permissible purpose. In particular, none of the three decisions held that collection is a permissible purpose for debts like the one at issue here.

Only one of the three cases – *Miller v. Wolpoff & Abramson, LLP*, 309 Fed. Appx. 40 (7th Cir. 2009) – actually concerned collection of a debt at all. The consumer in that case incurred the debt by using his credit card. No one disputes that the use of a credit card involves "credit" or that Section 1681b(a)(3)(A) permits a credit card issuer or its collection agency to pull a cardholder's credit report. But *Miller*'s casual references to the credit card balance as a "debt" say nothing about how the Seventh Circuit would analyze whether a towing charge for which immediate

payment was demanded constitutes a credit transaction.

Phillips v. Grendahl, 312 F.3d 357 (8th Cir. 2002), did not even involve a debt. Rather, the Eighth Circuit was asked to determine what the phrase "consumer report" meant. The court held that the document at issue qualified as a "consumer report" because the credit reporting agency intended to use it "for a statutory purpose" – "debt collection." *Id.* at 366. That holding says nothing about whether collection of any particular debt would be a permissible purpose for obtaining a report.

Duncan v. Handmaker, 149 F.3d 424 (6th Cir. 1998), is even further afield. In earlier litigation, the Duncans had sued the bank that held their mortgage, claiming that it had been negligent during the pre-closing inspection of the property. Hoping to find information that could help them in defending the suit, the bank's lawyers pulled the Duncans' credit report and used information from that report in deposing the Duncans. The Duncans then sued the law firm under FCRA. No party in that case was seeking to collect a debt of any kind. Not only is *Duncan* completely inapposite since the provision at issue there was Section 1681b(a)(3)(E) and not Section 1681b(a)(3)(A), it illustrates precisely why Congress sharply limited the permissible purposes for which credit reports may be used.

2. Experian identifies two cases that it claims conflict with the Ninth Circuit's decision here because they permit using a credit report to collect "debt [that] was incurred involuntarily and was not reduced to judgment." Pet. 17. Both opinions are

unreported and thus cannot supply the basis for a circuit split. Furthermore, they are so lacking in even basic detail that it is virtually impossible to determine whether they conflict with the outcome here. To the extent that any conclusions may be drawn, Experian misconstrues both cases.

Lusk v. TRW, Inc., 173 F.3d 429 (6th Cir. 1999) (unpublished table decision) involved litigation by a tenant against a collection agency that pulled his credit report in connection with "money possibly due [to his] landlord for damage in [his] apartment." *Id.* at *1. At the very least, tenant Lusk had voluntarily entered into a contractual arrangement with his landlord. Moreover, the one-sentence discussion in *Lusk* is so truncated that it is impossible to conclude anything more, including whether the money Lusk possibly owed to his landlord stemmed from any kind of deferred payment agreement. In fact, *Lusk* never quotes, let alone interprets, FCRA's language.

In *Dumas v. City of Chicago*, 234 F.3d 1272 (7th Cir. 2000) (unpublished table decision), the city of Chicago obtained Dumas's credit report because she refused to pay a water bill for her property incurred years before she obtained the building via quitclaim. The court determined that this "collection of an overdue balance" was a permissible purpose under Section 1681b(a)(3)(A). *Id.* at *1. Common experience suggests that where there is a water bill, there is an "account" entered into voluntarily, but no further conclusions can be drawn.

These two unpublished table decisions from ten and twelve years ago, respectively, hardly create a circuit split worthy of review. In the intervening

decade, Congress enacted FACTA, amending FCRA to confirm that "credit" does *not* include debt incurred through transactions such as the one at issue in this case. *See supra* pages 26-28. Thus, even if *Lusk* and *Dumas* were to indicate some limited split of authority, there is substantial reason to believe – in light of FACTA – that the rendering courts would reconsider those decisions.

B. The Ninth Circuit's Decision Does Not Conflict With The Approach Taken By The FTC.

Experian admits that the FTC commentary it cites is not entitled to *Chevron* deference, Pet. 18, but nevertheless asserts that the commentary persuasively "reinforces . . . the erroneous nature of the decision below." Pet. 19. Taken as a whole, however, the FTC commentary is at best ambiguous, and indeed many of its passages fully support the Ninth Circuit's decision in this case.

Experian refers to a statement in the commentary that "'[a] judgment creditor'" may request a credit report in collecting on the judgment "'because it is in the same position as any creditor attempting to collect a debt from a consumer who is the subject of a consumer report.'" Pet. 18 (quoting 16 C.F.R. pt. 600, App. § 604(3)(A) cmt. 2 (2002)) (emphasis omitted). But Experian ignores that the FTC clarified this specific commentary by stating that the "judgment creditor" theory of permissible purpose is unavailable "in the absence of any such 'credit' relationship." ER 35-36 (Pintos). The FTC makes clear that the existence of a creditor does not necessitate the existence of "credit."

Similarly, Experian refers to the commentary's statement that Section 1681b(a)(3)(A) provides a permissible purpose "'to receive a consumer report on a consumer for use in attempting to collect that consumer's debt.'" Pet. 18 (quoting 16 C.F.R. pt. 600, App. § 604(3)(A) cmt. 1 (2002)). It is clear, however, that the FTC considers "credit" to be an integral part of Section 1681b(a)(3)(A)'s requirements. According to its commentary, "[a] party seeking to sue on a *credit* account would have a permissible purpose under section 604(3)(A)." 16 C.F.R. pt. 600, App. § 604(3)(E) cmt. 4 (2002) (emphasis in original). Moreover, the FTC has stated in an opinion letter that Section 1681b(a)(3)(A) does not authorize a residential landlord to obtain a former tenant's credit report in anticipation of litigation: that Section "applies only to the review or collection of a *credit* account, as well as to an extension of credit to a consumer." ER 32 (Pintos) (emphasis in original). If a landlord cannot obtain a tenant's credit report in anticipation of litigation, it is unclear why Experian and PCA think a towing company can obtain a vehicle owner's credit report to enforce a deficiency claim.

The common thread throughout the FTC commentary and opinion letters on this subject is that debt collection is a permissible purpose only when it is collection of a *credit* debt. The FTC's view is thus entirely consistent with the Ninth Circuit's holding in this case.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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December 3, 2010