No. 13-308

IN THE

Supreme Court of the United States

JAMES WILSON DABNEY,

Petitioner,

v.

TD BANK, N.A.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

REPLY BRIEF

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The brief in opposition (i) misstates the question presented, (ii) misstates the case, and (iii) misstates the holdings of conflicting case decisions cited in the petition.

1. *Respondent misstates the question presented.* The question presented is whether the Fair Credit Reporting Act, 15 U.S.C. §§ 1681-1681x (2006) (the "FCRA"), bars enforcement of *all* state *private* rights of action against persons who furnish false information to consumer reporting agencies. Contrary to respondent's suggestion, the question presented here concerns *private* rights of action, not "claim[s]" in general. Resp. Br. at i. And courts embracing the so-called "total preemption approach" (Pet. App. 17a) expressly reject any distinction between rights of action grounded in "common law" (Resp. Br. at i) as distinct from state statutory law. Pet. App. 14a, 17-18a. *See Macpherson v. JPMorgan Chase Bank, N.A.*, 665 F.3d 45, 48 (2d Cir. 2011) (per curiam), *cert. denied*, 132 S. Ct. 2113 (2012); *Purcell v. Bank of Am.*, 659 F.3d 622, 626 (7th Cir. 2011).

It is only by misstating the question the petition presents that respondent can assert: "In *Gorman* . . . the Ninth Circuit commented that it was not deciding the preemption issue." Resp. Br. at 10 (citing *Gorman v. Wolpoff & Abramson, LLP*, 584 F.3d 1147 (9th Cir. 2009), *cert. denied sub nom. FIA Card Servs., N.A. v. Gorman*, 131 S. Ct. 71 (2010)). In fact, the *Gorman* decision most certainly *did* decide the preemption issue raised here: the *Gorman* decision *reversed* a district court judgment in part and held that 15 U.S.C. § 1681t(b)(1)(F) *did not* bar enforcement of a state statutory claim for defamation indistinguishable, in principle, from the defamation claims dismissed in *Macpherson*, *Purcell*, and this case. *See Gorman*, 584 F.3d at 1169-73 & n.35, *rev'g* 370 F. Supp. 1005, 1011 (N.D. Cal. 2005).

Both inside and outside the Ninth Circuit, district courts have interpreted *Gorman* as permitting enforcement of state private rights of action against persons who furnish false information to consumer

reporting agencies. *See, e.g., Fishback v. HSBC Retail Servs., Inc.*, No. 12-0533, 2013 WL 3227458 at *22-*26 (D.N.M. Jun. 21, 2013) (FCRA did not bar enforcement of claims invoking New Mexico Unfair Practices Act against retail store that allegedly furnished false information to consumer reporting agencies); *Rex v. Chase Home Finance LLC*, 905 F. Supp. 2d 1111, 1153-54 (C.D. Cal. 2012) (FCRA did not bar enforcement of California state law claim for negligent misrepresentation against lender that furnished false information to consumer reporting agencies).

In falsely asserting that *Gorman* addresses the question presented here only in "*dictum*" (Resp. Br. at 11), respondent cites to and relies solely on a passage in *Gorman* (584 F.3d at 1167) which involved but one of several claims that the *Gorman* plaintiff had asserted and pressed on grounds different from those that petitioner asserts here.[1] The brief in opposition conspicuously fails to mention the subsections of § 1681t(b)(1)(F) which expressly except from preemption two state statutes which specifically regulate and prohibit the furnishing of false information to consumer reporting agencies. *See* Pet. at 9-10 & n.3, 20-21 (quoting Cal. Civ. Code § 1785.25(a) and Mass. Gen. Laws ch. 93, § 54A(a)). The reason for this omission is clear: what respondent calls "the 'total preemption' theory of the *Macpherson* and *Purcell* decisions" (Resp. Br. at 21) contradicts both the plain text of 15 U.S.C. § 1681t and *Gorman*'s express holding that § 1681t(b)(1)(F) *does not* bar enforcement of California state claims for statutory defamation. *See*

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[1] The plaintiff in *Gorman* invoked 15 U.S.C. § 1681h(e) and erroneously conceded that § 1681h(e) applied to his common law libel claim. In fact, § 1681h(e) applies only to claims that arise from FCRA-mandated disclosures. *See Ross v. FDIC*, 625 F.3d 808, 813-14 (4th Cir. 2010), *cert. denied*, 131 S. Ct. 2991 (2011). No such claim is alleged or presented here.

Gorman, 584 F.3d at 1169-73 & n.35, *rev'g* 370 F. Supp. 1005, 1011 (N.D. Cal. 2005).

Respondent is understandably reluctant to argue that 15 U.S.C. § 1681t(b)(1)(F) is an irrationally discriminatory statute, one that expressly preserves the rights of California and Massachusetts residents to sue persons who furnish false information to consumer reporting agencies while simultaneously abrogating the corresponding rights of all other States' residents. Such an implausible (and likely unconstitutional)[2] interpretation of § 1681t(b)(1)(F) is, however, the only basis on which the Ninth Circuit's *Gorman* decision could reconciled with what respondent calls "the 'total preemption' theory of the *Macpherson* and *Purcell* decisions." Resp. Br. at 21.

The far more plausible explanation of the situation presented by the petition is that the Ninth Circuit in *Gorman* rejected the Second and Seventh Circuit interpretation of § 1681t(b)(1)(F) as purportedly "implement[ing]" a "1996 decision that administrative action rather than litigation is the right way to deal with false reports to credit agencies." *Purcell*, 659 F.3d at 626. *See also id.* at 625 (justifying preemption holding on the basis that § 1681t(b)(1)(F) purportedly "implement[ed]" a "new plan under which reporting to credit agencies would be supervised by state and federal administrative agencies rather than judges"), *quoted in Macpherson*, 665 F.3d at 48.

Under *Gorman* (but not under *Macpherson*, *Purcell*, or the decision below), private plaintiffs (not just state and federal administrative agencies) are enti-

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[2] *Cf. Shelby County v. Holder*, 133 S. Ct. 2612, 2622 (2013) (noting "the fundamental principle of equal sovereignty" among the States) (quoting *Northwest Austin Municipal Util. Dist. No. One v. Holder*, 557 U.S. 193, 203 (2009)).

tled to sue persons who furnish false information to consumer reporting agencies. Under *Gorman* (but not under *Macpherson, Purcell,* or the decision below), judges (not administrative agencies) supervise adjudication of claims arising from false reports to consumer reporting agencies. Under *Gorman* (but not under *Macpherson*, *Purcell*, or the decision below), an injured consumer in petitioner's position is plainly entitled to invoke state law remedies for violations of state law duties which parallel the proscriptions of 15 U.S.C. § 1681s-2(a).

Respondent's statutory citations (Resp. Br. at 2-4) make clear that there is no *federal* private right of action for furnishing false information to consumer reporting agencies. But under this Court's precedents, the absence of a *federal* private right of action for tortious conduct is no evidence that Congress impliedly "intended to deprive injured parties of a long available form of compensation" under pre-existing parallel state laws. *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005). "Ordinarily, state causes of action are not pre-empted solely because they impose liability over and above that authorized by federal law." *English v. Gen. Elec. Co.*, 496 U.S. 72, 89 (1990) (quoting *California v. ARC Am. Corp.*, 490 U.S. 93, 105 (1989)).

Respondent's misstatement of the question presented goes to the heart of the conflict between the circuit and state appellate courts identified in Part I of the petition. There is simply no question but that the facts alleged in the complaint here would entitle petitioner to maintain a private right of action for damages in at least California (including in federal district courts located in the Ninth Circuit) and Pennsylvania, and yet were held in the decision below, following Second and Seventh Circuit precedent, to be totally barred by § 1681t(b)(1)(F).

2. *Respondent misstates the case.* In the procedural posture of this case, the Court's "inquiry is limited to examining the legal sufficiency of the facts alleged on the face of the complaint." Pet. App. 4a

(quoting *Printing Mart-Morristown v. Sharp Elecs. Corp.*, 563 A.2d 31, 34 (1989) (per curiam)). Those facts are set forth at Pet. App. 35a-40a and must be accepted as true for purposes of analyzing the petition. *Id. Cf. Erikson v. Pardus*, 551 U.S. 89, 94 (2007) (where a complaint is dismissed for failure to state a claim on which relief can be granted, a court "must accept as true all of the factual allegations contained in the complaint.").

Rather than address "the legal sufficiency of the facts alleged on the face of the complaint" (Pet. App. 4a), respondent erroneously asserts that the complaint contains "misstatements and omissions of pertinent facts." Resp. Br. at 6. For example, although the complaint alleges that respondent is a different corporate entity from the New Jersey-based "Commerce Bank d/b/a TD Bank" with which petitioner had a credit relationship prior to May 2009 (Pet. App. 35a-37a ¶¶ 20-24 & 26), respondent asserts that the complaint "incorrectly describes TD Bank, N.A." Resp. Br. at 7 & n.2.[3]

In a similar vein, the brief in opposition falsely states, "The complaint states that on or about June 30, 2009, TRS prevailed on *Commerce Bank* to debit Petitioner's credit card account. . . ." Resp. Br. at 7-8 (citing Pet. App. 34a-35a ¶ 14) (emphasis added). In

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[3] Respondent's corporate disclosure statement under Supreme Court Rule 29.6 (Resp. Br. at ii) does not identify respondent by its actual legal name, TD Bank, N.A., but instead refers to a trade name, "TD Bank." The latter name was used by more than one corporate entity including TD Bank USA, Inc. of Portland, Maine at relevant times. If respondent is ever required to answer the complaint, discovery is expected to establish that the brief in opposition makes deceptive and misleading use of "TD Bank" to refer to different and distinct corporate entities in different parts of the brief.

fact, the cited paragraph of the complaint alleges that "TRS induced **TDNA** [respondent]," and specifically *not* "Commerce Bank," to transfer funds to TRS on or about June 30, 2009. Pet. App. 34a ¶ 14. Petitioner denies having ever had any credit relationship with respondent. *Id.* at 37a ¶ 26.

In the courts below, prior to answer, respondent sought dismissal of petitioner's complaint on the basis that, even if every fact alleged in the complaint were true (including the absence of any credit relationship between petitioner and respondent and actual malice on respondent's part), the FCRA still purportedly barred the State of New Jersey from providing any private right of action to petitioner because: "[o]n its face, § 1681t(b)(1)(F) precludes *all* state statutory or common law causes of action that would impose any 'requirement or prohibition' on the furnishers of credit." Pet. App. 14a (emphasis added). Having taken this position below, which is the only stated basis of the decision below, respondent cannot now oppose certiorari by disputing facts alleged in petitioner's complaint or suggesting a different set of facts that respondent might allege or try to prove at a trial of petitioner's claim.

3. *Respondent misstates the holdings of conflicting case decisions cited in the petition.* Contrary to respondent's assertion (Resp. Br. at 10-11), the Ninth Circuit in *Gorman* most certainly *did* address, in a holding, the specific question presented by the petition, and unambiguously answered that question "no" — directly contrary to the holdings of the Second and Seventh Circuit precedent that the decision below followed. *See* 584 F.3d at 1169-73 & n.35, *rev'g* 370 F. Supp. 2d 1005, 1011 (N.D. Cal. 2005).

The plaintiff in *Gorman* had asserted, among other things, a claim for statutory defamation under California Civil Code §§ 1785.25(g) and 1785.31. The former statute imposes liability on "[a] person who furnishes information to a consumer reporting agency" and "does not comply with this section"; the latter

statute provides a private damages remedy to "[a]ny consumer who suffers damages as a result of a violation of this title." *See* 584 F.3d at 1170 nn. 30-31 (quoting statutory texts). California law prohibits the furnishing of false information to consumer reporting agencies in terms that parallel the prohibitions of 15 U.S.C. § 1681s-2(a). *See* Cal. Civ. Code § 1785.25(a), *quoted in Gorman*, 584 F.3d at 1169. The text of 15 U.S.C. § 1681t(b)(1)(F) expressly excludes California Civil Code § 1785.25(a) from its preemptive reach but does not similarly exclude the private remedial provisions that the *Gorman* plaintiff had invoked.

The district court in *Gorman* dismissed the plaintiff's statutory defamation claim, embracing the interpretation of § 1681t(b)(1)(F) that respondent puts forward here, namely, that "Congress . . . gave exclusive enforcement of the reporting aspect to certain federal and state officials." Resp. Br. at 5. *See Gorman v. Wolpoff & Abramson, LLP*, 370 F. Supp. 2d 1005, 1011 (N.D. Cal. 2005) ("the proper parties to pursue such liability are Federal and State officials."). That is also the view that the Second and Seventh Circuits have ultimately taken. *Macpherson*, 665 F.3d at 48 (stating that § 1681t(b)(1)(F) "implement[s]" a "new plan under which reporting to credit agencies would be supervised by state and federal administrative agencies rather than judges") (quoting *Purcell*, 659 F.3d at 624).

The *Gorman* plaintiff appealed the dismissal of his statutory defamation claim to the Ninth Circuit, which reversed and held that § 1681t(b)(1)(F) *did not* preempt or bar enforcement of the claim. 584 F.3d at 1169-73 & n.35. This was a holding, not "dictum" as respondent wrongly suggests. Indeed, respondent's merits arguments in opposition to certiorari serve to highlight the conflict between the circuits.

Respondent asserts, without evidentiary basis in the record, that "[w]ere this Court to consider contradicting the 'total preemption' theory of the *Macpherson* and *Purcell* decisions, such a result would

present a disincentive for 'furnishers' to voluntarily participate in the credit reporting system, because they would face unlimited risk from a disgruntled consumer dissatisfied with the information furnished to CRAs." Resp. Br. at 21-22. Respondent further asserts that disapproving the "total preemption theory" would purportedly "expose 'furnishers' to different risks in any number of the fifty (50) states, since there would be no uniformity." *Id.* at 21-22.

Respondent's merits arguments highlight the circuit conflict; for the Ninth Circuit considered and rejected those very arguments in *Gorman*. *See* 584 F.3d at 1172 ("the enforcement sections do not add to a patchwork of confusing obligations with which a furnisher must struggle to comply. They instead allow for additional avenues through which consumer can ensure that furnishers are complying the the obligations Congress specifically meant to impose."). *Cf. Bates,* 544 U.S. at 447-48 ("parallel requirements" of state law not preempted).

Respondent also misstates and mischaracterizes *Dietz v. Chase Home Finance, LLC*, 41 A.3d 882 (Pa. Super. Ct. 2012). Contrary to respondents' suggestion (Resp. Br. at 11-12), the *Dietz* decision expressly considered, and rejected, the so-called "total preemption approach" that *Macpherson*, *Purcell*, and the decision below applied.[4] In reaching this result, the *Dietz* court noted that § 1681t(b)(1)(F) expressly does not preempt California and Massachusetts statutes that specifically regulate the furnishing of information to consumer reporting agencies, and reasoned: "Congress seems to have been most concerned

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[4] In *Purcell* (*see* 659 F.3d at 625), the Seventh Circuit cited and expressly disagreed with the reasoning of *Manno v. Am. Gen. Fin. Co.*, 439 F. Supp. 2d 418 (E.D. Pa. 2006), which the *Dietz* decision extensively quoted and followed as described *infra*.

with protecting credit information furnishers from state statutory obligations *inconsistent with their duties under the FCRA*." 41 A.3d at 887 (quoting *Manno*, 439 F. Supp. 2d at 425 (emphasis added)). *Dietz* accordingly held that § 1681t(b)(1)(F) *did not apply* to the general common law duty not to defame and then proceeded to apply this holding to the facts presented. The court concluded that the defendant was entitled to the *immunity* from liability prescribed in 15 U.S.C. § 1681h(e). 41 A.3d at 889-90.

Respondent also misstates and mischaracterizes *Brown v. Mortensen*, 253 P.3d 522 (Cal.), *cert. denied*, 132 S. Ct. 847 (2011). *Brown* broadly held: "*we conclude* that section 1681t(b)(1)(F) preempts state law claims *only* insofar as they arise out of a requirement or prohibition with respect to the *specific furnisher duties* regulated by section 1681s-2, i.e., the duties to provide accurate information and to take action upon being notified on a dispute." 253 P. 3d at 533 (emphasis added). Under *Brown* (which repeatedly cites *Gorman* with approval), § 1681t(b)(1) would not bar enforcement of a *general* duty not to defame which paralleled federal prohibitions. *Cf. Altria Group, Inc. v. Good*, 555 U.S. 70, 82-84 (2008) (language similar to that of § 1681t(b)(1)(F) held not to bar enforcement of general state law "duty not to deceive" as distinct from "targeted regulations."); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 528-29 (1992) (plurality opinion) (language similar to that of § 1681t(b)(1)(F) held not to bar enforcement of general common law duty not to deceive as distinguished from specific regulations of cigarette warning labels); *Brown*, 253 P.3d at 528 ("the duty at issue in a defamation suit does not overlap with the duties actually addressed in section 1681s-2"). *See also id.* at 533 n.14 (explaining § 1681t(b)(1)(F)'s exclusion of specific state laws from the FCRA's preemptive reach).

4. *Respondent's brief confirms the importance of the question presented.* In Part B of its brief, respondent cites upward of twenty (20) recent district

court decisions in which § 1681t(b)(1)(F), as interpreted by the Second and Seventh Circuits, was held to bar enforcement of state private rights of action against persons who allegedly furnished false information to consumer reporting agencies. These citations show that the question presented is frequently recurring and warrants this Court's attention.

Most of the cited decisions were issued by district courts located in the Second or Seventh Circuits and so naturally follow the *Macpherson* and *Purcell* decisions. District courts in the Ninth Circuit, following *Gorman*, have rejected preemption defenses to claims like petitioner's here. *See, e.g., Abdelfattah v. Carrington Mtge. Servs. LLC*, No. 12-CV-04656, 2013 WL 495358 at *4-*5 (N.D. Cal. Feb. 7, 2013); *Rex v. Chase Home Finance LLC*, 905 F. Supp. 2d 1111, 1153-54 (C.D. Cal. 2012).

Scholarly commentary confirms the importance of the question presented. *See* Meredith Schramm-Strosser, *The "Not So" Fair Credit Reporting Act: Federal Preemption, Injunctive Relief, and the Need to Return Remedies for Common Law Defamation to the States*, 14 Duq. Bus. L.J. 165 (2012); Elizabeth C. De Armond, *Frothy Chaos: Modern Data Warehousing and Old Fashioned Defamation,* 41 Val. U. L. Rev. 1061 (2007).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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