Appeal No. 17-15201

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

JESUS JARAS,
Plaintiff-Appellant,

v.

EQUIFAX INC.
Defendant-Appellee.

On Appeal from the United States District Court
for the Northern District of California
D.C. Case No. 5:16-cv-03336-LHK

BRIEF OF *AMICI CURIAE* NATIONAL CONSUMER LAW CENTER, NATIONAL CONSUMER BANKRUPTCY RIGHTS CENTER, AND NATIONAL ASSOCIATION OF CONSUMER BANKRUPTCY ATTORNEYS IN SUPPORT OF PLAINTIFF-APPELLANT'S PETITION FOR REHEARING OR REHEARING EN BANC

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RULE 26.1 DISCLOSURE STATEMENT

The National Consumer Law Center, the National Consumer Bankruptcy Rights Center, and the National Association of Consumer Bankruptcy Attorneys are non-profit entities, qualified under section 501(c)(3) of the Internal Revenue Code. None have ever issued shares or securities.

Dated: June 17, 2019 Respectfully submitted,

/s/ Stuart Rossman, B.B.O. #430640

Attorney for *Amici Curiae*

STATEMENT OF INTEREST OF AMICI CURIAE

Amici Curiae are the National Consumer Law Center, the National Consumer Bankruptcy Rights Center, and the National Association of Consumer Bankruptcy Attorneys.

The **National Consumer Law Center** ("NCLC") is a nonprofit organization that possesses a unique expertise and interest because of its many years of work protecting the integrity of the Fair Credit Reporting Act ("FCRA") and the rights of low-income consumers under the Act. NCLC is recognized nationally as an expert on the FCRA, and has drawn on this expertise to provide information, legal research, policy analyses, and market insights to federal and state legislatures, administrative agencies, and the courts for over 40 years. NCLC has testified before Congress regarding the FCRA, regularly submits comments to regulators in FCRA rulemakings, and has issued special reports on consumer reporting issues. Undersigned counsel are principal and contributing authors of National Consumer Law Center, *Fair Credit Reporting* (9th ed. 2017), the primary treatise in this field, which comprehensively compiles judicial decisions, as well as regulatory and statutory developments, related to the FCRA.

The **National Consumer Bankruptcy Rights Center** ("NCBRC") is a nonprofit organization dedicated to preserving the bankruptcy rights of consumer debtors and protecting the bankruptcy system's integrity. The Bankruptcy Code grants financially distressed debtors rights that are critical to the bankruptcy system's operation. Yet consumer debtors with limited financial resources and minimal exposure to that system often are ill-equipped to protect their rights in the appellate process. NCBRC files amicus curiae briefs in systemically-important cases to ensure that courts have a full understanding of the applicable bankruptcy law, the case, and its implications for consumer debtors.

The **National Association of Consumer Bankruptcy Attorneys** ("NACBA") is a non-profit organization of consumer bankruptcy attorneys practicing throughout the country. Among other things, NACBA works to educate the bankruptcy bar and the community at large on the uses and misuses of the consumer bankruptcy process. NACBA also advocates for consumer debtors on issues that cannot be addressed adequately by individual member attorneys.

Amicus' interest in this appeal flows from its efforts to protect the integrity of consumer's FCRA rights.

This brief is submitted pursuant to Federal Rule of Appellate Procedure 29 and Ninth Circuit Rule 29-2. No party or party's counsel authored this brief in whole or in part; no party or party's counsel contributed money to fund the preparation or submission of this brief; and no other person except *Amici curiae*, its members, or its counsel contributed money intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief.

SUMMARY OF ARGUMENT

The Panel's apparent imposition of a new standing threshold requiring consumers to establish that they "had tried to engage in or were imminently planning to engage in any transactions for which the alleged misstatements in their credit reports made or would make any material difference" before pursuing a remedy under the FCRA will harm consumers. Currently, consumers are faced with wide-spread credit reporting errors. These errors result in a multitude of harm, independent of whether a specific credit application was rejected. Additionally, when consumers attempt to correct the serious inaccuracies present in their reports through the dispute system, their efforts are stymied by a dysfunctional and imbalanced dispute system. The heightened standing requirement created by the Panel deprives desperate consumers of their last available avenue to correct their reporting errors—FCRA litigation—and should be reconsidered.

Amici respectfully request that the Panel decision be withdrawn and that a corrected opinion be issued applying the law as unambiguously established by the FCRA. *Amici* have no other interest in the ultimate resolution of this case.

ARGUMENT

A. Inaccurate Credit Reporting Remains a Pervasive Problem

Credit reports and credit scores play a crucial role in consumers' lives. For example, credit reports control whether a consumer is able to obtain credit (and the amount they must pay for it); many employers and landlords rely on reports before making decisions about whom to hire or rent to; and a consumer's credit score "can also affect how much you pay for insurance, and whether a utility company asks for little or no deposit before starting a service for you."[1] With such far-reaching implications, the importance of ensuring maximum possible accuracy in credit reports should be paramount.

Yet unacceptable levels of inaccuracies in credit reports persist, affecting tens of millions of Americans. A landmark study by the Federal Trade Commission ("FTC") found that 1 in 5 consumers have verified errors in their credit reports, and 1 in 20 consumers have errors so serious they would be denied credit or need to pay more for it.[2] With an estimated 208 million Americans in the credit reporting system, 42 million consumers have errors in their credit reports, and 10 million have potentially life-altering errors.

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[1] Experian, How To Rebuild Credit, *available at* https://www.experian.com/blogs/ask-experian/credit-education/improving-credit/how-to-rebuild-credit/ (last visited June 12, 2019).

[2] Federal Trade Comm'n Report to Congress Under Section 319 of the Fair and Accurate Credit Transactions Act of 2003 (Dec. 2012).

B. Consumers are Unduly Frustrated in Their Efforts to Fix Errors in Their Credit Reports

"Achieving the accuracy in consumer report information was a main goal of the FCRA when it was enacted in 1970." S. Rep. No. 108–166, at 7 (2003). This Court has recognized that Congress "crafted [the FCRA] to protect consumers from the transmission of inaccurate information about them" in consumer reports. *Guimond v. Trans Union Credit Info. Co.*, 45 F.3d 1329, 1333 (9th Cir. 1995). Yet, as detailed below, the system developed to handle credit reporting disputes has for decades suffered from flaws, biases, and abuses by the Big Three credit bureaus. As a result, consumers are often compelled to file multiple disputes, and then ultimately resort to filing lawsuits under the FCRA to get their credit reports corrected.

A key protection provided by the FCRA to ensure accuracy, especially in the face of significant error levels, is a consumer's right to demand and obtain a reasonable investigation of disputed information. *See* 15 U.S.C. § 1681i(a) (requiring a credit bureau to conduct investigation and make corrections); § 1681s-2(b) (requiring furnisher of credit information to conduct its own investigation). For decades, the credit bureaus' entire role in dispute "investigation" has been to perfunctorily process them through the highly automated e-OSCAR system. Workers' main task is to convert disputes into shorthand two- or three-digit codes and then send the codes to the creditors or debt collectors that provide the information, which are called "furnishers." Workers do not examine documents, contact consumers by phone or email, or exercise any form of human discretion in resolving a dispute. Moreover, credit bureaus are universally biased in favor of furnishers and against consumers in disputes. In a practice known as "parroting," credit bureaus blindly adopt the response of the furnisher without performing any independent review, even when the consumer has compelling evidence of inaccuracy, such as a judgment, settlement or police report of identity theft. *See* National Consumer Law Center, *Automated Injustice Redux: Ten Years after a Key Report, Consumers Are Still Frustrated Trying to Fix Credit Reporting Errors*, at 11 (hereinafter "Automated Injustice Redux").

The harm caused by this deficient system is documented in numerous cases and by organizations such as NCLC. *See, e.g., Daugherty v. Ocwen Loan Servicing, LLC*, 701 F. App'x 246, 251 (4th Cir. 2017) (consumer filed 12 disputes over erroneous, negative second account entry that contradicted correct first account entry; inaccurate information not deleted until he filed lawsuit); *Eller v. Experian Info. Solutions, Inc.*, 739 F.3d 467 (10th Cir. 2013) (consumer forced to file three lawsuits against credit bureau for same mixed-file problem); *see generally* NCLC, Fair Credit Reporting, § 4.5.1.1; *Automated Injustice Redux*, at 11.

In the face of such abuses and inability to fix errors through the FCRA dispute process, a consumer's last resort might be a lawsuit under the FCRA. The Panel's apparent imposition of a standing threshold requiring a consumer to first establish that they "had tried to engage in or were imminently planning to engage in any transactions for which the alleged misstatements in their credit reports made or would make any material difference" will set an extremely high barrier for consumers to exercise this remedy of last resort and to ultimately fix their credit reports.

C. A Consumer Suffers Real World Harm from Inaccurate Credit Reporting Even Absent an Affirmative Credit Application

The Panel's heightened standing requirement misconstrues two important concepts. First, the Panel fails to consider the different types of harm a consumer can suffer as a result of a material inaccuracy. Second, the Panel's decision appears to have considered consumer credit in a binary way—it could be good or bad. This characterization is flawed and fails to recognize the importance of marginal changes.

The Panel appears to have limited the harm a consumer can suffer as a result of a material inaccuracy to one harm: the immediate economic impact caused by a denial of an application for credit. But considering only this harm is flawed because it ignores other damages which are often incurred, all of which have been recognized in this Circuit and nationwide. For example, a consumer with inaccurate credit may be hesitant to attempt a new application out of fear of further embarrassment, *Guimond v. TransUnion Credit Info. Co.*, 45 F.3d 1329 (9th Cir. 1995); consumers may suffer emotional distress, *Sloane v. Equifax Info. Servs.,* 510 F.3d 495, 500 (4th Cir. 2007); time and money may be spent attempting to correct an inaccurate credit report, *Robinson v. Equifax Info. Servs., LLC*, 560 F.3d 235, 241, n.2 (4th Cir. 2009); or consumers may not be offered credit by entities that prescreen them, Dissent at 2 (recognizing that credit report may be accessed without a consumer's knowledge). Consumers may recover for each of these harms.

Consumers such as the Plaintiffs-Appellants are harmed from an inaccurately-lowered credit risk score when they affirmatively seek credit. But they also are harmed when that lowered score prevents them from ever receiving and learning about pre-screen credit opportunities that would have otherwise been extended. Each of the Big-3 credit bureau sells lists of consumers who are pre-screened as eligible for various credit opportunities. As Experian explained,

> Prescreen is a process that happens behind-the-scenes where a lender screens a consumer's credit to determine whether to extend a firm offer of credit. The process takes place without the consumer's knowledge and without any negative impact to their credit score.
>
> For lenders and financial institutions, a prescreen is a way to pick and choose the criteria of the consumers you want to target for a particular offer – often in the form of better terms, interest rates or incentives. Typically, a list of consumers meeting specific credit criteria is compiled by a Credit Reporting Agency, like Experian, and then provided to the requesting lending institutions or their mailing service.

Experian, *What is PreScreen?*, *available at* https://www.experian.com/blogs/insights/2019/02/what-is-prescreen/ (last visited June 12, 2019). An inaccurately lowered credit score will necessarily deny consumers—even passive ones—these credit offers.

Additionally, the Panel's decision relies upon the principle that consumer credit is either of just two categories, good or bad. Because the Plaintiffs-Appellants had filed a Chapter 13 bankruptcy, their credit was the latter. But modern credit is never so simple. Today, credit is made available in a way that linearly tracks the consumer's credit score. A consumer who improves his credit report may improve his grade (his score) even if still far from ideal. "Think of your credit scores like a report card that you might review at the end of a school term, but instead of letter grades, your activity ends up within a scoring range." Experian, *What is a Good Credit Score?*, *available at* https://www.experian.com/blogs/ask-experian/credit-education/score-basics/what-is-a-good-credit-score/ (last visited June 12, 2019). And it is this differentiation—that even incremental improvements in credit scores matter—that has to be considered. Even if a consumer has filed bankruptcy or has other accurate derogatory credit blemishes, a material improvement in her credit score matters. Congress emphasized in its 2003 FCRA Conference Report,

> [T]he higher the risk the worse the terms * * * Certainly in 1970, the information-processing technology and the information sharing technology simply wasn't in place to support that kind of system on any very large scale. Now it is. Now it is done. It's much more differentiated pricing of credit and insurance products based on the risks that a particular customer may pose.
>
> Mr. Beales testimony provides an indication of the changes the use of "risk-based" pricing (i.e., pricing based on quantitative analysis of data related to credit worthiness) have brought to consumer reporting. Advancements in information technology and underwriting have moved credit markets far beyond the days where decisions with respect to eligibility were made on essentially a "pass-fail" basis.

S. Rep. 108-166 at 7 (Oct. 17, 2003).

D. Inaccurate Derogatory Credit Information Thwarts a Consumer's Bankruptcy "Fresh Start"

Beyond the immediate benefit of improved and accurate credit, a consumer who has suffered a bankruptcy will likely benefit even more from incremental credit improvements. Where, as here, it is alleged that the Defendants-Appellees have reported a consumer's debt as owing, unpaid, and in default or collection after the bankruptcy discharge, such current and continuing derogatory items can prevent the consumer from starting to rebuild his credit. As one credit bureau advises, "[i]t will be important to begin rebuilding your credit right away, making sure you pay all your bills on time. You'll also want to be careful not to fall back into any negative habits that contributed to your debt problems in the first place." Experian, *Bankruptcy: How it Works, Types & Consequences*, *available at* https://www.experian.com/blogs/ask-experian/credit-education/bankruptcy-how-it-works-types-and-consequences/ (last visited June 12, 2019); *see* National Consumer Law Center, *Fair Credit Reporting* § 4.3.2.4.1 (9th ed. 2017) ("One of the most serious consumer reporting problems is the failure of the reporting system to provide consumers a 'fresh start' after a bankruptcy discharge. Creditors frequently fail to report an updated status for discharged accounts or continue to report their pre-discharge status and balance."). As NCLC's Fair Credit Reporting treatise summarized,

> This failure to update debts discharged in bankruptcy could have a significant effect on consumers. The effect of a bankruptcy on a consumer's credit score is of course initially devastating. However, it is a static event and, all other things equal, a consumer's credit score will continue to improve each day that passes post-discharge. Failure to properly report the discharge of debts hampers that improvement.

National Consumer Law Center, *Fair Credit Reporting* § 4.3.2.4.2; *see also In re Helmes*, 336 B.R. 105 (Bankr. E.D. Va. 2005) ("[A] credit report entry that reflects a past due account is treated differently by prospective creditors in evaluating credit applications than an entry that reflects a debt that has been discharged in bankruptcy."). These harms are significant, particularly for Plaintiffs-Appellants here.

CONCLUSION

Amici urge that the Petition for Panel Rehearing and for Rehearing En Banc be granted and that the Panel opinion be corrected in accordance herewith.

Respectfully submitted,

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CERTIFICATION OF COMPLIANCE

9th Cir. Case Number(s) _ ***Appeal No. 17-15201***

I am the attorney or self-represented party.

This brief contains 2,068 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

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Signature __*/s/ Stuart Rossman*　　　　**Date** _**June 17, 2019**___________________

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of June 2019, I electronically filed the foregoing Brief of *Amici Curiae* with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit, with service of copies to all counsel of record.

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