CASE NOS. 17-15807 & 17-16000

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RICHARD ZABRISKIE and KRISTIN ZABRISKIE,
Plaintiffs-Appellees

v.

FEDERAL NATIONAL MORTGAGE ASSOCIATION,
Defendant-Appellant.

Appeal from the United States District Court for the District of Arizona, Phoenix
D.C. No. CV-13-02260-PHX- SRB

PETITION FOR REHEARING OR REHEARING EN BANC

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INTRODUCTION AND RULE 35 STATEMENT

There are hundreds of consumer reporting agencies in this country, companies that compile information on everything from consumers' credit history to their criminal background to their prescription drug history.[1] The reports these companies provide play a crucial role in nearly every aspect of our lives. Lenders use consumer reports to determine eligibility for auto and home loans; employers use them to vet job applicants; landlords use them to evaluate potential tenants.

Because of the far-reaching impact of these reports, Congress passed the Fair Credit Reporting Act (FCRA) to ensure that the information they contain is accurate. Congress was particularly concerned about the automation of consumer reporting: the "great danger of having" a person's "life and character reduced to impersonal 'blips' and key-punch holes in a stolid and unthinking machine which can literally ruin [a person's] reputation without cause, and make him unemployable or uninsurable, as well as deny him the opportunity to obtain a mortgage to buy a home." *Hearing on H.R. 16340 Before the Subcomm. on Consumer Affairs of the H. Comm. on Banking and Currency*, 91st Cong. 1 (1970) (remarks of Rep. Leonor Sullivan). The FCRA, therefore, requires that companies that provide consumer reports implement "reasonable procedures to assure

[1] *See* Defining Larger Participants in Certain Consumer Financial Product and Service Markets, 77 Fed. Reg. 9592, 9601 (Feb. 17, 2012).

maximum possible accuracy of the information" they report. 15 U.S.C. § 1681e(b).[2]

The panel majority's decision in this case turns the FCRA on its head. It concludes that Fannie Mae, which provides consumer reports to mortgage lenders through an online platform, can avoid the FCRA precisely *because* it has automated its consumer reporting. This decision directly conflicts with a prior decision of this Court, albeit unpublished, which rejected this very argument. *See McCalmont v. Fed. Nat'l Mortg. Ass'n*, 677 F. App'x 331 (9th Cir. 2017). It also conflicts with several published decisions of this Court making clear that the law applies equally to all companies, regardless of whether they operate through human employees at "quaint brick-and-mortar facilities" or entirely online via web-based software, *Fair Hous. Council of San Fernando Valley v. Roommates.Com, LLC*, 521 F.3d 1169 n.24 (9th Cir. 2008) (en banc). *See id.*; *F.T.C. v. Neovi, Inc.*, 604 F.3d 1150 (9th Cir. 2010); *In re Reynoso*, 477 F.3d 1117 (9th Cir. 2007).

The question whether Fannie Mae may be absolved of any responsibility for the reports it issues, simply because it has automated its reporting, is exceptionally important. Fannie Mae furnishes millions of consumer reports a year to mortgage

[2] Unless otherwise specified, internal quotation marks and alterations are omitted throughout this petition.

lenders, reports that are often dispositive of whether a prospective home-buyer can obtain a loan. The FCRA is an essential safeguard to ensure these reports are accurate.

Furthermore, the majority's decision cannot be cabined to Fannie Mae. Numerous consumer reporting agencies in a wide variety of fields operate via online platforms in the same way Fannie Mae does. The majority's reasoning would exempt a large and ever-growing portion of the consumer reporting industry from the law designed to regulate it. And, more generally, the decision throws into question what was previously clearly established in this Circuit: that a company cannot escape the law by automating its business.

Rehearing en banc is also warranted to review a second important issue raised by the panel's decision: The majority grafted onto the FCRA's definition of consumer reporting agency a subjective intent requirement that is not present in the statute's text. This requirement is difficult to square with this Court's previous interpretation of the statute in *Greenway v. Info. Dynamics, Ltd.*, 524 F.2d 1145 (9th Cir. 1975); it conflicts with the Court's interpretation of the same language in other statutes, *see W. Watersheds Project v. Interior Bd. of Land Appeals*, 624 F.3d 983 (9th Cir. 2010); *Ass'n des Eleveurs de Canards et d'Oies du Quebec v. Harris*, 729 F.3d 937 (9th Cir. 2013); and it will enable companies that sell consumer reports to evade the law by disclaiming any intent to be subject to it.

Given the conflicts within the Circuit and the broad impact of the issues presented here, this Court should grant en banc review.

STATEMENT OF THE CASE

1. Fannie Mae's Role as a Provider of Consumer Reports and its Erroneous Reporting of Nonexistent Foreclosures

Fannie Mae is best known for purchasing mortgage loans on the secondary market. But it has another lesser-known, but equally influential, role in the mortgage industry. It provides consumer reports on loan applicants to mortgage lenders. These reports contain a wide range of information, including credit history, employment and income, and risk factors, as well as a statement of the loan's eligibility for purchase by Fannie Mae and, in many cases, whether Fannie Mae recommends approving the loan. Op. 26-27.

Fannie Mae's reports are frequently dispositive in determining whether a mortgage lender will issue a loan. SER11-12. But they're not always accurate. Here, for example, Fannie Mae falsely told lenders that Appellees, the Zabriskies, had a prior foreclosure when they didn't, leading multiple lenders to deny mortgage financing the Zabriskies otherwise would have received. Op. 16-17.

This was not an isolated occurrence. Fannie Mae has issued thousands of reports to lenders falsely reporting foreclosures that never happened. *See* Mot. Class Cert., Dkt. 133, *Walsh v. Federal Nat'l Mortgage Ass'n*, No. 15-00761 (D. Ariz. Jan. 31, 2018), at 15.

2. Fannie Mae's Automated Consumer Reporting System

The reason Fannie Mae reported nonexistent foreclosures is because it programmed the automated system it uses to issue its reports to do so. Op. 16.

Fannie Mae produces its reports through an automated consumer reporting system it created, owns, and controls called Desktop Underwriter. *See* Answer Br. 5-17 (describing system in detail). Desktop Underwriter is connected to an online platform, through which lenders can request reports on loan applicants. Once a lender requests a report on a consumer and inputs the information Desktop Underwriter requests, Fannie Mae's automated system does the rest. It opens a file on the consumer that remains stored on Fannie Mae's servers forever; imports, directly from a company that sells consumer data, raw credit data on the loan applicant; combines that data with information provided by the lender; analyzes the combined data through Fannie Mae's proprietary credit risk assessment algorithm; applies any relevant policy overrides Fannie Mae has programmed into the system to dictate special treatment of certain cases; and produces a report according to specifications programmed into it by Fannie Mae, which it then furnishes to the lender through Desktop Underwriter's online platform. *Id.*

None of the credit data Fannie Mae imported or the information Fannie Mae received from lenders stated the Zabriskies had a foreclosure. Op. 26. Nevertheless, Fannie Mae's reports repeatedly said they did, providing information

on the (nonexistent) foreclosure with tables like this:

Borrower	Creditor	FC Type	Account Number	Date Reported
RICHARD C ZABRISKIE	PNC BANK	Foreclosure	[redacted]	07/08
RICHARD C ZABRISKIE	PNC BANK	Foreclosure	[redacted]	07/08

See, e.g., ER507.

As this Court has previously explained, the problem was that Fannie Mae programmed Desktop Underwriter to report a foreclosure any time the consumer credit data the company used contained a particular credit reporting code, even though Fannie Mae *knew* that this code "did not represent a foreclosure." *Shaw v. Experian Info. Sols., Inc.*, 891 F.3d 749, 753 (9th Cir. 2018).

3. The Fair Credit Reporting Act

The Fair Credit Reporting Act was passed to protect consumers and the security of the financial system against these kinds of inaccuracies. *See* 15 U.S.C. § 1681(a). The statute mandates that "[w]henever a consumer reporting agency prepares a consumer report it shall follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates." 15 U.S.C. § 1681e(b).

The statute's definition of "consumer reporting agency" is broad: "any person which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating

consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties," 15 U.S.C. § 1681a(f). *See* Haynes, F.T.C. Staff Opinion Letter, 1998 WL 34323759, at *1 (June 9, 1998) ("Congress intended for the FCRA to cover a very broad range of 'assembling' or 'evaluating' activities."). It covers everything from traditional credit bureaus to websites that offer instant background checks to check verification companies. *See* F.T.C., *40 Years of Experience with the Fair Credit Reporting Act*, 2011 WL 3020575, at *23, *25.

This breadth is crucial to the FCRA's purpose of ensuring that companies that play a "vital role in assembling and evaluating" consumer information "exercise their grave responsibilities" responsibly, 15 U.S.C. § 1681(a).

4. This Lawsuit and the Panel's Decision

After being told by lenders that the reason they had trouble getting a home loan was because Fannie Mae was reporting that they'd had a foreclosure, the Zabriskies sued Fannie Mae for its failure to comply with the FCRA. ER365-76. The case went to trial, and a jury found for the Zabriskies. ER1-2.

After the verdict, Fannie Mae appealed from the district court's pre-trial decision on cross-motions for summary judgment holding that Fannie Mae is a consumer reporting agency for purposes of the FCRA. ER83, 95-100. A divided panel of this Court reversed. Op. 15.

The majority's decision, written by Judge Wallace, rests on two holdings: First, the majority held that because Fannie Mae employees do not assemble and evaluate consumer credit information by hand, but instead have created and programmed an automated consumer reporting system to do so, Fannie Mae is not engaged in assembling or evaluating consumer credit information *at all*. Op. 7. Second, the majority held that even if Fannie Mae does assemble and evaluate consumer information, it does not do so "for the purpose of furnishing consumer reports." Op. 11-12.

The dissent strongly disagreed on both counts. First, the dissent rejected the majority's assertion that Fannie Mae does not assemble or evaluate consumer information. It's "undisputed" that Desktop Underwriter "pull[s] credit data (*i.e.*, assembling) and that it then evaluates that data using algorithms established by Fannie Mae (*i.e.*, evaluating) to generate a report and recommendation for the lenders." Op. 20. And Desktop Underwriter, the dissent explained, is *Fannie Mae's* system, owned, programmed, and controlled by Fannie Mae; all of this "assembling and evaluating" of consumer information "takes place on Fannie Mae's network." Op. 21. Therefore, the dissent concluded that Fannie Mae itself "engages" in "assembling and evaluating" consumer information. *See id.*

Second, the dissent rejected the majority's conclusion that Fannie Mae's purpose "is not to furnish a consumer report to a third party." Op. 26. The reports

Fannie Mae provides lenders, the dissent explained, meet the statutory definition of consumer reports: They contain information "'bearing on a consumer's credit worthiness'" and are "'used for the purpose of serving as a factor in establishing the consumer's eligibility for credit.'" Op. 27 (quoting 15 U.S.C. § 1681(d)). "As Fannie Mae is the entity that furnishes" these reports, the dissent concluded, "Fannie Mae is a consumer reporting agency." Op. 27.

REASONS FOR GRANTING THE PETITION

I. The Majority's Opinion Conflicts with Multiple Cases in this Circuit Holding that Companies Cannot Escape Liability Simply Because They Operate Online.

The majority's holding that Fannie Mae is not engaged in assembling or evaluating consumer information, simply because it created an automated system to perform these tasks, conflicts with several prior decisions of this Court. Until now, this Court had consistently held that the actions performed by a company's online platform are actions performed by the company.

Indeed, in *McCalmont*, a previous panel of this Court rejected the very same argument the panel majority adopts here and *reversed* a district court opinion, which held that because it is Fannie Mae's Desktop Underwriter system that assembles and evaluates consumer credit information, Fannie Mae itself does not do so. *See McCalmont*, 677 F. App'x at 332; *see also Shaw*, 891 F.3d at 758 (attributing "inaccurate reporting" to "*Fannie Mae's* mistreatment of Experian's

coding" (emphasis added)). The majority did not mention this decision, with which it directly conflicts.

McCalmont rests on the same principle this Court has upheld in multiple published decisions: Companies are responsible for what they program their online platforms to do. In *Reynoso*, for example, this Court held that a company that sold access to web-based software that prepared bankruptcy forms for debtors met the statutory definition of a bankruptcy preparer—"a person . . . who prepares for compensation a document for filing," 11 U.S.C. § 110(a)(1). *In re Reynoso*, 477 F.3d at 1123. Much like Fannie Mae here, the company argued that it could not be a bankruptcy preparer because it did not prepare any documents—it merely licensed software that customers themselves could use to prepare their own bankruptcy forms. *Id.*

This Court squarely rejected that argument. *Id.* at 1124. The company's software, the Court explained, "took debtors' responses to questions, restated them, and determined where to place the revised text into official forms." *Id.* at 1123. In other words, it prepared bankruptcy petitions. Therefore, the Court concluded, *the company* "was a bankruptcy petition preparer," "indistinguishable" from other companies that prepare petitions. *See id.* at 1123-24.

Similarly, in *Neovi*, this Court held that Qchex, which owned a website that "created and delivered unverified checks" for its users, could be held liable for the

fraudulent checks created through the website. *Neovi*, 604 F.3d at 1153. The Court rejected Qchex's "semantic" argument that its liability was "both 'legally' and 'literally' impossible" because "only users can create checks." *Id.* at 1155. "Even if the creation of the checks was impossible without user input," the Court explained, "that does not mean Qchex did not create the checks." *Id.*

And, in *Roommates.com*, this Court held that the operator of an online roommate-matching website was not immune from liability for discriminatory profiles posted on its site or discriminatory searches undertaken by its users. *See Roommates.Com*, 521 F.3d at 1166-67. The website required its customers, in creating their profiles, to answer questions about protected characteristics, such as their sex and race; and it "designed its search system so it would steer users based on" these characteristics. *Id.* Nevertheless, the company argued that because it was the *user* who chose to publish a profile or run a search, the *company* could not be found to have "create[d] or develop[ed]," even in part, the discriminatory content. *See id.* at 1166.

This argument, the Court held, "strains both credulity and English." *Id.* It was the company's website that required users to answer questions eliciting discriminatory information and the company's software that encouraged discriminatory searches; therefore, the company, at least in part, created and developed the discriminatory content. *See id.* at 1166-67.

Thus, this Court has repeatedly rejected the fundamental premise the majority here relies on: that a company is not responsible for what it programs its online platform to do. The majority's decision to the contrary conflicts with this Court's well-established case law.

It also conflicts with the view of the Federal Trade Commission. The majority seizes on a sentence in an FTC staff report that a "seller of software to a company that uses the software product to process credit report information is not" a consumer reporting agency. Op. 8. But the majority omits the very next sentence: "However, a company that *uses* software to assemble" consumer information "for transmission to third parties *may* be a [consumer reporting agency]." *40 Years of Experience*, 2011 WL 3020575, at *29 (emphasis added). In other words, the FTC distinguishes between companies that sell software to purchasers who install it on their own computers and use it "to process credit report information" themselves—Microsoft, for example, is not a consumer reporting agency just because someone might use Excel to process credit information—and companies like Fannie Mae that *use* software they themselves created and own to provide *others* with consumer reports. *See id.*

As the dissent notes, the FCRA itself characterizes Desktop Underwriter as "'an automated underwriting system *used by* [Fannie Mae].'" Op. 20 (quoting § 15 U.S.C. § 1681g(g)(1)(A)(ii)). And an FTC staff opinion advised that if a company

provided consumer reports through "an electronic loan origination system" much like Fannie Mae's Desktop Underwriter, the company would be a consumer reporting agency. *See* Grimes, F.T.C. Staff Opinion Letter (June 9, 1993).

The majority's unprecedented conclusion that companies that would otherwise be consumer reporting agencies are exempt from the law simply because they use software, rather than people, to assemble and evaluate consumer information has no basis in the text of the statute and conflicts with both this Court's prior precedent and the FTC's guidance.

II. The Majority's Novel Subjective Intent Requirement Conflicts with this Court's Precedent.

The majority held that even if Fannie Mae does assemble and evaluate consumer information, it still isn't a consumer reporting agency because, in the panel's view, it does not do so "for the purpose of furnishing consumer reports." Op. 11.[3] But it's indisputable that Fannie Mae's Desktop Underwriter assembles

[3] In support of this view, the majority asserts that Fannie Mae's reports "contain[] no evaluation or new information regarding the borrower's creditworthiness that wasn't already provided by the lender or credit bureau." Op. 12. As the dissent points out, that's simply not true. Op. 26. None of the credit data Fannie Mae imported on the Zabriskies or received from any lender stated that they had a foreclosure. *Id*.; *see Shaw*, 891 F.3d at 758 (foreclosure reporting error was "due to Fannie Mae's mistreatment of Experian's coding, not Experian's own inaccuracies"). But even if it were true, the FCRA expressly provides that entities that do nothing more than procure consumer information from other consumer reporting agencies and resell that information are themselves consumer reporting agencies. *See* 15 U.S.C. § 1681a(u).

and evaluates information "for the purpose of" furnishing reports to lenders. And, as the dissent explained, these reports meet the definition of a consumer report: They communicate "information bearing on a consumer's credit worthiness"; and mortgage lenders "use" them "as a factor in establishing the consumer's eligibility" for credit. Op. 27. Logic, therefore, dictates that Desktop Underwriter, and thus Fannie Mae, assembles and evaluates consumer credit information "for the purpose of furnishing consumer reports."

The majority held otherwise because, it asserted, Fannie Mae does not "*inten[d]*" to furnish consumer reports; according to the majority, Fannie Mae's sole "intention" is to "convey to lenders" whether Fannie Mae would purchase a loan if issued. Op. 11 (emphasis added).[4] In the majority's view, it doesn't matter that the whole point of Desktop Underwriter is to produce consumer reports for lenders. Or that Fannie Mae knows that lenders use its reports to make loan

[4] The majority treats this assertion as undisputed fact, but there is substantial evidence demonstrating that conveying to lenders whether Fannie Mae would purchase a loan was *not* the company's sole intent. As the dissent notes, Fannie Mae's reports contain all sorts of information beyond whether Fannie Mae would purchase the loan—including "credit history, any risk factors, existing credit and liabilities, [and] the consumer's employment and income"; in some cases, they even provide Fannie Mae's assessment of whether the loan presents an acceptable risk *for the lender*, even though the loan is ineligible for purchase by Fannie Mae—a completely unnecessary assessment if the goal is solely to convey eligibility for purchase by Fannie Mae. Op. 26-27.

determinations. All that matters is Fannie Mae's subjective motive for issuing the reports.

This reading of the statute conflicts with this Court's decision in *Greenway*, 524 F.2d at 1146. There, the Court adopted the district court's opinion, which held that when a company "disseminates" consumer credit information "to a third party," and the company "knows or expects that it will be used in connection with a business transaction involving the consumer, then that information is a 'consumer report' and its originator is a 'consumer reporting agency,'" *Greenway v. Info. Dynamics, Ltd.*, 399 F. Supp. 1092, 1095 (D. Ariz. 1974). Under *Greenway*, a company like Fannie Mae that furnishes consumer information knowing full well it will likely be used to determine loan eligibility is a consumer reporting agency. Its motive for doing so is irrelevant.

The majority's decision also conflicts with this Court's previous cases interpreting the phrase "for the purpose of" in other statutes. In *Harris*, this Court held the "natural reading of" the statutory language "force feeding a bird for the purpose of enlarging the bird's liver beyond normal size" is that it requires a determination of "the objective nature of the force feeding, rather than the subjective motive of the farmer." *Harris*, 729 F.3d at 947. Similarly, in *Western Watersheds Project*, the Court held the "natural reading of whether an adjudication is 'for the purpose of granting or renewing a license' looks to what the end result

of the adjudication ultimately will be," not the "subjective motives of the challenging party." *W. Watersheds Project*, 624 F.3d at 987; *see also United States v. Banks*, 514 F.3d 959, 966 (9th Cir. 2008) ("[I]n ordinary usage, doing X 'for the purpose of' Y does not imply that Y is the exclusive purpose.").

So too here. Nothing in the definition of consumer reporting agency suggests that courts should attempt to ferret out a company's subjective motive. The natural reading of "assembling or evaluating" consumer information "for the purpose of furnishing consumer reports" is that the "end result" of the assembly or evaluation of the information is a consumer report. Other provisions of the FCRA require intent. *See, e.g.*, 15 U.S.C. § 1681n (providing "civil liability for willful noncompliance"). The definition of consumer reporting agency doesn't.

And with good reason. Were it otherwise, any company that disputed whether its reports were consumer reports would automatically be exempt from the FCRA, because it could not possibly have *intended* to produce consumer reports; it didn't know it was doing so. Worse, a company that, like Fannie Mae, sells reports to third parties *knowing* those reports will be used to evaluate a consumer's eligibility for credit could easily evade liability under the FCRA simply by disclaiming any *intent* for the reports to be used that way.

The Federal Trade Commission has repeatedly rejected companies' efforts to circumvent the FCRA in this way. The agency has made clear that companies that

provide consumer information that is used or that the company expects to be used to establish a consumer's eligibility for credit or employment are consumer reporting agencies, regardless of the company's subjective intent. *See, e.g.*, *In re. Filiquarian Publ'g, LLC*, 155 F.T.C. 859 (2013) (mobile application offering "quick background checks" to employers was a consumer reporting agency even though it expressly disclaimed intent for reports to be used for purposes covered by the FCRA); Fed. Trade Comm'n, *Data Brokers: A Call for Transparency and Accountability* 54 n.94 (May 2014) (product marketed for "risk mitigation" could be covered by the FCRA if it is "used to determine creditworthiness" instead).

III. The Issues Presented Here are Exceptionally Important.

Fannie Mae issues reports on millions of loan applicants a year. *See* Answer Br. n.3. In many cases, these reports determine whether a prospective home-buyer will be able to secure a mortgage. Errors in Fannie Mae's algorithm for compiling these reports, such as falsely reporting thousands of foreclosures that never happened, can have an enormous impact. Not only do they prevent consumers from buying homes and mortgage lenders from accurately assessing loan applicants, but they threaten the entire housing industry (sellers, builders, realtors, etc.), which, at base, depends on people being able to buy homes. If Fannie Mae is not subject to the FCRA, if it is not required to "follow reasonable procedures" to

ensure the accuracy of its reports, there will be no mechanism for ensuring that these reports, upon which an entire industry relies, are accurate.

And that is not the only problem. The majority's decision effectively exempts a huge swath of the consumer reporting industry from the FCRA. Numerous consumer reporting companies operate in exactly the same way Fannie Mae does: Their employees don't personally assemble or evaluate consumer information; they program automated systems accessible through online platforms to do so. *See, e.g., Harris v. RELS Reporting Servs., LLC*, No. 2:14-CV-0805-SLB, 2016 WL 4366892, at *4 (N.D. Ala. Aug. 16, 2016); *In the Matter of First Am. Real Estate Sols., LLC*, 1998 WL 753243, at *5-6 (F.T.C. 1998). Under the majority's reasoning, all of these companies could potentially be exempt from the FCRA. Not just Fannie Mae.

Furthermore, the majority's decision could have widespread ramifications even outside the consumer reporting context. The decision raises a host of questions about whether, and under what circumstances, companies can immunize themselves from generally-applicable statutes simply by automating their business. As this Court explained over a decade ago, the internet "has become a dominant—perhaps the preeminent—means through which commerce is conducted." *Roommates.Com*, 521 F.3d at 1164 n.15. Its "vast reach into the lives of millions," is precisely why "we must be careful" to hold online businesses to the same

standard as "their real-world counterparts." *See id.* En banc review is necessary to ensure that companies cannot exempt themselves from the law, simply by moving their businesses online.

CONCLUSION

For the foregoing reasons, the Court should grant rehearing or rehearing en banc.

Dated: March 1, 2019

Respectfully submitted,

By: /s/ *Jennifer D. Bennett*

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