No. 10-___

IN THE

Supreme Court of the United States

EXPERIAN INFORMATION SOLUTIONS, INC.,
Petitioner,

v.

MARIA E. PINTOS,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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AUGUST 19, 2010

QUESTION PRESENTED

Under 15 U.S.C. § 1681b(a)(3)(A), a provision of the Fair Credit Reporting Act, a creditor in any "credit transaction involving [a] consumer" is authorized to obtain the consumer's credit report to assist in, *inter alia*, collecting the consumer's debt. The text of an accompanying subsection, § 1681b(c), makes clear that the authorization in § 1681b(a)(3)(A) extends to "credit . . . transactions that are not initiated by the consumer."

The question presented is whether the Ninth Circuit erred in holding, in the face of this express statutory language, that the authorization in § 1681b(a)(3)(A) applies only to transactions initiated by the consumer.

PARTIES TO THE PROCEEDING

The petitioner in this case is Experian Information Solutions, Inc., which was the defendant-appellee-cross-appellant below. Also party to the case below was defendant-appellee Pacific Creditors Association. The respondent in this case is Maria E. Pintos, who was the plaintiff-appellant-cross-appellee below.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioners disclose as follows:

Experian Information Solutions, Inc., is a wholly owned subsidiary of Experian plc. Experian plc is publicly traded on the London Stock Exchange. No other publicly traded corporation owns more than 10% of Experian Information Solutions, Inc.'s stock.

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OPINIONS BELOW

The order of the Ninth Circuit amending its opinion and denying rehearing en banc and its second amended opinion (Pet. App. 1a) are reported at 605 F.3d 665. The Ninth Circuit's first amended opinion (Pet. App. 30a) is reported at 565 F.3d 1106. The Ninth Circuit's original opinion (Pet. App. 52a) is reported at 504 F.3d 792. The district court's opinion (Pet. App. 69a) is unreported.

JURISDICTION

The court of appeals entered its original judgment on September 21, 2007. A timely petition for rehearing or rehearing en banc was filed. On April 30, 2009, the court of appeals entered its first amended judgment. A second petition for rehearing or rehearing en banc was denied on May 21, 2010, and the court of appeals entered its second amended judgment on that date. This court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Title 15, section 1681b, of the United States Code provides, in relevant part:

> (a) In general
>
> Subject to subsection (c) of this section, any consumer reporting agency may furnish a consumer report under the following circumstances and no other:
>
> . . . .
>
> (3) To a person which it has reason to believe—
>
> (A) 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 credit to, or review or collection of an account of, the consumer; . . . .

The full text of § 1681b is reproduced at Pet. App. 79a-96a.

STATEMENT

Under the Fair Credit Reporting Act (FCRA), a creditor in any "credit transaction involving [a] consumer" is authorized to obtain the consumer's credit report to assist in, *inter alia*, collecting the consumer's debt. 15 U.S.C. § 1681b(a)(3)(A). The text of an accompanying subsection of § 1681b makes clear that the "credit transaction[s]" in § 1681b(a)(3)(A) include "credit . . . transactions that are not initiated by the consumer." *See id.* § 1681b(c)(1).

Notwithstanding this express statutory language, the divided Ninth Circuit panel below held that a "credit transaction involving the consumer" under § 1681b must be one "the consumer initiate[d]." Pet. App. 15a-16a. And, despite a seven-judge dissent pointing out that this interpretation "is foreclosed by the plain language of the statute," Pet. App. 5a (Kozinski, C.J., dissenting from denial of reh'g en banc), the court below made no effort to square its holding with the contrary text of § 1681(b)(c). As Chief Judge Kozinski observed, this untenable reading of the FCRA—one the panel majority adopted, it is worth noting, only after withdrawing an opinion offering a completely different rationale for reaching the same result—"flunks Statutory Interpretation 101." Pet. App. 8a.

The decision below disregards both the language of the FCRA and this Court's repeated admonitions concerning the proper interpretation of statutes. It also conflicts with the interpretation of § 1681b by other circuits, and by the agency tasked with implementing and enforcing the statute—the Federal Trade Commission (FTC). And, as a practical matter, it drastically and unjustifiably narrows the circumstances under which a creditor may permissibly obtain a consumer's credit report, and injects disuniformity and uncertainty into the collection of consumer debts.

Petitioner respectfully submits that the Ninth Circuit's extreme departure from the text of the FCRA and from established principles of statutory interpretation calls for summary reversal by this Court, or, in the alternative, for correction after full briefing and argument.

1. "Congress enacted the FCRA [15 U.S.C. § 1681 *et seq.*] in 1970 to promote efficiency in the Nation's banking system and to protect consumer privacy." *TRW Inc. v. Andrews*, 534 U.S. 19, 23 (2001). To balance these sometimes competing goals, § 1681b of the FCRA creates rules defining the "permissible purposes" for which a "consumer report" (usually known colloquially as a "credit report") may be obtained. These permissible purposes include, *inter alia*, credit transactions, debt collection, employment, insurance, licensing, credit-risk valuation, business transactions, child support determinations, and court orders. *See* 15 U.S.C. § 1681b(a). Consumer reporting agencies are required to maintain "reasonable procedures" designed "to limit the

furnishing of consumer reports to" the permissible purposes listed in § 1681b. *Id.* § 1681e(a).

The provision at issue in this case, set forth in § 1681b(a)(3)(A), authorizes the furnishing of a credit report for various purposes related to consumer credit, including the collection of amounts owed by a consumer, *i.e.*:

> 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.

In contrast to the accompanying subparagraph (F)(i) of § 1681b(a)(3), which limits the permissible purpose it creates to transactions "initiated by the consumer," subparagraph (A) contains no language concerning consumer initiation of the relevant transaction.

2. Respondent Maria E. Pintos owned a sport-utility vehicle with an expired registration that was illegally parked on the street and, at the direction of the San Bruno Police Department, was towed and impounded by P&S Towing. Pet App. 10a. When Pintos failed to claim her vehicle or pay for P&S's services, P&S, in accordance with California Civil Code §§ 3068.1, 3068.2, obtained a lien on the vehicle, sold it, and obtained a deficiency claim against Pintos. Pet. App. 10a. P&S assigned the deficiency claim to the defendant below, Pacific Creditors Association (PCA), for collection. *Id.* To assist in collecting the debt, PCA sought and obtained a credit report on Pintos from petitioner Experian—a credit reporting agency—on December 5, 2002. *Id.*

3. Pintos subsequently filed this action in the Northern District of California against petitioner and PCA, claiming that PCA's collection of her debt was not a "permissible purpose" for requesting her credit information, and that Experian had violated the FCRA by providing it to PCA. *Id.* On motions for summary judgment, PCA and Experian argued that collection of a debt was a permissible purpose under § 1681b(a)(3)(A), as confirmed by the Ninth Circuit's decision in *Hasbun v. County of Los Angeles*, 323 F.3d 801 (9th Cir. 2003). The district court granted the motion for summary judgment, holding—in conformity with the "uniform[]" case law addressing the issue—that debt collection is considered to be the "collection of an account" and is therefore a permissible purpose under § 1681b(a)(3)(A) to access a credit report. Pet. App. 74a. Pintos appealed.

a. In the first of its three eventual opinions in this case, the Ninth Circuit—while acknowledging its prior "determin[ation] [in *Hasbun*] that debt collection was generally a permissible purpose for obtaining credit reports under § 1681b(a)(3)(A)," Pet. App. 60a—held that collection of Pintos's debt was not a permissible purpose. Adopting a theory not briefed by either party, the court deemed its prior interpretation of § 1681b(a)(3)(A) in need of "reevaluat[ion]" in light of the Fair and Accurate Credit Transactions Act of 2003 (FACTA), Pub. L. 108-159, 111 Stat. 1952 (2004)—legislation not enacted until after the events at issue in this case. Pet. App. 60a. In particular, the court reasoned, FACTA's definition of the term "credit"—notwithstanding that the definition made no

reference to who initiated a credit transaction[1]—meant that the "credit transaction[s]" covered by § 1681b(a)(3)(A) included only those in which "the consumer directly participates and voluntarily seeks credit." Pet. App. 59a. Because Pintos did not incur her debt voluntarily, the court held, her credit report could not be permissibly obtained to collect it. *Id.* at 59a-60a.

b. On the defendants' petition for rehearing—which pointed out, among other things, that FACTA was enacted after the relevant events and therefore inapplicable—the Ninth Circuit withdrew its initial opinion and (over the dissent of Judge Bea, who replaced Judge Schiavelli on the panel following the initial panel opinion) filed a superseding opinion reaching the same result on yet another theory argued by neither party: that § 1681b(a)(3)(A)'s language requiring a "credit transaction involving the consumer" demands a transaction *initiated* by the consumer. Pet. App. 38a-39a. To distinguish *Hasbun*'s holding that § 1681b(a)(3)(A) applied to collection of a child support judgment—presumably not a "consumer initiated" debt under the majority's new test—the court carved out an exception for judgment debts; a debt reduced to judgment, the court held without explanation, would be deemed "a 'credit transaction involving the consumer' no matter how it arose." Pet. App. 41a. Applying its interpretation of the statute to the case at bar, the court held that there was no permissible purpose,

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[1] The definition is: "The term 'credit' means 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 of services and defer payment therefore." 15 U.S.C. § 1691a(d).

because Pintos "never asked to have [her] vehicle towed" and PCA's lien had not been reduced to a judgment. *Id.* at 39a, 41a.

In dissent, Judge Bea argued that the majority had no coherent basis for its purported distinction of *Hasbun*. In addition, he noted, under the text of the statute Pintos was undoubtedly "involved" in a credit transaction by "her decision to leave her unregistered car on a public street where she knew it might be towed," which, Judge Bea explained, "*is* asking to have one's car towed." *Id.* at 49a. Under the uniform rule applied by other jurisdictions and the FTC and adopted in *Hasbun*, like "*any* creditor attempting to collect a debt from a consumer," P&S and PCA were "entitled to access Pintos's credit report in order to collect the debt." *Id.* at 50a-51a & n.1 (emphasis in original).

c. The defendants again sought rehearing or rehearing en banc. On May 21, 2010, the Ninth Circuit denied rehearing en banc and amended its opinion to add a footnote addressing the contention of the defendants (and seven dissenting judges) that the plain language of other sections of the FCRA—namely the "prescreening provisions," 15 U.S.C. §§ 1681a(m) and 1681b(c)—foreclosed the panel majority's new interpretation of § 1681b(a)(3)(A) as limited to transactions that the consumer initiated. Pet. App. 3a-4a, 17a n.2. The footnote declared that this argument had "not persuaded us to change our opinion," *id.*, but did not address how the panel squared its interpretation of § 1681b(a)(3)(A) with the other provisions of the statute.

Chief Judge Kozinski, writing for seven dissenting judges, argued that the majority's "interpretation of

the Fair Credit Reporting Act (FCRA) is foreclosed by the plain language of the statute." Pet. App. 5a. Under the statutory text, he explained, the majority's "holding that a person isn't 'involved' in a credit transaction unless he 'initiates' the transaction . . . . can't be squared with 15 U.S.C. § 1681b(c)," which specifically contemplates (and imposes certain restrictions on) the furnishing of consumer reports under § 1681b(a)(3)(A) "'*in connection with any credit . . . transaction that is not initiated by the consumer*.'" Pet. App. 5a-6a (quoting § 1681b(c), Chief Judge Kozinski's emphasis).

Chief Judge Kozinski concluded:

> Putting sections 1681b(a)(3)(A), 1681b(c) and 1681a(m) together, then, it's clear that: (1) Consumers can be "involved" in credit transactions under section 1681b(a)(3)(A) that they didn't initiate; (2) section 1681b(c) provides certain restrictions on access to reports under section 1681b(a)(3)(A) when the consumer didn't initiate the transaction; and (3) those limitations don't apply here because section 1681a(m) says that Pintos initiated the transaction.

Id. at 7a. "In holding otherwise, the majority flunks Statutory Interpretation 101." *Id.* at 7a-8a.

Judge Gould joined Chief Judge Kozinski's dissent, but also wrote separately to point out that the majority's distinction between judgment creditors and other creditors will inevitably increase the cost of consumer credit. "Uniformity of treatment of creditors is useful and likely leads to lower credit enforcement costs to the benefit ultimately of

consumers." *Id.* at 8a. Judge Gould explained: "Use of credit reports expedites collections, reducing collection costs, and because such costs may be shifted to consumers, permitting the credit reports to be relied upon by creditors may decrease costs to citizens who are so unfortunate as to leave their unregistered cars parked on the street and subject to towing." *Id.* In Judge Gould's view, "permitting credit reports to go to creditors, whether they have a judgment or not, will be less expensive for both debtors and creditors." *Id.*

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW RADICALLY DEPARTS FROM BOTH THE TEXT OF THE FCRA AND BINDING PRINCIPLES OF STATUTORY INTERPRETATION.

The decision below violates this Court's most basic rules of statutory interpretation by disregarding express statutory text—contained in the very same section of the statute the court below purported to interpret—that forecloses the court's preferred interpretation of the FCRA. Indeed, the contradiction between the panel majority's interpretation and the statutory text is so plain that, as Chief Judge Kozinski aptly put it, the majority's reading of the statute "flunks Statutory Interpretation 101." Pet. App. 8a (Kozinski, C.J., dissenting from denial of rehearing en banc). This extreme departure from the text of the FCRA and fundamental rules of interpretation calls for summary reversal by this Court, or, in the alternative, correction after full briefing and argument.

Section 1681b(a) of the FCRA authorizes a consumer reporting agency to furnish a consumer's credit report:

> (3) To a person which it has reason to believe—
>
> > (A) 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 credit to, or review or collection of an account of, the consumer.

15 U.S.C. § 1681b(a)(3)(A). As the Federal Trade Commission and courts have long recognized, this provision authorizes the furnishing of a consumer's credit report "for use in attempting to collect that consumer's debt." 16 C.F.R. pt. 600, App. § 604(3)(E) cmt. 1(A) (2002).[2]

The Ninth Circuit significantly restricted this statutory permissible purpose, 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.[3] Pet. App. 15a. In its

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[2] *See also Hasbun*, 323 F.3d at 801; *Phillips v. Grendahl*, 312 F.3d 357, 367 (8th Cir. 2002); *Duncan v. Handmaker*, 149 F.3d 424, 428 (6th Cir. 1998).

[3] To be more precise, the Ninth Circuit required consumer initiation for all debts except judgment debts; once reduced to judgment, a debt would be deemed to be within § 1681b(a)(3)(A) "no matter how it arose." Pet App. 17a As discussed *infra*, the incoherence of this exception—and its inconsistency with the court's own reading of the statutory text—highlights the extent to which the decision below was unconstrained by either that text or the governing rules of interpretation.

apparent determination to narrow the scope of § 1681b(a)(3)(A)—the court adopted its current interpretation only after first attempting a completely different rationale for reaching the same result—the Ninth Circuit simply refused to apply fundamental interpretive principles required by this Court's cases.

1. As Chief Judge Kozinski ably demonstrated, in light of the express provisions of § 1681b(c), the panel's reading of § 1681b(a)(3)(A) as requiring that transactions be initiated by the consumer is untenable. Pet. App. 5a-8a. Section 1681b(c) specifically recognizes that "credit transaction[s] involving the consumer" within the meaning of § 1681b(a)(3)(A) *do* include transactions that are "not initiated by the consumer." Indeed, § 1681b(c) is expressly aimed at certain of those transactions, directing that:

> A consumer reporting agency may furnish a consumer report relating to any consumer *pursuant to subparagraph (A) or (C) of subsection (a)(3) of this section* [*i.e.*, § 1681b(a)(3)(A) or (C)] in connection with any *credit or insurance transaction that is not initiated by the consumer* only if—

certain requirements are met. 15 U.S.C. § 1681b(c)(1) (emphasis added).

Section 1681b(c) regulates so-called "prescreening," whereby lenders (or insurers) are permitted to purchase a list of consumers who have not initiated any transaction with the lender, but who meet certain "prescreening" criteria (*e.g.*, all consumers in a certain zip code with more than three credit cards

and a credit score greater than 700) for the purpose of offering credit to those consumers.[4] The prescreening provision does not itself create any independent permissible purpose for access to credit information. Rather, by its express terms, it applies where a permissible purpose exists under § 1681b(a)(3)(A) or (C) with respect to a "transaction that is not initiated by the consumer." As Chief Judge Kozinski explained: "Section 1681b(c) provides special limits on access to credit reports sought under section 1681b(a)(3)(A) when transactions aren't initiated by consumers. We therefore know that section 1681b(a)(3)(A) covers transactions not initiated by consumers." Pet. App. 7a.[5]

Chief Judge Kozinski's argument, we submit, is irrefutable: Interpreting § 1681b(a)(3)(A) as covering only transactions initiated by consumers is impossible in light of § 1681b(c). Apparently recognizing this, the panel majority made no attempt to demonstrate that its interpretation *could* be harmonized with § 1681b(c). Instead, it simply refused to interpret § 1681b(a)(3)(A) in light of § 1681b(c), offering as its only justification for this the (accurate but irrelevant) observation that Pintos's case did not involve prescreening. Pet. App. 17a n.2. The court did not contend that this made the text of

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[4] To access such prescreened lists, a lender must comply with certain special requirements set forth in § 1681b(c), including making "a firm offer of credit" to each consumer on the list.

[5] As Chief Judge Kozinski also noted, a companion provision, § 1681a(m), exempts debt collection from the special prescreening requirements of § 1681b(c). Pet. App. 6a-7a.

§ 1681b(c) any less decisive in foreclosing its reading of § 1681b(a)(3)(A).[6]

The Ninth Circuit's refusal to interpret § 1681b(a)(3)(A) in light of § 1681b(c) violates one of this Court's most fundamental rules of statutory interpretation. It is a "cardinal rule that a statute is to be read as a whole," *King v. St. Vincent's Hospital*, 502 U.S. 215, 221 (1991), and, "[j]ust as a single word cannot be read in isolation, nor can a single provision of a statute." *Smith v. United States*, 508 U.S. 223, 233 (1993). For example, in *Smith*, this Court held that a narrow interpretation of the term "uses" in 18 U.S.C. § 924(c)(1) was foreclosed by the provisions of another subsection of the statute. *Id.* at 234. Thus, as this Court has frequently emphasized: "'A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme—because the same terminology is used elsewhere in a context that makes its meaning clear, or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law.'" *Koons Buick Pontiac GMC, Inc. v. Nigh*, 543 U.S. 50, 60 (2004) (quoting *United*

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[6] It may be worth addressing the court's suggestion that prior to the final round of briefing, "[t]he parties did not appear to view [§§ 1681b(c) and 1681a(m)] to be relevant to this case." Pet. App. 17a n.2. Until the panel adopted a novel interpretation of § 1681b(a)(3)(A) that conflicts with § 1681(c), the provisions were indeed of limited relevance; and the subsequent petitions for rehearing, as contemplated by Fed. R. App. P. 35, focused on the reasons for en banc consideration rather than on the merits. In any event, the court reached the merits of petitioner's arguments based on these provisions and held that they had "not persuaded us." *Id.*

Savings Ass'n of Texas v. Timbers of Inwood Forest Assocs., Ltd., 484 U.S. 365, 371 (1988)).

As Chief Judge Kozinski demonstrated, the panel majority's reading of § 1681b(a)(3)(A) is flatly inconsistent with § 1681b(c). The panel majority, of course, was free to disagree with that view (albeit it is difficult to see how a different view is possible, and the court made no effort to justify one). But it was not free—under either this Court's cases or elementary principles of interpretation—to insist on its preferred interpretation of § 1681b(a)(3)(A) without regard to whether that interpretation was "'compatible with the rest of the law,'" *Koons*, 543 U.S. at 60.

2. The text of § 1681b also demonstrates the error below in another way. The Ninth Circuit's interpretation of § 1681b(a)(3)(A) is belied by the striking contrast between § 1681b(a)(3)(A) and another provision in the very same subsection—and thereby runs afoul of yet another basic interpretive principle, that "where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Bates v. United States*, 522 U.S. 23, 29-30 (1997) (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)).

In contrast to the absence from § 1681b(a)(3)(A) of any language requiring consumer initiation, § 1681b(a)(3)(F)(i)—which creates a permissible purpose to access a consumer report for a "legitimate business need"—is expressly limited to a "transaction that is initiated by the consumer." Notably, prior to

1996, that provision used language exactly parallel to § 1681b(a)(3)(A): "in connection with a business transaction *involving* the consumer." 15 U.S.C. § 1681b(3)(E) (1995) (currently codified at 15 U.S.C. § 1681b(a)(3)(F)) (emphasis added). Congress changed that language in 1996 to the current "initiated by the consumer," but chose not to make a similar change to § 1681b(a)(3)(A).[7] The presumption that Congress acts intentionally when it "includes particular language in one section of a statute but omits it in another," *Bates*, 522 U.S. at 24, is particularly compelling under these circumstances, and particularly damning to the Ninth Circuit's textually insupportable interpretation here. *See also, e.g.*, 2A Norman J. Singer & J.D. Shambie Singer, *Sutherland Statutes and Statutory Construction* § 46:5 (7th ed. 2010) ("[W]here the legislature has employed a term in one place and excluded it in another, it should not be implied where excluded."); *Markham v. Cabell*, 326 U.S. 404, 411 (1945) ("[T]he normal assumption is that where Congress amends only one section of a law, leaving another untouched, the two were designed to function as parts of an integrated whole.").

3. Finally, the Ninth Circuit's interpretation of § 1681a(b)(3)(A) is contradicted by its own holding, with respect to judgment debts, that "[i]f a debt has been judicially established, there is a 'credit transaction involving the consumer' no matter how it arose," Pet. App. 17a—*i.e.*, regardless of whether the transaction creating the debt was initiated by the consumer. The panel majority did not identify any

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[7] *See* Consumer Credit Reporting Reform Act of 1996, Pub. L. No. 104-208, § 2403(a)(2), 110 Stat. 3009-430 (1996).

basis in the statutory text for treating judgment debts differently, or explain how the phrase "credit transaction involving the consumer" could be coherently interpreted to *include* a judgment debt that is not consumer-initiated but *exclude* the same debt before it is reduced to judgment. In short, the Ninth Circuit's exception for judgment debts further demonstrates its decision's complete divorce from statutory text and binding interpretive principles.

II. THE DECISION BELOW CONFLICTS WITH THE INTERPRETATIONS OF OTHER COURTS AND THE FTC.

If the Court does not summarily reverse the decision below, it should grant certiorari for the additional reason that the Ninth Circuit's interpretation of § 1681b(a)(3)(A) conflicts with the approach taken by other circuit courts and by the FTC, and creates confusion on a federal question of considerable importance to businesses.

A. The Decision Below Departs From The Interpretations Of Other Circuits

In contrast with the decision below, several circuits have interpreted § 1681b(a)(3)(A) without qualification as making debt collection a permissible purpose for obtaining a consumer's credit report. *See Phillips v. Grendahl*, 312 F.3d 357, 366 (8th Cir. 2002) ("'collection of an account of[] the consumer'—in other words, debt collection," is a permissible purpose); *Duncan v. Handmaker*, 149 F.3d 424, 428 (6th Cir. 1998) (recognizing "collection of a debt owed by the consumer" as permissible purpose); *see also Miller v. Wolpoff & Abramson, LLP*, 309 F. App'x 40, 43 (7th Cir. 2009) (collection agency had permissible

purpose to access credit report for debt collection) (unpublished).[8]

The rule in these cases has been applied to allow creditors to obtain debtors' credit reports where the debt was incurred involuntarily and was not reduced to judgment. In *Lusk v. TRW, Inc.*, for example, the Sixth Circuit held that a landlord had a permissible purpose to access a tenant's credit report to collect money possibly due for damages to the apartment—even though the debt was contested and had not been reduced to judgment. 173 F.3d 429 (6th Cir. 1999) (unpublished table decision). And in *Dumas v. City of Chicago*, the Seventh Circuit held that the city had a permissible purpose to access a property owner's credit report in an effort to collect on a delinquent water bill incurred by the former owner of the property, even though the current owner "never sought credit" from the city. 234 F.3d 1272 (7th Cir. 2000) (unpublished table decision).

B. The Decision Below Conflicts With The FTC's Interpretation

The decision below also conflicts with the FTC's interpretive guidance on § 1681b(a)(3)(A).

The FTC commentary on § 1681b(a)(3)(A) states without qualification that "[a] collection agency has a

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[8] The Ninth Circuit quoted dicta in a Seventh Circuit decision observing that to access a credit report in connection with the potential extension of credit to a consumer, "[a]n entity may rely on subparagraph (3)(A) only if the consumer initiates the transaction." *Stergiopoulos v. First Midwest Bancorp., Inc.*, 427 F.3d 1043, 1047 (7th Cir. 2005). However, the quoted language was merely an observation about how loans are typically initiated; it did not purport to be an interpretation of any requirement of § 1681b(a)(3)(A).

permissible purpose under this section to receive a consumer report on a consumer for use in attempting to collect that consumer's debt." 16 C.F.R. pt. 600, App. § 604(3)(A) cmt. 1 (2002). It likewise states unequivocally that § 1681b(a)(3)(A) provides a permissible purpose in exactly the type of situation at issue in this case: collection on a lien. The FTC explained that § 1681b(a)(3)(A) "permits judgment creditors and *lien creditors* to obtain consumer reports on judgment debtors or individuals whose property is subject to the lien creditor's lien." *Id.*, App. § 604(3)(E) cmt. 4 (emphasis added).

Moreover, the FTC has rejected the distinction drawn—without explanation—by the court below between "judgment creditors" and other creditors. The FTC explained: "A judgment creditor has a permissible purpose to receive a consumer report on the judgment debtor for use in connection with collection of the judgment debt, *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." 16 C.F.R. pt. 600, App. § 604(3)(A) cmt. 2 (2002) (emphasis added).

Although this interpretive guidance is not the product of formal rulemaking, *see* 16 C.F.R. § 600.2, it "nevertheless warrant[s] respect." *Washington State Dep't of Soc. & Health Servs. v. Keffeler*, 537 U.S. 371, 385 (2003); *see also United States v. Mead Corp.*, 533 U.S. 218, 228 (2001) (noting that administrative decisions not subject to *Chevron* deference may be entitled to a lesser degree of deference and that, following *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944), the agency position should be followed to the extent persuasive). At a

minimum, the FTC's guidance reinforces both the erroneous nature of the decision below, and the harm to businesses that have structured their operations in reliance on the FTC's guidance.

III. THE QUESTION PRESENTED IS AN IMPORTANT ONE THAT REQUIRES THIS COURT'S IMMEDIATE ATTENTION.

The harm resulting from the decision below is considerable. The Ninth Circuit's decision—based on an untenable interpretation of the FCRA—imposes confusing and disuniform rules on nationwide businesses, strips creditors of a traditional and important tool for the efficient collection of many types of debt, and invites forum-shopping in FCRA suits. Correction by this Court is urgently needed.

The confusion created by the decision below is substantial. As a trade magazine observed more than a year after the initial panel decision, "[t]he Ninth Circuit decision in *Pintos v. Pacific Creditors Association* in 2007 continues to affect the way credit and collection agencies handle consumer accounts, generating a great deal of confusion about their ability to obtain a consumer's credit report for collection purposes." Anne Rosso, *Weathering the Storm*, Collector Magazine, Vol. 74, No. 5, at 24 (Dec. 2008); *see also* Pulse Vol. 26, No. 4, at 1 (Apr. 2010) ("many questions" raised by *Pintos*); Gary Nitzkin, *Pulling Credit Bureaus Just Got Even More Dangerous*, Michigan Collection Law Blog (Oct. 25, 2007) ("As a general rule, it used to be that a collector could pull a credit report on any debtor. This is an easy concept. This is not the law anymore.") (http://www.michigancollectionlawblog.com/2007/10/pulling_credit_bureaus_just_go.html).

In addition, the "permissible purpose" invalidated by the decision below has traditionally been relied on as a valuable tool for the collection of a wide range of taxes, liens, and other "involuntary" debts. Creditors use consumer reports to find difficult-to-locate debtors, determine their ability to pay existing obligations, and facilitate collection efforts. Without access to consumer reports, these creditors will be left to rely on "skip-tracing" techniques to track down debtors that are far more costly and less accurate and current than consumer reports. Likewise, the burden on the judicial system will increase as lien holders and other creditors seek the assistance of the courts in locating and collecting from debtors through increased garnishment, execution, and attachment proceedings.

Moreover, the conflict created by the decision below imposes disuniformities on nationwide businesses that use credit reports to collect consumer debts, as well as on the nationwide consumer reporting agencies that furnish those reports. Because so many FCRA suits are brought as putative nationwide class actions—and forum-shopping plaintiffs can easily file suit in the Ninth Circuit—any company amenable to suit within the Ninth Circuit must consider the implications of the decision below, even if it accesses consumer reports to collect involuntarily incurred debts elsewhere. The exposure to suit in multiple jurisdictions with disparate rules for the use of credit reports threatens to skew decision-making by businesses nationwide.

Finally, nothing in the 2003 FACTA amendments mitigates the need for this Court to resolve the question presented in this case. Notwithstanding the

original panel opinion purporting to find justification for a narrowing of § 1681b(a)(3)(A) in FACTA's definition of "credit," nothing in FACTA can change the result compelled by § 1681b(c)—to wit, that § 1681b(a)(3)(A) cannot be read as requiring consumer initiation in light of the express recognition in § 1681b(c) that § 1681b(a)(3)(A) does *not* require consumer initiation.

Moreover, § 1681b(c) aside, there is nothing in FACTA's definition of "credit," 15 U.S.C. § 1691a(d), that has any legitimate effect on whether § 1681b(a)(3)(A) requires a "voluntary" or "consumer initiated" debt. That definition—"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"—says nothing about the debt being voluntarily assumed or the need for a consumer to initiate the transaction giving rise to the debt. Indeed, the definition is phrased in language—"the right granted by a creditor to a debtor"—that is most naturally read to include the *unilateral* granting of a right to defer payment. And the definition specifically includes the provision of services before payment, without regard to whether those services were voluntarily sought out by the consumer. *See Murray v. New Cingular Wireless Servs., Inc.*, 523 F.3d 719, 722 (7th Cir. 2008) ("Deferred payment is 'credit' as the statute uses that word.").

In short, the FACTA amendments have no bearing on the question presented in this case, and do nothing to mitigate the need for this Court's correction of the serious wrong turn taken by the Ninth Circuit below.

CONCLUSION

The petition for a writ of certiorari should be granted and the court of appeals' judgment summarily reversed or, in the alternative, the case should be set for full consideration on the merits.

Respectfully submitted,

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