

Nos. 17-15807 & 17-16000

In the
UNITED STATES COURT OF APPEALS
for the
NINTH CIRCUIT

RICHARD ZABRISKIE AND KRISTIN ZABRISKIE,
Plaintiffs-Appellees,

vs.

FEDERAL NATIONAL MORTGAGE ASSOCIATION,
Defendant-Appellant.

APPEAL FROM THE U.S. DISTRICT COURT
FOR THE DISTRICT OF ARIZONA, PHOENIX
D.C. No. 2:13-cv-02260-SRB

BRIEF OF AMICI CURIAE
NATIONAL EMPLOYMENT LAW PROJECT,
JUSTLEADERSHIPUSA, TOWARDS JUSTICE, LEGAL ACTION CENTER,
AND COMMUNITY SERVICE SOCIETY OF NEW YORK
IN SUPPORT OF
PLAINTIFFS'-APPELLEES' PETITION FOR REHEARING OR REHEARING EN BANC

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and 29(a)(4), Amici state that they are, respectively, tax-exempt non-profit corporations with no parent corporations and that no publicly held corporation owns ten percent or more of the stock of any Amicus.

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IDENTITY AND INTEREST OF AMICUS CURIAE

Amici curiae are organizations that advocate for workers' rights and access to job opportunities for people with arrest and conviction records. One important part of Amici's respective missions is ensuring that the Fair Credit Reporting Act, 15 U.S.C. § 1681, et seq. (FCRA), is interpreted consistent with its broad remedial purpose and in light of real-world context. The FCRA not only protects the interests of credit-seeking consumers, it also governs the responsibilities of employers and background check companies as well as the rights of millions of working people who regularly face employment-related background checks. The FCRA allows individuals to demand that consumer reporting agencies correct inaccuracies in their criminal history reports so that misinformation doesn't cost them job opportunities.

Amici submit this brief not to repeat arguments made by the parties, but to ensure that the members of this Court appreciate the potential implications of the decision for working people across the nation. People with arrest and conviction records face immense barriers to employment because of employment background checks, and the majority opinion of the divided panel will only exacerbate those barriers by narrowing the definition of a "consumer reporting agency" and thus limiting the reach of the FCRA. Amici submit this brief pursuant to Federal Rule

of Appellate Procedure 29.¹ Pursuant to Federal Rule of Appellate Procedure 29(a) and Circuit Rule 29-2(a), Amici certify that all parties have consented to the filing of this brief.

The **National Employment Law Project (NELP)** is a non-profit legal research and advocacy organization with 50 years of experience advocating for low-wage and unemployed workers. In important part, NELP's California-based staff specializes in advancing the employment rights of people with arrest and conviction records and reducing job barriers faced by workers with such records. A decision denying the Petition for Rehearing or Rehearing En Banc filed by Plaintiffs-Appellees will directly undermine NELP's mission by allowing a decision to stand that potentially undermines the recourse available to workers and job applicants with records under the FCRA. NELP has litigated and participated as amicus in cases addressing the rights of workers with arrest and conviction records. NELP works closely with numerous allies throughout the Ninth Circuit and across the country to promote fairness in employment background checks and minimize barriers to employment faced by workers with records.

¹ Pursuant to Federal Rule of Appellate Procedure 29(c)(5), Amici state that no party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and no person—other than Amici, their members, or their counsel—contributed money that was intended to fund preparing or submitting this brief.

JustLeadershipUSA (JLUSA) is a national advocacy organization that seeks to cut the United States correctional population in half by 2030. JLUSA empowers people most affected by incarceration to drive policy reform, knowing that those closest to the problem are closest to the solution but farthest from the resources and power. JLUSA has members in all 50 states, including in the states of the Ninth Circuit, which are home to over 50 supporting members and over 150 graduates from JLUSA’s leadership development programs, *Leading with Conviction* and *Emerging Leaders*. Through its #WORKINGfuture campaign and other efforts, JLUSA endeavors to eradicate the lingering, extralegal “collateral consequences” of contact with the criminal justice system. These barriers to employment opportunities and other human needs serve only to maximize the harm inflicted on directly impacted people and communities. Comprehensive enforcement of the FCRA helps to ensure fairness and prevent directly impacted people from facing additional collateral consequences related to employment. JLUSA has a strong interest in ensuring that the FCRA is applied broadly—to all agencies that distribute record information about workers, especially as technological innovations are developed.

Towards Justice is a non-profit law firm launched in 2014 to address systemic injustices in the labor market. Towards Justice fills a gap in direct legal services available to low-wage, mainly immigrant victims of wage theft in Denver,

Colorado and provides systematic advocacy for low-wage workers nationwide on a range of issues, including background checks. Towards Justice is currently litigating cutting-edge cases on behalf of large groups of low-wage workers, bringing claims under wage-and-hour laws, anti-discrimination laws, antitrust laws, and the FCRA. Towards Justice's FCRA litigation seeks accountability for background check companies that profit from the data of low-income people, especially people of color, without implementing basic procedures that would ensure the accuracy of the information shared with potential employers.

Legal Action Center (LAC) founded in 1973, is a national non-profit law and policy organization that works to fight discrimination against, and promote the privacy rights of, individuals with criminal records, substance use disorder histories, and/or HIV/AIDS. LAC provides direct services to approximately 2,000 clients per year. Our National H.I.R.E. (Helping Individuals with criminal records Re-enter through Employment) Network works with policy makers and advocates nationwide to promote employment and other opportunities for individuals with criminal records. Through policy advocacy, direct services, and impact litigation, LAC works to ensure compliance with the FCRA and to promote best practices. Narrowing the definition of consumer reporting agency in an age when technology is accelerating could strip job applicants with or without criminal records of

recourse under the FCRA, resulting in unfair rejection or termination from employment opportunities.

For 175 years, the **Community Service Society of New York (CSS)** has led the fight against poverty in New York City. Addressing root causes of poverty necessarily includes addressing mass imprisonment and the challenges of reentry. CSS’s Legal Department litigates on behalf of individuals and groups who suffer labor market discrimination because of their convictions; and its Next Door Project provides direct “rap sheet” related services for more than 700 people per year, in the process tackling conviction-based barriers to employment, housing, and civic participation. CSS also works for systemic change in areas its clients identify as problematic. The organization helped draft and—with labor, grassroots and faith-based support—ensure passage of the New York City Fair Chance Act, one of the strongest “ban the box” laws in the nation. Building on that effort, CSS now leads a statewide Expungement Campaign, the members of which advocate for legislation to automatically clear stale criminal records.

SUMMARY OF ARGUMENT

The majority opinion of the divided panel in *Zabriskie v. Federal National Mortgage Association* reaches broad conclusions about what does and does not satisfy its narrow interpretation of a “consumer reporting agency” pursuant to the definition set forth in the Fair Credit Reporting Act (FCRA). The opinion takes pains to distinguish the services of Defendant-Appellant Federal National Mortgage Association (Fannie Mae) and its Desktop Underwriter software from more traditional methods of assembling a credit report and evaluating the consumer information therein. But by ignoring broader context and focusing only on Fannie Mae and foreclosures, the two-judge majority misses the forest for the trees. The FCRA’s definition of a consumer reporting agency implicates the rights of various types of workers and consumers across the nation—not just potential homeowners.

Although the FCRA is perhaps best known for allowing individuals the ability to review and correct errors in credit reports, the law serves another significant purpose related to employment. The FCRA governs the responsibilities of employers and background check companies as well as the rights of working people to correct inaccuracies in their criminal history reports so that they are not unfairly denied job opportunities based on misinformation. But the FCRA’s protections extend to only those background check companies that satisfy the

definition of a consumer reporting agency (CRA). Narrowing the definition of a CRA—or creating a hefty, illogical, automation-based loophole in it—risks placing the operations of many background check companies outside the reach of the FCRA. If allowed to stand, the decision will not only unfairly deny mortgage-seeking homeowners any way to correct errors in their credit reports but will likely also deprive working people of the ability to seek redress for errors in employment background check reports, leading to unfair rejection or termination from job opportunities.

For many people, a criminal record translates directly into lost job opportunities and a lack of income. Most employers run background checks, and the results of that screening can mean the difference between a secured job and continued unemployment and economic instability. Millions of workers are plagued by the stigma of their contact with the justice system. Adding to that unfairness, rampant inaccuracies in background check reports mean that employers often mistakenly penalize job applicants for dismissed charges, expunged convictions, or even offenses the individual never committed. And even workers without a conviction history can mistakenly face the stigma of a record. For decades, the FCRA has offered individuals a means of forcing background check companies to correct those mistakes so they do not result in repeated rejections or terminations based on false information. If those profitable, powerful companies

are able to shirk liability simply by automating their processes or dishonestly misstating their technology's purpose, harmed workers across the country will be left without recourse.

ARGUMENT

I. Most employers now conduct background checks with the help of private companies and technology that make criminal records increasingly available.

In recent decades, the use of employment background checks has exploded, fueled largely by technological advances that have made such screening accessible, cheap, and quick.² See Alfred Blumstein & Kiminori Nakamura, *Redemption in the Presence of Widespread Criminal Background Checks*, 47 *Criminology* 327, 329 (2009). As recently as 1996, only half of employers conducted criminal background checks, Soc'y for Human Res. Mgmt., *Workplace Violence Survey* 19 (2004), whereas surveys now indicate that nearly nine in ten employers perform such checks for all or some positions, Soc'y for Human Res. Mgmt., *Background Checking—The Use of Criminal Background Checks in Hiring Decisions* 3 (2012), <http://bit.ly/2wJxh7U>.

Today, many states make criminal records available via the internet, and “hundreds, perhaps even thousands” of companies provide criminal record data to

² Simultaneously, state legislatures began encouraging employment background checks in numerous industries. See U.S. Dep't of Justice, Bureau of Justice Statistics, *Compendium of State Privacy and Security Legislation: 2002 Overview* 9 (2003).

users. Blumstein & Nakamura, *supra*, at 329. Nearly all—96%—of the 110 million records in state criminal history repositories are automated. SEARCH, Nat’l Consortium for Justice Info. & Statistics, *Survey of State Criminal History Information Systems, 2016*, 3 & tbl.2 (2018), <https://bit.ly/2pnzMKx>. Similarly, nearly 93% of name-based noncriminal justice background checks performed by such state repositories were received via the internet. *Id.* at 11-12 & tbl.14 (documenting 21.6 million checks via the internet out of 23.3 million total checks in 2016). Before digitization and internet access, background screeners could access records only by physically retrieving hard copies of arrest and conviction records from the courts. Nat’l Consumer Law Ctr., *Broken Records: How Errors by Criminal Background Checking Companies Harm Workers and Businesses* 11 (2012), <https://www.nclc.org/images/pdf/pr-reports/broken-records-report.pdf>.

Background check companies are now able to “build private criminal justice information libraries containing millions of criminal justice records,” by obtaining automated criminal record data in bulk from courts and agencies. SEARCH, Nat’l Consortium for Justice Info. & Statistics, *Report of the National Task Force on the Commercial Sale of Criminal Justice Record Information* 29 (2005), <http://www.search.org/files/pdf/RNTFCSCJRI.pdf>. Moreover, such commercial vendors can obtain directly from courts information on lesser offenses for which people are not fingerprinted, and is, therefore, sometimes not included in state

repositories, such as misdemeanors, traffic violations, and even bounced checks.

Id. at 34.

The background check industry is exceedingly profitable, and, as employers increasingly screen workers, background check companies grow with vigor. *See* Aaron Elstein, *Background-check Industry Under Scrutiny as Profits Soar*, *Crain's N.Y. Bus.*, June 23, 2013, <https://bit.ly/2TAmwTV>; Thomas Ahearn, *Background Check Industry Will Continue to Both Expand and Consolidate Simultaneously in 2016*, *Employment Screening Resources* (Dec. 23, 2015), <https://bit.ly/2J8JtKa>. New companies entering the market search for ways to distinguish themselves and cut costs. Innovation in the background check industry already includes automation, algorithms, and machine learning. Yoav Vilner, *These Companies Leverage AI to Disrupt Background Checks: Yes, AI is a Big Part of It*, *Inc.* (Feb. 21, 2018), <https://bit.ly/2XM7GZJ> (noting that artificial intelligence already plays a role in the industry).

As background check companies experiment with new models—from proprietary software to mobile apps—they also look for ways to place themselves outside of the reach of the FCRA liability. *See, e.g.*, Press Release, Fed. Trade Comm'n, *FTC Warns Marketers that Mobile Apps May Violate Fair Credit Reporting Act* (Feb. 7, 2012), <https://bit.ly/2H7yz5t>. To some extent, the Federal Trade Commission has rebuffed such efforts to circumvent FCRA liability through

technology and technicalities, *see* Tony Rodriguez & Jessica Lyon, *Background Screening Reports and the FCRA: Just Saying You're Not a Consumer Reporting Agency Isn't Enough*, Fed. Trade Comm'n: Bus. Blog (Jan. 10, 2013), <https://bit.ly/2EQpytW>, but the panel decision in *Zabriskie* could undermine such enforcement by narrowing the definition of CRAs and thus allowing creative background check companies to freely spread misinformation about workers. *See* Nat'l Consumer Law Ctr., *supra*, at 29-31 (describing the “disturbing trend among background checking agencies . . . to circumvent the [FCRA] through disclaimers and clever contracting”).

II. A record often means immediate rejection by potential employers, especially for job applicants of color, leading to economic instability.

The millions of background checks performed each year mean significantly reduced job prospects, and thus diminished income, for those with records. Nearly two-thirds of employers report via survey that they “probably or definitely would not” hire an individual with a criminal record. Devah Pager & Bruce Western, Nat'l Inst. of Justice, *Investigating Prisoner Reentry: The Impact of Conviction Status on the Employment Prospects of Young Men* 20 (2009). Many employers decline to even consider, let alone hire, a job applicant after discovering a criminal record. One prominent study found that indicating a record halved the callback

rate³ for white applicants from 34% to 17%. Devah Pager, *The Mark of a Criminal Record*, 108 Am. J. of Sociology 937, 955-56 (2003), <http://bit.ly/1vNQBJk>. Yet white applicants *with* records received more callbacks than Black applicants *without* records, the callback rate for whom was just 14%. *Id.* at 957-58. And Black candidates with records were penalized even more significantly than white applicants, with their callback rate reduced by almost two-thirds to 5%. *Id.*

A record need not even be recent, severe, or substantiated for it to inhibit job prospects. One study of individuals seeking expungement of past records in Illinois revealed that their records continued to significantly inhibit their employment prospects for many years, even if the offense was minor or the person had been arrested but not convicted. Simone Ispa-Landa & Charles E. Loeffler, *Indefinite Punishment and the Criminal Record*, 54 Criminology 387, 36-40 (2016), <http://bit.ly/2ngY3zn>. Furthermore, people with records don't lose job opportunities at only the front-end; instead, with the increasing trend of continuous background checks, even hardworking and dependable employees can find themselves abruptly terminated because of a record. *See, e.g.,* Roy Maurer, *More*

³ *See also* Scott Decker et al., *Criminal Stigma, Race, Gender, and Employment: An Expanded Assessment of the Consequences of Imprisonment for Employment* (2014), <https://bit.ly/2HdAUvG> (addressing effect of record on likelihood of receiving interview).

Employers Try Continuous Background Screening, Soc’y for Human Resource Mgmt. (Sept. 20, 2018), <https://bit.ly/2T0msIO>.

Reduced job opportunities harm the short- and long-term economic outlook of those with records as well as the broader economy. Previously incarcerated men take home an average of 40% less pay each year than those without incarceration history, adding up to nearly \$179,000 in lost earnings by age 48. Bruce Western & Becky Pettit, Pew Charitable Trusts, *Collateral Costs: Incarceration’s Effect on Economic Mobility* 6 (2010). And the income penalty is even more acutely felt by people of color: an incarceration record reduces the total lifetime earnings of white males by two percent, Latino males by six percent, and Black males by nine percent. *Id.* at 4.

The employment barriers facing people with records create financial difficulties not just for individuals and their families; these barriers also undermine the health of the nation’s overall economy. A study of 2014 data estimated that reduced employment prospects for people with felony conviction records translated into a loss of about \$78 to \$87 billion in annual gross domestic product.⁴ Cherrie Bucknor & Alan Barber, Ctr. for Econ. & Policy Research, *The Price We Pay:*

⁴ Because most people with a record do not have a *felony conviction* record, this figure likely understates the economic cost of records.

Economic Costs of Barriers to Employment for Former Prisoners and People Convicted of Felonies 1 (2016), <https://goo.gl/h3L6wr>.

Significant harm can result from inaccurate criminal history information reported by background check companies. Because of the potential for lost employment and diminished wages, working people must have access to the courts to force background check companies to correct errors in their personal data and hold accountable those agencies that fail to do so.

III. An enormous population—disproportionately people of color—will likely be harmed by reduced ability to demand the correction of background check errors via the FCRA.

Any worker—with or without a record—can be harmed by an inaccurate employment background check report. A person without a record may find that another person’s conviction history shows up on his or her report, especially if the person has a common name or the company uses unreliable algorithms. Nat’l Consumer Law Ctr., *supra*, at 15-19; *see also* Todd Feathers, *Lawsuits Allege Gig-economy Workers Fall Victim to Checkr’s Artificial Intelligence* (Mar. 3, 2019), <https://bit.ly/2VBNsA7> (reporting that over 40 FCRA lawsuits have been filed against one background screening company that uses “modern software and technology” for reporting false information).

People with an arrest or conviction record can face a variety of additional errors that exaggerate or misreport their criminal histories. Common errors include

reporting sealed or expunged records, failing to report that charges were dropped or the individual exonerated, reporting single arrests or incidents multiple times, or misclassifying an offense as something more serious. Nat'l Consumer Law Ctr., *supra*, at 20-29; *see also* Maurice Emsellem & Madeline Neighly, Nat'l Emp't Law Project, *Wanted: Accurate FBI Background Checks for Employment* (2013), <https://bit.ly/2HjpSEl>. Therefore, people with records are the population most likely to be harmed by rampant background check company errors.

A staggering number of people in the United States have records in the criminal justice system. Over 70 million people—or nearly one in three U.S. adults—have an arrest or conviction record that can be revealed through a background check. Anastasia Christman & Michelle Natividad Rodriguez, Nat'l Emp't Law Project, *Research Supports Fair Chance Policies* 1 & n.1 (2016), <http://bit.ly/1sk48Nn> (citing SEARCH, Nat'l Consortium for Justice Info. & Statistics, *Survey of State Criminal History Information Systems, 2012*, 2 (2014), <http://bit.ly/2m1uC4U>); *see also* Gary Fields & John R. Emshwiller, *As Arrest Records Rise, Americans Find Consequences Can Last a Lifetime*, Wall St. J., Aug. 8, 2014, <http://on.wsj.com/2lV1viR> (reporting that the names of over 77 million individuals appear in the FBI master criminal database). Put differently, nearly half of U.S. children have at least one parent with a record, Rebecca Vallas, et al., Ctr. for Am. Progress, *Removing Barriers to Opportunity for Parents with*

Criminal Records and Their Children 1 (2015), <https://goo.gl/8c2BZL>, meaning that families also suffer when individuals with records face reduced job prospects.

Perhaps even more startling than the number of people marked by the criminal justice system is the severe race disparity among that population. People of color are more likely to have records and are, therefore, more likely to have their records misreported by a background screening company. Nationally, African Americans make up twice the percentage of arrests as their share of the population. Compare Fed. Bureau of Investigation, *Crime in the United States, 2015: Overview Table 43* (2016), <http://bit.ly/2m0yMf5> (noting 26.6% of 2015 arrests were of black or African American people), with U.S. Census Bureau, *Quickfacts: United States*, <http://bit.ly/2m1NMFZ> (indicating that 13.3% of the U.S. population was black or African American in 2015). Black men are especially impacted, with nearly 50% arrested by age 23 versus approximately 30% for the general population. Robert Brame, et al., *Demographic Patterns of Cumulative Arrest Prevalence by Ages 18 and 23*, 60 *Crime & Delinquency* 471, 471-86 (2014).

Workers with records and workers of color already face tremendous barriers to employment and reduced job prospects compared with other working people in this country. See Janelle Jones, et al., Economic Policy Inst., *50 Years After the Kerner Commission 3* (2018), <https://www.epi.org/files/pdf/142084.pdf> (“[T]he

unemployment rate for black workers is consistently about twice as high as it is for white workers.”); Lucius Couloute & Daniel Kopf, Prison Pol’y Initiative, *Out of Prison & Out of Work* (2018), <https://bit.ly/2Jbib0t> (stating that, in 2008, workers with incarceration records faced an unemployment rate greater than the overall unemployment rate at the peak of the Great Depression). When compounded by inaccuracies in background check reports, these groups of working people can be extremely disadvantaged. By narrowing the FCRA’s definition of a consumer reporting agency to exclude companies that automate their reporting or purport to create reports for a non-employment purpose, the two-judge panel majority takes away one of the few avenues for legal recourse available to these already vulnerable workers.

CONCLUSION

The majority opinion of the divided panel adopts a narrow view of what qualifies as “assembling or evaluating” consumer information “for the purpose of furnishing consumer reports to third parties.” 15 U.S.C. § 1681a(f). By restricting the definition of a CRA in this way, the panel opens the door to criminal background check companies avoiding the FCRA’s requirement to “follow reasonable procedures to assure maximum possible accuracy of the information,” 15 U.S.C. § 1681e(b), through their use of technology and automation as well as by carefully misstating the purpose of their reports. Without the threat of FCRA

liability, companies in the competitive background check industry will cut costs by reducing their procedures to ensure accuracy, and individuals will lack legal recourse. Working people will forfeit job opportunities and income as their records become increasingly inaccurate.

In light of the importance of these issues and their significant impact on the lives of workers, especially those with records and workers of color, the Court should grant rehearing or rehearing en banc.

Respectfully submitted,

Dated: March 11, 2019

NATIONAL EMPLOYMENT LAW PROJECT

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