

No. 17-859

IN THE
Supreme Court of the United States

THE HERTZ CORPORATION AND DOLLAR THRIFTY
AUTOMOTIVE GROUP, INC.,
Petitioners,

v.

SUPERIOR COURT FOR THE CITY AND COUNTY OF SAN
FRANCISCO; PETER LEE; AND LATONYA CAMPBELL,
Respondents.

On Petition for Writ of Certiorari to the California Court
of Appeal, First Appellate District

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF
CERTIORARI

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STATEMENT OF JURISDICTION

Respondents do not agree with Petitioners' Statement of Jurisdiction (Pet. at 5), and state that this Court does not have jurisdiction. Respondents direct the Court to their Argument, at Section I, below.

INTRODUCTION

Petitioners in this case seek interlocutory review of a routine and unpublished decision by a California state trial court, applying California law. Two California appellate courts have already declined to review this decision, and this Court should do the same. Not only would review of this case be procedurally improper because there is no final decision below, this case also presents no substantial federal question because this Court has already resolved the relevant issues.

ARGUMENT

I. This Court Lacks Jurisdiction to Review this Interlocutory Appeal.

Petitioners assert without elaboration that this Court has jurisdiction to review the California Supreme Court's decision. (*See* Pet. at 5.) However, this Court's jurisdiction extends only to "[f]inal judgments or decrees" of a state's highest court, 28 U.S.C. § 1257, and the decision below is plainly not final. This Court, therefore, lacks jurisdiction and must deny the petition.

To be reviewable by this Court, a state court judgment “must be the final word of a final court.” *Jefferson v. City of Tarrant*, 522 U.S. 75, 81 (1997) (internal quotation marks omitted). Ordinarily, to invoke this Court’s jurisdiction, a petitioner must demonstrate that a state court judgment is not subject to “further review or correction” and does not constitute a “merely interlocutory or intermediate step[]” in the litigation. *Id.* (internal quotation marks omitted). This finality rule “is not one of those technicalities to be easily scorned. It is an important factor in the smooth working of our federal system.” *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 124, 65 S. Ct. 1475, 1478, 89 L. Ed. 569 (1945).

Petitioners do not meet this standard. Here, the California Supreme Court, in a single-sentence order, declined to accept Petitioners’ discretionary interlocutory appeal, which the California Court of Appeal had also declined to accept. (Pet., App. A and B.) Petitioners were (and are) attempting to appeal from an unpublished decision from the San Francisco County Superior Court, overruling Petitioners’ demurrer. (Pet., App. C.) A demurrer, in California state court, is similar to a Rule 12(b) motion in federal court – it is a motion based entirely on the pleadings, prior to any discovery. Decisions denying a demurrer are not final, and are ordinarily not appealable in the California state court system. *See, e.g., Edenbaum v. Ralphs Grocery Co.*, No. D041700, 2004 WL 2360255, at *7 (Cal. Ct. App. Oct. 5, 2004) (declining to hear appeal from order overruling demurrer, noting that “an appeal following final judgment is generally

considered to be an adequate remedy for an erroneous order overruling a demurrer.”). Here, both the California Supreme Court and the California Court of Appeals recognized the interlocutory nature of Petitioners’ attempted appeal, and properly declined to hear the case.

The trial court’s order overruling the demurrer is not final in any sense. It did not end the litigation or, importantly, the dispute over standing. Rather, it allowed the matter to proceed to discovery, where, after further development of the facts of this matter, Petitioners have the ability to renew their argument regarding standing. *See Flores v. Georgeson*, No. F061787, 2012 WL 2088220, at *3 (Cal. Ct. App. June 11, 2012) (noting that, on summary judgment, with the benefit of evidence, a trial court may reach a different outcome than it did on demurrer). Furthermore, after judgment, Petitioners will have the ability to appeal this issue to the California appellate courts in the normal course. An appeal of this issue after judgment would be an appeal of right, meaning the Court of Appeals would be obliged to take the case, and opine on the merits. Cal. Civ. Proc. Code § 904.1(a). After that, a petition for appeal could be taken to the California Supreme Court. Cal. R. Ct. 8.500. Therefore, the opinion below is simply not the final word from a final court. The decision from which Petitioners seek review is without question an interlocutory or intermediate step in the litigation, and this Court therefore lacks jurisdiction. 28 U.S.C. § 1257; *Jefferson*, 522 U.S. at 81. The petition must be denied.

II. The Decision Below Raises No Constitutional Questions.

The question of whether state courts may provide a forum for federal causes of action, even when federal courts might not, has been settled for decades:

We have recognized often that the constraints of Article III do not apply to state courts, and accordingly the state courts are not bound by the limitations of a case or controversy or other federal rules of justiciability even when they address issues of federal law, as when they are called upon to interpret the Constitution or, in this case, a federal statute.

ASARCO Inc. v. Kadish, 490 U.S. 605, 617 (1989) (citing *Pennell v. San Jose*, 485 U.S. 1, 8, (1988); *City of Los Angeles v. Lyons*, 461 U.S. 95, 113 (1983); *Doremus v. Bd. of Ed. of Borough of Hawthorne*, 342 U.S. 429, 434 (1952); *Secretary of State of Md. v. J.H. Munson Co.*, 467 U.S. 947, 971, (1984) (Stevens, J., concurring); *Bateman v. Arizona*, 429 U.S. 1302, 1305 (1976) (Rehnquist, J., in chambers); cf. *Highland Farms Dairy, Inc. v. Agnew*, 300 U.S. 608, 612 (1937)).

The Fair Credit Reporting Act (“FCRA”) provides that claims may be brought in “any court of competent jurisdiction” which includes states courts. 15 U.S.C. § 1681p. Indeed, this Court very recently reaffirmed that there exists a “presumption in favor

of concurrent state court jurisdiction’ when interpreting federal statutes.” *Cyan, Inc. v. Beaver Co. Employees Ret. Fund*, Slip Op. at 7 n. 2 (Mar. 20 2018), *quoting Mims v. Arrow Fin. Servs., LLC*, 565 U.S. 368, 378 (2012); *Tafflin v. Levitt*, 493 U.S. 455, 458–459 (1990). This principle has also long been recognized by leading constitutional law scholars:

[S]tate courts, if consistent with their own constitutions, may hear the federal claims of litigants who would not have standing to adjudicate them in federal court. This reflects the conclusion that federal standing requirements, whether dictated by Article III or suggested by policy, all arise out of institutional concerns peculiar to the federal judiciary and its special role and are therefore irrelevant to the question of what more generous standing rules a state may adopt if it chooses to do so.

Tribe, Am. Con. L. (2d ed. 1988), p. 112–113 (footnotes omitted). The decision below is entirely consistent with this principle. Not only do Petitioners offer no reason why this Court should depart from this settled law, Petitioners inexplicably fail to even mention this well-established and controlling body of law in the petition.

Petitioners also seek relief that this Court cannot provide. The decision below rests on a state court’s resolution of a state law question. In the

opinion below, the California court based its decision on principles of standing under California law. (*See* Pet., App. C, 8a-12a (determining that, under California law, Respondents have standing to pursue their claims in California courts).) This Court, of course, cannot and should not opine on such state law questions.

Even a cursory review of the question presented, as formulated by Petitioners, makes clear that this case cannot be decided by this Court. Petitioners ask this Court to decide:

Whether a class action seeking statutory damages for alleged procedural violations of the Fair Credit Reporting Act, 15 U.S.C. §§ 1681-1681x, can proceed in state court where plaintiffs did not suffer any concrete, real-world injury-in-fact.

(Pet. at i.) Of course, absent a Congressional command depriving the state court of jurisdiction over the claim, the question of whether a case can proceed in state court is entirely a question of state law, and outside the domain of this Court. *ASARCO*, 490 U.S. at 617.

Petitioners' position on the merits is similarly untenable. Petitioners would have this Court hold that when state courts are considering federal causes of action, they are bound by the limits of Article III standing. This cannot be the case, as Article III, by

its own terms, only limits the jurisdiction of *federal* courts. *ASARCO*, 490 U.S. at 617.

That Article III constrains only the federal courts is also fatal to Petitioners' other argument, which is that Article III somehow constrains Congress. In making this argument, Petitioners take two quotations from this Court badly out of context.¹ In both quotations, this Court made the point that Article III provides a firm limit on what cases federal courts could hear, and that limit could not be expanded legislatively. In neither case did this Court say that Article III provides a substantive limit on Congress' legislative power.

Petitioners' argument therefore conflates a plaintiff's standing with a statute's constitutionality. In *Spokeo*, for example, this Court held that the lower courts' evaluation of standing was insufficient, and remanded for further review. Even if this Court had held that the particular plaintiff in that case lacked standing, this Court would not have gone on to hold that the FCRA is unconstitutional. That, however, is what Petitioners seek here: a declaration that, because Respondents have asserted a cause of action under the FCRA, but allegedly have no Article III

¹ Pet. at 15, quoting *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547-48 (2016) ("Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing.") and *Gladstone Realtors v. Vill. of Bellwood*, 441 U.S. 91, 100 (1979) ("[I]n no event . . . may Congress abrogate the Art[icle] III minima [that] a plaintiff must . . . have suffered a distinct and palpable injury to himself . . .").

standing, the FCRA must be unconstitutional. This does not follow logically and is unwarranted in any event, as the power of Congress is unconstrained by Article III.

Finally, wading into this issue would create a jurisdictional morass. In *Howlett By and Through Howlett v. Rose*, 496 U.S. 356 (1990), this Court held that a state court violates the Supremacy Clause when it refuses to hear federal causes of action while at the same time providing a forum for similar state causes of action, because “a state court may not deny a federal right, when the parties and controversy are properly before it, in the absence of valid excuse.” 496 U.S. at 369 (quotation omitted). Now, Petitioners would have this Court add a new rule, that state courts *may not* hear federal claims that could not be heard in federal court. This would create a difficult tightrope for every state court presented with a federal cause of action: refuse to hear the case, and potentially violate the Supremacy Clause; hear the case, and potentially violate Article III. There is no justification for imposing such a burden on state courts.

III. The Decision Below Applied the Correct Zone-of-Interests Standard.

Petitioners argue that the Superior Court did not conduct the correct zone-of-interests review, apparently because it did not cite the Court’s recent decision in *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1388 (2014). However, the Superior Court did conduct a zone-of-

interests inquiry, relying on California precedents, and determined that “Plaintiffs’ claims fall within the zone of interests protected by the FCRA.” (Pet., App. C at 13a.) Petitioners make no attempt to explain why the outcome of this inquiry would have been different if it had included a citation to *Lexmark*, nor do Petitioners make any effort to explain why this Court should grant an interlocutory appeal of an unreported state trial court decision to correct this alleged error. Petitioners make no effort to claim that this issue is one of sufficient import to warrant Supreme Court review; it is not. *See* S.C. R. 10 (“a petition for a writ of certiorari is rarely granted when the asserted error consists of...the misapplication of a properly stated rule of law”).

Furthermore, it is clear that Respondents are within the zone of interests protected under the FCRA. The individuals protected by the FCRA are consumers upon whom reports are issued and whose rights under the statute have been violated – a group which unquestionably includes Respondents. 15 U.S.C. § 1681n provides that “[a]ny person who willfully fails to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer....” Petitioners do not contest that Respondents are consumers as defined by the statute, and Respondents have plead that Petitioners have failed to comply with the FCRA with respect to them. As a textual matter, there is no question that the FCRA includes Respondents in its zone of interests.

This is also true as a logical matter, with respect to both of the causes of actions alleged. Section 1681b(b)(2) requires that prospective employers provide prospective employees a “clear and conspicuous” disclosure in a document that consists “solely” of the disclosure prior to obtaining a consumer report on them for employment purposes. The statute also requires the consumer’s written authorization. The purpose is to ensure that prospective employees are put on notice that the employer intends to investigate their background, and that they consent thereto. This notice, in turn, serves many purposes – primarily to ensure that consumers give informed consent before an invasive and potentially life-changing report is created about them by a third party background check company and provided to a potential employer. The intent of Congress was that all job applicants upon whom an employer intends to procure a report receive notice, in a document consisting solely of the disclosure. Respondents are among those Congress intended to protect and are therefore within the statute’s zone of interest.

Section 1681b(b)(3) requires that if an employer intends to take an adverse employment action on the basis of a consumer report, it must first provide the prospective employee with notice and a copy of the report. The purpose of this provision is manifestly clear, as is the population Congress intended to protect: Congress intended to protect those who were at risk of suffering an adverse action because of a background check, and it wanted those individuals to have the opportunity to review their

reports, dispute any inaccuracies and/or explain their history to their prospective employers. Respondents, individuals who were not hired because of their background checks, and who were denied this notice, are in the population Congress intended to protect. That their reports may not have had inaccuracies is irrelevant: Respondents were denied what Congress intended them to have – the ability to review, dispute and/or explain their reports. *See, e.g., Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 543 (1985) (noting the “obvious value” of the ability of employee to “present his side of the case” in employment decisions). Courts routinely recognize that those in similar circumstances can pursue statutory damages under the FCRA.²

IV. Petitioners’ Harms are Hypothetical.

Unable to muster a meaningful constitutional question, Petitioners resort to speculating about potential forum shopping and inconsistent interpretations of the FCRA. However, Petitioners are unable to point to even one instance where a state court has decided a substantive FCRA issue in a manner inconsistent with federal holdings.³

²*See, e.g., Manuel v. Wells Fargo Bank, N.A.*, 123 F. Supp. 3d 810 (E.D. Va. 2015); *Singleton v. Domino's Pizza, LLC*, No. 11-1823, 2012 WL 245965 (D. Md. Jan. 25, 2012); *Graham v. Pyramid Healthcare Sols., Inc.*, No. 16-CV-1324, 2016 WL 6248309 (M.D. Fla. Oct. 26, 2016); *Thomas v. FTS USA, LLC*, 193 F. Supp. 3d 623 (E.D. Va. 2016).

³ That the state court in this case found standing while the federal court did not is not such an example; as pointed out above, the law of standing differs in federal court and state court.

Furthermore, Petitioners' evident mistrust of state courts to administer federal claims is utterly inconsistent with the holdings of this Court:

This Court has long made clear that federal law is as much the law of the several States as are the laws passed by their legislatures. Federal and state law together form one system of jurisprudence, which constitutes the law of the land for the State; and the courts of the two jurisdictions are not foreign to each other, nor to be treated by each other as such, but as courts of the same country, having jurisdiction partly different and partly concurrent.

Haywood v. Drown, 556 U.S. 729, 734–35 (2009) (citations and quotation omitted); *ASARCO*, 490 U.S. at 618 (“Although the state courts are not bound to adhere to federal standing requirements, they possess the authority, absent a provision for exclusive federal jurisdiction, to render binding judicial decisions that rest on their own interpretations of federal law.”) (citing 28 U.S.C. § 1738; *Grubb v. Public Utilities Comm'n of Ohio*, 281 U.S. 470 (1930)).

Because state courts are and always have been a proper forum for federal claims to be heard, filing such claims in state court is simply not forum shopping, in any meaningful sense of the term. This is not a situation where Respondents have filed in a

What Petitioners cannot offer is an example of a state court actually misapplying the *substance* of the statute.

certain forum for unfair strategic advantage; rather, the federal courts arguably lack jurisdiction to hear Respondents' claims, leading Respondents to file their meritorious claims in a court where they unquestionably do have jurisdiction.⁴

CONCLUSION

For the forgoing reasons, the petition should be denied.

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⁴ Furthermore, even accepting Petitioners' forum-shopping argument on its own terms, Petitioners are unable to muster any convincing evidence in support. The most dramatic numbers cited by Petitioners simply show an increase in FCRA filings in federal court, prior to *Spokeo*. (Pet. at 22 ("FCRA filings in California federal courts have increased by more than 300% over the past five years, from approximately 213 filings in 2011 to more than 700 in 2016.")) No numbers are given post-*Spokeo*, and the numbers related to state court filings are decidedly underwhelming. (*Id.* ("Approximately 71 FCRA cases were filed in California state court in the two years preceding the underlying writ petition, compared to 35 FCRA cases filed in the two years before that").) If *Spokeo*, which was decided nearly two years ago, actually unleashed a tsunami of FCRA claims in state court, Petitioners should be able to muster more convincing evidence showing it.

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