

No. 17-859

IN THE
Supreme Court of the United States

THE HERTZ CORPORATION *et al.*,
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**

PETITIONERS' REPLY BRIEF

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INTRODUCTION

Plaintiffs do not seriously contest that their putative class action alleges bare procedural violations of a federal statute (the FCRA) and seeks to win millions of dollars in statutory damages on behalf of thousands of individuals who have suffered no actual injury. The California Superior Court wrongly allowed those claims to proceed in state court even though a federal district court previously dismissed them due to the Plaintiffs' failure to allege any real world, concrete injury. The California Court of Appeal summarily denied Hertz's petition for a writ of mandate, and the California Supreme Court denied Hertz's petition for review. Plaintiffs' Opposition now advances four arguments against granting the Petition. None withstand scrutiny. This Court should exercise its certiorari jurisdiction to decide the important question of whether class actions seeking statutory damages for alleged procedural violations of the FCRA, where the plaintiffs do not allege any concrete, real-world injury-in-fact, can proceed in state court.

ARGUMENT

I. THIS COURT HAS JURISDICTION FOLLOWING TERMINATION OF ORIGINAL WRIT PROCEEDINGS IN THE CALIFORNIA APPELLATE COURTS

This Court can exercise its certiorari jurisdiction over this case because the California Supreme Court's decision denying review of the California Court of Appeal's denial of Hertz's petition for a writ of mandamus is a final judgment. 28 U.S.C. § 1257. Plaintiffs characterize Hertz's mandamus petition as an interlocutory appeal from a "trial court's order overruling [a] demurrer." (Opp. at 3.) But the California

Supreme Court's decision denying review in this case is an order from California's highest court disposing of a writ petition. Under the controlling cases cited in the Petition and conspicuously ignored by the Plaintiffs, it is a final judgment reviewable under 28 U.S.C. § 1257. *See Madruga v. Superior Court*, 346 U.S. 556, 557 n.1 (1954); *Bd. of Educ. of City of Los Angeles v. Superior Court*, 448 U.S. 1343, 1346 (1980) (Rehnquist, J.); *cf. Fisher v. District Court*, 424 U.S. 382, 385 n.7 (1976) ("A judgment that terminates original proceedings in a state appellate court, in which the only issue decided concerns the jurisdiction of a lower state court, is final even if further proceedings are to be had in the lower court.") (citations omitted).

Contrary to Plaintiffs' characterization of the posture of this case, this Court has repeatedly exercised its certiorari jurisdiction to review orders terminating original writ proceedings in the California appellate courts. *See Madruga*, 346 U.S. at 557 n.1. (reviewing California Supreme Court's denial of a writ of prohibition); *Bandini Petroleum Co. v. Superior Court*, 284 U.S. 8, 14 (1931) (granting review following denial by California Court of Appeal of writ of prohibition, and further denial of review by California Supreme Court); *see also Bd. of Educ. of City of Los Angeles*, 448 U.S. at 1346 ("In this action, the Board's petition for a writ of mandamus and/or prohibition was a distinct lawsuit which was fully and finally determined by the California Supreme Court's judgment . . ."). There is no genuine question whether this Court can exercise its certiorari jurisdiction over this case.

II. THE QUESTION PRESENTED IS RIPE FOR REVIEW AND WILL LIKELY EVADE REVIEW IF NOT HEARD NOW

This Court should review the important question presented by Hertz’s Petition now – not after the parties have spent additional years and millions of dollars in litigation. Nor should this Court force Hertz to risk a windfall judgment requiring it to pay tens of millions of dollars to Plaintiffs and a class who have suffered no injury. Absent a grant of certiorari, the reality is that Hertz (and defendants in many other class actions like this one) will likely be forced to settle, and the important issues raised here will continue to evade this Court’s review. As this Court correctly noted in *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011), when “faced with even a small chance of a devastating loss, defendants will [often] be pressured into settling questionable [class] claims.”

This Court has identified several categories of cases that are “final” for purposes of exercising certiorari jurisdiction, despite the fact that the underlying state court proceedings have not terminated. See *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 477-83 (1975). This case closely mirrors at least one of those categories: “situations where the federal issue has been finally decided in the state courts with further [state court] proceedings pending in which the party seeking review here might prevail on the merits [in state court] . . . , thus rendering unnecessary review of the federal issue by this Court, and where reversal of the state court on the federal issue would be preclusive of any further litigation [in state court] on the relevant cause of action” *Id.* at 482-83. “In these circumstances, if a refusal immediately to review the state-court decision might seriously erode federal

policy, the Court has entertained and decided the federal issue.” *Id.* at 483. Here, if Hertz successfully defends against Plaintiffs’ claims on the merits, or settles them rather than betting the farm at trial, the important question presented by this writ petition will never be reviewed by this Court. Permitting uninjured Plaintiffs to pursue FCRA damages claims in state court would erode federal policies of uniformity in the application of a federal statute (*see* Section IV *infra*), and the injury requirements set forth in *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1388 (2014), and like cases (*see* Section III *infra*).

Hertz and other similarly situated defendants will suffer irreparable harm if this matter proceeds without intervention by this Court. Hertz will have to spend millions of dollars on further litigation, risk an adverse judgment, and hope that a California appellate court, or this Court, will ultimately step in and correctly apply federal law. There can be little doubt that it would “serve the policy underlying the requirement of finality . . . to determine now” whether no-harm FCRA claims can proceed in state court, “rather than subject [the parties] to long and complex litigation which may all be for naught if consideration of [this] preliminary question . . . is postponed until the conclusion of the [state court] proceedings.” *Mercantile Nat. Bank at Dallas v. Langdeau*, 371 U.S. 555, 558 (1963).

III. THIS COURT SHOULD GRANT REVIEW TO CONFIRM THAT *LEXMARK*’S ZONE-OF-INTERESTS TEST APPLIES IN STATE COURT AND CANNOT BE SATISFIED ABSENT ACTUAL INJURY

Plaintiffs contend that the Superior Court applied the zone-of-interests test set forth in *Lexmark*, but the

Superior Court’s failure even to mention *Lexmark*, or to address the crux of Hertz’s argument based thereon, belies this assertion. The Superior Court’s decision merely stated, without analysis of federal law, that if the zone-of-interests test were to apply, Plaintiffs’ “**claims**” fell within the zone-of-interests protected by the FCRA. (Pet. App. 13a (emphasis added).) But the zone-of-interests test does not assess “claims” – it assesses whether a federal statutory violation resulted in “harm” or “injury” to the Plaintiffs’ interests that the statute was designed to protect. *Lexmark*, 134 S. Ct. at 1388-90 and n.5. It follows that if Plaintiffs do not plausibly allege that they have been “harmed” or “injured,” they cannot satisfy the test. The Superior Court did not address this argument; had it done so, this suit would have been dismissed. The California appellate courts’ failure to remedy this error now ensures – absent intervention by this Court – that no-harm FCRA claims will find a comforting home in the state courts of California, if nowhere else.

Such a result would be untenable and directly conflict with this Court’s controlling precedent. This Court has “made clear” that the zone-of-interests test “[a]pplies to all statutorily created causes of action; that it is a requirement of general application; and that Congress is presumed to legislate against the background of the zone-of-interests limitation.” *Id.* at 1388 (internal quotes and brackets omitted). Accordingly, the test provides an “analytical framework for determining a party’s standing to maintain an action” under a federal statute in federal **and state** court. *Id.* at 1385.

In *Bank of America Corporation v. City of Miami, Fla.*, the Court recently applied *Lexmark* to claims brought under the Fair Housing Act and held that

merely alleging some “foreseeable” financial injury from an alleged violation of a federal statute was insufficient to establish proximate cause. 137 S.Ct. 1296, 1302-07 (2017). Rather, a plaintiff must allege “some direct relation between the *injury* asserted and the *injurious* conduct alleged.” *Id.* at 1299 (citations omitted, emphasis added). Thus, this Court left no doubt that the touchstone for pursuing damages claims under a federal statute is actual “injury.” Here, it is undisputed that Plaintiffs failed to allege that they suffered any injury-in-fact. The Court should grant review to confirm that such claims cannot proceed in any court – federal or state – as a matter of substantive federal law.

IV. ARTICLE III’S INAPPLICABILITY TO STATE COURTS HAS NO BEARING ON WHETHER FEDERAL UNIFORMITY AND CONSTITUTIONAL AVOIDANCE DOCTRINES PRECLUDE NO-HARM FCRA CLAIMS IN STATE COURT

Contrary to Plaintiffs’ assertions, Hertz does not argue that Article III applies to state courts, that the FCRA is unconstitutional, or that state courts cannot hear FCRA cases. Instead, Hertz stands on the unremarkable proposition that the constitutional avoidance doctrine and federal uniformity principles mandate a construction of the FCRA that requires plaintiffs to allege actual injury in order to pursue damages claims in any court. (Pet. at 14-18.)

Plaintiffs cite a number of cases and Professor Tribe’s constitutional law treatise for the proposition that state courts may interpret federal law in cases that cannot be heard in federal court due to Article III constraints. (Opp. at 4-8.) This is true as far as it goes, but it says nothing about the question presented by

this Petition: whether a class action seeking statutory damages for alleged FCRA procedural violations can proceed in state court where Plaintiffs have failed to allege any concrete injury-in-fact. None of Plaintiffs' cited authorities supports their contention that Article III's inapplicability to state courts somehow obviates the presumption that federal enactments must be applied uniformly and not based on variations in state law. *See Jerome v. United States*, 318 U.S. 101, 104 (1943); *see also Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 43 (1989).

In fact, the primary authority on which Plaintiffs rely, *ASARCO Inc. v. Kadish*, stands for the opposite conclusion: that the federal courts, and ultimately this Court, must have the last word on matters of federal law. 490 U.S. 605, 621-22 (1989) (“[T]his Court is responsible for assuring that state courts will not be the final arbiters of important issues under [] federal [law] . . . [and] that the binding application of federal law is uniform and ultimately subject to control by this Court.”) (internal quotes and citations omitted). Yet Plaintiffs' position would permit the California courts to decide whether they can hear no-harm FCRA claims irrespective of contrary decisions from this Court (or lower federal courts), and irrespective of whether federal law permits California to breathe life into FCRA cases that are dead-on-arrival in the federal courts. While a FCRA defendant could theoretically risk an adverse judgment, undertake years of expensive (and likely quixotic) appeals in the California appellate courts, and then hope that this Court exercises its discretion to review the case as the “final arbiter,” in reality, the pressure to settle will likely be too great. As a practical matter, absent review now, this Court may never have the final word

on the viability of no-harm FCRA cases filed in California state courts.

Moreover, in *ASARCO*, the plaintiffs did not seek damages. Rather, they sought injunctive relief and a declaration that a state statute governing mineral leases on state lands was void because it conflicted with federal law. *Id.* at 610. Because the state court had rendered a judgment that caused specific injury, a decree which rested on principles of federal law, this Court determined that the petitioners there had standing to seek this Court's review. *Id.* The Article III issues presented in *ASARCO*, and this Court's resolution of them, have nothing to say about the question presented by this Petition.

The other cases cited by Plaintiffs for the noncontroversial principle that Article III does not apply to state courts are equally inapposite. Plaintiffs have not pointed to a single case in which an uninjured plaintiff was permitted to seek damages under a federal statute in state court, or that allowed a state court to hear such a case *after* a federal court has already ruled that the claims failed because the plaintiffs had not alleged injury-in-fact. *See Pennell v. San Jose*, 485 U.S. 1 (1988) (state court action challenging the constitutionality of a California rent control ordinance); *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983) (state court action for injunctive and declaratory relief based on an allegedly unconstitutional police chokehold policy); *Doremus v. Board of Ed. Of Borough of Hawthorne*, 342 U.S. 429 (1952) (state court action for declaratory judgment on a question of federal constitutional law); *Secretary of State of Md. v. J.H. Munson Co.*, 467 U.S. 947 (1984) (action brought for declaratory and injunctive relief against state official challenging state statute); *Bateman v. Arizona*, 429 U.S. 1302 (1976)

(application for bail pending certiorari or, in the alternative, application for stay of mandate of the state supreme court); *Highland Farms Dairy, Inc. v. Agnew*, 300 U.S. 608 (1937) (action for injunctive relief contending that the state law was unconstitutional under the Fourteenth Amendment). Nor does Professor Tribe’s constitutional law treatise cite any authority that purports to address the circumstances presented here. *See Tribe*, Am. Con. L. § 3-15 n.10 (2d ed. 1988) (collecting authority, none of which involves claims for damages under a federal statute).

Lastly, Plaintiffs cite *Howlett By and Through Howlett v. Rose*, for the proposition that a “state court may not deny a federal right, when the parties and controversy are properly before it, in the absence of a valid excuse.” 496 U.S. 356, 369 (1990). Plaintiffs claim that this general rule would create a “jurisdictional morass” because state trial courts would be confused about whether they could hear no-harm FCRA claims, but this argument is easily refuted based on the very language Plaintiffs quote from *Howlett*. Uninjured FCRA plaintiffs would not be “properly before” the state court, because the “presumption of validity” and “constitutional avoidance” doctrines require the statute to be interpreted to preclude no-harm claims. There is no “federal right” to damages for uninjured would-be plaintiffs. (*See Pet.* at 16-17.) Moreover, state courts would have a “valid excuse” (in the form of federal uniformity principles) not to entertain such claims, since they could not be heard in federal court or other state courts that adhere to federal standing rules.

V. RECENT DECISIONS IN OHIO AND MISSOURI CONTRARY TO THE CALIFORNIA COURTS' DECISIONS BELOW SHOW THAT INCONSISTENT APPLICATION OF THE FCRA AND FORUM SHOPPING CONCERNS ARE NOT MERELY HYPOTHETICAL

Permitting Plaintiffs to proceed with their no-harm FCRA claims in California state court will result in disparate dispositions of identical claims between federal and state courts, and among the courts of various states. As the underlying appellate proceedings in this case unfolded, state appellate courts in Ohio and Missouri held that no-harm FCRA claims similar to those Plaintiffs assert here *cannot* proceed in state court. *See Smith v. Ohio State University*, No. 17AP-218, 2017 WL 6016627 (Dec. 5, 2017); *Corozzo v. Wal-Mart Stores, Inc.*, 531 S.W.3d 566 (Mo. Ct. App. 2017). These rulings are directly contrary to the rulings of the California state courts in the proceedings below.

On December 5, 2017, the Court of Appeals of Ohio determined that Ohio courts could not entertain no-harm FCRA claims based on bare procedural violations following a *Spokeo*-based remand by a federal district court. *See Ohio State University*, No. 17AP-218, 2017 WL 6016627, at *1-5. The *Ohio State University* case is an example of the exact problem Hertz's Petition identifies – cases in the courts of different states with identical procedural postures and claims, but completely opposite outcomes.

In *Corozzo*, the Missouri Court of Appeal held that Missouri courts could not hear a no-harm FCRA case. 531 S.W.3d at 572-76. Though the case was never removed to or remanded by a federal district court, the Missouri court's decision recognized the importance of

consistent rulings among the federal and state courts, and of looking “respectfully” at federal authority, particularly where the “case could either have been brought in the federal court or in the state court. This militates in favor of consistency in the legal standards applied by our state courts and the Eighth Circuit if at all possible.” *Id.* at 575. Despite Hertz’s express arguments to this effect below, the California state courts were not similarly moved to ensure “consistency” between their rulings and the rulings of a federal district court at the other end of San Francisco Bay.

Ohio State University and *Corazzo* alone rebut Plaintiffs’ contention that Hertz’s concerns about forum shopping and inconsistent applications of the FCRA are “hypothetical.” (Opp. at 11.) Indeed, if Plaintiffs had brought this same suit in Ohio or Missouri, they would have been out of court long ago. Yet because they filed suit in California, their no-harm claims – and their pursuit of an eight-figure windfall – persist. This is an untenable paradigm that will result in rampant forum shopping, and the California state courts will become the most popular clearinghouse for no-harm FCRA and other federal claims that federal courts and other state courts refuse to entertain. Hertz respectfully urges this Court to grant certiorari in this case.

CONCLUSION

The Court should grant the petition and issue a writ of certiorari to the California Court of Appeal.

Respectfully submitted,

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