No. 12-57246

In the United States Court of Appeals for the Ninth Circuit

GABRIEL FELIX MORAN,

Plaintiff-Appellant,

v.

THE SCREENING PROS, LLC, a California Corporation,
Defendant-Appellee.

On Appeal from the United States District Court
for the Central District of California

REPLY BRIEF FOR APPELLANT GABRIEL FELIX MORAN

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TABLE OF CONTENTS

Table of Authorities iii

Reply Brief for Appellant Gabriel Felix Moran 1

I. California's consumer-reporting laws provide fair notice, consistent with the requirements of due process. 3

II. The Fair Credit Reporting Act prohibits the inclusion of a ten-year old misdemeanor charge in a consumer report. 9

III. This Court should remand this case to the district court for further proceedings on Moran's claims for damages under the Fair Credit Reporting Act. 12

IV. Under this Court's precedent, Moran's request for injunctive relief under state law is not preempted by the Fair Credit Reporting Act. 14

Conclusion 16

TABLE OF AUTHORITIES

Cases

Barlow v. United States,
7 Pet. 404, 8 L. Ed. 728 (1833) 9

Blakely v. Washington,
542 U.S. 296 (2004) 4

Callahan v. Woods,
736 F.2d 1269 (9th Cir. 1984) 13

Chase Bank USA, N.A. v. McCoy,
131 S. Ct. 871 (2011) 11

Cheek v. United States,
498 U.S. 192 (1991) 9

Clayworth v. Pfizer, Inc.,
233 P.3d 1066 (Cal. 2010) 15

Coleman v. Thompson,
501 U.S. 722 (1991) 9

Connecticut National Bank v. Germain,
503 U.S. 249 (1992) 6

Fountain v. Filson,
336 U.S. 681 (1949) 14

Fruge's Heirs v. Blood Services,
506 F.2d 841 (5th Cir. 1975) 13

Gorman v. Wolpoff & Abramson, LLP,
584 F. 3d 1147 (9th Cir. 2009) 2, 14, 15

Harris v. Mexican Specialty Foods, Inc.,
564 F.3d 1301 (11th Cir. 2009) 3

Intel Corp. v. Advanced Micro Devices, Inc.,
542 U.S. 241 (2004)..11

J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred International, Inc.,
534 U.S. 124 (2001)..6

Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA,
559 U.S. 573 (2010)..10

Ramirez v. Trans Union LLC,
899 F. Supp. 2d 941 (N.D. Cal. 2012) 15

Safeco Insurance Co. of Am. v. Burr,
551 U.S. 47 (2007)..12

Simpson v. Lockhart,
942 F.2d 493, 497 (8th Cir. 1991) 1

Ortiz v. Lyon Management Group, Inc.,
69 Cal. Rptr. 3d 66 (Ct. App. 2007)...8

Powell v. United States Cartridge Co.,
339 U.S. 497 (1950)..5

United States v. Batchelder,
442 U.S. 114 (1978)..1, 3

United States v. Brewster,
506 F.2d 62 (D.C. Cir. 1974) 4

United States v. Hicks,
106 F.3d 187 (7th Cir. 1997)..4

United States v. Pallares–Galan,
359 F.3d 1088 (9th Cir. 2004)..8

Weissburg v. Lancaster School Dist.,
591 F.3d 1255 (9th Cir. 2010)..8

Yee v. City of Escondido,
503 U.S. 519 (1992)..8

Statutes

15 U.S.C. § 1681c(a)(2) 10

15 U.S.C. § 1681c(a)(5) 10, 12

15 U.S.C. § 1681c(a)(5) (1996) 10

15 U.S.C. § 1681n(a) 12

15 U.S.C. § 1681s(c) 15

Cal Bus. & Prof. Code § 17204 15

Cal Civ. Code § 1785.3(c) 7

Cal Civ. Code § 1785.3(c)(1) 6

Cal. Civ. Code § 1785.13(a)(6) 4

Cal. Civ. Code § 1785.15.2 7

Cal. Civ. Code § 1786.2(b) 6

Cal. Civ. Code § 1786.2(c) 5

Cal. Civ. Code § 1786.18(a)(7) 4

Legislative History

S. Rep. No. 97–517 (1969) 15

Miscellaneous

10A Wright & Miller, *Federal Practice and Procedure* (3d ed. 2013) 13

REPLY BRIEF FOR APPELLANT GABRIEL FELIX MORAN

After one hundred pages of briefing, it has become clear that the two central issues in this appeal—the constitutionality of the state consumer-reporting laws and the interpretation of the federal Fair Credit Reporting Act (FCRA)—boil down to an incoherent gripe about fair notice.

On the constitutional front, the gripe is that California's consumer-reporting laws violate due process because they fail to give The Screening Pros (TSP) "adequate notice regarding which of the two statutory schemes applies." TSP Br. 2. But that constitutional theory has been definitively rejected, in both civil and criminal cases. *United States v. Batchelder*, 442 U.S. 114 (1978). Whether the state's laws are regarded as overlapping (as we contend) or as mutually exclusive (as TSP contends), there is no due-process problem. So long as "each statute unambiguously specifies the conduct prohibited and the penalties authorized," the statutory scheme "satisfies the fair notice requirements of the due process clause." *Simpson v. Lockhart*, 942 F.2d 493, 497 (8th Cir. 1991). Nobody in TSP's shoes can have legitimate doubts about how to conform their conduct to the law.

On the statutory-interpretation front, TSP's argument is just as odd. TSP complains that it is "unfair to credit reporting agencies" to follow the FCRA's current text because TSP was not previously "told that the rule changed 16 years ago," when Congress amended the statute. TSP Br. 51, 57. But ignorance of the

law is no excuse—especially for industries that risk great harm to consumer privacy. As TSP acknowledges, a 1998 FCRA amendment deleted the terms "indictment" and "date of disposition," leaving in place a rule that "limits the reporting of such information to seven years from the particular adverse event being reported." TSP Br. 15. TSP ran afoul of that rule when it included one such adverse event—a decade-old misdemeanor charge—in Moran's consumer report.

It is no answer to say, as TSP does, that the legislative history does not specifically reveal an intent to change the prior rule. Text controls over history, not the other way around. Nor is it an answer to rely on *pre-amendment* agency commentary that—as the Consumer Financial Protection Bureau and Federal Trade Commission confirm in their brief—relied on the text of the old statute.

Shifting gears, TSP asks this Court to direct summary judgment in its favor because Moran has, in its view, presented "no evidence of damages." Br. 61. But Moran claims *statutory* damages, this appeal arises from a motion to dismiss, and the facts on actual damages are disputed. These issues should all be left to further proceedings in the district court. By contrast, there is no need for further proceedings on TSP's claim that Moran's request for state-law injunctive relief is preempted by the FCRA. Br. 62. That argument is foreclosed by this Court's decision in *Gorman v. Wolpoff & Abramson, LLP*, 584 F. 3d 1147 (9th Cir. 2009), which TSP does not cite. Accordingly, the decision below should be reversed.

I. California's consumer-reporting laws provide fair notice, consistent with the requirements of due process.

1. TSP's constitutional theory is that the Investigative Consumer Reporting Agencies Act (ICRAA) is unconstitutionally vague because the ICRAA and Consumer Credit Reporting Agencies Act (CCRAA), taken together, do not provide "adequate notice regarding which of the two statutory schemes applies" to its tenant screening reports. Br. 2. But TSP's lengthy briefing never manages to locate that constitutional theory in any precedent from the U.S. Supreme Court or the California Supreme Court, or explain how California's statutes—even assuming they work as TSP says they do—prevent TSP from conforming its conduct to the law.

As we explained in our opening brief (at 19-25), the vagueness doctrine simply demands that the law "clearly defines what conduct is prohibited and the potential range of fine that accompanies noncompliance," *Harris v. Mexican Specialty Foods*, 564 F.3d 1301, 1311-12 (11th Cir. 2009), and TSP never really denies that California's consumer-reporting laws satisfy that requirement. That should be the beginning and the end of the analysis.

The Due Process Clause does not, on the other hand, give TSP a constitutional right to be subject to only one statute for its consumer-reporting violations. *See United States v. Batchelder*, 442 U.S. 114, 123 (1978). Nor does it provide a constitutional right to elect which of the two statutes shall be the basis for Moran's

claims. *Id.* The potential application of either or both statutes is "no ground for declaring one or both to be unconstitutionally vague or overbroad, so long as each intelligibly defined an offense." *United States v. Brewster*, 506 F.2d 62, 76 (D.C. Cir. 1974); *see United States v. Hicks*, 106 F.3d 187, 188 (7th Cir. 1997) (rejecting contrary view as "frivolous"). After all, a defendant charged with burglary could not escape culpability by claiming that he lacked adequate notice whether the burglary or larceny statute would apply. *See Blakely v. Washington*, 542 U.S. 296, 309 (2004). Both statutes prohibit the taking of another's property, and the legislature twice provided notice of what the state forbids.

The same principles apply here. TSP steadfastly refuses to acknowledge the fact that the overlapping provisions in ICRAA and CCRAA either prohibit exactly the same conduct or impose different requirements that do not conflict. *See* Moran Br. at 27-29. All of these non-conflicting, and often identical, provisions provide clear notice of what is required when issuing tenant screening reports. For example, both ICRAA and CCRAA forbid the reporting of dismissed indictments in consumer reports. Cal Civ. Code §§ 1786.18(a)(7) (ICRAA); 1785.13(a)(6) (CCRAA) (an "indictment . . . shall no longer be reported if at any time it is learned that . . . a conviction did not result"). These requirements are crystal clear, and they are not rendered vague just because the legislature wrote them down twice.

2. The foregoing discussion explains why TSP's due-process theory fails, as a matter of constitutional law, regardless how the state law is interpreted. But as the opening brief showed, the relevant provisions of California's consumer-reporting laws are complementary and overlapping—not in conflict with one another. Moran Br. 25-30. TSP does not specifically rebut that showing, but asserts (at 42) that we "ignore[] the lengthy set of differences identified by TSP between the two statutory schemes," set out in an appendix to TSP's brief. There are two principal problems with that assertion.

First, none of the "lengthy set of differences" in TSP's appendix are actually conflicts. Some of the requirements in each statute may be *different*, but in each instance a tenant screening company could easily satisfy both statutes by complying with the "higher requirement"—demonstrating that the statutes are "mutually supplementary" rather than "mutually exclusive." *Powell v. United States Cartridge Co.*, 339 U.S. 497, 518 (1950). Compliance is neither impossible nor difficult. All a company needs to do is consult the definition in ICRAA. If its tenant screening report is not excluded—*i.e.*, if it is not a report "limited to specific factual information relating to a consumer's credit record or manner of obtaining credit obtained directly from a creditor," Cal. Civ. Code § 1786.2(c)—then the company is on notice that it must comply with the stricter standards of ICRAA.

Second, both ICRAA and CCRAA can be given effect because they reach distinct cases. If TSP had issued the exact same report about Moran, but for the purpose of credit screening rather than tenant screening, it would have only been subject to CCRAA. *Compare* Cal Civ. Code § 1785.3(c)(1) (CCRAA governs consumer reports used for purposes of credit eligibility, employment, hiring of a dwelling unit, and other purposes) *with* Cal Civ. Code § 1786.2(b), (c) (ICRAA only governs consumer reports used for purposes of employment, insurance, or the hiring of a dwelling unit). And if TSP had omitted the section about criminal records and only reported Moran's credit history from TransUnion (SER 283), then the report would have been subject to the statutory exclusion in ICRAA and thus governed solely by CCRAA. Cal. Civ. Code § 1786.2(c) (excluding from ICRAA a report that is "limited to specific factual information relating to a consumer's credit record or manner of obtaining credit obtained directly from a creditor of the consumer"). The courts must "give effect to two statutes that overlap, so long as each reaches some distinct cases." *J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc.*, 534 U.S. 124, 144 (2001); *see Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253 (1992) (statutes that overlap "do not pose an either-or proposition" where each reaches distinct cases). These statutes fit the bill.

For this reason, the CCRAA is not rendered superfluous, as TSP contends (at 43-44). Indeed, as our opening brief notes (at 5-6), the California Legislature

expanded ICRAA in 1988 to provide greater protections and stricter notice requirements for all consumer reports, except certain credit reports—a response to concerns about the use of inaccurate reporting of criminal records, in particular, for housing and employment. After the 1998 amendment, there is considerable overlap between ICRAA and CCRAA, but each statute still reaches distinct cases. ICRAA still exclusively governs reports based solely on personal interviews. Cal Civ. Code § 1785.3(c) (excluded from the definition in CCRAA). CCRAA still exclusively governs any reports that are issued for credit purposes, and any reports that only contain information from creditors (e.g., a traditional credit report from Equifax, TransUnion, or Experian). Cal Civ. Code § 1786.2(c) (excluded from the definition in ICRAA). This is why the credit-score provisions are only in CCRAA. Cal. Civ. Code § 1785.15.2. As a result, consumer reports in California are regulated by these two mutually supplementary, non-conflicting statutory schemes.

TSP does not exactly deny the existence of the 1998 amendment to ICRAA, but its repeated insistence that the two statutes are mutually exclusive appears to be rooted in a wish that the statute had never been amended. *See* TSP Br. 34, 35 ("statutes were *meant* to be mutually exclusive" and "*meant* to govern two different types of information"). But the statute *was* in fact amended. TSP says that the vagueness problem arises because "the text of ICRAA and CCRAA, after a 1998 two-word amendment to ICRAA, impermissibly permits criminal record

information to be subject to both statutes." TSP Br. 2. If that is all TSP is saying, then the solution is easy: Give effect to the amendment, which (as TSP acknowledges) makes clear that the statutes *are* now partially overlapping.

3. To be clear, this Court need not venture its own interpretation of state law to resolve the federal constitutional question presented here. TSP's due-process theory fails under any available interpretation. But, contrary to what TSP says, the Court should certainly feel free to reach its own interpretation of the Constitution.

In response to our basic point that the district court was wrong to regard itself as "bound" by the *state* courts on a question of *federal* constitutional law, TSP says that "this argument was not raised in the District Court and is therefore waived." Br. 32. This not a new issue, however; it is merely a critique of the district court's methodology on the central argument that Moran pressed below—namely, that the ICRAA satisfies due process—and he is "free to make any argument in support of that claim on appeal." *Weissburg v. Lancaster Sch. Dist.*, 591 F.3d 1255, 1260 (9th Cir. 2010). The rule is clear: "it is *claims* that are deemed waived or forfeited, not *arguments*." *United States v. Pallares–Galan*, 359 F.3d 1088, 1095 (9th Cir. 2004) (emphasis added); *see Yee v. City of Escondido*, 503 U.S. 519, 534 (1992).

TSP asserts that the California intermediate-court decision on which the district court relied, *Ortiz v. Lyon Management Group*, 69 Cal. Rptr. 3d 66 (2007), "cited California cases" on vagueness, suggesting perhaps that the decision could

have been grounded in state constitutional law. But TSP fails to acknowledge our point that the cited cases and the doctrine they represent arise from the U.S. Constitution. Moran Br. 30-31. TSP does not even attempt to show any independent state-law ground that is "clear from the face of the opinion." *Coleman v. Thompson*, 501 U.S. 722, 735 (1991). Indeed, TSP concedes that the void-for-vagueness doctrine under the state and federal constitutions is "coextensive" and that "the same result ensues" under either one, TSP Br. 33, so nothing is to be gained by deferring to *Ortiz* instead of following U.S. Supreme Court precedent.

II. The Fair Credit Reporting Act prohibits the inclusion of a ten-year-old misdemeanor charge in a consumer report.

TSP's federal statutory argument fares just as poorly as its constitutional challenge to the state laws. Both arguments rest on a similarly misguided plea for fair notice. As to the federal statute, TSP contends that "Congress has never expressed an intent to change the operative date for reporting criminal dismissals from 'date of disposition'" and that it is unfair that it is now being "told that the rule changed 16 years ago without a single word from anyone—including Congress." TSP Br. 30, 51.

But ignorance of the law is no excuse. *See Barlow v. United States*, 7 Pet. 404, 411, 8 L.Ed. 728 (1833) (opinion for the Court by Story, J.). That rule, "deeply rooted in the American legal system," *Cheek v. United States*, 498 U.S. 192, 199 (1991), is especially apt for a company like TSP, whose activities risk serious harm

to consumer privacy. *See Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573, 581 (2010) (invoking this maxim with respect to federal regulation of debt collectors). There is no justification for selling background screening reports and failing to keep abreast of developments in the law.

In any event, TSP acknowledges that the 1998 amendment deleted the terms "indictment" and "date of disposition" from the FCRA, and that "Congress left such information to be covered by the 'catch all' provision of 15 U.S.C. § 1681c(a)(5), which limits the reporting of such information to seven years from the particular adverse event being reported." Br. 15. In the original FCRA, "[r]ecords of arrest, indictment, or conviction of crime" were reportable for seven years, starting at the "date of disposition, release, or parole." 15 U.S.C. § 1681(c)(a)(5) (1996). The 1998 amendment deleted this paragraph, and moved the term "records of arrest" to a pre-existing paragraph that now limits the reporting of "[c]ivil suits, civil judgments, and records of arrest" to seven years "from date of entry," *id.* § 1681c(a)(2), and removed criminal convictions altogether from the restriction on reporting obsolete information. *Id.* § 1681c(a)(5) (prohibiting reporting, past seven years, of "any adverse item of information, other than records of convictions of crimes"). The statute, as amended, therefore yields a clear rule: a criminal indictment triggers the seven-year reporting period for adverse information. But TSP just ignores that there is nothing remaining in the current

text of the statute that allows a dismissed indictment to be reported from the date of disposition—an approach at odds with the presumption that "Congress intends its statutory amendments to have real and substantial effect," *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 243 (2004).

Instead, TSP appeals at length to silence in the legislative history, outdated *pre-amendment* commentary by the FTC, and its own view of what would make for good public policy. TSP Br. 44-59. None of these things can trump the text, of course, and TSP's reliance on administrative commentary is substantially undermined by the amicus brief of the FTC and the CFPB. Indeed, the agencies' brief is even more authoritative if, as TSP suggests, there is a statutory ambiguity that requires gap-filling. *See* TSP Br. 45 ("The statute itself provides no guidance itself on what 'antedate' or 'adverse' mean in this context."). We think the text is clear enough, but if TSP is correct then that is all the more reason that the amicus brief itself should be accorded deference, particularly to the extent that it sheds light on both the FTC's 1990 commentary and the 2011 report. *See Chase Bank USA, N.A. v. McCoy*, 131 S. Ct. 871, 884 (2011) (according deference to Federal Reserve Board's amicus brief interpreting its own regulations and commentary under the Truth in Lending Act).

III. This Court should remand this case to the district court for further proceedings on Moran's claims for damages under the Fair Credit Reporting Act.

The district court granted TSP's motion to dismiss Moran's first and second FCRA claims; that dismissal, in turn, foreclosed Moran's third FCRA claims "as a matter of law." ER 9-10. Nevertheless, TSP now asks this Court, in the first instance, to direct summary judgment in its favor on all three FCRA claims, arguing that the "undisputed evidence" shows that its violation of the FCRA did not cause Moran any injury because he was denied housing for independent reasons. TSP Br. 60-61.

But the premise of TSP's argument is wrong: Moran need not prove that the FCRA violations caused him to be denied housing. Either way, he may recover statutory and punitive damages for TSP's willful noncompliance with the FCRA—without proving any actual damages. 15 U.S.C. § 1681n(a). TSP acknowledges that the reporting of a dismissed indictment is subject to the FCRA's catch-all provision, which "limits the reporting of such information to seven years from the particular adverse event being reported." TSP Br. 15 (citing 15 U.S.C. § 1681c(a)(5)). On remand, Moran will establish that TSP willfully failed to comply with this requirement when reporting Moran's decade-old dismissed indictment. *See Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 57 (2007) ("reckless disregard" of a "statutory duty" constitutes a willful FCRA violation).

In any event, this Court should not direct summary judgment in the first instance. *See, e.g., Fruge's Heirs v. Blood Servs.*, 506 F.2d 841, 844 (5th Cir. 1975) (appellate court should not grant summary judgment "under the guise of affirming the 'result below' when the effect is to preclude the losing party from 'disput[ing] facts material to that claim'"); *Callahan v. Woods*, 736 F.2d 1269, 1275 (9th Cir. 1984) (although court has "power to grant summary judgment," it "hesitate[s] to do so if it would unfairly deprive the other party of the opportunity to present evidence"). "In most instances … the court simply will remand the case for further proceedings rather than direct the entry of judgment." 10A Wright & Miller, *Federal Practice* § 2716 (3d ed. 2013).

Here, that approach is plainly warranted because the facts are contested. TSP claims that Moran's housing application would have been denied because of a lawfully reported theft conviction. TSP Br. 60-61. But TSP's only evidence on this score is a conclusory declaration from someone who did not even make the decision about Moran's application. SER 202-206. Moreover, the exhibits attached to that very declaration raise an issue of material fact: The denial letter states that Moran was denied housing for multiple misdemeanors, even though TSP reported only one conviction (and three dismissed charges). SER 234. It does not specify which charges made Moran ineligible, so it is possible that Maple Square based its denial on one of the dismissed charges. SER 234. And Maple Square's Resident

Selection Criteria indicate that applicants may be rejected for illegal drug activity, but do not mention theft. SER 222-223. Because there is thus a disputed question whether the obsolete drug charge was the actual reason for the denial, this Court may not deprive Moran "of an opportunity to dispute the facts material to that claim." *Fountain v. Filson*, 336 U.S. 681, 683 (1949). These questions are for the district court on remand.

IV. Under this Court's precedent, Moran's request for injunctive relief under state law is not preempted by the Fair Credit Reporting Act.

Finally, TSP argues that Moran's request for state-law injunctive relief under the UCL is preempted by the FCRA. Its reasoning is that because "injunctive relief is not available to private plaintiffs under FCRA," state statutes allowing for injunctive relief are necessarily "inconsistent with FCRA and preempted." TSP Br. 62. That sweeping preemption argument is foreclosed by this Court's decision in *Gorman v. Wolpoff & Abramson, LLP*, 584 F. 3d 1147 (9th Cir. 2009), which held that the FCRA did *not* preempt the availability of injunctive relief for violations of California consumer-reporting law. *Id.* at 1170–71. The logic and holding of *Gorman* compels reinstatement of Moran's UCL claims for injunctive relief based on ICRAA violations. *See* Moran Br. 32-34.

Gorman reasoned that Congress not only intended to save California's consumer-reporting liability rules from preemption, but expressly "intended also to

save 'other remedies as are provided under State law' to enforce those liability rules"—including injunctive relief. *Id.* at 1173 n.35 (quoting 15 U.S.C. § 1681s(c)). And "[t]he Federal Trade Commission, charged with enforcing the FCRA, similarly understands the 'basic rule' governing preemption under the FCRA: Section 1681t(a) preempts state law 'only when compliance with inconsistent state law would result in a violation of the FCRA.'" *Id.* (citing 16 C.F.R. pt. 600 apx. § 622 ¶ 1). Finally, this Court relied on the FCRA Senate Report, which concluded that "no State law would be preempted [by the FCRA] unless compliance would involve a violation of Federal law." S. Rep. No. 97–517, at 12 (1969).

TSP does not cite *Gorman*, and instead invokes earlier district court decisions whose reasoning was rejected in *Gorman*. TSP Br. 62. But post-*Gorman* decisions have allowed private rights of action for injunctive relief as long as the underlying requirement or prohibition does not conflict with the FCRA. "Here, as in *Gorman*, compliance with state law—the availability of an injunctive remedy to private litigants—would not result in a violation of federal law. Thus, the availability of the remedy is not inconsistent with the FCRA." *Ramirez v. Trans Union LLC*, 899 F. Supp. 2d 941, 948 (N.D. Cal. 2012). [1]

[1] TSP also asserts, without elaboration, that Moran has no standing to bring a UCL claim. But Moran has satisfied the standard for UCL standing, Cal. Bus. & Prof. Code § 17204, by alleging that he has expended money as a result of TSP's unfair competition (ER 53 ¶17); nothing more is required. *See Clayworth v. Pfizer, Inc.*, 233 P.3d 1066, 1086-87 (Cal. 2010).

CONCLUSION

Because the ICRAA is not unconstitutionally vague or otherwise invalid, and because the text of the FCRA prohibits the disclosure of a ten-year-old misdemeanor charge that did not result in a conviction, the district court's contrary judgments should be reversed and counts one through eleven of the first amended complaint should be reinstated.

Respectfully submitted,

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April 18, 2014

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)

I hereby certify that my word processing program, Microsoft Word, counted 3,761 words in the foregoing brief, exclusive of the portions excluded by Rule 32(a)(7)(B)(iii).

/s/ Deepak Gupta
Deepak Gupta

April 18, 2014

CERTIFICATE OF SERVICE

I hereby certify that on April 18, 2014, I filed the forgoing Reply Brief for Appellant Gabriel Felix Moran with the Clerk of the Court of the U.S. Court of Appeals for the Ninth Circuit using the Court's CM/ECF system. I further certify that all parties required to be served have been served.

Dated: April 18, 2014

/s/ Deepak Gupta
Deepak Gupta