No. 07-1896

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIAN DIXON,

Plaintiff-Appellant,

v.

SHAMROCK FINANCIAL CORPORATION,

Defendant-Appellee.

Appeal from Judgment of the
United States District Court for the District of Massachusetts
Hon. Richard G. Stearns, Presiding

BRIEF *AMICUS CURIAE* OF AMERICAN FINANCIAL SERVICES ASSOCIATION, CONSUMER MORTGAGE COALITION, AND MORTGAGE BANKERS ASSOCIATION SUPPORTING APPELLEE AND URGING AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amici curiae* the American Financial Services Association, Consumer Mortgage Coalition, and Mortgage Bankers Association state that they have no parent corporations and that no publicly-held corporations own their stock.

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IDENTITY AND INTEREST OF AMICI CURIAE

This brief is filed on behalf of the American Financial Services Association, Consumer Mortgage Coalition, and Mortgage Bankers Association ("*Amici*"). *Amici* are trade associations whose members, collectively, extend a large percentage of consumer credit in America today, including mortgage loans, automobile credit, and consumer loans.

Amici appear frequently in litigation where the issues raised are of widespread importance to their members. That is the case here, because many of *Amici*'s member organizations (or their affiliates) make prescreened offers of credit authorized under the Fair Credit Reporting Act. *Amici*'s members also are defendants in putative class action lawsuits raising many of the same issues as this appeal. The Court's decision in this appeal may accordingly affect the interests of *Amici*'s members as well as the outcome of lawsuits they are defending.

For further details of their interests, *Amici* refer the Court to their "Motion for Leave to File Brief *Amici Curiae* Supporting Appellee and Urging Affirmance."

BACKGROUND

This appeal, and the appeal in *Sullivan* v. *Greenwood Credit Union*, No. 07-2354, involves firm credit offers made to consumers after creditors prescreened their credit information to determine if those consumers met certain credit criteria.

The use of prescreening in order to make credit offers is explicitly authorized by the Fair Credit Reporting Act ("FCRA"). Appellant Brian Dixon ("Dixon") claims that Shamrock Financial Corporation ("Shamrock") violated 15 U.S.C. § 1681b because, when it introduced the offer to him in a promotional mailing, the material terms of Shamrock's offer were not stated in the initial mailer and the mailer (as opposed to the offer itself) did not have sufficient "value" to him.

The district court properly found that Shamrock did not violate the statute, and *Amici* urge the Court to affirm its decision. The district court correctly adhered to the statutory text enacted by Congress that authorizes prescreened offers, and rejected Dixon's attempt to undermine prescreening by adding the requirement – that Congress never imposed – that any initial mailer reveal all detailed terms of the credit offer. The district court also rejected Dixon's corollary assertion, repeated in this Court, that the mailer is itself the "firm offer of credit." The mailer, standing alone, is not the offer, under the law or under any common sense understanding of credit offers. Nor does the text of FCRA contain the "value" test suggested by Appellant, or any guidance as to which credit offers have value and which do not, or how a creditor can determine the answer to that question in advance of a court ruling.

The district court's ruling is not only correct – and in line with two dozen other decisions – the result supports the statute's text and purpose. *Amici*'s members and companies in other industries (such as insurers) have been providing prescreened offers for many years. These offers reduce search costs for consumers and provide an important means for consumers to learn about credit and insurance products. In addition, prescreening reduces acquisition costs for financial institutions, who are able to pass the cost savings on to consumers in the form of reduced interest rates and lower origination fees. As the Federal Reserve recently found, use of consumer report information for prescreened offers such as the one Shamrock made is a useful and direct benefit to American consumers. If Appellant's position is adopted, and the statute interpreted differently than Congress intended, many of *Amici*'s members and other creditors would be forced to make very limited offers that would not serve the purposes of the law or they possibly would stop making offers altogether.

The issues on appeal also carry great significance for *Amici's* members and others in the credit industry, because, as a result of certain decisions from federal courts in Chicago, a meaningful number of *Amici*'s members and others in the credit industry have been made defendants in putative class actions arising from prescreening programs. Over 250 of these suits of which *Amici* are aware have been filed nationwide, almost twenty of which were filed in this Circuit. Potential liability, both industry wide and with respect to individual companies, arising from an improper interpretation of FCRA could be catastrophic. FCRA allows for imposition of statutory damages of $100 to $1000 per violation, plus punitive damages, upon proof of a willful violation of law. As most prescreened solicitations are sent to thousands of consumers at a time, potential exposure could run into the billions of dollars.

These results are avoidable, and Congressional intention can be upheld, by an affirmance of the district court's decision. *Amici* explain this point further in this brief.

I. PRESCREENED OFFERS BENEFIT CONSUMERS AND CREDIT GRANTORS, AND SHOULD NOT BE DISCOURAGED.

A. Prescreening Programs Are An Important Part Of The Credit Market.

The efficient flow of consumer credit information is vital to the national economy. In passing FCRA, Congress found that our "banking system is dependent upon fair and accurate credit reporting," and that consumer reporting agencies "have assumed a vital role in assembling and evaluating consumer credit and other information on consumers." 15 U.S.C. §§ 1681(a)(1) & (3).

By allowing creditors and insurers to have access to specific credit information about consumers in a regulated and controlled manner, Congress struck a balance between unlimited access to consumer credit information on the one hand and no access to consumer credit information on the other hand, thereby providing considerable benefits to businesses and consumers.

The opportunity to make prescreened solicitations is a vital part of the credit granting system. [1] The Board of Governors of the Federal Reserve System ("Board") has found that prescreened offers are "useful to both their senders and recipients." "Report to the Congress on Further Restrictions on Unsolicited Written Offers of Credit and Insurance," Board of Governors of the Federal Reserve System (Dec. 2004) ("Board Report") at 3, available at http://www.federalreserve.gov/boarddocs/rptcongress/ UnsolicitedCreditOffers2004.pdf. It concluded that consumers directly benefit from prescreened solicitation programs:

> For consumers, prescreened solicitations reduce search costs by providing them with ready information about product availability and pricing tailored more closely to their financial experiences and needs. Such screening also increases the likelihood that consumers responding to such solicitations qualify for the product or service being offered and thereby reduces the possibility that the consumer will be wasting his or her time and effort when responding to a mailing. Because of their advantages to

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1 Credit information of course is an important component of the extension of credit and insurance generally. The Federal Trade Commission recently stated that the defined use of credit information enables credit grantors and others "to make more expeditious and accurate decisions, to the benefit of consumers." Report to Congress Under Sections 318 and 319 of the Fair and Accurate Credit Transactions Act of 2003, at 1 (Dec. 2004), available at www.ftc.gov/reports/facta/041209factrpt.pdf. The increased use of credit information has resulted, in *Amici*'s view, in higher levels of home ownership and increased availability of non-mortgage credit for lower-income households. H.R. Rep. 108-263, 1st Sess., at 23 (2003). According to Congress, these benefits have saved consumers as much as $100 billion annually. Id.

> senders and consumers, prescreened solicitations are important in promoting competition and enhancing consumer welfare in the markets for credit and insurance.

Id. at 3. Approximately half of survey respondents stated that information they received in prescreened solicitations was "helpful." Id. at 32.

The Board found that prescreening also "improves market efficiency." By allowing businesses to send solicitations to those who meet established criteria, prescreening "reduc[es] account acquisition costs for creditors and insurers." Prescreening also allows creditors "to control certain risks relating to the offering of their products," because they can access consumer information once to select prospective customers, and again to verify continued eligibility. As a result, prescreening is used for a variety of products including credit cards, home equity lines of credit, student loans and automobile credit. Id. at 8, 10.

Prescreening's importance to the credit market has increased as the market has become more national. Consumers who otherwise have few local resources can be – and are – reached through prescreening. Until recently, there has been little controversy in the courts concerning the legality of these prescreened solicitations.

Amici submit that placing new or further restrictions on prescreening would contravene Congressional intent to the detriment of businesses and consumers. The Federal Reserve agrees: "further restrictions on the ability of lenders and insurers to provide written offers of credit or insurance to consumers would on balance result in a less competitive marketplace and thus relatively higher prices and reduced availability." Board Report at 47.

B. Prescreening, As Enacted Under FCRA, Contains Balanced Protection Of Consumers' And Businesses' Interests.

Dixon agrees with *Amici* that FCRA is not a law where all construction issues are to be resolved in favor of the consumer, but rather is a statute that strikes a balance between business and consumers. "Initial Brief of Appellant Brian Dixon" ("App. Br."), at 4. See S. Rep. No. 104-185, at 36 (1995) (Congress sought to "balance any privacy concerns created by prescreening with the benefit of a firm offer of credit or insurance for all consumers who meet the criteria for the credit or insurance being offered"). To protect consumers, for example, Congress allowed individuals to "opt out" of receiving prescreened solicitations. 15 U.S.C. § 1681b(e)(1). Creditors disclose to consumers how to opt out, and credit bureaus maintain toll-free numbers to receive requests. 15 U.S.C. §§ 1681b(e)(5), 1681m(d)(1)(D), (E). Congress passed these provisions specifically to protect consumer privacy. S. Rep. No. 104-185, at 38.

Congress also limited the information provided in connection with prescreening. A credit bureau may provide only the consumer's name and address; an identifier to verify identity; and other information about the consumer that does not identify the relationship or experience of the consumer with respect to a particular creditor or other entity. 15 U.S.C. § 1681b(c)(2). Creditors engaged in prescreening do ***not*** gain access to the consumer's full credit report. Further, in addition to limiting the types of consumer information that creditors may obtain in connection with prescreening, Congress also limited the uses of consumer information in connection with prescreening: creditors may only use the information for the process of extending firm offers of credit.

Despite these protections, Dixon disingenuously likens this process to an "invasion of privacy," (App. Br. at 5), without acknowledging either that Congress expressly permits prescreening or that Dixon could have "opted out" of prescreening if he was unwilling to receive such offers. Indeed, if Dixon was really concerned about an "invasion of privacy," he could easily have dialed the toll-free number listed on any mailer he might receive to completely exclude himself from this process.

On the other hand, the prescreening rules expressly contemplate that the "firm offer of credit" be subject to underwriting conditions and other preestablished restrictions. 15 U.S.C. § 1681a(*l*). This ensures that credit is not granted to those who do not qualify, and allows creditors to evaluate the full range of the consumer's credit and collateral information once the consumer responds to the solicitation. Congress recognized (as discussed below) that a consumer responding to a prescreened offer must make an application, that information used to select the consumer (*e.g.*, credit score) must be verified, and that additional information usually must be gathered – because neither prescreened data nor even full consumer reports often do not contain all the information needed to make an appropriate credit decision. *Id.* As to the last point, Congress explicitly allowed creditors to condition firm offers of credit on review of creditworthiness information not found in consumer reports (and, by definition, not found in the more-truncated prescreened data):

> The Committee is also aware that certain information used to determine creditworthiness is not contained in consumer reports. Consequently, an individual may meet the criteria used to create the prescreened list, yet not [be] creditworthy. By allowing credit and insurance providers to revoke offers based on preselected criteria besides those used to create the list, the Committee intends to ensure that providers are not locked into extending credit to such uncreditworthy customers.
>
> For example, consumer reports often lack accurate information concerning income, and therefore, credit and insurance providers often do not use income criteria when requesting prescreened lists. If the conditions under which the firm offer may be revoked are limited to the criteria used to select the consumer for the list, a credit provider would then be forced to extend credit even if the provider learned that the consumer actually had no income. The Committee bill allows the credit or insurance providers to revoke the offer extended to such a consumer if the income listed on the application does not meet a preestablished level, regardless of the fact that income was not used to select the consumer.

S. Rep. No. 103-209, at 10 (1993).

These carefully-balanced provisions (and others) ensure that consumer information will not be used in any unauthorized or harmful manner and that the prescreening process is fair to consumers and creditors alike. Appellant's position would upset the balance Congress struck, recasting the law to require firm offers to be in writing with all material terms and subject to acceptance immediately. This would skew the law, and limit creditors to making firm offers based on incomplete information. This result is not legally correct, as we discuss in Section II below, and not practical or appropriate as described in Section III below.

II. THE DISTRICT COURT CORRECTLY FOLLOWED THE LAW; DIXON'S ARGUMENTS SHOULD BE REJECTED AS THEY WOULD IMPOSE SUBSTANTIVE RESTRICTIONS CONGRESS CHOSE NOT TO ENACT.

A. The District Court's Ruling Should Be Affirmed.

In granting Shamrock's motion to dismiss, the district court enforced the language and intent of FCRA's prescreening provisions. It correctly enabled Shamrock (and other creditors) to make prescreened solicitations that are conditional and informational in nature while remaining true to the Congressional requirement that creditors make a "firm offer of credit," as statutorily defined, when they engage in prescreening.

The district court considered an offer of a home mortgage refinance made by Shamrock. As this Court doubtless would recognize, a consumer loan secured by residential real estate, such as this one, is a complex transaction in which credit terms hinge on repayment risk and collateral. The limited consumer report information available in prescreening does not address collateral at all, and addresses the ability to pay only in part. Income, assets, credit experience, and explanation for any credit blemishes (among other facts) all play an important role in any mortgage credit decision – but are not available in prescreening. For this and other reasons, prescreened offers involving secured loans must be conditional.

The district court properly approved the "firm offer of credit," as partially described in the mailer sent by Shamrock, in these circumstances. The district court correctly pointed to the statutory definition of "firm offer of credit" as stating the sole standard to judge the legality of the use of consumer information to make the offer, and found that because Dixon did not allege that Shamrock dishonored its offer for individuals who responded and who met creditworthiness and collateral requirements, there was a firm offer here. The court also refused to indulge the view that the mailer that introduced to the offer was the offer itself.

Amici submit that the district court's ruling is plainly correct and should be affirmed. As explained below, Dixon's arguments to the contrary are inconsistent with FCRA and would undermine the Congressional purpose behind its authorization of prescreened solicitations.

B. Dixon's Proposed Statutory Construction Is Inconsistent With FCRA.

Dixon asserts that Shamrock violated FCRA because the mailer he received was the offer, and the offer was insufficient under FCRA because the mailer lacked material loan terms and had insufficient value to him. App. Br. at 5-6, 10-11, 20-21. At least twenty-five (25) federal courts have disagreed with interpretations like Dixon's and instead held, variously, that the offer is not the mailer; the mailer need not disclose all material loan terms; and/or that the mailer (or the offer) need not meet any "value" test.[2] These opinions demonstrate why adopting such requirements would contravene FCRA.

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2 *Sullivan* v. *Greenwood Credit Union*, 499 F. Supp. 2d 83 (D. Mass. 2007); *Soroka* v. *JP Morgan Chase & Co.*, 500 F. Supp. 2d 217 (S.D.N.Y. 2007); *McDonald* v. *Nelnet, Inc.*, 477 F. Supp. 2d 1010 (E.D. Mo. 2007); *Cavin* v. *Home Loan Center, Inc.*, 469 F. Supp. 2d 561 (N.D. Ill. 2007); *Ludditt-Poehl* v. *Capital One Auto Finance, Inc.*, 2007 WL 2428044 (E.D. Mo. Aug. 21, 2007); *Poehl* v. *Countrywide Home Loans, Inc.*, 2007 WL 2302491 (E.D. Mo. Aug. 7, 2007); *McFarland* v. *Calusa Investments, LLC*, No. 06-1519 (W.D. Pa. July 20, 2007) (Exhibit 1); *Klutho* v. *Corinthian Mortgage Corp.*, 2007 WL 2002495 (E.D. Mo. July 5, 2007); *Klutho* v. *Shenandoah Valley Nat'l Bank*, 2007 WL 1527074 (E.D. Mo. May 22, 2007); *Price* v. *Capital One Bank*, 2007 WL 1521525 (E.D. Wis. May 22, 2007); *King* v. *Commerce Bancshares, Inc.*, 2007 WL 781732 (N.D. Ill. Mar. 12, 2007); *Klutho* v. *GE Money Bank*, 2007 WL 162291 (E.D. Mo. Jan. 17, 2007); *Forrest* v. *Universal Savings Bank F.A.*, 2006 WL 3486913 (E.D. Wis. Dec. 1, 2006); *Murray* v. *New Cingular Wireless Serv., Inc.*, 432 F. Supp. 2d 788 (N.D. Ill. 2006); *Gross* v. *Washington Mutual, Inc.*, 2007 WL 1404435 (S.D.N.Y. May 10, 2007); *Nasca* v. *J.P. Morgan Chase Bank, N.A.*, 2007 WL 678407 (S.D.N.Y. Mar. 5, 2007); *Crossman* v. *Chase Bank USA NA*, 2007 WL 2702699 (D.S.C. Sept. 12, 2007); *Villagran* v. *Freeway Ford, Ltd.*, 2007 WL 2688432 (S.D. Tex. Sept. 10, 2007); *Villagran* v. *Central Ford, Inc.*, 2007 U.S. Dist. LEXIS 78507 (S.D. Tex. Oct. 23, 2007); *Hoffer* v. *Landmark Chevrolet Ltd*, 2007 U.S. Dist. LEXIS

1. <u>Requiring detailed loan terms, whether through applying state law contract standards or otherwise, would be improper</u>.

Dixon argues that "[a] prescreened mailing without loan terms is not an offer." <u>App. Br.</u> at 11. He asserts that, under the "common law meaning of 'offer,'" a prescreened mailing must include "a set of terms that can be immediately accepted," and argues that Shamrock's mailer was not capable of being accepted, and so was not a "firm offer of credit," because it failed to state pricing or other loan terms. <u>Id</u>. at 5, 10, 11.

Dixon's argument ignores the plain language of FCRA. Congress defined the phrase "firm offer of credit or insurance" at 15 U.S.C. § 1681a(*l*):

> The term "firm offer of credit or insurance" means any offer of credit or insurance to a consumer that will be honored if the consumer is determined, based on information in a consumer report on the consumer, to meet ***the specific criteria used to select the consumer for the offer***, except that that the offer ***may be further conditioned*** on one of more of the following:
>
> (1) The consumer being determined, ***based on information in the consumer's application*** for the credit or insurance, ***to meet specific criteria bearing on credit worthiness or insurability***, as applicable, that are established –

78521 (S.D. Tex. Oct. 23, 2007); *Hoge* v. *Parkway Chevrolet, Inc.*, 2007 U.S. Dist. LEXIS 78596 (S.D. Tex. Oct. 23, 2007); *Gelman* v. *State Farm Mutual Auto. Ins. Co.*, 2007 WL 2306578 (E.D. Pa. Aug. 9, 2007); *Phinn* v. *Capital One Auto Finance, Inc.*, 2007 WL 1675282 (E.D. Mich. June 11, 2007); *Putkowski* v. *Irwin Home Equity Corp.*, 423 F. Supp. 2d 1053 (N.D. Cal. 2006); *Pearson* v. *Novastar Home Mortgage, Inc.*, 2006 U.S. Dist. LEXIS 36282 (M.D. La. Mar. 28, 2006).

> (A) before selection of the consumer for the offer; and
>
> (B) for the purpose of determining whether to extend credit or insurance pursuant to the offer.
>
> (2) Verification
>
> (A) that the consumer ***continues to meet the specific criteria used to select the consumer for the offer***. . . ; or
>
> (B) ***of the information in the consumer's application*** for the credit or insurance, to determine that the consumer meets the specific criteria bearing on credit worthiness or insurability.
>
> (3) The consumer ***furnishing any collateral*** that is a requirement for the extension of the credit. . .

15 U.S.C. § 1681a(*l*) (emphasis added). Note that this definition does not require a written mailer (or any writing) at all; does not state that written expressions of the offer are the offer or must contain material terms; and does not add a "value" test to firm offers of credit.

Under Congress's definition, a "firm offer of credit" proceeds in stages. The creditor initially establishes "specific criteria" to select consumers and to make credit decisions on ensuing applications; information is obtained from a consumer reporting agency and consumers are contacted, often by mail;[3] the consumer responds and applies for credit; and the creditor processes the application. In

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3 Prescreened solicitations are "conducted by mail, telephone, or electronically through the Internet." Board Report at 7.

processing the application, the creditor "verifi[e]s" whether the consumer continues to meet the criteria used to select the consumer for the offer, "determine[s]" whether the consumer meets "specific criteria bearing on creditworthiness," and evaluates any required collateral.

This multi-step process is consistent with the description of a "firm offer of credit" as a "transaction" in 15 U.S.C. § 1681b(c)(1)(B)(i). The definition also makes clear that the transaction cannot be conducted without information supplied by the borrower, which can be provided only *after* receipt of the initial communication, as it refers to evaluating "information in the consumer's application" and the collateral.

Congress thus enacted a provision that unambiguously contemplates conditional offers of credit. *Kennedy* v. *Chase Manhattan Bank USA, NA*, 369 F.3d 833, 841 (5th Cir. 2004). The process created by Congress is diametrically opposed to Dixon's notion (App. Br., at 10-11) that FCRA only permits offers of credit that show up as a written mailer with credit terms so specific that a binding obligation arises upon mere notification by the consumer that it has been accepted.[4] It is well-settled that, "[w]hen a statute includes an

[4] This is not to say that there is no firm offer being made. FCRA requires that creditworthiness criteria be established before selection of the consumer for the offer, that the creditor retain records of such criteria for three years, and that the offer "will be honored" if these (and other statutory-defined criteria) are met. 15 U.S.C. §§1681(a)(1), 1681m(d)(3). These strictures ensure that an offer is being extended, and that it is definite in scope and in substance.

explicit definition, [courts] must follow that definition, even if it varies from that term's ordinary meaning." *Stenberg* v. *Carhart*, 530 U.S. 914, 942 (2000). Because Congress enacted a specialized definition of a "firm offer of credit," that definition controls.

Dixon's contention that the mailer is the offer and it must be painstakingly specific is also disproven by the fact that Congress enacted <u>two (and only two) specific disclosure requirements</u> – any collateral required for a credit offer must be disclosed, and consumers must be notified that they may "opt out" of future prescreening altogether. 15 U.S.C. §§ 1681a(*l*)(3) & 1681m(d)(1). Congress's decision to mandate specific disclosures raises the strong presumption that no others should be implied. *TRW, Inc.* v. *Andrews*, 534 U.S. 19, 28 (2001).

Dixon's contention that state law concepts of offer and acceptance are a gloss on FCRA is wrong for other reasons. In enacting the prescreening provisions "[t]here is no question that Congress intended a uniform application of 'firm offer of credit.'" *Cole* v. *U.S. Capital, Inc.*, 389 F.3d 719, 726 n.6 (7th Cir. 2004). That intent is reflected in 15 U.S.C. § 1681t(c) (among other places):

> Notwithstanding any definition of the term "firm offer of credit or insurance" (or any equivalent term) under the laws of any State, the definition of that term contained ins section 1681a(*l*) of this title shall be construed to apply in the enforcement and interpretation of the laws of any state governing consumer reports.

Use of common law contract rules, which vary by state, would defeat the statute's command for uniformity.[5]

Moreover, many of *Amici*'s members – and many in the credit industry generally – operate regionally or nationally. Using state law standards to decide whether a prescreened offer constitutes a "firm offer of credit" would result in potentially inconsistent applications of that term across the country. This result is avoided correctly, under the district court's decision.[6]

2. Dixon's theory that the offer must be judged as to whether it had "value" would rewrite FCRA.

Dixon also contends that "a prescreened mailer must contain sufficient value to the consumer to offset the invasion of privacy," and that Shamrock violated Section 1681b because its mailer does not contain the requisite value. App. Br. at 5, 20-21. This argument is meritless because FCRA contains no "value" test.

As the district court correctly recognized, the alleged requirement that a prescreened solicitation is legal only if some judicial officer decides it describes an

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5 Congress is well-aware of the common law and knows how to incorporate it when it deems necessary. E.g., 21 U.S.C. § 1603(b)(2)(B) (action by medical device purchaser "shall be governed by applicable commercial or contract law").

6 Indeed, at least one creditor has received opposite results from two federal courts, both purporting to apply the standards suggested by Dixon, reviewing the identical prescreened mailer. *Compare Walker* v. *Calusa Investments, LLC*, No. 06-508 (S.D. Ind. Feb. 27, 2007), *with Dixon* v. *Calusa Investments, LLC*, No. 06-442T (D.R.I. Feb. 20, 2007) (Exhibits 2 and 3).

offer with "value" is not contained in FCRA. "Memorandum and Order" (Apr. 20, 2007) at 7 n.4. Dixon offers no statutory basis or even legislative history to support the existence of a "value" test. FCRA is carefully balanced and detailed in its prescreening provisions. Judicially-created, subjective standards would grossly upset that balance, and introduce uncertainty, which would have the collateral consequence of driving creditors into limiting or abandoning prescreening programs.

The primary authority he cites for the existence of his "value" argument is *Cole* v. *U.S. Capital, Inc.*, 389 F.3d 719 (7th Cir. 2004). Even if *Cole* was correctly decided – and, for the reasons set forth immediately above, *Amici* respectfully suggest that its creation of a "value" test was in error – it is of no assistance in this case.

Cole involved an advertisement for automobiles from a Chevrolet dealership. The advertisement offered a limited amount of credit (as little as $300), which could only be used for purchasing a car at one specific car dealership. 389 F.3d at 722-23. Based on these facts, the Seventh Circuit determined that the complaint stated a claim that the offer was a solicitation to sell cars, not to make a loan, and so it was possible the consumer could prove his credit had not been accessed for the purpose of providing a "firm offer of credit." 389 F.3d at 728.

The court's concern was that use of credit was "a guise for solicitation rather than [for] a legitimate credit product."

The Seventh Circuit subsequently explained that *Cole* was a decision about distinguishing "advertisements for products and services" from "*bona fide* offers of credit." *Murray* v. *GMAC Mortgage Corp.*, 434 F.3d 948, 955-956 (7th Cir. 2006). Indeed, that same court recently upheld a prescreened offer involving a VISA card with a $250 credit limit, because, among other reasons, the offer was not a sham since "[t]he only product First National offered was a credit line." *Perry* v. *First Nat'l Bank*, 459 F.3d 816, 825 (7th Cir. 2006). *See also Forrest* v. *Universal Savings Bank, F.A.*, 2007 WL 3102077 at * 3 (7th Cir. Oct. 25, 2007)(credit card offer not a sham because card "may be used anywhere Visa is accepted and is not restricted to the purchase of a particular product").

Cole's "value" analysis plainly was developed as a way to identify whether credit was being offered or instead the credit was just "a sham offer used to pitch a product," *Murray*, 434 F.3d at 955 -- i.e., "a guise for solicitation rather than a legitimate credit product," *Cole*, 389 F.3d at 728. This analysis is not applicable here or in any other case in which no other, non-credit product is involved. 389

F.3d at 728. Where a credit product is involved, the question under FCRA is decided by the statutory terms of Section 1615b.[7]

The creation of a "value" test in connection with a pure credit product also would lead to undesirable results. Value is a subjective measure. In the context of a solicitation sent to thousands of consumers – as most prescreened solicitations are – there may well be some who do not find the underlying offer valuable to them, but there may be many others who do find such value. For the latter group, the offer plainly has value. Yet, under a "value" test, the creditor could be held liable under FCRA if it does not accurately predict, in advance, that some unspecified percentage of recipients find the offer potentially attractive. Creditors, faced with the risk of such a subjective standard, may well cut back on prescreened firms offers of credit, which would undermine the purpose and benefits of prescreening, recognized by Congress and the Federal Reserve Board.[8]

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7 As the district court correctly recognized, a creditor could violate FCRA if, for example, it failed to carry through on the mandate that the firm offer "will be honored" when consumers respond. In such an instance, an advocate might label that offer a "sham" or "guise for solicitization" (App. Br., at 20-21, 25), but merely attaching those words that *Cole* also used does not mean *Cole*'s analysis (under a different set of facts) applies.

8 Dixon's other authorities add no persuasive support for a value test. App. Br. at 5, 19. Dixon cites a 1990 FTC statement of policy about FCRA. App. Br. at 9. When it amended FCRA thereafter, Congress specifically *repudiated* this statement as an unduly "narrow." S. Rep. No. 103-209, at 13 (1993). Dixon also places reliance on a recent statement by five federal regulatory about disclosure of loan terms to consumers. App Br. at 18. The statement is not a regulation interpreting FCRA's prescreening provisions, but rather informal guidance about "emerging issues" concerning adjustable rate mortgages with features that could cause "payment shock" to potential borrowers. "Statement on Subprime Mortgage Lending," 72 Fed. Reg. 37,569, 37,572 (July 10, 2007).

In short, Congress provided for the terms and protections it thought appropriate for use of consumer information in connection with prescreened solicitations. This Court ought not to create additional tests that would upset that balance, and undermine prescreened solicitations.

III. DIXON'S PROPOSED INTERPRETATION OF FCRA WOULD CREATE PRACTICAL PROBLEMS AND IS INCONSISTENT WITH HOW LOANS ARE MADE.

A. Requiring Loan Terms To Be Fixed, And Stated In An Introductory Mailer, Is Impractical and Ignores The Realities of the Lending Process.

That Congress decided not to require inclusion of specific and final terms in any flyer that introduces a firm offer, as Dixon urges, is understandable. Providing binding, material home loan terms in a prescreened solicitation letter would pose significant practical problems.

Prudent creditors make loans to individuals able to repay them, and make secured loans with adequate security if a borrower defaults. These are bedrock principles of the credit industry, and under the current prescreening regime, *Amici*'s members are permitted to condition prescreened solicitations on creditworthiness and collateral requirements. But those requirements cannot be assessed fully before a solicitation is sent.

A creditor's decision as to whether a particular borrower is creditworthy – in other words, his or her ability to repay a loan – is typically based on review of the consumer's income, employment, assets, expenses, and debt-to-income ratio. Neither prescreened data nor a subsequently-obtained credit report provide income data, employment status, or complete debt information. Similarly, information about the loan's collateral – here, whether there even was equity available for Shamrock's offer of a home mortgage loan – is not found in a consumer report at all, and would be requested from the consumer only *after* he or she responded to the initial solicitation about the firm offer.

Adopting Dixon's position that a prescreened letter must state material terms capable of acceptance is inconsistent with this fact that, as a practical matter, home mortgage credit offers cannot contain final terms until the creditor receives the application and information upon which the offer is conditioned. It also adds to FCRA an implicit requirement as to the content of mailers, and inappropriately equates the "firm offer of credit" in all instances with the mailer that may describe some of its terms. The mailer might describe credit terms in much detail, but there is no requirement in FCRA that it do so – or even that there be a mailer. Congress chose instead to regulate the timing, manner and content of credit term disclosures in FCRA's sister statute, the Truth in Lending Act, as discussed below.

If Dixon's position is adopted, some creditors, hoping to continue prescreening but unable to provide in advance a specific rate or terms reflecting the creditworthiness of individual consumers, might adopt a lowest common denominator approach, offering and describing a product with the highest interest rate available and lowest amount of credit offered, to ensure credit will not be extended to uncreditworthy borrowers. This approach would hurt consumers, by reducing the availability of credit with more favorable terms and discouraging consumers from finding out about other rates and loan amounts that may be available. It would also hurt creditors, by limiting prescreened solicitations to the specific (unfavorable) product described in the solicitation.

Other creditors might stop using prescreened solicitations entirely, because the benefits of prescreening could not be achieved through the lowest common denominator approach. Halting prescreening would again reduce the information flow available to consumers, while increasing creditors' solicitation costs -- costs usually passed to the consumer through higher interest rates.

Both scenarios contravene the purposes Congress sought to advance when it passed Section 1681b, and would impair the very substantial savings that use of consumer information through prescreening confers on the American consumer. *Amici* are aware that, in the wake of recent decisions about the prescreening rules, ***some creditors ceased prescreening activities***, while others have limited the content of their solicitations to quoting definite but very disadvantageous terms that would be justified only for the least creditworthy consumer. These results undermine Congress' intent in allowing previewing, and undermine the advantages or previewed offers as recognized by the Federal Reserve.

Dixon claims that materials terms must be included in a prescreened mailer "to offset the invasion of privacy" that occurs in prescreening. App. Br. at 5. As explained above, Congress was well aware of the interests involved in prescreening and passed specific safeguards (the right to opt out, and access to limited consumer report information only) to protect consumers' interests. Adopting Dixon's restrictions would upset the balance drawn by Congress when it enacted FCRA, and replace it with a different set of policy judgments. *Amici* respectfully suggest that the settled expectations of the credit industry (and others) should not be overturned in these circumstances in favor of ill-defined requirements Congress never enacted.

Rather than the rigid model of offer and acceptance Dixon posits, the loan origination process is fluid by nature. The central event in any loan is the application, but loan underwriting, approval and commitment evolves through a process. During this process information in the application is verified, additional information is collected and analyzed from sources such as credit reports and appraisals, and the borrower's eligibility under investor guidelines.

Throughout this process, it is commonplace for terms of a prospective loan to change. Information in an appraisal may affect loan-to-value ratio, or clarify equity available as collateral, resulting in an adjustment in the loan amount or other terms. Information in a credit report may affect assessment of repayment risk resulting in an adjustment in pricing. Moreover, borrowers often choose to leave material terms of the loan open even after they commit to go forward with the transaction; they can "lock-in" an interest rate, for example, accepting both the upside and downside risks should interest rates change before closing.

Congress recognized the fluid nature of credit transactions and the changes that occur during underwriting. The Truth in Lending Act, 15 U.S.C. §§ 1601 *et seq.* ("TILA") is designed "to assure meaningful [a] disclosure of credit terms" to consumers, 15 U.S.C. § 1601(a). Unlike FCRA, regulations promulgated under TILA *do* specify, when, and in what format and detail, a creditor must state particular terms of a credit offer. *See* 12 C.F.R. §§ 226.5a & 226.5b.

The disclosure regime mandated by TILA recognizes that terms of a credit transaction frequently change. Borrowers are provided initial disclosure statements and closing cost estimates, the latter by virtue of the Real Estate Settlement Procedures Act of 1974, 12 U.S.C. §§ 2601 *et seq.* ("RESPA"), soon after applications are submitted.[9] These estimates are not binding; lenders provide final disclosures prior to and at the time that a loan closes. FCRA's definition of "firm offer of credit," which allows a creditor to condition a prescreened offer on creditworthiness and collateral requirements, reflects a parallel approach.

Any requirement that prescreened solicitations (or the offers they describe) contain final and immutable loan terms is flatly inconsistent with how consumers and lenders negotiate and agree upon loan terms. This would disserve consumers, ultimately, for the free availability of credit is fostered, not impeded, by today's market.

Dixon's attempt to graft a "value" requirement onto firm offers of credit presents similar difficulties. His position assumes, for example, that every borrower desires an offer with a set interest rate. But, as discussed above, many individuals choose to "float" their rate at time of application, hoping that prevailing rates will fall before loan closing. Likewise, the "value" of any particular "firm offer" may depend on each borrower's existing credit facilities or alternative credit opportunities available to each consumer. Attempting to determine "value" in a vacuum ignores the borrowers' opportunity to seize on the availability of credit

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[9] Good faith estimates of closing costs, and disclosures of identity of the creditor and the amount financed, are made within three days after a loan application is submitted. 12 U.S.C. § 2604 & 12 C.F.R. § 226.19(a)(1).

signaled by the firm offer and demonstrate their eligibility for better terms -- an opportunity Dixon's proposed interpretation of the statute would eliminate.

B. Dixon Would Draw Courts Into Unnecessarily Subjective Judgments In The Absence Of Standards Provided By Congress.

If Dixon's arguments are adopted, courts also would be drawn into decision making about whether prescreened offers provide sufficiently-detailed material terms, and contain significantly-enough "value," without guidance from Congress about how to assess them. The difficulty of that regime is manifest because the questions a court would need to consider could be highly subjective yet very detailed. The challenges it would create for creditors trying to comply with the law are also obvious.

For example, in considering whether a prescreened offer for an adjustable rate loan was sufficiently detailed, the court might need to decide whether stating in a mailer that the loan was "adjustable" was good enough, or whether the solicitation also must describe the mechanism by which the interest rate adjusts, such as the index on which the rate adjustment is based.[10] Other issues could arise

[10] The difficulty of the "value" analysis is illustrated in the Seventh Circuit's *Perry* decision, where the panel split over whether a $250 revolving line of credit, with certain monthly and account opening fees, had "value." The debate in the decision dissolved, in part, into a discussion of whether an offer has "value" if it is directed towards, or likely to be taken advantage by, only a segment of the population. This Court should not require judges of this Circuit to engage in such a highly-subjective inquiry without clear guidance from Congress that it was contemplated.

in determining what terms are "material," such as whether closing costs must be disclosed, and how. Ironically, many of these issues are treated in great detail in other consumer lending statutes and regulations, such as TILA and RESPA – but Congress decided that those statutory disclosures should be made only *after* an application is made. FCRA neither requires such disclosures nor explains how they could be made.

The combined effect of Appellant's arguments further places creditors in an untenable position. If predetermined credit terms are required, many creditors will likely adopt a lowest common denominator approach with a high interest rate and low loan value. But, such offers could be attacked as lacking in "value" to many recipients. The threat of liability, based on undefined, state-law standards, will at a minimum foment litigation and almost certainly cause many creditors to halt prescreening activity altogether.

CONCLUSION

For these reasons, *Amici* respectfully request that the Court affirm the judgment of the district court.

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2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2003 SP2 in fourteen-point Times New Roman type.

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CERTIFICATE OF SERVICE

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