No. 18-545

IN THE

Supreme Court of the United States

FIRST ADVANTAGE BACKGROUND SERVICES CORP.,
Petitioner,

v.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN MATEO,
Respondent;

MARCUS CHISM,
Real Party in Interest.

On Petition for Writ of Certiorari to the Supreme Court of California

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

POINTS ON REPLY

Chism's Brief in Opposition ("BIO") turns on his assertion that First Advantage's alleged conduct—none of which occurred within California—was nonetheless "aimed at California." *E.g.*, BIO at 3. But that assertion fails. Not only does it ignore the undisputed fact that Chism suffered no harm in California, but it defies Chism's own pleadings, which allege that First Advantage's purported violations were systematic and nationwide—not specific to California.

As it stands, the courts of California are asserting specific personal jurisdiction against an out-of-state defendant even though the alleged conduct took place outside the state and caused no harm in California. This Court's precedents preclude such a gaping exception to the Fourteenth Amendment. To allow this case to proceed in California would be to offend those precedents. It would also allow California state-court plaintiffs to checkmate out-of-state defendants by haling them into California court without alleging a sufficient connection to the forum, while at the same time depriving federal courts of subject-matter jurisdiction by omitting any allegations of harm. Given that FCRA cases are on the rise, this situation will only worsen without this Court's guidance. And given the likelihood that defendants facing this dilemma will settle rather than litigate, opportunities to review this situation will be rare.

A. Despite what Chism suggests, courts cannot exercise specific jurisdiction over an out-of-state defendant when the plaintiff has not been harmed.

This case tests the limits of specific personal jurisdiction. As the Petition shows, the uncontroverted

record shows that all of First Advantage's alleged conduct occurred outside California. The challenged background report was prepared outside California and ultimately made available on a secure, private server outside California. Even the conduct the Superior Court relied upon in denying the motion to quash—i.e., preparing a document that includes references to California law—occurred outside the state. *See* Petition at 2-3.

As the Petition also shows, it is undisputed that Chism was not harmed by First Advantage's alleged procedural violation—i.e., its purported failure to obtain a sufficient certification before checking his background. And in truth, no harm befell him: Frito-Lay notified him of the background check; he authorized it; the ensuing report was accurate; and he got the job. Chism has never identified any actual injury that he suffered, either in California or anywhere else.

In his BIO, Chism argues that specific jurisdiction exists because First Advantage intentionally aimed its conduct at California. But that position conflicts with this Court's well-established jurisprudence on specific jurisdiction and defies Chism's own theory that the violations at issue affected a class of job applicants throughout the United States.

Specific jurisdiction cannot exist here unless First Advantage engaged in conduct that was calculated to harm Chism in the forum state. This inquiry cannot turn upon where Chism happens to reside—rather, First Advantage must have specifically intended not only to harm Chism, but to harm him *in California*.

This Court's jurisprudence makes this absolutely clear. In *Calder v. Jones*, 465 U.S. 783 (1984), the

Court examined the circumstances under which an out-of-state defendant can be called to account for conduct that occurred outside the forum state. The plaintiff, actress Shirley Jones, sued the National Enquirer and two of its employees in California state court, alleging they had libeled her in an article that the magazine had published. The individual defendants sought to quash service of process, arguing that they had written and edited the article in Florida and that California courts therefore lacked personal jurisdiction over them. This Court disagreed. Because the story involved intentional conduct that was calculated to harm Jones's reputation and television career *in California*, this Court found that specific jurisdiction existed. *Calder*, 465 U.S. at 789-90, 791. *Cf. Bristol-Myers Squibb Co. v. Super. Ct.*, 137 S. Ct. 1773, 1782 (2017) (specific jurisdiction did not exist where plaintiffs' claims involved "no in-state injury and no injury to residents of the forum State").

Thirty years later, this Court applied *Calder* in *Walden v. Fiore*, 571 U.S. 277 (2014). The Court noted that "[t]he crux of *Calder* was that the reputation-based 'effects' of the alleged libel connected the defendants to California, *not just to the plaintiff*." *Walden*, 571 U.S. at 288 (emphasis added). That is, because Jones's reputational injury arose from how her local community viewed her, the injury necessarily occurred in California, and specific jurisdiction was therefore proper. *Id.* at 288-89. But the facts in *Walden* were different. There, the alleged injury—i.e., depriving the plaintiffs of their money—would have affected them regardless of where they resided. *Id.* at 290.

Here, Chism has never shown that First Advantage intended to cause him harm in California. To the contrary, he suffered no harm at all. He knowingly

authorized the background report in question. That report was accurate and resulted in him getting the job he sought. Moreover, as the U.S. District Court found before dismissing Chism's claim against First Advantage, Chism's pleadings alleged no harm. And despite multiple opportunities, Chism has never amended his complaint to fix that defect. These facts alone should end the case for specific jurisdiction in California.

Chism tries to evade this problem by creating a strawman. According to Chism, First Advantage seeks to impose a "new rule that personal jurisdiction requires a showing of tangible harm, no matter what suit-related contacts with the forum state exist." BIO at 7; *accord id.* at 21-25. From there, he describes a world in which this hypothetical new test will wreak havoc. But Chism's supposition fails for two reasons. First, it reflects a fundamental misunderstanding of First Advantage's position. It is not the absence of "tangible" harm that deprives California of specific jurisdiction here, but rather the undisputed absence of *any harm of any kind*.

Second, even if Chism were capable of identifying some form of harm, the effects of that harm would not be aimed at California. This is so because Chism would experience those effects wherever he lived or applied for a job—be it California, Florida, or Washington, D.C. Chism's own class allegations verify this: He alleges that First Advantage engaged in "systematic" FCRA violations that affected job applicants *throughout the United States*. *Chism v. First Advantage Background Servs. Corp.*, No. CGC-17-560531 (Cal. Super. Ct. (San Francisco Cty.), Aug. 2, 2017) ¶¶ 2, 12. If First Advantage has engaged in systematic conduct affecting an entire class of people

from coast to coast, one cannot logically conclude that First Advantage took specific aim at California. The *only* connection to California is Chism's residence—a fortuitous fact that has nothing to do with any intent by First Advantage. Exercising jurisdiction on these facts violates *Calder*, *Walden*, and the Fourteenth Amendment's guarantee of due process.[1]

Chism also relies on the trial court's conclusion that specific jurisdiction exists "based on the California specific disclaimers on the background check." BIO at 1. He repeatedly contends that these disclosures are significant because they "indicate[] that Chism's claim arises out of First Advantage's broader commercial activities directed at California." *Id.* at 2; *accord id.* at 9 ("larger commercial enterprise"), 12 ("extensive business in California"). But this reasoning improperly conflates specific jurisdiction with general jurisdiction, and highlights yet another problem with the trial court's reasoning. As this Court made clear in *Bristol-Myers Squibb*, a court may not rely on general connections to a forum when deciding whether specific jurisdiction exists. *Bristol-Myers Squibb*, 137 S. Ct. at 1781-82 (rejecting California's "sliding scale approach" to personal jurisdiction, in which courts would use general contacts to relax the requirements for specific jurisdiction). Moreover, the boilerplate disclaimers Chism cites do not show that First Advantage sought

[1] Nor can California exercise specific jurisdiction simply because Frito-Lay hired Chism in California. First Advantage's decision to contract with Frito-Lay and other employers to perform background checks across the United States does not provide a sufficient basis for personal jurisdiction. *See Bristol-Myers Squibb*, 137 S. Ct. at 1783.

to *harm* him in California—and without that showing, specific jurisdiction simply does not exist.[2]

Chism fails to cite any case holding that specific jurisdiction is proper when the plaintiff has not suffered any injury of any kind. He cites *Spokeo v. Robins*, 136 S. Ct. 1540 (2016) for the proposition that plaintiffs may recover for violations of legally protected rights even when the harm is intangible. BIO at 4, 24. But again, Chism has not alleged any harm—tangible or intangible—and nowhere does *Spokeo* say that a state may exercise specific jurisdiction on such facts. To the contrary, it makes clear that "bare procedural violation[s]" do not constitute concrete, particularized injuries (and thus do not confer Article III standing). *Spokeo* at 1550.

Despite the undisputed lack of harm here, the courts of California are at this moment exercising specific jurisdiction over First Advantage, forcing it to face a putative nationwide class action there. To make matters worse, as detailed in the Petition, California law forces First Advantage either to litigate and thereby waive its personal-jurisdiction defense, or to maintain that defense by sitting out and risking a default judgment for a nationwide class comprising

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[2] Chism repeatedly references a California address for Frito-Lay that appears on the background report, and holds it up as proof that First Advantage "intentionally targeted" California. BIO at 13-14, 16-17. Contrary to Chism's suggestion, however, the record contains no evidence that First Advantage sent any reports to California; rather, it made the report available on its secure, private server in Indiana. *See* Petition at 2-3. Regardless, the point is moot for the simple reason that, no matter who at Frito-Lay received the report or how they got it, Chism suffered no harm. And without harm in California, specific jurisdiction over First Advantage does not exist.

millions of members seeking between $100 and $1,000 each in statutory damages. This untenable situation is the result of an ongoing constitutional violation that is bound to be repeated should it go unreviewed.

B. Chism's side arguments fail.

Chism makes other arguments as well, but they all fail. For example, he argues that the Court should not grant certiorari because no split in authority exists and because he deems First Advantage's arguments to be novel. BIO at 5, 16, 21-25. But First Advantage does not seek certiorari based on a split of authority, and the law governing specific jurisdiction is well-developed.

The problem here is that the California judiciary has, at every echelon, misapplied this well-developed law, creating a loophole that will have a lasting and profound effect on the limits of personal jurisdiction. If this case is allowed to proceed in California, state-court plaintiffs will have a new tool to call out-of-state defendants into California court to face massive class actions while simultaneously precluding removal.[3] As

[3] It is no secret that class certification is generally easier to obtain in California state courts than in most other jurisdictions (including federal courts, which are bound by Rule 23). Unlike federal courts, California has a public policy that encourages courts to use class actions. *See Sav-On Drug Stores v. Superior Court*, 34 Cal. 4th 319, 339-40 (2004). And unlike in federal court, defendants in California court are rarely able to avoid class certification through preemptive dispositive motions. *See Fireside Bank v. Superior Court*, 40 Cal. 4th 1069, 1083 (2007) (absent a compelling reason, courts should not resolve the merits in putative class actions until after certification and notice). Notably, these litigation risks are not limited to California. When considering the Class Action Fairness Act, the Senate Judiciary Committee reported that state judges bore a much heavier caseload, and were sometimes "less careful" and more "lax" and

First Advantage has already explained, these defendants will effectively be trapped in California court and will face immense pressure to settle rather than litigate or absorb a default. Petition at 9-11. And the higher the stakes, the more likely it is that the defendants will settle. *See Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978) ("Certification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense."). Meanwhile, California will continue to confer standing upon no-injury plaintiffs who assert federal FCRA claims, even though such plaintiffs would lack standing in federal court—effectively sidestepping *Spokeo*. *See Spokeo*, 136 S. Ct. at 1550 (plaintiff could not "satisfy the demands of Article III by alleging a bare procedural violation"). Opportunities to review such cases will be rare, and absent this Court's guidance, the situation is not likely to improve.

Chism suggests that none of this is really a problem because out-of-state defendants improperly haled into California have the option of filing demurrers or seeking dismissal or summary judgment. BIO at 21. But those options are cold comfort for defendants who should not be sued in California in the first place. Such rough justice does not cure the underlying constitutional violations—if anything, it prolongs them because it requires the defendants to litigate, thereby waiving their personal-jurisdiction defenses altogether. *See* Petition at 10-11.

"permissive" about certifying class actions, than their federal counterparts—all leading to frequent due-process violations. S. REP. NO. 109-14 at 4, 14, 22, 52 (2005).

Chism also claims that First Advantage waived its present arguments in its motion to quash service. But as First Advantage established in its Petition, its motion contained the same arguments it makes here. *See* Petition at 6-7, 18-19 (citing App. 42a-60a). Although Chism purported to counter these arguments in his opposition brief, he failed to show that he suffered any harm—indeed, he did not even *contend* that such harm occurred, in California or anywhere else. *See id.* Naturally, First Advantage highlighted these failures in its reply, along with Chism's general failure to satisfy his burden of establishing personal jurisdiction. *See id*. This is not waiver—it is what reply briefs are for, especially when (as here) the nonmovant bears the burden of proof.

Finally, First Advantage objects to Chism's repeated references to the pending *Larroque* case. BIO at 20-21 & n.5. Not only do those references deal with matters outside the record, but *Larroque's* procedural posture is irrelevant to this case.

CONCLUSION

Chism's core position—that First Advantage "aimed" its alleged conduct at California—fails as a matter of law, and thus is no cause to deny the Petition. The reasons are simple: Chism suffered no harm in California or anywhere else, and he alleges that First Advantage's alleged conduct was "systematic" and nationwide in its reach. On this record, it is impossible to conclude, as *Calder* and *Walden* require, that First Advantage engaged in intentional conduct calculated to harm Chism in California.

Ultimately, the only connection between the alleged conduct and California is the fortuitous fact that Chism happens to live there. That is constitutionally

inadequate to support specific jurisdiction, and the California courts are now violating the Fourteenth Amendment by exercising such jurisdiction over First Advantage here. If that violation is allowed to continue, First Advantage will be forced to litigate this nationwide class action and forgo its jurisdictional defense, or to avoid appearing and risk a default, or to just surrender and settle. Once the word gets out, other cases are sure to follow the same trajectory.

This Court should grant the Petition.

Respectfully submitted,

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