NO. 19-_____

In the Supreme Court of the United States

JAMES HUFF, Individually and on Behalf of Others Similarly Situated,

Petitioner,

v.

TELECHECK SERVICES, INC.; TELECHECK INTERNATIONAL INC.; FIRST DATA CORPORATION,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a consumer who requested his entire credit file under the Fair Credit Reporting Act has suffered a concrete injury sufficient to confer Article III standing where the consumer reporting agency, as part of its systematic practices, withheld substantive information in the consumer's file (including inaccurately linked bank accounts) that the agency relies on to make credit determinations about the consumer?

PARTIES TO THE PROCEEDING

Petitioner

- James Huff was plaintiff in the district court and plaintiff-appellant in the court of appeals.

Respondents

- Telecheck Services, Inc., Telecheck International Inc., and First Data Corporation were defendants in the district court and defendants-appellees in the court of appeals.

LIST OF PROCEEDING

United States Court of Appeals, Sixth Circuit

No. 18-5438

James Huff, Plaintiff-Appellant v.
Telecheck Services, Inc., Telecheck International, Inc., First Data Corporation, Defendants-Appellees

Decision Date: May 3, 2019

Rehearing En Banc Denial Date: July 19, 2019

United States District Court,
Middle District of Tennessee Nashville Division

No. 3:14-cv-01832

James Huff, Plaintiff v. *Telecheck Services, Inc., Telecheck International, Inc., First Data Corporation*, Defendants

Decision Date: March 30, 2018

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PETITION FOR WRIT OF CERTIORARI

Petitioner James Huff respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The Sixth Circuit's 2-1 opinion is reported at 923 F.3d 458 and reproduced at App.1a-26a. The district court's opinion is unreported but reproduced at App.27a-39a.

JURISDICTION

The Sixth Circuit issued its opinion on May 3, 2019. Huff timely filed a petition for rehearing en banc on May 17, 2019, which the court denied on July 19, 2019, after Respondents filed a response on June 28, 2019 as directed on June 14, 2019. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III, Section 2 of the United States Constitution provides:

> "The judicial Power shall extend to all Cases, in Law and Equity, arising under . . . the Laws of the United States, and . . . to Controversies. . . . "

The pertinent provisions of the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. § 1681 *et seq.*, are reproduced at App.42a-47a.

INTRODUCTION AND STATEMENT OF THE CASE

In the landmark case of *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016), this Court held that "the violation of a procedural right granted by statute can be sufficient in some circumstances to constitute injury in fact," in which case a plaintiff "need not allege any *additional* harm beyond the one Congress has identified." *Id.* at 1549. This Court framed the question as whether the plaintiff has alleged "a bare procedural violation, divorced from any concrete harm," or a procedural violation that "entail[s] a degree of risk sufficient to meet the concreteness requirement." *Id.* at 1549-50. This Court also viewed history and the judgment of Congress as important and instructive in the analysis. *Id.* at 1549.

The Court gave an example that would likely not constitute a concrete injury—finding it "difficult to imagine how the dissemination of an incorrect zip code, without more, could work any concrete harm" that Congress sought to prevent with the FCRA—but it took no position on whether the respondent had suffered a concrete injury. *Id.* at 1550. Indeed, beyond the zip code example, the Court offered "no view about any other types of false information that may merit similar treatment." *Id.* at 1550 n.8.

The Court was careful to preserve the justiciability of claims involving certain "informational injuries," *i.e.*, violations of statutory provisions that require the disclosure of substantive information. *Id.* at 1549-50 (citing *Federal Election Comm'n v. Akins*, 524 U.S. 11 (1998) and *Public Citizen v. Department of Justice*, 491 U.S. 440 (1989)). The Court made clear that certain deprivations of statutorily-required information are concrete in their own right, but it did not delineate the types of informational injuries that confer standing.

Justice Thomas joined the Court's opinion but wrote separately to discuss what he believed to be an important distinction between statutory rights that protect individuals and those that protect the public at large. *Id.* at 1550 (Thomas, J., concurring). He stated that § 1681e(b) of the FCRA "could arguably establish a private cause of action to vindicate the violation of a privately held right," in which case "the violation of the legal duty suffices for Article III injury in fact." *Id.* at 1553-54.

Writing in dissent, Justice Ginsburg agreed with much of the Court's opinion, including what she perceived to be a focus on whether Congress connected

the procedural requirement "to the prevention of a *substantive* harm." *Id.* at 1555 (Ginsburg, J., dissenting) (emphasis added). She dissented because she viewed a remand as unnecessary where the respondent plainly suffered a concrete injury: "Far from an incorrect zip code, Robins complains of misinformation" in his credit report "that could affect his fortune in the job market." *Id.* at 1556.

In the years since *Spokeo*, lower courts have struggled to apply this Court's teachings consistently. The divisions—which are at least three-fold—concern how to differentiate between bare procedural violations on the one hand and violations that are sufficiently concrete on the other.

The first division concerns informational injuries. Whereas the Seventh, Ninth, and Eleventh Circuits recognize informational injuries under various disclosure requirements in consumer protection statutes as sufficiently concrete in their own right, the Fourth and Sixth Circuits limit the category to deprivations that result in additional consequential harm. In Huff's case, TeleCheck withheld substantive information to which Huff was statutorily entitled under § 1681g of the FCRA (key portions of his credit file), and the Sixth Circuit held that Huff lacked standing because he never suffered additional consequential harm in the form of a check decline. Still other courts do not analyze informational injuries as a distinct category of intangible harm, despite the Court's preservation of *Akins* and *Public Citizen*.

The second division concerns whether to differentiate between substantive and procedural rights. Whereas the Ninth Circuit and a number of trial courts

have treated procedural violations that protect substantive rights as concrete, the Seventh Circuit rejects the distinction as irrelevant, and still others remain silent on the issue. Remaining silent here, the Sixth Circuit ignored the fact that TeleCheck's disclosure was deficient in substance and not merely form and hindered Huff's ability to exercise his substantive right to monitor and correct inaccuracies in his credit file.

The third division concerns how to apply the "risk of harm" test when the violation results in a missed opportunity to exercise a statutory right. Some courts ask if the violation risked depriving the plaintiff of an opportunity to exercise a right conferred by statute. The Sixth Circuit here, purporting to follow the Fourth Circuit, instead asked whether giving Huff the opportunity to review and correct inaccuracies in his credit file, in hindsight, could have prevented additional consequential harm. In doing so, the Sixth Circuit transformed the "risk of harm" inquiry into a quest for additional harm that conflicts with *Spokeo*, further fractures the split among the Courts of Appeals, and results in a conflict within the Sixth Circuit.

As this case illustrates, the standard applied to determine concreteness is no minor matter but if applied inaccurately (as in this case) results in major consequences. Huff's FCRA rights and those of thousands of others have been eviscerated in favor of TeleCheck's quest to profit. Here, the Sixth Circuit plainly went too far in concluding that Huff does not have access to federal court redress, and the outcome would have been different had the issue been decided by most other Court of Appeals or another Sixth Circuit panel. That makes this case an ideal vehicle for the

Court to correct a specific injustice while also offering much-needed guidance on the limits of Congress' authority to create intangible injuries.

A. The Statutory Protections

Congress enacted the FCRA because it recognized a need for reasonable procedures to promote accuracy and fairness in credit reporting. 15 U.S.C. § 1681; *see also Spokeo*, 136 S. Ct. at 1545. "Congress plainly sought to curb the dissemination of false information [in consumer reporting] by adopting procedures designed to decrease that risk." *Spokeo*, 136 S. Ct. at 1550. "Congress found that in too many instances agencies were reporting inaccurate information," often without consumers' knowledge. *Dalton v. Capital Associated Indus., Inc.*, 257 F.3d 409, 414 (4th Cir. 2001).

As relevant here, Congress aimed to decrease the risk of harm associated with inaccurate credit reporting by imposing a disclosure requirement under which consumer reporting agencies must, upon request by the consumer, "clearly and accurately disclose to the consumer . . . [a]ll information in the consumer's file at the time of the request." 15 U.S.C. § 1681g. The consumer's file includes "all of the information on that consumer recorded and retained by a consumer reporting agency regardless of how the information is stored." *Id.* § 1681a (g). This required disclosure, with limited exceptions, must be in writing. *Id.* § 1681h(a)(2). The only burden imposed on the consumer is to furnish proper identification. *Id.* § 1681h(a)(1).

The disclosure requirement serves the FCRA's purpose by giving consumers the opportunity to review their complete files and dispute inaccurate informa-

tion, which in turn prevents the risk of harm associated with inaccuracies. *See Robertson v. Allied Sols., LLC*, 902 F.3d 690, 696 (7th Cir. 2018) ("Agencies' disclosure obligations protect consumers' interest in accurate reporting."); *Gillespie v. Equifax Info. Servs., LLC*, 484 F.3d 938, 941 (7th Cir. 2007) (stating that the disclosure requirement aims to "allow consumers to identify inaccurate information in their credit files and correct this information"); *Hauser v. Equifax, Inc.*, 602 F.2d 811, 817 (8th Cir. 1979) (same); *Ricketson v. Experian Info. Sols., Inc.*, 266 F.Supp.3d 1083, 1090 (W.D. Mich. 2017) (explaining that § 1681g "promote[s] consumer oversight of compliance with the FCRA"); *see also* S. Rep. No. 517, 91st Cong., 1st Sess. 2 at 1-2 (emphasizing consumers' right to be informed about and correct information in their credit files). This statutory protection also aims to correct skewed market incentives that exist because "time spent with consumers going over individual reports reduces . . . profits" for consumer reporting agencies and means less time for "creditors and other business customers" from whom these agencies earn their income. 115 Cong. Rec. 2, 412 (1969).

For negligent violations of the disclosure requirement, consumers can seek "actual damages" along with reasonable attorney's fees and costs. 15 U.S.C. § 1681o (a). For willful violations, consumers have the option to recover "actual damages" or statutory "damages of not less than $100 and not more than $1,000" per violation along with reasonable attorney's fees and costs. *Id.* § 1681n(a)(1). Consumers may also seek punitive damages for willful violations. *Id.* § 1681n(a)(2).

B. Factual Background and District Court Proceedings

This petition arises from a putative class action brought by James Huff on behalf of himself and similarly situated consumers who received facially deficient disclosures from Respondents TeleCheck Services, Inc., TeleCheck International Inc., and First Data Corporation (collectively "TeleCheck"). TeleCheck is a check verification company that provides consumer reports to merchants, recommending whether merchants should accept or decline checks from retail consumers at the point of sale. To do so, TeleCheck relies on identifiers including bank account numbers and driver's license numbers, which come from several sources, including prior merchant transactions processed through TeleCheck's system at the point of sale. When a consumer presents two identifiers to make a transaction (for example, a check and a driver's license), TeleCheck's system creates and maintains a link between those identifiers. In a future transaction, TeleCheck will recommend that a merchant decline a consumer's check if there is debt associated with any identifier presented at the point of sale or any identifier linked to the consumer stored in TeleCheck's system, without being able to reliably determine if the linked identifiers actually belong to the consumer. App.2a-3a.

Huff often pays by check. Exercising his rights under § 1681g of the FCRA, and having furnished his driver's license as proper identification, Huff asked TeleCheck for his entire credit file. TeleCheck partially responded to Huff's request, but purposefully omitted information from the disclosure, including linked identifiers. Based on its systematic practice, TeleCheck instead provided this cryptic disclaimer: "Your record

is linked to information not included in this report, subject to identity verification prior to disclosure." If Huff were to have contacted TeleCheck, TeleCheck would have only disclosed linked information, including linked identifiers, that Huff "affirmatively provided" TeleCheck, not information related to a linked identifier belonging to someone else which was unbeknownst to him linked to him. App.54a. TeleCheck usually receives calls from consumers only after a check decline, so it is only then that consumers may find out about an inaccurately linked account purposefully withheld from them, only if they "affirmatively provide[ ]" TeleCheck with each undisclosed linked identifier they do not know is linked to them. App.51a-52a, App.54a. Huff claims in this putative class action that TeleCheck's practice of excluding from mandatory disclosures substantive information linked to consumers within their credit files, and that TeleCheck relies on to make credit determinations and recommendations to merchants, violates the FCRA. App.28a-29a.

Huff first learned the nature of the linked information purposefully omitted from his disclosure during discovery in the lawsuit. The purposefully omitted information included six bank accounts and two transactions linked to Huff. Most troubling, five of the six linked bank accounts do not even belong to Huff, and yet TeleCheck tied Huff's creditworthiness to the accounts and considered them when deciding whether merchants should decline his checks. App.3a-4a.

According to TeleCheck, these inaccurately linked accounts have had no debt, so TeleCheck has never told a merchant to decline one of Huff's checks based on any of those accounts. Nonetheless, if any of the

inaccurately linked accounts were to have developed debt in the future, and were Huff to have then presented a check to a merchant, TeleCheck would have told the merchant to decline Huff's check. App.7a-8a.

Huff moved for class certification and TeleCheck moved for summary judgment based on Huff's alleged lack of standing. The district court granted TeleCheck's motion and denied Huff's motion as moot. In analyzing standing, the district court focused on the two omitted transactions and did not even mention the six omitted bank accounts. Huff lacked standing, the district court held, because the two transactions were accurate and their non-disclosure did not prevent Huff from obtaining credit or result in any other actual harm to Huff. App.34a. The district court recognized that Congress intended through § 1681g to give consumers the opportunity to correct inaccurate information in their files, but it did not believe that this concern was implicated "because there was no erroneous information for [Huff] to correct." On this false premise, and after years of litigation, the district court dismissed Huff's case. App.37a.

C. Sixth Circuit Proceedings.

A divided panel of the Sixth Circuit affirmed, holding that Huff had not suffered a concrete injury because the violation "had no adverse consequences" for him. App.12a. Although recognizing that TeleCheck had failed to disclose not only the two transactions, but also bank accounts, most of which did not belong to Huff, the Sixth Circuit considered it dispositive that none of the purposefully omitted information "made a difference in any credit determination." App.16a. Specifically, the court reasoned, "TeleCheck has never

told a merchant to decline one of Huff's checks due to his linked information," since "[n]one of the six accounts linked to Huff's driver's license has ever been associated with an outstanding debt." App.4a; App.12a. Although recognizing the power of Congress to elevate intangible injuries to concrete ones, the Sixth Circuit believed that Congress had failed to explain why this type of "seemingly harmless procedural violation constitutes a real injury." App.13a.

The court rejected Huff's position that Congress gave consumers the substantive right to monitor their credit files and that depriving consumers of the opportunity to dispute inaccuracies by purposefully omitting linked information is itself a concrete injury. The court distinguished this Court's informational injury cases—*Akins* and *Public Citizen*—on grounds that the plaintiffs in those cases "would have used the [withheld] information to participate in the political process," whereas "TeleCheck's incomplete report had no effect on Huff or his future conduct." App.16a. In doing so, the Sixth Circuit joined the Fourth Circuit, which together comprise the minority view that informational injuries are only concrete if the plaintiff would have altered his conduct had he received the information and thereby would have avoided additional consequential harm. App.16a. Notably, the Sixth Circuit applied the Fourth Circuit's minority view inaccurately and even ignored that Huff filed a lawsuit.

The Sixth Circuit also rejected Huff's argument that "the risk of a check decline created by TeleCheck's nondisclosure establishes standing." App.16a. With the benefit of knowing the nature of the pur-

posefully omitted information and the fact that Huff did not suffer a check decline or any other additional "adverse consequences" due to TeleCheck's violation, the majority concluded in hindsight that Huff was never exposed to a risk of real harm. App.12a.

Judge Helene White dissented, concluding that "Congress conferred on consumers like Huff the right to request their entire file to protect their interest in having only accurate information reported about them" and "TeleCheck's failure to provide Huff's entire file created a material risk that inaccurate information would be reported about him and he would face a check decline." App.21a. This two-part reasoning tracked the test adopted in *Macy v. GC Services Limited Partnership*, 897 F.3d 747, 756 (6th Cir. 2018), which followed *Strubel v. Comenity Bank*, 842 F.3d 181, 190 (2d Cir. 2016).

The dissent criticized the majority for departing from *Macy* and instead adopting "a rule that requires the plaintiff to show actual harm," which cannot be reconciled with *Spokeo*. App.23a. And whereas the majority faulted Congress for not explaining itself, the dissent had no trouble concluding that "Congress closely tied the right to disclosure of one's entire file to the legitimate purpose of preventing the risk of an inaccurate credit report." App.25a. The dissent concluded that "[t]he majority declares the [FCRA] unconstitutional" as applied to TeleCheck's systematic violations. App.21a.

Notably, not even the majority viewed the law as clear in this area, acknowledging that "the border between what Congress may do in creating cognizable intangible injuries and what it may not do remains

elusive" after *Spokeo*. App.11a. The court suggested that it may be appropriate to draw a line between private and public rights, as Justice Thomas proposed in *Spokeo*, and stated that "the theory deserves further consideration at some point." App.19a.

REASONS FOR GRANTING THE PETITION

I. THE LOWER COURTS HAVE ADOPTED DIFFERENT TESTS TO DETERMINE WHETHER A STATUTORY VIOLATION IS SUFFICIENTLY CONCRETE TO CONFER ARTICLE III STANDING.

Although *Spokeo* made clear that intangible harms *can* satisfy the concreteness requirement, the dividing line remains elusive. The lack of clarity on how to differentiate between "bare procedural violations" on the one hand and violations that are sufficiently concrete on the other has resulted in confusion and inconsistency among lower courts, in at least three respects.

A. Lower Courts Disagree Regarding the Concreteness of Informational Injuries.

Lower courts disagree on how to analyze informational injuries. The Eleventh Circuit, falling on one side of the spectrum, takes the position that plaintiffs who have been deprived of information to which they are statutorily entitled have necessarily suffered a concrete injury. *See Nicklaw v. CitiMortgage, Inc.*, 839 F.3d 998, 1002 (11th Cir. 2016) ("[A] plaintiff who alleges a violation of a statutory right to receive

information alleges a concrete injury."). In *Church v. Accretive Health, Inc.*, 654 Fed. App'x 990 (11th Cir. 2016), the court held that the plaintiff had standing to sue the defendant for failure to provide required disclosures under the Fair Debt Collection Practices Act ("FDCPA"). *Id.* at 995 ("Church did not receive information to which she alleges she was entitled."). The court did not view this Court's standing precedent as placing any limit on the types of informational injuries that confer Article III standing. *Id.* at 995 (relying on *Spokeo, supra*, and *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982)).

In a case out of the Ninth Circuit, *Larson v. Trans Union, LLC*, 201 F.Supp.3d 1103 (N.D. Cal. 2016), the plaintiff alleged a violation of § 1681g of the FCRA—the same provision at issue here—based on misleading information in his credit file that left him uncertain whether he was reported as a match to another individual and whether he had the right to dispute the information. The *Larson* court concluded that this violation fell within the category of informational injuries "that the *Spokeo* Court implicitly recognized in citing *Public Citizen* and *Akins*," and that several other courts, including the Eleventh Circuit in *Church*, have since found sufficient to confer Article III standing. *Id.* at 1106-107.

Along similar lines, the Seventh Circuit, consistent with *Akins* and *Public Citizen*, takes the position that "[a]n informational injury is concrete if the plaintiff establishes that concealing information impaired her ability to use [the information] for a substantive purpose that the statute envisioned." *Robertson*, 902 F.3d at 694. In *Robertson*, the defendant violated § 1681b(b)

(3)(A) of the FCRA by rescinding an employment offer without providing the plaintiff with the background report it had obtained. The plaintiff had standing because she "was denied information that could have helped her craft a response to [the defendant's] concerns." *Id.* at 697. This position is narrower than the standard in *Church* and *Larson* in that it turns on whether the deprivation could compromise a substantive right.

The Seventh Circuit reiterated its position but with some contradiction in *Casillas v. Madison Avenue Assocs., Inc.*, 926 F.3d 329 (7th Cir. 2019). There, the defendant violated the FDCPA when it sent an incomplete letter that failed to specify that debts may only be disputed in writing. *Id.* at 331. In concluding that the plaintiff lacked standing, the court distinguished *Robertson*: "Unlike the [FCRA], the provisions of the [FDCPA] that [the defendant] violated do not protect a consumer's interest in having an opportunity to review and respond to *substantive* information." *Id.* at 334-35. The court also found it significant that the plaintiff did not *seek* the information or allege that she would have *used* it. *Id.* at 338. This creates tension with *Robertson*, where the plaintiff likewise did not *seek* the background report, and it only mattered that she was denied "the *chance* to respond." *Robertson*, 902 F.3d at 697 (emphasis added). Further, not knowing the in-writing requirement could compromise a debtor's *substantive* right to dispute debt, which again creates tension between *Casillas* and *Robertson*.

Landrum v. Blackbird Enterprises, LLC, 214 F.Supp.3d 566 (S.D. Tex. 2016), from the Fifth Circuit,

is consistent with *Robertson*. There, the plaintiff alleged that the defendants had violated his right under the FCRA to be notified of their intent to perform a background check for employment purposes. *Id.* at 572. The plaintiff complained that he did not receive a stand-alone disclosure of this intent. *Id.* The plaintiff lacked standing, the court held, because he did not allege that he was unaware, as a substantive matter, that the defendants may conduct a background check; the fact that he did not receive the information in the proper format was a "bare procedural violation." *Id.*

The Fourth Circuit, in *Dreher v. Experian Info. Sols., Inc.*, 856 F.3d 337 (4th Cir. 2017), articulated a heightened standard for informational injuries. There, an Experian credit report revealed the plaintiff's association with a delinquent account. *Id.* at 341. As the source for the account, the report listed the defunct credit card company, rather than its servicer, but nonetheless provided the servicer's contact information. *Id.* The *Dreher* court held that standing based on an "informational injury requires that a person lack access to information to which he is legally entitled *and* that the denial of that information creates a real harm with an adverse effect." *Id.* at 345 (internal quotation marks omitted). The plaintiff lacked standing, the court reasoned, because "receiving a creditor's name rather than a servicer's name—without hindering the accuracy of the report or efficiency of the credit report resolution process—worked *no real world harm* on [him]." *Id.* at 346 (emphasis added). Thus, the Fourth Circuit requires plaintiffs to show real world harm in addition to the deprivation of information to establish Article III standing.

Here, the Sixth Circuit, purporting to rely on *Akins*, *Public Citizen*, and *Dreher*, concluded that a deprivation of information, to be concrete, must hinder participation in the political process or result in other "actual consequences." App.15a-16a. The Sixth Circuit found it dispositive that TeleCheck's violation did not affect Huff's future conduct or result in a check decline.[1] The court was not persuaded that depriving Huff of his substantive right to monitor his file and correct inaccuracies was enough without some extra showing of harm: "[T]he linked information nonetheless never made a difference in any credit determination[.]" App.16a. This standard is arguably harder to meet than the one in *Dreher*. Whereas *Dreher* could be distinguished as involving an entity misnomer that did not result in the deprivation of any substantive right, much like a mere zip code error, preventing Huff from reviewing linked information that TeleCheck relies on to evaluate his creditworthiness unquestionably deprived Huff of his substantive right to monitor and correct inaccuracies in his credit file. Nonetheless, the Sixth Circuit concluded that he had suffered no injury-in-fact.

Finally, some courts seem to ignore informational injuries as a distinct category of intangible harm. In *Strubel*, for example, the plaintiff alleged that the defendant violated certain disclosure provisions of the Truth in Lending Act: (1) failure to give notice that certain rights pertain only to disputed credit card purchases not yet paid in full; and (2) failure to give notice that a consumer dissatisfied with a credit card

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[1] *See infra* at p. 11 (explaining how TeleCheck's violation of the FCRA did impact Huff's future conduct: Huff filed a lawsuit).

purchase must contact the creditor in writing or electronically. *Strubel*, 882 F.3d at 190. Although concluding that the plaintiff had standing, and acknowledging that *Akins* and *Public Citizen* remain good law, the Second Circuit did not treat informational injuries as a distinct category and instead applied the general "risk of harm" test. The Sixth Circuit, in two deficient disclosure cases, also failed to mention informational injuries. *See Hagy v. Demers & Adams*, 882 F.3d 616, 623 (6th Cir. 2018) (holding that the plaintiffs lacked standing to bring FDCPA claim based on letter forgiving debt that did not disclose that it was from a debt collector); *Macy*, 897 F.3d at 758-60 (holding that the plaintiffs had standing to bring FDCPA claim where letters failed to state that disputes of debt must be in writing).

These variations in the standard for evaluating informational injuries are not mere semantics. As this case illustrates, the standard can make all the difference. There can be no serious dispute, for example, that the Eleventh Circuit would have concluded that Huff had standing to sue based on a concrete informational injury, since the test there is virtually unqualified. The result here would also be different in the Seventh Circuit and in other courts that consider whether the deprivation of information affected a substantive right but do not require that the violation cause any additional adverse effect.

In sum, the lower courts disagree on how to analyze whether informational injuries are sufficiently concrete to confer Article III standing in ways that are outcome-determinative. The Court should grant certiorari to resolve the division.

B. Lower Courts Disagree on Whether to Differentiate Between Procedural and Substantive Rights.

A second area of division—whether to differentiate between procedural and substantive rights—appears in informational injury cases, as described above. But the division also appears in cases that do not involve informational injuries.

On the one hand, in non-informational injury cases, the Seventh Circuit rejects any "distinction between substantive and procedural statutory violations." *Gubala v. Time Warner Cable, Inc.*, 846 F.3d 909, 912 (7th Cir. 2017); *see also Meyers v. Nicolet Restaurant of De Pere, LLC*, 843 F.3d 724, 727 n.2 (7th Cir. 2016) ("[W]hether the right is characterized as 'substantive' or 'procedural,' its violation must be accompanied by an injury-in-fact.").[2] On the other hand, the Ninth Circuit, among other courts, considers the distinction dispositive. *See Eichenberger v. ESPN, Inc.*, 876 F.3d 979, 984-85 (9th Cir. 2017) ("[T]he [Video Privacy Protection Act] identifies a *substantive* right to privacy that suffers *any time* a video service provider discloses otherwise private information."); *see also Burke v. Fed. Nat'l Mortg. Ass'n*, No. 16-CV-153-HEH, 2016 WL 4249496, at *4 (E.D. Va. 2016) ("[G]iven the purposes, framework, and structure of the FCRA, the right to privacy established by the statute appears to be more substantive than procedural."); *Matera v. Google Inc.*, No. 15-CV-04062-LHK, 2016 WL 5339806,

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[2] This is in contrast to the Seventh Circuit's focus on the substantive nature of violations alleged in informational injury cases. It is unclear why the Seventh Circuit rejects the distinction outside that context.

at *12 (N.D. Cal. Sept. 23, 2016) (following the lead of "many courts since *Spokeo*" that have "placed dispositive weight on whether a plaintiff alleges the violation of a substantive, rather than procedural, statutory right").

The Second Circuit does not use the term "substantive right," but effectively draws that line. In *Melito v. Experian Marketing Sols.*, 923 F.3d 85 (2d Cir. 2019), the court reasoned that "the receipt of unwanted advertisements [under the Telephone Consumer Protection Act] is itself the harm" and there was thus no need to analyze whether the violation posed a risk of harm to the plaintiff. *Id.* at 93-94.

The distinction may have some roots in *Spokeo*; Justice Ginsburg, writing in dissent, interpreted the majority decision as announcing a standard that considers whether the procedural requirements of the violated statute are connected "to the prevention of a *substantive* harm." *Spokeo*, 136 S. Ct. at 1555 (Ginsburg, J., dissenting) (emphasis added). But the distinction is entirely lost on many lower courts, who remain silent on whether the nature of the statutory right is relevant to the analysis.

The Sixth Circuit is among the silent courts. Here, the court never considered whether Congress gave Huff the substantive right to monitor his entire credit file and correct inaccuracies. Not asking that question made all the difference. In many courts, Huff's case would still be alive on this basis alone. *See Robertson*, 902 F.3d at 694 ("An informational injury is concrete if the plaintiff establishes that concealing information impaired her ability to use it for a substantive purpose that the statute envisioned."); *Church*, 654

Fed. App'x at 992 n.2 (concluding that Church had standing because "Congress provided Church with a substantive right to receive certain disclosures and Church has alleged that Accretive Health violated that substantive right."); *Thomas v. FTS USA, LLC*, 193 F.Supp.3d 623, 631-32 (E.D. Va. 2016) (concluding that § 1681b(b) of the FCRA establishes a substantive right to specific information). The outcome-determinative nature of the division among lower courts warrants this Court's consideration.

C. Lower Courts Disagree on How to Analyze Risk of Harm.

Finally, the way in which lower courts analyze risk of harm under *Spokeo* has resulted in inconsistent rulings in "missed opportunity" cases involving indistinguishable facts. For example, where debtors were not informed that disputes under the FDCPA must be in writing, the Sixth Circuit asked whether the violation risked compromising the *ability* of the plaintiffs to exercise their rights under the FDCPA. *Macy*, 897 F.3d at 760. In *Casillas*, by contrast, the Seventh Circuit concluded that the same violation posed no risk of harm "because there was no prospect that [the plaintiff] *would have tried* to exercise" her statutory rights. *Casillas*, 926 F.3d at 334 (emphasis added); *see id.* at 340 (Wood, C.J., dissenting) (recognizing that *Casillas* "has created a conflict with the Sixth Circuit, which held otherwise in *Macy*"); *but see Robertson*, 902 F.3d at 697 ("Article III's strictures are met not only when a plaintiff complains of being deprived of some benefit, but also when a plaintiff complains that she was deprived of a *chance* to obtain a benefit.") (emphasis added).

Here, the Sixth Circuit asked whether Huff would have avoided additional consequential harm by exercising his rights under the FCRA had TeleCheck disclosed the purposefully omitted information as statutorily required. App.7a-8a. That standard is higher than *Casillas* and far more onerous than *Macy*, resulting in an internal split in the Sixth Circuit. Had the panel in *Macy* decided Huff's appeal, his case would be alive because there is no dispute that TeleCheck's violation deprived Huff of the *ability* to monitor and correct inaccuracies in his credit file. The fractured state of the law in this area warrants the Court's review. Moreover, the majority opined that Huff "could have learned which accounts TeleCheck linked to him" if he simply called TeleCheck. App.9a. To the contrary, TeleCheck would not have disclosed the linked information to Huff unless he "affirmatively provided" TeleCheck each identifier that was, unbeknownst to him, inaccurately linked to him. App.54a.

II. THE DECISION BELOW IS PLAINLY WRONG BECAUSE IT CANNOT BE RECONCILED WITH THIS COURT'S STANDING PRECEDENT.

Under *Spokeo*, courts must assess alleged intangible harm by evaluating risk: the question is whether the violation "entail[s] a degree of risk sufficient to meet the concreteness requirement." *Spokeo*, 136 S. Ct. at 1550. A plaintiff who alleges "a bare procedural violation" for which "[i]t is difficult to imagine" how it "could work any concrete harm" of the type that Congress sought to prevent does not have standing because the violation does not carry a sufficient degree of risk. *Id.* at 1550. A zip code error, for example, may be a bare procedural violation because it is hard to

imagine how it could cause a consumer to suffer harm of the type that Congress sought to prevent with the FCRA. *Id.*

But here, the Sixth Circuit did not analyze risk; it analyzed harm. Consider this quote: "TeleCheck's alleged statutory violation did not harm Huff's interests under the Fair Credit Reporting Act because it had *no adverse consequences*." App.12a (emphasis added). And this one: "The linked information nonetheless *never made a difference in any credit determination*, meaning its continued existence in TeleCheck's system did not harm Huff's concrete economic interests." App.16a (emphasis added). The dissent appropriately criticized the majority for announcing a standard that "requires the plaintiff to show actual harm," which cannot be reconciled with *Spokeo*. App.23a.

In accord with *Spokeo*, the Sixth Circuit majority should have asked whether TeleCheck's failure to disclose substantive information to Huff, including bank accounts that TeleCheck relies on but that are not his, created a risk of harm of the type that Congress sought to prevent. The obvious answer is yes—no imagination is required—and the violation trounces upon the very purpose of the FCRA, which is to reduce the risk of harm associated with inaccurate credit reporting. Indeed, TeleCheck does not dispute that if any of the inaccurately linked accounts were to have developed debt, and were Huff to have thereafter presented a check to a merchant, then TeleCheck would have told the merchant to decline Huff's check. Nor is it disputed that, had TeleCheck properly disclosed Huff's complete file, Huff could have demanded that TeleCheck delink the inaccurately linked accounts,

thereby eliminating the risk of a check decline based on the inaccurately linked accounts.

The Sixth Circuit concluded that Huff lacked standing only because it failed to ask the right question. The error stems from an improper vantage point. While purporting to evaluate risk, the Sixth Circuit approached the inquiry with the benefit of hindsight. The Sixth Circuit considered it dispositive that the inaccurately linked accounts have not had or developed any debt, so TeleCheck's improper reliance on those accounts has not caused Huff to suffer a check decline. Yet this information—the existence of the inaccurately linked accounts and the fact that they have not been associated with debt—was first learned during discovery in the lawsuit, long after the violation occurred.

The problem is that risk, by definition, is not measured in hindsight. A poker analogy is illustrative. When a player evaluates whether to bet, call, or fold, she cannot see her opponent's cards. At that point, her decision carries risk. Once the cards are exposed, the player rejoices or laments her decision. Take, for example, a player with three-of-a-kind who decides to bet and her opponent turns out to have only two-of-a-kind. In hindsight, the player concludes that she made the right choice and would not have done anything different in hindsight. But that does not mean that her decision carried no risk. Plenty of hands *could* have beat hers, in which case she would have suffered economic harm. Hindsight does not remove the odds inherent in poker. Nor would it be accurate to say that the risk associated with the player's bet was speculative or remote—at the time she placed her bet, the risk was both actual and imminent.

The Sixth Circuit's use of hindsight is equally flawed. Except here, we are not talking about a poker game, but about thousands of consumers subjected to TeleCheck's systematic violations of the FCRA. For some, the risk of harm associated with TeleCheck's violations will materialize into additional consequential harm. For others, it will not. That is the nature of risk. In Huff's case, he learned through discovery in the lawsuit that he is linked to accounts that are not his. Although Huff did not ultimately suffer a check decline, the violation at the time nonetheless created a risk that was both sufficient in degree and imminent. Unbeknownst to Huff, TeleCheck was relying on, not just one, but five inaccurately linked accounts each and every time it evaluated Huff's creditworthiness, any one of those accounts could have developed debt at any time, any debt that developed would be grounds for a check decline, and Huff frequently pays by check.

The Sixth Circuit's error cannot be overstated. As this Court held in *Spokeo*, a statutory remedy is within Congress' authority to provide, and is thus constitutional, when the procedural violation is connected to the risk of real harm that Congress sought to prevent. *Spokeo*, 136 S. Ct. at 1549. By not analyzing risk, and instead analyzing in hindsight whether the violation resulted in additional consequential harm, the Sixth Circuit has effectively eliminated the category of intangible harms that this Court intended to preserve as constitutional. *See* App.21a (White, J., dissenting). The decision will also be used as a tool to eviscerate class actions in the Sixth Circuit seeking statutory damages under consumer protection laws. In both respects, the decision below is at odds with *Spokeo*.

In yet another misstep, the Sixth Circuit faulted Huff because, before filing suit, he did not contact TeleCheck to correct substantive information in his file that TeleCheck never disclosed to him. App.3a. But even if Huff had contacted TeleCheck, TeleCheck would have only revealed the linked information purposefully withheld from him, including bank accounts linked to him which did not belong to him—clearly information relevant to Huff, *only* if Huff "affirmatively provided" TeleCheck with each undisclosed identifier he did not know was linked to him. App.54a. Beyond the logical flaw of this position, the FCRA does not require a consumer who properly sought a disclosure under § 1681g to contact TeleCheck to try to guess what information was omitted, the nature of which the consumer does not even know, or to take any other pre-suit recourse. Nor is it fair to blame Huff for not contacting TeleCheck during this litigation. App.8a. TeleCheck has now learned which linked accounts are not Huff's and became obligated to delink them. The Sixth Circuit's focus on Huff's post-violation conduct only further exposes its improper vantage point and failure to analyze risk.

In sum, at the time the violation occurred, Huff was denied the right to monitor and correct substantive inaccuracies in his credit file, the existence of which carried a risk that he would suffer a check decline. This right to correct inaccuracies with real-world import in credit determinations is precisely the type of concrete interest that Congress sought to give consumers like Huff. *Spokeo* requires no greater showing from a plaintiff. Yet the Sixth Circuit has now announced a test under which a plaintiff can establish standing in this context only if the missed

opportunity to correct inaccuracies, if taken, would have prevented additional harm to the consumer. The Court should grant certiorari because the lower court plainly departed from *Spokeo*.

Spokeo also recognized certain informational injuries as concrete in their own right, offering *Akins* and *Public Citizen* as examples, but without elaboration. Here, the Sixth Circuit interpreted the examples as imposing a limitation: "the plaintiffs [in those cases] would have used the information to participate in the political process," whereas the purposefully omitted information here "had no effect on Huff or his future conduct" and "carried no actual consequences." App.16a. Yet an examination of *Akins* and *Public Citizen* does not support that limitation.

In *Akins*, voters sought information about campaign-related contributions and expenditures under the Federal Election Campaign Act to help them "*evaluate* candidates for public office," but the Federal Election Commission failed to disclose the information. *Akins*, 524 U.S. at 19-21 (emphasis added). According to the Court, "a plaintiff suffers an 'injury in fact' when the plaintiff fails to obtain information which must be publicly disclosed pursuant to statute." *Id.* at 21. The Court did not limit this rule to the political arena, nor did it ask whether the information would necessarily have influenced the voters' future conduct. What mattered for purposes of standing was that the voters were deprived of their statutory right to *evaluate* the substance of the information. *Id.* at 20-21.

In *Public Citizen*, interest groups sought "access to the ABA Committee's meetings and records in order to *monitor* its workings and participate more effectively

in the judicial selection process." *Public Citizen*, 491 U.S. at 449 (emphasis added). There, this Court reasoned that "refusal to permit [the interest groups] to *scrutinize* the ABA Committee's activities to the extent [the Federal Advisory Committee Act] allows constitutes a sufficiently distinct injury to provide standing to sue." *Id.* (emphasis added). To bolster its point, the Court referred to its "decisions interpreting the Freedom of Information Act," which "have never suggested that those requesting information under it need show more than that they sought and were denied specific agency records." *Id.* In other words, a plaintiff who is deprived of a statutory right to monitor or scrutinize substantive information has suffered a concrete injury, and no additional consequence need be shown.

The Sixth Circuit here did not appreciate the breadth of *Akins* and *Public Citizen*, which this Court in *Spokeo* left undisturbed. And while none of this precedent explicitly draws a line between substantive deprivations and deficiencies in disclosures, the line is reasonably inferred from this Court's standing precedent. Indeed, the majority of lower courts conclude that informational injuries that are substantive in nature are concrete. Here, however, the Sixth Circuit did not express a view one way or the other with respect to this distinction. Despite that TeleCheck deprived Huff of substantive information to which he is statutorily entitled and that TeleCheck considers every time it decides whether a merchant should accept one of Huff's checks, the Sixth Circuit held that there could be no standing absent some additional showing of consequential harm to Huff.

Under the standard applied in this case, credit reporting agencies are only liable for violations of § 1681g if they fail to disclose inaccurate information in a consumer's credit file that, if disclosed, would have allowed the consumer to take corrective action *and* ultimately avoid additional consequential harm. In effect, the decision allows consumer reporting agencies to usurp the monitoring right that Congress intended to give consumers. Although a troubling thought, because responding to § 1681g requests is expensive and time-consuming, and because the standard applied in this case dramatically reduces exposure for violations, consumer reporting agencies may be incentivized to forgo responses altogether. Yet that is precisely the skewed market incentive that Congress sought to correct with the FCRA. 115 Cong. Rec. 2, 412 (1969). This sort of "no [additional consequential] harm, no foul" message is also at odds with *Spokeo*. The Court should grant certiorari to review this important issue.

III. This Case Is an Ideal Vehicle to Address a Frequently Recurring Issue of Exceptional Importance.

This case is an ideal vehicle to resolve key areas of division that have emerged in *Spokeo's* wake. The Court in *Spokeo* did not have occasion to delineate the category of informational injuries that confer Article III standing because *Spokeo* did not involve an informational injury, and the Court's reference to *Akins* and *Public Citizen* has been interpreted inconsistently or ignored by lower courts. This case involves an informational injury and thus offers the opportunity for the Court to clarify the circumstances under which informational injuries are concrete and

the extent to which they should be analyzed differently than other types of intangible harms.

This case also offers the opportunity to clarify whether courts should first consider whether the statutory violation pertains to a substantive right. Here, Huff does not complain of the format in which his disclosure came; rather, he complains that TeleCheck withheld key information to which he was statutorily entitled and without which he could not exercise his substantive right to monitor and correct inaccuracies in his credit file. Asking whether a violation tends to risk harming a procedural or substantive right is a sensible way to separate "bare procedural violations" from violations that are sufficiently concrete, but without clear direction from the Court, division among the lower courts will likely persist.

Finally, the Sixth Circuit in this case asked in hindsight whether Huff could have avoided additional consequential harm had TeleCheck disclosed linked information to Huff as statutorily required. This improper vantage point, in effect, requires plaintiffs to show additional consequential harm and thus cannot be reconciled with *Spokeo*, which only requires that the violation pose a *risk* of harm to a concrete interest that Congress sought to prevent. Nothing in *Spokeo* supports requiring a plaintiff like Huff to suffer a check decline before he can sue to vindicate his substantive right to monitor and correct inaccuracies in his credit file. This case is the ideal vehicle to clarify the "risk of harm" standard in the context of a missed opportunity to exercise a statutory right.

Deficient disclosures are frequently the subject of class action litigation. Disclosure obligations under

the FCRA and a variety of other statutes serve a critical role in equipping protected individuals with the information needed to protect their concrete interests in the way that Congress intended. As for the FCRA, Congress recognized that "a credit reporting agency earns its income from creditors or its other business customers"—the same entities it relies on to obtain credit information—and that it must "exercise [its] grave responsibilities" in a way that "ensure[s] fair and accurate credit reporting." 115 Cong. Rec. 2, 412 (1969); 15 U.S.C. § 1681(a). The Sixth Circuit's decision in this case puts those interests in jeopardy, promotes the type of harm that Congress sought to prevent through disclosure obligations, and places constraints on congressional authority far beyond those envisioned in *Spokeo*. The Court should grant certiorari to resolve the division among the lower courts on issues that *Spokeo* did not squarely address but that are properly presented here.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for certiorari.

Respectfully submitted,

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