No. 20-297

In the Supreme Court of the United States

TRANSUNION LLC, PETITIONER,
v.
SERGIO L. RAMIREZ, RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF CONSUMER DATA INDUSTRY ASSOCIATION AS *AMICUS CURIAE* SUPPORTING PETITIONER

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QUESTIONS PRESENTED

1. Whether either Article III or Federal Rule Of Civil Procedure 23 permits a damages class action where the vast majority of the class suffered no actual injury, let alone an injury anything like what the class representative suffered.

2. Whether a punitive damages award that is multiple times greater than an already substantial class-wide award of statutory damages, and is orders of magnitude larger than any actual proven injury, violates due process.

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INTEREST OF *AMICUS CURIAE*[1]

The Consumer Data Industry Association ("CDIA") is a century-old international trade association for consumer reporting agencies, and it is the largest trade association of its kind in the world. Among other activities, CDIA establishes industry standards, provides business and professional education for its members, and produces educational materials for consumers on their credit rights and the role of consumer reporting agencies in the marketplace. CDIA participated in the legislative efforts that culminated in the enactment of the Fair Credit Reporting Act ("FCRA") and its subsequent amendments, as well as efforts to pass similar statutes in various States.

CDIA's members play a vital role in the American economy by creating, maintaining, and communicating consumer reports on approximately 200 million American consumers. Consumer Financial Protection Bureau ("CFPB"), *Key Dimensions And Processes In The U.S. Credit*

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[1] Under Rule 37.6, the Consumer Data Industry Association affirms that no counsel for a party authored this brief, in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae, its members, or its counsel made a monetary contribution to its preparation or submission. Under Rule 37.2, all parties received timely notice of the intent to file this brief and have consented to its filing.

Reporting System: A Review Of How The Nation's Largest Credit Bureaus Manage Consumer Data at 3 (Dec. 2012) (hereinafter "*CFPB 2012 Report*");[2] *see also* Federal Trade Commission ("FTC"), *Report To Congress Under Section 319 Of The Fair And Accurate Credit Transactions Act Of 2003* at 1–2 (Jan. 2015) (hereinafter "*FTC 2015 Report*").[3] These reports "are used by creditors and others to make critical decisions about the availability and costs of," for example, "credit, insurance, and employment." FTC, *Report To Congress Under Sections 318 And 319 Of The Fair And Accurate Credit Transactions Act Of 2003* at i (Dec. 2004) (hereinafter "*FTC 2004 Report*").[4]

The U.S. consumer reporting system evolved and operates on a voluntary basis. Furnishing information to a consumer reporting agency is, with limited exception, a voluntary endeavor. When the providers of consumer reports and the furnishers of consumer report information face substantial liability for an error sitting in a credit file that the agency

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[2] Available at https://www.consumerfinance.gov/data-research/research-reports/key-dimensions-and-processes-in-the-u-s-credit-reporting-system/ (all websites last accessed October 7, 2020).

[3] Available at https://www.ftc.gov/system/files/documents/reports/section-319-fair-accurate-credit-transactions-act-2003-sixth-interim-final-report-federal-trade/150121factareport.pdf.

[4] Available at https://www.ftc.gov/sites/default/files/documents/reports/under-section-318-and-319-fair-and-accura te-credit-transaction-act-2003/041209factarpt.pdf.

never disseminates to any creditor, that undermines the incentive to collect credit information. If consumer reports become less complete and, consequently, paint a less comprehensive picture of the consumer, these reports will be less predictive of lending risk. The result will be increased transaction costs whenever a creditor or insurer makes a risk determination, and thus increased costs to all consumers. By holding that no-report-dissemination FCRA claims satisfy Article III's injury-in-fact requirement and allow for class actions composed largely of no-report-dissemination plaintiffs, the Ninth Circuit's decision below poses a grave threat to CDIA's members, particularly in light of the FCRA's allowance for the recovery of an unlimited aggregate of statutory and punitive damages (which punitive damages amounts the Ninth Circuit's decision below further inflates).

INTRODUCTION AND SUMMARY OF ARGUMENT

The Ninth Circuit affirmed, in relevant part, a massive damages award to a class composed largely of consumers whose consumer reports were never provided to a potential creditor. The Ninth Circuit's theory was that the mere existence of a line of inaccurate information sitting in a credit file gives a consumer standing to bring a claim under 15 U.S.C. § 1681e(b), because of the *possibility* that a creditor might seek and obtain that information. That decision portends a far-reaching expansion of FCRA

class actions, harming consumer reporting agencies, consumers, and with them, the entire economy.

The first Question Presented is plainly worthy of this Court's review. The Ninth Circuit's holding that a never-disclosed line of inaccurate information in a consumer's file creates an Article III injury under *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016), conflicts with decisions from multiple other courts of appeals. Further, that holding is particularly inapt under *Spokeo*'s consideration of Congress' judgment of which statutory violations produce harm or risk of harm. That is because, in enacting § 1681e(b), Congress was not purporting to address non-disseminated errors sitting in credit files. *Id.* at 1549 ("In determining whether an intangible harm constitutes injury in fact, both history and the judgment of Congress play important roles."). And the Ninth Circuit's holding will be particularly harmful to the consumer reporting industry, given that the industry keeps files on about 200 million Americans, with *billions* of lines of information within those reports. If any consumer having a line of inaccurate information merely sitting within any credit file has Article III standing and can join a class action lawsuit, the negative consequences for consumer reporting agencies, and thus consumers and the economy as a whole, would be severe.

The second Question Presented further reinforces the need for review. FCRA violations can already result in "crushing liability," *Trans Union LLC v.*

FTC, 122 S. Ct. 2386, 2387 (2002) (Kennedy, J., joined by O'Connor, J., dissenting from denial of writ of certiorari), and the Ninth Circuit's approach to punitive damages, if permitted to stand, will exacerbate this problem. And that issue is likely to evade this Court's review in future cases, as the combination of the Ninth Circuit's holdings here will lead to massive "pressure[ ]" to "settl[e] questionable claims," ensuring that such cases may not reach this Court. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011).

This Court should grant the Petition.

ARGUMENT

I. This Court Should Review Whether Article III And Rule 23 Permit A Plaintiff To Be Part Of An FCRA Class When No Creditor Requested Or Saw The Claimed Error In The Plaintiff's Credit File

CDIA wholly agrees with Petitioner that this Court should review the first Question Presented, which asks whether Article III and Rule 23 permit a class that contains numerous members who suffered no actual injury from the claimed error in their credit files. *See* Pet. 18–28. CDIA highlights three considerations supporting review of that Question, especially as to the Ninth Circuit's holding on Respondent's principal claim here, under 15 U.S.C.

§ 1681e(b)[5]: (A) the Ninth Circuit's decision upholding this class action award, in the face of Petitioner's Article III and Rule 23 challenges, conflicts with decisions from other courts of appeals; *infra* Part I.A; (B) the Ninth Circuit's holding is based upon a claimed injury that Congress, under *Spokeo*'s congressional intent analysis, declined to recognize in adopting 15 U.S.C. § 1681e(b), *infra* Part I.B; and (C) the decision below poses a serious threat to consumer reporting agencies, which "have assumed a vital role," 15 U.S.C. § 1681(a)(3), in the Nation's economy, *infra* Part I.C.

A. The Ninth Circuit's Decision Creates Conflicts With Other Courts Of Appeals

The Ninth Circuit affirmed a class verdict where, as to most class members, no creditor ever saw the allegedly inaccurate line of information sitting in the consumer's credit file. App. 26, 39–40. The Ninth Circuit's premise that the mere existence of that line of information somewhere within the credit file amounts to an Article III injury, and permits

[5] Respondent's two other follow-on claims alleged that Petitioner did not "clearly and accurately disclose" class members' credit files upon request, 15 U.S.C. § 1681g(a), and that Petitioner did not include a required summary-of-rights disclosure in a mailing to class members, *id.* § 1681g(c)(2). *See* App. 29–30. As Petitioner properly explains, these follow-on claims are non-starters for the vast majority of class members here under both Article III and Rule 23, for much the same reasons articulated for Respondent's lead claim. *See* Pet. 18–28.

certification of a class, conflicts with multiple decisions from other courts of appeals.

The D.C. Circuit, the Seventh Circuit, and the Eighth Circuit have all held that the mere storage of consumer information, without dissemination, does not inflict an Article III injury on the consumer under *Spokeo*, even when that storage is unlawful. In *Owner-Operator Independent Drivers Association, Inc. v. United States Department of Transportation*, 879 F.3d 339 (D.C. Cir. 2018), the D.C. Circuit held that the "mere existence of inaccurate [safety] information" about certain truck drivers in a database maintained by the Department of Transportation did not impose an Article III injury under *Spokeo*, given that the information was not "disseminat[ed]" to any "potential employer." *Id.* at 340, 345. "[A]lthough the mere existence of inaccurate database information is not sufficient to confer Article III standing," the D.C. Circuit explained, the actual "dissemination of that information to a potential employer is." *Id.* at 345. The Seventh and Eighth Circuits reached the same Article III conclusion with respect to personally-identifying consumer information unlawfully held, but not disseminated, by cable companies. *Gubala v. Time Warner Cable, Inc.*, 846 F.3d 909, 910, 912 (7th Cir. 2017); *Braitberg v. Charter Commc'ns, Inc.*, 836 F.3d 925, 930 (8th Cir. 2016).

Similarly, the Seventh Circuit, the Fourth Circuit, and the Sixth Circuit have held that FCRA plaintiffs' failure to establish actual harm from an

"informational injury" defeats Article III standing under *Spokeo*. The Seventh Circuit reached this holding when considering a prospective employer's provision of a disclosure to a job applicant, informing him that it may access his consumer report, which disclosure contained "extraneous information" in (technical) violation of the FCRA. *Groshek v. Time Warner Cable, Inc.*, 865 F.3d 884, 887–89 (7th Cir. 2017). The Fourth Circuit came to the same conclusion in a case where a consumer reporting agency erroneously listed a "defunct credit card company" as a source of information in a consumer report, rather than "the name of [that company's] servicer." *Dreher v. Experian Info. Sols., Inc.*, 856 F.3d 337, 340, 343–47 (4th Cir. 2017). And the Sixth Circuit reached the same result in a case where a check-verification company sent a consumer his own file, which omitted transactions from accounts linked to him. *Huff v. TeleCheck Servs., Inc.*, 923 F.3d 458, 461, 467–68 (6th Cir. 2019).

All of these decisions conflict with the Ninth Circuit's holding in the present case. Here, the Ninth Circuit held that the mere existence of a line of inaccurate information in a credit file imposes an Article III injury and permits participation in an FCRA class, App. 26, 40, even when that information is, to quote the D.C. Circuit, never "disseminat[ed]" to any "potential" creditor, *Owner-Operator*, 879 F.3d at 345. Or, in the Seventh Circuit's words, the Ninth Circuit's holding here permits a lawsuit for mere "extraneous information" sitting within a credit file,

even where the consumer reporting agency never disseminates that information to any creditor. *Groshek*, 865 F.3d at 887.

B. Congress Recognized The Harm That Consumer Reporting Agencies Impose By *Disseminating* Inaccurate Information To Creditors, Not From Having A Line Of Inaccurate Information Merely Sitting In A Consumer File

This Court in *Spokeo* explained that "the judgment of Congress" informs the determination of "whether an intangible harm constitutes injury in fact" under Article III of the Constitution. 136 S. Ct. at 1549. Here, the Ninth Circuit's holding that all class members suffered an Article III injury simply because their consumer file contained a line of inaccurate information, finds no grounding in the harms that Congress sought to remedy in 15 U.S.C. § 1681e(b). That is because, in adopting § 1681e(b), Congress focused on the harm from a consumer reporting agency *disseminating* inaccurate information about a consumer in a consumer report. There is no indication that Congress believed inaccuracies merely sitting in a consumer file should lead to a finding of cognizable injury under § 1681e(b).

To understand that Congress in § 1681e(b) did not seek to address the (nonexistent) harms that flow from a line of information merely sitting within a consumer's credit file, recognizing the difference

between consumer “file” and “consumer report” is critical. § 1681e(b) requires that whenever “a consumer reporting agency prepares a *consumer report* it shall follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates.” 15 U.S.C. § 1681e(b) (emphasis added). A “consumer report” is, in relevant part, “any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer’s credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living.” *Id.* § 1681a(d)(1). A consumer “file,” on the other hand, is “all of the information” that a consumer reporting agency has “recorded and retained” on a consumer, “regardless of how the information is stored.” *Id.* § 1681a(g). So while both a “file” and a “report” contain consumer information, what distinguishes a consumer report is the *communication* of that information to a third party. *See Collins v. Experian Info. Sols., Inc.*, 775 F.3d 1330, 1335 (11th Cir. 2015) (“A ‘consumer report’ requires communication to a third party, while a ‘file’ does not.”); *Brown v. Wal-Mart Stores, Inc.*, 507 F. App’x 543, 546 (6th Cir. 2012) (“Under the plain language of section 1681e(b), [plaintiff] cannot maintain a claim for allegedly improper procedures unless the consumer reporting agency actually issued a consumer report about him.”); *but see generally Guimond v. Trans Union Credit Info. Co.*, 45 F.3d 1329, 1333 (9th Cir. 1995).

In other words, when a consumer reporting agency "record[s] and "retain[s]" consumer information, the agency has simply created a consumer "file." § 1681a(g). Only when the agency "communicat[es]" that information to a third party has the agency created a consumer "report." *Id.* § 1681a(d)(1); *see Spokeo*, 136 S. Ct. at 1545 (noting "the FCRA applies to companies that regularly disseminate information"); *accord Trans Union Corp. v. FTC*, 81 F.3d 228, 233 (D.C. Cir. 1996). Or, as the FTC has explained, the "information furnished to a final user" is the consumer report under the FCRA, *FTC 2004 Report* at 10, while the information that an agency "compile[s]" is the consumer file, *id.* at 1; *accord* FTC, *40 Years Of Experience With The Fair Credit Reporting Act: An FTC Staff Report With Summary Of Interpretations* (July 2011), 2011 WL 3020575, at *13.

The distinction between a consumer report and a consumer file shows what "intangible harms" Congress sought to "elevate" to Article III injuries in § 1681e(b). *Spokeo*, 136 S. Ct at 1549. Again, under § 1681e(b)'s reasonable procedures provision, "[w]henever a consumer reporting agency prepares a *consumer report* it shall follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the *report* relates." § 1681e(b) (emphases added). The statute's repeated uses of "report"—rather than "file"—"plainly" shows that Congress was concerned with "the *dissemination* of false information," rather

than the mere existence of inaccurate information sitting in a consumer file, because, by definition, only reports are disseminated to third parties. *See Spokeo*, 136 S. Ct. at 1550 (emphasis added); *see generally Russello v. United States*, 464 U.S. 16, 23 (1983) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (brackets omitted)). Rephrased, Congress required the use of reasonable procedures whenever a consumer reporting agency prepares a consumer "report"; the fact that Congress chose "report" instead of "file" demonstrates which intangible harms it crafted § 1681e(b) to prevent: the "communication of [inaccurate] information by a consumer reporting agency bearing on a consumer's credit worthiness." 15 U.S.C. § 1681a(d)(1); *id.* § 1681e(b); *see Spokeo*, 136 S. Ct. at 1549–50.

The Ninth Circuit's Article III holding conflicts with Congress' understanding of the specific harms that it designed § 1681e(b) to protect. According to the Ninth Circuit, all class members may bring a § 1681e(b) claim although, for the vast majority of members, Petitioner *never* disseminated their consumer reports to any third party. App. 26. That is, for the overwhelming majority of class members, the reasonable procedures claim was premised on inaccuracies in their credit file only, given that Petitioner had not "disclosed [their] credit report[s] to a third party." *Id.* at 19. Nevertheless, the court

concluded that these class members had standing to both bring, and prevail on, the reasonable procedures claims against Petitioner. *Id.* at 19–29.

C. The Ninth Circuit's Holding Needlessly Harms Consumer Reporting Agencies, And Thus Consumers And The Economy As A Whole

The Ninth Circuit's decision poses a substantial threat to consumer reporting agencies and thus to all consumers and the Nation's economy. Given the large number of furnishers and other sources that send information to consumer reporting agencies, some inaccuracies within internal databases are inevitable, notwithstanding the best efforts of the agencies and the entities that furnish information. If the Ninth Circuit's holding—that any such latent inaccuracies in consumer files can amount to an Article III injury and permit class-wide recovery, even when consumer information is not disseminated to any potential creditors—is permitted to stand, then consumer reporting agencies will face staggering liability from class action lawsuits, using this lawsuit as the model.

1. As Congress recognized in the FCRA, the Nation's economy "is dependent upon fair and accurate credit reporting," 15 U.S.C. § 1681(a)(1); *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 52 (2007), given that lenders rely on consumer reports "to make sound decisions" with respect to consumers, S. Rep. No. 91-517, at 2 (1969); *FTC 2004 Report* at i; *FTC*

2015 Report at 2; *CFPB 2012 Report* at 3. This reliance "benefits both creditors and consumers," *FTC 2004 Report* at i, since consumers may obtain low-cost credit "within minutes of applying," and lenders may more accurately assess risk, *FTC 2015 Report* at 2; Michael E. Staten & Fred H. Cate, *The Impact of National Credit Reporting Under the Fair Credit Reporting Act: The Risk of New Restrictions and State Regulation* at ii, iv (2003).[6] So, because of the function of consumer reports in the national economy, "[c]onsumer reporting agencies have assumed a vital role" as the "assembl[ers] and evaluat[ors]" of "consumer credit." 15 U.S.C. § 1681(a)(3).

The benefits to the users of consumer reports are vast. Consumer reports lessen the "informational asymmetry" between borrowers and lenders concerning a borrower's likelihood of repaying a loan. Staten & Cate, *supra*, at 11; Michael A. Turner, *et al.*, *U.S. Consumer Credit Reports: Measuring Accuracy And Dispute Impacts* at 9 (May 2011).[7] Once equipped with "accurate and complete credit ratings" from a consumer report, which bear on the borrower's likelihood of repayment, a lender may "more precisely estimate default risk," which then enables the lender to "tailor [its] interest rates and other credit terms to the risk presented by the borrower." FTC, *Report To*

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[6] Available at http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.111.3481&rep=rep1&type=pdf.

[7] Available at https://www.perc.net/publications/u-s-consumer-credit-reports-measuring-accuracy-dispute-impacts/.

Congress Under Section 319 Of The Fair And Accurate Credit Transactions Act Of 2003 at 5 (Dec. 2012) (hereinafter "*FTC 2012 Report*")[8]; Staten & Cate, *supra*, at 11–12. This tailoring reduces the lender's bad-debt costs, which, in turn, allows the lender to extend more credit to more credit-worthy consumers and generate more income. Staten & Cate, *supra*, at 12.

Consumers "across the age and income spectrum" benefit from a robust consumer reporting industry. *Id.* at ii–iii; World Bank Group, *General Principles For Credit Reporting* at 1 (Sept. 2011).[9] Consumer reports lower the cost of borrowing, since the lenders who reduce costs of bad debt by relying on these reports can lend to consumers at lower interest rates. *See* Staten & Cate, *supra*, at ii–iii, vii; World Bank Group, *supra*, at 1. Consumer reports facilitate faster credit decisions, allowing consumers to quickly receive necessary financing, even for "very significant decisions" like "a college education," "a new home," or an "automobile." Staten & Cate, *supra*, at vi; *FTC 2015 Report* at 1–2; World Bank Group, *supra*, at 1. This all means that "[c]redit reporting . . . increas[es] the number of Americans who qualify for credit,"

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[8] Available at https://www.ftc.gov/sites/default/files/documents/reports/section-319-fair-and-accurate-credit-transactions-act-2003-fifth-interim-federal-trade-commission/130211factareport.pdf.

[9] Available at http://documents.worldbank.org/curated/en/662161468147557554/General-principles-for-credit-reporting.

Staten & Cate, *supra*, at iv—most prominently, "borrowers that have traditionally faced systemic bias" from mainstream credit institutions, Turner, *supra*, at 9; Staten & Cate, *supra*, at 8–9.

These crucial benefits of the consumer reporting industry depend in a large degree on keeping the costs of this "elaborate" consumer reporting "mechanism" reasonable. § 1681(a)(2); *see* Staten & Cate, *supra*, at vii; World Bank Group, *supra*, at 4, 20, 30. Yet, that important goal is difficult, since "most aspects" of this system "are vulnerable to the high costs of . . . regulation." Staten & Cate, *supra*, at vii; *see id.* at 28.

2. Consumer reporting agencies hold a substantial volume of information about consumers. Even just the three largest consumer reporting agencies maintain detailed credit files for "approximately *200 million consumers*." *FTC 2015 Report* at 1–2 (emphasis added). Those files contain information from over 1.3 billion "trade lines," or individual credit accounts owned by consumers. *CFPB 2012 Report* at 3. Consumer reporting agencies receive this consumer information from roughly 10,000 data furnishers. *Id.* These furnishers themselves are often creditors, including "[m]ost large banks and finance companies," *FTC 2012 Report* at 3, as well as "collections agencies" and other institutions, *FTC 2015 Report* at 1–2. These entities all voluntarily provide this information to the consumer reporting agencies "because they benefit from the credit

reporting system as well." *Trans Union Corp.*, No. 9255, 2000 WL 257766, at *2 (F.T.C. Feb. 10, 2000).

To keep information on 200 million consumers as current and accurate as possible, consumer reporting agencies must regularly process *billions* of updates. Staten & Cate, *supra*, at 28; *FTC 2004 Report* at 14 & n.43. This includes "over 2 billion trade line updates, 2 million public record items, [and] an average of 1.2 million household address changes a month." Staten & Cate, *supra*, at 28; *see also Trans Union Corp. v. FTC*, 245 F.3d 809, 812 (D.C. Cir. 2001) ("Trans Union receives 1.4 to 1.6 billion records per month."); *Sarver v. Experian Info. Sols.*, 390 F.3d 969, 972 (7th Cir. 2004) ("over 50 million updates . . . each day"). Such "huge volumes of data," Staten & Cate, *supra*, at 28, are crucial to the "effectiveness of this system," since the production of reliable consumer reports "depends upon a constant flow of consumers' credit information," *Trans Union Corp.*, 2000 WL 257766, at *2; *see FTC 2015 Report* at 1–2.

3. Given the sheer volume of information that consumer reporting agencies maintain in their files, the Ninth Circuit's decision threatens to impose huge FCRA-related costs on these agencies, and thus society in general. *See Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 146 (2011) ("[C]ourts must be more careful to insist on the formal rules of standing, not less so," in this "era of frequent litigation [and] class actions[.]"). By conferring Article III standing on consumers for mere

inaccuracies in credit files—even when the agency never communicates the inaccurate information to a potential creditor—the Ninth Circuit's decision will exponentially increase the potential grounds for costly class action lawsuits. It is, after all, impossible to eliminate all errors from such a large database. If every such error in an internal database is now an Article III injury and Rule 23 basis for a class action lawsuit, consumer reporting agencies will bear significant burdens in the form of more and costlier FCRA class action lawsuits. These unjustified, increased burdens would inevitably reduce the important value that these agencies provide, thus harming creditors, consumers, and the national economy.

II. The Ninth Circuit's Punitive Damages Holding Magnifies The Threat That Its Article III And Rule 23 Holdings Pose To Consumer Reporting Agencies

The second Question Presented—challenging on due-process grounds the Ninth Circuit's authorization of the outsized punitive damages award, compared to an already substantial class-wide statutory damages award, itself unmoored from any actual injury—only serves to heighten the necessity of this Court granting review. Pet. 28–31.

The FCRA's damages provisions can expose consumer reporting agencies to "crushing liability." *Trans Union, LLC*, 122 S. Ct. at 2387 (Kennedy, J.,

joined by O'Connor, J., dissenting from denial of writ of certiorari). Under the FCRA, any consumer may recover "damages of not less than $100 and not more than $1,000" for a consumer reporting agency's "willful[ ]" violation of "any requirement imposed." 15 U.S.C. § 1681n(a)(1)(A). Further, the statute expressly provides for punitive damages in "such amount . . . as the court may allow." *Id.* § 1681n(a)(3). The FCRA does not cap the aggregation of these statutory and punitive damages in a class action, *see* § 1681n(a); *compare id.* § 1640(a)(2)(B), or provide any standards for setting the damages amount within the statutory damages range. As a result, a consumer reporting agency's potential exposure in such a case "can add up quickly," *Barr v. Am. Ass'n of Pol. Consultants, Inc.*, 140 S. Ct. 2335, 2345 (2020) (plurality opinion)—like the $40 million award here, Pet. 28.

The "simple mathematics" of the FCRA's damages provisions means that these cases will only multiply, since these kinds of "class actions [are] so attractive to plaintiffs' lawyers." Sheila B. Scheuerman, *Due Process Forgotten: The Problem of Statutory Damages and Class Actions*, 74 Mo. L. Rev. 103, 114 (2009). On the contrary, the Ninth Circuit's opinion makes them *more* likely, because it would potentially afford Article III standing to any of the approximately 200 million consumers with a consumer file on record with a consumer reporting agency, regardless of the communication of any inaccuracy in a consumer report. *See supra* Part I. And because this FCRA

class-action-damages issue has sufficiently percolated in the lower courts, *see, e.g.*, *Bateman v. Am. Multi-Cinema, Inc.*, 623 F.3d 708, 721 (9th Cir. 2010); *Harris v. Mexican Specialty Foods, Inc.*, 564 F.3d 1301, 1310–13 (11th Cir. 2009); *Murray v. GMAC Mortg. Corp.*, 434 F.3d 948, 953–54 (7th Cir. 2006); *see also* Scheuerman, *supra*, at 112–13 & nn.56–73, the Court's review is warranted.

Importantly, while the frequency of these crushing-liability FCRA class actions will only increase, this Court may not have the opportunity to address the Ninth Circuit's erroneous punitive damages holding again in the foreseeable future. As Petitioner explains, this case was already the "rare class action that was litigated to final judgment." Pet. 35. Now, with the Ninth Circuit's condoning (and, indeed, encouraging) outsized punitive damages awards on top of the FCRA's already-significant statutory damages allowance, consumer reporting agencies finding themselves as defendants in landslides of such cases will face even more "pressure[ ] into settling questionable claims" before they ever reach appellate review. *Concepcion*, 563 U.S. at 350. And, absent this Court's review, these cases will gravitate to district courts in the Ninth Circuit. This Court should grant review now, lest "the risk of 'in terrorem' settlements" insulate this important issue for decades to come. *Id.*

CONCLUSION

This Court should grant the Petition.

Respectfully submitted,

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