No. 20-297

In the Supreme Court of the United States

TRANS UNION LLC, PETITIONER,
v.
SERGIO L. RAMIREZ, RESPONDENT.

ON 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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QUESTION 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.

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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 this brief's preparation or submission. All parties have filed letters granting blank consent to the filing of merits-stage amicus briefs. Rule 37.3.

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's accuracy and reliability depends on the voluntary furnishing and collection of information. Furnishing information to a consumer reporting agency about a consumer is, with limited exception, a voluntary endeavor, but the more entities participate, the more reliable and accurate consumer reports will be. When the

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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 February 3–4, 2021).

[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-accurate-credit-transaction-act-2003/041209factarpt.pdf.

providers of consumer reports and the furnishers of consumer information face substantial liability for an error sitting in a consumer file that the agency 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. To hold that FCRA claims satisfy Article III's injury-in-fact requirement even where no report was ever disseminated—and to allow for class actions composed largely of plaintiffs whose reports were never disseminated—would pose a grave threat to CDIA's members. The FCRA would then allow for plaintiffs to recover a significant aggregate of statutory and punitive damages based on errors that never saw the light of day.

INTRODUCTION AND SUMMARY OF ARGUMENT

Consumer reporting agencies maintain hundreds of millions of consumer files, composed of billions of lines of information linked to consumers. Some entries within this substantial store of information will, from time to time, turn out to be inaccurate, notwithstanding these agencies' diligent efforts. As the FCRA makes clear, consumer reporting agencies

do *not* generally disseminate consumer *files* to third parties; rather, they disseminate consumer *reports*.

This Court should honor this distinction between consumer files that consumer reporting agencies maintain internally, on the one hand, and disseminated consumer reports, on the other, and hold that the presence of inaccurate information sitting in consumer file does not give consumers Article III standing. That is because the mere storage of an inaccuracy in a consumer file, which inaccuracy the agency never disclosed to any third party, does not cause any real-world harm. And Congress' decision to enact 15 U.S.C. § 1681e(b) does not change that Article III conclusion, under *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016). In Section 1681e(b), Congress drew upon the common law background and focused on the harms that some consumers would suffer from inaccurate, disseminated consumer reports to third parties, not the claimed impacts from latent errors in undisclosed consumer files.

Adopting the Ninth Circuit's contrary approach would cause needless, grave harm to consumer reporting agencies, consumers, and the national economy. If undisclosed inaccuracies sitting within vast consumer files now create Article III standing to bring an FCRA lawsuit—including a lawsuit on behalf of all those with a common error in such files—consumer reporting agencies would face massive liability. That, in turn, would harm the credit industry, the businesses that rely on it to accurately

evaluate risk, and all consumers, who shoulder the increased costs when those companies cannot.

ARGUMENT

I. Having An Error Sitting In One's Consumer File, Undisclosed To A Third Party, Does Not Impose An Article III Injury

This case involves the injury-in-fact element of this Court's Article III standing doctrine, in a circumstance where most class members seek only to invoke an intangible, statutory-based injury.[5] Injury-in-fact is "the first and foremost" of the standing elements, and it requires a plaintiff to show "an invasion of a legally protected interest" that is both "concrete and particularized." *Spokeo*, 136 S. Ct. at 1547–48 (citations omitted; brackets omitted). The concreteness aspect of the injury-in-fact element requires that a plaintiff's injury "be '*de facto*'; that is, it must actually exist." *Id.* at 1548. Further, "[i]n determining whether an intangible harm constitutes injury in fact," "history" "play[s] [an] important

[5] The Ninth Circuit correctly held that each class member must independently demonstrate Article III standing to recover individual money damages. Pet. App. 17; *see Lewis v. Casey*, 518 U.S. 343, 349 (1996) ("It is the role of courts to provide relief to claimants, in individual or class actions, who have suffered, or will imminently suffer, actual harm[.]"); *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1053 (2016) (Roberts, C.J., concurring); *accord Town of Chester, N.Y. v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1651 (2017).

role[ ]." *Id.* at 1549. And when Congress seeks to elevate intangible harms previously unrecognized in the law, this Court considers that congressional "judgment [ ] instructive and important," *id.*, and deserving of "attention and respect" during its Article III calculus, *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 185 (2000). Notably, when deciding whether Congress has, in fact, sought to elevate an intangible harm to an injury-in-fact, a court must consider whether Congress has *clearly* sought to achieve that outcome. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 580 (1992) (Kennedy, J., concurring in part and concurring in the judgment).

This Court should hold that a consumer does not suffer an injury-in-fact from a consumer reporting agency's mere storage of inaccurate information about that consumer in a consumer file. *Infra* Part I.A. Congress' judgment in Section 1681e(b)—the purported source of Respondent's reasonable procedures claim[6]—does not alter this Article III conclusion, since Congress' focus in that Section was

[6] While CDIA focuses this amicus brief on the Article III standing aspects of Respondent's reasonable procedures claim, under Section 1681e(b), CDIA also agrees with Trans Union that the class members here did not suffer Article III injury for their disclosure claims, Pet. Br. 29–34, and that Respondent failed to satisfy the typicality requirement, Pet. Br. 43–50.

the dissemination of consumer reports. *Infra* Part I.B.

A. A Consumer Does Not Suffer An Article III Injury When A Consumer Reporting Agency Maintains An Undisclosed Error Sitting In That Consumer's File

The mere presence of inaccurate information sitting in a consumer file, undisclosed to any third party—such as through a consumer report—neither causes real-world injury to a consumer, *see Spokeo*, 136 S. Ct. at 1550, nor is analogous to harms recognized in the common law, *id.* at 1549.

1. An error in a consumer *file* that a consumer reporting agency does not disclose to any third party causes no Article III injury to a consumer.

To see why the harm that Respondent seeks to vindicate in his reasonable procedures claim does not amount to a real-world injury, it is important to understand the difference between a consumer "file" and "consumer report," as the FCRA uses those terms. A "consumer report" is "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 which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the

consumer's eligibility for" credit, employment, or other relevant purposes. 15 U.S.C. § 1681a(d)(1) (emphasis added). A consumer "file," in turn, is "all of the information" that a consumer reporting agency has "*recorded and retained*" on a consumer, "regardless of how the information is stored." § 1681a(g) (emphasis added). While both a consumer report and a consumer file contain consumer information, only "[a] 'consumer report' requires communication to a third party, . . . a 'file' does not." *Collins v. Experian Info. Sols., Inc.*, 775 F.3d 1330, 1335 (11th Cir. 2015). Put another way, "information about the consumer that is collected and kept on file, but not communicated to a third party, is not a consumer report." *See* 1A Consumer Credit Law Manual § 16.02(2)(a) (2020).

When a consumer reporting agency "record[s] and retain[s]" consumer information, the agency creates a consumer "file"; it does not at that point create a consumer report. § 1681a(g). Only once the agency "communicat[es]" that consumer information from that file to a third party for certain, statutorily-specified reasons does the agency create a "consumer report." § 1681a(d)(1). Or, as the FTC has explained, the "information furnished to a final user" is the consumer report, *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.

Take 15 U.S.C. § 1681g, which Respondent also invoked in this lawsuit, and which clearly and specifically distinguishes between consumer files and consumer reports. That provision requires the "disclosure" of "[a]ll information in the *consumer's file*," § 1681g(a)(1) (emphasis added), and the disclosure of the *identity* of "each person . . . that procured a *consumer report*," § 1681g(a)(3)(A) (emphasis added). The giving of the information in a consumer file to the consumer is a consumer "disclosure," § 1681g, not a consumer report, *see* 1A Consumer Credit Law Manual §16.02(2)(a); *see also Johnson v. Equifax, Inc.*, 510 F. Supp. 2d 638, 645 (S.D. Ala. 2007).

With the distinction between a consumer file and consumer report in mind, the Article III defect in any claim that bases its purported injury on an error sitting in a consumer file is apparent. A mere error sitting in the consumer's undisclosed consumer file—or even mailed to the consumer himself upon his request for a file disclosure—does not cause that consumer any "harm" or "risk of real harm." *See Spokeo*, 136 S. Ct. at 1549–50 ("[N]ot all inaccuracies cause harm or present any material risk of harm."). Undisclosed errors in consumer files alone would not cause creditors to deny a consumer a line of credit or employers to deny the consumer a job. *See* § 1681a(d)(1). This is because, by definition, the consumer reporting agency has not communicated those errors to any creditor, employer, or other third-party. *See* § 1681a(g). Neither does the consumer

receiving the inaccurate information, such as upon request from the consumer reporting agency, result in any concrete harm. Upon receiving a file disclosure, the consumer will presumably know—or can quickly discern—the information's inaccuracy, given that all of the information in the file pertains to the consumer himself. *See supra* p. 8. Thus, "[i]t is difficult to imagine" how the delivery of inaccurate information about a consumer solely to himself, "without more, could work any concrete harm." *Spokeo*, 136 S. Ct. at 1550.

2. Nothing in the relevant common-law "history," *id.* at 1549, supports the conclusion that having an undisclosed error sitting in a consumer file constitutes a cognizable harm, when that error has not been disclosed to any third party, such as through a consumer report.

The "harm" that the FCRA seeks to prevent "has a close relationship to [the] harm" of defamation at common law. *Id.* That is, Congress, "to a great extent, incorporated common law defamation principles" in this statute, Virginia G. Maurer, *Common Law Defamation and the Fair Credit Reporting Act*, 72 Geo. L.J. 95, 126 (1983); *see also* Comment, *An Analysis of the Fair Credit Reporting Act*, 1 Fordham Urb. L.J. 48, 48 (1972)—an incorporation best evidenced by the FCRA's express preemption of "any [consumer] action or proceeding in the nature of defamation . . . against a consumer reporting agency . . . except as to false information furnished with

malice or willful intent to injure such consumer," 15 U.S.C. § 1681h(e). Thus, as one of the FCRA's lead sponsors explained, this statute seeks to combat the "[m]alicious gossip and hearsay" found in pre-Act consumer reports. 115 Cong. Rec. 2335, 2411 (1969) (Senator Proxmire).

Defamation, moreover "has traditionally been regarded as providing a basis for a lawsuit in English or American courts." *Spokeo*, 136 S. Ct. at 1549. Indeed, defamation principles have a robust common law provenance, tracing their roots back "to the first stages in the development of organized society." Van Vechten Veeder, *History and Theory of the Law of Defamation*, 3 Colum. L. Rev. 546, 548, 549–69 (1903); *see also* 3 William Blackstone, Commentaries on the Laws of England *123; 2 Kent, Commentaries on American Law 13 (1827).

Congress incorporated these traditional common law defamation principles into the FCRA in part because courts had begun developing a "qualified privilege" shielding consumer reporting agencies from liability for disseminating "false credit report[s]." Maurer, *supra*, at 99–105, 132; *see* 115 Cong. Rec. at 2414. Under that privilege, a consumer could only recover from an agency that disseminated inaccurate information in a consumer report if the consumer proved that the dissemination was made with "actual malice" and that the consumer suffered "actual damages." Maurer, *supra*, at 100; *see* 115 Cong. Rec. at 2414. That burden of proof was a "major

obstacle[ ]" to recovery for significant consumer harms, Maurer, *supra*, at 99–100, ultimately prompting Congress to "statutor[ily] overthrow" this privilege with the FCRA, thereby codifying a federal defamation cause of action against consumer reporting agencies, *id.* at 132–34. Then, "as a compromise between consumer interests and [the] credit reporting industry," *id.* at 132, Congress "limit[ed] the availability of the common law [defamation] action" in light of this new federal cause of action, *id.* at 133.

Most critically for this case, an essential element of defamation at common law is the defendant's "publication" of the defamatory material "to a third party." Restatement (Second) of Torts §§ 558, 577 (1977); *Defamation*, Black's Law Dictionary (11th ed. 2019) ("Malicious or groundless harm to the reputation or good name of another by the making of a false statement to a third person."); 2 Kent, Commentaries on American Law 12–13 (explaining that the "well defined" definition of "libel" includes "malicious publication . . . tending [ ] to blacken . . . the reputation"); 3 William Blackstone, Commentaries on the Laws of England *123 (requiring the defendant to "utter," "say," or have "spoken" "any slander or false tale"). Or, as Judge McKeown noted in her partial dissent below, "although publication of defamatory information has long provided the basis for a lawsuit, there is no common law analogue for a suit absent dissemination." Pet. App. 54 (citations omitted;

ellipses omitted); *accord Crane v. N.Y. Zoological Soc'y*, 894 F.2d 454, 457 (D.C. Cir. 1990) ("[T]here can be no defamation without publication."). And "[t]o constitute a publication" or dissemination for purposes of defamation, the defendant must actually "*communicate[ ]*" the "defamatory matter" to the third party. Restatement (Second) of Torts § 577 (emphasis added); 1 Law of Defamation §§ 4:77–78 (2d ed.).

Non-disseminated errors in a consumer file could not support a consumer's claim against a consumer reporting agency under common law defamation, for failure of the essential publication element. Because those errors sit undisclosed in a consumer's file, *see* § 1681a(g), the consumer reporting agency has not "communicated" this information to any third party, as the publication element of common law defamation requires, *e.g.*, Restatement (Second) of Torts § 577. Nor would the consumer reporting agency face liability for disclosing an error in a consumer file to the consumer himself, as part of a file disclosure under § 1681g(a), since that is not publication to a third party "other than the person [allegedly] defamed." Restatement (Second) of Torts § 577. Accordingly, "there is no common law [defamation] analogue for a suit" regarding an error in a consumer file, "absent dissemination" of that error in a consumer report. Pet. App. 54 (McKeown, J., concurring in part and dissenting in part).

B. The "Judgment Of Congress," As Embodied In Section 1681e(b), Does Not Elevate Errors In Consumer Files To Article III Injury Status

As this Court explained in *Spokeo*, Congress may, where appropriate, seek to elevate intangible harms unrecognized at common law to Article III injuries, and this Court gives such congressional judgments due weight in its own Article III analysis. 136 S. Ct. at 1549. Here, the core distinction between a consumer report and a consumer file reveals the harm that Congress focused on in Section 1681e(b), the statute at issue in Respondent's reasonable procedures claim. Specifically, Section 1681e(b)'s text repeatedly references consumer *reports*, not consumer *files*, demonstrating that Congress did not seek to elevate to Article III harm status an error merely sitting in a consumer file. And that conclusion is in accord with the "background of common-law . . . principles" underlying the FCRA. *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991).

The text of Section 1681e(b) provides that "[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). Again, as explained above, only consumer reports, not consumer files, are "communicat[ed] to third parties. § 1681a(d)(1); *supra* pp. 7–8. Unlike with consumer reports, consumer reporting agencies merely store—

not disseminate—consumer files. § 1681a(g); *supra* pp. 7–8. So, by referencing consumer reports in Section 1681e(b), to the exclusion of consumer files, Congress clearly identified the harm with which it was concerned: the *communication* of erroneous consumer information to third parties. Or, in *Spokeo*'s words, "Congress plainly sought to curb the *dissemination* of false information" about a consumer by a consumer reporting agency to third parties, rather than the mere existence of inaccurate information in a consumer file stored somewhere by an agency. *See* 136 S. Ct. at 1550 (emphasis added).

The common law of defamation, which provides the backdrop to Section 1681e(b), comports with Section 1681e(b)'s plain-text focus on disseminated errors. *Astoria*, 501 U.S. at 108; *supra* Part I.A.2. The harm that Congress targeted in Section 1681e(b) is analogous to the harm that defamation law seeks to prohibit. *See* BIO at 16 (characterizing Respondent's class's alleged harm as an "inaccurate and *libelous* designation" (emphasis added)). Section 1681e(b) prohibits consumer reporting agencies from issuing a consumer report without using "reasonable procedures to assure maximum possible accuracy of the information concerning the individual," § 1681e(b), thereby weeding out "[m]alicious gossip and hearsay," *see* 115 Cong. Rec. at 2411, which is one species of "false statement" within defamation's ambit, *Defamation*, Black's Law Dictionary (11th ed. 2019). Understandably, then, Congress in Section 1681e(b) was concerned with the harm or risk

of harm flowing naturally from dissemination of inaccurate consumer information to third parties.

II. Adopting The Ninth Circuit's Contrary Approach Of Allowing Article III Standing For Non-Disseminated Errors In Consumer Files Would Harm Consumers, Companies, And The Economy

If this Court were to adopt the Ninth Circuit's approach of permitting Article III standing based upon non-disseminated errors sitting in consumer files, this would impose substantial, needless harms on consumer reporting agencies and thus to consumers and the Nation's economy as a whole.

A. Consumer reporting agencies provide factual, reliable, and unbiased data to decision makers. The information provided undergirds the economy of the United States, the strength of which is based upon dependable, consistent, and accurate information that allows market participants to rely on that information to make credit determinations.

In enacting the FCRA, Congress recognized the crucial role that the consumer reporting industry plays in the Nation's economy. 15 U.S.C. § 1681(a)(1) ("The banking system is dependent upon fair and accurate credit reporting."); § 1681(a)(2) (the consumer reporting system is an "elaborate mechanism" for investigating and evaluating a consumer's "credit worthiness, credit standing, credit capacity, character, and general reputation");

§ 1681(a)(3) ("Consumer reporting agencies have assumed a vital role in assembling and evaluating consumer credit and other information on consumers."); *TRW Inc. v. Andrews*, 534 U.S. 19, 23 (2001) ("Congress enacted the FCRA in 1970 to promote efficiency in the Nation's banking system and to protect consumer privacy.").

Consumer reports "are used by lenders to help set interest rates and other key credit terms, or determine whether the consumer is offered credit at all." *Taskforce on Federal Consumer Financial Law Report Volume 1* at 395 (Jan. 2021) (hereinafter "*Taskforce Report*").[7] Prior to consumer reports being "widely available and inexpensive, information was a competitive advantage for creditors with repeat business." *Id.* Only those creditors who had interacted with a particular consumer in the past were able to assess the potential risks of entering into a credit transaction with that consumer. With the advent of consumer reports, creditors are no longer restricted by prior experience and can instead rely on these 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; *see also Taskforce Report at* 394–99.

[7] Available at https://files.consumerfinance.gov/f/documents/cfpb_taskforce-federal-consumer-financial-law_report-volume-1_2021-01.pdf.

Thus, reliance on consumer reports "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).[8] Because of its usefulness in predicting risk, information in consumer reports contributes to the efficiency, soundness, and safety of numerous industries in the United States, including the insurance, banking, finance, retail credit, housing, and law enforcement industries. Staten & Cate, *supra*, at vi, vii, 3 n.9, 8–9, 23. In the context of consumer credit, the CFPB has previously noted that "[o]f 113 million credit card and retail card accounts, auto loans, personal loans, mortgages, and home equity loans originated in the United States in 2011, the vast majority of approval decisions used information furnished by credit reporting agencies." *CFPB 2012 Report* at 5 (citing Experian – Oliver Wyman, *Comprehensive Consumer Credit Review, Experian-Oliver Wyman Market Intelligence Report*, at 7 (2011 Q4)). Accordingly, because of the core function consumer reports play in the national economy, "[c]onsumer reporting agencies have assumed a vital role" as the "assembl[ers] and evaluat[ors]" of "consumer credit." § 1681(a)(3).

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

Consumer reports provide critically important information to their users, and they benefit both lenders and borrowers. Lenders suffer from an "information[al] asymmetry" with borrowers when assessing the likelihood that a borrower will repay 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).[9] Consumer reports narrow that gap. Staten & Cate, *supra*, at 11–12. The "accurate and complete credit ratings" from a consumer report, which incorporate a borrower's repayment history, allow a lender to "more precisely estimate default risk," enabling the lender to "tailor [its] interest rates and other credit terms to the risk presented by the borrower." FTC, *Report to Congress Under Section 319 of the Fair and Accurate Credit Transactions Act of 2003* at 5 (Dec. 2012) (hereinafter "*FTC 2012 Report*")[10]; Staten & Cate, *supra*, at 11–12. By minimizing its bad-debt costs through this tailoring, the lender can provide more credit to more credit-worthy consumers, thereby generating more income. Staten & Cate, *supra*, at 12.

The benefits of a robust consumer reporting industry accrue to consumers "across the age and

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

[10] 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.

income spectrum." *Id.* at ii–iii; The World Bank, *General Principles for Credit Reporting* at 1 (Sept. 2011).[11] Consumer reports allow consumers to borrow at lower costs, since lenders who use these reports to reduce the risk of bad debt can afford to lend at lower interest rates. *See* Staten & Cate, *supra*, at ii–iii, vii; The World Bank, *supra*, at 1. And consumer reports enable lenders to make quicker credit decisions, so consumers can receive the vital financing they need without delay, 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; The World Bank, *supra*, at 1. As a result, "[c]redit reporting . . . increas[es] the number of Americans who qualify for credit," 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.

"Credit provides a 'bridge' to tens of millions of households that can sustain them through temporary disruption and declines in incomes" and, as a result, helps to "neutralize the macroeconomic drag associated with these events," lowering the risk and reducing the magnitude of economic recessions. Staten & Cate, *supra*, at iii. Through the use of both traditional and nontraditional data sources, the consumer reporting industry helps to increase

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

financial inclusion for consumers and to foster competition in credit pricing. *See id.* at iii–iv.

Keeping the costs of this well-calibrated system low is challenging because "most aspects" of this system "are vulnerable to the high costs of . . . regulation." *Id.* at vii; *see id.* at 28. Thus, while increasing access to consumer reports inevitably leads to creditors expanding credit offerings, putting consumer reporting agencies, furnishers, and consumer report users at risk of exponential monetary judgments for errors that have no impact on consumers (like sending disclosures in two envelopes, rather than one) will necessarily have the opposite effect, harming those same consumers, rather than helping them.

B. Consumer reporting agencies work with vast amounts of consumer information. The three largest consumer reporting agencies house detailed credit files for "approximately 200 million consumers." *FTC 2015 Report* at 1–2. Those files hold information on over 1.3 billion "trade lines," or individual credit accounts owned by consumers. *CFPB 2012 Report* at 3. An estimated 10,000 data furnishers provide this information to the consumer reporting agencies, *id.*, doing so voluntarily "because they benefit from the credit reporting system as well," *In re Trans Union Corp.*, No. 9255, 2000 WL 257766, at *2 (F.T.C. Feb. 10, 2000). Among these furnishers are many creditors, including "[m]ost large banks and finance companies," *FTC 2012 Report* at 3, "collections

agencies," and other institutions who recognize the utility of the system, *FTC 2015 Report* at 1–2.

These 200 million files are anything but static. To keep the files current and accurate, consumer reporting agencies regularly process *billions* of updates. Staten & Cate, *supra*, at 28; *FTC 2004 Report* at 14 & n.43. So, on average, consumer reporting agencies manage "over 2 billion trade line updates, 2 million public record items, [and] . . . 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 necessary to "effective[ly]" produce reliable consumer reports, given that their accuracy "depends upon a constant flow of consumers' credit information," *In re Trans Union Corp.*, 2000 WL 257766, at *2; *see FTC 2015 Report* at 1–2.

Because of the colossal volume of information furnished to, and warehoused by, consumer reporting agencies, "[i]naccuracies are inevitable in billions of bits of information, and the sheer volume of data means that even a vanishing fraction of errors will add up to large absolute numbers, which could affect millions of reports." *Taskforce Report* at 397. Moreover, "[i]t would be impossible to eliminate errors, and this is recognized in federal policy." *Id.*

The drafters of the FCRA foresaw this impossibility and provided consumers with a statutory means for disputing errors in their consumer files. *See* 15 U.S.C. § 1681i. The drafters then provided consumers with a cause of action if a consumer reporting agency's reinvestigation of a disputed error was unreasonable. §§ 1681i(a)(1)(A) (requiring "reasonable reinvestigation"), 1681n (cause of action for willful failure to comply with any FCRA requirement), 1681o (same, as to negligent noncompliance).

C. If this Court were to confer Article III standing on consumers for mere inaccuracies in consumer files, this would exponentially increase the number of costly FCRA lawsuits—pursued both by individual plaintiffs and by plaintiff classes—despite the fact that errors in such voluminous databases are "inevitable." *Taskforce Report* at 397. That is, if every such error in an internal database is now an Article III injury, consumer reporting agencies will bear significant burdens in the form of more and costlier FCRA litigation.

These burdens on consumer reporting agencies would be substantial. The FCRA permits consumers to recover "any actual damages sustained by the consumer as a result of" a willful failure to comply with the FCRA or "damages of not less than $100 and not more than $1,000" from those who have willfully failed to comply with the FCRA "with respect to" such consumers. § 1681n(a)(1)(A). Further, given the sheer volume of information that consumer reporting

agencies hold in consumer files, any activity taken by such an agency involving consumer information may be repeated *millions* of times each day, or even billions of times each month. *See supra* Part II.B. When the FCRA's expansive liability regime and the amount of information sitting in consumer reporting agencies files are combined with the aggregating nature of class actions like the one at issue here, consumer reporting agencies' potential "liability" from FCRA lawsuits would be "crushing." *Trans Union LLC v. FTC*, 536 U.S. 915, 917 (2002) (Kennedy, J., joined by O'Connor, J., dissenting from denial of writ of certiorari).

Crushing liability on consumer reporting agencies will mean serious harm to the economy and consumers. Such liability would force these agencies to increase the cost of providing consumer reports to creditors, ultimately curtailing creditors' use of this vital consumer information when making important lending decisions. *See* Staten & Cate, *supra*, at vii, 12, 28. Inevitably, these unjustified, increased burdens will flow to consumer borrowers themselves, in the form of increased interest rates or even exclusion from the essential consumer credit market. *See* Turner, *supra*, at 9; Staten & Cate, *supra*, at 8–9. As explained above, consumer reporting agencies help power the economy by enabling the efficient allocation of vital consumer credit. Increasing consumer reporting agencies' costs for compiling consumer files and disseminating consumer reports will increase creditors' costs to access these crucial consumer

reports. *See supra* p. 21. Increasing creditors' costs, in turn, will cause an increase in interest rates on consumer borrowers. *See supra* pp. 19–20. As a result, consumer borrowers will have less access to credit, impeding their ability to obtain essential goods and services, such as homes, automobiles, and college educations. *See supra* pp. 19–20.

CONCLUSION

This Court should reverse the judgment below.

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