No. 20- 297

IN THE

Supreme Court of the United States

TRANSUNION LLC,

Petitioner,

v.

SERGIO L. RAMIREZ,

Respondent.

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

BRIEF OF PROFESSIONAL BACKGROUND SCREENING ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

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.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS..... ii

TABLE OF CITED AUTHORITIES iv

IDENTITY AND INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT.....3

ARGUMENT.....4

I. The Ninth Circuit's Decision Has The Potential To Further Open The Floodgates To A Multitude Of New "No Injury" Class Actions...4

A. The FCRA's Statutory Framework Demonstrates The Importance Of Rigorous Enforcement of Article III's "Concrete Harm" Requirement 6

B. The Ninth Circuit's Decision Likely Will Result In A Marked Increase In FCRA Class Actions Where Plaintiffs and Class Members Suffered No Concrete Harm.....10

Table of Contents

Page

1. Section 1681b(b)(1) of the FCRA, Which Requires A Certification or Promise By an Employer to a Consumer Reporting Agency 11

2. Section 1681e(b) of the FCRA, Which Requires a CRA to Have Reasonable Procedures to Assure Maximum Possible Accuracy 14

II. The Ninth Circuit's Decision Exacerbates Ongoing And Unjustified Harm For Businesses and Consumers 18

CONCLUSION 23

TABLE OF CITED AUTHORITIES

Page

Cases

Auer v. TransUnion, LLC, et al.,
902 F.3d 873 (8th Cir. 2018). 13

Berther v. TSYS Total Debt Mgt.,
No. 06-cv-293, 2007 WL 1795472 (E.D. Wis. June 19, 2007) 19

Collins v. Experian Info. Sols., Inc.,
775 F.3d 1330 (11th Cir. 2015). 16-17

EEOC v. Freeman,
961 F. Supp. 2d 783 (D. Md. 2013) 18

Frazier v.
First Advantage Background Servs. Corp.,
No. 17-cv-30, 2018 WL 4568612 (E.D. Va. Sept. 24, 2018). 13

Gilberg v. Cal. Check Cashing Stores, LLC,
913 F.3d 1169 (9th Cir. 2019) 7

Lujan v. Defenders of Wildlife,
504 U.S. 555 (1992). 12, 17

NASA v. Nelson,
562 U.S. 134 (2011) 18

Sarver v. Experian Info. Sols.,
390 F.3d 969 (7th Cir. 2004) 15

Cited Authorities

Page

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136 S. Ct. 1540 (2016) . . . . . *passim*

Stillmock v. Weis Mkts., Inc.,
385 F. App'x. 267 (4th Cir. 2010) 9

Sullivan v. Greenwood Credit Union,
520 F.3d 70 (1st Cir. 2008) 9

Syed v. M-I, LLC,
853 F.3d 492 (9th Cir. 2017) 5, 6, 7

Syed v. M-I, LLC,
No. 14-cv-742, 2014 WL 5426862 (E.D. Cal. Oct. 23, 2014) 13, 14

Walker v. Fred Meyer, Inc.,
953 F.3d 1082 (9th Cir. 2020) 7

Wantz v. Experian Info. Sols.,
386 F.3d 829 (7th Cir. 2004) 16

Washington v. CSC Credit Servs., Inc.,
199 F.3d 263 (5th Cir. 2000) 16

Wright v. Zabarkes,
No. 07-cv-7913, 2008 WL 872296 (S.D.N.Y. April 2, 2008) 17

Page

Statutes and Other Authorities

U.S. Const. Art. III . . . . . *passim*

15 U.S.C. § 1640(a)(2)(B) 8

15 U.S.C. § 1681a(d)(1) 15

15 U.S.C. § 1681a(f) 15

15 U.S.C. § 1681a(g) 21

15 U.S.C. § 1681b(b)(1) . . . . . *passim*

15 U.S.C. § 1681b(b)(2) . . . . . *passim*

15 U.S.C. § 1681b(b)(3) 11

15 U.S.C. § 1681c 10, 22

15 U.S.C. § 1681e(b) . . . . . *passim*

15 U.S.C. § 1681g 21

15 U.S.C. § 1681i 22

15 U.S.C. § 1681n(a)(1)(A) 8

15 U.S.C. § 1681n(a)(2) 8

Cited Authorities

Page

15 U.S.C. § 1681n(a)(3). 8

15 U.S.C. § 1681p(2). 20

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15 U.S.C. § 1692k(b)(1) 9

Consumer Financial Protection Bureau, Market Snapshot: Background Screening Reports (October 2019). 19

Fed. Civ. Proc. R. 23 . . . . . .2, 4

Sup. Ct. Rule 37.6 1

Taskforce on Federal Consumer Financial Law Report, Volume II (Jan. 2021) 8

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IDENTITY AND INTEREST OF *AMICUS CURIAE*[1]

The Professional Background Screening Association ("PBSA") is an international trade association of over 850 member companies that provide employment, credit, insurance, and tenant background screening and related services to virtually every industry around the globe. The consumer reports prepared by PBSA's background screening members are used by employers, property managers, credit lenders, and volunteer organizations every day to ensure that communities are safe for all who work, reside, or visit there.

PBSA members range from large background screening companies to individually-owned businesses, each of which must comply with applicable laws, including the Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq.* ("FCRA"). PBSA members include companies that operate as "consumer reporting agencies" under the FCRA.

Among other goals, PBSA members seek to promote the accurate and timely reporting of a variety of consumer-related information for the purpose of empowering employment, housing, insurance, credit and other financial opportunities to individuals across the country. Consistent with those purposes, PBSA's members obtain consumer

1. Pursuant to Rule 37.6, PBSA 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. In addition, no person or entity other than *amicus*, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief. All parties filed letters granting consent to the filing of merits-stage *amicus* briefs.

information from thousands of different courts and other sources across the country and, in compliance with the FCRA and other laws, maintain a high volume of consumer information on a daily basis.

Many of PBSA's members are or may become defendants in putative class actions brought under the FCRA and other laws. Many of the FCRA's requirements are highly technical and procedural in nature, yet have the potential to impact thousands to tens of millions items of consumer information maintained by PBSA members. PBSA therefore has a significant interest in ensuring that courts rigorously and consistently enforce Article III standing requirements and Rule 23 of the Federal Rules of Civil Procedure.

PBSA respectfully submits that this brief will aid the Court by providing its perspective on important questions raised by the Ninth Circuit's decision. PBSA's brief is not intended to address every aspect of the issues on appeal. The matters addressed in this brief, however, are relevant to the disposition of this appeal because the brief provides additional context, particularly with respect to the potentially widespread and detrimental consequences of allowing class members to recover statutory and punitive damages where class members have not suffered concrete harm, have not sustained any actual damages, or have not even been subject to a consumer report being procured about them. The issues raised on this appeal are significant not just to the parties in this case, but to all businesses that may be affected by class action litigation where there is no injury to most or all putative class members.

SUMMARY OF ARGUMENT

Amicus agrees with Petitioner that the vast majority of class members in this appeal fail to satisfy Article III standing because they did not suffer the requisite constitutional "concrete harm," as clarified by this Court in *Spokeo, Inc. v. Robins*, 136 S.Ct. 1540, 1548-50 (2016). The Ninth Circuit's holding runs counter to *Spokeo*, invites further class action abuses, and encourages (in many cases, *compels*) unfair *in terrorem* settlements to companies facing potentially ruinous judgments – most, if not all, of which would be paid, like here, to class counsel and to class members who did not suffer any actual injury or damages whatsoever.

Amicus' members are particularly susceptible to such "no injury" class actions. This is because the FCRA imposes a number of hyper-technical and procedural requirements where an alleged violation rarely (and in some cases never) results in an injury to an individual consumer, much less to an entire class. Many of these potential FCRA claims involve fact patterns even further divorced from any potential "harm" to the consumer as compared to the claims and factual record at issue on this appeal. Yet, after the Ninth Circuit's decision, a myriad of other "no injury" class claims may fall into the web of extraconstitutional standing endorsed by the Ninth Circuit. The FCRA creates a bounty for plaintiff's attorneys to bring these "no injury" class actions by imposing statutory damages up to $1,000 per consumer, attorney's fees to prevailing plaintiffs, and possible punitive damages.

The inevitable impact of the Ninth Circuit's decision is a flood of new "no injury" class actions – brought under the FCRA and other statutes with similar overly technical requirements unlikely to cause any constitutionally recognized concrete harm to most or all purported class members. That outcome has significant ramifications for the background screening industry and for consumers, employers, landlords, credit lenders, and others that obtain or use consumer report information. By allowing Respondent to dispense with the requisite Article III standing requirements, the Ninth Circuit has—once again—provided an unwarranted incentive for the plaintiff's bar and future litigants to attempt to turn garden-variety single-plaintiff individual actions into class actions encompassing wide swaths of consumers suffering no harm or injury whatsoever. That outcome is unsupported by Rule 23, the FCRA, and this Court's precedent.

ARGUMENT

I. The Ninth Circuit's Decision Has The Potential To Further Open The Floodgates To A Multitude Of New "No Injury" Class Actions.

In *Spokeo*, this Court made clear, within the specific context of a FCRA claim, that a plaintiff cannot "allege a bare procedural violation, divorced from any concrete harm, and satisfy the injury-in-fact requirement" of Article III. 136 S.Ct. at 1549. Reaffirming prior Article III standing precedent, this Court held that "[a] 'concrete' injury must be '*de facto*'; that is, it must *actually exist*." *Id.* at 1548 (emphasis added). In other words, the injury at issue must be "real," and not merely "abstract" or speculative. *Id.*

Viewing the FCRA under this analytical framework, this Court recognized that, while Congress "sought to curb the dissemination of false information by adopting procedures designed to decrease that risk . . .[,] [a plaintiff] cannot satisfy the demands of Article III by alleging a bare procedural violation" of Section 1681e(b) of the FCRA, or any other section of the statute. 136 S.Ct. at 1550. That is because "[a] violation of one of the FCRA's procedural requirements may result in no harm," and thus not confer standing on any unharmed plaintiff or putative class member. *Id.*

The Ninth Circuit's decision unjustifiably subverts this Court's articulation of "concrete harm" to allow class members suffering no "real" or "actually exist[ing] harm" whatsoever to recover collectively tens of millions of dollars in damages. Instead of applying this Court's standard for "concrete harm," the Ninth Circuit created an extraconstitutional class action standing rule that allows class members to recover damages based on nothing more than the allegation of a hypothetical harm that *could* have occurred, but never did.

More troubling, this appeal does not represent an outlier in the Ninth Circuit. After *Spokeo*, the Ninth Circuit has chipped away the "concrete harm" requirement to allow hyper-technical, no-harm class claims to proceed – including in cases brought under the FCRA. *See, e.g.*, *Syed v. M-I, LLC*, 853 F.3d 492, 499 (9th Cir. 2017) (concluding that a plaintiff's mere allegation of "confusion" regarding a background check disclosure form conferred standing for claim brought under 15 U.S.C. § 1681b(b)(2)).

As this appeal, *Syed*, and other cases illustrate, *Spokeo* and the "concrete harm" requirement have been reduced almost to the point of a nullity in the Ninth Circuit. This appeal presents but one erroneous elevation of speculation into standing. The importance of each and every class member satisfying the "concrete harm" requirement extends well beyond the specific claims and fact pattern presented in this appeal. To prevent class action abuse (especially for FCRA claims), *amicus* respectfully submits that this Court should provide firm guideposts for appellate courts that fail to follow the path laid down in *Spokeo*, and continue to find mere speculation to rise to the level of "real," "*de facto*, "existing," and *actual* "concrete injury."

A. The FCRA's Statutory Framework Demonstrates The Importance Of Rigorous Enforcement of Article III's "Concrete Harm" Requirement.

It is no coincidence that, in just the last five years, this Court has heard two appeals regarding whether a FCRA plaintiff and class have standing under Article III. The FCRA, unfortunately, provides the perfect mechanism for the plaintiff's bar to attempt to extract large settlements under the threat of a "no injury" class action. This is the result of three primary factors: (i) the numerous exacting and specific technical requirements imposed by the FCRA; (ii) the uncapped class action damages available to prevailing plaintiffs; and (iii) the high volume nature of background screening.

First, it is well recognized that the FCRA imposes many largely procedural requirements, the violation of

which rarely (if ever) results in any harm to the consumer. One salient example can be found in Section 1681b(b)(2) of the FCRA, which requires users of employment-purposed consumer reports to provide a background check disclosure to consumers before procuring a consumer report. *See* 15 U.S.C. § 1681b(b)(2). This required disclosure must be in a document "consisting solely of the disclosure." *Id.* In a series of cases postdating *Spokeo*, the Ninth Circuit has increasingly narrowed what may be included in this "stand-alone" disclosure document, while at the same time holding that a bare allegation of "confusion" regarding the document is sufficient for Article III standing. *See, e.g.*, *Syed*, 853 F.3d at 499-500 (holding inclusion of liability release in disclosure violates statute and that plaintiff's alleged "confusion" over disclosure qualified as concrete harm); *Gilberg v. Cal. Check Cashing Stores, LLC*, 913 F.3d 1169, 1175 (9th Cir. 2019) (holding inclusion of state law disclosures was extraneous to FCRA disclosure); *Walker v. Fred Meyer, Inc.*, 953 F.3d 1082, 1090-91 (9th Cir. 2020) (holding inclusion of language advising consumers how to obtain and inspect information about their consumer report violated the stand-alone disclosure requirement).

What by statute is a procedural obligation to disclose to a consumer that a background check may be conducted about him or her has now become a tool for extracting unfair settlements, with the plaintiff's bar bringing numerous claims alleging increasingly tenuous types of supposed "extraneous" or "unclear" information on the disclosure, challenging everything from misplaced punctuation to an alleged extra word or phrase. *See Gilberg*, 913 F.3d at 1175; *Walker*, 953 F.3d at 109-91. In these cases, the empty-vessel class representatives almost

always understand they were consenting to a background check, and in most cases were hired by the defendant following the background check. Their "informational" harm is a mere fiction that has resulted in millions of settlement and litigation dollars being spent by employers. As discussed *infra* Part I.B.1-2, this is just one of the many no-injury claims under the FCRA.

Second, the FCRA imposes potentially staggering damages where liability is found. Where a willful violation is established, the FCRA mandates an award of statutory damages between $100 and $1,000 per consumer. 15 U.S.C. § 1681n(a)(1)(A). The FCRA also mandates an award of attorney's fees and costs to a prevailing plaintiff's counsel. 15 U.S.C. § 1681n(a)(3). In addition, uncapped punitive damages also are available, and as this appeal illustrates, can be awarded even to class members who did not suffer an actual injury. 15 U.S.C. § 1681n(a)(2). Moreover, unlike other consumer protection statutes, the FCRA does not impose any limits on monetary awards in class actions.[2] Tellingly, just last month, the Consumer Financial Protection Bureau (CFPB) Taskforce recommended that "Congress should adopt class action damages limitations for FCRA, to bring the FCRA civil liability provision in line with similar laws." *Taskforce on Federal Consumer Financial Law Report, Volume II* at 26 (Jan. 2021).[3]

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2. In contrast, the Truth in Lending Act, 15 U.S.C. § 1640(a)(2)(B), the Equal Credit Opportunity Act, 15 U.S.C. § 1691e(b), the Fair Debt Collection Practices Act, 15 U.S.C. § 1692k(a)(2)(B) and other similar statutes limit class action awards to the lesser of $500,000 or $1 million, or 1 percent of the defendant's net worth.

3. Available at https://files.consumerfinance.gov/f/documents/cfpb_taskforce-federal-consumer-financial-law_report-volume-2_2021-01.pdf (all websites last accessed February 5, 2021).

Even setting aside large six-figure (and higher) attorney fee awards and unlimited punitive damages, the mandate for statutory damages alone can be ruinous to *amicus*' members. Other consumer protection statutes provide guidance on the appropriate measure of statutory damages in light of the violation at issue. *See, e.g.*, 15 U.S.C. § 1692k(b)(1) (FDCPA statutory damages should consider, among other factors, the "nature" and "frequency" of the defendant's noncompliance with the statute, and whether noncompliance was "intentional"). The FCRA, however, reserves the amount of statutory damages to the fact-finder, who is free to award anywhere from $100 to $1,000 per consumer – regardless of whether the violation was intentional, whether it was technical in nature, or whether it affected substantive rights and caused real harm. *See Sullivan v. Greenwood Credit Union*, 520 F.3d 70, 74 (1st Cir. 2008) (recognizing court's discretion in selecting amount of FCRA statutory damages); *Stillmock v. Weis Mkts., Inc.*, 385 F. App'x. 267, 277 (4th Cir. 2010) ("The [FCRA] does not specify what factors a jury should consider when selecting" the amount of statutory damages.). This lack of clarity invites juries, like here, to award at or near the $1,000 statutory damages maximum, which increases *amicus*' members' exposure exponentially for even hyper-technical violations resulting in no actual injury to a consumer class.

Third, *amicus*' members operate in a high volume industry. Many of *amicus*' members prepare hundreds of thousands to millions of consumer reports per year, and retain an even higher volume of consumer data that does not appear in consumer reports. *Amicus*' members often obtain and store large quantities of criminal and other public record information, much of which never is

communicated to a third party because of the limits on reporting such information to third parties in sections of the FCRA such as Section 1681c and Section 1681e(b). As a whole, the background screening industry prepares over 100 million consumer reports per year. By their very nature, the FCRA's numerous obligations apply to voluminous amounts and types of consumer information. If a plaintiff challenges a particular practice of an industry member on a class-wide basis, the putative class claim could be on behalf of thousands or even millions of consumers. The FCRA's two- and five-year limitations periods significantly increase even these possibly astronomical class sizes and attendant liability.

The FCRA's numerous obligations and the high volume nature of the background screening industry, combined with the statute's bounty of $1,000 per consumer *and* attorney's fees *and* punitive damages, result in technical, no-harm violations of the law having the potential for company-crushing liability. The facts on this appeal illustrate how only 8,185 class members can lead to a jury awarding $60 million in damages. The Ninth Circuit's reasoning is even more concerning when applied to claims with significantly larger classes.

B. The Ninth Circuit's Decision Likely Will Result In A Marked Increase In FCRA Class Actions Where Plaintiffs and Class Members Suffered No Concrete Harm.

For the reasons discussed *supra*, the Ninth Circuit's decision has the potential to further open the floodgates of "no injury" class actions – in the Ninth Circuit and beyond. The plaintiff's bar will be highly incentivized to

pour over every policy and procedure of *amicus'* members looking for even a possibly colorable technical violation of the FCRA that could then be extrapolated into a class claim with potentially thousands or millions putative class members. A good case for the plaintiff's bar is any case with even the potential for a large class, regardless of how unlikely the class is to prevail on the merits. Because *amicus'* members are part of an organization committed to compliance with the FCRA and other applicable laws, most members have written standardized procedures to ensure compliance. It is not difficult for enterprising plaintiff's attorneys to discover such policies and then nitpick them against the statute's many procedural requirements with the goal of pursuing a no-injury class action.

1. Section 1681b(b)(1) of the FCRA, Which Requires A Certification or Promise By an Employer to a Consumer Reporting Agency.

Section 1681b(b)(1) of the FCRA offers one stark example of an acute procedural obligation under the statute and the potential massive exposure that may face a consumer reporting agency for an alleged violation. 15 U.S.C. § 1681b(b)(1). This section requires consumer reporting agencies to obtain a certification from an end-user of an employment-purposed consumer report, namely, an employer that: (i) the employer complied with the disclosure and authorization requirements in Section 1681b(b)(2); and (ii) that the employer will comply, if necessary, with the adverse action notice requirements of Section 1681b(b)(3), among other things. 15 U.S.C. § 1681b(b)(1)(A)(i-ii).

Section 1681b(b)(1) is a purely procedural requirement between the consumer reporting agency and employer. Consumers are *never* provided the certification, nor do they generally even know when or how (or even that) it is obtained. Neither the consumer reporting agency nor the user has *any* obligation to disclose the certification to the consumer. Consumers simply are not harmed whatsoever by this section of the FCRA. Section 1681b(b)(1) violations (real or alleged) are too far removed from the consumer to either cause harm or be traceable to any Section 1681b(b)(2)-related harm alleged by the consumer.

Until recently, Section 1681b(b)(1) was rarely litigated. To the extent a consumer reporting agency did not obtain any certification whatsoever, there arguably is a technical violation of the statute. But even then, any potential "injury" to the consumer could only occur through (i) the employer end-user of a consumer report running afoul of Section 1681b(b)(2) by procuring a consumer report without first disclosing its intent to do so and obtaining authorization from the consumer; or (ii) the end-user failing to send the consumer a pre-adverse action notice prior to taking adverse action. For Article III standing purposes, those theoretical injuries would be proximately caused only by the user of the consumer report, and not be fairly traceable to the consumer reporting agency for failing to get a certification. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (Article III standing requires a "causal connection between the injury and the conduct complained of" that is "fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court") (alterations and citation omitted). For this reason, most courts have held that Article III standing

does not exist for Section 1681b(b)(1) claims. *See, e.g.*, *Auer v. TransUnion, LLC, et al.*, 902 F.3d 873, 879-80 (8th Cir. 2018) (dismissing § 1681b(b)(1) claim for lack of standing); *Frazier v. First Advantage Background Servs. Corp.*, No. 17-cv-30, 2018 WL 4568612, at **8-9 (E.D. Va. Sept. 24, 2018) ("Even assuming that Plaintiffs allege a sufficiently concrete injury flowing from [ ] improper disclosure forms, that injury is not traceable to a consumer reporting agency's alleged failure to obtain a proper certification from its customers.").

In recent years, there has been an increase in claims brought under Section 1681b(b)(1). In *Syed v. M-I, LLC*, No. 14-cv-742, 2014 WL 5426862, at **4-5 (E.D. Cal. Oct. 23, 2014), for example, the plaintiff sought to certify a class of every consumer on whom the defendant consumer reporting agency had prepared a consumer report over a five-year period. Despite the plaintiff's employer certifying its compliance with Section 1681b(b)(2) in writing with the defendant consumer reporting agency, the plaintiff argued that a new certification was required each and every time the employer ordered a new consumer report from the consumer reporting agency. *Id.*

On the defendant's motion to dismiss, the district court agreed with the plaintiff and held that allegations that the defendant obtained prospective certifications from the users of its consumer reports were enough to survive a motion to dismiss. 2014 WL 5426862, at *5. The result was predictable. Faced with even the potential for liability on each and every consumer report it prepared over a five-year period, rather than litigate a bet-the-business case with an uncertain outcome in the Ninth Circuit, the defendant consumer reporting agency

essentially was forced into a seven-figure settlement on a subset of the purported class. *See Syed v. M-I, LLC*, No. 14-cv-742, 2016 WL 310135 (E.D. Cal. Jan. 26, 2016) (final order approving class settlement).

Following *Syed*, and despite *Spokeo*, Section 1681b(b)(1) claims continue to be filed. Taken together with the Ninth Circuit's decision on this appeal, consumers conceivably may argue that a prospective certification (or other alleged technical noncompliance with the certification requirement) violates Section 1681b(b)(1), that consumers may satisfy Article III standing because of the risk of some speculative and highly specious "privacy" or "informational" injury through a noncompliant disclosure by the third-party end-user under Section 1681b(b)(2), and then seek to represent a class of *everyone* on whom the consumer reporting agency has prepared a consumer report over a five year period.

2. Section 1681e(b) of the FCRA, Which Requires a CRA to Have Reasonable Procedures to Assure Maximum Possible Accuracy.

One of the claims on appeal is asserted under Section 1681e(b) of the FCRA. Section 1681e(b) requires consumer reporting agencies to maintain reasonable procedures to assure maximum possible accuracy when reporting consumer information to third parties. 15 U.S.C. § 1681e(b). The essential elements of Section 1681e(b) require a plaintiff to show an actual inaccuracy on his or her consumer report, communication of such inaccurate information to a third party, and that the consumer reporting agency did not have reasonable procedures in

place. *Sarver v. Experian Info. Sols.*, 390 F.3d 969, 971-72 (7th Cir. 2004)

The Ninth Circuit's decision misapplied black-letter law regarding the communication element in multiple respects. First, as other *amici* ably explain, without dissemination to a third party, there can be no "concrete harm" to the consumer. In *Spokeo*, this Court recognized that preventing the dissemination of inaccurate material information was the precise type of potential harm Congress sought to prevent through Section 1681e(b). 136 S.Ct. at 1549.

Second, without the communication of inaccurate information to a third party, there is not even a "consumer report" on which to base a claim. The FCRA defines "consumer report" to mean a written, oral or other *communication* of certain types of "information by a consumer reporting agency . . . . 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" a permissible purpose under the Act. 15 U.S.C. § 1681a(d)(1) (emphasis added). In turn, a "consumer reporting agency" is defined as anyone "regularly engage[d] . . . in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties, and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports." 15 U.S.C. § 1681a(f). Consistent with those definitions, in *Spokeo*, this Court correctly assumed that before there is a "consumer report" under the FCRA, there must first be a communication, or a distribution of covered consumer

information *to a third party*. 136 S.Ct. 1540, 1545, 1550, n.2. *See also Wantz v. Experian Info. Sols.*, 386 F.3d 829, 834 (7th Cir. 2004) ("In short, where there is no evidence of disclosure to a third party, the plaintiff cannot establish the existence of a consumer report."); *Washington v. CSC Credit Servs., Inc.*, 199 F.3d 263, 267 (5th Cir. 2000) (recognizing that the harm the FCRA "envisions is improper disclosure, not the mere *risk* of improper disclosure").

The Ninth Circuit's decision entirely disregards the requirement that inaccurate information actually be communicated or disseminated to state a viable Section 1681e(b) claim. Indeed, of the 8,185 class members at issue on appeal, more than 77% of those individuals *never* had their credit information communicated to a third party. The Ninth Circuit's decision allowed 6,332 individuals, at a minimum, to recover damages where they suffered no harm at all and could not have stated a claim. For FCRA claims involving much higher putative class sizes, *amicus*' members face potential liability to far greater numbers of no-injury putative class members.

Taken to its logical conclusion, the Ninth Circuit has expanded Section 1681e(b) liability to *any* piece of consumer information maintained by a consumer reporting agency, regardless of whether it ever sees the light of day. This is an untenable reading of the statute. A more narrow reading of the Ninth Circuit's decision still is that a plaintiff states a cognizable harm and claim merely because he or she personally received allegedly inaccurate information, even though it was never communicated to any third party as required by the FCRA. That result, too, is at odds with the text of the FCRA and case law. *See Collins*

v. Experian Info. Sols., Inc., 775 F.3d 1330, 1335 (11th Cir. 2015) ("A 'consumer report' requires communication to a third party . . . ."); *Wright v. Zabarkes*, No. 07-cv-7913, 2008 WL 872296, at *2 (S.D.N.Y. April 2, 2008) (merely "possessing information about a [consumer] . . . does not fall within the statutory definition of 'assembling or evaluating consumer credit information' for the purpose of furnishing such information to others").

Article III standing requires not only a concrete harm, but one that is traceable back to an injury that a court can redress. *Lujan*, 504 U.S. at 560. Thus, class members cannot have standing when they do not even have a claim under Section 1681e(b) upon which a court could grant redress. Where there is no communication to a third party, there is neither a harm nor a "consumer report" to form a predicate for the claim.

* * *

In sum, the Ninth Circuit's decision has the potential for courts to further expand Article III standing to any technical violation of the FCRA, regardless of whether the plaintiff or class members suffered a constitutional concrete harm. This appeal illustrates on a small scale how future FCRA class actions will be used on a much larger scale to force settlements on behalf of no-injury classes. *Amicus* respectfully submits that this Court should reaffirm *Spokeo*, and provide an unambiguous concrete harm requirement to prevent current and future abuses of the class action device.

II. The Ninth Circuit's Decision Exacerbates Ongoing And Unjustified Harm For Businesses and Consumers.

The Ninth Circuit's decision creates further incentive for plaintiffs to both (i) take garden-variety single-plaintiff cases and plead them as class actions where most of the purported class suffered no injury; or (ii) rely on one of the FCRA's technical requirements to plead a class claim where *no one*—not even the class representative—suffered any injury whatsoever. In both situations, the plaintiff's bar stand to leverage the threat of significant costs of defense and a potential "bet the company" judgment into an early settlement. This ongoing class action threat that hangs over the industry adversely affects *amicus*' members, other businesses across the country, and consumers themselves.

Amicus' members are in the information business. To that end, they provide invaluable services to the economy as a whole, helping businesses screen potential employees, insurance companies underwrite insurance, and helping consumers obtain lines of credit and efficient employment and insurance. Their efforts, for example, help an employer or housing provider "ensure the security of its facilities" and employ "a competent, reliable workforce." *NASA v. Nelson*, 562 U.S. 134, 150 (2011); *see also EEOC v. Freeman*, 961 F. Supp. 2d 783, 785 (D. Md. 2013) (recognizing that "conducting a . . . background check on a potential employee is a rational and legitimate component of a reasonable hiring process"). *See also U.S. Chamber of Commerce, A Guide to Choosing the Best Background Check Services* (Feb. 25, 2019) (recognizing that background screening "improve[s] your chances of

making wise hiring decisions" and "improve workplace safety");[4] *Consumer Financial Protection Bureau, Market Snapshot: Background Screening Reports* (October 2019) (explaining how employers use background screening reports to efficiently evaluate prospective and current employees).[5]

This Court's May 2016 decision in *Spokeo* should have curbed the rise in "no injury" actions under the FCRA. Instead, with the help of the Ninth Circuit's precedent and instant decision, FCRA actions continue to be filed in the thousands every year. Indeed, from 2016 to 2020, FCRA claimants grew from 3,835 in 2016 to 5,223 in 2020. As explained *supra*, this high number is the result of both the nature of the FCRA and the failure of lower courts to rigorously apply the concrete harm requirement for Article III standing.

The ongoing threat of "no injury" class actions has an adverse impact on the background screening industry, businesses that rely on the industry, consumers, and the economy as a whole. The Ninth Circuit's decision further raises the specter of *amicus'* members having to defend against class actions based on nothing more than technical, no-harm violations of the law, filed by plaintiff's attorneys who are the only true beneficiaries. *See, e.g.*, *Berther v. TSYS Total Debt Mgt.*, No. 06-cv-293, 2007 WL 1795472 (E.D. Wis. June 19, 2007) (recognizing that

4. Available at https://www.uschamber.com/co/run/human-resources/background-check-service-guide

5. Available at https://files.consumerfinance.gov/f/documents/201909_cfpb_market-snapshot-background-screening_report.pdf

consumer protection class actions brought under similar statutes "appear to be much more about attorney's fees than the prosecution of consumer rights" and it is "simply more cost effective to settle, even if the merit of such a case is debatable"). Moreover, *amicus*' members often have no early procedural devices to challenge the appropriateness of a ruinous class-based judgment.

As a result, *amicus*' members often are left with a Hobson's choice of (i) expending significant legal fees to defend against a no-injury class action (all the while having the prospect of a multi-million dollar judgment in the background) or; (ii) to settle a technical violation early and on an *in terrorem* basis.

As discussed above, several sections of the FCRA have the potential to be abused by "no injury" class actions. Section 1681b(b)(1) is an illustrative example of a technical requirement incapable of resulting in direct consumer harm but with the potential to impose massive liability on consumer reporting agencies. For example, a consumer reporting agency that prepares 1 million reports in a year would face statutory damages between *$100 million and $1 billion* – for just one year of consumer reports. The FCRA, however, has a five-year statute of limitations where the consumer does not have constructive knowledge of the alleged violation. 15 U.S.C. § 1681p(2). Because the consumer is never aware of the certification between the consumer reporting agency and end-user of the report, consumers arguably are not on notice of a potential Section 1681b(b)(1) claim, meaning a five-year limitations period could apply. Under the example above, if the same consumer reporting agency prepared 5 million reports over 5 years, its potential liability increases to

between *$500 million and $5 billion.* That staggering potential liability does not even account for the cost of defense, attorney's fees, and potential punitive damages – which is why the majority of FCRA class actions settle.

The issue on appeal here presents a further example of the expansive liability associated with the Ninth Circuit's interpretation of Section 1681e(b). The Ninth Circuit's decision is based on the erroneous conclusion that Section 1681e(b) imposes liability solely based on information maintained by a consumer reporting agency, or shared with the consumer to whom the information belongs. As discussed *supra*, without communication of such information to a third party, Section 1681e(b) does not apply, period. If plaintiffs are now allowed to pursue Section 1681e(b) claims without a third party ever receiving a report, then consumer reporting agencies could face claims by merely storing information they used to prepare a report (*i.e*, a criminal record that was *not* included on a consumer report because, for example, there were not enough personal identifiers to confirm it was the person) and by responding to consumer requests for copies of their "file"[6] under Section 1681g of the FCRA.

Amicus' members maintain a variety of information in connection with preparation of a specific consumer report, much of which never is distributed to third parties because it is not reportable under other sections of the FCRA or because, over time, it has become unreportable. Such

6. "File" as defined in the FCRA "means all of the information on that consumer recorded and retained by a consumer reporting agency regardless of how the information is stored." 15 U.S.C. § 1681a(g).

information could include: (i) pointer data that shows the source where a criminal or other record could be located; (ii) older information about the consumer that could not be reported based on Section 1681c (15 U.S.C. § 1681c) or state reporting restrictions; (iii) consumer reports that were accurate when distributed to a third party, but where some information on the reports has been updated, *e.g.*, through an expungement or amended charge or through the dispute process set forth in Section 1681i of the FCRA; (iv) consumer reports that included record information that was within temporal reporting limitations at the time of the report, but has since become obsolete under Section 1681c of the FCRA; or (v) information that was thought to potentially be about the consumer, but where a consumer reporting agency did not include such information in any consumer report because it could not match the information to the consumer based on its procedures to assure maximum possible accuracy. In addition to the ongoing threat of no-injury class actions, the Ninth Circuit's decision raises a new cost to the industry by potentially forcing members to defend Section 1681e(b) claims where they have not even communicated consumer information to a third party.

These realities turn what is supposed to be a "reasonable," 15 U.S.C. § 1681e(b), system of consumer reporting on its head. In many no-injury class actions, statutory damages will far exceed the net worth of even the largest of *amicus*' members. The result is forced settlements, windfalls for plaintiff's attorneys bringing no-injury cases, and costs passed on to the customer and to the consumer.

CONCLUSION

Amicus respectfully submits that class members who do not suffer actual injury do not have standing to recover money damages in class actions. In this appeal, that includes, at a minimum, 6,332 people – the vast majority of the class. This ongoing problem continues to raise costs in the background screening industry. This appeal presents an opportunity to close the federal courthouse doors to plaintiff's lawyers who would turn the FCRA's technical requirements into a cudgel to use against *amicus'* members on behalf of class members who do not suffer any concrete harm from the alleged violation at issue. Accordingly, the judgment of the Ninth Circuit should be reversed.

Respectfully submitted,

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