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 THE NATIONAL CONSUMER REPORTING ASSOCIATION, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST[1]

The members of the National Consumer Reporting Association, Inc. ("NCRA") are subject to the Fair Credit Reporting Act and other federal statutes that provide statutory damages in addition to other damages. The NCRA's respective members are frequently confronted with individual and class actions brought by consumers who have suffered no concrete or particularized injury, but who file suit with the hopes (and often promises) of large payouts. Those lawsuits by uninjured consumers cause real injuries to the NCRA's members, because those members are forced to spend thousands, if not millions, of dollars defending themselves against objectively meritless claims. The high costs of litigation defense have sadly become costs of doing business, and together with incredibly thin margins, they have created a circumstance that many of the NCRA's members simply cannot survive. Accordingly, the net effect of those lawsuits by uninjured consumers is a shrinking consumer reporting agency market that negatively impacts the national economy because among other harms, it affects consumers' abilities to obtain quality credit reports for mortgages and tenant screening reports in a timely and cost-efficient manner.

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[1] The parties have filed blanket consents to the filing of this and all other *amicus curiae* briefs. Pursuant to Supreme Court Rule 37.6, counsel for *amicus* represents that this brief was not authored in whole or in party by counsel for a party and that none of the parties or their counsel, nor any other 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.

Founded in 1992, the NCRA (formerly National Credit Reporting Association, Inc.) is a national trade organization of consumer reporting agencies and associated professionals that provide products and services to hundreds of thousands of mortgage lenders and property owners and managers who use consumer reports to make housing decisions. The NCRA's members include approximately 80% of the consumer reporting agencies in the United States that can produce a credit report that meets the requirements of the Department of Housing and Urban Development ("HUD"), the Federal National Mortgage Association ("Fannie Mae"), and the Federal Home Loan Mortgage Corporation ("Freddie Mac") for mortgage lending, as well as the nation's leading resident screening firms providing consumer data to the multifamily housing industry.

SUMMARY OF ARGUMENT

The Ninth Circuit's decision below poses a major threat to the consumer reporting industry and violates the Constitution's requirements for access to the courts. This Court's prior decisions are clear that, although Congress has the power to create new legal rights and causes of action where none previously existed, Article III requires a plaintiff to have suffered injury-in-fact before he or she can avail himself or herself of the federal courts. Although Rule 23 of the Federal Rules of Civil Procedure sets forth the procedures by which one or more members of a class may sue or be sued as representative parties on behalf of all members of that class, those procedural rules do not have the power

to usurp Article III's threshold standing requirements. The Ninth Circuit's decision below to the contrary cannot be reconciled with this Court's longstanding Article III jurisprudence.

The Ninth Circuit's decision is based on an erroneous presumption of damages that were never actually suffered by the vast majority of the alleged class. Article III does not allow for such a presumption of injury, but rather requires that each person who seeks redress before the courts have suffered a concrete and particularized harm.

Even if Article III did allow for such a presumption of harm, the Ninth Circuit's decision below failed to articulate a standard by which such injuries may fairly and uniformly be presumed. Thus, the Ninth Circuit's decision not only causes due process concerns, but opens the flood gates for a tidal wave of similarly unharmed plaintiffs seeking their fortune.

The first ripples of that tidal wave are already being felt in the district courts. Since the Ninth Circuit's decision below, at least six new putative class actions relying on that decision have been filed. This proliferation of class action lawsuits places many businesses and individuals, the members of the NCRA included, at heightened risk of being sued for annihilating damages even when none of the absent class members have suffered any injury due to the statutory violations that they allege. Those cases are precisely the type that Article III standing requirements are intended to prevent.

The NCRA is not advocating that violations of the law go unchecked, but rather that only those consumers

who have been injured shall have redress before the courts, as intended by Article III.

ARGUMENT

I. ARTICLE III REQUIRES CONCRETE AND PARTICULARIZED HARM THAT CANNOT BE PRESUMED.

As this Court previously observed in *Spokeo v. Robins*, "[i]njury in fact is a constitutional requirement, and '[i]t is settled that Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing.'" *Spokeo v. Robins*, 578 U.S. ___, 136 S. Ct. 1540, 1547-48 (2016). It follows that a procedural rule, such as Rule 23 of the Federal Rules of Civil Procedure, cannot alter those fundamental legal requirements. "To establish injury in fact, a plaintiff must show that he or she suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Id.* at 1548 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). "A 'concrete' injury must be 'de facto;' that is, it must actually exist" and be "'real,' and not 'abstract.'" *Id.*

In this instance, the class consisted of 8,185 members. The Ninth Circuit below concluded that 6,332 absent class members had suffered a sufficiently concrete and particularized harm in connection with Respondent Sergio Ramirez's (referred to herein as "Ramirez") claim pursuant to section 15 U.S.C. § 1681e (b) of the Fair Credit Reporting Act ("FCRA"), based on injuries that fall broadly into three categories:

(1) uncertainty and stress upon receipt of file disclosure letters from Petitioner TransUnion LLC (referred to herein as "TransUnion") noting a possible name match to someone listed on the Office of Foreign Assets Control ("OFAC") Sanctions List (known as an "OFAC match"); (2) the "significant risk that third parties other than the affected consumers would learn about the inaccurate and highly embarrassing OFAC matches;" and (3) the fact that consumers' reports were available from TransUnion at a moment's notice. *Ramirez v. TransUnion LLC*, 951 F.3d 1008 (9th Cir. 2020), 1026-1027.[2] The Ninth Circuit further concluded that the same absent class members were all injured when TransUnion violated 15 U.S.C. § 1681g by transmitting their file disclosures in two separate envelopes, only one of which contained a summary of rights. *Id.* at 1029-1030.

With respect to the other 1,852 class members whose consumer reports were actually disseminated to end users (*i.e.*, banks, property management companies, etc.) the Ninth Circuit found that they had suffered a concrete harm solely by virtue of that dissemination. *Id.* at 1027. There was no exploration in the trial court, nor discussion in the circuit court, of whether those particular class members had actually been hindered in obtaining credit, housing, or employment due to the OFAC alerts.

Indeed, the Ninth Circuit's analysis—like the district court's—stopped short of any examination of the actual injuries that may or may not have been

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[2] Because the text of the Ninth Circuit's decision is not reproduced in the Joint Appendix, *amicus* cites the published version throughout this brief.

sustained by any of the absent class members, instead relying on findings of fact following a trial that focused squarely on "the story of Mr. Ramirez." As Judge McKeown observed in her dissenting opinion, "[t]he trial featured no evidence that absent class members received, opened, or read the mailings, nor that they were confused, distressed, or relied on the information in any way. There was no evidence that absent class members were denied credit, or expended any time or energy attempting to clear their name." *Id.* at 1039 (McKeown, J., concurring in part and dissenting in part). "The jury was left to assume that the absent class members suffered the same injury. But such conjecture is insufficient to confer Article III standing." *Id.* "Because no evidence in the record establishes a serious likelihood of disclosure, we cannot simply presume a material risk of concrete harm, and three-quarters of the class lacks standing for the reasonable procedures claim." *Id.* at 1040.

The complete lack of evidence regarding the alleged harms suffered by absent class members is troubling, particularly given the glaring and consistent lack of evidence from the class certification stage through trial, and an ultimate judgment that provided for over $8 million in statutory damages and over $32 million in punitive damages. As Judge McKeown noted in her dissent, "whether any . . . absent class member was confused, suffered the adverse consequences that befell Ramirez, or even opened the letter, is pure conjecture," and that "[c]onjecture based on an unrepresentative plaintiff does not meet the constitutional minimum." *Id.* at 1041.

II. THE NINTH CIRCUIT ERRED BY ALLOWING THE INJURIES TO THE ABSENT CLASS MEMBERS TO BE PRESUMED.

The Ninth Circuit unambiguously held below that "each member of a class certified under Rule 23 must satisfy the bare minimum of Article III standing at the final judgment stage of a class action in order to recover monetary damages in federal court." *Ramirez*, 951 F.3d 1023. The Ninth Circuit further acknowledged that "[a]lthough this is an issue of first impression for this Court, our holding today clearly follows from Supreme Court precedent, as well as the fundamental nature of our judicial system." *Id.*

Although the Ninth Circuit recognized the need for each class member to have standing, it allowed Ramirez's damages to support a presumption of harm on a class-wide basis. But class certification was improperly granted in the first instance, given the entirely atypical nature of Ramirez's individual experience. *Id.* at 1039-1040 (McKeown, J.). That much is clear from the fact that over 75% of the class comprised members whose consumer reports were never disseminated to third parties—and who therefore could not have suffered the denial of credit that was a hallmark of Ramirez's case. *Id.* at 1022.

The Ninth Circuit completely disregarded the typicality requirement of Rule 23, both at the class certification stage, and in addressing TransUnion's motion to decertify the class. *Id.* at 1038, 1040 (McKeown, J.). Typicality requires that "a class representative . . . [have] suffer[ed] the same injury as the class members." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 348-49 (2011); *see also* Fed. R. Civ. P. 23(a)(3) (requiring that "the claims or defenses of the

representative parties are typical of the claims or defenses of the class").

Nonetheless, the district court denied relief after TransUnion moved to decertify the class for lack of Article III standing based upon this Court's decision in *Spokeo*, and allowed the case to proceed through a trial that involved no substantive discussion regarding the experiences of absent class members. *Ramirez*, 951 F.3d at 1038 (McKeown, J.). In the absence of any evidence, at both the class certification phase and trial, regarding the unique experiences of persons other than Ramirez, there was no justification for the district court to find that 8,184 absent class members suffered uniform harm. Thus, it is apparent that the only way in which the district court could have determined—and the Ninth Circuit affirmed—that the absent class members sustained concrete and particularized injuries was to have presumed such harm based upon Ramirez's harm.

The approach taken by the Ninth Circuit below is squarely at odds with that of several other circuit courts that have required proof of injury to the absent class members. For example, in *Owner-Operator Indep. Drivers Ass'n, Inc. v. U.S. Dep't of Transp.*, the D.C. Circuit examined a claim by a coalition of commercial truck drivers who asserted that they had been injured by the Department of Transportation's failure "to ensure the accuracy of a database containing driver-safety information." 879 F.3d 339, 340 (D.C. Cir. 2018). In concluding that the plaintiffs lacked Article III standing, the D.C. Circuit held that "the mere existence of inaccurate information" in a database, "absent dissemination," does not amount to concrete injury. *Id.* at 344-45.

The Fifth Circuit has similarly held, in the context of a claim under section 1681g of the FCRA, that mere receipt of a deficient FCRA disclosure does not give rise to Article III standing, and acknowledged the reality that "unnamed class members . . . who received the letter, but ignored it as junk mail or otherwise gave it no meaningful attention lack[ed] a cognizable injury under Article III." *Flecha v. Medicredit, Inc.*, 946 F.3d 762, 768 (5th Cir. 2020); *cf. Braitberg v. Charter Commc'ns, Inc.*, 836 F.3d 925, 931 (8th Cir. 2016) (The Eighth Circuit found that the class representative lacked Article III standing where he failed to allege that Charter disclosed his information to any third party or otherwise used it to his detriment.).

In each of those cases, the circuit courts found that the absent class members lacked Article III standing after examining the particular circumstances and experiences of those absent class members. Those analyses stand in stark contrast to the Ninth Circuit's presumption in this case of equal harm across the class.

The Ninth Circuit's presumption of harm raises Seventh Amendment and due process concerns. Although the First Circuit stopped short of determining whether a presumption of injury is appropriate for absent class members, it took some steps (more than the Ninth Circuit) to address those Seventh Amendment and due process concerns. *See AstraZeneca AB v. UFCW (In re Nexium Antitrust Litig.)*, 777 F.3d 9, 19-20 (1st Cir. 2015). In that matter, the named plaintiffs were union health and welfare funds that reimbursed health plan members for prescription drugs, including Nexium. *Id.* at 13. The plaintiffs alleged that AstraZeneca's patents for Nexium were invalid and sought to certify a class consisting of all

persons or entities in the United States who purchased or paid some or all of the purchase price for Nexium or its AB-rated generic equivalents during the time that the defendants were allegedly engaged in unlawful anti-competitive conduct. *Id.* at 14. The First Circuit ultimately found that common issues predominated and that the district court's grant of class certification was therefore permissible, even if the class included a de minimis number of uninjured parties. *Id.* at 21. The First Circuit reasoned that future proceedings during the liability and damages stage would likely involve individual determinations of injury and an examination that would reveal who amongst the class members had suffered no harm so that they could be excluded from the class before final judgment. *Id.* Notably, the First Circuit determined that such proceedings would ensure compliance with the requirements of the Seventh Amendment and due process. *Id.* (citing *Madison v. Chalmette Refining, LLC*, 637 F.3d 551, 556 (5th Cir. 2011)).

Although the matter involved a single plaintiff, the Eleventh Circuit's recent decision in *Erickson v. First Advantage Background Services Corp.* is instructive with respect to the type of evidence that the district court should have required here to prove harm to the 1,852 class members whose reports were provided to third parties along with a "potential match" to the OFAC exclusionary list. 981 F.3d 1246 (11th Cir. 2020). In *Erickson*, the plaintiff suffered embarrassment when his son's Little League team requested a search of sex-offender records in connection with his application to coach, and the plaintiff's name returned a match belonging to his estranged father of the same name. Similar to TransUnion's disclosures here, the

name-only report "explained that the matching record was located using a name-only search and cautioned that the record might not be [the plaintiff's] at all." *Id.* at 1249. The Eleventh Circuit aptly observed that the report was factually correct, because it identified a potential match based on a name-only search of an exclusionary list, and further explained that a potential match to an exclusionary list does not automatically give rise to a statutory violation: "Little League knew that it would get what it asked for here—a search based only on first and last name. And it also knew that it could not attribute any of those matched records to an applicant without conducting further research first." *Id.* at 1253. On that basis, the Eleventh Circuit concluded that the report at issue was also "free from potential for misunderstanding" and therefore cannot have violated the "maximum possible accuracy" standard of section 1681e(b). *Id.*

The Eleventh Circuit's decision in *Erickson* highlights the practical reality that whether a statutory violation occurred, and whether it caused a concrete harm for which recompense is justified, are entirely fact-dependent issues for which the answers may not simply be presumed. That same inability to assume injury across the entire class is evident here, where Ramirez's experience, involving the cancelation of a family vacation following his denial of credit by an end user who violated TransUnion's terms of use, was so unique and atypical that it cannot reasonably have formed the basis for an assumption about the experience of any absent class member, much less 1,852 of them.

The complete failure of proof regarding the absent class members' individual experiences, including those

of the 6,332 whose reports were never provided to third parties, violated the requirements of Article III and therefore the typicality and commonality requirements of Rule 23, and should have resulted in a denial of class certification. "The bottom line is that for judgment at trial, every member of the class must have Article III standing. Conjecture based on an unrepresentative plaintiff does not meet the constitutional minimum." *Ramirez*, 951 F.3d at 1038 (McKeown, J.).

The district court erred in presuming that absent class members were entitled to damages, based solely on the "story of Mr. Ramirez." The Ninth Circuit thereafter erred in affirming a judgment that should have been reversed in its entirety due to the lack of evidence that the absent class members had Article III standing. Because Article III requires a showing of concrete harm that cannot be presumed, the ruling of the Ninth Circuit below should be reversed and Ramirez should be required to affirmatively demonstrate harm as to each absent class member.

III. By Allowing a Presumption of Injury, the Ninth Circuit Has Opened the Flood Gates to Similar Class Actions.

As discussed above, the district court and then the Ninth Circuit allowed Ramirez's individual damages to support a presumption of exceptional harm on a class-wide basis, despite the lack of any evidence at class certification or trial regarding the absent class members' injuries. Those decisions have already spawned multiple putative class actions that rely on those decisions to bring claims demanding sky-high damages without any affirmative evidence of concrete harm to absent class members. Additionally, there is

a concerning line of decisions emerging in the Third Circuit that have wholly disregarded this Court's decision in *Spokeo*, concluding instead that absent class members are not required to have Article III standing. Altogether, these cases are encouraging the plaintiff's bar to pursue increasingly creative class claims for FCRA violations, even where no consumer reports were disseminated to third parties and no evidence exists to support a finding that absent class members suffered concrete and particularized harm.

In the words of Judge Henry Friendly, the class action device alone can at times result in "blackmail settlements," where even defendants with meritorious defenses feel compelled to settle based on the enormous threat of liability that a class action can present. *See In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995) (quoting Henry J. Friendly, FEDERAL JURISDICTION: A GENERAL VIEW, 120 (1973)). Expanding the ability to pursue class claims in federal court to absent class members with no proof of a concrete injury will simply make that practice more prevalent.

A. Several Recent FCRA Class Action Complaints Cite Ramirez or Otherwise Rely on Its Erroneous Holdings.

The Ninth Circuit's decision below has encouraged a wave of copycat cases.

For example, in *Alvarez v. Experian Information Solutions, Inc.*, Case No. 2:19-cv-03343 (E.D.N.Y., June 5, 2019), an individual named Manuel Alvarez ("Alvarez") brought a putative class action against TransUnion's direct competitor, Experian Information Solutions, Inc. ("Experian"), alleging that he was denied a home mortgage loan after Experian included an

OFAC match on the consumer report provided to his lender, Carrington Mortgage. Despite the particular circumstances of his alleged mortgage loan denial (and the fact that he was eventually able to purchase and move into the home for which the loan was sought), Alvarez defined the putative class broadly to include "[a]ll natural persons residing in the United States and its Territories about whom Defendant sold a consumer report to a third party that included any OFAC record, during the period beginning five (5) years prior to the filing of the Complaint and continuing through the date of the resolution of this case." *See id.* at Dkt. 1, ¶ 52.

Nowhere in Alvarez's proposed definition is the class limited to individuals whose reports returned an erroneous match. *See id.* Also critically missing from Alvarez's definition is any requirement that the putative class members actually sustained a concrete harm related to the reporting of OFAC information. On their face, Alvarez's claims cannot be typical of those of the class, because his alleged denial of credit does not speak for the experiences of every individual across the nation whose Experian consumer report contained an OFAC match. And, Alvarez's claims completely ignore the clear requirements of Article III and Rule 23, instead repeatedly citing the Ninth Circuit's decision below to suggest that that *Spokeo* and related cases have no practical effect on class claims.

Alvarez initiated a separate putative class action against Universal Credit Services, LLC ("UCS"), a reseller of consumer reports and member of the NCRA. *See Alvarez v. Universal Credit Services, LLC*, Case No. 2:20-cv-01903 (E.D.N.Y., Apr. 24, 2020). Alvarez alleged that UCS obtained from Experian, and then

sold to Carrington, the same consumer report that formed the basis of his claim against Experian. Despite the fact that UCS had not prepared the OFAC reports, Alvarez similarly defined the proposed class to include all persons in the United States about whom UCS sold a consumer report to a third party "that included any OFAC record"—whether or not that record was accurate, and regardless of its impact (if any) on the underlying transaction. *See id.* at Dkt. 1. Alvarez similarly cited the Ninth Circuit's decision in *Ramirez* throughout his complaint, in an attempt to magnify his recovery on behalf of a class of individuals defined so broadly that they cannot all have suffered a concrete harm—much less one that is typical of Alvarez's experience. *Id.*

Multiple other putative class actions alleging violations of the FCRA have cited the Ninth Circuit's decision below in an attempt to pursue claims on behalf of a class of individuals who seemingly lack Article III standing. *See, e.g.*, *Orozco Fritz v. RealPage, Inc.* Case No. 6:20-cv-07055 (W.D.N.Y., Dec. 9, 2020) (alleging the plaintiff's application for housing was denied due to an OFAC match on his consumer report, and pursuing FCRA claims on behalf of a class all individuals about whom RealPage provided a report with an OFAC match); *Martinez v. Avantus, LLC*, Case No. 3:20-cv-01772 (D. Conn., Jan. 22, 2021) (alleging that the plaintiff was denied a mortgage pre-approval due to an OFAC match on his consumer report, and pursuing FCRA claims on behalf of a class comprising all individuals about whom Avantus provided a report with an OFAC match); *Fernandez v. RentGrow, Inc.*, Case No. 1:19-cv-01190 (D. Md., Apr. 23, 2019) (alleging the plaintiff discovered that RentGrow had

inaccurately reported an OFAC match five years prior and defining seven subclasses whom the plaintiff purports to represent); and *Fernandez v. CoreLogic Credco, LLC*, Case No. 3:20-cv-01262 (S.D. Cal., Jul. 6, 2020) (claiming inaccurate reporting related to an OFAC search under both the FCRA and California Credit Reporting Agencies Act and defining seven subclasses whom the plaintiff purports to represent, despite the lack of allegations regarding his specific damages).

The sudden proliferation of these cases, clearly triggered by the Ninth Circuit's decision below, illuminates the practical effect of the Ninth Circuit's anomalous reasoning: consumer reporting agencies at every level of the market are being embroiled in expensive litigation brought by attorneys who seek to recover enormous judgments on behalf of classes who cannot satisfy basic Article III standing requirements. The NCRA respectfully submits that this Court's further clarification of the applicable standard is the only way to avoid an enormous and untenable volume of litigation on behalf of uninjured class members.

B. The Decisions of the Ninth and Third Circuits Avert the Protections that Article III Was Intended to Provide.

The Ninth's Circuit's decision to allow uninjured absent class members to recover substantial monetary awards based solely on the harm to the named plaintiff creates a slippery slope that serves only to erode the protections that Article III was intended to provide. The consequences of that erosion is evident in the Third Circuit's refusal to fully apply this Court's clarifications in *Spokeo* to class action cases.

As set forth below, the Third Circuit has instead held, on a repeated basis, that absent class members are not required to demonstrate Article III standing. These cases stand in contrast to the rule in the majority of circuits (including the Ninth Circuit) that "each member of a class certified under Rule 23 must satisfy the bare minimum of Article III standing at the final judgment stage of a class action in order to recover monetary damages in federal court." *Ramirez*, 951 F.3d at 1023. For example, in *Mielo v. Steak 'N Shake Operations, Inc.*, the Third Circuit cited its pre-*Spokeo* precedent in holding that "putative class members need not establish Article III standing." 897 F.3d 467, 478 (3d Cir. 2018) (citing *Neale v. Volvo Cars of N. Am., LLC*, 794 F.3d 353, 362 (3d Cir. 2015)). On that basis, the Third Circuit affirmed the district court's determination that the named plaintiffs, as class representatives, had satisfied Article III standing requirements.

Likewise, in *In re Horizon Healthcare Servs. Inc. Data Breach Litig.*, the Third Circuit held that "named plaintiffs who represent a class must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent." 846 F.3d 625, 634 (3d Cir. 2017). The Third Circuit then analyzed only the named plaintiffs' alleged injuries under the *Spokeo* rubric, disregarding the lack of evidence to support a finding that absent class members had standing based on their own concrete and particularized harms. Finding that the named plaintiffs satisfied the Article III standing requirements, the Third Circuit reversed the district

court's dismissal of claims and remanded the case for further consideration.

Although the Ninth Circuit's decision below does not go as far afield as the Third Circuit's decisions discussed above, its decision—presuming injury across the class in the absence of supporting evidence—erodes standing requirements and further encourages confusion about the standard that plaintiffs must meet to obtain judgment on behalf of a class whom they purport to represent.

The decisions of the Third and Ninth Circuits discussed above—along with other recent cases rejecting the need for consideration of absent class member experiences—ignore the practical reality that allowing no-injury classes to proceed through judgment encourages the plaintiff's bar to continue to make mountains out of molehills. Rather than follow the dispute procedures set forth in the FCRA and file actions to seek redress for statutory violations only where there has been concrete injury, plaintiffs' attorneys are incentivized to take a shotgun approach. They are doing so at the expense of the courts and consumers across the nation. This Court should affirmatively reject the approaches of the Third and Ninth Circuits and clarify that Article III standing under *Spokeo* must be established for each absent class member, throughout the life cycle of the litigation. To do otherwise would be to inspire copycat lawsuits that increase the costs of doing business to untenable levels across the board and make it more difficult for consumer reporting agencies to address the issues that are actually (rather than presumptively) impacting consumers.

IV. ALLOWING CONSUMERS TO PURSUE CLASS CLAIMS IN THE ABSENCE OF CONCRETE AND PARTICULARIZED HARM PUTS INNOCENT SMALL AND MEDIUM SIZED BUSINESSES AT AN UNACCEPTABLY HIGH RISK WHEN THEY HAVE DONE NOTHING WRONG.

A. Resellers Are a Vital Part of the Consumer Reporting Industry.

The NCRA's membership includes small and medium sized businesses that comprise approximately 80% of the mortgage consumer reporting agencies in the United States that can produce a credit report that meets the requirements of HUD, Fannie Mae, and Freddie Mac for mortgage lending ("Mortgage Credit Reports") and the nation's leading providers of resident screening reports that provide consumer data to the multifamily housing industry.

The NCRA's members are defined pursuant to section 1681a(u) of the FCRA as resellers of consumer reports (the "Resellers"), because they request consumer reports from all three nationwide consumer reporting agencies (Equifax, Experian and TransUnion, collectively referred to as "Repositories"), and then merge and de-duplicate the information contained in each of those consumer reports in order to assemble and provide an unified consumer report to their customers, who are the end users of the consumer reports (*i.e.*, the mortgage lenders and property owners or managers). By statutory definition, the Resellers do not maintain databases of the assembled or merged information from which new consumer reports may be produced. *See* 15 U.S.C. § 1681a(u)(2).

When there are questions about the contents of consumer reports, the Resellers often work directly

with consumers on behalf of lenders and landlords to verify reported information and/or to help the consumers dispute with the Repositories any information the consumers believe to be inaccurate. The NCRA's members therefore act as intermediates between the Repositories, end users, and the consumers to help provide the most accurate consumer reports possible. Thus, the Resellers provide critical services and fill a vital role in the United States housing market.

For the reasons discussed below, The Ninth Circuit's decision in *Ramirez* threatens the existence of the entire Reseller industry.

B. Claims Asserted on Behalf of Uninjured Absent Class Members Are a Major Source of Risk for Resellers.

Allowing absent class members to extract such a disproportionately high verdict as they did below, without any evidence as to their supposed injuries, puts Resellers in the impossible position of having to manage risks over which they have no control. As discussed above, the Resellers do not have control over the original consumer reporting information (*i.e.*, the OFAC list or information furnished by creditors) and do not match that information to specific consumers. That matching function is performed by the Repositories. Nonetheless, several courts have held, at least at the pleading stage,[3] that Resellers, as a subset of consumer reporting agencies, are responsible for complying with the accuracy standards under section

[3] No cases were found in which a court has addressed the proper standard of accuracy applicable to Resellers after a trial or other decision on the merits of the claim.

1681e(b) of the FCRA. *See, e.g.*, *Poore v. Sterling Testing Systems, Inc.*, 410 F.Supp.2d 557, 567 (E.D. Ky., Jan. 19, 2006); *Starkey v. Experian Information Solutions, Inc.*, 32 F.Supp.3d 1105, 1109 (2014); *Willoughby v. Equifax Information Services LLC*, Case No. 2:13-CV-788-RDP, 2013 WL 8351203 (N.D. Ala., Aug. 12, 2013); *Waterman v. Experian Information Solutions, Inc.*, Case No. CV12-01400-SJO (PLAx), 2013 WL 675764 (C.D. Cal., Feb. 25, 2013); and *Dively v. Trans Union, LLC*, Case No. 11-3607, 2012 WL 246095 (E.D. Pa., Jan. 26, 2012).[4]

Resellers therefore must manage the risk posed by claims filed against them, even though they have no control over the accuracy of the consumer reporting data that they obtain from the Repositories. That risk is further magnified in the class action context. That magnified risk has been simply too large for some Resellers to sustain, and the small and medium-sized businesses have been forced to merge to survive. *See, e.g.*, *CIS Credit Solutions News and Updates*, http://tinyurl.com/CISupdates (last visited Feb. 3, 2021); *see also Advantage Credit, Inc., and Partners Credit & Verification Solutions Announce Merger*, http://tinyurl.com/ADVpartners (last visited Feb. 3, 2021).[5]

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[4] The NCRA contends that the courts in these matters improperly applied the standard applicable to the Repositories to the Resellers, but that issue is not currently before this Court.

[5] That risk affects not only the consumer reporting agencies, but also the technology providers that support the industry. *See, e.g.*, *MeridianLink Announces Agreement to Acquire TazWorks*, http://tinyurl.com/meridianlinktazworks (last visited February 3, 2021).

The number of Resellers who are capable of providing Mortgage Credit Reports has been steadily dwindling at an alarming rate over the past twenty years. According to the American Antitrust Institute ("AAI"), as of 2003 there were over 200 (down from a peak of 1,500) different consumer reporting agencies in the Mortgage Credit Reporting industry. *See* Jonathan L. Rubin & Albert A. Foer, *Competitive Conditions in the Mortgage Credit Reporting Industry: A Report by the American Antitrust Institute*, American Antitrust Institute, Sept. 8, 2003, http://tinyurl.com/RubinFoer, 4-6. Today, once common ownership is taken into account, approximately 32 companies remain. *See Fannie Mae Credit Information Providers*, http://tinyurl.com/FMcreditinfo (last visited Feb. 3, 2021).

As additional Resellers are forced to close, not only are jobs lost, but mortgage lenders, property owners and managers, and consumers have fewer options for Mortgage Credit Reports and tenant screening reports. Moreover, the industry loses the benefit of the market's competitive forces to help provide the best products and services at effective prices.

According to the AAI,

> competition in the credit reporting industry affects the price and accuracy of credit reports, the opportunities for consumers to correct erroneous or stale information, and, ultimately, the cost of credit over the life of a residential mortgage. The role of credit reporting services and credit scoring has become increasingly important in determining the availability and cost of financing since the emergence of automated mortgage under-

> writing and risk-based pricing in the late 1990's.

Rubin & Foer, *supra*, 1. Accordingly, a lack of fair competition will inure to the detriment of consumers. *Id.*; *see also Brown Shoe Co. v. U.S.*, 370 U.S. 294, 344 (Jun. 25, 1962) (recognizing the importance of competition when holding that a merger was illegal under the Clayton Act because it would ultimately threaten smaller competitors of the merging firms).

As the Federal Trade Commission has advised,

> Competition in the marketplace is good for consumers and good for business. Competition from many different companies and individuals through free enterprise and open markets is the basis of the U.S. economy. When firms compete with each other, consumers get the best possible prices, quantity, and quality of goods and services.

Fed. Trade Comm'n, *FTC Fact Sheet: How Competition Works*, http://tinyurl.com/FTChowcomp (last visited Feb. 3, 2021).

A natural, and likely unintended, consequence of the Ninth Circuit's decision below is the clear threat it poses to consumer reporting agencies caused by the costs to defend against class claims where there is no evidence that the absent class members were injured. That threat to the consumer reporting agencies will ultimately cause more damage to consumers in the United States than the damages that Ramirez alleged on behalf of the absent class members.

C. The Outcome of This Case Will Also Impact Small and Medium Sized Businesses Outside of the Consumer Reporting Industry.

Allowing absent class members to recover when they have not been injured also affects every market participant in and outside of the consumer reporting industry. Businesses rely on being able to manage their risk using rules-based programs, such as compliance procedures. *See* Robert S. Kaplan & Anette Mikes, *Managing Risks: A New Framework*, HARVARD BUSINESS REVIEW, June 2012, http://tinyurl.com/KaplanMikes. If absent class members can recover for non-existent injuries whether or not compliance procedures are followed, there is no way to reasonably avoid such risk.

Even where the risk may be calculated, if a market participant is faced with the cost of defending against the influx of cases that are likely to occur—such as the increase in cases since the Ninth Circuit's decision below—small and medium sized businesses will continue to be driven out of the market, ultimately harming consumers.

CONCLUSION

For the reasons stated above, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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