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 OWNER-OPERATOR INDEPENDENT DRIVERS ASSOCIATION, INC. AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF THE *AMICUS CURIAE* [1]

The Owner-Operator Independent Drivers Association, Inc. ("OOIDA") is the largest international trade association representing the interests of independent owner-operators, small business motor carriers, and professional truck drivers. OOIDA's more than 150,000 members are professional drivers and small businessmen and women located in all 50 states and Canada who collectively own and operate more than 200,000 individual heavy-duty trucks. Single-truck motor carriers represent nearly half of the active motor carriers operated in the United States. OOIDA actively promotes the views of professional drivers and small business truckers through its interaction with state and federal government agencies, legislatures, courts, other trade associations, and private businesses to advance an equitable and safe environment for commercial drivers. OOIDA's mission includes the promotion and protection of the interests of independent truckers, whether they are owner-operators, small-business motor carriers, or professional truck drivers, on any issue that might touch on their economic well-being, their working conditions, or the safe operation of their motor vehicles on the nation's highways.

In addition to its affirmative, strategic litigation, OOIDA routinely participates as *amicus curiae* before

1. Both parties filed blanket consents to briefs of *amicus curiae* on December 23, 2020. No counsel for a party authored this brief in whole or in part, and no such counsel made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

federal Circuit Courts of Appeals and the United States Supreme Court to advocate for the lawful classification of drivers, the right to pursue independent owner-operator and small-business motor carrier opportunities, the right to freely participate in interstate commerce, and the ability to enforce truckers' rights in court.

Moreover, OOIDA was one of the plaintiffs[2] in *Owner-Operator Independent Drivers Association, Inc. v. U.S. Dep't of Transportation*, 879 F.3d 339 (D.C. Cir. 2018) ("*OOIDA I*"). The Ninth Circuit cited and distinguished *OOIDA I* in the case below, and Petitioner cited *OOIDA I* as in conflict with the Ninth Circuit's decision. *See Ramirez v. TransUnion LLC*, 951 F.3d 1008, 1028 (9th Cir. 2020); *Petition for Writ of Certiorari* at 17, 23-24; *Reply Brief* at 4-5 & n.1. Circuit Judge McKeown cited *OOIDA I* as a case involving "analogous circumstances" but conflicting with the Ninth Circuit's holding. *See Ramirez*, 951 F.3d at 1040 (McKeown Cir. J., concurring in part & dissenting in part).

In *OOIDA I*, five drivers and OOIDA alleged that the Federal Motor Carrier Safety Administration ("FMCSA") violated the Fair Credit Reporting Act's ("FCRA") accuracy requirements with respect to its driver reporting. 879 F.3d at 340. Through FMCSA's Pre-employment Screening Program, the government collects personal driver information and sells it to potential employers. *Id.* at 340-41. Each of those drivers was accused of a safety violation; each went to state court to have that safety violation dismissed or was adjudged not guilty; and each notified FMCSA that its record of a

2. The individual plaintiffs were OOIDA members.

violation was inaccurate. FMCSA refused to remove those records and continued to report to the public that those individuals violated the law. Inaccurate reports for two of the *OOIDA I* drivers had been distributed to potential employers, but reports for the other three had only been distributed to the drivers. *Id.* at 341.

In deciding whether the plaintiffs had standing to bring an FCRA claim, the D.C. Circuit, in contrast to the Ninth Circuit here, concluded that only the two drivers about whom reports were distributed suffered concrete Article III injuries. *Id.* at 346. Three other drivers' claims were dismissed because their reports had not been disseminated, and the period during which their inaccurate information could have been disseminated under FMCSA policies had expired. *Id.*[3] The Court's decision in this case, therefore, could directly impact OOIDA's members' ongoing litigation.

Resolving the Question Presented upon which certiorari was granted could significantly impact OOIDA's ability to help its members enforce their FCRA and other rights in court, through class actions and otherwise. Class actions provide the most efficient vehicle for enforcing many informational and regulatory rights that would otherwise evade meaningful review but bear significantly on truckers' livelihoods. Owner-operator truck drivers spend much of their lives on the road and make an average

3. On remand, the D.C. District Court dismissed the remaining drivers' claims, finding that the federal government was not subject to the FCRA. That decision is on appeal, No. 19-5321, and was argued in September 2020. *See Courtroom Minutes of Oral Argument, Owner-Operator Indep. Drivers Ass'n, Inc. v. U.S. Dep't of Transp.*, No. 19-5321 (D.C. Cir. Sept. 9, 2020).

of $50,000 per year. Class actions often provide the only practical solution for a group that lacks a realistic path to pursue their rights in court individually. *See, e.g.*, *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 617 (1997) ("The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights." (quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (1997))). Thus, resolving whether federal law permits a class action money judgment based solely on statutory violations directly and substantially affects OOIDA's members' ability to advance their interests.

The outcome of this case, therefore, impacts OOIDA's members in at least two discrete ways. First, the Court's ruling could alter OOIDA's members' ability to enforce their rights in court, whether or not this Court accepts Petitioner's and supporting *amici*'s urging to overhaul this Court's articulation of Article III standing in *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016). Second, the potential conflict between the Ninth Circuit below and the D.C. Circuit in *OOIDA I* concerning the issues under review means the Court's decision could affect a case to which OOIDA was a party.

BACKGROUND

I. The Fair Credit Reporting Act protects individuals from informational and reputational injuries by imposing procedural requirements on consumer reporting agencies.

Entire industries have been built on the collection and sale of personal data, putting at risk millions of individuals'

personal, financial, and employment reputations. The data these entities maintain carry the potential to make or break individuals when it comes to buying a car or home, applying for a job, investing in or starting a business, obtaining insurance coverage, and myriad other major life events. Both private entities and the federal government have adopted these reporting systems to serve the trucking industry.

The Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq.* ("FCRA"), stands as a bulwark against this type of reputational harm resulting from inaccurate reporting. *See, e.g.*, *Spokeo*, 136 S. Ct. at 1550 ("[In enacting the FCRA] Congress plainly sought to curb the dissemination of false information by adopting procedures designed to decrease that risk."); *see also* S. Rep. No. 91-517, at 1 (1969) ("The purpose of the fair credit reporting bill is to prevent consumers from being unjustly damaged because of inaccurate or arbitrary information in a credit report."); *Robins v. Spokeo, Inc.*, 867 F.3d 1108, 1113 (9th Cir. 2017) ("*Spokeo III*") ("Congress established the FCRA provisions at issue to protect consumers' concrete interests. We have previously observed that FCRA 'was crafted to protect consumers from the transmission of inaccurate information about them' in consumer reports." (quoting *Guimond v. Trans Union Credit Info. Co.*, 45 F.3d 1329, 1333 (9th Cir. 1995))).

The FCRA's protections extend beyond credit reporting. The statute obligates "consumer reporting agencies" to adopt accuracy-ensuring provisions and adhere to other procedural requirements with respect to a breadth of information used by third parties making credit, employment, insurance, and other decisions. *See* 15 U.S.C. §§ 1681a(d)(1), 1681b(a). It is primarily with

respect to professional reputation and employability that commercial truck drivers find themselves at the mercy of reporting agencies. Private and governmental entities alike collect and distribute driver and carrier data that inform the contracting decisions of shippers, brokers, and carriers. Guaranteeing the accuracy of personal information that hiring entities use every day holds paramount importance to truckers like the plaintiffs in *OOIDA I*.

II. Consumer reporting significantly impacts OOIDA's members' professional opportunities every day.

Independent owner-operators, like many of OOIDA's members, are forced to rely on accurate personal reporting to earn a living. Both governmental and private reporting agencies sell driver and carrier records to shippers, carriers, and other entities who are deciding whether to contract for driver and carrier services. *See, e.g.*, *OOIDA I*, 879 F.3d at 341 (noting that entities deciding whether to hire truck drivers use FMCSA's PSP reporting system); *see also Owner-Operator Indep. Driver Ass'n, Inc. v. USIS Commercial Servs., Inc.*, No. 04CV01384REBCBS, 2006 WL 2164661, at *1 (D. Colo. July 31, 2006) (describing Drive-A-Check—"DAC"—driver reporting); *cf. Maverick Transp., LLC v. U.S. Dep't of Lab., Admin. Rev. Bd.*, 739 F.3d 1149, 1152 & n.1 (8th Cir. 2014), *as corrected* (Jan. 17, 2014) (describing DAC reporting's potential effects on driving hiring). The receiving entities take these reports seriously—a single safety violation alone can cause a carrier to terminate or avoid hiring a driver simply to avoid potential liability in the event of an accident.

When these reports contain false information, OOIDA's members suffer. The federal government does driver reporting—FMCSA assembles and sells thousands of driver reports to motor carriers every month for the express purpose of informing carriers' hiring decisions. *See* 49 U.S.C. § 31150(a).[4] Similarly, carriers buy driver information from private reporting companies when making hiring decisions. DAC reports contain driver information that is gleaned from carriers and packaged and sold to prospective driver employers. *See USIS Commercial Servs.*, 2006 WL 2164661, at *1. Drivers suffer as soon as an inaccuracy exists that could be distributed on these reports. They must choose between delaying job opportunities and investing the time, energy, and resources to dispute and seek correction of the inaccurate information or suffering the reputational and financial harm resulting from prospective employers obtaining an inaccurate report. *See, e.g.*, *Corrected Appellants' Brief* at 13-15, *OOIDA I*, 879 F.3d 339 (D.C. Cir. 2018) (No. 16-5355), 2017 WL 1361799, *13-15 (describing numerous steps taken by drivers to attempt to remove inaccurate records from PSP reports). And countless small, independent operators rely on financing to purchase their rigs, financing that depends on accurate reporting.

Truckers' jobs depend on these consumer reports being accurate. False reports damage drivers' and carriers' reputations, and the economic impact of this reputational harm can be difficult to ascertain. *See, e.g.*, *Spokeo*, 136 S. Ct. at 1549 (noting that "tangible injuries are perhaps easier to recognize" than intangible injuries);

4. FMCSA's liability under the FCRA is currently at issue in the D.C. Circuit Court of Appeals. *See supra* at 3 n.3.

cf. Abbott Labs. v. Mead Johnson & Co., 971 F.2d 6, 16 (7th Cir. 1992) (noting that generally "it is virtually impossible to ascertain the precise economic consequences of intangible harms, such as damage to reputation and loss of goodwill"); *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 404 (2d Cir. 2004) (affirming finding of irreparable harm through "loss of reputation, good will, and business opportunities"). Carriers and drivers need to be able to enforce their rights in court before they suffer career-ending reputational damage. The FCRA stands as a particularly important means of protecting commercial truck drivers' rights.

SUMMARY OF THE ARGUMENT

Congress gave individuals the tools necessary to protect their reputations and livelihoods put at risk by the ever-expanding business of personal data collection and dissemination. The FCRA demonstrates Congress's understanding of the risks that follow from business practices that fall short of what is required to ensure accurate consumer reporting. The statute requires entities who hold individuals' futures in their hands to do their level best to report accurately, and it gives individuals the right to enforce this command.

Independent commercial truck drivers represent a group of individuals for whom the ability to ensure accurate reporting could scarcely be more important. Every day, at multiple points along the interstate transportation path, shippers, brokers, motor carriers, and others utilize reporting to inform hiring and contracting decisions. This Court's decision in *Spokeo*, as applied by the Ninth Circuit below, confirmed that *some* statutory violations

create a risk of harm sufficient to satisfy Article III injury standards, regardless of whether they cause any additional harm beyond the violations themselves. Such is the case for reporting agencies' violations of FCRA accuracy procedures, which protect against the reputational harm Congress sought to prevent with the FCRA. But Petitioner and *amici* supporting Petitioner ask this Court to require individuals to suffer the evils Congress sought to preempt before they can protect their rights.

This Court should instead affirm the Ninth Circuit's straightforward application of *Spokeo*'s Article III analysis and hold that statutory violations that create a material risk of harm, like these reporting agency violations of the FCRA's accuracy requirements, cause an Article III injury.

ARGUMENT

I. The FCRA establishes demanding procedural requirements of consumer reporting agencies to provide expansive protections for individuals from substantial risk of harm resulting from inaccurate information.

A. In enacting the FCRA, Congress intended to protect consumers by holding consumer reporting agencies accountable through strict procedural requirements.

Collecting personal information and distributing it to companies making hiring and other significant decisions carries the potential to cause great harm to the subjects of those reports. The damage done by inaccurate

personal data in the hands of persons using these data to make hiring or credit decisions is self-evident. Congress recognized as much and set up procedural safeguards to minimize the risk of the distribution of inaccurate personal data by the entities who do most of the distributing.

The FCRA requires consumer reporters to do their (reasonable) best to ensure that their reports contain accurate information: "Whenever a consumer reporting agency prepares a consumer report it shall follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates." 15 U.S.C. § 1681e(b). Congress recognized the potential harm from inaccurate consumer reporting: it "plainly sought to curb the dissemination of false information by adopting procedures designed to decrease that risk." *Spokeo*, 136 S. Ct. at 1550; *see also* S. Rep. No. 91-517, at 1 (1969) ("The purpose of the fair credit reporting bill is to prevent consumers from being unjustly damaged because of inaccurate or arbitrary information in a credit report."); *Seamans v. Temple Univ.*, 744 F.3d 853, 860 (3d Cir. 2014) (noting that FCRA "'was crafted to protect consumers from the transmission of inaccurate information about them, and to establish credit reporting practices that utilize accurate, relevant, and current information in a confidential and responsible manner'" (quoting *Cortez v. Trans Union, LLC*, 617 F.3d 688, 706 (3d Cir. 2010))); *Guimond*, 45 F.3d at 1333 ("The legislative history of the FCRA reveals that it was crafted to protect consumers from the transmission of inaccurate information about them . . . .").

Congress also apparently recognized that an effective means to combat inaccurate reporting is to give affected individuals the right to enforce the procedures reporting entities employ in preparing reports. 15 U.S.C. § 1681e(b). Congress could have provided a cause of action for only the dissemination or disclosure of inaccurate information. But by that time, the damage is done. Congress gave individuals a chance to prevent that damage.

The FCRA also imposes strict requirements with respect to consumer reporting agencies' disclosures to consumers. *See Ramirez*, 951 F.3d at 1029 (describing disclosure procedures found in 15 U.S.C. § 1681g). The disclosure provisions at issues here, § 1681g(a) and (c)(2), aid individuals' interest in "understanding how to correct inaccurate information in their credit reports." *See id.* Like the "reasonable procedures" requirements, these disclosure provisions "go to the core of Congress's purpose in enacting the FCRA: 'to protect consumers from the transmission of inaccurate information about them.'" *Id.* (alteration omitted) (quoting *Guimond*, 45 F.3d at 1333)).

Thus, Respondent Ramirez and the absent class members in this case asserted violations of three FCRA provisions that protect the very interests Congress set out to safeguard.

B. Violations of FCRA accuracy requirements cause Article III injuries where disclosure of the inaccurate information could cause concrete harm.

1. Statutory violations causing risk of real harm satisfy Article III's injury requirements whether additional, tangible harm results from the violations.

Congress can define injuries by enacting procedural requirements intended to protect against such injuries. *See Spokeo*, 136 S. Ct. at 1549. And although Congress's will to give a class of persons a right to sue, while informative, does not establish an Article III injury, Congress is "well positioned to identify intangible harms that meet Article III requirements." *See id.* Thus, its choice to define an injury is "instructive and important" and can involve elevating a previously inadequate injury to an Article III harm. *See id.* (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 578 (1992)). "[T]o determine whether a procedural violation manifests injury in fact, a court properly considers whether Congress conferred the procedural right in order to protect an individual's concrete interests." *Strubel v. Comenity Bank*, 842 F.3d 181, 189 (2d Cir. 2016) (citing *Lujan*, 504 U.S. at 572, and *Summers v. Earth Island Inst.*, 555 U.S. 488, 496 (2009)). Thus, the analysis set forth in *Spokeo* and applied by the Ninth Circuit below echoes the inquiry advanced in *Lujan*, *Summers*, and this Court's other injury precedents. *See Spokeo*, 136 S. Ct. at 1549 (analyzing *Lujan*, *Summers*, and others).

In sum, where Congress protects an interest with procedural requirements, and that interest is sufficiently concrete (or violations of the procedural requirements pose a sufficiently concrete risk of harm), procedural violations create Article III injuries. Such a plaintiff "need not allege any *additional* harm beyond" the statutory violation. *See Spokeo*, 136 S. Ct. at 1549. "In short, some violations of statutorily mandated procedures may entail the concrete injury necessary for standing." *Strubel*, 842 F.3d at 189.

2. Violations of the FCRA's accuracy requirements cause a risk of real harm to the subjects of the inaccurate data sufficient for Article III standing.

Congress enacted the FCRA to protect individuals' concrete interests. The law specifically aims to prevent against the harm caused by the distribution of inaccurate personal information. *See Spokeo III*, 867 F.3d at 1113-14 ("[G]iven the ubiquity and importance of consumer reports in modern life—in employment decisions, in loan applications, in home purchases, and much more—the real-world implications of material inaccuracies in those reports seem patent on their face."); *see also Spokeo*, 136 S. Ct. at 1550 ("Congress plainly sought to curb the dissemination of false information by adopting procedures designed to decrease that risk."); *cf. Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 52 (2007) ("Congress enacted FCRA in 1970 to ensure fair and accurate credit reporting, promote efficiency in the banking system, and protect consumer privacy.").

Violations of the procedural rules designed to advance reporting accuracy injure individuals in a concrete and particularized way. *Strubel*, 842 F.3d at 190 ("[W]e understand *Spokeo*, and the cases cited therein, to instruct that an alleged procedural violation can by itself manifest concrete injury where Congress conferred the procedural right to protect a plaintiff's concrete interests and where the procedural violation presents a 'risk of real harm' to that concrete interest."); *cf. Van Patten v. Vertical Fitness Group, LLC*, 847 F.3d 1037, 1043 (9th Cir. 2017) (recognizing that Telephone Consumer Protection Act, 47 U.S.C. § 227, established substantive right to be free from harassing telephone communications and statutory violations that harmed that right cause Article III injuries); *Dreher v. Experian Info. Sols., Inc.*, 856 F.3d 337, 346 (4th Cir. 2017) (distinguishing harm resulting from reporting agency's misnaming servicing company from other harms that could affect report accuracy).

Thus, Congress created procedural obligations that serve to protect against the risk of real harm and elevated violations of these obligations to the level of Article III injuries, regardless of whether affected individuals experienced any additional, tangible harm from the violations. *See Spokeo III*, 867 F.3d at 1114; *see also Ramirez*, 951 F.3d at 1027 (noting that the FCRA's accuracy requirements are "particularly important" due to risk of harm following from inaccurate data). Individuals suffer Article III harm when consumer reporting agencies violate the FCRA's accuracy requirements in a way that creates a material risk of harm.

C. Current standing rules, applied by the Ninth Circuit below, already protect against the purported flood of frivolous suits cited by Petitioner and *amici* supporting Petitioner.

This standard for constitutional injury comports with Article III's requirements as expressed in *Spokeo* and this Court's other precedents. It also strikes a balance between preventing lawsuits based on mere technical statutory violations and permitting court enforcement for statutory violations that carry the potential to do real harm to large swaths of the public. Nonetheless, *amici* supporting Petitioner warn this Court that affirming the Ninth Circuit opens the floodgates to frivolous, "no-injury" litigation. For example, eBay, Facebook, and Google claim that the Ninth Circuit's decision would grant Article III standing to anyone who can claim a statutory violation. *Brief for* Amici Curiae *eBay, Inc., Facebook, Inc., Google LLC, Computer & Communications Industry Association, The Internet Association, and Technology Network Supporting Petitioner* ("eBay Brief") at 6 (arguing that Ninth Circuit's decision gives standing to anyone who has a statutory cause of action);*cf. Brief for the Chamber of Commerce of the United States of America & National Federation of Independent Business as* Amici Curiae *in Support of Petition* at 2-3 (asserting that "businesses will find themselves mired in massive lawsuits over alleged technical statutory violations that have not caused actual harm to the vast majority of the class"). But this supposed cautionary tale ignores the analysis and facts of both the decision below and this Court's *Spokeo* opinion.

The *Spokeo* decision foresaw and specifically preempted this concern. This Court took great pains to

preclude frivolous suits based on mere statutory violations by ensuring that only *some* procedural violations cause Article III injuries. *Spokeo* requires courts to examine the violation involved to determine if that violation causes Article III harm:

> Congress' role in identifying and elevating intangible harms does not mean that a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right. Article III standing requires a concrete injury even in the context of a statutory violation. . . . This does not mean, however, that the risk of real harm cannot satisfy the requirement of concreteness. . . . Just as the common law permitted suit in such instances, the violation of a procedural right granted by statute can be sufficient in some circumstances to constitute injury in fact. In other words, a plaintiff in such a case need not allege any additional harm beyond the one Congress has identified.

Spokeo, 136 S. Ct. at 1549; *see also id.* at 1550 ("A violation of one of the FCRA's procedural requirements may result in no harm.").

Thus, *Spokeo* specifically contemplated that some statutory violations, in and of themselves, would cause Article III injuries and some would not. *See id.* at 1549-50; *see also Strubel*, 842 F.3d at 189 ("We do not understand *Spokeo* categorically to have precluded violations of statutorily mandated procedures from qualifying as

concrete injuries supporting standing. Indeed, if that had been the Court's ruling, it would not have remanded the case for further consideration of whether the particular procedural violations alleged 'entail a degree of risk sufficient to meet the concreteness requirement' as clarified in *Spokeo*." (quoting *Spokeo*, 136 S. Ct. at 1550)). Thus, the decision below applies *Spokeo*'s strictures and demonstrates how the standard resolves concerns about relatively innocuous statutory violations leading to unwarranted class action suits.

Applying *Spokeo*, the Ninth Circuit did not find that *every* FCRA violation caused Article III harm. *See Ramirez*, 951 F.3d at 1026. Rather, the court noted that, in contrast to a mere zip code inaccuracy, *Spokeo*, 136 S. Ct. at 1550, TransUnion "inaccurately identified and labeled all class members as potential terrorists, drug traffickers, and other threats to national security." *Id.* This "severe" inaccuracy, combined with the potential for instantaneous dissemination to third parties, carried with it the risk of causing the type of harm Congress sought to prevent with the FCRA. *Id.* (noting that risk of harm here was "far graver" than even the inaccurate age, marital status, education, and wealth information at issue in *Spokeo*).

Reporting entities may not be mislabeling drivers as national security threats, but driver reporting inaccuracies can greatly diminish drivers' economic opportunities, if not end their careers. The plaintiffs in *OOIDA I* alleged that their driver reports falsely stated that the drivers had violated safety regulations. *Owner-Operator Indep. Drivers Ass'n, Inc. v. U.S. Dep't of Transp.*, 211 F. Supp. 3d 252, 256-57 (D.D.C. 2016), *aff'd in part, rev'd in part,* 879 F.3d 339 (D.C. Cir. 2018). Carriers and other

driver employers use these reports to decide whether to hire drivers; an inaccurate report of a safety violation seriously jeopardizes a driver's ability to get a job.

At the root of *amici*'s argument in support of Petitioner, therefore, lies a resistance to being held accountable under essential consumer protection regimes, like the FCRA, that serve to protect against the harm caused by the pervasive use and sale of individuals' personal data as a business model. *See, e.g.*, *Campbell v. Facebook, Inc.*, 951 F.3d 1106, 1112 (9th Cir. 2020) (approving settlement of class action challenging Facebook's practice of collecting data from private messages); *see also In re Facebook, Inc. Internet Tracking Litig.*, 956 F.3d 589, 596 (9th Cir. 2020) (describing Facebook's compiling users' browsing histories to generate revenue); *In re Google Inc. Cookie Placement Consumer Priv. Litig.*, 806 F.3d 125, 132 (3d Cir. 2015) (describing Google's and other companies' practice of placing cookies despite users' attempts to block cookies' data collection). The FCRA is not a new law: entities have been required to adopt reasonable procedures to ensure maximum possible accuracy of consumer reports since 1970. *See* Pub. L. No. 91-508 § 607(b), 84 Stat. 1131 (1970). These companies entered (if not created) the marketplace of personal data, and that marketplace is governed by consumer protection regimes like the FCRA that give individuals the right to protect their concrete interests in court.

The standard for evaluating concreteness in statutory violation cases, as expressed in *Spokeo* and applied below, sorts the purportedly frivolous suits from the cases where there is real risk of harm. TransUnion's records, ready to be distributed at a moment's notice to third parties

making credit, employment, and other important life decisions, inaccurately identified thousands of individuals as potential national security threats with whom the third parties should not transact.

Opening the courthouse doors to protect individuals from being falsely identified as terrorists and drug traffickers comports with this Court's precedent, advances the interests Congress sought to protect with the FCRA, and makes sense as a tool to combat the damage wrought by billion-dollar companies' profiting from the personal data of millions of individuals.

II. Truck drivers are particularly vulnerable to harm from false reporting.

A. Truck drivers are exposed to personal reporting on a near-daily basis.

Personal reporting plays an outsized role in the professional lives of the nation's truck drivers. Whether an independent motor carrier seeking a load to haul from a broker or shipper or a driver trying to haul loads for a motor carrier, individual truckers are forced to rely on fair and accurate reporting to obtain work.

Shippers, brokers, and motor carriers, entities who contract for the carriers' and drivers' services, regularly use reporting services to inform their decisions. These systems include government and private reporting. FMCSA sells driver reports to carriers making hiring decisions through the Pre-employment Screening Program ("PSP"). *See* 49 U.S.C. § 31150(a). These reports contain driver inspection and crash data collected from

federal, state, and local inspection entities throughout the United States. *See, e.g.*, *OOIDA I*, 879 F.3d at 341 (noting that entities deciding whether to hire truck drivers use FMCSA's PSP reporting system).

Trucking companies also use private reporting like Drive-A-Check ("DAC") reports to evaluate prospective drivers. *See, e.g.*, DAC Employment History File, HireRight, https://www.hireright.com/transportation/solutions/verifications/dac-report-employment-history-file (last visited March 7, 2021) ("With one easy-to-read report, prospective employers will be able to quickly and efficiently determine if an applicant has a safe driving record and meets their hiring standards."); *see also USIS Commercial Servs., Inc.*, 2006 WL 2164661, at *1 (describing DAC driver reporting). The accuracy of DAC reports is essential to drivers' ability to make a living. *See, e.g.*, *Maverick Transp.*, 739 F.3d at 1152 & n.1 (describing DAC reporting's potential effects on driving hiring). False negative information in these reports can be devastating. *See id.* at 1152 ("An abandonment notation has a negative effect on a driver's ability to be hired and some employers refuse to hire drivers who have an abandonment notation in their DAC report."). And many carriers have adopted the approach that a single safety violation is grounds for refusing to hire a driver, based solely on the carrier's wish to avoid liability for a future accident.

The nature of the trucking industry means that thousands of independent truck drivers and carriers enter into agreements with shippers, brokers, and agreements every day. These shippers, brokers, and carriers use government and private reporting to decide which drivers and carriers to hire. When these reports contain

inaccurate information, truckers suffer a variety of harms that are difficult to ascertain. *See Spokeo III*, 867 F.3d at 1115 (noting that the FCRA protects against intangible harms to reputational and privacy interests). Few carriers report to drivers when they choose to not hire a driver based on a DAC or PSP report.[5] And drivers and carriers who know their reports contain inaccurate information may refrain from applying to jobs altogether, instead delaying action until they complete the often-months-long process of correcting their records. *See, e.g.*, Todd Dills & Max Heine, *Red tape, deaf ears: Criticism mounts of DataQs crash- and inspection-info review system*, Overdrive (Feb. 15, 2021), https://www.overdriveonline.com/regulations/article/15063803/criticism-of-dataqs-review-system-continues-to-rise (describing drivers' and carriers' experiences attempting to correct inaccurate records in government reporting systems). Limiting judicial accountability can only serve to exacerbate these issues, and by the time a false negative report is actually distributed to a third party, the damage sought to be prevented by the FCRA is done.

5. The FCRA requires decisionmakers who take adverse action based on a consumer report to inform the consumer. *See* 15 U.S.C. § 1681m. But in the trucking industry, carriers seldom satisfy that requirement, making it difficult for drivers to determine the negative consequences of inaccurate reports. *See, e.g.*, Eric Miller, *Settlement Puts Spotlight on Background Checks*, Transport Topics (June 16, 2014, 1:30 AM), https://www.ttnews.com/articles/settlement-puts-spotlight-background-checks (describing lack of adverse action notices in trucking industry).

B. Adopting Petitioner's interpretation of standing under the FCRA—closing the courts until reports are distributed—would undermine the statute's very purpose.

Because truckers' livelihoods depend on accurate consumer reporting, they face precisely the type of injury Congress sought to prevent. The statute's plain language expressly demonstrates Congress's desire to ensure consumer reporting accuracy:

> It is the purpose of this subchapter to require that consumer reporting agencies adopt reasonable procedures for meeting the needs of commerce for consumer credit, personnel, insurance, and other information in a manner which is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information in accordance with the requirements of this subchapter.

15 U.S.C. § 1681(b); S. Rep. No. 91-517, at 1 (1969) ("The purpose of the fair credit reporting bill is to *prevent* consumers from being unjustly damaged because of inaccurate or arbitrary information in a credit report." (emphasis added)); *cf.* § 1681(a) (noting that "banking system is dependent upon fair and accurate credit reporting"). This Court has unambiguously recognized the role of reporting accuracy in Congress's passing the FCRA: "Congress plainly sought to curb the dissemination of false information by adopting procedures designed to decrease that risk." *Spokeo*, 136 S. Ct. at 1550.

Requiring individuals to wait until reporting agencies' systemic accuracy failures manifest in inaccurate reports actually distributed to third parties undermines reporting generally and carries the risk of far-reaching reputational injuries. Congress's goal of ensuring accurate reporting is better advanced if individuals can sue to enforce the FCRA's obligations when accuracy violations that put individuals at a real risk of harm are discovered, not when the damage is already done. Widescale procedural deficiencies put thousands at risk, as demonstrated by the case below and Congress's emphasis on procedural safeguards.

Petitioner and supporting *amici* would prefer that a person be stopped at the courthouse steps until reporting entities complete the process of falsely informing employers, lenders, and other decisionmakers that the person is a terrorist—or an unsafe truck driver. This argument fails in logic and reason. Congress, by specifically requiring various prophylactic procedures and providing a cause of action for their violations, sought to prevent intangible reputational injuries before they occurred. Requiring individuals to suffer these harms ignores common sense. Accordingly, the Ninth Circuit declined to require individuals to wait. Instead, the court sensibly confirmed that Congress's FCRA goals were advanced by giving individuals access to federal courts when entities' violations created real risk of harm.

Without this access, even truckers who discover wide-spread FCRA violations that negatively impact the accuracy of reports that they count on everyday could not motivate the reporting entities to fix their shoddy practices until it was too late. That is simply not what Congress intended in adopting the FCRA.

III. Additional consequential harm suffered by one class member does not preclude Rule 23 typicality when the class suffers Article III injuries from statutory violations.

The Ninth Circuit held that violations of the FCRA's accuracy requirements create Article III injuries without a showing of additional harm and without a showing that inaccurate records were distributed to third parties. *See Ramirez*, 951 F.3d at 1025-26. In so holding, the Ninth Circuit correctly applied this Court's Article III standards, and individuals suffer injury in the form of a material risk of harm stemming from the statutory violations. *See supra* Part I; *see also Brief for the United States as Amicus Curiae Supporting Neither Party* at 15-16.

Apart from the question of concrete Article III injury, Petitioner and several supporting *amici* argue separately that the Ninth Circuit erred because the class of individuals represented by Ramirez did not suffer injuries sufficiently typical to satisfy the standards of Federal Rule of Civil Procedure 23. *See, e.g.*, *Brief for Petitioner* at 43-46; eBay Brief at 19-20. Because only Mr. Ramirez was shown to have suffered additional tangible injuries beyond the Article III harm he and the rest of the class suffered as a result of TransUnion's FCRA violations, Petitioner argues that the class's injuries don't meet typicality requirements.

But Mr. Ramirez's failure to receive credit, cancellation of his international trip, and embarrassment did not serve as the "injuries" he shared with the class and which provided the basis for certification. *See, e.g.*, *Brief for*

Respondent at 38-39. Rather, the class's FCRA injuries occurred when the statute was violated in a way that created a substantial risk of harm. *See, e.g.*, *Ramirez*, 951 F.3d at 1028. The jury awarded statutory damages for TransUnion's "severe" FCRA violations, not as compensation for specific economic harms suffered by class members:

> [T]he jury's award—which falls within the statutory range—is proportionate to TransUnion's offenses and reasonable in light of the evidence. Indeed, if we were to envision a case that might warrant the high end of the statutory-damages range, we might envision something like this case. TransUnion recklessly labeled thousands of consumers as potential terrorists and other sanctioned individuals without taking even basic steps to verify the accuracy of these labels. And then it hid the ball from these consumers when they asked for their files and withheld important information about their right to dispute the labels

Ramirez, 951 F.3d at 1035. Thus, Ramirez's suffering additional consequential harms does not render his injury atypical. Indeed, the class members' injuries supporting their claims are identical—they all suffered the same risk of harm from TransUnion's procedural violations.[6]

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6. Respondent might have argued that individuals for whom inaccurate credit reports were distributed and those whose reports were not distributed suffered different injuries, requiring two subclasses and/or potentially different damage awards. TransUnion declined the district court's invitation to follow this approach. *See Ramirez*, 951 F.3d at 1033 n.14. And in any event, both injuries satisfy Article III standards.

Petitioner's complaints about typicality are, therefore, more appropriately framed in terms of damages evidence. *Cf. Brief for the United States as Amicus Curiae Supporting Neither Party* at 31-32 (observing that jury, in determining amount of statutory damages, might erroneously consider evidence of additional harm suffered by unique plaintiff). Had the jury awarded $984.22 as an economic measure of the unique, consequential harm Ramirez suffered, it might have inappropriately measured damages for the class. But as both the Ninth Circuit and the district court found, the statutory damages awarded by the jury were consistent with the severity of TransUnion's three FCRA violations. *Ramirez*, 951 F.3d at 1035; *see also Ramirez v. Trans Union, LLC*, No. 12-CV-00632-JSC, 2017 WL 5153280, at *6 (N.D. Cal. Nov. 7, 2017), *aff'd in part, vacated in part, rev'd in part sub nom. Ramirez v. TransUnion LLC*, 951 F.3d 1008 (9th Cir. 2020) (refusing to reduce jury's statutory damages award due to the "evidence regarding Trans Union's practices").[7] The statutory damages award, just like the class-wide Article III injuries, were based on TransUnion's FCRA violations, not Ramirez's consequential damages.

Like Ramirez and countless other individuals, commercial truckers face the potential for grave harm from FCRA violations. For instance, drivers with inaccurate information on their PSP reports face the choice of: (1) applying for jobs and risking the negative reputational consequences; or (2) postponing employment

7. TransUnion did not accept the district court's suggestion to modify the jury verdict form to allow different damage awards for members for whom inaccurate credit reports were distributed and those whose reports were not distributed. *See Ramirez*, 951 F.3d at 1033 n.14.

until they complete the gauntlet of state and federal administrative and/or judicial steps to correct the report. *See, e.g.*, *Corrected Appellants' Brief* at 13-15, *OOIDA I*, 879 F.3d 339 (D.C. Cir. 2018) (No. 16-5355), 2017 WL 1361799, *13-15 (describing numerous steps taken by drivers to attempt to remove inaccurate records from PSP reports). These drivers, like other individuals subject to FCRA reporting, suffer harm when inaccurate information is at risk of dissemination.

The *potential* for inaccurate reporting is inherently disruptive: It causes individuals to make impossible decisions: cancel family vacations or risk being detained at an airport; reorganize important purchases or face public embarrassment; postpone employment indefinitely or ruin professional reputation. The Ninth Circuit's application of *Spokeo* recognizes this reality and opens the courthouse doors to individuals seeking to preempt these harms that Congress has deemed worthy of protection.

CONCLUSION

In passing regimes like the FCRA, Congress recognized that the protection of individuals' rights often starts with procedure. This Court should affirm the Ninth Circuit's decision and hold that (1) FCRA procedural violations that create a real risk of harm to the interests the FCRA protects, like TransUnion's here, cause Article III injuries without a showing of additional harm; and (2) Rule 23's typicality requirement is satisfied where statutory procedural violations cause Article III injuries to class members, regardless of whether they suffered different or no additional harm.

Respectfully submitted,

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