

In the
Supreme Court of the United States

ESTATE OF CHERYL BEAUDRY, INDIVIDUALLY
AND ON BEHALF OF OTHERS SIMILARLY SITUATED,

Petitioner,

v.

TELECHECK SERVICES, INC.;
TELECHECK INTERNATIONAL INC.;
AND FIRST DATA CORPORATION,

Respondents.

**On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit**

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In this putative class action involving over 1.4 million consumers, when presenting checks to merchants for payment, did named plaintiff Cheryl Beaudry (“Beaudry”) suffer an injury in fact sufficient to confer Article III standing for an action under the Fair Credit Reporting Act when TeleCheck provided inaccurate consumer reports to merchants about Beaudry by failing to include positive checkwriting information stored in TeleCheck’s files, thereby increasing the risk that Beaudry would receive check declines?

PARTIES TO THE PROCEEDINGS

Petitioner

- Petitioner Estate of Cheryl Beaudry (“Beaudry”),¹ individually and on behalf of a putative class of more than 1.4 million consumers, was plaintiff in the district court and plaintiff-appellant in the court of appeals.

Respondents

- Respondents Telecheck Services, Inc., Telecheck International Inc., and First Data Corporation (“TeleCheck”) were defendants in the district court and defendants-appellees in the court of appeals.

¹ Beaudry died during the course of this action and her Estate was substituted as named plaintiff.

LIST OF PROCEEDINGS

United States Court of Appeals for the Sixth Circuit
No. 20-6018

Cheryl Beaudry, *Plaintiff*, Estate of Cheryl Beaudry, Individually and on behalf of all Others Similarly Situated, *Plaintiff-Appellant*, *v.* TeleCheck Services, Inc.; TeleCheck International, Inc.; First Data Corporation, *Defendants-Appellees*

Date of Final Opinion: July 27, 2021

Date of Rehearing Denial: October 21, 2021

United States District Court
for the Middle District of Tennessee

No. 3:07-cv-00842

Estate of Cheryl Beaudry, *Plaintiff*, *v.* TeleCheck Services, Inc., et al., *Defendants*

Date of Memorandum Opinion/Order: August 6, 2020

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Estate of Cheryl Beaudry (“Beaudry”) respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.



OPINIONS BELOW

The Sixth Circuit’s opinion on this appeal (“*Beaudry II*”) is found at 854 Fed.Appx. 44 and reproduced at App.1a-6a. The district court’s opinion is found at 477 F.Supp.3d 681 and reproduced at App.7a-24a. The Sixth Circuit’s opinion in the earlier appeal addressing Article III standing (“*Beaudry I*”) is reported at 579 F.3d 702 (6th Cir. 2009) and reproduced at App.27a-40a. *Beaudry I* was designated for publication, but *Beaudry II* was not.



JURISDICTION

In *Beaudry II*, the Sixth Circuit issued its opinion on July 27, 2021, affirming the district court’s order granting TeleCheck’s Motion for Summary Judgment on the issue of whether Beaudry had suffered an injury in fact sufficient to confer Article III standing. Beaudry timely filed a petition for rehearing en banc on October 4, 2021, which the court denied on October

21, 2021. This Court has jurisdiction under 28 U.S.C. § 1254(1).



CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. art. III, § 2

Article III, Section 2 of the United States Constitution provides: “The judicial Power shall extend to all Cases, in Law and Equity, arising under . . . the Laws of the United States, and . . . to Controversies. . . .”

15 U.S.C. § 1681 et seq.

The pertinent provisions of the Fair Credit Reporting Act (“FCRA”), 15 U.S.C. § 1681 *et seq.*, are reproduced at App.43a-47a.



INTRODUCTION AND STATEMENT OF THE CASE

This is a putative class action brought by Beaudry, individually and on behalf of a putative class of over 1.4 million consumers who were victims of TeleCheck’s widespread practice and procedure of failing to follow reasonable procedures to assure maximum possible accuracy of information about consumers when providing consumer reports in violation of the Fair Credit Reporting Act (“FCRA”), 15 U.S.C. § 1681e(b).

Despite evidence showing that TeleCheck provided inaccurate consumer reports about Beaudry and over

1.4 million Tennessee consumers, and further, evidence as a result of the inaccurate consumer reports, Beaudry and over 1.4 million Tennessee consumers were at a greater risk of suffering check declines based on TeleCheck’s failure to follow reasonable procedures in violation of § 1681e(b) of the FCRA, the district court held that there was no genuine issue of material fact and that as a matter of law Beaudry failed to establish a sufficient injury in fact to confer Article III standing. The district court’s order was affirmed by the Sixth Circuit.

In reaching their decisions, both the district court and the Sixth Circuit misapplied and ignored law regarding Article III standing and disregarded the rulings of this Court, as discussed below.

In the landmark case of *Spokeo, Inc. v. Robins*, 136 S.Ct. 1540 (2016), this Court held that “the violation of a procedural right granted by statute can be sufficient in some circumstances to constitute injury in fact,” in which case a plaintiff “need not allege any additional harm beyond the one Congress has identified.” *Id.* at 1549. This Court framed the question as whether the plaintiff has alleged “a bare procedural violation, divorced from any concrete harm,” or a procedural violation that “entail[s] a degree of risk sufficient to meet the concreteness requirement.” *Id.* at 1549-50. This Court also viewed history and the judgment of Congress as important and instructive in the analysis. *Id.* at 1549.

Justice Thomas joined the Court’s opinion but wrote separately to discuss what he believed to be an important distinction between statutory rights that protect individuals and those that protect the public at large. *Id.* at 1550 (Thomas, J., concurring). He stated

that § 1681e(b) of the FCRA “could arguably establish a private cause of action to vindicate the violation of a privately held right,” in which case “the violation of the legal duty suffices for Article III injury in fact.” *Id.* at 1553-54.

Writing in dissent, Justice Ginsburg agreed with much of the Court’s opinion, including what she perceived to be a focus on whether Congress connected the procedural requirement “to the prevention of a substantive harm.” *Id.* at 1555 (Ginsburg, J., dissenting) (emphasis added). She dissented because she viewed a remand as unnecessary where the respondent plainly suffered a concrete injury: “Far from an incorrect zip code, Robins complains of misinformation” in his credit report “that could affect his fortune in the job market.” *Id.* at 1556.

In the years following *Spokeo*, lower courts struggled to apply this Court’s teachings consistently. As a result, in *TransUnion, LLC v. Ramirez*, 141 S.Ct. 2190 (2021), this Court again addressed the issue of Article III standing in the context of a case involving alleged violations of § 1681e(b) of the FCRA. TransUnion provided consumer reports to third parties containing OFAC alerts labeling 1,853 consumers as potential terrorists. In a 5-4 decision, the Court held that the consumers for whom TransUnion had disseminated a consumer report suffered a concrete injury to confer Article III standing.

As to the remaining 6,332 consumers whose TransUnion files contained the same inaccurate information labeling them as potential terrorists but for whom TransUnion had not disseminated a consumer report, plaintiffs argued that they suffered concrete injuries because of a material risk that OFAC alerts would be

disseminated in future consumer reports. The Court, however, disagreed holding that plaintiffs did not prove a sufficient likelihood that their individual reports would be requested by third parties and thereafter, provided by TransUnion. Thus, the Court held that the mere existence of inaccurate information, absent dissemination, did not constitute a concrete injury.

In a dissenting opinion joined by Justices Breyer, Sotomayor and Kagan, Justice Thomas disagreed again with the majority, discussing what he believed to be an important distinction between statutory rights that protect individuals and those that protect the public at large. *Id.* at 2217 (Thomas, J., dissenting). “[E]ach class member established a violation of his or her private rights.” *Id.* at 2218. The jury found that TransUnion violated three separate duties created by statute. *Id.* at 2216. “All three of those duties are owed to individuals, not to the community writ large. Take § 1681e(b), which requires a consumer reporting agency to “follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates.” This statute creates a duty: to use reasonable procedures to assure maximum possible accuracy. And that duty is particularized to an individual: the subject of the report.” *Id.* at 2218.

Also in a dissenting opinion joined by Justices Breyer and Sotomayor, Justice Kagan disagreed with the majority, stating “[a]s *Spokeo* recognized, ‘Congress is well positioned to identify [both tangible and] intangible harms’ meeting Article III standards. *Ibid.* Article III requires for concreteness only a ‘real harm’ (that is, a harm that “actually exist[s]”) or a ‘risk of real harm.’ *Ibid.* And as today’s decision definitively

proves, Congress is better suited than courts to determine when something causes a harm or risk of harm in the real world. For that reason, courts should give deference to those congressional judgments. Overriding an authorization to sue is appropriate when but only when Congress could not reasonably have thought that a suit will contribute to compensating or preventing the harm at issue.” *Id.* at 2226 (Kagan, E., dissenting).

Appellees assert Beaudry suffered no concrete injury because the alleged inaccuracy here—that TeleCheck did not associate Beaudry’s eight-and nine-digit Tennessee driver license number in its internal system—was never published to a third party. Yet, TeleCheck provided consumer reports to merchants to accept or decline Beaudry’s (and over 1.4 million putative class members’) checks purportedly based on their checkwriting history. And when TeleCheck provided consumer reports recommending merchants accept or decline Beaudry’s (and putative class members’) checks, TeleCheck excluded their prior checkwriting history under their eight-digit driver license number. TeleCheck’s reporting system, and hence its reports, were based on inaccurate information disseminated to merchants.

Further, even under the majority’s ruling, as discussed below, Beaudry established that merchants were likely, and actually did, request millions of consumer reports from TeleCheck about Beaudry and the putative class members, and, each time, TeleCheck issued inaccurate consumer reports.

The standard applied to determine concreteness is no minor matter and if applied inaccurately (as in this case) results in major consequences. Beaudry’s FCRA rights and those of over 1.4 million Tennessee

consumers have been eviscerated by the lower courts in favor of TeleCheck’s quest to profit through issuing consumer reports without regard to accuracy, much less reasonable procedures to assure maximum possible accuracy of information in issuing consumer reports. Here, the district court and the Sixth Circuit ignored the fact that in some instances the violation of a statutory right, standing alone, can confer Article III standing. Instead, the lower courts conduct inaccurate after-the-fact analysis in holding that no check decline means no standing because apparently consumers’ rights do not matter unless TeleCheck’s unreasonable, inaccurate, practices under the FCRA result in a check decline.

In so doing, the lower courts went too far in concluding that Beaudry does not have access to federal court redress, and the outcome would have been different had the issue been decided by other Court of Appeals or another Sixth Circuit panel.¹ This case is an excellent vehicle for the Court to correct a specific

¹ Notably, on an earlier appeal in this case, the district court granted TeleCheck’s Motion to Dismiss, holding that because Beaudry did not plead that she actually suffered a check decline (*i.e.* an actual injury), she failed to state a claim for which relief could be granted. On appeal, the Sixth Circuit reversed, holding that Beaudry need not plead that she suffered an actual injury in order to have Article III standing. *See Beaudry v. TeleCheck*, 579 F.3d 702, 705 (6th Cir. 2009) (“*Beaudry I*”) (“The Act does not require a consumer to wait for unreasonable credit reporting procedures to result in the denial of credit or other consequential harm before enforcing her statutory rights.”). Significantly, the Sixth Circuit has not reversed *Beaudry I* and in the most recent appeal, the Sixth Circuit panel did not address *Beaudry I* or attempt to reconcile it when affirming the district court’s granting of TeleCheck’s motion for summary judgment on the Article III standing issue.

injustice to Tennessee consumers while also offering much-needed guidance on what is required to confer Article III standing so that consumers are actually protected by consumer protection statutes.

To be sure, the Sixth Circuit’s decision in this case closes the door to the courthouse for millions of FCRA violation victims, infringes upon Congress’s authority to establish statutory damages as a standing basis, and impedes the ability of class actions to address widespread FCRA violations.

For the foregoing reasons, and for the reasons discussed below, the Court should grant the petition for certiorari.

A. The Statutory Framework

Congress enacted the FCRA because it recognized a need for reasonable procedures to be established and followed to promote accuracy and fairness in credit reporting. 15 U.S.C. § 1681; *see also Spokeo*, 136 S.Ct. at 1545. “Congress plainly sought to curb the dissemination of false information [in consumer reporting] by adopting procedures designed to decrease that risk.” *Spokeo*, 136 S.Ct. at 1550. “Congress found that in too many instances agencies were reporting inaccurate information,” often without consumers’ knowledge. *Dalton v. Capital Associated Indus., Inc.*, 257 F.3d 409, 414 (4th Cir. 2001).

As relevant here, Congress aimed to decrease the risk of harm associated with inaccurate credit reporting by enacting the Fair Credit Reporting Act. As its findings and statement of purpose, the FCRA provides that “consumer reporting agencies have assumed a vital role in assembling and evaluating consumer credit and other information on consumers” and that

there “is a need to insure that consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer’s right to privacy.” 15 U.S.C. § 1681(a)(3)&(4) (emphasis added). As its stated purpose, the FCRA is designed “to require that consumer reporting agencies adopt reasonable procedures . . . with regard to the . . . accuracy . . . of such information” 15 U.S.C. § 1681(b) (emphasis added). More specifically, 15 U.S.C. § 1681e(b) imposes strict statutory duties upon consumer reporting agencies when providing consumer reports, providing that “[w]henever a consumer reporting agency prepares a consumer report it shall follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates.” 15 U.S.C. § 1681e(b) (emphasis added).

For negligent violations of § 1681e(b), consumers can seek “actual damages” along with reasonable attorney’s fees and costs. 15 U.S.C. § 1681o(a). For willful violations, consumers have the option to recover “actual damages” or statutory “damages of not less than \$100 and not more than \$1,000” per violation along with reasonable attorney’s fees and costs. *Id.* § 1681n(a)(1). Consumers may also seek punitive damages for willful violations. *Id.* § 1681n(a)(2).

B. Factual Background and District Court Proceedings

This petition arises from a putative class action brought by Beaudry on behalf of herself and over 1.4 million Tennessee consumers who presented checks to merchants using TeleCheck’s check verification services when making their decisions to accept or decline the checks.

TeleCheck provides check-verification services to merchants, recommending whether merchants should accept or decline checks from retail consumers at the point of sale. To do so, TeleCheck relies on identifiers including bank account numbers and driver license numbers, which come from several sources, including prior merchant transactions processed through TeleCheck's system at the point of sale. When a consumer presents a check as a method of payment, a merchant will acquire an "identifier" from the consumer (typically a driver license number) and send that information to TeleCheck for a recommendation about whether the merchant should accept or decline the check. TeleCheck then runs the identifier through its system, for a purported review of the consumer's checkwriting and banking history stored in its files, and uses its "predictive scoring logic" to calculate the risk that the check will bounce. Thereafter, TeleCheck sends the merchant a consumer report in the form of a single-digit recommendation code. A "Code 1" recommends that the business accept the check because TeleCheck does not perceive it as a risk to bounce. Conversely, and particularly relevant here, a "Code "3" recommends that the merchant decline the check because TeleCheck perceives it as a risk to bounce purporting to be based on the checkwriting history stored in its consumer files and its "predictive scoring logic".² App.2a; App.59a-60a.

TeleCheck admits that checkwriting history stored in its databases is a very important variable in Tele-

² Although not relevant here, TeleCheck also can issue a "Code 4" recommending that the business decline based on negative information contained in TeleCheck's files, such as an unpaid bounced check or a bank account closed in bad standing.

Check's "predictive scoring logic," which is used to determine whether to provide a merchant with a "Code 3" decline. TeleCheck further admits that its system generally gives consumers with more good checks in TeleCheck's database a greater likelihood that TeleCheck will issue an "Code 1" approval. "Life-to-date" count, or LTD count, is a variable that TeleCheck's system considers in deciding whether to issue an approval or decline code; generally speaking, the higher the LTD count, the more positive this factor becomes in the process to issue an approval code. Conversely, appearing as a first-time check writer may be considered a negative factor by TeleCheck's predictive scoring logic when it determines whether to send the merchant a "Code 3" decline. Similarly, consumers with driver license numbers having lower LTD counts are viewed as more risky due to their limited checkwriting history, which factors into TeleCheck's issuance of a Code 3 decline. App.60a-62a.

In February 2002, Tennessee changed its driver license numbering system from an eight-digit to a nine-digit format. For individuals obtaining a Tennessee driver license for the first time, the license number started with a "1." For example, "123456789." To transition existing license holders (including Beaudry and the over 1.4 million putative class members) to the new system, Tennessee merely added a leading zero to their old eight-digit numbers. For example, if a driver had a license number "23456789," his or her new nine-digit number became "023456789." App.9a; App.59a.

In doing so, Tennessee did not treat these individuals as "new" drivers, erasing their previous driving history and information from its databases which, of course, would have been unreasonable and inaccu-

rate. But not TeleCheck. To the contrary, TeleCheck had absolutely no procedures in place whatsoever to recognize or accommodate this simple change instead TeleCheck opted for profits over accuracy choosing to treat these individuals as “new” checkwriters by ignoring their previous checkwriting history and information stored under the very same person’s eight-digit number within its databases.

Initially, because TeleCheck’s system only recognized eight-digit Tennessee driver license numbers as a “valid ID format,” when consumers attempted to use checks as payment and merchants inputted the nine-digit license numbers, TeleCheck rejected the checks because the license numbers presented were not recognized as a “valid ID format.” After months of delay, TeleCheck updated its system to accept the new nine-digit numbers as a valid identification format, but did nothing else. More specifically, TeleCheck did not update its databases to link or combine a consumer’s nine-digit number to the checkwriting history stored in TeleCheck’s files under the eight-digit number, even though it was the same person and the numbers were identical with the exception of adding a “0” at the beginning of his or her driver license. As a result, when a consumer (such as Beaudry and the over 1.4 million putative class members) presented their nine-digit driver license numbers to a merchant, which in turn inputted this information in order to receive a consumer report from TeleCheck to accept or decline the check, TeleCheck’s “predictive-scoring logic” treated that person as if they were a first-time checkwriter, which meant that the check posed a greater risk of bouncing. Because of this (and TeleCheck’s failure to link or combine the two numbers)

there was an increased likelihood that TeleCheck would recommend a “Code 3” decline of that person’s check. App.2a-3a; App.62a-65a.

Even thereafter, when a person (like Beaudry and the over 1.4 million putative class members) presented additional checks to merchants, which in turn inputted their nine-digit driver license number in order to receive a consumer report from TeleCheck to accept or decline the check, because TeleCheck had failed to link or combine checkwriting history stored under the person’s eight-digit number, TeleCheck’s “predictive-scoring logic” treated the person as one with limited checkwriting history, increasing the likelihood that TeleCheck would recommend a “Code 3” decline of that person’s check.³ App.60a-62a; 64a.

TeleCheck’s records show that Beaudry’s first transaction processed with her nine-digit Tennessee driver license number occurred on December 27, 2005. Although Beaudry was not a first-time checkwriter in TeleCheck’s system because it had checkwriting history stored under her eight-digit number, TeleCheck’s systems viewed her as such, ignoring Beaudry’s positive check writing history stored under her eight-digit driver license number. As even TeleCheck admits, when Beaudry was viewed as a first-time checkwriter, she was at an increased risk of receiving a Code 3 decline. Moreover, TeleCheck’s records show that after Decem-

³ Conversely, the likelihood of a “Code 1” approval increases based on the number of checks processed through TeleCheck which do not bounce. So had TeleCheck linked checks processed through its system using the eight-digit driver license numbers which did not bounce and used them when issuing consumer reports to merchants, there was an increased likelihood of a “Code 1” approval.

ber 27, 2005, additional checks from Beaudry were processed with her nine-digit license number, each time ignoring the positive checkwriting history stored under her eight-digit number. Because of this, Beaudry was at an increased risk to receive a Code 3 decline. App. 66a-67a; 80a-81a. As another telling admission of the increased risk to Beaudry by being viewed as a first-time check writer, and thereafter, a check writer with limited check writing history—and as further proof that TeleCheck's procedures are unreasonable—TeleCheck gave Beaudry "preferred status" in 2010, during the course of the lawsuit, to prevent her from receiving a check decline. App.67a.

TeleCheck moved for summary judgment based on Beaudry's alleged lack of standing. The district court granted TeleCheck's motion. In analyzing standing, the district court ruled that to establish Article III standing, a plaintiff must prove that she suffered an injury in fact. App.11a-12a. The district court noted that Beaudry could establish standing in one of three ways by proving that: 1) the statutory violation created an injury in fact because she had a check decline; 2) the statutory violation did not injure her in any traditional way, but the risk of injury was so imminent that it satisfies Article III; or 3) the statutory violation did not create an injury in any traditional sense, but Congress had authority to establish the injury in view of its identification of meaningful risks of harm in this area. App.12a.

Yet, in reaching its decision that Beaudry lacked standing, the district court held that Beaudry failed to produce sufficient evidence that she had suffered a check decline and therefore suffered no injury in

fact.⁴ In response to Beaudry's argument that she was exposed to a material risk of a check decline by being viewed as a first-time checkwriter (or a checkwriter with a limited checkwriting history), the district court held that "Beaudry's risk-of-harm theory of standing is far too speculative to satisfy Article III's injury-in-fact requirement," even though the district court acknowledged that appearing as a first-time checkwriter may be considered a negative factor by TeleCheck's "predictive scoring logic" when it determines whether to send the merchant a "Code 3" decline recommendation. App.13a-16a. Finally, on the issue of whether TeleCheck's FCRA violation, alone, created an intangible injury in fact sufficient to confer standing, the district court held that Beaudry's alleged "injury," namely, improperly being viewed as having a nonexistent or limited checkwriting history in TeleCheck's issuance of consumer reports, did not present a material risk of real harm to the interests the FCRA was designed to protect. The district court stated that at most, TeleCheck's inaccurate driver's license data created a meaningless risk of harm akin to an incorrect zip code, rather than a substantial or severe risk of harm to Beaudry's concrete interest in avoiding the dissemination of inaccurate credit reports. Further, the district court stated that "[a]t the end of the day, Beaudry's erroneous check-writing history "never made a difference in any credit determination,

⁴ Ms. Beaudry testified that she had received check declines in the past; however, the district court held that the facts were insufficient to establish that the check declines occurred when she presented a check to a merchant using TeleCheck, as opposed to a merchant that used no check verification service whatsoever and denied her check for reasons other than one based on a consumer report.

meaning its continued existence in TeleCheck’s system did not harm [her] concrete economic interests.” App. 19a-24a. In short, the District Court’s analysis and erroneous no standing holding is based on the District Court finding that Beaudry did not establish actual harm in the form of a check decline.

On appeal, the Sixth Circuit affirmed. First, the Sixth Circuit held that there was insufficient proof to show that Beaudry suffered a check decline when one or more of her checks were processed through TeleCheck, and therefore, she did not suffer an actual injury. App.4a-5a.

Second, as to Beaudry’s argument that she had standing because TeleCheck’s failure to link or combine the driver license numbers placed her at “risk of real harm”, the Sixth Circuit held that this “theory of standing fails on redressability grounds. The only claim for relief that remains is Beaudry’s request for statutory damages. Yet those damages cannot redress a ‘risk of future harm, standing alone.’ *TransUnion LLC v. Ramirez*, ___ U.S. ___ 141 S.Ct. 2190, 2210-11, ___ L.Ed.2d ___ (2021). Instead, they can redress only a harm that actually happened, either when the risk materialized or when it caused a concrete injury. *See id.* at 2211. And here, as explained above, Beaudry lacks any evidence that the risk she cites (*i.e.*, rejection of her check because of a failure to link her license numbers) ever materialized.” App.5a.

Finally, as to Beaudry’s argument that the failure to link or combine her driver license numbers was an “informational injury” that supports standing, the Sixth Circuit held that “the ‘mere existence of inaccurate information in a database’ cannot confer standing. [*TransUnion*] at 2209.” App.5a-6a.



REASONS FOR GRANTING THE PETITION

I. THE LOWER COURTS HAVE ADOPTED DIFFERENT TESTS TO DETERMINE WHETHER A STATUTORY VIOLATION IS SUFFICIENTLY CONCRETE TO CONFER ARTICLE III STANDING.

Although *Spokeo* made clear that intangible harms can satisfy the concreteness requirement, the dividing line remains elusive. The lack of clarity on how to differentiate between “bare procedural violations” on the one hand and violations that are sufficiently concrete on the other has resulted in confusion and inconsistency among lower courts, in at least three respects.

A. Lower Courts Disagree Regarding the Concreteness of Informational Injuries.

Lower courts disagree on how to analyze informational injuries. The Eleventh Circuit, falling on one side of the spectrum, takes the position that plaintiffs who have been deprived of information to which they are statutorily entitled have necessarily suffered a concrete injury. *See Nicklaw v. CitiMortgage, Inc.*, 839 F.3d 998, 1002 (11th Cir. 2016) (“[A] plaintiff who alleges a violation of a statutory right to receive information alleges a concrete injury.”). In *Church v. Accretive Health, Inc.*, 654 Fed. App’x 990 (11th Cir. 2016), the court held that the plaintiff had standing to sue the defendant for failure to provide required disclosures under the Fair Debt Collection Practices Act (“FDCPA”). *Id.* at 995 (“Church did not receive information to which she alleges she was entitled.”).

The court did not view this Court’s standing precedent as placing any limit on the types of informational injuries that confer Article III standing. *Id.* at 995 (relying on *Spokeo*, *supra*, and *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982)).

In a case out of the Ninth Circuit, *Larson v. Trans Union, LLC*, 201 F.Supp.3d 1103 (N.D. Cal. 2016), the plaintiff alleged a violation of § 1681g of the FCRA based on misleading information in his credit file that left him uncertain whether he was reported as a match to another individual and whether he had the right to dispute the information. The *Larson* court concluded that this violation fell within the category of informational injuries “that the *Spokeo* Court implicitly recognized in citing *Public Citizen* and *Akins*,” and that several other courts, including the Eleventh Circuit in *Church*, have since found sufficient to confer Article III standing. *Id.* at 1106-107.

Along similar lines, the Seventh Circuit, consistent with *Akins* and *Public Citizen*, takes the position that “[a]n informational injury is concrete if the plaintiff establishes that concealing information impaired her ability to use [the information] for a substantive purpose that the statute envisioned.” *Robertson v. Allied Sols., LLC*, 902 F.3d 690, 694 (7th Cir. 2018). In *Robertson*, the defendant violated § 1681b(b)(3)(A) of the FCRA by rescinding an employment offer without providing the plaintiff with the background report it had obtained. The plaintiff had standing because she “was denied information that could have helped her craft a response to [the defendant’s] concerns.” *Id.* at 697. This position is narrower than the standard in *Church* and *Larson* in that it turns on whether the deprivation could compromise a substantive right.

The Seventh Circuit reiterated its position but with some contradiction in *Casillas v. Madison Avenue Assocs., Inc.*, 926 F.3d 329 (7th Cir. 2019). There, the defendant violated the FDCPA when it sent an incomplete letter that failed to specify that debts may only be disputed in writing. *Id.* at 331. In concluding that the plaintiff lacked standing, the court distinguished *Robertson*: “Unlike the [FCRA], the provisions of the [FDCPA] that [the defendant] violated do not protect a consumer’s interest in having an opportunity to review and respond to substantive information.” *Id.* at 334-35. The court also found it significant that the plaintiff did not seek the information or allege that she would have used it. *Id.* at 338. This creates tension with *Robertson*, where the plaintiff likewise did not seek the background report, and it only mattered that she was denied “the chance to respond.” *Robertson*, 902 F.3d at 697 (emphasis added). Further, not knowing the in-writing requirement could compromise a debtor’s substantive right to dispute debt, which again creates tension between *Casillas* and *Robertson*.

Landrum v. Blackbird Enterprises, LLC, 214 F. Supp.3d 566 (S.D. Tex. 2016), from the Fifth Circuit, is consistent with *Robertson*. There, the plaintiff alleged that the defendants had violated his right under the FCRA to be notified of their intent to perform a background check for employment purposes. *Id.* at 572. The plaintiff complained that he did not receive a stand-alone disclosure of this intent. *Id.* The plaintiff lacked standing, the court held, because he did not allege that he was unaware, as a substantive matter, that the defendants may conduct a background check; the fact that he did not receive the information in the proper format was a “bare procedural violation.” *Id.*

The Fourth Circuit, in *Dreher v. Experian Info. Sols., Inc.*, 856 F.3d 337 (4th Cir. 2017), articulated a heightened standard for informational injuries. There, an Experian credit report revealed the plaintiff's association with a delinquent account. *Id.* at 341. As the source for the account, the report listed the defunct credit card company, rather than its servicer, but nonetheless provided the servicer's contact information. *Id.* The *Dreher* court held that standing based on an "informational injury requires that a person lack access to information to which he is legally entitled and that the denial of that information creates a real harm with an adverse effect." *Id.* at 345 (internal quotation marks omitted). The plaintiff lacked standing, the court reasoned, because "receiving a creditor's name rather than a servicer's name—without hindering the accuracy of the report or efficiency of the credit report resolution process—worked no real world harm on [him]." *Id.* at 346 (emphasis added). Thus, the Fourth Circuit requires plaintiffs to show real world harm in addition to the deprivation of information to establish Article III standing.

In *Huff v. TeleCheck*, 923 F.3d 458 (6th Cir. 2019), the Sixth Circuit, purporting to rely on *Akins*, *Public Citizen*, and *Dreher*, concluded that a deprivation of information, to be concrete, must hinder participation in the political process or result in other "actual consequences." *Id.* at 467-468. The Sixth Circuit found it dispositive that TeleCheck's violation at issue in the *Huff* case (which is different than TeleCheck's violation at issue in this case) did not affect Huff's future conduct or result in a check decline. The court was not persuaded that depriving Huff of his substantive right to monitor his file and correct inaccuracies was enough

without some extra showing of harm: “[T]he linked information [which did not belong to Huff] nonetheless never made a difference in any credit determination[.]” *Id.* at 467. This standard is arguably harder to meet than the one in *Dreher*. Whereas *Dreher* could be distinguished as involving an entity misnomer that did not result in the deprivation of any substantive right, much like a mere zip code error, preventing Huff from reviewing linked information that TeleCheck relies on to evaluate his creditworthiness unquestionably deprived Huff of his substantive right to monitor and correct inaccuracies in his credit file. Nonetheless, the Sixth Circuit concluded that he had suffered no injury-in-fact.

Finally, some courts seem to ignore informational injuries as a distinct category of intangible harm. In *Strubel v. Comentity Bank*, 842 F.3d 181 (2d Cir. 2016), for example, the plaintiff alleged that the defendant violated certain disclosure provisions of the Truth in Lending Act: (1) failure to give notice that certain rights pertain only to disputed credit card purchases not yet paid in full; and (2) failure to give notice that a consumer dissatisfied with a credit card purchase must contact the creditor in writing or electronically. *Strubel*, 882 F.3d at 190. Although concluding that the plaintiff had standing, and acknowledging that *Akins* and *Public Citizen* remain good law, the Second Circuit did not treat informational injuries as a distinct category and instead applied the general “risk of harm” test. The Sixth Circuit, in two deficient disclosure cases, also failed to mention informational injuries. *See Hagy v. Demers & Adams*, 882 F.3d 616, 623 (6th Cir. 2018) (holding that the plaintiffs lacked standing to bring FDCPA claim based on letter forgiving debt

that did not disclose that it was from a debt collector); *Macy v. GC Services Limited Partnership*, 897 F.3d 747, 758-60 (6th Cir. 2018) (holding that the plaintiffs had standing to bring FDCPA claim where letters failed to state that disputes of debt must be in writing).

These variations in the standard for evaluating informational injuries are not mere semantics. As this case illustrates, the standard can make all the difference. There can be no serious dispute, for example, that the Eleventh Circuit would have concluded that Beaudry had standing to sue based on a concrete informational injury, since the test there is virtually unqualified. The result here would also be different in the Seventh Circuit and in other courts that do not require that the violation cause any additional adverse effect.

In sum, the lower courts disagree on how to analyze whether informational injuries are sufficiently concrete to confer Article III standing in ways that are outcome-determinative. The Court should grant certiorari to resolve the division.

B. Lower Courts Disagree on Whether to Differentiate Between Procedural and Substantive Rights.

A second area of division—whether to differentiate between procedural and substantive rights—appears in informational injury cases, as described above. But the division also appears in cases that do not involve informational injuries.

On the one hand, in non-informational injury cases, the Seventh Circuit rejects any “distinction between substantive and procedural statutory viola-

tions.” *Gubala v. Time Warner Cable, Inc.*, 846 F.3d 909, 912 (7th Cir. 2017); *see also Meyers v. Nicolet Restaurant of De Pere, LLC*, 843 F.3d 724, 727 n.2 (7th Cir. 2016) (“[W]hether the right is characterized as ‘substantive’ or ‘procedural,’ its violation must be accompanied by an injury-in-fact.”).⁵ On the other hand, the Ninth Circuit, among other courts, considers the distinction dispositive. *See Eichenberger v. ESPN, Inc.*, 876 F.3d 979, 984-85 (9th Cir. 2017) (“[T]he [Video Privacy Protection Act] identifies a substantive right to privacy that suffers any time a video service provider discloses otherwise private information.”); *see also Burke v. Fed. Nat'l Mortg. Ass'n*, No. 16-CV-153-HEH, 2016 WL 4249496, at *4 (E.D. Va. 2016) (“[G]iven the purposes, framework, and structure of the FCRA, the right to privacy established by the statute appears to be more substantive than procedural.”); *Matera v. Google Inc.*, No. 15-CV-04062-LHK, 2016 WL 5339806, at *12 (N.D. Cal. Sept. 23, 2016) (following the lead of “many courts since *Spokeo*” that have “placed dispositive weight on whether a plaintiff alleges the violation of a substantive, rather than procedural, statutory right”).

The Second Circuit does not use the term “substantive right,” but effectively draws that line. In *Melito v. Experian Marketing Sols.*, 923 F.3d 85 (2d Cir. 2019), the court reasoned that “the receipt of unwanted advertisements [under the Telephone Consumer Protection Act] is itself the harm” and there was thus no need to

⁵ This is in contrast to the Seventh Circuit’s focus on the substantive nature of violations alleged in informational injury cases. It is unclear why the Seventh Circuit rejects the distinction outside that context.

analyze whether the violation posed a risk of harm to the plaintiff. *Id.* at 93-94.

The distinction may have some roots in *Spokeo*; Justice Ginsburg, writing in concurrence, interpreted the majority decision as announcing a standard that considers whether the procedural requirements of the violated statute are connected “to the prevention of a substantive harm.” *Spokeo*, 136 S.Ct. at 1555 (Ginsburg, J., concurring) (emphasis added). But the distinction is entirely lost on many lower courts, who remain silent on whether the nature of the statutory right is relevant to the analysis.

The Sixth Circuit is among the silent courts. In *Huff*, the court never considered whether Congress gave Huff the substantive right to monitor his entire credit file and correct inaccuracies. Not asking that question made a difference. In many courts, Huff’s case would still be alive on this basis. *See Robertson*, 902 F.3d at 694 (“An informational injury is concrete if the plaintiff establishes that concealing information impaired her ability to use it for a substantive purpose that the statute envisioned.”); *Church*, 654 Fed. App’x at 992 n.2 (concluding that Church had standing because “Congress provided Church with a substantive right to receive certain disclosures and Church has alleged that Accretive Health violated that substantive right.”); *Thomas v. FTS USA, LLC*, 193 F.Supp.3d 623, 631-32 (E.D. Va. 2016) (concluding that § 1681b(b) of the FCRA establishes a substantive right to specific information). The outcome-determinative nature of the division among lower courts warrants this Court’s consideration.

C. Lower Courts Disagree on How to Analyze Risk of Harm.

Finally, the way in which lower courts analyze risk of harm under *Spokeo* has resulted in inconsistent rulings in “missed opportunity” cases involving indistinguishable facts. For example, where debtors were not informed that disputes under the FDCPA must be in writing, the Sixth Circuit asked whether the violation risked compromising the ability of the plaintiffs to exercise their rights under the FDCPA. *Macy*, 897 F.3d at 760. In *Casillas*, by contrast, the Seventh Circuit concluded that the same violation posed no risk of harm “because there was no prospect that [the plaintiff] would have tried to exercise” her statutory rights. *Casillas*, 926 F.3d at 334 (emphasis added); *see id.* at 340 (Wood, C.J., dissenting) (recognizing that *Casillas* “has created a conflict with the Sixth Circuit, which held otherwise in *Macy*”); *but see Robertson*, 902 F.3d at 697 (“Article III’s strictures are met not only when a plaintiff complains of being deprived of some benefit, but also when a plaintiff complains that she was deprived of a chance to obtain a benefit.”) (emphasis added).

In *Huff*, the Sixth Circuit speculated as to whether Huff would have avoided additional consequential harm by exercising his rights under the FCRA had TeleCheck disclosed the omitted information as statutorily required. *Huff*, 923 F.3d at 464. That standard is higher than *Casillas* and far more onerous than *Macy*. Had the panel in *Macy* decided Huff’s appeal, his case would be alive because there is no dispute that TeleCheck’s violation deprived Huff of the ability to monitor and correct inaccuracies in his credit file. The fractured state of the law in this area warrants

the Court’s review. Moreover, the majority opined that Huff “could have learned which accounts TeleCheck linked to him” if he simply called TeleCheck. *Id.* at 462. To the contrary, TeleCheck would not have disclosed the linked information to Huff unless he “affirmatively provided” TeleCheck each identifier that was, unbeknownst to him, linked to him.

II. THE DECISION BELOW IS PLAINLY WRONG BECAUSE IT CANNOT BE RECONCILED WITH THIS COURT’S STANDING PRECEDENT.

A. The Sixth Circuit’s Decision Misapprehends the Standards for Establishing an Informational Injury”.

To establish an 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.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 558-560 (1992). An “informational injury” may satisfy “concreteness”. *Owner-Operator Independent Drivers Association, Inc v. U.S. DOT.*, 879 F.3d 339, 344-345 (2018). “A plaintiff suffers an informational injury . . . where the plaintiff alleges that: (1) it has been deprived of information that, on its interpretation, a statute requires the government or a third party to disclose to it, and (2) it suffers, by being denied access to that information, the type of harm Congress sought to prevent by requiring disclosure.” *Id.* (finding that the plaintiffs had standing where inaccurate database information was “disseminated” to third parties); *see also TransUnion LLC*, 141 S.Ct. at 2214 (suggesting that an “informational injury” would, for example,

“hinder[] [the plaintiffs’] ability to correct erroneous information before it was later sent to third parties”).

Here, TeleCheck’s failure to take reasonable steps to link or combine consumers’ checkwriting histories affected Beaudry and over 1.4 million consumers, as there is no dispute that TeleCheck treated them as first-time checkwriters in issuing a consumer report, and in subsequent transactions, as checkwriters with limited checkwriting history. In addition to being false, treating Beaudry and over 1.4 million consumers as first-time checkwriters, and in subsequent transactions as checkwriters with limited checkwriting history, negatively influenced TeleCheck’s “predictive scoring logic” used to determine whether to issue a “Code 1” approval or a “Code 3” decline.

Further, where TeleCheck’s conduct precluded Beaudry and the putative class from preventing the dissemination of erroneous information, they experienced an “informational injury” sufficient to satisfy the “concreteness” requirement.

B. The Sixth Circuit’s Decision Completely Eliminates “Risk of Real Harm” as Grounds for “Concreteness”.

The Sixth Circuit’s decision conflicts with *Spokeo* and effectively eliminates a plaintiff’s ability to establish standing on “risk of real harm” grounds. In *Spokeo*, plaintiff alleged that defendant’s search engine violated the FCRA by disseminating false information about him. *Spokeo v. Robins*, 136 S.Ct. 1540 (2016). After the Ninth Circuit found the plaintiff had standing, the Supreme Court found the Ninth Circuit’s analysis “incomplete.” *Id.* at 1545. In remanding for further consideration, the court found it “instructive to consider

whether an alleged intangible harm has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American Courts.” *Id.* The court further observed that “Congress is well positioned to identify intangible harms that meet Article III requirements.” *Id.*

Importantly, a “risk of real harm” may 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.” *Id.* “In other words, a plaintiff in such a case need not allege any additional harm beyond the one Congress has identified.” *Id.* (citations omitted) (emphasis added). Applying this principle to the FCRA, the court observed that “Congress plainly sought to curb the dissemination of false information by adopting procedures designed to decrease that risk.” *Id.*

Here, TeleCheck issued consumer reports to merchants about Beaudry and over 1.4 million Tennessee consumers while inaccurately and fictitiously treating each as two distinct persons—simply because Tennessee added a leading zero to their driver license numbers. TeleCheck’s violation of the FCRA exposed Beaudry and the putative class to a material risk of harm of the type that Congress sought to prevent in § 1681e(b)—an adverse credit determination (a check decline) based on an inaccurate credit report.

The district court’s ruling also runs afoul of the Court’s rulings in *TransUnion*. TransUnion provided consumer reports to third parties containing OFAC alerts labeling 1,853 consumers as potential terrorists. In a 5-4 decision, the Court held that as to those consumers in which TransUnion had disseminated a

consumer report, the consumers had suffered a concrete injury to confer Article III standing.

The same is true here. There is no dispute that TeleCheck disseminated consumer reports to merchants about Beaudry and over 1.4 million consumers, each containing inaccurate information because they failed to link or combine checkwriting histories of the consumers stored under their eight-digit license numbers in TeleCheck's files.

As to the remaining 6,332 consumers whose TransUnion files contained the same inaccurate information labeling them as potential terrorists but TransUnion had not disseminated a consumer report about them, plaintiffs argued that they suffered concrete injuries because of a material risk that OFAC alerts would be disseminated in future consumer reports. The Court, however, disagreed holding that plaintiffs did not prove a sufficient likelihood that their individual reports would be requested by third parties and thereafter, provided by TransUnion. Thus, the Court held that mere existence of inaccurate information, absent dissemination, did not constitute a concrete injury.

By contrast, here TeleCheck did disseminate consumer reports and because of its failure to link or combine checkwriting histories under Beaudry's and the 1.4 million Tennessee consumers' eight-digit number, they were at an increased risk of receiving a check decline. Thus, consistent with the Court's holding in *TransUnion*, Beaudry established a sufficient risk of harm to confer Article III standing.

C. The Sixth Circuit’s Decision Conflicts with Other Sixth Circuit Decisions.

Just as the Sixth Circuit’s decision conflicts with *Spokeo* and *TransUnion*, it also conflicts with other decisions of the Sixth Circuit holding that procedural violations provide the “risk of real harm” that satisfies “concreteness”. For example, in an earlier appeal in this case, the Sixth Circuit held that the “Act does not require a consumer to wait for unreasonable credit procedures to result in the denial of credit or other consequential harm before enforcing her statutory rights.” *Beaudry I*, 579 F.3d at 705 (emphasis added). The Sixth Circuit’s decision in *Beaudry II* is inapposite.

In *Hagy v. Demers & Adams*, 882 F.3d 616 (6th Cir. 2018), the Sixth Circuit found that plaintiffs, who received “good news” from a debt collector, lacked standing “[b]ecause Congress made no effort to show how a letter like this [forgiving debt] would create a cognizable injury in fact” and because it could not see how “that could be the case.” *Id.* at 623 (emphasis added).

In *Huff v. TeleCheck Servs., Inc.*, 923 F.3d 458 (6th Cir. 2019), the Sixth Circuit, in a 2-1 decision held that TeleCheck’s omission of certain “linked information” in response to plaintiff’s 15 U.S.C. § 1681g request for “[a]ll information in the consumer’s file” did not constitute a concrete injury because the violation, according to the majority, never presented any risk to the plaintiff. *Id.* at 465-66. Although the Sixth Circuit majority in *Huff* found that Huff lacked standing, the majority did not question that procedural violations “in some instances may satisfy [the concreteness] requirement.” *Id.* at 464. In this case, consumer

reports were disseminated based on inaccurate information while posing a real risk of harm.

Based on the foregoing, the Sixth Circuit’s ruling cannot be reconciled with other Sixth Circuit decisions.

III. BECAUSE A JURY COULD REASONABLY CONCLUDE THAT TELECHECK PUBLISHED FALSE INFORMATION REGARDING BEAUDRY AND THE PUTATIVE CLASS, BEAUDRY AND THE PUTATIVE CLASS HAVE ESTABLISHED AN “ACTUAL INJURY” SUFFICIENT FOR STANDING UNDER *TRANSUNION LLC*.

The Sixth Circuit cites *TransUnion* for its holding that statutory damages “cannot redress a ‘risk of future harm, standing alone.’” App.5a. But the decision does not discuss the facts of *TransUnion* in the context of the facts of this case. Beaudry’s facts, and those of the putative class, mirror those of the “1,853 class members whose reports were actually disseminated . . . to third parties” in *TransUnion*. *TransUnion*, 141 S.Ct. at 2202.

In *TransUnion*, plaintiff sued TransUnion and alleged, among other claims, that TransUnion “failed to follow reasonable procedures to ensure the accuracy of information in his credit file” when it identified plaintiff as a “specially designated national[]” who was a threat to America. *Id.* at 2201 (citing § 1681e(b)).

In applying *Spokeo* to the facts, and examining a list of “intangible harms” that can “also be concrete,” including “reputational harms, disclosure of private information, and inclusion upon seclusion,” the Court held that the harm in *TransUnion* was “a misleading statement [and it was] . . . sufficiently close . . . to the harm from a false and defamatory statement.” *Id.* at 2204, 2209.

The same is true here. Like plaintiffs in *TransUnion*, based on transactional data produced by TeleCheck alone and excluding its missing data, at least 143,749 Tennessee consumers had one or more checks declined when processed through TeleCheck's system using a nine-digit Tennessee driver license number, who also had history stored in TeleCheck's files under their eight-digit Tennessee driver license number. And although Beaudry was not a first-time check writer, TeleCheck treated her as such. App.62a; 66a-67a.

IV. THIS CASE IS AN IDEAL VEHICLE TO ADDRESS A FREQUENTLY RECURRING ISSUE OF EXCEPTIONAL IMPORTANCE.

This case is an ideal vehicle to resolve key areas of division that have emerged in *Spokeo*'s and *TransUnion*'s wake. The Court in *Spokeo* did not have occasion to delineate the category of informational injuries that confer Article III standing because *Spokeo* did not involve an informational injury, and the Court's reference to *Akins* and *Public Citizen* has been interpreted inconsistently or ignored by lower courts. This case involves an informational injury and thus offers the opportunity for the Court to clarify the circumstances under which informational injuries are concrete and the extent to which they should be analyzed differently than other types of intangible harms.

The Sixth Circuit's decision cannot be reconciled with *Spokeo*, which only requires that the violation pose a risk of harm to a concrete interest that Congress sought to prevent. Nothing in *Spokeo* supports requiring a plaintiff like Beaudry to suffer a check decline before she can sue to vindicate her substantive

rights. This case is the ideal vehicle to clarify the “risk of harm” standard.

Cases brought under § 1681e(b) are frequently the subject of class action litigation. Accuracy of information obligations under the FCRA serve a critical role in protecting individuals from the sloppy, profit over accuracy focused procedures of consumer reporting agencies in the way that Congress intended. As for the FCRA, Congress recognized that “a credit reporting agency earns its income from creditors or its other business customers”—the same entities it relies on to obtain credit information—and that it must “exercise [its] grave responsibilities” in a way that “ensure[s] fair and accurate credit reporting.” 115 Cong. Rec. 2,412 (1969); 15 U.S.C. § 1681(a).

The Sixth Circuit’s decision in this case puts those interests in jeopardy, promotes the type of harm that Congress sought to prevent through accuracy obligations, and places constraints on congressional authority far beyond those envisioned in *Spokeo* and *TransUnion*. The Court should grant certiorari to resolve the division among the lower courts on issues that *Spokeo* and *TransUnion* did not squarely address but that are properly presented here.



CONCLUSION

For the foregoing reasons, this Court should grant the petition for certiorari.

Respectfully submitted,

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