APPENDIX TABLE OF CONTENTS

OPINIONS AND ORDERS

REHEARING ORDER

STATUTORY PROVISIONS

OTHER DOCUMENTS

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT (JULY 27, 2021)

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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.

No. 20-6018

On Appeal from the United States District Court
for the Middle District of Tennessee

Before: BOGGS, CLAY,
and KETHLEDGE, Circuit Judges.

KETHLEDGE, Circuit Judge.

Cheryl Beaudry sued TeleCheck on behalf of herself and other Tennessee consumers, alleging that its failure to link the consumers' old and new driver's-license numbers violated the Fair Credit Reporting Act. A district court granted summary judgment to TeleCheck because Beaudry lacked standing to sue. We affirm.

Businesses sometimes use a check-verification company, like TeleCheck, to determine whether to accept a customer's payment by check. If a business uses TeleCheck, it provides Telecheck the customer's "identifiers"—often a driver's-license number. TeleCheck then runs that identifier through its system, reviews the person's banking and check-writing history, and uses its "predictive scoring logic" to calculate the risk that the check will bounce. Ultimately, TeleCheck issues a single-digit code that represents its recommendation to the business. As relevant here, a "1" recommends that the business accept the check; a "3" recommends that the business decline the check due to the customer's predicted risk; and a "4" recommends that the business decline the check due to a discrete negative event in the customer's banking history (*e.g.*, a bounced check).

In February 2002, Tennessee changed the length of its driver's-license numbers from eight to nine digits. When a person with an eight-digit number applied for a new license, Tennessee created a new nine-digit number by adding a "0" to the front of the original license number.

After some delay, TeleCheck updated its system to accept the new nine-digit numbers as "identifiers." But TeleCheck did not update its databases to link a customer's new nine-digit number to her original

eight-digit number. As a result, when TeleCheck first used a customer's new nine-digit number, its predictive-scoring logic treated that person as if she were a first-time check writer, which meant that the check posed a greater risk. TeleCheck's failure to link the two numbers therefore increased the likelihood that TeleCheck would recommend a "Code 3" decline of that person's check.

Cheryl Beaudry, a Tennessee customer who paid various debts with checks, sued TeleCheck in 2007 on behalf of herself and a putative class of similarly situated individuals. In her complaint, she alleged that TeleCheck had willfully and negligently violated its duty under the Fair Credit Reporting Act to "follow reasonable procedures to assure maximum possible accuracy of the information" about Tennessee consumers in its reports. 15 U.S.C. § 1681e(b); *see id.* §§ 1681n, 1681o. A district court dismissed Beaudry's complaint for failure to allege that she had suffered actual damages. We reversed, holding that Beaudry did not need to allege actual damages to state a claim that TeleCheck had willfully violated the Act. *See Beaudry v. TeleCheck Servs., Inc.*, 579 F.3d 702, 705-06 (6th Cir. 2009). Beaudry later amended her complaint and sought statutory damages, punitive damages, injunctive relief, and declaratory relief.

Beaudry thereafter died. The court agreed to substitute her estate (which we also refer to as "Beaudry") as the named plaintiff, but in doing so dismissed her claims for punitive damages, injunctive relief, and declaratory relief. While this suit remained pending in the district court, the Supreme Court held that a "bare procedural violation" of the Fair Credit Reporting Act

could not give a plaintiff standing to sue. *Spokeo v. Robins*, 136 S. Ct. 1540, 1549 (2016).

The district court later granted summary judgment on that ground. We review that decision de novo. *See McKay v. Federspiel*, 823 F.3d 862, 866 (6th Cir. 2016).

To establish Article III standing, Beaudry must show that she suffered an injury in fact, that the injury is fairly traceable to the defendant's allegedly unlawful conduct, and that the relief she seeks will likely redress that injury. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992). The showing necessary to establish these elements depends on the stage of the case; on summary judgment, we ask whether the plaintiff has "set forth by affidavit or other evidence specific facts" that support each element. *Id.* at 561 (internal quotation marks omitted).

Beaudry asserts that businesses declined several of her checks because TeleCheck failed to link her eight-digit driver's-license number with her nine-digit one. But Beaudry lacks evidence that the rejection of any of her checks was fairly traceable to TeleCheck's failure to link those numbers. *See Bench Billboard Co. v. City of Cincinnati*, 675 F.3d 974, 984 n.3 (6th Cir. 2012). Beaudry could not recall in her deposition where or when any of her checks were rejected. And none of the remaining evidence connects the rejection of her checks to TeleCheck's failure to link the license numbers. TeleCheck's own records show that it never recommended a decline when using her nine-digit number; instead, on three occasions, it recommended the rejection of her checks using her eight-digit number. Moreover, when TeleCheck made those recommendations, it used "Code 4"—the code based on a discrete

negative event in Beaudry's banking history, rather than on a predicted future risk.

Beaudry contends that there is evidence that TeleCheck had recommended rejection of her checks, based on its failure to link her driver's-license numbers, but simply lost its records of having done so. Although TeleCheck did lose some of its records, Beaudry's argument is pure speculation, especially because she cannot identify when, where, or how many of these check declines occurred. And at summary judgment, a court cannot trace Beaudry's alleged injury to TeleCheck's actions through speculation alone. *See Parsons v. U.S. Dep't of Just.*, 801 F.3d 701, 715 (6th Cir. 2015).

Beaudry also argues that she has standing because TeleCheck's failure to link the driver's-license numbers placed her at "risk of real harm"—namely, that her checks would be rejected. *Spokeo*, 136 S. Ct. at 1549. But that 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*, 141 S. Ct. 2190, 2210-11 (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.

Finally, Beaudry argues that the failure to link her driver's-license numbers was an "informational injury" that supports standing. But the "mere existence

of inaccurate information in a database" cannot confer standing. *Id.* at 2209.

The district court's judgment is affirmed.

MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE NASHVILLE DIVISION (AUGUST 6, 2020)

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

ESTATE OF CHERYL BEAUDRY,

Plaintiff,

v.

TELECHECK SERVICES, INC., ET AL.,

Defendants.

No.3:07-cv-00842

Before: Waverly D. CRENSHAW, JR.,
Chief United States District Judge.

After nearly thirteen years of litigation, there is still a question about whether Cheryl Beaudry ("Plaintiff" or "Beaudry")[1] has standing to bring this putative

[1] Ms. Beaudry unfortunately passed away during the pendency of this action (Doc. No. 200), and the Estate of Cheryl Beaudry was substituted as the party plaintiff (Doc. No. 225). For ease of reference, however, the Court will refer to Beaudry in the present tense for purposes of resolving the pending motion.

class action against TeleCheck Services, Inc., TeleCheck International, Inc., and First Data Corporation (collectively, "TeleCheck"[2] or "Defendants") for their alleged violations of the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. § 1681 *et seq*. This issue returns to the Court after it previously denied without prejudice Defendants' Motion for Summary Judgment for Lack of Standing pending the appeal in *Huff v. TeleCheck Servs., Inc.*, No. 3:14-cv-1832, because *Huff* involved "[t]he same attorneys, same Defendants, and . . . the same issue" and was "likely to have a significant impact on the legal analysis in this case[.]" (Doc. No. 257 at 1.) Now that the Sixth Circuit has issued its opinion in *Huff v. TeleCheck Servs., Inc.*, 923 F.3d 458 (6th Cir. 2019), Defendants have filed a Renewed Motion for Summary Judgment for Lack of Standing (Doc. No. 260), which has been fully briefed by the parties. (*See* Doc. Nos. 261, 268, 274.) For the following reasons, Defendants' motion will be granted.

I. Background and Undisputed Facts[3]

TeleCheck provides check-verification services to businesses in Tennessee. (Doc. No. 90 ¶¶ 34, 45.)

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[2] Because the parties collectively refer to Defendants as "TeleCheck" in their briefing, the Court will follow suit. By doing so, the Court makes no determination about whether the TeleCheck companies operate as First Data Corporation's alter ego, as is alleged in the First Amended Complaint (see Doc. No. 90 ¶ 37).

[3] The Court draws the facts in this section from the undisputed portions of the parties' statements of facts (Doc. Nos. 269, 275), the depositions and declarations submitted in connection with the summary judgment briefing, and portions of the First Amended Complaint (Doc. No. 90) that are not contradicted by the evidence in the record.

When a retail consumer presents a check as a method of payment, a merchant will acquire an "identifier" (primarily a driver's license number) from the consumer and send it to TeleCheck for a recommendation about whether the merchant should accept or decline the check. (*Id.* ¶ 24.) TeleCheck processes the identifier through its internal "predictive risk-scoring system," which considers hundreds of variables related to consumers' check writing information, and then returns a single-digit recommendation "Code" to the merchant. (Doc. No. 269 ¶¶ 3, 6.) As relevant here, a Code 1 recommends that the merchant accept the check, a Code 3 recommends that the merchant decline the check because the identifier did not score high enough in TeleCheck's risk-scoring system, and a Code 4 recommends that the merchant decline the check not because of risk, but because there is some negative history associated with the identifier, such as an unpaid debt, bounced check, or closed bank account. (*Id.* ¶¶ 4-5, 7-8.)

In February 2002, Tennessee changed its driver's license numbering system from an eight-digit to a nine-digit format. (Doc. No. 90 ¶ 47.) To transition existing license holders to the new system, the state merely added a leading zero to their old eight-digit numbers. (Doc. No. 275 ¶ 5.) For example, if a driver had a license number "23456789," her new nine-digit number would become "023456789." (Doc. No. 90 ¶ 47.)

TeleCheck did not take measures to treat consumers' old and new Tennessee driver's license numbers the same, leading many consumers who presented nine-digit licenses at the point of sale to incorrectly appear as first-time check writers in TeleCheck's system. (*Id.* ¶ 60.) Claiming that this error negatively affected her

and "hundreds of thousands, if not millions, of persons" in Tennessee, (*id.* ¶ 72), Beaudry filed this lawsuit contending that TeleCheck's failure to implement reasonable procedures to associate eight-digit and corresponding nine-digit Tennessee driver's license numbers violated the FCRA, specifically 15 U.S.C. § 1681e(b). TeleCheck eventually[4] responded with the instant motion for summary judgment, contending that Beaudry lacks standing to bring this action because she did not suffer a concrete injury necessary to confer federal jurisdiction. (Doc. No. 260.)

II. Legal Standard

Summary judgment is appropriate only where there is "no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "The party bringing the summary judgment motion has the initial burden of informing the Court of the basis for its motion and identifying portions of the record that demonstrate the absence of a genuine dispute over material facts." *Rodgers v. Banks*, 344 F.3d 587, 595 (6th Cir. 2003) (citation omitted). "The moving party may satisfy this burden by presenting affirmative evidence that negates an element of the non-moving party's claim or by demonstrating an absence of evidence to support the non-moving party's case. *Id.* (citation and internal quotation marks omitted).

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[4] This case's "long and tortured" procedural history, which spanned more than a decade and involved a trip to the Sixth Circuit, is summarized in the Court's September 29, 2016 Memorandum Opinion and need not be repeated here. (*See* Doc. No. 224 at 4-5.)

In deciding a motion for summary judgment, the Court must review all the evidence, facts, and inferences in the light most favorable to the party opposing the motion. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (citation omitted). The Court does not, however, weigh the evidence, judge the credibility of witnesses, or determine the truth of the matter. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). The mere existence of a scintilla of evidence in support of the non-moving party's position will be insufficient to survive summary judgment; rather, there must be evidence on which a trier of fact could reasonably find for the non-moving party. *Rodgers*, 344 F.3d at 595.

III. Analysis

Article III of the Constitution provides that the "judicial Power" extends only to "Cases" and "Controversies," U.S. Const. art. III, § 2, an element of which is standing. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). "Although the term 'standing' does not appear in Article III, [the] standing doctrine is 'rooted in the traditional understanding of a case or controversy' and limits 'the category of litigants empowered to maintain a lawsuit in federal court[.]'" *Buchholz v. Meyer Njus Tanick, PA*, 946 F.3d 855, 861 (6th Cir. 2020) (quoting *Spokeo*, 136 S. Ct. at 1547). If no plaintiff has standing, the Court lacks subject-matter jurisdiction to hear the case. *See Lyshe v. Lew*, 854 F.3d 855, 857 (6th Cir. 2017).

To establish Article III standing, a plaintiff must show she "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable

judicial decision." *Spokeo*, 136 S. Ct. at 1547 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). The plaintiff has the burden of establishing all three elements and, at the summary judgment stage, "cannot rely on allegations alone but must set forth evidence demonstrating [her] standing." *Huff*, 923 F.3d at 462; *see also Exec. Transp. Sys. LLC v. Louisville Reg'l Airport Auth.*, 678 F. Supp. 2d 498, 505 (W.D. Ky. 2010) ("On summary judgment, proof of standing is subject to the same burden of proof and standard of review as any other critical fact: Plaintiffs must be able to show at least the existence of a genuine issue of material fact as to the elements of standing if their claims are to survive.").

Defendants argue that they are entitled to summary judgment because Beaudry has not met her burden to establish the "[f]irst and foremost" element of standing, injury in fact. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 103 (1998). According to the Sixth Circuit's recent decision in *Huff*, there are three potential ways Beaudry could establish an injury in fact as a result of TeleCheck's alleged FCRA violation: (1) "the statutory violation created an injury in fact as applied to [Beaudry] because it actually injured [her] when the violation led, say, to 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." *Huff*, 923 F.3d at 463. As explained more fully below, the Court agrees with TeleCheck and does not

find that Beaudry suffered an Article III injury under any of the three theories articulated in *Huff*.

A. Actual Injury

Beaudry argues that although there is no direct evidence in Defendants' document production showing that TeleCheck issued a decline recommendation for any transaction involving her nine-digit Tennessee driver's license number, the Court nevertheless should infer she suffered an actual injury (i.e. a check decline) because (1) there are gaps in TeleCheck's records, (2) she testified about check declines in the past, and (3) there is evidence that other consumers experienced "phantom declines." (*Id.* at 3, 17-18.) After carefully considering Beaudry's arguments, the Court does not find that it would be reasonable or permissible to make her requested inference because there is not enough evidence from which such an inference can be made. *See Jones v. Potter*, 488 F.3d 397,409 (6th Cir. 2007) (quoting *Matsushita*, 475 U.S. at 587-88) (noting that at the summary judgment stage, "[a]ll inferences must be drawn in the nonmoving party's favor unless they are 'unreasonable' or 'impermissible'").

Regarding Beaudry's argument that the record is incomplete, it is undisputed that Defendants' production is missing transactional data for the entire calendar year of 2004, February 2006, and August 11-20, 2006. (Doc. No. 275 ¶ 20.) As an initial matter, there is no evidence that Beaudry presented her nine-digit driver's license to a TeleCheck merchant before December 27, 2005, making the transactional data from 2004 irrelevant to whether TeleCheck's alleged FCRA violation caused an actual injury. (*See id.* ¶ 24; *see also* Doc. No. 248 (Ahles Dep.) at 127:5-128:9.) As for the missing

data from 2006, without evidence that Defendants destroyed data or acted with a culpable state of mind, which is not alleged, Beaudry is not entitled to an adverse inference that the missing data contains a Code 3 check decline for Beaudry. *Beaven v. U.S. Dep't of Justice*, 622 F.3d 540, 553 (6th Cir. 2010); *see also Vaughn v. Konecranes, Inc.*, 642 F. App'x 568, 578 (6th Cir. 2016).

Moreover, Beaudry's deposition testimony about past declines in *Searcy v. Equable Ascent Fin. LLC*, Case No. 1:11-cv-05990 (N.D. Ill), which was a different lawsuit against different defendants, is not enough to support an actual injury in this case. (Doc. No. 268 at 17-18.) Specifically, Beaudry testified in 2009 that merchants had declined her checks "[l]ess than five" times in the preceding five years, but she could not substantiate those claims by providing any additional information about where or when those specific declines occurred.[5] (Doc. No. 244-3 at 5-6.) Such vague testimony would not permit a jury to reasonably infer that *TeleCheck* issued a Code 3 decline recommendation for Beaudry, let alone that the decline was caused by TeleCheck's failure to associate the check-writing history of her two driver's license numbers. *See Lewis v. Philip Morris Inc.*, 355 F.3d 515, 533 (6th Cir. 2004) (internal quotation marks and citation omitted) ("In order to survive a motion for summary judgment, the non-moving party must be able to show sufficient

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[5] Beaudry also testified that she had several checks returned for having insufficient funds in her bank account. (Doc. No. 244-3 at 4-7.) As Defendants explain, if a bank returns a check for insufficient funds, "[t]hat would have caused a Code 4 decline, not a Code 3 decline, making such declines irrelevant to this lawsuit." (Doc. No. 261 at 16 n.9.)

probative evidence [that] would permit a finding in [her] favor on more than mere speculation, conjecture, or fantasy.").

Nor could a jury reasonably find that Beaudry suffered actual harm based on her "phantom declines" theory. Citing to a TeleCheck training manual section titled "Phantom Declines,"[6] Beaudry claims she is entitled to an inference that she suffered an unrecorded Code 3 decline because there are "numerous instances" where "consumers reported check declines by TeleCheck but TeleCheck had no record of the transactions in its system." (Doc. No. 268 at 17 (citing Doc. No. 249).) The Court is unwilling to make this leap of faith, particularly given Defendants' response that "[p]hantom declines do not mean, as [Beaudry] suggests, that TeleCheck may decline consumers and have no record of that decline in its system." (Doc. No. 274 at 6 n.5.) Instead, Defendants continue, the "term is used in a TeleCheck training manual to instruct call center representatives as to how to search for certain declines in TeleCheck's system." (*Id.*) Because there is no evidence that TeleCheck failed to record any check declines in its system, a jury could not reasonably conclude that Beaudry suffered an unrecorded Code 3 decline.

In sum, there is not enough evidence for a jury to find that TeleCheck's alleged FCRA violation actually injured Beaudry in the form of a check decline. *Huff*, 923 F.3d at 463.

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[6] The TeleCheck training manual states that "[i]f a Checkwriter contacts you in reference to obtaining a decline and you are unable to locate the transaction in the Record of Call in the Summary Screen, this is considered a Phantom Decline." (Doc. No. 249 at 2.)

B. Risk of Imminent Injury

Beaudry alternatively argues that she has standing because she was exposed to a material risk of a check decline when she incorrectly appeared as a first-time check writer in TeleCheck's internal system. (Doc. No. 268 at 6); *see also Huff*, 923 F.3d at 463. Even where a plaintiff cannot show actual harm, as is the case here, "[a] material risk of harm . . . may establish standing." *Huff* at 463 (citing *Spokeo*, 136 S. Ct. at 1549). However, the "threatened injury must be certainly impending to constitute injury in fact." *Id.* (quoting *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013)). "[A]llegations of possible future injury are not sufficient." *Clapper*, 568 U.S. at 409 (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990)) (internal quotation marks omitted).

Beaudry's risk-of-harm theory of standing is far too speculative to satisfy Article III's injury-in-fact requirement. It is undisputed that "[a]ppearing 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 recommendation." (Doc. No. 275 ¶ 9.) But check writing history is only one out of hundreds of variables TeleCheck considers in any given transaction, meaning first-time check writers do not automatically receive a Code 3 decline recommendation. (Doc. No. 269 at ¶ 6; *see also* Doc. No. 248 at 130:14-18.) This likely explains why Beaudry received a check approval when a merchant entered her new driver's license into TeleCheck's system on December 27, 2005, even though she incorrectly appeared as a first-time check writer. It is important to remember that "[t]he question . . . is not whether [Beaudry] faces some risk of a check decline in general but what additional risk of harm stems from TeleCheck's"

inaccurate information. *Huff*, 923 F.3d at 463-64 (citing *Macy v. GC Servs. Ltd.*, 897 F.3d 747, 758 (6th Cir. 2018)). Here, the evidence before the Court reveals that Beaudry's incorrect checking history presented no material risk that her "first" check would be declined.[7]

It logically follows that after Beaudry received one check approval associated with her nine-digit license number, she developed a positive check-writing history that made it even more likely that TeleCheck would approve her future checks. As Beaudry admits, "'[l]ife-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." (Doc. No. 268 at 4; *see also* Doc. No. 275 at 4.) And it is undisputed that 'Defendants' 'system' is supposed to result in those consumers having more good checks in TeleCheck's databases having a greater likelihood of TeleCheck issuing an approval code to merchants on subsequent checks. . . . " (Doc. No. 275 at ¶ 7.) Thus, if TeleCheck issued an approval code when Beaudry had an LTD count of zero, then it would be unreasonable to infer that she faced an imminent risk of a subsequent Code 3 decline based on her lack of check-writing history.

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[7] Because Beaudry argues that TeleCheck's records are incomplete and missing transactions, she admits only that "based on the limited transactional history produced" by TeleCheck, "her nine-digit license first appeared in a transaction in TeleCheck's system on December 27, 2005." (Doc. No. 269 at ¶ 2.) The Court does not find this potential factual dispute to be material, however, because regardless of whether Beaudry may have presented her nine-digit license before December 27, 2005, "she was viewed as a 'first-time checkwriter' when TeleCheck processed the transaction" on that date. (Doc. No. 275 at ¶ 24.)

And lest there be any doubt that this risk was negligible, it would have been impossible for Beaudry to receive a Code 3 decline recommendation after TeleCheck gave her "preferred status" in 2010.[8] (Doc. No. 269 at ¶¶ 9-10.)

To show that her risk of harm was not "hypothetical," Beaudry relies on her counsel's declaration stating that "approximately 143,749 people had one or more checks declined by TeleCheck's system using a nine-digit Tennessee driver license number." (Doc. No. 268 at 13 (citing Doc. No. 247 at ¶¶ 5-8)). This data fails to create a dispute of material fact for several reasons. First, "1,400,965 individuals had at least one transaction processed under both their eight-digit and nine-digit Tennessee license number," meaning that only 10% of relevant consumers who used a nine-digit license number suffered any form of a check decline. (*See* Doc. No. 247 at 2.) Second, Beaudry has not provided any evidence about whether those 10% of consumers received risk-based Code 3 declines, as opposed to Code 4 declines for having insufficient funds or unpaid debt. Third, even if the Court were to infer that some of those consumers received Code 3 declines, there is no evidence suggesting that those declines were caused by inaccurate check-writing histories. Last, even

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[8] Beaudry argues that by giving her preferred status, TeleCheck implicitly conceded that she faced an imminent risk of a check decline. (Doc. No. 268 at 14, 19.) TeleCheck responds that giving Beaudry preferred status was a "business decision . . . to ensure a litigious plaintiff did not suffer an adverse action that would undoubtedly lead to additional litigation." (Doc. No. 274 at 4.) Although there may be a dispute of fact about why TeleCheck gave Beaudry preferred status, it would be unreasonable to infer that Beaudry faced a certainly impending risk of harm on this basis alone.

if some consumers suffered a Code 3 decline because of TeleCheck's alleged FCRA violation, Beaudry's argument would still fail because she has not shown that she was personally at risk of being injured. *See Macy*, 897 F.3d at 752-53 (quoting *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26,40 n.20 (1976)) (noting that "named plaintiffs who represent a class must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent").

Based on the evidence before the Court, no reasonable jury could conclude that Beaudry suffered a check decline because TeleCheck failed to link consumers' eight-digit and nine-digit driver's license numbers. *See id*. at 758 (risk of harm must be traceable to the procedural violation). Accordingly, Beaudry has not shown that TeleCheck's alleged FCRA violation exposed her to a material risk of a tangible injury.

C. Intangible Injury

The Court next considers Beaudry's argument that TeleCheck's alleged FCRA violation, alone, created an intangible injury in fact sufficient to confer standing. (Doc. No. 268 at 12.) Enter Spokeo and "[t]he persisting obscurity of doctrine in [the] area" of Congress's authority to create actionable intangible injuries. *Macy*, 897 F.3d at 754 n.3 (quoting 13B Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 3531.13 (3d ed. 2017)).

"To establish injury in fact, a plaintiff must show that he or she suffered 'an invasion of a legally protected interest' that is 'concrete and particularized'[9] and 'actual or imminent, not conjectural or hypothetical.'" *Spokeo*, 136 S. Ct. at 1548 (quoting *Lujan*, 504 U.S. at 560) (emphasis added). Concreteness refers to a harm that is "real, and not abstract." *Id*. (citation and internal quotation marks omitted). Both tangible and intangible injuries (such as stifling free speech or free exercise of religion) can be concrete. *Id*. at 1549 (collecting cases). Congress has broad power to identify and define intangible injuries by statute that would not otherwise be actionable in federal court, *Lujan*, 504 U.S. at 578, but its authority is limited by Article III's requirement that there be some concrete injury even in the context of a statutory violation, *Spokeo*, 136 S. Ct. at 1549. *See also Lyshe*, 854 F.3d at 858 (emphasizing that Congress's power to create intangible injuries "does not eliminate the requirement that a plaintiff actually suffer harm that is concrete"). In other words, there is no "anything-hurts-so-long-as-Congress-says-it-hurts theory of Article III injury." *Hagy v. Demers & Adams*, 882 F.3d 616, 622 (6th Cir. 2018).

The Supreme Court in *Spokeo* addressed the issue of when a statutory violation (i.e. an intangible injury) alone is sufficient to establish a concrete injury in fact. The Sixth Circuit has interpreted *Spokeo*'s holding as follows:

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[9] Beaudry clearly satisfies the particularization requirement because any inaccuracies regarding her own check writing history would affect her in a personal and individual way. *Spokeo*, 136 S. Ct. at 1548 (collecting cases).

> *Spokeo* categorized statutory violations as falling into two broad categories: (1) where the violation of a procedural right granted by statute is sufficient in and of itself to constitute concrete injury in fact because Congress conferred the procedural right to protect a plaintiff's concrete interests and the procedural violation presents a material risk of real harm to that concrete interest; and (2) where there is a "bare" procedural violation that does not meet this standard, in which case a plaintiff must allege "additional harm beyond the one Congress has identified."

Macy, 897 F.3d at 756 (citing *Spokeo*, 136 S. Ct. at 1549). According to Beaudry, this case falls into the first *Spokeo* category because Congress created a cognizable intangible injury under the FCRA by giving consumers the right to enforce 15 U.S.C. § 1681e(b) to protect concrete interests specifically, fairness and accuracy in credit reporting. (Doc. No. 268 at 12.) Thus, Beaudry argues, she does not need to allege any additional harm beyond TeleCheck's statutory violation to have standing. Defendants contend that this case falls into the second category and "an alleged statutory violation of the FCRA . . . alone is insufficient to confer standing in the Sixth Circuit." (Doc. No. 274 at 9-10.)

To resolve the parties' disagreement about whether TeleCheck's alleged FCRA violation "is sufficient in and of itself to constitute concrete injury," the Court must first decide whether "Congress conferred the procedural right to protect a plaintiff's concrete interests. . . . " *Macy*, 897 F.3d at 756 (citing *Spokeo*, 136 S. Ct. at 1549). According to *Spokeo*, the answer is a resounding

yes because Congress's general goal in enacting the FCRA was to ensure accurate credit reporting by "curb[ing] the dissemination of false information." *Spokeo*, 136 S. Ct. at 1545, 1549. And the specific provision at issue here—15 U.S.C. § 1681e(b)—attempts to further protect those concrete interests by requiring consumer reporting agencies to "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).

The Court's inquiry does not and cannot end there, however, because it must also decide whether "the [alleged] procedural violation presents a material risk of real harm to that concrete interest." *Macy*, 897 F.3d at 756 (citing *Spokeo*, 136 S. Ct. at 1549). The answer to this question is important because TeleCheck's alleged § 1681e(b) violation does not automatically give Beaudry standing to sue. For example, the Supreme Court in *Spokeo* held that "[a] violation of one of the FCRA's procedural requirements may result in no harm," such as when a company disseminates an incorrect zip code. 136 S. Ct. at 1550. On the other hand, some FCRA violations alone may be sufficiently concrete to confer standing. *See Ramirez v. TransUnion LLC*, 951 F.3d 1008, 1026 (9th Cir. 2020) (finding § 1681e (b) violation conferred standing because defendant "inaccurately identified and labeled all class members as potential terrorists, drug traffickers, and other threats to national security"); *Robins v. Spokeo, Inc.*, 867 F.3d 1108, 1117 (9th Cir. 2017) (inaccurate information about plaintiff s age, marital status, education, and wealth published to third parties caused actual harm to his employment prospects).

Here, the Court finds that Beaudry's alleged "injury," namely, improperly being viewed as having a nonexistent or limited check-writing history in TeleCheck's internal database, did not present a material risk of real harm to the interests the FCRA was designed to prevent. As an initial matter, the FCRA was designed "to curb the dissemination of false information" in credit reports, *Spokeo*, 136 S. Ct. at 1550 (emphasis added), and Beaudry has not offered any evidence that TeleCheck published or disseminated her inaccurate information to a third party. But even assuming arguendo that TeleCheck did publish her false information, the record does not reflect that Beaudry experienced a single check decline or any credit-related inconveniences because of TeleCheck's inaccurate internal data that did not link her driver's license numbers. At most, TeleCheck's inaccurate driver's license data created a meaningless risk of harm akin to an incorrect zip code, *id*. at 1550, rather than a substantial or severe risk of harm to Beaudry's concrete interest in avoiding the dissemination of inaccurate credit reports. At the end of the day, Beaudry's erroneous check-writing history "never made a difference in any credit determination, meaning its continued existence in TeleCheck's system did not harm [her] concrete economic interests." *Huff*, 923 F.3d at 467 (citing *Owner-Operator Indep. Drivers Ass'n v. U.S. Dep't of Transp.*, 879 F.3d 339, 345 (D.C. Cir. 2018)).

Having concluded that TeleCheck's alleged FCRA violation did not cause an actual or material risk of harm to Beaudry's concrete interests, the Court finds that Beaudry has alleged nothing more than a "bare procedural violation, divorced from any concrete harm."

Spokeo, 136 S. Ct. at 1549; *Huff*, 923 F.3d at 465. That is not enough to survive summary judgment.

IV. Conclusion

For the foregoing reasons, Beaudry has not carried her burden to show she suffered an injury-in-fact and therefore lacks standing to bring this lawsuit. Accordingly, Defendants' Renewed Motion for Summary Judgment for Lack of Standing (Doc. No. 260) will be granted, and this case will be dismissed without prejudice.[10]

An appropriate order will enter.

/s/ Waverly D. Crenshaw, Jr.
Chief United States District Judge

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10 "Article III standing is jurisdictional, and . . . dismissal for lack of subject matter jurisdiction should normally be without prejudice." *Thompson v. Love's Travel Stops & Country Stores, Inc.*, 748 F. App'x 6, 11 (6th Cir. 2018).

ORDER OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE NASHVILLE DIVISION (AUGUST 6, 2020)

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

ESTATE OF CHERYL BEAUDRY,

Plaintiff,

v.

TELECHECK SERVICES, INC., ET AL.,

Defendants.

No.3:07-cv-00842

Before: Waverly D. CRENSHAW, JR.,
Chief United States District Judge.

For the reasons set forth in the accompanying Memorandum Opinion, Defendants' Renewed Motion for Summary Judgment for Lack of Standing (Doc. No. 260) is GRANTED, and this case is dismissed without prejudice. This is a final order. The Clerk shall enter judgment under the Federal Rules of Civil Procedure and close the file.

IT IS SO ORDERED.

/s/ Waverly D. Crenshaw, Jr.
Chief United States District Judge

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT (AUGUST 28, 2009)

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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

Plaintiff-Appellant,

v.

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

Defendants-Appellees.

No. 08-6428

Appeal from the United States District Court
for the Middle District of Tennessee at Nashville.
No. 07-00842–Aleta Arthur Trauger, District Judge.

Before: KEITH, SUTTON
and WHITE, Circuit Judges.

SUTTON, Circuit Judge.

Cheryl Beaudry appeals the district court's dismissal of her lawsuit under the Fair Credit Reporting Act (FCRA or the Act). Because FCRA's private right of action does not require proof of actual damages as

a prerequisite to the recovery of statutory damages for a willful violation of the Act, we reverse.

I

In 2007, Cheryl Beaudry sued the defendants, a group of foreign corporations who provide check-verification services. According to Beaudry, the defendants failed to account for a 2002 change in the numbering used by the Tennessee driver's license system, leading their systems to reflect incorrectly that many Tennessee consumers, including Beaudry, were first-time check-writers. Claiming that this error affected her and "hundreds of thousands, if not millions," of other Tennesseans, Class Action Compl., R. 1, ¶ 65 (Aug. 17, 2007), she sought to represent a class of affected consumers, contending that the defendants' willful failure to provide accurate information entitled the class members to "declaratory relief, injunctive relief, statutory damages, punitive damages, attorneys' fees, costs and expenses." *Id.* ¶ 99.

The defendants filed a motion to dismiss on two grounds: that her complaint failed to allege that she had been injured by a FCRA violation and that the statute of limitations had run. Beaudry argued that neither ground for dismissal applied, and that in the alternative the statute permitted her to obtain forward-looking injunctive relief. The district court granted the motion on the ground that she had not alleged any injury and that the statute does not authorize courts to grant injunctive relief.

II

We give fresh review to the district court's dismissal of a complaint under Rule 12(b)(6) of the Federal

Rules of Civil Procedure. *Bowman v. United States*, 564 F.3d 765, 769 (6th Cir. 2008). In deciding whether a complaint has stated a claim on which relief can be granted, we "construe the complaint in favor of the plaintiff, accept the allegations of the complaint as true, and determine whether plaintiff's factual allegations present plausible claims." *Id.*

The Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq*., places a number of restrictions on "consumer reporting agencies," meaning any individual or "other entity" who "regularly . . . assembl[es] or evaluat[es] consumer credit information . . . for the purpose of furnishing consumer reports to third parties." *Id.* § 1681a(b), (f). One of the Act's (many) requirements is that consumer reporting agencies must "follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom" a credit report relates. *Id.* § 1681e(b).

To ensure compliance with its mandates, the FCRA contains several enforcement mechanisms: (1) The Federal Trade Commission may bring an administrative action against violators of the Act, *see id.* § 1681s(a); (2) federal executive agencies that regulate certain types of consumer reporting agencies—such as the FDIC, which has jurisdiction over depository banks—may enforce the Act, *see id.* § 1681s(b); (3) state Attorneys General may bring enforcement actions to recover damages and to enjoin future violations, *see id.* § 1681s (c); and (4) private individuals may obtain relief against "willful[]" or "negligent" violators of the Act, *see id.* §§ 1681n, 1681o. The last enforcement mechanism—the private right of action—concerns us here.

The statute describes the willfulness private right of action in this way:

> Any person who willfully fails to comply with any requirement imposed under [the FCRA] with respect to any consumer is liable to that consumer in an amount equal to the sum of–
>
> (1)(A) any actual damages sustained by the consumer as a result of the failure or damages of not less than $100 and not more than $1,000; or
>
> (B) in the case of liability of a natural person for obtaining a consumer report under false pretenses or knowingly without a permissible purpose, actual damages sustained by the consumer as a result of the failure or $1,000, whichever is greater;
>
> (2) such amount of punitive damages as the court may allow; and
>
> (3) in the case of a successful action to enforce any liability under this section, the costs of the action together with reasonable attorney's fees as determined by the court.

Id. § 1681n(a). The negligence action is worded similarly: It provides that "[a]ny person who is negligent in failing to comply with any requirement imposed under [the FCRA] with respect to any consumer is liable to that consumer." *Id.* § 1681o. Unlike a willfulness claimant, however, the statute permits a negligence claimant to recover only actual damages, costs and attorney's fees. *Id.*

The district court, Beaudry claims, erred in dismissing her lawsuit on the ground that the complaint

failed to allege that the FCRA violation injured her. We agree.

Beaudry, to start, alleged that the defendants violated § 1681e(b) "with respect to" her, just as the statute requires. *Id.* § 1681n(a). "Whenever a consumer reporting agency prepares a consumer report," the provision says, "it shall follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates." *Id.* § 1681e(b). According to Beaudry's complaint, she has "presented checks to businesses utilizing Defendants' [check] verification services," Compl. ¶ 13, and "each time a transaction is processed by Defendants, a new consumer report is generated," *id.* ¶ 58. Since Tennessee changed the numbering system for its driver's licenses in 2002, those reports systematically have been based on inaccurate information because the new license numbers make consumers, including Beaudry, "appear as a first-time check writer" within the defendants' systems. *Id.* ¶ 60. All that the defendants need to do to correct the problem, she claims, is to "associate the old driver['s] license number with the new driver['s] license number." *Id.* Beaudry thus claims to have suffered the precise "injury" that the statute proscribes: The defendants "prepare[d] a consumer report" about her but failed to "follow reasonable procedures to assure maximum possible accuracy of the information" it contained. 15 U.S.C. § 1681e(b).

The defendants, however, insist that the statute requires something more—that Beaudry allege a different form of "injury": consequential damages. "Plaintiff," they note, "has not . . . had a check rejected or any other transaction terminated as a result of a TeleCheck recommendation"; nor has she "suffered

any harm with respect to the availability of credit." Br. at 5. But the Act imposes no such hurdle on *willfulness* claimants. 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. It requires regulated companies to use "reasonable procedures" when "prepar[ing] a consumer report" "with respect to" a given consumer, and creates a cause of action in favor of the consumer when they do not. 15 U.S.C. §§ 1681e(b), 1681n(a).

Section 1681n, which creates the cause of action for willful violations, also does not impose the consequential-damages requirement that defendants wish to add to the statute. "Any consumer," it says, may sue to recover "any actual damages . . . *or* damages of not less than $100 and not more than $1000" from "[a]ny person who willfully fails to comply with any requirement imposed under [the FCRA] with respect to [that] consumer." 15 U.S.C. § 1681n(a)(1)(A) (emphasis added). Because "actual damages" represent an *alternative* form of relief and because the statute permits a recovery when there are no identifiable or measurable actual damages, this subsection implies that a claimant need not suffer (or allege) consequential damages to file a claim. A comparison with § 1681o buttresses the point: Congress excluded the statutory-damages option in negligence cases. "Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983) (internal quotation marks omitted).

Case law in this and related areas backs up this interpretation. In *Murray v. GMAC Mortg. Corp.*, 434 F.3d 948 (7th Cir. 2006), the Seventh Circuit addressed the Act's prohibition on accessing a consumer's credit score without her consent and the narrow exception created for lenders who are making a "firm offer of credit" to the consumer. *See* 15 U.S.C. § 1681b(c)(1)(B)(i). The court explained that individual-damages issues did not preclude class certification because the class representative could seek statutory damages "without proof of injury" in lieu of actual damages. *Murray*, 434 F.3d at 952–53. Other courts have reached the same conclusion when considering § 1681n statutory damages suits premised on violations of other provisions of the Act. *See Ashby v. Farmers Ins. Co. of Or.*, No. CV 01-1446-BR, 2004 WL 2359968, at *5 (D. Or. Oct. 18., 2004) (holding that no "actual harm" need be proved in an action under § 1681m(a) because "Congress . . . has stated in plain terms that statutory damages are available as an alternative remedy to actual damages"); *accord Gillespie v. Equifax Info. Servs.*, No. 05 C 138, 2008 WL 4614327, at *7 (N.D. Ill. Oct. 5, 2008) (relying on the same reasoning in determining that class treatment was appropriate for a violation of § 1681g(a)(1)'s disclosure requirements); *Murray v. New Cingular Wireless Servs., Inc.*, 232 F.R.D. 295, 302–03 (N.D. Ill. 2005) (reaching a similar conclusion with respect to a FCRA claim premised on a violation of § 1681b(e)).

Courts have reached a like conclusion in considering other statutes that contain similar statutory damages provisions. "[A]ny actual damage[s] sustained by [a consumer] as a result of [a] failure" to comply with the Fair Debt Collection Protection Act are available as an *alternative* to the recovery of statutory

damages, suggesting that such damages are not a necessary precondition to suit. *See Fed. Home Loan Mortgage Corp. v. Lamar*, 503 F.3d 504, 513 (6th Cir. 2007) (noting that the availability of statutory damages under the Fair Debt Collection Protection Act, *see* 15 U.S.C. § 1692k(a), means that "a consumer may recover statutory damages if the debt collector violates the FDCPA even if the consumer suffered no actual damages"). In considering a claim that the anti-wiretapping provisions of 18 U.S.C. § 2520 had been violated, the Seventh Circuit reasoned that, because the statute permits the recovery of "actual damages . . . or statutory damages of not less than $50 and not more than $500," 18 U.S.C. § 2520(c)(1)(A), "the plaintiff need not prove any actual harm," *Apampa v. Layng*, 157 F.3d 1103, 1105 (7th Cir. 1998). We have reached the same conclusion when construing the Truth in Lending Act, 15 U.S.C. § 1640(a), which allows recovery of "any actual damage sustained . . . as a result of the failure" or "twice the amount of any finance charge," *see Purtle v. Eldridge Auto Sales, Inc.*, 91 F.3d 797, 800 (6th Cir. 1996) (holding that a consumer did not need to show that she "suffered actual monetary damages" or that she "was actually misled or deceived" in order to prevail on a TILA claim for statutory damages and attorney's fees); *accord Edwards v. Your Credit, Inc.*, 148 F.3d 427, 441 (5th Cir. 1998); *see also Martinez v. Shinn*, 992 F.2d 997 (9th Cir. 1993) (reaching the same conclusion with respect to the Migrant and Seasonal Agricultural Worker Protection Act, which allows the recovery of "actual damages, or statutory damages," 29 U.S.C. § 1854(c)(1)).

No Article III (or prudential) standing problem arises, it bears adding, if Beaudry is permitted to file

this claim. Congress "has the power to create new legal rights, [including] right[s] of action whose only injury-in-fact involves the violation of that statutory right," *In re Carter*, 553 F.3d 979, 988 (6th Cir. 2009), and the two constitutional limitations on that power do not apply here. First, Beaudry must be "among the injured," in the sense that she alleges the defendants violated *her* statutory rights. *Id.*; *see Sierra Club v. Morton*, 405 U.S. 727, 734–35 (1972). Yet that limit poses no obstacle here: Beaudry alleged that she was one of the consumers about whom the defendants were generating credit reports based on inaccurate information due to their failure to update their databases to accommodate the new Tennessee driver's license numbering system. She thus has alleged that the defendants' failure to follow "reasonable procedures to assure maximum possible accuracy" of credit reporting information occurred "with respect to" her, as the statute requires. 15 U.S.C. §§ 1681e(b), 1681n(a). Second, although a right created by Congress "need not be economic in nature, it still must cause individual, rather than collective, harm." *Carter*, 553 F.3d at 989. The Act's statutory damages claim clears this hurdle as well: It does not "authorize suits by members of the public at large," *id.*; it creates an individual right not to have unlawful practices occur "with respect to" one's own credit information, 15 U.S.C. § 1681n. This nexus between the individual plaintiff and the legal violation thus suffices to sustain this statutorily created right. *See Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373 (1982) (sustaining the right of Fair Housing Act market testers to receive "truthful information concerning the availability of housing" from sellers, even in the absence of any further harm).

Urging a contrary conclusion, defendants invoke a long list of cases purporting to support their position. They start with a Sixth Circuit case, claiming that the "established" law of this circuit requires the dismissal of this claim. Resp. Br. at 9. But the opinion they cite does not contain a holding on the matter at hand, and it is unpublished to boot. *See Nelski v. Trans Union, LLC*, 86 F. App'x 840 (6th Cir. 2004). To be fair to the defendants and to the district court judge who relied on *Nelski*, the opinion does list "injur[y]" as one of four things a plaintiff must prove in a § 1681e(b) claim. *Id.* at 844. But this aspect of the case was pure dictum because the parties *conceded* that an injury had occurred and disputed only the reasonableness of the defendant's credit reporting procedures. *Id.*

In *Washington v. CSC Credit Servs.*, 199 F.3d 263 (5th Cir. 2000), the Fifth Circuit also appears to address today's issue, but it *never mentions* the 1996 amendment to FCRA, which added a statutory-damages remedy as an alternative to the actual damages already provided for willfulness claims. *Id.* at 266–67. With one exception, the decision also relies entirely on pre-1996 cases, *id.*, bolstering the inference that the court never came to terms with (or was not told by the parties about) the amendment. The one exception makes the same mistake. *See Andrews v. Trans Union Corp.*, 7 F. Supp. 2d 1056, 1084 n.33 (C.D. Cal. 1998), *aff'd in part and rev'd in part on other grounds*, 225 F.3d 1063 (9th Cir. 2000), *rev'd*, 534 U.S. 19 (2001). The *Washington* opinion contains nothing to suggest that the panel or parties were aware the statute had been amended in 1996 to permit claims without proof of "actual damages."

Other cases are no more helpful. One case lists an "injury" requirement in connection with the private

action for *negligent* FCRA violations under 15 U.S.C. § 1681o, *Philbin v. Trans Union Corp.*, 101 F.3d 957, 963 (3d Cir. 1996), but omits any reference to it when discussing the cause of action for *willful* violations under § 1681n, *see id.* at 970. Analogies to the negligence cause of action offer little assistance to the defendants because § 1681o, unlike § 1681n, allows a plaintiff to recover only actual damages, not statutory damages. Another case, decided in 1983, (1) dealt with an earlier version of the FCRA, which again did not allow for private actions to recover statutory damages until 1996, *see* Pub. L. 104-208, Div. A, Title II, § 2412(b); *see also former* 15 U.S.C. § 1681n(1) (West 1996), and (2) dealt with a negligence claim, not a willfulness one. *See Morris v. Credit Bureau of Cincinnati, Inc.*, 563 F. Supp. 962, 963, 967 (S.D. Ohio 1983).

The refrain continues. A number of cases cite *Nelski*, *Philbin* or *Morris* for the proposition that injury is required in a willfulness action without explaining what they mean by injury and without adding any reasoning to support that conclusion. *See, e.g.*, *Currier v. Transunion Credit Info. Co.*, No. 06-12365, 2008 WL 795738, at *4 (E.D. Mich. Mar. 25, 2008); *Holmes v. TeleCheck Int'l*, 556 F. Supp. 2d 819, 831 (M.D. Tenn. 2008); *Breed v. Nationwide Ins. Co.*, No. 3:05CV-547-H, 2007 WL 1408212, at *1 (W.D. Ky. May 8, 2007). Other cases contain like assertions but again do not address the implications of FCRA's language or rely exclusively on cases that predate the 1996 amendment. *See, e.g.*, *Jackson v. Equifax Info. Servs.*, 167 F. App'x 144, 146 (11th Cir. 2006); *George v. Equifax Mortg. Servs.*, No. 06-cv-971, 2008 WL 4425299, at *7 (E.D.N.Y. Sept. 30, 2008); *Johnson v. Equifax, Inc.*, 510 F. Supp. 2d 638, 647 (S.D. Ala. 2007). Still other cases—the least

helpful of all—predate the critical 1996 amendment. *See, e.g.*, *Cahlin v. Gen. Motors Acceptance Corp.*, 936 F.2d 1151, 1160–61 (11th Cir. 1991); *Pettrus v. TRW Consumer Credit Serv.*, 879 F. Supp. 695, 697 (W.D. Tex. 1994).

The district court and the defendants suggest that, if we read the law to allow statutory damages without proof of injury, we would be creating a strict liability regime. Not so. The existence of a *willfulness* requirement proves that there is nothing "strict" about the state of behavior required to violate the law. And there is an injury requirement because the statute requires the claimant to show that the defendants used unreasonable procedures in preparing a credit report about her. To the extent the defendants worry about violations of the statute that hurt no one—say a willful violation of the "reasonable procedures" requirement that creates no inaccuracies in the data used to generate reports or, better yet, creates inaccuracies that *favor* the consumer—that interesting problem is not presented here. Beaudry alleges that the defendants' systems include *false* and *negative* information about her.

Under these circumstances, Beaudry's claim should not have been dismissed. She has the statutory right to move beyond the Rule 12(b)(6) stage of this case.

III.

That leaves this question: Should we address the district court's rejection of Beaudry's alternative reason for not dismissing the case—her argument that, even if she does not have a damages action, FCRA empowers her to bring an injunction action? We think not.

In filing their motion to dismiss, the defendants did not seek to dismiss the claim on this ground. The issue arose solely in Beaudry's response to the motion to dismiss, apparently as a way to preserve a cause of action of some type should the court reject her damages claim on lack-of-injury or statute-of-limitations grounds. Two years also have passed since Beaudry filed her complaint, raising questions in our minds about whether a claim for injunctive relief would now be moot given the possibility, perhaps likelihood, that the defendants have changed their procedures in the interim.

Adding to our reluctance to resolve the issue at this juncture is the reality that the answer to the question is far from self-evident. In *Washington*, the one court of appeals case to address the issue, the Fifth Circuit held that FCRA's grant to the FTC of the power to obtain injunctive relief, *see* 15 U.S.C. § 1681s (a)(1); *id.* § 45(a), creates a negative inference that FCRA's private right of action, which has no express provision for injunction actions, does not allow individuals to obtain injunctive relief. 199 F.3d at 268. *Washington* may be right, and the district court thus may have been right to rely on it. But the answer is not free from doubt. *Califano v. Yamasaki*, 442 U.S. 682, 705 (1979), points out that a district court should start with the assumption that, in actions over which it has jurisdiction, it has authority to issue injunctive relief. In the absence of "the clearest command to the contrary from Congress," the plaintiff may seek injunctive relief. *Id.*; *see also Renegotiation Bd. v. Bannercraft Clothing Co.*, 415 U.S. 1, 19 (1974) (holding that the enumeration of specific types of equitable authority in the Freedom of Information Act did not

preclude district courts from granting non-enumerated injunctive relief); *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946) ("Unless otherwise provided by statute, all the inherent equitable powers of the District Court are available for the proper and complete exercise of that jurisdiction."); *United States v. Universal Mgmt. Servs., Inc.*, 191 F.3d 750, 761 (6th Cir. 1999). Further complicating the picture are the conflicting negative inferences created by other parts of the statute. *Compare* 15 U.S.C. § 1681s(c)(1)(A) (explicitly allowing state Attorneys General to pursue injunctive relief—suggesting that such injunctive relief would not otherwise be available); *id.* § 1681u(m) (explicitly allowing injunctive relief under that section—suggesting it would not otherwise be available), *with id.* § 1681u(l) (limiting remedies in that section to those explicitly provided—suggesting that other remedies would otherwise be available implicitly).

Because this issue may no longer have any bearing on this case and because its premature resolution runs the risk of etching error into our case books, we save its resolution for another day. If, as it turns out, the issue remains relevant to the final resolution of this case, the district court is free to certify the issue under 28 U.S.C. § 1292(b) for an immediate interlocutory appeal to us.

IV.

For these reasons, we reverse the dismissal of Beaudry's complaint and remand for further proceedings.

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT DENYING PETITION FOR REHEARING EN BANC (OCTOBER 21, 2021)

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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.

No. 20-6018

Before: BOGGS, CLAY, and KETHLEDGE, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then

was circulated to the full court.* No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

Entered by Order of the Court

/s/ Deborah S. Hunt
Clerk

* Judge White recused herself from participation in this ruling.

RELEVANT STATUTORY PROVISIONS

15 U.S.C. § 1681 - Congressional Findings and Statement of Purpose

(a) Accuracy and Fairness of Credit Reporting

The Congress makes the following findings:

(1) The banking system is dependent upon fair and accurate credit reporting. Inaccurate credit reports directly impair the efficiency of the banking system, and unfair credit reporting methods undermine the public confidence which is essential to the continued functioning of the banking system.

(2) An elaborate mechanism has been developed for investigating and evaluating the credit worthiness, credit standing, credit capacity, character, and general reputation of consumers.

(3) Consumer reporting agencies have assumed a vital role in assembling and evaluating consumer credit and other information on consumers.

(4) 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.

(b) Reasonable Procedures

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. § 1681e - Compliance Procedures

(a) Identity and Purposes of Credit Users

Every consumer reporting agency shall maintain reasonable procedures designed to avoid violations of section 1681c of this title and to limit the furnishing of consumer reports to the purposes listed under section 1681b of this title. These procedures shall require that prospective users of the information identify themselves, certify the purposes for which the information is sought, and certify that the information will be used for no other purpose. Every consumer reporting agency shall make a reasonable effort to verify the identity of a new prospective user and the uses certified by such prospective user prior to furnishing such user a consumer report. No consumer reporting agency may furnish a consumer report to any person if it has reasonable grounds for believing that the consumer report will not be used for a purpose listed in section 1681b of this title.

(b) Accuracy of Report

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.

(c) Disclosure of Consumer Reports By Users Allowed

A consumer reporting agency may not prohibit a user of a consumer report furnished by the agency on a consumer from disclosing the contents of the report to the consumer, if adverse action against the consumer has been taken by the user based in whole or in part on the report.

(d) Notice to Users and Furnishers of Information

(1) Notice Requirement

A consumer reporting agency shall provide to any person-

(A) who regularly and in the ordinary course of business furnishes information to the agency with respect to any consumer; or

(B) to whom a consumer report is provided by the agency;

a notice of such person's responsibilities under this subchapter.

(2) Content of Notice

The Bureau shall prescribe the content of notices under paragraph (1), and a consumer reporting agency shall be in compliance with this subsection if it provides a notice under paragraph (1) that is substantially similar to the Bureau prescription under this paragraph.

(e) Procurement of Consumer Report for Resale

(1) Disclosure

A person may not procure a consumer report for purposes of reselling the report (or any information in the report) unless the person discloses to the consumer reporting agency that originally furnishes the report-

(A) the identity of the end-user of the report (or information); and

(B) each permissible purpose under section 1681b of this title for which the report is furnished to the end-user of the report (or information).

(2) Responsibilities of Procurers for Resale

A person who procures a consumer report for purposes of reselling the report (or any information in the report) shall-

(A) establish and comply with reasonable procedures designed to ensure that the report (or information) is resold by the person only for a purpose for which the report may be furnished under section 1681b of this title, including by requiring that each person to which the report (or information) is resold and that resells or provides the report (or information) to any other person-

(i) identifies each end user of the resold report (or information);

(ii) certifies each purpose for which the report (or information) will be used; and

(iii) certifies that the report (or information) will be used for no other purpose; and

(B) before reselling the report, make reasonable efforts to verify the identifications and certifications made under subparagraph (A).

(3) Resale of Consumer Report to a Federal Agency or Department

Notwithstanding paragraph (1) or (2), a person who procures a consumer report for purposes of reselling the report (or any information in the report) shall not disclose the identity of the end-user of the report under paragraph (1) or (2) if-

(A) the end user is an agency or department of the United States Government which procures the report from the person for purposes of determining the eligibility of the consumer concerned to receive access or continued access to classified information (as defined in section 1681b(b)(4)(E)(i) of this title); and

(B) the agency or department certifies in writing to the person reselling the report that nondisclosure is necessary to protect classified information or the safety of persons employed by or contracting with, or undergoing investigation for work or contracting with the agency or department.

BRIEF OF APPELLANT
(NOVEMBER 16, 2020)

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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.

No. 20-6018

On Appeal from the United States District Court
for the Middle District of Tennessee Case
No. 3:07-cv-00842
Honorable Waverly D. Crenshaw, Jr.

BRIEF OF APPELLANT

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ORAL ARGUMENT REQUESTED

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.l(a), Plaintiff/Appellant files this Corporate Disclosure Statement, stating as follows:

1. All parent corporations, if any, of the named party:

   NONE.

2. All publicly held companies, if any, that owns ten percent (10%) or more of the named party's stock:

   NONE.

STATEMENT IN SUPPORT OF REQUEST FOR ORAL ARGUMENT

Plaintiff/Appellant Estate of Cheryl Beaudry (formerly, Cheryl Beaudry) (hereinafter "Plaintiff" or "Beaudry") respectfully requests oral argument. This appeal involves the fundamental question of when a consumer has Article III standing in Federal Courts

to seek redress under statutes enacted to protect and advance consumers' interests. The answer to this question will have significant ramifications on whether and when consumers may pursue claims against consumer reporting agencies for violations of the Fair Credit Reporting Act ("FCRA"), which cause informational injury or result in a risk of harm to consumers.

In this case, when issuing millions of consumer reports involving Tennessee consumers, a consumer reporting agency failed to follow reasonable procedures to assure maximum possible accuracy of information contained in the consumer reports in violation of 15 U.S.C. § 1681e(b) of the FCRA by choosing not to implement procedures to associate, link, or combine each consumer's eight-digit Tennessee driver license number information with each consumer's nine-digit Tennessee driver license number information. More particularly, this Court must determine whether consumers have standing to sue a consumer reporting agency that systematically chooses to fictitiously treat each Tennessee consumer as *two* distinct persons simply because Tennessee added a leading zero to their driver license number.[1] This systemic violation fulfills the "concrete" aspect of the "injury-in-fact" standing requirement under Article III. First, this systematic decision and violation to ignore a consumer's information stored under their eight-digit number in issuing consumer reports constitutes an informational injury. Second, this systematic decision and violation constitutes a

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1 The concept of "padding," whereby a leading zero or leading zeroes are added to numbers is a common and widely-accepted practice in computerized numbering systems.

risk of harm (a risk of check declines) based on inaccurate information.

Oral argument would aid the Court in the decisional process, allow the Court to question each side about their legal arguments, and provide additional clarification on the facts and issues involved in the case.

JURISDICTIONAL STATEMENT

Beaudry appeals the District Court's August 6, 2020 Order granting Defendants' Renewed Motion for Summary Judgment. *Order, RE 290, PageID# 4724; Memo. Op., RE 289, PageID# 4710-4723.* Under F.R.A.P. 3 and 4, the Order is final and appealable as of right.

Beaudry timely appealed on September 2, 2020. *Notice of Appeal, RE 293, PageID# 4728-4730.*

Under 28 U.S.C. § 1291, this Court has appellate jurisdiction.

I. Statement of the Issues

1. Whether the District Court erred in granting summary judgment by finding that Defendants' failure to follow reasonable procedures under 15 U.S.C. § 1681e(b) to associate, link, or combine each consumer's eight-digit Tennessee driver license number information with each consumer's nine-digit Tennessee driver license number information, which made Beaudry and over 1.4 million Tennessee consumers appear like first-time check writers, and in subsequent transactions, check writers with limited check-writing history, did not give rise to an "informational injury" sufficient to satisfy the "concrete" aspect of the injury-in-fact standing requirement under Article III?

2. Whether the District Court erred in granting summary judgment by finding that Defendants' failure to follow reasonable procedures under 15 U.S.C. § 1681e (b) to associate, link, or combine each consumer's eight-digit Tennessee driver license number information with each consumer's nine-digit Tennessee driver license number information, which made Beaudry and over 1.4 million Tennessee consumers appear like first-time check writers, and in subsequent transactions, check writers with limited check-writing history, did not give rise to a risk of harm sufficient to satisfy the "concrete" aspect of the injury-in-fact standing requirement under Article III?

3. Whether the District Court erred in granting summary judgment by finding that there was no genuine issue as to any material fact that Beaudry did not receive a check decline when one or more of her checks were processed by Defendants using her nine-digit license number, where the District Court improperly engaged in fact-finding, determining the truth of factual matters, and failed to review all of the evidence, facts and inferences in the light most favorable to Beaudry?

II. Statement of the Case

Beaudry commenced this action on August 17, 2007, and filed an Amended Complaint on September 23, 2010 on behalf of herself and other similarly situated persons against Defendants TeleCheck Services, Inc., TeleCheck International, Inc., and First Data Corporation (collectively, "TeleCheck") alleging that TeleCheck committed widespread violations under 15 U.S.C. § 1681e(b) of the FCRA by refusing or failing to update their databases, systems, and files after the state of

Tennessee modified its driver license numbering system from an eight-digit format to a nine-digit format by merely adding a leading zero to the nine-digit numbers, in order to assure that information regarding consumers stored in TeleCheck's databases, systems, and files was associated with or "linked" to the nine-digit driver license numbers issued to Beaudry and over 1.4 million Tennessee consumers. *Class Action Complaint, RE 1, PageID# 1-26; First Am. Class Action Compl., RE 90, PageID# 695-696, ¶ 1-3; PageID# 704-05, ¶ 46-49; PageID# 707-08, ¶ 60-62; PageID# 708-09, ¶ 63-65; and PageID# 711, ¶ 71.*

On October 15, 2007, TeleCheck filed a Motion to Dismiss arguing, among other things, that Beaudry failed to allege that she suffered an actual injury or harm from TeleCheck's deficient procedures. *Defs' Mot. Dismiss, RE 10, PageID# 45-46; Memo. Of Law In Supp. Of Defs' Mot. Dismiss, RE 11, PageID# 97-110.* District Court Judge Trauger granted TeleCheck's Motion, *see Memorandum, RE 35, PageID# 355-369; Order, RE 36, PageID# 370,* and Beaudry appealed. In a *per curiam* opinion by Judge Sutton, the Sixth Circuit reversed and remanded, holding that Beaudry pied sufficient injury to confer Article III standing:

> [n]o Article III (or prudential) standing problem arises, it bears adding, if Beaudry is permitted to file this claim. . . . Beaudry alleged that she was one of the consumers about whom the defendants were generating credit reports based on inaccurate information due to their failure to update their databases to accommodate the new Tennessee driver's license numbering system. She has thus alleged that the defendants' failure to follow

> "reasonable procedures to assure maximum possible accuracy" of credit reporting information occurred "with respect to" her, as the statute requires.

Beaudry v. TeleCheck Services, Inc., 579 F.3d 702, 707 (6th Cir. 2009) (Sutton, J.) *("Beaudry I").* Thus, the Sixth Circuit Court of Appeals held that Beaudry need not allege (or ultimately prove) that she received a check decline in order to have standing under Article III. *Id.* The Sixth Circuit further held that *"the Act [FCRA] 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." Id.* at 705 (emphasis added).[2]

On February 27, 2017, TeleCheck filed a Motion for Summary Judgment for Lack of Standing arguing that Beaudry did not suffer a "concrete" injury necessary to confer Article III standing under *Spokeo, Inc. v. Robins,* 136 S. Ct. 1540 (2016). *Defs' Mot. Summ. Judg. for Lack of Standing, RE 236, PageID# 4072-4074; Memo. in Supp. of Defs' Mot. Summ. Judg. for Lack of Standing, RE 237, PageID# 4075-4086.* In response, Beaudry argued, among others things, that an adverse action *(i.e.* a check decline) is not required to confer Article III standing, and even if Beaudry did not receive a check decline, she suffered sufficient injury-in-fact by being placed at risk of receiving a check decline based on TeleCheck's failure to associate

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[2] After receiving the adverse decision and denial of *en banc* review, TeleCheck filed a Petition for Writ of Certiorari with the United States Supreme Court on February 23, 2010. *Notice of Petition for Writ of Certiorari, RE 49, PageID# 477.* On April 26, 2010, the United States Supreme Court denied TeleCheck's Petition. 130 S. Ct. 2379 (2010).

her prior check writing history stored under her eight-digit Tennessee driver license number with her nine-digit Tennessee driver license number when TeleCheck processed a transaction initiated by the merchant. *Pl's Resp. in Opp. to Defs' Mot. Summ. Judg. for Lack of Standing, RE 243, PageID# 4122-4145.*

The case was re-assigned, and District Court Judge Crenshaw, Jr. issued an Order denying TeleCheck's Motion for Summary Judgment for Lack of Standing without prejudice. *Order, RE 257, PageID# 4561-4562.* Judge Crenshaw, Jr. indicated the order in *Huff v. TeleCheck Servs., Inc.,* No. 3:14-cv-1832, ECF No. 110 (M.D. Tenn. Apr. 24, 2018), which was "in the early stages of an appeal" before the Sixth Circuit Court of Appeals involved "[t]he same attorneys, same Defendants, and . . . the same issue. . . . " as the instant case, and that "the impact of the appeal in *Huff* is likely to have a significant impact on the legal analysis in [Beaudry]."[3] *Order, RE 257, PageID# 4561.* The case was stayed pending the Sixth Circuit Court of Appeals' decision in *Huff. Order, RE 257, PageID# 4562.*

On May 2, 2019, the Sixth Circuit Court of Appeals issued a 2-1 decision in *Huff v. TeleCheck Servs., Inc.,* 923 F.3d 458 (2019) (Sutton, J.), which involved violations of a different statutory provision-the FCRA's disclosure requirement, § 1681g, under which consumer reporting agencies must, upon request by the consumer, "clearly and accurately disclose to the consumer . . . [a]ll information in the consumer's file." 15 U.S.C. § 1681g. There, TeleCheck responded to Huff's § 1681g request

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[3] As discussed below, the *Huff* case is distinguishable from this case in that it involves a different provision of the FCRA and different facts.

but omitted certain "linked information" in his file, including two transactions and six bank accounts. *Huff*, 923 F.3d at 461-62. The majority reasoned that this non-disclosure did not amount to a concrete injury because the violation never presented any risk to Huff:

> In TeleCheck's system, linked accounts play a role only when one of the accounts lists an active debt. None of the six accounts linked to Huff's driver's license has ever been associated with an outstanding debt. That means the linked data never affected, altered, or influenced a single consumer report on [Huff]. By omitting the linked accounts and missing transactions, TeleCheck at most prevented Huff from delinking those accounts from his driver's license. But because the undisclosed information was irrelevant to any credit assessment about Huff, delinking the accounts would not have had any effect.

Id. at 465-66 (internal quotation marks and citation omitted); *id.* at 468. By contrast, the dissent concluded that Huff had standing because TeleCheck's violation created "a risk of harm to a concrete interest that Congress sought to prevent-an inaccurate credit report based on bank accounts that are not his." *Id.* at 471.[4]

On September 3, 2019, TeleCheck filed a Renewed Motion for Summary Judgment for Lack of Standing on whether Beaudry satisfied the "concrete" aspect of

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[4] The dissent further opined that the majority has "declare[d] the Fair Credit Reporting Act ('FCRA') unconstitutional as exceeding Congress's power to provide a judicial remedy for statutory violations." *Id.* at 469.

the injury-in-fact element for standing under Article III, based in part on the Sixth Circuit's decision in *Huff v. TeleCheck Servs., Inc. Defs' Renewed Mot. Summ. Judg., RE 260, PageID# 4566-4569; Defs' Memo. In Supp. of Renewed Mot. Summ. Judg., RE 261, Page1D#4570-4591.* TeleCheck argued that Beaudry alleged only a "bare procedural violation" of the FCRA, which is not sufficient to meet her burden at summary judgment of demonstrating that she suffered an injury-in-fact sufficient to confer standing under *Spokeo,* and that the Sixth Circuit's former decision in *Beaudry I* had been overturned by *Spokeo. Defs' Renewed Mot. Summ. Judg., RE 260, PageID# 4567.*

In her Response, Beaudry argued, among other things, that the Sixth Circuit already ruled that Beaudry sufficiently alleged an "informational injury," and that the standing logic of *Beaudry I* remained valid *post-Spokeo*—a consumer should not have "to wait for unreasonable credit reporting procedures to result in a denial of credit or other consequential harm before enforcing her statutory rights." *Pl's Resp. in Opp. to Defs' Renewed Mot. Summ. Judg., RE 268, PageID# 4608-4627.* Beaudry also argued that neither *Spokeo* nor the Sixth Circuit's *post-Spokeo* jurisprudence required dismissal. Further, Beaudry argued it would be error to treat *Huff v. TeleCheck Servs., Inc.,* which involved a different provision of the FCRA, as dispositive. The Sixth Circuit majority in *Huff* reasoned, albeit incorrectly, that the undisclosed information at issue posed no risk of a check decline or any other adverse consequence for Huff. Whereas, in this instant case, TeleCheck's violations *"did* pose a material risk that Beaudry would suffer a check decline based on an inaccurate credit report, which is

precisely the type of harm that Congress sought to prevent." *Pl's Resp. in Opp. to Defs' Renewed Mot. Summ. Judg., RE 268, PageID# 4623.*

On August 6, 2020, the District Court issued an Opinion granting TeleCheck's Renewed Motion for Summary Judgment for Lack of Standing. *Memo. Op., RE 289, PageID# 4710-4723; Order, RE 290, PageID# 4724.* The District Court held, among other things, that standing based on a risk of imminent injury was "too speculative" because "check writing history is only one out of hundreds of variables TeleCheck considers in any given transaction," and Beaudry's "incorrect checking history presented no material risk that her 'first' check would be declined." *Memo. Op., RE 289, PageID# 4717-18.* The District Court further held that "improperly being viewed as having a non-existent or limited check-writing history in TeleCheck's internal database, did not present a material risk of real harm to the interests the FCRA was designed to prevent[,]" and likened TeleCheck's inaccurate driver's license data to "an incorrect zip code[.]" *Memo. Op., RE 289, PageID# 4722-23.* Moreover, the District Court opined that a jury could not reasonably find that Beaudry suffered an actual injury *(i.e.,* a check decline). *Memo. Op., RE 289, PageID# 4714-4716.*

In reaching its decision, the District Court overlooked the Sixth Circuit's decision in *Beaudry I,* misapplied the United States Supreme Court's *Spokeo* decision affirming long standing "standing" precedent, ignored the Ninth Circuit's decision on remand in *Spokeo* finding "standing" under the very same FCRA provision at issue in this case, misapplied Sixth Circuit precedent including *Macy,* and improperly weighed

record evidence and made inferences in the light most favorable to the moving party (Defendants).

III. Statement of Facts

A. Change in Tennessee's Driver License Numbering System

In February 2002, the state of Tennessee modified its driver license numbering system from an eight-digit format to a nine-digit format. *First Am. Class Action Compl., RE 90, PageID# 704 ¶ 46-47; Birdwell Decls., RE 244-6, PageID# 4204-4206.* For the millions of individuals who already held Tennessee driver licenses with eight digits, Tennessee merely added a leading "0," creating a nine-digit number. *First Am. Class Action Complaint, RE 90, PageID# 704, ¶ 47; Birdwell Decls., RE 244-6, PageID# 4204-4206.* For example, an individual with the license number "23456789" became "023456789."

Rather than mail out millions of new nine-digit licenses, Tennessee implemented the new format by providing physical nine-digit license numbers upon renewal. *First Am. Class Action Compl., RE 90, PageID# 754, ¶ 48; Birdwell Decls., RE 244-6, PageID# 4204-4206.*

B. TeleCheck's Business Operations

TeleCheck provides payment processing services to businesses, including check verification. *First Am. Class Action Compl., RE 90, PageID# 699-700, ¶ 21-23.* TeleCheck claims to use its proprietary databases to assist in verifying that a check writer is a reasonable credit risk for a business or to guarantee that approved checks presented to businesses for payment will be

collectable. *First Am. Class Action Compl., RE 90, PageID# 699, ¶ 21.*

TeleCheck maintains databases which contain information regarding consumers' check writing histories that are used in the verification or guarantee process. *First Am. Class Action Compl., RE 90, PageID# 700, ¶ 22.*

Procedurally, when a consumer presents a check as a method of payment, the business processes it through TeleCheck's system, typically by way of a terminal or by phone. *First Am. Class Action Compl., RE 90, PageID# 700, ¶ 24.* The check is processed by the clerk at the point of sale, who inputs identifiers unique to that consumer, primarily a driver license and/or bank number (MICR number). *First Am. Class Action Compl., RE 90, PageID# 700, ¶ 24.* The transaction is then processed through TeleCheck's systems and databases, at which time the business receives a "code" indicating whether the check is accepted with a "Code 1," declined with a "Code 4" (which according to TeleCheck means that there is evidence of an unpaid item, such as a return check, in its database regarding the customer), declined with a "Code 3" (which TeleCheck claims is a risk-based decline regarding the consumer, meaning that the consumer's check is risky and poses a risk that it will bounce), or declined with a "Code O" (call center code). *First Am. Class Action Compl., RE 90, PageID# 700, ¶ 24.*

TeleCheck admits that check-writing history stored in its databases is a very important variable in TeleCheck's "predictive scoring logic," which is used to determine whether to provide a merchant with a "Code 3" risk-based decline recommendation. *Resp. to Pl's Statement of Additional Facts, RE 275, PageID#*

4667. 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 approval code to merchants. *Resp. to Pl's Statement of Additional Facts, RE 275, PageID# 4667*. "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.[5] *Resp. to Pl's Statement of Additional Facts, RE 275, PageID# 4667; Appendix to Pl's Resp. in Opp. to Defs' Mot. Summ. Judg., RE 244, Sealed Ahles Dep., p. 30, 114:2-115:7; Appendix to Pl's Resp. in Opp. to Defs' Mot. Summ. Judg., RE 244, Sealed* Ex. 31, *Telecheck-395072-Telecheck395107, at TeleCheck395075* ("The more transactions processed and approved by TeleCheck, the higher the consumer's PNC level will climb resulting in the Consumer receiving fewer Code 3's [declines].");[6] *Appendix to Pl's Resp. in Opp. to Defs' Mot. Summ. Judg., RE 244, Sealed Ex. 31, at Telecheck-3950576* (discussion of LTD counts)).

Conversely, "[a]ppearing 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 recommendation."

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[5] "Life to date" count is the number of checks previously processed and approved by TeleCheck under a consumer's particular identifier, such as the consumer's driver license number.

[6] "PNC" is a scoring model used by TeleCheck. As more checks are approved by TeleCheck under a consumer's particular identifier, the consumer's PNC score increases, making it more likely that TeleCheck will approve subsequent transactions involving the consumer.

Memo. in Supp. of Defs' Mot. Summ. Judg. for Lack of Standing, Sealed Ahles Dep., RE 237-1, PageID# 4090; Resp. to Pl's Statement of Additional Facts, RE 275, PageID# 4667. Similarly, consumers with driver license numbers having lower LTD counts are viewed as more risky due to their limited check-writing history, which factors into TeleCheck's issuance of a Code 3 decline. *Appendix to Pl's Resp. in Opp. to Defs' Mot. Summ. Judg., RE 244, Sealed Ahles Dep., p. 30, 115:21-116:21.* The *risk* of an inaccurate credit report in the form of a Code 3 check decline is not hypothetical. Based on transactional data produced by TeleCheck alone and excluding TeleCheck's "missing" data and data TeleCheck "could not" produce, 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 system under their eight-digit Tennessee driver license number. In declining the checks of the 143,749 Tennessee consumers, TeleCheck completely ignored the check-writing histories stored under their eight-digit Tennessee driver license number. *Pl's Resp. in Opp. to Defs' Mot. Summ. Judg., RE 247, Sealed Holmes Decl., pp. 2-3, ¶¶ 5-8.*

As it relates to the change in the Tennessee driver license numbering system, at the time of the license number format change, TeleCheck's systems were set up to recognize *only* an eight-digit number as a "valid ID format" for Tennessee driver licenses. *Appendix to Pl's Resp. in Opp. to Defs' Mot. Summ. Judg., RE 244, Sealed Ahles Dep., p. 23, 86:11-87:11; p. 24, 91:23-92:4.* When businesses began processing checks and electronic fund transfers through TeleCheck using a nine-digit Tennessee driver license number, TeleCheck's

system generated an "error" message and TeleCheck automatically recommended a check decline. *Appendix to Pl's Resp. in Opp. to Defs' Mot. Summ. Judg., RE 244, Sealed Ahles Dep., p. 24, 93:25-94:16.* These declines had nothing to do with the consumer's check-writing history, and thus, the consumer reports provided by TeleCheck were inaccurate because they were based on a purportedly "invalid" ID format, despite the undisputed fact that Tennessee's nine-digit ID format was *valid.*

Although TeleCheck should have known about the format change for Tennessee driver licenses, TeleCheck ostensibly did not even learn that a format change had occurred until/our months later in June 2002. *Appendix to Pl's Resp. in Opp. to Defs' Mot. Summ. Judg., Sealed Ahles Dep., RE 244, p. 24, 91:2-92:17.* After receiving multiple complaints from merchants about an unusual number of check declines, TeleCheck "investigated" and determined that Tennessee had changed its ID format to a nine-digit format. At that point, TeleCheck changed its systems so that both eight-digit and nine-digit numbers were "valid ID formats" for Tennessee driver licenses, but it did *nothing else.* Specifically, TeleCheck did nothing to associate leading "0" nine-digit numbers with the check writing histories stored in its systems under the corresponding eight-digit numbers of Tennessee consumers. In fact, according to TeleCheck's position in this case, TeleCheck still did not know that Tennessee had simply added a leading "0" to otherwise identical eight-digit numbers for millions of Tennessee consumers. *Appendix to Pl's Resp. in Opp. to Defs' Mot. Summ. Judg., RE 244-2, Ahles Dep. Excerpts, PageID# 4151-4161.*

The flaw in TeleCheck's system is simply egregious. Devoid of any logic, TeleCheck's systems interpret the leading "0" nine-digit numbers as *brand new numbers,* un-associated with any check writing history, and individuals presenting nine-digit ID numbers beginning with a leading "0" were and are processed through TeleCheck inaccurately as first-time check writers upon the initial presentation of their nine-digit license to a merchant at the point of sale, and thereafter, as check writers with limited check-writing history in subsequent transactions processed through TeleCheck. *Appendix to Pl's Resp. in Opp. to Defs' Mot. Summ. Judg., RE 244, Sealed Ahles Dep., RE 244, p. 38, 147:21-25.* In short, TeleCheck's procedures (or–better put, lack thereof) were and are woefully inadequate (unreasonable) resulting in widespread inaccurate reports due to TeleCheck's failure to account for this slight change in format for Tennessee driver licenses.

To date, TeleCheck has done nothing to associate, link, or combine information stored in its systems under Tennessee consumers' eight-digit and nine-digit numbers. *First Am. Class Action Compl., RE 90, PageID# 707, ¶ 60.* Thus, when transactions are processed using the nine-digit number, TeleCheck completely ignores the history under the eight-digit number when issuing consumer reports recommending that a business accept or decline a check, and vice versa. As discussed below, TeleCheck's systemic failure to associate, link, or combine check writing histories violates 15 U.S.C. § 1681e(b). Put simply, TeleCheck fails to follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the consumer report relates. This exposed Beaudry, along with over 1.4 million other

similarly situated Tennessee consumers, to a material risk of harm. *First Am. Class Action Compl., RE 90, PageID# 695-722, ¶ 60.*

C. Relevant Provisions of the FCRA

As a check verification company, TeleCheck is a "nationwide specialty consumer reporting agency" under the FCRA. *First Am. Class Action Compl., RE 90, PageID# 705, ¶ 50* 15 U.S.C. § 1681a(w)(3). When a transaction is processed by a business through TeleCheck's systems, TeleCheck is providing a "consumer report" as defined by the FCRA.[7]

Under the FCRA, TeleCheck must follow reasonable procedures to assure maximum possible accuracy of consumer reports that it prepares and provides to merchants about check writers. 15 U.S.C. § 1681e(b). Section 1681e(b) provides that "[w]henever a consumer reporting agency prepares a consumer report it shall follow reasonable procedures to assure maximum

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[7] Under the FCRA, a "consumer report" is defined as "any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility" for: a) credit or insurance to be used primarily for personal, family, or household purposes; b) employment purposes; or c) any other purpose authorized under 15 U.S.C. § 1681b. *See also First Am. Class Action Compl., RE 90, PageID# 705-706, ¶ 51.* Under 15 U.S.C. § 1681b, one of the authorized purposes listed is in connection with a business transaction initiated by the consumer, which is applicable here when a consumer presents a check as a form of payment for goods or services.

possible accuracy of the information concerning the individual about whom the report relates."

D. TeleCheck's Transactional History for Beaudry

TeleCheck's records show that Beaudry's first transaction processed with her nine-digit Tennessee driver's license number occurred on December 27, 2005. *Appendix to Pl's Resp. in Opp. to Defs' Mot. Summ. Judg., RE 244, Sealed Ahles Dep., p. 33, 127:5-12.* However, TeleCheck admits that the transactional data for the entire calendar year of 2004, all of February 2006, and 10 days in August 2006 are missing. *Appendix to Pl's Resp. in Opp. to Defs' Mot. Summ. Judg., RE 244, Sealed Ahles Dep., p. 4, 10:21-27:5; id. at Sealed Ex. 4; Memo. In Supp. of Defs' Mot. Summ. Judg., RE 123-1, Decl. of Daniel Ahles (Ahles Decl.), ¶ 14).*[8]

Beaudry testified that her checks had been declined in the past. *Appendix to Pl's Resp. in Opp. to Defs' Mot. Summ. Judg., RE 244-3, Depo. of Cheryl Beaudry (Beaudry Dep.), PageID# 4163-4167.*

Although Beaudry was not a first-time check writer, TeleCheck's systems viewed her as such, ignoring Beaudry's positive check writing history stored under her eight-digit driver license number and its associated "life to date" count and PNC score. *Appendix to Pl's Resp. in Opp. to Defs' Mot. Summ. Judg., RE 244, Sealed*

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[8] The missing data is significant because TeleCheck processed *hundreds of millions* of transactions each year between 2002 and 2010. During 2004 alone, TeleCheck processed over 441 million check transactions, which TeleCheck has completely lost. Similarly, for 2006, TeleCheck has lost approximately 443,000 check transactions. *Appendix to Pl's Resp. in Opp. to Defs' Mot. Summ. Judg., RE 248, Sealed Ex. 8.*

Ahles Dep., pp. 33, 127:13-128-20. As TeleCheck admits, being viewed as a first time check writer increases the risk of a Code 3 decline. *Appendix to Pl's Resp. in Opp. to Defs' Mot. Summ. Judg., RE 244, Sealed Ahles Dep., p. 56, 218:18-219:6.* Moreover, limited check-writing history also increases the risk of a Code 3 decline. *Appendix to Pl's Resp. in Opp. to Defs' Mot. Summ. Judg., RE 244, Sealed Ahles Dep., p. 38, 147:21-25.*

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 Tele-Check's procedures are unreasonable–TeleCheck gave Beaudry "preferred status" in 2010 to prevent her from receiving a check decline.[9] Once TeleCheck gave Beaudry "preferred status," it was impossible for Beaudry to receive a Code 3 decline regardless of how much of a risk she posed to a merchant to bounce a check. *Appendix to Pl's Resp. in Opp. to Defs' Mot. Summ. Judg., Sealed Ahles Dep., RE 244, p. 39, 151:13-152:20.* This begs the question—why would TeleCheck have placed Beaudry on "preferred status" had it not acknowledged the substantial risk that she would receive a check decline? Simply put, TeleCheck's "preferred status" placement is yet just another example of TeleCheck's business practice of implementing easy and arbitrary procedures, rather than reasonable and accurate procedures.

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[9] Although TeleCheck invoked the attorney-client privilege when asked the specific reasoning for changing Beaudry's status, the record reveals that whether to give a consumer "preferred status" is a business decision. *Appendix to Pl's Resp. in Opp. to Defs' Mot. Summ. Judg., RE 244, Sealed Ahles Dep., p. 41, 159:15-161:22.*

IV. Summary of Argument

This Court should reverse the District Court's Order. First, the District Court misapplied *Spokeo,* which merely reaffirmed long-standing precedent, including as articulated in *Beaudry I,* that informational injuries may be cognizable "concrete" injuries. Second, the District Court erroneously held that TeleCheck's systemic failure to associate, link, or combine a consumer's eight-digit and nine-digit Tennessee driver license number information did not give rise to an "informational injury" under *Spokeo.* Third, the District Court improperly held that TeleCheck's systemic violations did not give rise to a risk of harm sufficient to establish "concreteness."

In sum, *Spokeo* did not change the law resulting in Federal Courts' doors being closed to Beaudry and millions of other Tennessee consumers to redress TeleCheck's continuing violations of 15 U.S.C. § 1681 e(b). TeleCheck's obligation to "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), includes implementing a reasonable procedure *(e.g.,* a simple algorithm) to treat each Tennessee consumer as *one* distinct person. It is, put simply, unreasonable and inaccurate to fictitiously treat one person as *two* distinct persons based on Tennessee merely adding a leading zero to each Tennessee consumer's driver license number, which is precisely what TeleCheck has done and continues to do.

Finally, the District Court erred in granting summary judgment by finding that there was no genuine issue as to any material fact that Beaudry did not receive a check decline when one or more of her checks

were processed by TeleCheck using her nine-digit license number. First, it is undisputed that Beaudry received check declines in the past, and the issue is simply whether these check declines involved one or more transactions processed by TeleCheck using her nine-digit license number. Second, it is undisputed that there is missing transactional data involving millions of checks processed through TeleCheck's databases and systems for the entire calendar year of 2004, all of February 2006, and 10 days in August 2006. A reasonable juror *could* conclude that transactions involving Beaudry were contained in the missing TeleCheck data, including a transaction which resulted in a check decline. Third, it is undisputed that TeleCheck has experienced "phantom declines" in the past, which simply put, involves check declines which TeleCheck cannot locate in their databases and systems.

In reaching its decision, while first articulating the appropriate legal standard for analyzing Defendants' Motion for Summary Judgment, the District Court completely disregards the legal standard by engaging in fact finding, weighing of evidence and determining the truth of factual matters, and further, fails to review all of the evidence, facts and inferences in the light most favorable to the non-moving party—Beaudry. Instead, the District Court *dismisses* Beaudry's facts summarily and construes evidence, facts and inferences in the light most favorable to the moving parties—Defendants, and then *dismisses* Beadury's case. Applying the appropriate legal standard, a genuine issue of material fact exists on whether one or more of Beaudry's checks were declined by TeleCheck when processed using Beaudry's nine-digit license number.

In sum, Beaudry has Article III standing under the "informational injury" analysis, under the "risk of harm" analysis, and under the "actual harm" analysis. A finding in favor of Beaudry under any of the aforementioned means that Beaudry and the putative class can hold TeleCheck accountable under the law.

V. Standard of Review

This Court reviews an order granting or denying summary judgment *de novo,* and accords no deference to the trial court's determination. *Tompkins v. Crown Corr., Inc.,* 726 F.3d 830, 837 (6th Cir. 2013); *Maggart v. Almany Realtors, Inc.,* 259 S.W.3d 700, 703 (Tenn. 2008) (internal citations omitted). A grant of summary judgment is affirmed "where the record as a whole could not lead a rational trier of fact to find for the non-moving party." *Cummings v. City of Akron,* 418 F.3d 676, 682 (6th Cir. 2005) (citation, internal quotation marks, and alterations omitted).

VI. Law and Argument

A. The District Court Erred by Holding That Beaudry Lacks Standing Because the "Informational Injury" and Risk of Harm Caused by TeleCheck's Systemic Violations Satisfies "Concreteness."

1) Spokeo Reaffirmed Long Standing Precedent That Procedural Violations Can Alone Be Concrete.

Article III requires, among other things, an injury-in-fact. *Lujan v Defs. Of Wildlife,* 504 U.S. 555, 560-61; 112 S. Ct. 2130; 119 L.Ed.2d 351 (1992) (internal citations and quotations omitted). The injury-in-fact

element requires a plaintiff to allege an injury that is both "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Friends of the Earth, Inc. v. Laidlaw Envt'l Services (TOC), Inc.,* 528 U.S. 167, 181; 120 S. Ct. 693, 704; 145 L.Ed.2d 610 (2000).

The Supreme Court in *Spokeo* reaffirmed the above long standing "standing" principles. In *Spokeo,* plaintiff alleged that Spokeo disseminated inaccurate information about him in violation of § 1681e(b) of the FCRA. *Id.* at 1544-46. The trial court held that plaintiff failed to properly plead an injury-in-fact. *Id.* at 1542. The Ninth Circuit reversed, holding that plaintiff had standing because he alleged a violation of *"his* statutory rights, not just the rights of other people," and because his "personal interests in the handling of his credit information [were] individualized rather than collective." *Id.* at 1546 (quoting *Robins v. Spokeo, Inc.,* 742 F.3d 409, 413 (9th Cir. 2014) (emphasis in original)). The Ninth Circuit also held that a "violation of a statutory right is usually a sufficient injury in fact to confer standing." *Id.*

The Supreme Court reversed, holding that "Congress cannot erase Article Ill's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing." *Id.* at 1547-48 (citations and punctuation omitted). To establish injury-in-fact, a plaintiff must show that he or she suffered "an invasion of a legally protected interest" that is "concrete and particularized[.]" *Id.* at 1548. The Supreme Court explained that "[a] 'concrete' injury must be *'de facto;'* that is, it must actually exist." *Id.* (internal citation omitted). The Supreme Court provided two guiding principles for determining concreteness,

consistent with long standing precedent. First, courts should "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.* at 1549. Second, courts should consider the judgment of Congress, since "Congress is well positioned to identify intangible harms that meet minimum Article III requirements." *Id*. The Court gave an example of an FCRA violation involving the dissemination of false information that would likely not constitute a concrete injury–finding it "difficult to imagine how the dissemination of an incorrect zip code, without more, *could* work any concrete harm" that Congress sought to prevent. *Id.* at 1550 (emphasis added).

Although a plaintiff cannot allege "a bare procedural violation, divorced from any concrete harm," to satisfy the injury-in-fact requirement when alleging a statutory violation, the Supreme Court in *Spokeo* explained that

> *[t]his does not mean, however, that the risk of real harm cannot satisfy the requirement of concreteness. See, e.g., Clapper v. Amnesty lnt'l USA*, 568 U.S. ___ ___, 133 S. Ct. 1138, 185 L.Ed.2d 264. For example, the law has long permitted recovery by certain tort victims even if their harms may be difficult to prove or measure. *See, e.g.,* Restatement (First) of Torts §§ 569 (libel), 570 (slander *per se)* (1938). 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. *See Federal Election Comm'n v. Akins,* 524 U.S. 11, 20-25, 118 S. Ct. 1777, 141 L.Ed.2d 10 (1998) (confirming that a group of voters' *"inability to obtain information"* that Congress had decided to make public is a sufficient injury in fact to satisfy Article III); *Public Citizen v. Department of Justice,* 491 U.S. 440, 449, 109 S. Ct. 2558, 105 L.Ed.2d 377 (1989) (holding that two advocacy organizations' failure to obtain information subject to disclosure under the Federal Advisory Committee Act "constitutes a sufficiently distinct injury to provide standing to sue").

Id. at 1549-50 (emphasis added). Thus, *Spokeo* reaffirmed the Supreme Court's holdings in *Akins* and *Public Citizen* that the denial of information required by statute may be sufficient, in and of itself, to confer standing, and plaintiff need not allege "any *additional* harm" beyond the statutory violation in certain instances. *Id.*

To be sure, *Spokeo* is also consistent with the Sixth Circuit's logic in *Beaudry I*—the FCRA "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." *Beaudry v. TeleCheck,* 579 F.3d at 705.[10]

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[10] Judge Sutton continues to treat his *Beaudry I* decision as good law, at least his conclusion that Beaudry suffered a particularized injury. *See Brintley v. Aeroquip Credit Union,* 936 F.3d 489, 493 (6th Cir. 2019) (Sutton, J.).

2) The Sixth Circuit's *Post-Spokeo* Decisions Also Recognize That Procedural Violations Can Alone Constitute Concrete Injury.

The Sixth Circuit has issued a number of *post-Spokeo* standing decisions. In *Hagy v. Demers & Adams,* 882 F.3d 616 (6th Cir. 2018), the plaintiffs received a letter sent on behalf of a mortgage servicing company, informing them that their debt was forgiven. *Id.* at 618-19. This was "good news," but technically violated the Fair Debt Collection Practices Act ("FDCPA") because the letter did not say that it was from a debt collector. *Id.* at 618. The Sixth Circuit held that the plaintiffs 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). Stated differently, a violation in the context of *forgiving* debt is not connected to the risk of abusive *collection* practices that Congress sought to prevent. *See Robins,* 867 F.3d at 1116 (looking to "the *nature* of the specific alleged [violations] to ensure that they raise a real risk of harm to the concrete interests that" Congress sought to protect).

By contrast, in *Macy v. GC Services Limited Partnership,* 897 F.3d 747 (6th Cir. 2018), another case involving the FDCPA, a collection agency sent letters informing the plaintiffs that they must dispute their debt within 30 days, but the letters did not mention that disputes must be in writing. *Id.* at 751. A consumer who contests a debt only by phone loses certain protections. *Id.* at 758. Consistent with *Spokeo,* the Sixth Circuit recognized that "a direct violation of

a specific statutory interest recognized by Congress, standing alone, may constitute a concrete injury without the need to allege any additional harm." *Id.* at 745. Under *Spokeo,* a violation is enough when: (1) "Congress conferred the procedural right to protect a plaintiff's concrete interests;" and (2) "the procedural violation presents a material risk of real harm to that concrete interest." *Id.* at 756. The *Macy* plaintiffs met this test because, by failing to disclose the writing requirement, the collection agency placed the plaintiffs "at a materially greater risk of falling victim to abusive debt collection practices," which is precisely the concrete interest that Congress sought to protect. *Id.* at 758 (internal quotation marks omitted).

In *Huff v. TeleCheck Servs., Inc.,* 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 plaintiff:

> In TeleCheck's system, linked accounts play a role only when one of the accounts lists an active debt. None of the six accounts linked to [plaintiff]'s driver's license has ever been associated with an outstanding debt. That means the linked data never affected, altered, or influenced a single consumer report on [plaintiff]. By omitting the linked accounts and missing transactions, TeleCheck at most prevented [plaintiff] from delinking those accounts from his driver's license. But because the undisclosed information was irrelevant to any credit assessment about [plaintiff],

> delinking the accounts would not have had any effect.

Id. at 465-66 (internal quotation marks and citation omitted). The Sixth Circuit majority in *Huff* did not perceive any connection between what it viewed as a "seemingly harmless procedural violation" that carried "no actual consequences or real risk of harm" and "the problem [that Congress sought] to resolve" with the FCRA. *Id.* at 466-67. On this basis, the *Huff* majority distinguished *Macy,* where "Congress did not trespass on Article III because the statutory violation [in *Macy]* was closely connected to real economic harm" that Congress sought to prevent. *Id.* at 468.

By contrast, the dissent in *Huff* concluded that Huff had standing because TeleCheck's violation created "a risk of harm to a concrete interest that Congress sought to prevent—an inaccurate credit report based on bank accounts that are not his." *Id.* at 471. Notably, the dissent also expressed concern that the majority had "declare[d] the Fair Credit Reporting Act ('FCRA') unconstitutional as exceeding Congress's power to provide a judicial remedy for statutory violations." *Id.* at 469.

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. Nor did it call into question or abrogate the prior Sixth Circuit ruling in this very case, *Beaudry I. See Beaudry v. TeleCheck Services, Inc.,* 579 F.3d at 705 ("[T]he Act [FCRA] 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.").

3) TeleCheck's Failure to Associate, Link, or Combine Consumers' Eight-Digit and Nine-Digit Tennessee Driver's License Numbers in its Systems Is an "Informational Injury" Satisfying "Concreteness."

i. The FCRA's Purpose.

Congress enacted the FCRA out of concerns about abuses in the consumer reporting industry, based on recognition of a need for reasonable procedures to promote accuracy and fairness in credit reporting. 15 U.S.C. § 1681; *Dalton v. Capital Associated Indus., Inc.,* 257 F.3d409, 414 (4th Cir. 2001). "Congress found that in too many instances [consumer reporting] agencies were reporting inaccurate information," often without consumers' knowledge. *Id.; see also* S. Rep. No. 91-157, at 3-4 (1969) (describing "inability" of consumers to discover errors). And, prior to the FCRA, even if consumers learned of an error, they often had "difficulty in correcting inaccurate information" because of skewed market incentives: "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 "time spent with consumers going over individual reports reduces . . .profits." 115 Cong. Rec. 2,412 (1969).

Thus, recognizing reporting agencies' "vital role" in the economy, Congress determined that consumer reporting agencies must "exercise their grave responsibilities" in a way that "ensure[s] fair and accurate credit reporting[,]" 15 U.S.C. § 1681(a), and "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. Further, Congress stated that consumer reporting agencies should "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). The provision at issue in this case is at the heart of Congress' objective: "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).

While the Sixth Circuit has not had occasion to consider this particular statutory provision *post-Spokeo,* the Ninth Circuit on remand in *Spokeo* held that § 1681e (b) protects concrete interests. *See Robins,* 867 F.3d at 1114. To be sure, "the real-world implications of material inaccuracies in [consumer] reports seem patent on their face," and "[t]he threat to a consumer's livelihood is caused by the very existence of inaccurate information in his credit report and the likelihood that such information will be important to one of the many entities who make use of such reports." *Id.* The Ninth Circuit also looked to history and the judgment of Congress: "Courts have long entertained causes of action to vindicate intangible harms caused by certain untruthful disclosures," such as defamation or libel per se, "and we respect Congress's judgment that a similar harm would result from inaccurate credit reporting." *Id.* at 1115; *see also Spokeo,* 136 S. Ct. at 1549-50 (describing history and the judgment of Congress as important

and instructive). This Court should also conclude that Congress gave consumers the right to enforce § 1681e (b) to protect concrete interests—specifically, fairness and accuracy in credit reporting.

Here, "the [alleged] procedural violation presents a material risk of real harm to that concrete interest." *Macy v. GC Servs. Ltd.,* 897 F.3d 747, 756 (6th Cir. 2018). Specifically, TeleCheck did not implement an algorithm to associate, link, or combine eight-digit number check writing histories stored in its systems with each consumer's leading zero nine-digit number, meaning that TeleCheck's system incorrectly viewed consumers with leading "0" numbers as first-time check writers, and in subsequent transactions, as check writers with limited check writing histories. *Appendix to Pl's Resp. in Opp. to Defs' Mot. Summ. Judg., RE 244, Sealed Ahles Dep., p. 38, 147:21-25.* By systematically ignoring a consumer's information in issuing consumer reports, TeleCheck failed to "follow reasonable procedures to assure maximum possible accuracy of the information" about check writers in its systems. 15 U.S.C. § 1681e(b).

ii. The District Court Erred by Holding That Beaudry Did Not Suffer an "Informational Injury."

The District Court erred by holding that "Beaudry's alleged 'injury,' namely, improperly being viewed as having a non-existent or limited check-writing history in TeleCheck's internal database, did not present a material risk of real harm to the interests the FCRA was designed to prevent[,]" and by wrongly concluding that "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." *Order, RE 289, PageID# 4722-4723.*

TeleCheck's failure to take reasonable steps to associate, link, or combine consumers' check writing history under their eight-digit Tennessee driver license numbering system affected Beaudry specifically, as there is no dispute that TeleCheck treated her as a first-time check writer in issuing a consumer report, and in subsequent transactions, as a check writer with limited check writing history. *Appendix to Pl's Resp. in Opp. to Defs' Mot. Summ. Judg., RE 244, Sealed Ahles Dep., p. 33, 127:13-128-20.* In addition to being false, treating Beaudry as a first time check writer, and in subsequent transactions as a check writer with limited check writing history, negatively influenced TeleCheck's "predictive scoring logic" used to determine whether to issue a Code 1 approval or a Code 3 decline for Beaudry. *Appendix to Pt's Resp. in Opp. to Defs' Mot. Summ. Judg., RE 244, Sealed Ahles Dep., p. 56, 218:18-219:6.* First, Beaudry lost the benefit of her good check writing history, including her "life to date" count and PNC score under her eight-digit license number, which generally increases the likelihood of an approval code. *Appendix to Pl's Resp. in Opp. to Defs' Mot. Summ. Judg., RE 244, Sealed Ahles Dep., p. 30, 114:2-115:7; id. at Sealed Ex. 31, Telecheck395075.* Second, the absence of any check writing history meant that Beaudry was viewed as more risky, which increased the likelihood of a decline code. *Memo. In Supp. of Defs' Mot. Summ. Judg. For Lack of Standing, RE 237, PageID# 4078, fn. 2;*

Appendix to Pl's Resp. in Opp. to Defs' Mot. Summ. Judg., RE 244, Sealed Ahles Dep., p. 30, 115:21-116:21, pp. 54-55, 213:8-216:20; Appendix to Pl's Resp. in Opp. to Defs' Mot. Summ. Judg., RE 244, Sealed Ahles Dep., Sealed Exs. 34 & *35.* This continued after being viewed as a first time check writer, when TeleCheck's system viewed her as a check writer with limited check writing history, again increasing the risk of a check decline.

Accordingly, TeleCheck's violation exposed Beaudry to a material risk of harm of the type that Congress sought to prevent in § 1681e(b) of the FCRA—an adverse credit determination (a check decline) based on an inaccurate credit report (in which Beaudry was falsely portrayed as a first-time check writer and thereafter as having limited check writing history) caused by TeleCheck's failure to implement a reasonable procedure (a simple algorithm). *See Macy,* 897 F.3d at 760 ("[T]he harm Plaintiffs allege—being misled by a debt collector about the rights the FDCPA gives to debtors —is precisely the type of harm–abusive debt—collection practices—the FDCPA was designed to prevent.").

4) Risk of Harm Satisfies Concreteness.

The District Court misapplied the law and ignored the facts in holding that Beaudry's "risk-of-harm theory of standing is far too speculative to satisfy Article III's injury-in-fact requirement." *Memo. Op., RE 289, PageID# 4717.* Ignoring that it was TeleCheck's failure to implement reasonable procedures under 15 U.S.C. § 1681e(b) that caused Beaudry to be inaccurately viewed as a first-time check writer upon the initial presentation of her nine-digit driver license to a merchant at the point of sale in the first instance, and to be viewed as a check writer with limited check writing

history in subsequent transactions, the District Court actually found that "[i]t logically follows that after Beaudry received one check approval associated with her nine-digit license number, she developed a positive check-writing history that made it even more likely that TeleCheck would approve her future checks." *Memo. Op., RE 289, PageID# 4718.* The District Court also found that "if TeleCheck issued an approval code when Beaudry had an LTD count of *zero,* then it would be unreasonable to infer that she faced an *imminent* risk of a subsequent Code 3 decline based on her lack of check-writing history." *Memo. Op., RE 289, PageID# 4718.*

In yet another observation divorced from fact, the District Court reasoned that Beaudry "has not offered any evidence that TeleCheck published or disseminated her inaccurate information to a third party[,]" and, further, that "Beaudry's erroneous check-writing history 'never made a difference in any credit determination, meaning its continued existence in TeleCheck's system did not harm [her] concrete economic interests.'" *Memo. Op., RE 289, PageID# 4723.* These assertions ignore the very foundation of TeleCheck's business model. When TeleCheck makes a recommendation (*e.g.* Code 1 approval or Code 3 decline) to merchants at the point of sale (issues a consumer report), TeleCheck relies on information stored in its systems. In this instant case, TeleCheck issued consumer reports to merchants about Beaudry and over 1.4 million Tennessee consumers based on unreasonably, inaccurately and fictitiously treating each person as *two* distinct persons simply because Tennessee added a leading zero to each Tennessee consumer's driver license number. Moreover,

the District Court analyzed the risk of harm by TeleCheck's practices in hindsight; namely, with the benefit of knowing that Beaudry received a check approval associated with her nine-digit license number notwithstanding TeleCheck's violations and notwithstanding the "missing" data. The Court completely ignores TeleCheck's business model, in which the chance of a decline decreases as the "life to date" counts and PNC scores increase. The District Court also improperly relied on TeleCheck giving Beaudry "preferred status" to prevent her from receiving a check decline to find that any risk to Beaudry "was negligible[.]" *Memo. Op., RE 289, PageID# 4718.*

In sum, the District Court did not perform a *risk* analysis; it performed a *harm* analysis. Yet *Spokeo* (and other long standing precedent) is clear: a violation connected to the *risk* of real harm that Congress sought to prevent constitutes concrete injury and additional harm need not be shown. *Spokeo,* 136 S. Ct. at 1549.

B. The District Court Erred by Holding That Beaudry Lacks Standing Because She Could Not Prove "Actual Injury" in the Form of a Check Decline.

The District Court erred in granting summary judgment by finding that there was no genuine issue as to any material fact that Beaudry did not receive a check decline when one or more of her checks were processed by TeleCheck using her nine-digit license numbers.

First, it is undisputed that Beaudry received check declines in the past. *Appendix to Pl's Resp. in Opp. to*

Defs' Mot. Summ. Judg., RE 244-3, Beaudry Dep., PageID# 4163-4167.[11]

Second, as to the issue of whether Beaudry's check declines involved one or more transactions processed by TeleCheck using her nine-digit license number, while TeleCheck's records show that Beaudry's first transaction processed with her nine-digit Tennessee driver's license number occurred on December 27, 2005, the Court *assumes* that TeleCheck's records are accurate. Reviewing all the evidence, facts and inferences in the light most favorable to Beaudry, however, genuine issues of material fact exist on not only when Beaudry's nine-digit driver license was first processed by TeleCheck, but also whether she received a check decline. TeleCheck admits that the transactional data for the entire calendar year of 2004, all of February 2006, and 10 days in August 2006 are missing. *Appendix to Pl's Resp. in Opp. To Defs' Mot. Summ. Judg., RE 244, Sealed Ahles Dep., p. 4, 10:21-27:5; id. at Sealed Ex. 4; Memo. In Supp. of Defs' Mot. Summ. Judg., RE 123-1, Decl. of Daniel Ahles (Ahles Decl.), PageID# 1102-1111, ¶ 14.* This is significant because TeleCheck processed over 441 million check transactions in 2004, which TeleCheck has completely lost. Similarly, for 2006, TeleCheck has lost approximately 443,000 check transactions. *Appendix to Pl's Resp. in Opp. to Defs' Mot. Summ. Judg., RE 248, Sealed Ex. 8.*

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[11] While the District Court notes that Beaudry's testimony was given in another case, this is irrelevant for purposes of Defendants' Motion or the District Court's ruling. Unfortunately, Beaudry died before her deposition was taken in this case.

Further, it is undisputed that TeleCheck has experienced "phantom declines" in the past, which simply put, involves check declines which TeleCheck cannot locate in their databases and systems. *Ex. 4 to Pl's Resp. in Opp. to Defs' Mot. Summ. Judg., RE 249.*

In reaching its decision, the District Court acknowledges the appropriate legal standard—namely, that summary judgment is appropriate only where there is no genuine dispute as to any material fact and the movant is entitled to a judgment as a matter of law. Further, the District Court acknowledges that the Court must review all the evidence, facts and inferences in the light most favorable to the party opposing the motion. *Memo Op., RE 289, PageID# 4712-4713.* Finally, the District Court acknowledges that it is not permitted to "weigh the evidence . . . or determine the truth of the matter." *Memo Op., RE 289, PageID# 4713.*

Afterwards, however, the District Court does just the opposite. The District Court ignores that there are genuine disputes to material facts. Further, the District Court fails to review all the evidence, facts and inferences in the light most favorable to the non-moving party–Beaudry. Finally, the District Court is heavily involved in improper fact finding and weighing of the evidence.

Applying the appropriate legal standard, a genuine issue of material fact exists on whether one or more of Beaudry's checks were declined by TeleCheck when processing Beaudry's nine-digit check number, and therefore, Beaudry has Article III standing. In summarily dismissing Beaudry's facts stated above regarding undisputed check declines, lost data and "phantom" declines, the District Court holds "there is

not enough evidence from which such an inference [a check decline by TeleCheck] can be made." *Memo Op., RE 289, PageID# 4714-4715.* As to the issue of missing data, the District Court concludes that the missing data from 2004 is irrelevant because "there is no evidence that Beaudry presented her nine-digit driver's license to a TeleCheck merchant before December 27, 2005." *Memo Op., RE 289, PageID# 4715.* This, of course, *assumes* that TeleCheck's records are accurate and that, in fact, Beaudry did not present her nine-digit license to a TeleCheck merchant before December 27, 2005. Based on the evidence and facts taken in the light most favorable to Beaudry, an inference could be drawn to the contrary by a jury based on TeleCheck's shoddy record keeping.

Second, as to the missing data from 2006, the District Court holds that "without evidence that Defendants destroyed data or acted with a culpable state of mind, which is not alleged, Beaudry is not entitled to an adverse inference that the missing data contains a Code 3 check decline for Beaudry." *Memo Op., RE 289, PageID# 4715.* In so doing, the District Court shifts the burden to Beaudry to create an "adverse inference," when to the contrary, Beaudry is entitled have the evidence, facts and inferences reviewed in her favor under the summary judgment standard.

Third, in concluding that Beaudry's testimony regarding check declines was "vague," the District Court engaged in the very fact finding and weighing of evidence prohibited at the summary judgment stage. *Memo Op., RE 289, PageID# 4715-4716.*

Finally, as to "phantom" declines, the District Court accepts TeleCheck's interpretation of what constitutes a "phantom" decline, and rejects Beaudry's interpretation.

Memo Op., RE 289, PageID# 4716. In so doing, the District Court failed to review all evidence, facts and inferences in the light most favorable to the non-moving party–Beaudry.

Based on the foregoing, the District Court ignored the legal standard applicable to summary judgment motions. In taking the evidence, facts and inferences in the light most favorable to Beaudry, a jury could conclude that one or more of her checks were declined by TeleCheck using Beaudry's nine-digit license number. And, certainly, it was inappropriate for the District Court to, put simply, accept TeleCheck's story as "the truth" despite TeleCheck's record-keeping issues and other evidence sufficient to establish a genuine issue of material fact on whether Beaudry suffered a check decline under her nine-digit Tennessee license number. The District Court's decision was in error.

C. The District Court Misapplies the Law, Defeats the Intent of the FCRA, and Improperly Precludes Entry to Federal Courts.

By holding that Beaudry lacks standing to remedy TeleCheck's failure to follow reasonable procedures to assure maximum possible accuracy of information, the District Court undermines the Legislature's intent to require consumer reporting agencies to implement reasonable procedures to assure maximum possible accuracy of information as to consumer reports under the FCRA and to allow lawsuits for statutory damages to address widespread violations—in this case, a wide-spread violation affecting over 1.4 million Tennessee consumers. Because class actions are a common vehicle for seeking redress under consumer protection statutes,

the District Court's holding thwarts consumers' ability to rectify rampant[12] abuses by consumer reporting agencies. *See Allard v. SCI Direct, Inc.,* No. 16-CV-01033, 2017 WL 3236448 (M.D. Tenn. Apr. 15, 2016) (copy attached) ("The denial of a plaintiff class sometimes defeats the case as a practical matter because the stakes are too small and the litigation costs are too high for the individual plaintiff to go forward."). Thus, affirming the District Court's erroneous holding would reward unreasonable and inaccurate consumer reporting, and prevent consumers from obtaining entry to Federal Courts. To be sure, TeleCheck does not have a sufficient economic incentive to account for the Tennessee license number change unless it is held accountable under the law and Tennessee consumers should be able to hold TeleCheck accountable for the wide-spread violation of the FCRA at issue through this putative class action.

VII. Conclusion

The District Court erred in granting Defendants' Motion. Plaintiff/Appellant Beaudry requests that this Court reverse the District Court's Order and remand the case for further proceedings.

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[12] Inaccurate consumer reports are a widespread problem for American consumers. *See, e.g.,* REPORT TO CONGRESS UNDER SECTION 319 OF THE FAIR AND ACCURATE CREDIT TRANSACTIONS ACT OF 2003, FEDERAL TRADE COMMISSION, 21-22 (Jan. 2015), available at https://www.ftc.gov/system/files/documents/reports/section-319-fair-accurate-credit-transactions-act-2003-sixth-interim-final-report-federaltrade/150121factareport.pdf.

Respectfully submitted,

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