

No. 17-____

IN THE
Supreme Court of the United States

THE HERTZ CORPORATION AND
DOLLAR THRIFTY AUTOMOTIVE GROUP, INC.,

Petitioners,

v.

SUPERIOR COURT FOR THE CITY AND COUNTY OF
SAN FRANCISCO; PETER LEE; AND LATONYA CAMPBELL,

Respondents.

**On Petition for Writ of Certiorari to the
California Court of Appeal,
First Appellate District**

PETITION FOR WRIT OF CERTIORARI

ROBERT A. DOLINKO

Counsel of Record

CHARLES M. DYKE

MATTHEW J. FRANKEL

NIXON PEABODY LLP

One Embarcadero Center,

Suite 1800

San Francisco, CA 94111

(415) 984-8200

rdolinko@nixonpeabody.com

cdyke@nixonpeabody.com

Counsel for Petitioners

December 12, 2017

QUESTION PRESENTED

Whether a class action seeking statutory damages for alleged procedural violations of the Fair Credit Reporting Act, 15 U.S.C. §§ 1681-1681x, can proceed in state court where plaintiffs did not suffer any concrete, real-world injury-in-fact.

**PARTIES TO THE PROCEEDINGS
AND RULE 29.6 DISCLOSURE STATEMENT**

The Plaintiffs and Real Parties in Interest in the proceedings below, and the Respondents here, are Peter Lee and Latonya Campbell, both of whom are individuals. The California Superior Court in and for the County of San Francisco was also a Respondent in the writ proceeding below.

The Defendants and Petitioners in the proceedings below, and the Petitioners here, are The Hertz Corporation and Dollar Thrifty Automotive Group, Inc.

Pursuant to Supreme Court Rule 29.6, The Hertz Corporation makes the following disclosures concerning parent entities and publicly held corporations that own 10% or more of its stock: Hertz Global Holdings, Inc., a publicly held corporation, is the direct parent company and 100% owner of The Hertz Corporation.

Pursuant to Supreme Court Rule 29.6, Dollar Thrifty Automotive Group, Inc. makes the following disclosures concerning parent entities and publicly held corporations that own 10% or more of its stock: Hertz Global Holdings, Inc., a publicly held corporation, is the direct parent company and 100% owner of Dollar Thrifty Automotive Group, Inc.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED.....	i
PARTIES TO THE PROCEEDINGS AND RULE 29.6 DISCLOSURE STATEMENT.....	ii
TABLE OF AUTHORITIES.....	vi
INTRODUCTION.....	1
OPINIONS AND ORDERS BELOW	4
STATEMENT OF JURISDICTION.....	5
PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS.....	5
STATEMENT OF THE CASE	8
A. The Fair Credit Reporting Act	8
B. Plaintiffs’ Allegations and FCRA Claims	9
C. The Federal Court Dismisses Plaintiffs’ FCRA Claims for Lack of Injury	10
D. Following Remand, the Superior Court Denies Hertz’s Demurrer to the SAC, the California Court of Appeal Denies Hertz’s Petition for Writ of Mandamus, and the California Supreme Court Denies Review.....	13
REASONS FOR GRANTING THE PETITION...	14

TABLE OF CONTENTS—Continued

	Page
I. THIS COURT SHOULD GRANT REVIEW BECAUSE ALLOWING NO-INJURY FCRA CLAIMS IN STATE COURT RAISES SERIOUS CONSTITUTIONAL QUESTIONS AS TO CONGRESS' POWER TO AUTHORIZE SUCH CLAIMS AND GUARANTEES NON-UNIFORM APPLICATION OF THE FCRA AMONG FEDERAL AND STATE COURTS	14
II. THIS COURT SHOULD GRANT REVIEW TO CONFIRM THAT <i>LEXMARK'S</i> ZONE-OF-INTERESTS TEST MUST BE APPLIED TO CLAIMS ASSERTING FCRA PROCEDURAL VIOLATIONS AND CANNOT BE SATISFIED ABSENT ACTUAL INJURY	19
III. REVIEW IS NECESSARY TO AVOID FORUM SHOPPING, THE PURPOSEFUL ASSERTION OF NO-HARM CLASS ACTIONS, AND THE DISPARATE DISPOSITION OF FCRA CLAIMS BY STATE COURTS	20
CONCLUSION	25
APPENDIX	
APPENDIX A: ORDER, California Supreme Court (September 13, 2017)	1a
APPENDIX B: ORDER, California Court of Appeals (June 22, 2017)	2a

TABLE OF CONTENTS—Continued

	Page
APPENDIX C: ORDER, California Superior Court (April 5, 2017)	3a
APPENDIX D: CERTIFICATE OF ELECTRONIC SERVICE, California Superior Court (April 5, 2017)	15a
APPENDIX E: CORRECTED SECOND AMENDED COMPLAINT FOR VIOLATIONS OF THE FCRA, California Superior Court (April 12, 2017)	16a
APPENDIX F: OPINION, U.S. District Court, Northern District of California (December 2, 2016).....	52a
APPENDIX G: TABLE, WESTLAW Searches (June 1, 2017)	69a
APPENDIX H: LIST, WESTLAW Results for “Fair Credit Reporting Act” (June 1, 2017)...	73a
APPENDIX I: TABLE, California FCRA Cases	85a
APPENDIX J: Joanna Shepherd, <i>An Empirical Survey of No-Injury Class Actions</i> , Emory Legal Studies Research Paper No. 16-402 (2016)	110a

TABLE OF AUTHORITIES

CASES	Page(s)
<i>Agency Holding Corp. v. Malley-Duff & Associates, Inc.</i> , 483 U.S. 143 (1987).....	18
<i>Albu v. Home Depot, Inc.</i> , 2016 U.S. Dist. LEXIS 185557 (N.D. Ga. Nov. 2, 2016), report and recommendation adopted, 2017 U.S. Dist. LEXIS 49918 (N.D. Ga. Mar. 20, 2017)	23
<i>Atlanta Taxicab Co. Owners Ass’n v. City of Atlanta</i> , 638 S.E.2d 307 (Ga. 2006)	18
<i>Baird v. City of Burlington</i> , 136 A.3d 223 (Vt. 2016)	18
<i>Baker v. Microbilt Corp.</i> , 2016 U.S. Dist. LEXIS 137946 (M.D. Pa. Oct. 3, 2016)	23
<i>Bandini Petroleum Co. v. Superior Court of State of California in and for Los Angeles County</i> , 284 U.S. 8 (1931).....	5
<i>Boergert v. Kelly Services, Inc.</i> , 2016 U.S. Dist. LEXIS 157042 (W.D. Missouri Nov. 14, 2016), <i>vacated in part on other grounds</i> , 2017 U.S. Dist. LEXIS 13714 (W.D. Mo. Feb. 1, 2017)	23
<i>Campbell v. Adecco USA, Inc.</i> , 2017 U.S. Dist. LEXIS 61515 (W.D. Mo. Apr. 24, 2017).....	23

TABLE OF AUTHORITIES—Continued

	Page(s)
<i>Case v. Hertz Corp.</i> , 2016 U.S. Dist. LEXIS 162097 (N.D. Cal. Nov. 21, 2016).....	23
<i>Cole v. U.S. Capital, Inc.</i> , 2003 U.S. Dist. LEXIS 7279 (N.D. Ill. Apr. 30, 2003).....	16
<i>Detter v. KeyBank N.A.</i> , 2016 U.S. Dist. LEXIS 157043 (W.D. Missouri Nov. 14, 2016).....	23
<i>Disalvo v. Intellicorp Records, Inc.</i> , 2016 U.S. Dist. LEXIS 133344 (N.D. Ohio Sept. 27, 2016).....	24
<i>Dowell v. Wells Fargo Bank, NA</i> , 517 F.3d 1024 (8th Cir. 2008).....	17
<i>Dutta v. State Farm Mutual Automobile Ins. Co., Inc.</i> , 2016 U.S. Dist. LEXIS 152850 (N.D. Cal. Nov. 3, 2016).....	23
<i>Fields v. Beverly Health & Rehab. Servs.</i> , 2017 U.S. Dist. LEXIS 29771 (D. Minn. Mar. 1, 2017).....	23
<i>Fleming v. Demeritt Co.</i> , 56 F. Supp. 376 (D. Vt. 1944)	18
<i>Franchise Tax Board of California v. Hyatt</i> , 538 U.S. 488 (2003).....	5
<i>Frankenfield v. Microbilt Corp.</i> , 2016 U.S. Dist. LEXIS 137944 (M.D. Pa. Oct. 3, 2016)	23

TABLE OF AUTHORITIES—Continued

	Page(s)
<i>Gladstone Realtors v. Vill. of Bellwood</i> , 441 U.S. 91 (1979).....	15
<i>Gomez v. United States</i> , 490 U.S. 858 (1989).....	14, 17, 20
<i>Groshek v. Time Warner Cable, Inc.</i> , 865 F.3d 884 (7th Cir. 2017).....	23
<i>Groshek v. Time Warner Cable, Inc.</i> , 2016 U.S. Dist. LEXIS 104952 (E.D. Wis. Aug. 9, 2016)	23
<i>Hopkins v. Staffing Network Holdings</i> , <i>LLC</i> , 2016 U.S. Dist. LEXIS 146485 (N.D. Ill. Oct. 18, 2016).....	23
<i>In re Michaels Stores, Inc.</i> , 2017 U.S. Dist. LEXIS 9310 (D.N.J. Jan. 24, 2017)	23
<i>Jerome v. United States</i> , 318 U.S. 101 (1943).....	3, 16, 20
<i>Kirchner v. First Advantage Background</i> <i>Services Corp.</i> , 2016 U.S. Dist. LEXIS 157373 (E.D. Cal. Nov. 14, 2016)	23
<i>Knights Templars’ & Masons’ Life</i> <i>Indemnity Co. v. Jarman</i> , 187 U.S. 197 (1902).....	14
<i>LaFollette v. RoBal, Inc.</i> , 2017 U.S. Dist. LEXIS 47144 (N.D. Ga. Mar. 30, 2017)	23

TABLE OF AUTHORITIES—Continued

	Page(s)
<i>Landrum v. Blackbird Enters., LLC</i> , 2016 U.S. Dist. LEXIS 143044 (S.D. Tex. Oct. 3, 2016)	23
<i>Larroque v. First Advantage LNS Screening Sols., Inc.</i> , 2016 U.S. Dist. LEXIS 119249 (N.D. Cal. Sep. 2, 2016)	24
<i>LeGrand v. Intellicorp Records, Inc.</i> , 2017 U.S. Dist. LEXIS 26156 (N.D. Ohio Feb. 24, 2017).....	23
<i>Lee v. Hertz Corp.</i> , No. 15-cv-04562-BLF, 2016 U.S. Dist. LEXIS 166911 (N.D. Cal. Dec. 2, 2016)	10, 11, 12
<i>Lexmark Int’l, Inc. v. Static Control Components, Inc.</i> , 134 S. Ct. 1377 (2014).....	3, 4, 19, 20
<i>Long v. SEPTA</i> , 2017 U.S. Dist. LEXIS 51731 (E.D. Pa. Apr. 5, 2017)	23
<i>Madruga v. Superior Court of State of California in and for San Diego County</i> , 346 U.S. 556 (1954).....	5
<i>Martin v. Hunter’s Lessee</i> , 14 U.S. 304 (1816).....	21
<i>Mitchell v. Winco Foods, LLC</i> , 2017 U.S. Dist. LEXIS 32460 (D. Idaho Mar. 7, 2017)	23

TABLE OF AUTHORITIES—Continued

	Page(s)
<i>Nokchan v. Lyft, Inc.</i> , 2016 U.S. Dist. LEXIS 138582 (N.D. Cal. Oct. 5, 2016).....	23
<i>Noori v. Vivint, Inc.</i> , 2016 U.S. Dist. LEXIS 120963 (C.D. Cal. Sept. 6, 2016).....	23-24
<i>Rust v. Sullivan</i> , 500 U.S. 173 (1991).....	15
<i>Safeco Ins. Co. of Am. v. Burr</i> , 551 U.S. 47 (2007).....	8
<i>Salvatore v. Microbilt Corp.</i> , 2016 U.S. Dist. LEXIS 137943 (M.D. Pa. Oct. 3, 2016)	23
<i>Shoots v. iQor Holdings US Inc.</i> , 2016 U.S. Dist. LEXIS 144559 (D. Minn. Oct. 18, 2016)	23
<i>Smith v. Ohio State Univ.</i> , 2016 U.S. Dist. LEXIS 74612 (S.D. Ohio June 8, 2016).....	24
<i>Spokeo, Inc. v. Robins</i> , 136 S. Ct. 1540 (2016).....	<i>passim</i>
<i>Summers v. Earth Island Inst.</i> , 555 U.S. 488 (2009).....	14
<i>Tyus v. United States Postal Serv.</i> , 2016 U.S. Dist. LEXIS 144849 (E.D. Wis. Oct. 19, 2016), <i>vacated in part on other grounds</i> , 2017 U.S. Dist. LEXIS 833 (E.D. Wis. Jan. 4, 2017)	23

TABLE OF AUTHORITIES—Continued

	Page(s)
<i>United States v. Delaware & Hudson Co.</i> , 213 U.S. 366 (1909).....	14
<i>Vera v. Mondelez Global LLC</i> , 2017 U.S. Dist. LEXIS 38328 (N.D. Ill. Mar. 17, 2017)	23
<i>Wallace v. ConAgra Foods, Inc.</i> , 747 F.3d 1025 (8th Cir. 2014)	16, 17
<i>Woods v. Caremark, L.L.C.</i> , 2016 WL 6908108 (W.D. Mo. July 28, 2016).....	24
 CONSTITUTION	
U.S. Const. art. III.....	<i>passim</i>
U.S. Const. art. III, cl. 1	6
 STATUTES	
Fair Credit Reporting Act, 15 U.S.C.	
§§ 1681-1681x.....	<i>passim</i>
§ 1681	8
§ 1681b	7
§ 1681b(b)(2).....	9
§ 1681b(b)(3).....	9
§ 1681n	<i>passim</i>
§ 1681p	8, 9, 15
28 U.S.C. § 1257(a).....	5

TABLE OF AUTHORITIES—Continued

RULES	Page(s)
Sup. Ct. R. 10(c).....	4, 20
OTHER AUTHORITIES	
H.R. Rep. 103-486 (1994)	22
Joanna Shepherd, <i>An Empirical Survey of No-Injury Class Actions</i> , Emory Legal Studies Research Paper No. 16-402 (2016), available at http://ssrn.com/abstract=2726905	21
Michael E. Solimine, <i>Recalibrating Justiciability in Ohio Courts</i> , 51 Clev. St. L. Rev. 531 (2004)	18
16B Wright & Miller, Fed. Prac. & Proc. Juris. §4006 (3d ed. updated Apr. 2017) ...	21

PETITION FOR WRIT OF CERTIORARI

Petitioners The Hertz Corporation and Dollar Thrifty Automotive Group, Inc. (collectively, “Hertz”) hereby respectfully submit this petition for a writ of certiorari to the California Court of Appeal, First Appellate District, which denied Hertz’s petition for a writ of mandamus. Through that writ proceeding, Hertz sought an order requiring the California Superior Court to sustain its demurrer on the ground that Plaintiffs Lee and Campbell (collectively, “Plaintiffs”) could not maintain a state court putative nationwide class action for statutory damages based on alleged procedural violations of the Fair Credit Reporting Act (“FCRA”) that a federal district court had already held did not result in concrete harm to Plaintiffs.

INTRODUCTION

This case presents an important issue of federal law that has not been but should be settled by this Court: whether state courts may entertain federal statutory claims that federal courts cannot hear because the plaintiffs have not been injured. Answering this question requires determinations as to whether: (1) Congress has the power to authorize no-injury suits in state court, when it lacks such power relative to federal courts; (2) federal uniformity principles preclude such no-harm suits from proceeding in state court, when they cannot proceed in federal court; and (3) this Court’s “zone-of-interests” test precludes no-injury federal statutory claims from proceeding in state court. On a practical level, this case raises the issue of whether receptive state courts will, and constitutionally can, become clearing houses for no-injury nationwide class actions under the FCRA (and other federal statutes) that are not cognizable in federal court. The

state courts of California have decided this issue in a way that conflicts with relevant decisions of this Court.

This is a putative class action lawsuit alleging bare procedural violations of the FCRA. Plaintiffs seek millions of dollars in statutory damages on behalf of thousands of individuals who indisputably have not suffered any actual injury. In *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016) (“*Spokeo*”), however, this Court concluded that mere procedural violations of the FCRA which do not cause injury-in-fact to the plaintiff cannot support a statutory damages claim under the FCRA. *Id.* at 1547-48, 1550. Nor can Congress constitutionally authorize such claims without violating standing requirements under Article III of the federal constitution. *Id.* at 1547-48. Relying on *Spokeo*, the U.S. District Court for the Northern District of California concluded that the Plaintiffs in this case had not alleged, and could not plausibly allege, that they suffered actual injury as a result of the alleged procedural violations, and thus remanded the action to the California Superior Court. The District Court’s remand immediately raised the question of whether the same alleged FCRA procedural violations that could not, as a matter of constitutional law, support a claim for statutory damages in federal court could be given precisely the opposite effect in state court.

The California Superior Court erroneously side-stepped this question, overruling Hertz’s demurrer to Plaintiffs’ Second Amended Complaint on the grounds that the FCRA authorizes actions to be brought in either federal or state courts, Article III’s standing requirements do not apply in California state court, and Plaintiffs did not need to allege any actual injury to pursue their claims in state court. This last holding

was error. Accordingly, Hertz sought discretionary writ review by the California Court of Appeal, and when that request was denied, sought review by the California Supreme Court, which likewise chose not to intervene. Hertz now asks this Court to step in to confirm the important principle that no-harm FCRA class actions that cannot survive in federal court cannot survive in state court, either.

There are several reasons compelling such a conclusion. First, there is only one FCRA provision authorizing statutory damages, and this Court already has ruled that Congress cannot authorize recovery in federal court for procedural violations that do not cause actual harm. The same provision of the statute cannot be given a different meaning in state court. The Superior Court's ruling contradicts *Spokeo* and other binding decisions of this Court holding that Congress cannot constitutionally authorize no-harm claims. Further, the Superior Court's ruling necessarily incorporates and depends on state law to achieve its result, which violates this Court's controlling decisions holding that judicial applications of federal statutes cannot vary based on state law. *Jerome v. United States*, 318 U.S. 101, 104-05 (1943) (federal statutes have nationwide application and must be construed uniformly).

Second, alleged FCRA procedural violations that cause no injury do not, and cannot, fall within the "zone of interests" protected by the FCRA. See *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377 (2014). *Lexmark* explained that the zone-of-interests test looks to whether a congressionally created cause of action encompasses a particular plaintiff's claim. *Id.* at 1387-89. *Lexmark* made clear that the one thing **every** plaintiff must show is that he or she was actually **injured** by the defendant's conduct, and

that the injury is covered by the statute. 134 S. Ct. at 1389 n.5, 1390. The zone-of-interests test applies to all federal statutes, and Congress is presumed to legislate against the background of this limitation. *Id.* at 1388. Here, the Plaintiffs' lack of actual injury precludes their statutory damages claim from going forward in federal or state court. The Superior Court never addressed this argument or *Lexmark*.

By permitting Plaintiffs to proceed with their no-harm nationwide putative class action based on bare alleged procedural violations of the FCRA, the state courts of California have effectively "decided an important question of federal law that has not been, but should be, settled by this Court," and have done so "in a way that conflicts with relevant decisions of this Court." Supreme Court Rule 10(c). If this Court does not step in, receptive state courts (such as California's) will become breeding grounds for improper no-harm class actions under the FCRA – and other federal statutes – that federal courts cannot hear. The result will be rafts of forum shopping, artful no-harm pleading meant to evade federal jurisdiction, and inconsistent application of the FCRA not only between federal and state courts, but among the courts of the different states. Accordingly, Hertz respectfully urges the Court to grant certiorari in this case.

OPINIONS AND ORDERS BELOW

The unreported decision of the California Superior Court overruling Hertz's demurrer is reprinted at App. 3a-14a. The unreported order of the California Court of Appeal denying discretionary writ review of the trial court's order, is reprinted at App. 2a. The unreported order of the California Supreme Court denying review of the Court of Appeal's order is reprinted at App. 1a.

STATEMENT OF JURISDICTION

On April 5, 2017, the Superior Court issued an order overruling Hertz's demurrer to Plaintiffs' Second Amended Complaint ("SAC"). On June 4, 2017, Hertz filed with the California Court of Appeal a petition for a writ of mandamus seeking reversal of the Superior Court's order, which the Court of Appeal denied by order dated June 22, 2017. Hertz timely filed a petition for review, which the California Supreme Court denied by order dated September 13, 2017. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a). *See Franchise Tax Board of California v. Hyatt*, 538 U.S. 488 (2003); *Madriga v. Superior Court of State of California in and for San Diego County*, 346 U.S. 556 (1954); *Bandini Petroleum Co. v. Superior Court of State of California in and for Los Angeles County*, 284 U.S. 8 (1931).

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Case or Controversy Clause of the United States Constitution provides, in relevant part:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming

Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

U.S. Const. art. III, cl. 1.

The relevant substantive provisions of the FCRA state:

(b) Conditions for furnishing and using consumer reports for employment purposes.

...

(2) Disclosure to consumer.

(A) In general. Except as provided in subparagraph (B), a person may not procure a consumer report, or cause a consumer report to be procured, for employment purposes with respect to any consumer, unless—

(i) a clear and conspicuous disclosure has been made in writing to the consumer at any time before the report is procured or caused to be procured, in a document that consists solely of the disclosure, that a consumer report may be obtained for employment purposes; and

(ii) the consumer has authorized in writing (which authorization may be made on the document referred to in clause (i)) the procurement of the report by that person.

...

(3) Conditions on use for adverse actions.

(A) In general. Except as provided in subparagraph (B), in using a consumer report for employment purposes, before taking any adverse action based in whole or in part on the report, the person intending to take such adverse action shall provide to the consumer to whom the report relates—

- (i) a copy of the report; and
- (ii) a description in writing of the rights of the consumer under this title, as prescribed by the Bureau under section 609(c)(3).

15 U.S.C. § 1681b.

The relevant remedial provisions of the FCRA state:

(a) In general. Any person who willfully fails to comply with any requirement imposed under this title [15 USCS §§ 1681 et seq.] 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 any 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.

15 U.S.C. § 1681n.

The relevant jurisdictional provisions of the FCRA state:

An action to enforce any liability created under this title [15 USCS §§ 1681 et seq.] may be brought in any appropriate United States district court, without regard to the amount in controversy, or in any other court of competent jurisdiction

15 U.S.C. § 1681p.

STATEMENT OF THE CASE

A. The Fair Credit Reporting Act

The FCRA is a federal statute governing, *inter alia*, the procurement, preparation, and use of consumer reports, which include background reports for employment purposes. 15 U.S.C. §§ 1681-1681x. The FCRA's purposes are "to ensure fair and accurate credit reporting, promote efficiency in the banking system, and protect consumer privacy." *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 52 (2007) (citing 15 U.S.C. § 1681). In enacting the FCRA, "Congress plainly sought to curb the dissemination of false information by adopting procedures designed to decrease that risk." *Spokeo*, 136 S. Ct. at 1550.

Under the FCRA, before procuring a background report for purposes of evaluating an employment

application, an employer must provide a “stand-alone” disclosure “that a consumer report may be obtained for employment purposes” and obtain written authorization from the applicant. 15 U.S.C. § 1681b(b)(2). Further, before taking any adverse action based on information in a background report, an employer must provide the applicant with a copy of the report and standardized summary of rights form. 15 U.S.C. § 1681b(b)(3). The FCRA provides that plaintiffs who prove a willful violation of these requirements may recover statutory damages up to \$1,000, punitive damages, and costs of suit and attorney’s fees. 15 U.S.C. § 1681n. The FCRA further provides that “[a]n action to enforce any liability created under [the FCRA] may be brought in any appropriate United States district court . . . or in any other court of competent jurisdiction.” 15 U.S.C. § 1681p.

In *Spokeo*, this Court stated that not every “violation of one of the FCRA’s procedural requirements” results in an actual injury to a plaintiff. 136 S. Ct. at 1550. To the contrary, a plaintiff who alleges “a bare procedural violation [of the FCRA], divorced from any concrete harm,” does not suffer an actual injury. *Id.* at 1549. This Court provided an example of a procedural violation that would result in no actual injury: where a “consumer reporting agency fails to provide the required notice to a user of the agency’s consumer information, [but] that information [is] regardless . . . entirely accurate.” *Id.* at 1550.

B. Plaintiffs’ Allegations and FCRA Claims

In April and May 2015, Plaintiffs applied for employment with Hertz in certain of its San Francisco locations, and each received a conditional employment offer. (App. 23a-24a, 27a-28a, SAC ¶¶ 30, 38, 59, 66.) In connection with their respective conditional

employment offers, Hertz procured a background report on each Plaintiff. Before Hertz procured the reports, Plaintiffs each signed separate, written disclosure and authorization forms provided by Hertz's background check vendor, Sterling Infosystems, Inc. (the "Sterling Disclosures"). It is undisputed that the contents of the Sterling Disclosures advised Plaintiffs that background reports would be procured, and each document contained Plaintiffs' written authorization to proceed. (App. 23a-25a, 27a-28a, SAC ¶¶ 35, 45, 61, 68; App. 55a-56a, 62a-63a, *Lee v. Hertz Corp.*, No. 15-cv-04562-BLF, 2016 U.S. Dist. LEXIS 166911, at *4-6, *13-14 (N.D. Cal. Dec. 2, 2016).)

Based on undisputedly accurate criminal history information in each of Plaintiffs' background reports, Hertz rescinded the conditional offers. It is undisputed that before the rescissions, each Plaintiff was advised of the background information that Hertz found problematic and each had an opportunity to discuss the information with Hertz. (App. 67a, *Lee*, 2016 U.S. Dist. LEXIS 166911, at *19-20.) Plaintiffs allege only that they received FCRA-required pre-adverse action packages after being advised of Hertz's decision to rescind their respective offers. (App. 24a-26a, 29a-30a, SAC ¶¶ 45-53, 70-79).)

C. The Federal Court Dismisses Plaintiffs' FCRA Claims for Lack of Injury

On August 21, 2015, Plaintiffs filed the underlying Action in San Francisco Superior Court, and Hertz timely removed the case to the U.S. District Court for the Northern District of California. Following this Court's issuance of *Spokeo* on May 16, 2016, Plaintiffs filed a First Amended Complaint ("FAC") with new allegations purporting to set forth several theories for

how they had suffered injuries sufficient to satisfy the standing requirements discussed in *Spokeo*. (App. 57a, *Lee*, 2016 U.S. Dist. LEXIS 166911, at *7.)

Hertz moved to dismiss the FAC on the ground that Plaintiffs had not suffered actual injury and thus did not have standing to maintain their FCRA suit. On December 2, 2016, the District Court issued a decision and order (the “Remand Order”) granting the motion to dismiss and remanding the case to Superior Court. (App. 52a-68a, *Lee*, 2016 U.S. Dist. LEXIS 166911.)

In the Remand Order, the District Court rejected Plaintiffs arguments that the alleged FCRA procedural violations caused them two types of injury: (1) invasion of privacy and (2) informational injury. (App. 57a, 62a-68a, *Lee*, 2016 U.S. Dist. LEXIS 166911 at *7, *13-21.) With respect to alleged invasion of privacy, the District Court held, *inter alia*, that “Plaintiffs do not allege that the disclosures they received prevented them from understanding that they were authorizing Hertz to procure a background report or that they would not have authorized Hertz to [procure] a background report had they received a FCRA-compliant disclosure.” The District Court continued: “Indeed, Plaintiffs have not proffered such an allegation nor is there any indication that Plaintiffs could plausibly allege those facts. Instead, the crux of Plaintiffs’ complaint is that the consent form did not technically comply with the requirements of the FCRA. This is the kind of bare procedural violation that the Supreme Court described in *Spokeo* as insufficient.” (App. 63a, *id.* at *14-15.)

With respect to Plaintiffs’ claim of an “informational injury,” the District Court held that Plaintiffs “have not alleged that Hertz’s disclosure form did not contain the information required by the FCRA.” (App. 65a, *id.* at *16.) “Instead, Plaintiffs claim that the

disclosure was not in the format required by the statute because it contained ‘extraneous’ information. Absent some additional allegation of harm, the Court cannot find an informational injury based on the current record.” (App. 65a, *id.* at *17.)

Last, the District Court rejected Plaintiffs’ claim of injury from Hertz’s alleged noncompliance with the FCRA’s pre-adverse action notice requirements. The District Court noted Plaintiffs’ concession “that they communicated with Hertz regarding the contents of their criminal background reports, and Campbell was even given an opportunity to provide written evidence on her own behalf. . . . [N]either Plaintiff alleges that the information on which Hertz relied was inaccurate or that timely receipt of pre-adverse action packages would have allowed them to successfully contest Hertz’s decision.” (App. 67a, *id.* at *19-20.) The District Court further stated that “the *Spokeo* Court addressed this very issue by providing the example discussed above.” (App. 67a, *id.* at *20 (citing *Spokeo*, 136 S. Ct. at 1550).) Noting that Plaintiffs had “simply allege[d] that the information was ‘not relevant’ to the positions for which [they] applied,” the District Court characterized Plaintiffs’ claim as a “dispute [over] how Hertz treats accurate information, rather than the lack of an opportunity to timely correct inaccurate information.” *Id.* “This is not what the FCRA protects. *See Spokeo*, 136 S. Ct. at 1550 (‘Congress plainly sought to curb the dissemination of false information by adopting procedures designed to decrease that risk.’).” (App. 67a-68a, *Lee*, 2016 U.S. Dist. LEXIS 166911, at *20-21.) Because Plaintiffs had suffered no actual injury, the District Court dismissed the action for lack of standing and remanded it to the Superior Court.

D. Following Remand, the Superior Court Denies Hertz's Demurrer to the SAC, the California Court of Appeal Denies Hertz's Petition for Writ of Mandamus, and the California Supreme Court Denies Review

Following remand, the parties stipulated to Plaintiffs filing a Second Amended Complaint ("SAC"), which is the operative pleading here and is substantively identical to the FAC that the federal court dismissed.¹ Hertz promptly filed a demurrer to Plaintiffs' SAC on, *inter alia*, the grounds discussed in this Petition.

On April 4, 2017, the Superior Court issued an order overruling Hertz's demurrer to the SAC (the "Order"). (App. 3a-14a.) The Superior Court's Order did not mention the federal court's Remand Order, did not address the federal court's holding that Plaintiffs had not been injured, and glossed over Hertz's arguments that controlling federal law precluded Plaintiffs from pursuing their federal no-harm FCRA claims in state court.

On June 4, 2017, Hertz filed a Petition for Writ of Mandamus with the Court of Appeal for the First Appellate District. On June 22, 2017, the Court of Appeal issued a one-line order summarily denying Hertz's petition. (App. 2a.) On July 3, 2017, Hertz filed a petition for review with the California Supreme Court. On September 13, 2017, the California Supreme Court issued its own one-line order denying review. (App. 1a.) This Petition follows.

¹ The SAC includes additional allegations relating to the purported willfulness of Hertz's alleged noncompliance with the FCRA procedural requirements at issue, but does not set forth any new allegations regarding Plaintiffs' purported injuries resulting from such alleged noncompliance.

REASONS FOR GRANTING THE PETITION

I. THIS COURT SHOULD GRANT REVIEW BECAUSE ALLOWING NO-INJURY FCRA CLAIMS IN STATE COURT RAISES SERIOUS CONSTITUTIONAL QUESTIONS AS TO CONGRESS' POWER TO AUTHORIZE SUCH CLAIMS AND GUARANTEES NON-UNIFORM APPLICATION OF THE FCRA AMONG FEDERAL AND STATE COURTS

This Court should grant review to establish that its decisions are controlling and dispositive with respect to FCRA procedural violations that do not result in concrete harm, even when such claims are pursued in state court.

Plaintiffs' lack of injury negates any cause of action because the FCRA *must* be construed to require a showing of actual injury before a plaintiff can recover statutory damages. The “presumption of validity” and “constitutional avoidance” canons of statutory construction – which disfavor an interpretation that would cause a statute to be unconstitutional or “engender constitutional issues” when a reasonable alternative interpretation poses no such issue – compel this result. *Gomez v. United States*, 490 U.S. 858, 864 (1989); *United States v. Delaware & Hudson Co.*, 213 U.S. 366, 407 (1909); *Knights Templars' & Masons' Life Indemnity Co. v. Jarman*, 187 U.S. 197, 205 (1902).

“[T]he requirement of injury in fact is a hard floor of Article III jurisdiction that ***cannot be removed by statute***.” *Summers v. Earth Island Inst.*, 555 U.S. 488, 497 (2009) (emphasis added); *see also Spokeo*, 136 S. Ct. at 1547-50. This Court has characterized Article III as a limit not only on federal court jurisdiction but

also on Congress’s **legislative** power. “Congress cannot erase Article III’s standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing.” *Spokeo*, 136 S. Ct. at 1547-48. “[I]n no event . . . may Congress abrogate the Art[icle] III minima [that] a plaintiff must . . . have suffered a distinct and palpable injury to himself . . .” *Gladstone Realtors v. Vill. of Bellwood*, 441 U.S. 91, 100 (1979) (internal quotes and citation omitted). Of critical significance to this case, the Supreme Court has made clear that courts **must** assume that Congress “legislates in the light of [this] constitutional limit.” *Rust v. Sullivan*, 500 U.S. 173, 191 (1991).

Plaintiffs argued below, and the Superior Court implicitly held, that Congress **may** “abrogate the Article III minima” when it authorizes federal statutory claims in state court. But this proposition runs into two brick walls: one textual, and one jurisprudential. The textual wall is that the FCRA’s authorization for statutory damages is codified only once, in 15 U.S.C. § 1681n. Likewise, the authorization to bring a FCRA suit in either federal or state court is written in unitary language in a single provision, 15 U.S.C. § 1681p. The statute does not contain separate provisions or legal standards for federal and state lawsuits. Because there is only one statutory damages provision, it can have only one construction – requiring a showing of injury in all cases – regardless of forum. Put differently, if the FCRA’s statutory damages provision must be read “in the light of [the] constitutional limit” requiring injury-in-fact in federal court (and it must), *Rust*, 500 U.S. at 191, Plaintiffs’ advocacy for the opposite reading in state court is contrary to the statute’s text.

The jurisprudential wall that precludes applying FCRA's statutory damages provision in opposite ways in federal and state court is well established: unless Congress expressly states otherwise, federal enactments must be applied ***uniformly*** and not based on variations in state law. *Jerome v. United States*, 318 U.S. 101, 104 (1943). “[I]n the absence of a plain indication to the contrary, [] Congress when it enacts a statute is not making the application of the federal act dependent on state law. That assumption is based on the fact that the application of federal legislation is nationwide . . . and at times on the fact that the federal program would be impaired if state law were to control.” *Id.* Here, the Superior Court’s Order and Plaintiffs’ arguments are irreconcilable with this controlling principle, because the application of the FCRA’s statutory damages provision would be ***entirely*** “dependent on state law,” *i.e.*, California’s purportedly relaxed standing doctrine.

Neither the Superior Court nor Plaintiffs identified anything to suggest that Congress intended the FCRA to be applied non-uniformly between and among federal and state courts, such that no-harm class actions are barred in the former, but may proceed (if state standing doctrine permits) in the latter. To the contrary, “[i]t is clear that Congress intended the FCRA to have uniform nationwide application.” *Cole v. U.S. Capital, Inc.*, 2003 U.S. Dist. LEXIS 7279, at *13 (N.D. Ill. Apr. 30, 2003).

Plaintiffs’ reading would render the FCRA damages provision unconstitutional, or at the very least raise a “difficult constitutional question.” *Wallace v. ConAgra Foods, Inc.*, 747 F.3d 1025, 1032 (8th Cir. 2014) (emphasis in original). The Superior Court’s conclusory assertion that “the ‘constitutional avoidance’ theory

has no application in this case” because the court is “not bound by Article III’s requirement of injury in fact” (App. 12a, Order at 7) ignores the controlling authority of this Court discussed above. Under the doctrines of presumed validity and constitutional avoidance, courts must assume that Congress did not extend the FCRA’s statutory damages provision to plaintiffs who lack an actual injury – so long as such a construction of the statute is “reasonable.” *Gomez*, 490 U.S. at 864. And such a construction is eminently reasonable, as the Eighth Circuit Court of Appeals has expressly held:

Th[e] language [in 15 U.S.C. § 1681n] clearly provides that an award of statutory damages is available as an alternative to an award of actual damages. . . . It does not necessarily follow from the cited language that statutory damages are available where a plaintiff fails to prove actual damages. ***A reasonable reading of the statute could still require proof of actual damages but simply substitute statutory rather than actual damages for the purpose of calculating the damage award.***

Dowell v. Wells Fargo Bank, NA, 517 F.3d 1024, 1026 (8th Cir. 2008) (emphasis added). Because interpreting the FCRA to create a “statutory cause of action requiring no showing the plaintiff was . . . actually harmed” would pose at the very least a “serious constitutional question,” *Wallace*, 747 F.3d at 1032, controlling federal law ***required*** the Superior Court to avoid that question and to adopt the reasonable alternative construction – requiring actual injury – that was approved in *Dowell*.

Adopting the Superior Court’s and Plaintiffs’ position would not only result in disparate applications of the FCRA between federal and state courts, but also would result in disparate applications between courts in different states, because many states have adopted or follow Article III standing requirements. *See, e.g., Baird v. City of Burlington*, 136 A.3d 223, 229 (Vt. 2016); *Atlanta Taxicab Co. Owners Ass’n v. City of Atlanta*, 638 S.E.2d 307, 317 (Ga. 2006); Michael E. Solimine, *Recalibrating Justiciability in Ohio Courts*, 51 Clev. St. L. Rev. 531, 536 (2004). Thus, the rule adopted by the Superior Court would necessarily result in forum shopping, which the law disfavors. *Cf. Agency Holding Corp. v. Malley-Duff & Associates, Inc.*, 483 U.S. 143, 154 (1987) (adopting “uniform” limitations period for federal statute and noting that the use of “multiple state limitations . . . would present the danger of forum shopping”).

The Superior Court’s Order, which will be replicated in other cases if it is allowed to stand, guarantees that identical no-harm FCRA cases will receive diametrically opposite treatment in federal and state courts. But just as the court in *Fleming v. Demeritt Co.*, 56 F. Supp. 376 (D. Vt. 1944), long ago held with respect to the Fair Labor Standards Act, “[n]othing in the [FCRA’s] background, history, terms or purposes indicates . . . that it is to be administered in accordance with whatever different standards the respective states may see fit to adopt . . .” *Id.* at 379. In short, the presumed-validity and constitutional-avoidance doctrines dictate that Section 1681n be construed to require actual injury, and the uniform application doctrine requires that construction to be applied by both federal and state courts. This Court should grant certiorari to confirm this conclusion.

**II. THIS COURT SHOULD GRANT REVIEW
TO CONFIRM THAT *LEXMARK*'S ZONE-
OF-INTERESTS TEST MUST BE APPLIED
TO CLAIMS ASSERTING FCRA PROCE-
DURAL VIOLATIONS AND CANNOT BE
SATISFIED ABSENT ACTUAL INJURY**

“[A] statutory cause of action extends only to plaintiffs whose interests fall within the zone of interests protected by the law invoked.” *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1388 (2014) (internal quotes omitted). The zone-of-interests test looks at whether the statute was “designed to protect the class of persons in which the plaintiff is included against the risk of the ***type of harm which has in fact occurred*** as a result of its violation.” *Id.* at 1389 n.5 (emphasis added).

This Court has “made clear” that the zone-of-interests test “applies to all statutorily created causes of action; that it is a requirement of general application; and that Congress is presumed to legislate against the background of the zone-of-interests limitation” *Id.* at 1388 (internal quotes and brackets omitted; emphasis added). Thus, the Superior Court was required to apply the zone-of-interests test to determine whether Plaintiffs have a cause of action under the FCRA.

The Superior Court did not do so. The Superior Court assumed the test applied (App. 13a-14a, Order at 7), but then failed to mention *Lexmark* or address Hertz’s primary argument based thereon: that because the zone-of-interests test clearly requires a showing that “harm . . . has in fact occurred,” *Lexmark*, 134 S. Ct. at 1389 n.5, the Plaintiffs’ lack of actual injury negates their ability to satisfy that test here. The Superior Court erred by ignoring this dispositive

point. This Court should grant review to confirm that the test applies here and that it cannot be satisfied absent a showing of actual injury to Plaintiffs.

III. REVIEW IS NECESSARY TO AVOID FORUM SHOPPING, THE PURPOSEFUL ASSERTION OF NO-HARM CLASS ACTIONS, AND THE DISPARATE DISPO- SITION OF FCRA CLAIMS BY STATE COURTS

This petition presents a compelling case for review because “a state court . . . has decided an important question of federal law that has not been, but should be, settled by this Court,” and because the state court “has decided an important federal question in a way that conflicts with relevant decisions of this Court.” Supreme Court Rule 10(c). Allowing no-harm FCRA class actions to proceed in state court, when a federal court has already held that the plaintiffs failed to allege injury-in-fact, would run counter to the constitutional avoidance principles set forth in *Gomez*, 490 U.S. at 864, and like cases; would result in non-uniform FCRA decisions from state to state in violation of *Jerome*, 318 U.S. at 104-05, and like cases; and would contravene *Lexmark*, 134 S. Ct. at 1388, by rendering the “zone of interests” tests a nullity.

For these reasons alone, this Court should grant review to ensure that state courts are not free to apply the FCRA in a manner at odds with the federal courts, or each other. Indeed, it is beyond cavil – and has been since the founding era – that “state courts [must] not have the power finally to dispose of federal questions: there is an intrinsic interest in sound disposition of federal questions, and there is an even more compelling need to achieve uniform disposition of these questions in a way that could not be accomplished by

a congeries of independently acting state courts.” Wright & Miller, 16B Fed. Prac. & Proc. Juris. (3d ed. updated Apr. 2017), § 4006 (citing *Martin v. Hunter’s Lessee*, 14 U.S. 304, 346-47 (1816)). Yet the California courts are poised to run roughshod over these principles by arrogating for themselves the right to adjudicate FCRA claims that the federal courts cannot, deciding important federal questions under the FCRA without reference to controlling principles of federal law, and ensuring that the viability of no-harm FCRA claims will rise or fall based solely on where they are brought.

This, of course, will encourage aggressive forum shopping and artful no-harm pleading meant to evade federal jurisdiction, so that plaintiffs and class counsel can pursue statutory damage bounties for unharmed individuals in receptive state court systems like California’s. It makes no sense that if Plaintiffs were residents of, say, Vermont – a state that follows Article III standing rules – their FCRA claims would long be dead, but because they live in California, their same federal claims are alive and well, requiring Hertz to decide between risking an adverse judgment while defending a time-consuming and expensive class action, or paying millions of dollars to persons who suffered no injury (and their counsel). Yet that is precisely the paradigm created by the California courts’ rulings below.

Moreover, the potential availability of statutory damages under the FCRA historically has led to numerous no-harm class action filings by counsel pursuing quick windfalls. (App. 122a-128a, Joanna Shepherd, *An Empirical Survey of No-Injury Class Actions*, Emory University School of Law, Research Paper No. 16-402, at 9-13 (2016), available at <http://ssrn.com/abstract=2726905>). These actions

impose significant burdens on the judicial system that Congress did not anticipate the courts having to bear. See H.R. Rep. 103-486 (1994) (Cost Estimate of the Congressional Budget Office) (inaccurately predicting that, by 2000, the costs to the judicial system from FCRA lawsuits would be “negligible” because the number of lawsuits would have decreased). Because California is among the most popular venues for consumer class actions, California state courts have seen, and given the most recent trends noted above, likely will continue to see, significantly increasing numbers of no-harm FCRA class actions presenting precisely the issues raised by this petition.

The legal issues presented here are of national interest and importance, and will increase in frequency, as exemplified by the trends in California. FCRA filings in California federal courts have increased by more than 300% over the past five years, from approximately 213 filings in 2011 to more than 700 in 2016. (See App. 69a-70a (reflecting results of PACER searches for FCRA case filings in California federal district courts). Likewise, an increasing number of FCRA suits are being filed in California state courts. (See App. 73a-109a (reflecting results of state court case searches showing that approximately 71 FCRA cases were filed in California state court in the two years preceding the underlying writ petition, compared to 35 FCRA cases filed in the two years before that). Since this Court decided *Spokeo*, FCRA claims for procedural violations like those at issue here have overwhelmingly been found to be of the no-harm variety and dismissed or

remanded by the federal courts.² Such remanded or re-filed cases in state courts that impose requirements

² See, e.g., *Groshek v. Time Warner Cable, Inc.*, 865 F.3d 884 (7th Cir. 2017), *affg*, *Groshek v. Time Warner Cable, Inc.*, 2016 U.S. Dist. LEXIS 104952, at *7-8 (E.D. Wis. Aug. 9, 2016); *Campbell v. Adecco USA, Inc.*, 2017 U.S. Dist. LEXIS 61515 (W.D. Mo. Apr. 24, 2017); *Long v. SEPTA*, 2017 U.S. Dist. LEXIS 51731 (E.D. Pa. Apr. 5, 2017); *LaFollette v. RoBal, Inc.*, 2017 U.S. Dist. LEXIS 47144 (N.D. Ga. Mar. 30, 2017); *Vera v. Mondelez Global LLC*, 2017 U.S. Dist. LEXIS 38328 (N.D. Ill. Mar. 17, 2017); *Albu v. Home Depot, Inc.*, 2016 U.S. Dist. LEXIS 185557 (N.D. Ga. Nov. 2, 2016), report and recommendation adopted, 2017 U.S. Dist. LEXIS 49918 (N.D. Ga. Mar. 20, 2017); *Mitchell v. Winco Foods, LLC*, 2017 U.S. Dist. LEXIS 32460 (D. Idaho Mar. 7, 2017); *Fields v. Beverly Health & Rehab. Servs.*, 2017 U.S. Dist. LEXIS 29771 (D. Minn. Mar. 1, 2017); *LeGrand v. Intellicorp Records, Inc.*, 2017 U.S. Dist. LEXIS 26156 (N.D. Ohio Feb. 24, 2017); *In re Michaels Stores, Inc.*, 2017 U.S. Dist. LEXIS 9310, at *12 n.8 (D.N.J. Jan. 24, 2017); *Case v. Hertz Corp.*, 2016 U.S. Dist. LEXIS 162097 (N.D. Cal. Nov. 21, 2016); *Boergert v. Kelly Services, Inc.*, 2016 U.S. Dist. LEXIS 157042 (W.D. Missouri Nov. 14, 2016), *vacated in part on other grounds*, 2017 U.S. Dist. LEXIS 13714 (W.D. Mo. Feb. 1, 2017); *Kirchner v. First Advantage Background Services Corp.*, 2016 U.S. Dist. LEXIS 157373 (E.D. Cal. Nov. 14, 2016); *Detter v. KeyBank N.A.*, 2016 U.S. Dist. LEXIS 157043 (W.D. Missouri Nov. 14, 2016); *Dutta v. State Farm Mutual Automobile Ins. Co., Inc.*, 2016 U.S. Dist. LEXIS 152850 (N.D. Cal. Nov. 3, 2016); *Tyus v. United States Postal Serv.*, 2016 U.S. Dist. LEXIS 144849 (E.D. Wis. Oct. 19, 2016), *vacated in part on other grounds*, 2017 U.S. Dist. LEXIS 833 (E.D. Wis. Jan. 4, 2017); *Hopkins v. Staffing Network Holdings, LLC*, 2016 U.S. Dist. LEXIS 146485 (N.D. Ill. Oct. 18, 2016); *Shoots v. iQor Holdings US Inc.*, 2016 U.S. Dist. LEXIS 144559 (D. Minn. Oct. 18, 2016); *Nokchan v. Lyft, Inc.*, 2016 U.S. Dist. LEXIS 138582 (N.D. Cal. Oct. 5, 2016); *Baker v. Microbilt Corp.*, 2016 U.S. Dist. LEXIS 137946 (M.D. Pa. Oct. 3, 2016); *Frankenfield v. Microbilt Corp.*, 2016 U.S. Dist. LEXIS 137944 (M.D. Pa. Oct. 3, 2016); *Salvatore v. Microbilt Corp.*, 2016 U.S. Dist. LEXIS 137943 (M.D. Pa. Oct. 3, 2016); *Landrum v. Blackbird Enters., LLC*, 2016 U.S. Dist. LEXIS 143044 (S.D. Tex. Oct. 3, 2016); *Noori v. Vivint, Inc.*, 2016 U.S. Dist. LEXIS 120963

akin to Article III will be dismissed or abandoned; those that happen to be in state courts that purport to apply looser standing rules – like California’s – will survive. Such disparate treatment of identical FCRA claims among jurisdictions is untenable.

* * *

For the foregoing reasons, this Court should grant this Petition and confirm that no-injury FCRA claims that are not cognizable in federal court are likewise not cognizable in state court. Any other course will result in forum shopping, make California and other receptive state courts into clearing houses for no-injury FCRA class actions that federal courts (and certain other state courts) cannot hear, and turn such receptive state court systems into mere conduits for uninjured plaintiffs (and their counsel) to obtain statutory-damage windfalls.

(C.D. Cal. Sept. 6, 2016); *Larroque v. First Advantage LNS Screening Sols., Inc.*, 2016 U.S. Dist. LEXIS 119249 (N.D. Cal. Sep. 2, 2016); *Disalvo v. Intellicorp Records, Inc.*, 2016 U.S. Dist. LEXIS 133344 (N.D. Ohio Sept. 27, 2016); *Woods v. Caremark, L.L.C.*, 2016 WL 6908108 (W.D. Mo. July 28, 2016); *Smith v. Ohio State Univ.*, 2016 U.S. Dist. LEXIS 74612 (S.D. Ohio June 8, 2016).

CONCLUSION

The Court should grant the petition and issue a writ of certiorari to the California Court of Appeal.

Respectfully submitted,

ROBERT A. DOLINKO

Counsel of Record

CHARLES M. DYKE

MATTHEW J. FRANKEL

NIXON PEABODY LLP

One Embarcadero Center,

Suite 1800

San Francisco, CA 94111

(415) 984-8200

rdolinko@nixonpeabody.com

cdyke@nixonpeabody.com

Counsel for Petitioners

December 12, 2017