No. 19-706

In The
Supreme Court of the United States

FACEBOOK, INC.,

Petitioner,

v.

NIMISH PATEL, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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Brief of Amicus Curiae Consumer Data Industry Association in Support of Petitioner

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January 3, 2020

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INTEREST OF AMICUS CURIAE

With the consent of all parties,[1] *amicus curiae*, the Consumer Data Industry Association ("CDIA"), submits its brief in support of petitioner, Facebook, Inc. (hereinafter, "Facebook").

CDIA is an international trade association, founded in 1906, and headquartered in Washington, D.C. As part of its mission to support companies offering consumer information reporting services, CDIA establishes industry standards, provides business and professional education for its members, and produces educational materials for consumers describing consumer credit rights and the role of consumer reporting agencies ("CRAs") in the marketplace. CDIA is the largest trade association of its kind in the world. Through data and analytics, CDIA members empower economic opportunity, thereby helping to ensure fair and safe transactions for consumers and facilitating competition and expanding consumers' access to financial and other products suited to their unique needs.

In its more than 100-year history, CDIA has worked with the United States Congress and state legislatures to develop laws and regulations governing the collection, use, maintenance, and

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[1] The parties were notified of CDIA's intention to file this brief in accordance with Rule 37.2(a). All parties have consented to the filing of CDIA's *amicus* brief.

No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

dissemination of consumer report information. In this role, CDIA participated in the legislative efforts that led to the enactment of the Fair Credit Reporting Act ("FCRA") in 1970 and its subsequent amendments.

CDIA is vitally interested in the outcome of this appeal because CDIA's members are subject to an intricate and comprehensive regulatory scheme under the FCRA, which governs the collection, use, maintenance, and dissemination of consumer report information.[2] Plaintiffs often file suit alleging violations of merely technical requirements under the FCRA without having sustained any real, cognizable harm. An expansive interpretation of constitutional Article III standing would heighten CRAs' litigation risk based on novel theories in an already unclear area of the law. Such risk is compounded by the potential for unlimited statutory damages that successful plaintiffs may recover in class action lawsuits under the FCRA.

Because in the electronic age, any CRA business practice is likely to be repeated millions of times each year (perhaps even millions of times each day),[3] preserving Article III standing requirements,

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[2] 15 U.S.C. §§ 1681 *et seq.* (2018).

[3] *See, e.g.,* S*arver v. Experian Info. Sols.,* 390 F.3d 969, 972 (7th Cir. 2004) (noting that one CRA "processes over 50 million updates to trade information each day"); *see also* Michael E. Staten & Fred H. Cate, *The Impact of National Credit Reporting Under the Fair Credit Reporting Act: The Risk of New Restrictions and State Regulation* at 28 (May 2003) (the consumer reporting system "deals in huge volumes of data – over 2 billion trade line updates, 2 million public record items, an

particularly the injury in fact requirement, is critical to nationwide CRAs whose activities can be said to be, in the FCRA's language (15 U.S.C. § 1681n), "with respect to" almost any adult U.S. consumer. The Constitutional constraints established in Article III are essential to prevent entrepreneurial plaintiffs' class action lawyers from abusing the FCRA's statutory damages provision to challenge any CRA activity as a willful violation even when the activity results in no consumer injury.

The Ninth Circuit's decision has broad implications to statutory claims under a number of consumer statutes. Because CDIA has been involved in the consumer reporting industry for more than a century, and because its member CRAs, their furnishers, and users are all subject to potential class action claims under the FCRA's statutory damages provisions, CDIA is uniquely qualified to assist this Court as it considers Facebook's petition for certiorari.

The Consumer Reporting Industry

In enacting the FCRA, Congress recognized that the consumer reporting industry is vital to the U.S. economy. Each year, CRAs furnish more than 1.5 billion consumer reports to creditors, insurers, employers, landlords, law enforcement, and counter-terrorist agencies, all of which use this information to make important risk-based decisions, hire employees, evaluate the backgrounds of potential tenants, and provide information to law enforcement to locate

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average of 1.2 million household address changes a month, and over 200 million individual credit files.").

individuals suspected of criminal activity. Information in consumer reports contributes to the soundness, safety and efficiency of the insurance, banking, finance, retail credit, housing, and law enforcement systems in the United States.

In order to prepare these reports, CRAs have created and maintain data files on nearly 200 million consumers. The files contain 2.6 billion tradelines (an industry term for accounts that are included in a credit report) that include billions of items of information the CRAs receive from over ten thousand furnishers on a monthly basis. Because credit reports are compiled over the course of years, based on information obtained from different types of furnishers, and updated on a periodic basis, insurers, creditors, landlords, employers and others who have "permissible purposes" can obtain a detailed picture of the risk (e.g., default risk, risk of a covered loss, etc.) presented by a particular consumer.

The U.S. consumer reporting system evolved and operates on a voluntary basis. Furnishing information to a consumer reporting agency is, with limited exception, a voluntary endeavor. If the providers of consumer reports and the furnishers of consumer report information must face company-crippling liability for technical issues that result in no consumer harm, it will undermine the incentive to furnish. If consumer reports become less complete and, consequently, paint a less accurate picture of the consumer, they will be less predictive of risk. The result will be increased transaction costs whenever a creditor or insurer makes a risk determination, and thus increased costs to the consumer.

SUMMARY OF ARGUMENT

The Ninth Circuit's decision creates a deep divide in how courts apply the framework this Court adopted in *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016) ("Spokeo I"). First, the Ninth Circuit permitted vague concerns about the purported future risks of using biometric data to constitute a sufficiently concrete injury for purposes of Article III standing. Yet the plaintiff below alleged no real-world injury or even an imminent risk of injury. Other circuits have expressly declined to follow this approach. Second, the Ninth Circuit adopted a divergent approach to the weight it provides to the judgment of the legislature under the *Spokeo I* framework, departing from the approach of other circuits that have been unwilling to afford such deference to the legislature.

Guidance from this Court is necessary to clarify those questions. That clarification is particularly urgent for CDIA's members, which face ruinous damages through no-injury class actions as a result of the current lack of certainty around Article III standing requirements.

ARGUMENT

I. Circuit courts are split with respect to whether informational injuries can support standing absent real-world harm to the plaintiff.

In the decision below, the Ninth Circuit applied its permissive interpretation of this Court's *Spokeo I* framework and concluded that an alleged violation of Illinois Biometric Information Privacy Act ("BIPA")

through Facebook's tagging function created a concrete injury for purposes of Article III. The Ninth Circuit found purportedly concrete harm by relying on speculative *risks* of harm that it deemed to arise from facial recognition generally: "It seems likely that a face-mapped individual could be identified from a surveillance photo taken on the streets or in an office building. Or a biometric face template could be used to unlock the face recognition lock on that individual's cell phone."[4]

The record is devoid of any indication that *Facebook's* technology is or could be used for such a purpose; the gulf between tagging individuals in a social media post and unlocking phones or conducting deep state surveillance is a wide one. This remote and speculative risk deemed sufficient by the Ninth Circuit is pure speculation, failing the fundamental lesson of *Spokeo I*: statutory violations must "entail a degree of risk sufficient to meet the concreteness requirement."[5]

The Ninth Circuit also relied on Facebook's failure to make the disclosures that plaintiffs alleged were required by BIPA, without considering whether plaintiffs were harmed by the failure to provide that information instead of the disclosures that Facebook actually provided. Critically, questions related to standing based on this type of information harm reach across substantive areas of the law. Circuit

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4 *Patel v. Facebook, Inc.*, 932 F.3d 1264, 1273 (9th Cir. 2019).

5 *Spokeo I*, 136 S. Ct. at 1550; *see also Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 402 (2013) (standing cannot be manufactured "based on hypothetical future harm that is **not certainly impending**") (emphasis added).

courts are not aligned as to whether and when the failure to make disclosures required by statute satisfies Article III standing requirements.

The **Sixth Circuit** in *Huff v. TeleCheck Services, Inc.*[6] rejected a similar approach to risk of harm in a putative FCRA class action. There, the plaintiff received an incomplete consumer report, a violation of the FCRA's requirement to provide "all [of the] information" in a consumer's file.[7] The court recognized that the risk of harm from TeleCheck's incomplete disclosure was "highly speculative," as an attenuated chain of unlikely events would need to happen in order for any alleged injury to occur.[8] Huff had not suffered a declined check in years. Because Huff did not show that he was actually harmed by the failure to provide the required information, he did not have standing. [9]

The Sixth Circuit's approach faithfully follows this Court's guidance in *Spokeo I*, and stands in direct contrast to the Ninth Circuit's approach in *Patel*. As it currently stands, the Ninth Circuit will allow harm that "seems likely" to constitute a concrete injury, even where that "likely" harm is a mere future possibility, far from imminent, completely divorced from the conduct (here, the alleged failure to comply with notice and consent requirements) at issue, and the record suggests no actual risk of use or harm. Further, plaintiffs below <u>admitted</u> that the alleged

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6 *Huff v. Telecheck Servs., Inc.*, 923 F.3d 458 (6th Cir. 2019).

7 15 U.S.C. § 1681g(a)(1).

8 *Huff*, 923 F.3d at 463.

9 *Id.*

harmful conduct had no actual effect on their behavior.[10]

In another FCRA case, the **Fourth Circuit** in *Dreher v. Experian Information Solutions, Inc.*, found no concrete injury in the context of another informational injury that is commonly alleged in FCRA class actions.[11] There, the consumer reporting agency failed to accurately disclose the source of a tradeline in the plaintiff's consumer report.[12] Following this Court's guidance in *Spokeo I*, the Fourth Circuit reasoned that Dreher lacked a concrete, real-world injury because he had not demonstrated how inaccurately disclosing the source of a tradeline affected his actual conduct in any way.[13] He had not been "adversely affected" and therefore "suffered no real harm."[14]

As in *Dreher*, the plaintiffs here have admitted to having been unaffected in any real-world way. Rather, the plaintiffs argued before the Ninth Circuit that "'[i]t is of no moment' whether any individual Plaintiff would have opted out of Tag Suggestions, or changed his behavior in some other way, had he received a different disclosure from Facebook. Appellees' Br. at 29, *Patel*, 932 F.3d 1264 (No. 18-15982)."[15] Yet while the Court in *Dreher* found that

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[10] Petition at 16-17.

[11] *Dreher v. Experian Info. Sols., Inc.*, 856 F.3d 337 (4th Cir. 2017).

[12] *Id.* at 345.

[13] *Id.* at 347.

[14] *Id.*

[15] Petition at 17.

the injury was insufficiently concrete, the Ninth Circuit permits such attenuated risks to pass muster.

This approach misinterprets not only Article III but the FCRA as well. CDIA's members frequently face class action lawsuits over alleged informational injuries such as incomplete file disclosures or the inaccurate source of a tradeline, as seen in *Huff* and *Dreher*.[16] And Congress has authorized plaintiffs to recover statutory damages under the FCRA for willful violations of the statute.[17] The FCRA's statutory history, however, demonstrates that Congress sought to provide redress only where real harm, or a <u>material</u> risk of harm, flows from a violation of the FCRA. The

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16 *See, e.g., Kamal v. J. Crew Grp., Inc.,* 918 F.3d 102 (3d Cir. 2019) (alleging that the retailer violated the Fair and Accurate Credit Transactions Act by printing more than the last five digits of a consumer's credit card number on their receipt); *Meyers v. Nicolet Rest. of De Pere, L.L.C.*, 843 F.3d 724 (7th Cir. 2016) (alleging that restaurant did not truncate the expiration date of a customer's credit card on their receipt, in violation of the Fair and Accurate Credit Transactions Act); *Hendrick v. Aramark Corp.*, 263 F. Supp. 3d 514 (E.D. Pa. 2017), *appeal dismissed*, No. 17-2120, 2017 WL 5664867 (3d Cir. Oct. 31, 2017) (alleging violation of the Fair and Accurate Credit Transactions Act for giving a customer a paper receipt displaying ten digits of their credit card number); *Saltzberg v. Home Depot, U.S.A., Inc.*, No. CV17-05798-RGK (AKX), 2017 WL 4776969 (C.D. Cal. Oct. 18, 2017) (alleging that Home Depot violated the Fair Credit Reporting Act by including unlawful waivers in the background check consent forms); *LaFollette v. RoBal, Inc.*, No. 1:16-CV-2592-WSD, 2017 WL 1174020 (N.D. Ga. Mar. 30, 2017) (alleging defendant violated 15 U.S.C. § 1681b(b)(2)(A) because it failed to give her a standalone document that consisted solely of a disclosure indicating that the defendant might obtain a consumer report for employment purposes).

17 15 U.S.C. § 1681n.

Senate Report surrounding the adoption of the FCRA frequently focused on the real-world impact of FCRA violations.[18] The report then listed examples of the damage the bill was meant to protect against: "being rejected for credit or insurance or employment because of a credit report[.]"[19] The report emphasized that the bill's procedures "give the consumer access to the information in his credit file so that he is not unjustly damaged by an erroneous credit report."[20] Congress's intent is clear: protecting consumers from the real harms that might flow from inaccurate information, not creating a statutory scheme whereby enterprising plaintiffs' attorneys can take advantage of harmless but inaccurate information in consumer reports.

A ruling from this Court clarifying what types of informational injuries are sufficiently concrete, would resolve the confusion surrounding FCRA class actions that create so much uncertainty for CDIA's members.

II. Circuit courts are split as to the weight afforded to legislative judgments in applying *Spokeo I.*

This Court should also grant the Petition to resolve a split among the circuits with respect to the weight accorded to the judgment of legislatures. To

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[18] "The purpose of the fair credit reporting bill is to prevent consumers from being unjustly damaged because of inaccurate or arbitrary information in a credit report." S. Rep. No. 91-517, at 3 (1969).

[19] *Id.*

[20] *Id.*

be sure, this Court has explained that Congress's judgment is "instructive and important" in assessing whether an injury is sufficiently concrete[21] and that Congress can elevate intangible injuries to Article III injuries. However, as this Court has explained, a legislature may not abrogate standing requirements by "statutorily granting the right to sue to a plaintiff who would not otherwise have standing."[22] That a legislature may occasionally elevate an intangible harm to a legally cognizable injury in fact "does not mean that a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right."[23]

Patel diverges from that framework. As an initial matter, state legislatures are not entitled to the same deference as Congress in interpreting the *federal* Constitution and determining the jurisdiction of the *federal* courts. This Court explained in *Spokeo I* that "*Congress* is well positioned to identify intangible harms that meet minimum Article III requirements." *Spokeo I*, 136 S. Ct. at 1549 (emphasis added)—and that Article III places firm limits on what even Congress may deem an Article III harm. There is no basis for extending the same deference to *state* legislative bodies in determining what Article III requires.

Further, *Patel* failed to require any pertinent exercise of legislative judgment about concrete

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[21] *Spokeo I*, 136 S. Ct. at 1549.

[22] *Id.* at 1548.

[23] *Id.* at 1549.

harms. In finding that Plaintiffs had established a concrete injury, the Ninth Circuit explained that: "[I]n enacting BIPA, the [Illinois] General assembly found that the development and use of biometric data presented risks to Illinois's citizens, and that '[t]he public welfare, security, and safety will be served by regulating the collection, use, safeguarding, handling, storage, retention, and destruction of biometric identifiers and information.'"[24]

The General Assembly made no "judgment," however, that a violation of BIPA's notice-and-consent provisions automatically establishes harm. It found only that, "once compromised," biometric identifiers may create a "risk of identity theft."[25] Patel also found that in *Rosenbach v. Six Flags*,[26] the Illinois Supreme Court deemed the General Assembly to have made a judgment that the collection of biometric data is harmful.[27] The opposite is true. Rosenbach held that BIPA's statutory "aggrieved" provision did not require a "compensable injury" because BIPA was intended to permit "preventative" lawsuits before "compensable" harm occurs.[28] By definition, a "preventative" suit cannot be brought in federal court.

Critically, in analyzing Illinois' legislative findings, the Ninth Circuit made no effort to connect the purported "risks" imposed by collection of biometric identifiers and the specific technology at

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[24] *Patel*, 932 F.3d at 1273 (citing 740 ILCS 14/5(g) (2008)).
[25] 740 ILCS 14/5(c) (emphasis added).
[26] 2019 IL 123186 (Jan. 25, 2019).
[27] Patel, 932 F.3d at 1274.
[28] 2019 IL 123186, ¶¶ 35 37.

issue here: the application of facial recognition technology to online photos. The weight given to the Illinois legislature's pronouncements – and an erroneous interpretation of an Illinois Supreme Court precedent -- far exceeds the deference other Circuits have afforded even Congress, let alone state legislatures.

In *Salcedo v. Hanna*,[29] the Eleventh Circuit held that in implementing the Telephone Consumer Protection Act, Congress sought to protect consumers from intrusive telephone calls at home, not unwanted text messages on mobile phones.[30] This rationale meant that a plaintiff who had received a single unwanted text message lacked standing to sue; his alleged harm was not within the realm of injury Congress sought to protect.[31] The court did not extrapolate intrusive text messages from Congress's elevation of intrusive phone calls.

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[29] *Salcedo v. Hanna*, 936 F.3d 1162, 1168–69 (11th Cir. 2019).

[30] "Congress's legislative findings about telemarketing suggest that the receipt of a single text message is qualitatively different from the kinds of things Congress was concerned about when it enacted the TCPA. In particular, the findings in the TCPA show a concern for privacy within the sanctity of the home that do not necessarily apply to text messaging. 'Unrestricted telemarketing ... can be an intrusive invasion of privacy,' and '[m]any consumers are outraged over the proliferation of intrusive, nuisance calls to their homes from telemarketers,' Congress found. Pub. L. No. 102-243, § 2, ¶¶ 5, 6. By contrast, cell phones are often taken outside of the home and often have their ringers silenced, presenting less potential for nuisance and home intrusion." *Salcedo*, 936 F.3d at 1169.

[31] *Id.*

Similarly, in *Huff*, the Sixth Circuit considered the legislative history of the FCRA and, while recognizing that Congress had sought to curb the dissemination of inaccurate consumer report information,[32] held that Congress did not have a "blank check" to define and create informational injuries.[33] "Any other conclusion would give Congress the final say over the injury-in-fact limitations in Article III, an outcome inconsistent with the architecture of the Constitution."[34] *Huff* had not shown how Congress's concern with inaccurate consumer reports actually had a real-world impact on him.[35]

The Ninth Circuit afforded plaintiffs the precise "blank check" condemned in *Huff* and *Salcedo*, creating divergent outcomes over the same set of facts. Privacy concerns with *the application of facial recognition technology to online photos* were not part of the Illinois legislature's consideration of harm in enacting the BIPA -- indeed, the legislature specifically excluded "photographs" and "information derived from" "photographs" from the statute's reach.[36] And again, the legislature was concerned about the risks of identity theft when biometric data

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[32] *Huff*, 923 F.3d at 465.

[33] *Id.* at 466.

[34] *Id.*

[35] "All of this still leaves Congress with plenty of power to define and create intangible injuries. It just has to explain itself in a way it never did here. In the absence of an explanation of how a seemingly harmless procedural violation constitutes a real injury, we are left with a canyon-sized gap between Congress's authority and the problem it seeks to resolve." *Id.*

[36] 740 ILCS 14/10.

is compromised, not merely collected or stored.[37] The legislature never suggested that the mere use of facial recognition technology creates such risks, nor did the Ninth Circuit. Yet the Ninth Circuit held that any application of facial recognition technology without notice and consent is sufficient to establish an Article III injury. By contrast, the Eleventh Circuit required a specific finding regarding the harm associated with an unwanted text message in enacting the TCPA.

If the Petition is not granted, CDIA's members face the possibility of divergent outcomes under the same set of facts. It is easy to see how a broad reference to "privacy" in the context of FCRA could be used to create causes of action for informational injuries that would be insufficient in other circuits such as the Sixth and Eleventh Circuits. The membership should not face such uncertainty. The Court should grant the Petition to bring clarity to how legislative findings are treated in the standing analysis.

III. Clarification of Article III standing requirements is particularly important to CDIA members, who face ruinous damages through no-injury class actions.

For CDIA's members, expanding standing as the Ninth Circuit has done in the underlying decision is no academic exercise. Affording access to the federal courts in the absence of a real-world harm is particularly troubling where citizens, including CDIA's members and its members' data furnishers

[37] 740 ILCS 14/5.

and customers, may be subject to ruinous damages through class action lawsuits that do not seek to redress any actual consumer harm. CDIA's members' business practices are subject to the FCRA and may involve millions of consumers each day, touching every aspect of the economy.[38] Given their important role in the economy, it is not surprising that consumers sue CDIA's members hundreds of times each year, alleging violations of the FCRA. Through the sheer volume of consumer reports generated, and the FCRA's statutory damages provision, CDIA's members face crushing liability if no-injury plaintiffs can bring class actions in federal court. Worse yet, the Ninth Circuit's decision will encourage forum-shopping—plaintiffs are likely to file class actions in the Ninth Circuit to take advantage of its outlier approach to Article III standing.

The effect of the Ninth Circuit's effective abrogation of *Spokeo I* reverberate beyond just the parties to these cases. The enormous risk of no-harm class actions is an obstacle for members of CDIA that might want to innovate by, for example, creating products that facilitate reporting of vulnerable or "credit invisible" consumers[39] who have no credit history. That risk is also an obstacle for furnishers of

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[38] *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349-50 (2011) (internal quotation marks omitted).

[39] According to a 2016 study by the Consumer Financial Protection Bureau, "credit invisibles"—people with little or no credit history—are disproportionately low-income, minorities, and young. CONSUMER FINANCIAL PROTECTION BUREAU, "Who are the credit invisibles?" (Dec. 2016), available at: https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/201612_cfpb_credit_invisible_policy_report.pdf.

information to CRAs, which face the same statutory damages scheme.[40] In light of this risk, a number of furnishers have decided to stop furnishing information, and other potential furnishers have decided not to furnish information. At a macro level, the less information that is furnished to and compiled by CRAs, the less reliable the information in consumer reports becomes for purposes of risk modeling. At a micro level, reduced furnishing and reporting hinders the ability of "credit invisible" consumers to build credit history. These decisions by CRAs and furnishers are important, because users of consumer reports rely on them to make important decisions affecting consumers' employment, housing, and access to credit.[41]

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[40] The statutory damages provision of the FCRA applies to all violations of the statute, not just violations by CRAs. 15 U.S.C. § 1681n(a)(1)(A).

[41] "In competitive markets, the benefits of credit reporting activities are passed on to borrowers in the form of a lower cost of capital, which has a positive influence on productive investment pending. Improved information flows also provide the basis for fact-based and quick credit assessments, thus facilitating access to credit and other financial products to a larger number of borrowers with a good credit history (i.e. good repayment prospects)." International Bank for Reconstruction and Development, "General principles for credit reporting," The World Bank (Sept. 2011), available at: http://documents.worldbank.org/curated/en/662161468147557554/General-principles-for-credit-reporting.

CONCLUSION

This Court should grant Facebook's petition for certiorari and bring clarity to the circuit courts' competing approaches to *Spokeo I*.

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