No. 17-806

In The Supreme Court of the United States

SPOKEO, INC.,

Petitioner,

v.

THOMAS ROBINS, INDIVIDUALLY ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Respondent.

On Petition For Writ Of *Certiorari* To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICUS CURIAE* CONSUMER DATA INDUSTRY ASSOCIATION IN SUPPORT OF PETITIONER

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RULE 29.6 STATEMENT

Pursuant to Rule 29.6, the Consumer Data Industry Association ("CDIA") provides the following disclosure.

CDIA is a trade association. No publicly held company owns 10% or more of CDIA stock.

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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, Spokeo, Inc. (*hereinafter*, "Spokeo").

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, with a membership of approximately 100 consumer reporting agencies and other specialized CRAs operating throughout the United States and the world.

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

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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. CDIA's letters requesting consent and the parties' responses have been filed with the Clerk of Court.

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.

the collection, use, maintenance, and 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 CRA members are subject to the FCRA's comprehensive regulatory scheme and its statutory damages provision, which permits consumers to recover "any actual damages sustained by the consumer as a result of the [willful violation] *or damages of not less than $100 and not more than $1,000*" from those who have willfully failed to comply with the FCRA "with respect to" such consumers.[2]

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] the Article III standing requirements, particularly the injury-in-fact requirement, are critical to 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.

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[2] 15 U.S.C. § 1681n(a)(1)(A) (emphasis added).

[3] *See*, *e.g.*, *Sarver v. Experian Info. Solutions*, 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 and 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 average of 1.2 million household address changes a month, and over 200 million individual credit files.").

consumer. Article III's limitations are essential to prevent entrepreneurial plaintiffs' class action counsel from abusing the FCRA's statutory damages provision to challenge any CRA activity as a willful violation even when the activity results in no cognizable consumer injury.

Moreover, because the FCRA imposes compliance obligations upon tens of thousands of businesses who furnish information to CRAs,[4] and the users (*e.g.*, creditors, insurers, employers, landlords, and law enforcement) of the billions of consumer reports CRAs prepare every year,[5] the risk of no-injury class action lawsuits, such as Robins's putative class action, could threaten nearly every aspect of the U.S. economy.

Given that CDIA has represented the consumer reporting industry for more than a century, and because its member CRAs and their furnishers and users are all subject to potential claims under the FCRA's statutory damages provision, CDIA is uniquely qualified to assist this Court as it considers Spokeo's petition.

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[4] *See*, *e.g.*, *Sarver*, 390 F.3d at 972 (noting that a single CRA "gathers credit information originated by approximately 40,000 sources").

[5] Federal Trade Commission, *Report to Congress Under Sections 318 and 319 of the Fair and Accurate Credit Transactions Act of 2003* at 8-9 (2004) (more than 1.5 billion consumer reports furnished annually) available at http://www.ftc.gov/reports/facta/041209factarpt.pdf.

THE CONSUMER REPORTING INDUSTRY

In enacting the FCRA, Congress recognized that the consumer reporting industry is vital to the U.S. economy.[6] 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 individuals suspected of criminal activity.[7] 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, the three nationwide CRAs have created and maintain data files on nearly 200 million consumers.[8] These files contain 2.6 billion tradelines (an industry term for accounts that

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[6] 15 U.S.C. § 1681(a)(1) ("The banking system is dependent upon fair and accurate credit reporting."); 15 U.S.C. § 1681(a)(2) (the consumer reporting system is an "elaborate mechanism" for investigating and evaluating a consumer's credit worthiness, credit standing, credit capacity, character, and general reputation); *TRW Inc. v. Andrews*, 534 U.S. 19, 23 (2001) ("Congress enacted the FCRA in 1970 to promote efficiency in the Nation's banking system and to protect consumer privacy").

[7] *TRW*, 534 U.S. at 23; *Sarver v. Experian Info. Solutions*, 390 F.3d 969, 972 (7th Cir. 2004); *see* Staten and Cate, *supra* note 3, at iv.

[8] Federal Trade Commission, *Report to Congress Under Sections 318 and 319 of the Fair and Accurate Credit Transactions Act of 2003* (2004) at 8-9.

are included in a consumer report)[9] that include billions of items of information the CRAs receive from over ten thousand furnishers on a monthly basis.[10] Because consumer 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"[11] 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 purely voluntary basis. Furnishing information to a consumer reporting agency is largely a voluntary endeavor.[12] 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, less accurate, 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.

[9] *Id.*

[10] *Id.*

[11] 15 U.S.C. § 1681b.

[12] Some non-traditional small dollar lenders are under an obligation to furnish under certain state laws.

SUMMARY OF ARGUMENT

In its opinion on remand, the Ninth Circuit provides only cursory consideration to this Court's reasoned analysis in *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016) ("*Spokeo I*"), by finding that Robins's speculative injuries were sufficiently "concrete" to satisfy Article III. The Ninth Circuit decision deepens an already significant split amongst the lower courts, which differ on whether the plaintiffs themselves must suffer real world harm or can instead satisfy Article III by allegations that are little different from the "injury in law" rejected by *Spokeo I*.

In addition to transgressing Article III, allowing uninjured plaintiffs like Robins to enforce statutory violations is not what Congress intended when it passed the Fair Credit Reporting Act and would incentivize forum-shopping by class-action lawyers bringing nationwide suits in circuits that favor them. Authorizing these types of class actions also would undermine the consumer reporting industry's incentives to root out and prevent harm to consumers, by diverting resources away from combating actual consumer harm to assuring hyper-technical statutory compliance to shield themselves from forum-shopping litigants. This Court's guidance in *Spokeo I* is essential to preventing these harms, but it has been misinterpreted, and largely neutered, across some circuits. The Court should grant the petition in order to bring clarity to this critical, often occurring, issue.

ARGUMENT

I. Lower courts apply this Court's previous opinion in *Spokeo I* inconsistently in Fair Credit Reporting Act cases.

In the less than two years since *Spokeo I*, this Court's holding has been interpreted inconsistently across FCRA cases involving intangible harms, or so-called informational injuries. As explained in *Spokeo I*, violation of a statute may satisfy the injury-in-fact requirement of Article III where a plaintiff can allege a harm resulting from the violation that is both particularized and concrete.[13] Focusing on the concreteness aspect of an injury in fact, this Court directed lower courts to consider whether: (1) the statutory right is related to a harm traditionally regarded as a basis for a lawsuit in English or American courts (i.e., the statutory harm has an analogous common law right), *or* (2) Congress has defined an injury and articulated a chain of causation that elevates a previously inadequate harm to a legally cognizable injury.[14] In so holding, this Court recognized that "not all inaccuracies cause harm or present any material risk of harm," specifically citing the example of the inaccurately-reported zip code but declining to draw a bright line as to when an inaccuracy would be actionable.[15]

Almost immediately following this Court's decision in *Spokeo I*, a split emerged in FCRA cases in the

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

[14] *Id.*

[15] *Id.* at 1550.

lower courts between those that allow hypothetical or conjectural risk to confer standing, versus courts that require a material risk of harm or real-world effect.

The Ninth Circuit's decision on remand follows the approach where a hypothetical risk of harm can be a "concrete" injury. On remand, the court purports to follow the *Spokeo I* framework but finds that Robins's generalized "anxiety" and "stress" over speculative "diminished employment prospects" are a concrete injury because they "seem[ed] directly and substantially related to [the] FCRA's goals."[16] The court further reasons that alleged injury was "substantially more likely to harm his concrete interests than the Supreme Court's example of an incorrect zip code" and that the type of allegedly inaccurate information at issue – age, marital status, educational background, and employment history – "is the type that may be important to employers."[17] Yet this "injury" is purely hypothetical; Robins never claimed that any potential employer ever saw, considered, or relied on the alleged inaccuracies in Spokeo's report.[18]

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[16] *Robins v. Spokeo, Inc.*, 867 F.3d 1108, 1117 (9th Cir. 2017).

[17] *Id.* at 1117.

[18] Robins's first amended complaint does not allege that any potential employer even saw the report from Spokeo containing the alleged inaccuracies. First Amended Complaint at 7-8, *Robins v. Spokeo, Inc.*, 867 F.3d 1108 (2017) (No. 2:10-cv-05306-ODW-AGR), 2011 WL 7782796. The Ninth Circuit's opinion, however, jumps immediately to the conclusion that Robins suffered harm simply because the allegedly inaccurate information is information employers would care about. Perhaps the Ninth Circuit inferred from Robins's first amended complaint that an employer

The Third Circuit in *In re Horizon Healthcare Services Inc. Data Breach Litigation*[19] followed a similar approach in finding that unauthorized disclosure of the plaintiffs' personal information through a data breach created a sufficiently concrete injury. It reached this decision by comparing the FCRA's data security provisions to the common law tort for invasion of privacy. The court reasoned that "with the passage of [the] FCRA, Congress established that the unauthorized dissemination of personal information by a credit reporting agency causes an injury in and of itself – *whether or not the disclosure of that information increased the risk of identity theft or some other future harm*."[20] The court further concluded that the FCRA's provision for "statutory damages for willful violations . . . clearly illustrates that Congress believed that the violation of [the] FCRA causes a concrete harm to consumers."[21]

In this vein, the Ninth and Third Circuits, while claiming to faithfully apply this Court's decision in *Spokeo I*, have permitted the same types of no-injury,

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did actually view the allegedly inaccurate information; perhaps the Ninth Circuit simply did not consider whether the inaccurate information posed a risk of real world harm to Robins by virtue of a potential employer seeing it and potentially relying on it. In either scenario – whether relying on incorrect facts, or misapplying this Court's holding in *Spokeo I* – the Ninth Circuit's reasoning was flawed.

[19] 846 F.3d 625 (3d Cir. 2017).

[20] *Id*. at 639 (emphasis added).

[21] *Id.*

speculative, harms that necessitated this Court's review in the first instance. The Court's holding in *Spokeo I* is effectively nullified if theoretical harms can constitute a concrete injury so long as the plaintiff can point to some attenuated relationship to a common law right or harm that Congress sought to remedy.[22] In fact, the Ninth Circuit's decision appears to go further in that so long as an alleged injury seems "substantially related to" a statute's goals, that injury is sufficient for purposes of Article III.[23] It is easy to see how allowing violations that are generally related to the "goals" of a statute effectively swallows the rule that plaintiffs must suffer a concrete injury to have standing.

In contrast, other circuits have required a specific, real world, harm in order to establish a concrete injury. In *Dreher v. Experian Information Solutions, Inc.*,[24] the plaintiff argued that the defendant, a consumer reporting agency, failed to accurately disclose to him the source of a tradeline in his consumer report, which in turn caused additional stress as he tried to correct the alleged inaccuracy.[25] Analyzing these claims under this Court's *Spokeo I* framework, the Fourth Circuit found that there was neither a common law analogue to

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[22] In particular, the Ninth Circuit's reliance on the "goals" of the FCRA to establish concreteness seem problematic. Arguably, *any* violation of the FCRA would be inconsistent with its goals, which again would effectively nullify this Court's holding in *Spokeo I*.

[23] *Spokeo, Inc.*, 867 F.3d at 1117.

[24] 856 F.3d 337 (4th Cir. 2017).

[25] *Id.* at 345.

Dreher's alleged injury, nor was the source of a tradeline within the type of harm that Congress sought to prevent in enacting the FCRA.[26] Instead, it reasoned that Dreher's alleged injury was not concrete because he had not demonstrated how inaccurately disclosing the source of a tradeline affected his actual conduct in any way.[27] He had not been "adversely affected" and therefore "suffered no real harm."[28]

A similar split exists in FCRA cases arising from the employment-screening context. There, courts are divided on whether an employee has standing to sue an employer that provided extraneous information in a disclosure, which, under the FCRA, must be standalone. Employees often have difficulty demonstrating that they suffered a real-world injury from the extraneous information, leading some courts to conclude that there is no concrete injury; yet facing the same facts, other courts have found that the "informational injury" alone is sufficient to establish standing.[29]

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[26] *Id.* at 346.

[27] *Id.* at 347.

[28] *Id.*

[29] *Compare*, *e.g.*, *Groshek v. Time Warner Cable, Inc.*, 865 F.3d 884, 886-89 (7th Cir. 2017) (plaintiff lacked standing to bring claim over extraneous information in employment screening disclosures); *Shoots v. iQor Holdings US, Inc.*, No. 15-cv-563, 2016 WL 6090723, *4-6 (D. Minn. Oct. 18, 2016) (same); *Stacy v. Dollar Tree Stores, Inc.*, No. 16-cv-61032, 2017 WL 3531513, *4-6 (S.D. Fla. Aug. 14, 2017) (same); *with Anderson v. Wells Fargo Bank, N.A.*, No. 17-cv-5010, 2017 WL 3034260, *4-7 (D.S.D. July 17, 2017) (plaintiff had standing to bring claim over extraneous information in employment screening disclosures, without any

Plainly, even under a single statute like the FCRA, there is a chasm between courts who require real world harm and courts that authorize lawsuits based on generalized anxiety over contingent events that are "related" to a common law right or "goal" of Congress. Yet even the FCRA itself supports the Fourth Circuit's approach in *Dreher* rather than the Ninth and Third Circuits' expansive view of concreteness. With respect to the willful damages provision of the FCRA, the statutory history demonstrates that Congress sought to provide redress for some real harm, or material risk of harm, flowing from violations of the FCRA. The Senate Report quoted by the Ninth Circuit describes throughout its text the statute's purpose as being to prevent actual damage to consumers. For example, "[o]ne problem which the hearings . . . identified is the inability at times of the consumer to know he is being *damaged* by an adverse credit report."[30] The report then lists examples of the damage the bill was meant to protect against: "*being rejected for* credit or insurance or *employment* because of a credit report[.]"[31] The report

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allegation of real-world harm, because the requirement in the FCRA to provide the disclosure in a stand-alone document is a substantive, rather than procedural, right); *Banks v. Central Refrigerated Servs., Inc.*, No. 2:16-cv-356, 2017 WL 1683056, *2-4 (D. Utah May 2, 2017) (same); *Thomas v. FTS USA, LLC*, 193 F.Supp.3d 623, 631-33 (E.D. Va. 2016) (same).

[30] S. Rep. No. 97-517, at 3 (1969) (emphasis added). *See also Spokeo, Inc.*, 867 F.3d at 1113 (quoting S. Rep. No. 97-517, at 1 (1969) ("The purpose of the fair credit reporting bill is to prevent consumers from being unjustly damaged because of inaccurate or arbitrary information in a credit report")).

[31] S. Rep. No. 97-517, at 3 (1969) (emphasis added).

emphasizes 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."[32] 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 intangible injuries are sufficient to establish standing would help resolve the conflicting judicial applications of *Spokeo I* under not only the FCRA, but also in cases arising under other statutes. Many consumer protection statutes include technical requirements, create rights for consumers, and include blanket statutory damages provisions for all violations. Likewise, courts applying *Spokeo I* to other consumer protection statutes, such as the Fair Debt Collection Practices Act, the Truth in Lending Act, and the Telephone Consumer Protection Act, have also reached inconsistent conclusions about whether a statutory violation alone can establish standing.[33] If this Court does not resolve the

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[32] *Id*. at 2 (emphasis added).

[33] *Compare Church v. Accretive Health, Inc.*, 654 Fed. Appx. 990, 994-95 (7th Cir. 2017) (failure to provide certain disclosures required by the FDCPA was sufficient injury to establish standing), *with Perry v. Columbia Recovery Group, LLC*, No. C16-0191JLR, 2016 WL 6094821, *8 (W.D. Wash. Oct. 19, 2016) (providing information that is inconsistent with a debtor's rights under the FDCPA alone, without any showing of harm, is insufficient to establish standing). *Compare also Strubel v. Comenity*

issue with a clear rule, plaintiffs will be incentivized to forum-shop for favorable circuits under a myriad of consumer protection statutes, which could cause significant disruption to the consumer credit economy at large.

II. Clarification is warranted because CDIA members continue to face ruinous damages through no-injury class actions as a result of the inconsistent application of *Spokeo I*.

This case presents a perfect example of why no-harm class actions are more broadly problematic: they permit the precise type of bounty hunting that this Court has long disfavored.[34] Although the Ninth

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Bank, 842 F.3d 181, 190-91 (2d Cir. 2016) (finding that a plaintiff who did not receive certain notices required by the federal Truth in Lending Act had standing, even absent any specific harm, because the notice requirements "serve[ ] to protect a consumer's concrete interest in avoiding the uninformed use of credit, a core object of [TILA]" (internal quotations omitted)), *with Jamison v. Bank of America, N.A.*, 194 F.Supp.3d 1022, 1028 (E.D. Cal. 2016) (finding that a plaintiff who did not receive certain notices required by TILA did not have standing because the violation was a "bare procedural one" and the plaintiff failed to allege any likely harm). Finally, *compare Van Patten v. Vertical Fitness Group*, 847 F.3d 1037, 1042-43 (9th Cir. 2017) (finding that an alleged TCPA violation had a common law analogue with invasion of privacy) *with Sartin v. EKF Diagnostics, Inc.*, No. 16-cv-1816, 2016 WL 3598297, at *3 (E.D. La. July 5, 2016) (requiring a specific injury to assert standing under the TCPA).

[34] In *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, this Court considered whether a plaintiff suing under the *qui tam* provision of the False Claims Act had standing to

Circuit conceded that not any inaccuracy is enough to confer standing to pursue an FCRA violation,[35] it failed to articulate what actual injury Robins suffered. The court simply speculated that the type of information at issue – age, marital status, educational background, and employment history – "is the type that may be important to employers" without ever pointing to an actual injury, or material risk of injury, suffered by Mr. Robins.[36] The decision subverts the Article III requirement that a plaintiff show palpable, concrete harm, and creates a standard that is inherently speculative and essentially impossible to apply predictably.[37] A plaintiff who can enforce a statutory violation with no concrete injury merely becomes a private Attorney General seeking vindication for an undifferentiated public interest in FCRA compliance. Article III standing must mean something more than allowing plaintiffs to pursue FCRA claims for generalized harm to the public where there is no specific injury.

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assert his claims because the injury alleged in the suit was suffered by the United States. 529 U.S. 765, 772 (2000). The plaintiff's only interest in the litigation was the "bounty," in the form of a percentage of the United States' recovery he stood to receive if he prevailed in the litigation. The Court firmly rejected the notion that this interest in the suit's outcome sufficed for standing, comparing the plaintiff's interest to that of "someone who has placed a wager upon the outcome." *Id.* No-injury class actions of the type pursued by Robins here are effectively a wager by a plaintiff (and his counsel) who has no true interest in the case.

[35] *Spokeo, Inc.*, 867 F.3d at 1116.

[36] *Id.* at 1117.

[37] *See Warth v. Seldin*, 422 U.S. 490, 501 (1975).

Affording access to the courts in the absence of a real world harm is particularly troubling because CDIA's members and its members' data furnishers and customers will 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.

And the effect of the Ninth Circuit's misinterpretation of *Spokeo I* reverberates 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

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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?*" (December 2016), available at: https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/201612_cfpb_credit_invisible_policy_report.pdf.

is also an obstacle for furnishers of 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)." The World Bank, *General Principles for Credit Reporting* (2011), at 1, available at: http://documents.worldbank.org/curated/en/662161468147557554/General-principles-for-credit-reporting.

III. Uncertainty also prevents CDIA members from allocating compliance resources to *actual consumer harm*, creating perverse incentives to assure hyper-technical compliance with the FCRA.

Data furnishers and CRAs currently tailor their compliance obligations to the mandates of the federal regulators tasked with overseeing this industry. The resources that the industry allocates for compliance are prioritized to prevent risk of harm to consumers. The Consumer Financial Protection Bureau ("CFPB") – which has supervisory authority over many of the key institutions in the consumer reporting industry – has repeatedly emphasized to regulated entities that their focus should be on consumer *harm*. For example, the CFPB stated in its supervisory highlights that:

> [W]e expect institutions subject to our supervisory authority to structure their Compliance Management System in a manner sufficient to comply with Federal consumer financial laws and appropriately address associated risks of *harm* to consumers.[42]
>
> . . .
>
> Supervision will continue to prioritize new and existing FCRA areas based on insights from a robust number of data sources that

[42] *Supervisory Highlights, Consumer Reporting, Special Edition*, Issue 14, at 12 (CFPB March 2017), available at: https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/201703_cfpb_Supervisory-Highlights-Consumer-Reporting-Special-Edition.pdf (emphasis added).

> help us to identify areas where the risk of consumer *harm* is greatest.[43]

Authorizing no-injury class actions undermines the incentive to root out and prevent harm to consumers by requiring companies to devote resources to hypertechnical compliance brought about by forum-shopping litigants.

Technical no-harm violations are better addressed through the administrative forum, where regulators have supervisory authority and access to injunctive relief. The FCRA provides for administrative enforcement by the Federal Trade Commission, CFPB, the federal banking agencies, and state Attorneys General.[44] Administrative agencies have unique expertise in enforcing the public interest in this area, and can do so without running afoul of Article III's requirements. Rather than allowing for ruinous damages in no-injury class actions, the better approach is to allow the federal regulators to continue to police these issues.

[43] *Id.* at 22.

[44] *See* 15 U.S.C. § 1681s.

CONCLUSION

This Court should grant Spokeo's petition for review and clarify that no concrete injury exists where a plaintiff only alleges a speculative injury.

Respectfully submitted,

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