No. 17-806

IN THE

Supreme Court of the United States

SPOKEO, INC.,

Petitioner,

v.

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

Respondent.

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

BRIEF OF TRANS UNION LLC AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*

Trans Union LLC ("TransUnion") is a "consumer reporting agency that compiles and maintains files on consumers on a nationwide basis," as defined in section 603(p) of the Fair Credit Reporting Act, 15 U.S.C. §§ 1681-1681x (FCRA). As one of the nation's three major credit bureaus, TransUnion maintains billions of pieces of information about United States consumers and issues millions of consumer reports every month. Given these functions and the consumer credit reporting system's critical importance to the national economy, TransUnion is regulated comprehensively as a "consumer reporting agency" by the FCRA, as well as by certain state mini-FCRAs and the Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C. § 5301 *et seq*. (Dodd-Frank Act).[1]

TransUnion has a strong interest in ensuring that the FCRA is applied in accordance with Constitutional requirements and is properly construed. TransUnion expends millions of dollars annually to ensure compliance with credit reporting laws, regulations and relevant judicial decisions. The opinion below once again threatens to greatly expand FCRA liability beyond its intended scope of consumer protection, thereby exposing TransUnion, other credit bureaus, data furnishers and users of credit reports to potentially

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[1] Pursuant to Rule 37.2(a), letters of consent from petitioner and respondent have been filed with the Clerk of the Court. Counsel of record for all parties received timely notice of *amicus curiae's* intent to file this brief. Pursuant to Rule 37.6, *amicus curiae* certifies that no counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus curiae* and its counsel made a monetary contribution to the preparation or submission of this brief.

massive class action cases brought by or on behalf of persons without any real-world harm.

This Court should grant the petition for certiorari to provide necessary guidance to courts around the country. Without clear guidance from this Court, high-stakes litigation filed under the Act will continue, inevitably reducing innovation in new data services and diminishing the scope of predictive information available to credit grantors to manage risk. Such litigation also risks introducing bias into the system of information exchange and discouraging the reporting of truthful information, thus impairing the usefulness of data relied upon by lenders, insurers, employers and landlords to make critical business decisions, and reducing the value of a good credit history to consumers who maintain a good history. Moreover, the expense of delivering information will be higher than it would be in the absence of potentially devastating litigation risk, and some services may become wholly unavailable due to the difficulty and expense of insuring against unpredictably massive statutory damages exposure. Ultimately, consumers will bear the brunt of these effects in the form of diminished access to credit, delays in obtaining credit and/or higher costs of obtaining it.

SUMMARY OF THE ARGUMENT

Certiorari should be granted because confusion and disagreement pervade the entire legal system in regard to how courts should apply the standing requirement set forth in Article III of the Constitution.

This Court initially granted certiorari to correct the Ninth Circuit's error in handling questions of Article III standing. Certiorari should again be granted to confirm this Court's authority to explicate the law in

this area, to respond to the Ninth Circuit's avoidance of that authority and to address the resulting chaos and confusion among courts nationwide.

In *Spokeo, Inc. v. Robins (Spokeo I)*, 136 S. Ct. 1540, 1549 (2016), *as revised* (May 24, 2016), this Court cautioned that a plaintiff does not automatically satisfy 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," since "Article III standing requires a concrete injury even in the context of a statutory violation."

The Court observed that "[a] violation of one of the FCRA's procedural requirements may result in no harm," and that standing to assert an FCRA claim could therefore not be established through a bare procedural violation. *Id.* at 1550. Only actual harm, or a sufficiently large "*risk* of real harm" to the plaintiff, could satisfy the requirement of concreteness. *Id.* at 1549 (emphasis added) (citing *Clapper v. Amnesty Int'l USA*, 568 U.S. 398 (2013)). The Court also noted that "not all inaccuracies cause harm or present any material risk of harm." *Id.* at 1550. The Court remanded with directions for the Ninth Circuit to "address . . . whether the particular procedural violations alleged in this case *entail a degree of risk* sufficient to meet the concreteness requirement." *Id.* (emphasis added).

On remand, the Ninth Circuit did not attempt to address the degree of risk of harm presented by the alleged inaccuracies, and again elided the question of how making a particular job applicant appear *more* stable and *more* educated created an *actual* risk of harm *to him specifically* of being denied the specific job in question. Rather, the Ninth Circuit found, as a general matter, that the information at issue—age,

marital status, educational background, and employment history—was "the type that *may* be important to employers or others making use of a consumer report," and that "[e]nsuring the accuracy of this sort of information thus seems directly and substantially related to FCRA's goals." *Robins v. Spokeo, Inc. (Spokeo II)*, 867 F.3d 1108, 1117 (9th Cir. 2017) (emphasis added). The Ninth Circuit said, "It does not take much imagination to understand how inaccurate reports on such a broad range of material facts about Robins's life *could* be deemed a real harm." *Id.* (emphasis added). In other words, the Ninth Circuit incorrectly conflated *hypothetical* harm to a *generic* job applicant with *actual* harm to the *specific* job applicant who filed suit, in spite of this Court's statements that "conjectural or hypothetical" impacts do not satisfy Article III. *See Spokeo I*, 136 S. Ct. at 1548 (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)).

This error effectively nullifies this Court's rule that "threatened injury must be certainly impending to constitute injury in fact." *Clapper*, 568 U.S. at 409 (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990)). Nothing in *Spokeo I* suggested a retreat from this rule. To the contrary, *Spokeo I* cited *Clapper* favorably. 136 S. Ct. at 1544.

Faithful application of this Court's precedents mandates the rejection of claims under the FCRA (and other statutes) unless there is actual harm to the plaintiff before the court, resulting from the actual violation alleged, rather than speculation about how the alleged violation might possibly affect consumers in general. The Ninth Circuit's approach in *Spokeo II* is emblematic of massive confusion and disagreement among the lower courts about how to apply *Spokeo I*. Many are taking an approach to the question of

intangible harm that is too deeply hypothetical, and are not carefully examining the particular plaintiff or the specific impact of the particular violation alleged, as *Spokeo I* commands.

Requiring a plaintiff to show actual or certainly impending injury in fact is core to the separation of powers between the Legislative and Judicial branches. Recognizing an Article III limit on no-harm class actions is therefore essential "to prevent the judicial process from being used to usurp the powers of the political branches," which include assessing new technologies and their social implications, and (when necessary) taking appropriate, measured enforcement actions on behalf of the general public. *See Clapper*, 568 U.S. at 408.

A rule requiring pleading and proof of injury in fact also has important practical implications. Opportunistic lawsuits seeking class relief on behalf of persons who were not injured in any real-world sense divert attention and resources from efforts to compensate the genuinely injured. They also impair American competitiveness, reduce employment and lead to increased consumer expense, as the costs of these cases must be absorbed by the economic system as a whole. In the FCRA context, these cases also discourage innovation in the credit reporting industry, and this also harms the public by impairing the development and reporting of alternative data that potentially can be used to qualify more people for credit than traditional credit data might allow.

The Ninth Circuit's approach also has exacerbated confusion within the lower courts over how to apply Article III standing requirements. This Court should once again grant certiorari to clarify whether Article III permits suit based on injury in law, without

corresponding injury in fact actually caused by the alleged legal violation and actually sustained by the particular plaintiff before the court.

ARGUMENT

A. Injury in Fact Is an Element of Every Private Claim Filed in Federal Court.

The Constitution limits the judicial power to "Cases" and "Controversies." U.S. CONST. art. III, § 2. Just as Article III protects the courts from infringements on their Constitutional powers, Article III also prohibits Congress from expanding the judicial power beyond its Constitutional limits. *See Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 217-18 (1995); *Marbury v. Madison*, 5 U.S. 137, 176-77 (1803). The judicial branch has a "constitutionally limited role of adjudicating actual and concrete disputes." *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 71 (2013); *see also Joint Stock Soc'y v. UDV N. Am., Inc.*, 266 F.3d 164, 175-76 (3d Cir. 2001) (Alito, J.); John G. Roberts, *Article III Limits on Statutory Standing*, 42 DUKE L.J. 1219, 1230 (1993).

Article III requires that "the plaintiff must have suffered an 'injury in fact'—an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical. [Also] there must be a causal connection between the injury and the conduct complained of." *Lujan*, 504 U.S. at 560 (internal quotation marks, citations and footnote omitted). Where a plaintiff is not injured in a real-world sense, he has no true controversy with the defendant, and thus lacks standing to sue. *See id.* at 560-61. "Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise

have standing." *Raines v. Byrd*, 521 U.S. 811, 820 n.3 (1997). This principle applies in both individual and class cases. *See Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 40 (1976). Treating any technical violation of a statute as an actual injury, regardless of its real-world effect on the plaintiff (or in a class case, a provable effect on each and every proposed class member) "improperly waters down the fundamental requirements of Article III." *See Clapper*, 568 U.S. at 416. General complaints about abstract harm do not create Article III standing. *See Allen v. Wright*, 468 U.S. 737, 755-56 (1984); *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974) ("Abstract injury is not enough. It must be alleged that the plaintiff 'has sustained or is immediately in danger of sustaining some direct injury' . . . .") (quoting *Massachusetts v. Mellon*, 262 U.S. 447, 488 (1923)); *see also Lujan*, 504 U.S. at 580-81 (Kennedy, J., concurring in part and concurring in the judgment) ("the party bringing suit must show that the action injures him in a concrete and personal way"). It is not enough for a private plaintiff simply to identify a legal violation and then sue on it, regardless of how the alleged violation *actually* affected him. *Lujan*, 504 U.S. at 559-560. "In an era of frequent litigation, class actions, sweeping injunctions with prospective effect, and continuing jurisdiction to enforce judicial remedies, courts must be more careful to insist on the formal rules of standing, not less so." *Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 146 (2011).

The Ninth Circuit's approach in *Spokeo II* improperly weakens these principles by turning the focus away from whether the particular plaintiff before the court has been actually harmed (or is facing a risk of certainly impending harm), and instead toward whether the particular statute is the *kind* of statute

that Congress intended a wholly uninjured plaintiff to have the right to enforce. This Court's precedents require a plaintiff-based approach to standing, not an approach based on the generic nature of the legal claim. The Ninth Circuit therefore profoundly misapprehends this Court's standing doctrine, and this error is unfortunately propagating throughout the lower courts.

B. This Court Should Grant Certiorari to Resolve Confusion in the Lower Courts That Is Likely to Persist Without This Court's Intervention.

The Ninth Circuit's application of *Spokeo I* also differs markedly from the approaches employed by several other circuit courts, which have rightly rejected attempts to establish standing to assert claims under the FCRA—and other statutes—without a showing of actual harm, or risk of harm, to the plaintiff. This split in authority should be addressed now.

For example, in *Dreher v. Experian Information Solutions, Inc.*, 856 F.3d 337, 346 (4th Cir. 2017), the Fourth Circuit held that plaintiff lacked standing to assert an FCRA claim because plaintiff failed to show how knowledge of the source of information in his credit report—a required disclosure under 15 U.S.C. § 1681g(a)(2)—would have made any difference in the accuracy of his credit report, or that it would have made the credit bureau dispute resolution process more efficient. In that case, the Fourth Circuit recognized, "An 'informational injury' is a type of intangible injury that *can* constitute an Article III injury in fact." *Id.* at 345 (emphasis added) (quoting *Fed. Election Comm'n v. Akins*, 524 U.S. 11, 24 (1998)). The Fourth Circuit emphasized, however, that "a

statutory violation *alone* does not create a concrete informational injury sufficient to support standing." *Id.* (emphasis in original) (citing *Spokeo I*, 136 S. Ct. at 1549). "Rather, a constitutionally cognizable informational injury requires that a person lack access to information to which he is legally entitled *and* that the denial of that information creates a 'real' harm with an adverse effect." *Id.* (emphasis in original) (quoting *Spokeo I*, 136 S. Ct. at 1548 (internal quotation marks omitted)).

In another FCRA case, the Seventh Circuit similarly found that plaintiff lacked standing without a showing of any real-world harm. In *Groshek v. Time Warner Cable, Inc.*, 865 F.3d 884, 888 (7th Cir. 2017), the Seventh Circuit held that defendant's inclusion of *too much* information on a disclosure form, allegedly in violation of 15 U.S.C. § 1681b(b)(2)(A), did not confer standing, because the plaintiff did not claim to have suffered any harm resulting from the inclusion of the additional information.

Other circuit courts—including the Ninth Circuit in its opinion below—have found Article III standing to assert FCRA claims despite the lack of any real-world harm, or risk of harm, to the plaintiff. For example, in *In re Horizon Healthcare Servs. Inc. Data Breach Litig.*, 846 F.3d 625, 629 (3d Cir. 2017), the Third Circuit held that plaintiffs had standing to assert FCRA claims arising from the defendant's alleged failure to use reasonable procedures to protect plaintiffs' personal information. The Third Circuit reasoned that "with the passage of 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." *Id.* at 639 (footnote omitted). This approach was in turn criticized by the Fourth Circuit in *Beck v. McDonald*, 848 F.3d 262, 271 n.4 (4th Cir. 2017), *cert. denied sub nom. Beck v. Shulkin*, 137 S. Ct. 2307 (2017), which found that an increase in risk of harm did not satisfy Article III unless the risk was so enhanced as to make certainly impending specific danger of concrete harm.

The differing approaches of the circuit courts have resulted in chaos among the district courts. For example, in evaluating standing to pursue FCRA permissible purpose claims under 15 U.S.C. § 1681b, some courts hold, consistent with the Seventh Circuit's *Groshek* ruling, that a plaintiff must show some real-world harm or very high risk of harm resulting from an alleged failure to comply with the statute. *Dyson v. Sky Chefs, Inc.*, No. 3:16-CV-3155-B, 2017 WL 2618946, at *6-7 (N.D. Tex. June 16, 2017) (finding no standing but noting disagreement among district courts).[2]

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[2] Many other cases also require pleading of concrete harm, and not simply a technical violation of the permissible purpose rules. *See Stacy v. Dollar Tree Stores, Inc.*, No. 16-cv-61032, 2017 WL 3531513, *4-6 (S.D. Fla. Aug. 14, 2017); *Dilday v. DirecTV, LLC*, No. 3:16CV996-HEH, 2017 WL 1190916, at *5 (E.D. Va. Mar. 29, 2017); *Vera v. Mondelez Glob. LLC*, No. 16 C 8192, 2017 WL 1036509, at *2-3 (N.D. Ill. Mar. 17, 2017); *Davis v. D-W Tool, Inc.*, No. 2:16-CV-04297-NKL, 2017 WL 1036132, at *4 (W.D. Mo. Mar. 17, 2017); *Fields v. Beverly Health & Rehab. Servs., Inc.*, No. CV 16-527 (DWF/LIB), 2017 WL 812104, at *4-5 (D. Minn. Mar. 1, 2017); *In re Michaels Stores, Inc., Fair Credit Reporting Act (FCRA) Litig.*, No. 2615, 2017 WL 354023, at *1 (D.N.J. Jan. 24, 2017); *Boergert v. Kelly Servs., Inc.*, No. 2:15-CV-04185-NKL, 2016 WL 6693104, at *3-4 (W.D. Mo. Nov. 14, 2016), *on reconsideration in part,* No. 2:15-CV-04185-NKL, 2017 WL 440272 (W.D. Mo. Feb. 1, 2017); *Shoots v. iQor Holdings US, Inc.*, No. 15–cv–563 (SRN/SER), 2016 WL 6090723, *4-6 (D. Minn. Oct.

However, the Ninth Circuit and some district courts even outside the Ninth Circuit have reached the opposite conclusion with respect to these FCRA claims. *See Syed v. M-I, LLC*, 853 F.3d 492, 500 (9th Cir. 2017), *cert. denied*, No. 16-1524, 2017 WL 2671483 (U.S. Nov. 13, 2017); *Hargrett v. Amazon.com DEDC LLC*, 235 F. Supp. 3d 1320, 1325 (M.D. Fla. 2017) (recognizing the "split in persuasive authority" on the issue of what constitutes an intangible harm, and holding that any violation of 15 U.S.C. § 1681b, without more, satisfies Article III).[3]

Courts also have applied *Spokeo I* inconsistently to claims for violation of the FCRA's reinvestigation requirements under 15 U.S.C. § 1681i. *Compare Frydman v. Experian Info. Sols., Inc.*, No. 14CIV9013PACFMHBP, 2017 WL 4221086, at *4 (S.D.N.Y. Sept. 21, 2017) (finding lack of standing where plaintiff failed to allege actual damages or risk of real harm), *with Ricketson v. Experian Info. Sols., Inc.*, No. 1:16-CV-1165, 2017 WL 3142750, at *5 (W.D. Mich. July 18, 2017) (finding standing, in spite of agency's prompt deletion of a disputed credit item, due to agency's alleged failure to make a disclosure relating to the reinvestigation).

16, 2016); *Khan v. Children's Nat'l Health Sys.*, 188 F. Supp. 3d 524, 533 (D. Md. May 19, 2016).

[3] *See also In re Ocwen Loan Servicing LLC Litig.*, 240 F. Supp. 3d 1070, 1076 (D. Nev. 2017); *Perrill v. Equifax Info. Servs.*, LLC, 205 F. Supp. 3d 869, 875 (W.D. Tex. 2016); *Anderson*, 2017 WL 3034260, at *4-7; *Banks v. Cent. Refrigerated Servs.*, Inc., No. 2:16-CV-356-DAK, 2017 WL 1683056, *2-4 (D. Utah May 2, 2017); *Mix v. Asurion Ins. Servs. Inc.*, No. CV-14-02357-PHX-GMS, 2016 WL 7229140, at *6-7 (D. Ariz. Dec. 14, 2016). This approach is directly contrary to the Seventh Circuit's approach. *See Groshek*, 865 F.3d at 888.

As discussed by Petitioner (Pet. 22-24), confusion surrounding the proper application of *Spokeo I* is by no means limited to claims relating to credit reports. For example, some circuit courts applying *Spokeo I* to claims under various other statutory provisions reject attempts to establish standing without a showing of actual harm, or risk of harm, to the plaintiff. *See Crupar-Weinmann v. Paris Baguette Am., Inc.*, 861 F.3d 76, 81 (2d Cir. 2017) (holding that "bare procedural" violation of FCRA prohibition on printing credit card expiration dates on receipts was insufficient to establish standing); *Lyshe v. Levy*, 854 F.3d 855, 859 (6th Cir. 2017) (holding that plaintiff lacked standing to assert Fair Debt Collection Practices Act (FDCPA) claim based on defendant's alleged violations of the Ohio Rules of Civil Procedure, since the alleged harm "was not the type of harm the FDCPA was designed to prevent" and plaintiff did "not even allege that he suffered this harm, and concede[d] that he is at no risk to suffer this harm"); *Gubala v. Time Warner Cable, Inc.*, 846 F.3d 909, 910 (7th Cir. 2017) (holding that plaintiff lacked standing to pursue a claim for violations of the Cable Communications Policy Act (CCPA) based on defendant's failure to destroy personal information as required under 47 U.S.C. § 551(e), reasoning that "[t]here is unquestionably a risk of harm in such a case[,] [b]ut the plaintiff has not alleged that [defendant] has ever given away or leaked or lost any of his personal information or intends to give it away or is at risk of having the information stolen from it"); *Soehnlen v. Fleet Owners Ins. Fund*, 844 F.3d 576, 582 (6th Cir. 2016) (holding that plaintiffs lacked standing to sue under Employee Retirement Income Security Act of 1974 (ERISA) where plaintiffs alleged a statutory violation but failed to allege a "risk of real harm" to themselves resulting

from the violation); *Meyers v. Nicolet Rest. of De Pere, LLC*, 843 F.3d 724, 727-28 (7th Cir. 2016) (holding that plaintiff lacked standing to sue based on defendant's failure to truncate the expiration date of plaintiff's credit card on a receipt, where plaintiff discovered the violation immediately and suffered no harm or risk of harm), *cert. denied*, 137 S. Ct. 2267 (2017); *Nicklaw v. Citimortgage, Inc.*, 839 F.3d 998, 1002-03 (11th Cir. 2016) (holding that plaintiff lacked standing to assert a claim under New York law for failure to record a satisfaction of mortgage within the statutory time period, where plaintiff failed to establish that he personally suffered or could suffer any harm as a result); *Lee v. Verizon Commc'ns, Inc.*, 837 F.3d 523, 530 (5th Cir. 2016) (holding that the "mere allegation of fiduciary misconduct in violation of ERISA, divorced from any allegation of risk to defined-benefit-plan participants' actual benefits," was insufficient to satisfy the "concrete" injury requirement for Article III standing), *cert. denied sub nom. Pundt v. Verizon Commc'ns, Inc.*, 137 S. Ct. 1374 (2017); *Braitberg v. Charter Commc'ns, Inc.*, 836 F.3d 925, 930 (8th Cir. 2016) (holding that plaintiff lacked standing to pursue a claim for violations of the CCPA since plaintiff did not allege that defendant had "disclosed information to a third party, that any outside party had accessed the data" or that defendant had used the information in any way during the disputed period).

Other circuit courts, however, refuse to require any showing of real-world harm or risk of harm to the plaintiff. *See Church v. Accretive Health, Inc.*, 654 F. App'x 990, 994-95 (11th Cir. 2016) (holding that plaintiff had standing to sue creditor for failure to provide a debt validation notice required under 15 U.S.C. §§ 1692e(11) and 1692g(a)(1)-(5), despite the absence of any actual harm, reasoning that "through

the FDCPA, Congress has created a new right—the right to receive the required disclosures in communications governed by the FDCPA—and a new injury—not receiving such disclosures," and that "this injury is one that Congress has elevated to the status of a legally cognizable injury through the FDCPA"); *Aikens v. Portfolio Recovery Assocs., LLC*, No. 17-1132-CV, 2017 WL 5592341, at *3 (2d Cir. Nov. 21, 2017) (stating "that a defendant's failure to make statutorily mandated disclosures may confer standing based on a risk that 'the challenged disclosure would have [] an effect on consumers generally,' even if the plaintiff herself was not directly harmed") (quoting *Strubel v. Comenity Bank*, 842 F.3d 181, 193 (2d Cir. 2016)); *Strubel*, 842 F.3d at 188-190 (holding that plaintiff had standing to assert a Truth in Lending Act claim based on defendant's failure to provide certain billing-rights disclosures required under 15 U.S.C. § 1637(a)(7), reasoning that "a creditor's alleged violation of each notice requirement, by itself, gives rise to a 'risk of real harm' to the consumer's concrete interest in the informed use of credit" (quoting *Spokeo I*, 136 S. Ct. at 1549)).

These varying approaches have also resulted in confusion among the district courts, which note persisting conflict among the circuit courts in regard to how to apply this Court's decision in *Spokeo I*. *Compare Bouton v. Ocean Props., Ltd*, No. 16-CV-80502, 2017 WL 4413994, at *5 (S.D. Fla. Sept. 27, 2017) (rejecting *Meyers* and *Crupar-Weinmann*, and following *Church*, in concluding that printing expiration date on receipt violated a "substantive" right under FCRA amendment that "without more, establishes a concrete injury and satisfies the injury-in-fact requirement of standing"), *with Nokchan v. Lyft, Inc.*, No. 15-CV-03008-JCS, 2016 WL 5815287, at

*9 (N.D. Cal. Oct. 5, 2016) (rejecting *Church* as contrary to *Spokeo I*).

In light of the foregoing, this Court should once again grant certiorari to clarify whether injury in law, without corresponding injury in fact, and without any certainly impending harm, satisfies Article III's limitation on the judicial power to cases and controversies.

C. Standing Limits Should Be Enforced Against Abusive Class Action Litigation.

There are also sound policy reasons to grant certiorari. In addition to being mandated by the Constitution, requiring injury in fact—shown by the particular plaintiff before the court—is necessary to preserve competitiveness, to encourage job creation, to control the cost of credit, to protect consumers from higher prices and to expand opportunities for credit to those not served by traditional credit data.

In spite of this Court's decision in *Spokeo I*, the uncertainty created by the Ninth Circuit's failure to apply it properly continues to lead to extortionate settlements because defendants cannot risk the massive exposure a statutory damage class action threatens, even in cases where neither the class representative nor any specifically identifiable class member was actually harmed.[4] These unfair outcomes result from

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[4] *See In re: Uber FCRA Litig.*, No. 3:14-cv-05200-EMC, ECF No. 242 (N.D. Cal. June 29, 2017) (preliminary approval of $7.5 million class settlement of § 1681b claim); *Carter v. Shalhoub Mgmt. Co.*, No. 5:15-cv-1531-MWF-JC, ECF No. 70 (C.D. Cal. Mar. 15, 2017) (approving approximately $1 million class settlement of § 1681b claim); *see also Fuller v. Avis Budget Rental, LLC*, No. 2:15-cv-03856, ECF No. 54 (D.N.J. Dec. 15, 2017) ($2.7 million class settlement of § 1681b claim); *Hillson v. Kelly Services, Inc.*,

excessive settlement pressure when a massive class is certified, even if the class's liability theory is weak, because entry of a class certification order "poses the risk of massive liability unmoored to actual injury." *See Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 445 n.3 (2010) (Ginsburg, J., dissenting) (citation omitted). "Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011); *see also Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978) ("Certification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense."); Neil M. Gorsuch & Paul B. Matey, *No Loss; No Gain*, 28 LEGAL TIMES 5 (2005) ("Because the amount of damages demanded can be so great, corporations confront the reality that one bad jury verdict could mean bankruptcy. That sobering prospect encourages many responsible corporate fiduciaries to forgo the adversarial process, settling even meritless suits to avoid the risk of financial oblivion.").

The intersection of statutory damages and the class action device demonstrates the dangers of an expansive (and expensive) private enforcement regime. Enforcing Article III limits on claimants and classes, restricting recoveries to persons who actually sustained concrete injury in fact, is essential to prevent abuse. Class litigation is often driven by lawyers who advertise for clients rather than by injured people seeking meaningful relief. *See* Mohsen Manesh, Note, *The New Class Action Rule: Procedural*

No. 2:15-cv-10803, ECF No. 71 (E.D. Mich. Aug. 11, 2017) ($6.7 million class settlement of § 1681b claim).

Reforms in an Ethical Vacuum, 18 GEO. J. LEGAL ETHICS 923, 924-25 (2005) ("Unlike most litigation actions, where an injured claimant seeks the attorney, in class actions, the attorney seeks the claimants. From the initial investigation of a claim, to class certification, and finally settlement, class actions are attorney-driven."). Given the opportunity to certify a massive class of unharmed individuals with aggregated statutory damages, self-interested attorneys representing statutory damages classes will not be concerned with prosecuting statutory violations to redress *actual injuries* suffered by consumers—as an Executive Branch subject to "legal and practical checks" presumably would—but rather, they are incentivized to pursue the largest possible class action lawsuits to pressure defendants to settle in the face of potentially crushing liability for statutory violations, even when little or no actual harm has occurred. *See* Tara L. Grove, *Standing as an Article II Nondelegation Doctrine*, 11 U. PA. J. CONST. L. 781, 818 (2009) ("Virtually none of the checks on executive enforcement discretion apply to private parties."). This "has grave implications for democratic governance," *see Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 202 (2000) (Scalia, J., dissenting), whereby the arbitrary private enforcement of regulatory programs results in reaction far beyond the objectives of the regulatory scheme. *See* J. Maria Glober, *The Structural Role of Private Enforcement Mechanisms in Public Law*, 53 WILLIAM & MARY L. REV. 1137, 1191 (2012); *see also* STEPHEN BREYER, BREAKING THE VICIOUS CYCLE: TOWARD EFFECTIVE RISK REGULATION 19-20 (1993) (noting the problem of "random agenda setting" even under thoughtfully designed regulatory systems).

Nor is there any public policy need to ignore the strictures of Article III to appoint the class action bar as public enforcers of the FCRA, as both the FCRA itself and the 2010 Dodd-Frank Act contain robust *public* enforcement provisions in regard to consumer credit reporting, authorizing public enforcement by the Consumer Financial Protection Bureau (CFPB), the Federal Trade Commission (FTC) and state attorneys general. *See* 12 U.S.C. §§ 5481(14), 5564(a); 15 U.S.C. § 1681s. The CFPB also asserts ongoing supervisory authority over the credit reporting industry. *See* 12 C.F.R. § 1090.104. Yet perversely, if no-injury statutory damages class actions are broadly permitted—as the Ninth Circuit's approach allows—the private class action bar presently has *greater* ability to seek penalties than government officials are allowed, *greater* ability to set policy than the government and *greater* ability to restrict growth and innovation in the credit reporting industry. *See* 15 U.S.C. §§ 1681s(a)(2)(C) (FTC may not seek penalties under the FCRA except for violation of a prior injunction) & 1681s(a)(2)(B) (FTC's penalty determination must take into account the defendant's "ability to continue to do business" and other factors); 12 U.S.C. § 5565(c)(2)(A) (CFPB may not seek a penalty of more than $5,000 per day for a first violation of the FCRA). Indeed, there is an increasing volume of generally accurate and predictive data that businesses remain hesitant to provide due to ongoing legal risk.[5] Young adults attempting to

[5] *See* Julia S. Cheney, *Alternative Data and Its Use in Credit Scoring Thin- and No-File Consumers*, PAYMENT CARDS CENTER PUBLICATIONS 15 (Feb. 2008) ("Without clear regulatory direction, utilities, including telecommunications companies, have been hesitant to report full-file consumer data. Additionally, data furnishers will be subject to requirements and obligations set forth in the Fair Credit Reporting Act (FCRA) and, as

establish a credit history for the first time and recent immigrants who are new to the American financial system potentially benefit from expanded reporting of alternative data. According to the CFPB, almost twenty percent of adults living in the United States either lack a credit file with one of the nationwide consumer reporting agencies, or such file that does exist lacks sufficient data to generate a credit score.[6] Those who are attempting to re-establish good credit after suffering financial hardship also often benefit by expanding the range of data that may be reported. Yet many businesses are reluctant to develop or provide the range of alternative data that may help consumers, for fear that one misstep can result in massive litigation claims. Allowing uninjured plaintiffs to sue injures consumers who are left out of the financial system by litigation-driven restrictions on industry's ability to innovate.

Some degree of inaccuracy is inevitable in any information-based business, whether a newspaper, a credit bureau or a data broker. Where the inaccuracy results in no concrete harm, the speaker should not be exposed to a potentially bankrupting statutory damages class action.

Accordingly, and in light of the mass confusion among the lower courts in the wake of *Spokeo I* (discussed above), this Court should once again address the Article III question squarely. Given how

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amended, by the Fair and Accurate Credit Transactions Act of 2003 (FACTA), adding often unfamiliar compliance responsibilities.").

[6] CONSUMER FINANCIAL PROTECTION BUREAU, WHO ARE THE CREDIT INVISIBLES? 2 (Dec. 2016), https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/201612_cfpb_credit_invisible_policy_report.pdf.

aggressively statutory damages claims are presently being pursued in courts throughout the United States, in cases where no genuine harm can be identified, a definitive rule is essential. A plaintiff should not be allowed to pursue a statutory damages claim unless he or she (and all members of the class he or she claims to represent) personally suffered concrete injury in fact, that was actually caused by the alleged violation. Certiorari should be granted to address these critically important issues.

CONCLUSION

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

Respectfully submitted,

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