No. 13-1339

# 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 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 over 140 consumer credit 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

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[1] All parties have consented to the filing of CDIA's *amicus* brief, in accordance with Rule 37.3(a). CDIA's correspondence 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.

legislatures to develop laws and regulations governing 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 [a 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

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

[3] *See, e.g.*, Consumer Financial Protection Bureau, *Key Dimensions and Processes in the U.S. Credit Reporting System* (*hereinafter* "*Key Dimensions*") at 3 (noting that the three national CRAs "each maintain credit files on over 200,000,000 adults and receive information from approximately 10,000 furnishers of data") (Dec. 2012), *available at* http://files.consumerfinance.gov/f/201212_cfpb_credit-reporting-white-paper.pdf; *see also 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"); 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 (Credit Research Center,

(Continued on following page)

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. § 1681a) "with respect to" almost any adult U.S. 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 or provide 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

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Working Paper No. 67, 2003) (the credit 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."), *available at* http://faculty.msb.edu/prog/CRC/pdf/WP67.pdf.

[4] *See, e.g.*, *Sarver*, 390 F.3d at 972 (noting that a single CRA "gathers 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; *see also Key Dimensions*, *supra* note 3, at 3 ("On a monthly basis, . . . furnishers provide information on over 1.3 billion credit accounts or other 'trade lines' ").

class action lawsuits, such as Robins's putative class action, could threaten nearly every aspect of the U.S. economy.

Because 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 case.

## 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

[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.").

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, CRAs have created and maintain data files on nearly 200 million consumers.[8] The files contain 2.6 billion tradelines (an industry term for accounts that are included in a credit report)[9] that include billions of items of information the CRAs receive from over ten thousand furnishers on a monthly basis.[10] 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"[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. There is no

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[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*, *supra* note 5, at 8-9.

[9] *Id.* at 8-9.

[10] *Id.*

[11] 15 U.S.C. § 1681b(a).

legal requirement that any entity furnish information to a consumer reporting agency. 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, there will be little incentive to participate in the consumer reporting process. 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.

## SUMMARY OF THE ARGUMENT

Left uncorrected, the Ninth Circuit's decision disrupts long-held rules that govern standing and ensure the Article III courts address only true cases or controversies as required by the Constitution. This Court has held repeatedly that Article III standing requires three elements: (1) a concrete injury, (2) that is caused by the defendant's actions, and (3) that is redressable by the Courts. According to the Ninth Circuit, the tripartite test may now be collapsed into one question in circumstances where Congress has granted plaintiffs the ability to seek statutory damages, as in a case brought under the FCRA. While this Court has recognized that Congress may create enforceable rights that did not previously exist, this Court has never held that Congress may dispose of

the requirement that the plaintiff suffer a distinct, palpable injury.

The Ninth Circuit's decision disregards the unique complexity of the FCRA and the industry it regulates. The FCRA imposes a number of technical burdens on CRAs, the violation of which could conceivably lead to no consumer harm. And, in many instances, a violation of a highly technical provision of the FCRA could result in a *benefit* to the consumer. Following the Ninth Circuit's holding and allowing private rights of action for such violations, in the absence of any consumer harm, is a recipe for absurd results.

The Ninth Circuit's decision places CDIA's members at great risk. Virtually all aspects of the data that CRAs provide to their customers relate to activities with respect to consumers. Granting consumers standing to sue without any allegation of injury-in-fact would open the door to ruinous damages to CDIA's members through unchecked class action litigation based upon minor technical issues that automatically repeat across millions of consumers and potentially billions of tradelines. The effects would reverberate throughout the broader economy, which depends heavily on the availability and accuracy of information concerning consumer creditworthiness.

To confirm that Congress may not abrogate by legislative fiat the U.S. Constitution's minimum requirements for judicial standing, this Court should

reverse the court of appeals' decision to make clear that actual injury remains part of the "hard floor of Article III jurisdiction that cannot be removed by statute[s]."[12]

## ARGUMENT

### I. THE NINTH CIRCUIT ERRED IN PERMITTING A PRIVATE RIGHT OF ACTION BASED ON A BARE VIOLATION OF A FEDERAL STATUTE.

In determining that Robins had standing to pursue his class action lawsuit against Spokeo, the Ninth Circuit erred by holding that Congress may create standing for plaintiffs who suffer no actual injury and seek to recover solely through a statutory damages remedy.[13] This holding represents an unwarranted and unprecedented expansion of standing in violation of Article III of the Constitution.

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[12] *Summers v. Earth Island Inst.*, 555 U.S. 488, 497 (2009).

[13] *Robins v. Spokeo*, 742 F.3d 409, 414 (9th Cir. 2014). This case arises in the same context as *First Am. Fin. Corp. v. Edwards*, 132 S. Ct. 2536 (2012) (cert. dismissed as improvidently granted). However, this case differs from *Edwards* in that Robins has not alleged that he paid any money to Spokeo. Since *Edwards* was a RESPA case, the plaintiffs' claims arose from the payment of settlement fees. *Edwards v. First Am. Fin. Corp.*, 610 F.3d 514, 516 (9th Cir. 2010). This case presents no such difficulty.

### A. Article III of the Constitution requires an actual case or controversy.

This Court's rules for standing are well-established. "[T]hose who seek to invoke the jurisdiction of the federal courts must satisfy the threshold requirement imposed by Article III of the Constitution by alleging an actual case or controversy."[14] "One of those landmarks, setting apart the 'Cases' and 'Controversies' that are of the justiciable sort referred to in Article III – serving to identify those disputes which are appropriately resolved through the judicial process – is the doctrine of standing."[15] "For the federal courts to decide questions of law arising outside of cases and controversies would be inimical to the Constitution's democratic character. And the resulting conflict between the judicial and the political branches would not, 'in the long run, be beneficial to either.'"[16]

This Court has consistently held that the "irreducible constitutional minimum of standing" consists of three elements: (1) an injury-in-fact, that (2) is caused by the challenged action of the defendant, and that (3) is redressable in some way by a favorable

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[14] *City of L.A. v. Lyons*, 461 U.S. 95, 101 (1983).

[15] *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (internal citations omitted).

[16] *Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436, 1442 (2011) (quoting *U.S. v. Richardson*, 418 U.S. 166 (1974)).

decision.[17] In requiring a particular injury, this Court has emphasized "that the injury must affect the plaintiff in a personal and individual way."[18]

### B. Circuit court cases holding that a violation of a statutory right is an injury-in-fact have confused an injury-in-law with an injury-in-fact.

To be sure, Congress may in some circumstances recognize new rights, with the result that an invasion of those rights causes injury and, therefore, permits standing. "[T]he . . . injury required by Art. III may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing.'"[19] Nonetheless, "Art. III's requirement remains: the plaintiff *must still allege a distinct and palpable injury to himself*."[20]

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[17] *Lujan*, 504 U.S. at 560 (citing *Warth v. Seldin*, 422 U.S. 490, 508 (1975); *Sierra Club v. Morton*, 405 U.S. 727, 740-741, n. 16 (1972); *Whitmore v. Ark.*, 495 U.S. 149, 155 (1990); *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976)).

[18] *Ariz. Christian Sch.*, 131 S. Ct. 1442 (quoting *Lujan*, 504 U.S. at 560, n. 1).

[19] *Lujan*, 504 U.S. 579 (citing *Warth v. Seldin*, 422 U.S. 490, 500 (1975), quoting *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 n. 3 (1973)); *see also Mass. v. EPA*, 549 U.S. 497, 516 (2007) ("In exercising this power, however, Congress must at the very least identify the injury it seeks to vindicate and relate the injury to the class of persons entitled to bring suit.") (quoting *Lujan*, 504 U.S. at 581 (Kennedy, J., concurring)).

[20] *Warth*, 422 U.S. at 501 (emphasis added).

The Ninth Circuit's *Spokeo* decision ignores this fundamental rule, holding that a mere statutory violation is "injury" enough, "when . . . the statutory cause of action does not require proof of actual damages. . . ."[21] Thus, because Congress authorized "damages of not less than $100 and not more than $1,000" against "[a]ny person who willfully fails to comply with"[22] the FCRA, the Ninth Circuit held that Robins had sustained the requisite "injury" because he alleged willful violations of the FCRA.[23]

The Ninth Circuit purported to follow the lead of two other courts of appeals that concluded that section 1681n authorizes a cause of action for statutory damages without the need to show any actual injury.[24] In *Beaudry v. TeleCheck Services, Incorporated*, the Sixth Circuit concluded that, in section 1681n, Congress created a "new legal right," including the right to sue when "the only injury-in-fact involves the violation of that statutory right."[25] Similarly, but in a more attenuated connection to the Ninth Circuit's holding in *Spokeo*, the Seventh Circuit

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[21] 742 F.3d 409, 413 (9th Cir. 2014).

[22] 15 U.S.C. § 1681n.

[23] 742 F.3d at 413. As demonstrated by Spokeo in Petitioner's Brief, there was no invasion of Robins's legal right, nor did Robins suffer an injury-in-fact. Brief for Petitioner at 36-40, *Spokeo, Inc. v. Robins*, No. 13-1339 (U.S. July 2, 2015).

[24] *See, e.g.*, *Beaudry v. TeleCheck Servs., Inc.*, 579 F.3d 702 (6th Cir. 2009); *Murray v. GMAC Mortg. Corp.*, 434 F.3d 948 (7th Cir. 2006).

[25] *Beaudry*, 579 F.3d at 705.

in *Murray v. GMAC Mortgage Corporation*, stated that the FCRA "provide[s] for modest damages without proof of injury."[26] However, the Seventh Circuit couched this statement in a discussion where it also noted that individual losses would be "small and hard to quantify" and did so without reference to Article III requirements.[27] Regardless of what the court in *Murray* meant, the Ninth Circuit's *Spokeo* holding builds upon prior decisions from the Sixth and Seventh Circuits that appear to suffer from the same infirmity. Spokeo transforms the existence of a remedy (*i.e.*, statutory damages) into the existence of a remedial case or controversy.

After the Ninth Circuit's *Spokeo* decision, the Eighth Circuit similarly dispensed with the requirement for injury-in-fact, holding that a defendant retail store's violation of the FCRA's requirement to truncate account numbers on receipts was sufficient to confer standing.[28] The court reasoned that the FCRA created "the legal right to obtain a receipt at the point of sale showing no more than the last five digits of the consumer's credit or debit card number"

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[26] *Murray*, 434 F.3d at 953.

[27] *Id.*

[28] *Hammer v. Sam's East, Inc.*, 754 F.3d 492, 498-499 (8th Cir. 2014). The provision of the FCRA at issue in *Hammer*, 15 U.S.C. § 1681c(g), applies to a "person that accepts credit or debit cards for [a] transaction" and provides an electronically printed receipt. This is the type of technical requirement where an error can be replicated millions of times.

and concluded that a person who provides a receipt without adequate truncation has injured the plaintiff by invading her legal right.

The dissent in *Hammer* properly identified the infirmity in the majority's holding: "the [plaintiffs'] only basis for appearing in federal court . . . is a harmless statutory violation."[29] The dissent noted that it was undisputed that the plaintiffs in the underlying case never alleged that they suffered any concrete harm, such as an actual identity theft or costs incurred to protect themselves from identity theft, as a result of the failure of the stores to truncate their receipts, and that the receipts at issue never left the possession of the plaintiffs.[30] The dissent drew a distinction between an injury-in-law – one created by an invasion of statutory right – and an injury-in-fact – one in which there is actual harm to the plaintiff.[31] As the dissent argued, an injury-in-law

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[29] *Id.* at 504 (Riley, J., dissenting).

[30] "This putative 'identity theft' case contains no trace of actual identity theft. The plaintiffs . . . do not allege the receipts containing their credit card information were ever at risk of exposure to would-be identity thieves. Until this lawsuit, the receipts apparently never left the [plaintiffs'] possessions, and now the receipts are safely ensconced in the sealed record . . . [T]here is no allegation the [plaintiffs] suffered so much as a sleepless night or other psychological harm . . . [T]he [plaintiffs] do not even claim to have undertaken costly and burdensome measures to protect themselves from the risk they supposedly face." *Id.* (internal quotation omitted).

[31] *Id.* at 505-506.

without any injury-in-fact is not sufficient for Article III standing.[32]

### C. This Court's decisions do not allow a bare statutory violation to establish standing.

This Court's own decisions support the *Hammer* dissent's interpretation of standing and have never allowed bootstrapping to establish a justiciable case or controversy. Even where Congress creates a private right of action, "Art. III's requirement remains: the plaintiff must still allege a distinct and palpable injury to himself, even if it is an injury shared by a large class of other possible litigants."[33] This is because "the requirement of injury in fact is a hard floor of Article III jurisdiction that cannot be removed by statute."[34] "Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing."[35]

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[32] *Id.* at 507.

[33] *Warth*, 422 U.S. at 499.

[34] *Summers v. Earth Island Inst.*, 555 U.S. 488, 497 (2009); *Lujan*, 504 U.S. at 560 ("[T]he core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III.").

[35] *Raines v. Byrd*, 521 U.S. 811, 820 n. 3 (1997) (citing *Gladstone, Realtors v. Vill. of Bellwood*, 441 U.S. 91, 100 (1979)).

CDIA does not deny that, through the FCRA, Congress granted putative plaintiffs a private right of action, including a private right of action for statutory damages based on willful violations. But Congress' creation of a private right of action (an injury-in-law) does not entitle every member of the public who simply claims there is a violation of the statute access to the federal courts, which requires at the very minimum, an injury-in-fact.

This Court addressed this issue in a related context, noting "[a]n interest unrelated to injury in fact is insufficient to give a plaintiff standing."[36] 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 assert his claims because the injury alleged in the suit was suffered by the United States. 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 on the outcome."[37]

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[36] *Vt. Agency of Natural Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 772 (2000).

[37] *Id*.

The *Spokeo* decision would permit what this Court rejected in *Vermont Agency*: "wagering" on the outcome of class action litigation by plaintiffs who have suffered no actual injury.[38]

### D. The appropriate way to remedy harmless violations of the FCRA is through administrative enforcement.

That Robins lacks standing does not mean that the alleged violations are not subject to any other type of oversight or enforcement. The FCRA provides for its administrative enforcement by the Federal Trade Commission, the Consumer Financial Protection Bureau, the federal banking agencies, and state Attorneys General.[39] Each of these enforcement authorities may vindicate the public interest in seeing that the FCRA's provisions are obeyed. Even when no individual has been injured, governmental authorities charged with enforcement of the law always have an interest in seeing that the laws are obeyed.[40] This Court has acknowledged the "peculiar

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[38] Brief for Petitioner, *supra* note 23, at 47-49.

[39] 15 U.S.C. § 1681s.

[40] *Heckler v. Chaney*, 470 U.S. 821, 831-832 (1985) ("[A]n agency decision . . . often involves a complicated balancing of a number of factors which are peculiarly within its expertise. . . . Thus, the agency must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and, indeed, whether the

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expertise" of administrative agencies which Congress has tasked with carrying out the mandates of particular statutes.[41] CDIA submits that administrative enforcement actions advance statutory purposes without exceeding the courts' traditional and proper Article III role of vindicating individual rights and remedying individual injuries.

## II. THE FCRA IS A COMPLEX, HIGHLY-TECHNICAL STATUTE, AND ALLOWING SUITS UNDER THE FCRA TO PROCEED IN THE ABSENCE OF INJURY-IN-FACT WOULD CREATE ABSURD RESULTS.

To govern the complex consumer reporting industry, the FCRA was first enacted in 1970. Congress has amended the FCRA a number of times in many significant respects. The FCRA's requirements govern all aspects of credit reporting, an industry that has changed significantly since the statute's original passage.[42] As this Court has observed, the FCRA is in many places a "less-than-pellucid"[43] statute and

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agency has enough resources to undertake the action at all. An agency generally cannot act against each technical violation of the statute it is charged with enforcing. The agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities.").

[41] *Id*.

[42] *See Key Dimensions*, *supra* note 3, at 7 (describing the changes to the consumer reporting industry).

[43] *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 70 (2007).

imposes a number of responsibilities on CRAs and others, some highly technical. It contains no fewer than 31 separate sections, 145 subsections, and approximately 34,000 words.

Given the statutory complexity of the FCRA, many courts have rejected attempts to bring suits on the existence of a mere violation of a particular statutory requirement in the absence of harm to the consumer. This is best illustrated by suits based solely on an alleged failure of a CRA to act "reasonably." A number of the provisions of the FCRA require CRAs to maintain reasonable procedures or otherwise act reasonably.[44] When preparing consumer reports, for example, CRAs must "follow reasonable procedures to assure the maximum possible accuracy of the information concerning the individual about whom the report relates."[45] Similarly, a CRA that receives a consumer dispute must "conduct a reasonable reinvestigation to determine whether the disputed information is inaccurate. . . ."[46] Under the Ninth Circuit's view, a plaintiff could maintain a cause of action based solely on the absence of reasonable procedures, regardless of whether there was any injury-in-fact to the plaintiff. This is an absurd result that the courts have sought to avoid.

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[44] *See, e.g.*, 15 U.S.C. §§ 1681e(a), 1681i(a)(5)(C), 1681s-2(a)(6)(A), 1681i(a)(1)(A).

[45] 15 U.S.C. § 1681e(b).

[46] 15 U.S.C. § 1681i(a)(1)(A).

The Fifth Circuit's opinion in *Washington v. CSC Credit Services* illustrates this point.[47] Faced with a suit alleging a failure to maintain reasonable procedures under section 1681e(a), the court refused to impose liability where there was no evidence that the alleged failure to maintain such procedures harmed the plaintiffs.[48] The plaintiffs argued that, regardless of whether the disclosure was permissible under the FCRA, they were entitled to relief because the defendants did not have reasonable procedures in place to prevent improper disclosures.[49] Notably, the plaintiffs did not allege that they suffered any harm as a result of the defendant's unreasonable procedures, or that the disclosures at issue were improper under the FCRA. The entire basis for the plaintiffs' claim for damages was that the defendants' *procedures* were inadequate.

The court, in rejecting plaintiffs' claims, explained that the connection between the alleged violation of the FCRA (failure to maintain reasonable procedures) and any alleged damages was too attenuated: "[T]he actionable harm the FCRA envisions is improper disclosure, not the mere *risk* of improper disclosure that arises when 'reasonable procedures' are not followed and disclosures are made."[50] Citing

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[47] *Washington v. CSC Credit Serv. Inc.*, 199 F.3d 263 (5th Cir. 2000).

[48] *Id.* at 267.

[49] *Id.* at 266-267.

[50] *Id.* at 267 (emphasis in original).

Congressional intent, the court explained that "Congress identified actual injuries – including breaches of 'confidentiality and '[im]proper utilization' – which only occur if there is an improper disclosure, suggesting that a general claim of improper procedures is by itself inadequate."[51] In other words, a consumer must suffer *actual injuries* as a result of the improper procedures. Absent resulting harm, a plaintiff has no cause of action for improper procedures. Further, the court refused to accept the plaintiffs' argument that the plain language of the damages provisions of the FCRA (sections 1681o and 1681n) permit damages without any requirement of harm.[52]

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[51] *Id.*

[52] Prior to the Fifth Circuit's decision in *Washington*, at least two district courts had applied the same rule, and refused to find a cause of action where the consumer could only allege that the defendant had insufficient procedures, with no resulting harm. *Andrews v. Trans Union Corp.*, 7 F. Supp. 2d 1056 (C.D. Cal. 1998), *aff'd in part, rev'd in part sub nom. Andrews v. TRW Inc.*, 225 F.3d 1063 (9th Cir. 2000), *rev'd*, 534 U.S. 19 (2001); *Middlebrooks v. Retail Credit Co.*, 416 F. Supp. 1013 (N.D. Ga. 1976). Following *Washington*, courts in a number of circuits adopted the interpretation of actionable harm in *Washington*. *Wantz v. Experian Info. Solutions*, 386 F.3d 829 (7th Cir. 2004), *abrogated by Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47 (2007); *Kennedy v. Chase Manhattan Bank USA, NA*, 369 F.3d 833 (5th Cir. 2004); *Farmer v. Phillips Agency, Inc.*, 285 F.R.D. 688 (N.D. Ill. 2012); *Harris v. Database Mgmt. & Mktg., Inc.*, 609 F. Supp. 2d 509 (D. Md. 2009); *Villagran v. Freeway Ford, Ltd.*, 525 F. Supp. 2d 819, 834 (S.D. Tex. 2007) ("[A] plaintiff must show injury to have standing to assert a claim under the FCRA based on improper disclosure and use of credit information."); *Gillespie v. Trans Union, LLC*, 433 F. Supp. 2d 908 (N.D. Ill.

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A review of some of the more technical requirements of the FCRA illustrates the absurdity of deriving standing from a mere violation of the statute. 15 U.S.C. § 1681g(c)(1)(B)(iv), for example, requires that when a CRA provides a consumer with a copy of her file disclosure, the CRA must include a description of the consumer's right to obtain a credit score and a description of how to obtain such a score. If the Court were to allow standing based on a violation of the statute alone, a consumer could bring an action where a CRA failed to provide such a description, but instead provided the consumer with her credit score, a clear benefit to a consumer.

Similarly, the FCRA requires that a CRA include information about certain overdue child support obligations received from state or local child support agencies in a consumer report where the information pre-dates the report by seven years or less.[53] Under the bare violation approach, a consumer would have standing, in the absence of injury-in-fact, where a CRA failed to include his six-year-old overdue child support obligation in a consumer report. Such results – violations based upon mere technical mistakes without any impact on, much less harm to, the consumer –

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2006); *Gillespie v. Equifax Info. Serv., LLC*, 2006 WL 681059, at *2 (N.D. Ill. March 9, 2006), *rev'd*, 484 F.3d 938 (7th Cir. 2007) (extending the rule in *Washington* to include section 1681e(a)'s requirement that consumer reporting agencies maintain reasonable procedures to avoid making reports that improperly include obsolete debt).

[53] 15 U.S.C. § 1681s-1.

cannot be what Congress intended when it provided consumers with a right to sue.[54]

To avoid such absurd results, the Court should reverse the court of appeals to make clear that "injury-in-fact" remains part of the essential minimum a plaintiff must allege and demonstrate to have standing.

## III. THE NINTH CIRCUIT'S DECISION THREATENS CDIA'S MEMBERS WITH CRUSHING LIABILITY THROUGH UNCHECKED CLASS ACTION LITIGATION.

Affording access to the courts in the absence of injury-in-fact 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.[55] Given their important role in the

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[54] *See* discussion *supra* pp. 13-14. In the *Hammer* case, for instance, the dissent pointed out that there was absolutely no risk of identity theft because the receipts never left the plaintiffs' possession. The dissent noted that there could be no possible injury-in-fact in the absence of even a risk of the result that the FCRA's truncation requirements sought to prevent (identity theft). *Hammer*, 754 F.3d at 504.

[55] *See* 15 U.S.C. § 1681n; *see also Key Dimensions*, *supra* note 3, at 6 ("Of 113 million credit card and retail card accounts, auto loans, personal loans, mortgages, and home equity loans

(Continued on following page)

economy, it is not surprising that consumers sue CDIA's members hundreds of times each year, alleging violations of the FCRA.

Recasting standing as a one-part inquiry (whether there was a violation of the statute) that does not require actual injury removes some of the principal constraints to class certification, namely commonality and predominance.[56] "Commonality requires the plaintiff to demonstrate that the class members have suffered the same injury."[57] Predominance "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation."[58] If the Ninth Circuit's holding were allowed to stand, a class asserting willful violations of the FCRA, but no injury-in-fact, would face little challenge to class certification under the commonality and predominance prongs; the mere existence of a statutory violation, without more, could support an argument that every consumer is a member of a class.[59]

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originated in the United States in 2011, the vast majority of approval decisions used information furnished by credit reporting agencies").

[56] *See* Fed. R. Civ. P. 23.

[57] *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011) (internal quotation marks omitted).

[58] *Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 623 (1997).

[59] *Cf. Murray v. GMAC Mortg. Corp.*, 434 F.3d 948, 953 (7th Cir. 2006) (Where consumers must allege individual harm "[c]ommon questions no longer would predominate, and an effort to determine a million consumers' individual losses would make the suit unmanageable.").

Opening the door for no-harm plaintiffs to pursue class actions creates a high risk of *in terrorem* settlements.[60] CDIA's members maintain or furnish credit information on millions of consumers. With statutory damages as much as $1,000 per violation under section 1681n, and no limit on total class recovery, a CRA's potential monetary exposure could reach into the billions, particularly if one computer glitch repeats itself across millions of consumers. This increases the likelihood that CDIA's members will be forced to settle questionable claims out of fear of catastrophic liability.[61]

Further, a plaintiff who seeks to vindicate the violation of a statutory right, and nothing more, becomes a private attorney general, seeking to vindicate an undifferentiated public interest in CRAs' compliance with the FCRA.[62] Article III must have a more concrete limitation. Robins must allege a distinct and palpable injury.



[60] *See AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1752 (2011) ("Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims.").

[61] *Id.*

[62] *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 576-577 (1992) (Congress cannot convert "public interest in proper administration of the laws" into an " 'individual right' vindicable in the courts").

## CONCLUSION

For the reasons set forth above, the decision of the court of appeals should be reversed.

Respectfully submitted,

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