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 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 (the "FCRA" or the "Act"), 15 U.S.C. § 1681a(p). 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-FCRA's and the Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C. § 5301 (the "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 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 massive class action cases

[1] Pursuant to Rule 37.3(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.

brought by or on behalf of persons without any real-world harm.

If this Court does not correct the Ninth Circuit's error, then the immediate result will be more "bet the company" litigation filed under the Act, 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 those consumers who maintain such a 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

TransUnion fully supports Petitioner's argument that Article III forbids Congress from authorizing litigation in the absence of a genuine "Case" or "Controversy," and that accordingly the plaintiff's injury in fact is a necessary element of any federal civil case.

In addition to being required by the Constitution, a rule requiring pleading and proof of injury in fact has important practical implications. The legal system is currently plagued by opportunistic lawsuits seeking class relief on behalf of persons who were not injured in any real-world sense. These cases 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.

These cases are particularly pernicious with respect to the FCRA, because credit reporting is protected First Amendment activity. Additional legal expense in this area increases the cost of obtaining credit reports, and necessarily reduces speech by discouraging data furnishers from participating in a wholly voluntary reporting system and by discouraging users from seeking credit information that may help them make more informed choices with respect to lending, leasing, insuring and hiring decisions. These are genuine chilling effects that should inform the Court's judgment here.

In other areas of the law, where interpretation of a statute may threaten an area of important constitutional concern, this Court requires a clear indication that Congress intended to tread across a constitutional boundary. The present case offers two independently sound reasons to apply such a clear statement rule. First, Congress would invade the judicial power of Article III if it were to attempt to authorize private civil litigation by persons suffering no injury in fact. Second, Congress would violate the First Amendment if it were to allow disproportionate punishment of consumer reporting agencies, as compared to similar speech by other speakers, and this intent should not be presumed. Because the FCRA contains no clear authorization of massive, enterprise-threatening class action statutory damages claims on behalf of uninjured persons, the Act should not be construed to permit such claims.

Accordingly, and for the reasons stated below, this Court should reverse or vacate the judgment of the Court of Appeals below.

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. (1 Cranch.) 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. __, 133 S. Ct. 1523, 1528 (2013); *see also* John G. Roberts, *Article III Limits on Statutory Standing*, 42 DUKE L.J. 1219, 1230 (1993); Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 886 (1983).

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 v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (internal quotations, citations and footnote omitted); *accord Hollingworth v. Perry*, 133 S. Ct. 2652, 2661 (2013) (plaintiffs lack standing unless they "seek a remedy for a personal and tangible harm"). The basic rules of standing do not change when a claim is asserted on behalf of a putative class because the Federal Rules of Civil Procedure cannot expand the judicial power described in Article III. *See* 28 U.S.C. § 2072; *Willy v. Coastal Corp.*, 503 U.S. 131, 135 (1992).

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 Lujan*, 504 U.S. at 560-61. "Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff that 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." *Clapper v. Amnesty Int'l USA*, 568 U.S. __, 133 S. Ct. 1138, 1151 (2013).

Five Circuit Courts of Appeals already recognize that injury in fact is an element of standing, and that a plaintiff may not file a civil suit based on an alleged statutory violation that does not actually cause him harm. "The proper analysis of standing focuses on whether the plaintiff suffered an actual injury, not on whether a statute was violated." *Doe v. Nat'l Bd. of Med. Exam'rs*, 199 F.3d 146, 153 (3d Cir. 1999); *see also United States v. Weiss*, 467 F.3d 1300, 1310-11 (11th Cir. 2006) ("federal court's jurisdiction . . . can be invoked only when the plaintiff himself has suffered some threatened or actual injury resulting from the putatively illegal action") (internal citations and quotation marks omitted) (ellipses in original); *Owner-Operator Indep. Drivers Ass'n, Inc. v. USIS Commercial*

Servs., Inc., 537 F.3d 1184, 1194 (10th Cir. 2008) (recognizing that injury is an element of a claim for FCRA statutory damages); *Washington v. CSC Credit Servs., Inc.*, 199 F.3d 263, 266 (5th Cir. 2000) (the purpose of the FCRA "is not furthered unless [before filing suit] a plaintiff suffers the harm the procedures are meant to prevent"); *United States ex rel. Kreindler & Kreindler v. United Techs. Corp.*, 985 F.2d 1148, 1154 (2d Cir. 1993) ("Congress cannot waive the constitutional minimum of injury-in-fact.").

This Court should approve the reasoning of the cases requiring injury in fact as an element of every federal claim, and should reject the reasoning of the Circuits that disagree, such as in the opinion below, in *Hammer v. Sam's East, Inc.*, 754 F.3d 492, 498 (8th Cir. 2014), and in *Beaudry v. Telecheck Servs., Inc.*, 579 F.3d 702, 707 (6th Cir. 2009). These cases in essence hold that where Congress authorizes a statutory damages remedy, Article III is *per se* satisfied.[2] Perhaps the most extreme example of this analysis appears in *Tourgeman v. Collins Fin. Servs.*, 755 F.3d 1109, 1117 (9th Cir. 2014), where the Ninth Circuit allowed a class action lawsuit to proceed, seeking statutory damages under the Fair Debt Collection Practices Act based on the

[2] The Seventh Circuit has not squarely addressed the issue. *Murray v. GMAC Mortgage Co.*, 434 F.3d 948, 953 (7th Cir. 2006), states, "That actual loss is small and hard to quantify is why statutes such as the Fair Credit Reporting Act provide for modest damages without proof of injury." However, *Murray* also says, "Rule 23(b)(3) was designed for situations such as this, in which the potential recovery is too slight to support individual suits, but injury is *substantial in the aggregate*." *Id.* (emphasis supplied). Thus, the Seventh Circuit appears to recognize that some "substantial" injury must be shown even in a case seeking only statutory damages.

sending of an allegedly defective form letter to a plaintiff who admittedly never saw the letter and was not deceived by it. According to the Ninth Circuit, "nonreceipt of the letter, or the consumer's failure to read it," were wholly immaterial. *Id*.

The Ninth Circuit's approach is incorrect because 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. 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; *see also Washington*, 199 F.3d at 266-67 (consumer may not sue under FCRA based on allegedly unreasonable procedures designed to ensure that reports are communicated only to those with a permissible purpose to receive the reports, unless someone lacking a permissible purpose actually improperly received a report as a result of the allegedly unreasonable procedure).

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*, 133 S. Ct. at 1146. For example, in *United States v. Spokeo, Inc.*, No. CV12-5001-MMM(SHx) (C.D. Cal. June 7, 2012), the Federal Trade Commission entered into a consent decree with Petitioner here, mandating practice changes but not imposing such severe penalties as to put it out of business, and not requiring payments to uninjured persons.

If the Ninth Circuit's view of the FCRA and Article III is ratified, private class action plaintiffs will obtain *greater* power than public officials to penalize and bankrupt alleged FCRA violators, an absurd result. *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) & 5565(c)(3)(C) (CFPB penalty determination must take into account "the severity of the risks to or losses of the consumer"). Even though this Court's standing jurisprudence traditionally derives from Article III, not Article II, *see Vermont Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 778 n.8 (2000), weakening Article III's injury-in-fact requirement interferes with Executive authority by delegating Article II enforcement powers to private class action attorneys. *See Lujan*, 504 U.S. at 577 (Congress may not transfer Article II powers to the courts); 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."). Unlike Executive Branch enforcement of FCRA requirements, no-injury statutory damages cases, as a practical matter, impose regulation wholly independent of any thoughtful agenda for achieving an appropriate balance between consumer protection and other important public policy goals, such as technological innovation, employment or the overall cost of credit. *See Nike, Inc. v. Kasky*, 539 U.S. 654, 680 (2003) (Breyer, J., dissenting) (discussing the risk that a plaintiff lacking injury in fact could sue "unencumbered by the legal and practical checks that tend to keep the energies of public enforcement agencies focused upon more purely economic harm").

Oddly, then, because of solely judge-made law under Federal Rule of Civil Procedure 23, unelected, unappointed and unaccountable plaintiffs' class action attorneys may have more power than government officials to decide which FCRA provisions are most in need of enforcement, and which defendants should be threatened with obliteration for committing what private attorneys consider to be violations. These enforcement decisions may be made by class action attorneys without consideration of actual impact on the public or actual harm to be redressed. *See* 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). Accordingly, this Court should again recognize: "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." *Arizona Christian Sch. Tuition Org. v. Winn*, 563 U.S. __, 131 S. Ct. 1436, 1449 (2011).

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

In addition to being mandated by the Constitution, requiring injury in fact as an element of standing is necessary to preserve American competitiveness, to encourage job creation, to control the cost of credit and to protect consumers from higher prices.

The lower courts are replete with examples of FCRA lawsuits leading to large settlements because defendants cannot risk the massive exposure a statutory damage class action threatens, even in cases where neither the class representative or any specifically identifiable class member was actually harmed.[3] These unfair outcomes result from 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."

[3] *See In re Toys R Us-Delaware, Inc.-Fair & Accurate Credit Transactions Act (FACTA) Litig.*, 295 F.R.D. 438 (C.D. Cal. 2014) (approving class settlement that could potentially award the class $391.5 million and class counsel $458,602.54 in attorneys' fees even though "no putative class member had alleged any actual injury"); Order of Final Approval of Settlement and J. at 2-3, *White v. E-Loan, Inc.*, No. 3:05-cv-02080-SI (N.D. Cal. May 11, 2007), ECF No. 136 (approving class settlement that awarded the class approximately $4.75 million, including approximately $750,000 in attorneys' fees, even though class members suffered no actual damages from the sending of an allegedly non-compliant credit offer); *Razilov v. Nationwide Mut. Ins. Co.*, No. 01-CV-1466-BR, 2006 WL 3312024, at *1 (D. Or. Nov. 13, 2006) (approving class settlement that awarded the class $19.25 million, and class counsel approximately $5.7 million in attorneys' fees, even though class members suffered no actual harm as a result allegedly non-compliant form adverse action notices); Settlement Agreement at 23, *King v. Gen. Info. Servs., Inc.*, No. 2:10-cv-06850-PBT (E.D. Pa. June 24, 2014), ECF No. 105-2 (proposed class settlement for $3.2 million, including $1 million in attorneys' fees, for reporting truthful but outdated public records information, even though there was no proof of any classwide harm from the alleged practice).

AT&T Mobility LLC v. Concepcion, 563 U.S. __, 131 S. Ct. 1740, 1752 (2011); *see also Bell Atlantic v. Twombly*, 550 U.S. 544, 559 (2007) ("the threat of discovery expense will push cost-conscious defendants to settle even anemic cases"); *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.").

One solution to this problem is for district courts to deny class certification where the evidence shows that the proposed class as a whole suffered only *de minimis* harm, or where the proponent of the class cannot prove by objective means which specific members of the proposed class were actually harmed as a result of the challenged conduct. *See Stillmock v. Weis Markets, Inc.*, 385 F. App'x 267, 276 (4th Cir. 2010) ("To certify in cases where no plaintiff has suffered any actual harm from identity theft and where innocent employees may suffer the catastrophic fallout could not have been Congress's intent.") (Wilkinson, C.J., concurring specially); *London v. Wal-Mart Stores, Inc.*, 340 F.3d 1246, 1255 n.5 (11th Cir. 2003) (refusing to certify a statutory damages class where the defendant's potential liability "would be enormous and completely out of proportion to any harm suffered by the plaintiff") (citation omitted); *Leysoto v. Mama Mia I, Inc.*, 255 F.R.D. 693, 699 (S.D. Fla. 2009) (refusing to certify a FCRA statutory damages claim because "to grant the requested class relief would allow this Plaintiff, and his counsel, to dangle the Sword of Damocles over Defendant, without any showing of actual economic harm. . . . the threat of annihilation associated with certification does not serve the purpose of the legislation, and moreover, is simply unnecessary to effectively enforce the Act . . . ."); *Ratner v. Chem. Bank N.Y. Tr. Co.*, 54 F.R.D. 412, 416 (S.D.N.Y. 1972) (denying class certification because damages were negligible and "the proposed recovery of $100 each for some 130,000 class members would be a horrendous, possibly annihilating punishment, unrelated to any damage to the purported class or to any benefit to defendant, for what is at most a technical and debatable violation . . . .").

"The common sense of justice would surely bar penalties that reasonable people would think excessive for the harm caused in the circumstances." *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2627 (2008); *see also Hale v. Morgan*, 22 Cal. 3d 388, 402 (1978) (statutory damages provision held unconstitutional as applied because the "exercise of a reasoned discretion is replaced by an adding machine" resulting in "potentially infinite penalties, regardless of the circumstances of the violation, the offender, the victim or the damage caused"). However, the Ninth and Seventh Circuits interpret Federal Rule of Civil Procedure 23 inflexibly, denying district judges discretion to refuse certification based on lack of harm to class members or based on the risk of annihilating punishment of the defendant. *See Bateman v. Am. Multi-Cinema, Inc.*, 623 F.3d 708, 716-17 (9th Cir. 2010); *Murray*, 434 F.3d at 953-54.

Accordingly, this Court should address the Article III question squarely. In light of how 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 has personally suffered injury in fact caused by the alleged violation. Nor should any plaintiff be allowed to pursue statutory damages claims on behalf of other persons who did not personally suffer injury in fact caused by the alleged violation. This Court also should make it clear that the injury-in-fact requirement may be examined either at the pleading stage (as the district court below did correctly) or at the class certification stage.

C. Statutory Damages Class Actions Under the Fair Credit Reporting Act Also Improperly Chill Protected First Amendment Activity.

The present case illustrates a further problem with no-injury FCRA statutory damages class actions—a chilling effect on protected First Amendment activity. As routinely litigated today, FCRA statutory damages class actions threaten disproportionate punishment for activity protected by the First Amendment, but threaten that severe punishment only against certain speakers and listeners based solely on their legal status under the statute. This is yet another reason to recognize an injury-in-fact element for statutory damages claims asserted under the FCRA.

In the present case, a putative class action challenges nearly every aspect of an internet-based service that gathers public information from public sources, and distributes it conveniently and inexpensively to those interested in what those public sources reflect. If statutory damages are awarded on a class basis for every alleged violation, regardless of the actual impact on the proposed class as a whole or any particular member thereof, Petitioner would be bankrupted hundreds of times over. Effectively, this distributor of information would be closed down for distributing public records data, regardless of the actual impact of distribution on anyone. The First Amendment forbids such an outcome. *See Sorrell v. IMS Health, Inc.*, 131

S. Ct. 2653, 2667-68 (2011) (a statute regulating content of commercial speech must directly advance "a substantial government interest," and there must be a close fit between the means chosen and the statute's ends to ensure that the government's "interests are proportional to the resulting burdens placed on speech"); *see also Reed v. Town of Gilbert*, No. 13-502, slip op. at 6 (U.S. June 18, 2015) ("Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly-tailored to serve compelling state interests.").

The FCRA governs the transmission of even truthful information. Among other things, the FCRA compels consumer reporting agencies to give both furnishers of information and readers of reports specific notices with content dictated by the government, even if all the information transmitted is truthful. *See* 15 U.S.C. § 1681e(d); 12 C.F.R. pt. 1022, apps. M (Notice of Furnisher Responsibilities) & N (Notice of User Responsibilities). The statute also forbids consumer reporting agencies from transmitting potentially derogatory information from public records to potential employers, unless the consumer reporting agency either: (1) gives notice to the applicant for employment contemporaneous with transmission to the potential employer, or (2) employs "strict procedures designed to ensure" that the public records information is "complete and up to date." *See* 15 U.S.C. § 1681k(a). The same requirement does not apply to transmission of beneficial or neutral information from public records, or to a communication that no public records data could be found.

On its face, then, the FCRA imposes content-based burdens on speech, but only on certain speakers. Other distributors of public records information, such as newspapers, television stations or Internet search engines, are not similarly burdened. Cases filed under Section 1681k(a) routinely settle for millions of dollars, with the settlement amounts calculated not on the basis of the number of applicants denied employment as a result of inaccurate information, but rather based on the number of times the notice described under Section 1681k(a)(1) is allegedly sent too late or is incorrectly worded.[4] This application of the FCRA is troubling because liability bears no relationship to accuracy or inaccuracy, or even to financial impact on the subjects of reports, but instead depends on other factors, *i.e.*, whether the distributor can possibly be deemed a consumer reporting agency, whether the report includes public records information and whether the user is an employer. *See Sorrell*, 131 S. Ct. at 2665 ("An individual's right to speak is implicated when information he or she possesses is subjected to restraints on the way in which the information might be used or disseminated.") (internal

[4] *See* Final Order and J. at 10-11, *Henderson v. HireRight Solutions, Inc.*, No. 3:11-cv-00558-JAG (E.D. Va. Dec. 21, 2011), ECF No. 74 ($28 million settlement based on failure to provide Section 1681k(a)(1) notice); Settlement Agreement and Release at 9-10, *Williams v. LexisNexis Risk Management, Inc.*, No. 3:06-cv-241 (E.D. Va. Feb. 20, 2008), *available at* http://web.archive.org/web/20081009014019/http://www.williamsfcrasettlement.com/pdfs/settlementAgreement.pdf ($20.7 million settlement); J. of Class Action Settlement at 3, *Robinson v. WFS Fin., Inc.*, No. 8:06-cv-01072-ODW-RNB (C.D. Cal. July 8, 2008), ECF No. 58 ($3.2 million settlement); Order Granting Final Approval of Class Action Settlement at 4-5, *Roe v. Intellicorp Records, Inc.*, No. 1:12-cv-02288-JG (N.D. Ohio June 5, 2014), ECF No. 139 ($19.6 million settlement).

quotation omitted). The exact same information could be distributed by a different kind of organization to a different kind of user, with no statutory damage risk. For example, a potential landlord could use a search engine or visit a newspaper's website to look for public information about a potential tenant, and receive the exact same information, yet neither the search engine nor the newspaper would face any statutory damages risk unless found to be a "consumer reporting agency" within the meaning of 15 U.S.C. § 1681a(f).

In response to the notice under Section 1681k(a)(1), the consumer may request that the consumer reporting agency reinvestigate the public records information under 15 U.S.C. § 1681i(a).[5] If the information previously provided cannot be "verified" (even if the information is not affirmatively *disproven*), the consumer reporting agency may not continue to report it. *See* 15 U.S.C. § 1681i(a)(5). The consumer reporting agency also must advise the consumer of the results of the reinvestigation and, upon request, inform recipients of prior reports that the information was deleted. *See* 15 U.S.C. §§ 1681i(a)(6) & 1681i(d). If the consumer disagrees with the result of the reinvestigation, he has a right to demand that the consumer reporting agency include in his file and in any future report the consumer's statement of dispute (not to exceed 100 words). See 15 U.S.C. §§ 1681i(b) & 1681i(c).[6] The consumer

[5] One case settled for free credit monitoring and $1.5 million in attorneys' fees based on consumer reporting agency's allegedly improper requirement that the consumer prove his identity, by providing a Social Security Number, before processing a reinvestigation request. Final Order and J. at 5-6, *James v. Experian Info. Solutions, Inc.*, No. 3:12-cv-00902-REP (E.D. Va. Dec. 9, 2014), ECF No. 156.

[6] A class action under this FCRA provision settled for nearly $300,000 (including costs and a $90,000 attorneys' fee award).

also has the right to insist that his statement of dispute be delivered to past recipients of reports. *See* 15 U.S.C. § 1681i(d).

Other reporters of public records information, such as print journalists and television newscasters, are not subject to similar requirements, in spite of well-publicized examples of inaccuracy.[7] And even where a news story based on information derived from public records is not technically inaccurate, it might not be "complete and up to date," and thus would arguably violate 15 U.S.C. § 1681k if that statute's provisions were applied to the news organization. Under this Court's precedent, however, traditional media cannot be exposed to statutory damages liability if they choose

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See Final Approval of Settlement at 2, 4, *LaValle v. Chexsystems, Inc.*, No. 8:08-cv-01383-AHS-RNB (C.D. Cal. Oct. 5, 2011), ECF No. 58. The defendant reports events where a consumer wrote a check on insufficient funds. Out of concern for potential defamation liability to persons not engaged in credit reporting activity, the defendant's former policy was to request that consumers omit from Section 1681i(b) statements any names of individuals or businesses other than the specific individual or business who furnished the bad-check data to the defendant; plaintiff contended that the FCRA bars consumer reporting agencies from imposing any such content restrictions on consumer statements. *See id*. (May 18, 2009) (Joint Rule 26(f) Report), EFC No. 11. The case did not involve a claim that the bad-check reporting was inaccurate as to any class member.

[7] "Young, upcoming lying reporters like onetime New York Times fabulist Jayson Blair and The New Republic's past stable of fantasy writers—Stephen Glass, Scott Beauchamp, and Ruth Shalit—had their work finally disowned by their publications. Former Washington Post reporter Janet Cooke got her Pulitzer Prize revoked for fabricating a story." Victor David Hanson, *Brian Williams' Truth Problem, and Ours*, NATIONAL REVIEW, Feb. 12, 2015, http://www.nationalreview.com/article/398416/brian-williamss-truth-problem-and-ours-victor-davis-hanson.

to report public records information without giving the subjects of such reporting notice of the reporting, the opportunity to demand reinvestigation or the right to force publication of the subject's rebuttal statement if reinvestigation of the item is not resolved to the subject's satisfaction. *See Miami Herald Pub'g Co. v. Tornillo*, 418 U.S. 241, 256-57 (1974) (invalidating Florida statute allowing plaintiff to seek statutory damages against a newspaper for refusing to publish plaintiff's rebuttal to a news report).

As presently litigated, the FCRA greatly burdens the speech of consumer reporting agencies, even though the same information is often transmitted by parties not regulated by the FCRA. Permitting FCRA statutory damages litigation by or on behalf of uninjured parties risks violating the First Amendment principle that *the identity of the speaker* cannot justify greater burdens on otherwise protected speech. *See Reed v. Town of Gilbert*, slip op. at 13 ("a law limiting the contents of newspapers, but only newspapers, could not evade strict scrutiny simply because it could be characterized as speaker based"); *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 340, 130 (2010) ("Speech restrictions based on the identity of the speaker are all too often simply a means to control content.").

Under libel law the plaintiff must prove an inaccurate publication, but under the FCRA, liability may attach for a host of reasons unrelated to inaccuracy, such as failing to give a required notice (*see* 15 U.S.C. § 1681g(c)), for reporting an accurate item longer than the statute allows (*see* 15 U.S.C. § 1681c) or for failing to respond quickly enough to a credit reporting dispute (*see* 15 U.S.C. § 1681i(a)(1), (2)). Since so many FCRA statutory damages class actions are not based on alleged inaccuracy, but rather on some other statutory requirement not imposed on traditional media, the risk of discouraging distribution of truthful information is real and severe. *See Nike*, 539 U.S. at 679 ("a private 'false advertising' action brought on behalf of the State, by one who has suffered no injury, threatens to impose a serious burden upon speech") (Breyer, J., dissenting); *New York Times Co. v. Sullivan*, 376 U.S. 254, 294-95 (1964) (Black, J., concurring) (discussing how civil litigation may impair protected First Amendment activity).

Data furnishers also have potentially significant exposure to statutory damages claims by uninjured persons asserting violations of 15 U.S.C. § 1681s-2(b). It is rare for a single item, inaccurate in a small detail, to actually result in a denial of credit, but furnishers may choose to avoid reporting questioned items regardless of their truth or falsity, simply to avoid risk of suit. Data furnishers' participation in the credit reporting system, although essential for its operation, is purely voluntary, and the risk associated with no-injury statutory damages lawsuits will discourage participation from furnishers who might otherwise wish to provide positive information into the system. This is potentially damaging to first-time and second-chance borrowers, who may benefit from having their credit files supplemented with information from smaller lenders or from non-traditional furnishers of information, such as utility companies or landlords. Recent analysis by the Consumer Financial Protection Bureau indicates that, as of 2010, approximately 11% of Americans are "credit invisible," in that the credit reporting system lacks sufficient information about them to issue a credit score.[8] The problem of credit

[8] *See* KENNETH P. BREVOORT ET AL., CONSUMER FIN. PROT. BUREAU'S OFFICE OF RESEARCH, DATA POINT: CREDIT INVISIBLES

invisibility may be mitigated by allowing alternative payment data into the system.[9] For example, a pattern of regular payments of utility bills or rent may show a consumer to be more creditworthy than one who does not make regular payments. Data furnishers' fear of liability, however, can discourage them from making their data available, particularly when the risk is of annihilating statutory damages liability bearing no relationship to anyone's actual harm.[10] *Sorrell* described credit reporting as protected First Amendment activity. 131 S. Ct. at 2667. Thus, as a "law . . . abridging the freedom of speech," the FCRA is inherently in tension with the First Amendment, and must be scrutinized carefully whenever its interpretation may discourage legitimate distribution of credit or public records information, or when its interpretation discourages furnishers from their voluntary participation in the system.

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6 (May 2015), http://files.consumerfinance.gov/f/201505_cfpb_data-point-credit-invisibles.pdf.

[9] *See* MICHAEL A. TURNER ET AL., POLICY & ECONOMIC RESEARCH COUNCIL (PERC), RESEARCH CONSENSUS CONFIRMS BENEFITS OF ALTERNATIVE DATA 18 (March 2015), http://www.perc.net/wp-content/uploads/2015/03/ResearchConsensus.pdf.

[10] *See* JULIA S. CHENY, PAYMENT CARDS CENTER NEWSLETTER, ALTERNATIVE DATA AND ITS USE IN CREDIT SCORING THIN-AND-NO-FILE CONSUMERS 15 (Summer 2008), https://www.philadelphiafed.org/consumer-credit-and-payments/payment-cards-center/publications/discussion-papers/2008/D2008FebAlternativeData.pdf ("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 amended, by the Fair and Accurate Credit Transactions Act of 2003 (FACTA), adding often unfamiliar compliance responsibilities.").

The FCRA also exposes *readers* to uniquely dangerous statutory damages risks. The FCRA contains a grab-bag of duties imposed on users of reports, potentially penalizing them for purely technical errors, such as for including extraneous information on a form seeking a potential employee's consent to obtain a consumer report about him. *See* 15 U.S.C. § 1681b(b)(2)(A)(i). Multi-million dollar settlements under this provision have become routine.[11] Similarly sized settlements also are frequent under 15 U.S.C. § 1681b(b)(3), which requires a potential employer to give specialized notice to a job applicant before taking adverse action based on the information in a report.[12] By contrast, an

[11] *See* Final Order and J. at 8, *Marcum v. Dolgencorp, Inc.*, No. 3:12-cv-00108 (E.D. Va. Mar. 4, 2015), ECF No. 92 (approving class settlement that awarded the class approximately $4 million, including attorneys' fees of $1 million, even though no actual damages occurred as a result of a purely technical violation); Final Approval Order and J. at 2, *Knights v. Publix Super Markets, Inc.*, No. 3:14-cv-00720 (M.D. Tenn. Nov. 12, 2014), ECF No. 72 ($6.8 million settlement); Final Order and J. at 6, *Ellis v. Swift Transp. Co. of Ariz., LLC*, No. 3:13-cv-00473 (E.D. Va. Oct 7, 2014), ECF No. 59 ($5 million settlement); Pl.'s Motion for Prelim. Approval of Class Action Settlement at 7, *Fernandez v. Home Depot USA, Inc.*, No. 8:13-cv-00648 (C.D. Cal. Apr. 20, 2015), ECF No. 38 ($1.8 million settlement); *Singleton v. Domino's Pizza, LLC*, 976 F. Supp. 2d 665, 682 (D. Md. 2013) ($2.5 million settlement).

[12] *See* Settlement Agreement at 5, *Brown v. Delhaize Am., LLC*, No. 1:14-cv-00195 (M.D. N.C. Feb. 20, 2015), ECF No. 63-1 (providing for a class settlement fund value of approximately $3 million, and granting class counsel approximately $1 million in attorneys' fees, even though class members suffered no actual damages); Final Order and J. at 7, *Pitt v. K-Mart Corp.*, No. 3:11-cv-00697 (E.D. Va. May 24, 2013), ECF No. 75 ($3 million settlement); Final Order and J. Approving Settlement at 5-6, *Bell v. US Xpress, Inc.*, No. 1:11-cv-00181-CLC-WBC (E.D. Tenn. Jan. 21, 2015), ECF No. 71 ($2.75 million settlement); Order Granting

employer faces no potential liability for basing employment decisions on search engine results, and is not required to seek applicants' consent before having its own personnel department comb through the Internet. Huge FCRA settlement payments discourage legitimate access to credit reporting, out of users' fear that the potential liability risk outweighs the value from the information to be obtained. Instead, some employers rely on wholly unregulated technologies to make decisions affecting consumers' livelihoods, even though these may be less reliable than credit reports and even though consumers may have less practical ability to correct harmful inaccurate information or to learn what particular piece of information led to an adverse decision.[13]

Focusing the damages inquiry on actual harm always has been a key component of First Amendment and defamation jurisprudence intended to minimize chilling effects on speech. As Justice Brennan explained, speaking for himself and three other Justices, "The ready availability and unconstrained application of presumed and punitive damages in libel actions is too blunt a regulatory instrument . . . 'the underlying aim of the law is to compensate for harm actually caused.'" *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 778-79 (1985) (Brennan, J., dissenting) (quoting *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 73

Final Approval of Settlement at 5, *Hunter v. First Transit, Inc.*, No. 1:09-cv-06178 (N.D. Ill. Sept. 9, 2011), ECF No. 79 ($5.9 million settlement).

[13] *See* JON RONSON, SO YOU'VE BEEN PUBLICLY SHAMED 69-70 (2015) (describing employee termination based solely on Twitter information); Victoria Fitzgerald, *Is it wrong to google a job candidate*, FINANCIAL TIMES, Nov. 8, 2013, http://www.ft.com/cms/s/0/303e35be-e330-11e2-bd87-00144feabdc0.html#axzz3e7nExwW7.

(1971) (Harlan, J., dissenting)). Three Justices described common-law rules permitting presumed damages in defamation cases as a consequence of circumstances where proof of specific damages would be impossible but nevertheless "from the character of the defamatory words and the circumstances of publication, it is all but certain that serious harm has resulted in fact." *Id*. at 760 (Powell, J.) (quoting W. Prosser, *Law of Torts* § 112, p. 765 (4th ed. 1971)). "The common law [also] recognizes that credit reporting is quite susceptible to libel's chill; this accumulated learning is worthy of respect." *Id*. at 792 (Brennan, J., dissenting).[14]

To allow unrestrained FCRA statutory damages claims by or on behalf of uninjured persons creates serious First Amendment concerns. This provides further justification for this Court to uphold its prior Article III jurisprudence, and to reverse or vacate the Ninth Circuit's decision below. This Court should rule that FCRA statutory damages claims may not be pursued by or on behalf of uninjured persons.

[14] Justice Brennan suggested that the FCRA, as then in effect, appeared to comport with the First Amendment as "appropriate regulation designed to prevent the social losses caused by false credit reports." *See id*. at 795-96 & n.19. However, the Act did not permit statutory damages then, and the version of 15 U.S.C. § 1681n currently before the Court was enacted eleven years after *Dun & Bradstreet*. *See* Pub. L. 104-208, 110 Stat. 3009, 3009-446 (Sept. 30, 1996). The FCRA previously authorized, for a willful violation, "such amount of punitive damages as the court may allow." *See* Pub. L. 91-508, 84 Stat. 1114, 1134 (Oct. 26, 1970).

D. In Light of the Important Separation of Powers and First Amendment Concerns Presented by No-Injury Statutory Damages Claims Under the FCRA, This Court Should Construe 15 U.S.C. § 1681n to Include an Injury-in-Fact Requirement.

This Court may avoid deciding the core Article III constitutional question by construing 15 U.S.C. § 1681n to contain an injury-in-fact requirement.

Nothing in the statute suggests clear Congressional intent to permit statutory damages claims by or on behalf of wholly uninjured persons. Without such a clear indication, the statute should be construed narrowly to ensure its compliance with Article III. Congress passed the FCRA to improve the credit reporting system, but to allow massive no-harm statutory damages classes threatens to destroy that system. Congress did not intend to allow such cases and no "fair understanding of the legislative plan" is consistent with the Ninth Circuit's approach. *Cf. King v. Burwell*, No. 14-114, slip op. at 21 (U.S. June 25, 2015).

The FCRA itself contains no indication of Congressional intent to allow private litigation at the outer limits of Article III standing rules. Nor is there any meaningful legislative history suggesting Congress understood that massive statutory damages class actions would be pursued under 15 U.S.C. § 1681n on behalf of uninjured consumers. *See Bateman*, 623 F.3d at 718 n.7 ("there was no discussion on how Congress arrived at the range of statutory damages or the appropriateness of that remedy").

The 1996 amendment to the FCRA that includes the current language of 15 U.S.C. § 1681n focused in large part on expanding the compliance duties imposed on furnishers of credit data to consumer reporting agencies. *See* Pub. L. 104-208, 110 Stat. 3009, 3009-446 (Sept. 30, 1996). The 1996 amendment was attached to a mammoth 750-page appropriations bill, with little Congressional discussion. The House Conference Committee Report does not specifically discuss the amendment to Section 1681n, but merely references in a general sense "a number of revisions to the Fair Credit Reporting Act" as a whole, intended to respond to "information technology advances that have occurred over the last twenty years" since the FCRA was first enacted. H.R. Conf. Rep. 104-863 at 1175-76 (Sept. 28, 1996). Nothing suggests any careful contemplation or specific intent by Congress to convert the FCRA into the powerful litigation weapon it has lately become. *See Hammer*, 754 F.3d at 509 ("it does not make sense to assume Congress intended to confer a windfall on consumers . . . who face no reasonable likelihood of harm, let alone any actual harm") (Riley, C.J., dissenting); *cf. King v. Burwell*, slip op. at 14 (health care statute "does not reflect the type of care and deliberation that one might expect of such significant legislation").

The FCRA says only that a defendant "who willfully fails to comply with any requirement" of the Act "with respect to any consumer is liable to that consumer in an amount equal to the sum of [] [] any actual damages sustained by the consumer as a result of the failure or damages of not less than $100 and not more than $1,000." 15 U.S.C. § 1681n(a)(1)(A). Read properly, this provision means that where damages are genuine but small, or difficult to quantify, the damaged consumer is guaranteed a minimum recovery. Nonetheless, some real-world impact on the plaintiff still must be shown as a precondition to suit, unless Congress clearly indicated that the contrary interpretation should follow. Congress did not so indicate, and use of the word "damages" (rather than "penalty") indicates that the $100-$1,000 range described is intended to approximate or enhance damages that actually occurred but might be difficult to measure. "Congress presumably expected the federal courts to require factual harm under Article III's injury in fact prong." *Hammer*, 754 F.3d at 509 (Riley, C.J., dissenting); *see also Trujillo v. First American Registry, Inc.*, 157 Cal. App. 4th 628, 637-38 (2008) (California credit reporting statute construed to include injury-in-fact requirement).

"A reasonable reading of the statute could still require proof of actual damages but simply substitute statutory rather than actual damages for the purpose of calculating the damage award." *Dowell v. Wells Fargo Bank, N.A.*, 517 F.3d 1024, 1026 (8th Cir. 2008). Two judges of a later Eighth Circuit panel rejected this statement in *Dowell*, calling it dicta. *Hammer*, 754 F.3d at 499. Chief Judge Riley disagreed, describing the Dowell analysis as both "eminently reasonable" and necessary to avoid "offering a doubtful answer to a difficult constitutional question." *Id*. at 508 (Riley, C.J., dissenting); *see also Wallace v. ConAgra Foods, Inc.*, 747 F.3d 1025, 1031 (8th Cir. 2014) (interpreting the Class Action Fairness Act to require an allegation of injury in fact because Congress cannot be presumed to have "intended to stretch, if not breach, the constitutional limits on federal jurisdiction").

As this Court recognized in interpreting a different statute, "a guaranteed minimum" statutory damages must be "contingent upon some showing of actual damages, thereby avoiding giveaways to plaintiffs with nothing more than abstract injuries . . . ." *Doe v. Chao*, 540 U.S. 614, 625-26 (2004) (citation and internal quotation omitted); *see also Paroline v. United States*, 572 U.S. __, 134 S. Ct. 1710, 1720 (2014) ("[T]his Court has more than once found a proximate-cause requirement built into a statute that did not expressly impose one."); *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 266 (1992) (noting the unlikelihood that Congress intended for literally "all factually injured plaintiffs" to recover under the Racketeer Influenced and Corrupt Organizations Act); *Joint Stock Soc'y v. UDV N. Am., Inc.*, 266 F.3d 164, 176 (3d Cir. 2001) (Alito, J.) (observing that plaintiffs lacked standing under the Lanham Act because they failed to allege that defendants' alleged misconduct "harmed" them and thus lacked "injury in fact"); *Starbucks Corp. v. Super. Ct.*, 168 Cal. App. 4th 1436, 1449 (2008) (construing statutory damages provision to require proof of injury and causation to avoid turning "the statute into a veritable financial bonanza . . . and to avoid absurd consequences, including an unconstitutionally excessive penalty").

The few cases suggesting that statutory damages may be awarded without quantified proof of harm involve unique situations, and do not undermine the grounds for construing the FCRA narrowly to forbid statutory damages without injury in fact. *Douglas v. Cunningham*, 294 U.S. 207, 209 (1935), for example, observed that copyright statutory damages address the problem of "difficult or impossible proof of damages or discovery of [the defendant's] profits." Moreover, there is unjust enrichment in a copyright case, as the infringer takes compensation that the author otherwise could gain through sale or license of an authorized copy. Similarly, the standing of a *qui tam* relator, which derives from actual financial injury to the government, is deeply embedded in the Anglo-American legal system, having been frequently approved of by multiple Congresses and before then multiple English Parliaments. *See Vermont Agency*, 529 U.S. at 776-78. "Tester" standing under the Fair Housing Act was justified on the grounds that Congress indicated a clear intent to allow suits to the maximum degree permitted by Article III. *See Havens Realty Corp. v. Coleman*, 455 U.S. 363, 372-74, n.14. (1982); *Gladstone, Realtors v. Vill. of Bellwood*, 441 U.S. 91, 103, n.9, 109 (1979). Yet even in *Havens* this Court said that the plaintiffs might be unable to prove injury in fact in compliance with Article III, and that if they could not, the case should be dismissed. 455 U.S. at 378; *see also id*. at 382-83 (Powell, J., concurring) (expressing doubt about the plausibility of the standing allegation); *see also Fair Hous. Council v. Main Line Times*, 141 F.3d 439, 444 (3d Cir. 1998) ("a violation of the [Fair Housing] Act does not automatically confer standing on any plaintiff, even one who holds the status of a private attorney general").

This Court should explain that where a statute does not clearly authorize a lawsuit that might violate Article III standing limits, the statute should be construed not to authorize such a suit, pursuant to the "settled policy of adopting acceptable constructions of statutory provisions in order to avoid the unnecessary adjudication of constitutional questions." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 133 (1998) (Stevens, J., concurring); *see also id*. at 134 (Ginsburg, J., concurring) ("resist expounding or offering advice on the constitutionality of what Congress might have done, but did not do"). Moreover, the First Amendment implications of an expansive reading of the FCRA provide further justification for a narrow construction of 15 U.S.C. § 1681n because credit reporting is protected speech. *See United States v. X-Citement Video, Inc.*, 513 U.S. 64, 69 (1994) (statute should be interpreted to avoid "substantial constitutional questions" under the First Amendment).

The FCRA nowhere states expressly that statutory damages may be recovered by or on behalf of consumers who suffered no harm at all. It certainly does not state that a class action may be pursued for massive statutory damages on behalf of thousands or millions of persons lacking any injury in fact. Without such a clear indication, the statute should not be construed to authorize such suits. Indeed, the statute is being litigated in a fashion that Congress did not contemplate and that distorts its purpose. *See Washington*, 199 F.3d at 267 (rejecting "plain language argument" for broad class certification order including persons not injured by alleged procedures violation; "In light of the purposes of the FCRA, we find that the 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.") (emphasis in original); Richard A. Nagareda, *Aggregation and its Discontents: Class Settlement Pressure, Class-Wide Arbitration, and CAFA*, 106 COLUM. L. REV. 1872, 1886 (2006) (addressing a different statutory damages statute; "The distortion of the underlying remedial scheme comes from the aggregation of statutory damages seemingly set forth by Congress with the scenario of individual litigation in mind.").

Without a clear indication that Congress desired to allow statutory damages suits without any damages (rather than if damages are concrete but small), the FCRA should not be construed to permit such suits. *See United States v. Bass*, 404 U.S. 336, 349-50 (1971) ("the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision"); *Vermont Agency*, 529 U.S. at 788-89 (Ginsburg, J., concurring) ("I do not find in the False Claims Act any clear statement subjecting the States to *qui tam* suits brought by private parties . . . ."). As explained above, FCRA statutory damages lawsuits implicate important separation of powers and First Amendment issues, but "as a general matter, when a particular interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result." *INS v. St. Cyr*, 533 U.S. 289, 299 (2001); *see also Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575 (1988) ("The courts will therefore not lightly assume that Congress intended to infringe constitutionally protected liberties or usurp power constitutionally forbidden it.").

This Court often requires clear-statement rules when Congress may have impinged upon an important area of constitutional concern, or when the particular application of a statute "would intrude on sensitive domains in a way that Congress is unlikely to have intended had it considered the matter." *Spector v. Norwegian Cruise Line Ltd.*, 545 U.S. 119, 139 (2005); *see also NLRB v. Drivers, Chauffeurs, Helpers Loc. Union No. 639*, 362 U.S. 274, 284 (1960) (statute should not be construed to restrict right to picket peacefully without clear statement by Congress). The Court should apply a clear-statement rule here as well because to allow FCRA suits by uninjured plaintiffs, or on behalf of uninjured class members, would present difficult separation of powers and First Amendment issues, as discussed in greater detail above, and nothing suggests that Congress considered these issues. *See Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247, 265 (2010) (observing that the Securities

Exchange Act of 1934 does not permit class actions based on extraterritorial activity because the statute lacks any "affirmative indication" by Congress to permit such suits).

No-injury statutory damages class actions should not be allowed under the FCRA unless Congress has given a clear indication to allow such lawsuits, in light of the "high stakes" involved. *See Landsgraf v. USI Film Prods.*, 511 U.S. 244, 259 (1994). Extremely high stakes are involved here, where any potential violation can trigger a class action lawsuit that, regardless of its ultimate merit, will pose an existential threat to the targeted business. *See Trans Union LLC v. Fed. Trade Comm'n*, 536 U.S. 915, 122 S. Ct. 2386, 2387 (2002) (Kennedy, J., dissenting from denial of certiorari) ("Because the FCRA provides for statutory damages of between $100 and $1,000 for each willful violation, petitioner faces potential liability approaching $190 billion. If the Court of Appeals' decision is given collateral-estoppel effect in these class actions (as the class-action plaintiffs seek), petitioner will face crushing liability.").

Chief Judge Riley of the Eighth Circuit, dissenting in *Hammer*, warned that interpreting 15 U.S.C. § 1681n(a)(1) to permit statutory damages without any underlying injury in fact

> will lead to results Congress cannot have intended. . . . A retailer earning less than $100 per average receipt could not afford a $100 penalty per receipt, let alone $1,000. The district court took the fact that damages would exceed $1 billion despite the absence of a penny's worth of injury as a sign that Congress probably knew not what they wrought.

754 F.3d at 509 (internal quotations omitted).

Properly construed, 15 U.S.C. § 1681n(a) permits enhancement of small but concrete damages into the $100-$1,000 range, if a willful violation is shown, but the statute does not authorize an automatic recovery of $100-$1,000 for violations that do not cause injury in fact. This Court should rule that FCRA claims may not be pursued by or on behalf of persons who did not suffer injury in fact resulting from the particular substantive statutory violation alleged.

CONCLUSION

For the foregoing reasons, this Court should reverse or vacate the judgment of the Court of Appeals, and further, this Court should explain that no FCRA claim may be pursued by or on behalf of a person who did not sustain concrete injury in fact.

Respectfully submitted,

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