No. 14-857

IN THE

Supreme Court of the United States

CAMPBELL-EWALD COMPANY,

Petitioner,

v.

JOSE GOMEZ,

Respondent.

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

BRIEF OF THE CONSUMER DATA INDUSTRY ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE[1]

The Consumer Data Industry Association ("CDIA") is an international trade association, founded in 1906, and headquartered in Washington, D.C. As part of its mission to support companies offering consumer information reporting services, CDIA establishes industry standards, provides business and professional education for its members, and produces educational materials for consumers describing consumer credit rights and the role of consumer reporting agencies ("CRAs") in the marketplace. CDIA is the largest trade association of its kind in the world, with a membership of approximately 180 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 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"), 15 U.S.C. § 1681 *et seq.*, in 1970, and its subsequent amendments.

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[1] Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus*, its members, or its counsel made any monetary contributions intended to fund the preparation or submission of this brief. Pursuant to this Court's Rule 37.3(a), letters from all parties consenting to the filing of *amicus* briefs have been submitted to the Clerk.

CDIA has a significant interest in this case because its members face an onslaught of class litigation under the FCRA. CRAs perform the economically vital function of gathering large amounts of consumer information and making that information available for use in credit decisions. Operating in a heavily regulated context, CRAs' activities by necessity touch on the vast majority of adult Americans, and entail the handling of billions of discrete pieces of data. Because of the large-scale nature of their businesses, coupled with a legislative scheme that a number of courts have construed to provide uncapped statutory damages irrespective of actual harm, CRAs have become a target of the class action bar. Many of the cases that are brought against CRAs are based on alleged violations that are technical at best, but because the potential liabilities are so enormous, class action lawyers are able to leverage lucrative settlements.

The issue in this case—whether an individual whose own claim has been fully satisfied can nonetheless pursue litigation against a defendant for claimed statutory violations against other people—goes to the heart of the distinction between regulation and litigation. If a novel exception to Article III mootness principles permits such litigation, the result is to blur that important line and allow class action attorneys to operate as private enforcers of the law. As the experience of CDIA's members illustrates, there is a stark difference between the Executive Branch enforcing the FCRA in the public interest and private attorneys enforcing it as a means to extract settlements.

INTRODUCTION AND SUMMARY OF ARGUMENT

Suppose that James Madison, having been sued by William Marbury, had relented and delivered to Marbury his commission. Suppose further that Mr. Marbury had shut his door and refused to accept it, announcing to the Secretary of State that instead of having his injury redressed in full, he was more interested in hearing the Supreme Court expound on the issue of judicial review, and in ensuring that commissions not be illegally denied to other Federalists. *See generally Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803); Michael W. McConnell, *The Story of* Marbury v. Madison*: Making Defeat Look Like Victory* 13, 18, *in* Constitutional Law Stories (M. Dorf ed., 2004) (noting the "sheaf of [undelivered] commissions" left behind by President Adams). Would Chief Justice Marshall have humored Mr. Marbury's academic interest in hearing the Court "say what the law is"? *Marbury*, 5 U.S. at 177. Of course not. *See Flast v. Cohen*, 392 U.S. 83, 96 n.14 (1968) ("The rule against advisory opinions was established as early as 1793, and the rule has been adhered to without deviation." (internal citation omitted)).

The question presented here is the same: the plaintiff has made a demand and the defendant has acceded to it in full, but the plaintiff has refused to take yes for an answer and instead insists on continuing to pursue litigation to obtain what he has already been offered. The only reason Respondent can even arguably claim to have a live "Case or Controversy" is that his ambitions go beyond full redress of his individual claim. Respondent declined to be made whole so that he could pursue other people's claims. More to the point, Respondent's attorneys persuaded him not to accept full relief so that they could proceed with a class action, demand staggering damages, and extract a lucrative settlement.

This invocation of the judicial power is untenable. The Constitution draws a sharp distinction between true cases or controversies brought by an individual for the redress of his own injuries, and the more sweeping power to enforce the law that is vested in the Executive Branch. By refusing an offer of complete relief so that he could challenge Petitioner's alleged violations against strangers, Respondent has made clear what kind of case he wishes to bring: he—and his lawyers—want to enforce the law for a bounty.

In an era of class actions and threats of annihilating statutory damages often based on minor or technical alleged violations, the ability to offer a plaintiff full relief is a vital check. This is made particularly clear in the case of the consumer data industry, which faces uncapped statutory damages for claims under the Fair Credit Reporting Act ("FCRA"). If many individuals are truly harmed by the conduct challenged in a lawsuit, new plaintiffs would surely surface and demand their share of the relief; any sustained strategy to "pick off" new plaintiffs would be self-defeating. But if an enterprising attorney cannot identify anyone else motivated to file a lawsuit, then the offer of judgment has served the valuable purpose of keeping an abstract law enforcement action out of Article III courts. That result may be a loss for the class action bar, but it is a victory for the separation of powers. The Court should not create an exception to ordinary mootness principles that blurs the line between Article III cases or controversies and the Article II power to take care that the laws be faithfully executed.

1. a. Article III courts are restricted to deciding "Cases or Controversies" in which an aggrieved individual has a live stake in the dispute. Private litigation stands in stark contrast to regulation and enforcement by Executive Branch agencies. Unlike private litigants, Executive Branch agencies are entrusted with the sensitive policy decisions necessary to making law enforcement choices, including the discretion to *decline* to take enforcement action. The Constitution requires this important power to be exercised by public officers who are accountable to the people for their actions, and are charged with protecting the public interest. Policing the line between Article III litigation and Article II law enforcement is thus an important separation of powers concern.

That concern does not disappear when a case is filed as a putative class action. The class action is simply a procedural device for aggregating claims, not a license to serve as a private attorney general. Yet without strict adherence to the Article III "Case or Controversy" requirement, class actions threaten to become private law enforcement actions without any accountability.

b. Mootness doctrine is an aspect of the "Case or Controversy" requirement that ensures the judiciary is not asked to interfere with the Executive's law enforcement decisions. Because the courts have no role left to play once a plaintiff has been offered everything his lawsuit demands, mootness principles preclude him from proceeding. The existence of a putative class action does not change this analysis. That follows both from this Court's decision in *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523 (2013), as well as from the separation of powers concerns that animate Article III, which foreclose a private individual from prosecuting alleged violations of a statute committed against *other people*.

The theory that defendants might attempt to "pick off" class representatives offers no basis for creating a special exception to mootness. When many people are genuinely injured, offers of judgment would generally just spur others to file claims. That is particularly likely under statutes such as the Fair Credit Reporting Act that provide for attorney's fees. By contrast, if a long line of new plaintiffs does *not* materialize, that is simply an indication that the case is an abstract attempt by private class action attorneys to enforce the law—exactly the sort of case that does not belong in Article III court.

2. The consumer data industry's experience demonstrates the need to maintain the distinction between regulatory law enforcement and Article III litigation. CRAs deal with massive amounts of information relating to hundreds of millions of consumers. They are heavily regulated by the FCRA, and subject to vigorous oversight and enforcement from federal agencies. While regulators have been aggressive, they have generally set priorities based on the needs of consumer protection,

and sought to correct perceived issues in proactive and cooperative ways.

Private attorneys, unsurprisingly, pursue class actions based on the possibility of extracting lucrative settlements, not the public interest. FCRA cases are ubiquitous, and, simply because of the size of the classes at issue, exert tremendous settlement pressure. It is in this context that CRAs and other FCRA defendants consider whether to offer full relief at the outset. If, after an offer of judgment to the putative class representative, not a single member of a million-person strong class comes forward to file a new claim, mootness principles will have ensured that a private law enforcement action is properly kept out of Article III courts.

ARGUMENT

I. "Headless" Class Actions Are An Improper Species Of Private Law Enforcement, Not Bona Fide "Cases or Controversies."

A. Article III's "Case or Controversy" Requirement Safeguards The Distinction Between Litigation And Regulatory Enforcement.

"Article III, § 2, of the Constitution limits the jurisdiction of federal courts to 'Cases' and 'Controversies,' which restricts the authority of federal courts to resolving 'the legal rights of litigants in actual controversies.'" *Genesis Healthcare*, 133 S. Ct. at 1528 (quoting *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 471 (1982)). This principle restricts the judiciary "to its constitutionally limited role of adjudicating actual and concrete disputes, the resolutions of which have direct consequences on the parties involved." *Id.* "'The province of the court,' as Chief Justice Marshall said in *Marbury v. Madison*, 'is, solely, to decide on the rights of individuals.'" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 576 (1992) (internal citation omitted).

An essential aspect of the "Case or Controversy" requirement is that when the individual bringing a lawsuit no longer has a grievance capable of judicial resolution, the basis for exercising the judicial power disappears. Thus, "[i]f an intervening circumstance deprives the plaintiff of a personal stake in the outcome of the lawsuit, . . . the action can no longer proceed and must be dismissed as moot." *Genesis Healthcare*, 133 S. Ct. at 1528 (citation and internal quotation marks omitted).

Article III litigation contrasts sharply with regulation and administrative enforcement. Whereas courts resolve individual claims, it is the Executive Branch that is charged with enforcing the law, without any need for a live "Case or Controversy." This broad power to enforce the law entails many sensitive policy considerations. When an Executive Branch agency decides to bring an enforcement action, it has both the expertise and the responsibility to consider "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 agency has enough resources to undertake the action at all." *Heckler v. Chaney*, 470 U.S. 821, 831 (1985).

Equally important, when an agency *declines* to bring an enforcement action, it is making a policy decision that lies within the "special province of the Executive Branch." *Id.* at 832. Just as "[t]he police overlook minor infractions of the traffic code," regulatory agencies exercise the power of "discretionary nonenforcement" rather than enforce every technical provision of law to the fullest extent. William M. Landes & Richard A. Posner, *The Private Enforcement of Law*, 4 J. Legal Stud. 1, 38 (1975); *see also* Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 Suffolk Univ. L. Rev. 881, 897 (1983) (noting the Executive's "ability to lose or misdirect laws" that ought not be fully enforced).

The power to enforce—or not enforce—the law is sufficiently important that it is reserved to officers who are charged with pursuing the public interest, and in doing so are ultimately accountable to the people. *See Dep't of Transp. v. Ass'n of Am. R.Rs.*, 135 S. Ct. 1225, 1234 (2015) (Alito, J., concurring) ("Liberty requires accountability."); *see also Clinton v. City of New York*, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring) ("Liberty is always at stake when one or more of the branches seek to transgress the separation of powers."). In fact, the Framers consciously structured the Executive Branch "to ensure that one executive would be accountable for law enforcement choices." Saikrishna Prakash, *The Chief Prosecutor*, 73 Geo. Wash. L. Rev. 521, 583 (2005).

Policing the line between Article III "Cases or Controversies" and Article II law enforcement is thus an important separation of powers concern. This Court has recognized that the limits on the judicial power help ensure that Congress may not "transfer from the President to the courts the Chief Executive's most important constitutional duty, to 'take Care that the Laws be faithfully executed.'" *Lujan*, 504 U.S. at 577 (quoting U.S. Const. art. II, § 3).

The line between litigation and regulatory enforcement is no less important in class actions, which are simply a "species" of "traditional joinder" that "enable[] a federal court to adjudicate claims of multiple parties at once, instead of in separate suits." *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 559 U.S. 393, 408 (2010) (plurality); *see also Amchem Prods. v. Windsor*, 521 U.S. 591, 625-26 (1997) (representative plaintiff and absent class members must each "possess the same interest and suffer the same injury" (quoting *E. Tex. Motor Freight Sys. v. Rodriguez*, 431 U.S. 395, 403 (1977)) (internal quotation marks omitted)). This procedural device provides no basis for breaking down the division between Article II and Article III responsibilities; it is not a license "to hand a private attorney general's badge to any counsel who wants it." S. Rep. No. 109-14, Class Action Fairness Act of 2005, at 58, *as reprinted in* 2005 U.S.C.C.A.N. 3, 54 (quoting Hon. William T. Coleman before the Advisory Committee on Civil Rules).

Yet without strict adherence to Article III limits, class actions threaten to do just that: empower "private attorneys general" to bring abstract law enforcement actions. These are law enforcement actions, however, with "[v]irtually none of the checks on executive enforcement discretion." Tara Leigh Grove, *Standing as an Article II Nondelegation Doctrine*, 11 U. Pa. J. Const. L. 781, 807 (2009); *see also* Harold J. Krent, *Fragmenting the Unitary Executive: Congressional Delegations of Administrative Authority Outside the Federal Government*, 85 Nw. U. L. Rev. 62, 104 (1990) ("Delegations to private attorneys general . . . are immune from most external supervision. . . ."). What to an Executive Branch agency would be a poor candidate for enforcement—*e.g.*, a trivial or technical violation subject to disproportionate sanctions—may represent a lucrative settlement opportunity for a private attorney. *See AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1752 (2011) (noting the "risk of 'in terrorem' settlements that class actions entail"); *Shady Grove*, 559 U.S. at 445 n.3 (Ginsburg, J., dissenting) (noting that "pressure to settle may be heightened" in class actions for statutory damages, where there is a "risk of massive liability unmoored to actual injury").

B. An Offer Of Judgment Moots A Putative Class Action.

Mootness doctrine, as an aspect of the Article III "Case or Controversy" requirement, helps ensure that the judiciary is not asked to interfere with the Executive's power to enforce the law. Allowing a plaintiff who has been offered complete relief to nonetheless proceed to represent a class would endorse the sort of private law enforcement action that the separation of powers forecloses.

"[F]ederal courts are without power to decide questions that cannot affect the rights of litigants in the cases before them." *North Carolina v. Rice*, 404 U.S. 244, 246 (1971) (per curiam). Once a plaintiff has been offered everything his lawsuit demands, nothing the court does can "affect [his] rights." If "the defendant unconditionally surrenders and only the plaintiff's obstinacy or madness prevents her from accepting total victory," *Genesis Healthcare*, 133 S. Ct. at 1536 (Kagan, J., dissenting), there is no more "lively conflict between antagonistic demands, actively pressed, which make resolution of the controverted issue a practical necessity." *Poe v. Ullman*, 367 U.S. 497, 503 (1961) (plurality op. of Frankfurter, J.).

Filing a lawsuit as a putative class action does nothing to change this analysis. As this Court recently held in a closely analogous context, "the mere presence of collective-action allegations in the complaint cannot save the suit from mootness once the individual claim is satisfied." *Genesis Healthcare*, 133 S. Ct. at 1529. There is no principled basis for reaching a different result here. Just as an individual plaintiff does not have "a sufficient personal stake . . . based on a statutorily created collective-action interest in representing other[s] similarly situated," *id.* at 1530, neither does the claim-aggregation procedure of Rule 23 accord any right or interest in representing a class.

This result follows not just from *Genesis Healthcare*, but more broadly from the separation of powers principles that animate the "Case or Controversy" requirement. An individual without any continuing stake in a dispute, who nonetheless wishes to prosecute alleged violations of a statute involving *other people*, seeks to perform a quintessentially regulatory function. If someone lacking the traditional interest in a dispute can play the role of private attorney general, significant constitutional protections would be eroded.

The Ninth Circuit and other courts of appeals, however, have departed from these principles, expressing a concern that applying them would permit a "tactic of 'picking off' lead plaintiffs with a Rule 68 offer to avoid a class action." *Pitts v. Terrible Herbst, Inc.*, 653 F.3d 1081, 1091 (9th Cir. 2011) (quoting *Weiss v. Regal Collections*, 385 F.3d 337, 347 (3d Cir. 2004)). This policy objection is misplaced, and in fact confirms the importance of preventing class actions from becoming regulatory enforcement actions.

When many people are genuinely injured by an allegedly illegal practice, one would expect no shortage of aggrieved plaintiffs to step forward and sue for redress of those injuries. If one plaintiff's claim is resolved and she is no longer able to represent a large class of genuinely injured individuals, the next plaintiff in line can step forward and file suit. If the defendant offers full relief to that plaintiff, then the third plaintiff in line can step forward, and so on. Indeed, once it becomes known that any plaintiff who files a complaint will receive not an answer but a check, anyone with a viable claim would have even more reason to come forward.

To the extent Congress is concerned that suing over small-bore grievances would not be economical outside the context of a class action, it can—and does—respond with fee-shifting provisions. The Fair Credit Reporting Act, for example, guarantees attorney's fees to a prevailing plaintiff. *See* 15 U.S.C. § 1681n(a)(3). As one court has explained, the fact that "the FCRA requires that a court award a successful plaintiff attorneys' fees . . . dispel[s] the notion that a class action is the only way" to address alleged violations. *Klotz v. Trans Union, LLC*, 246 F.R.D. 208, 217 (E.D. Pa. 2007). In any attempt to "pick off" representatives of a putative FCRA class action, not only would new plaintiffs have every reason to file a claim and perhaps receive their own offers of judgment, but they will also likely be able to find an attorney to pursue their claims and receive compensation for doing so.

Because of these dynamics, in any putative class action that genuinely seeks to aggregate the claims of many aggrieved parties, a strategy of offering judgment to the named plaintiff is inherently self-limiting. Rather than enable a defendant to escape liability for legitimate claims, serial offers of full judgment will only encourage injured parties to join the chorus asking for their own complete relief.

If this does *not* happen—if an enterprising class action attorney is unable to persuade a single additional person to file a lawsuit, despite the fact that the first plaintiff was quickly paid in full—that is a telling sign about the case. It suggests that there is not in fact a large group of aggrieved individuals, each possessing a bona fide claim. An offer of judgment, in short, allows a defendant to put its money where its mouth is, predicting that the case is genuinely an insubstantial nuisance that the offer could fully resolve. If the defendant guesses wrong, and there *has* been a substantial violation that has truly injured many individuals, the "tactic" would backfire: it would encourage more lawsuits, signal a willingness to pay, and likely increase the sum of any ultimate settlement.

Offers of judgment thus help draw a line between a bona fide class action and an impermissible attempt by private parties to enforce the law. If a named plaintiff is "picked off" and no class action attorney can identify a single aggrieved individual to take his place, that is not a case in which the defendant won on a technicality. It is instead a case in which a would-be "private attorney general" was prevented from using the federal courts to threaten massive penalties and extract a lucrative settlement based on abstract allegations of a violation of the law. Such actions have no place in an Article III court—and certainly do not warrant the protection of a special exception to mootness.

II. As Litigation Under The FCRA Illustrates, Offers Of Judgment Help Preserve The Distinction Between Regulation And Litigation.

The consumer data industry's experience demonstrates the need to maintain the distinction between regulation and law enforcement, on the one hand, and Article III litigation, on the other.

Consumer reporting is both a profoundly important aspect of the economy and a massive and complex undertaking. As Congress has recognized, the consumer reporting system is an "elaborate mechanism" on which "[t]he banking system is dependent." 15 U.S.C. § 1681(a)(1), (2). To facilitate the operation of this system, credit-reporting agencies ("CRAs") in the United States maintain files concerning more than 200 million adults, and each month receive information on more than 1.3 billion "trade lines" (an industry term for accounts that are included in a credit report). Consumer Financial Protection Bureau, *Key Dimensions and Processes in the U.S. Credit Reporting System*, at 3 (Dec. 2012), *available at* http://tinyurl.com/CFPB-CRA [hereinafter "Key Dimensions"]. As one court has observed, a CRA can "process[] over 50 million updates to trade information each day." *Sarver v. Experian Info. Sols.*, 390 F.3d 969, 972 (7th Cir. 2004). CRAs receive this information from approximately 10,000 data "furnishers." Key Dimensions, *supra*, at 14.

CRAs, furnishers of consumer data, and users of credit reports are all subject to a detailed regulatory scheme enacted by the FCRA. *See* Key Dimensions, *supra*, at 13 ("All of these participants have defined roles with specific obligations under the FCRA."). The FCRAs requirements range from the broad—*e.g.*, requiring CRAs to "follow reasonable procedures to assure maximum possible accuracy" of information, 15 U.S.C. § 1681e(b)—to the detailed and technical—*e.g.*, requiring CRAs to post toll-free telephone numbers for consumers, 15 U.S.C. § 1681j(a). And as this Court has observed, the FCRA's requirements are often expressed in "less-than-pellucid statutory text." *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 70 (2007).

The FCRA is actively and aggressively enforced by public regulatory agencies. The Federal

Trade Commission ("FTC") "has brought over 30 actions to enforce the FCRA against CRAs, users of consumer reports, and furnishers of information to CRAs," and in 2013 announced that "[v]igorous enforcement of the FCRA is a high priority for the Commission." The Accuracy and Completeness of Consumer Credit Reports: Prepared Statement of the Federal Trade Commission, at 5, Hearing before the U.S. Sen. Comm. on Commerce, Sci. & Transp., Subcomm. on Consumer Protection, Prod. Safety & Ins. (May 7, 2013).

With the passage of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act"), Pub. L. No. 111-203, 124 Stat. 1376 (2010), the FTC has been joined by the Consumer Financial Protection Bureau (CFPB) as an enforcer of the FCRA. The CFPB has focused on companies that furnish data to CRAs, noting that it "will prioritize examinations and other actions on the basis of risks posed to consumers." Consumer Financial Protection Bureau, CFPB Bulletin 2013-09, at 2 (Sept. 4, 2013), *available at* http://tinyurl.com/CFPB2013-09. In the summer of 2015, the CFPB also noted its "reviews of the reasonableness of methods and processes used by certain CRAs to assure maximum possible accuracy of consumer reports they produce." Consumer Financial Protection Bureau, *Supervisory Highlights*, at 5 (Summer 2015), *available at* http://tinyurl.com/CFPB-Summer2015. The CFPB praised CRAs' "highly knowledgeable staff and management that oversee complex processes for maintaining consumer credit data." *Id.* It also announced efforts to remedy alleged "weaknesses" through, for example, "implementation timelines to establish quality controls." *Id.* at 6-7.

Few would say that the CFPB has not been an aggressive enforcer of the law. But as an Executive Branch agency, it is not constrained by Article III requirements, not limited to the blunt tool of litigation, and not driven by a profit motive. Accordingly, the agency has set priorities based on "risks posed to consumers," and has sought to resolve perceived problems in forward-looking ways without necessarily resorting to large enforcement actions.

Unsurprisingly, private attorneys seeking to enforce the FCRA have approached the issues in a different way. Because CRAs, data furnishers, and users of consumer reports necessarily deal in large quantities of information, and because the FCRA offers uncapped statutory damages for violations, class action attorneys are able to threaten massive damages for even trivial alleged violations. One such action is already before the Court this Term in *Spokeo, Inc. v. Robins*, No. 13-1339, in which the plaintiff seeks to recover billions of dollars on behalf of a class comprising "millions." Br. for Pet'r in *Spokeo* at 33-34 (July 2, 2015). That is par for the course in cases against CRAs. *See, e.g.*, *Trans Union LLC v. Fed. Trade Comm'n*, 536 U.S. 915 (2002) (Kennedy, J., dissenting from the denial of certiorari) (noting a "series of class actions brought under the FCRA" against Trans Union LLC, "allegedly on behalf of the 190 million individuals in [its] database," with "potential liability approaching $190 billion").

Such actions are filed with increasing frequency. As the Chief Justice noted in his 2009 report on the state of the judiciary, "[f]ilings of cases involving consumer credit, such as those filed under the Fair Credit Reporting Act, increased 53% (up 2,143 cases), fueled in part by the current economic downturn." *2009 Year-End Report on the Federal Judiciary*, at 3 (Dec. 31, 2009), *available at* http://tinyurl.com/CJ2009Rept. While the economic climate has improved, the litigation climate has not—in just the first four months of 2014, 802 FCRA lawsuits were filed. *See* Web Recon, *Debt Collection Litigation & CFPB Complaint Statistics, April 2014*, *available at* http://tinyurl.com/FCRA2014Stats. Turning the separation of powers on its head, Article III litigation under the FCRA has overshadowed regulation and enforcement by the Executive Branch.

Considering the ability of a class action attorney to threaten statutory damages up to $1,000 for each member of a class numbering into the millions, *see* 15 U.S.C. § 1681n, it is disturbingly easy to lodge a FCRA accusation, and difficult to fend off even spurious charges. Such lawsuits typically allege broadly that a CRA has failed to follow "reasonable procedures" to assure the "maximum possible accuracy" of credit reports. 15 U.S.C. § 1681e(b). Paradoxically, a FCRA case can be tailor-made to *avoid* difficult class certification issues by disclaiming any effort to recover based on actual injuries, and seeking to recover class-wide statutory damages irrespective of individualized questions of harm. And after certification, settlement is all but inevitable. As Judge Wilkinson commented about the FCRA, "[o]nce a class is certified, a statutory damages defendant faces a bet-the-company proposition and likely will settle rather than risk shareholder reaction to theoretical billions in exposure even if the company believes the claim lacks merit." *Stillmock v. Weis Mkts.*, 385 F. App'x 267, 281 (4th Cir. 2010) (Wilkinson, J., concurring) (quoting Sheila B. Scheuerman, *Due Process Forgotten: The Problem of Statutory Damages and Class Actions*, 74 Mo. L. Rev. 103, 104 (2009)).

This is the context within which FCRA defendants consider whether to offer the plaintiff complete relief at the outset of the litigation. If a CRA were engaged in truly harmful misconduct affecting a class of millions, one would not expect an attempt to "pick off" a single class representative to have any impact on the ultimate viability of a class action. Class action attorneys could easily identify a long line of prospective plaintiffs, each one demanding full relief *plus* attorney's fees. *See* 15 U.S.C. § 1681n(a)(3); *Klotz*, 246 F.R.D. at 217. At some point, the defendant would be compelled to reckon with the putative class rather than make serial offers of judgment on generous terms. Yet if that long line of new plaintiffs—out of a million-strong class—does *not* materialize, that itself is telling. Such a class action, which in the case of CRAs may quite literally be brought on behalf of most of the general public, *see Trans Union LLC*, 536 U.S. 915, is nothing more than private law enforcement. But it is law enforcement driven by private lawyers' pursuit of lucrative settlements rather than an Executive Branch agency's expertise, accountability, and discretion.

CONCLUSION

For the foregoing reasons, as well as the reasons set forth in Petitioner's brief, the decision of the court of appeals should be reversed.

Respectfully submitted,

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