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 FOR EXPERIAN INFORMATION SOLUTIONS, INC., AS *AMICUS CURIAE* SUPPORTING PETITIONER

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July 9, 2015

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INTEREST OF *AMICUS CURIAE* [1]

Experian Information Solutions, Inc. (Experian) is a nationwide consumer reporting agency subject to regulation under the Fair Credit Reporting Act (FCRA). The Ninth Circuit held below that plaintiffs claiming an FCRA violation "with respect to" them, 15 U.S.C. § 1681n, automatically satisfy the injury-in-fact requirement of Article III without any need to show that the alleged violation caused them any harm.

Consumer reporting agencies like Experian serve, essentially, as warehouses of consumer credit information. Experian maintains credit files on more than 200 million consumers, and, each day, answers 2 million credit inquiries and processes up to 50 million updates to its credit information database from lenders and other data furnishers.

As a nationwide consumer reporting agency, Experian is frequently subject to class action lawsuits by plaintiffs who have experienced no actual harm but seek class-wide statutory damages for alleged technical violations of the FCRA. Plaintiffs argue the Act permits plaintiffs to sue for between $100 and $1,000 in statutory damages for any allegedly willful departure from FCRA requirements "with respect to" a consumer, without expressly requiring that the consumer be injured by the violation. Indeed, it is

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[1] All parties have consented in writing to the filing of this *amicus curiae* brief. No counsel for any party authored this brief in whole or in part, and no person or entity other than *amicus curiae* or its counsel made a monetary contribution to the preparation or submission of this brief.

not uncommon in these cases for significant numbers of class members to have actually *benefited* from the alleged violations. Due to the large number of consumers for which Experian and other credit reporting agencies maintain information, these suits can involve millions of putative class members, and thereby threaten staggering liability.

Experian accordingly has a strong interest in the proper construction of the Act as requiring traditional injury in fact, and in the enforcement of the constitutional requirement that only plaintiffs who have suffered an injury in fact may sue.

SUMMARY OF THE ARGUMENT

The decision below and others like it have given rise to a species of litigation that thoroughly inverts the case or controversy model of Article III. The federal courts have filled with "cases" that not only involve no concrete injury, but which are filed precisely *because* there is no injury—allowing entrepreneurial lawyers to obtain certification of massive classes that would be impossible if class members had experienced real, inherently individual, injuries. As the court in one typical case recently explained (apparently without irony), there was no obstacle to class certification, because "[g]iven the nature of the violation in this case, it is unlikely that anyone suffered actual injury."[2]

Such litigation in which the absence of any injury is treated as a virtue rather than a constitutional obstacle—and the accompanying subversion of Article

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[2] *Dreher v. Experian Info. Solutions, Inc.*, No. 3:11-CV-00624-JAG, 2014 WL 2800766, at *3 (E.D. Va. June 19, 2014).

III—has proliferated in the federal courts. The FCRA has been a particular font of such no-injury lawsuits, as it is replete with technical provisions whose alleged violation can be transformed into lawsuits on behalf of thousands or millions of uninjured class members. Indeed, due to the nature of the FCRA many "fail[ures] to comply with any requirement," 15 U.S.C. § 1681n, not only do not injure, but in fact *benefit*, the applicable consumers—for example, when a practice results in errors that favor consumers, such as inaccurately reporting delinquent credit accounts as properly paid. Yet under the injury-in-law theory adopted below, such consumers have been "injured," and multi-billion-dollar lawsuits can be—and often have been—brought on their behalf.

As Petitioner's brief demonstrates, Article III requires that a plaintiff have been concretely injured *in fact*, and a mere statutory violation without more cannot suffice. But this Court need not reach this fundamental constitutional issue, because the FCRA itself can reasonably be construed as requiring a showing of injury. Indeed, Experian submits that, under ordinary principles of statutory construction, this is the *better* reading of the text and structure of the FCRA. The text of § 1681n(a)(1)(A) provides for "damages" of $100 to $1000—in marked contrast to the neighboring § 1681n(a)(1)(B), which omits the word "damages"—thereby indicating that a consumer must have been damaged in some fashion to qualify. Moreover, it is implausible that Congress intended—in the face of Article III's requirements—to authorize lawsuits by uninjured consumers, and even more implausible that it intended to authorize lawsuits by

consumers who *benefited* from an alleged violation. The far more natural reading is one that preserves the traditional requirement that a plaintiff have suffered an actual injury.

ARGUMENT

The holding below permits plaintiffs who have suffered no injury, and in many cases have affirmatively benefited from the conduct at issue, to file federal lawsuits seeking what amounts to a statutory bounty. In so holding, the Ninth Circuit ratified a mutant new species of litigation that would have been unrecognizable to the Framers of Article III—or even the enacters of the FCRA—one in which the absence of injury in fact is a class-action-generating feature rather than a constitutional bug. These cases exist precisely *because* they involve no injury, as actual injury typically entails individual damages claims that preclude class action treatment. In the absence of injury—a frequent circumstance due to the often technical requirements of the FCRA—enterprising lawyers can waive actual damages claims and proceed on behalf of often-massive classes of identically uninjured plaintiffs seeking statutory damages that can run into the billions.

The Ninth Circuit's holding that a bare statutory violation related to the plaintiff satisfies the injury-in-fact requirement of Article III is squarely contrary to this Court's cases. But the Court need not address this fundamental constitutional question, because there is no reason to believe that the FCRA, properly interpreted, creates a cause of action for consumers

who have suffered no injury, or affirmatively benefited, from a statutory violation.

I. NO-HARM FCRA ACTIONS TURN THE ARTICLE III MODEL ON ITS HEAD BY PRODUCING "CASES" THAT ARE FILED PRECISELY *BECAUSE* OF THE ABSENCE OF INJURY, AND THAT OFTEN ARE BROUGHT ON BEHALF OF CLASS MEMBERS WHO AFFIRMATIVELY BENEFITED FROM THE ALLEGED VIOLATION

A. The Absence Of Any Concrete Injury Has Become A Feature Rather Than A Bug In FCRA Class Actions.

Due to the nature of the FCRA's requirements, the statute frequently produces alleged violations that do not harm, and often even benefit, the consumers to whom they relate. At the same time, the nature of credit reporting means that many credit reporting agency practices and policies will apply to millions of consumers. In the absence of actual injuries and damages whose individualized character prevents class action treatment, these circumstances have produced the opportunity for enterprising lawyers to file suit on behalf of thousands or millions of uniformly uninjured consumers, seeking statutory damages that can run into the hundreds of billions of dollars. *See, e.g.*, *Trans Union LLC v. Fed. Trade Comm'n*, 536 U.S. 915 (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.").

The absence of injury is a key to class action treatment of these cases—and therefore a key to the threat of massive damages and attorney's fees that provide the incentive for filing them. As the Seventh Circuit has explained, if damages for individual injuries were at issue, "[c]ommon questions no longer would predominate, and an effort to determine a million consumers' individual losses would make the suit unmanageable." *Murray v. GMAC Mortgage Corp.*, 434 F.3d 948, 953 (7th Cir. 2006).

As a result, FCRA class action attorneys therefore regularly waive claims for actual damages, which they can do only if the injury to class members is nonexistent, or so insignificant that it may be waived without turning the named plaintiffs into inadequate class representatives. *See id.*; *Dreher v. Experian Info. Solutions, Inc.*, No. 3:11-CV-00624-JAG, 2014 WL 2800766, at *3 (E.D. Va. June 19, 2014) ("Given the nature of the violation in this case, it is unlikely that anyone suffered actual injury."); *Armes v. Shanta Enter., Inc.,* No. 07C5766, 2009 WL 2020781, at *6 (N.D. Ill. July 8, 2009) ("[T]he parties do not point to any instance where a potential class member suffered actual harm from the alleged FACTA violation," which consisted of printing too many credit card digits on receipts); *Summerfield v. Equifax Info. Servs. LLC*, 264 F.R.D. 133, 141 (D.N.J. 2009) ("[T]he likelihood of substantial actual damages is almost non-existent.").[3]

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[3] *See also, e.g., Ramirez v. Trans Union, LLC*, 301 F.R.D. 408, 419 (N.D. Cal. 2014) ("[A]s Plaintiff is seeking statutory damages and not actual damages, whether he was actually denied credit or received inferior credit terms because of Trans

B. The Decision Below Authorizes, And Class Action Plaintiffs Regularly File, FCRA Actions On Behalf Of Plaintiffs Who Are Uninjured By Or Affirmatively Benefit From The Alleged Violation.

The extent to which no-harm FCRA litigation subverts the ordinary Article III model is further highlighted by another feature of such litigation: Due to the nature of the FCRA's requirements, the litigation is often brought on behalf of class members who have benefited from the claimed violation. For example, even aside from the FCRA's many technical provisions, one of the most frequent types of lawsuits

(continued)

Union's [conduct] is not at issue."); *Holloway v. Full Spectrum Lending*, No. CV 06-5975 DOC RNBX, 2007 WL 7698843, at *7 (C.D. Cal. June 26, 2007) (noting, in support of class certification, that "[defendant] has argued that there are no injuries"); *Cavin v. Home Loan Ctr., Inc.*, 236 F.R.D. 387, 392 (N.D. Ill. 2006) ("[T]he Cavins are seeking only statutory damages, and those class members who want to pursue actual damages can opt out of the class."); *In re Farmers Ins. Co., Inc., FCRA Litig.*, No. CIV-03-158-F, 2006 WL 1042450, at *6 (W.D. Okla. Apr. 13, 2006) (certifying class over defendants' objection "that plaintiffs have limited their requested class relief to statutory damages in order to avoid class certification hurdles inherent in seeking actual damages."); *White v. Imperial Adjustment Corp.*, No. CIV.A. 99-3804, 2002 WL 1809084, at *13 (E.D. La. Aug. 6, 2002) ("The fact that plaintiff seeks statutory and punitive damages, as opposed to actual damages, does not in this Court's opinion create conflict, rendering White an inadequate representative of the class. Indeed, not unlike the majority of the cases, actual damages are difficult if not impossible to demonstrate."), *aff'd in relevant part*, 75 F. App'x 972 (5th Cir. 2003).

filed under the FCRA alleges inaccuracy in consumer credit reports, under the FCRA provision requiring "reasonable procedures to assure maximum possible accuracy of the information" in each report. 15 U.S.C. § 1681e(b). A credit report inaccuracy can favor a consumer as easily as it can disfavor her—as when unreasonable procedures result in a credit reporting agency inaccurately reporting a delinquent account as timely paid. Yet under the holding below, even beneficiaries of such violations are deemed to have suffered an Article III injury—as a violation of FCRA requirements "with respect to" them, even to their benefit, is automatically deemed an injury—and are entitled to seek statutory damages.

Such cases, moreover, are far from theoretical. For example, in *Harris v. Experian Information Solutions, Inc.*, No. 6:06-cv-1808-GRA (D.S.C. June 30, 2009), the plaintiff class claimed that Experian and other credit reporting agencies violated § 1681e(b)'s "reasonable procedures" requirement by failing to report consumers' credit limits for their Capital One credit cards (information that Capital One refused to provide to credit reporting agencies). The omission of credit-limit information had no consistent effect on consumers: It decreased the credit scores of only certain consumers, *increased* the scores of many others, and had no effect on still others. *Harris*, No. 6:06-cv-1808-GRA, slip op. at 5. Although the named plaintiff was one of those who had actually benefited from the alleged violation, he sought to represent a class of over four million consumers—including the many consumers whose credit scores were increased by the alleged inaccuracy—which, at $100 to $1,000 per violation, sought aggregate statutory damages

between $400 million and $4 billion. The district court certified a class that included the consumers who benefited from the alleged violation—and therefore plainly had not been harmed or injured (in any ordinary sense of those words) by the alleged violation. *Id.* at 2-5. All of these consumers would have Article III standing under the decision below, because the Ninth Circuit held that the mere existence of a statutory violation qualifies as "injury" for purposes of Article III.

Likewise, in *White v. Experian Information Solutions, Inc.*, No. 05-cv-1070-DOC-MLG (C.D. Cal. Jan. 26, 2009), the plaintiff claimed that Experian and two other nationwide consumer reporting agencies, Trans Union and Equifax, violated the FCRA by not reporting that certain debts had been discharged in bankruptcy. The claimed error, however, had no impact on many debtors and actually *improved* the credit scores of many others. *White*, No. 05-cv-1070-DOC-MLG, slip op. at 9. Nevertheless, the plaintiffs sought between hundreds of millions and billions of dollars in statutory damages on behalf of a class of nearly eight million consumers. The district court deferred a final ruling on the class's viability, but noted the "serious constitutional issues" implicated by the class's Article III standing. *Id.* at 11.

In addition to these examples of suits on behalf of consumers who benefited from the alleged violations, there are many others in which it is clear that the violation had no effect at all. The plaintiff in *Dreher v. Experian Information Solutions, Inc.*, No. 11-cv-624-JAG (E.D. Va.), alleges that Experian inaccurately reported the *name* of his creditor, by

listing his Advanta credit card debt under the familiar Advanta Bank name instead of under the unfamiliar name of CardWorks, a processor assigned to handle the accounts after Advanta Bank was placed in receivership. Experian reported the debts under the only name that would be recognizable to consumers holding Advanta credit cards, thus at least arguably benefiting consumers. Yet, the *Dreher* plaintiff seeks statutory damages on behalf of nearly 70,000 consumers affected by the same issue who at worst were unharmed, and arguably were benefited by the technical inaccuracy. While the district court found Article III standing by relying on the Ninth Circuit's decision below in the instant case, *see Dreher v. Experian Info. Solutions, Inc.*, No. 3:11-CV-624, 2014 WL 6834867, at *3-4 (E.D. Va. Dec. 3, 2014), it has since lamented that the *Dreher* class action does not "have a lot of social value," as Experian's actions did not cause "injury." *See* Tr. of Oral Arg. at 8:14-16, 10:10-14, *Dreher v. Experian Info. Solutions, Inc.*, No. 3:11-CV-624 (E.D. Va. Apr. 13, 2015), Dkt. No. 326.

Another theory of no-harm liability seen regularly under the FCRA relies on 15 U.S.C. § 1681b(b)(2), which requires a party requesting a consumer's credit report "for employment purposes" to have (1) told the consumer about the request "in a document that consists solely of the disclosure," and (2) obtained the consumer's consent. *Id.* § 1681b(b)(2)(A)(i)-(ii). At least three class actions have been filed in 2015 and five in 2014 seeking only statutory damages for an

alleged violation of this provision.[4] Each suit's only purported basis for liability is the defendant's failure to provide a *stand-alone* disclosure. *See id.* § 1681b(b)(2)(A)(i) (requiring "a document that consists *solely* of the disclosure" (emphasis added)). These plaintiffs do not claim to have been unaware of the disclosure, to have not consented to the request, or to have otherwise been harmed in any identifiable way. Nonetheless, they seek $100 to $1,000 per disclosure on behalf of sizable putative classes.

Indeed, this very case is a good example. Respondent alleges that Petitioner violated the FCRA by inaccurately reporting a variety of seemingly positive facts about him: that he "has a graduate degree, that his economic health is 'Very Strong,' and that his wealth level [is in] the 'Top 10%.'" First Am. Compl. ¶ 32. Respondent further alleges that his consumer report wrongly reports "that he was employed in a professional or technical field," even though he in fact "is currently out of work and seeking employment." *Id.* ¶¶ 31, 34. Despite the fact that Respondent likely benefits from these inaccuracies—in the (vanishingly unlikely) event a potential employer or creditor is basing decisions on the Spokeo website, these errors would presumably

[4] *See Easterbrook v. Inter-Con Sec. Sys., Inc.* (S.D. Cal. No. 3:15-cv-00565); *Gabra v. Tyson Foods Inc.* (M.D. Tenn. No. 15-cv-00232); *Peikoff v. Paramount Pictures Corp.* (N.D. Cal. No. 15-cv-00068); *Graham v. Michaels Stores Inc.* (D.N.J. No. 14-cv-07563); *Knights v. Publix Super Markets, Inc.* (M.D. Tenn. No. 14-cv-00720); *Gezahegne v. Whole Foods Market Cal., Inc.* (N.D. Cal. No. 14-cv-00592); *Hathaway v. Mrs. Gooch's Natural Food Markets, Inc.* (S.D. Cal. No. 14-cv-00663); *Ragland v. Guardsmark, LLC* (S.D. Cal. No. 14-cv-00693).

improve Respondent's standing—he seeks to represent a class of "millions of individuals," which, at $100 to $1,000 per violation, seeks aggregate statutory damages exceeding $1 billion. *Id.* ¶ 39, p. 16.

Nor are such no-harm statutory damages suits limited to credit reporting. Numerous lawsuits were filed in the wake of the 2003 Fair and Accurate Credit Transactions Act (FACTA), which among other things required retailers to redact the expiration date and all but the last five digits of a credit card number on all electronically printed receipts. In many of these putative class actions—brought under the FCRA statutory damages provision at issue in this case, 15 U.S.C. § 1681n—the plaintiffs claimed no actual injury from the failure to redact, but nevertheless sought hundreds of millions or even billions of dollars in statutory damages.

In *Lopez v. KB Toys Retail, Inc.*, No. CV 07-144-JFW (CWx), 2007 U.S. Dist. LEXIS 82025, at *14-15 (C.D. Cal. July 17, 2007), for example, the plaintiff sought statutory damages between $290 million and $2.9 billion, even though, as the court noted, the putative class members could not have been harmed by the inclusion of their credit card numbers' first four (not last five) digits, which merely identify the issuing bank. And in *Evans v. U-Haul Co.*, No. CV 07-2097-JFW, 2007 U.S. Dist. LEXIS 82026, at *14-17 (C.D. Cal. Aug. 14, 2007), the plaintiff sought between $115 million and $1.5 billion in statutory damages for the defendant's inclusion of expiration

dates on receipts, despite admitting that she suffered no harm from the practice.[5] *See generally* Sheila B. Scheuerman, *Due Process Forgotten: The Problem of Statutory Damages and Class Actions*, 74 Mo. L. Rev. 103, 104-06, 111-14, 134-35 (2009).

No-injury actions of this type, which essentially co-opt the federal courts to enforce abstract statutory violations, are more than just a nuisance. They threaten staggering liability in the absence of any actual harm suffered by an individual consumer. As noted, the named plaintiffs will frequently waive any claims for actual damages in an effort to obtain certification of massive classes on their statutory damages claims. *See*, *e.g.*, *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 54 (2007) (claiming no actual harm); *Murray*, 434 F.3d at 952-53.

Such windfall damages can cripple or destroy businesses. The FCRA's statutory damages of $100 to $1,000 per violation can quickly add up to crushing liability for credit reporting agencies like Experian, which maintain files on millions, if not hundreds of millions, of consumers, and face suits over procedures that apply to large numbers of those consumers. *See, e.g.*, Scheuerman, *supra*, at 104.

Faced with potential liability in the hundreds of millions or billions of dollars—liability that would

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[5] Although the district court in both *Lopez* and *Evans* denied class certification in part because the staggering amount of statutory damages sought was wholly out of proportion to the harm alleged (*i.e.*, none), the Ninth Circuit subsequently rejected such disproportionality as a basis for denying class certification. *See Bateman v. Am. Multi-Cinema, Inc.*, 623 F.3d 708, 721 (9th Cir. 2010).

sink even large companies—defendants are put under tremendous pressure to settle, even when the class's claims are questionable and the defendants have meritorious defenses. This Court has often noted "the risk of 'in terrorem' settlements that class actions entail." *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."); *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."); *see also In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995) (Posner, J.) (noting "intense pressure to settle"); Henry J. Friendly, *Federal Jurisdiction: A General View* 120 (1973) (calling settlements induced by small probabilities of immense judgments in class actions "blackmail settlements").

The risk of defendants being forced into unfair settlements is exacerbated in statutory damages class actions. As Justice Ginsburg recently explained: "When representative plaintiffs seek statutory damages, pressure to settle may be heightened because a class action poses the risk of massive liability unmoored to actual injury." *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 445 n.3 (2010) (Ginsburg, J., dissenting); *see also Parker v. Time Warner Entm't Co.*, 331 F.3d 13, 22 (2d Cir. 2003) (aggregated statutory damages claims can produce "an *in terrorem* effect on defendants,

which may induce unfair settlements"); *id.* at 29 (Newman, J. concurring) (same).

The Ninth Circuit's decision below, and other decisions like it, encourages the filing of numerous no-injury class actions that threaten liability of staggering proportions decoupled from any actual harm, even where—as here—the consumer may have benefited from the alleged statutory violation.

II. THE FCRA'S PRIVATE RIGHT OF ACTION REQUIRES TRADITIONAL INJURY IN FACT

The Court need not reach the fundamental Article III questions presented in this case, because the FCRA itself, properly interpreted, requires plaintiffs to show they have suffered an actual injury in fact. And the grave constitutional problems raised by reading the FCRA to allow for no-injury suits in any event require that, if fairly possible—which it plainly is—the Court should construe the FCRA to require traditional injury in fact.

"'It is a cardinal principle' of statutory interpretation . . . that when an Act of Congress raises 'a serious doubt' as to its constitutionality, 'th[e] Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.'" *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001) (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932)). The constitutionally unproblematic construction must be adopted "unless such construction is plainly contrary to the intent of Congress." *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). Due to the vital importance of avoiding

the unnecessary adjudication of difficult and far-reaching constitutional issues, this Court has decided cases "on nonconstitutional grounds even though the petition for certiorari presented only a constitutional question"—and should do so again here. *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 33 (1993) (per curiam); *accord Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 205 (2009) ("[N]ormally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case" (quotation marks omitted)). Here, the better reading of the FCRA in any event is one that requires traditional, real world injury in fact.

A. There is every indication that the FCRA's private right of action requires actual, real-world injury in fact. In enacting the FCRA, Congress was solely concerned with remedying and preventing *harm* to consumers, principally from the disclosure of adverse information in their credit reports. "The purpose of the [FCRA] is to prevent consumers from being unjustly *damaged* because of inaccurate or arbitrary information in a credit report." S. Rep. No. 91-517, at 1 (1969) (emphasis added); *accord* 15 U.S.C. § 1681 ("An elaborate mechanism has been developed for investigating and evaluating the credit worthiness, credit standing, credit capacity, character, and general reputation of consumers.").[6] "Th[e]

[6] *See also* Virginia G. Maurer, *Common Law Defamation and the Fair Credit Reporting Act*, 72 Geo. L.J. 95, 97 (1983) (FCRA was prompted by growing recognition in 1960s and 70s that "a higher rate of information transfer increases the opportunity for *injury* to the individuals about whom unfavorable information is reported.") (emphasis added).

legislation [was] not intended to place undue burdens on legitimate credit bureaus" but instead sought to address the "far too many cases where *adverse* credit reports cause irreparable *harm* to the individual." 115 Cong. Rec. 2676 (1969) (statement of Sen. Williams, co-sponsor of S. 823) (emphases added).

The FCRA's singular focus on preventing injury is evident throughout the statutory scheme. The Act imposes requirements governing actions to be taken by employers "before taking any *adverse* action based" on a credit report, 15 U.S.C. § 1681b(b)(3)(A) (emphasis added); reporting stale "*adverse* item[s] of information" predating the credit report by more than seven years, *id.* § 1681c(a)(5) (emphasis added); confirmation of certain "information that is *adverse* to the interest of the consumer," *id.* § 1681d(d)(4) (emphasis added); disclosure of the "the key factors that *adversely* affected the credit score of the consumer," *id.* § 1681g(f)(1)(C) (emphasis added); dissemination of "public record information which is likely to have an *adverse effect* on a consumer's ability to obtain employment," *id.* § 1681k(a)(2) (emphasis added); re-verification of "*adverse* information" in an investigative consumer report, *id.* § 1681*l* (emphasis added); and the "[d]uties of users taking *adverse* actions on basis of information contained in consumer reports," *id.* § 1681m(a) (emphasis added). These numerous references to harmful information and harmful actions show that Congress sought to prevent harm to consumers, not authorize uninjured consumers to seek a windfall.

B. In keeping with the statute's purpose, the plain language of the FCRA's private right of action for damages shows that it is only available to individuals

who have suffered injury. When a credit reporting agency "willfully fails to comply with any requirement imposed under [the FCRA] with respect to any consumer," the statute provides a private cause of action to sue for "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) (emphases added). By using the undefined term "damages"—which in ordinary legal parlance means "[m]oney claimed by, or ordered to be paid to, a person as compensation for *loss* or *injury*," BLACK'S LAW DICTIONARY 416 (8th ed. 2005) (emphasis added)—the statute limits recovery to consumers who have suffered at least some minimal "loss or injury." *See also Penn. R.R. Co. v. Int'l Coal Mining Co.*, 230 U.S. 184, 204 (1913) ("The statute gives a right of action for *damages* to the *injured* party, and by the use of these legal terms clearly indicated that the damages recoverable were those known to the law and intended as compensation for the injury sustained."). The FCRA's statutory-damages provision simply allows the consumer to elect the *measure* of "damages" he or she will recover—*either* "any actual damages" *or* "damages of not less than $100 and not more than $1,000."[7]

The contrasting language in the remainder of section 1681n demonstrates further Congress's intent

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[7] *See Stillmock v. Weis Markets, Inc.*, 385 F. App'x 267, 277 (4th Cir. 2010) (Wilkinson, J., concurring) ("The fact that statutory damages are available in lieu of actual damages suggests that they too serve to compensate individual consumers for their injuries.").

to provide for statutory damages as an alternative measure of actual damages. The very next paragraph in section 1681n, governing damages for obtaining credit reports under false pretenses, provides for "actual damages . . . or $1,000." 15 U.S.C. § 1681n(a)(1)(B). By providing for $1,000 without classifying that award as a species of "damages," Congress evinced an intent to presume injury from the privacy invasion—in sharp contrast to the provision at issue here, which requires "damages." *Compare* 15 U.S.C. § 1681n(a)(1)(A) *with id.* § 1681n(a)(1)(B). Congress is "presumed" to act "intentionally" in such "disparate inclusion or exclusion," *Kucana v. Holder*, 558 U.S. 233, 249 (2010) (internal quotation marks and alteration omitted), and any other reading would render the term "damages" superfluous, contrary to well-settled principles of statutory interpretation. *See, e.g.*, *Safeco*, 551 U.S. at 60 (courts should "[g]ive effect, if possible, to every clause and word of a statute.") (brackets and internal quotation marks omitted).

C. Reading the FCRA's private right of action provision as allowing for no-injury suits would untenably impute an irrational intent to Congress. Courts should avoid construing statutes to produce "absurd or futile results . . . plainly at variance with the policy of the legislation as a whole." *EEOC v. Commercial Office Prods. Co.*, 486 U.S. 107, 120 (1988) (quoting *United States v. Am. Trucking Ass'ns., Inc.*, 310 U.S. 534, 543 (1940)) (internal quotation marks omitted). Moreover, even where an interpretation is not entirely absurd, in choosing between two permissible interpretations of statutory text, this Court disfavors interpretations that

Congress cannot plausibly have intended. *See, e.g.*, *Eli Lilly & Co. v. Medtronic, Inc.*, 496 U.S. 661, 672-3, (1990) (Court will not ascribe "implausible" intention to Congress absent "strong evidence" of such intention).

Here, interpreting the FCRA to permit statutory damages suits without any showing of injury not only requires assuming that Congress intentionally departed from the longstanding tradition under which injury in fact is necessary; it requires the wholly implausible assumption that Congress intended to authorize statutory damages for consumers who *benefited* from the alleged violation. Consumers with false *positive* information in their credit reports already receive an unwarranted benefit in the form of an increased likelihood of unjustified extensions of credit and the like. *See generally* Roger D. Blair & Virginia Maurer, *Statute Law and Common Law: The Fair Credit Reporting Act*, 49 Mo. L. Rev. 289, 294 (1984). It would be not merely implausible but absurd to suggest that Congress meant to bestow on those consumers a second unjustified windfall in the form of statutory damages.

Moreover, the specter of statutory-damage class actions in such cases presents a serious threat of staggering liability that would cripple or destroy even large companies, and creates a strong risk that defendants would be forced into unfair settlements. Nothing in the statute's text or in the legislative history indicates that Congress intended such "unjust [and] absurd" results. *In re Chapman*, 166 U.S. 661, 667 (1897).

D. The FCRA's legislative history unequivocally shows that Congress sought to prevent harm to consumers, not authorize suits based on harmless or beneficial conduct. *See generally* Scheuerman, *supra*, at 138 ("Congress was particularly concerned with the harm erroneous information in a credit report caused consumers . . . .") (discussing FCRA's legislative history). The Senate Report explicitly states that "[t]he purpose of the [FCRA] is to prevent consumers from being unjustly *damaged* because of inaccurate or arbitrary information in a credit report." S. Rep. No. 91-517 at 1 (emphasis added). Inaccurate information was a "serious problem" not for its own sake, but because of its impact on "citizens whose reputations [were] unjustly maligned." 115 Cong. Rec. 2411 (1969) (statement of Sen. Proxmire, co-sponsor of S. 823). Indeed, the Act was premised on the understanding that while "[i]t would be unrealistic to expect credit reporting agencies to be absolutely accurate on every single case[,] . . . consumers affected by an *adverse* rating do have a right to present their side of the story and to have inaccurate information expunged from their file." *Id.* at 2412 (statement of Sen. Proxmire, co-sponsor of S. 823) (emphasis added).[8] The Act was "not intended to place undue burdens on legitimate credit bureaus," but "only" to "insure fair and equitable credit reporting." 115 Cong. Rec. 2676 (1969) (statement of

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[8] *See also* 115 Cong. Rec. 2411 (1969) (statement of Sen. Proxmire, co-sponsor of S. 823) ("Given the inherent difficulties involved in collecting, storing, and distributing information, it is unrealistic to expect 100 percent accuracy. Errors can crop up in a variety of ways.").

Sen. Williams, co-sponsor of S. 823). "Entitled the 'Fair Credit Reporting Act,' the bill could just as well be called the 'Good Name Protection Act.'" 116 Cong. Rec. 6200 (1970) (statement of Rep. Sullivan).[9]

In keeping with the unitary focus on consumer harm, Congress devoted a full day of hearings to the testimony of "individual citizens . . . adversely affected by credit reporting agencies." Fair Credit Reporting Act: Hearings on S. 823 Before the Subcomm. on Fin. Instit. of the Senate Comm. on Banking and Currency, 91st Cong., 3 (1969). To justify the need for congressional action, the Bill's sponsor emphasized individual stories of credit reports containing false and injurious information causing real world harm. 115 Cong. Rec. 2411-12 (1969) (statement of Sen. Proxmire) (describing a New York assemblyman with a "falsely blemished record," a Maine housewife who "lost virtually all her credit," a Pennsylvania woman who "was turned down for major medical coverage by an insurance company" due to false adverse information in a credit

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[9] The FCRA's legislative history is replete with references to preventing and correcting harm to consumers. *See also, e.g.*, 115 Cong. Rec. 33,408 (1969) (statement of Sen. Proxmire) (FCRA allowed the "consumer access to his credit file so that he is not *unjustly damaged* by an erroneous credit report." (emphasis added); 115 Cong. Rec. 33,412 (1969) (statement of Sen. Williams) (the "[FCRA] will prevent consumers from being *unjustly damaged* by inaccurate credit reports.") (emphasis added); 116 Cong. Rec. 36,574 (1970) (statement of Rep. Wylie) ("[M]istakes do occasionally occur in various types of credit reports, which mistakes are *harmful* to consumers in their efforts to obtain credit, insurance or employment.") (emphasis added).

report, and a California man who has "never been able to obtain any credit" due to false adverse information in his credit report, *inter alios*).

For 26 years—from the enactment of the FCRA in 1970 to the 1996 amendments—the Act's private right of action required all plaintiffs to show actual damages. *See generally* Scheuerman, *supra*, at 138-39. There is no indication that Congress sought to completely upend 26 years of practice by authorizing no-injury suits when, in 1996, it added statutory damages as an alternative measure of damages.[10] Rather, while the availability of statutory damages now allows plaintiffs to recover without proof of the *amount* of damages, it does not eliminate the baseline requirement of proving at least some minimal harm or injury caused by the alleged violation.

E. Construing the FCRA to require traditional injury in fact does not pose any enforcement problems because the Act provides that administrative agencies—principally the Federal Trade Commission ("FTC") and the Consumer Financial Protection Bureau ("CFPB")—as well as state attorneys general will enforce the Act's terms even when private actions are unavailable. *See* 15

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[10] There is no meaningful legislative history as regards the addition of the statutory damages provision in 1996. *See* Scheuerman, *supra*, at 141 n.302 ("Apart from one paragraph by Consumers Union praising the statutory damages provision, it is not mentioned in any of the legislative history."). If anything, the Senate Report's "concern with 'consumers who have been wronged[]' suggest[s]" that Congress meant to extend statutory damages only to "injured consumers." *Id.* at 141-42 (quoting S. Rep. No. 104-185, at 49 (1995)).

U.S.C. § 1681s(a)-(c) (providing for enforcement of the FCRA by the FTC, the CFPB, and state attorneys general). For example, the CFPB accepts complaints from consumers regarding inaccuracies on their credit reports and forwards them to credit reporting agencies, working to get a response. *See Submit a Complaint*, Consumer Financial Protection Bureau http://www.consumerfinance.gov/complaint/ (last visited June 30, 2015). Since 2011, the CFPB has fielded over 43,000 complaints about inaccuracies on credit reports. *See Beta Consumer Complaints Visualization*, Consumer Financial Protection Bureau, https://data.consumerfinance.gov/view/wkue-ycpk (last visited June 30, 2015).

Both the CFPB and the FTC actively enforce the FCRA. For example, when a furnisher of information allegedly did not respond to numerous consumer disputes within the 30-day time limit established by the FCRA, the CFPB obtained a consent order requiring changes in the furnisher's business practices and payment of an over $5 million civil penalty. *See Syndicated Office Sys., LLC, d/b/a Ctr. Fin. Control*, No. 2015-CFPB-0012, at 8-14 (C.F.P.B. June 18, 2015) (consent order), http://files.consumerfinance.gov/f/201506_cfpb_order-syndicated.pdf. When a credit reporting agency allegedly refused to investigate disputes and promptly correct errors in credit reports, the FTC brought an action in federal district court which led to a $3.5 million settlement and an agreement from the defendant to alter its business practices. *See* Press Release, Fed. Trade Comm'n, TeleCheck to Pay $3.5 Million for Fair Credit Reporting Act Violations (Jan. 16, 2014), https://www.ftc.gov/news-

events/press-releases/2014/01/telecheck-pay-35-million-fair-credit-reporting-act-violations.

The FCRA's delegation of enforcement authority to executive agencies, who are accountable to the public and whose prosecutorial discretion is cabined by legal and political checks, vindicates the public's interest in ensuring that the law is obeyed—without the need to authorize bounties for harmless and technical violations of the FCRA or to transgress Article III. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 576-77 (1992); *see also In re Trans Union Corp. Privacy Litig.*, 211 F.R.D. 328, 351 (N.D. Ill. 2002) ("[A]ny 'uninformed victims' who have suffered no actual economic damage, have been and continue to be protected by the FTC's enforcement of the [FCRA] and regulations."), *appeal dismissed sub nom. Albert v. Trans Union Corp.*, 346 F.3d 734 (7th Cir. 2003). Unlike entrepreneurial class action lawyers, who will generally prefer no-injury class actions due to the uniformity of the no-injury class and the ease of gaining class certification, the executive agencies can be expected to pursue the most serious, harmful, and widespread violations of the FCRA and thereby protect consumers from the real-world harm that the FCRA seeks to prevent.

F. The serious constitutional problems posed by a contrary interpretation of the FCRA command interpreting the Act's private right of action to require plaintiffs to show traditional injury in fact. When confronted with such constitutional concerns, this Court has construed private rights of action in federal statutes to extend only as far as Article III permits. *See, e.g.*, *Gollust v. Mendell*, 501 U.S. 115, 122-23, 125-26 (1991) (construing Securities

Exchange Act of 1934 to require plaintiffs to "maintain some continuing financial stake in the litigation" in order to "avoid the serious constitutional question that would arise" from a contrary construction, despite lack of explicit "textual restrictions" on private right of action); *see also Wallace v. ConAgra Foods, Inc.*, 747 F.3d 1025, 1032 (8th Cir. 2014) ("Rather than confronting the difficult constitutional question whether Congress can drill through this hard floor of injury *in fact* by creating an injury *in law* . . . we follow the traditional rule and 'independently inquire whether there is another interpretation, not raising . . . serious constitutional concerns, that may fairly be ascribed to the statute.") (internal quotations and citations omitted). The serious constitutional problems raised by reading the FCRA to allow for no-injury suits, discussed below, compel construing the FCRA to require injury in fact here.[11]

III. EVEN IF THE FCRA IS READ AS AUTHORIZING STATUTORY DAMAGES WITHOUT INJURY, ARTICLE III PRECLUDES LAWSUITS BY PLAINTIFFS WHO HAVE SUFFERED NO INJURY IN FACT

Plaintiffs bringing no-injury suits under the FCRA (and other statutes providing for statutory damages)

[11] Because the proper construction of the FCRA is "'logically antecedent' to Article III concerns"—since those concerns arise only if the FCRA is interpreted to allow for no-injury suits—the Court may construe the Act so as to avoid the constitutional question. *See Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 831 (1999).

lack Article III standing, which does not extend to private attorneys general seeking bounties for harmless and technical legal violations. By prohibiting private attorney general enforcement schemes, Article III furthers separation-of-powers values by ensuring that enforcement of the law is undertaken by the democratically accountable Executive.

A. "[T]he requirement of injury in fact is a hard floor of Article III jurisdiction that cannot be removed by statute." *Summers v. Earth Island Inst.*, 555 U.S. 488, 497 (2009). This essential element of Article III's case-or-controversy "'is founded in concern about the proper—and properly limited—role of the courts in a democratic society.'" *Id.* at 492-93 (quoting *Warth v. Seldin*, 422 U.S. 490, 498 (1975)). That role is limited to vindicating the rights of individuals and "redress[ing] or prevent[ing] actual or imminently threatened injury to persons caused by private or official violation of law." *Id.* at 492; *see also Lewis v. Casey*, 518 U.S. 343, 353 n.3 (1996). Vindicating the broader public interest in seeing that the laws are obeyed is the province of the political branches. *Lujan*, 504 U.S. at 576-77.

As this Court has repeatedly explained, the "actual injury" component of Article III's case or controversy requirement is necessary to maintain the separation of powers. *Lewis*, 518 U.S. at 353 n.3; *Lujan*, 504 U.S. at 559-60, 576-77. "[F]ederal courts may exercise power only in the last resort, and as a necessity, and only when adjudication is consistent with a system of separated powers and the dispute is one traditionally thought to be capable of resolution through the judicial process." *Allen v. Wright*, 468 U.S. 737, 752

(1984) (citations omitted). "We accept the judiciary's displacement of the democratically elected branches when necessary to decide an actual case," but in the absence of the need to remedy an individual's injury, the courts may not reach out to address alleged violations of the law. John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 Duke L.J. 1219, 1230 (1993).

In keeping with these principles, a mere violation of a statute with respect to a particular individual—absent some actual adverse affect on that individual—is not an "injury" sufficient to confer Article III standing. A plaintiff's interest in such a case is no different from the general public interest "in seeing that the law is obeyed," which this Court has repeatedly held is insufficient for a private litigant to invoke the judicial power. *E.g.*, *FEC v. Akins*, 524 U.S. 11, 24 (1998); *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 107 (1998); *Valley Forge Christian Coll. v. Americans United for Separation of Church & State*, 454 U.S. 464, 485 (1982). Thus, while Congress can allow a private party to invoke the judicial power based on a "concrete, *de facto* injur[y]," *Lujan*, 504 U.S. at 578, "[i]t is settled that Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing." *Raines v. Byrd*, 521 U.S. 811, 820 n.3 (1997).

Attempting to avoid these principles, the Solicitor General incorrectly argued in opposing certiorari in this case that the common law allowed for no-injury defamation suits based merely on false but harmless statements. But while plaintiffs could recover presumed or nominal damages for certain categories

of statements—libel and slander per se—without proof of pecuniary loss, the law allowed this only because those statements were *inherently injurious*. *See, e.g.*, *Pollard v. Lyon*, 91 U.S. 225, 227 (1875) ("Certain words, [*i.e.*, those slanderous per se,] all admit, are in themselves actionable, because the natural consequence of what they impute to the party is damage . . . .").

Claims for libel and slander per se (and the availability of presumed or nominal damages) were thus limited to instances in which "the character of the defamatory words and the circumstances of publication" entail that "serious harm . . . in fact" to the plaintiff is "all but certain," yet difficult to prove. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 760 (1985) (plurality opinion) (quoting William Prosser, Law of Torts § 112, at 765 (4th ed. 1971)); *see also* 3 Restatement (Second) of Torts § 620 cmt. b (nominal damages only available for defamation per se). Indeed, Justice Powell emphasized this very point in a defamation case against a credit reporting agency for misreporting that the plaintiff had filed for bankruptcy. *See Dun & Bradstreet, Inc.*, 472 U.S. at 760 (plurality opinion). Therefore, the Solicitor General's contention that defamation law allowed for recovery without injury in fact is wrong.

B. Similarly—and crucially, for purposes of this case and for statutes like the FCRA—Congress cannot manufacture standing simply by offering a bounty to private plaintiffs for bringing suits to enforce the law. Although a bounty may give a plaintiff a concrete interest in the outcome of a suit, this Court has held that an "interest unrelated to

injury in fact is insufficient to give a plaintiff standing." *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 772 (2000). An interest, such as a bounty or an award of attorney's fees, "that is merely a 'byproduct' of the suit itself cannot give rise to a cognizable injury in fact for Article III standing purposes." *Id.* at 773; *see Steel Co.*, 523 U.S. at 107 ("[A] plaintiff cannot achieve standing to litigate a substantive issue by bringing suit for the cost of bringing suit.").

Consistent with these limitations, Congress cannot authorize roving private attorneys general to seek out violations of the law that have caused them no actual injury and prosecute them in court in the hopes of obtaining a bounty. *See Lujan*, 504 U.S. at 576-77; *id.* at 580-81 (Kennedy, J., concurring). To do so would be to "transfer from the President to the courts the Chief Executive's most important constitutional duty, to 'take Care that the Laws be faithfully executed,' Art. II, § 3." *Id.* at 577 (majority opinion); *see also* Tara Leigh Grove, *Standing as an Article II Nondelegation Doctrine*, 11 U. Pa. J. Const. L. 781 (2009); Harold J. Krent & Ethan G. Shenkman, *Of Citizen Suits and Citizen Sunstein*, 91 Mich. L. Rev. 1793 (1993). Article III prevents Congress from authorizing private attorneys general to exercise the discretion of the Executive in "roam[ing] the country in search of" legal violations and deciding which to prosecute in the absence of the legal and political constraints that cabin the democratically-accountable Executive's prosecutorial discretion. *Valley Forge*, 454 U.S. at 487; *see* Grove, *supra*, at 784, 807-09, 828.

C. Statutory damages class actions of this type—where plaintiffs have suffered no injury, or worse,

have actually *benefited*, from the alleged violations—starkly present the precise dangers this Court has repeatedly warned against in its Article III standing cases. *See, e.g.*, *Vt. Agency*, 529 U.S. at 772-73. In such suits, as in a private-attorney-general scheme, eligible plaintiffs are not differentiated from the general public by any injury they have suffered, and the courts are impermissibly enlisted into hearing abstract claims of FCRA violations unconnected to any concrete individual injury. The plaintiffs in these suits do not seek to "obtain[] compensation for, or prevent[], the violation of a legally protected right"; they seek only a bounty for prevailing in the litigation—little different from "a wager upon the outcome." *Id.*

The allegations in this action serve only to highlight this problem. As noted, Respondent claims that Petitioner violated the FCRA by reporting information that overstated his employment status and creditworthiness. First Am. Compl. ¶¶ 31-32, 34. Even though Respondent likely *benefited* from these alleged inaccuracies in the eyes of potential employers and creditors, he seeks to represent a class of "millions of individuals," which, at $100 to $1,000 per violation, seeks aggregate statutory damages in excess of $1 billion. *Id.* ¶ 39, p. 16. In other words, Respondent has no actual concrete interest in this action other than the mere possibility of recovering statutory damages—an outcome directly at odds with longstanding principles of Article III standing.

In such circumstances, Petitioner, like the targets of other no-harm statutory damages suits under the FCRA, is threatened with one of the very dangers Article III's injury-in-fact requirement is designed to

prevent—arbitrary enforcement by plaintiffs who are entirely unaffected by (or even benefited from) the challenged conduct, who lack any accountability, and whose prosecutorial discretion is limited only by the creativity of their claims. *See* Grove, *supra* at 784, 791, 807-09. Entrepreneurial lawyers representing statutory-damages classes will not seek out the defendants and violations that cause the most harm to consumers (as we would expect an accountable Executive Branch to do), but will instead have every incentive to seek out violations that maximize class size—and therefore the aggregated statutory damages bounty—regardless of whether the violations actually injure anyone (or, indeed, even benefit class members). Indeed, these lawyers will likely prefer no-injury classes, since class members will not possess potentially valuable yet highly individualized claims for actual damages that could render the class uncertifiable. And with the *in terrorem* effect of such massive potential damages, opportunistic lawyers need not even bring claims for *actual* violations; so long as the violation is arguable and the class large enough, defendants will be forced to settle or risk bankruptcy.

In short, the Ninth Circuit's erroneous understanding of Article III's limitations on standing would all but erase those limits whenever Congress does not require a plaintiff to prove actual damages, severely undermining the separation-of-powers values protected by Article III, and taking the federal courts well beyond their traditional, proper, and constitutionally authorized function—"decid[ing] on the rights of individuals" and remedying actual

individual injuries. *Lujan*, 504 U.S. at 576 (quoting *Marbury v. Madison*, 1 Cranch 137, 170 (1803)).

CONCLUSION

For the foregoing reasons, the judgment of the Ninth Circuit should be reversed.

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July 9, 2015

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