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

Michael O'Neil
Albert E. Hartmann
REED SMITH LLP
10 S. Wacker Dr.
Chicago, IL 60606

Casey D. Laffey
Nana Japaridze
REED SMITH LLP
599 Lexington Ave.
New York, NY 10022

James C. Martin
Counsel of Record
Colin E. Wrabley
Douglas C. Allen
REED SMITH LLP
225 Fifth Avenue
Pittsburgh, PA 15222
(412) 288-3546
jcmartin@reedsmith.com

Counsel for Amicus Curiae

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INTEREST OF *AMICUS CURIAE* [1]

Trans Union LLC is a "consumer reporting agency [CRA] that compiles and maintains files on consumers on a nationwide basis," as defined in Section 603(p) of the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. § 1681a(p). TransUnion's diverse work force includes over 4,000 individuals, in 30 countries, on 5 different continents. At its core, TransUnion is a risk information solutions provider. As one of the nation's three nationwide CRAs (Experian Information Solutions, Inc. and Equifax Information Services, LLC are the others), it has over 30 petabytes (1 million gigabytes) of information associated with approximately one billion consumers globally. TransUnion provides tens of millions of consumer reports every month to credentialed users for an identified permissible purpose.

These items of information consist of "tradelines" from credit grantors ("tradeline" is an industry term for the current and historical activities of a particular consumer's account with a particular credit grantor), and public record items from public records sources. Each month,

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

TransUnion receives over one billion updates to the items in its database. These updates come from approximately 90,000 different sources (called "furnishers"), including banks, credit card companies, mortgage companies, collection agencies, and other financial institutions. *See also Benson v. Trans Union, LLC*, 387 F. Supp. 2d 834, 841 (N.D. Ill. 2005) (noting vast scale of information received and processed by TransUnion).

This massive bank of information serves multiple private and public interests. Consumer reports are used daily by employers, individuals, financial institutions, and other commercial enterprises in making credit, personnel, life-management, hiring and other transactional decisions across all channels of commerce. *See Sarver v. Experian Info. Solutions*, 390 F.3d 969, 972 (7th Cir. 2004). They likewise are used by law enforcement and counter-terrorist agencies in locating suspected criminals. Michael E. Staten and Fred H. Cate, *The Impact of National Credit Reporting Under the Fair Credit Reporting Act: The Risk of New Restrictions and State Regulation* (hereinafter "*The Impact*") at 28 (Financial Services Coordinating Council 2003). As a result, CRAs play a "vital role" in the national economy. 15 U.S.C. § 1681(a)(3).

In carrying out its diverse information-providing functions, TransUnion is comprehensively regulated by the FCRA, certain state counterparts to

the FCRA, and the Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C. § 5301 *et seq*. The regulations under the various statutory schemes also are rigorously enforced by federal and state agencies alike. And states have *parens patriae* powers to sue under the FCRA on behalf of their citizens.

The FCRA also allows individuals to sue for a violation of any of its many provisions. Under the FCRA, successful litigants can obtain statutory penalties of up to $1,000 per violation, as well as attorneys' fees. And, just like the Telephone Consumer Protection Act at issue here, the FCRA provides for uncapped awards of statutory damages.

Over many years, the FCRA's provisions have been subject to varying interpretations by the nations' courts. Based on these decisions, the FCRA can fairly be described as a waiting trap for the unwary. Its many technical provisions are prone to differing interpretation, making compliance difficult to say the very least. To compound matters, where CRAs are concerned, an alleged violation can be replicated instantaneously and simultaneously over thousands or even millions of transactions.

These compliance difficulties, coupled with the available statutory damages and attorneys' fees, have forced TransUnion and other companies regulated under the FCRA to confront a wave of class action lawsuits. It is no exaggeration to say

that FCRA class action lawsuits have exploded in recent years. And, as TransUnion knows all too well, these lawsuits are expensive to defend and materially and deleteriously impact the cost of doing business and providing reporting services.

Once an FCRA class action is filed, there is enormous pressure to settle because of the potentially catastrophic costs associated with class-wide FCRA recoveries. Given that reality, TransUnion has a substantial interest in legal doctrines that promote the expeditious resolution of class action lawsuits. Offers of judgment made under Federal Rule of Civil Procedure 68, and the mootness principles engendered by such offers where an uncertified class is involved, provide one such avenue for efficient resolution. Indeed, Rule 68 offers have their highest utility in the FCRA class actions that threaten the greatest exposure—those seeking solely statutory damages, which are uncapped, for alleged willful violations—because the class representative's maximum recovery can be determined at the lawsuit's outset and complete relief can be promptly provided. TransUnion accordingly files this *amicus* brief urging reversal of the Ninth Circuit's decision, which deprives target defendants like TransUnion of this critical resolution tool.

In urging this Court to reinforce the efficacy of Rule 68, TransUnion hastens to add that the application of mootness principles following a

complete offer of judgment does not pave the way for a company to circumvent FCRA regulation or avoid FCRA compliance. No CRA gains anything by violating the statutory scheme, and if violations occur, they must promptly be remedied to avoid the costs associated with the FCRA lawsuits or regulatory enforcement that are certain to follow.

Nor does the application of Rule 68 mootness principles in uncertified class actions seeking statutory damages spell the end of consumer class actions under the FCRA, or anything close to it. Rule 68 mootness principles apply only in those limited circumstances where an offer of complete relief can be calculated and made, just as would be true in any other action. Class actions brought under the statute where that is not the case—for example, where actual damages are sought—are not susceptible to Rule 68.

On balance, the proper application of Rule 68's mootness principles to uncertified classes serves only to mitigate the enormous costs associated with serial class actions where there is no actual injury. The ability to contain those costs is essential to TransUnion's effective performance of its critical position in the health of the nation's economic infrastructure.

SUMMARY OF ARGUMENT

TransUnion is under siege from class lawsuits—most seeking uncapped statutory damage awards for minor and inadvertent alleged FCRA violations. In an effort to contain the escalating costs of defending these FCRA class actions, when appropriate, TransUnion relies on Federal Rule of Civil Procedure 68 and the mechanism it provides for prompt resolution of these lawsuits. Offers of judgment under Rule 68 are particularly effective in resolving FCRA suits seeking statutory damages because the claimant's potential recovery—encompassing statutorily-determined damages and attorneys' fees—can be calculated and fully paid at the outset of the dispute before further, unnecessary attorneys' fees are incurred litigating claims where the plaintiff has not suffered or sought actual damages.

The Ninth Circuit's decision below deprives companies such as TransUnion of this valuable resolution tool, and does so without a firm footing in controlling law. Nothing in Rule 68 or Federal Rule of Civil Procedure 23 or the FCRA itself purports to exempt uncertified class actions from the effect of Rule 68 offers of judgment, much less the strictures of Article III of the Constitution. Further, as explained more fully below, there are good reasons, grounded in established law, for applying Rule 68's mootness principles to uncertified FCRA class actions.

ARGUMENT

A. Consumer Reporting Agencies Like TransUnion Play A Critical Role In Our National Economy.

In December 2012, the Consumer Financial Protection Bureau reported that the three national CRAs "each maintain credit files on over 200,000,000 adults and receive information from approximately 10,000 furnishers of data." Consumer Financial Protection Bureau, *Key Dimensions and Processes in the U.S. Credit Reporting System* (hereinafter "Key Dimensions") at 3 (Dec. 2012), available at http://files.consumerfinance.gov/f/201212_cfpb_credit-reporting-white-paper.pdf.[2]

Using this compiled information, TransUnion and the other two national CRAs furnish more than 1.5 billion consumer credit reports annually. Federal Trade Commission, *Report to Congress Under Sections 318 and 319 of the Fair and Accurate Credit Transactions Act of 2003* at 8-9 (December

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[2] *See also Sarver*, 390 F.3d at 972 (noting that one CRA "processes over 50 million updates to trade information each day"); Staten and Cate, *The Impact*, *supra*, at 1-2 (the credit reporting system "deals in huge volumes of data – over 2 billion trade line updates, 2 million public record items, an average of 1.2 million household address changes a month, and over 200 million individual credit files").

2004) (more than 1.5 billion consumer reports furnished annually) available at http://www.ftc.gov/reports/facta/041209factarpt.pdf; *see also Key Dimensions*, *supra*, at 3 ("On a monthly basis, . . . furnishers provide information on over 1.3 billion credit accounts or other 'trade lines'"). As Congress has acknowledged, this consumer reporting system is an "elaborate mechanism" for investigating and evaluating a consumer's credit worthiness, standing, and capacity. 15 U.S.C. § 1681(a)(2).

By performing this "elaborate" information-gathering and reporting function, as Congress itself has acknowledged, the CRAs serve a "vital role" in the national economy. *Id.* at § 1681(a)(3). Indeed, our entire "banking system is dependent upon fair and accurate credit reporting." *Id.* at § 1681(a)(1).

To underscore the point, in a hearing before the Subcommittee on Financial Institutions and Consumer Credit, Michael Staten, then Professor of Management and Director of the Credit Research Center at Georgetown University's McDonough School of Business, stated that the United States credit reporting system is the "the most robust credit reporting system in the world." *The Importance of the National Credit Reporting System to Consumers and the U.S. Economy: Hearing Before the Subcomm. on Fin. Insts. & Consumer Credit of the Comm. on Fin. Servs.*, 108th Cong. 2 (May 8, 2003) (statement of Michael Staten), available at http://commdocs.house.gov/committees/bank/hba908

37.000/hba90837_0.htm. As a result, he continued, the consumer and mortgage-credit markets in the United States have achieved:

> [O]ne, widespread access to credit across the age and income spectrum; two, relatively low-interest rates on secured loans, such as autos and home loans; three, exceptionally broad access to open and unsecured lines of credit, such as bank credit card-products; and four, relatively low default rates across all types of consumer loans.

Id.

As befits any business dealing with private financial information, TransUnion and other CRAs are closely and comprehensively regulated, most particularly by the detailed provisions in the FCRA. *See FTC v. TRW, Inc.*, 628 F.2d 207, 208-09 (D.C. Cir. 1980) (CRAs are "comprehensively regulated by the provisions of the FCRA"); *Islam v. Option One Mortgage Corp.*, 432 F. Supp. 2d 181, 185 (D. Mass. 2006) (noting the FCRA's "elaborate regulatory structure"). Under the FCRA, CRAs are required to establish reasonable procedures to ensure that they report, with maximum possible accuracy, consumer information only to those with a legitimate need for it. *40 Years of Experience with the Fair Credit Reporting Act: An FTC Staff Report with Summary*

Interpretations (hereinafter "*40 Years*") at 28 (July 2011) (providing a complete list of the duties imposed on CRAs), available at https://www.ftc.gov/sites/default/files/documents/reports/40-years-experience-fair-credit-reporting-act-ftc-staff-report-summary-interpretations/110720fcrareport.pdf.

The FCRA permits consumers to sue CRAs for the violation of "any requirement imposed under" the FCRA. 15 U.S.C. §§ 1681n(a), 1681o(a). Where a CRA has been "negligent in failing to comply with any requirement," the FCRA expressly provides for an award of "any actual damages sustained by the consumer as a result of the failure," as well as an award of attorneys' fees. *Id.* at § 1681o(a). Where a CRA is found to have "willfully" violated "any" of its statutory duties, it is liable for "actual damages" or, alternatively, "damages of not less than $100 and not more $1,000," and punitive damages, as well as attorneys' fees. *Id.* at § 1681n(a).

The FCRA authorizes administrative enforcement by both federal and state agencies. *See id.* at § 1681s. A total of eight federal agencies—including the Federal Trade Commission and the Consumer Financial Protection Bureau—have enforcement authority over the FCRA. In addition to injunctive relief, federal agencies can seek monetary payments and penalties, and states have *parens patriae* powers to bring suits on behalf of their citizens for monetary damages. *Id.* at

§§ 1681s(a)(2)(A), (c)(1)(B). Independent of the FCRA, the Consumer Financial Protection Bureau has, under the Dodd-Frank Act, extensive supervisory and additional enforcement authority over the consumer reporting industry. *See* 12 U.S.C. § 5514; 12 C.F.R. Part 1090.

State and federal governments have wielded these enforcement powers aggressively in recent years. The Federal Trade Commission "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 before the U.S. Sen. Comm. on Commerce, Science and Transp., Subcomm. on Consumer Protection, Product Safety, and Insurance* at 5 (May 7, 2013), available at https://www.ftc.gov/sites/default/files/documents/public_statements/prepared-statement-federal-trade-commission-discussing-most-recent-commission-report-congress-under/130507fcra.pdf.

In addition, and again by way of example, the attorneys general of 31 states recently announced a multi-million dollar settlement of FCRA and similar state statutory claims alleged against TransUnion and other consumer reporting agencies. *See Credit Reporting Agencies Reach Settlement with State*

Attorneys general Regarding Credit Report Inaccuracies, Practical Law (June 2, 2015). The settlement includes various monitoring requirements and imposes a series of requirements on the reporting agencies to ensure compliance.

B. FCRA Class Actions Pose A Serious Threat To TransUnion And Its Peer Consumer Reporting Agencies.

Apart from state and federal enforcement actions, because of the intricacies in the regulatory scheme, TransUnion and the other national CRAs have become targets for private FCRA class actions as well. *See, e.g.,* David D. Schein & James D. Phillips, *Holding Credit Reporting Agencies Accountable: How the Financial Crisis May Be Contributing to Improving Accuracy in Credit Reporting*, 24 Loy. Consumer L. Rev. 329, 339 (2012) ("The advent of information sharing over the internet, the recent lending and mortgage crisis, and the rise in popularity and proliferation of advertisements from independent credit bureaus . . . has led to a sharp rise in CRA litigation."); David L. Permut & Tamra T. Moore, *Recent Developments in Class Actions: The Fair Credit Reporting Act*, 61 Bus. Law. 931, 931 (2006) (noting the "proliferation of class action lawsuits brought under" the FCRA that, "combined with certain class action-friendly provisions of FCRA—such as the availability of fee shifting and statutory damages, and the lack of a class action damages cap—have … push[ed] the

FCRA to the forefront of consumer financial services class litigation").

The explosion of FCRA class actions comes as no surprise. For one thing, in some jurisdictions, there is no apparent requirement that plaintiffs show any actual damages from the defendants' technical violation of the FCRA. *See, e.g., Bateman v. Am. Multi-Cinema, Inc.*, 623 F.3d 708, 718-19 (9th Cir. 2010); *Beaudry v. TeleCheck Servs., Inc.*, 579 F.3d 702, 705-07 (6th Cir. 2009); *Murray v. GMAC Mortg. Corp.*, 434 F.3d 948, 953 (7th Cir. 2006); *but see Spokeo, Inc. v. Robins*, No. 13-1339 (U.S.) (pending) (considering "[w]hether Congress may confer Article III standing upon a plaintiff who suffers no concrete harm, and who therefore could not otherwise invoke the jurisdiction of a federal court, by authorizing a private right of action based on a bare violation of a federal statute"). For another, many courts will certify classes when they include some—or even many—class members who suffered no harm, and therefore would lack standing to sue had they brought the case themselves. *See, e.g., In re Nexium Antitrust Litig.*, 777 F.3d 9, 25, 31-32 (1st Cir. 2015) (affirming certification despite fact that the class consisted of thousands who were not injured); *but see Tyson Foods, Inc. v. Bouaphakeo*, No. 14-1146 (U.S.) (pending) (considering "[w]hether a class action may be certified . . . when the class contains hundreds of members who were not injured and have no legal right to any damages").

The ease with which even "no-injury" FCRA class actions can be certified has magnified the already-serious threat those lawsuits pose to TransUnion and the consumer reporting industry. The potential class-wide liability in such suits is staggering, particularly because the FCRA lacks an express statutory cap on damage awards. *See Bateman*, 623 F.3d at 718; *Murray*, 434 F.3d at 953.[3] *Bateman* is typical of this catastrophic exposure. There, the defendant faced a $290 million liability just for including more than 5 digits of account numbers on credit card receipts—even though the complaint contained no allegation of any actual harm. *Bateman*, 623 F.3d at 710-11. Similarly, as Justices Kennedy and O'Connor noted in *Trans Union LLC v. FTC*, 536 U.S. 915 (2002), TransUnion faced a potentially "crushing" multi-billion dollar liability in an FCRA class action for violating the FTC's "nonsensical" decision to ban the disclosure of names and addresses on "target marketing lists"—and despite the fact that TransUnion was expressly permitted to disclose "detailed credit performance information, including bill payment history[,]" which

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[3] Moreover, in *Bateman* and *Murray*, the Ninth and Seventh Circuits both rejected the defendants' contentions that the possibility of "annihilating damages" in "no injury" FCRA class actions precluded class certification. *Bateman*, 623 F.3d at 718-19; *Murray*, 434 F.3d at 953-54.

disclosure was "far more invasive of consumer privacy…." *Id.* at 917 (Kennedy, J., dissenting).

As this Court and others also have acknowledged, the *in terrorem* effect of these extraordinary damage exposures provides a strong compulsion to settle even baseless claims. *See AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1752 (2011) (when faced with "even a small chance of a devastating loss," defendants will feel significant "pressure[]" to settle even "questionable claims"); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 559 (2007) (expensive litigation "will push cost-conscious defendants to settle even anemic cases"); *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 445 n.3 (2010) (Ginsburg, J., concurring) ("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."); *see also Parker v. Time Warner Entm't Co., L.P.*, 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"); Michael O'Neil, *Privacy and Surveillance Legal Issues, Leading Lawyers on Navigating Changes in Security Program Requirements and Helping Clients Prevent Breaches – The Transformation of the "Right to Privacy" and its Unintended Liability Consequences*, 2014 WL 10441, at *6 (Aspatore Jan. 2014) ("The impact of

federal statutes that allow the award of statutory damages for violations that cause no harm is exponentially multiplied by the class-action mechanism of Federal Rule of Civil Procedure 23.").

Cases asserting only technical violations of the FCRA—violations that cause no tangible harm to consumers—still generate the same heightened pressure to settle. *See, e.g., In re Toys R Us—Del., 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 granting class counsel $458,602.54 in attorneys' fees even though "no putative class member had alleged any actual injury"); *Knights v. Publix Super Markets, Inc.*, No. 3:14-cv-00720 (M.D. Tenn. Nov. 12, 2014) (court approved settlement of $6.8 million to settle claim for inclusion of extraneous language on a disclosure form).

Unfortunately for TransUnion and the other national CRAs, there is no readily apparent way to shut down this threat.[4] The FCRA's myriad regulatory provisions, burdened by multiple, highly-

[4] Nor is the threat limited to CRAs. The FCRA also strictly regulates "furnishers" of information to the CRAs, and "users"—including employers—of the reports that CRAs issue. 15 U.S.C. §§ 1681s-2(a) ("furnishers"), 1681b(f), 1681m ("users"), and 1681b(b)(2) and b(b)(3) (employers).

technical subparts—the statute contains no fewer than 31 separate sections, 145 subsections, and approximately 34,000 words—present exceedingly difficult compliance challenges.[5] This Court has noted as much, pointing out the FCRA's "less-than-pellucid" text and the "dearth of guidance" on its proper construction. *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 70 (2007). And, even "recklessness" is enough to satisfy the FCRA's willfulness standard for recovering statutory damages (*id.* at 68-69)—and that includes "something more than negligence but less than knowledge of the law's requirements." *Murray v. New Cingular Wireless Servs., Inc.*, 523 F.3d 719, 726 (7th Cir. 2008). Inevitably, good faith mistakes are made regarding the FCRA's requirements and, just as inevitably, class action lawsuits follow.

To protect the health of its risk-information-delivery business, TransUnion must look for ways to forestall the extraordinary costs associated with this spate of class action lawsuits. When appropriate, offers of judgment under Federal Rule of Civil Procedure 68, made to the representative of an uncertified class, provide a vehicle for just such an

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[5] *See 40 Years*, *supra*, at 28 (providing a complete list of the duties imposed on CRAs). Congress itself has acknowledged ambiguities in the FCRA since the time it was enacted. *See* 116 Cong. Rec. 36574-76 (Oct. 13, 1970).

expeditious resolution. But the utility of those offers plainly is imperiled by the Ninth Circuit's decision under review in this case.

C. Mootness Principles Engendered By Offers Of Judgment Under Rule 68 Allow Consumer Reporting Agencies To Expeditiously Resolve FCRA Class Actions.

Rule 68 provides that, "[a]t least 14 days before the date set for trial, a party defending against a claim may serve an opposing party an offer to allow judgment on specified terms, with the costs then accrued." Fed. R. Civ. P. 68(a). If the offeree serves written notice accepting the offer within 14 days of being served, "either party may then file the offer and notice of acceptance," and "[t]he clerk must then enter judgment." *Id.* As an additional incentive for settlement, Rule 68 states that the offeree must pay litigation costs incurred after an unaccepted offer was made "[i]f the judgment that the offeree finally obtains is not more favorable than the unaccepted offer." Fed. R. Civ. P. 68(d).

Thus, when defendants like TransUnion are targeted in a putative FCRA class action suit seeking only quantifiable statutory (but not actual) damages, and before any class is certified, they will extend a Rule 68 offer of judgment to compensate the named plaintiff fully for his or her individual claims, including reasonable costs or attorneys' fees as

provided for in the FCRA. In most instances, the plaintiff either rejects the offer of judgment outright or simply lets it expire.

Having made the offer, defendants move to dismiss plaintiff's individual claims on the basis of mootness because there is no longer a live case or controversy. With the proposed representative having received complete relief, the claims of the uncertified class are moot as well. *See Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523, 1529 (2013) (holding that "[plaintiff's] suit became moot when her individual claim became moot, because she lacked any personal interest in representing others in the action" prior to the case reaching the FLSA's equivalent of class certification); *Damasco v. Clearwire Corp.*, 662 F.3d 891, 896 (7th Cir. 2011) ("To allow a case, not certified as a class action and with no motion for class certification even pending, to continue in federal court when the sole plaintiff no longer maintains a personal stake defies the limits on federal jurisdiction expressed in Article III."); *Pettrey v. Enterprise Title Agency, Inc.*, 584 F.3d 701, 703 n.1 (6th Cir. 2009) (settlement of class representatives' individual claims before certification mooted class claims); *Anderson v. CNH U.S. Pension Plan*, 515 F.3d 823, 826-27 (8th Cir. 2008) (class claims moot where "claims of all named plaintiffs … were satisfied before the district court's ruling on class certification"); *Comer v. Cisneros*, 37 F.3d 775, 798 (2d Cir. 1994) ("[I]f the claims of the named

plaintiffs become moot prior to class certification, the entire action becomes moot.").

As the foregoing cases recognize, there are a number of sound reasons to bring mootness principles to bear when a bona fide offer of complete relief is made to the plaintiff in an as yet uncertified FCRA class action.

First, as petitioner's brief comprehensively explains, offers of complete relief moot individual and class claims alike under fundamental Article III "case or controversy" principles because there is no live dispute remaining. Indeed, the mooting effect of an offer of complete relief applies whether the offer is called a "Rule 68 offer of judgment" or not given a label at all. What matters is the substance of the offer, and if it provides everything the plaintiff could conceivably recover were the case to proceed to judgment—in other words, it reflects the defendant's "unconditional[ ] surrender[ ] and only [ ] plaintiff's obstinacy or madness prevents her from accepting total victory" (*Genesis Healthcare*, 133 S. Ct. at 1536 (Kagan, J., dissenting))—then the controversy is dead and there is nothing left for the court to do but enter judgment. *Chathas v. Local 134 Int'l Bhd. of Elec. Workers*, 233 F.3d 508, 512 (7th Cir. 2000) (Posner, J.) ("[I]f the defendant has thus thrown in the towel there is nothing left for the district court to do except enter judgment.").

Second, apart from Article III's jurisdictional bar, the application of mootness principles underscores that Rule 23 is a rule of procedure only; the Rule does not—and cannot—alter the result that the substantive law requires. *See, e.g., Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 612-13 (1997) ("Rule 23's requirements must be interpreted in keeping with Article III constraints"). Not only is there no legal basis for exempting class actions from otherwise applicable substantive law—the Rules Enabling Act and this Court's precedents forbid it. *See Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2561 (2011) (holding that the Rules Enabling Act's proscription against "interpreting Rule 23 to 'abridge, enlarge or modify any substantive right,' [barred certification] on the premise that Wal-Mart will not be entitled to litigate its statutory defenses to individual claims") (citing 28 U.S.C. § 2072(b); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 845 (1999)).

Third, the application of mootness principles in the context of an uncertified class action also serves Rule 68's core purposes. That is, Rule 68 is intended to facilitate and encourage settlement and thereby to avoid the needless expenditure of public and private resources. *Marek v. Chesny*, 473 U.S. 1, 5 (1985); *see also* Fed. R. Civ. P. 68 advisory committee's note ("These provisions should serve to encourage settlements and avoid protracted litigation"); 12 Charles Alan Wright & Arthur R. Miller, Fed. Prac. & Proc. Civ. § 3001 (2d ed. 2015)

("It is roundly agreed in the courts that Rule 68 was intended to encourage settlements and avoid protracted litigation[.]").

In sum, the continued vitality of Rule 68 offers of judgment in the context of uncertified class actions aligns with fundamental jurisdictional principles, established limits on the provisions of Rule 23, and judicial efficiencies. There is every reason to recognize and preserve these benefits.

D. Uncertified Class Actions Are Not, And Should Not Be, Exempted From Mootness Principles Engendered By Rule 68 Offers.

While there are sound reasons supporting the application of mootness principles engendered by Rule 68 in the context of uncertified classes, there is no basis to find that uncertified class actions—including, specifically, FCRA class actions seeking statutory damages for willful violations—should be exempted from those mootness principles.

1. There Is No Basis In Rule 23, Rule 68, Or The FCRA For Exempting Uncertified Class Actions From Mootness Principles That Follow From Rule 68 Offers.

To begin with, by its plain terms, Rule 68 operates regardless of the type of federal court action. *See* Fed. R. Civ. P. 68. In particular, nothing

in the Rule suggests it does not apply, or applies more restrictively, in the context of putative class action claims. Instead, the rule refers generally to any offers made to "a party defending against a claim[.]" *Id.*; *see also* 12 Charles Alan Wright & Arthur R. Miller, Fed. Prac. & Proc. Civ. § 3001.1 (2d ed. 2015) (stating that exempting class actions from Rule 68 "is inappropriate" given that there is no language in the Federal Rules limiting the application of Rule 68).

This construction is bolstered by Rules 1 and 81 of the Federal Rules of Civil Procedure. Rule 1 provides that all Rules govern "all civil actions and proceedings," except as stated in Rule 81, and Rule 81 makes no mention of excluding putative class actions under Rule 23 from the reach of Rule 68. Fed. R. Civ. P. 1; *see* Fed. R. Civ. P. 81; s*ee also Lucero v. Bureau of Collection Recovery, Inc.*, 639 F.3d 1239, 1244 (10th Cir. 2011) ("[N]o express statement in the rules limits the application of rule 68 in class action complaints.") (citation and internal quotation marks omitted).

Turning next to Rule 23, there is no basis for an exemption from operative mootness principles there either. Nothing in the Rule's various subparts suggests that result. *See* Fed. R. Civ. P. 23. Nor does such an exemption arise from the nature of a class action either. There is no "right" to bring a class action, s*ee, e.g., Am. Express Co. v. Italian Colors Rest.*, 133 S.Ct. 2304, 2309-10 (2013)

(reasoning that "congressional approval of Rule 23 [does not] establish an entitlement to class proceedings for the vindication of statutory rights[,]" and "there is no evidence of such an entitlement in any event"), and the dismissal or resolution of putative class claims before class certification happens as a matter of course if the substantive law provides for such a dismissal.

For example, prior to any grant of class certification, the named plaintiff is always free to accept a settlement offer in exchange for dismissing the action. *See Pettrey, Inc.*, 584 F.3d at 703 n.1; *Anderson*, 515 F.3d at 826-27. In addition, of course, a targeted defendant can move to dismiss a putative class action complaint prior to certification if the putative class representative fails to state a legally viable claim or lacks standing to sue. *See, e.g., Murr v. Midland Nat'l Life Ins. Co.*, 758 F.3d 1016 (8th Cir. 2014) (affirming summary judgment for defendant issued prior to class certification); *McNulty v. Fed. Hous. Fin. Agency*, 954 F. Supp. 2d 294 (M.D. Pa. 2013), *aff'd* (3d Cir. Mar. 18, 2014) (granting motion to dismiss for failure to state a claim prior to certification); *Zaycer v. Sturm Foods, Inc.*, 896 F. Supp. 2d 399, 409 (D. Md. 2012) (granting motion to dismiss for lack of standing and rejecting plaintiff's argument that certification is antecedent to standing). In these scenarios, the courts permit the action to be disposed of because a

class has not yet been certified and, as such, does not yet exist.

The mootness principles evoked by Rule 68 reach the same outcome through application of a different—but no less fundamental—aspect of our substantive law. And, there is no corresponding aspect of our substantive law that allows for an exception where Rule 23 is invoked but a class is not yet certified. A complaint containing class allegations holds no special immunity from prudential and substantive principles that apply to actions without those allegations.

Finally, looking at the FCRA, nowhere in its 34,000 words does it indicate that bona fide Rule 68 offers of judgment cannot operate specifically to moot a putative FCRA class action seeking statutory damages. As noted (*supra* at 10), it provides for $100-1,000 in statutory damages per class member for willful violations, plus the possibility of punitive damages and attorneys' fees. 15 U.S.C. § 1681n(a). Such an award exceeds the actual harm that most consumers experience from FCRA violations, suggesting an intent by Congress to encourage individual suits and their resolution. This statutory structure—which Congress enacted long before the explosion of consumer class litigation—does not reflect the intent to create a scheme that provides for class-wide resolution. The FCRA reflects, instead, Congress's intent to create a remedial scheme that encourages individual suits and settlements—not

aggregate litigation that multiplies damages exposure to a degree that threatens a company's very existence.

As a result, any effort to foreclose application of the mootness principles triggered by bona fide offers of judgment under Rule 68, made in the context of an uncertified class, has no grounding in Rule 68, Rule 23, or the FCRA itself. There is, in fact, no indication in any of these statutory provisions that Rule 68 should not retain its utility where an uncertified class action in concerned.

2. There Is No Compelling Reason For Exempting Uncertified FCRA Class Actions From Mootness Principles That Follow From Rule 68 Offers.

Those courts and commentators who oppose the recognition of mootness principles where bona fide Rule 68 offers are made and rejected by the named representatives of an uncertified class believe strongly in the utility of consumer class actions. Based on that strongly-held belief, they condemn the "picking off" of class representatives as an unseemly procedural gambit that contravenes Rule 23's consumer protection function. From both a legal and practical standpoint, there are a number of problems with this line of reasoning.

First, on the legal side, there is nothing untoward about the application of mootness

principles following a bona fide Rule 68 offer of judgment made to the named representative of an as-yet uncertified class. Such an offer eliminates any case or controversy and the dismissal that follows is grounded in Article III of the Constitution and the prudential conservation of public and private resources.

Nor does Rule 23, in its provisions or application, provide for any kind of fundamental right that should be elevated to negate what controlling substantive law compels. There is, as noted, no right to bring a class action and a class action does not create any rights either. On the contrary, a class action is a procedural device that must yield when our substantive law so dictates. There likewise is nothing in the language of Rule 23 suggesting it is exempt from Rule 68 or the salutary benefits that Rule 8 confers.

Second, on the practical side, applying controlling mootness principles poses no categorical threat to consumers, particularly where a reticulated statute like the FCRA is concerned. For one thing, the threat of successive FCRA class action lawsuits seeking massive damages will remain, and that is incentive enough to strive for statutory compliance. The fact that "the FCRA requires that a court award a successful plaintiff attorneys' fees[,]" however, "dispel[s] the notion that a class action is the only way" for alleged victims of violations to being vindicated. *Klotz v. TransUnion, LLC*, 246 F.R.D.

208, 217 (E.D. Pa. 2007); *see also Molina v. Roskam Baking Co.*, No. 1:09-cv-475, 2011 U.S. Dist. LEXIS 136460, *17 (W.D. Mich. Nov. 29, 2011) (noting that the FCRA's attorneys' fee provision "furnishes an adequate incentive for individual plaintiffs" to bring claims); *Stillmock v. Weis Mkts., Inc.*, 385 F. App'x 267, 282 (4th Cir. 2010) ("There is no shortage of incentives for consumers to bring individual suits under" the FACTA amendments to the FCRA). And indeed, the threat of individual FCRA claims likewise is real. *See, e.g., In re Trans Union Corp. Privacy Litig.*, 741 F.3d 811, 814 (7th Cir. 2014) (noting the more than 70,000 individual FCRA suits filed against TransUnion in Texas state court).

Moreover, any instances of noncompliance with the FCRA that are systemic and widespread—the type of noncompliance that a class action would undoubtedly address—are likely to trigger a lawsuit by one of the many agencies charged with enforcing FCRA's regulations. State *parens patriae* lawsuits could be filed as well. 15 U.S.C. § 1681s(c)(1)(B). As noted (*supra* at 10-11), state and federal regulators have extensive powers to enforce statutes like the FCRA—and they are active in doing so.

At the same time, recognizing that Rule 68 offers can moot class claims does nothing to deter individual claimants from obtaining relief to which they are entitled. For starters, only offers of complete relief can moot a representative plaintiff's claims, so a Rule 68 offer is not available in any class

action cases where actual damages cannot be fully accounted for pre-certification. Mooting a class representative's claims pre-certification also has no preclusive effect on the claims of any other potential claimant. *Genesis Healthcare*, 133 S. Ct. at 1531 (observing that while settlement may foreclose putative plaintiffs from having their rights vindicated in the named plaintiff's suit, they "remain free to vindicate their rights in their own suits"). Those individuals remain strongly incentivized to bring their own FCRA lawsuits precisely because their costs of litigating are fully recoverable. And they also can pursue claims for injunctive relief that will serve to put an end to the allegedly offending practice for the benefit of those who elect not to sue.

Given the magnitude of the threat posed by class and individual litigation, moreover, target defendants, such as TransUnion, cannot afford to stand pat. Of course, no company sets out to violate the FCRA and expose itself to uncapped statutory liability. But where a violation is uncovered, ignoring it is not an option. On the contrary, the most cost-effective strategy a company can employ is an immediate, categorical fix to stem the threat of continuing violations.

From TransUnion's perspective, therefore, there is no compelling need to declare that uncertified consumer class actions must be exempted from the mootness principles that a bona fide Rule

68 offer would otherwise evoke. This Court should reverse the Ninth Circuit and so hold.

CONCLUSION

For the reasons discussed above, TransUnion respectfully urges this Court to reverse the judgment of the court of appeals.

Respectfully submitted,

Michael O'Neil
Albert E. Hartmann
REED SMITH LLP
10 S. Wacker Dr.
Chicago, IL 60606

Casey D. Laffey
Nana Japaridze
REED SMITH LLP
599 Lexington Ave.
New York, NY 10022

James C. Martin
Counsel of Record
Colin E. Wrabley
Douglas C. Allen
REED SMITH LLP
225 Fifth Avenue
Pittsburgh, PA 15222
(412) 288-3546
jcmartin@reedsmith.com

Counsel for Amicus Curiae

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