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 Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

INTEREST OF *AMICUS CURIAE*

Trans Union LLC ("TransUnion") is a "consumer reporting agency that compiles and maintains files on consumers on a nationwide basis," as defined in Section 603(p) of the Fair Credit Reporting Act (the "FCRA" or the "Act"), 15 U.S.C. § 1681a(p). As one of the nation's three major credit bureaus, TransUnion maintains billions of pieces of information about United States consumers, and issues millions of consumer reports every month. Given these functions and the consumer credit reporting system's critical importance to the national economy, TransUnion is regulated comprehensively as a "consumer reporting agency" by the FCRA, as well as by certain state mini-FCRAs and the Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C. § 5301 (the "Dodd-Frank Act").[1]

TransUnion has a strong interest in ensuring that the Act is applied in accordance with Constitutional requirements and is properly construed. It expends millions of dollars annually to ensure compliance with credit reporting laws, regulations and relevant judicial decisions. The opinion below threatens to greatly expand FCRA liability beyond its intended scope of consumer protection, thereby exposing TransUnion, other credit bureaus, data furnishers and users of credit reports to potentially massive class action cases brought by persons without any real-world harm.

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[1] Pursuant to Rule 37.2(a), letters of consent of all parties are being filed with the Clerk of the Court. Counsel of record for all parties received timely notice of *amicus curiae's* intent to file this brief. Pursuant to Rule 37.6, *amicus curiae* certifies that no counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus curiae* and its counsel made a monetary contribution to the preparation or submission of this brief.

If this Court does not grant the petition for certiorari and correct the Ninth Circuit's error, then the immediate result will be more "bet the company" litigation filed under the Act. The consequent defense costs and inevitable corporate skittishness with respect to offering new data services will reduce the scope of predictive information available to credit grantors to manage risk. Moreover, it will increase the expense of delivering such new information services that survive legal challenge. Ultimately, consumers will bear the brunt of these effects in the form of diminished access to credit, delays in obtaining credit and/or higher costs of obtaining it.

SUMMARY OF THE ARGUMENT

This Court should confirm that alleged FCRA violations not causing actual injury do not merit financial awards. Even if the Court should believe otherwise, it should nevertheless provide definitive guidance to enable those subject to the FCRA to fully understand what peril results from any compliance error under the Act, so that they can appropriately pass the costs associated with the risk of this extreme potential liability to those who ultimately benefit from the services regulated under the Act: all United States consumers who currently reap the rewards of the miracle of instant credit in the modern American economy.

Accordingly, this Court should grant certiorari to consider whether injury in law, without corresponding injury in fact, satisfies Article III of the Constitution's limitation of the judicial power to cases and controversies. In other words, may Congress constitutionally expand the power of the federal courts to hear disputes where the plaintiff has not been

deprived of a property or contract interest, and has not suffered any traditional tort-like injury?

In various circumstances, the Justices of this Court and other members of the federal judiciary have expressed concern about the rising tide of massive class action cases, and the harm they may pose to the economic system and principles of sound policymaking. To keep the class action in its appropriate procedural place, this Court should recognize an inherent constitutional limitation under Article III. A class action violates the Constitution unless the proposed class representative and each member of the proposed class sustained an injury in fact.

The problem posed is a particularly pressing one with respect to FCRA actions, as these actions challenge informational activity subject to First Amendment protection. In addition to regulating consumer reporting agencies, the Act imposes requirements on those who furnish data into the consumer reporting system. It also imposes requirements on those who obtain consumer reports, reaching not only lenders and insurers, but also the vast majority of employers (including governmental agencies) and landlords of all sizes.

The FCRA was enacted before the procedural vehicle of the consumer class action became routinely employed, and before the information revolution that has transformed the world. The FCRA's absence of an express cap on class awards has led many plaintiffs' attorneys to treat FCRA litigation like a trip to a casino; to throw the dice in hopes of certifying a potentially enormous statutory damages class, recognizing that once a class is certified, the defendant

will have no choice but to settle the case rather than risk bankruptcy.[2]

There has recently been a vast expansion of enabling information technology that has created immediate access to public and private data sources. This has necessitated that business dealings be structured with numerous parties spread throughout the United States. Yet many businesses and individuals are unaware of their potential FCRA risk until they are sued for annihilating damages, often based on the activity of another person who may have failed to honor his contractual obligations or simply was careless with his collection, handling, processing or management of data. Many new information-based businesses or potential supporters of this industry were beyond the imagination of the FCRA's drafters when the statute was enacted. These businesses now face potentially catastrophic consequences that are for all practical purposes uninsurable because of

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[2] The most egregious examples occur under the 2003 Fair and Accurate Credit Transactions Act ("FACTA") amendments to the FCRA, requiring redaction of information on credit card receipts. *See* 15 U.S.C. § 1681c(g). It is widely accepted that the risk of actual damages from this kind of FACTA violation is exceptionally small; indeed, probably no consumer ever has been actually harmed. Nonetheless, the immense statutory damages risk has led to obscenely large settlements. *E.g., In re Toys R Us-Delaware, Inc.-Fair & Accurate Credit Transactions Act (FACTA) Litig.*, 295 F.R.D. 438 (C.D. Cal. 2014) (approving class settlement that could potentially award the class $391.5 million and granting class counsel $458,602.54 in attorneys' fees even though "no putative class member had alleged any actual injury"); *Redman v. RadioShack Corp.*, No. 11 C 6741, 2014 WL 497438 (N.D. Ill. Feb. 7, 2014) (approving class settlement that could potentially award the class $40 million, and granting class counsel approximately $1 million in attorneys' fees, even though class members suffered no actual damages).

the size of the potential risk. Class action attorneys recognize what leverage they have under the current regime, and press it to the utmost. Although they may cloak themselves with sanctimonious platitudes about needing to protect consumers, their true goal is to bully the defendant into paying a large fee as part of a settlement that delivers minimal relief to the public.

Few defendants faced with a claim that seeks statutory damages under a law for which there is a "dearth of guidance and [] less-than-pellucid statutory text," *Safeco Ins. Co. v. Burr*, 551 U.S. 47, 70 (2007), will roll the dice in litigation when the result of losing the case is the total loss of their business. The issue inherent in all class actions—that class certification itself often places defendants in a must-settle position—is more pernicious under the FCRA, due to the Act's regulation of commercial speech. *See Sorrell v. IMS Health, Inc.*, 564 U.S. __, 131 S. Ct. 2653, 2667 (2011) (credit report is "speech") (citing *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 759 (1985)). There are grave First Amendment implications when the procedural device of the class action threatens, as a practical matter, to restrict innovation and limit the free flow of information critical to economic decision-making.

The FCRA, properly construed, allows only consumers with true injury in fact to receive statutory damages. Technical violations that do not actually harm the vast majority of consumers should not threaten the destruction, through private litigation, of vital components of America's economic and informational systems.

ARGUMENT

A. This Court Should Restrain Abuses of the Class Action System.

Members of this Court often have expressed concerns that representative litigation, pursued without restraint, threatens the American economy and polity.

In *Trans Union LLC v. Fed. Trade Comm'n*, 536 U.S. 915 (2002) (Kennedy, J., dissenting), Justice Kennedy wrote, dissenting from the denial of certiorari, that a potential billion dollar exposure resulting from a FCRA statutory damages class action risked adverse effects on the nation's economy and presented important First Amendment concerns.[3] Similarly, in her dissent in *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 445 n.3 (2010) (Ginsburg, J., dissenting), Justice Ginsburg recognized, "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." *Id.* (citation omitted). And Justice Breyer, dissenting from the dismissal of certiorari in *Nike, Inc. v. Kasky*,

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[3] TransUnion actively litigated the class actions filed in the wake of the FTC order at issue in this ruling, and incurred tens of millions of dollars in defense costs. Later, the Seventh Circuit ruled, in an unrelated case, that the possibility of an unfair annihilating statutory damages award could not be considered at the class certification stage. *See Murray v. GMAC Mortgage Corp.*, 434 F.3d 948 (7th Cir. 2006). Faced with this precedent (TransUnion's headquarters are in Chicago), TransUnion had no practical choice but to settle the class cases for $75 million: TransUnion could not litigate in the face of an existential threat, even though it did not believe it ultimately would be found liable for willfully violating the Act.

539 U.S. 654, 678-80 (2003) (Breyer, J., dissenting), warned that when private plaintiffs may bring suit "even though they themselves have suffered no harm," they may "potentially constitute a large and hostile crowd freely able to bring prosecutions designed to vindicate their beliefs, and to do so unencumbered by the legal and practical checks" on "public enforcement agencies." *Id.* (citation omitted).

This Court as a whole, of course, has repeatedly recognized the dangers posed by class cases. *E.g.*, *AT&T Mobility LLC v. Concepcion*, 563 U.S. __, 131 S. Ct. 1740, 1752 (2011) ("Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims."); *Bell Atlantic v. Twombly*, 550 U.S. 544, 559 (2007) (stating that "the threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching [discovery] proceedings"); *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.").

In *Edwards v. First American Corp.*, 610 F.3d 514 (9th Cir. 2010), *cert. granted*, 131 S. Ct. 3022 (2011), *cert. dismissed as improvidently granted*, 132 S. Ct. 2536 (2012), this Court did not address whether a plaintiff lacking injury in fact could pursue a class case. The present petition presents a better vehicle for this Court to decide this important and recurring question. Unlike in *Edwards*, respondent here paid no money to petitioner and suffered no pecuniary impact whatsoever from the practices challenged in the litigation. The Ninth Circuit's decision below is based on a bare allegation that petitioner is subject to

the FCRA, but failed to comply with it. (Pet. App. at 7a-9a.) Thus the Ninth Circuit would allow a class claim to proceed even if the alleged violation had no impact whatsoever on the claimant's or any other putative class member's ability to obtain employment, insurance or credit. Under the Ninth Circuit's expansive view, the class procedure upsets the substantive balance Congress recognized in the FCRA itself: to protect consumers' interests while at the same time imposing only reasonable duties on consumer reporting agencies and others regulated under the Act.

The present petition should be granted because a proper approach to standing is an essential check against abuses of the procedural class device. "In an era of frequent litigation, class actions, sweeping injunctions with prospective effect, and continuing jurisdiction to enforce judicial remedies, courts must be more careful to insist on the formal rules of standing, not less so." *Arizona Christian Sch. Tuition Org. v. Winn*, 563 U.S. __, 131 S. Ct. 1436, 1449 (2011).

B. Article III's Standing Requirements Impose an Important Restraint on the Class Device, and Help Ensure Good Governance and Sound Policy Choices.

There may be areas of the law requiring private attorneys general to assist with enforcement efforts. Consumer reporting is not one of them. The FCRA itself authorizes administrative enforcement by both federal and state agencies. *See* 15 U.S.C. § 1681s. Moreover, independent of the FCRA, the Consumer Financial Protection Bureau has, under the Dodd-Frank Act, extensive supervisory and enforcement authority over the consumer reporting industry. *See* 12 U.S.C. § 5514; 12 C.F.R. §§ 1090.100-1090.106. The Federal Trade Commission also has FCRA

enforcement powers, and in 2012 obtained a consent decree against petitioner, imposing a substantial (but not annihilating) fine and mandating changes to its business practices. *See United States v. Spokeo, Inc.*, No. CV12-5001-MMM(SHx) (C.D. Cal. June 7, 2012).

In the present litigation (like in so many others) a private attorney is simply seeking to collect a bounty, not to improve the consumer reporting system. As a practical matter, no-injury statutory damages cases impose overshadowing regulation independent of any "rational, overall agenda" for achieving an appropriate balance between innovation and consumer protection. *See* STEPHEN BREYER, BREAKING THE VICIOUS CYCLE: TOWARD EFFECTIVE RISK REGULATION 20 (Harvard University Press 1993). Recognizing an Article III limit on such litigation is therefore essential to "prevent the judicial process from being used to usurp the powers of the political branches," which include assessing new technologies and their social implications, and (when necessary) taking appropriate, measured enforcement actions on behalf of the general public. *See Clapper v. Amnesty Int'l USA*, 568 U.S. __, 133 S. Ct. 1138, 1146 (2013).

When an uninjured plaintiff is empowered through Federal Rule of Civil Procedure 23 to seek catastrophic statutory damages for an uninjured class pursuant to the FCRA, the governmental power to prohibit or mandate particular conduct is effectively delegated to private class action attorneys, in spite of the statutory text's assignment of injunctive relief claims to government officials alone. *See* 15 U.S.C. § 1681s. Worse, private class action attorneys, unlike regulators, are highly incentivized to conclude matters quickly for their personal financial benefit, rather than to provide the greatest public benefits. *See Nike*, 539

U.S. at 679-80 (warning of the lack of any political check on lawsuits filed by uninjured plaintiffs) (Breyer, J., dissenting from the dismissal of certiorari); Tara L. Grove, *Standing as an Article II Nondelegation Doctrine*, 11 U. Pa. J. Const. L. 781, 818 (2009) ("Virtually none of the checks on executive enforcement discretion apply to private parties. Private enforcement decisions are not subject to judicial review for the simple reason that there are no constitutional or other legal restrictions to enforce. Nor are there political constraints.") (footnote omitted). Companies seeking to avoid these risks of unchecked enforcement proceedings will be reluctant to bring legally untested informational products to the market, thereby slowing innovation and impairing the public interest.

Article III's injury-in-fact requirement "is founded in concern about the proper—and properly limited—role of the courts in a democratic society." *Summers v. Earth Island Inst.*, 555 U.S. 488, 492-93 (2009) (quoting *Warth v. Seldin*, 422 U.S. 490, 498 (1975)). Congress may not "transfer from the President to the courts the Chief Executive's most important constitutional duty, to 'take Care that the Laws be faithfully executed. . . .'" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 577 (1992) (quoting U.S. Const. art. II, § 3). Congress, of course, has the power to legislate a private remedy for an actual harm, assuming Congress is otherwise acting within the scope of its Constitutional powers. *See Lujan*, 504 U.S. at 578. But Article III is offended when Congress attempts to grant judicial recourse to those who have not suffered any injury in fact. *Wallace v. ConAgra Foods, Inc.*, 747 F.3d 1025, 1030 (8th Cir. 2014). This principle applies in both individual and class cases. *See Simon v. E. Kentucky Welfare Rights Org.*,

426 U.S. 26, 40 (1976). The procedural device of a class action may not be used to enlarge, abridge or modify any substantive right, and Congress disclaims any intent to do so. *See* 28 U.S.C. § 2072(b); *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. __, 131 S. Ct. 2541, 2561 (2011). Thus, in a class case, the plaintiff must "demonstrate that the class members 'have suffered the same injury,' . . . . This does not mean merely that they have all suffered a violation of the same provision of law." *Wal-Mart*, 131 S. Ct. at 2551 (quoting *Gen. Tel. Co. of Southwest v. Falcon*, 457 U.S. 147, 157 (1982)). A class action based solely on injury in law, but with no rigorous analysis of whether the proposed class representative or any members of the proposed class suffered injury in fact (and if so, which ones), is anathema to these principles.

The Ninth Circuit's recognition of standing for injury in law, decoupled from any real-world harm, is profoundly inconsistent with authorities from the Second, Third and Eleventh Circuits, in addition to the Eighth Circuit's recent *Wallace* opinion. "The proper analysis of standing focuses on whether the plaintiff suffered an actual injury, not on whether a statute was violated." *Doe v. National Bd. of Med. Exam'rs*, 199 F.3d 146, 153 (3d Cir. 1999); *see also United States v. Weiss*, 467 F.3d 1300, 1310-11 (11th Cir. 2006) ("While it is true that Congress may enact statutes creating legal rights . . . [a] federal court's jurisdiction . . . can be invoked only when the plaintiff himself has suffered some threatened or actual injury resulting from the putatively illegal action[.]" (internal citations and quotation marks omitted) (alteration and second ellipses in original); *United States ex rel. Kreindler & Kreindler v. United Techs Corp.*, 985 F.2d 1148, 1154 (2d Cir. 1993) ("Nevertheless, some injury-in-fact must be shown to satisfy constitutional requirements, for

Congress cannot waive the constitutional minimum of injury-in-fact.").

Treating a technical violation of a statute as an injury in fact "improperly waters down the fundamental requirements of Article III" by ensuring that the plaintiff will have standing whenever a statutory violation is alleged. *See Clapper*, 133 S. Ct. at 1151. Certiorari should be granted because the Ninth Circuit has departed from this Court's precedents, deviated from its sister Circuits and ignored the settled principle "that Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff that would not otherwise have standing." *Raines v. Byrd*, 521 U.S. 811, 820 n.3 (1997).

C. Allowing Standing for Injury in Law, Without Corresponding Injury in Fact, Violates Core Separation of Powers Principles.

This Court has long recognized that just as Article III protects the courts from infringements on their Constitutional powers, Article III also prohibits Congress from expanding the judicial power beyond its Constitutional limits. *See Marbury v. Madison*, 5 U.S. (1 Cranch.) 137, 176-77 (1803).

By allowing standing for pure injury in law, with no corresponding injury in fact, the Ninth Circuit has improperly expanded the court system's "constitutionally limited role of adjudicating actual and concrete disputes, the resolutions of which have direct consequences on the parties involved." *See Genesis Healthcare Corp. v. Symczyk*, 569 U.S. __, 133 S. Ct. 1523, 1528 (2013).

Here, allowing an uninjured plaintiff to pursue a class claim for statutory damages violates "the general prohibition on a litigant's raising another person's legal rights" and "the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches." *See Allen v. Wright,* 468 U.S. 737, 751 (1984). The core of respondent's claim here is that petitioner should, as a general matter, be regulated under the FCRA. Unless petitioner's failure to be so regulated causes an injury in fact to respondent, then respondent lacks standing, because he has only a "nonconcrete interest in the proper administration of the laws," and has not been injured in any "concrete and personal way." *See Lujan*, 504 U.S. at 580-81 (Kennedy, J., concurring in part and concurring in the judgment). "Abstract injury is not enough." *O'Shea v. Littleton*, 414 U.S. 488, 495 (1974); *see also Hollingworth v. Perry*, 570 U.S. __, 133 S. Ct. 2652, 2661 (2013) (petitioner's interest in determining the constitutional validity of a generally applicable California law did not confer standing absent personal, tangible harm); *Warth*, 422 U.S. at 499 (stating that "when the asserted harm is a 'generalized grievance' shared in substantially equal measure by all or a large class of citizens, that harm alone normally does not warrant exercise of jurisdiction"). These concepts are deeply embedded in the traditional understanding of the judiciary's proper role in society, and Article III standing doctrines help to ensure that the federal courts give proper deference to the Executive branch's responsibility under Article II to take care that the laws be faithfully executed. *See* John G. Roberts, *Article III Limits on Statutory Standing*, 42 Duke L.J. 1219, 1230 (1993).

Congress exceeds its power by requiring the courts to hear litigation filed by or on behalf of individuals

who neither were injured personally by a particular practice, nor face an imminent threat of such injury. The concept of pure injury in law is simply a "kind of undifferentiated, generalized grievance" that someone else has disobeyed a statute, but the Constitution does not authorize private litigation on this basis. *See Lance v. Coffman*, 549 U.S. 437, 442 (2007); Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 Suffolk U. L. Rev. 881, 886 (1983) (stating that "there is a limit upon even the power of Congress to convert generalized benefits into legal rights—and that is the limitation imposed by the so-called 'core' requirement of standing. It is a limitation, I would assert, only upon the *congressional* power to confer standing, and not upon the courts, since the courts *have* no such power to begin with.") (emphasis in original).

"No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." *Simon*, 426 U.S. at 37. "One essential aspect of this requirement is that any person invoking the power of a federal court must demonstrate standing to do so." *Hollingworth*, 133 S. Ct. at 2660. "The constitutional requirements for federal-court jurisdiction—including the standing requirements and Article III—'are an essential ingredient of separation and equilibrium of powers.'" *Hein v. Freedom From Religion Found.*, 551 U.S. 587, 611 (2007) (quoting *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101 (1998)).

The Ninth Circuit's opinion improperly departs from the above principles. Article III does not authorize a court to hear a dispute brought by a plaintiff who suffered no injury in fact, and Congress may not

through legislation allow what the Constitution prohibits. Certiorari should be granted so that this Court may explain how these limits should be defined and applied.

D. Allowing Standing for Injury in Law, Without Corresponding Injury in Fact, in a Lawsuit Challenging Communications, Also Threatens Important First Amendment Values.

Much of the FCRA attempts to protect the same interests protected by the common law of defamation or invasion of privacy. The opinion below, however, would vastly expand FCRA liability to circumstances where no plaintiff or any putative class member suffered any actual impairment to his reputation or any other traditional tort-like injury. Here, sound Article III jurisprudence will help protect important First Amendment values. To allow uninjured consumers to participate in FCRA class actions "works speech-related harm that is out of proportion to" the statute's goals. *See United States v. Alvarez*, 567 U.S. __, 132 S. Ct. 2537, 2551 (2012) (Breyer, J., concurring).

This Court recognizes that "the creation and dissemination of information are speech within the meaning of the First Amendment. . . . Facts, after all, are the beginning point for much of the speech that is most essential to advance human knowledge and to conduct human affairs." *Sorrell*, 131 S. Ct. at 2667 (citing *Bartnicki v. Vopper*, 532 U.S. 514, 527 (2001)) (stating that "if the acts of 'disclosing' and 'publishing' information do not constitute speech, it is hard to imagine what does fall within that category, as distinct from the category of expressive conduct") (internal quotation marks and alterations omitted).

Rapid advances in technology will continue to lead to new and different methods of distributing information, unless legal risk interferes. The First Amendment, however, protects the transmission of information even if transmission occurs by means other than traditional print media. *E.g.*, *Lovell v. City of Griffin*, 303 U.S. 444, 452 (1938) ("every sort of publication which affords a vehicle of information and opinion"). The First Amendment also protects for-profit ventures. *E.g.*, *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 351-52 (2010). The threat of a class action litigation seeking millions or even billions of dollars in FCRA statutory damages will have an extraordinary chilling effect on companies that otherwise would expand access to publicly available information. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 294-95 (1964) (discussing how civil litigation may impair protected First Amendment activity; "public feelings may make local as well as out-of-state news-papers easy prey for libel verdict seekers") (Black, J., concurring).

The underlying claim in the present litigation comes dangerously close to suggesting that the FCRA provides consumers with a "right to be forgotten" on the internet, something out-of-tune with American free speech principles.[4] No-injury statutory damages

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[4] *See* Ciaran Giles et al., *European Court: Google Must Yield On Personal Info*, WASH. POST, May 13, 2014, ¶ 17, available at http://www.washingtonpost.com/world/europe/european-court-google-must-amend-some-results/2014/05/13/f372fe08-da78-11e3-a837-8835df6c12c4_story.html (quoting Professor Joel Reidenberg regarding the Court of Justice of the European Union's decision: "'There's not much guidance for Google on how to figure out how and when they are supposed to comply with take-down requests. . . .'"); Max Mosley, *Google and the EU on Being Forgotten*, ECONOMIST, May 17, 2014, ¶ 4, available at

class actions improperly threaten "a novel restriction on content" in a novel technological environment. *See Alvarez*, 132 S. Ct. at 2547 (plurality opinion) (quoting *Brown v. Entm't Merchants Ass'n*, 564 U.S. ___, 131 S. Ct. 2729, 2734 (2011)).

If Congress has the power to override Article III's standing requirements and allow private litigants to commence statutory damages class actions, without regard to injury in fact, companies will refrain from developing new information products due to the specter of destructive litigation that will follow even technical statutory violations. This Court's Article III jurisprudence supports its First Amendment jurisprudence, and that too is a reason to grant certiorari.

E. Article III Requires the FCRA to Be Construed to Include an Injury-in-Fact Requirement.

At a minimum, Article III requires the FCRA to be construed to include an injury-in-fact requirement. *See United States v. X-Citement Video, Inc.*, 513 U.S. 64, 69 (1994) (federal statutes should be "construed where fairly possible so as to avoid substantial constitutional questions"). Such a constitutionally-compliant construction will not hinder, but rather will promote Congress's goal of fairly compensating those consumers who are actually harmed by a violation.

An injury-in-fact requirement thus comports with Article III, the statutory text and Congressional intent. Section 1681n nowhere states expressly that a

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http://www.economist.com/news/leaders/21602219-right-be-forgotten-sounds-attractive-it-creates-more-problems-it-solves-being ("Even if Google is made to censor its search results in Europe, in America the First Amendment's free-speech provision usually trumps privacy concerns.").

wholly undamaged consumer has a right to sue. To the contrary, it states that a defendant who violates any requirement of the Act with respect to any consumer "is liable to that consumer in an amount equal to . . . any actual damages sustained by the consumer as a result of the [willful] failure [to comply with a statutory "requirement"] or damages of not less than $100 and not more than $1,000. . . ." 15 U.S.C. § 1681n(a)(1)(A). Read properly, this provision means that where damages are genuine but small, or difficult to quantify, the damaged consumer is guaranteed a minimum recovery. Nonetheless, some real-world impact on the plaintiff still must be shown as a precondition to suit. "A reasonable reading of the statute could still require proof of actual damages but simply substitute statutory rather than actual damages for the purpose of calculating the damage award." *Dowell v. Wells Fargo Bank, N.A.*, 517 F.3d 1024, 1026 (8th Cir. 2008); *see also Cassara v. DAC Servs. Inc.*, 276 F.3d 1210, 1217 (10th Cir. 2002) (statutory damages claim may not be pursued without proof of some actual damages).[5]

As this Court recognized in interpreting another statute, "a guaranteed minimum" statutory damages is "contingent upon some showing of actual damages, thereby avoiding giveaways to plaintiffs with nothing more than abstract injuries. . . ." *Doe v. Chao*, 540 U.S. 614, 625-26 (2004) (citation and internal quotation

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[5] The plaintiff in *TRW, Inc. v. Andrews*, 534 U.S. 19, 33-35 (2001), argued that a FCRA claim does not accrue for statute of limitations purposes until after injury occurs, because injury is an element of the claim; this Court noted the argument but did not rule on its validity. The FCRA provision construed in *TRW*, 15 U.S.C. § 1681p, was subsequently amended. Pub. L. 108-159, § 156, 117 Stat. 1968 (Dec. 4, 2003).

omitted). Likewise, nothing suggests that Congress intended for technical violations of the FCRA, which cause no harm to any specific consumer, to trigger enterprise-threatening statutory damages class actions:

> I worry that the exponential expansion of statutory damages through the aggressive use of the class action device is a real jobs killer that Congress has not sanctioned. To certify in cases where no plaintiff has suffered any actual harm from identity theft and where innocent employees may suffer the catastrophic fallout could not have been Congress's intent. Indeed, the relatively modest range of statutory damages chosen by Congress suggests that bankrupting entire businesses over somewhat technical violations was not among Congress's objectives. . . . Certainly nothing in 15 U.S.C. § 1681n(a)(1) would lead us to believe that Congress intended the modest range of statutory damages to be transformed into corporate death by a thousand cuts through Rule 23.

Stillmock v. Weis Markets, Inc., 385 F. App'x 267, 276 (4th Cir. 2010) (Wilkinson, J., concurring specially); *see also London v. Wal-Mart Stores, Inc.*, 340 F.3d 1246, 1255 n.5 (11th Cir. 2003) (refusing to certify a statutory damages class where the defendant's potential liability "would be enormous and completely out of proportion to any harm suffered by the plaintiff") (citation omitted).

According to the FCRA's legislative history, the statute's main purpose 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). To allow a consumer who was not damaged to seek a recovery for a purely legal violation, which did not cause him or her any actual harm, would both violate Article III and contradict Congressional intent. *See Paroline v. United States*, 572 U.S. __, 134 S. Ct. 1710, 1720 (2014) ("this Court has more than once found a proximate-cause requirement built into a statute that did not expressly impose one"); *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 266 (1992) (noting the unlikelihood that Congress intended for literally "all factually injured plaintiffs" to recover under the Racketeer Influenced and Corrupt Organizations Act); *see also Joint Stock Soc'y v. UDV N. Am., Inc.*, 266 F.3d 164, 176 (3d Cir. 2001) (plaintiffs lacked standing under the Lanham Act because they failed to allege that defendants' alleged misconduct "harmed" them and thus lacked "injury in fact") (Alito, J.).

Congress "legislates in the light of constitutional limitations." *Rust v. Sullivan*, 500 U.S. 173, 191 (1991). An injury-in-fact requirement—a "hard floor of Article III jurisdiction that cannot be removed by statute"—therefore should be recognized as part of the FCRA's statutory damages provision. *See Summers*, 555 U.S. at 497; *Douglas v. Cunningham*, 294 U.S. 207, 209 (1935) (copyright statutory damages address the problem of "difficult or impossible proof of damages or discovery of [the defendant's] profits"); *Perrone v. General Motors Acceptance Corp.*, 232 F.3d 433, 436 (5th Cir. 2000) ("statutory damages are reserved for cases in which the damages caused by a violation are small or difficult to ascertain."). It is error to assume, as the Ninth Circuit did, that Congress authorized, in derogation of Article III, potential class action recovery for thousands or even millions of people who

never suffered any "personal and tangible harm." *See Hollingworth*, 133 S. Ct. at 2661.

Certiorari should be granted because if 15 U.S.C. § 1681n(a)(1)(A) lacks an injury-in-fact requirement, it violates Article III of the Constitution.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ of certiorari.

Respectfully submitted,

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