No. 14-17186

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SARMAD SYED, an individual, on behalf of other members of the public similarly situated,

Plaintiff-Appellant,

v.

M-I, LLC, a Delaware Limited Liability Company; PRECHECK, INC., a Texas Corporation,

Defendants-Appellees.

On Appeal from the U.S. District Court
for the Eastern District of California
No. 1:14-cv-00742-WBS-BAM (Shubb, J.)

MOTION FOR LEAVE TO FILE BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANT-APPELLEE M-I, LLC'S PETITION FOR PANEL REHEARING OR REHEARING *EN BANC*

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MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE* IN SUPPORT OF DEFENDANT-APPELLEE M-I, LLC

Pursuant to Rule 29 of the Federal Rules of Appellate Procedure and Circuit Rule 29-3, the Chamber of Commerce of the United States of America (the "Chamber") respectfully requests leave to file the accompanying *amicus* brief in support of Defendant-Appellee M-I, LLC's Petition for Panel Rehearing or Rehearing *En Banc*. In support of this motion, the Chamber states as follows:

1. The Chamber is the world's largest business federation. The Chamber represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country.

2. The Chamber represents the interests of its members in matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of vital concern to the Nation's business community, including cases addressing the requirements for Article III standing. The Chamber participated as an *amicus* before the Supreme Court at both the petition and merits stages in *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540

(2016)—which is at the heart of the Article III standing issue presented in this case.

3. The Chamber has a significant interest in the issues presented in this case because its members frequently face putative class action lawsuits alleging bare violations of the Fair Credit Reporting Act and other statutes—without any plausible allegation that the plaintiff has suffered actual harm.

4. The Chamber respectfully submits that its proposed brief will aid in the Court's resolution of the petition. The proposed *amicus* brief attached to this motion explains why rehearing of the panel's opinion is warranted, and why the panel's opinion, if left to stand, would impose unjustified costs on businesses.

5. Defendants-Appellees have consented to the filing of the *amicus* brief. Counsel for the Chamber contacted counsel for Plaintiff-Appellant by email and telephone to inquire about consent, but was unable to obtain a response, necessitating the filing of this motion.

WHEREFORE, the Chamber respectfully requests that the Court grant its motion for leave to file the attached brief as *amicus curiae*.

Dated: February 27, 2017

Respectfully submitted,

/s/ *Andrew J. Pincus*

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the undersigned counsel certifies that this motion:

(i) complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared using Microsoft Office Word 2007 and is set in Century Schoolbook font in a size equivalent to 14 points or larger; and

(ii) complies with the length requirement of Rule 27(d)(2) because it is 353 words.

Dated: February 27, 2017

/s/ *Andrew J. Pincus*
Andrew J. Pincus
Counsel for Amicus Curiae

CERTIFICATE OF FILING AND SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on February 27, 2017. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ *Andrew J. Pincus*
Andrew J. Pincus
Counsel for Amicus Curiae

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

The Chamber of Commerce of the United States of America is a non-profit corporation organized under the laws of the District of Columbia. It has no parent corporation. No publicly held corporation owns ten percent or more of its stock.

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INTEREST OF THE *AMICUS CURIAE*

The Chamber of Commerce of the United States of America is the world's largest business federation. The Chamber represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country.[1]

The Chamber represents the interests of its members in matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of vital concern to the Nation's business community, including cases addressing the requirements for Article III standing. The Chamber participated as an *amicus* before the Supreme Court at both the petition and merits stages in *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016).

The Chamber has a significant interest in the issues presented in this case because its members frequently face putative class action lawsuits alleging bare violations of the Fair Credit Reporting Act and other statutes—without any plausible allegation that the plaintiff has

[1] Pursuant to Federal Rule of Appellate Procedure 29(c)(5), *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus*, its members, or its counsel has made any monetary contributions intended to fund the preparation or submission of this brief.

suffered actual harm. The Supreme Court in *Spokeo* affirmed that the Constitution requires plaintiffs to allege concrete, *i.e.*, "real," harm—rejecting the contention that alleging a bare statutory violation automatically satisfies Article III's injury-in-fact requirement. If, despite *Spokeo*'s mandate, the panel's opinion stands, the federal courts will be forced to hear, and businesses (including the Chamber's members) will be mired in, lawsuits over alleged technical statutory violations that have not caused any actual harm. And the reality is that these cases are designed to force costly settlements rather than redress actual, real-world injuries.

The Chamber therefore has a strong interest in this case and in rehearing by the panel or an *en banc* Court.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

This case provides a paradigmatic example of a no-injury class action that, under the Supreme Court's holding in *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016), cannot proceed in federal court. The plaintiff does not deny that when he applied for (and ultimately *obtained*) a job with M-I, M-I provided him with a form disclosing that it would procure a background report about him. Nor does he deny that he signed the form and thereby acknowledged that M-I would procure the report for purposes of evaluating his suitability for employment.

He claims only that the disclosure form did not comply with the provision of the Fair Credit Reporting Act (FCRA) that requires such disclosures to be presented on a separate piece of paper that contains no other information (besides the applicant's authorization). 15 U.S.C. § 1681b(b)(2)(A). Tellingly, however, he does not allege any consequence to him from this claimed foot-fault: for instance, he does not allege that if he had received the disclosure in a different manner, he would not have signed the form; that he would not have sought the job; or that he would have done anything differently at all. *See also* Pet. 3-4, 7.

Nonetheless, the panel in this case—without the benefit of any briefing following the Supreme Court's decision in *Spokeo*—held in a single paragraph that an alleged violation of the FCRA's stand-alone disclosure provision automatically satisfies Article III, even if the plaintiff experienced no adverse consequences whatsoever from the violation. Op. 9-10.

With respect, that holding—which conflicts with the majority of decisions addressing this precise question—cannot be squared with the Supreme Court's decision in *Spokeo*. As the Supreme Court explained, "Article III standing requires a concrete injury even in the context of a statutory violation," and a plaintiff does not "automatically satisf[y] the injury-in-fact requirement whenever a statute grants [him] a statutory right and purports to authorize [him] to sue to vindicate that right." 136 S. Ct. at 1549. Indeed, the Supreme Court declared that "fail[ing] to provide [statutorily] required notice," without more, is insufficient to allege concrete harm. *Id.* at 1550. *A fortiori*, therefore, providing the required notice but failing to do so on a separate piece of paper cannot, standing alone, constitute concrete harm. The panel's holding also conflicts with the decisions of seven other circuits, holding in a variety

of contexts that *Spokeo* requires a plaintiff to allege a real, concrete injury to himself or herself resulting from an alleged statutory violation.

Moreover, while the panel relied on a single district court case to support its conclusion, *Thomas v. FTS USA, LLC*, 193 F. Supp. 3d 623 (E.D. Va. 2016), it failed to recognize at least *seven* decisions expressly rejecting that case's reasoning or distinguishing it on its facts—including three decisions in which losing plaintiffs have appealed to this Court. *See Case v. Hertz Corp.*, 2016 WL 6835086 (N.D. Cal. 2016), *appeal pending* (16-17231); *Kirchner v. First Advantage Background Servs. Corp.*, 2016 WL 6766944 (E.D. Cal. 2016), *appeal pending* (16-17210); *Nokchan v. Lyft, Inc.*, 2016 WL 5815287 (N.D. Cal. 2016), *appeal pending* (16-16876).[2] Nor did the panel engage with the numerous other cases that have likewise concluded that a bare violation of the FCRA's stand-alone disclosure provision does not amount to a concrete injury in fact.[3]

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[2] *See also Lee v. Hertz Corp.*, 2016 WL 7034060 (N.D. Cal. 2016); *In re Michaels Stores, Inc. FCRA Litig.*, 2017 WL 354023 (D.N.J. 2017); *Tyus v. U.S. Postal Serv.*, 2016 WL 6108942 (E.D. Wis. 2016), *reconsideration denied in relevant part*, 2017 WL 52609 (E.D. Wis. 2017); *Shoots v. iQor Holdings US Inc.*, 2016 WL 6090723 (D. Minn. 2016).

[3] *See, e.g.*, *LeGrand v. IntelliCorp Records, Inc.*, 2017 WL 733664 (N.D. Ohio 2017); *Groshek v. Great Lakes Higher Educ. Corp.*, 2016 WL

As this volume of cases indicates, the plaintiffs' bar has developed a cottage industry of suing businesses for bare violations of FCRA's stand-alone disclosure provision, attempting to use the combination of the class action mechanism and statutory damages to extract massive settlements from businesses in the absence of any actual harm.[4] The critical and frequently recurring question whether such suits satisfy the dictates of Article III warrants full consideration and rehearing by the panel or *en banc* Court.

6819697 (W.D. Wis. 2016); *Boergert v. Kelly Servs., Inc.*, 2016 WL 6693104 (W.D. Mo. 2016), *reconsideration denied in relevant part*, 2017 WL 440272 (W.D. Mo. 2017); *Gunther v. DSW Inc.*, 2016 WL 6537975 (E.D. Wis. 2016); *Landrum v. Blackbird Enters., LLC*, 2016 WL 6075446 (S.D. Tex. 2016); *Fisher v. Enterprise Holdings, Inc.*, 2016 WL 4665899 (E.D. Mo. 2016); *Groshek v. Time Warner Cable, Inc.*, 2016 WL 4203506 (E.D. Wis. 2016); *Smith v. Ohio State Univ.*, 2016 WL 3182675 (S.D. Ohio 2016).

[4] As the petition persuasively explains (at 12-16), rehearing is also independently warranted to resolve the proper standard for "willfulness" under the FCRA—which is a prerequisite to statutory damages. *See* 15 U.S.C. § 1681n(a)(1).

ARGUMENT

I. The Panel's Holding That The Plaintiff Has Article III Standing Conflicts With The Supreme Court's Decision In *Spokeo* And The Holdings Of Other Circuits.

A. *Spokeo* squarely held that alleging a bare violation of the FCRA—without more—does not confer standing to sue.

The panel held here that Congress's enactment of the stand-alone disclosure provision in the FCRA accompanied by "a private cause of action" for any violation of the statute's requirements means that a plaintiff automatically satisfies Article III by alleging a violation of that provision. Op. 10-11.

That reasoning is indistinguishable from the legal rule adopted by this Court in *Spokeo*, *see Robins v. Spokeo, Inc.*, 742 F.3d 409, 413 (9th Cir. 2014), and squarely *rejected* by the Supreme Court, which held that a plaintiff cannot plead a concrete "injury in fact" merely by alleging a bare statutory violation "divorced from any concrete harm." *Spokeo*, 136 S. Ct. at 1549. The Supreme Court stated: "Article III standing requires a concrete injury *even in the context of a statutory violation*." *Id.* (emphasis added); *see also* Pet. 6-10. The Court likewise admonished that "Congress's role in identifying and elevating intangible harms does *not* mean that a plaintiff automatically satisfies the injury-in-fact

requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right." 136 S. Ct. at 1549 (emphasis added).

At least seven other circuits have recognized that the Supreme Court meant what it said in *Spokeo*—plaintiffs may not satisfy their obligation to establish standing by asserting ***only*** "the invasion of a legal right that Congress created." *Braitberg v. Charter Comm'cns, Inc.*, 836 F.3d 925, 930 (8th Cir. 2016) (emphasis and quotation marks omitted); *see also Ross v. AXA Equitable Life Ins. Co.*, --- F. App'x ----, 2017 WL 730266, at *2 (2d Cir. 2017) ("Appellants cannot rely solely on a violation of New York Insurance Law Sections 4226(a)(4) and (d) in order to satisfy Article III's injury-in-fact requirement.") (citing *Strubel v. Comenity Bank*, 842 F.3d 181, 193 (2d Cir. 2016)); *Soehnlen v. Fleet Owners Ins. Fund*, 844 F.3d 576, 582 (6th Cir. 2016) (holding that "merely alleging a violation of ERISA rights" is not enough to "satisfy [plaintiffs'] obligation under Article III"); *Nicklaw v. CitiMortgage, Inc.*, 839 F.3d 998 (11th Cir. 2016) ("Article III is not satisfied every time a statute creates a legal obligation and grants a private right of action for its violation."); *Hancock v. Urban Outfitters, Inc.*, 830 F.3d 511, 514 (D.C. Cir. 2016) ("[A]n asserted injury to even a statutorily conferred

right 'must actually exist,' and must have 'affect[ed] the plaintiff in a personal and individual way.'"); *Lee v. Verizon Commc'ns, Inc.*, 837 F.3d 523, 529 (5th Cir. 2016) ("*Spokeo* recognize[d] that at minimum, a 'concrete' intangible injury based on a statutory violation must constitute a 'risk of real harm' to the plaintiff.").

For instance, the Seventh Circuit held that, under *Spokeo*, the legislature "does not have the final word on whether a plaintiff has alleged sufficient injury for purposes of standing." *Meyers v. Nicolet Restaurant of De Pere, LLC*, 843 F.3d 724, 727 (7th Cir. 2016). Even when a legislature "has passed a statute coupled with a private right of action," "the plaintiff still must allege a concrete injury that resulted from the violation *in his case*." *Id.* (emphasis added). "[O]ne of the lessons of *Spokeo,*" the court stated, is that "[a] violation of a statute that causes no harm does not trigger a federal case." *Id.* at 727 n.2. That is true regardless of whether the statutory "right is characterized as substantive or procedural"; in either case, "its violation must be accompanied by an injury-in-fact." *Id.*; *accord Gubala v. Time Warner Cable, Inc.*, 846 F.3d 909, 912 (7th Cir. 2017).

Contrary to the cases just discussed, the panel suggested that *Spokeo* is limited to "procedural" violations. Op. 10. But that suggestion

misunderstands *Spokeo*. The Supreme Court did cite a "bare procedural violation" as an "*example*" of a violation that, in the absence of concrete harm, would not satisfy the injury-in-fact requirement. 136 S. Ct. at 1549 (emphasis added). But the concrete-harm requirement is *not* limited to "procedural" violations. The Court held that "Article III standing requires a concrete injury even in the context of a statutory violation" (*id.*)—and that holding applies to a statutory violation of *any* kind, procedural or otherwise. After all, "'Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing.'" *Id.* at 1547-48 (quoting *Raines v. Byrd*, 521 U.S. 811, 820 n.3 (1997)).

For that reason, a number of courts of appeals have squarely held that *Spokeo*'s concrete injury requirement applies whether or not the claimed statutory violation can be labeled as "procedural." *Gubala*, 846 F.3d at 912; *Meyers*, 843 F.3d at 727 n.2; *Hancock*, 830 F.3d at 514.[5]

[5] Even if the distinction between procedural and substantive violations were relevant, the claimed violation here still falls on the procedural side of the line. As the panel elsewhere noted, in enacting the stand-alone disclosure provision, "Congress prohibited procurement of consumer reports unless certain specified *procedures* were followed." Op. 6 (emphasis added); *see also, e.g.*, *In re Michaels Stores*, 2017 WL 354023, at *7 ("The stand-alone requirement is no less procedural than a hypothetical requirement that the disclosure be printed with double

In short, *Spokeo* confirms that the injury-in-fact requirement mandates that the plaintiff allege that he or she suffered *real-world adverse consequences* from an alleged statutory violation. Because the panel's decision cannot be squared with the Supreme Court's mandate in *Spokeo*, it should not be permitted to stand. *See* Fed. R. App. P. 35(b)(1)(A). At a minimum, the panel's holding creates a conflict with numerous other circuits, which independently warrants rehearing. *See* Fed. R. App. P. 35(b)(1)(B); 9th Cir. R. 35-1.

B. The allegations in this case do not establish a cognizable invasion of privacy or informational injury.

The panel upheld plaintiff's standing on the theory that the stand-alone disclosure provision creates a "right to information" and a "right to privacy." Op. 11. But the Supreme Court held that a plaintiff must demonstrate "concrete *injury*" resulting from a statutory violation that is "'real' and not 'abstract.'" *Id.* at 1548 (emphasis added). The panel's focus on the "right" rather than the "injury" is, therefore, a different question than the one the Supreme Court asked—and one that improperly casts aside *Spokeo*'s holding that "Article III standing

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spacing or in a given font."). To say that a plaintiff has a substantive right to enforce compliance with statutorily-mandated procedures would render the purported distinction meaningless.

requires a concrete injury even in the context of a statutory violation." *Id.* at 1549; *see also* pp. 8-9, *supra* (collecting contrary decisions from other circuits).

The two purported intangible harms identified by the panel—violations of information and privacy rights—also fail on their own terms under the allegations presented here. The panel failed to apply the Supreme Court's two-prong test to aid in determining whether an alleged intangible harm is sufficiently concrete: (1) does the alleged harm have "a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts;" and (2) did Congress make a "judgment" that the particular "intangible harms . . . meet Article III requirements." *Spokeo*, 136 S. Ct. at 1549. A bare allegation that a disclosure is not formatted on a separate piece of paper, without more, falls far short under this test.

1. Any purported harm from the violation of the stand-alone disclosure provision in this case bears no resemblance to cognizable informational injuries or invasions of privacy.

On the informational front, plaintiff does not allege that he failed to receive the information the FCRA required M-I to disclose—that a background report would be procured about him for employment

purposes—or even that the inclusion of extra information on the disclosure form obscured in any way his understanding of the disclosure. He alleges only that the information was not presented in the proper ***format***—an alleged harm that is different in kind from the statutory violations at issue in the "informational injury" cases cited in *Spokeo*, which involved plaintiffs' ***inability*** to obtain information that the government was required by statute to disclose. *See* 136 S. Ct. at 1549-50 (citing *Federal Election Commission v. Akins*, 524 U.S. 11 (1998); *Public Citizen v. Department of Justice*, 491 U.S. 440 (1989)).

The distinction is well-illustrated in this context by one court's colorful example: "a noncompliant disclosure that did not appear in a stand-alone document, but in flashing red letters a foot high, could nevertheless be unmissable. . . . [A] concrete injury entails, at a minimum, that the statutory violation *in fact* denied the plaintiff information to which the plaintiff was entitled." *In re Michaels*, 2017 WL 354023, at *6; *see also, e.g.*, *Shoots*, 2016 WL 6090723, at *7 ("[T]he Court's concern in the realm of informational injury has been with the *deprivation* of information to which the plaintiff is otherwise entitled.").

Plaintiffs' allegations also do not amount to anything resembling an invasion of privacy. Even assuming that it would be a cognizable

invasion of privacy for an employer to obtain a background report on an applicant without the applicant's consent or authorization, that is not what is alleged here. The panel appeared to conflate the procurement of a background report about the plaintiff—a fact that was disclosed to the plaintiff in advance and authorized by him—with the formatting of the disclosure and consent form that was provided to him.

Plaintiff does not—and cannot—articulate any coherent theory for how his privacy was violated by the extraneous information on the disclosure document. For example, variations in the design and layout of a document in no way "intrude[], physically or otherwise, upon the solitude or seclusion of another or his private affairs"—much less in a manner that "would be highly offensive to a reasonable person." RESTATEMENT (SECOND) OF TORTS § 652B (1977); *see also, e.g.*, *Nokchan*, 2016 WL 5815287, at *6 (distinguishing same section of the Restatement and noting the absence of "any authority in support of th[e] proposition" that standing is established by an "allegation that the authorization [plaintiff] gave [defendant] to obtain his personal information was not *proper*").

For these reasons, at least ***nine*** judges—including three within this Circuit—have expressly rejected claimed harms of informational

injury and invasion of privacy based solely on violations of the FCRA's stand-alone disclosure requirement. *Case*, 2016 WL 6835086, at *3-4; *Lee*, 2016 WL 7034060, at *4-5; *Kirchner*, 2016 WL 6766944, at *3; *Nokchan*, 2016 WL 5815287, at *6-9; *In re Michaels*, 2017 WL 354023, at *5-11; *Groshek*, 2016 WL 6819697, at *2; *Boergert*, 2016 WL 6693104, at *3-4; *Gunther*, 2016 WL 6537975, at *3-5; *Shoots*, 2016 WL 6090723, at *4-8; *Landrum*, 2016 WL 6075446, at *3-4.

2. In addition, there is no congressional judgment that each and every failure to provide a disclosure on a separate piece of paper should trigger a lawsuit in federal court. Instead, Congress created a private cause of action for *every* violation of the FCRA (*see* 15 U.S.C. § 1681*o*(a)); and it subsequently authorized statutory damages for *every* willful violation (*see id.* § 1681n(a)(1)). There is no evidence that Congress focused on the stand-alone disclosure provision of the FCRA—much less that it made a "judgment" (*Spokeo*, 136 S. Ct. at 1549) that such violations should be actionable even when not accompanied by any "real" injury or concrete consequence.

Moreover, the panel's background references to Congress's "overarching purposes" in enacting the FCRA of "ensuring accurate credit reporting, promoting efficient error correction, and protecting

privacy" (Op. 5) do not circumvent plaintiff's burden of alleging concrete injury resulting from the particular violation *in his case*. A contrary rule would render *Spokeo* a nullity: Whenever Congress enacts a statutory requirement, its goal is to further some purpose. In nearly every case, therefore, a violation of a statutory requirement, at least to some degree, hinders full accomplishment of the statute's objectives.

Indeed, the Supreme Court specifically cautioned in *Spokeo* that some violations of the FCRA could "result in no harm," even if they involve alleged conduct that violates the law *and* Congress' purpose in enacting that law. 136 S. Ct. at 1550. The Court pointed out that, in enacting the FCRA, "Congress plainly sought to curb the dissemination of false information," yet for purposes of Article III standing, "not all inaccuracies cause harm or present any material risk of harm." *Id.*; *see also, e.g.*, *Hancock*, 830 F.3d at 514 (explaining that, under *Spokeo*, "some statutory violations could 'result in no harm,' even if they involved producing information in a way that violated the law").

Even if plaintiff could show that Congress had made the requisite determination—and he cannot—*Spokeo* makes clear that any such judgment is "instructive" rather than dispositive. 136 S. Ct. at 1549. Congress could not transform by fiat conduct that "works [no] concrete

harm" (*id.* at 1550) into a "concrete" harm. That would transgress the "hard floor of Article III jurisdiction that cannot be removed by statute." *Summers v. Earth Island Inst.*, 555 U.S. 488, 497 (2009).

II. Whether Article III Standing Is Satisfied By A Bare Violation Of The FCRA's Stand-Alone Disclosure Provision Is A Frequently Recurring And Exceptionally Important Issue That Has Divided The Courts.

Perhaps because the standing issue was never fully briefed, the panel's one-paragraph standing discussion did not engage with the substantial body of post-*Spokeo* case law on alleged violations of the FCRA's stand-alone disclosure provision.[6] Instead, the panel cited only the district court decision in *Thomas*. Op. 11.

To be sure, a handful of other district courts have agreed with *Thomas*.[7] But as detailed above (at 5 & nn.2-3), at least ***fifteen*** decisions have held that *Spokeo* requires rejection of the argument that a bare violation of the FCRA's stand-alone disclosure provision is itself

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[6] M-I flagged the then-pending *Spokeo* case in a footnote (M-I Br. 13 n.4), but there was no other briefing on the standing issue; nor was there any supplemental briefing after the Supreme Court decided *Spokeo*.

[7] *See, e.g.*, *Hargrett v. Amazon.com*, 2017 WL 416427, at *4-5 (M.D. Fla. 2017) (collecting cases, although noting "the split in persuasive authority"); *Mix v. Asurion Ins. Servs.*, 2016 WL 7229140 (D. Ariz. 2016).

a concrete injury. As the district judge here summarized in another case, "[t]o the extent *Thomas* and other unpublished cases after *Spokeo* have gone so far as to hold that inclusion of 'extraneous' information on a (b)(2) notice is itself a 'concrete' injury, the court must join with numerous other courts in respectfully disagreeing with such authorities." *Kirchner*, 2016 WL 6766944, at *3 (footnote omitted). For the reasons discussed above, this substantial weight of authority is better reasoned and properly adheres to *Spokeo*'s mandate. At a minimum, however, it demonstrates that the Article III standing issue presented here is frequently recurring and merits full briefing and more detailed consideration by this Court on rehearing.

III. No-Injury Lawsuits Like This One Impose Unjustified Costs On Businesses.

Finally, rehearing is critical because the failure to properly apply Article III's injury-in-fact requirement carries significant real-world adverse consequences. The sheer volume of cases alleging bare violations of the FCRA's stand-alone disclosure requirement is emblematic of broader abuses of the class-action device. Rather than litigate alleged statutory violations in the context of actual injuries caused to a particular plaintiff, entrepreneurial class-action lawyers

deliberately litigate their claims of statutory violations in the abstract to expand the class size and increase settlement amounts.

Indeed, "[w]hat makes these statutory damages class actions so attractive to plaintiffs' lawyers is simple mathematics: these suits multiply a minimum $100 statutory award (and potentially a maximum $1,000 award) by the number of individuals in a nationwide or statewide class." Sheila B. Scheuerman, *Due Process Forgotten: The Problem of Statutory Damages and Class Actions*, 74 Mo. L. Rev. 103, 114 (2009); *see also* Pet. 3, 12.

As the Seventh Circuit recently put it, the only "'victims'" of strict adherence to Article III's injury-in-fact requirement are, by definition, "persons or organizations who suffer no significant deprivation if denied the right to sue." *Gubala*, 846 F.3d at 912. Yet in stark contrast to plaintiff's purported injury here, the injuries inflicted upon businesses by the relaxation of constitutional standing requirements are anything but abstract. Lawsuits such as this one create a risk of crippling damages for conduct that has caused no actual harm—often resulting in *in terrorem* settlements that impose substantial costs on businesses

even though no one has actually been injured and even when the underlying claims lack merit.[8]

The Supreme Court has recognized this problem, underscoring that in this "era of frequent litigation [and] class actions . . ., courts must be more careful to insist on the formal rules of standing, not less so." *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 146 (2011). The panel's failure to do so cries out for rehearing.

[8] *See, e.g.*, *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 445 n.3 (2010) (Ginsburg, J., dissenting) ("A court's decision to certify a class . . . places pressure on the defendant to settle even unmeritorious claims."); Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 99 (2009) ("With vanishingly rare exception, class certification sets the litigation on a path toward resolution by way of settlement, not full-fledged testing of the plaintiffs' case by trial.").

CONCLUSION

The petition for panel rehearing or rehearing *en banc* should be granted.

Dated: February 27, 2017

Respectfully submitted,

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I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on February 27, 2017. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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