feinberg jackson worthman & wasow

2030 Addison Street, Suite 500, Berkeley, CA 94704
tel: 510/269.7998 • fax: 510/269.7994
www.feinbergjackson.com

December 21, 2022

The Honorable Chief Justice and Associate Justices
California Supreme Court
350 McAllister Street
San Francisco, CA 94102

RE: *Limon v. Circle K Stores Inc.*, S277435
Letter of *Amici Curiae* Electronic Frontier Foundation and Electronic Privacy Information Center in Support of Petition for Review

To the Honorable Chief Justice and Associate Justices of the Court,

Amici Electronic Frontier Foundation ("EFF") and Electronic Privacy Information Center ("EPIC") respectfully urge the Court to grant review in this matter. *Amici* submit that, for the reasons discussed herein, review is necessary "to settle an important question of law." Cal. Rules of Court, rule 8.500(b)(1).

Specifically, the opinion of the Court of Appeal in *Limon v. Circle K Stores Inc.* ("*Limon*") incorrectly imports restrictive federal standing requirements into independent California law. If left undisturbed, that holding is likely to deny justice to many Californians who otherwise have standing to enforce their rights under critical federal and state consumer protection statutes.

I. Identity and Interests of *Amici*.

EFF is a nonprofit organization that works to ensure that technology supports freedom, justice, and innovation for all people. EFF was founded in 1990 and has more than 32,000 members. It advocates before courts and legislatures to protect the privacy of technology users and consumers from corporations that collect and monetize their personal information. EFF has filed numerous *amicus* briefs that address whether a plaintiff has suffered sufficient injury to enforce a data privacy law, including in *TransUnion LLC*

v. Ramirez, 141 S. Ct. 2190 (2021), *Spokeo, Inc. v. Robins*, 578 U.S. 330 (2016), and *Patel v. Facebook, Inc.*, 932 F.3d 1264 (9th Cir. 2019).

EPIC is a public interest research center in Washington, D.C., that was established in 1994 to focus public attention on emerging privacy issues. EPIC regularly participates as *amicus* in cases concerning individuals' standing to sue for invasions of their privacy rights, including in *TransUnion*, *Spokeo* and *Patel*. EPIC has also litigated informational standing twice post-*Spokeo* before the D.C. Circuit. *See EPIC v. Presidential Advisory Comm'n on Election Integrity*, 878 F.3d 371, 400-02 (D.C. Cir. 2017); *EPIC v. Dep't of Commerce*, 928 F.3d 95, 103-04 (D.C. Cir. 2019).

II. Consumer Protection Statutes Provide Critical Safeguards Against Invasions of Privacy, Identity Theft, and Other Grave Threats.

Consumer protection laws, including laws that protect privacy, have long been of vital importance to California citizens. This importance has only grown as increasing amounts of consumer data are collected and circulated, making consumers more vulnerable to identity theft and other forms of exploitation. As explained below, a person's standing, or right to pursue a claim in court, is independent of their ability to show actual damages. This is because, among other reasons, quantifying the damages that flow from a corporation's decision to flout privacy laws can be difficult or impossible, and the loss of statutory privacy rights is itself a serious harm that must be remedied by California courts.

Robust enforcement of consumer protection laws is increasingly necessary, as people are now almost unavoidably subjected to data collection and disclosure as a routine part of day-to-day life. Companies collect an array of personal data about people as they conduct ordinary online activities, such as shopping or reading the news. The sensitive information companies collect and maintain on employees and others can influence critical life events: whether someone is approved for a mortgage, hired or fired, able to rent a home, accepted to an educational institution, verified as themselves to confirm important transactions, or subjected to increased police surveillance.

Incorrect data can even create the risk of an erroneous adverse immigration action.[1]

Credit reporting agencies' data collection efforts present particularly acute risks. Federal studies show that the data collected by such agencies are frequently materially inaccurate. A recent FTC report found that 26% of consumers have at least one potentially material error on their credit file.[2] Likewise, Consumer Financial Protection Bureau data show that consumer complaints regarding credit reports more than doubled in 2020.[3] These common errors can have dire consequences, as explained above.[4]

These facts underscore the critical role of many consumer protection laws, such as the Fair Credit Reporting Act ("FCRA"), the statute at issue in *Limon*. Indeed, long before contemporary systems of data aggregation and the internet, Congress anticipated that, "with the trend toward . . . the establishment of all sorts of computerized data banks, the individual is in great danger of having his life and character reduced to impersonal 'blips' and key-punch holes in a stolid and unthinking machine which can literally ruin his reputation without cause." *Dalton v. Capital Associated Industries*, 257 F.3d 409, 414 (4th Cir. 2001) (quoting 116 Cong. Rec. 36570 (1970) (statement of Rep. Sullivan)). Congress addressed such concerns by enacting, in FCRA, statutory provisions intended "to prevent consumers from being

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[1] *See* Drew Harwell, *ICE Investigators Used a Private Utility Database Covering Millions to Pursue Immigration Violations*, Wash. Post (Feb. 26, 2021), http://wapo.st/2OCVwCE.

[2] Fed. Trade Comm., Report to Congress Under Section 319 of the Fair and Accurate Credit Transactions Act of 2003 (Jan. 2015).

[3] Ann Carrns, *More Consumers Complain About Errors on Their Credit Reports*, N.Y. Times (Feb. 19, 2021), http://nyti.ms/3cdqqcL.

[4] Consumers Union, Errors and Gotchas: How Credit Report Errors and Unreliable Credit Scores Hurt Consumers, 18-22 (2014), https://advocacy.consumerreports.org/wp-content/uploads/2014/04/Errors-and-Gotchas-report.pdf.

unjustly damaged because of inaccurate or arbitrary information in a credit report." *Cortez v. Trans Union, LLC*, 617 F.3d 688, 706 (3d Cir. 2010) (quoting S. Rep. No. 91-517, at 1 (1969)).

State legislatures have followed suit. For instance, California has imposed disclosure and authorization requirements when background checks are run via the Investigative Consumer Reporting Agencies Act ("ICRAA"), which is modeled on FCRA. *See* Cal. Civ. Code § 1786 et seq.

Because damages flowing from privacy violations can be difficult or impossible to quantify, and lost control of one's data is inherently injurious, many privacy laws do not require a plaintiff to allege an additional injury in order to sue. For example, ICRAA grants standing to any consumer who alleges their employer or landlord has violated one of ICRAA's requirements with respect to a background check run on them. *See* Cal. Civ. Code, §§ 1786.50, 1786.52. It does not also require that the consumer allege they have suffered specific damages or any other form of "concrete injury" beyond the injury inherent in the violation of the statute. *See, e.g.*, *Diaz v. Fist Advantage Corp.*, 2006 WL 8428091, at *4 (C.D. Cal. July 17, 2006) (finding that a plaintiff did not need to show injury to obtain statutory damages under the ICRAA because "it is possible that a plaintiff will not have suffered or benefitted, and yet still be the subject of a violative report.").

The same is true of California's Consumer Privacy Act ("CCPA"), a data privacy law that gives consumers a private right of action against companies that negligently allow a data breach. The CCPA allows consumers to bring claims when their information is disclosed in a data breach even if they do not experience additional harm, like fraud or identity theft. Cal. Civ. Code § 1798.150. The CCPA also does not require consumers to demonstrate actual damages and instead authorizes statutory damages of between $100 to $750 "or actual damages, whichever is greater." *Id.*

In these and many other consumer protection statutes, the California Legislature has granted standing to plaintiffs who do not allege that they suffered monetary losses or other provable damages stemming from the violation of their statutory rights. However, under the reasoning of *Limon*, it

could become impossible for consumers to enforce such laws unless they can demonstrate "concrete injury" above and beyond a defendant's violation of statutory requirements or prohibitions. This would contradict the legislative intent of these statutes. It would also undermine the Legislature's constitutional prerogatives to enact laws that protect privacy, remedy harms, and ensure effective enforcement.

III. Recent Cases Have Tightened Standing Requirements in Federal Courts, Leaving State Courts as the Only Fora for Consumers to Obtain Redress.

In recent years, divided opinions of the United States Supreme Court have significantly tightened standing requirements for consumers under Article III's "case or controversy" requirement. *See Spokeo*, 578 U.S. at 340 (holding that a FCRA plaintiff must show an injury that is both concrete and particularized); *see also TransUnion LLC*, 141 S. Ct. at 2197, 2214 (holding that inaccuracies in credit files that violated FCRA but were not disseminated to third parties were not enough to establish Article III standing).

These cases were wrongly decided and should be reconsidered.[5] Until they are, as Justice Thomas noted in his four-Justice dissent in *TransUnion LLC*, state courts are "the sole forum" for certain kinds of claims under FCRA (and, by extension, other privacy statutes). *TransUnion,* 141 S. Ct. at 2224, n.9 (Thomas, J., dissenting). "By declaring that federal courts lack jurisdiction, the Court has thus ensured that state courts will exercise exclusive jurisdiction over these sorts of class actions." *Ibid.*

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[5] *See, e.g., amicus* brief of EFF in *TransUnion LLC*, https://www.eff.org/document/transunion-amicus-brief; and *amicus* brief of EPIC in *TransUnion LCC*, https://epic.org/documents/transunion-llc-v-ramirez/.

If *Limon* stands, however, such consumers may also lose the opportunity to vindicate their rights in the California courts, as discussed below.

IV. By Importing Article III's Standing Requirements, *Limon* Sets a Dangerous Precedent That, Left Undisturbed, Will Adversely Impact Many Californians.

The *Limon* court erroneously concluded that standing requirements essentially identical to Article III's standing restrictions apply in California courts. The court further wrongly concluded that "informational harm" is not enough to confer standing in California. These are dangerous precedents that could prevent many California workers and residents from being able to pursue their claims under a variety of privacy-related statutes.

a. *Limon* adopts a restrictive new standing requirement virtually indistinguishable from Article III standing restrictions.

In reaching its determination that Appellant Limon lacked standing to pursue his FCRA claims, the *Limon* court held that "as a general matter, to have standing to pursue a claim for damages in the courts of California, a plaintiff must be beneficially interested in the claims he is pursuing." *Limon v. Circle K Stores Inc.*, 300 Cal. Rptr. 3d 572, 593 (2022). In doing so, *Limon* moved the "beneficial interest" requirement from the context of mandamus actions, where it normally arises, and held that standing in California requires a showing of "beneficial interest" in other contexts, too. The court also held that this requirement is equivalent "to the injury-in-fact prong of the Article III test for standing in the federal courts." *Id.* at 591. Finally, the court concluded that in order to pursue his claims, Limon "must allege a

concrete injury" beyond his employer's violations of FCRA, and that he had failed to do so. *Id.* at 595-98.[6]

Limon's reasoning and conclusion ignore the well-established rule that "[u]nlike the federal constitution, [the California] Constitution has no case or controversy requirement." *San Diegans for Open Gov. v. Pub. Facilities Fin. Auth. of City of San* Diego, 8 Cal.5th 733, 738 (2019) (citations and quotations omitted). Generally, a party lacks standing to sue in California courts only "if it does not have an actual and substantial interest in, or would not be benefited or harmed by, the ultimate outcome of an action." *City of Santa Monica v. Stewart*, 126 Cal. App. 4th 43, 59 (2005) (citations and quotations omitted.) "The purpose of a standing requirement is to ensure that the courts will decide only actual controversies between parties with a sufficient interest in the subject matter of the dispute to press their case with vigor." *Shapell Indus., Inc. v. Super. Ct.*, 132 Cal.App.4th 1101, 1111 (2005) (quoting *Common Cause v. Bd. of Supervisors*, 49 Cal.3d 432, 438 (1989)).

Furthermore, standing requirements in California vary from statute to statute "according to the intent of the Legislature and the purpose of the enactment." *Angelucci v. Century Supper Club*, 41 Cal.4th 160, 175 (2007). An "invasion of the plaintiff's legally protected interests" is generally a sufficient injury to confer standing in California, as it is enough to ensure the plaintiff has "an interest in pursuing their action vigorously." *Id.* (quotations and citations omitted).

Limon disregards the distinctions between California and federal standing law. Its ultimate conclusion, that the plaintiff lacked standing because he did not allege a "concrete injury" resulting from the employer's FCRA violations (*Limon,* 300 Cal. Rptr. 3d at 595-98), thus introduces a sweeping and restrictive standing requirement for state-court actions. It is

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[6] The *Limon* court rejected several arguments by Limon concerning the harms he contended he had suffered based on his employer's FCRA violations, including his argument that he was subjected to informational injury. *Limon,* 300 Cal. Rptr. 3d at 597-98.

not based in the California Constitution and is inconsistent with longstanding California precedent.

b. Without review, *Limon* is likely to bar many California consumers from enforcing their privacy rights.

Absent review, California courts could interpret *Limon* to limit standing not only in FCRA cases, but more broadly. That is, under *Limon*, courts could impose a restrictive, Article III-like standing requirement on Californians seeking relief under a variety of privacy statutes and other consumer protection laws. That would significantly impede enforcement of both federal and state consumer protection laws in California courts.

Indeed, large corporations have already begun to argue that *Limon* requires dismissal of claims brought under ICRAA in California courts. For example, in the *First Student, Inc. Cases*, Los Angeles Superior Court Case No. JCCP4624, defendants recently contended that *Limon* required dismissal of ICRAA litigation that has been pending since 2009 on behalf of 1400 plaintiffs. Specifically, defendants argued that "*Limon* provides a broadly applicable holding that a plaintiff must prove a concrete injury to establish standing," including in ICRAA cases, and that the court thus should reverse an earlier ruling that the plaintiffs need not prove actual damages to pursue their claims seeking statutory awards.[7] While the *First Student* court ultimately did not rule on the defendants' standing challenge, this case shows that defendants will leap to use *Limon* to attempt to evade liability, unless this Court grants review.

V. Conclusion

For the foregoing reasons, *amici* ask the Court to grant review in order to address the important questions of standing law presented by *Limon*,

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[7] *Amici* have not attached the briefing hereto, in light of Cal. Rules of Court, rule 8.500(g)(2), but would be happy to provide it upon request.

which could have far-reaching repercussions for the California consumers whose interests *amici* represent.

Respectfully submitted,

By: _____

Genevieve Casey
Feinberg, Jackson, Worthman & Wasow LLP
Hunter Pyle
Hunter Pyle Law

Attorneys for Amici Curiae *Electronic Frontier Foundation and Electronic Privacy Information Center*

PROOF OF SERVICE

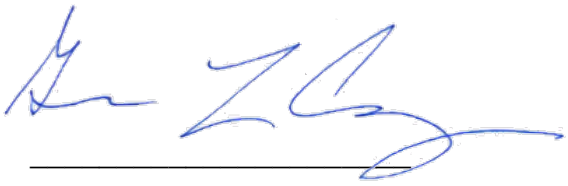
I am employed in the County of Alameda, California. I am over the age of eighteen years and not a party to this action. My business address is 2030 Addison Street, Suite 500, Berkeley, California, 94704.

On December 21, 2022, I served the following document:

Letter of *Amici Curiae* EFF and EPIC in Support of Petition for Review in *Limon v. Circle K Stores Inc.*, S277435

on the Parties appearing on the electronic service list for the above-entitled case. I served this document by electronically filing via TrueFiling, and a copy of the TrueFiling confirmation will be filed with the original documents in my office.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed December 21, 2022, at Berkeley, California.



Genevieve Casey