NO. 13-1339

In The
Supreme Court of the United States

SPOKEO, INC.,

Petitioner,

v.

THOMAS ROBINS, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Respondent.

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

BRIEF OF NATIONAL ASSOCIATION OF PROFESSIONAL BACKGROUND SCREENERS; NATIONAL CONSUMER REPORTING ASSOCIATION; BACKGROUND SCREENING & SECURITY SOLUTIONS LLC; BACKTRACK, INC.; CHECKR, INC.; LOWERS RISK GROUP LLC; PEOPLETRAIL; AND PRECHECK AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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IDENTITY OF THE *AMICI*[1]

Amici are companies or associations of companies that operate as "consumer reporting agencies" under the Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq*. They provide pre-employment, tenant, and mortgage credit reports to employers, lenders, and landlords of all shapes and sizes.

The **National Association of Professional Background Screeners** (NAPBS) is an international trade association of nearly 750 large and small employment and tenant background screening firms that provides a unified voice in the development of national, state, and local regulation of background screening. Its members, all of whom are regulated by the FCRA, search publicly available criminal background information from domestic and international sources in order to enable employers and landlords to provide their customers with safe places to live and work. NAPBS's membership primarily consists of small and mid-size businesses.

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. In addition, no person or entity other than *amici* or their members made a monetary contribution intended to fund the preparation or submission of this brief. Evidence of the parties' consent to its filing has been lodged with the Clerk of this Court.

The **National Consumer Reporting Association** (NCRA) is a national trade organization of consumer reporting agencies and associated professionals that provide products and services to credit grantors, employers, landlords and all types of general businesses. NCRA's membership includes 70 percent of the mortgage credit reporting agencies in the United States that can produce a credit report meeting Fannie Mae, Freddie Mac and HUD requirements for mortgage lending.

Background Screening & Security Solutions LLC is a five-employee consumer reporting agency that provides pre-employment and volunteer screening to small & mid-sized companies and non-profit organizations. It also provides numerous educational programs on recommended screening policy and procedure development.

BackTrack, Inc is a nationwide consumer reporting agency who employs nearly 100 people. It checks and verifies criminal record, employment, education histories and other matters regarding their clients' prospective employee**s.**

Checkr, Inc., www.checkr.com, is regulated by the Fair Credit Reporting Act, and provides employment screening to a variety of industries. Its Checkr U compliance education programs inform customers and consumers about their critical roles and responsibilities in the screening process.

Lowers Risk Group LLC (Lowers Risk Group), a rapidly growing mid-size consumer reporting agency, services organizations operating in high-risk, highly-regulated environments and organizations that value risk mitigation. More specifically, Lowers Risk Group companies Wholesale Screening Solutions and Proforma Screening Solutions are consumer reporting agencies as defined by the federal Fair Credit Reporting Act (FCRA). Wholesale Screening Solutions provides wholesale public record court and law enforcement data, and verification services to other consumer reporting agencies. Proforma Screening Solutions provides consumer reports in the form of background check services to end users.

Peopletrail is a fifty-employee company whose activities are regulated by the Fair Credit Reporting Act. It integrates customer service and technology to deliver on-demand, accurate and timely consumer reporting results to government, small business, and Fortune 500 clients.

PreCheck is an industry-accredited, national background screening company that focuses on the needs of healthcare employers. In accordance with the Fair Credit Reporting Act, PreCheck performs pre-employment screening of doctors, nurses, hospital staff, and healthcare workers involved in providing patient care at all levels.

SUMMARY OF ARGUMENT

Amici and their members consist primarily of small and midsize consumer reporting agencies that conduct background screening for employment, housing, and mortgage lending. They provide the information necessary to create safe places to live and work. *Amici* agree with petitioner that the facts in this case fail to state a justiciable "case or controversy," and that Article III standing requires more than a bare statutory violation.

The Ninth Circuit created federal court jurisdiction based solely on a technical violation of the Fair Credit Reporting Act ("FCRA"). When this Court clarified pleading standards under the Federal Rules of Civil Procedure, it remarked on the prospect of unfair *in terrorem* settlements and an unwieldy discovery process as reasons for trial courts to ensure that the specific facts pled in a complaint support the claimed wrong. *Amici* submit that the same unfairness occurs through class-action suits that lack allegations of concrete harm, and is exacerbated by the presence of a statutory damage multiplier. *Amici*'s members face a practical reality in which ruinous potential liability and litigation expense grossly outweighs any particularized injury actually experienced by consumers. Additionally, *amici's* members are seeing an increase in the number of class action and individual claims in which the plaintiffs have suffered no injury whatsoever. That exposure and expense is not limited to large consumer reporting agencies: it has spread to small and mid-size businesses.

The lower court's Article III analysis omitted an important predicate question, namely whether the FCRA even purports to grant standing to sue individuals who have not suffered harm. Ordinarily, statutes are not presumed to reach the outer bounds of Article III standing without express Congressional direction. Instead, courts should determine standing based on two well-known common law doctrines: the zone-of-interests test, and proximate causation.

Respondent's claims fall well outside the statutory standing that the FCRA creates. Applying the zone of interests test to the text of the FCRA reveals that Congress was only concerned with a consumer's privacy as it pertains to the fields specified in the statute: employment, credit and insurance. Here, respondent has alleged harm to his privacy interests as applied to employment, but facts showing proximate cause are absent. None of the petitioner's alleged inaccuracies directly harmed the respondent's privacy interests in the field of employment (or anywhere else).

ARGUMENT

I. THE NINTH CIRCUIT DECISION VIOLATES ARTICLE III STANDING REQUIRMENTS

Section 616 of the Fair Credit Reporting Act (FCRA), 15 U.S.C. § 1681 *et seq.*, provides that any person who "willfully" fails to abide by any of its requirements with "respect to any consumer" shall be liable to that consumer for "any actual damages . . . or damages of not less than $100 and not more than $1000." 15 U.S.C. § 1681n(a)(1)(A). The Ninth Circuit found that the naked allegation of a "willful" FCRA violation gives a plaintiff Article III standing to bring a case. *Robins v. Spokeo, Inc.*, 742 F.3d 409, 414 (9th Cir. 2014). Relying on the Sixth Circuit's analysis in *Beaudry v. TeleCheck Servs., Inc.,* 579 F.3d 702, 707 (6th Cir. 2009), the lower court used a two-part test to address Article III standing. First, the plaintiff "must be among the injured, in the sense that she alleges the defendants violated *her* statutory rights." *Robins*, 742 F.3d at 413 (citation omitted). In addition, "the statutory right at issue must protect against individual, rather than collective, harm." *Id.* (citation and quotation omitted). Applying this test, the lower court concluded that the alleged violations of respondent's statutory rights conferred federal jurisdiction. *Id.* at 413-14. The Ninth Circuit erred.

Article III requires the plaintiff to have suffered "an injury in fact—an invasion of a legally protected interest which is (a) concrete or particularized, and (b) actual or imminent, not

conjectural or hypothetical." *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560 (1992) (internal quotation marks, citations, and footnote omitted); s*ee also Clapper v. Amnesty Int'l,* 133 S. Ct. 1138, 1147 (2013). In addition, the plaintiff must show a "causal connection between the injury and the conduct complained of" that is "fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court." *Lujan*, 504 U.S. at 560 (quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976)). Because standing allegations are "not mere pleading requirements, but rather an indispensible part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof." *Lujan*, 504 U.S. at 561.

Although Congress has broad power to create private causes of action by statute, "[I]t is settled that Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing." *Raines v. Byrd*, 521 U.S. 811, 820 n.3 (1997); *see also Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 487 n.24 (1982) ("Neither the Administrative Procedure Act, nor any other congressional enactment, can lower the threshold requirements of standing under Art. III.").

In this case, the Ninth Circuit confused the violation of a statutory protection with the concrete harm required by Article III: the mere fact that a statute may "protect against harm" does not mean

that justiciable injury has occurred. *See Lujan,* 504 U.S. at 580 (Kennedy, J., concurring). *Amici* agree with petitioner that Article III standing does not exist in this case because the Ninth Circuit's approach collapses a three-part injury test into one factor. (Pet. Br. at 36-39.) The Ninth Circuit analysis suffers from another defect, however, in that it failed to determine whether the statute gave Mr. Robins a cause of action in the first place. Their extensive compliance efforts notwithstanding, the Ninth Circuit's rule has improperly forced *amici*'s members to live under a sword of Damocles forged from one part harm-free suits, and one part statutory damage multiplier.

II. FCRA CASES BASED ON TECHNICAL VIOLATIONS OF THE STATUTE HAVE THREATENED THE VIABILITY OF *AMICI'S* MEMBERS

Amici's members are in the business of information. In the language of the statute, *amici's* members are "consumer reporting agencies"[2] (CRAs) that are in the business of assembling and furnishing "consumer reports."[3] Their efforts help

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[2] 15 U.S.C. 1681a(f) (defining "consumer reporting agencies" as any person . . . which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties").

[3] The statute defines a consumer report as "any . . . communication of any information by a consumer reporting

an employer or housing provider "ensure the security of its facilities" and employ "a competent, reliable workforce." *NASA v. Nelson*, 562 U.S. 134, 150 (2011); *see also EEOC v. Freeman,* 961 F. Supp. 2d 783, 785 (D. Md. 2013) (noting that "[C]onducting a … background check on a potential employee is a rational and legitimate component of a reasonable hiring process.").

Amici's members primarily operate in three fields: (1) pre-employment criminal background screening; (2) tenant screening; and (3) credit screening for residential mortgages. Although *amici* have a few larger members, the overwhelming majority are small and mid-size businesses. A substantial part of the *amici's* purpose is to educate its members on FCRA compliance, despite the "less-than-pellucid statutory text" of many provisions. *Safeco Ins. Co. of Am. v. Burr,* 551 U.S. 47, 70 (2007). For example, *amicus* NAPBS offers individual certification programs and accredits companies that comply with its accreditation program's high standards of operation.[4] Similarly, *amicus* NCRA

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agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living" that is used or expected to be used for certain statutorily prescribed purposes, most notably credit, insurance, and employment, 15 U.S.C. § 1681a(d)(1).

[4] Background Screening Credentialing Council, *Background Screening Agency Accreditation Program Policies and Procedures* 9-11 (2009), *available at* http://www.napbs.com/accreditation/Policies_and_Procedures.p

provides courses not only to users of consumer reports, but also to CRAs in a variety of fields.[5] Both *amici* also devote substantial efforts to educating their members on recent FCRA activity by inviting practicing lawyers to advise their members on the latest FCRA developments and inviting regulators to advise *amici's* members about their views of sound industry practice.[6] *Amici's* members spend millions of dollars on FCRA compliance every year, which is also marketed as a reason for employers, landlords and others to use their services.

The statute places certain legal obligations on *amici*'s members. When an employer, lender or housing provider requests applicant screening, *amici*'s CRA members have to honor several FCRA obligations that apply to the consumer information that they assemble. With respect to the consumer reports they furnish, they must "follow reasonable procedures to assure maximum possible accuracy," 15 U.S.C. § 1681e(b). Special care is taken with

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df (last visited June 23, 2015); *see also generally About NAPBS' Accreditation Program,* Nat'l Assoc. of Professional Background Screeners, http://www.napbs.com/accreditation (describing the certification program).

[5] *Education & Training Opportunities*, Nat'l Consumer Reporting Assoc., http://www.ncrainc.org/education-training-opportunities.html (last visited July 8, 2015).

[6] *See, e.g.*, *Program Information: Schedule of Events*, Nat'l Assoc. of Prof'l Background Screeners, https://www.napbs.com/events/midyear2015/program/schedule.cfm (last visited July 8, 2015).

screening for employment: when reporting public record information (e.g., criminal information), CRAs must maintain "strict procedures" ensuring that such information is complete and up to date, or notify the consumer when that information is being reported. 15 U.S.C. § 1681k(a)(2). When *amici's* members provide a consumer report, they must provide the report's user with a statutorily prescribed notice detailing the user's obligations.[7] 15 U.S.C. § 1681e(d)(1)(B). Moreover, they must obtain certifications from the user that the report will be used only for a permissible purpose. 15 U.S.C. § 1681e(a).

The statute recognizes that mistakes can occur in the consumer reporting process and takes that possibility into account. The statute only provides private causes of action for negligent or willful violations, not all violations.[8] It also

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[7] A similar notice must be sent to "furnishers" of information (such as a department store who reports a delinquent account) that describes that furnisher's obligations. 15 U.S.C. § 1681e(d)(1)(A).

[8] *See* 15 U.S.C. § 1681o(a) (indicating that private causes of action exist for negligent violations). *See also* 16 C.F.R. § 607(b)(3)(A) (noting that when a CRA receives information "from a source that it reasonably believes to be reputable and which is credible on its face, the agency does not violate this section simply by reporting an item of information that turns out to be inaccurate"); *Lazarre v. JPMorgan Chase Bank, N.A.*, 780 F. Supp. 2d 1320, 1328 (S.D. Fla. 2011) ("[t]he FCRA does not make consumer reporting agencies strictly liable for all inaccuracies in the reports they prepare.").

preempts most state causes of action for defamation against CRAs and others based on erroneous information in a consumer report, and requires a minimum of negligence before any private civil action can be filed. 15 U.S.C. §§ 1681h(e) & 1681o(a). Moreover, section 611, entitled "Procedure in case of disputed accuracy," creates a duty to investigate disputed information, and an opportunity to cure inaccuracies. 15 U.S.C. § 1681i. Similarly, furnishers of information (i.e., a department store) are only liable in private suits if they have cause to believe that the information they provide is false, or when they fail to conduct a reasonable reinvestigation of a claimed error. 15 U.S.C. §§ 1681s-2(a)(1)(A), 1681s-2(c).

A. Permitting these suits to proceed in the absence of harm skews the statute against small businesses

Read as a whole, the statute creates a balance between the accuracy and the availability of consumer reports. On one hand, it creates a number of obligations on both the users of consumer reports and those who furnish information for them to protect consumers' personal reputations. On the other hand, recognizing "the vital role played by credit reporting agencies in our economy," S. Rep. No. 91-517, at 1 (1969), it limits the exposure of CRAs for individual mistakes if the FCRA's reasonable procedures are followed. That balance is now skewed against CRAs by the threat of annihilating liability for technical violations.

The standing doctrine as espoused by the Ninth Circuit has rendered the FCRA a target-rich environment for enterprising plaintiffs' attorneys: even the small chance of being found liable for substantial multi-million-dollar awards creates enormous incentives to settle litigation no matter how tenuous the plaintiff's claim.[9] The class action bar has taken note: according to this Court's own reports, filings of cases involving consumer credit statutes, including the FCRA, increased by 53 percent in 2009.[10] Six years later, *amici*'s members are finding that where once only the large firms were targeted, smaller firms now appear in the crosshairs on truly questionable grounds. Many cases have been filed in instances where the harm suffered by the consumer consists solely of a violation of the statute.

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[9] *See generally* Sheila Scheuerman, *Due Process Forgotten: The Problem of Statutory Damages and Class Actions*, 74 Mo. L. Rev. 103, 104-06 (2009), *available at* http://scholarship.law.missouri.edu/cgi/viewcontent.cgi?article=3812&context=mlr (discussing the ruinous potential of the $100 to $1000 statutory damages under the Fair and Accurate Credit Transactions Act); David L. Permut & Tamra T. Moore, *Recent Developments in Class Actions: The Fair Credit Reporting Act*, 61 Bus. L. 931 (2006) (discussing FCRA damages in a class action context).

[10] 2009 Year-End Report on the Federal Judiciary, at 3, http://www.supremecourt.gov/publicinfo/year-end/2009year-endreport.pdf

For example, section 609 of the FCRA states that "a consumer reporting agency shall provide to a consumer" a series of written disclosures. 15 U.S.C. § 1681g(c)(2). *Amici* face a class action based on an alleged failure to provide statutory notices under that provision, *even though the defendant had no information on the plaintiff and never ran a consumer report on him.*[11] In another case, a class plaintiff was able to avoid any actual harm before filing the complaint.[12]

Sections 604 and 607 of the FCRA require CRAs to notify users of reports (i.e., employers and lenders) of their responsibilities under the Act, and to obtain certifications from employers that the reports will only be used for a permissible purpose. 15 U.S.C. §§ 1681e(a), (d), & 1681b. A CRA faced a consumer class action because it did not adequately obtain certifications from *employers* that the consumer report would be used for employment purposes, even though that was the *only* purpose for

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[11] Class Complaint ¶¶ 28-33, *Henderson v. InfoMart, Inc.*, No. 3:13-cv-00578 (E.D. Va. Aug. 26, 2013) (alleging violation of 15 U.S.C. § 1681g(c)(2); *see also* Class Complaint ¶¶ 24-30, *Henderson v. First Advantage Background Servs. Corp.*, No. 3:14-cv-00221 (E.D. Va. Mar. 24, 2014) (alleging violation of FCRA based on inaccurate information the plaintiff "believed" that the CRA had in his file).

[12] Another class representative in *InfoMart*, Mr. Woods, based his claim on the fact that he had a dispute with the CRA; the CRA fixed the erroneous information, and he was permitted to go on a field trip with his daughter. Class Complaint, *InfoMart*, *supra* note 11, at ¶¶ 51-56.

which the class plaintiff's report was used.[13] Still another CRA faced a class action employer certification complaint even though the plaintiff was completely ineligible for employment due to an accurately reported criminal conviction.14 Some courts are treating these minor issues the same as if the CRA totally failed to follow the FCRA thus demanding a minimum of $100 per consumer affected. *E.g., Syed v. M-I LLC*, 2014 U.S. Dist. LEXIS 150748, at 10-15 (E.D. Cal. Oct. 22, 2014); *Milbourne v. JRK Residential Am., LLC*, 2015 U.S. Dist. LEXIS 29905, at 19-20 (E.D. Va. Mar. 10, 2015); *Lengel v. HomeAdvisor, Inc.*, 2015 U.S. Dist. LEXIS 59017, at *1-*2 (D. Kan. May 5, 2015) (creating question of fact in the absence of actual damage).

B. The Ninth Circuit rule compels *in terrorem* settlements.

These fillings are not unique and demonstrate a serious and growing problem for CRAs. Plaintiffs who have never had a report generated on them, who were able to correct inaccurate reports before suffering any harm, who had their reports correctly

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[13] Class Action Complaint, ¶¶ 3, 21-26, *Lozano-Rivera v. Universal City Nissan,* No. 2:14-cv-01010 (C.D. Cal. Feb. 10, 2014) (alleging violations of 15 U.S.C. § 1681b(b)(2)(a)).

[14] *See* Class Action Complaint, ¶¶ 42-60, *Henderson v. Wal-Mart,* No. 3:14-cv-208 (E.D. Va. Mar. 24, 2014). *See also Scott v. KKW Trucking*, No. 3:14-cv-00494-SI (D. Or. Mar. 25, 2014) ¶¶7-15.

used for lawful purposes, or whose accurately assembled history rendered them ineligible for hire are being used to turn a supposedly reasonable regime of regulation into one of draconian liability.

Amici's smaller and midsize members simply cannot afford to fight these lawsuits. In *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 559 (2007), and *Ashcroft v. Iqbal,* 556 U.S. 662, 684 (2009), this Court clarified pleading requirements under rule 12(b)(6) of the Federal Rules of Civil Procedure to prevent discovery abuse and conserve judicial resources. *See Twombly,* 550 U.S. at 559 ("the threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching those proceedings"); *see also Iqbal*, 556 U.S. at 684 (clarifying that *Twombly*'s concerns over unruly discovery and *in terrorem* settlements are not limited to antitrust suits). By permitting FCRA cases to go forward based only on an unadorned statement of a statutory violation, the Ninth Circuit rule opens *amici's* members to *in terrorem* settlement of these claims as a "partial downside insurance policy." *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 347-48 (2006); *see also Twombly,* 550 U.S. at 557-58.

The prospects of statutory damages only compound these massive discovery costs. To make matters more daunting for defendants, there are no early procedural devices to challenge the appropriateness of an award. In a class action alleging that receipts improperly contained the expiration date of the plaintiff's credit card, the United States persuaded the trial court not to

examine the constitutionality of an award until *after* certification and willfulness had been proved. *See Bateman v. Am. Multi-Cinema, Inc.*, 623 F.3d 708, 723 (9th Cir. 2010); *Hepokoski v. Brickwall of Chi.*, LLC, 2009 U.S. Dist. LEXIS 122389 at *10-11 (N.D. Ill. Sept. 22, 2009).

As a result, the calculation on whether to settle a technical violation suit is performed *in terrorem*. A typical midsize background screening company might run one million checks per year, creating consumer reports "with respect to" five million total consumers in five years. A small, five-employee screening company might run about 5,000 consumer reports per year, and retain records on 25,000 total consumers over the same five-year time period as the midsize company. The midsize company stares down the barrel of a $ 5 billion maximum liability. Its *minimum* liability of $500 million is still well outside its revenue or even net worth. The smaller company faces an equally devastating $2.5 million liability on the low end, and $25 million on the high end. *Cf. Trans Union LLC v. FTC*, 122 S. Ct. 2386, 2387 (2002) (Kennedy, J., dissenting from denial of certiorari) (describing FCRA liability as "crushing").

That reality has turned what is supposed to be a "reasonable," 15 U.S.C. § 1681(b) system of consumer reporting on its head. Claimed statutory damages far exceed the net worth—or indeed the total assets—of most of *amici's* members. The liability that *amici's* members face under "bare allegation" FCRA suits therefore renders their defense choices fairly simple. They may either settle

the case based on creation of a class that has never been directly harmed by their activity, and be done with the liability, or they can litigate these marginal claims, endure a discovery process involving potentially millions of consumers--a process that the courts have acknowledged can barely be controlled, *see Iqbal,* 556 U.S. at 684-85, and risk liability that bankrupts the company. The choice to settle is not a hard one.[15] As the cost of the industry's insurance policies rise, *amici* are concerned that only the largest employers and CRAs will be financially able to afford the risk of fighting these suits.

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[15] *Amici's* members have seen steady increases in their insurance premiums as these cases become more prolific from year to year, and some insurers have ceased offering FCRA coverage altogether. *See* Jonathan Schwartz & Colin Wilmott, *EPLI Carriers Beware the Rising Tide of Background Check Actions*, Inside Couns. Magazine, June 11, 2015, *available at* http://www.insidecounsel.com/2015/06/11/epli-carriers-beware-the-rising-tide-of-fcra-backg (noting that " violation of law" exclusions from general liability coverage "specifically applies to (and was designed to eliminate) FCRA liability"). Justin F. Lavella & John W. McGuiness, *Insurance Coverage in Consumer Class Actions,* Corp. Couns. (Oct. 2010), at 7, 8 (noting that insurers had excluded FCRA and related claims from a variety of different policies). As the cost of the industry's insurance policies rise, *amici* are concerned that only the largest employers and CRAs will be financially able to afford the risk.

C. Government enforcement and the potential for competitor suits vindicates the public interest

To be clear, the conduct that Petitioner is alleged to have engaged in will receive no praise from *amici*. If proven, the allegations in the First Amended Complaint establish a business operating in willful disregard of the FCRA's dictates, and one that attempted to siphon customers from *amici* and their members without undertaking *any* of their extensive compliance costs. But Petitioner hardly got away with it: *amici* note that Petitioner was investigated by and settled with the Federal Trade Commission over the very same activity alleged in the complaint.[16] In the absence of concrete, particularized injury, that investigation and settlement vindicated the public interest in petitioner's FCRA compliance. *See, e.g.*, 15 U.S.C. §§ 1681s(a), (b), (c)(1), & (c)(2) (providing enforcement authority to Federal Trade Commission, multiple agencies, and state attorneys general); 12 U.S.C. § 5564 (describing CFPB litigation authority). In addition, Spokeo's alleged bad acts may expose it to federal and state liability from competitors on a

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[16] *See* Press Release, FTC, *Spokeo to Pay $800,000 to Settle FTC Charges Company Allegedly Marketed Information to Employers and Recruiters in Violation of FCRA* (June 12, 2012), *available at* http://www.ftc.gov/news-events/press-releases/2012/06/spokeo-pay-800000-settle-ftc-charges-company-allegedly-marketed. Prior to July 21, 2011 the Federal Trade Commission was the primary agency charged with FCRA enforcement.

theory of unfair competition. *See Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377 (2014). And, to the extent any consumer actually *was* hurt by Petitioner's transmission of inaccurate information (e.g., losing a job for which she was otherwise qualified), *amici* do not contest that the consumer and all others similarly situated would have suffered an injury-in-fact, have standing to sue, and should be fairly compensated for their injuries.

In that kind of case, the FCRA's statutory damage provisions create a range from which damages can be awarded in cases where harm cannot be accurately quantified. *See Dowell v. Wells Fargo Bank, NA*, 517 F.3d 1024, 1026 (8th Cir. 2008) (per curiam) (noting that a reasonable reading of the statute could require that plaintiff show some actual damage in order to make statutory damages available). Actual injury, however, is missing not only from this case, but every case in which *amici*'s members face suits based on nothing more than a technical statutory violation. The question becomes whether Congress intended that injury to be absent.

III. THE FAIR CREDIT REPORTING ACT REQUIRES THE DEFENDANT TO CAUSE HARM TO A RECOGNIZED REPUTATIONAL OR ECONOMIC INTEREST

In determining whether Congress intended to grant standing to plaintiffs covered by a cause of action, this Court unanimously instructed that the judiciary should not automatically assume the "unlikelihood that Congress meant to allow all

factually injured plaintiffs to recover." *Holmes v SIPC*, 503 U.S. 258, 266 (1992) (cited in *Lexmark*, 134 S. Ct. at 1388. Congress "must at the very least identify the injury it seeks to vindicate and relate the injury to the class of persons entitled to bring suit." *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring). Moreover, "statutory causes of action are regularly interpreted to incorporate standard common-law limitations on civil liability—the zone-of-interests test no less than the requirement of proximate causation." *Lexmark*, 134 S. Ct. at 1389 n.5. *See also* John Roberts, *Article III Limits on Statutory Standing*, 42 Duke L.J. 1219, 1227 (1993).

Here, although Congress identified consumers as the class of persons entitled to bring suit, they failed to relate the injury protected by the statute to that class of persons. The Ninth Circuit misconstrued the phrase "with respect to any consumer," and as a result "treats willful action as the last fact necessary" to make a private cause of action accrue. *Doe v. Chao,* 540 U.S. 614, 620 (2004). As was the case in *Lexmark,* broad language alone does not and should not convey an intent to reach or exceed the bounds of Article III. *See Lexmark*, 134 S. Ct. at 1388. Before addressing those bounds, the lower court should have looked to the zone-of-interests protected by the statute, and whether the statutory violation proximately caused harm to those interests. *See id.*

Application of that traditional common-law analysis reveals two things. First, the "zone of interests" protected by the statute encompasses a consumer's privacy interests in the areas of

insurance, employment and credit, not every imaginable reputational harm or inaccuracy. Second, the defendant's act must proximately cause injury to those interests, which is where respondent's case fails.

A. The zone of interest protected by the Fair Credit Reporting Act is limited to a consumer's privacy interests in the fields of credit, insurance, and employment.

As an initial matter, Congress is "presumed to "legislat[e] against the background of" the zone-of-interests limitation, "which applies unless it is expressly negated." *Bennett v. Spear*, 520 U.S. 154, 163 (1997) (cited in *Lexmark*, 134 S. Ct. at 1388). In the absence of Congressional instruction, construction of the statute should begin "with the traditional understanding that tort recovery requires not only wrongful act plus causation reaching to the plaintiff, but proof of *some harm* for which damages can reasonably be assessed." *Doe*, 540 U.S. at 621 (citing W. Keeton et al., Prosser and Keeton on Law of Torts §30 (5th ed. 1984)) (emphasis supplied). Absent an express statement by Congress that it intended to stretch the bounds of Article III, the proper way to resolve the zone of interests inquiry is by examining the text of the statute. *Lexmark,* 134 S. Ct. at 1388.

When it enacted the FCRA, Congress made several express statutory findings. It acknowledged the dependence of the banking system on "fair and accurate" credit reporting, and acknowledged that an

"elaborate mechanism" exists for investigating consumers' character, creditworthiness and "general reputation." 15 U.S.C. §§ 1681(a)(1), (2). It also found that CRAs have assumed a "vital role" in assembling and evaluating consumer information, and that a need existed to ensure CRAs carried out their "grave responsibilities" with "fairness, impartiality, and a respect for the consumer's right to privacy." 15 U.S.C. § 1681(a)(3), (4). Based on these findings, Congress defined the purpose of the Fair Credit Reporting Act as follows:

> It is the purpose of this title to require that consumer reporting agencies adopt *reasonable* procedures for meeting the needs of commerce for consumer credit, personnel, insurance, and other information in a manner which is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information in accordance with the requirements of this subchapter."

15 U.S.C. § 1681(b) (emphasis supplied).

Structurally, the FCRA regulates the accuracy of "consumer reports," which exist only if assembled by a CRA and used or expected to be used primarily for three specific purposes relevant to this case: employment, insurance, or credit. 15 U.S.C. § 1681a(d) (defining consumer report); 15 U.S.C. § 1681b(a) (limiting consumer report use). It also places further limits on so-called "investigative consumer reports," which are used for the same

purposes but involve interviews with neighbors, co-workers, and others and are typically more thorough than an ordinary consumer report.[17] These provisions reveal a Congressional concern with a consumer's reputation and privacy, but one tailored to specific areas where the consumer suffers specific injury in expressly defined contexts.

Respondent's common-law privacy interests are therefore fairly placed within the zone of interests protected by the FCRA, namely, protection of his reputation in one or more fields that the statute expressly regulates: insurance, credit or employment. He has alleged that harm to those interests has occurred. (First Amd. Compl. ¶¶ 34-37.) The next question turns on whether respondent has sufficiently alleged that the violation of the statute was the proximate cause of an injury to those interests. He has not.

B. Respondent has failed to allege proximate cause to an interest covered by the statute

There is no indication that Congress intended to dispose of the common-law concept of privacy or its requirement of proximate cause. Unlike the Lanham Act provision construed in *Lexmark*, which provided a cause of action to anyone who "believed"

[17] *See* 15 U.S.C. § 1681b; *see also generally* S. Rep. No. 91-517, at 4 (1969) (expressing concerns over scope of investigative consumer reports).

they were harmed, the FCRA is narrower. In cases involving a willful violation, the text of the statute entitles a consumer to "actual damages" or "damages" within a statutory range. *See* 15 U.S.C. § 1681n. *Amici* note that "when the statute gets to the point of guaranteeing the [statutory] minimum, it not only has confined any eligibility to victims of adverse effects caused by intentional or willful actions, but has provided expressly for liability to such victims for "actual damages."" *Doe*, 540 U.S. at 619. That language should be "interpreted as designed to protect the class of persons in which the plaintiff is included, against the risk of the type of harm *which has in fact occurred* as a result of its violation." *Lexmark*, 134 S. Ct. at 1389 n.5. (citing W. Keeton, *supra* § 36, 229-30); *see also Doe*, 540 U.S. at 621 (noting that tort law requires some harm before damages are presumed). In other words, the word "damage" used in this context incorporates a requirement that the violation proximately caused harm within the zone of interests.

Changes to the statutory text confirm its common-law background. As initially introduced and passed in the Senate,[18] the FCRA allowed the

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[18] The text of S. 823 was added to S. 3678 (Foreign Bank Secrecy and Bank Recordkeeping), which replaced H.R. 15073 as an amendment in the nature of a substitute offered on the floor of the Senate. 116 Cong. Rec. 32,639 & 32,644 (1970). The resulting Act was sent to conference where it was amended, reported, and passed both chambers without further amendment. *Compare* H.R. Rep. No. 91-1587, at 15-24 (1970) (Conf. Rep.) (containing the conference approved amendments

consumer to recover "an amount equal to the sum of – (1) any actual damages sustained . . . ; (2) such amount of punitive damages, which shall not be less than $100 nor greater than $1,000; *and* (3) . . . costs . . . together with reasonable attorney's fees . . . ." for willful violations.[19] The floor and ceiling amounts for punitive damages were removed through a House amendment during the conference process.[20]

In 1996, Congress introduced a statutory damage calculation range, creating the current version of the law.[21] Punitive damages remain uncapped by statute.[22] *Amici* suggest the reason Congress inserted this range was, as was common in reputational torts, actual damages can be hard to prove. For that reason, Congress added language to allow presumed damages to be recovered from a predefined range. *Cf. Doe*, 540 U.S. at 621-22 (the word "damage" does not automatically imply that general damages are available in privacy statute). It does not follow—at all—that Congress meant to

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to the Consumer Credit Protection Act) *with* Fair Credit Reporting Act, Pub. L. No. 91-508, Title VI, 84 Stat. 1114, 1127 (1970) (text of amendments as enacted).

19 S. 823, 91st Cong. § 616 (1969).

20 H.R. Rep. No. 91-1587, at 30 (1970) (Conf. Rep.).

21 Consumer Credit Reporting Reform Act of 1996, Pub. L. No. 104-208, § 2412, 110 Stat. 3009, 3009-446 (1996).

22 15 U.S.C. § 1681n(a)(2). *But see BMW of N. Am. Inc. v. Gore*, 517 U.S. 559 (1996) (stating "exemplary damages must bear a "reasonable relationship" to compensatory damages")

depart from the common-law standards of the privacy tort, which require proof of causation and harm before establishing damages. Congress only intended to provide an alternate means of calculating damages after causation of injury had been demonstrated.

1. A plaintiff must allege harm to a privacy interest to have statutory standing under the FCRA

The common law long recognized a personal right in one's reputation, protected by causes of action for invasion of privacy and defamation. *See* Restatement of Torts §§ 867, 559 (1938). By the time of the FCRA's drafting, courts had recognized the legal concept of privacy as not only containing defamation, but also several other overlapping causes of action, most notably "intrusion on seclusion," "false light," and "publicity given to private facts."[23] That right, however, was a "personal one, which does not extend to the members of [a plaintiff's] family." William L. Prosser, *Privacy*,

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[23] *Privacy*, *supra* at 389; *see also, e.g.*, William L. Prosser, Torts § 112 at 832 (and cases cited therein) (3d ed. 1964). Dean Prosser's framework was adopted in the Restatement (2d) of Torts. *See* Restatement (Second) of Torts §§ 652A (defining privacy tort generally), 652D (stating that the tort of publication of private facts exists if "the matter publicized is of a kind that would be highly offensive to a reasonable person, and is not of legitimate concern to the public") § 652B (intrusion on seclusion), & 652E (false light) .

48 Cal. L. Rev. 383, 408 (1960). Plaintiffs personally harmed in privacy cases also could recover damages for "emotional distress or personal humiliation that he proves to have been actually suffered", if "normal" and "reasonable in its extent." Restatement (Second) of Torts § 652H, comment b. Each of these torts requires the plaintiff's acts to be the proximate cause of some reputational harm—either through the publication of private facts in an offensive manner, or through the false imputation of some harm caused by the words' offensive nature, such as a refusal to do business with someone. *See* Restatement of Torts §§ 559, 867 comment d. (1938); *Dun and Bradstreet v. Greenmoss Builders*, 472 U.S. 749, 761 (1985) (allowing for recovery of presumed damages in defamation cases involving matters of private concern irrespective of fault).

The kinds of actionable personalized harm traditionally suffered by plaintiffs in privacy cases formed the reason for the statute's enactment. In enacting the FCRA, Congress was concerned that consumers applying for "credit, insurance, or employment *should not be denied* these essentials because of erroneous, incomplete, obsolete, misleading or malicious information." *Fair Credit Reporting: Hearings on H.R. 16340 Before the Subcomm. on Consumer Affairs of the H. Comm. on Banking and Currency,* 91st Cong. at 1 (1970) (emphasis supplied). It sought to "ensure the free flow of credit information" while at the same time ensuring consumer access to the consumer's credit file "so that he is not unjustly damaged by an erroneous credit report." S. Rep. 91-517, at 2 (1969).

The harm to individual consumers that Congress sought to remedy fits well within traditional common-law bounds. First, a consumer could not discover when a consumer report damaged them, as users were contractually bound not to disclose those reports. S. Rep. 91-517, at 3. Second, assuming that she learned of a harmful error, the consumer had difficulty correcting inaccurate information. *Id.* Third, the consumer's personal reputations were subject to the vagaries of invasive, unregulated and unreliable investigative consumer reports that reached into intimate details of their domestic and social life, and Congress found it too easy to get access to consumer reports of any kind. *Id.* at 4. Finally, Congress noted that some agencies had difficulty keeping public records current, for example by reporting a lawsuit, but not reporting that it had been dismissed, or by keeping credit difficulties in the consumer's file forever—long after they ceased to be relevant. *Id.* Put another way, at the time of the FCRA's enactment, Congress sought to provide a federal remedy for activity that harmed consumers' reputations under false light, public fact, and defamation theories. [24]

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[24] Before adding the statutory damage range, the testimony Congress received uniformly involved statements from consumers who had suffered actual harm beyond a mere statutory violation. *See, e.g., Fair Credit Reporting Act: Hearing before the Subcomm. on Consumer Affairs and Coinage of the H. Comm. on Banking, Finance and Urban Affairs,* 102d Cong. 18-27 (1991) (Serial No. 102-45); *see also id.* at 640, 649 (letters from state attorneys general expressing concern over

The FCRA does nothing more than provide a federal framework to regulate a species of common-law privacy wrong, but that wrong is personal to the individual. A parallel example exists in the Copyright Act, 17 U.S.C. § 101 *et seq.*, which protects both a property and a privacy right. *See Harper & Row v. The Nation,* 471 U.S. 539, 554 (1985) (noting that common law copyright was often enlisted in the service of personal privacy"). In the absence of the statute's protection, both the property and the privacy rights evaporate on publication. *See generally* 1 M. Nimmer & D. Nimmer, Nimmer on Copyright § 4.04. Infringement currently lies only after application of the fair use defense, which analyzes both whether the work was published or unpublished, and the effect of the use on the actual or potential market. 17 U.S.C. § 107(2), (4); H.R. Rep. No. 94-1476, at 66 (1976) (noting that the statute did not expand the common-law cases). Thus, statutory damages may be available for violation of a statutory right, 17 U.S.C. § 504(c), but

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the actual harm done to consumers); *Fair Credit Reporting Act: Hearing before the Subcomm. on Consumer Affairs and Coinage of the H. Comm. on Banking, Finance and Urban Affairs,* 102d Cong. 86-87 (1991) (Serial No. 102-79) (describing how the every resident of Norwich Vermont was erroneously described as having tax liens on their property). As a result, the 1996 amendment not only added the provision discussed above, but also amended the statute (over strenuous industry objection, *see id.* at 145, 183, 263) to allow the FTC to collect civil penalties. Pub. Law No. 104-208, § 2416, 110 Stat. at 3009-450 (1996).

only after invasion of a property right or harm to a recognized personal privacy interest has occurred.[25]

2. The complaint lacks a causal link to reputational harm

The harm suffered by respondent boils down to two allegations: (1) that his personal employment prospects were "damaged" because the information is inaccurate and he remains unemployed; and (2) that he has suffered anxiety by virtue of the presence of

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[25] It may be argued that in the copyright context, Congress has created new rights to sue out of whole cloth, for example by restoring certain foreign works from the public domain. *See* 17 U.S.C. § 104A, *Golan v. Holder,* 132 S. Ct. 873 (2012). In addition to incorrectly mixing the privacy and property strands of copyright law, that argument conflates the power of Congress to create property rights under Article I with the manner in which it intended those rights to be enforced in the courts under Article III. 17 U.S.C. § 501 (giving rights only to the legal or beneficial owner to sue for infringement). For example, *amici* do not gainsay legislative ability to regulate false patent marking. *Compare* 35 U.S.C. § 292 (standing for competitive injury only). The prior version of 35 U.S.C. § 292 (2010) expressly delegated *qui tam* status to private individuals for any false marking of a patented item. Congress amended the statute to limit standing to those who had suffered competitive injury. Leahy-Smith America Invents Act, Pub. L. 112–29, §§ 16(b)(1)–(3), 125 Stat. 284, 329 (2011) (codified at 35 U.S.C §§ 292(a)-(c)). Assignment language does not exist in the FCRA—only state attorneys general and federal regulators can sue on behalf of the public. *See* 15 U.S.C. § 1681s(c). Unlike prior versions of the copyright statute or prior versions of the patent marking statute (respectively), the FCRA neither creates a property right nor delegates the United States' interests to individuals.

inaccurate information and ensuing worry about his diminished employment prospects. (First Amend. Compl. ¶¶ 35-37.)

With respect to the first claim, "damage," absent facts tending to satisfy the traditional elements of false light, defamation, or other privacy torts represents nothing more than a legal conclusion required by the statute. As such, that allegation fails under *Iqbal. See Iqbal,* 566 U.S. at 678-79. In the absence of allegations demonstrating a violation of a traditional privacy interest, the bald allegation of harm to employment requires additional information to demonstrate proximate cause, and is not entitled to the presumption of truth. *Id.*

Based entirely on public information, Spokeo has made respondent's reputation better than might otherwise be in that he is richer, married, and better educated. (*Cf.* First Amend. Compl. ¶¶ 30-34.) Insurance rates for many married men are, for example, often lower than those of single men,[26] and higher education and wealth make it more likely that a consumer will either gain a job or obtain a loan. Without more, none of the inaccuracies alleged in the complaint are of the sort that are "offensive to a person of ordinary sensibilities," Restatement of Torts § 867 comment c., or would "lower his

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[26] Fred Imbert, *The One Time Being Married May Cost You Less*, CNBC (Mar. 28, 2015), http://www.cnbc.com/id/102537119.

estimation in the community or cause third parties to refuse to deal with him." *Id.* § 559.

Respondent's second class of harm entirely derives from the first, namely, that his employment prospects have diminished, and he is anxious because he is unemployed. (First Amend. Compl. ¶ 37.) Indeed, respondent's anxiety over his employment situation is understandable, but it remains causally untethered to the defendant's alleged wrongs. Inaccurate information in and of itself does not create a cause of action under either traditional privacy law, *see* Restatement (Second) of Torts § 652E, comment c, or under the FCRA. Moreover, the complaint does not allege any facts suggesting that petitioner had done anything more invasive than cull public records and social media sites in which respondent, like millions of other Americans, participated. *See* Restatement (Second) of Torts § 652D, comments b, c (noting that "there is no liability for giving publicity to facts about the plaintiff's life that are matters of public record", and that "anyone who is not a hermit must expect and endure the ordinary incidents of the community life of which he is a part"); (Pet. Br. 4 (citing C.A. Supp. Excerpts of Record (ER) 22).)

In short, petitioner's alleged violation of the statute did not proximately cause harm to a privacy interest protected by the statute. With the addition of a few hypothetical facts, such allegations could proximately cause "damage" under the FCRA. For example, if respondent had applied for subsidized housing and had been denied because Spokeo incorrectly showed him as too rich, a cause of action

would lie. Similarly, if he was denied a job because a recipient of a consumer report wrongly thought him overqualified, an action would also lie. *E.g.*, Restatement (Second) of Torts § 652E (describing how false light may differ from defamation). *Amici* acknowledge that the respondent could rightly claim damages for the mental stress caused by any of these statements in a willful violation context; however, in each of these scenarios the defendant's actions are the proximate cause of actionable "damage." But these are not the facts that Mr. Robins has alleged.

Instead, respondent's suit seeks millions in damages because Spokeo has information about him and does not have a toll-free phone number, and has refused to receive certifications or provide a number of statutorily required notices to third parties. (*See* First Amend. Compl. ¶ 73 (alleging violation of 15 U.S.C. § 1681j(a)(1)(C) and 16 C.F.R. § 610.3).) That construction conflicts with the highly personal nature of privacy rights. Moreover even assuming that Spokeo actually disseminated information about him, the sins alleged by respondent lack a causal connection to personal reputational damage—namely, some degrading imputation, cognizable economic harm, or privacy invasion that would be offensive to a reasonable person. *Amici* do not suggest that this bar is a toweringly high one, only that it exists. The complaint does not pass it.

IV. CONCLUSION

Amici respectfully submit that if Congress meant to so radically test the bounds of standing and privacy it would have said so expressly. Neither the text, structure, purpose, or history of the statute suggests that Congress intended to confer standing beyond the traditional common law bounds, and the Court should not infer that intent without express legislative direction. Accordingly, the judgment of the Ninth Circuit should be REVERSED.

Respectfully Submitted,

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