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 *AMICI CURIAE* INFORMATION PRIVACY LAW SCHOLARS IN SUPPORT OF RESPONDENT

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## INTEREST OF AMICI[1]

*Amici curiae* are fifteen law professors engaged in significant research and teaching on information privacy law. *See* Appendix A (listing individual law professors joining this brief). This brief addresses issues that are within *amici*'s particular areas of scholarly expertise.

## SUMMARY OF ARGUMENT

In enacting the Fair Credit Reporting Act (FCRA), Congress crafted a bargain between aggressive, secretive data-aggregating businesses and the public: if those businesses limited disclosures and made reasonable efforts to adhere to practices ensuring "maximum possible accuracy," they would enjoy a safe harbor from litigation under many state and federal theories. The FCRA's consumer transparency requirements and remedial provisions were designed to encourage steady improvement in consumer reporting practices and to relieve pressure on public enforcement authorities. The Petitioner's claim that Respondent cannot pursue it for its violations of the FCRA

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[1] Each party has consented to the filing of this brief, and copies of the consents have been lodged with the Clerk of the Court. Pursuant to this Court's Rule 37.6, *amici* state that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than *amici* or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

would unravel that bargain, preserving consumer reporting agencies' broad immunity from suit while diminishing incentives to handle data fairly.

In an era in which employers increasingly practice "hiring by algorithm," inaccurate consumer reports—even those that contain putatively favorable inaccuracies—can cause real economic injury to consumers. Such inaccuracies can lead employers to screen out prospective employees as overqualified or too well-paid. Alternatively, employers may suspect resume inflation and dishonesty if background checks reveal inconsistencies or unearned honors.

More generally, lawmakers historically have recognized and responded to non-economic and dignity-based injuries by creating rights of action to remedy such wrongs in court. The FCRA follows that pattern. In enacting the FCRA, Congress did not create injury but rather recognized the injury worked by improper disclosure and handling of information. Petitioner's argument to the contrary threatens to upset numerous privacy, consumer protection, and other laws.

## ARGUMENT

### I. The FCRA Represents a Carefully Crafted Bargain.

During the late 1960s, Congress became alarmed by the proliferation of data brokers serving the credit, insurance and employment markets with secret and frequently inaccurate dossiers of personal information. At hearings prior to enactment of the FCRA in 1970, Congress heard horror stories about hidden collections and inappropriate disseminations of consumer information, about the harms that the dissemination of false or inaccurate information had caused, and about affected consumers' inability to combat the continued spread of such information after learning of its existence. *See Fair Credit Reporting: Hearings on S. 823 Before the Subcomm. on Fin. Insts. of the S. Comm. on Banking & Currency*, 91st Cong. 368, 378-81 (1969) (showing and providing transcript of CBS report on the ease with which fictitious companies could obtain consumer reports for non-legitimate purposes); *id.* at 381-424 (statements of consumer witnesses); *Fair Credit Reporting: Hearings on H.R. 16340 Before the Subcomm. on Consumer Affairs of the H. Comm. on Banking & Currency*, 91st Cong. 62-81 (1970) (statement of Prof. Alan Westin) (citing examples); *id.* at 109 (statement of Chairwoman

Leonor Sullivan) (indicating that the subcommittee watched the CBS report).

In enacting the FCRA and in subsequent amendments, Congress sought to resolve these problems explicitly and to give individual consumers redress when consumer reporting agencies have failed to provide transparency to those consumers, have improperly disclosed those consumers' report information, or have willfully or negligently failed to follow reasonable procedures for assuring accuracy of those consumers' reports.

The FCRA represents a careful bargain that could be unraveled by a ruling for Petitioner. First, the statute's "reasonable procedures" and preemption provisions are intended to set sensible national standards for consumer reporting and protect the industry from the risk of prohibitive liability. Second, the statute's transparency provisions are designed to enlist consumers themselves in the process of correcting inaccurate information. Third, the statute's remedial provisions are designed to provide a meaningful deterrent to willful violation of the statute's reasonableness and transparency standards, and to respond to the structural difficulty of proving the extent of injury flowing from conduct in a marketplace whose detailed workings still remain largely invisible to consumers. Finally, the

legislative scheme as a whole indicates clear legislative intent to achieve comprehensive coverage of consumer reporting activities. Petitioner's claim that Respondent cannot pursue it for its violations of the FCRA would vitiate each prong of that bargain.

### A. Uniform National Standards and Preemption of Unpredictable Tort Liability

When businesses amass records on hundreds of millions of Americans, both errors and improper disclosures inevitably will result. For that reason, the FCRA does not hold the consumer reporting industry to an unattainable standard of perfection. Instead, Congress chose a different strategy, imposing an affirmative duty to handle data reasonably and fairly. Congress recognized that, absent legal obligation, consumer reporting agencies would have insufficient incentive to incur the costs of ensuring a high degree of accuracy and fairness. *See* Michael E. Staten & Fred H. Cate, *Does the Fair Credit Reporting Act Promote Accurate Credit Reporting?* 23 (Harvard Joint Center for Hous. Studies, Working Paper No. BABC 04-14 2004), *available at* http://www.jchs.harvard.edu/research/publications/does-fair-credit-reporting-act-promote-accurate-credit-reporting. The FCRA imposes on consumer reporting agencies

the obligations to "maintain reasonable procedures designed . . . to limit the furnishing of consumer reports to the purposes listed" and to "follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates." Fair Credit Reporting Act of 1970, Pub. L. 91-508, § 607, 84 Stat. 1127, 1130-31 (codified as amended at 15 U.S.C. § 1681e (a)-(b)).

At the same time, to protect a then-emerging industry from the imposition of inconsistent obligations and unpredictable liability across multiple jurisdictions, Congress conferred immunity from state law defamation, invasion of privacy, and negligence claims "except as to false information furnished with malice." *Id.* § 610(2), 84 Stat. at 1131-32 (codified as amended at 15 U.S.C. § 1681h(e)). Critically, the FCRA's preemption provision does not seek to foreclose all monetary liability. Instead, Congress replaced an uneven patchwork of state common law rules affording remedies for consumer reporting abuses with a uniform federal remedial scheme.

In claiming that Respondent cannot pursue it for its violations of the FCRA, Petitioner seeks effectively to declare itself exempt from compliance with the statutory standard of reasonableness and from the nationwide remedial scheme that the

statute creates. Under the Petitioner's interpretation of the FCRA, consumer reporting agencies would enjoy the broad immunities conferred by the FCRA while not meeting their end of the bargain to give consumers access to their own reports, limit disclosures of consumer reports to others, and strive for accuracy in compiling consumer reports.

### B. Transparency as a Mechanism for Error-Correction

The keystone rights created by the FCRA are the rights of consumers to learn about adverse information and false or inaccurate information in their own consumer reports and to seek correction of that information. *See Fair Credit Reporting*, S. Rep. No. 91-517, at 1-2 (1969). That legislative structure reflects congressional judgment that sunlight is the best disinfectant. The transparency requirements are envisioned as the principal mechanism for policing industry conduct, enlisting consumers themselves in the process of overseeing the statutory requirements of reasonable accuracy and appropriate disclosure.

As the Senate Banking and Currency Committee noted in its 1969 report on the bill that would become the FCRA, Congress wanted "to prevent consumers from being unjustly damaged because of inaccurate or arbitrary information . . .

[and] to prevent an undue invasion of the individual's right to privacy in the collection and dissemination of [his or her] information." *Id*. at 1. The consumer access and adverse action notice requirements were envisioned as the means for attaining that result. *See id*. at 1-2; *see also Consumer Reporting Reform Act of 1994*, H.R. Rep. No. 103-486, at 26, 47 (1994) (explaining intent behind strengthened adverse action requirements). Although the FCRA also can be enforced by a number of federal and state agencies, *see* Pub. L. 91-508, § 621, 84 Stat. at 1134-35 (codified as amended at 15 U.S.C. § 1681s), those agencies do not have knowledge of the underlying facts with respect to particular consumers and thus are poorly placed to determine whether any particular consumer report contains errors and whether any particular consumer is, for example, seeking employment and therefore likely to be harmed by those errors. Public enforcement agencies also lack sufficient resources to pursue all violations. *See* Fed. Trade Comm'n, Consumer Sentinel Network Data Book for January-December 2014 6 (2015) (indicating that FTC received over 35,000 complaints related to consumer reporting in 2014). The primary mechanism for flagging inaccurate information in consumers' records therefore is and must be consumers themselves.

Each time Congress revisited the FCRA, the statute's transparency rights were strengthened, notably by the Consumer Credit Reporting Reform Act of 1996, Pub. L. 104-208, Title II, subtitle D, 110 Stat. 3009-426, and the Fair and Accurate Credit Transactions Act of 2003 (FACTA), Pub. L. 108-159, 117 Stat. 1952. In particular, "during the period leading up to the [FACTA] amendments, the FTC consistently indicated that it received more complaints about consumer reporting errors than any other item." *Amending Fair Credit Reporting Act*, S. Rep. No. 108-166, at 6 (2003). The FACTA reforms were designed to indicate that Congress was serious about transparency. They included "numerous provisions to increase the accuracy of consumer reports by providing consumers greater notice about the content of their reports . . . [and] requir[ing] credit bureaus and furnishers to take additional steps to rid consumer credit reports of inaccurate or incomplete information" reported to them by the affected individuals. *Id.* at 4. The Senate Committee report on FACTA states that "the driving force behind the changes was the significant amount of inaccurate information that was being reported by consumer reporting agencies and the difficulties that consumers faced getting such errors corrected." *Id.* at 5-6.

In continually acting to strengthen the statutory guarantees of transparency and the opportunity to correct false or inaccurate information, Congress has sought to combat the injuries that secret, inaccurate dossiers of personal information can create. Petitioner's claim that Respondent cannot pursue it for its violations of the FCRA, if taken seriously, would prevent the statute's principal error-correction mechanism from operating.

### C. Enhanced Consumer Remedies to Deter Willful Violations of the FCRA's Transparency and Reasonable Accuracy Standards

To reinforce the statutory obligations of reasonableness and transparency, Congress enabled consumer suits where consumer reporting agencies acted negligently or willfully. While preempting state tort suits in most cases, Congress also provided a comprehensive suite of federal statutory remedies. As originally drafted, Congress authorized actual damages, court costs, and attorneys' fees for negligent violations, s*ee* Pub. L. 91-508, § 617, 84 Stat. at 1134 (codified as amended at 15 U.S.C. § 1681o), and enhanced these remedies with the option for punitive damages for willful violations, s*ee id*. § 616, 84 Stat. at 1134 (codified as amended at 15 U.S.C. §1681n).

Notably, however, although the FCRA's provisions authorizing actual and punitive damages in cases of willful violation manifested a clear legislative intent to hold consumer reporting agencies to certain minimum standards of transparency and accountability, instances of secrecy and abuse continued. In the early 1990s, as Congress began discussing a series of amendments designed to strengthen the law's guarantees, both the House and Senate Committees heard stories of consumers who had tried in vain to remove false and damaging information from their files. *See Amendments to the Fair Credit Reporting Act: Hearing Before the Subcomm. on Consumer Affairs & Coinage of the H. Comm. on Banking, Fin., & Urban Affairs*, 101st Cong. 136-45 (1990) (statement of Edmund Mierzwinski, U.S. Public Interest Research Group); *Consumer Problems with Credit Reporting Bureaus: Hearings Before the Subcomm. on Consumer of the S. Comm. on Commerce, Science, & Transp.*, 102d Cong. 19-33, 75-90 (1992) (statements of consumer witnesses); *The Consumer Reporting Reform Act of 1993—S. 783: Hearing Before the S. Comm. on Banking, Hous., & Urban Affairs*, 103d Cong. 64-66 (1993) (statement of Michelle Meier, Consumers Union).

As a response to this testimony, the amendments ultimately enacted as the Consumer

Credit Reporting Reform Act of 1996, authorized courts to award statutory damages as an alternative to actual damages in cases of willful failure to comply with the FCRA's requirements. Pub. L. 104-208, Title II, subtitle D, § 2412, 110 Stat. at 3009-446 (codified at 15 U.S.C. § 1681n(a)(1)(A)) (authorizing award of "any actual damages sustained by the consumer as a result of the failure or damages of not less than $100 and not more than $1,000").

Congressional authorization of statutory damages does not signal a lack of injury in fact. Rather, it represents congressional recognition of the difficulty of documenting that injury, given the structural characteristics of the offending conduct. Statutory damages provisions throughout the U.S. Code serve a similar purpose. Thus, for example, the Copyright Act authorizes an infringement plaintiff to request "instead of actual damages and profits, an award of statutory damages for all infringements involved in the action, with respect to any one work." 17 U.S.C. § 504(c)(1). Historically, statutory damages for copyright infringement have been used to afford a remedy to copyright owners who could prove infringement but not the resulting damages—for example, because it was not possible to trace the disposition of infringing copies. *See* Pamela Samuelson & Tara

Wheatland, *Statutory Damages in Copyright Law: A Remedy in Need of Reform*, 51 Wm. & Mary L. Rev. 439, 446-47 & n.22 (2009).

Similar problems of proof led Congress to provide for statutory damages in the Truth in Lending Act (TILA) when the cost of credit is inaccurately disclosed. 15 U.S.C. § 1640(a)(2). An early case regarding this provision explained:

> The misrepresentation of the cost of credit may have prevented the debtor from obtaining cheaper credit after comparison shopping. The debtor's actual damages are difficult to ascertain. Nonetheless, the creditor has injured the debtor in his monetary interests by misrepresenting the cost of credit. And the Truth-in-Lending Act avoids the difficulty in calculating damages by providing for liquidated damages of twice the amount of the finance charge.

*Porter v. Household Fin. Corp. of Columbus*, 385 F. Supp. 336 (S.D. Ohio 1974); *accord Adiel v. Chase Fed. Savings & Loan Ass'n*, 810 F.2d 1051, 1054-55 (11th Cir. 1987) (holding that award of statutory damages was appropriate when actual damages from TILA violation were difficult to prove); *In re Wood*, 643 F.2d 188, 192 (5th Cir. 1980) (explaining

that the TILA allows for statutory damages because actual damages can be difficult to prove).

The statutory damages provisions of the FCRA conform to this pattern. The consumer reporting industry remains structurally opaque to consumers. In particular, the barriers to discovering all of the facts about a dissemination of false or inaccurate information are significant. The FCRA was enacted because consumers were not able to learn who was selling their personal information, nor could they learn who was receiving the data and whether the data was accurate. Data brokers who deny that their activities are covered by the FCRA assert trade secrecy protection for their contracts, customer lists, and profiling algorithms. *See* Office of Oversight & Investigations Majority Staff of S. Comm. on Commerce, Science, and Transp., 113th Cong., *A Review of the Data Broker Industry: Collection, Use, and Sale of Consumer Data for Marketing Purposes* 10-11 (2013); Frank Pasquale, *Black Box Society: The Secret Algorithms that Control Money and Information* 22-42 (2013). These structural attributes of the contemporary consumer reporting industry make the difficulty of proving injury so significant that to require such proof would be to prevent injured consumers—consumers who have suffered real, concrete harms from the

dissemination of secret, inaccurate dossiers and profiles—from recovering a monetary remedy at all.

Petitioner's argument that consumers who have suffered FCRA violations have incurred no federally cognizable injury is disingenuous. It seeks to convert endemic industry secrecy into a federally-conferred entitlement for a rogue business model to continue with impunity its pattern of injurious conduct.

### D. Comprehensive Coverage of Consumer Reporting Activities

A final, critical aspect of the balance embodied in the FCRA is comprehensive coverage of activities falling within the general domain of consumer reporting. *See* Pub. L. 91-508, § 602, 84 Stat. at 1128 (codified at 15 U.S.C. § 1681); *see also id.* § 604, 34 Stat. at 1129 (codified as amended at 15 U.S.C. §1681(b)) (authorizing consumer reports to be furnished "under the following circumstances and no other"); S. Rep. No. 91-517, at 2 ("The procedures established in the bill assure the free flow of credit information while at the same time they give the consumer access to the information in his credit file so that he is not unjustly damaged by an erroneous credit report."). The activities in which Petitioner is alleged to have engaged manifest flagrant disregard of the carefully crafted statutory regime.

Although Spokeo purports not to offer the same products as traditional consumer reporting entities such as Experian or Equifax, Spokeo's activities "are substantially similar to those of the . . . companies that Congress [intended] the Act to reach." *Am. Broad. Cos., Inc. v. Aereo, Inc.*, 134 S. Ct. 2498, 2506 (2014) (comparing Internet retransmission of broadcast television programming to retransmission by cable companies, which federal law regulates comprehensively). Insofar as differences exist, they concern the level of care exercised by Spokeo with respect to the data it gathers and provides and the extent of its compliance with fair information practices—precisely those deficiencies now alleged to constitute statutory violations. Moreover, as in other contexts, Spokeo's business model "shows a purpose to cause and profit from third-party acts" in violation of the FCRA's clear limitations. *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 941 (2005). Notwithstanding its pro forma instruction to site users not to violate the law, *see* http://www.spokeo.com/business-uses, the probable scope of those violations is, as in *Grokster*, "staggering." *Id.* at 923.

Spokeo is worried about the possibility of massive liability if the claims by Respondent and others are allowed to go forward. It should be. But

legitimate consumer reporting agencies that comply with the FCRA's clear requirements need have no such fear. This Court has not been swayed by the downside risks to rogue business models in the past, and it should not be swayed now. Moreover, the risk of billion-dollar liability is only theoretical in FCRA litigation. The largest FCRA jury award to date is $18,420,000, and that award was reduced to $1,620,000. *Miller v. Equifax Info. Servs., LLC.*, No. 3:11-CV-01231-BR, 2014 WL 2123560 (D. Or. May 20, 2014). In exchange for the significant benefits of the FCRA bargain, *all* businesses engaged in the consumer reporting activities defined by the statute must also conform to its uniform minimum standards.

## II. FCRA Violations Are Injuries in Fact.

A prime motivation for the FCRA was the impact of third party data collection on the employment market and particularly on individual job seekers. The costs to consumers whose information is erroneous can be high, including loss of job opportunities. Those costs are real and concrete, and have only increased since 1970 when Congress passed the FCRA.

In the 20th century, direct contact between job seekers and employers ensured notice to job seekers when consumer reporting processes were initiated. This allowed the FCRA's mechanism for

error-correction to work. Under the FCRA, an employer must obtain authorization from a consumer before procuring his or her consumer report. 15 U.S.C. § 1681b(b)(2). The job seeker would submit personal information through an application process and would consent to having his or her consumer report pulled. If the employer planned to deny the application based on data in the consumer report, the job seeker would be informed, as the FCRA requires, *id.* § 1681b(b)(3), and could explain any errors in the report. If the employer nonetheless declined the applicant on the basis of information in the consumer report, the applicant would be notified, *id.* § 1681m(a), and would have the opportunity to correct any errors in his or her consumer report through the FCRA's dispute process, *id.* § 1681i.

In the 21st century, employers increasingly rely on algorithms to recruit and screen potential employees. Claire Cain Miller, *Can an Algorithm Hire Better Than a Human?,* N.Y. Times, June 25, 2015, at SR4; Vivian Giang, *Why New Hiring Algorithms Are More Efficient — Even If They Filter Out Qualified Candidates*, Business Insider (Oct. 25, 2013, 10:51 AM), http://www.businessinsider.com/why-its-ok-that-employers-filter-out-qualified-candidates-2013-10; Tomas Chamorro-Premuzic, *3 Emerging Alternatives to*

*Traditional Hiring Methods*, Harv. Bus. Rev. (June 26, 2015), https://hbr.org/2015/06/3-emerging-alternatives-to-traditional-hiring-methods ("Algorithms are also used to translate people's web and social media activity into a quantitative estimate of job potential or fit.").

For recruiting, many employers today search for prospective employees by querying consumer information supplied by consumer information aggregators like Petitioner Spokeo, in effect pre-screening applicants without their awareness. *See, e.g.*, Jeanne Meister, *2014: The Year Social HR Matters*, Forbes (Jan. 6, 2014, 7:21 AM), http://www.forbes.com/sites/jeannemeister/2014/01/06/2014-the-year-social-hr-matters/2/ ("Big Data Lets New Jobs Find You Before You Even Know You're Looking"); Alexandra Chang, *The Most Important LinkedIn Page You've Never Seen*, Wired (April 15, 2013, 9:30 AM), http://www.wired.com/2013/04/the-real-reason-you-should-care-about-linkedin/ (describing one online recruitment tool as "like a two-way mirror where companies and recruiters can see all of your profile information, without you knowing they're checking you out"); George Anders, *Who Should You Hire? LinkedIn Says: Try Our Algorithm,* Forbes (Apr. 10, 2013, 1:31 PM), http://www.forbes.com/sites/georgeanders/2013/04/10/who-should-you-hire-

linkedin-says-try-our-algorithm/ (reporting estimate that "more than half of job prospecting is driven by what the algorithms recommend"); Michael Fertik, *Your Future Employer Is Watching You Online. You Should Be, Too*, Harv. Bus. Rev. (Apr. 3, 2012), https://hbr.org/2012/04/your-future-employer-is-watchi (explaining how algorithms increasingly enable employers to search online for potential job prospects, selecting and rejecting people who have not even applied). Employers need not advertise positions and prospects need not apply. As currently structured, this process of "job prospecting" affords no opportunity for employers to ask "prospects" to authorize the use of their consumer reports or to provide individuals who did not know they were prospects with copies of their reports or adverse action notices. Further, it affords prospects no opportunity to dispute the accuracy of the consumer information queried. Although the FCRA permits narrowly circumscribed forms of pre-screening for credit and insurance offers, 15 U.S.C. §§ 1681a(l) & 1681b(c), it does not permit pre-screening of potential job prospects without their consent.

With respect to screening, when job openings *are* advertised, the cost of responding is so low today that applicants apply in droves, even for jobs for which they are not qualified. Rather than

contacting all potential prospects or interviewing all applicants, employers screen out most. *See* Berrin Erdogan, *Overqualified Employees: Making the Best of a Potentially Bad Situation for Individuals and Organizations*, 4 Indust. & Org. Psychol. 215 (2011); Amy Gallo, *Job Seekers: Get HR on Your Side*, Harv. Bus. Rev. (Nov. 30, 2011), https://hbr.org/2011/11/job-seekers-get-hr-on-your-sid.html. In addition to using information extracted from individual applications for this purpose, employers search online for information posted by the candidate and by others. *See* Alex Rosenblat et al., *Data & Civil Rights: Employment Primer*, Data & Civil Rights, 5 (Oct. 30, 2014), http://www.datacivilrights.org/pubs/2014-1030/Employment.pdf ("According to a 2009 survey by Microsoft, 75% of HR professionals and recruiters in the U.S. reported that their companies have formal policies in place to research job candidates' online reputations; 89% of U.S. recruiters and HR professionals seek out professional online data …; and 84% think it is appropriate to check online personal data as well.… 70% of HR professionals reported that they rejected candidates after mining their data."); Chamorro-Premuzic, *supra* (explaining that employers use "web scraping" to obtain "[c]andidates' digital footprints," which "include information that [candidates] have deliberately collected and curated

— such as LinkedIn endorsements and recommendations — but also comments, photos, and videos posted by colleagues, clients, friends, and family"). Rather than having to search online sites one by one, many use the services offered by online consumer information aggregators like Petitioner Spokeo. *See* Chad Brooks, *Choosing a Background Check Service: A Buying Guide for Businesses*, Business News Daily (Jan. 8, 2015 9:34 AM), http://www.businessnewsdaily.com/ 7636-choosing-a-background-check-service.html (explaining that many online background check services are not FCRA-compliant, but are inexpensive and provide instant results); Roy Maurer, *Amazon, Staffing Company Sued Under FCRA*, Society for Human Resource Management (May 8, 2015), http://www.shrm.org/hrdisciplines/ staffingmanagement/articles/pages/amazon-staffing-company-sued-fcra.aspx (noting that one cause of widespread FCRA violations is that staffing agencies which assist firms with hiring "use the least expensive background check possible").

While in theory employers could ask an applicant for consent before obtaining his or her consumer report for screening purposes, and could seek to determine whether any discrepancy between the application and the consumer report

indicated an inaccuracy in the latter, in practice it may be increasingly common for employers to do neither. *See* Steve Johnson, *Those Party Photos Could Cost You a Job*, Chi. Trib. (Jan. 17, 2012), http://www.chicagotribune.com/lifestyles/ct-tribu-facebook-job-dangers-20120117-column.html (reporting that in a survey of employers that screen applicants' social media sites, "73 percent said they don't give the applicants a chance 'to explain questionable information'"); Adam T. Klein, Testimony at EEOC Meeting of May 16, 2007 (testifying that employers often do not notify applicants when they are rejected on the basis of information in their consumer reports), *available at* http://www.eeoc.gov/eeoc/meetings/archive/5-16-07/transcript.html#12; Lisa D. Grant Harpe, *Are You Putting Your Organization at Risk?*, PeopleClick, 28 (2009), http://www.iowaabi.org/documents/filelibrary/events/social_media/Social_Networks_Employment_Law_eBoo_C3A386C1048E1.pdf (misleadingly advising employers that only third-party recruiters need to comply with the FCRA's consumer notification requirements).

The alleged errors Spokeo distributed in its data about Respondent Robins are among the precise types of errors that cost people job opportunities. Two common grounds for exclusion from the prospect pool or from the applicant pool

are that the consumer is overqualified or that the consumer's past salary was higher than what this employer plans to pay. The common wisdom among employers is that an overqualified employee will not stay in the position for long and therefore will produce high turnover costs for the employer. Erdogan, *supra*, at 215 (explaining that "overqualified" candidates are "considered high risks for turnover and lower performance because of low morale and potential boredom"); Amy Gallo, *Should You Hire an Overqualified Candidate?*, Harv. Bus. Rev. (Mar. 3, 2011), https://hbr.org/2011/03/should-you-hire-an-overqualifi.html ("As politicians and economists puzzle over America's jobless recovery, managers who have started to hire again face another problem: how to handle all the overqualified candidates coming through their doors. The prevailing wisdom is to avoid such applicants."). Employers believe that if an applicant is or was earning more at his or her last job than the employer plans to pay, he or she will not accept an offer and so pursuing that applicant is a waste of the employer's time. Donna Fuscaldo, *How to Negotiate Your Starting Salary*, Glassdoor (Apr. 7, 2014, 7:00 AM), http://www.glassdoor.com/blog/negotiate-starting-salary/ (noting that current or prior salary is "used to screen out candidates that are simply too expensive"). One columnist for an

online job matching service explains that firms use automated tools to screen out candidates with prior salaries that are too high or too low. Jack Chapman, *Salary Negotiation Tips: Disclosure Sabotage*, The Ladders (Feb. 14, 2012), http://www.theladders.com/career-advice/salary-negotiation-tips-disclosure-sabotage ("[T]o whittle down those thousands to just 10 to 50 candidates to be considered for interviews, software is used. Software has no ability to think about salary or candidate qualifications, it's 'in or out.' The employer enters salary parameters and if you're outside those, you're screened out.").

Employers also commonly screen out applicants whose applications contain information that does not mirror information that employers gather about the applicant from other sources. In such cases, the employer may fear that the applicant is careless, dishonest, or even presents a risk of employer liability for negligent hiring. Hester Lacey, *Is That Promising Applicant Genuine? Weeding Out the 50% of CVs that Aren't Accurate*, Forbes (May 27, 2014, 8:20 AM), http://www.forbes.com/sites/hesterlacey/2014/05/27/is-that-promising-applicant-genuine-weeding-out-the-50-of-cvs-that-arent-accurate/ (reporting analysis finding that just over half of applications contain inaccuracies and suggesting that, although

some inaccuracies are mistakes, employers may err on the side of caution out of a concern about reputation risk from bad hires); Gallo, *Job Seekers*, *supra* (characterizing misstated information on applications as "red flags"); Anne Fisher, *10 Ways to Use Social Media in Your Job Hunt*, Fortune (Jan. 13, 2011, 5:47 PM), http://fortune.com/2011/01/13/10-ways-to-use-social-media-in-your-job-hunt/ (advising job seekers to "[c]heck carefully for any discrepancies between your resume and your online profiles...[because] [e]ven a small, innocent error can make you look dishonest or just careless"); Robert Sprague, *Googling Job Applicants: Incorporating Personal Information into Hiring Decisions*, 23 Lab. Law. 19 (2007) (discussing negligent hiring liability concern).

While the injuries to individual consumers resulting from FCRA violations by employers and consumer information aggregators are real, proof of harm likely is impossible for those consumers to obtain. Data brokers that refuse to acknowledge their roles as consumer reporting agencies make it impossible for consumers to inspect logs reflecting access by prospective employers. As a result, even a consumer who knows his or her profile contains inaccuracies and sues to correct them cannot ascertain whether any particular employer accessed that profile and declined to hire the

consumer on the basis of those inaccuracies. Thus, for example, whether any particular employer used Spokeo's erroneous data to weed out Robins is probably unknowable unless Spokeo itself tracks the results of employer searches of its consumer files and can recreate the counterfactual circumstances that would have occurred had Robins's data been accurate.

Contemporary practices of hiring by algorithm, without notice to the affected individuals and without concern or accountability for decisions based on error or mistake, are precisely the sort of conduct that Congress enacted the FCRA to address. And the combination of real, concrete injury with impossible-to-obtain proof is precisely the reason that Congress granted affected consumers the right to sue for statutory damages in cases involving willful failures to comply with the FCRA's uniform requirements.

## III. Numerous Other Statutes Use a Similar Model to Provide Recourse for Privacy-Related Injuries.

A broad ruling in this case would disrupt established privacy law well beyond the boundaries of the FCRA. Many other statutory regimes rely on private rights of action as a sole or significant enforcement mechanism.

As one example, consider the Video Privacy Protection Act (VPPA), 18 U.S.C. § 2710. The VPPA, enacted in 1988 and amended most recently in 2013, prohibits the unauthorized disclosure of information identifying the videos a customer has viewed, rented, or purchased. *Id.* at § 2710(b). Such disclosures violate core values of personal autonomy and expressive freedom, and therefore cause injury-in-fact even if they do not result in provable reputational harm or emotional distress. *See generally Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (identifying a First Amendment right to "possession of printed or filmed matter in the privacy of a person's own home"); Neil Richards, *Intellectual Privacy* 132-33 (2015); William McGeveran, *The Law of Friction*, 2013 U. Chi. Legal F. 15, 39-46 (2013). Indeed, the invasion of Judge Robert Bork's privacy that motivated Congress to enact the VPPA in the first place, *see* Richards, *supra*, at 132, was a significant injury even absent proof of such additional, consequential harms. An exclusionary rule in the VPPA prevents admission of illegally obtained records in evidence, 18 U.S.C. § 2710(d), but the statute contains no other criminal or regulatory enforcement mechanism. A broad ruling in this case could foreclose the private suits Congress envisioned as VPPA remedies.

Another example is the Wiretap Act, 18 U.S.C. § 2510 *et seq*. This statute, enacted in 1968 and amended in the Electronic Communications Privacy Act of 1986, Pub. L. 99-508, 100 Stat. 1848, prohibits interception, use, or disclosure of the contents of communications obtained from telephone and computer networks. 18 U.S.C. §§ 2511(a)-(c). Unlike the VPPA, the Wiretap Act provides for public enforcement. *Id.* But from the start, Congress has authorized parallel civil enforcement by any "person whose . . . communication is intercepted, disclosed, or intentionally used in violation" of the law. *Id.* § 2520(a); s*ee also id.* § 2707 (authorizing civil enforcement of the Stored Communications Act). Like the FCRA, the Wiretap Act specifies statutory damages as an alternative to actual damages. *Id.* § 2520(c)(2)(B). The Wiretap Act was the result of decades of concern and debate about law enforcement agencies' uses of electronic surveillance technologies. *See generally* Priscilla M. Regan, *Legislating Privacy: Technology, Social Values, and Public Policy* (1995). In the law it enacted and later amended, Congress recognized the concrete and significant injury visited on individuals whose private communications—whether in the form of voice or email messages—are taken by unauthorized others. *See Bartnicki v. Vopper*, 532 US 514, 553-55 (2001) (Rehnquist,

C.J., dissenting) (extolling role of Wiretap Act in protecting "important interests of deterring clandestine invasions of privacy and preventing the involuntary broadcast of private communications"). The law has served as a great bulwark for personal privacy in an age of rapidly changing modern communication. Its protections could be vitiated if the Court narrows significantly the ability of Congress to recognize and remedy privacy injuries.

The VPPA and Wiretap Act are only two examples of privacy statutes that rely significantly on private civil enforcement, and that therefore would be undermined by a holding that ignored the reality of privacy injury-in-fact. Others include the Telephone Consumer Protection Act, 47 U.S.C. § 227(b)(3); the Cable Communications Privacy Act, 47 U.S.C. § 551(f)(1)-(2); and the Drivers' Privacy Protection Act, 18 U.S.C. § 2724(a)-(b).

Congress did not "create" injury in any of these statutes. Rather, in each case it simply recognized privacy injuries-in-fact occurring in new technological contexts, delineated corresponding legal violations, and created private civil rights of action as remedies. This it was constitutionally empowered to do. The Court should not second-guess considered legislative judgments about the desirability of affording such remedies.

## CONCLUSION

For the foregoing reasons, *amici curiae* information privacy law scholars urge this Court to protect the privacy rights of millions of Americans by affirming the decision below.

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