No. 13-1339

IN THE
Supreme Court of the United States

SPOKEO, INC.,
Petitioner,

v.

THOMAS ROBINS, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED,
Respondent.

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

BRIEF OF PUBLIC JUSTICE, P.C., THE NATIONAL ASSOCIATION OF CONSUMER ADVOCATES, THE NATIONAL CONSUMER LAW CENTER, THE IMPACT FUND, AND THE SOUTHERN COALITION FOR SOCIAL JUSTICE AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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STATEMENT OF INTEREST

Petitioner Spokeo, Inc. and its amici suggest that Fair Credit Reporting Act (FCRA) cases generally present little or no harm to consumers, who they argue thus lack standing and deserve no remedy. Further, they argue, class actions brought for violations of the statute are "abusive."[1]

Amici are legal advocacy groups that represent consumers and employees and advocate for robust enforcement of and remedies for violations of civil and statutory rights. Amici submit this brief to combat the misleading description of FCRA cases by Spokeo and its amici, and amici explain the real-world harm that individuals suffer when their FCRA rights are violated, notwithstanding the difficulty of proving a quantifiable loss. FCRA class actions remain the most important means to prevent and end those real world harms. Amici urge the Court to ensure that any standard of "injury" it adopts is broad enough to encompass the diverse harms illustrated by the cases discussed here.[2]

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[1] No counsel for a party authored any part of this brief and no counsel or party made a monetary contribution intended to fund the preparation or submission of the brief. Only the amici and their attorneys have paid for the filing and submission of this brief. Pursuant to Rule 37.3(a), all parties consented to the filing of this brief.

[2] Spokeo's novel standing challenge to FCRA causes of action implicates other statutes enacted and commonly referred to collectively with the FCRA as the Consumer Credit Protection Act, 15 U.S.C. § 1601, *et seq*. This group of laws was enacted over forty years ago and the legal remedies available for their violation—including statutory damages even absent proof of actual damages—have been solidified and defined over that period. *See, e.g.*, Truth in Lending Act, 15 U.S.C. §§ 1601

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Public Justice, P.C.

Public Justice, P.C. is a national public interest law firm dedicated to pursuing justice for the victims of corporate and governmental abuses. It specializes in precedent-setting and socially significant cases designed to advance consumers' and victims' rights, civil rights and civil liberties, occupational health and employees' rights, the preservation and improvement of the civil justice system, and the protection of the poor and the powerless. Public Justice regularly represents employees and consumers in class actions, and its experience is that the class action device is often the only meaningful way that individuals can vindicate important legal rights.

The National Association of Consumer Advocates

The National Association of Consumer Advocates (NACA) is a non-profit association of attorneys and consumer advocates committed to representing consumers' interests. Its members are private and public sector attorneys, legal services attorneys, law professors, and law students whose primary focus is the protection and representation of consumers. NACA's mission is to promote justice for all consumers by maintaining a forum for communication, networking, and information-sharing among consumer advocates across the

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to 1667(f), Credit Repair Organizations Act, 15 U.S.C. §§ 1679 to 1679(j), Equal Credit Opportunity Act, 15 U.S.C. §§ 1691 to 1691f, Fair Debt Collections Practice Act, 15 U.S.C. §§ 1692 to 1692p. Amici also represent consumers protected by these statutes.

country, particularly regarding legal issues, and by serving as a voice for its members and consumers in the ongoing struggle to curb unfair or abusive business practices that affect consumers.

NACA was founded in 1994 by 12 pioneering consumer attorneys who saw a need to link advocates working in all disciplines of consumer law to effectively create a fair, honest, and open consumer marketplace. Today, NACA has grown into an organization of more than 1,800 attorneys who represent and have represented hundreds of thousands of consumers victimized by fraudulent, abusive, and predatory business practices. As a national organization fully committed to promoting justice for consumers, NACA's members and their clients are actively engaged in promoting a fair and open marketplace that forcefully protects the rights of consumers, particularly those of modest means. In pursuit of this mission, making certain that corporations comply with state and federal consumer protection laws in general and the FCRA in particular has been a continuing and significant concern of NACA since its inception.

The National Consumer Law Center

The National Consumer Law Center, Inc. (NCLC) is a national, non-profit Massachusetts corporation specializing in consumer law, with historical emphasis on consumer credit. NCLC is recognized nationally as an expert in consumer credit issues, including fair credit reporting, and has drawn on this expertise to provide information, legal research, policy analyses, and market insights to federal and state legislatures, administrative agencies, and the courts for over 46 years. NCLC is the author of the Consumer Credit and Sales Legal Practice Series,

consisting of twenty practice treatises and annual supplements. One volume, Fair Credit Reporting Act (8th ed. 2013), is a standard resource on privacy and the FCRA. In addition, NCLC has testified before Congress regarding the FCRA, regularly submits comments to regulators in FCRA rulemakings, and has issued special reports on consumer reporting issues.

The Impact Fund

The Impact Fund is a non-profit foundation that provides funding, training, and co-counsel to public interest litigators across the country. It is a California State Bar Legal Services Trust Fund Support Center, providing services to legal services projects across California. The Impact Fund is counsel in a number of major civil rights class actions, including cases challenging employment discrimination, lack of access for those with disabilities, and violations of fair housing laws.

The Southern Coalition for Social Justice

The Southern Coalition for Social Justice (SCSJ) is a 501(c)3 nonprofit organization founded in August 2007 in Durham, North Carolina, by a multidisciplinary group, predominantly people of color, who believe that families and communities engaged in social justice struggles need a team of lawyers, social scientists, community organizers and media specialists to support them in their efforts to dismantle structural racism and oppression. Through its Criminal Justice Initiative, the SCSJ tackles racial discrimination at the legal and policy levels to eliminate obstacles facing those with criminal records as they attempt to re-enter the mainstream of society.

The SCSJ provides direct reentry legal services and referrals (in the NC Triangle and Triad areas) to clients seeking to expunge their criminal records and obtain certificates of relief. Through this clinic, the SCSJ witnesses, firsthand, how Fair Credit Reporting Act violations undermine its clients' attempts to obtain meaningful employment and a better life for their families.

INTRODUCTION AND SUMMARY OF ARGUMENT

Fair Credit Reporting Act (FCRA) class actions seeking statutory damages are brought to address real-world harm to consumers caused by willful and systemic violation of the statute by consumer reporting agencies and other governed parties. Again and again, reporting agencies, including Spokeo's amici, have been found to have knowingly or recklessly violated established law requiring the maintenance of procedures to ensure consumer reports are maximally accurate, current and complete, or requirements that consumers receive disclosures, alerts, and notices Congress has determined to have real-world value. A balanced look at the actual body of the FCRA class actions that have survived the arduous obstacles of litigation—even those misleadingly characterized as "abusive" by Spokeo's amici—demonstrates the real-world harms that violations of the FCRA have on consumers.

It makes sense that Congress decided to permit these types of statutory damage claims to go forward. Where a statutory violation will cause financial harm or other harm to consumers, but the extent of that harm would be difficult or burdensome to prove in individual cases, Congress has often permitted plaintiffs to sue for statutory damages without proof of pecuniary harm. Consumer-protection statutes, including the FCRA, regularly fit this description. Because proving monetary damages can cost more than the harm suffered, few consumers would accept this cost if recoveries were limited to proven monetary losses.

With this concern in mind, Congress has long included statutory damages provisions in consumer protection statutes. "Many statutes, notably consumer-protection statutes, authorize the award of damages (called 'statutory damages') for violations that cause so little measurable injury that the cost of proving up damages would exceed the damages themselves, making the right to sue nugatory." *Crabill v. Trans Union, L.L.C.*, 259 F.3d 662, 665 (7th Cir. 2001). Such statutes create legally protected interests and thus confer standing on a consumer who is injured by participation in a transaction tainted by a statutory violation.

As Congress recognized, lawsuits seeking to enforce the FCRA's important accuracy, privacy, and informational notice provisions have meaningful tangible consequences for consumers and are necessary to protect consumers' ability to obtain the basic credit, employment, and housing necessities the statute was designed to address. If enforced, the FCRA's requirements protect the security of consumers' private information and ensure that consumer reports, which often determine consumer eligibility to everything from a mortgage and insurance to license and employment eligibility, are accurate. The harms averted and corrected by lawsuits brought to enforce rights provided by the FCRA are real and concrete. And that is true even when those harms are not easily quantifiable or cannot be proven in the rigors of litigation.

It is true that not all FCRA plaintiffs will have yet lost a job, been rejected for a loan, or been turned down for an apartment because of inaccurate information in their consumer files. And of course not every consumer whose private information is

unlawfully sold will suffer quantified harms of identity theft. But for many of them, it is simply a matter of time. Class actions to stop systemic errors are important because they can prevent the violation at issue from leading to the larger harms, the sort of harms Spokeo's amici demand as the admission to FCRA litigation.

Prior to the FCRA, increasing quantities of personal information were exchanged electronically with virtually no regulation. This resulted in frequent inaccuracies in consumer reports. 115 Cong. Rec. 2414 (1969). The frequency of inaccurate information was particularly problematic because of the outsize power consumer reports wield over consumers' daily lives: They often determine whether a consumer can get a job, obtain a mortgage, or qualify for a credit card. In 1970, Congress passed the FCRA with the goal of "fair and accurate" consumer reporting. 15 U.S.C. § 1681(a)(1). At the heart of the new statute's focus on accuracy was its requirement that consumer reporting agencies to "follow reasonable procedures to assure maximum possible accuracy." 15 U.S.C. § 1681e(b). In order to ensure consumers are able police the accuracy of their reports, the FCRA also contains a variety of provisions requiring notice and disclosures. *E.g.,* 15 U.S.C. § 1681b(b)(3)(A) (establishing pre-adverse employment action notice requirement); § 1681b(4)(B) (requiring notification of national security investigation); § 1681d(a) (requiring disclosure of investigative report); § 1681g (requiring full file disclosure to consumers); § 1681h (setting forth form and conditions of disclosure); § 1681k(a)(1) (requiring disclosure regarding the use of public record information); § 1681m(a) (requiring notice of adverse action based on consumer report).

However, with only an actual damages remedy initially available, the FCRA's protections were difficult to enforce. Lawrence D. Frenzel, *Fair Credit Reporting Act: The Case for Revision*, 10 Loy. L.A. L. Rev. 409, 429-30 (1977). Though inaccuracies and notice violations cause real harms—as the cases discussed below demonstrate—these harms were difficult to prove in litigation, and litigation often resulted in only nominal monetary damages. *Id.* The result? Reporting agencies made a rational economic decision to flout the law because it was cheaper for them to pay damage awards in litigation than to fully comply. To address such deliberate violations of the FCRA, Congress added a provision allowing for small statutory damages, but still imposed the substantial limitation that it only be available in circumstances where consumers could prove that an FCRA violation was "willful." 15 U.S.C. § 1681n(a)(1)(A).

Given that the requirements of the FCRA are designed to be systematic and that the statutory damages available under the act are modest ($100-$1000 per violation), class actions have become one of the primary methods through which compliance has been compelled. Individual consumer claims for hard-to-prove actual damages or small statutory damages are both unlikely to be brought in the first instance and, more importantly, are unlikely to persuade sophisticated, large corporate reporting agencies to comply with the law. But, where many consumers are subject to the same violations, and where the reporting agencies' violations are willful, those consumers' rights can be vindicated in a class action seeking statutory damages for each member of the class. Faced with the threat of substantial class-wide damages, consumer reporting agencies

are encouraged to, and in fact do, make changes to achieve the FCRA's goal: ensuring accurate reporting.

Not only do FCRA class actions play an important role in ensuring a fair and accurate consumer reporting system, but, contrary to the assertions of Spokeo's amici, they are also rooted in the real harms caused by inaccurate reports and notice violations. Below, the amicus brief discusses several widespread FCRA violations and the real-world impact those violations have on consumers. The brief also discusses how FCRA class actions—including those labeled as "abusive" by Spokeo's amici—address and attempt to correct those real-world harms. None of the consumer reporting agency cases cited by Spokeo's amici as "abusive" actually fit that description.

ARGUMENT

LAWSUITS BROUGHT AGAINST CONSUMER REPORTING AGENCIES ADDRESS REAL HARMS.

A. As in Other Consumer-Protection Statutes, the FCRA's Statutory Damages Provisions Provide for Recovery Where Monetary or Other Harm Is Difficult to Quantify.

In enacting the FCRA, Congress sought to alleviate the real harms done to consumers by inaccurate consumer reports. Congress found that modern consumer reporting had developed into an "elaborate mechanism" for "investigating and evaluating the credit worthiness, credit standing, credit capacity, character, and general reputation of consumers. 15 U.S.C. § 1681. Because "[i]naccurate credit reports directly impair the efficiency of the

banking system" and "unfair credit reporting methods" harmed "public confidence which is essential to the continued functioning of the banking system," there was "a need to insure that consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer's right to privacy." *Id.* "As Representative Sullivan remarked, 'with the trend toward . . . the establishment of all sorts of computerized data banks, the individual is in great danger of having his life and character reduced to impersonal 'blips' and key-punch holes in a stolid and unthinking machine which can literally ruin his reputation without cause, and make him unemployable.' 116 Cong. Rec. 36570 (1970)." *Dalton v. Capital Associated Indus., Inc.*, 257 F.3d 409, 414 (4th Cir. 2001).

And yet, between 1970 and 1996, these legislative objectives of accuracy, information, and privacy remained unfulfilled. In 1996, Congress amended the FCRA to provide consumers with a right of action for statutory damages that is not dependent on a showing of actual monetary loss. Consumer Credit Reporting Reform Act of 1996 (Public Law 104-208, the Omnibus Consolidated Appropriations Act for Fiscal Year 1997, Title II, Subtitle D, Chapter 1). Congress created this remedial scheme because "individual losses" are "likely to be small—a modest concern about privacy, a slight chance that information would leak out and lead to identity theft." *Murray v. GMAC Mortgage Corp.*, 434 F.3d 948, 953 (7th Cir. 2006). Statutory damages are an integral part of Congress' effort to provide consumers with a practical remedy that will serve values of both deterrence and compensation.

B. Class Actions Brought Against Consumer Reporting Agencies for Informational Notice Violations and Systemic Inaccuracies Reflect Real-World Harm to Consumers.

Unsurprisingly, the consumer reporting agencies and credit reporting users subject to the restrictions Congress imposed in the FCRA are critical of efforts to enforce these provisions, referring to them as abusive or extortive. However, even the cases cited by Spokeo's amici as "abusive" involve real harms. By the account of Spokeo and its amici, the small subset of consumer class actions that have been brought and survived summary judgment and class certification were unjust, unnecessary, and abusive. But if such an action survived motions practice, there was a reason. District courts are not blind to the merits of a claim or the importance of a remedy sought, even if actual damages could not be quantified or proved. Spokeo's amici's attempts to paint these claims as "abusive" are attempts to relitigate those issues.

In addition to the practical reality that an "abusive" action is unlikely to be permitted to proceed in the district court, there are significant defenses on the merits to these cases. Most importantly, a consumer must prove that a violation was "willful." *See, e.g.*, *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47 (2007); *Ashby v. Farmers Ins. Co. of Ore.*, No. 01-CV-1446-BR, 2009 WL 3261925, at *2 (D. Ore. Sept. 30, 2009) (jury found violation not willful). In this case, for example, it is possible that Spokeo will prevail on the basis that its actions were not "willful" regardless of the outcome of this appeal. To the extent a consumer reporting agency's conduct was merely negligent, no statutory damages are

available, and only actual damages may be obtained. 15 U.S.C. § 1681o. The fact that statutory damages are only available in cases involving willful misconduct is a significant bulwark against frivolous actions and appropriately calibrates the burden of compliance; where consumer reporting agencies know they are breaking the law, or are reckless with respect to their legal obligations, they face potentially stiff penalties. But where their conduct is merely negligent, their liability is limited to the actual harm that can be proven.

Contrary to the characterizations by Spokeo's amici, there has never been a problem of "class action lawyers" driving a wave of abusive FCRA cases without existing judicial remedy to prevent such misconduct. In each case and instance attacked by Spokeo's amici, these precepts have been true. A more complete account of some of the "abusive" cases offered by Spokeo's amici confirms this reality.

1. **Trans Union's inaccurate reporting that the consumer was on the terrorist watch list, and withholding of the disclosure that it was doing so.**

   Ramirez v. Trans Union, LLC.

Spokeo amicus Trans Union routinely sold consumer reports that inaccurately label consumers as terrorists. Specifically, it purported to provide information on whether a given consumer is on the U.S. Treasury Department's Office of Foreign Assets Control's list. This list is meant to track whether the consumer is a suspected terrorist. *Ramirez v. Trans Union, LLC*, 301 F.R.D. 408, 413-15 (N.D. Cal. 2014). Trans Union's procedure for determining whether a given individual was on the list, however, was far from a reasonable procedure designed to

ensure maximum accuracy: Trans Union matched consumers to the list based only on the consumers' names, without requiring any further verification that the consumer who is the subject of the report is the same person who is on the government's list. *Id.* at 414. As a result, Sergio Ramirez and thousands of other consumers were falsely labeled by Trans Union as terrorists.

When Mr. Ramirez sought to buy a car on credit, the Trans Union report that the dealership obtained incorrectly matched Mr. Ramirez (by name alone) to the terrorist list. *Id.* Because the dealership noticed that the birthdates of the individuals on the terrorist list did not match Mr. Ramirez's birthdate, the dealership agreed to go forward with the transaction, but advised that the car had to be put only in the name of Mr. Ramirez's wife. The Ramirezes complied with that request. *Id.* at 415.

The next day, Mr. Ramirez requested a copy of his report from Trans Union, but the report Trans Union sent him in response did not contain such an alert. *Id.* Mr. Ramirez then brought a class-action suit on behalf of himself and others who had also inaccurately been labeled terrorists based on Trans Union's flawed name-only matching system. The case seeks to recover statutory damages on behalf of those Trans Union has falsely labeled terrorists. *Id.* at 413. Importantly, because Trans Union fails to include the fact that it has labeled someone as a terrorist from the disclosures it makes to consumers who request their credit report, many class members may not know they are being falsely labeled as terrorists until it is too late.

Trans Union had been well aware of the inaccuracies resulting from its inadequate terrorist

matching procedures for years, yet was apparently unmotivated to correct the problem. Years before *Ramirez*, Trans Union was sued individually by Sandra Cortez, who was also falsely labeled as a terrorist by Trans Union. *Cortez v. Trans Union, LLC*, 617 F.3d 688, 697 (3d Cir. 2010). Like Mr. Ramirez, Ms. Cortez attempted to buy a car. She went to the car dealership armed with the exemplary Trans Union credit report she had requested from the agency. *Id.* But unlike Mr. Ramirez, Ms. Cortez suffered pecuniary damages by being held at the car dealership for several hours.

Under Spokeo's view of standing law, however, Mr. Ramirez and class members in his case lack standing to bring suit. Unlike in *Cortez*, they did not suffer any quantifiable harm. Mr. Ramirez acted and brought suit before he had suffered actual damages to the degree necessary to satisfy Spokeo. But even in spite of the lack of quantifiable harm, consumers were injured by the publication of demonstrably false information about them. Trans Union falsely published that they were terrorists on government watch lists, the type of libelous speech that has always been found to be injurious under common law, and able to recover nominal damages regardless of monetary loss. *See* Restatement (2d) of Torts, §§ 570-574 (a statement is defamatory per se when it falsely imputes a criminal offense to the plaintiff).

Ramirez is exactly the type of case that could be impacted by a no-standing ruling here. After this Court granted review in *Spokeo*, the district court stayed the case pending this Court's decision.

Ramirez v. Trans Union, LLC, No. 3:12-cv-632 (N.D. Cal. June 22, 2015), Doc. 184.[3]

2. Reporting agency refusal to reveal the actual sources of the information they report.

a. Dennis v. Trans Union, LLC.

Dennis v. Trans Union, LLC is another example of how consumers can suffer redressible injury when they are deprived of statutory rights that Spokeo's amici characterize as merely "technical." *Dennis* involved a violation of § 1681g(a)(2), which requires that a consumer reporting agency to "clearly and accurately disclose to the consumer . . . [t]he sources of the information." This requirement is critical to the FCRA's purpose of ensuring that consumer reports are accurate, because consumers are powerless to stop the dissemination of inaccurate information unless they can determine its source.

In 2012, Deidre Dennis sought a mortgage loan to purchase a home, but she was unable to close on the loan because her Trans Union credit report erroneously reported that she still owed a $33,194 tax lien (the lien, which was actually for a much small amount, had been paid years earlier). Compl. at 5, *Dennis v. Trans Union, LLC*, No. 2:14-cv-02865

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[3] *Ramirez* is not the only FCRA case that has been stayed pending this Court's decision in *Spokeo*. *E.g.*, *Patel v. Trans Union, LLC*, No. 3:14-cv-00522 (N.D. Cal. Sept. 3, 2015), Doc. 116 (also involving Trans Union falsely labeling the individual a terrorist); *Stone v. Sterling Infosystems, Inc.*, No. 2:15-cv-00711 (E.D. Cal. July 29, 2015), Doc. 26; *Hilson v. Kelly Servs., Inc.*, No. 2:15-cv-10803 (E.D. Mich. July 15, 2015), Doc. 29; *Larson v. Trans Union, LLC*, No. 3:12-cv-05726 (N.D. Cal. June 22, 2015), Doc. 184.

(E.D. Penn. May 20, 2014), Doc. 1. The reports that Ms. Dennis received and disputed stated that the source of the tax lien information was the "Albany County Clerk" in Albany, New York, which, in fact, was *not* the source of Trans Union's erroneous information—it obtains its "public records" from a private third party. *Id.* at 4. After Trans Union (mis)represented that it had "verified" the accuracy of the lien with its source, Ms. Dennis contacted the New York tax authorities, who advised her that the Albany clerk's records (correctly) showed only a satisfied lien and in a much smaller amount. *Id.* at 5. Thus, because Trans Union misrepresented the source of its information, Ms. Dennis was both unable to correct her credit report with Trans Union, and unable to correct the inaccurate information at its source. There is no question that Ms. Dennis suffered an injury—the denial of a mortgage loan. But what if she had checked her Trans Union report prior to applying for mortgages? Should Ms. Dennis have been required to apply for a loan and be rejected before she was entitled to bring suit against Trans Union?

According to Spokeo, yes. In Spokeo's view, even when a consumer knows that a reporting agency is publishing false information about her for profit in violation of the FCRA—information that is frequently the gatekeeper to credit, housing, and employment opportunities—she may not seek to enforce her rights until it is too late.

b. Dreher v. Experian Information Solutions, Inc.

According to Spokeo's amici, *Dreher v. Experian Information Solutions, Inc.* is another prime example of an abusive lawsuit brought on the basis of a

technical violation that has not done anyone any real harm. Br. for Experian Info. Solutions, Inc. as Amicus Curiae Supporting Pet., at 9-10 (Experian Br.). A look at the actual case reveals a very different picture. In fact, amici Experian suffered summary judgment in favor of the plaintiff and ultimately stipulated that a jury would award statutory damages.[4]

In November 2010, Michael Dreher was subject to a federal background check in order to receive a security clearance. *Dreher*, 71 F. Supp. 3d at 575. Much to Mr. Dreher's surprise, the investigator uncovered a delinquent credit card account on Mr. Dreher's Experian credit report for a credit card Mr. Dreher had never taken out. *Id.* In an attempt to save his clearance, Mr. Dreher obtained a copy of his Experian report and saw that the delinquent account was listed as being reported by "Advanta Credit Cards." *Id.* But Advanta had been closed by regulators and no longer existed. Instead, the account information was actually being reported by an undisclosed company called CardWorks. *Id.* at 576. Mr. Dreher sued Experian under § 1681g(a)(2) for failing to accurately disclose the sources of information contained in its reports.

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[4] In its amicus brief, Experian claims that the district court found that "[i]t is difficult to see how anyone suffered any injury from Experian's error." But Experian made the same argument to the district court itself, which made clear that Experian's characterization of its earlier statement was misleading, explaining that Experian had "pounced on a statement by the Court in its opinion certifying the class in this action." *Dreher v. Experian Info. Solutions, Inc.*, 71 F. Supp. 3d 572, 577 (E.D. Va. 2014).

Because of Experian's misrepresentation, there was no way for consumers to know how to correct their reports. Just as with *Dennis*, the problem here is that, without the correct source information, a consumer—such as Mr. Dreher, an identity theft victim trying to correct his credit report—cannot know where to turn to correct inaccurate information.

While Mr. Dreher was harmed by the inclusion of inaccurate information in his report, his cause of action was not the proximate cause of the harm—by the time he requested his disclosure, the pecuniary harm, job loss, had already occurred. An overly narrow reading of the kind of concrete harm that must be alleged to allow a consumer to pursue a claim in federal court would wipe out consumers' ability to enforce rights which are critical to the FCRA's regulatory scheme, which depends in large part on providing consumers with truthful disclosures in order to enable them to know, and correct, what is being reported about them.

3. Employment reporting agency refusal to either maintain "strict procedures" designed to ensure that criminal background checks are "complete and up to date" or to provide contemporaneous notice to consumers that it is furnishing such a report.

Employment consumer reports are amongst the most challenging obstacles confronted by Congress' enactment of the FCRA. "Employers were placing increasing reliance on consumer reporting agencies to obtain information on the backgrounds of prospective employees. Congress found that in too many instances agencies were reporting inaccurate

information that was adversely affecting the ability of individuals to obtain employment." *Dalton*, 257 F.3d at 414.

With conventional credit reporting, when a consumer suffers the denial of a credit card or other fungible credit commodity because of inaccurate or incomplete information, the consumer has a right to make a dispute to the credit bureau, which if successful, can enable recovery of the lost opportunity. 15 U.S.C. § 1681i(a). However, this is not true for lost employment opportunities. Unlike the credit reporting industry, which is dominated by the "big three" (Experian, Trans Union, and Equifax), employment "background screeners" are often fly-by-night companies that may be difficult track down and hold accountable. When a consumer is denied a job because of an inaccurate or incomplete background check, unlike as with a credit opportunity, there is rarely a second chance to obtain that employment through later disputes.

As such, the FCRA's application to employment reports emphasizes prevention and information. Indeed, FCRA class actions are often brought to prosecute systemic violations of 15 U.S.C. § 1681k(a), which "entitles a consumer either a notification 'of the fact that public record information is being reported . . . together with the name and address of the person to whom such information is being reported' or the maintenance of 'strict procedures designed to insure that whenever public record information which is likely to have an adverse effect on a consumer's ability to obtain employment is reported it is complete and up to date.'" *Ryals v. Strategic Screening Solutions, Inc.*,

No. 3:14CV643, 2015 WL 4606168, at *4 (E.D. Va. July 30, 2015); 15 U.S.C. § 1681k(a).

Roe v. IntelliCorp Records, Inc.

IntelliCorp is a consumer reporting agency that sold an "instant" employment background report called the "Criminal SuperSearch," over the internet. The Criminal SuperSearch purported to offer a prospective employer immediate information about a prospective employee's criminal history. Pls.' Memo. in Support of Mot. for Class Cert. and Approval of Class Counsel at 1, *Roe v. IntelliCorp Records, Inc.*, 1:12-cv-02288-JG (N.D. Ohio Feb. 18, 2013), Doc. 79-1. Unsurprisingly, given the myriad of jurisdictions that need to be searched, and the tremendous variation and complexity in the meaning of various notations in criminal records, the Criminal SuperSearch results were riddled with inaccuracies.

Moreover, IntelliCorp's practice of providing instant results, some of which included a notation that a given consumer was ineligible for hire, meant that IntelliCorp systematically failed to comply with the FCRA's requirement that the agency either follow "strict procedures" or otherwise provide contemporaneous notice to consumers so that they could preemptively address their report with the employer. 15 U.S.C. § 1681k(a). The results of IntelliCorp's wholesale failure to comply with the FCRA were devastating.

In the case of each of the plaintiffs in that action, the reporting agency had compiled a report with grossly inaccurate and incomplete information. For example, as to Michael Thomas and Mark Johnson, the reporting agency had matched criminal records to otherwise innocent consumers because their name

and date of birth were similar. Motion for Preliminary Approval of Proposed Class Settlement, at 11, *Roe v. IntelliCorp Records, Inc.*, 1:12-cv-02288-JG (N.D. Ohio Nov. 12, 2013), Doc. 124. As to Mr. Johnson, this included the allegation that he had been convicted of "sexual abuse" and "indecent assault and battery on child under 14 years of age." *Id.* As to Jane Roe, the report overstated her minor criminal history and failed to recognize that one of her convictions had been expunged. *Id.* at 10. None of the plaintiffs were offered the job for which he or she had applied.

This case is emblematic of the problems brought on by inaccurate reporting of criminal history. Despite having an outsize impact on an employer's decision, criminal background reports contain an appalling number of errors and out-of-date or out-of-time information. *See generally* National Consumer Law Center, Broken Records: How Errors by Criminal Background Checking Companies Harm Workers and Businesses (2012), *available at* http://www.nclc.org/images/pdf/pr-reports/broken-records-report.pdf. These errors persist even though the information is available in easily accessible public records and in spite of the FCRA's requirements regarding accuracy. *See* 15 U.S.C. §§ 1681e(b), 1681k(a)(2).

Not only do the criminal background check agencies frequently mix consumers' identities—resulting in the appearance that an individual with no criminal history has such a history—but they also report charges that were expunged, dismissed, or otherwise do not belong in a complete and up to date report. *See* 15 U.S.C. § 1681c(a) (forbidding reports from including certain information, such as

bankruptcies and arrests which did not result in a conviction which are older than seven years). Because people of color are significantly overrepresented in the criminal justice system, the widespread inclusion of old and/or outdated criminal record information has a disparate impact on them. Dorothy E. Roberts, *The Social and Moral Costs of Mass Incarceration in African American Communities*, 56 Stan. L. Rev. 1271, 1274 (2004).

The background screening problem also illustrates the importance of the availability of FCRA remedies on a classwide basis, even for claims that do not directly lead to job and other pecuniary losses. The *Roe* plaintiffs brought claims both about the inaccurate reporting system and the failure of reporting agencies to comply with the FCRA's notice requirements—notice that, if given, may have ameliorated the immediate damage and prevented future losses to Ms. Roe, Mr. Thomas, and Mr. Johnson.

But the lack of notice was not the proximate cause of their job loss—the inaccuracies were. And FCRA lawsuits to seek recovery for an agency's refusal to provide the long-mandated notice could never prove that the legal "cause" of the employment denial was the lack of the § 1681k(a)(1) notice. Under Spokeo's amici's view of the law, the *Roe* plaintiffs would likely be barred from bringing those claims unless they could show that, had they gotten the appropriate notice, they could have fixed the report and gotten their jobs. *See* Experian Br., at 9-10 (citing *Dreher* an example of a no-injury class action even though it was brought by a consumer whose security clearance was impacted by an inaccuracy but who ultimately sued only for notice

violations). There is no reason to put consumers to such a high burden of counterfactual proof. When violations are willful, consumers should be able to sue for statutory damages when their reports are wrong, or when they do not receive required notices.

4. Consumer reporting agency refusal to update credit reports to show that various collections, judgments, or charged off accounts were no longer owed and were discharged in bankruptcy.

White v. Experian Information Solutions, Inc.

White v. Experian Information Solutions, Inc. is a similarly unpersuasive example of a so-called 'no harm' class action. *See* Experian Br., at 9. There, too, Experian *admits* that it and the other major consumer reporting agencies systematically created inaccurate consumer reports by failing to report that certain debts had been discharged in bankruptcy. No harm, says Experian, because the failure resulted in the artificial inflation of some consumers' credit scores. Tellingly, that argument ignores the very function that bankruptcy is meant to serve: permitting certain insolvent debtors to enjoy a "new opportunity in life . . . unhampered by the pressure and discouragement of preexisting debt." *Grogan v. Garner*, 498 U.S. 279, 286 (1991). When discharged debt continues to appear on a consumer's credit report as active debt, the purpose of bankruptcy has been defeated. Arguing that the mis-labeling of the discharged debt as still-owing did not injure those consumers because it raised their credit scores misses the point entirely—more credit is not necessarily good credit, particularly in the context of people who have already filed for bankruptcy and

who are thus demonstrably at risk of assuming more obligations than they can sustain.

Rather than its characterization as an example of an "abusive" case, *White* provides a textbook example of exactly how the "no proven actual damages" remedy works. Terri White and each similarly situated consumer had filed a Chapter 7 bankruptcy. As a result, their short term credit prospects were ended. However, their longer-term credit prospects had improved, as each consumer was now debt-free and could begin the arduous process of rebuilding their financial viability. And yet, Experian and its co-defendants had refused to permit the commencement of this rebuilding—still saddling the credit reports with accounts and financial obligations that were now ended.

The problem faced by these consumers in *White* was that there was no means to "prove" and show causation for actual damages. Statutory damages were thus an appropriate proxy for actual damages.

5. Credit reporting agency refusal to report account credit limits where it impacts consumer credit scores.

Harris v. Experian Information Solutions, Inc.

Experian and the Chamber of Commerce also contend that *Harris v. Experian Information Solutions, Inc.* is abusive. The case was based on Experian's alleged knowing and willful failure to report the credit limits on certain credit cards. According to amici, not all consumers were "harmed" because the omission of the credit limit information increased the credit scores of some consumers while decreasing others. Experian Br., at 8; Br. of the Chamber of Commerce of the United States of

America, et al, as Amici Curiae, at 17. They make this contention even though Experian, one of the nation's largest credit reporting agencies, and a corporation that has made billions of dollars by selling credit reports, *admits* that, as a matter of course, it *knowingly* failed to include information that had a material impact on consumers' credit scores. Yet, Experian argues that, because the inaccurate representation increased some consumers' scores, it should escape liability. Aside from the fact that Experian believes it should be immune from its widespread violation of a federal statute based on an unintended consequence, this position is problematic because an artificially inflated credit score cannot be conflated with the absence of a concrete injury. Many consumers assume that if their credit score is such that they qualify for a given kind of credit, that kind of credit is appropriate for them and within their means, but the experience of our recent financial crisis demonstrate that that assumption is not correct. *See* Gary Klein & Shennan Kavanaugh, *Causes of the Subprime Foreclosure Crisis and the Availability of Class Action Responses*, 2 Ne. U. L.J. 111, 113-16 (2010). Setting up a system that routinely functions to offer consumers credit opportunities that are not appropriate for them is not in consumers' best interest, and the Court should not endorse any view of standing which allows for inaccurate reporting so long as the inaccuracy is to the consumer's purported "benefit." In the context of consumer reporting, there is no such thing as an inaccuracy which operates to a consumer's benefit because such inaccuracies inevitably put consumers in the position of being offered opportunities which are not sustainable, or which are unreliable because the consumer remains

in constant danger that the opportunity will evaporate if the inaccuracy is revealed.

6. Consumer reporting agency refusal to provide consumers with a legally mandated copy of their consumer file.

Meyer v. National Tenant Network, Inc.

National Tenant Network, Inc. (NTN) is a consumer reporting agency that provides credit and criminal reports. Third Am. Compl., at 2, *Meyer v. National Tenant Network, Inc.*, No. 3:13-cv-03187-JSC (N.D. Cal. Mar. 21, 2014), Doc. 50. Harold Meyer and his wife Phyllis Meyer encountered NTN when they sought to become the live-on assistant managers of an RV park. *Meyer v. National Tenant Network, Inc.*, 10 F. Supp. 3d 1096, 1098 (N.D. Cal. 2014). They were hired into the positions, pending a background check. *Id.* The property management company, however, rescinded the offer after receiving Mr. Meyer's NTN consumer report. *Id.*

Specifically, Mr. Meyer's report falsely stated that he was a "violent sex offender" who failed to register as such, and had committed "sexual battery" and "aggravated sexual battery." *Id.* After the management company rescinded his offer of employment, Mr. Meyer sought to obtain a copy of his report from the prospective employer, but the prospective employer refused, in part because the employer was forbidden from providing him with a copy by its contract with NTN, which contained an illegal provision forbidding the employer from providing him with a copy of the report. *Id.* at 1098-99. *See* 15 U.S.C. § 1681e(c) (prohibiting a reporting agency from prohibiting a user of a consumer report "from disclosing the contents of the report to the

consumer, if adverse action against the consumer has been taken"). He also sought a copy of his consumer file directly from NTN pursuant to § 1681g(a) (requiring a reporting agency to disclose the information in the file on the consumer upon request). *Meyer*, 10 F. Supp. 3d at 1098. He requested his report on multiple occasions, but NTN refused to respond to his requests. *Id.* And when Mr. Meyer hired a lawyer, who also requested the report from NTN, NTN still refused to give Mr. Meyer a copy of his report. *Id.* Mr. Meyer was able to obtain a copy of his only when his lawyer requested it from the prospective employer. *Id.* at 1099.

Though it was the inaccurate report and not the informational violations that proximately caused Mr. Meyer to lose his job offer, the right to review his consumer file, and to receive a copy of the actual information NTN had disseminated about him was critical to Mr. Meyer's ability to correct the inaccurate information. Until he finally gained access to his reports, which happened only after he hired lawyers, Mr. Meyer had no way to know what false information had been reported about him, or to seek an appropriate remedy. But, again, under the view urged by Spokeo, Mr. Meyer would not be able to bring suit on the basis of the notice violations alone. Without the ability to enforce their rights to obtain copies of their consumer files, consumers like Mr. Meyer will be hobbled in their ability to enforce the FCRA's accuracy requirements, and put in an unenviable, and unjustifiable, chicken-egg situation, where consumers are unable to demonstrate the consequences of erroneous reports because their right to obtain the reports is rendered toothless.

Not all inaccurate reports and notice violations are as obviously harmful as those falsely labeling an individual a sex offender or a terrorist, or those that result in a futile, Kaftkaesque attempt to fix a life-changing error, as in *Dennis* and *Dreher*. But even those errors that the consumer reporting agencies call "positive" can have negative impacts. For example, a "positive" inaccuracy might result in a consumer qualifying for a mortgage that she cannot afford to pay or a credit increase that would ruin his finances. In Thomas Robins's case, the "positive" overstatement of his education means that a potential employer might pass him over as being too expensive to hire, or deny him employment because it viewed him as overqualified and unlikely to remain in the position.

* * *

Spokeo and its amici cite *no* other examples of supposedly abusive class actions against consumer reporting agencies. The predominance of class actions resulting from real-world harm overwhelms even the so-called abusive actions they point to—actions that are not at all abusive once one digs under the surface. In short, there is no evidence that the "abusive" "no-harm" class actions the credit reporting agencies tout actually exist.

CONCLUSION

Contrary to the assertions of Spokeo and its amici, FCRA class actions against credit reporting agencies for systemic inaccuracies and notice violations involve the real-world harms the FCRA was meant to prevent. And given the difficult-to-quantify nature of those harms along with the availability of small statutory damages, it is class

actions that, as a practical matter, have the biggest role in effectively enforcing the FCRA and carrying out Congress' goal of a fair and accurate consumer reporting system.

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