No. 17-806

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 PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF NATIONAL ASSOCIATION OF PROFESSIONAL BACKGROUND SCREENERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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IDENTITY OF THE *AMICUS*[1]

Amicus, the National Association of Professional Background Screeners ("NAPBS"), is a trade association representing over 900 small and large background screening firms whose mission is to advance excellence in the screening profession and provide a unified voice in the development of national, state, and local regulation of professional screening services. Its members, many of whom are regulated by the Fair Credit Reporting Act, 15 U.S.C. § 1681, *et seq.* ("FCRA"), among other laws and regulations, verify criminal record, education, driving, and employment information from domestic and international sources to enable employers and other users of consumer reports to provide their customers (and the public at large) with safe places to live and work.

[1] Counsel of record for all parties received ten (10) days' written notice of *amicus's* intent to file this brief, and they have consented thereto. 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 *amicus* made a monetary contribution intended to fund the preparation or submission of this brief.

SUMMARY OF ARGUMENT

Amicus's members consist primarily of consumer reporting agencies regulated by the FCRA. Its members operate in the background-screening industry and provide essential screening services to organizations for pre-employment and tenant screening. Their efforts help ensure that Americans have safe places to live and work.

Amicus is writing to emphasize the negative nationwide effects of decisions interpreting this Court's landmark decision in *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016) ("*Spokeo* I"). Many, including the Ninth Circuit, have misapplied the Court's instruction to limit federal court jurisdiction to actual cases and controversies under Article III of the Constitution. Instead, they have allowed plaintiffs access to federal courts simply through the allegation of a technical inaccuracy or bare procedural violation. These courts have rejected the mandate that a concrete injury under Article III "must actually exist" in a "'real,' and not 'abstract'" sense – and, importantly, "must affect the plaintiff in a personal and individual way." *Id.* at 1548.

That misinterpretation of *Spokeo* I threatens the viability of *amicus's* members and their services. The sheer size of statutory-damages exposure under the FCRA continues to force companies to settle meritless claims to avoid vexatious litigation. In turn, those *in terrorem* settlements have resulted in large payouts to attorneys with little (if any) practical benefit to consumers. *Amicus* and its members face a practical reality in which ruinous potential liability and litigation expense grossly outweigh any harm

actually caused to consumers – which oftentimes is no injury whatsoever. Since the Court's 2016 decision in *Spokeo* I, technical, no-injury lawsuits have continued to proliferate, particularly via forum shopping in favorable courts like the Ninth Circuit.

This matter raises exactly the type of fundamental, jurisdictional question that the Court is designed to answer. *Amicus* encourages the Court to provide the necessary clarity to its landmark decision in light of uncommon lower-court confusion.

ARGUMENT

I. ARTICLE III STANDING DESERVES ENHANCED CLARITY AS THE FOUNDATIONAL GATEKEEPER TO FEDERAL COURT, ESPECIALLY WHERE LOWER COURTS SHOW DRASTIC DIVERGENCE IN INTERPRETATION.

Jurisdiction is the foundational bedrock on which federal courts rest. The jurisdiction of federal courts is purposefully defined and limited by Article III of the Constitution. *See Flast v. Cohen*, 392 U.S. 83, 94 (1968). And Article III standing "represents 'perhaps the most important' of all jurisdictional requirements." *Am. Canoe Ass'n v. Murphy Farms, Inc.*, 326 F.3d 505, 515 (4th Cir. 2003) (citing *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231 (1990)). Thus, if any principle of law deserves the utmost clarity and definition, it is standing – the threshold by which we determine whether a litigant may have her day in court.

In *Lujan*, this Court reemphasized the irreducible minimum requirements under Article III for a plaintiff to proceed in federal court. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). The plaintiff must establish that she suffered "an injury in fact" that is "concrete and particularized" and "actual or imminent." *Id.* at 560. 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." *Id.* As standing allegations are "not mere pleading requirements, but

rather an indispensable 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." *Id.* at 561. This standing bar is purposefully substantial, so as to embody the limited jurisdiction of federal courts in the first instance.

In 2016, this Court reaffirmed that high bar, holding that "Article III standing requires a concrete injury even in the context of a statutory violation." *Spokeo* I, 136 S. Ct. at 1543. Alleging a violation of the FCRA, or any other statute, "does not mean that a plaintiff automatically satisfies the injury-in-fact requirement." *Id.* at 1549. Instead, "a 'concrete' injury must be '*de facto*'; that is, it must actually exist" in a "'real,' and not 'abstract'" sense. *Id.* at 1548. The injury must also be "particularized," meaning "it 'must affect the plaintiff in a personal and individual way.'" *Id.* *Spokeo* I also made clear that a plaintiff must demonstrate the harm suffered is the "legally protected interest" under the statute. *Id.*

As the Petitioner notes, lower courts – including several Courts of Appeal – have grappled with the proper application of *Spokeo* I, particularly as it relates to those "intangible" harms that satisfy the threshold level of actual (or imminent) real-world injury. Petition for *Certiorari* at 2-3, *Spokeo, Inc. v. Robins* (U.S. 17-806) ("Pet."). A circuit split is most troubling where subject matter jurisdiction is in play. The Petition presents an uncertain issue striking at the heart of federal court jurisprudence and standing principles, not simply over the legality of a particular statutory provision. As such, it should be granted.

A. Lower courts have inconsistently applied *Spokeo* I, creating uncertainty and unwarranted risk to all defendants.

In *Spokeo* I, this Court laid down an important marker that federal lawsuits should be based on claims of real harm. Hundreds of lower court decisions since have reaffirmed that a litigant must have actual (or imminent) real-world harm – whether tangible or intangible – to satisfy Article III. Those lower courts followed this Court's rejection in *Spokeo* I of abstract "injuries in law" that lack plausible allegations of concrete harm to the plaintiff herself.[2]

Scores of other lower court decisions, however, have ignored that jurisdictional mandate of real-world harm to the plaintiff under the guise of following this

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[2] *See, e.g., Dreher v. Experian Info. Sols., Inc.*, 856 F.3d 337 (4th Cir. 2017); *Gubala v. Time Warner Cable, Inc.*, 846 F.3d 909 (7th Cir. 2017); *Meyers v. Nicolet Restaurant of De Pere, LLC*, 843 F.3d 724 (7th Cir. 2016); *Nicklaw v. CitiMortgage*, 839 F.3d 998 (11th Cir. 2016); *Hancock v. Urban Outfitters, Inc.*, 830 F.3d 511 (D.C. Cir. 2016); *Hendrick v. Aramark Corp.*, 263 F. Supp. 3d 514 (E.D. Pa. 2017); *Frydman v. Experian Info. Sols., Inc.*, No. 14-cv-9013, 2017 U.S. Dist. LEXIS 141188 (S.D.N.Y. Aug. 30, 2017); *O'Shea v. P.C. Richard & Son, LLC*, No. 15-cv-9069, 2017 U.S. Dist. LEXIS 122424 (S.D.N.Y. Aug. 3, 2017); *Kamal v. J. Crew Group, Inc.*, No. 2:15-cv-190, 2017 U.S. Dist. LEXIS 86222 (D.N.J. June 6, 2017); *Llewellyn v. AZ Compassionate Care, Inc.*, No. 16-cv-4181, 2017 U.S. Dist. LEXIS 61840 (D. Ariz. Apr. 24, 2017); *Dilday v. DIRECTV, LLC*, No. 3:16cv996, 2017 U.S. Dist. LEXIS 47195 (E.D. Va. March 29, 2017); *Bultemeyer v. CenturyLink, Inc.*, No. 2:14-cv-2530, 2017 U.S. Dist. LEXIS 25831 (D. Ariz. Feb. 15, 2017); *Stelmachers v. Verifone Sys.*, No. 5:14-cv-04912-EJD, 2016 U.S. Dist. LEXIS 162081 (N.D. Cal. Nov. 21, 2016) (FACTA); *Nokchan v. Lyft, Inc.*, No. 15-cv-3008, 2016 U.S. Dist. LEXIS 138582 (N.D. Cal. Oct. 5, 2016).

Court's instructions in *Spokeo* I.[3] They have, in many cases, misapplied the way Congress may afford a remedy for previously unrecognized concrete injuries, whether tangible or not. The Third Circuit recognized this divergence in January 2017. *See In re Horizon*, 846 F.3d at 637 n.17 (citing *Braitberg v. Charter Commc'ns, Inc.*, 836 F.3d 925, 930 (8th Cir. 2016) (concluding, in light of *Spokeo* I, the improper retention of information under the Cable Communications Policy Act did not provide an injury in fact absent proof of "material risk of harm from the retention")).

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[3] *See, e.g., In re Horizon Healthcare Servs. Inc. Data Breach Litig.*, 846 F.3d 625 (3d Cir. 2017); *Van Patten v. Vertical Fitness Group, LLC*, 847 F.3d 1037 (9th Cir. 2017); *Galaria v. Nationwide Mut. Ins. Co.*, 663 F. App'x 384 (6th Cir. 2016); *In re Nickelodeon Consumer Privacy Litig.*, 827 F.3d 262 (3d Cir. 2016); *Gambles v. Sterling Infosystems, Inc.*, 234 F. Supp. 3d 510 (S.D.N.Y. 2017); *Gibbs v. SolarCity Corp.*, 239 F. Supp. 3d 391, 395 (D. Mass. 2017); *Ricketson v. Experian Info. Sols., Inc.*, No. 1:16-cv-1165, 2017 U.S. Dist. LEXIS 121753 (W.D. Mich. July 18, 2017) (FCRA); *Clark v. Trans Union, LLC*, No. 3:15-cv-391, 2017 U.S. Dist. LEXIS 29738 (E.D. Va. Mar. 1, 2017); *Miller v. Trans Union, LLC*, No. 3:12-cv-1715, 2017 U.S. Dist. LEXIS 7622 (M.D. Pa. Jan. 18, 2017); *Guarisma v. Microsoft Corp.*, 209 F. Supp. 3d 1261 (S.D. Fla. 2016); *Bellino v. JPMorgan Chase Bank, NA*, 209 F. Supp. 3d 601 (S.D.N.Y. 2016); *Thomas v. FTS USA, LLC*, 193 F. Supp. 3d 623 (E.D. Va. 2016); *Wood v. J Choo USA, Inc.*, 201 F. Supp. 3d 1332 (S.D. Fla. 2016); *Rodriguez v. El Toro Medical Investors,* No. SACV 16-00059-JLS (KES), 2016 U.S. Dist. LEXIS 160077 (C.D. Cal. Nov. 16, 2016); *Green v. RentGrow, Inc.*, No. 2:16-cv-421, 2016 U.S. Dist. LEXIS 166229 (E.D. Va. Nov. 10, 2016); *Munoz v. Cal. Bus. Bureau, Inc.*, No. 15-cv-1345, 2016 U.S. Dist. LEXIS 151495 (E.D. Cal. Nov. 1, 2016); *Stokes v. RealPage, Inc.*, Nos. 15-1520, 15-3894, 2016 U.S. Dist. LEXIS 144637 (E.D. Pa. Oct. 19, 2016).

This inconsistent application of *Spokeo* I is concerning for multiple reasons. First, it deals with the jurisdictional bedrock of federal courts. Second, the divergence is uncommonly wide, with over 400 decisions interpreting the decision and a near even split in outcomes. Third, it affects a broad swath of potential defendants in the United States that may be subject to no-injury lawsuits under consumer-protection or similar statutes.

As of May 2017, more than 400 judicial decisions nationwide have applied *Spokeo* I to Article III standing challenges.[4] The prevalence of cases applying *Spokeo* I is not surprising, given the vital role standing plays in our jurisprudence. What *is* surprising is the near even split in outcomes. In the FCRA context, for instance, courts have ruled that Article III standing was satisfied in forty-nine percent (49%) of cases.[5] And, analyzing all of the nearly 430 decisions (as of May 15, 2017) applying *Spokeo* I in cases involving consumer-protection statutes, those courts found standing in fifty-nine percent (59%) of such challenges.[6] *Amicus* and its members are concerned that this even split demonstrates significant confusion among the lower courts regarding the contours of *Spokeo* I. That confusion is succinctly highlighted in the Petition. Pet. 4-21. *Amicus* urges the Court to grant the Petition and resolve this ambiguity.

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[4] *See* Ezra Church, Brian Ercole, Christina Vitale, Warren Rissier & Ken Kliebard, *The Meaning of Spokeo, 365 and 430 Decisions Later*, Law360, May 15, 2017.

[5] *Id.*

[6] *Id.*

B. Courts of Appeal have diverged in applying *Spokeo* I to standing challenges in FCRA disputes.

The circuit split created by FCRA decisions interpreting *Spokeo* I is particularly illuminating. The Third Circuit, on the one hand, rejected the notion *Spokeo* I required a plaintiff to "show a statutory violation has caused a 'material risk of harm' before he can bring suit." *In re Horizon*, 846 F.3d at 637. Despite this mandate, district courts in the Third Circuit have consistently disagreed on the contours of *Spokeo* I. *See Miller v. Trans Union, LLC*, No. 3:12-cv-1715, 2017 U.S. Dist. LEXIS 7622 (M.D. Pa. Jan. 18, 2017) (finding that standing does exist in an FCRA suit); *In re Michaels Stores, Inc., Fair Credit Reporting Act (FCRA) Litigation*, MDL No. 2615, 2017 U.S. Dist. LEXIS 9310 (D.N.J. Jan. 24, 2017) (finding that standing does not exist in an FCRA suit); *Long v. SEPTA*, No. CV 16-1991, 2017 U.S. Dist. LEXIS 51731 (E.D. Pa. Apr. 5, 2017) (same).

The Third Circuit's *In re Horizon* decision stands in stark contrast to the Eighth Circuit's *Braitberg* ruling, as well as district courts within the Seventh and Eighth Circuits applying *Spokeo* I to FCRA disputes. Those decisions strongly disfavor the finding of Article III standing under *Spokeo* I's guidance.[7]

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[7] *See, e.g.*, *Campbell v. Adecco USA, Inc.*, No. 2:16-cv-04059, 2017 U.S. Dist. LEXIS 61515 (W.D. Mo. Apr. 24, 2017) (finding standing does not exist); *Davis v. D-W Tool, Inc.*, No. 2:16-cv-04297-NKL, 2017 U.S. Dist. LEXIS 38367 (W.D. Mo. Mar. 17, 2017) (same); *Fields v. Beverly Health and Rehab. Servs.*, Inc., No. 16-527, 2017 U.S. Dist. LEXIS 29771 (D. Minn. Mar. 1, 2017)

The Ninth Circuit and its district courts have shown the opposite trend, denying standing challenges at a consistent rate.[8] The court below did the same, considering two main issues: (1) "whether the statutory provisions at issue were established to protect [Respondent's] concrete interests (as opposed to purely procedural rights), and if so, (2) whether the specific procedural violations alleged in this case actually harm, or present a material risk of harm to, such interests." *Robins v. Spokeo, Inc.*, 867 F.3d 1108, 1113 (9th Cir. 2017). As to the first question, the

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(same); *Boergert v. Kelly Servs., Inc.*, No. 2:15cv04185-NKL, 2017 U.S. Dist. LEXIS 13714 (W.D. Mo. Feb. 1, 2017) (same). *But see Vera v. Mondelez Global LLC*, No. 16 C 8192, 2017 U.S. Dist. LEXIS 38328 (N.D. Ill. Mar. 17, 2017) (finding standing exists).

[8] *See, e.g., Syed v. M-I, LLC*, 853 F.3d 492 (9th Cir. 2017) (finding standing exists); *Demmings v. KKW Trucking, Inc.*, No. 3:14-cv-494-SI, 2017 U.S. Dist. LEXIS 46455 (D. Or. Mar. 29, 2017) (same); *Mamisay v. Experian Info. Sols., Inc.*, No. 16cv05684-YGR, 2017 U.S. Dist. LEXIS 40793 (N.D. Cal. Mar. 21, 2017) (same); *Terrell v. Costco Wholesale Corp.*, No. C16-1415JLR, 2017 U.S. Dist. LEXIS 34821 (W.D. Wash. Mar. 10, 2017) (same); *Artus v. Experian Info. Sols., Inc.*, No. 5:16-cv-03322-EJD, 2017 U.S. Dist. LEXIS 10718 (N.D. Cal. Jan. 24, 2017) (same); *Benton v. Clarity Servs., Inc.*, No. 16cv6583-MMC, 2017 U.S. Dist. LEXIS 10537 (N.D. Cal. Jan. 24, 2017) (same); *Keller v. Experian Info. Sols., Inc.*, No. 16-cv-04643-LHK, 2017 U.S. Dist. LEXIS 5735 (N.D. Cal. Jan. 13, 2017) (same). *But see Prescott v. Am. Auto. Ass'n*, 676 F. App'x 643 (9th Cir. 2017) (finding standing does not exist); *Bultemeyer*, 2017 U.S. Dist. LEXIS 25831, at *1 (same); *Mitchell v. WinCo Foods, LLC*, No. 1:16-cv-00076-BLW, 2017 U.S. Dist. LEXIS 32460 (D. Idaho Mar. 7, 2017) (same); *Dutta v. State Farm Mut. Auto. Ins.*, No. 3:14-cv-04292-CRB, 2016 U.S. Dist. LEXIS 152850, at *8 (N.D. Cal. Nov. 3, 2016) (finding a lack of standing when "several other items in Dutta's consumer report left him no chance of getting hired" such that "Dutta complains that State Farm denied him the chance to raise a doomed dispute three days earlier. That is a textbook example of a 'bare procedural violation.'").

Ninth Circuit answered in the affirmative. It held "that Congress established the FCRA provisions at issue to protect consumers' concrete interests," namely their interests in ensuring fair and accurate credit reporting and protecting consumer privacy. *Id.* "Even if there are differences between FCRA's cause of action and those recognized at common law, the relevant point is that Congress has chosen to protect against a harm that is at least closely similar in kind to others that have traditionally served as the basis for [a] lawsuit." *Id.* at 1115.

With respect to the second question, the Ninth Circuit held that because Respondent alleged that Petitioner simply prepared an inaccurate report and published that report on the Internet, his claim "clearly implicates, at least in some way, [Respondent's] concrete interests in truthful credit reporting." *Id.* at 1116. That, the court ruled, was sufficient for Respondent to show that the violation materially affected his protected interests in accurate credit reporting. In other words, the Ninth Circuit was satisfied Respondent had alleged a concrete injury because his claim implicated the real-world interests protected by the FCRA. The Ninth Circuit overlooked the fact Respondent had not alleged the claimed inaccuracy inflicted or threatened imminent real-world injury; the First Amended Complaint failed to allege that anyone other than the Respondent ever saw the subject report or how its contents (which were apparently more favorable than reality) harmed Respondent. *See* Pet. at 6, 17. This, as the Petition explains, is a critical oversight and misinterpretation of *Spokeo* I. *Id.*

The Fourth Circuit, in a similar dispute under a different provision of the FCRA, interpreted *Spokeo* I and came to the opposite conclusion – instead emphasizing the need to allege real-world, concrete injury to the plaintiff to establish federal court jurisdiction. *See Dreher v. Experian Info. Sols., Inc.*, 856 F.3d 337 (4th Cir. 2017). That complaint alleged a national consumer reporting agency violated FCRA § 1681g when it identified a defunct credit card company, rather than the name of the current servicer, as the source of a tradeline on the plaintiff's credit report.

The Fourth Circuit considered whether a consumer's alleged "informational injury" – an alleged right to know the identity of a different entity that was the true source of the credit reporting – conferred Article III standing in light of *Spokeo* I. It ultimately held that although the plaintiff had alleged the existence of an "informational injury" because he was allegedly "denied specific information to which he was entitled under the FCRA," the denial of information must still "create[] a 'real' harm with an adverse effect." *Id.* at 345 (citing *Spokeo* I). After reviewing the record, the court found the violation had "worked no real world harm" and "had no legitimate effect on the background check process." *Id.* at 346. The court noted plaintiff was able to "cure his credit issues" and "ultimately resolve those issues." *Id.* at 347. To the Fourth Circuit: "It would be an end-run around the qualifications for constitutional standing if any nebulous frustration resulting from a statutory violation would suffice." *Id.* at 346. Informational injury alone cannot ground standing. *Id.*

Dreher is consistent with the Fourth Circuit's prior 2017 decision in *Beck v. McDonald*, wherein the Fourth Circuit held a claim for "enhanced risk of future identity theft" due to a data breach was too speculative to confer Article III standing. 848 F.3d 262, 275 (4th Cir. 2017). While *Beck* addressed standing in the data breach context, *Dreher* broadened the Fourth Circuit's unwillingness to recognize informational injuries alone as sufficient to confer Article III standing. The Fourth Circuit, in *Beck* and now in *Dreher*, is firmly in the camp of requiring a showing of "real" harm to support standing. That interpretation stands in stark contrast to the Ninth Circuit's decision applying *Spokeo* I below.

The lower-court confusion as to *Spokeo* I threatens *amicus* and its members' businesses because of the critical role that subject matter jurisdiction plays in the federal court system. Uncertainty about whether a case exists could, and often does, result in massive waste of resources that accompany that uncertainty. Unless this Court resolves that uncertainty, companies across the nation will spend millions of dollars defending against technical, no-injury claims for which standing, and thus subject matter jurisdiction, are not present – or worse, settling at an early stage to avoid the mass confusion within the courts as to *Spokeo* I. Those outcomes are not only unfair to defendants and wasteful, but contrary to the spirit of Article III's primary gatekeeping function.

C. *Amicus* and its members face significant risk from forum-shopping, particularly in class actions.

The inevitable result of circuit divergence in interpretation and treatment of *Spokeo* I has been forum shopping by plaintiffs. This Court has consistently condemned forum shopping since its landmark decisions in *Erie Railroad v. Tompkins*, 304 U.S. 64 (1938) and *Hanna v. Plumer*, 380 U.S. 460 (1965), including by noting the dangers and general policy against the practice. *See, e.g., Agency Holding Corp. v. Malley-Duff & Assocs.*, 483 U.S. 143, 154 (1987); *see also Posadas de Puerto Rico Assocs., Inc. v. Asociacion de Empleados de Casino de Puerto Rico*, 873 F.2d 479, 485 (1st Cir. 1989) (calling it "wise" to "discourage forum-shopping"); *Ojeda Rios v. Wigen*, 863 F.2d 196, 199 (2d Cir. 1988) ("[f]orum-shopping is to be discouraged").

Amicus and its members are particularly at risk of no-injury class action claims brought for bare procedural violations of a consumer protection statute. Such technical compliance issues may be ideal to plaintiffs from a class action perspective, but they do not often yield measurable actual damages. Under this Court's decision in *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011), individualized actual damages claims may be practically impossible to pursue in a large-scale class action. As a result, plaintiffs typically frame their class theories around a statutory damage claim, which allows for a substantial monetary recovery without having to offer individualized proof of harm. To recover statutory damages under many consumer-protection statutes (such as the FCRA), however, plaintiffs must

demonstrate that the defendant committed a willful violation.

FCRA Sections 1681n and 1681o impose liability for willful noncompliance and negligent noncompliance, respectively. 15 U.S.C. §§ 1681n, o. In the case of negligent noncompliance, the consumer can recover actual damages, plus costs and attorneys' fees. In the case of a willful violation, the consumer can recover statutory damages of a minimum of $100 and a maximum of $1,000, plus punitive damages. Thus, at least in the FCRA arena – whose statutory framework partially mirrors many other consumer protection statutes – *amicus's* members can be subject to millions of dollars of risk exposure from the allegation of a purely technical, no-injury class claim in a favorable circuit or court. And, unlike other consumer-protection laws, the FCRA includes no maximum cap on statutory or punitive damages, so *amicus's* members realistically face *billions* of dollars of exposure from these claims.

Further, the standing inquiry takes on another layer of significance in the Fed. R. Civ. P. 23 analysis. It is hornbook law that a class representative must have standing. *Spokeo* I, 136 S. Ct. at 1547 n.6. But, absent class members *also* must have standing, lest the court afford relief to individuals with no claim, which is inconsistent with due process and Constitutional limits of the court's power. *Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1650–51 (2017). Indeed, under the Rules Enabling Act, procedural rules cannot enlarge substantive rights. 28 U.S.C. § 2072(b). Thus, "certification is not proper . . . to the extent that the class includes consumers who have no cognizable injury." *Sandoval v. Pharmacare*

US, No. 15-cv-738, 2016 U.S. Dist. LEXIS 140717, at *22 (S.D. Cal. June 10, 2016).

Clarity with respect to the foundational principle of Article III standing thus is not just relevant to individual cases. It is critical to the requirements for class certification under Fed. R. Civ. P. 23. Under *Dreher*'s analysis, for instance, determining "real world" harm on a class-wide basis would require individualized determinations of whether there was any impact on the employment prospects of class members. This may defeat certification of a class on commonality, typicality, and predominance grounds. Given the importance of the Rule 23 certification decision to plaintiffs (and defendants alike), as well as its intersection with jurisdiction and standing principles, it is not surprising that *amicus* and its members face significant risk from forum shopping and inconsistent rulings from appellate courts on these core issues. Clarity is warranted.

II. TECHNICAL, NO-INJURY CLASS ACTIONS THREATEN THE VIABILITY OF THE BACKGROUND-SCREENING INDUSTRY.

Amicus and its members represent a majority of background-check service providers in the United States. Over ninety percent (90%) of companies in the United States rely on background-check services. Yet, the proliferation of technical, no-injury lawsuits from consumers, particularly putative class actions, threaten the continued ability of the background-check industry to provide those services efficiently, or even at all.

The structure of the FCRA in particular has created a target-rich environment for class-action attorneys. Even the small chance of being found liable for multi-billion-dollar awards creates enormous incentives to settle litigation no matter how tenuous the plaintiff's claim.[9]

A. The background-screening industry provides valuable services that prevent dangerous work environments.

Amicus's members are in the business of information and mainly operate in the areas of pre-employment criminal background and tenant screening. Many are "consumer reporting agencies"[10] that furnish "consumer reports"[11] under the purview of the FCRA and its "less-than-pellucid statutory text." *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 70 (2007).

By providing access to criminal record data, as well as educational and employment history, *amicus* members provide crucial services to employers. As one federal district court noted, "conducting a . . . background check on a potential employee is a rational and legitimate component of a reasonable hiring process." *EEOC v. Freeman*, 961 F. Supp. 2d

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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; David L. Permut and Tamra T. Moore, Recent Developments in Class Actions: The Fair Credit Reporting Act, 61 Bus. L. 931 (2006).

[10] *See* 15 U.S.C. 1681a(f).

[11] *See* 15 U.S.C. § 1681a(d)(1).

783, 785 (D. Md. 2013). The background-check industry plays an essential role in reducing the serious problem of workplace violence. According to the United States Department of Labor, nearly two million Americans report being subject to workplace violence each year, including 403 homicides.[12] Approximately twenty percent (20%) of this violence comes at the hands of other employees.[13]

In a 2002 study, the Federal Bureau of Investigations ("FBI") concluded that red flags for future workplace violence include a history of drug or alcohol abuse, past conflicts (especially if violence was involved) with coworkers, and past convictions for violent crimes.[14] Effective background screening reveals these red flags and prevents the hiring of a future violent employee. The FBI, in fact, endorses background checks as a key preventative measure to reduce workplace violence.[15]

Effective background screening also reduces costly workplace theft. In a 2016 study, The Association of Certified Fraud Examiners found that the typical organization loses five percent of annual

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[12] United States Department of Labor, Occupational Safety and Health Administration, https://www.osha.gov/SLTC/workplace violence (last visited December 22, 2017).

[13] United States Department of Justice, *Special Report: Workplace Violence*, 1993-2009, at 6 (March 2011).

[14] United States Department of Justice, Federal Bureau of Investigations, *Workplace Violence: Issues in Response*, at 21 (2002).

[15] *Id.* at 20.

revenue to fraud.[16] Thirty percent of fraud cases occurred in small businesses, and sixty percent of those small businesses recover none of their losses.[17] In total, workplace fraud resulted in a loss of $6.3 billion, which cost is often passed along to consumers.[18] Robust background screening practices help identify risks associated with hires that would otherwise expose employers to theft or fraud.

The efforts of *amicus's* members also help an employer or housing provider "ensur[e] the security of its facilities" and employ "a competent, reliable workforce." *NASA v. Nelson*, 562 U.S. 134, 150 (2011). Permitting the continued proliferation of class action claims premised on technical or bare, procedural violations threatens to reshape the background industry through higher costs and less efficient services. Practically, the result will be fewer background checks being conducted and an increase in workplace crime. *Freeman*, 961 F. Supp. 2d at 803 ("By bringing actions of this nature, [plaintiff] placed many employers in the 'Hobson's choice' of ignoring criminal history and credit background, thus exposing themselves to potential liability for criminal and fraudulent acts committed by employees, on the one hand, or incurring the wrath of [plaintiff] for having utilized information deemed fundamental by most employers.").[19]

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[16] Association of Certified Fraud Examiners, *Report to the Nations on Occupational Fraud and Abuse*, at 8 (2016).

[17] *Id.* at 22.

[18] *Id.* at 9.

[19] As illustrated by horrific crimes that have been committed during the course of employment by felons who could have been

The background-check industry relies on robust procedures to gather and ensure accurate data to further those efforts. Among other things, those procedures seek to avoid overly-narrow background reports that omit critical identifying information or applicable records. A recent study by researchers at Utica College and the University of Massachusetts-Lowell found that sex offenders frequently manipulate their identity to escape detection, including by using multiple aliases, manipulating their names, using the address of family members or friends, using the identifying information of family members, or altering their date of birth.[20] The study found that roughly forty-two percent of offenders in the National Sex Offender Registry have multiple names, Social Security numbers, dates of birth, or other identity indicators, and that nearly seventeen percent of offenders attempt to manipulate their identities.[21]

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easily identified by a background check, the background screening industry prevents losses, and even tragedy. In *Beverly v. Diamond*, a mentally-disabled woman was raped by a newly hired bus driver who was not required to undergo a background check. The driver was a felon with prior convictions that included conspiracy to commit robbery, felony robbery, possession of marijuana, reckless driving, and concealment of a firearm. A jury verdict of $3 million against the employer was affirmed. *See Beverly v. Diamond Transportation Servs., Inc.*, No. 98-2230 (4th Cir. June 1, 1999) (unpublished), which can be found at http://www.ca4.uscourts.gov/opinions/Unpublished/982230.U.pdf.

[20] Center for Identity Management and Information Protection, *Hiding in Plain Sight? A Nationwide Study of the Use of Identity Manipulation by Registered Sex Offenders* (February 2015).

[21] *Id.* at 70, 75.

In such circumstances, the benefit of robust background-check processes is obvious. Background screening companies, as a first step, cast a sufficiently broad search to ensure that potentially applicable records are not omitted. Then, they are charged under the FCRA to further match and/or discard inapplicable data. That process results in safer work environments.

B. Despite best practices, technical, no-injury class actions compel *in terrorem* settlements.

A substantial part of the *amicus's* purpose is to educate its members on FCRA compliance. For example, *amicus* not only develops and promotes best practices for its members, but also accredits screening companies that demonstrate compliance with high standards of operation as prescribed by its industry accreditation program.[22] *Amicus* also devotes substantial efforts to educating its members on recent FCRA activity by inviting practicing lawyers to advise its members on the latest FCRA developments and inviting regulators to advise *amicus's* members about their views of sound industry practice.[23] *Amicus's*

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[22] 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.pdf (last visited June 23, 2015); *see also* About NAPBS' Accreditation Program, Nat'l Assoc. of Professional Background Screeners, http://www.napbs.com/accreditation.

[23] *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).

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 industry's emphasis on FCRA compliance results from direct legal responsibility and desired market advantage, and serves to minimize errors in consumer reporting. Nonetheless, no matter how extensive, industry compliance efforts cannot change the reality that background screening is a business run by human beings and even an individual exercising reasonable care can make a mistake. The FCRA's provisions contemplate the presence of inaccuracies, and provide means to correct them.[24]

Despite these best practices, the risk of *in terrorem* settlements is particularly acute in the consumer-protection arena. Under the current state of standing law in jurisdictions like the Ninth Circuit, one technical mistake could bankrupt a company. Permitting statutory damage suits to proceed in the absence of real-world harm to the plaintiff skews the statute against all companies subject to consumer-protection statutes, but especially medium and small businesses. Potential statutory damages in the class action context often far exceed the net worth – or indeed the total assets – of most background screening companies, and well out of proportion to any harm actually caused to consumers. *See AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1751-52 (2011) (the class certification process must be regulated due to the "risk of '*in terrorem*' settlements"). Despite

[24] *See, e.g.,* 15 U.S.C. § 1681i ("Procedure in case of disputed accuracy").

strong certification defenses under Fed. R. Civ. P. 23, these companies simply cannot afford to fight these lawsuits.[25] *See London v. Wal-Mart Stores, Inc.,* 340 F.3d 1246, 1255 n.5 (11th Cir. 2003) (doubting superiority when "defendants' potential liability would be enormous and completely out of proportion to any harm").

Further, no-injury class action cases rarely benefit consumers, instead only enriching the plaintiffs' attorneys. Emory University law professor Joanna Shepherd recently examined no-injury class actions for a working paper on the effects of settlement, ultimately finding that they hurt consumers more than they help them.[26] Professor Shepherd determined that 432 cases filed between 2005 and 2015 fit the criteria as no-injury class action cases.[27] Of those 432, only two and one-half percent were resolved at trial.[28] Settlements ranged from $2,200 to $580 million, with an average of $9,366,940, and a total payout of approximately $4 billion.[29] Ten percent of the cases had awards over $20 million.[30]

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[25] For example, a midsize background screening company might run one million checks per year. Under the FCRA's statutory damages framework, a class action contesting the legality of some aspect of that one-year set of background checks would result in $500 million to $5 billion of potential maximum liability.

[26] Joanna Shepherd, *An Empirical Survey of No-Injury Class Actions*, Legal Studies Research Paper Series, available at http://ssrn.com/abstract=2726905 (2016).

[27] *Id.* at 10.

[28] *Id.* at 13.

[29] *Id.* at 14.

[30] *Id.*

Yet, most of that money did not end up with the consumers. While class counsel were awarded an average of thirty-eight percent of the settlement amounts, class members ultimately received merely fifteen percent, though usually less, of the total fund.[31]

These settlements impose a significant cost on businesses. Professor Shepherd noted that "the in terrorem effect of class action lawsuits triggers defendants' risk-aversion and motivates them to settle claims for more than their expected value, often inducing a quick but expensive settlement."[32] Businesses then pass on these costs ($4 billion plus defense costs) to consumers through increased prices, fewer innovations, and lower product quality.[33] Further, when businesses assess their risks to determine where to spend their compliance budget, the disproportionate cost of no-injury class claims forces *amicus's* members to allocate money to prevent violations that result in no injury rather than to prevent violations that do result in injury.

In sum, the liability that *amicus's* members face under technical FCRA suits with no real-world injury to the plaintiff renders their defense choices simple. The choice to settle is not a hard one. As the cost of the industry's insurance policies rise and become more difficult to even obtain, *amicus* and its members are concerned that only the largest companies in the background-screening industry will

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[31] *Id.* at 15-20.

[32] *Id.* at 23.

[33] *Id.*

be financially able to shoulder the risk of fighting these suits.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted,

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