No. 16-1524

IN THE
Supreme Court of the United States

M-I, LLC,

Petitioner,

v.

SARMAD SYED,

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

MOTION FOR LEAVE TO FILE AND BRIEF OF THE CONSUMER DATA INDUSTRY ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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July 2017

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M-I, LLC,

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MOTION OF THE CONSUMER DATA INDUSTRY ASSOCIATION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

The Consumer Data Industry Association ("CDIA") hereby seeks leave, pursuant to this Court's Rule 37.2, to file the attached brief as *amicus curiae* in support of Petitioner M-I, LLC. Counsel of record for all parties received notice of CDIA's intent to file a brief more than ten days before the due date. Petitioner has consented to the filing of this brief, and that letter of consent has been lodged with the Clerk of this Court. Respondent has declined to consent to the filing of this brief.

CDIA is an international trade association, founded in 1906, and headquartered in Washington, D.C. As part of its mission to support companies offering consumer information reporting services, CDIA establishes industry standards, provides business and professional education for its members, and produces

educational materials for consumers describing consumer credit rights and the role of consumer reporting agencies ("CRAs") in the marketplace. CDIA is the largest trade association of its kind in the world, with a membership of approximately 130 consumer credit and other specialized CRAs operating throughout the United States and the world.

In its more than 110-year history, CDIA has worked with the United States Congress and state legislatures to develop laws and regulations governing the collection, use, maintenance, and dissemination of consumer report information. In this role, CDIA participated in the legislative efforts that led to the enactment of the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. § 1681 *et seq.*, in 1970, and its subsequent amendments.

CDIA has a significant interest in this case because its members face an onslaught of class action litigation under the FCRA. CRAs perform the economically vital function of gathering large amounts of consumer information and making that information available for use in credit, insurance, and employment decisions. Operating in a heavily regulated context, CRAs' activities by necessity touch on the vast majority of adult Americans, and entail the handling of billions of discrete pieces of data. Because of the large-scale nature of their businesses, coupled with a legislative scheme that a number of courts have construed to provide uncapped statutory damages irrespective of actual harm or culpability, CRAs and those that supply them with information have become a target of the class action bar. Many of the cases that are brought against CRAs and CDIA's other members are based on alleged violations that are technical at best, but because the potential

liabilities are so enormous, class action lawyers are able to leverage lucrative settlements.

This Court has recognized important constitutional and statutory limits on FCRA class actions seeking statutory damages. Lower courts have not consistently enforced these limits, as the decision below demonstrates. This Court's review is necessary to properly confine statutory damages class actions to the cases in which they are appropriate: egregious violations causing actual consumer harm.

CDIA believes that the attached brief, based on its members' expertise in consumer reporting and experience in FCRA class action litigation, will assist the Court in evaluating the importance of the issues presented by the Petition. Accordingly, CDIA respectfully seeks the Court's leave to file the attached brief supporting Petitioner.

Respectfully submitted,

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

INTEREST OF AMICUS CURIAE[1]

The Consumer Data Industry Association ("CDIA") is an international trade association, founded in 1906, and headquartered in Washington, D.C. As part of its mission to support companies offering consumer information reporting services, CDIA establishes industry standards, provides business and professional education for its members, and produces educational materials for consumers describing consumer credit rights and the role of consumer reporting agencies ("CRAs") in the marketplace. CDIA is the largest trade association of its kind in the world, with a membership of approximately 130 consumer credit and other specialized CRAs operating throughout the United States and the world.

In its more than 110-year history, CDIA has worked with the United States Congress and state legislatures to develop laws and regulations governing the collection, use, maintenance, and dissemination of consumer report information. In this role, CDIA participated in the legislative efforts that led to the enactment of the Fair Credit Reporting Act

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[1] Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus*, its members, or its counsel made any monetary contributions intended to fund the preparation or submission of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of *amicus*' intention to file this brief; counsel for Petitioner has consented to the filing of this brief, but counsel for Respondent declined to consent to the filing of this brief. Accordingly, *amicus* has filed a motion to for leave to file this brief.

("FCRA"), 15 U.S.C. § 1681 *et seq.*, in 1970, and its subsequent amendments.

CDIA has a significant interest in this case because its members face an onslaught of class action litigation under the FCRA. CRAs perform the economically vital function of gathering large amounts of consumer information and making that information available for use in credit, insurance, and employment decisions. Operating in a heavily regulated context, CRAs' activities by necessity touch on the vast majority of adult Americans, and entail the handling of billions of discrete pieces of data. Because of the large-scale nature of their businesses, coupled with a legislative scheme that a number of courts have construed to provide uncapped statutory damages irrespective of actual harm or culpability, CRAs and those that supply them with information have become a target of the class action bar. Many of the cases that are brought against CRAs and CDIA's other members are based on alleged violations that are technical at best, but because the potential liabilities are so enormous, class action lawyers are able to leverage lucrative settlements.

This Court has recognized important constitutional and statutory limits on FCRA class actions seeking statutory damages. Lower courts have not consistently enforced these limits, as the decision below demonstrates. This Court's review is necessary to properly confine statutory damages class actions to the cases in which they are appropriate: egregious violations causing actual consumer harm.

INTRODUCTION AND SUMMARY OF ARGUMENT

The number and magnitude of FCRA class actions is alarming. While this powerful litigation tool has its role, it cannot be to license what are effectively bounty-seeking actions, brought on behalf of classes of uninjured consumers, and targeting defendants that followed good-faith interpretations of the law. This Court has already established important gatekeeping requirements that, if followed, should confine statutory damages class actions to their proper place. Two such requirements—that statutory damages only be awarded for willful violations of clearly established rules, and that an injury-in-fact be alleged to establish Article III standing—serve as essential checks on FCRA class actions.

The decision below honors these checks only in the breach. When courts do not take these threshold questions sufficiently seriously, the result is unconstrained class action litigation that threatens crippling, punitive sanctions with no relation to culpability or actual harm. Review is necessary to ensure that the balance this Court has previously struck is recognized and enforced.

1. The consumer data industry's experience illustrates the pressing need for the constitutional and statutory checks on statutory damages class actions to be enforced. Unconstrained, these suits risk discouraging important economic activity and threaten staggering, punitive sanctions that are disproportionate to any actual harm or culpability.

The FCRA is actively and aggressively enforced by public regulatory agencies. The government's enforcement of the Act is intended to be performed in the overall public interest, with an eye toward preventing and remedying actual consumer harm. Plaintiffs' lawyers, by contrast, have every incentive to focus not on consumer protection but on maximal recoveries and settlement leverage.

Suits that do not even allege actual damages are being filed with increasing frequency. This upward trend is no aberration. The confluence of three factors—permissive class action certification, ready availability of statutory damages, and a "less-than-pellucid" statute—has created the perfect storm for well-intentioned producers and users of consumer credit reports, and an attractive tool for plaintiffs' lawyers.

2. To prevent abusive litigation that is contrary to the public interest, lower courts must properly apply the standards articulated by this Court regarding willfulness and actual injury. The decision below epitomizes a lax approach to both of these important requirements.

a. This Court in *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47 (2007), adopted a standard of willfulness under the FCRA that confines statutory damages to the most egregious cases, where the defendant's conduct is clearly unlawful. In explaining how lower courts should apply this standard, *Safeco* drew an important analogy to qualified immunity. Under that familiar doctrine, a defendant is not liable unless it violates "clearly established law." Likewise under the FCRA, willfulness cannot be established when there is a lack of guidance from binding judicial and

administrative decisions, at least in the absence of especially pellucid statutory text. If a court properly finds that a defendant unreasonably interpreted the FCRA in the face of controlling precedent, the defendant can still avoid liability for statutory damages if it did not act recklessly, *e.g.*, it subjectively acted in good faith.

The Ninth Circuit's failure to faithfully apply *Safeco* on both scores warrants this Court's review. Enforcing the line between willful violations and all others is essential to achieving the FCRA's purposes and to preventing abusive and wasteful litigation.

b. In *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016), this Court was clear: a statutory violation standing alone is insufficient to confer Article III standing. Nonetheless, courts of appeals continue to diverge on what types of injuries are adequate to establish standing. This circuit split is paralleled by divergent results in the district courts. Many courts have failed to faithfully adhere to this Court's admonition to carefully distinguish mere procedural violations from concrete injuries. These courts recite the holding of *Spokeo*, but ultimately equate a violation of a statutory right with a concrete injury—without evidence of further harm.

Permitting class actions to proceed without any plausible allegation of actual harm upends important separation of powers principles. To the extent the alleged harm is simply the defendant's technical violation of the law, the Executive Branch is best suited to determine whether to bring an enforcement action, and if so what type of penalties to seek in the public interest. Because less serious violations are often easier to prove, plaintiffs' lawyers often pursue

statutory damages rather than actual damages, avoiding the sort of individualized inquiries that could impede class certification. Remedying consumer harm is not the point, nor could it be in cases where such harm cannot be plausibly alleged.

ARGUMENT

I. Litigation Under The FCRA Demonstrates The Urgent Need For Enforcement Of The Checks On Statutory Damages Class Actions.

The consumer data industry's experience illustrates the pressing need for the constitutional and statutory checks on statutory damages class actions to be enforced. Unconstrained, these suits threaten to deter important economic activity and impose staggering, punitive sanctions that are disproportionate to any actual harm or culpability.

Consumer reporting is both a profoundly important aspect of the economy and a massive and complex undertaking. As Congress has recognized, the consumer reporting system is an "elaborate mechanism" on which "[t]he banking system is dependent." 15 U.S.C. § 1681(a)(1), (2). To facilitate the operation of this system, CRAs in the United States maintain files concerning more than 200 million adults, and each month receive information on more than 1.3 billion "trade lines" (an industry term for accounts that are included in a credit report). Consumer Financial Protection Bureau, *Key Dimensions and Processes in the U.S. Credit Reporting System*, at 3 (Dec. 2012), *available at* http://tinyurl.com/CFPB-CRA [hereinafter "Key Dimensions"]. As one court has observed, a CRA can

"process[] over 50 million updates to trade information each day." *Sarver v. Experian Info. Sols.*, 390 F.3d 969, 972 (7th Cir. 2004). CRAs receive this information from approximately 10,000 data "furnishers." Key Dimensions, *supra*, at 14.

CRAs, furnishers of consumer data, and users of credit reports are all subject to a detailed regulatory scheme enacted by the FCRA. *See* Key Dimensions, *supra*, at 13 ("All of these participants have defined roles with specific obligations under the FCRA."). The FCRA's requirements range from the general—*e.g.*, requiring CRAs to "follow reasonable procedures to assure maximum possible accuracy" of information, 15 U.S.C. § 1681e(b)—to the detailed and technical—*e.g.*, requiring CRAs to post toll-free telephone numbers for consumers, 15 U.S.C. § 1681j(a). And as this Court has observed, the FCRA's requirements are often expressed in "less-than-pellucid statutory text." *Safeco*, 551 U.S. at 70.

The FCRA is actively and aggressively enforced by public regulatory agencies. The Federal Trade Commission ("FTC") has brought dozens of FCRA actions against CRAs, users of consumer reports, and furnishers of information to CRAs, and in 2013 announced that "[v]igorous enforcement of the FCRA is a high priority for the Commission." The Accuracy and Completeness of Consumer Credit Reports: Prepared Statement of the Federal Trade Commission, at 5, Hearing Before the U.S. Senate Comm. on Commerce, Sci. & Transp., Subcomm. on Consumer Prot., Prod. Safety & Ins. (May 7, 2013). In recent years, the FTC has continued to rigorously enforce the FCRA. *See* Complaint, *United States v. Sprint Corp.*, No. 2:15-cv-9340 (D. Kan. filed Oct. 21,

2015), *available at* https://tinyurl.com/2015-FTC; Complaint, *United States v. Time Warner Cable, Inc.*, No. 13-cv-8998 (S.D.N.Y. filed Dec. 19, 2013), *available at* https://tinyurl.com/2013-FTC.

With the passage of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010), the FTC has been joined by the Consumer Financial Protection Bureau ("CFPB") as an enforcer of the FCRA. The CFPB has focused on companies that furnish data to CRAs, noting that it "will prioritize examinations and other actions on the basis of risks posed to consumers." Consumer Financial Protection Bureau, CFPB Bulletin 2013-09, at 2 (Sept. 4, 2013), *available at* http://tinyurl.com/CFPB2013-09. In the summer of 2015, the CFPB also noted its "reviews of the reasonableness of methods and processes used by certain CRAs to assure maximum possible accuracy of consumer reports they produce." Consumer Financial Protection Bureau, *Supervisory Highlights*, at 5 (Summer 2015), *available at* http://tinyurl.com/CFPB-Summer2015. The CFPB praised CRAs' "highly knowledgeable staff and management that oversee complex processes for maintaining consumer credit data." *Id.* It also announced efforts to remedy alleged "weaknesses" through, for example, "implementation timelines to establish quality controls." *Id.* at 6-7.

The government's enforcement of the Act is intended to be performed in the overall public interest, with an eye toward preventing and remedying actual consumer harm. The CFPB, as an Executive Branch agency, has set priorities based on risk of consumer harm, and has sought to resolve perceived problems in forward-looking ways without

necessarily resorting to large enforcement actions. As the CFPB explained in March 2017, its "work is producing an entirely different approach to ensuring compliance at the major consumer reporting companies: one of proactive attention to compliance, as opposed to a defensive, reactive approach in response to consumer disputes and lawsuits," an approach that it believes "will reap benefits for consumers—and the lenders that use consumer reports—for many years to come." Consumer Financial Protection Bureau, *Supervisory Highlights Consumer Reporting Special Edition*, at 3 (Winter 2017), *available at* https://tinyurl.com/CFPB-Winter2017.

Plaintiffs' lawyers, by contrast, have no obligation to act in the public interest, and have every incentive to focus not on consumer protection, but on maximal recoveries and settlement leverage to extract sizable attorney's fees. Because CRAs, data furnishers, and users of consumer reports necessarily deal in large quantities of information, and because the FCRA offers uncapped statutory damages for willful violations, class action attorneys are able to threaten massive damages for even trivial alleged violations.

The plaintiffs' bar often files these suits despite the absence of any evidence of actual consumer harm. Indeed, paradoxically, these suits typically *avoid* alleging actual harm, in order to skirt individualized differences among class members, and therefore improve the odds that class certification will be granted.

These suits are being filed with increasing frequency. As the Chief Justice noted in his 2009

report on the state of the judiciary, "[f]ilings of cases involving consumer credit, such as those filed under the Fair Credit Reporting Act, increased 53% (up 2,143 cases), fueled in part by the current economic downturn . . . ." *2009 Year-End Report on the Federal Judiciary*, at 3 (Dec. 31, 2009), *available at* http://tinyurl.com/CJ2009Rept. While the economic climate has improved, the litigation climate has not—the number of FCRA lawsuits filed annually has more than doubled in the last five years. *See* Web Recon, *2016 Year in Review: FDCPA Down, FCRA & TCPA Up*, *available at* https://tinyurl.com/FCRA2016Stats.

This upward trend is no aberration. The confluence of three factors—permissive class action certification, ready availability of statutory damages, and a "less-than-pellucid" statute—has created the perfect storm for well-intentioned producers and users of consumer credit reports, and an attractive tool for plaintiffs' lawyers.

Together these factors risk discouraging economically beneficial activity, and even raise due process concerns. Without proof of concrete injury, these suits threaten damages that are disproportionate to any actual harm. Without effective protections from statutory damages for those who do not violate clearly established law, these suits mete out punitive sanctions without the requisite level of culpability. In addition to, and on top of, these statutory damages, plaintiffs' attorneys separately seek punitive damages and their own fees.

The disproportionate nature of statutory damages awarded in class actions has been well documented by courts and commentators. As the Second Circuit has cautioned, a statutory scheme that

combines mandatory statutory damages and the class action mechanism "may expand the potential statutory damages so far beyond the actual damages suffered that the statutory damages come to resemble punitive damages—yet ones that are awarded as a matter of strict liability, rather than for the egregious conduct typically necessary to support a punitive damages award." *Parker v. Time Warner Entm't Co., L.P.*, 331 F.3d 13, 22 (2d Cir. 2003). "Combining the two mechanisms creates 'a form of double counting which could easily lead to overdeterrence.'" Sheila B. Scheuerman, *Due Process Forgotten: The Problem of Statutory Damages and Class Actions*, 74 Mo. L. Rev. 103, 115 (2009) (quoting Richard A. Epstein, *Class Actions: Aggregation, Amplification, and Distortion*, 2003 U. Chi. Legal F. 475, 505 (2003)). These problems are compounded by the "risk of '*in terrorem*' settlements that class actions entail," through which defendants can be "pressured into settling questionable claims." *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1752 (2011).[2]

Disproportionate penalties under the FCRA have the potential to wreak havoc on the economy. Justice Kennedy has described the potentially backbreaking liability possible under the FCRA, as a consequence not of extraordinary culpability but simply the scale of the economic activity that is involved. "Because the FCRA provides for statutory damages of between $100 and $1,000 for each willful violation, [Trans Union] faces potential liability

[2] These dangers are increasingly recognized in Congress as well. Pending legislation would address this abuse by placing limits on class action recoveries under the FCRA. *See* FCRA Liability Harmonization Act, H.R. 2359, 115th Cong. (2017).

approaching $190 billion." *Trans Union LLC v. FTC*, 122 S. Ct. 2386, 2387 (2002) (Kennedy, J., dissenting from denial of certiorari). In highlighting the importance of granting review in cases like this one, Justice Kennedy warned that this threat to a major CRA would "have adverse effects on both the national economy and [its] thousands of employees." *Id.*

It is against this backdrop—staggering statutory damages sought in class actions that allege no actual harm and that require no proof of a violation of clearly established law—that the Court confronts the questions presented by Petitioner.

II. Review Is Necessary To Ensure That Two Critical Checks On FCRA Statutory Damages Class Actions—Proof Of Willfulness And Actual Injury—Are Appropriately Enforced.

To prevent abusive litigation that is contrary to the public interest, lower courts must properly apply the standards articulated by this Court regarding willfulness and actual injury. Both requirements have an important role to play: the FCRA willfulness standard ensures that the extraordinary remedy of statutory damages is used as a deterrent for truly culpable conduct, and the Article III concrete injury requirement ensures that mere technical violations cannot serve as the basis of private litigation. The decision below epitomizes a lax approach to both of these important requirements.

A. Willfulness Findings Should Be Reserved For Egregious Cases Where The Conduct Violates Clearly Established Law.

The object of the FCRA is to "ensure fair and accurate credit reporting, promote efficiency in the banking system, and protect consumer privacy." *Safeco*, 551 U.S. at 52. In pursuing these goals, Congress also recognized the complexities involved for those subject to the statutory and regulatory scheme that governs the economically vital consumer data industry. To balance these concerns, Congress established different remedies for different types of violations: actual damages for ordinary FCRA violations, with the strong medicine of statutory damages reserved for willful violations of the Act. *See* 15 U.S.C. § 1681n. As in other contexts, statutory damages are therefore "reserved for egregious cases of culpable behavior." *See Halo Elecs., Inc. v. Pulse Elecs., Inc.*, 136 S. Ct. 1923, 1932 (2016) (analyzing willfulness in the context of patent infringement).

This Court in *Safeco* adopted a standard of willfulness under the FCRA that confines statutory damages to the most egregious cases. The inquiry proceeds in two steps. First, a court asks whether the defendant's conduct is clearly unlawful. Second, even if the violation is clearly established as an objective matter, the plaintiff must plead and prove that the defendant's conduct was actually reckless, and not, for example, based on a misguided but good-faith view of the law.

At the first step, courts ensure that statutory damages are not permitted simply because a court found a statutory violation after the fact. Rather, to be eligible for statutory damages, the plaintiff must

show that "the company ran a risk of violating the law *substantially greater* than the risk associated with a reading that was merely careless." *Safeco*, 551 U.S. at 69 (emphasis added). Thus, statutory damages are unavailable if the defendant's "reading of the statute . . . could reasonably have found support in the courts." *Id.* at 70 n.20; *see also Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573, 584 (2010) (noting that the term "willful" is "often understood in the civil context to excuse mistakes of law").

In explaining how lower courts should apply this standard, *Safeco* drew an important analogy to qualified immunity. 551 U.S. at 70 (citing *Saucier v. Katz*, 533 U.S. 194, 202 (2001)). Under that familiar doctrine, a defendant is not liable unless it violates "clearly established law," meaning that "existing precedent must have placed the statutory or constitutional question *beyond debate*." *Reichle v. Howards*, 132 S. Ct. 2088, 2093 (2012) (emphasis added) (quoting *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2083 (2011)). Likewise under the FCRA, willfulness cannot be established when there is a "dearth of guidance." *Safeco*, 551 U.S. at 70. Thus, in *Safeco*, the defendant did not willfully violate the statute because it did not have "the benefit of guidance from the courts of appeals or the Federal Trade Commission (FTC) that might have warned it away from the view it took." *Id.*

Safeco's analogy to qualified immunity rules, and its requirement of an indisputable violation as a prerequisite to willfulness liability, highlights the significant flaws in the Ninth Circuit's approach. Here, as in *Safeco*, the defendant did not "ha[ve] the

benefit of guidance from the courts of appeals" or any regulator. *See* Pet. App. 26 ("[W]e are the first federal appellate court to construe Section 1681b(b)(2)(A)[.]").

Not only that, but the panel acknowledged a lack of uniformity on the question even at the district court level. *Id.* at 26 n.8. In the qualified immunity context, even unanimous district court authority does not make a right clearly established. *See Camreta v. Greene*, 131 S. Ct. 2020, 2033 n.7 (2011). Plainly, a right is not clearly established when only district courts have weighed in and are *divided*. As the district court in this case correctly recognized, "[t]he inability of district courts around the country to agree" on the interpretation of the statutory provision at issue is itself strong evidence that "the statute is 'less than pellucid.'" Pet. App. 92 (quoting *Safeco*, 551 U.S. at 70); *cf. Oliver v. Fiorino*, 586 F.3d 898, 907 (11th Cir. 2009) (in the absence of controlling case law, "qualified immunity almost always protects the defendant," unless the statute or constitutional provision speaks with "obvious clarity"). Yet in the face of this division and without any guidance from the courts of appeals, the Ninth Circuit was able to deem Petitioner's alleged violation of a less-than-pellucid provision "willful" as a matter of law. That is not a faithful application of *Safeco*.

The Ninth Circuit's misapplication of *Safeco* is already having its predictable effect. A recent district court decision expressly rejected the analogy to qualified immunity that this Court drew in *Safeco*. Instead, relying on the decision below, the court held that "a plaintiff need *not* show that a defendant's conduct violated clearly established law to prove a willful violation of the FCRA." *Ramirez v. Trans*

Union, LLC, No. 12-CV-00632-JSC, 2017 WL 1133161, at *1 (N.D. Cal. Mar. 27, 2017) (emphasis added). The result of that decision was a $60 million jury verdict in statutory and punitive damages, without a finding that clearly established law was violated—and with the court considering it irrelevant whether each class member's allegedly "inaccurate credit report was disseminated to a third party." *Ramirez v. Trans Union, LLC*, No. 12-CV-00632-JSC, 2016 WL 6070490, at *5 (N.D. Cal. Oct. 17, 2016).

A court reaches the second step of the willfulness inquiry only if the plaintiff has established that the defendant's conduct violated clearly established law. The second prong then asks whether the plaintiff can plead and then prove that the defendant's conduct was reckless "based on the facts surrounding defendants' adoption of a particular reading of the statute." *Fuges v. Sw. Fin. Servs., Ltd.*, 707 F.3d 241, 251 n.16 (3d Cir. 2012). This Court, for example, expressly preserved the possibility that "good-faith reliance on legal advice should render companies immune to [FCRA statutory damages] claims." *Safeco*, 551 U.S. at 70 n.20.

But the Ninth Circuit compounded its erroneous application of *Safeco* by considering it irrelevant whether Petitioner acted in good faith, based on the circular logic that it had already found Petitioner's interpretation objectively unreasonable. Pet. App. 25. A defendant that has made diligent and genuine efforts to comply in good faith cannot be said to "willfully" violate the law, even if it reached a view that a court later considers unreasonable.

The Ninth Circuit's failure to apply *Safeco*'s limits on statutory damages warrants this Court's

review. Enforcing the line between willful violations and all others is essential to achieving the FCRA's purposes and to preventing abusive and wasteful litigation. In the absence of a clear boundary between willful and other violations, plaintiffs' attorneys, whose incentives often do not align with the public interest, will be left to their own devices. They will not seek out the most egregious misconduct; they will bring the cases with the greatest number of putative class members and technical violations. Regulatory agencies are charged with prioritizing the worst offenses, while plaintiffs' lawyers can be expected to prioritize personal gain. *See supra* pp. 8-9.

Myriad other undesirable outcomes will result if the lower courts are not reminded of the strict willfulness standard this Court has adopted. For one, the most flagrant violations will be punished no more seriously than those that result from an honest mistake of law made without judicial guidance. To properly deter and penalize the worst offenders, the award of statutory damages should be directed solely at those warranting deterrence.

Furthermore, entities seeking to comply in good faith with the FCRA's mandates will face damages awards that are statutory in name but punitive in effect. Fairness requires that the well-intentioned not be treated the same as knowing violators. *See Parker*, 331 F.3d at 22 (finding that "statutory damages come to resemble punitive damages—yet ones that are awarded as a matter of strict liability").

Last but by no means least, CRAs, on whom businesses, lenders, and others rely, as well as employers and other users of consumer data, will face serious threats well out of proportion to any

misconduct. Indeed, the threat of billion-dollar class actions will exert tremendous settlement pressure even in the absence of any misconduct at all. As Judge Wilkinson has observed, "once a class is certified, a statutory damages defendant faces a bet-the-company proposition and likely will settle rather than risk shareholder reaction to theoretical billions in exposure even if the company believes the claim lacks merit." *Stillmock v. Weis Mkts.*, 385 F. App'x 267, 281 (4th Cir. 2010) (Wilkinson, J., concurring) (quoting Sheila B. Scheuerman, *Due Process Forgotten: The Problem of Statutory Damages and Class Actions*, 74 Mo. L. Rev. 103, 104 (2009)). Absent review, the Ninth Circuit's watered-down version of willfulness will only worsen this dynamic.

B. Permitting No-Injury FCRA Class Actions Neither Comports With Article III's Standing Requirement Nor Furthers The Consumer Protection Purposes Of The Act.

In cases where no actual harm is plausibly alleged, the plaintiff "is left with a statutory violation divorced from any real world effect." *See Dreher v. Experian Info. Sols., Inc.*, 856 F.3d 337, 346 (4th Cir. 2017). Such a violation is insufficient to confer Article III standing under *Spokeo*, which held that without "concrete injury," a "statutory violation" is not a sufficient basis to bring suit. *Spokeo*, 136 S. Ct. at 1549.

But the clear principle recognized in *Spokeo* has not been uniformly followed. Instead, courts of appeals continue to diverge on what types of injuries are sufficient to establish standing. The Fourth

Circuit in *Dreher* recently confirmed that "a statutory violation *alone* does not create a concrete informational injury sufficient to support standing." 856 F.3d at 345. The plaintiff had sued over the identification of a shuttered credit card company, as opposed to the company's appointed servicer, as the source of information on his credit report. *Id.* at 340. Yet despite this technical flaw, the plaintiff was "still able to receive a fair and accurate credit report, obtain the information he needed to cure his credit issues, and ultimately resolve those issues." *Id.* at 347. The Fourth Circuit concluded that a statutory violation resulting in an informational injury must still result in a *concrete* informational injury—for example, one that would have prevented the plaintiff from curing his credit issues. In this case, however, the Ninth Circuit leapt to the conclusion that any defect in the provision of information automatically shows a concrete injury. *See* Pet. App. 11-12; *infra* pp. 20-21.

This circuit split is paralleled by divergent results in the district courts. Many courts have found that, absent an additional allegation of real harm, a failure to comply with the FCRA's stand-alone disclosure provision is not a concrete injury. *See, e.g.*, *In re Michaels Stores, Inc., Fair Credit Reporting Act (FCRA) Litig.*, MDL No. 2615, 2017 WL 354023, at *5 (D.N.J. Jan. 24, 2017) (holding that, "[i]n light of *Spokeo*, bare procedural violations of the FCRA, such as the violation of the stand-alone requirement alleged here, do not constitute an injury-in-fact"); *Tyus v. U.S. Postal Serv.*, No. 15-CV-1467, 2017 WL 52609, at *6 (E.D. Wis. Jan. 4, 2017) (same); *Lee v. Hertz Corp.*, No. 15-CV-04562-BLF, 2016 WL 7034060, at *5 (N.D. Cal. Dec. 2, 2016) (same).

Others, however, have failed to faithfully adhere to this Court's admonition to carefully distinguish mere procedural violations from concrete injuries. *See, e.g.*, *Hargrett v. Amazon.com*, No. 8:15-cv-2456, 2017 WL 416427, at *6 (M.D. Fla. Jan. 30, 2017); *Graham v. Pyramid Healthcare Sols., Inc.*, No. 8:16-cv-1324-T-30AAS, 2016 WL 6248309, at *2 (M.D. Fla. Oct. 26, 2016); *Meza v. Verizon Commc'ns, Inc.*, No. 1:16-CV-0739, 2016 WL 4721475, at *3 (E.D. Cal. Sept. 9, 2016). These courts recite the holding of *Spokeo*, but ultimately equate a violation of a statutory right with a concrete injury—without evidence of further harm. For example, one court has pronounced a "concrete informational injury" to be present any time a consumer receives a "disclosure that does not satisfy [statutory] requirements." *Thomas v. FTS USA, LLC*, 193 F. Supp. 3d 623, 635 (E.D. Va. 2016). That is exactly the type of "injury-in-law" standing that *Spokeo* rejected.

The Article III inquiry centers on allegations of actual, concrete harm. But rather than search the complaint in this case for facts showing such harm, the Ninth Circuit considered it sufficient to "infer" from Syed's allegation of the statutory violation that "Syed was confused by the inclusion of the liability waiver with the disclosure and would not have signed it had it contained a sufficiently clear disclosure," and thereby "was deprived of the right to information and the right to privacy." Pet. App. 12-13. But more than a generous inference should be required; plaintiffs must plausibly allege—and ultimately prove—real-world harm to turn an alleged statutory violation into an injury-in-fact that satisfies Article III.

The nature of the Ninth Circuit's "inference" is striking. The sole allegation on which it was based was that Respondent "discovered" that his consent had been "procured" using an "illegal disclosure and authorization form." Pet. App. 12. The allegation, in other words, was simply that Petitioner had violated the FCRA and Respondent found out. If such an allegation permitted the fair inference that the alleged violation *actually caused* harm (*e.g.*, by extracting a consent Petitioner would not have otherwise given), then virtually any allegation of a violation of law could permit the "inference" that the violation harmed the plaintiff. This is no mere factual mistake made by the court of appeals; it is a recipe to circumvent *Spokeo* and promote no-injury class actions.

Permitting class actions to proceed without any plausible allegation of actual harm upends important separation of powers principles. As discussed above, regulatory agencies are charged with using their prosecutorial discretion to remedy the worst offenses, without launching counterproductive enforcement actions that may not be in the public interest. *See Heckler v. Chaney*, 470 U.S. 821, 831 (1985) ("[T]he agency must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, [and] whether the particular enforcement action requested best fits the agency's overall policies . . . ."). To the extent the alleged harm is the defendant's technical violation of the law, the Executive Branch is best suited to determine whether to bring an enforcement action, and if so what type of penalties to seek in the public

interest. *See* John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 Duke L.J. 1219, 1230 (1993) ("The Article III standing requirement . . . ensures that the court is carrying out *its* function of deciding a case or controversy, rather than fulfilling the *executive*'s responsibility of taking care that the laws be faithfully executed.").

Plaintiffs' lawyers lack similar incentives and institutional constraints. Because less serious technical violations are often easier to prove, pursuing statutory damages rather than actual damages makes it easier to avoid the sort of individualized inquiries that could impede class certification. Moreover, while the Executive Branch has the obligation to seek proportionality and fairness in enforcement, for a private lawyer the more disproportionate the claimed damages—and thus the greater pressure to settle—the better. Remedying consumer harm is not the point, nor could it be in cases where such harm cannot be plausibly alleged.

From a consumer perspective, the counterproductive nature of the Ninth Circuit's approach is illustrated by the facts of this case. If M-I had provided other helpful information on the required disclosure form—for example, how particular factors affect an individual's creditworthiness, where Syed could obtain a credit report for himself, and how he could object to any errors in a report—the Ninth Circuit's logic would permit a federal class action under the FCRA. *See In re Michaels Stores, Inc., Fair Credit Reporting Act (FCRA) Litig.*, 2017 WL 354023, at *6 ("[A] noncompliant disclosure that did not appear in a stand-alone document, but in flashing red letters a

foot high, could nevertheless be unmissable."). Few would think that such a form, which could only benefit its recipient, should give rise to a massive enforcement action. Yet under the Ninth Circuit's twin holdings, it would constitute an egregious, willful violation of the FCRA, and a plaintiff could readily institute a class action seeking staggering damages based on the faintest "inference" of harm.

Other measures that benefit consumers would be stymied by overzealous enforcement of procedural violations. For example, as employers make job applications available online, they risk committing a host of technical violations. *See, e.g.*, *In re Michaels Stores, Inc., Fair Credit Reporting Act (FCRA) Litig.*, 2017 WL 354023, at *1 (alleging an FCRA violation because the disclosure appeared in the middle of the continuous, online job application as opposed to in a stand-alone document); *Goldberg v. Uber Techs., Inc.*, No. CIV.A. 14-14264-RGS, 2015 WL 1530875, at *2 (D. Mass. Apr. 6, 2015) (alleging an FCRA violation because the disclosure's preamble included a few lines regarding "Uber's commitment to passenger safety" and because the text box required the applicant to scroll through some of the disclosure). Employers would have reason to hesitate before adopting enhancements to the application process that would likely be welcomed by applicants, if these changes will simultaneously expose them to yet another basis of class action liability.

Even limiting the question of lost consumer benefits to those arising from compliance efforts, a focus on no-injury procedural violations causes a misallocation of resources. Compliance departments across the country use some form of risk assessment

that considers both the likelihood of a violation and the injury it causes. This is a common-sense practice: all other things equal, it is better to focus on avoiding risks that cause greater injury. But if no-injury procedural violations put CRAs at greater risk than those resulting in injuries, compliance departments will have reason to allocate more resources toward reducing risks of no-injury procedural violations. These are of course just a few examples of how public law enforcement pursued for narrow private interests can lead to undesirable consequences.

To ensure that *Spokeo* is taken seriously, and to prevent private attorneys with their own interests from supplanting the role of public regulatory bodies, the Court should remind the lower courts that bare statutory violations are inadequate to establish Article III standing, and that this principle must be rigorously enforced.

CONCLUSION

For the foregoing reasons, as well as the reasons set forth in the Petition, the Court should grant the Petition for a writ of certiorari.

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