**No. 11-56843**

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

**THOMAS ROBINS, individually and on behalf of all others similarly situated,**

*Plaintiff-Appellant,*

**v.**

**SPOKEO, INC.,**

*Defendant-Appellee.*

On Appeal From The United States District Court
For The Central District Of California,
Honorable Otis D. Wright II
Case No. 10-cv-5306

# Brief For Experian Information Solutions, Inc., As *Amicus Curiae* Supporting Appellee And Supporting Affirmance

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## CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, *Amicus Curiae* Experian Information Solutions, Inc. provides the following corporate disclosure statement:

Experian Information Solutions, Inc. is a wholly-owned subsidiary of Experian plc. Experian plc is publicly traded on the London Stock Exchange. No other publicly traded corporation owns 10% or more of Experian Information Solutions, Inc.'s stock.

## IDENTITY, INTEREST, AND AUTHORITY OF *AMICUS CURIAE*[1]

Experian Information Solutions, Inc. ("Experian") is a nationwide consumer reporting agency subject to regulation under the Fair Credit Reporting Act ("FCRA"). The FCRA includes a statutory-damages provision that permits recovery of "damages of not less than $100 and not more than $1,000" for willful violations of the FCRA's requirements "with respect to any consumer." 15 U.S.C. § 1681n. The Supreme Court has now held that plaintiffs suing under this statutory provision (and others) must have suffered actual or imminent real harm.

Consumer reporting agencies like Experian serve, essentially, as warehouses of consumer credit information. Experian maintains credit files on more than 200

[1] The parties have indicated that they do not oppose the filing of this amicus brief. No counsel for any party authored this brief in whole or in part, and no person or entity other than *amicus curiae*, its members, or counsel made a monetary contribution to the preparation or submission of this brief.

million consumers, and, each day, answers 2 million credit inquiries and processes up to 50 million updates to its credit information database from lenders and other data furnishers.

As a nationwide consumer reporting agency, Experian is frequently subject to class-action lawsuits by plaintiffs who have experienced no actual harm but seek class-wide statutory damages for alleged technical violations of the FCRA. Indeed, it is not uncommon in these cases for significant numbers of class members to have actually benefited from the alleged violations. Due to the large number of credit files, updates, and inquiries that Experian handles, these suits can involve millions of putative class members, and thereby threaten staggering liability.

Experian accordingly has a strong interest in the enforcement of constitutional restrictions on FCRA suits by plaintiffs who have suffered no actual injury. Decisions that allow unharmed plaintiffs to bring statutory-damages suits are inconsistent with the Supreme Court's recent holding that Article III requires real harm even in the context of an alleged statutory violation.

## SUMMARY OF ARGUMENT

The Supreme Court's decision in this case made clear, at a minimum, that not all consumer report inaccuracies amount to the "real harm" required by Article III. As the Court explained, citing the example of an inaccurate zip code, "not all inaccuracies cause harm or present any material risk of harm." *Spokeo, Inc. v.*

*Robins*, 136 S. Ct. 1540, 1550 (2016). Rather, a plaintiff seeking to sue in federal court over an inaccurate consumer report must allege not merely an inaccuracy but a *harmful* inaccuracy.

Notwithstanding this admonition, Plaintiff Robins's brief on remand makes little effort to identify any harm he suffered from Spokeo's alleged inaccuracies. Perhaps recognizing that a focus on any personal harm would undermine the likely purpose of his suit—obtaining certification of a massive class seeking billions of dollars in statutory damages—Robins argues that any inaccuracy as to certain broad "types" of information (such as age, earnings history, and personal appearance) is enough to create a risk of harm that satisfies Article III.

This effort to create class-action-friendly categories of harm that automatically satisfy Article III is untenable for multiple reasons. First, Robins offers no basis for saying that inaccuracies in these categories are necessarily likely to cause harm, and—to the contrary—minor errors as to age, earnings history, or appearance appear highly *un*likely to be significant.

Second, Robins's notion of a risk of harm satisfying Article III fails to account for the established doctrine about when a mere risk can satisfy constitutional requirements. As the Supreme Court emphasized in the very case *Spokeo* cited for the notion that "the risk of real harm" can satisfy Article III, 136 S. Ct. at 1549, the "threatened injury must be *certainly impending* to constitute

injury in fact." *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013) (emphasis in original). An unspecified inaccuracy about a consumer's age or physical appearance—absent any information about the degree of inaccuracy or the ways in which that consumer might be harmed—falls far short of this requirement.

Finally, Robins argues that the courts should defer to what he claims is a congressional judgment that "the dissemination of false credit reports" necessarily causes a concrete injury, but Congress made no such judgment. Robins points to Congress's creation of a right to sue for statutory damages without showing actual damages, 18 U.S.C. § 1681n, but that provision in no way represents a finding about the harm caused by inaccuracies. Rather, § 1681n on its face applies not only to inaccuracies, but to violation of "any requirement" of the FCRA—even the most technical, and even those unrelated to accuracy of consumer reports. And, even if Congress had made such a judgment, the Supreme Court's zip code example makes clear that such a determination would not override the absence of real harm.

In short, the Supreme Court's decision in this case means what it says: an abstract statutory violation cannot satisfy Article III absent a showing that the plaintiff personally suffered real, concrete harm. Alleging a broad "type" of inaccuracy may preserve Robins's ability to represent a large class, but it fails, without more, to satisfy Article III.

## ARGUMENT

Prior to the Supreme Court's decision in this case, the theory that a bare alleged statutory violation sufficed for Article III standing gave rise to a host of statutory damages class actions threatening massive liability in cases in which the alleged statutory violation did not harm, and sometimes even *benefitted* class members. The absence of real injury was key to class treatment of these cases, since real injuries and damages would normally be too individualized for class adjudication. The Supreme Court's decision in this case precludes such no-injury class actions, by holding that a bare statutory violation is never enough and real harm is always required.

Robins's argument on remand is less an attempt to show that he suffered concrete harm than an effort to resuscitate the type of class-action-friendly abstract injury the Supreme Court just rejected. Robins argues that certain categories of inaccuracy automatically establish Article III injury without inquiry into whether any actual harm occurred or was imminent. But under the Supreme Court's decision it is actual harm to particular plaintiffs—or, at a minimum, harm that is imminent and "certainly impending"—that is necessary, and Robins's abstract categories do not suffice.

### A. The Supreme Court Has Now Held That Real Harm Is Required.

In its decision in this case, the Supreme Court squarely rejected the faulty theory of standing that allowed a mere abstract violation of "statutory rights" to suffice—and that had allowed no-injury FCRA class actions to proliferate. It held that a bare alleged violation of a statutory right does not establish the injury-in-fact required by Article III. Rather, even where there is a statutory violation, the plaintiff must show that he or she has suffered a "concrete," "de facto" injury, meaning the injury "must *actually exist*" and be "*real*." *Spokeo*, 136 S. Ct. at 1548 (emphases added). "Congress cannot erase" this real-injury requirement "by statutorily granting the right to sue to a plaintiff who would not otherwise have standing." *Id.* at 1547–48. Thus, a plaintiff does not "automatically satisf[y] the injury-in-fact requirement whenever a statute grants [her] a statutory right and purports to authorize [her] to sue to vindicate that right." *Id.* at 1549. Instead, "a concrete injury" is required "even in the context of a statutory violation."[2] *Id.*

Moreover, the Court held that while Article III injury can include "intangible" harms such as a sufficiently serious "risk of real harm," such harms must nonetheless be "concrete" and "real." *Id.* at 1549–50. And while a sufficiently imminent "risk of real harm" can qualify as injury-in-fact, the

[2] Even the two dissenting justices seem to have agreed that Article III requires "harm that is real, not abstract" for plaintiffs asserting statutory claims. *See id.* at 1556 (Ginsburg, J., dissenting).

standards for such risk-based injury-in-fact are strict. 136 S. Ct. at 1549. On this point, *Spokeo* cites *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138 (2013), which in turn emphasizes that the "threatened injury must be *certainly impending* to constitute injury in fact." *Id.* at 1147 (emphasis in original).

Thus, only the sort of *real* harm Congress sought to guard against can establish standing for FCRA plaintiffs, and a violation of FCRA requirements that "result[s] in no harm" cannot suffice. *Id.* at 1545, 1550. For example, if a "consumer reporting agency fail[s] to provide [a] required notice" but "th[e] [consumer] information regardless [is] entirely accurate," the real harm Congress sought to prevent—"dissemination of false information" negatively reflecting on consumers' credit worthiness—would be lacking despite the statutory violation. *Id.* at 1550. Furthermore, "not all inaccuracies cause harm or present any material risk of harm." *Id.* For instance, "the dissemination of an incorrect zip code, without more," would not have any negative "bearing on an individual's credit worthiness," and thus would not lead to any real harm that Congress sought to prevent. *Id.* at 1545, 1550.

### B. Plaintiff Cannot Establish Standing Based On Abstract Categories Divorced From Any Showing Of Personal Injury.

Rather than attempt to show any personal injury, Robins—in an apparent effort to preserve his ability to represent a massive class—now argues that certain broad *types* of inaccuracies automatically establish Article III injury. His new

theory is that alleged "inaccuracies in [the following categories] of information"—"age, marital status, earnings history, employment circumstances, and physical appearance"—eliminate the need to show individual harm. Pl.'s Supp. Br. at 19, 9th Cir. Dkt. 76. Similarly, *amicus curiae* the Consumer Financial Protection Bureau ("CFPB") argues that *any* alleged inaccuracy in these "categor[ies]" of information suffices "[t]o establish concrete injury." CFPB Br. at 20-21 n.3, 9th Cir. Dkt. 77-2.

This is an untenable reading of the Supreme Court's decision. Much as it is difficult to imagine how an incorrect zip code standing alone "could work any concrete harm," *Spokeo*, 136 S. Ct. at 1550, there is no imminent risk of real harm posed by the mere misreporting of an individual's age by a day or year; misreporting a separated individual as divorced; overstating an individual's earnings history by a dollar; misstating an individual's height by a half inch; or mischaracterizing his eye color as hazel instead of brown. While additional individual factual circumstances *could* make any of these seemingly trivial inaccuracies highly relevant in a particular case, inaccuracies in these categories of information "without more"—like a mere incorrect zip code—do not *automatically* pose an imminent risk of real harm.[3] *Id.*

[3] As the CFPB admits, harmless and beneficial inaccuracies such as these and innumerable other possible inaccuracies in these categories of information are a far cry from the sort of inherently damaging statement for which the common

Rather, as the Supreme Court has held, it is only the individual facts of a plaintiff's particular case that can establish standing, as a concrete injury "must *actually exist*" and be "'real,' and *not 'abstract*.'" *Id.* at 1548 (emphases added). This is why a "bare procedural violation" will not suffice, since it "may result in no harm" to the plaintiff whatsoever and remain merely an "abstract" statutory violation. *Id.* at 1548–50. Plaintiff's faulty theory of standing is "abstract" in the extreme, turning only on what category of information is at issue, rather than whether he has alleged facts showing that he has "actually" suffered any "exist[ing]" or imminent real harm. *Id.* at 1548–49. Plaintiff's proposed standing theory is an equally erroneous variant on his previous unsuccessful attempt to rely on a bare statutory violation.

Indeed, a focus on abstract categories instead of actual harm to identifiable individuals will inevitably produce the perverse result of deeming errors in a consumer's *favor* to constitute Article III harm. For example, the core concern of the FCRA is information about a consumer's creditworthiness—such as

(continued…)

law of defamation presumed injury and damages. *See* CFPB Br. at 25 n.5, 9th Cir. Dkt. 77-2 (acknowledging that only written communications that "'tend[ed] so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating . . . with him,'" and only certain categories of spoken communications such as falsely imputing a "'loathsome and communicable disease'" to an individual, were actionable "without a showing of actual damages." (quoting RESTATEMENT (FIRST) OF TORTS §§ 559, 568, 569, 570 (1938))).

information about whether a consumer has paid his debts—yet errors in such information can as easily run in the consumer's favor (*e.g.*, a mistaken report that a consumer paid when in fact he defaulted) as against him.[4]

Further, Robins's theory rests on the notion that it is sufficient to identify types of inaccuracy that produce a "material risk" of harm. But even if it were true that his identified categories necessarily produced such a material risk—and it plainly is not—Robins misapprehends the applicable standard. There is established law as to when a mere risk of harm can satisfy Article III, and the applicable standard—as emphasized in *Clapper*, the case cited in *Spokeo* for the concept of risk as Article III injury—requires a "certainly impending" injury. 133 S. Ct. at 1147. An unspecified, and potentially trivial, inaccuracy about a consumer's age, marital status, or physical appearance falls far short of this requirement.

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[4] For example, in *Harris v. Experian Information Solutions, Inc.*, No. 6:06-cv-1808-GRA (D.S.C. June 30, 2009), the class action plaintiff claimed that a failure to report consumers' credit limits for certain credit cards was an inaccuracy in violation of the FCRA. But that omission decreased the credit scores of only certain consumers—it increased the scores of many others, and had no effect on still others. *Harris*, No. 6:06-cv-1808-GRA, slip op. at 5. Likewise, in *White v. Experian Information Solutions, Inc.*, No. 05-cv-1070-DOC-MLG (C.D. Cal. Jan. 26, 2009), the plaintiff claimed that credit reporting agencies violated the FCRA by not reporting that certain debts had been discharged in bankruptcy. The claimed error, however, had no impact on many debtors and actually improved the credit scores of many others. *White*, No. 05-cv-1070-DOC-MLG, slip op. at 9.

Finally, Robins's contention that the courts must defer to a purported congressional judgment that consumer report inaccuracies necessarily amount to concrete injury cannot withstand scrutiny. Even if Congress had made such a judgment, the Supreme Court's holding that "not all inaccuracies cause harm," *Spokeo*, 136 S. Ct. at 1550, makes clear that such a judgment cannot override the absence of a real and concrete injury. And, in any event, Congress plainly made no such judgment about the effect of inaccuracies. Robins's only support for this claim is that 15 U.S.C. § 1681n creates a cause of action for willful FCRA violations that do not produce actual damages. But § 1681n expresses no judgment about inaccuracies—let alone about the specific categories of inaccuracies Robins claims should be deemed to be automatic injury. Rather, § 1681n applies to violation of "any requirement" of the FCRA, even the most highly technical provisions of the statute, and even those unrelated to the accuracy of consumer reports. There is simply no basis for finding a congressional judgment that inaccuracies necessarily amount to concrete injury.

For all of these reasons, Robins's attempt to satisfy Article III by identifying class-action-friendly categories of inaccuracies fails to satisfy *Spokeo*.

## CONCLUSION

For the foregoing reasons, the District Court's judgment should be affirmed.

Dated: July 18, 2016

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. P. 32(A)(7)(C) AND CIRCUIT RULE 32-1**

I certify that, pursuant to Fed. R. App. P. 29(d) and 9th Cir. R. 32-1, the attached amicus brief is proportionally spaced, has a typeface of 14 points or more, and contains 2,734 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

Dated: July 18, 2016

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**CERTIFICATE OF SERVICE**

I certify that on this 18th day of July, 2016, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all parties in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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