No. 20-297

IN THE

Supreme Court of the United States

TRANSUNION LLC,

Petitioner,

v.

SERGIO L. RAMIREZ,

Respondent.

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

BRIEF OF LEGAL SCHOLARS AS *AMICI CURIAE* SUPPORTING RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

INTEREST OF *AMICI CURIAE*[1]

Amici are legal scholars with expertise in federal courts, federal jurisdiction, and federal civil procedure. *Amici* have an interest in the proper interpretation and application of the standing requirements imposed by Article III of the U.S. Constitution, and in assuring access to federal courts to adjudicate federal causes of actions authorized by Congress.

A summary of each *amicus*'s qualifications and affiliations is below. *Amici* file this brief solely as individuals, and institutional affiliations are given for identification purposes only.

Adam Steinman is the University Research Professor of Law at the University of Alabama School of Law. He is an author on the Wright & Miller *Federal Practice & Procedure* treatise.

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[1] The parties have given blanket consent to the filing of *amicus* briefs. No counsel for a party authored this brief in whole or in part, and no person other than *amici* or their counsel has made any monetary contributions intended to fund the preparation or submission of this brief.

of the federal courts, as well as several books on constitutional law.

Heather Elliott is the Alumni, Class of '36 Professor of Law at the University of Alabama School of Law. She has published articles on Article III standing doctrine in the Stanford Law Review, the Indiana Law Journal, and the Boston University Law Review, among others.

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INTRODUCTION

When Congress passed and President Nixon signed the Fair Credit Reporting Act (FCRA) in 1970, the credit industry was new, and the possibility of "a nationwide data bank covering every citizen" created the risk that consumers would be "unjustly damaged because of inaccurate or arbitrary information in a credit report." S. Rep. No. 517, 91st Cong., 1st Sess. 1-2 (1969) ("Senate Report"). A citizen so damaged could, under FCRA, vindicate their right to an accurate report—first, by exercising their new procedural rights as to the credit agencies themselves, and second, by resort to the federal courts.

In the decade that followed, this Court repeatedly affirmed the power of Congress to "enact statutes

creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute." *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 n.3 (1973); *accord Schlesinger v. Reservists to Stop the War*, 418 U.S. 208, 224 n.14 (1974); *Warth v. Seldin*, 422 U.S. 490, 500 (1975). Far from undermining those earlier statements, this Court's more recent decisions have repeatedly affirmed that Congress can "identify intangible harms that meet Article III requirements" and empower citizens to seek redress in federal courts. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1543 (2016). Although that power is not unlimited, the harm in this case is unquestionably of the kind federal courts may take up: at issue are plaintiffs' individual rights, the violation of which bears a close relationship to harms traditionally regarded at common law as providing a basis for a lawsuit, and the infringement of which has caused the very harms Congress sought to prevent when it passed FCRA.

By enacting FCRA, Congress determined that consumer rights could best be protected through a regime of private enforcement and that the federal and state courts should be available to hear such claims. Article III comfortably supports the federal courts' exercise of power, and so constitutional standing is present. To hold that the federal courts lack Article III power over the class members' claims would subvert Congress's judgment that private enforcement is the best way to protect consumers from individual injuries that result from failures of the consumer-reporting industry—like those injuries proven in this case—and would invite inefficient and undesirable results. Effectively it could lead to a situation in which state courts, and state courts alone, can exercise jurisdiction over violations of FCRA—a result that Congress did not intend and that the federal Constitution does not require.

STATEMENT

Recognizing that credit agencies bear "grave responsibilities" toward consumers, Congress passed the Fair Credit Reporting Act (FCRA) to provide consumers with new rights to ensure the "accuracy and fairness" of credit reports and new tools to enforce those rights. 15 U.S.C. § 1681; *see also Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 52 (2007) ("Congress enacted FCRA . . . to ensure fair and accurate credit reporting . . . .").

For example, because inaccurate reports could "jeopardize[]" not only consumers' credit but also, potentially, their employment, S. Rep. No. 517, 91st Cong., 1st Sess. 4 (1969) ("Senate Report"), Congress provided in FCRA that "[w]henever a consumer reporting agency prepares a consumer report" it must "follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates." 15 U.S.C. § 1681e(b). The consumer's right to "reasonable procedures" was intended to prevent credit reporting agencies from allowing incorrect or outdated information to be included on a consumer's report, including because the agencies deemed the correct information too "costly" to attain and maintain. Senate Report 4.

Congress in FCRA also required that every consumer reporting agency must "upon request . . . clearly and accurately disclose to the consumer . . . [a]ll information in the consumer's file." 15 U.S.C. § 1681g(a)(1). Thus, a consumer who, in the past, was "not always

given access to the information in his file" is now entitled to it. Senate Report 3.

Finally, Congress in FCRA required a credit reporting agency to "provide to a consumer, with each written disclosure," a "summary of rights," including a description of the consumer's right to dispute information in their credit file. 15 U.S.C. § 1681g(c)(2)(A). Thus, a consumer who, in the past, had "difficulty in correcting inaccurate information," is now entitled to be told how to do so. Senate Report 3.

Congress also recognized, however, that these rights would do little to enable consumers "to protect themselves against arbitrary, erroneous, and malicious credit information" without tools of enforcement. Congress therefore empowered consumers to bring "[a]n action to enforce any liability . . . in any appropriate United States district court." 15 U.S.C. § 1681p.

In this case, Mr. Ramirez did just that, on behalf of himself and the 8,184 other consumers who requested copies of their credit reports between January 2011 and July 2011. Pet. App. 8. TransUnion did not argue then—or at any time while the case was pending before the district court—that the case should have been dismissed for lack of Article III injury-in-fact to named class members. Resp. Br. 9 (citing J.A. 281). Five years after the litigation commenced, Resp. Br. 7, 10, three of the class plaintiffs' claims were tried to the jury: *First*, the class claimed that TransUnion willfully failed to follow reasonable procedures to assure the accuracy of Office of Foreign Assets Control ("OFAC") alerts by using name-only matching software without undertaking any other steps to avoid falsely labeling a person a terrorist or potential terrorist. Pet. App. 15. *Second*, the class claimed that TransUnion willfully

excluded the OFAC alerts from the credit reports requested by class members. *Id*. *Third*, the class claimed that TransUnion willfully omitted a summary of rights from the OFAC letter. *Id*.

The jury found in favor of the class on all three claims. Pet. App. 15. Subsequently, TransUnion filed a renewed motion for judgment as a matter of law, but again, TransUnion did not challenge the court's Article III jurisdiction over the case. *See* Pet. App. 62 (Order, *Ramirez v. TransUnion LLC*, No. 12-cv-006320JSC (N.D. Cal. Nov. 7, 2017)). On appeal, after losing both at trial and with the trial judge, TransUnion argued for the first time that the verdict cannot stand because none of the class members—other than Ramirez—has standing. *See* Pet. App. 16. The Ninth Circuit properly rejected that argument. Pet. App. 33.

SUMMARY OF ARGUMENT

In passing FCRA, Congress imposed obligations on credit reporting companies like TransUnion that are designed to protect precisely the kind of individuals who were members of the plaintiff class in this case. Congress also provided a cause of action to allow those individuals to enforce the companies' obligations. At trial, the jury found that the evidence supported each statutory element of the cause of action as to each individual class member. And the jury awarded remedies that are specifically authorized by the same statute that created the cause of action.

Nonetheless, TransUnion asks this Court to throw out the judgment below for lack of subject-matter jurisdiction based on additional, uncodified elements that are ostensibly necessary for this case even to qualify as a "case or controversy" under Article III.

That is not, however, what Article III requires. Doing so would not only deprive class members of a jury verdict vindicating their rights after years of litigation, but also upend this Court's standing jurisprudence and require class members—and anyone injured by violations of similar congressionally created statutory rights—to seek redress only in state courts.

I. A. The Court in *Spokeo* identified two helpful references for assessing whether an intangible injury will support standing: history and Congress. The first of these two presents a simple question: whether the intangible injury is the close relative of a harm that provided a traditional basis for a lawsuit at common law. Where the answer is yes, Article III standing certainly exists, as numerous Courts of Appeals have ruled. *Spokeo* also made clear that Congress itself can define injuries that support Article III standing. Although the Court left open the precise standard for evaluating Article III standing in such situations, several Courts of Appeals have provided a sensible test: citizens can avail themselves of a federal forum to vindicate a federal statutory right created to protect their concrete and particular interests when a violation of that right presents a risk of real harm to those interests. This approach is bolstered by Justice Thomas's insight in recent standing cases that the violation of *private* rights created by Congress suffices to create Article III standing, without imposing uncodified elements beyond what Congress required.

B. Each class member has standing as to each of the three claims in this action. The rights that class members seek to assert are private rights, concrete and particular to each member; they are not public rights to which a private right of action has been added by Congress. Each class member suffered concrete

and particularized injuries because each was affected "in a personal and individual way" by TransUnion's failure to follow reasonable procedures, failure to apprise them of the inaccuracies in their reports, and failure to provide them with a required summary-of-rights form explaining how they could challenge their designation as a terrorist or potential terrorist. TransUnion violated statutory provisions that established private rights, those violations bear close relationships to harms that traditionally provided the basis for a lawsuit, and Congress explained how each of the rights was essential to FCRA's core purpose of ensuring the accuracy and fairness of credit reports.

II. Denying Article III standing to the class members in this case would undermine the rights established by Congress and lead to inefficient, undesirable results for consumers and corporations alike. Such a ruling would require dismissal of the class's claims for lack of subject-matter jurisdiction. To be sure, that dismissal would have no preclusive effect on class members' claims, and they would be free to refile their federal claims in state courts—which are not subject to any Article III constraints on federal-court jurisdiction and maintain their own requirements for standing.

Admittedly, state courts have concurrent jurisdiction over FCRA claims; the federal courts do not have exclusive jurisdiction over them. However, reading Article III to require that such claims be heard only in state court would be inefficient and defeat the purpose of a unified federal judiciary. Ousting suits under federal statutes from the purview of the federal courts decentralizes the law in ways that a regime of concurrent jurisdiction does not. Congress passed FCRA against a legal backdrop that includes federal-question jurisdiction, a grant of jurisdiction that is sup-

ported by the need for uniform interpretation, federal expertise, and sympathy to federal claims. It included a federal cause of action with the understanding that federal courts would exercise federal-question jurisdiction over such claims pursuant to 28 U.S.C. § 1331, and the expectation that injury to a person's statutory rights was a concrete and particular injury within the meaning of Article III. To dismiss the class's claims against this backdrop would vitiate the purpose of a lower federal court system, which the Constitution both contemplates and permits. Under any sensible approach to Article III standing, each class member's FCRA claim constitutes a "case or controversy" that falls within the subject-matter jurisdiction of federal courts.

ARGUMENT

I. FEDERAL COURTS HAVE ARTICLE III JURISDICTION OVER THE CLASS MEMBERS' CLAIMS

The class members in this case alleged—and the jury found—violations of private rights guaranteed to them by FCRA. They therefore have each suffered injuries-in-fact sufficient to support standing as to all three of their claims: that TransUnion failed to "follow reasonable procedures to assure maximum possible accuracy" of the information in their credit files, 15 U.S.C. § 1681e(b); that TransUnion failed to provide them with all the information in their credit files, 15 U.S.C. § 1681g(a)(1); and that TransUnion failed to

provide them with a summary-of-rights form with the OFAC letter, 15 U.S.C. § 1681g(c)(2)(A).

A. The Violation Of A Private Right Conveyed By Statute Is An Injury-In-Fact

The "irreducible constitutional minimum" of standing consists of three elements: (1) "the plaintiff must have suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical"; (2) "there must be a causal connection between the injury and the conduct complained of"; and (3) "it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992) (internal quotations and citations omitted).

In *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016), the Court addressed the particularization and concreteness requirements. In order for an injury to be particularized, it "must affect the plaintiff in a personal and individual way." *Id.* at 1548 (quoting *Lujan*, 504 U.S. at 560 n.1). In order for an injury to be concrete, it must be "real and not abstract," though it may be intangible, as with injuries to the rights of free speech and free exercise. *Id.* at 1549 (quoting Webster's Third New International Dictionary 472 (1971)).

In assessing whether an intangible injury will support standing, two sources are helpful reference points: history and Congress. "Because the doctrine of standing derives from the case-or-controversy requirement, and because that requirement in turn is grounded in historical practice, it is instructive to consider whether an alleged intangible harm has a

close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts." *Spokeo*, 136 S. Ct. at 1549. In addition, "Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before." *Id.* (quoting *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring in part and concurring in judgment)); *see also Schlesinger v. Reservists to Stop the War*, 418 U.S. 208, 224 n.14 (1974) ("We have no doubt that if the Congress enacted a statute creating . . . a legal right, the requisite injury for standing would be found in an invasion of that right."); *Warth v. Seldin*, 422 U.S. 490, 500 (1975) ("The actual or threatened injury required by Art. III may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing." (quoting *Linda R.S.*, 410 U.S. at 617 n.3)).

As numerous Courts of Appeals have concluded, Article III standing is proper when statutory injuries have a relationship to a harm that has traditionally provided a basis for a lawsuit. For example, on remand, the Ninth Circuit in *Robins v. Spokeo* drew a line from "common-law causes of action like defamation or libel per se" to the harms at issue—including, as in this case, a failure under FCRA to "follow reasonable procedures to assure maximum possible accuracy" of the information in Robins's consumer report—before concluding that Robins had alleged injuries sufficiently concrete for the purposes of Article III. 867 F.3d 1108, 1111, 1113 (9th Cir. 2017) (quoting 15 U.S.C. § 1681e(b)). Likewise, in *Krakauer v. Dish Network, LLC*, the Fourth Circuit held that a class of individuals alleging receipt of multiple unwanted calls on numbers registered to the Do-Not-Call registry had standing to bring claims under the Telephone Consumer

Protection Act in line with "legal traditions [that] have long protected privacy interests in the home." 925 F.3d 643, 653 (4th Cir. 2019), *cert. denied*, 140 S. Ct. 676 (2019). And the Third Circuit *In re Horizon Healthcare Servs. Inc. Data Breach Litigation* held that a putative class of individuals whose sensitive personal information was stolen from a health insurer had standing to bring claims against the insurer under FCRA for inadequately protecting that information. 846 F.3d 625, 641 (3d Cir. 2017). The court explained that the "intangible harm" for which the putative class sought redress had "a close relationship to a harm [i.e. invasion of privacy] that has traditionally been regarded as providing a basis for a lawsuit." *Id.* at 639-40 (quoting *Spokeo*, 136 S. Ct. at 1549 (alteration in original)).

In addition, Article III does not prevent Congress from "defin[ing] injuries and articulat[ing] chains of causation that will give rise to a case or controversy where none existed before." *Spokeo*, 136 S. Ct. at 1549 (quoting *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring in part and concurring in judgment)). Although this Court has yet to refine the proper standard for evaluating Article III standing in such situations, *amici* urge the following test that has held sway in several Courts of Appeals: (1) whether Congress has conferred a statutory right "to protect a plaintiff's concrete interests," and, if so, (2) whether violation of that right "presents a 'risk of real harm'" to those interests. *Strubel v. Comenity Bank*, 842 F.3d 181, 190 (2d Cir. 2016) (quoting *Spokeo*, 136 S. Ct. at 1549) (holding, on the basis of that test, that plaintiffs had standing to allege two violations of the Truth in Lending Act and lacked standing to allege two others); *see also Robins*, 867 F.3d at 1113 (adopting the *Strubel* test and holding that plaintiff had standing to assert

violations of FCRA); *Macy v. GC Servs. Ltd. P'ship*, 897 F.3d 747, 756 (6th Cir. 2018) (same).

This approach finds further support in the recognition that assertions of private rights in federal court need not undergo an additional inquiry into whether the plaintiff suffered an injury beyond the violation of such a private right. As the Court recently observed: "the common law inferred damages whenever a legal right was violated." *Uzuegbunam v. Preczewski*, No. 19-968, 2021 WL 850106, at *4 (U.S. Mar. 8, 2021). Concurring in *Spokeo*, Justice Thomas further explained that "[c]ommon-law courts possessed broad power to adjudicate suits involving the alleged violation of private rights"—those "belonging to individuals, considered as individuals"—which "traditionally included rights of personal security (including security of reputation), property rights, and contract rights." *Spokeo*, 136 S. Ct. at 1551 (Thomas, J., concurring) (quoting 3 W. Blackstone, Commentaries *2). Thus, "traditional remedies for private-rights causes of action—such as for trespass, infringement of intellectual property, and unjust enrichment—are not contingent on a plaintiff's allegation of damages beyond the violation of his private legal right." *Id.*

In other words, a plaintiff asserting a violation of a private right was presumed to have incurred a *de facto* injury. *Spokeo*, 136 S. Ct. at 1551 (Thomas, J., concurring); *see also Frank v. Gaos*, 139 S. Ct. 1041, 1047 (2019) (Thomas, J., dissenting) ("[A] plaintiff seeking to vindicate a private right need only allege an invasion of that right to establish standing."); James E. Pfander, *Standing, Litigable Interests, and Article III's Case-or-Controversy Requirement*, 65 UCLA L. REV. 170, 215 (2018) ("Justice Thomas explained that the common law evaluated the plaintiff's right to sue

depending on the type of right the plaintiff sought to vindicate. In the arena of private rights, the common-law courts were willing to adjudicate bare allegations of a rights violation, and nothing more." (quoting *Spokeo*, 136 S. Ct. at 1551 (Thomas, J., concurring)) (footnote omitted)). Thus, it is only in cases in which a private plaintiff "attempt[s] to vindicate the infringement of *public* rights" that the plaintiff "must allege that he has suffered a 'concrete' injury particular to himself." *Spokeo*, 136 S. Ct. at 1552 (Thomas, J., concurring); F. Andrew Hessick, *Standing, Injury in Fact, and Private Rights*, 93 CORNELL L. REV. 275, 277-78 (2008) ("[W]hatever the virtue of limiting the judiciary's role in the vindication of public interests, the restriction on a litigant's ability to seek redress in the courts for a violation of a private right is ahistorical and unjustified.").

The approach urged by *amici* would align the *Spokeo* majority and Justice Thomas's concurring opinions with respect to such private rights. When Congress has created procedural rights designed to enforce private interests of a sort traditionally recognized at common law to give rise to an individual's cognizable claims, it has created private rights. Violations of those rights are sufficient to satisfy Article III.

B. Each Class Member In This Case Has Article III Standing

Each of the three injuries found by the jury is a particularized and concrete injury to each class

member.[2] Thus, each class member has standing as to all three claims.

To begin with, each plaintiff suffered particularized injuries because each was affected "in a personal and individual way" by TransUnion's failure to follow "reasonable procedures." 15 U.S.C. § 1681e(b). TransUnion declared each individual class member to be a potential terrorist on the OFAC list. Further, each class member requested their own credit report and was sent an incomplete report. 15 U.S.C. § 1681g(a)(1). Finally, each class member received their own OFAC letter, and each letter omitted the required summary-of-rights form explaining how they could challenge the designation. 15 U.S.C. § 1681g(c)(2)(A).

In addition, each plaintiff passes any possible test for concreteness. *First*, each injury was to a "private right" because all of TransUnion's failures harm all class members' rights to their "security of reputation." *Spokeo*, 136 S. Ct. at 1551 (Thomas, J., concurring). TransUnion falsely labeled them terrorists or potential terrorists, failed to inform them of the inaccuracy in their credit reports, and failed to apprise them as to how to correct this gross mischaracterization. *Second*, each injury "has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit." *Id.* at 1549. The false terrorist designations bear a close relationship to the harm on which a common-law defamation claim is premised.

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[2] Defendants' insistence that class members failed to "prove[]" their concrete injuries, Pet. Br. 22, is not only belied by the jury's verdict, but also misstates the relevant standard. As the Court recently reiterated: "[A] plaintiff must plausibly allege all jurisdictional elements," but "need not *prove*" them. *Brownback v. King*, No. 19-546, 2021 WL 726222, at *5 (U.S. Feb. 25, 2021).

Amicus Br. United States 16. The failures to provide class members with their complete credit reports and to provide them with a summary of rights explaining how they could challenge their designation both bear a close relationship to informational-standing cases. Amicus Br. United States 21. *Third*, Congress explained exactly how each of the three rights violated by TransUnion was central to the essential purpose of FCRA—to ensure the "accuracy and fairness" of credit reports. 15 U.S.C. § 1681; *see* pp. 2-3, *supra*.

The inquiry into private rights suggested in Justice Thomas's recent opinions makes it even clearer that the class members in this case have Article III standing to pursue their claims. All the claims here involve private rights created by Congress for consumers, including the class members in this case. These class members seek to enforce TransUnion's FCRA obligations regarding information about *them* in *their* credit reports. And they seek to enforce FCRA's disclosure and summary-of-rights obligations that TransUnion owed to *them* regarding *their* credit reports.

Because each class member's injuries are particularized and concrete—and because they seek to enforce rights that Congress created to protect their private interests—all have demonstrated an injury-in-fact sufficient to support standing.

II. TO DENY ARTICLE III STANDING HERE WOULD DEFY CONGRESS'S JUDGMENT AND LEAD TO INEFFICIENT, UNDESIRABLE RESULTS

If this Court ultimately agrees with Petitioner and rules that the class members do not have Article III standing, that ruling would not be a judgment based

on the merits of the class members' claims. Rather, it would be a dismissal of those claims for lack of federal subject-matter jurisdiction. The upshot would be that, after all these years, these same class members could refile exactly the same claims they asserted in this federal lawsuit, seeking exactly the same remedies they obtained in this federal lawsuit—but they would have to do so in an appropriate *state* court that evaluates standing differently from this Court. This would be an inefficient, misguided allocation of judicial authority.

Because the ruling that TransUnion urges regarding Article III standing would be jurisdictional, class members would not be precluded from refiling their claims. Restatement (Second) of Judgments § 20 (1982) ("A personal judgment for the defendant, although valid and final, does not bar another action by the plaintiff on the same claim . . . [w]hen the judgment is one of dismissal for lack of jurisdiction."); 18A C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 4436 (3d ed. 2017 & Supp. 2020) ("The basic rule that dismissal for lack of subject-matter jurisdiction does not preclude a second action on the same claim is well settled."). A lack of Article III standing to sue in federal court does not prevent litigation in state court. *See, e.g.*, *ASARCO Inc. v. Kadish*, 490 U.S. 605, 617 (1989) (noting that state courts "are not bound to adhere to federal standing requirements"). Because FCRA does not include "a provision for exclusive federal jurisdiction," state courts "possess the authority . . . to render binding judicial decisions that rest on their own interpretations of federal law." *Id.* Accordingly, class members could refile *the exact same claims* against TransUnion in state court, even though these claims are based on a federal cause of action seeking remedies authorized

by federal law. *See* Thomas B. Bennett, *The Paradox of Exclusive State-Court Jurisdiction over Federal Claims*, 105 MINN. L. REV. 1211, 1229-31 (2021) ("FCRA claims increasingly are being brought in state courts"). Roughly half of states have not adopted the *Lujan* standing inquiry and would be less likely to dismiss such claims on standing grounds. *Id.* at 1232-33.

This result would not be faithful to Article III's constitutional limits on subject-matter jurisdiction. The claims pursued by the plaintiff class in this case are perfectly suitable for federal courts to adjudicate. Article III does not mandate the conclusion that only *state* courts are competent to assert jurisdiction to adjudicate those claims, when it is a *federal* statute that sets forth the governing obligations on the defendant, the legal elements of the class members' causes of action, and the available remedies, and when the plaintiffs have alleged—and shown after a jury trial—injury to a private right that has historical roots and has been explicitly identified by Congress as the mischief to be redressed under FCRA.

The result urged by TransUnion would run squarely afoul of a jurisdictional policy that has been a bedrock of the federal courts for a century and a half. Since 1875, Congress has authorized federal district courts to assert original jurisdiction over claims "arising under the Constitution or laws, or treaties of the United States." *See* Judiciary Act of 1875, 18 Stat. 470; 28 U.S.C. § 1331. Allowing federal courts to adjudicate federal claims raising federal issues is wise institutional design in light of "the experience, solicitude, and hope of uniformity that a federal forum offers on federal issues." *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 312 (2005); *see*

generally Paul J. Mishkin, *The Federal "Question" in the District Courts*, 53 COLUM. L. REV. 157, 157-59 (1953). "Indeed, this was one of the principal reasons that the Constitution authorized Congress to create a system of lower federal courts." 13D C. Wright, A. Miller, E. Cooper & R. Freer, *Federal Practice and Procedure* § 3561 (3d ed. 2008 & Supp. 2020) ("The Founders clearly envisioned that federal question jurisdiction would provide plaintiffs with a sympathetic forum for the vindication of federal rights."); Ernest A. Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 TEX. L. REV. 1549, 1611 (2000) ("Congress generally cannot ensure enforcement of its legislative mandates without providing a federal judicial forum where violators of those mandates can be prosecuted."); John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 712 n.163 (1997) (observing that "any effort to pare back federal jurisdiction would deny Congress an important and historically effective forum for the implementation of its laws").[3]

Congress passed the FCRA—including its private causes of action and accompanying remedies, 15

[3] The result urged by TransUnion could easily be extended to undermine the jurisdictional policy of diversity jurisdiction as well. Indeed, the defendants in *Thornley v. Clearview AI, Inc.*, recently decided by the Seventh Circuit, have expressed their intent to seek clarification from this Court "whether a plaintiff who alleges that access to her biometric information was sold in violation of the Illinois Biometric Information Privacy Act" alleges an injury-in-fact for purposes of Article III standing, such that defendants were entitled to remove the case to a federal forum. *See* Motion to Stay the Mandate, *Thornley v. Clearview AI, Inc.*, No. 20-3249 (7th Cir. Feb. 22, 2021), ECF 47. Applying the *Spokeo* reasoning that Petitioner invokes here, the Seventh Circuit has concluded in that case that, because the plaintiffs do not allege any concrete and particularized harm, but rather a

U.S.C. §§ 1681n, 1681o—against this backdrop of § 1331 federal-question jurisdiction. *See Bond v. United States*, 572 U.S. 844, 857 (2014) ("'Congress legislates against the backdrop' of certain unexpressed presumptions"). Congress undoubtedly anticipated that FCRA opened the door to federal courts exercising subject-matter jurisdiction over these causes of action, and this Court should not defy that judgment by Congress. *See* Lumen N. Mulligan, *You Can't Go Holmes Again*, 107 NW. U. L. REV. 237, 281 (2012) ("[A] plaintiff's presentation of a congressionally created cause of action is strong evidence that Congress desires cases of that type be heard in federal court . . . .").[4]

If the lower federal courts are unable to resolve issues of federal law, the only alternative is for plaintiffs to bring their suits in state courts. In that universe, this Court's review of state-court decisions in fifty states would be the only opportunity for any federal court to interpret and apply Congress-given rights and remedies. *See* Mishkin, *supra*, at 157 (noting that "[t]he alternative" to federal-question jurisdiction in federal district courts "would be to rely entirely upon United States Supreme Court review of state court decisions"). But this Court could only review such decisions where the plaintiff prevailed

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"general, regulatory violation" under Illinois law, they do not have standing in federal courts and thus may "steer clear of federal court." *Thornley v. Clearview AI, Inc.*, 984 F.3d 1241, 1248 (7th Cir. 2021).

[4] Of course, Article III limits the jurisdiction that Congress can confer on the courts. *See Lujan*, 504 U.S. at 577 (1992). But as explained in Part I, Article III is sensibly interpreted to recognize that the claims brought by the class members here present the kind of "case or controversy" that falls within Article III.

before the state high court. Bennett, *supra*, at 1248. And then only to a very limited extent. This Court already has plenty on its docket in supervising just twelve circuit courts' interpretations of federal statutory law. Of the over 7,000 petitions for writs of certiorari this Court receives every year, its docket has room for at most 100 to 150 cases. Administrative Office of the U.S. Courts, *Supreme Court Procedures*, ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, https://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/supreme-1 (last visited March 3, 2021). The inherent limitations of that docket would substantially increase disunity in the interpretation and application of federal law across the fifty states, creating new challenges and increasing costs for businesses operating across state lines. Bennett, *supra*, at 1247-48. The exercise of the federal court system's power to hear suits arising under federal legislation is "one of the major purposes of a full independent system of national trial courts." Mishkin, *supra*, at 157. Article III standing should not be interpreted to undermine this purpose and to force such litigation into state courts.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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