No. 21-1672

IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

KEVIN J. KELLY, ET AL.,
Plaintiffs-Appellants,

v.

REALPAGE, INC., ET AL.,
Defendants-Appellees,

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
No. 2:19-cv-01706-JDW (Wolson, J.)

BRIEF OF *AMICI CURIAE* CONSUMER DATA INDUSTRY ASSOCIATION AND PROFESSIONAL BACKGROUND SCREENING ASSOCIATION IN SUPPORT OF DEFENDANTS-APPELLEES AND AFFIRMANCE

Mark W. Mosier
Virginia A. Williamson
COVINGTON & BURLING LLP
One CityCenter
850 Tenth Street NW
Washington, DC 20001
Tel: 202-662-6000
Fax: 202-662-6291
mmosier@cov.com
vwilliamson@cov.com

Counsel for Amici Curiae

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Pursuant to Federal Rule of Appellate Procedure 26.1 and Third Circuit Local Rule 26.1, *amici curiae*, Consumer Data Industry Association and Professional Background Screening Association, disclose the following:

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   None.

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4) In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate must list: 1) the debtor, if not identified in the case caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and 3) any entity not named in the caption which is an active participant in the bankruptcy proceeding. If the debtor or trustee is not participating in the appeal, this information must be provided by the appellant.

   Not Applicable.

Dated: August 5, 2021

Respectfully submitted,

By: */s/ Mark W. Mosier*
Mark W. Mosier
Counsel for Amici Curiae

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STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

The Consumer Data Industry Association ("CDIA") and the Professional Background Screening Association ("PBSA") are leading international trade associations for the consumer reporting industry.

CDIA. The Consumer Data Industry Association ("CDIA") is a century-old international trade association for consumer reporting agencies, and it is the largest trade association of its kind in the world. Among other activities, CDIA provides business and professional education for its members, and produces educational materials for consumers on their rights and the role of consumer reporting agencies in the marketplace. CDIA participated in the legislative efforts that culminated in the enactment of the Fair Credit Reporting Act, 15 U.S.C. § 1681 et seq. ("FCRA"), and its subsequent amendments, as well as efforts to pass similar statutes in various States.

CDIA's members play a vital role in the American economy by providing consumer reports to enable employers, contractors, principals, landlords, nonprofits, volunteer organizations, and charities to make critical decisions about protecting the health and safety of millions of people in workplaces, rental housing communities, religious institutions, and volunteer organizations.

[1] No counsel for a party authored this brief in whole or in part, and no person other than the *amici curiae* or their members contributed money that was intended to fund the preparation or submission of this brief. *See* Fed. R. App. P. 29(a)(4)(E). All parties consented to the filing of this brief. *See* Fed. R. App. P. 29(a)(2).

PBSA. The Professional Background Screening Association ("PBSA") is an international trade association of over 650 member companies ranging from large background screening companies to individually-owned businesses, each of which must comply with applicable laws, including the FCRA. PBSA's members provide employment, credit, insurance, and tenant background screening and related services to virtually every industry around the globe. The consumer reports prepared by PBSA's background screening members are used by employers, property managers, credit lenders, and volunteer organizations every day to ensure that communities are safe for all who work, reside, or visit there.

Among other goals, PBSA members seek to promote the accurate and timely reporting of a variety of consumer-related information for the purpose of empowering employment, housing, insurance, credit and other financial opportunities to individuals across the country. Consistent with those purposes, PBSA's members obtain consumer information from thousands of different courts and other sources across the country and, in compliance with the FCRA and other laws, produce millions of consumer reports per month.

Amici respectfully submit that this brief will aid the Court by providing their perspective on important questions presented in this appeal. *Amici*'s members include companies that operate as "consumer reporting agencies" ("CRAs") under the

FCRA,[2] and thus face the threat of putative FCRA class action suits like the one on appeal in this case. *Amici* and their members thus have significant interest in this Court's interpretation of the FCRA's requirements and in ensuring that courts enforce Article III's standing requirements with respect to alleged violations of FCRA's procedural rules.

INTRODUCTION AND SUMMARY OF ARGUMENT

Amici's members, like all CRAs, play a critical role in the efficient functioning of the U.S. economy. They assemble and evaluate data on hundreds of millions of consumers, which they can provide to lenders, landlords, employers, volunteer organizations, and other decisionmakers in the form of a "consumer report." As the Federal Trade Commission has observed, consumer reports "benefit[] both creditors and consumers."[3] They benefit creditors by helping them more accurately assess risk.[4] And they benefit consumers by allowing them to obtain financing more

[2] A CRA is an entity that, in exchange for fees, "regularly engages . . . in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties." 15 U.S.C. §1681a(f).

[3] Fed. Trade Comm'n, *Report to Congress Under Sections 318 and 319 of the Fair and Accurate Credit Transactions Act of 2003* at i (Dec. 2004), https://tinyurl.com/2stju543.

[4] *See* U.S. Bureau of Consumer Fin. Prot., *Taskforce on Federal Consumer Financial Law Report*, Vol. 1 at 395 (Jan. 2021), https://tinyurl.com/vbem49sb (consumer reports benefit lenders in "help[ing] set interest rates and other key credit terms, or determin[ing] whether the consumer is offered credit at all").

quickly and on more favorable terms.[5] Consumer reports contribute to the efficiency, soundness, and safety of numerous industries in the United States, including housing, insurance, banking, finance, retail credit, healthcare, childcare, eldercare, transportation, home service, and law enforcement.

The efficient functioning of the consumer reporting system depends on keeping the costs of the system as low as possible while maintaining precision and accuracy. Increased costs impact the entire system from the users of consumer reports—employers, property managers, and volunteer organizations, among others—to the consumers themselves. Increased costs will result in everything from less favorable credit terms to lower usage of consumer reports—particularly in the areas where their use is most critical. For example, many volunteer organizations do not have a mandate to screen their staff or volunteers and do not receive funding for background checks. If the cost of running a background check continues to increase underfunded volunteer organizations will be forced to determine whether they can afford to screen Little League, soccer, and dance coaches, or Girl Scout and Boy Scout troop leaders.

[5] *See, e.g.*, Michael E. Staten & Fred H. Cate, *The Impact of National Credit Reporting Under the Fair Credit Reporting Act: The Risk of New Restrictions and State Regulation* at ii–iii, vi-vii (2003), https://tinyurl.com/y3wm3248.

One of the most significant drivers of cost increases for CRAs in recent years has been putative class actions alleging procedural FCRA violations like the complaint in this case. FCRA suits continue to be filed in increasingly large numbers each year, growing from 3,835 in 2016 to 5,223 in 2020,[6] and a significant number of those suits are pleaded as putative class actions.

FCRA class action suits are so popular with plaintiffs' lawyers—and thus such a threat to CRAs—for numerous reasons. *First*, the FCRA imposes many requirements on CRAs that are highly technical and procedural in nature, permitting creative plaintiffs and lawyers to challenge a CRA's practices on a virtually endless number of grounds. *Second*, courts have often permitted plaintiffs to seek up to $1,000 in statutory damages, attorney's fees, and punitive damages, even when they cannot show that they suffered any actual harm from the alleged FCRA violation. *See, e.g.*, *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2214 (2021) (reversing class certification as to "6,332 class members whose credit reports were not provided to third-party businesses" because they "did not suffer concrete harm and thus do not have standing as to [a] reasonable-procedures claims").[7] *Third*, because CRAs prepare millions of consumer reports each year, a putative class claim could be on behalf

[6] *See* WebRecon LLC, *WebRecon Stats for Dec 2020 and Year in Review* (Jan. 26, 2021), https://tinyurl.com/fyxed25r.

[7] Seeking to curb such "no injury lawsuits," the Supreme Court has in recent years emphasized that a statutory violation alone is not enough to satisfy Article III's concreteness requirements; a plaintiff must suffer actual harm. *See TransUnion LLC*,

of thousands or even millions of consumers and could seek astronomical amounts in damages and attorney's fees. *See* JA016 (noting that one of Plaintiffs' putative subclasses "has hundreds-of-thousands, if not millions, of members"). The result is too often that a CRA will feel compelled to settle a technical violation on an *in terrorem* basis, even when it has strong defenses to the claim and there is no evidence that its practices caused any real harm.

This case illustrates the threat posed by "no injury" FCRA class actions. Plaintiffs brought suit on behalf of themselves and a putative class of consumers, alleging that RealPage violated the FCRA by not disclosing the "source" of the public records included in their consumer "file," as required by 15 U.S.C. § 1681g(a)(2). This claim depends on Plaintiffs' novel interpretation of "source." RealPage disclosed the actual repository of the public records in Plaintiffs' files—for example, the court that held the records—but Plaintiffs contend that the "source" of the public records is the private third-party vendor that retrieved the records from that repository, and thus RealPage violated the FCRA by not disclosing the vendors' names.

Plaintiffs do not contend that they suffered any actual harm from not knowing the identity of the vendors or that they would have done anything differently if they

141 S. Ct. at 2250 ((quoting *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016) ("Article III standing requires a concrete injury even in the context of a statutory violation.")).

had that information. Instead, they seek only statutory damages up to $1,000, attorney's fees, and punitive damages, but they do so on behalf of the more than two million consumers who received reports from RealPage during the class period. JA004. The District Court correctly declined to certify a class action, but it erred in holding that Plaintiffs had standing to pursue their individual claims.

I. Plaintiffs lack Article III standing because they suffered no concrete harm. Plaintiffs' allegation that RealPage failed to include source information in disclosures made to consumers amounts to nothing more than an allegation of a bare procedural violation, which is insufficient to confer Article III standing. *See TransUnion LLC*, 141 S. Ct. at 2214. The District Court held that Plaintiffs had standing because they suffered an "informational injury," JA009-11, JA021, but the Court's analysis improperly conflated the merits question (whether the FCRA requires disclosure of the identity of vendors) with the standing question (whether Plaintiffs suffered concrete harm as a result of the alleged statutory violation). The Supreme Court's recent decision in *TransUnion* makes clear that alleging a procedural FCRA violation does not relieve a plaintiff of the obligation to demonstrate the concrete harm that resulted from that violation.

II. The District Court correctly held that class certification is inappropriate because individual inquiries predominate over common ones. Central to this determination was the District Court's recognition that many consumers included in

Plaintiffs' putative classes may have requested from RealPage a "consumer report"—not a consumer "file"—and that many putative class members did not request *any* information from RealPage. *See* JA019-22. The District Court correctly construed the FCRA as imposing an obligation on RealPage to disclose a consumer's file only to those consumers who actually made a request for their file. Plaintiffs' contrary interpretation of the FCRA conflicts with the statutory text, harms consumers, and frustrates Congress's intent in enacting the statute.

ARGUMENT

I. Plaintiffs Lack Article III Standing.

The District Court held that Plaintiffs have standing to bring their claims based on their allegations that RealPage violated the FCRA. According to the court, because "[t]he FCRA requires that a consumer have access to all information in his file and the sources of that information," "[i]f a CRA like RealPage deprives the consumer of information about him in his file, then it causes the consumer a concrete injury." JA010; *see also* JA011 ("If the FCRA requires its disclosure [of information] to individual consumers, then its absence harms those consumers."). That holding is squarely foreclosed by the Supreme Court's recent decision in *TransUnion*, which makes clear that not every statutory violation results in an Article III injury.

To satisfy the "irreducible constitutional minimum" for standing under Article III, a plaintiff must establish three elements: (1) an injury-in-fact; (2) a fairly traceable causal connection between the injury and the defendant's challenged conduct; and (3) a likelihood that the injury will be redressed by a favorable decision. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Injury-in-fact is "first and foremost" among these standing elements, and it requires a plaintiff to show "an invasion of a legally protected interest" that is both "concrete and particularized." *Spokeo*, 136 S. Ct. at 1547–48 (cleaned up). Plaintiffs lack standing here because they have not suffered a concrete harm, and as the Supreme Court recently observed, "[n]o concrete harm, no standing." *TransUnion*, 141 S. Ct. at 2200.

TransUnion expressly rejects the view that an FCRA violation necessarily causes concrete harm to a plaintiff. The Supreme Court explained that "[f]or standing purposes, . . . an important difference exists between (i) a plaintiff's statutory cause of action to sue a defendant over the defendant's violation of federal law, and (ii) a plaintiff's suffering concrete harm because of the defendant's violation of federal law." *Id.* at 2205. Importantly, "Article III standing requires a concrete injury even in the context of a statutory violation." *Id.* (cleaned up). And "Congress's creation of a statutory prohibition or obligation and a cause of action does not relieve courts of their responsibility to independently decide whether a plaintiff has suffered a concrete harm under Article III." *Id.* Rather, "[o]nly those plaintiffs who have

been concretely harmed by a defendant's statutory violation may sue that private defendant over that violation in federal court." *Id.*; *see also Spokeo*, 136 S. Ct. at 1549 (plaintiff cannot "allege a bare procedural violation, divorced from any concrete harm, and satisfy the injury-in-fact requirement" of Article III).

To determine whether a harm is concrete—that is, "'real,' and not 'abstract'," *Spokeo*, 136 S. Ct. at 1548 (citation omitted)—courts are guided by "history and tradition." *TransUnion*, 141 S. Ct. at 2204. Intangible harms traditionally recognized as providing a basis for a lawsuit, such as "reputational harms, disclosure of private information, and intrusion upon seclusion," may qualify as concrete injuries under Article III. *Id.* *Spokeo* provides a good example. There, the Supreme Court recognized that a plaintiff may suffer a concrete harm to his reputation when false information about him was publicly disclosed, because that reputational harm has long been recognized as actionable for defamation claims. *Id.* at 2208 ("Under longstanding American law, a person is injured when a defamatory statement 'that would subject him to hatred, contempt, or ridicule' is published to a third party." (cleaned up)). The Supreme Court relied on this analysis in *TransUnion* to hold that the plaintiffs there alleged a similar concrete reputational injury for their claims involving the dissemination of false or misleading information to third parties. *See id.*

Plaintiffs here have suffered no similar reputational injury. An essential element of defamation at common law is the "publication" of defamatory material "*to*

a third party." Restatement (Second) of Torts §§ 558, 577 (1977) (emphasis added); *Graboff v. Colleran Firm*, 744 F.3d 128, 136 (3d Cir. 2014) ("A statement is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or deter third persons from associating or dealing with him." (cleaned up)). Plaintiffs here have not suffered any reputational injury because their claims are not based on any misinformation *published* to any third party. They allege only that RealPage failed to disclose information to Plaintiffs from their own files.

Plaintiffs also have not established any reputational injury because they allege a type of FCRA violation that could not affect their reputation. Unlike in *Spokeo* and *TransUnion*, the alleged FCRA violation here does not involve the dissemination of false information. Instead, the allegation is merely that RealPage failed to disclose to Plaintiffs the identity of the vendors who obtained the public records found in their file. JA002. There is no reason that disclosure (or non-disclosure) of the vendor's identity to Plaintiffs would harm Plaintiffs' reputation.

The District Court characterized Plaintiffs' harm as an "informational injury," JA021, but they have not suffered the sort of informational injury that could give them standing under Article III.

Like Plaintiffs here, the *TransUnion* plaintiffs asserted a "disclosure claim" under Section 1681g(a), which "alleged that TransUnion breached its obligation to provide them with their complete credit files upon request." 141 S. Ct. at 2213. The

United States appearing as *amicus curiae* argued that TransUnion's alleged failure to provide all information required by the FCRA resulted in plaintiffs suffering "informational injur[ies]," but the Supreme Court rejected that argument on multiple grounds. *Id.* at 2214. For one reason, the Supreme Court explained that its informational-injury precedents apply only to a narrow subset of cases "involv[ing] denial of information subject to public-disclosure or sunshine laws that entitle all members of the public to certain information," and the FCRA is not "such a public-disclosure law." *Id.* at 2214.[8] For another reason, the plaintiffs "identified no 'downstream consequences' from failing to receive the required information. They did not demonstrate, for example, that the alleged information deficit hindered their ability to correct erroneous information before it was later sent to third parties." *Id.* (citation omitted). This showing was necessary because "an 'asserted informational injury that causes no adverse effects cannot satisfy Article III.'" *Id.* (quoting *Trichell v. Midland Credit Mgmt., Inc.*, 964 F.3d 990, 1004 (11th Cir. 2020)); *see also Dreher v. Experian Info. Sols., Inc.*, 856 F.3d 337, 345 (4th Cir. 2017) ("[A] constitutionally cognizable informational injury requires that a person lack access to information to which he is legally entitled *and* that the denial of that information creates a 'real' harm with an adverse effect.").

[8] This Court recognized an informational injury in *In re Nickelodeon Consumer Privacy Litig.*, 827 F.3d 262 (3d Cir. 2016)), but that case is easily distinguished from the facts here. That case concerned the disclosure of information about minors, not the purported failure to disclose information. *See id.* at 273–74.

Plaintiffs here have not suffered an informational injury for the same reasons. As in *TransUnion*, Plaintiffs do not seek information subject to a disclosure law that entitles members of the public to certain information. In fact, Plaintiffs challenge the sufficiency of a disclosure made only to them of their own personal information.

Plaintiffs have not demonstrated any "downstream consequences" from purportedly being denied access to the "source" information they claimed RealPage should have produced. Consumers often challenge attribution errors, which occur when a public record is matched to the wrong consumer. This type of error results from the CRA's internal process for matching consumers with public records; it does not result from anything done by the vendor who provided the records. As a result, a consumer complaining of an attribution error typically cannot show any harm caused by not knowing the third-party vendor's identity because she should address the attribution error with the CRA, which has the ultimate responsibility to determine which records match a particular consumer. Plaintiffs here challenge attribution errors that had nothing to do with the vendors, and it appears that they did not take any steps to contact the vendors when they learned their identity during this case. JA005, JA011; RealPage Br. 12-14. Plaintiffs' failure to receive "source" information thus did not have any downstream consequences because that information was irrelevant to their complaints about the reports they challenged. *See also Dreher*, 856 F.3d at 346 (rejecting plaintiff's argument that he suffered concrete harm in the form of loss

of the value of "knowing who it is you're dealing with" when a consumer reporting agency failed to disclose the sources of information in a file disclosure).

In sum, Plaintiffs lack standing to pursue their claims because they have not established that they suffered any cognizable injury based on RealPage's alleged failure to disclose to Plaintiffs the vendors who collected the information in their files. The District Court erred in holding that Plaintiffs' allegations of an FCRA violation were necessarily sufficient to establish a concrete injury.

II. The District Court Correctly Denied Class Certification Because a CRA Must Disclose "Source" Information Only to Consumers Who Request Their File.

Even if Plaintiffs could establish Article III standing, they would not be entitled to certification of their putative classes. Plaintiffs' proposed classes include (1) consumers that requested a consumer report—not their full file—and (2) consumers who received either their file or a consumer report without requesting it. JA012. These consumers do not have viable claims because, as the District Court correctly concluded, "a consumer must make a direct request for the complete contents of his or her own file before Section 1681g(a) imposes obligations on a CRA." JA012. As a result, Plaintiffs could not show that common issues predominate over individualized ones—a necessary showing for their proposed damages classes—because adjudicating the class claims "would require an inquiry as to whether class members requested information from RealPage," and "whether each class member sought a particular report or a full file disclosure from RealPage." JA003.

Plaintiffs primarily challenge this holding by arguing that the District Court misconstrued Section 1681g(a). Pls. Br. 13–20. In Plaintiffs' view, a CRA has an obligation to disclose the "source" of information in a consumer's file even if the consumer specifically requests only a particular report—and not her entire file—or, indeed, makes no request for information at all. *Id.* The District Court was correct to reject this overly broad reading of the FCRA. Plaintiffs' novel and unsupported interpretation is not only contrary to the statutory text, but it will also harm consumers and frustrate Congress's intent in enacting the FCRA.

A. The FCRA Requires a CRA to Provide a Consumer's File Only When the Consumer Requests It.

The District Court correctly concluded "that a consumer must make a direct request for the complete contents of his or her own file before Section 1681g(a) imposes obligations on a CRA." JA012. That interpretation is compelled by the statutory text. Plaintiffs challenge this interpretation on two grounds. *First*, they contend that a CRA should treat any request for information—including a specific request for a particular report—as a request for the consumer's full file. *Second*, they contend that consumers need not request their own files, but rather anyone can make a file request on a consumer's behalf. Neither argument has merit.

1. Plaintiffs contend that the District Court misinterpreted Section 1681g by requiring consumers to use "magic words" (Pls. Br. 4) or "terms of art" (*id.* at 18) to request their "file." But the District Court did no such thing. The court did not

specify the words that a consumer must use. The District Court merely recognized that consumers frequently request something other than their full file—for example, a particular report provided to a potential creditor, landlord, or employer—and that nothing in the statute permits a court to treat a request for a "consumer report" as if it were actually a request for a "file."

The District Court correctly distinguished between consumer requests for their file and requests for a particular report. The FCRA clearly differentiates between the two types of documents. A consumer "file" contains "all of the information" that a CRA has "recorded and retained" about a consumer, "regardless of how the information is stored." 15 U.S.C. § 1681a(g). In contrast, a "consumer report" is "any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for" credit, employment, or other relevant purposes. *Id.* § 1681a(d)(1).

As these statutory definitions demonstrate, both a consumer report and a consumer file contain consumer information, but only "[a] 'consumer report' requires communication to a third party, . . . a 'file' does not." *Collins v. Experian Info. Sols., Inc.*, 775 F.3d 1330, 1335 (11th Cir. 2015). When "information about the consumer

. . . is collected and kept on file, but not communicated to a third party, [it] is not a consumer report." 1A Consumer Credit Law Manual § 16.02(2)(a) (2020). Only once the agency "communicat[es]" consumer information from that file to a third party for certain, statutorily specified reasons does the agency create a "consumer report." 15 U.S.C. § 1681a(d)(1).

A consumer "report" is different from a "file" in a variety of other ways, too. For one, a "report" is "expected to be used or collected" to establish a consumer's eligibility for credit, insurance, employment or another permissible purpose. That is, a consumer report is typically directed to a third party that may engage in a transaction with a consumer, based in part on the information in the report. *See* Fed. Trade Comm'n, *Report to Congress Under Sections 318 and 319 of the Fair and Accurate Credit Transactions Act of 2003*, at 10 ("The FCRA refers to information furnished to a final user as a 'consumer report.'"). Importantly, even though a report is based on the information in a consumer's file, the content of a report may not match that of the file. The FCRA prohibits consumer reporting agencies from including obsolete, adverse information in consumer reports, even though such information may be recorded and retained in a consumer's file. *See* 15 U.S.C. § 1681c(a) (providing that "no consumer reporting agency may make any *consumer report* containing" certain information (emphasis added)).

The FCRA also provides vastly different procedural requirements for disclosure of a consumer file. For one, before disclosing a consumer file, a consumer reporting agency "shall require . . . that the consumer furnish proper identification." 15 U.S.C. §1681h(a)(1). And a consumer is permitted only "one other person of his choosing," to accompany him or her to receive a file from a consumer reporting agency, and the agency "may require the consumer to furnish a written statement granting permission to the consumer reporting agency to discuss the consumer's file in such person's presence." *Id.* §1681h(d). Unlike a consumer report, which is designed for a third-party audience of potential creditors, a consumer file has a limited audience of the consumer and consumer reporting agency who compiled its contents.

Other procedural requirements further establish the different audiences for the two documents. While a consumer reporting agency may, in its discretion, provide a consumer report in writing, orally, or through other means, *see id.* §1681a(d)(1), consumer files must be provided in writing unless a consumer specifically authorizes another form of disclosure, *id.* §1681h(a)(2), (b). And a consumer reporting agency may not simply provide a written file to a consumer, it "shall" also "provide trained personnel to explain to the consumer any information furnished to him" in this consumer file. *Id.* §1681h(c). Far from an accidental difference in procedures, Congress established that a "file" would serve a difference purpose than a consumer "report."

Cf. S. Rep. No. 91-517, at 2 (1969) (repeatedly differentiating between credit files and reports in discussing the history preceding the enactment of the FCRA).

In sum, Plaintiffs' contention that a consumer's request for a specific report should be construed as a request for an entire consumer file fails to account for the significant differences between consumer files and consumer reports. The District Court correctly held that Section 1681g's obligation to provide a consumer's file and "source" information is triggered only when a consumer requests the file, and not by something else, such as a request for a consumer report.

2. Plaintiffs also contend that the District Court erred in holding that the request for a file must come from the consumer herself for a CRA to have an obligation to disclose the file under Section 1681g. JA020. In Plaintiffs' view, the statute imposes no restrictions on who may request a consumer's file, and thus a CRA's obligations under Section 1681g arise whenever anyone requests a file for a consumer. Pls. Br. 15–19. The District Court correctly rejected this interpretation.

Plaintiffs contend that anyone can request a consumer's file because § 1681g states that a CRA must disclose a consumer file "upon request," rather than "upon request by the consumer." Pls. Br. 17–18. But this qualification is unnecessary given the context in which the phrase "upon request" is used. That phrase appears in a provision governing disclosures only to consumers; the full sentence states: "Every [CRA] shall, upon request, and subject to section 1681h(a)(1) of this title,

clearly and accurately disclose to the consumer" certain information. 15 U.S.C. § 1681g(a). The sentence thus addresses a CRA's obligation to disclose information about a consumer to that "consumer." The sentence does not contemplate the involvement of any third parties in this provision, and thus the reference to "upon request" is reasonably interpreted as referring to a request from the consumer because it is the consumer who is obtaining information from the CRA.

Section 1681g's requirement that the CRA's disclosure is "subject to section 1681h(a)(1)" confirms that the consumer must make the file request. Section 1681h(a)(1) states that a CRA "shall require, as a condition of making the disclosures required under section 1681g of this title, that the consumer furnish proper identification." 15 U.S.C. § 1681h(a)(1). Given that a CRA can make a disclosure upon receiving a request only if the consumer furnishes proper identification, the only reasonable reading of Section 1681g(a) is that the request itself must also come from the consumer. Otherwise, there would be no good reason to allow a third party to make the file request if the consumer must provide proper identification before the disclosure is made.

The District Court thus correctly interpreted Section 1681g to require a CRA to disclose a consumer's file, including "source" information, only to consumers who request their file. Because the proposed classes would include many consumers who did not request their file—either because they requested something different or

because they made no request at all—the District Court correctly held that the putative classes could not be certified.

B. Plaintiffs' Contrary Interpretation Harms Consumers and Frustrates Congress's Intent in Enacting the FCRA.

Plaintiffs' interpretation of Section 1681g is not only contrary to the statutory text, but it will also harm consumers and frustrate Congress's intent in enacting the FCRA. It will harm consumers because consumers often request only a particular report, which they can use to challenge an adverse decision made in reliance on that report. And it frustrates Congress's intent because Congress intended to protect consumer's privacy when it enacted the FCRA, and allowing third parties to play a central role in the file-request process threatens that privacy interest.

1. Many CRAs provide a specific report to a consumer upon request by the consumer. Under Plaintiffs' interpretation of Section 1681g(a), a CRA violates the FCRA by responding to a request for a specific report by sending that report. In Plaintiffs' view, the CRA must provide the consumer with her full file even when the consumer expressly requests a specific consumer report. That result will harm consumers who would prefer to receive the specific report, and not their full file.

When a consumer requests a particular report, it is typically because the consumer wants to see the report used to take action in connection with a transaction initiated by the consumer. *See, e.g.*, *Taylor v. Screening Reports, Inc.*, 294 F.R.D.

680, 689 (N.D. Ga. 2013) (denying class certification and observing that "some consumers, particularly those who have been adversely affected by a CRA's report, may specifically want only the report that resulted in the adverse effect," and distinguishing those consumers from consumers "who purportedly wanted their entire file"). A consumer may prefer to see a particular report because it allows the consumer to learn the specific information communicated to a potential employer, property manager, or creditor regarding her application for employment, tenancy, or credit.

The consumer's file may be of only limited utility for that purpose. Her file may contain new information added after the CRA issued the consumer report to the potential decisionmaker. It also may show obsolete, adverse actions, such as bankruptcies, tax liens, and accounts in collection that would not have been provided to the potential employer, property manager, creditor. *See* 15 U.S.C. § 1681c(a) (listing "information excluded from consumer reports," including, among other things, bankruptcy cases after 10 years and paid tax liens after 7 years). The obsolete information in the full file has the potential to confuse and ultimately harm a consumer. When the consumer receives her full file, she is left to guess which information impacted the adverse decision. In attempting to determine the grounds for the decision, a consumer may harm her prospects in obtaining a job or an apartment by disclosing additional information that the employer or landlord could not obtain. For example, the consumer may address a decade-old bankruptcy or arrest—assuming it was

grounds for the adverse decision—without knowing that the FCRA generally prohibits disclosure of these older events.

2. Plaintiffs' interpretation of "upon request" frustrates Congress's intent and creates a risk that consumers' privacy will be invaded. One of Congress's primary goals in enacting FCRA was "to protect consumer privacy." *TRW Inc. v. Andrews*, 534 U.S. 19, 23 (2001). Congress sought to achieve this objective by limiting the information that could be included in consumer reports, and by specifying particular information that—even if it were contained in the consumer's file—could not be disclosed to third parties in consumer reports. *See* S. Rep. No. 91-517, at 1 (The FCRA "seeks to prevent an undue invasion of the individual's right of privacy in the collection and dissemination of credit information."); *id.* at 4 (identifying the problems that "information in a person's credit file is not always kept strictly confidential" and that creditors "report[] . . . information about a person's earlier credit difficulties" as two motivations behind the FCRA). Congress also ensured that the consumer's file would be disclosed only to the consumer upon a showing of personal identification, 15 U.S.C. §1681h(a)(1), and Congress even limited the number of people who could accompany a consumer to view her file, *id.* §1681h(d). These restrictions demonstrate just how seriously Congress took privacy concerns and the lengths that Congress went to protect them.

Plaintiffs' proposed interpretation frustrates this goal by giving third parties substantial control over the file request process. Plaintiffs urge this Court to interpret the FCRA so broadly as to allow anyone to submit a file request on a consumer's behalf. And to avoid the statute's identification requirement, Plaintiffs suggest that the third party can perform the identification check, instead of the CRA. Pls. Br. 15. The result is that the third party becomes a key intermediary between the CRA and consumer in the file-disclosure process, and eliminates any need for the CRA and consumer to communicate directly with each other. In Plaintiffs' view, the third party can control the entire request process by submitting a file request to the CRA and then by informing the CRA that it has performed the requisite identification check. This alternative process creates substantial risk that a third party could get access to information in a consumer's file that Congress has otherwise forbidden third parties to access without consumer consent.

CONCLUSION

For the foregoing reasons, the Court should hold that Plaintiffs' claims should be dismissed for lack of Article III standing. Alternatively, the Court should affirm the District Court's denial of class certification.

Respectfully submitted,

By: */s/ Mark W. Mosier*

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Mark W. Mosier
Virginia A. Williamson
COVINGTON & BURLING LLP
One CityCenter
850 Tenth Street NW
Washington, DC 20001
Tel: 202-662-6000
Fax: 202-662-6291
mmosier@cov.com

Counsel for Amici Curiae

CERTIFICATIONS OF BAR MEMBERSHIP, WORD COUNT, IDENTICAL COMPLIANCE OF BRIEFS, AND VIRUS CHECK

I hereby certify that:

1. I am a member in good standing of the Bar of the U.S. Court of Appeals for the Third Circuit.

2. This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), it contains 5,803 words.

3. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in proportionally-spaced typeface, using Microsoft Word, in Times New Roman 14-point font.

4. This brief complies with Third Circuit Local Rule 31.1(c) because the text of the electronically filed brief is identical to the text of paper copies of the brief.

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Dated: August 5, 2021

/s/ Mark W. Mosier

Mark W. Mosier
COVINGTON & BURLING LLP
One CityCenter
850 Tenth Street NW
Washington, DC 20001
Tel: 202-662-6000
Fax: 202-662-6291
mmosier@cov.com

Counsel for Amici Curiae

CERTIFICATE OF SERVICE

I hereby certify that on August 5, 2021, I caused the foregoing document to be electronically filed with the United States Court of Appeals for the Third Circuit using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to counsel of record.

/s/ Mark W. Mosier

Mark W. Mosier
COVINGTON & BURLING LLP
One CityCenter
850 Tenth Street NW
Washington, DC 20001
Tel: 202-662-6000
Fax: 202-662-6291
mmosier@cov.com

Counsel for Amici Curiae