UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SUZANNE BOELTER, individually and on behalf of all others similarly situated, Plaintiff, v. HEARST COMMUNICATIONS, INC., Defendant.	Civil Action No. 15-cv-03934-AT
JOSEPHINE JAMES EDWARDS, individually and on behalf of all others similarly situated, Plaintiff, v. HEARST COMMUNICATIONS, INC., Defendant.	Civil Action No. 15-cv-09279-AT

PLAINTIFFS' OPPOSITION TO DEFENDANT HEARST COMMUNICATIONS, INC.'S
SUPPLEMENTAL BRIEF IN FURTHER SUPPORT OF ITS MOTION TO DISMISS

Dated: June 14, 2016

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Per this Court's May 17, 2016 Order, Doc. No. 76, Plaintiffs respectfully submit this memorandum of law in opposition to Defendant Hearst Communications, Inc.'s ("Hearst") Supplemental Authority In Further Support Of Its Motion To Dismiss, Doc. No. 77 ("Hearst's Br.").

INTRODUCTION

Hearst continues to assert that Plaintiffs lack Article III standing to sue for its violations of the Michigan Preservation of Personal Privacy Act, M.C.L. §§ 445.1711 *et seq.* (the "PPPA"). But this Court already held that the PPPA "creates for Plaintiff[s] a specific, enforceable legal right to expect Defendant to keep private [their] identifying information … [and] its violation constitutes a concrete, particularized deprivation. … If Defendant violated the statute by disclosing Plaintiff[s'] personal information, it deprived Plaintiff[s] of a right to which [they] [were] particularly entitled by law, constituting an injury-in-fact sufficient to confer standing." *Boelter v. Hearst Commc'ns. Inc.*, 2016 WL 361554, at *3 (S.D.N.Y. Jan. 28, 2016). In doing so, this Court joined every other court to consider the question. *See Halaburda v. Bauer Pub. Co., LP*, 2013 WL 4012827, at *4, *6 (E.D. Mich. Aug. 6, 2013) (same); *Kinder v. Meredith Corp.*, 2014 WL 4209575, at *2 (E.D. Mich. Aug. 26, 2014) (same); *Owens v. Rodale, Inc.*, 2015 WL 575004, at *4 (E.D. Mich. Feb. 11, 2015) (same); *Cain v. Redbox Automated Retail, LLC*, 981 F. Supp. 2d 674, 683 (E.D. Mich. 2013) (same); *Deacon v. Pandora Media, Inc.*, 901 F. Supp. 2d 1166, 1172 (N.D. Cal. 2012) (same). Hearst does not even acknowledge this Court's holding in *Boelter*. Rather, Hearst asserts that two recent developments in law confirm that Plaintiffs' lack standing.

First, Hearst argues that the Supreme Court's holding in *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016) supports its argument. That is wrong. In *Spokeo*, the Court held that while an injury must be "concrete" to support Article III standing, "intangible injuries can nevertheless be

concrete." *Id.* at 1549. Thus, the Court held that "the violation of a procedural right granted by statute can be sufficient in some circumstances to constitute injury in fact. In other words, a plaintiff in such a case ***need not*** allege any *additional* harm beyond the one Congress has identified." *Id.* (emphasis added).

In sum, *Spokeo* does not have the widespread impact that Hearst asserts it does. Instead, *Spokeo* merely requires a court to "consider *both* aspects of the injury-in-fact requirement," particularity and concreteness. *Id.* at 1545. This Court did exactly that in *Boelter* when it found that an alleged violation of the PPPA "constitutes a ***concrete, particularized*** deprivation." *Boelter*, 2016 WL 361554, at *3 (emphasis added). Therefore, *Spokeo* does not require this Court to reconsider its holding in *Boelter*.

Furthermore, even if this Court were to reconsider whether a violation of the PPPA constitutes a concrete harm, guidance from *Spokeo* compels the conclusion that it does. *Spokeo* held that in considering whether an intangible harm is concrete, "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. Here, the PPPA protects an individual's right to personal security, which traditionally provided a basis for a lawsuit at common law. *See id.* at 1551 (Thomas, J., concurring). *Spokeo* also held that in considering whether an intangible harm is concrete, "because Congress is well positioned to identify intangible harms that meet minimum Article III requirements, its judgment is also instructive and important." *Id.* at 1549. Here, the Michigan Legislature recognized "that a person's choice in reading … is a private matter, and not a fit subject for consideration by gossipy publications." Complaint, Doc. No. 1, Ex. A., *Privacy: Sales, Rentals of Videos, etc.*, House Legislative Analysis Section, H.B. No. 5331, Jan. 20, 1989. Pursuant to *Spokeo*, that

judgment is instructive and important towards determining whether a violation of the PPPA is a concrete injury.

Moreover, even if this Court finds that a violation of the PPPA, by itself, is not a concrete harm, Plaintiffs allege tangible concrete harm in the forms of receipt of unwarranted junk mail and telephone solicitations, risk of identity theft, and overpayment. Courts have consistently found these injuries sufficient to confer Article III standing.

Second, Hearst argues that recent amendments to the PPPA deprive Plaintiffs of statutory standing. *See* Doc. No. 78, Ex. A ("Amended PPPA"). But under Michigan law, statutory amendments "are presumed to operate prospectively unless the contrary intent *is clearly manifested*." *Frank W. Lynch & Co. v. Flex Technologies, Inc.*, 463 Mich. 578, 583 (2001) (emphasis added). Here, the Amended PPPA does not contain any language indicating that the Legislature intended retroactivity. That fact is fatal to Hearst's argument that the Amended PPPA applies retroactively. *See Kia Motors Am., Inc. v. Glassman Oldsmobile Saab Hyundai, Inc.*, 706 F.3d 733, 739 (6th Cir. 2013) ("The Michigan Supreme Court has repeatedly observed that the Michigan Legislature 'knows how to make clear its intention that a statute apply retroactively,' so the absence of express retroactive language is a strong indication that the Legislature did not intend a statute to apply retroactively.") (citing *Brewer v. A.D. Transport Express, Inc.*, 486 Mich. 50, 56 (2010) (quoting *Frank W. Lynch & Co.*, 463 Mich. at 584)).

Further, even if the Michigan Legislature's intent against retroactivity was not clear, Michigan law also prohibits retroactive application where, as here, vested rights would be impaired. *See Frank W. Lynch & Co.*, 463 Mich. at 584 (holding that the presumption against retroactivity "is especially true if retroactive application of a statute would impair vested rights, create a new obligation and impose a new duty, or attach a disability with respect to past

transactions"); *Davis v. State Employees' Ret. Bd.*, 272 Mich. App. 151, 158 (2006) ("A statute may not be applied retroactively if it abrogates or impairs vested rights."). And, while Hearst argues that the Amended PPPA is a "remedial" statute, Michigan law "reject[s] the notion that a statute significantly altering a party's substantive rights should be applied retroactively merely because it can also be characterized in a sense as remedial." *Frank W. Lynch & Co.*, 463 Mich. at 585.

All told, the Amended PPPA does not have any impact on these actions because it does not – and cannot – apply retroactively pursuant to Michigan law.

ARGUMENT

I. *SPOKEO* REAFFIRMS THIS COURT'S HOLDING THAT PLAINTIFFS HAVE ARTICLE III STANDING

A. Intangible Injuries Satisfy The Concreteness Requirement

In *Spokeo v. Robins*, 136 S. Ct. 1540 (2016) the Supreme Court reaffirmed its long line of case law holding that Article III standing does not require tangible injury. *See id.* at 1549 ("'Concrete' is not, however, necessarily synonymous with 'tangible.' … [W]e have confirmed in many of our previous cases that intangible injuries can nevertheless be concrete."). Contrary to Hearst's argument, the Supreme Court did <u>not</u> "flatly reject[] the argument and the Ninth Circuit's holding that the mere disclosure of false information in violation of the FCRA was itself enough to confer Article III standing." Hearst's Br. at 3. Instead, the Supreme Court expressly held that "the violation of a procedural right granted by statute can be sufficient in some circumstances to constitute injury in fact. In other words, a plaintiff in such a case ***need not*** allege any *additional* harm beyond the one Congress has identified." *Spokeo*, 136 S. Ct. at 1549 (emphasis added).

The Supreme Court only remanded because it found that the Ninth Circuit did not "consider *both* aspects of the injury-in-fact requirement," particularity and concreteness. *Id.* at 1545. But this Court did consider both aspects in its January 28, 2016 Order in which it found that an alleged violation of the PPPA confers Article III standing. *See Boelter*, 2016 WL 361554, at *3 ("[T]he Court finds that … the VRPA creates for Plaintiff a specific, enforceable legal right to expect Defendant to keep private her identifying information, and … its violation constitutes a *concrete, particularized* deprivation.") (emphasis added). For that reason, the Supreme Court's holding in *Spokeo* does not change this Court's holding that Plaintiffs have Article III standing.

In the short time since *Spokeo* was released, at least three district courts have endorsed this view, including one court in this District. In *In re Barclays Bank PLC Securities Litigation*, 2016 WL 3235290 (S.D.N.Y. June 9, 2016), Judge Crotty, citing to *Spokeo*, rejected the argument that using a statute's statutory damage provision to establish injury is impermissible under Article III. *Id.* at *6. Rather, Judge Crotty held that because the plaintiff sought "to vindicate his private right to [statutory] damages based on *his* purchase of Series 5 shares and the alleged diminution in value of *his* shares," he had standing under Article III. *Id.* (also citing *Donoghue v. Bulldog Inv'rs Gen. P'ship*, 696 F.3d 170, 175 (2d Cir. 2012)). Here, likewise, this Court has already held that the PPPA's statutorily-defined damages award confers Article III standing, because Hearst "violated the statute by disclosing Plaintiff's personal information." *Boelter*, 2016 WL 361554, at *3.

In *Rogers v. Capital One Bank (USA), N.A.*, 2016 WL 3162592 (N.D. Ga. June 7, 2016), Judge Thrash held, citing to *Spokeo*, that "Congress may, by statute, transform a previously non-concrete injury into one that is concrete and therefore sufficient to confer standing." *Id.* at *2.

(citing *Spokeo*, 136 S. Ct. at 1549). Thus, Judge Thrash concluded that in the context of the Telephone Consumer Protection Act ("TCPA") "a violation of the TCPA is a concrete injury." *Id.* Here, likewise, as this Court has already held, a violation of the PPPA is a concrete injury.[1]

And in *Chapman v. Dowman, Heintz, Boscia & Vician, P.C.*, 2016 WL 3247872 (N.D. Ind. June 13, 2016), Judge Deguilio, after asking for supplemental briefing regarding the impact of *Spokeo*, held that "*Spokeo* largely reiterated long-standing principles of Article III standing," and therefore did not deprive the plaintiff of Article III standing in an action alleging that the defendant violated the Fair Debt Collection Practices Act "by failing to properly advise [plaintiff] of her rights as required by the statute." *Id.* at *1 & *1 n.1.

Moreover, even if this Court were to revisit whether a violation of the PPPA is a concrete injury, *Spokeo*'s guidance clearly indicates that it is. "In determining whether an intangible harm constitutes injury in fact, both history and the judgment of Congress play important roles." *Spokeo*, 136 S. Ct. at 1549.

First, "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." *Id.* "Historically, common-law courts possessed broad power to adjudicate suits involving the alleged violation of private rights, even when plaintiffs alleged only the violation of those rights and nothing more." *Id.* at 1551 (Thomas, J., concurring). "'Private rights' have traditionally included rights of *personal security* (including security of reputation), property rights, and contract rights." *Id.* (emphasis added) (citing 1 W. Blackstone,

[1] For the same reason, *Spokeo* does not abrogate the Article III rulings from the Eastern District of Michigan PPPA cases. *See Halaburda v. Bauer Pub. Co., LP*, 2013 WL 4012827 (E.D. Mich. Aug. 6, 2013); *Kinder v. Meredith Corp.*, 2014 WL 4209575 (E.D. Mich. Aug. 26, 2014); *Owens v. Rodale, Inc.*, 2015 WL 575004 (E.D. Mich. Feb. 11, 2015); *Cain v. Redbox Automated Retail, LLC*, 981 F. Supp. 2d 674 (E.D. Mich. 2013).

Commentaries at *130-139). Here, the PPPA protects Plaintiffs rights to personal security of their Personal Reading Information. As such, the PPPA "has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts." *Id.* at 1549.

Second, "because Congress is well positioned to identify intangible harms that meet minimum Article III requirements, its judgment is also instructive and important." *Id.* Here, the Michigan Legislature recognized "that a person's choice in reading … is a private matter, and not a fit subject for consideration by gossipy publications." Complaint, Doc. No. 1, Ex. A., *Privacy: Sales, Rentals of Videos, etc.*, House Legislative Analysis Section, H.B. No. 5331, Jan. 20, 1989. Pursuant to *Spokeo*, that judgment is instructive and important towards determining whether a violation of the PPPA is a concrete injury.[2]

Hearst fails to address these points. Rather, Heart argues that "in order to constitute an injury-in-fact, an intangible harm must pose 'the risk of real harm.'" Hearst's Br. at 4. That argument finds no support in *Spokeo*, as the Supreme Court explicitly held the opposite. *See Spokeo*, 2016 S. Ct. at 1549 ("In other words, a plaintiff in such a case need not allege any *additional* harm beyond the one Congress has identified.").

Hearst's attempt to distinguish these actions from other cases where the violation of an affirmative right constituted an injury-in-fact fares no better. *See* Hearst's Br. at 4 n.3. Hearst

[2] Hearst reiterates its argument that "it has never been clear that a *state* legislature has the same power as Congress to elevate certain intangible harms to a concrete injury sufficient to satisfy Article III." Hearst's Br. at 5 n.4. But as Plaintiffs have previously explained, every appellate court to consider this question has held that a state legislature may elevate intangible harms to a concrete injury to satisfy Article III. *See* Ltr. From Joseph I. Marchese, Dated October 7, 2015, Doc. No. 36; *see also Beyond Systems, Inc. v. Kraft Foods, Inc.*, 777 F.3d 712, 716 (4th Cir. 2015); *FMC Corp. v. Boesky*, 852 F.2d 981, 993 (7th Cir. 1988); *Cantrell v. City of Long Beach*, 241 F.3d 674, 684 (9th Cir. 2001); *Utah ex rel. Div. of Forestry, Fire & State Lands v. United States*, 528 F.3d 712, 721 (10th Cir. 2008); *Katz v. Pershing, LLC*, 672 F.3d 64, 75 (1st Cir. 2012).

argues that *Federal Election Commission v. Akins*, 524 U.S. 11 (1998) and *Public Citizen v. Dep't of Justice*, 491 U.S. 440 (1989) are distinguishable because in "those cases, the statutes at issue conferred an affirmative right," while the PPPA "creates or confers no such affirmative individual right." Hearst's Br. at 4 n.3. But Hearst fails to address this Court's holding that the PPPA does "create[] for Plaintiff[s] a specific, enforceable legal right." *Boelter*, 2016 WL 361554, at *3.

Hearst also argues that a violation of the PPPA "could never give rise to a concrete harm based on the protection of any purported 'privacy interest,'" because "the Supreme Court has long recognized that … 'a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties.'" Hearst's Br. at 4 n.3 (quoting *Smith v. Maryland*, 442 U.S. 735, 743-44 (1979)). However, unlike in *Smith*, here a statute exists by which Plaintiffs "expect Defendant to keep private [their] identifying information." *Boelter*, 2016 WL 361554, at *3. Thus, even though Plaintiffs voluntarily turned over identifying information to Hearst when they subscribed to Hearst's magazines, they nonetheless had a reasonable expectation of privacy under the PPPA.

In sum, *Spokeo* reaffirms that the violation of a statute in and of itself is sufficient to confer Article III standing here. *Spokeo* only requires that a court consider whether violation of the statute at issue creates an injury that is both concrete and particularized, which this Court already did in its January 28, 2016 Order. *See Boelter*, 2016 WL 361554, at *3. *Spokeo*, therefore, does not deprive Plaintiffs of Article III standing.

B. Plaintiffs Have Also Alleged Concrete Injury In The Forms Of Receipt Of Unwarranted Junk Mail And Telephone Solicitations, Risk Of Identity Theft, And Overpayment

Even if the Court finds that a violation of the PPPA alone is not a concrete injury, Plaintiffs allege additional concrete injuries in the form of receipt of unwarranted junk mail and telephone solicitations, risk of identity theft, and overpayment.

1. Receipt Of Unwarranted Junk Mail And Telephone Solicitations

First, Plaintiffs allege that "[b]ecause Hearst sold and disclosed [their] Personal Reading Information, [they] now receive[] junk mail and telephone solicitations offering discounted magazine subscriptions, among other things. These unwarranted offers waste [their] time, money, and resources. These harassing junk mail offerings and phone call solicitations … are attributable to Hearst's unauthorized sale and disclosure of [their] Personal Reading Information." Consolidated Complaint, Doc. No. 67 ("Consol. Compl.") ¶¶ 7-8; *see also id.* ¶ 73. Following *Spokeo*, at least one district court has found that similar allegations sufficiently allege concrete injury under Article III. *See Booth v. Appstack, Inc.*, 2016 WL 3030256, at *5 (W.D. Wash. May 25, 2016). In *Booth*, the plaintiffs brought claims under the TCPA and the Washington Dialing and Announcing Device Act ("WADAD"). In analyzing whether the "Plaintiffs' allegations demonstrate[d] 'concrete' injury as elucidated in *Spokeo*," Judge Robart held:

> [T]he TCPA and WADAD violations alleged here, if proven, required Plaintiffs to waste time answering or otherwise addressing widespread robocalls. … The use of the autodialer, which allegedly enabled Defendants to make massive amounts of calls at low cost in a short period of time, amplifies the severity of this injury. As Congress and Washington State's legislature agreed, such an injury is sufficiently concrete to confer standing.

Id.

Hearst argues that this form of injury is insufficient because "there is no legal or factual basis to conclude that the receipt of unwanted junk mail is a concrete injury for purposes of Article III." Hearst's Br. at 8. But the *Booth* court's holding provides such a legal basis. Hearst also argues that "Plaintiffs' conclusory allegation … is unsupported by any factual allegations that might make such a claim plausible." *Id.* But at the motion to dismiss stage, the Court "must accept all factual allegations in the complaint as true, while also drawing all reasonable inferences in favor of the nonmoving party." *United States v. Painting Known and Described as Madonna and Child*, 2015 WL 108416, at *3 (S.D.N.Y. Jan. 6, 2015). And, in any event, Plaintiffs' allegations are entirely plausible, especially considering that Hearst has admitted that it "makes lists of its subscribers available to direct mail marketers." Hearst's Motion to Dismiss, Doc. No. 72-1, at 2.[3]

In sum, Plaintiffs' allegations that Hearst's sale and disclosure of their Personal Reading Information caused them to receive unwarranted junk mail offerings and telephone solicitations, thereby wasting their time, money, and resources, sufficiently allege a concrete injury, and thus confer Article III standing.

2. Risk Of Identity Theft

Second, Plaintiffs allege that Hearst's unlawful disclosures put them "at risk of serious harm from scammers." Consol. Compl. ¶ 42. The *Spokeo* Court specifically stated that "the risk of real harm" can "satisfy the requirement of concreteness." *Spokeo*, 136 S. Ct. at 1549. And, in the similar context of data breaches, courts have held that "the risk that Plaintiffs' personal data will be misused by … hackers … is immediate and very real." *In re Adobe Sys., Inc. Privacy Litig.*, 66 F. Supp. 3d 1197, 1214 (N.D. Cal. 2014). That "threatened harm" therefore "is

[3] Hearst's discussion of Plaintiff Boelter's Motion For A Preliminary Injunction is irrelevant to the pending Motion to Dismiss, as the standards for each are entirely different.

sufficiently concrete and imminent" to satisfy Article III standing. *Id.*; *see also Remijas v. Neiman Marcus Grp., LLC*, 794 F.3d 688, 694 (7th Cir. 2015) (holding that it was "plausible to infer that the plaintiffs have shown a substantial risk of harm from the Neiman Marcus data breach," thereby satisfying Article III standing); *Lewert v. P.F. Chang's China Bistro, Inc.*, 2016 WL 1459226, at *3 (7th Cir. Apr. 14, 2016) (holding that "the increased risk of fraudulent charges and identity theft … are concrete enough to support a lawsuit"); *In re Anthem, Inc. Data Breach Litig.*, 2016 WL 3029783, at *25-26 (N.D. Cal. May 27, 2016) (same). Thus, Plaintiffs' allegations that Hearst's unlawful disclosures put them "at risk of serious harm from scammers," satisfy the injury-in-fact requirement of Article III standing.[4]

3. Overpayment

Third, Plaintiffs allege that they "would not have been willing to pay as much, if at all, for [their magazine] subscription[s] had [they] known that Hearst would disclose [their] Personal Reading Information." Consol. Compl. ¶¶ 7-8, 70-73, 80-83. Courts have found that allegations of overpayment, such as these, are sufficient to confer Article III standing. *See, e.g.*, *In re Adobe Sys., Inc. Privacy Litigation*, 66 F. Supp. 3d at 1223-24 (allegations of overpayment based on lack of privacy protection conferred Article III standing); *In re Google, Inc. Privacy Policy Litig.*, 2013 WL 6248499, at *8 (N.D. Cal. Dec. 3, 2013) (same); *Goodman v. HTC Am., Inc.*, 2012 WL 2412070, at *5 (W.D. Wash. June 26, 2012) (same); *Wang v. OCZ Tech. Group, Inc.*, 276 F.R.D. 618, 628 (N.D. Cal. 2011) (same); *Doe 1 v. AOL, LLC.*, 719 F. Supp. 2d 1102, 1111 (N.D. Cal. 2010) (same).

In re Adobe Sys., Inc. Privacy Litigation is instructive. There, the "Plaintiffs allege[d] they personally spent more on Abode products than they would had they known Abode was not

[4] Hearst ignores this form of injury.

providing the reasonable security Abode represented it was providing." *In re Adobe Sys., Inc. Privacy Litig.*, 66 F. Supp. 3d at 1224. The court held that it was plausible that the plaintiffs "relied on Abode's representations regarding security to their detriment," and that it was "plausible that a company's reasonable security practices reduce risk of theft of customers' personal data and thus that a company's security practices have economic value." *Id.* Here, likewise, Plaintiffs allege that they "would not have been willing to pay as much, if at all, for [their magazine] subscription[s] had [they] known that Hearst would disclose [their] Personal Reading Information." Consol. Compl. ¶¶ 7-8. Thus Hearst's unlawful disclosures of their Personal Reading Information, in violation of the PPPA, caused them economic injury.

Khan v. Children's National Health System, 2016 WL 2946165, at *6 (D. Md. May 19, 2016), cited by Hearst, does not compel a different conclusion. There, the court held that the plaintiff did not have standing where she did not "allege any facts showing that she overpaid for [medical] services or that she would have sought those services from another provider had she been aware of the hospital's allegedly lax data security." *Id.* Here, however, Plaintiffs allege that they overpaid for their Hearst magazine subscriptions because they would not have been willing to pay the same price, if anything at all, had they known that Hearst would violate their PPPA rights. *Khan* is therefore distinguishable.[5]

In sum, Plaintiffs' allegations that they overpaid for their Hearst magazine subscriptions because they would not have been willing to pay the same price, if anything at all, had they known that Hearst would violate their PPPA rights are sufficient to confer Article III standing.

[5] Hearst also cites *In re Facebook Internet Tracking Litig.*, 2015 WL 6438744 (N.D. Cal. Oct. 23, 2015), but that case did not involve allegations of overpayment and is therefore inapposite.

II. THE AMENDED PPPA DOES NOT APPLY RETROACTIVELY AND THUS HAS NO IMPACT ON THESE ACTIONS

The recent amendments to the PPPA do not apply retroactively, and thus have no impact on these actions. Under Michigan law, statutory amendments "are presumed to operate prospectively unless the contrary intent *is clearly manifested*." *Frank W. Lynch & Co. v. Flex Technologies, Inc.*, 463 Mich. 578, 583 (2001) (emphasis added). "This is especially true if retroactive application of a statute would impair vested rights, create a new obligation and impose a new duty, or attach a disability with respect to past transactions." *Id.* "The Legislature's expression of an intent to have a statute apply retroactively must be clear, direct, and unequivocal as appears from the context of the statute itself." *Davis v. State Employees' Ret. Bd.*, 272 Mich. App. 151, 155-56 (2006) (citing *Chesapeake & O. R. Co. v. Pub. Service. Comm.*, 382 Mich. 8, 23 (1969)). As the Michigan Supreme Court recently stated, "[r]etroactive application of legislation presents problems of unfairness … because it can deprive citizens of legitimate expectations and upset settled transactions." *LaFontaine Saline, Inc. v. Chrysler Group, LLC*, 496 Mich. 26, 38 (2014) (internal quotations omitted). Thus, Hearst must overcome this heavy presumption in order for the Court to apply the Amended PPPA retroactively.

In determining whether a law has retroactive effect, Michigan courts consider four factors. "First, we consider whether there is a specific language providing for retroactive application. Second, in some situations [not presented here], a statute is not regarded as operating retroactively merely because it relates to an antecedent event. Third, in determining retroactivity, we must keep in mind that retroactive laws impair vested rights acquired under existing laws or create new obligations or duties with respect to transactions or considerations already past. Finally, a remedial or procedural act not affecting vested rights may be given

retroactive effect where the injury or claim is antecedent to the enactment of the statute." *Id.* at 38-39.

Here, the relevant factors all weigh against retroactivity. The Court should therefore hold that the Amended PPPA does not impact these actions.

A. The Amended PPPA Does Not Have Any Specific Retroactive Language

The Amended PPPA does not contain specific language providing for retroactive application. To the contrary, the text of Enacting Provision § 2 indicates prospective application. "The Michigan Supreme Court has repeatedly observed that the Michigan Legislature 'knows how to make clear its intention that a statute apply retroactively,' so the absence of express retroactive language is a strong indication that the Legislature did not intend a statute to apply retroactively." *Kia Motors Am., Inc. v. Glassman Oldsmobile Saab Hyundai, Inc.*, 706 F.3d 733, 739 (6th Cir. 2013) (citing *Brewer v. A.D. Transport Express, Inc.*, 486 Mich. 50, 56 (2010) (quoting *Frank W. Lynch & Co.*, 463 Mich. at 584) (providing examples of statutory amendments that expressly used the word "retroactive")); *see also LaFontaine Saline, Inc.*, 496 Mich. at 39-40 (same). Here, the Amended PPPA does not use any form of the word "retroactive" to describe its application. Additionally, the portions of the Provision at issue are written in the future tense. The Provision reads that the "amendatory act is *curative*." Amended PPPA, Enacting Provision § 2. The word "curative" does not denote retroactivity. The Michigan Legislature knows this as evidenced by other recent statutory amendments that supplemented the word "curative" with express retroactive language. *See, e.g., Daimler Chrysler Servs. of N. Am, LLC v. Dep't of Treasury*, 2010 WL 199575, at *2 n.1 (Mich. Ct. App. Jan. 21, 2010) ("The amendment to M.C.L. 205.54i also contains the following enacting provision … [t]his amendatory act is curative and *shall be retroactively applied*.") (emphasis added). Furthermore, the last clause of the Provision states "that a civil action for a violation of

those prohibitions *may only be brought* by a customer who has suffered actual damages as a result of the violation." Enacting Provision, § 2 (emphasis added). Had the Michigan Legislature wanted this provision to apply retroactively, it would have written this text in the past tense, *e.g.*, a civil action for violation of the PPPA "may *have* only been brought." *See Davis*, 272 Mich. App. at 157 ("Given the use of the language 'who becomes,' which is strictly in the future tense, as opposed to or coordinated with the use of 'who was,' 'who is,' or 'who became,' and taking into consideration the statute's effective date of March 27, 2002, the only logical conclusion is that the Legislature specifically intended the amendment to apply only to situations … [which] first arose on or after March 27, 2002.").[6]

Moreover, Enacting Provision § 1 states that "[t]his amendatory act takes effect 90 days after the date it is enacted into law." That gives the Amended PPPA an effective date of July 31, 2016, over a year after Ms. Boelter first filed her lawsuit. The Michigan Supreme Court "has recognized that 'providing a specific, future effective date and omitting any reference to retroactivity' supports a conclusion that a statute should be applied prospectively only." *Brewer*, 486 Mich. at 56 (quoting *White v. Gen. Motors Corp.*, 431 Mich. 387, 398-99 (1988)).[7]

Hearst nonetheless argues "[b]y using the words 'curative' and indicating the amendment 'clarified' the law, the Michigan legislature was indicating its clear intention" that the

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[6] Hearst argues that use of the past tense would render the Amended PPPA "meaningless and inapplicable to future actions." Hearst's Br. at 10-11 n.11. But that argument overlooks the fact that the Amended PPPA eliminates the statutory damages provision, thereby necessarily limiting future PPPA actions to those where the plaintiff suffers actual damages. Thus, writing Enacting Provision § 2 in the past tense would not render the Amended PPPA inapplicable to future actions – it would have instead given retroactive application.

[7] Hearst's assertion that the Michigan Legislature voted to give the Amended PPPA immediate effect is of little consequence. *See* Hearst's Br. at 9 n.10. Indeed, as Michigan courts recognize, "[w]hile the Legislature gave the amendatory acts … immediate effect, this does not suggest an intent to make the addition retroactively applicable." *Lenawee Co. v. Wagley*, 301 Mich. App. 134, 176 (2013).

amendment "be applied retroactively." Hearst's Br. at 11. That is wrong. Plaintiffs' counsel could not find a single instance where the Michigan Legislature relied solely on the phrase "curative and intended to clarify" to denote retroactivity. Indeed, two other recent Michigan statutory amendments supplement the phrase with clear retroactive language. *See* M.C.L. § 324.20140(4) ("Subsection (3) is curative and intended to clarify the original intent of the legislature *and applies retroactively*.") (emphasis added); M.C.L. § 208.1512, "Retroactive Application" Section ("P.A. 2011, No. 305, § 1 provides the amendatory act is curative and intended to clarify the original intent of P.A. 2007, No. 36, *and is retroactive* and effective for taxes levied on and after January 1, 2008.") (emphasis added). Hearst fails to explain why the Michigan Legislature did not supplement "curative and intended to clarify" with clear retroactive language, as it has in other recent statutory amendments.[8] Given that the Michigan Legislature knows how to do so, Hearst's argument must be rejected.

Moreover, at best, the text of Enacting Provision, § 2 is unclear as to what "curative and intended to clarify" addresses. The text reads "[t]his amendatory act is curative and intended to clarify that the prohibitions on disclosing information contained in 1988 PA 378 … do not prohibit disclosing information if it is incident to the ordinary course of business … , *and that* a civil action for a violation of those prohibitions may only be brought by a customer who has suffered actual damages as a result of the violation." Amended PPPA, Enacting Provision § 2 (emphasis added). The use of the comma denotes that "curative and intended to clarify" does not modify the clause regarding who may bring a civil action. At best, the use of the comma renders

[8] *People v. Sheeks*, 244 Mich. App. 584 (2001), cited by Hearst, is easily distinguishable. There, the accompanying legislative analysis stated that the amendments were intended to address a pending case. *See id.* at 590. The accompanying legislative analyses to the Amended PPPA do not mention any pending litigation. *See* Declaration of Joseph I. Marchese ("Marchese Decl.") Exs. A & B (House and Senate legislative analyses).

it vague whether "curative and intended to clarify" modifies the clause, thereby creating ambiguity, which must be construed against the drafter. *See Owen v. Bristol West Preferred Ins. Co.*, 2016 WL 930727, at *2 (Mich. Ct. App. Mar. 10, 2016) ("At most, the company's arguments indicate a potential ambiguity in the contract, which must be resolved against the drafter.").

Hearst further asserts that Section 3(d) of the Amended PPPA demonstrates that the Amended PPPA has retroactive application. Hearst's Br. at 11-12. That is wrong. Section 3(d) adds an entirely new exception to the PPPA that permits disclosures that are "incident to the ordinary course of business." Amended PPPA, § 3(d). Section 3(d) provides the only wholly new exception to the PPPA. Because of this, the Legislature included additional language that the "subdivision ***only applies to a record or information*** that is ***created or obtained after*** the effective date of the amendatory act." *Id.* (emphasis added). The Legislature's clear intent was to avoid creating a situation where older records (such as those of Plaintiffs) could now be lawfully disclosed under this new exception. In other words, the Legislature wanted to maintain the status quo for records created prior to the effective date of the Amended PPPA – that disclosure of such records under this new exception continues to be prohibited and actionable.[9] Thus, contrary to Hearst's assertion, this subdivision only serves to bolster Plaintiffs' argument against retroactivity. For example, it shows that the Legislature intended to maintain the status quo for records created prior to the effective date of the Amended PPPA.

[9] This fact defeats Hearst's argument that applying "the entire Amended VRPA only prospectively would be to render … Section 3(d) superfluous." Hearst's Br. at 12. Section 3(d) would not be superfluous because it would still reinforce that its exception is only applicable for records created or obtained after the effective date of the Amended PPPA.

Hearst's cited cases in support of this argument do not compel a different conclusion. First, Hearst cites the ***dissenting*** opinion in *Dow Chem. Co. v. Curtis*, 431 Mich. 471 (1988). But the majority opinion held that "[i]n the absence of any clear indication from the Legislature that retrospective operation was intended" the statutory amendment only applied prospectively. *Id.* at 482-83. Second, Hearst cites *People v. Bywater*, 2015 WL 2448684, at *10 (Mich. Ct. App. May 21, 2015), but the statutory amendment to M.C.L. § 769.1k, which was at issue in *Bywater*, contained clear retroactive language. *See* M.C.L. § 769.1k, Application Section ("[T]he amendatory act applies to all fines, costs, and assessments ordered or assessed before June 18, 2014, and after October 17, 2014."); *People v. Konopka*, 309 Mich. App. 345, 357 (2015) (finding amendments to M.C.L. § 769.1k were retroactive based on its clear retroactive language).[10]

Hearst also argues that the "legislature's intent to have the Amended VRPA apply … retroactively is [] clear from the bill's legislative history." Hearst's Br. at 12. That is wrong. Michigan courts "do not resort to legislative history to cloud a statutory text that is clear." *Chmielewski v. Xermac, Inc.*, 457 Mich. 593, 608 (1998). As the text of the Amended PPPA clearly does not denote retroactivity, *see supra*, Michigan law does not permit the Court to consult legislative history.[11] And, even when statutes are ambiguous, Michigan courts "question

[10] Hearst also incorrectly appeals to the canon of statutory construction *expressio unius est exclusion alterius*. *See* Hearst's Br. at 12. As Justice Scalia explained, the "doctrine properly applies only when the *unius* (or technically, *unum*, the thing specified) can reasonably be thought to be an expression of *all* that shares in the grant or prohibition involved." Antonin Scalia & Bryan A. Garner, *Reading Law: The Art of Interpreting Legal Texts* 107 (2012). Here, the subdivision at issue makes a distinction between records created or obtained <u>before</u> the effective date of the Amended PPPA and those created or obtained <u>after</u> the effective date of the Amended PPPA. It therefore clearly cannot be reasonably thought to be an expression of the entire statute.

[11] This Court has also rejected appeals to legislative history where "the statutory language … is clear." *Costantino v. U.S. Citizenship*, 2015 WL 8489976, at *2 (S.D.N.Y. Dec. 9, 2015).

whether the use of legislative histories is appropriate in analyzing any statute." *Detroit Edison Co. v. Celadon Trucking Co.*, 248 Mich. App. 118, 124 n.15 (2001).

Nonetheless, Hearst cites to floor statements made by State Senator Rebekah Warren and Ari J. Scharg. But Michigan courts, including the Michigan Supreme Court, have held that floor statements of individual Senators and others are "significantly less useful because they do not necessarily reflect the intent of the Legislature as a body." *People v. Gardner*, 482 Mich. 41, 58 (2008) (finding that "comments of a single state senator" are significantly less useful pieces of legislative history); *see also In re Complaint of MCTA*, 241 Mich. App. 344, 373 (2000) ("Even if legislative history incorporates individual legislators' statements in the course of debate or in postdebate reflection, there is no reasonable way to attribute these individual statements to the Legislature as a whole, much less at the climactic moment of the final vote itself."). Thus, Senator Warren and Mr. Scharg's floor statements are not useful towards determining whether retroactivity was intended.[12]

Moreover, even if the Court were permitted to look to legislative history, the legislative history supports Plaintiffs' position that the Amended PPPA does not apply retroactively as the legislative analyses say nothing about retroactive application, nor do they name or reference pending litigation. *See* Marchese Decl. Exs. A-B.

Hearst finally argues that "the legislature's intent that the Amended VRPA apply retroactively to pending cases is underscored by the fact that the amendment arose … amid debates concerning Article III standing … and the intended scope and parameters of the original Michigan VRPA." Hearst's Br. at 13. That is wrong for two reasons.

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[12] Hearst notes that Bursor & Fisher, P.A. is co-counsel with Mr. Scharg in another PPPA case, *Moeller v. Am. Media Inc.*, Case No. 16-cv-11367 (E.D. Mich.). That is entirely irrelevant to the pending motion. Mr. Scharg does not represent Ms. Boetler or Ms. Edwards, nor does he have any affiliation with Bursor & Fisher, P.A. or Carrey Rodriguez Millian Gonya, LLP.

First, there is and never was any "debate" concerning Article III standing and the PPPA. As Plaintiffs have stressed throughout this litigation, every single court to consider whether the PPPA's statutorily-defined damages award confers Article III standing has held that it does. *See Boelter*, 2016 WL 361554, at *3 ("[T]he court finds that … the VRPA creates for Plaintiff a specific, enforceable legal right to expect Defendant to keep private her identifying information … its violation constitutes a concrete, particularized deprivation. … If Defendant violated the statute by disclosing Plaintiff's personal information, it deprived Plaintiff of a right to which she was particularly entitled by law, constituting an injury-in-fact sufficient to confer standing."); *Halaburda*, 2013 WL 4012827, at *4, *6 (same); *Kinder*, 2014 WL 4209575, at *2 (same); *Owens*, 2015 WL 575004, at *4 (same); *Cain*, 981 F. Supp. 2d at 683 (same); *Deacon v. Pandora Media, Inc.*, 901 F. Supp. 2d 1166, 1172 (N.D. Cal. 2012) (same).

Second, while Hearst argues that the "Michigan legislature can be presumed to know of these controversies," the citations it provides contain very different scenarios. In *Detroit Edison Co. v. Michigan*, 320 Mich. 506 (1948) the Michigan Legislature amended a statute "to clarify the statute because of the differences of opinion existing between the department of revenue, and the board of tax appeals." *Id.* at 521. There is no such difference of opinion here as every court to consider whether the PPPA's statutorily-defined damages award confers Article III standing has held that it does. And in *Romein v. Gen. Motors Corp.*, 168 Mich. App. 444 (1988) the statutory amendment at issue specifically stated that "[t]he decision of the Michigan Supreme Court in *Franks v. White Pine Copper Division*, 422 Mich. 636 (1985) is declared to have been erroneously rendered." *Id.* at 450. Accordingly, the Legislature there made clear it was addressing that decision. Here, by contrast, the Legislature did not name or reference *Halaburda* or any of the other recent decisions addressing the PPPA.

In sum, the Amended PPPA does not include any express language denoting retroactivity, and therefore does not "clearly manifest" an intent by the Michigan Legislature that it be applied retroactively. *Frank W. Lynch & Co.*, 463 Mich. at 583. In these circumstances, Michigan courts do not apply statutory amendments retroactively.

B. Retroactive Application Of The Amended PPPA Would Impermissibly Impair Plaintiffs' Vested Rights

Even if the Legislature's intent against retroactivity was not clear, the third factor[13] of the *LaFontaine Saline* test weighs against retroactivity as it would impair Plaintiffs' vested rights. Under Michigan law, "[a] statute may not be applied retroactively if it abrogates or impairs vested rights." *Davis*, 272 Mich. App. at 158. The Michigan Supreme Court has long held that "a statutory right of action for damage to person or property, which has accrued, is a vested right and likewise to be protected." *Minty v. Bd. of State Auditors*, 336 Mich. 370, 391 (1953); *see also In re Certified Questions from the U.S. Court of Appeals for the Sixth Circuit*, 416 Mich. 558, 573 (1982) ("The general rule against retrospective application has been applied in cases where a new statute abolishes an existing cause of action. It is clear that once a cause of action accrues, – *i.e.*, all the facts become operative and are known – it becomes a "vested right." … A new statute which abolishes an existing cause of action brings the statute within the general proscription of rule three."); *Doe v. Dep't of Corrections*, 249 Mich. App. 49, 61-62 (2001) ("A cause of action becomes a vested right when it accrues and all the facts become operative and known. Plaintiffs' cause of action accrued and all the facts became operative and known before the effective date of 1999 PA 201. Retroactive application of the [statute] would impair plaintiffs' cause of action."). Thus, retroactive application of these amendments would

[13] The second *LaFontaine Saline* factor is not applicable to the circumstances of this case.

impermissibly impair Plaintiffs' vested rights, which accrued when Plaintiffs discovered that Hearst had disclosed their Personal Reading Information.

Moreover, retroactive application would "present[] problems of unfairness," because it would "deprive [Plaintiffs] of legitimate expectations and upset settled transactions." *LaFontaine Saline, Inc.*, 496 Mich. at 38. As alleged in the Consolidated Complaint, Plaintiffs "would not have been willing to pay as much, if at all, for [their magazine] subscription[s] had [they] known that Hearst would disclose [their] Personal Reading Information." Consol. Compl. ¶¶ 7-8, 70-73, 80-83. But the amendments to the PPPA significantly alter the privacy protections afforded by the Act. For example, the Amended PPPA significantly alters the "exclusively for direct marketing" exception because it removes the word "exclusive," provides for additional forms of acceptable written notice, and even permits Hearst to disclose a customer's name for 30 days after that customer provides written notice to Hearst instructing that it discontinue disclosing her name. *See* Section 3(e). Thus, retroactive application of the Amended PPPA would deprive Plaintiffs of legitimate expectations they had under the law when they subscribed to Hearst's magazines and at the time they commenced this action. *See Neal v. Dep't of Corrections*, 2005 WL 326883, at *8 (Mich. Ct. App. Feb. 10, 2005) ("The record displays that several members of the class had vested claims pending … at the time the statutory amendment became effective. The amendment during the pendency of the class action has no bearing on those rights because they were fixed by law before the amendment.").

Hearst counters by arguing that Plaintiffs' statutory cause of action under the PPPA is not a vested right. *See* Hearst's Br. at 15-16. Hearst primarily relies on *Lahti v. Fosterling*, 357 Mich. 578 (1959), but as other courts have recognized, the holding in *Lahti* is directly at odds with more recent binding Michigan Supreme Court precedent from *In re Certified Questions*,

416 Mich. 558 (1982). *See, e.g.*, *Doe*, 249 Mich. App. 49 at 61-62 ("A cause of action becomes a vested right when it accrues and all the facts become operative and known. Plaintiffs' cause of action accrued and all the facts became operative and known before the effective date of 1999 PA 201. Retroactive application of the [statute] would impair plaintiffs' cause of action."); *Neal*, 2005 WL 326883, at *8 ("[W]e conclude that the amendment … should not be applied to any claims that had already vested when the amendment became effective.") (citing *In re Certified Questions*, 416 Mich. 558 (1982)); *Fire Ins. Exchange v. County of Kent*, 2004 WL 2050302, at *2 (Mich. Ct. App. Sept. 14, 2004) ("Once a cause of action accrues, it becomes a vested right. … Here, the tort was complete, and the cause of action arose … on May 18, 2000, before the effective date of 2001 PA 222. Accordingly, we hold that 2001 PA 222, which took effect after plaintiffs' cause of action accrued … does not apply to preclude plaintiffs' claim.").[14]

Hearst's other cited cases do not compel a different conclusion. First, *Bay City E.S.R. Co. v. Austin*, 21 Mich. 390 (1870) predates *In re Certified Questions* and is therefore inapplicable. Second, *Attorney General v. Flint City Council*, 269 Mich. App. 209 (2005) did not involve a statutory right which had accrued, rather it involved a decision by the emergency financial manager for the City of Flint, which was authorized by statute. It also did not involve a statutory amendment. *Id.* at 210, 215-16. Third, *Township of Van Buren v. Garter Belt Inc.*, 258 Mich. App. 594 (2003) involved a constitutional challenge to a town ordinance that prohibited nudity at establishments licensed to sell liquor. *Id.* at 632-33. It did not involve a statutory right which had accrued, nor did it involve a statutory amendment. *Id.*

[14] "[M]ore recent cases from the Michigan Supreme Court cast doubt on *Lahti*'s broad language." *Kia Motors Am., Inc. v. Glassman Oldsmobile Saab Hyundai, Inc.*, 2012 WL 175489, at *5 (E.D. Mich. Jan. 23, 2012) (citing *White*, 431 Mich. at 429).

Thus, as in *Doe*,[15] *Neal*, and *Fire Ins. Exchange*, Plaintiffs' causes of action accrued, and became vested rights, prior to the effective date of the Amended PPPA. Accordingly, retroactive application of the Amended PPPA would impermissibly impair Plaintiffs of their vested rights. This factor therefore also weighs against retroactivity.

C. The Amended PPPA Is Not Merely Remedial Or Procedural

The fourth factor of the *LaFontaine Saline* test also weighs against retroactivity as the amendments to the PPPA are not merely remedial or procedural. In applying this factor, Michigan courts "have rejected the notion that a statute significantly altering a party's substantive rights should be applied retroactively merely because it can also be characterized in a sense as remedial." *Frank W. Lynch & Co.*, 463 Mich. at 585; *see also White*, 431 Mich. at 397 ("[W]e prefer the narrower meaning, in which the term remedial is often employed to describe legislation which is procedural in nature, i.e., it does not affect substantive rights.") (internal quotations and citations omitted). Thus, "the term 'remedial' in this context should only be employed to describe legislation that does not affect substantive rights." *Frank W. Lynch & Co.*, 463 Mich. at 585. As described above, the Amended PPPA significantly alters the privacy protections afforded by the Act. *See supra* at 22. It therefore is not merely remedial or procedural. *See, e.g.*, *Brewer*, 486 Mich. at 58 (amendment was not remedial or procedural where it "imposed a new legal burden on out-of-state employers").

Hearst nonetheless argues that the "Amended VRPA is clearly remedial" because, according to Hearst, "[i]t creates no new substantive rights. It takes away no substantive rights."

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[15] *Doe* is also instructive because the statutory amendment at issue stated that the "amendatory act is curative and intended to correct any misinterpretation of legislative intent in the court of appeals decision in *Doe v. Department of Corrections*, 236 Mich. App. 801 (1999)." *Doe*, 249 Mich. App. at 57. Despite that language, the Court of Appeals of Michigan still refused to apply the statute retroactively because doing so would have impermissibly impaired vested rights. *Id.* at 61-63.

Hearst's Br. at 15. That is belied by Hearst's admission that the "clarifications provided by the Amendment are extensive." *Id.* at 8. Hearst even included a four page chart detailing the extent of the amendments. *See* Doc. No. 78-1, Ex. B. In the end, the Amended PPPA significantly alters the privacy protections afforded by the Act. Amendments of that magnitude do not qualify as "remedial" under Michigan law.[16]

Hearst also argues that a remedy made available by a statute is not a vested right. Hearst's Br. at 15-16. But Michigan courts reject that argument as well. *See Lenawee Co.*, 301 Mich. App. at 175-76 ("Although subsection (5) is distinguishable from a statute conferring a substantive right because it relates to the remedy available … the amendment creates new obligations, which counsels against retroactive application. Irrespective of whether a statute qualifies as procedural or remedial, a court may not retroactively apply the statute if this application would abrogate or impair vested rights."); *see also id.* at 177 (holding rights vested when action was filed because that is when "[t]he potential for damages arose").

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court deny Hearst's Motion to Dismiss in its entirety.

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[16] Hearst's citations to *In re Certified Questions*, 416 Mich. 558 (1982) and *Allstate Ins. Co. v. Faulhaber*, 157 Mich. App. 164 (1987) are inapposite. The amendment at issue in *In re Certified Questions* did "not bar any claim, legal or equitable," it merely "mitigate[d] damages in products liability actions." *In re Certified Questions*, 416 Mich. at 577. The Amended PPPA, by contrast, requires actual damages for standing, and significantly alters the privacy protections afforded by the Act. And the statutory amendment at issue in *Allstate Ins. Co.* was remedial or procedural because it "did not create a new substantive right for insurance companies, but instead simply provided for a definitive statute of limitations in reimbursement actions. Prior to the statutory amendment, no clear statute of limitations existed in such actions." *Allstate Ins. Co.*, 157 Mich. App. at 167.

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Respectfully submitted,

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