No. 20-297

IN THE
Supreme Court of the United States

TRANSUNION LLC,

Petitioner,

v.

SERGIO L. RAMIREZ,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR AMICI CURIAE NATIONAL CONSUMER LAW CENTER, ET AL. IN SUPPORT OF RESPONDENT

John G. Albanese
Counsel of Record
BERGER MONTAGUE PC
43 SE Main Street
Suite 505
Minneapolis, MN 55414
(612) 594-5997
jalbanese@bm.net

Chi Chi Wu
Ariel Nelson
NATIONAL
CONSUMER LAW
CENTER
7 Winthrop Square
4th Floor
Boston, MA 02210
(617) 542–8010
cwu@nclc.org
anelson@nclc.org

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF THE *AMICI CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT 3

ARGUMENT 6

I. The Consumer Reporting Industry Is Massive, and Inaccurate Reports Are a Widespread and Persistent Problem 6

II. Consumer File Disclosures Are Crucial to the FCRA's Ultimate Purpose of Ensuring Fair and Accurate Credit Reporting 9

A. The Statutory Rights Provided to Consumers Ensure Accurate Reporting 9

B. Legislative History Shows the Importance of File Disclosures 11

III. The Credit Reporting Systems Breaks Down When CRAs Fail to Comply with the File Disclosure and Summary of Rights Requirements 16

IV. TransUnion's Violations of the FCRA's File Disclosure and Summary of Rights Requirements Cause Concrete Harm 18

V. A Holding That There Was No Concrete Harm Would Render Unenforceable Federal Consumer Protection Laws That Rely Heavily on Disclosure Requirements 23

CONCLUSION 25

TABLE OF AUTHORITIES

Constitutional Provisions

Article III, U.S. Constitution 5, 6, 21, 23, 25

Statutes

15 U.S.C. §§ 1601–1693r 24, 25

15 U.S.C. § 1681, *et seq.* ..... *passim*

Cases

Cortez v. Trans Union, LLC, 617 F.3d 688 (3d Cir. 2010) 4, 5, 16, 17, 18, 23

Fed. Election Comm'n v. Akins, 524 U.S. 11 (1998) 21

Fernandez v. CoreLogic Credco, LLC, Case No. 3:20-cv-1262-JM-AGS (S.D. Cal. Sept. 28, 2020) 23

Gillespie v. Equifax Info. Servs., L.L.C., 484 F.3d 938 (7th Cir. 2007) 20, 21

Larson v. Trans Union, LLC, 201 F. Supp. 3d 1103 (N.D. Cal. 2016) 22

McIntyre v. TransUnion LLC, No. CV 18-3865, 2020 WL 1150443 (E.D. Pa. Mar. 5, 2020) 20

Spokeo, Inc. v. Robins, 136 S. Ct. 1540 (2016), *as revised* (May 24, 2016) 21

Uzuegbanum v. Preczewski, 592 U.S. —— (2021) 21

Legislative Material

H.R. 1015, 103rd Cong. § 120 (1994) 15

S. 783, 103rd Cong. § 116 (1994) 14

115 Cong. Rec. 2410 (Jan. 31, 1969) 12

116 Cong. Rec. 36,572 (Oct. 13, 1970) 13

140 Cong. Rec. 8942 (May 2, 1994) 14

S. Rep. No. 103-209 (1993) 14

S. Rep. No. 104-185 (1995) 16

H. R. Rep. No. 103-486 (1994) 15

Regulations

12 C.F.R. § 1022.140(a) 20

Secondary Material

Consumer Fin. Prot. Bureau, *Data Point: Credit Invisibles* (2015), https://files.consumerfinance.gov/f/201505_cfpb_data-point-credit-invisibles.pdf 7

Consumer Fin. Prot. Bureau, *List of Consumer Reporting Companies* (2021),

https://files.consumerfinance.gov/f/documents/cfpb_consumer-reporting-companies-list_2021.pdf 7

Fed. Trade Comm'n, *Report to Congress under Section 319 of the Fair and Accurate Transactions Act of 2003* (2012), https://www.ftc.gov/sites/default/files/documents/reports/section-319-fair-and-accurate-credit-transactions-act-2003-fifth-interim-federal-trade-commission/130211factareport.pdf 7

Californians for Consumer Privacy, *ICYMI: Summary of Key Findings from California Privacy Survey* (Oct. 16, 2019), https://www.caprivacy.org/icymi-summary-of-key-findings-from-california-privacy-survey/ 9

Ariel Nelson, Nat'l Consumer Law Ctr., *Broken Records Redux: How Errors by Criminal Background Check Companies Continue to Harm Consumers Seeking Jobs and Housing* (2019), https://www.nclc.org/images/pdf/criminal-justice/report-broken-records-redux.pdf 7

Chi Chi Wu & Katie Plat, Nat'l Consumer Law Ctr. & Cities for Financial Empowerment Fund, *Account Screening Consumer Reporting Agencies Impede Access for Millions* (2015), https://www.nclc.org/images/pdf/pr-reports/Account-Screening-CRA-Agencies-BankingAccess101915.pdf 8

INTEREST OF THE *AMICI CURIAE*

The National Consumer Law Center (NCLC) is a national nonprofit research and advocacy organization that works for consumer justice and economic security for low-income and other disadvantaged people, including older adults.[1] NCLC draws on fifty years of expertise regarding the Fair Credit Reporting Act (FCRA) and its protections for consumers. NCLC provides information, legal research, and policy analysis to Congress, state legislatures, administrative agencies and courts. NCLC publishes *Fair Credit Reporting* (9th ed. 2018), the definitive treatise on the FCRA. Its interest in this appeal flows from its efforts to protect the integrity of the FCRA and the rights of consumers under the Act. The Supreme Court of the United States has cited NCLC's treatises with approval.

United States Public Interest Research Group Education Fund, Inc. (U.S. PIRG Education Fund) is an independent 501(c)(3) organization that works for consumers and the public interest. Through research, public education, and outreach, it serves as a counterweight to the powerful special interests that threaten our health, safety, and well-being. U.S. PIRG Education Fund regularly participates as

---

[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this *amici* brief in whole or in part and no person or entity, other than *amici* or their counsel, made a monetary contribution to the preparation or submission of the brief.

Pursuant to Rule 37.3(a), *amici* state that the parties have consented to the filing of this brief.

amicus curiae in cases that will have a substantial impact on consumers and the public interest, such as this one. U.S. PIRG Education Fund has been active in investigating problems with, and suggesting reforms to, the credit reporting industry to protect consumers for over 30 years.

Consumer Action has been a champion of underrepresented consumers nationwide since 1971. A non-profit 501(c)(3) organization, now in its 50th year, Consumer Action focuses on consumer education that empowers low-and moderate-income and limited-English-speaking consumers to financially prosper. Consumer Action's mission is to educate and advocate for consumers who face an imbalance of power in the marketplace. For decades, Consumer Action has worked to improve the accuracy and reliability of credit reports and credit scores, to hold credit reporting agencies accountable for the information they retain and sell, and to improve the dispute process for individuals who risk loss of access to credit, employment, housing and insurance because of inaccurate data connected to their names in credit bureau files. Consumer Action has advocated before lawmakers and regulators to advance consumer rights and promote industry-wide change.

Americans for Financial Reform Education Fund (AFREF) is an independent, nonprofit coalition of more than 200 consumer, investor, labor, civil rights, business, faith-based, and community groups working to lay the foundation for a strong, stable, and ethical financial system. Through policy analysis, education, and outreach, AFREF actively engages in advocacy for

stronger consumer financial protections, including protecting the rights of consumers with regard to credit reports. AFREF's interest in this appeal comes from its advocacy to protect the rights of consumers under the FCRA as the statute intended.

The Consumer Federation of America (CFA) is an association of non-profit consumer organizations that was established in 1968 to advance the consumer interest through research, advocacy, and education. Today, nearly 250 of these groups participate in the federation and govern it through their representatives on the organization's Board of Directors. As a research organization, CFA investigates consumer issues, behavior, and attitudes and publishes these findings in reports that assist consumer advocates and policymakers as well as individual consumers. As an advocacy organization, CFA works to advance pro-consumer policies on a variety of issues before Congress, the White House, federal and state regulatory agencies, state legislatures, and the courts. As an educational organization, CFA disseminates information on consumer issues to the public and news media, as well as to policymakers and other public interest advocates. CFA promotes consumer protection by advocating for strong laws and regulation, encouraging enforcement of existing consumer protection laws, such as the FCRA.

INTRODUCTION AND SUMMARY OF ARGUMENT

Enacted over 50 years ago, the Fair Credit Reporting Act (FCRA) has never been more important

to ensure accuracy in the credit reporting industry and to protect consumers. In this era of Big Data, the consumer reporting industry is rapidly expanding, and consumer reports include many different and varied types of information. It is getting harder and harder for consumers to keep track of what is being reported about them and whether such information is accurate.

The FCRA provides three core rights that allow consumers to ensure that information contained in consumer reports is accurate: (1) a consumer must be informed when a consumer report is used against them, 15 U.S.C. § 1681m; (2) a consumer must be allowed to see what information their file contains, *id.* § 1681g; and (3) consumers have the right to dispute inaccurate information, *id.* § 1681i. When a consumer is provided an adverse action notice, a file disclosure, or the results of a reinvestigation, Congress required that the consumer be given a notice detailing their rights.

These three rights work together, and when a consumer reporting agency (CRA) disregards one of these rights and fails to provide the consumer the required notice detailing their rights, like TransUnion did here, the system designed by Congress breaks down. As illustrated in this case and its predecessor litigation, *Cortez v. Trans Union, LLC*, 617 F.3d 688 (3d Cir. 2010), when a CRA does not disclose all information that it includes in a consumer report or discloses that information in a confusing manner, consumers are not informed as to what is in their reports and how to get them corrected.

The legislative history of the disclosure requirement, 15 U.S.C. § 1681g(a), shows that Congress recognized that one of the primary ways to ensure accuracy in credit reporting was to give consumers full access to their files. TransUnion, however, has repeatedly attempted to avoid compliance with Section 1681g(a). Even after the *Cortez* decision, wherein the Third Circuit unequivocally held that Office of Foreign Asset Control (OFAC) information included on a consumer report had to be disclosed when a consumer requested their file disclosure, TransUnion did not disclose OFAC information with the rest of the consumer file. Instead, TransUnion sent a separate letter without the Summary of Rights required by Section 1681g(c), leaving consumers in the dark about how to dispute being falsely labeled a potential terrorist or drug dealer.

Under the FCRA, it is not enough to simply make the disclosure of the consumer's file. The disclosure must be clear and understandable to the consumer in order to allow them to determine the accuracy of the information. TransUnion's failure to comply with Section 1681g(a) and Section 1681g(c) was not merely procedural or technical. Rather, this failure harmed consumers' concrete interests in knowing what is being reported about them and how to correct erroneous information.

TransUnion's arguments regarding Article III standing, if adopted by this Court, would not only undermine the credit reporting system, but also many

other aspects of federal consumer law. A large portion of federal consumer law is based around the provision of clear and accurate disclosures of information so that consumers can be fully informed when making important financial, and other, decisions. If the Court finds that a significant violation of these disclosure rights, like those present in this case, may not cause concrete harm sufficient for Article III standing, it would undermine these important protections, many of which have been in place for decades.

ARGUMENT

I. The Consumer Reporting Industry Is Massive, and Inaccurate Reports Are a Widespread and Persistent Problem.

The Fair Credit Reporting Act (FCRA) was enacted over 50 years ago, and its core protections have never been more vital for consumers. The vast and growing types of consumer reporting agencies (CRAs) that collect, compile, analyze, score, and sell highly sensitive and personal information about consumers makes the FCRA's file disclosure requirements even more important than they were half a century ago. Without these protections and rights, consumers would have no access to the information that thousands of CRAs are collecting and supplying to creditors, landlords, employers, and other third parties.

In the United States, nearly 200 million people have credit files with one of the Big Three credit

bureaus, TransUnion, Equifax, and Experian.[2] Widespread, inaccurate credit reporting among the Big Three remains a persistent problem. In 2012, a Federal Trade Commission (FTC) study found that 20 percent of consumers had a verified error in their credit reports.[3]

Moreover, the consumer reporting industry is not limited to the Big Three credit bureaus. The industry is immense, wide-ranging, and growing, with thousands of companies creating and disseminating consumer reports.[4] These reports go far beyond reporting mortgages, credit cards, and other lines of credit typically seen in the reports produced by the

---

[2]Consumer Fin. Prot. Bureau, *Data Point: Credit Invisibles* 9, 12 (2015), available at https://files.consumerfinance.gov/f/201505_cfpb_data-point-credit-invisibles.pdf.

[3]Fed. Trade Comm'n, *Report to Congress under Section 319 of the Fair and Accurate Transactions Act of 2003*, at 25 (2012), available at https://www.ftc.gov/sites/default/files/documents/reports/section-319-fair-and-accurate-credit-transactions-act-2003-fifth-interim-federal-trade-commission/130211factareport.pdf.

[4] *See* Ariel Nelson, Nat'l Consumer Law Ctr., *Broken Records Redux: How Errors by Criminal Background Check Companies Continue to Harm Consumers Seeking Jobs and Housing* 7–8 (2019), available at https://www.nclc.org/images/pdf/criminal-justice/report-broken-records-redux.pdf. The Consumer Financial Protection Bureau publishes a partial list of some of the larger consumer reporting agencies. Consumer Fin. Prot. Bureau, *List of Consumer Reporting Companies* (2021), https://files.consumerfinance.gov/f/documents/cfpb_consumer-reporting-companies-list_2021.pdf.

Big Three. Especially today, in this era of Big Data, the amount of information that is collected and reported on individuals is staggering.

For instance, there are hundreds, if not thousands, of CRAs that specialize in employment and tenant screening. These CRAs frequently provide near-instant criminal background checks derived from vast databases of public records that often contain incomplete or outdated information and incorrectly match the wrong consumers to those records with overly loose matching criteria. As a result, these background check reports are frequently inaccurate or incomplete. *See id.* at 6–7.

There are also CRAs that specialize in bank account information and report on purported account abuse.[5] Insurance companies use specialty CRAs that provide information used in insurance underwriting for property, auto, and personal property insurance.[6] Other CRAs report telecom and utility bill payments.[7] Medical information is also included in some consumer reports and is scored, providing life insurers

---

[5] *See* Chi Chi Wu & Katie Plat, Nat'l Consumer Law Ctr. & Cities for Financial Empowerment Fund, *Account Screening Consumer Reporting Agencies Impede Access for Millions* 5–6 (2015), available at https://www.nclc.org/images/pdf/pr-reports/Account-Screening-CRA-Agencies-BankingAccess101915.pdf.

[6] LexisNexis Risk Solutions https://risk.lexisnexis.com/products/clue-property.

[7] Nat'l Consumer Telecom & Utilities Exchange, https://www.nctue.com/.

with a relative mortality risk.[8] One CRA even provides reports on customer returns to retail stores.[9]

It is getting more and more difficult for consumers to keep abreast of who is collecting their personal information, what information is being reported, and how the information is being used. Yet consumers want to know what information is being reported about them. This is why expansive data privacy laws like the recently passed California Consumer Privacy Act enjoy wide popular support.[10]

II. Consumer File Disclosures Are Crucial to the FCRA's Ultimate Purpose of Ensuring Fair and Accurate Credit Reporting.

A. The Statutory Rights Provided to Consumers Ensure Accurate Reporting.

Congress enacted the FCRA because consumers, along with creditors, employers, and other users of consumer reports, have an interest in ensuring that consumer reports are accurate. *See* 15 U.S.C. § 1681(a)(1) (setting forth Congressional finding that

---

[8]Millman Intelliscript, https://www.rxhistories.com/irix/medical-data/.

[9] The Retail Equation, https://www.theretailequation.com/.

[10] Californians for Consumer Privacy, *ICYMI: Summary of Key Findings from California Privacy Survey* (Oct. 16, 2019), https://www.caprivacy.org/icymi-summary-of-key-findings-from-california-privacy-survey/ (noting that nearly 9 out of 10 voters approved of ballot measure that would expand consumer privacy rights).

"inaccurate credit reports directly impair the efficiency of the banking system, and unfair credit reporting methods undermine the public confidence which is essential to the continued functioning of the banking system"). To accomplish this goal, the FCRA requires CRAs to "use reasonable procedures to assure maximum possible accuracy" in producing reports. *Id.* § 1681e(b).

Congress also provided rights to consumers so that consumers could take steps to ensure that their reports are accurate. In particular, the FCRA grants consumers with three essential rights that work together to ensure fairness and accuracy in consumer reporting: the right to an adverse action notice, the right to a file disclosure, and the right to dispute information.

First, a consumer is required to be told when a consumer report is used against them. Consumer reports can be obtained for many purposes and often times without the consumer's knowledge or express authorization. *Id.* § 1681b. If a user of a consumer report relies on information in the report to take an adverse action against the consumer, the user must inform the consumer and provide the identity of the CRA from which the information was obtained. *Id.* § 1681m(a). The user must also provide a notice of the consumer's right to obtain a copy of the report and dispute the information in the report. *Id.* § 1681m(a)(4).

Second, the consumer has a right to request all information in their file at the time of the request from

a CRA. *Id.* § 1681g(a). When a CRA discloses such information, the agency must provide a Summary of Rights that has been prepared, formerly by the Federal Trade Commission (FTC) and now by the Consumer Financial Protection Bureau. *Id.* § 1681g(c)(2). The Summary of Rights includes critical information for consumers, including information regarding the consumer's right to dispute any inaccurate information.

Third, the consumer has the right to dispute any inaccurate information. The CRA must reinvestigate the information and notify the consumer of the results of the reinvestigation. *Id.* § 1681i. When the CRA provides the notice of its reinvestigation, it must provide the consumer with information about the consumer's right to add a statement disputing the accuracy or completeness of the information. *Id.* § 1681i(a)(6).

Any derogation of any of these rights severely damages the functioning of a fair and accurate credit reporting system. If consumers cannot meaningfully find out what is in their reports and how to dispute that information, inaccuracies in reports will persist.

B. Legislative History Shows the Importance of File Disclosures.

Congress adopted Section 1681g(a) not only because it believed consumers should have a right to see the information that CRAs were providing to creditors and others about them, but also to promote the accuracy of credit reports. Congress has

repeatedly emphasized the importance of these goals. CRAs, on the other hand, have consistently attempted to avoid compliance with Section 1681g(a).

Since the beginning, i.e., the debates in the late 1960s that led to the passage of the FCRA in 1970, Congress expressed concerns that consumers did not have adequate access to their credit reporting files. Senator William Proxmire, considered the father of the FCRA, decried the fact that:

> Many credit reporting agencies refuse to show consumers their files possibly out of fear of litigation and partly to protect its information sources. Retail Credit will neither confirm nor deny that it made a report on an individual on the grounds that if it did so, its information would dry up, litigation would increase, and its reporting activities would be slowed down. This argument is but another example of the needs of business taking precedence over consumer rights.

115 Cong. Rec. 2410 (Jan. 31, 1969).

To address this concern, Congress added a provision to the original FCRA as enacted in October 1970 requiring CRAs to, upon the consumer's request, "clearly and accurately disclose to the consumer: (1) The nature and substance of all information (except medical information) in its files on the consumer at the time of the request." 15 U.S.C. § 1681g(a) (1970).

According to Congresswoman Lenore Sullivan, often considered the mother of the FCRA:

> The term 'nature and substance of all information' was discussed by the conferees, and it was agreed that the only prohibition intended by the term was to limit the individual from physically handling his file . . . we stressed that the consumer should have access to all information in any form which would be relayed to a prospective employer, insurer or creditor.

116 Cong. Rec. 36,572 (Oct. 13, 1970).

However, CRAs took liberties with this language, claiming that it only required them to provide summaries of the credit reports of consumers, and not the actual contents. Congress was concerned enough about this practice that, in the 1996 Reform Act Amendments, it modified the language of Section 1681g(a) to its current form to state that CRAs are required, upon request, to "clearly and accurately disclose to the consumer: (1) All information in the consumer's file at the time of the request."

In debating the bills that led to the 1996 Reform Act Amendments, Congress repeatedly noted the importance of the disclosure of *all* information in a consumer's file held by a CRA, especially to fulfill the purpose of promoting accuracy in credit reporting. For example, Senator Richard Bryan (D-Nev.) who was a lead co-sponsor in the Senate of the 1996

Reform Act Amendments, stated when introducing the bill:

> Accurate credit reports, as I have indicated, are in everyone's best interest—the consumer, the credit bureau, and the business which bases its credit approval on these reports.
>
> Mr. President, it is my belief the best way to improve the accuracy of credit reports is for individuals to review their own files.

140 Cong. Rec. at 8942 (May 2, 1994).

The Senate Committee on Banking, Housing, and Urban Affairs stated in its report regarding S. 783, 103rd Cong. § 116 (1994), an earlier version of the bill that became the 1996 Reform Act, that "[t]he Committee believes that enhancing consumers' access to their credit reports is an effective step towards ensuring an accurate credit reporting system." S. Rep. No. 103-209, at 5 (1993). It also stated:

> The Committee bill also enhances the quality of the report information that consumers receive. Under current law, consumer reporting agencies must provide consumers, upon request, with "the nature and substance of all information (except medical information) in its files on the consumer." This has been interpreted to

> allow a consumer reporting agency to comply by providing summaries of reports to consumers. The Committee is concerned, however, that this does not provide consumers with sufficient access to their report information. Therefore, section 106 of the Committee bill requires consumer reporting agencies to disclose "all information in the consumer's file at the time of the request."

Id. at 16–17.

Similarly, when an earlier version of the 1996 Reform Act, H.R. 1015, 103rd Cong. § 120 (1994), was introduced, the House Financial Services Committee stated that:

> The bill is intended to provide consumers with increased information about their files and rights under the FCRA, and to make available to consumers alternative and more convenient forms in which to receive the contents of their files.
>
> . . . Such information is all information on a consumer that is maintained by a consumer reporting agency that might be furnished, or has been furnished, in a consumer reports on that consumer.

H. R. Rep. No. 103-486, at 39 (1994).

The Senate Committee on Banking, Housing, and Urban Affairs also expressed its concern that the CRAs not only disclose all the information in a consumer's file, but that the disclosure be comprehensible, stating "the Committee expects that report information will be provided in a form that can be understood by the average consumer." S. Rep. No. 104-185, at 43 (1995).

Thus, since the beginning, Congress emphasized the importance of ensuring that consumers have access to all of the information that CRAs have about them that may be included in a consumer report. Congress wanted to prevent the CRAs from editing information by providing summaries, or as in this case, sending information in a separate document, thereby hindering consumers' access to their own information. Furthermore, Congress wanted this information to be in a form that was clear and understandable to the average consumer, which as a jury has held, TransUnion did not achieve when it disclosed the Office of Foreign Asset Control (OFAC) alert in a separate letter. *See* Pet. App. 15.

III. The Credit Reporting Systems Breaks Down When CRAs Fail to Comply with the File Disclosure and Summary of Rights Requirements.

The essential rights provided by the FCRA, including the disclosure and dispute rights, impose costs on CRAs. Thus, CRAs have gone to great lengths to avoid meaningful compliance with the FCRA. This case and its predecessor litigation, *Cortez v. Trans*

Union, *LLC*, 617 F.3d 688 (3d Cir. 2010), illustrate how the intended functioning of the FCRA breaks down when a CRA does not comply with the file disclosure and summary-of-rights requirements.

In *Cortez*, TransUnion issued a report, in 2005, on Sandra Cortez to a car dealership that inaccurately stated that she was possibly a match to a person on the OFAC list of Specially Designated Nationals. *Id.* at 698.

Ms. Cortez had requested her TransUnion credit file before going to the dealership, but there was no OFAC alert or notification in the file. *Id.* at 697. After the incident at the dealership, Ms. Cortez contacted TransUnion four times to correct her report but TransUnion asserted repeatedly that the OFAC alert was not on her credit report. *Id.* at 699–700. She went back to the dealership and asked them to pull her report again. The credit report from TransUnion once again contained the OFAC alert. *Id.* at 700. The same OFAC alert later appeared on a report issued to Ms. Cortez's putative landlord. *Id.* at 700–01. Ms. Cortez could not access the information that was reported on her, nor could she meaningfully dispute the inaccurate information.

Ms. Cortez eventually sued TransUnion. TransUnion asserted that the OFAC alert was not in Ms. Cortez's TransUnion consumer file because it was in a separate database maintained by TransUnion's vendor and therefore did not have to be disclosed to Ms. Cortez. *Id.* at 711. The Third Circuit rejected TransUnion's defense, stating that "Congress clearly

intended the protections of the FCRA to apply to all information furnished or that might be furnished in a consumer report" and that the OFAC alert was part of the consumer's file. *Id.* at 711–12.

As shown by *Cortez*, when a CRA does not comply with Section 1681g, the system designed by Congress for ensuring the accuracy of credit reports breaks down. A consumer cannot meaningfully dispute inaccurate items of information on a credit report if the CRA never discloses to the consumer that certain information is on the credit report in the first instance. A consumer also needs to be informed of what steps can and need to be taken in order to dispute the accuracy of information with a CRA.

IV. TransUnion's Violations of the FCRA's File Disclosure and Summary of Rights Requirements Cause Concrete Harm.

Here, despite the clear warning from the Third Circuit in *Cortez*, TransUnion did not start treating the OFAC alerts as part of consumers' files that is disclosed with their credit reports. Instead, TransUnion began sending a separate letter that was not accompanied by the Summary of Rights.

The jury found that TransUnion willfully violated Section 1681g(a) by sending consumers a mailing that professed to include all the information in their files but did not include the OFAC alerts. *See* Pet. App. 15. Instead, "[a]s a courtesy," TransUnion subsequently mailed class members a letter stating that their names were "considered a potential match" to names

on the OFAC list. Pet. App. 36; *see also* JA 92. These OFAC letters stated that they were "separate[]" from the previously mailed disclosure of the TransUnion credit report, rather than an amendment. Pet. App. 26; *see also* JA 92. The jury also found that TransUnion willfully violated Section 1681g(c) by failing to include the Summary of Rights along with the separate OFAC letters. *See* Pet. App. 15.

The two mailings were "inherently . . . confusing," and named plaintiff Sergio Ramirez testified to that effect. Pet. App. 7–8, 34. Although the lack of OFAC information on the credit report mailing suggested that the OFAC alert had been removed from his report, the second letter suggested the opposite. Pet. App. 7–8. At the same time, the second letter disclaimed that it was providing Mr. Ramirez with information from his file, stating instead that it was being provided "[a]s a courtesy" and not as required by law. *See* JA 320. At best, the two mailings created an ambiguity as to whether the OFAC alert was in the consumer's file and thus included on the credit report. JA 320. Further, because the OFAC letter did not include instructions for initiating a dispute, Mr. Ramirez did not know how he could fix the problem. Pet. App. 8. The mailings therefore failed to satisfy Section 1681g(a)'s clear and accurate disclosure standard. Under the FCRA, it is not enough to simply make the disclosure of the consumer's file. The disclosure must be clear and understandable to the consumer and "made in a manner sufficient to allow the consumer to compare the disclosed information from the credit file against the consumer's personal information in order to allow the consumer to

determine the accuracy of the information." *Gillespie v. Equifax Info. Servs., L.L.C.*, 484 F.3d 938, 941 (7th Cir. 2007) (explaining that even an "accurate disclosure of unclear information defeats the consumer's ability to review the credit file, eliminating a consumer protection procedure established by Congress under the FCRA.").

In addition to violating Section 1681g(a), TransUnion's position that it either does not need to disclose OFAC alerts or that they can be sent separately from the rest of the file disclosure because they originate from a separate database located at TransUnion's vendor contradicts the FCRA's circumvention provisions and their implementing rules in Regulation V. *See* 15 U.S.C. § 1681x; 12 C.F.R. § 1022.140(a). These provisions prevent nationwide CRAs like TransUnion from using corporate structure or organization to evade the requirements of the FCRA. *See McIntyre v. TransUnion LLC*, No. CV 18-3865, 2020 WL 1150443, at *3–4 & n.3 (E.D. Pa. Mar. 5, 2020) (holding that plaintiff sufficiently alleged TransUnion evaded its obligation to make a full and accurate disclosure under Section 1681g(a)(1) through the use of corporate organization, reorganization, structure, or restructuring in case where eviction information was maintained and sold by TransUnion subsidiary).

The violations here cannot be shrugged off as "harmless" or "technical." TransUnion's conduct harmed class members' concrete interests that the FCRA's disclosure and summary-of-rights requirements are intended to protect: consumers'

interests in knowing what is in their credit files and understanding how to dispute inaccurate information. Pet. App. 31; *see Gillespie*, 484 F.3d at 941 ("A primary purpose[] of the statutory scheme provided by the disclosure in § 1681g(a)(1) is to allow consumers to identify inaccurate information in their credit files and correct this information via the grievance procedure established under § 1681i."); *see also Fed. Election Comm'n v. Akins*, 524 U.S. 11, 21 (1998) ("[A] plaintiff suffers an 'injury in fact' when the plaintiff fails to obtain information which must be publicly disclosed pursuant to a statute.").

Sending two separate mailings—one that purported to be the consumer's entire credit file but was not and another that was sent "[a]s a courtesy" and did not include the Summary of Rights—posed an imminent risk that class members would be in the dark about whether they had a damaging label on their credit reports and whether and how they could remove such a label from their reports. These injuries satisfy Article III's injury-in-fact requirement; the class members did not need to allege any further consequential harm. *See Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016), *as revised* (May 24, 2016) ("[T]he violation of a procedural right granted by statute can be sufficient in some circumstances to constitution injury in fact. . . . [A] plaintiff in such a case need not allege any *additional* harm beyond the one Congress has identified."). As recently recognized by this Court, there is a long common law tradition of allowing plaintiffs to proceed in court for violations of nonpecuniary rights like those violated here. *Uzuegbanum v. Preczewski*, 592 U.S. ——, —— (2021)

(slip. op. at 8) ("By permitting plaintiffs to pursue nominal damages whenever they suffered a personal legal injury, the common law avoided the oddity of privileging small-dollar economic rights over important, but not easily quantifiable, nonpecuniary rights.").

TransUnion points to evidence that the "two-letter format" increased consumers' contact with TransUnion relative to later single-letter mailings to suggest that class members could not have been confused and could not have suffered a concrete injury-in-fact. Pet. Br. 32–33. But more consumers could have reached out to TransUnion *precisely because they were confused about having received two separate letters. See Larson v. Trans Union, LLC*, 201 F. Supp. 3d 1103, 1106 (N.D. Cal. 2016) (finding concrete injury where plaintiff argued that separate OFAC letter provided as a "courtesy" and not as part of the disclosure left him and the class confused as to whether they had a right to dispute the OFAC alert).

Imagine a situation where not only OFAC information, but every other component of a credit report is unbundled and sent separately to consumers over the course of a week, with the required Summary of Rights attached to the first mailing only. Credit accounts would arrive in the first mailing, credit inquiries in the second mailing, collection accounts in the third mailing, public records in the fourth mailing, and so on. A consumer would wonder: is each of these items in my file and are all of these items things that the credit bureau will share with potential creditors? Or are some of these items something different than a

credit report? And if the information in one of the items was inaccurate, the consumer would wonder: how can I fix this problem? Providing each component of a credit report separately would not be a clear and understandable method of providing a file disclosure. To the contrary, it would make it nearly impossible to effectively monitor one's credit reports and promptly correct any inaccuracies.

Even after *Cortez* and the significant jury verdict in this case, CRAs are still failing to provide information regarding reporting OFAC alerts when a consumer requests the consumer's file. *See, e.g.*, First Amended Class Action Complaint ¶¶ 10, 77–81, *Fernandez v. CoreLogic Credco, LLC*, Case No. 3:20-cv-1262-JM-AGS (S.D. Cal. Sept. 28, 2020), ECF No. 14 (alleging that CoreLogic Credco violated Section 1681g(a) by failing to include OFAC alert in file disclosure).

V. A Holding That There Was No Concrete Harm Would Render Unenforceable Federal Consumer Protection Laws That Rely Heavily on Disclosure Requirements.

Almost all federal consumer protection laws rely on disclosure as a component, and for some, it is the primary means with which they protect consumers. A holding that violation of the FCRA disclosure requirements does not cause concrete harm for Article III standing purposes would render unenforceable major portions of the federal statutory scheme for safeguarding consumers. It would also imply that these disclosures are meaningless, directly

contradicting the intent and purpose of Congress in enacting them. One statute that would be affected is the Truth in Lending Act (TILA), 15 U.S.C. §§ 1601–1693r, which like the FCRA, is part of the Consumer Credit Protection Act (CCPA), the umbrella for many of the federal consumer laws passed in the late 1960s and early 1970s.

TILA, and its components, including the Credit CARD Act, Consumer Leasing Act, and Fair Credit Billing Act, is primarily a disclosure statute. Congress explicitly stated that "the purpose of this title [is] to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit." *Id.* § 1601(a). TILA's disclosure requirements include the credit card "Schumer Box" for applications, as well as requirements for account opening disclosures and monthly statements. *Id.* §§ 1637(b), (c). For closed-end credit such as mortgages and auto loans, TILA requires the familiar closed-end credit disclosure with a box for the Annual Percentage Rate, Finance Charge, Amount Financed, and Total of Payments. *Id.* §§ 1632, 1638.

A failure by a creditor to provide one of the above TILA disclosures at all would cause a significant informational harm to the consumer. For example, consumers would be left ignorant of the price they are paying for credit if deprived of a TILA disclosure when they closed on their mortgage, the very evil that Congress intended to prevent in passing TILA.

But it is not only the utter failure to make a disclosure that can cause harm. Improper formatting or omission of critical elements can also harm the consumer by making the disclosure confusing and incomprehensible. Imagine if the TILA disclosure provided at a car dealership did not include the familiar mandatory box but instead had the information scattered in fine print throughout the paperwork. Or if a credit card company mailed a consumer's list of monthly credit card transactions separately from the disclosure of the minimum payment required for the month, contrary to the format required by TILA and its implementing regulations.

If this Court were to hold that there is no concrete harm from a failure to properly provide disclosures in a single document as required by consumer protection laws and regulations, creditors and other companies would be free to mangle mandatory disclosures with the certainty that they could not be held accountable by consumers. It would create confusion due to inconsistent information in the consumer credit market. Furthermore, a holding that mangling a consumer protection disclosure cannot cause concrete harm for Article III standing purposes sends a message from the highest court in the land that the disclosures are of little or no value despite Congress's explicit purpose in adopting them.

CONCLUSION

The FCRA and the disclosure and summary of rights requirements set forth in Section 1681g(a) and

Section 1681g(c) have never been more important to ensuring fairness and accuracy in the credit and consumer reporting industries. TransUnion's repeated disregard of the straightforward command of the FCRA's disclosure requirement harmed consumers and undermined Congress's specific intent in providing tools to promote accuracy in the credit reporting system. The Ninth Circuit correctly recognized the class members' concrete interests protected by Section 1681g(a) and Section 1681g(c), and the harm to those interests caused by TransUnion's conduct. The decision of the Ninth Circuit should be affirmed.

Respectfully submitted,

John G. Albanese
Counsel of Record
BERGER MONTAGUE PC
CONSUMER LAW
43 SE Main Street
Suite 505
Minneapolis, MN 55414
(612) 594–5997
jalbanese@bm.net

Chi Chi Wu
Ariel Nelson
NATIONAL

CENTER
7 Winthrop Square,
4th Floor
Boston, MA 02210
(617) 542–8010
cwu@nclc.org
anelson@nclc.org