CASE NOS. 17-15987, 17-15990, 17-15991, & 17-15992

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WILBUR GREEN,
Plaintiff-Appellant,

v.

EXPERIAN INFORMATION SOLUTIONS, INC.; et al.,
Defendants-Appellees.

HOWARD RYDOLPH,
Plaintiff-Appellant,

v.

EXPERIAN INFORMATION SOLUTIONS, INC.; et al.,
Defendants-Appellees.

KIMBERLY CONTRERAS,
Plaintiff-Appellant,

v.

EXPERIAN INFORMATION SOLUTIONS, INC.; et al.,
Defendants-Appellees.

SCOTT HUNTER,
Plaintiff-Appellant,

v.

EXPERIAN INFORMATION SOLUTIONS, INC.; et al.,
Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of California
D.C. Nos. 3:16-cv-05679-WHA, 3:16-cv-05694-WHA,
3:16-cv-06315-WHA, 3:16-cv-06335-WHA.

PETITION FOR REHEARING OR REHEARING EN BANC

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INTRODUCTION AND RULE 35 STATEMENT

By a 2-1 vote, the panel majority in this case held that material inaccuracies in a credit report, even if they lower your credit score, do not constitute a concrete harm sufficient for Article III standing. In the majority's view, a plaintiff does not have standing to challenge a credit reporting agency's refusal to correct these inaccuracies, as required by the Fair Credit Reporting Act (FCRA), *unless* the plaintiff has engaged in, or is "imminently planning to engage in," a specific transaction that would rely on the report. If permitted to stand, the decision would make it impossible for many people to challenge inaccuracies in their credit reports until it is too late—until an employer or landlord or creditor had already used the report to deny a job, housing, or credit offer.

In dissent, Judge Berzon explained that the majority's decision directly conflicts with the holding in *Robins v. Spokeo, Inc.*, 867 F.3d 1108 (9th Cir. 2017) (*Spokeo III*), *on remand from Spokeo, Inc. v. Robins* (*Spokeo II*), 136 S. Ct. 1540 (2016), that "adverse information on a credit report, often resulting in a lower credit rating, constitutes a reputational injury creating a material risk of harm, *whether or not an individual contemplates a specific imminent transaction.*" Dissent at 3 (emphasis added). Judge Berzon emphasized that *Spokeo III* "does *not* demand an allegation of known access by a third party of a past, or imminent, specific transaction." *Id.* (emphasis in original). "Nor should it," given that credit

reports "are used in a wide variety of transactions" and it is "often difficult to predict when a credit report may be accessed or to know when it has been accessed…" *Id*. at 1-2. Because "the threat to a consumer's livelihood is caused by the very existence of inaccurate information in his credit report," making available a "materially inaccurate credit report" should be injury enough to satisfy Article III. *Id*. at 3-4 (quoting *Spokeo III*, 867 F.3d at 1118).

Against this backdrop, panel rehearing or rehearing en banc is warranted for several reasons.

First, as the dissent recognized, the majority's decision conflicts with *Spokeo III*'s holding that a materially inaccurate credit report "is itself" a sufficiently concrete injury to satisfy Article III's injury-in-fact requirement.

Second, the majority's decision conflicts with the Supreme Court's instructions, in *Spokeo II*, about the proper *methodology* for evaluating whether a harm grounded in a statutory violation is sufficiently "concrete" for Article III's injury-in-fact requirement.

Third, the majority's decision conflicts with rulings of four other circuits holding, like *Spokeo III*, that "an alleged procedural violation [of a statute] can by itself manifest concrete injury where Congress conferred the procedural right to protect a plaintiff's concrete interests and where the procedural violation presents a

risk of real harm to that concrete interest." *Strubel v. Comenity Bank*, 842 F.3d 181, 190 (2d Cir. 2016).[1]

Fourth, there is both an intra- *and* an inter-Circuit split as to whether a diminished credit score constitutes injury-in-fact within the meaning of Article III.

Fifth, and finally, this case concerns an issue of exceptional importance. Credit assessments affect nearly every aspect of a person's life. Moreover, as the dissent noted, third parties can access a person's credit report without the person taking any action at all. Thus, an inaccurate credit report can cause serious—sometimes irreparable—damage.

Yet under the majority's approach, nobody can sue under FCRA unless they can identify an "actual or imminent" transaction that would be harmed by an inaccurate report—even if they have been harmed in ways they never learn about or, if they do, have no way of fixing after the fact. The majority's decision guts FCRA's protections and directly undermines Congress's intent. Rehearing is the only way to rectify this harsh and indefensible result.

STATEMENT OF THE CASE

1. These Lawsuits.

These appeals are on behalf of several individuals (Plaintiffs) who filed for bankruptcy under Chapter 13 of the Bankruptcy Code "in order to reorganize and

[1] Additional cases are addressed *infra* at Part I(C).

repair [their] credit worthiness and FICO score[s]." Green ER 64, 80, 97, 115; Jaras ER 2 (similar).[2]

After the bankruptcy courts confirmed their Chapter 13 plans, Plaintiffs requested their credit reports "to ensure proper reporting by [their] creditors." *Id.* They discovered multiple inaccuracies "that did not comport with credit reporting industry standards." *Id.*

Plaintiffs asked the three largest credit reporting agencies (CRAs) to update the inaccurate information to match their confirmed bankruptcy plans. The CRAs failed to comply. Majority Opinion (Majority) at 3.

Plaintiffs sued the CRAs and several creditors that furnished the inaccurate information (Defendants), alleging that they violated FCRA and the California Credit Report Agencies Act.

Plaintiffs alleged that they, like "the majority of consumer debtors who file consumer bankruptcy[, did] so to raise their FICO score and remedy their poor credit worthiness." Green ER 56, 72, 88, 106. They further alleged that this underlying goal of bankruptcy is often thwarted, particularly "in Chapter 13 bankruptcy filings," by creditors who "ignore credit-reporting industry

[2] Citations to "Green ER" and "Jaras ER" are to the Record Excerpts in the appeals of Green, et al., Nos. 17-15987, 17-15990, 17-15991, 17-15992, and Jaras, No. 17-15201, respectively.

standards…in an effort to keep consumer's credit scores low and their interest rates high." Green ER 56, 72, 88, 106. Each Plaintiff also specifically alleged that their credit scores were damaged by Defendants' failure to follow credit-reporting industry standards. Green ER 69, 86, 103, 121; Jaras ER 6.

None of the Defendants challenged Plaintiffs' standing, perhaps because many district courts presiding over similar suits had rejected such challenges in cases like these. *See, e.g., Tanimura v. Experian Info. Sols., Inc.*, WL 1354767, at *10 (N.D. Cal. Apr. 13, 2017) (collecting cases).

Instead, Defendants moved to dismiss on substantive grounds: that the credit reports were not actually inaccurate—a point on which lower courts are in disagreement. *See Aulbach v. Experion Info. Sols., Inc*., 241 F. Supp. 3d 1281, 1287-88 (N.D. Cal. 2017).

Here, the lower courts held that the challenged statements were not inaccurate and, as a result, FCRA did not require changing them. Green ER 5-6; Jaras ER 57-64.

On review, the panel ordered the parties to address whether plaintiffs had standing to sue under "the decisions in [*Spokeo III*] and *Bassett v. ABM Parking Servs., Inc*., 883 F.3d 776, 780 (9th Cir. 2018)…" No. 17-15201, Dkt. 45 2-3.

2. The Panel's Decision.

The panel held, 2-to-1, that Plaintiffs lack standing because they had not alleged "they had tried to engage in or were imminently planning to engage in any transactions for which the alleged misstatements in their credit reports made or would make any material difference…." Majority at 4.

Judge Berzon dissented on the ground that this Court's decision in *Spokeo III* does not require any allegation that inaccuracies in a credit report "affected a specific previous or imminent transaction"—"nor should it." Dissent at 1. She noted that *Spokeo III* merely requires a showing of a "material *risk* of harm" to satisfy the concrete harm requirement, and that all plaintiffs but one had met that test by alleging "that inaccuracies in the reporting of their confirmed bankruptcy lowered their credit score." *Id*. (emphasis added).[3]

Judge Berzon further observed that "[c]redit reports exist to convey information to third parties and are used in a wide variety of transactions, from applying for a home loan to purchasing a cell phone." *Id*. at 1-2. "[I]n some

[3] Contrary to Judge Berzon's statement that "Plaintiff Jaras did not sufficiently allege that inaccuracies in his credit report adversely affected his creditworthiness," Dissent at 1, Jaras, like the other plaintiffs, alleged that his report was inaccurate and that the inaccuracies resulted in a "diminished credit score." Jaras ER 6. At the pleading stage, in response to a *facial* motion to dismiss, that is sufficient. *See In re Zappos.com, Inc.*, 888 F.3d 1020, 1028 (9th Cir. 2018); *see also Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004) (distinguishing facial from factual attacks on standing).

instances," moreover, "third parties can access credit reports without the consumer taking any action to instigate a transaction..." *Id.* As a result, "adverse information on a credit report…constitutes a reputational injury creating a material risk of harm, *whether or not an individual contemplates a specific, imminent transaction*." *Id*. at 3 (emphasis added).

REASONS FOR GRANTING THE PETITION

I. THE MAJORITY'S DECISION THAT A MATERIALLY INACCURATE CREDIT REPORT IS NOT AN INJURY-IN-FACT CONFLICTS WITH *SPOKEO III*, *SPOKEO II*, AND FOUR OTHER CIRCUIT DECISIONS APPLYING *SPOKEO II*.

A. The Majority's Decision Conflicts with *Spokeo III*.

In determining whether a plaintiff has standing, a court's job is to "ask (1) whether the statutory provisions…were established to protect his *concrete interests* (as opposed to purely procedural rights), and if so (2) whether the specific procedural violations…present a *material risk of harm* to[ ] such interests." *Spokeo III*, 867 F.3d at 1113 (emphases added). The majority's decision here conflicts with *Spokeo III* on both prongs.

First, the majority's concrete-interest analysis is contrary to *Spokeo III*'s holding that, under FCRA, people have a "concrete interest in accurate credit reporting about themselves." 867 F.3d at 1115. On this prong, *Spokeo III* considered whether the harm has a "close relationship to a [traditional] harm" and,

whether Congress "has elevate[d] to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law." *Id.* at 1112-15.

Answering both questions "yes," *Spokeo III* held that FCRA protects consumers' "concrete interest in accurate credit reporting about themselves." *Id.* at 1115. *Spokeo III* then held that "[t]he threat to a consumer's livelihood is caused by the *very existence* of inaccurate information in [a] credit report and the likelihood that such information will be important to one of the many entities to make use of such reports." *Id.* at 1114 (emphasis added).

This mode of analysis is nowhere to be found in the majority's decision. Just as in *Spokeo III*, Plaintiffs alleged harm to their "concrete interest in accurate credit reporting about themselves." *Id.* at 1115. Yet the majority never even considered the possibility that an inaccurate credit report could, standing alone, constitute injury-in-fact under Article III. Instead, the majority reflexively demanded that Plaintiffs allege *additional* harm—e.g., a specific lost job opportunity—without stopping to ask whether such a showing is required under law.

As Judge Berzon noted in dissent, this approach directly conflicts with *Spokeo III*'s recognition that "it is often difficult to predict when a credit report may be accessed or to know when it has been accessed," and that, even when

agencies are cooperative, it "may take up to 30 days to investigate and correct" inaccuracies. Dissent at 2.

As recognized in *Spokeo II*, it is precisely *because of* circumstances like this—where an injury is difficult to measure, predict, or detect—that Congress has the power "to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before." 136 S. Ct. at 1549. The majority's decision casts aside *Spokeo III*'s holding (and Congress's judgment) that consumers have a concrete interest in accurate credit reporting and that harm to that interest is therefore, itself, a concrete injury in fact. *See Spokeo III*, 867 F.3d at 1114 (citing legislative record).

Second, the majority further deviated from *Spokeo III* in analyzing, under prong two, whether "the specific procedural violations… present a material risk of harm to, such interests." 867 F.3d at 1113. Instead of asking whether the specific procedural violations pose a material risk of harm to Plaintiffs' "concrete interest in accurate credit reporting," *id.* at 1115, the majority asked whether the violations pose a material risk of harm to a specific "transaction with a third party in the past or imminent future." Majority at 6.

The majority failed to recognize that, under *Spokeo III*, the "risk analysis" for the second prong merely requires a court to examine "*the nature* of the specific alleged reporting inaccuracies to ensure that they raise a real risk of harm to the

concrete interests that FCRA protects." 867 F.3d at 1116 (emphasis added). This inquiry is limited to asking whether the inaccuracies rise beyond the level of "trivial" (such as an inaccurate zip code) and are "the type that *may* be important to employers or others making use of a consumer report." *Id.* at 1116-17 (emphasis added).

Spokeo III's use of the subjunctive (asking if the inaccuracies "would be relevant to employers," *id.*, rather than "will be") shows that a court has no call to look beyond "the nature" of the inaccuracy to determine if it *will* cause (or has caused) further injury to a *specific transaction* identified by the plaintiff—yet that is precisely what the majority did here.

* * *

The majority tried to reconcile its approach with *Spokeo III* on three grounds that do not withstand scrutiny: (1) "the inaccuracies in the credit report at issue [in *Spokeo III*] had already been requested and obtained by at least one third party;" (2) the *Spokeo III* plaintiff (Robins) was "unemployed and actively looking for work;" and (3) unlike in *Spokeo III*, the plaintiffs here have declared bankruptcy. Majority at 5-6.

First, *Spokeo III* didn't even mention that a third party had accessed Robins's report—it just noted that the report had been published on the Internet.

See 867 F.3d at 1116. As the dissent notes (at 2), Plaintiffs' credit reports can also be accessed by third parties, often without their knowledge.[4]

Second, while Robins alleged that someone "made a Spokeo search request for information about [him]," *Spokeo II*, 136 S. Ct. at 1546, he never alleged that a prospective employer had accessed or would soon access the report—a fact *Spokeo III* emphasized. 867 F.3d at 1118 ("It is of no consequence how likely Robins is to suffer *additional* concrete harm [beyond the existence of inaccurate information] as well (such as the loss of a specific job opportunity).").

Third, the majority erred in suggesting that, unlike in *Spokeo III*, there's no real risk of harm to Plaintiffs because they declared bankruptcy and thus have bad credit already. This reasoning ignored Plaintiffs' allegations that (1) "[t]he *majority* of consumer Debtors who file consumer bankruptcy do so to *raise* their FICO Score and remedy their poor credit worthiness"; and (2) "[i]t is entirely

[4] This fact renders *Bassett v. ABM Parking Servs., Inc.*, 883 F.3d 776 (9th Cir. 2018), which held that violation of a FCRA provision requiring businesses to redact credit-card expiration dates on receipts did not confer standing, inapposite. First, in *Bassett*, only the plaintiff had access to the receipt with his expiration date. *Id.* at 780. Here, the point of a credit report is to provide access to third parties. Second, *Bassett* found that Congress's decision to pass the Clarification Act, which temporarily eliminated liability for such a FCRA violation, suggested that Congress didn't think such a violation harmed consumers' concrete interests. *Id.* at 781. Here, the text and legislative history of FCRA is clear that Congress believed materially inaccurate information in a credit report *was* a concrete harm.

possible for consumer Debtors to have over a 700 FICO Score within as little as 12 months after filing a consumer bankruptcy." Green ER 56, 72, 88, 106 (emphasis in original).[5]

Whatever one thinks about the majority's (incorrect) assumption that debtors in bankruptcy have no need for FCRA's protections, the majority's failure to credit Plaintiffs' allegations to the contrary renders its analysis fatally defective—and fatally in conflict with *Spokeo III*. *See Novak v. United States*, 795 F.3d 1012, 1017 (9th Cir. 2015) (on motion to dismiss, court "accept[s] as true all material allegations of the complaint, and construe[s] the complaint in favor of the complainant party).

B. The Majority's Decision Conflicts with the Supreme Court's Decision in *Spokeo II*.

The majority's decision also conflicts with *Spokeo II* itself.

There, the Supreme Court articulated specific instructions about the proper *methodology* for evaluating whether a harm grounded in a statutory violation is

[5] The majority also failed to apprehend that even marginal differences in a score—or just the type of information in a credit report—could affect future lending decisions, as well as decisions to employ, rent to, or provide insurance to the consumer. *See* Robert B. Avery et al., *Credit Report Accuracy and Access to Credit*, 90 Fed. Res. Bull. 297, 298, 304, 313 n.31 (2004) (explaining "scores are closely aligned" with interest rates and score ranges vary by loan product and appetite for risk); *id.* at 297 (credit records affect "employment screening and underwriting of property and casualty insurance").

sufficiently "concrete" for Article III's injury-in-fact requirement. *Spokeo II* specifically held that, "[i]n determining whether an intangible harm constitutes injury in fact, *both history and the judgment of Congress* play important roles." 136 S. Ct. at 1549 (emphasis added). *Spokeo II* then directed courts to consider (1) "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" and (2) Congress's judgment as to whether certain statutorily defined injuries "give rise to a case or controversy where none existed before." *Id*. (citation omitted).

In *Spokeo III*, this Court followed these instructions to the letter in holding that Robins's inaccurate credit report inflicted "particularized and concrete harm" under Article III. *See* 867 F.3d at 1113-16. But the majority here did not even acknowledge the need to conduct such an inquiry, much less engage in one. This, too, is reason enough to grant rehearing.

C. The Majority's Decision Creates a New Circuit Split on the Application of *Spokeo II*.

The majority's decision also directly conflicts with other circuit decisions that, like *Spokeo II* and *Spokeo III*, hold that "an alleged procedural violation [of a statute] can by itself manifest concrete injury where Congress conferred the procedural right to protect a plaintiff's concrete interests and where the procedural violation presents a risk of real harm to that concrete interest." *Strubel v. Comenity*

Bank, 842 F.3d 181, 190 (2d Cir. 2016) (violation of Truth in Lending Act notice requirement is "by itself" concrete injury). *Accord In re Horizon Healthcare Servs. Inc. Data Breach Litig.*, 846 F.3d 625, 639 (3d Cir. 2017) (violation of FCRA rule against unauthorized dissemination of personal information "causes an injury in and of itself"); *Macy v. GC Servs. Ltd. P'ship*, 897 F.3d 747, 758-59 (6th Cir. 2018) (violation of Fair Debt Collection Practices Act requirement that debt-collection letters accurately convey debtor's rights is concrete injury); *Muransky v. Godiva Chocolatier, Inc.*, WL 1760292, at *7 (11th Cir. Apr. 22, 2019) (violation of Fair and Accurate Credit Transactions Act's requirement that businesses omit digits on credit-card receipt is concrete injury).[6]

In each of these cases, the court held that plaintiffs need not allege "additional harm" beyond the statutory violations. And in each case, the standard for a "risk of harm" to the concrete interests recognized by Congress was low: "if Congress adopts procedures designed to minimize the risk of harm to a concrete interest, then a violation of that procedure that causes *even a marginal increase* in the risk of harm to the interest is sufficient to constitute a concrete injury." *Muransky*, 2019 WL 1760292 at *6 (emphasis added).

The majority's decision is squarely in conflict with all these decisions.

[6] The Ninth Circuit in *Spokeo III* expressly adopted the approach used by the Second Circuit in *Strubel*. *See* 867 F.3d at 1113.

II. THE MAJORITY'S FAILURE TO RECOGNIZE THAT A DIMINISHED CREDIT SCORE IS AN INJURY-IN-FACT CONFLICTS WITH NINTH CIRCUIT CASE LAW AND THAT OF FOUR OTHER CIRCUITS.

Even if the majority were correct that inaccuracies in Plaintiffs' credit reports are insufficient to confer standing in and of themselves, it should nonetheless have held that Plaintiffs have standing to sue based on their allegation that these inaccuracies resulted in *additional* harm to them (in the form of diminished credit scores). *See* Green ER 69, 86, 103, 121; Jaras ER 6. The majority's failure to recognize a lower credit score as a concrete injury creates both an intra- *and* inter-Circuit conflict.

First, the majority's decision conflicts with this Court's prior holding that even a *risk* of a diminished credit score satisfies Article III standing. In *Adam v. United States*, 532 Fed. App'x 730, 731 (9th Cir. 2013), property owners challenged an IRS tax lien on their property. This Court held that "at a minimum, the IRS liens are likely to damage [plaintiffs'] credit ratings—an injury in fact." *Id.*

Here, plaintiffs do not just allege a *risk* of harm to their credit scores; they allege that the inaccuracies have *already* caused them to suffer lower credit scores. Thus, the majority's decision not only conflicts with this Court's decision in *Adam*, but it substantially raises the standard for what constitutes an injury-in-fact in this Circuit.

The majority's decision also conflicts with Ninth Circuit case law on what constitutes a material risk of concrete harm. In *Krottner v. Starbucks Corp.*, 628 F.3d 1139 (9th Cir. 2010), employees sued Starbucks after someone stole a company laptop that stored employees' private information, alleging that the theft subjected them to an increased risk of identity theft. This Court held that this risk constituted injury-in-fact even though plaintiffs never alleged that the thief intended to access, much less fraudulently misuse, the employees' personal information. *See id.* at 1142-43.

Likewise, here, a lower credit score at least increases the risk of future harm to plaintiffs. And here, the risk of harm is *much* greater than in *Krottner*: four Plaintiffs alleged that consumers with lower scores "will be considered a higher credit risk resulting in less favorable lending terms." Green ER 60, 76, 92, 110. The chance then, that plaintiffs' lower scores will cause them to receive less favorable lending terms in the future, is a near certainty—and far greater than the risk that the laptop thief in *Krottner* will decide to misuse the data stored on the laptop.

Second, the majority's holding that a diminished credit score is not a concrete harm conflicts with every other circuit that has confronted the question. *See Hutton v. Nat'l Bd. of Examiners in Optometry, Inc.*, 892 F.3d 613, 622 (4th Cir. 2018) (allegation that "credit score had decreased eleven points due to a credit

application that was fraudulently filed" constitutes injury-in-fact); *Evans v. Portfolio Recovery Assocs.*, 889 F.3d 337, 345 (7th Cir. 2018) (allegation of "real risk of financial harm caused by an inaccurate credit rating" constitutes injury-in-fact); *Pedro v. Equifax, Inc.*, 868 F.3d 1275, 1280 (11th Cir. 2017) ("credit score dropp[ing] 100 points" constitutes injury-in-fact); *Sayles v. Advanced Recovery Sys., Inc.*, 865 F.3d 246, 250 (5th Cir. 2017) ("real risk of financial harm caused by an inaccurate credit rating" constitutes injury-in-fact); *Diedrich v. Ocwen Loan Servicing, LLC*, 839 F.3d 583, 591 (7th Cir. 2016) (allegation of "damage to…credit" constitutes injury-in-fact).

III. THE MAJORITY'S DECISION INVOLVES A QUESTION OF EXCEPTIONAL IMPORTANCE.

Finally, rehearing is warranted because the majority's holding raises an issue of exceptional importance.

First, the majority's decision drastically impairs consumers and workers' ability to enforce their rights under FCRA. A whole range of actors, including creditors, insurance companies, landlords, utility companies, mortgagees, and employers, condition services based credit reports. Yet, as the dissent recognized (at 2), people often don't know whether or how information in their report has influenced or will influence a transaction, or when they will need to share their credit report with a third party. By the time someone learns they need a loan (to, for example, pay for urgent medical care or cover an unexpectedly large bill), it's

too late to fix an inaccurate report, especially if doing so requires legal action. By making it impossible for a consumer or worker to sue unless s/he can identify a specific at-risk "transaction," the majority's decision effectively guts FCRA.

On a broader level, the majority's decision threatens numerous other statutory schemes that rely on a private right of action to enforce procedural safeguards designed to protect peoples' concrete interests.

For example, courts have held that certain procedural violations of the Truth in Lending Act, the Fair Debt Collection Practices Act, and the Fair and Accurate Transactions Act are concrete injuries because Congress created the procedures to protect peoples' concrete interests. *See supra* I.C. Additionally, most privacy statutes rely on the premise that Congress has identified certain intangible harms—like unauthorized access to personal data—as concrete injuries, even if plaintiffs fail to allege *additional* harm. *E.g.*, Video Privacy Protection Act, 18 U.S.C. § 2710 (prohibiting unauthorized disclosure of information identifying the videos a customer has rented); Wiretap Act, 18 U.S.C. §§ 2510 *et seq* (prohibiting disclosure of communications obtained from telephone and computer networks).

But under the majority's approach, people alleging injury under all of these statutes would be barred from court unless they can identify a specific at-risk transaction—a standard many victims will be unable to meet. If the majority

opinion stands, all these efforts to protect peoples' concrete interests from intangible harms will be dramatically undermined.

CONCLUSION

For the foregoing reasons, the Court should grant rehearing or rehearing en banc.

Dated: June 5, 2019

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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9th Cir. Case Number(s) Appeal Nos. 17-15987, 17-15990, 17-15991, & 17-15992

I am the attorney or self-represented party.

I certify that pursuant to Circuit Rule 35-4 or 40-1, the attached petition for panel rehearing/petition for rehearing en banc/answer to petition is *(select one)*:

[x] Prepared in a format, typeface, and type style that complies with Fed. R. App. P. 32(a)(4)-(6) and **contains the following number of words:** 4,199.

(Petitions and answers must not exceed 4,200 words)

OR

[ ] In compliance with Fed. R. App. P. 32(a)(4)-(6) and does not exceed 15 pages.

Signature s/ Leslie Brueckner **Date** June 5, 2019

*(use "*s/[typed name]*" to sign electronically-filed documents)*

NOT FOR PUBLICATION

FILED

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JESUS JARAS, Plaintiff-Appellant, v. EQUIFAX INC., Defendant-Appellee.	No. 17-15201 D.C. No. 5:16-cv-03336-LHK MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
Lucy H. Koh, District Judge, Presiding

WILBUR GREEN, Plaintiff-Appellant, v. EXPERIAN INFORMATION SOLUTIONS, INC.; et al., Defendants-Appellees.	No. 17-15987 D.C. No. 3:16-cv-05679-WHA

HOWARD RYDOLPH, Plaintiff-Appellant,	No. 17-15990 D.C. No. 3:16-cv-05694-WHA

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

v.

EXPERIAN INFORMATION SOLUTIONS, INC.; et al.,

Defendants-Appellees.

KIMBERLY CONTRERAS,

Plaintiff-Appellant,

v.

EXPERIAN INFORMATION SOLUTIONS, INC.; et al.,

Defendants-Appellees.

No. 17-15991

D.C. No. 3:16-cv-06315-WHA

SCOTT HUNTER,

Plaintiff-Appellant,

v.

EXPERIAN INFORMATION SOLUTIONS, INC.; et al.,

Defendants-Appellees.

No. 17-15992

D.C. No. 3:16-cv-06335-WHA

Appeal from the United States District Court
for the Northern District of California
William Alsup, District Judge, Presiding

Argued and Submitted September 5, 2018
San Francisco, California

Before: BERZON and FRIEDLAND, Circuit Judges, and DOMINGUEZ,** District Judge.

The Plaintiffs in these related cases—Wilbur Green, Howard Rydolph, Kimberly Contreras, Scott Hunt, and Jesus Jaras (collectively, "Plaintiffs")—filed for bankruptcy between 2011 and 2014 under Chapter 13 of the Bankruptcy Code. After the bankruptcy court confirmed their Chapter 13 plans, Plaintiffs requested their credit reports and noticed that some account information was being reported in a manner that they allege is inconsistent with the treatment of those claims in their confirmed bankruptcy plans. Plaintiffs asked the three largest credit reporting agencies—Experian Information Solutions, Inc., Equifax, Inc., and Transunion, LLC—to update the information to match their confirmed bankruptcy plans. But when Plaintiffs requested their credit reports again after allowing the credit reporting agencies adequate time to reinvestigate and update the information, they allege that several inaccuracies remained.

Plaintiffs subsequently sued credit reporting agencies and creditors providing the allegedly inaccurate information under the federal Fair Credit Reporting Act ("FCRA"), 15 U.S.C. § 1681s-2(b), and its California law counterpart, the California Consumer Credit Report Agencies Act ("CCRAA"),

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** The Honorable Daniel R. Dominguez, United States District Judge for the District of Puerto Rico, sitting by designation.

Cal. Civ. Code § 1785.25(a), alleging that a confirmed Chapter 13 bankruptcy plan changes the legal status of prior debts, and that such changes must be reflected in the credit report in order for the report to be accurate and not misleading. The district courts granted Defendants' motions to dismiss or for judgment on the pleadings, holding that the challenged statements were not inaccurate so FCRA did not require changing them. On review, we affirm the dismissal of these complaints, but on the grounds that Plaintiffs—a group of individuals in bankruptcy who gave no indication that they had tried to engage in or were imminently planning to engage in any transactions for which the alleged misstatements in their credit reports made or would make any material difference—lack standing to pursue their claims.

In *Spokeo, Inc. v. Robins*, the Supreme Court held that a plaintiff does not "automatically satisf[y] the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right." 136 S. Ct. 1540, 1549 (2016). Rather, "Article III standing requires a concrete injury even in the context of a statutory violation." *Id.* The Supreme Court offered a specific example to show that "not all inaccuracies cause harm or present any material risk of harm"—stating that "[i]t is difficult to imagine how the dissemination of an incorrect zip code, without more, could work any concrete harm." *Id.* at 1550. The Court then remanded to our court to determine whether

the alleged FCRA violations "entail[ed] a degree of risk sufficient to meet the concreteness requirement." *Id.*

On remand, we accordingly considered whether the alleged FCRA violations—Spokeo's publication on the internet of a credit report that falsely stated the plaintiff's age, marital status, wealth, education level, and profession, in violation of 15 U.S.C. § 1681e(b)—were more material than a zip code error and thus amounted to a sufficiently concrete injury to support Article III standing. *Robins v. Spokeo, Inc.*, 867 F.3d 1108, 1111 (9th Cir. 2017). The plaintiff alleged that the inaccuracies harmed his chances of making a favorable impression on prospective employers and that he was actively looking for a job. *Id.* at 1117. In holding that the plaintiff did have standing, we emphasized that the inaccuracies in the credit report at issue had already been requested and obtained by at least one third party, and that they were of a type likely enough to cause harm to his employment prospects at a time when he was unemployed and actively looking for work. *Id.* at 1116-17.

By contrast, Plaintiffs here do not make any allegations about how the alleged misstatements in their credit reports would affect any transaction they tried to enter or plan to try to enter—and it is not obvious that they would, given that Plaintiffs' bankruptcies themselves cause them to have lower credit scores with or without the alleged misstatements. They have therefore said nothing that would

distinguish the alleged misstatements here from the inaccurate zip code example discussed by the Supreme Court in *Spokeo*. Indeed, Plaintiffs have not alleged that they tried to enter any financial transaction for which their credit reports or scores were viewed at all, or that they plan to imminently do so, let alone that the alleged inaccuracies in their credit reports would make a difference to such a transaction. Unlike the plaintiff in *Spokeo*, Plaintiffs did not say anything about what kind of harm they were concerned about, other than making broad generalizations about how lower FICO scores can impact lending decisions generally—without any specific allegation that lower FICO scores impact lending decisions regarding individuals who are already in Chapter 13 bankruptcy. Without any allegation of the credit report harming Plaintiffs' ability to enter a transaction with a third party in the past or imminent future, Plaintiffs have failed to allege a concrete injury for standing.[1]

[1] The absence of allegations of an actual or imminent concrete harm also causes Plaintiffs' claims to be too amorphous to litigate. As the Supreme Court has explained:

> The gist of the question of standing is whether the party seeking relief has 'alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends . . . [Standing] is demanded so that federal courts will not be asked to decide illdefined controversies over . . . issues . . . or a case which is of a hypothetical or abstract character.

Flast v. Cohen, 392 U.S. 83, 99-100 (1968) (citations and internal quotation marks omitted).

The absence of allegations that Plaintiffs have suffered or imminently will suffer a concrete injury compels dismissal of the Complaints in this case for lack of standing. *Spokeo*, 136 S. Ct. at 1547-48. But such dismissals should be without prejudice. *See Missouri ex rel. Koster v. Harris*, 847 F.3d 646, 656 (9th Cir. 2017) ("Plaintiffs have not satisfied the requirements [for] . . . standing. In theory, Plaintiffs could allege . . . facts that might support standing. As a result, the complaint should have been dismissed *without* prejudice."); *Hampton v. Pac. Inv. Mgmt. Co. LLC*, 869 F.3d 844, 846 (9th Cir. 2017) ("Dismissals for lack of . . . jurisdiction . . . must be without prejudice.").

AFFIRMED in part and VACATED in part. REMANDED with instructions to enter dismissals without prejudice.

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U.S. COURT OF APPEALS

Jaras v. Equifax, Inc., No. 17-15201+

BERZON, Circuit Judge, partially dissenting:

I respectfully dissent from the majority's holding that Plaintiffs have not alleged a concrete injury sufficient to establish standing. The majority requires Plaintiffs to allege that the inaccuracies in their credit reports affected a specific previous or imminent transaction. No such requirement exists in our case law, nor should it.

To plead a concrete injury in a FCRA action for correction of an inaccurate credit report, individuals must allege that a violation of FCRA "actually harm[s], or present[s] a material risk of harm" to their concrete interests. *Robins v. Spokeo, Inc.*, 867 F.3d 1108 (9th Cir. 2017). Nearly all Plaintiffs state that inaccuracies in the reporting of their confirmed bankruptcy lowered their credit score.[1] Those allegations satisfy the concrete harm requirement.

Unlike an erroneous zip code, *see Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1550 (2016), the alleged inaccuracies in Plaintiffs' credit reports harm or present a material risk of harm to their concrete interests. Credit reports exist to convey information to third parties and are used in a wide variety of transactions, from

[1] Because Plaintiff Jaras did not sufficiently allege that inaccuracies in his credit report adversely affected his creditworthiness, I concur with the majority that his complaint should be dismissed.

applying for a home loan to purchasing a cell phone.[2] In most instances, third parties need not give notice before accessing an individual's credit report, 15 U.S.C. § 1681b(2)(A) (requiring notice only when requesting credit reports for employment purposes); and in some instances, third parties can access credit reports without the consumer taking any action to instigate a transaction—pre-screening individuals for offers of credit or insurance, for example. *See* 15 U.S.C. § 1681b(c)(1)(B). It is thus often difficult to predict when a credit report may be accessed or to know when it has been accessed, and inaccuracies that are discovered may take up to 30 days to investigate and correct. *See* 15 U.S.C. § 1681i(a)(1)(A).

Given their "ubiquity and importance . . . in modern life—in employment decisions, in loan applications, in home purchases, and much more—the real–world implications of material inaccuracies in [credit] reports seem patent on their face." *Robins*, 867 F.3d at 1114. That is because "[t]he threat to a consumer's livelihood is caused by the very existence of inaccurate information in his credit report and the likelihood that such information will be important to one of the many entities who make use of such reports." *Id*.

[2] *See* Beth Braverman, *Getting a new cellphone? Expect a credit check*, Creditcards.com (Feb. 2, 2016), https://www.creditcards.com/credit-card-news/cellphone-credit-check-1270.php.

As a result, adverse information on a credit report, often resulting in a lower credit rating, constitutes a reputational injury creating a material risk of harm, whether or not an individual contemplates a specific, imminent transaction. Our decision on remand from the Supreme Court in *Robins v. Spokeo, Inc*. so recognizes, and does *not* demand an allegation of known access by a third party or of a past, or imminent, specific transaction. The plaintiff in *Robins* alleged only that a website's posting of inaccurate information about his personal life "caused actual harm to [his] employment prospects" because he was "actively seeking employment." First Amended Complaint at ¶¶ 34-35, *Robins*, 867 F.3d 1108. He did not state what specific transactions he was undertaking to look for employment, or whether any prospective employer had looked at the allegedly inaccurate reports.

Nonetheless, we held that he had alleged a sufficiently concrete injury to establish standing. *Id*. at 1118. We did not require the plaintiff to be more specific because we recognized that "determining whether any given inaccuracy in a credit report would help or harm an individual (or perhaps both) is not always easily done." *Id* at 1117. Moreover, we rejected the argument that Robins lacked standing because he had only "asserted that such inaccuracies *might* hurt his employment prospects, but not that they present a material or impending risk of doing so." *Id*. at

1118. We held that making available "a materially inaccurate consumer report" was injury enough. *Id*.

Plaintiffs' allegations in this case are just as specific and just as concrete as the ones we accepted in *Robins*. For that reason, I would hold that Plaintiffs have standing.

I note that establishing constitutional standing is separate from answering the substantive question, as required by FCRA, of whether Plaintiffs' credit reports are "patently incorrect, or . . . misleading in such a way and to such an extent that it can be expected to adversely affect credit decisions." *Gorman v. Wolpoff & Abramson, LLP*, 584 F.3d 1147, 1163 (9th Cir. 2009). The original dispute in this case—before the panel asked for supplemental briefing on the standing issue—was whether any error in those credit reports meets this standard, given that the Plaintiffs' pre-petition bankruptcy debts were not yet discharged and the Chapter 13 plans, even if accurately reported, might have the same consequences for future transactions as the current reporting method. In my view, that bankruptcy-focused issue is the one we should be addressing, as the plaintiffs do have standing. But as the majority does not address this substantive question, I do not either.

I respectfully dissent.