No. 15-2119

In the United States Court of Appeals for the Fourth Circuit

MICHAEL T. DREHER,
on behalf of himself and all others similarly situated,
Plaintiff-Appellee,

v.

EXPERIAN INFORMATION SOLUTIONS, INC.,
Defendant-Appellant.

On Appeal from the United States District Court
for the Eastern District of Virginia

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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(name of party/amicus)

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Signature: s/ Deepak Gupta Date: August 29, 2016

Counsel for: Michael T. Dreher

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****

I certify that on August 29, 2016 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

s/ Deepak Gupta (signature) August 29, 2016 (date)

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INTRODUCTION

Aware of rampant abuses in the consumer-reporting industry, Congress enacted the Fair Credit Reporting Act to protect consumers from unfair and inaccurate credit reporting. Congress was particularly concerned about the industry's skewed incentives: because consumer-reporting agencies are paid by the very same entities that provide them with information, the agencies cater to these business customers rather than consumers. To help address this problem, Congress required reporting agencies, upon any consumer's request, to "clearly and accurately disclose to the consumer . . . [a]ll information in the consumer's file at the time of the request"—including "[t]he sources of the information." 15 U.S.C. § 1681g(a)(1) & (2).

In this case, Michael Dreher requested a credit report from Experian after learning—while applying for a Top Secret security clearance—that his identity had been stolen. The report listed a delinquent account under the name "Advanta Bank"—an account that he did not open and had never heard of. Because that delinquent account threatened his security clearance, Dreher attempted to contact Advanta to clear his record. As he would later discover, however, Advanta no longer existed: It had been shut down two years earlier, in the wake of the 2008 financial crisis. In reality, a different company, CardWorks, had assumed responsibility for servicing all Advanta credit-card accounts.

Experian knew this. But it decided not to mention CardWorks in Dreher's credit report—or in any other report to former Advanta customers. Experian knew that the FCRA clearly required reporting agencies to disclose all "sources of information" when providing credit reports to consumers. And its own normal practice—consistent with industry standards—was to identify the source that actually furnished the information alongside the preceding creditor or another involved entity. But when Experian asked CardWorks whether its identity should be revealed, CardWorks said no, and Experian obliged. Experian thus chose to elevate its client's business decision over compliance with the FCRA.

Experian now attempts to evade liability for this clear violation, mischaracterizing the district court's decision in numerous respects along the way.

First, Experian contends that Dreher and the class lack Article III standing because they have suffered no "real-world" injury. And in saying so, Experian repeats—as it did in both of its previously denied interlocutory petitions to this Court—its false claim that the district court "recognized" that there was no injury here. But that's not true. The district court itself admonished Experian for "pounc[ing] on a statement" taken out of context (from an earlier order regarding statutory remedies) as finding no Article III injury. JA 394.

The district court actually concluded that, by denying the class members information to which they were entitled under the FCRA, Experian caused them to

suffer an informational injury—a form of injury that the Supreme Court has long held cognizable under Article III. Although Experian claims that the Court's recent decision in *Spokeo, Inc. v. Robins* somehow changes this analysis, that decision only reaffirmed that informational injury—without any showing of "*additional* harm"—is enough. 136 S. Ct. 1540, 1549 (2016). And numerous post-*Spokeo* decisions, none of which Experian mentions, have consistently held that consumers (like Dreher) who have been deprived of statutorily required information have Article III standing.

Second, Experian takes issue with the district court's finding that, by deferring to CardWorks' demand to withhold its true identity from consumers, Experian willfully violated section 1681g(a)(2) as a matter of law. But the court correctly concluded that reading the law to permit the non-disclosure of a direct source is "objectively unreasonable" under *Safeco Insurance Company of America v. Burr*, 551 U.S. 47, 70 (2007). Remarkably, Experian faults the district court for relying *too much* on Congress's language, rather than replacing it with Experian's own judgment that labeling CardWorks as "Advanta" would be better for consumers. As the district court observed, however, "Experian easily could have disclosed *both* Advanta and CardWorks"—for no added cost. Where "a completely adequate precaution would have cost nothing," not taking that precaution "[is] indicative of willful violation." *Redman v. RadioShack Corp.*, 768 F.3d 622, 638 (7th Cir. 2014). On this point, Experian has no response.

Regardless, Experian argues (at 32), the court should have sent the willfulness question to the jury because it is, in Experian's view, "a classic state of mind determination." But *Safeco* made clear that a defendant's subjective state of mind is irrelevant where it acts in reckless disregard of a "pellucid" statutory text; in that scenario, an objective standard applies. And Experian mischaracterizes the court's decision here as well, claiming (at 42) that the court "collaps[ed]" the recklessness inquiry into its analysis of reasonableness. But that's not true: Applying the correct standard, the court simply found that the undisputed evidence supported a finding of willfulness. On appeal, Experian points to no evidence—let alone any genuine dispute of material fact—to the contrary.

Finally, Experian contends that the class must be decertified under Rule 23(b)(3) because calculating statutory damages would entail individualized determinations. It relies on a sentence from Judge Wilkinson's concurrence in *Stillmock v. Weis Markets*, 385 F. App'x 267 (4th Cir. 2010), but fails to mention that *Stillmock* itself held precisely the opposite: Where FCRA liability issues are common, "individual statutory damages issues are insufficient to defeat class certification." *Id.* at 273. The only individualized inquiry here is determining the number of times Experian failed to disclose CardWorks' identity to each class member; that ministerial task "does not complicate matters very much at all." *Id.* Accordingly, the district court should be affirmed in all respects.

JURISDICTIONAL STATEMENT

The district court had jurisdiction over this action under 28 U.S.C. § 1331 and 15 U.S.C. § 1681p. After granting Dreher's motion for partial summary judgment on his class claim on December 3, 2014, JA 407–08, the court entered final judgment in favor of the class members on August 26, 2015, JA 427–28. Experian filed its timely notice of appeal on September 18, 2015. JA 429–32. This Court has appellate jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Article III Standing. Did Dreher and the class members have Article III standing because Experian's willful failure to accurately disclose CardWorks as a "source[]" of their credit information, as required by the Fair Credit Reporting Act, 15 U.S.C. § 1681g(a)(2), caused them to suffer concrete informational injury?

2.a. Willful Violation of FCRA: Did the district court correctly determine that, under *Safeco*, it was "objectively unreasonable" for Experian to choose not to disclose the identity of the direct source of consumers' credit information, in violation of section 1681g(a)(2)?

b. Did the district court properly grant summary judgment to Dreher on his class claim, in light of the undisputed evidence that Experian "blatantly ignor[ed] the Act's clear and simple command to disclose the 'sources of information' for the

Advanta trade lines" to oblige CardWorks' demand "to go unlisted on the credit reports?" JA 392, 396 n.7.

3. Class Certification. Did the district court err in concluding that any individualized statutory-damages issues do not predominate over common questions of liability, particularly where such issues entail only the ministerial task of determining how many times each class member's rights were violated?

STATEMENT OF THE CASE

A. The Fair Credit Reporting Act.

"Congress enacted FCRA in 1970 out of concerns about abuses in the consumer reporting industry." *Dalton v. Capital Associated Indus., Inc.*, 257 F.3d 409, 414 (4th Cir. 2001). "Congress found that in too many instances [consumer-reporting] agencies were reporting inaccurate information," often without consumers' knowledge. *Id.*; *see* S. Rep. No. 91-157, at 3–4 (1969) (describing "inability" of consumers to discover errors). And even if consumers learned of an error, they often had "difficulty in correcting inaccurate information" because of skewed market incentives: "a credit reporting agency earns its income from creditors or its other business customers"—the same entities it relies on to obtain credit information—and "time spent with consumers going over individual reports reduces . . . profits." 115 Cong. Rec. 2,412 (1969).

With the FCRA, Congress sought to change this. Recognizing reporting agencies' "vital role" in the economy, Congress determined that they must "exercise their grave responsibilities" in a way that "ensure[s] fair and accurate credit reporting." 15 U.S.C. § 1681(a); *Robinson v. Equifax Info. Servs., LLC*, 560 F.3d 235, 239 (4th Cir. 2009). The FCRA thus contains "a variety of measures designed to insure that agencies report accurate information." *Dalton*, 257 F.3d at 414–15.

One is the requirement that reporting agencies, upon any request by a consumer, "clearly and accurately disclose to the consumer . . . [a]ll information in the consumer's file at the time of the request," as well as "[t]he sources of the information." 15 U.S.C. § 1681g(a)(1) & (2). By giving consumers the right to access the information in their files—and to know where it came from—this requirement serves two important purposes: it allows consumers to confirm that the information is accurate, and it tells them whom to contact if it's not. Indeed, Congress "felt that it was necessary to give consumers a specific statutory right to acquire such information on sources" because in some cases it "may be the only way in which the consumer can effectively" correct mistakes. 116 Cong. Rec. 35,940 (1970).

Like other disclosure statutes, the FCRA enforces its provisions by creating a private right of action with a two-tier damages scheme. "If a violation is negligent, the affected consumer is entitled to actual damages. If willful, however, the consumer may have actual damages, or statutory damages ranging from $100 to

$1,000, and even punitive damages." *Safeco*, 551 U.S. at 53. The availability of statutory damages in lieu of actual damages is crucial to this scheme. As this Court has observed, Congress generally "creates statutory damages remedies because it wants to encourage civil enforcement suits in situations where actual damages are difficult to prove." *Doe v. Chao*, 306 F.3d 170, 198 (4th Cir. 2002). That is true of the FCRA in particular, as one treatise explains: "Statutory damages for willful violations are available when actual damages are difficult to prove," as is often the case when consumers are deprived information to which they are entitled. Wu, *Fair Credit Reporting* § 11.11.3.3 (2010).

B. Factual background

In late 2010, Michael Dreher discovered that someone had stolen his identity and opened a credit card in his name two years before. As the district court explained, Dreher later found out that this person was his cousin, who "took out the business credit card in Dreher's name in order to cover expenses for his failing bowling alley in Indiana." JA 391. Dreher learned of the identity theft when the National Security Agency, while processing his Top Secret security clearance, notified him that his credit report listed a delinquent account under the name "Advanta Bank" and "Advanta Credit Cards"—an account that he did not open and had never heard of. JA 154. The NSA investigator told Dreher that if he could not prove that he made payments on the account, it could "severely impact" his

clearance. *Id.* Dreher thereafter had "multiple conversations" with the NSA in which he "tr[ied] to convince them this account was not mine." JA 155.

Hoping to save his security clearance, Dreher requested a copy of his credit report from Experian. It listed one delinquent account—Advanta Bank—with a P.O. box as the only contact information. "No phone number [is] available," the report read. JA 160. When Dreher requested a second report in early 2011, it said the same thing. JA 164. Because he'd never had any contact with Advanta Bank and didn't recognize the name, he wrote a letter to the address provided, in which he explained the situation, disputed the debt, and requested verification that the account was in fact his. JA 154–55. He waited a month, didn't hear back, and then wrote another letter. JA 155. This time he received a response (on Advanta letterhead), but it did not resolve the problem. *Id.* So he wrote to Advanta once more the next month; Advanta did not respond. *Id.*

Shortly thereafter, in June 2011, Dreher requested a third credit report from Experian. It still showed the delinquent account, but now the account was listed under a slightly different name: "Advanta Credit Cards." JA 168. After he disputed the debt on the account and explained to Experian that his identity had been stolen, Experian sent Dreher a letter informing him that the "Advanta Credit Cards" account had been deleted but that a new account—"Advanta Bank Corp."—"remain[ed]." JA 173, 178–79. The letter included a note saying that the

"credit grantor requests that you contact them directly." JA 177 (capitalization removed). There was no phone number—only the same P.O. Box to which he had already written three times, to no avail. *Id.*

Eventually Dreher discovered that Advanta didn't actually exist. The bank was closed by the Utah Department of Financial Institutions in March 2010 (before any of the credit reporting at issue in this case) and entered into FDIC receivership several months later. JA 156, 342. A different company, CardWorks, was hired by Deutsche Bank, the owner of the Advanta portfolio, to begin servicing the former Advanta credit-card accounts on August 1, 2010. At the time, Tom Wineland, a manager at the FDIC, wrote an email informing CardWorks that the agency "will not directly contact the cardholders with information of a servicing change" and that "Cardworks will use the name Advanta Credit Cards" when servicing the credit-card portfolio. JA 346–47. The email, which was sent only to CardWorks, said nothing about consumer-reporting agencies or the company's FCRA obligations. *See id.*

Experian knew that Advanta had ceased operations by at least September 2010—months before Dreher first wrote to them to dispute his credit report. *See* JA 261–63. But instead of listing CardWorks as one of the sources for Advanta accounts, Experian adopted a different policy: It asked CardWorks—its customer—what it wanted Experian's reports to say. CardWorks' answer? "We

want the subscriber code to remain in the Advanta company ID"—as "Advanta Credit Cards," not CardWorks—even though CardWorks was now "the only party servicing the accounts" and handling the credit reporting, and thus a source of information. JA 241–42, 247, 257. The company reaffirmed this demand in a letter, co-signed by Tom Wineland as FDIC receiver: "We would like for this new code to report on the consumers' trade line as Advanta Credit Cards." JA 349. It did so despite the fact that Experian itself "corresponded with CardWorks acting as CardWorks, not as Advanta." JA 399 n.8.

Experian's employees asked if CardWorks wanted its name identified as well, as is industry practice. JA 249.[1] Indeed, Experian had previously identified CardWorks along with other entities for other accounts the company serviced. *See id.* (Experian email to CardWorks noting that "your other subcodes show as 'Spiegel/CWS,' to consumers and creditors"). And many of the other accounts listed on Dreher's Experian credit report had dual trade lines. *See* JA 221–23 (listing "GE Capital/Home Design," "HSBC/Yamaha Music," and "Dell Computer/Web Bank"). CardWorks nevertheless replied: "No, we would not want

[1] The "industry-standard format for listing subscriber codes," the district court observed, "is 'Metro2,' which specifically allows trade lines to identify both the previous servicer/issuer of the debt and the current servicer." JA 315. And Evan Hendrick, Dreher's industry expert and a former member of Experian's Consumer Advisory Council, explained that Experian "for decades has referred to the *actual* furnisher—the entity that provided credit tradelines to Experian . . . as the 'source,' and emphasized the importance of consumer contact directly with the 'source.'" JA 203, 205 (emphasis added).

CWS or CardWorks mentioned in the trade line, just Advanta Credit Cards." JA 250. Experian obliged. As the district court found, "Experian easily could have disclosed both Advanta and CardWorks." JA 403. Instead, it adopted a company-wide policy—for all relevant accounts—to have "the name changed to 'ADVANTA Credit Cards,'" without also mentioning CardWorks. JA 251–54.

C. Procedural history

In September 2011, Dreher brought this case challenging, as relevant here, Experian's policy as a willful violation of the FCRA's requirement that consumer-reporting agencies disclose all "sources of information" in a credit report. 15 U.S.C. § 1681g(a)(2). Because actual damages for informational injuries can be difficult to prove, Dreher sought statutory damages on this claim. And because he challenged a uniform policy—Experian's refusal to identify CardWorks as a source—he sought certification of the claim as a class action.[2]

A. Experian's first motion for summary judgment. Experian initially moved for partial summary judgment on the class claim, which the district court denied. JA 320. The court rejected Experian's contention that its violation of section 1681g(a)(2) was "objectively reasonable" under *Safeco*. "Although Experian posits that the word 'sources' could have many meanings," the court held, "in the

[2] Even after Dreher filed this case, Experian still had not listed CardWorks as a source of information on its credit reports. In November 2011, his Experian credit report identified the delinquent account as "Advanta Bank" and listed the same P.O. box as before, with no telephone number. JA 176.

context of this case and the FCRA, the term clearly embraces CardWorks. Whatever else it might mean, the term 'sources of the information' certainly includes the entity that gave the information to Experian." JA 312–13.

The court drew added support from the standard industry practice of "identify[ing] both the previous servicer/issuer of the debt and the current servicer," and from the fact that "Experian actually considered following this practice and using the trade line 'Advanta/CWS' but instead deferred judgment to CardWorks." JA 315–16. As the court explained, "Experian had no obligation to select only one single source; in fact, doing so directly conflicted with the FCRA's language, which compels parties to identify, not the 'source,' but the 'sourc*es* of the information.'" JA 313 (quoting 15 U.S.C. § 1681g(a)). It was irrelevant, the court concluded, "[t]hat the Advanta website, mailing address, and phone number continued to function"; "[f]or behind the website, address, and phone number—not to mention the Advanta trade lines in Dreher's credit report, which represent 'the information' that *actually* matters in this case—stood none other than CardWorks." JA 318.

B. Class certification. Shortly thereafter, the court certified a class of all people who requested an Experian credit report during or after August 2010 that identified Advanta "as the only source of the information for the tradeline." JA 336. "The 'overarching issue,'" the court explained, "concerns Experian's

willfulness: whether Experian acted in objectively reasonable fashion in failing to identify Cardworks as a source of information" and instead deferring to what Cardworks wanted Experian to tell consumers. JA 330.

The court's order rejected Experian's primary argument against certification: "that the question of individual statutory damages will predominate over any common questions regarding liability." JA 328–29. "[T]he question of Experian's liability," the court found, "represents the central, dominant issue before the Court" and is common to the class. JA 329. By contrast, the "questions of statutory damages . . . are secondary considerations" that "do not preclude the common issue of liability from predominating." JA 329–30. The court quoted from this Court's holding in *Stillmock v. Weis Markets*: "[W]here, as here, *the qualitatively overarching issue by far is the liability issue of the defendant's willfulness*, and the purported class members were exposed to the same risk of harm every time the defendant violated the statute in the identical manner, the individual statutory damages issues are insufficient to defeat class certification under Rule 23(b)(3)." *Id.* (quoting 385 F. App'x 267, 273 (4th Cir. 2010).

The "calculation of statutory damages," the court held, "must focus on the nature of the particular statutory violation in question," which is common to the class. JA 334. The court elaborated: "That violation—in this case, Experian's alleged failure to disclose Cardworks as a source of information about consumer

credit—is the same for each plaintiff, in each instance. The only variation among the individual plaintiffs, then, concerns the number of discrete statutory violations as to each," which is easily addressed by "a simple, per-violation statutory damages calculation." JA 329, 334. So the "'individual question' of statutory damages," the court explained, "is reduced to mouse-clicking simplicity" using Experian's own database—and thus "does not complicate matters very much at all," as this Court has recognized. JA 334 (quoting *Stillmock*, 385 F. App'x at 273).

C. Experian seeks interlocutory review under Rule 23(f). Experian sought permission from this Court for an interlocutory appeal under Rule 23(f). *See* Dkt. 2-1, No. 14-325 (July 3, 2014). Experian's central argument was that class members lacked Article III standing because they had not been injured—even though they had been denied specific information to which they were entitled under the FCRA. Seizing on a sentence from the decision discussing available statutory remedies, not Article III standing, Experian asserted that the district court "expressly recognized" that most class members "have suffered no injury in fact." *Id.* at 1, 7–8. Experian also argued that the existence of statutory damages by itself defeats certification, because "FCRA statutory damages determinations 'typically require an individualized inquiry.'" *See id.* at 12–17.

Opposing the petition, Dreher argued that Experian "mischaracterize[ed]" the district court's Article III holding "by carefully selecting quotations out of

context." Dkt. 15, No. 14-325 (Aug. 25, 2014), at 11. Dreher further explained that "every member of the class, by definition, is alleged to have suffered the same concrete and particularized injury: the denial of specific information to which they were entitled under the FCRA"—"a doctrine . . . well established in Supreme Court precedent." *Id.* at 13. As to Experian's statutory-damages argument, Dreher contended that damages could be calculated based on "(1) the value of the right to receive the sources of information and (2) the willfulness of Experian's uniform corporate policy—both of which are common." *Id.* at 16. "The only variable is how many times Experian's policy deprived each class member of the information to which they're entitled"—a "ministerial task [that] is no bar to certification." *Id.*

This Court denied Experian's petition. *See* Order, No. 14-325 (Sept. 2, 2014) (Motz, Wilkinson, King, JJ.).

D. Experian's second summary-judgment motion. After Experian's petition had delayed the proceedings by two months, Experian then made the same Article III argument to the district court in another summary-judgment attempt—more than three years after the case was filed. *See* D. Ct. Dkt. 180. And Experian again moved for summary judgment on willfulness, asking the court to rule as a matter of law that Experian lacked the "objective culpability" required by *Safeco* because, "whatever [its] subjective intent may have been," "the statutory text and

relevant court and agency guidance allow for more than one reasonable interpretation." *Id.* at 3, 25, 27.

In response, Dreher argued that Experian's theory of Article III standing "ignores established precedent from the Fourth Circuit holding that a denial of a right of information under a federal statute is a cognizable injury." D. Ct. Dkt. 182, at 15. He also filed his own motion for summary judgment on willfulness, arguing that "Experian's utter disregard for the statute's plain language"—including its decision to let CardWorks "dictate whether Experian would identify CardWorks as a 'source'"—"makes its conduct objectively unreasonable as a matter of law" and reckless under *Safeco*. D. Ct. Dkt. 176, at 2, 7.

The court sided with Dreher on both issues. As to standing, the court reproached Experian for again "pounc[ing] on a statement" taken out of context from the class-certification decision to suggest that class members had not suffered an injury in fact. JA 394. The court explained that class members have standing because the FCRA gives them "the right to receive certain information from consumer reporting agencies, including the sources of information on their credit reports," "the violation of which causes an informational injury that can be redressed in federal court." JA 390, 394–95 (citing *Fed. Election Comm'n v. Akins*, 524 U.S. 11, 22 (1998); *Salt Inst. v. Leavitt*, 440 F.3d 156, 159 (4th Cir. 2006)).

As to willfulness, the court held that "Experian's decision to intentionally omit CardWorks" from the reports—which "CardWorks specifically requested"—"so obviously violated the language of the Act" as to be objectively reckless as a matter of law. JA 390, 392. Under *Safeco*, the court explained, a "defendant's conduct" is objectively reckless if it "involved 'an unjustifiably high risk of harm that is either known or so obvious that it should be known.'" JA 396 n.7 (quoting *Safeco*, 551 U.S. at 68). "Experian's conduct met that high threshold by blatantly ignoring the Act's clear and simple command to disclose the 'sources of information' for the Advanta trade lines." JA 396 n.7.

The court acknowledged that "no appeals court or regulatory agency has given a definitive definition of the scope of 'sources of information.'" JA 399. But the court continued: "Although gifted legal minds can create myriad interpretations for how many sources or what kinds of sources should be included in the disclosure, the term 'sources' clearly includes, at the very least, the entity that gives that information directly to the consumer reporting agency." JA 398. "Experian easily could have disclosed both Advanta and CardWorks," the court concluded, but the company instead chose to defer to CardWorks. JA 403.

In so concluding, the court specifically rejected Experian's argument that it "acted under the guidance" of the FDIC. JA 400. Reviewing the three documents Experian supplied in support of its FDIC justification, the court held that "it is not

clear that Experian received *anything* authoritative from the FDIC regarding Experian's disclosure obligations under the Act." *Id.* In the court's view, the documents merely "summariz[ed] CardWorks' internal practice on how it identifies itself to consumers" and "provide[d] formal documentation of Advanta's dissolution and CardWorks' role in taking over Advanta's old accounts." JA 401. They did "not purport to give direction to Experian about how to comply with § 1681g(a)." *Id.* The court thus found that no jury could find that the FCRA violation anything other than willful, and granted Dreher's motion for partial summary judgment.

E. Experian again seeks interlocutory review. After granting partial summary judgment to Dreher, at Experian's request the district court (without providing any reasons) certified the case for interlocutory review under 28 U.S.C. § 1292(b). JA 407.

In its petition, Experian once again misrepresented the district court's observation on statutory remedies as "acknowledg[ments] . . . that it 'was "unlikely that anyone [in the class] suffered actual injury,' and that it was 'difficult to see how anyone suffered any injury.'" Dkt. 15-1, No. 14-492 (Dec. 31, 2014), at 12. And it asserted that, to sufficiently establish informational injury, "a plaintiff must demonstrate some harm over and above 'not knowing.'" *Id.* at 15. On the *Safeco* issue, Experian argued that the district court "perversely treated the very absence

of any statutory, appellate, or FTC definition of 'sources of information' as meaning that what the phrase requires is *un*ambiguous." *Id.* at 18. And it similarly mischaracterized the district court's case-specific decision as holding that "if a defendant is not eligible for the *Safeco* safe harbor, it is automatically established that the defendant acted (at least) recklessly." *Id.* at 19. Whether Experian was liable for a willful violation, the company continued, "was for the jury to decide." *Id.* at 20.

This Court again declined to permit Experian's interlocutory appeal. *See* Order, No. 14-491 (4th Cir. Jan. 29, 2015) (Motz, Wilkinson, King, JJ.). After failing in its second attempt to obtain interlocutory review, Experian agreed to stipulate to damages, the only outstanding issue on Dreher's class claim. The district court then entered final judgment on that claim.

SUMMARY OF ARGUMENT

I. This Court should affirm the district court's conclusion that Dreher and the class members have Article III standing. Far from relying on a "bare statutory violation," as Experian contends (at 20), the district court held that Experian's failure to disclose its true sources of information, as required by the FCRA, caused Dreher and the class members to suffer cognizable informational injury.

Spokeo does not compel a different result. Despite Experian's claims, *Spokeo* is a narrow opinion that essentially reiterates the Supreme Court's existing precedent

on Article III injury. In *Spokeo*, the Court confirmed that "intangible injuries" can be sufficiently concrete, and that Congress's judgment is particularly instructive. 136 S. Ct. at 1549. In light of that judgment, Congress can elevate procedural rights to a concrete injury if they protect against a congressionally identified harm. And while Experian characterizes *Spokeo* (at 15) as "reject[ing] the basis" on which the district court found standing, the decision simply remanded the case to the Ninth Circuit for further consideration of concreteness.

Although Experian asserts (at 16) that Dreher has shown no "real-world harm," *Spokeo* in fact reaffirmed the Court's longstanding precedent holding that informational injury—the deprivation of information to which an individual is entitled by statute—is sufficiently "real" without any showing of "*additional* harm." 136 S. Ct. at 1549 (citing *Pub. Citizen v. U.S. Dep't of Justice*, 491 U.S. 440 (1989), and *Fed. Election Comm'n v. Akins*, 524 U.S. 11 (1998)). In fact, since *Spokeo*, numerous courts have concluded that plaintiffs like Dreher, who claim that they've been denied access to information required under federal consumer-protection laws, have adequately demonstrated Article III standing.

Experian avoids grappling with any of this precedent, instead contending that informational injury requires a showing that the information is subjectively important to the plaintiffs. Not only does this requirement lack any support in precedent, but it also conflicts with the Supreme Court's command to respect

Congress's decisions regarding which informational harms are sufficiently concrete. With the FCRA, Congress clearly concluded that it was important that consumers be informed of the sources of their credit-history information. Experian's argument that the class should be decertified because absent class members cannot demonstrate standing without individualized inquiries should be rejected for the same reason: there is no need for individualized showings of importance to establish Article III injury in fact.

II.A. The district court correctly concluded that Experian's interpretation of section 1681g(a)(2)—as permitting non-disclosure of CardWorks, the direct source of information about Dreher and the class members—was "objectively unreasonable" under *Safeco*. Experian leans heavily on its erroneous assumption that the *Safeco* test is exactly the same as the qualified-immunity doctrine's "clearly established" standard. "[D]espite comparisons made to qualified immunity analysis," however, the *Safeco* inquiry "is an issue of statutory interpretation where there is a greater potential for the relevant text to provide clear guidance." *Lengel v. HomeAdvisor, Inc.*, 102 F. Supp. 3d 1202, 1211 (D. Kan. 2015).

And here the statue is clear: Experian must disclose all "sources of information," 15 U.S.C. § 1681g(a)(2), which certainly includes CardWorks—the direct source. Experian's argument that the FCRA does not specify how to choose the name of the source is a straw man, because, as the district court observed,

"Experian easily could have disclosed both Advanta and CardWorks" without any additional cost. JA 403. That a separate provision of the FCRA tells consumer-reporting agencies to disclose the "business name" of information providers demonstrates that, by not including that language in section 1681g(a)(2), Congress intended to require disclosure of the actual names of "sources" like CardWorks. Experian's argument that the absence of any case law or regulatory guidance means that its interpretation is automatically "objectively reasonable" should also be rejected; "[t]he credit agency whose conduct is first examined under [a] section of the [FCRA] should not receive a pass because the issue has never been decided." *Cortez v. Trans Union, LLC*, 617 F.3d 688, 722 (3d Cir. 2010).

II.B. Nor did the district court err in finding that Experian willfully violated section 1681g(a) as a matter of law. While a defendant's subjective "state of mind" may generally be a question for the jury, *Safeco* instructs that reckless disregard of the FCRA's clear text should be evaluated against an "objective standard: action entailing an unjustifiably high risk of harm that is either known or so obvious that it should be known." 551 U.S. at 58, 68 (quotations omitted). Experian also accuses the district court (at 39) of erroneously treating *Safeco*'s "objective reasonableness" test as "the ultimate standard of liability," but the court actually applied the correct "unjustifiably high risk of harm" standard. *See* JA 396 n.7. After reviewing the evidence in the record (none of which Experian disputes), the court determined

that Experian's conduct here satisfied that standard as a matter of law. And Experian identifies no genuine dispute of material fact—or even any contrary evidence—that would support reversing the court's grant of summary judgment.

III. Finally, this Court should reject Experian's argument that individualized issues relating to statutory damages predominate, thus requiring decertification of the class. In *Stillmock v. Weis Markets*, 385 F. App'x 267, 273 (4th Cir. 2010), another FCRA case seeking statutory damages, this Court held that where "the qualitatively overarching issue by far is the liability issue of the defendant's willfulness . . . individual statutory damages issues are insufficient to defeat class certification." Experian entirely ignores that holding, instead emphasizing an irrelevant observation from the concurrence in *Stillmock*, as well as relying on an unpublished opinion that concerned only typicality (under Rule 23(a)), not predominance (under Rule 23(b)). This Court has made clear that statutory-damages claims like those at issue here "are not the kind of individualized claims that threaten class cohesion and are prohibited," because "every class member [is] entitled uniformly to the same amount of statutory damages, set by rote calculation." *Berry v. Schulman*, 807 F.3d 600, 609–10 (4th Cir. 2015). The district court's decision to certify the class was therefore correct.

STANDARD OF REVIEW

This Court reviews questions of Article III standing de novo. *King v. Burwell*, 759 F.3d 358, 365 (4th Cir. 2014). This Court likewise "review[s] a grant of summary judgment de novo." *Jones v. Chandrasuwan*, 820 F.3d 685, 691 (4th Cir. 2016). "Summary judgment is appropriate when there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Id.* (quotations omitted). A district court's decision to certify a class is reviewed "only for clear abuse of discretion." *Berry*, 807 F.3d at 608.

ARGUMENT

I. Dreher and the class members have suffered concrete injury in fact, and thus have Article III standing on their FCRA claims.

For the third time in a brief to this Court, Experian wrongfully claims (at 20) that the district court "recognized" that the company's FCRA violation "caused no real-world harm," and thus could not have suffered an Article III injury in fact. Even after the district court itself criticized Experian for "pounc[ing] on a statement" the court made in the context of discussing statutory remedies, not constitutional standing, Experian repeats it again, and again it is unpersuasive. JA 394. In reality, the district court held that Experian violated the class members' statutory right to certain information to which they are entitled under the FCRA—a concrete and particularized "informational injury that can be redressed in federal

court." JA 390. Thus, under decades-old precedent recognized by the Supreme Court in *Spokeo*, Dreher and the class members have Article III standing.

A. *Spokeo* did not change the analysis required for Article III standing.

Experian asserts (at 15) that, in *Spokeo*, the Supreme Court "squarely rejected the basis on which the District Court here found Article III satisfied." But *Spokeo* did nothing of the sort. Despite Experian's mischaracterization of the decision, *Spokeo* did not change the legal framework for analyzing standing nor overrule any of the relevant precedent. Instead, as scholars have recognized, "*Spokeo* is a narrow opinion" that "gave little guidance." Fred O. Smith, *Undemocratic Restraint* 45 (UC Berkeley Public Law Research Paper No. 2802781, June 30, 2016).[3] All that the Court did in *Spokeo* was reiterate that the Article III standing inquiry asks not only whether an injury is particularized, but also whether it is concrete—"that is, it must actually exist." 136 S. Ct. at 1548.

The Court proceeded in *Spokeo* to elaborate on the meaning of concreteness by distilling several "general principles" from its prior cases, without going beyond those cases. *Id.* at 1550. First, it acknowledged that, although tangible injuries (like physical or economic harm) are "perhaps easier to recognize" as concrete injuries, "intangible injuries can nevertheless be concrete." *Id.* at 1549.

[3] *Available at* http://bit.ly/2c9hGaU.

Second, "[i]n determining whether an intangible harm constitutes injury in fact, both history and the judgment of Congress play important roles." *Id.* So if the "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"—or, put in fewer words, if "the common law permitted suit" in analogous circumstances—the plaintiff will have suffered a concrete injury that can be redressed by a federal court. *Id.* But the plaintiff need not dig up a common-law analogue to establish a concrete injury because Congress has the power (and is in fact "well positioned") "to identify intangible harms that meet minimum Article III requirements," even if those harms "were previously inadequate in law." *Id.*

Accordingly, the third principle emphasized in *Spokeo* is that Congress can elevate even procedural rights to a substantive concrete injury if they protect against a congressionally identified harm. And the majority cited with approval Justice Kennedy's concurrence in *Lujan* 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.'" *Id.* (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 580 (1992) (Kennedy, J., concurring in part and concurring in the judgment)). Of course, "a bare procedural violation, divorced from any concrete harm" identified by Congress, will not give rise to an Article III injury. *Id.* But a "person who has been accorded a procedural right to protect his concrete interests" has standing to

assert that right, and may do so "without meeting all the normal standards for redressability and immediacy." *Lujan*, 504 U.S. at 572 n.7.

None of these principles are new. *See* Smith, *supra*, at 45; Robert H. Klonoff, *Class Actions in the Year 2026: A Prognosis*, 65 Emory L.J. 1569, 1581–82 (2016) (describing *Spokeo* as a "narrow 6-2" opinion that contained no "sweeping new pronouncements about standing"); Justin R. Pidot, *Tie Votes and the 2016 Supreme Court Vacancy*, 101 Minn. L. Rev. Headnotes 107, 119 (2016) (noting that *Spokeo* "postpone[d] consideration of a contentious legal issue"). And the Court in *Spokeo* did not even apply these principles to the facts before it, choosing instead to remand the case to the Ninth Circuit, whose previous analysis was "incomplete" because it had "overlooked" concreteness. 136 S. Ct. at 1545, 1550. The Court, in other words, offered no assessment of the Ninth Circuit's analysis, aside from its determination that the Ninth Circuit had failed to analyze concreteness as a separate step in the injury-in-fact inquiry. *See id.* ("tak[ing] no position as to whether the Ninth Circuit's ultimate conclusion—that Robins adequately alleged an injury in fact—was correct").

Thus, despite Experian's efforts to exaggerate the decision's importance, *Spokeo* has done very little to change (or even clarify) the law; it simply summarizes the doctrine and provides examples of injuries that might (or might not) constitute sufficiently concrete harm. *Spokeo* therefore should not alter this Court's well-

established standing analysis, nor the district court's correct conclusion that the plaintiffs have standing here.

B. Experian's FCRA violation caused Dreher and the class members concrete informational injury, expressly recognized by *Spokeo*.

Experian's standing arguments are based on a fatally flawed premise: that the district court "found standing by explicitly relying on the Ninth Circuit's now-rejected premise that a bare statutory violation is enough." Experian Br. 23. But that is simply wrong. The district court here found standing based on informational injuries to Dreher and the rest of the class—not on "a bare statutory violation." Indeed, the court noted that the Supreme Court (as well as this Court) have long "recogni[zed]" that "informational injuries" like those alleged by Dreher are sufficient "to satisfy the injury-in-fact requirement of constitutional standing." JA 395. And Experian's failure to provide consumers with accurate sources of information in their credit reports, the court held, violated their statutory "right to receive certain information from consumer reporting agencies." *Id.*

Spokeo expressly reaffirmed that these sorts of informational injuries are cognizable, concrete injuries under Article III. In particular, the Court cited *Public Citizen v. U.S. Department of Justice*, which held that the plaintiff had standing to challenge the Justice Department's failure to provide access to information, the disclosure of which was required by the Federal Advisory Committee Act, because

the inability to obtain such information "constitutes a sufficiently distinct injury to provide standing to sue." 491 U.S. 440, 449 (1989); *see Spokeo*, 136 S. Ct. at 1549–50. It also cited *Federal Election Commission v. Akins* for a similar point, "confirming that a group of voters' 'inability to obtain information' that Congress had decided to make public is a sufficient injury in fact to satisfy Article III." *Id.* at 1549 (citing *Akins*, 524 U.S. 11, 20–25 (1998)).

These cases, which are consistent with this circuit's precedent, illustrate that an informational injury—*i.e.*, being denied access to information to which an individual is entitled by statute—is a concrete injury under Article III. *See Doe v. Pub. Citizen*, 749 F.3d 246, 263 (4th Cir. 2014) (observing that "[t]he Supreme Court consistently has held that a plaintiff suffers an Article III injury when he is denied information that must be disclosed pursuant to a statute"); *Salt Inst. v. Leavitt*, 440 F.3d 156, 159 (4th Cir. 2006) (recognizing that "informational injury" is "sufficiently concrete and specific to satisfy Article III"); *see also* Cass R. Sunstein, *Informational Regulation and Informational Standing:* Akins *and Beyond*, 147 U. Penn. L. Rev. 613 (1999). And critically, the Court in *Spokeo* emphasized that "a plaintiff in such a case need not allege any *additional* harm beyond the one Congress has identified." 136 S. Ct. at 1549.

Experian's repeated claims (at 23, 25–26, 29) that Dreher suffered no "real" or "real-world" harm are therefore undermined by *Spokeo*, which held that

depriving individuals of information to which they are statutorily entitled—as Experian indisputably did to Dreher here—is itself a "real-world" harm even without any additional showing.[4] *See id.* And numerous post-*Spokeo* decisions confirm that plaintiffs who have been deprived of information required by federal consumer-protection statutes have suffered concrete Article III injury.

In *Church v. Accretive Health, Inc.*, for example, the plaintiff filed a class action alleging that a debt collector failed to provide her with certain disclosures required by the Fair Debt Collection Practices Act. *See* —Fed. App'x—, 2016 WL 3611543 (11th Cir. July 6, 2016). The Eleventh Circuit rejected the debt collector's argument that, under *Spokeo*, the plaintiff's injury was "not sufficiently concrete to support Article III standing because [she] incurred no actual damages from [the] violation of the FDCPA." *Id.* at *1. Relying on *Spokeo* and earlier Supreme Court precedent, the court held that the plaintiff sufficiently "alleged injury to her statutorily-created right to information pursuant to the FDCPA." *Id.* at *3. The plaintiff had, in other words, "sustained a concrete—*i.e.*, 'real'—injury because she

[4] The informational injury alleged here is also far more particularized than those recognized in *Spokeo*. In *Public Citizen* and *Akins*, the plaintiffs alleged that they had been deprived of information concerning other entities—for instance, "the names of candidates under consideration by the ABA Committee, reports and minutes of the Committee's meetings, and advance notice of future meetings"—to which they were entitled under federal law. *Pub. Citizen*, 491 U.S. at 449; *Akins*, 524 U.S. at 21 (seeking "lists of AIPAC donors . . . and campaign-related contributions and expenditures"). Here, by contrast, the plaintiffs have been deprived of information pertaining to *themselves*—indeed, their own credit histories.

did not receive the allegedly required disclosures." *Id.* And "[t]he invasion of [her] right to receive the disclosures is not hypothetical or uncertain," the court continued; it is an injury "that Congress has elevated to the status of a legally cognizable injury through the FDCPA." *Id.*; *see also In re Nickelodeon Consumer Privacy Litigation*, —F.3d—, 2016 WL 3513782, at *7 (3d Cir. June 27, 2016) (explaining that "unlawful denial of access to information subject to disclosure" is a harm that gives rise to standing); *Lane v. Bayview Loan Servicing, LLC*, 2016 WL 3671467, at *4 (N.D. Ill. July 11, 2016) (holding that plaintiff "has alleged a sufficiently concrete injury because he alleges that [defendant] denied him the right to information due to him under the FDCPA").

So too in *Larson v. TransUnion LLC*, —F. Supp. 3d—, 2016 WL 4367253 (N.D. Cal. Aug. 11, 2016). Just like Dreher here, Larson brought a class action against TransUnion for willfully violating section 1681g(a) of the FCRA "by providing him with a credit report with allegedly misleading information." *Id.* at *2. The court held that Mr. Larson's claim was not based on "a bare procedural violation," but "on the sort of 'informational' injury that the *Spokeo* Court implicitly recognized in citing *Public Citizen* and *Akins*, and that a number of other cases, from both before *Spokeo* and after, have found sufficient to support Article III standing." *Id.* at *3. (citing cases). Other courts have likewise held that plaintiffs who claim violation of their rights under the FCRA's information-disclosure provisions have

shown Article III injury in fact. *See, e.g., Thomas v. FTS USA, LLC*, 2016 WL 3653878, at *9 (E.D. Va. June 30, 2016) (holding that, by "alleg[ing] that he was deprived of a clear disclosure [under 15 U.S.C. § 1681b(b)(2)] stating that Defendants sought to procure a consumer report before the report was obtained," the plaintiff "alleged a concrete informational injury").

Like the plaintiffs in these cases, Dreher claims that Experian failed to disclose information required by the FCRA—namely, CardWorks' true identity. And, for the very same reasons those cases concluded that the plaintiffs had Article III standing, this Court should as well. Conspicuously, however, Experian does not address any of this post-*Spokeo* precedent. Instead, it offers just two responses regarding informational injury, each of which is unmoored from the principles and precedent recognized in *Spokeo*.

First, Experian argues (at 27–28) that the Supreme Court's informational-injury cases contain an implicit "importance" requirement. In Experian's view, "there has been no showing that receiving the name CardWorks instead of the name Advanta was of any significance to any of the class members," and thus the class members lack Article III standing on the basis of informational injury. Experian Br. 28.

But Experian is mistaken; neither *Akins* nor *Public Citizen* even come close to suggesting such a requirement. *Akins* held only that "[t]he 'injury in fact' that

respondents have suffered consists of their inability to obtain information . . . that, on respondents' view of the law, the statute requires that [the defendant] make public." 524 U.S. at 21. The Court in fact rejected the notion that the plaintiffs needed to make any additional showing, holding that the plaintiffs had standing simply by way of "a statute which . . . seek[s] to protect individuals such as respondents from the kind of harm they say they have suffered, i.e., failing to receive particular information." *Id.* at 22. And Experian grasps even further (at 28) by ascribing significance to three words in *Public Citizen*—"participate more effectively"—that simply *described* why the plaintiffs wanted the denied information. That decision ascribed no significance to the importance of that information, holding only that the defendant's refusal to provide the plaintiffs with *statutorily required* information "constitutes a sufficiently distinct injury to provide standing to sue." 491 U.S. at 449.

More importantly, "[a]s the Supreme Court recently indicated, the existence and scope of an injury for informational standing purposes is *defined by Congress*." *Friends of Animals v. Jewell*, —F.3d—, 2016 WL 3854010, at *2 (D.C. Cir. July 15, 2016), (citing *Spokeo*, 136 S. Ct. at 1549) (emphasis added). Put differently, the *subjective* importance of the information to the class members is irrelevant to determining whether an informational injury is sufficiently concrete; in enacting the FCRA, *Congress* decided that disclosing the sources of information to consumers

was critical to safeguarding them from harm. *See* 116 Cong. Rec. 35,940 (1970) (noting "that it was necessary to give consumers a specific statutory right to acquire such information on sources" because in some cases it "may be the only way in which the consumer can effectively" correct errors).

Indeed, the Supreme Court essentially rejected the rationale of Experian's argument in *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 374 (1982), in which the Court held that a housing-discrimination "tester" had standing based on a violation of "[his] statutorily created right to truthful housing information." Although the tester had no "intention of buying or renting a home" and "fully expect[ed] that he would receive false information," the Court held that "[a] tester who has been the object of a misrepresentation made unlawful under [the statute] has suffered injury in precisely the form the statute was intended to guard against, and therefore has standing." *Id.* at 373–74. In other words, what mattered was the importance that *Congress*—not the plaintiff-tester (who had no interest in the information as a customer)—placed on the information. *See Prindle v. Carrington Mortgage Servs., LLC*, 2016 WL 4369424, at *11 (M.D. Fla. Aug. 16, 2016) ("*Havens* recognized that . . . the Fair Housing Act created a new standalone right to truthful information, violation of which amounted to an injury in fact regardless of whether the recipient relied on or was damaged by receipt of false information."). And Congress had good reason to require, as part of the FCRA, that consumer-reporting agencies

disclose the sources of their information to consumers; as the district court explained, "[c]onsumers unquestionably want to know whom they can hold ultimately accountable for the content of their credit reports." JA 314.[5]

Second, Experian says (at 29), apparently based on its reading of the separate opinions in *Spokeo*, that "the mere failure to disclose information under the FCRA is not a sufficient informational 'injury'—rather, real harm is required in addition to the mere withholding of information." Asserting that, however, does not make it so. The examples that Experian cites (at 28–29) from *Spokeo* concern an entirely different type of claim—claims where, as Justice Thomas explained, "a private plaintiff[] attempt[s] to vindicate the infringement of *public* rights." 136 S. Ct. at 1552 (Thomas, J., concurring). The FCRA requirements that Experian takes issue with in its brief were "duties that Spokeo owes to the public collectively," and thus, in Justice Thomas's view, provide shaky grounds for Article III standing. *Id.* at

[5] For these reasons too, Experian's argument (at 29–31) that decertification is required because the absent class members lack standing should be rejected. As discussed, the "subjective importance of the information to the plaintiffs" is irrelevant to determining informational injury; the common issue is that Experian failed to disclose the true "sources of information" to all class members. *See Larson*, 2016 WL 4367253 at *4 ("Article III standing in this case, just like Trans Union's alleged liability under section 1681g(a), is predicated on the character of the allegedly misleading information in the credit reports disseminated to Larson and absent class members, not on Larson's or absent class members' subjective interpretation of that information."). In any case, the information is uniformly important to the class members for the very reasons Congress identified in enacting section 1681g(a); put simply, there is no need for "individualized showings specific to particular class members." Experian Br. 31.

1553–54. But Justice Thomas recognized that the same is not true where, as here, "a private plaintiff seeks to vindicate his own private rights." *Id.* at 1552. "If Congress has created a private duty owed personally to Robins to protect *his* information," Justice Thomas elaborated, "then the violation of the legal duty suffices for Article III injury in fact." *Id.* at 1554. Likewise, Dreher claims that Experian violated section 1681g(a) by failing to disclose to *him* the sources of information about *his own* credit history. Therefore, Dreher would have Article III standing even under Justice Thomas's view.

Dreher not only suffered the type of informational injury recognized by the Court in *Spokeo*, but the facts of this case illustrate the real-world value of this information. In enacting the FCRA, Congress identified the risk of significant harms associated with "the dissemination of false information" (or lack thereof) and "plainly sought to curb" those harms "by adopting procedures designed to decrease that risk." *Id.* at 1550. Specifically, Congress enacted § 1681g because in some cases disclosure of the source "may be the only way in which the consumer can effectively" correct mistakes. 116 Cong. Rec. 35,940 (1970). And section 1681g(a)(2) reflects Congress's judgment that requiring transparency is often the best—and most effective—way to prevent dissemination of inaccurate information.

Here, rather than facilitating an effective dispute process, Experian severely limited the ability of Dreher and others like him to confront and communicate with

the entity controlling the information in his report. More importantly, CardWorks had no incentive to incur the costs of conducting a "detailed inquiry or systematic examination" of Dreher's dispute because, at the end of the day, any negative complaints would be attributed to Advanta. *Johnson v. MBNA Am. Bank, NA*, 357 F.3d 426, 430 (4th Cir. 2004). By withholding CardWorks as a source, Experian thus removed one of Congress's intended mechanisms for policing industry conduct (transparency) and facilitated CardWorks' ability to conduct a "superficial, *un*reasonable" investigation. *Id.* at 431.[6]

As the Court made clear in *Spokeo*, "because Congress is well positioned to identify intangible harms that meet minimum Article III requirements," its "judgment" is both "instructive and important." 136 S. Ct. at 1549. This Court should respect Congress's considered judgment in enacting the FCRA and conclude that Dreher and the class members have standing.

[6] Experian's investigation policy further demonstrates the importance of identifying the source of the information. Experian does not independently investigate consumer disputes and instead merely "parrots" the responses it receives from sources of information. *See, e.g., Burke v. Experian Info. Solutions, Inc.*, 2011 WL 1085874, at *6 (E.D. Va. Mar. 18, 2011) ("Experian seeks summary judgment based on the proposition that by sending [notice of the dispute to the source], without more, it discharged its duty of reinvestigation as a matter of law."). Thus, full disclosure of sources is not only the most effective way, but the *only* way, for consumers to effectively correct mistakes in their Experian credit reports.

II. Experian willfully violated the FCRA by failing to disclose to consumers the source of their credit information.

Apart from standing, Experian argues that the district court improperly granted summary judgment to Dreher on his claim that Experian willfully violated the FCRA by catering to CardWorks' desire "to go unlisted on the credit reports." JA 392. This Court should reject that argument. *First*, applying the Supreme Court's framework in *Safeco*, the district court correctly concluded that Experian's claimed reading of section 1681g(a)(2)—as permitting the non-disclosure of CardWorks, the direct source of its information regarding Dreher—was "objectively unreasonable." *Second*, Experian's assertion (at 32) that "willfulness is a classic state of mind determination that is for the jury to decide" lacks merit in a case like this, where Experian acted in reckless disregard of a clear provision of the FCRA. *Safeco* instead requires an "objective standard" in such a case. 551 U.S. at 68.[7] The district court here properly applied that standard—whether "the defendant's conduct involved 'an unjustifiably risk of harm'"—and reached the correct conclusion on its review of the undisputed evidence. JA 396 n.7. Because Experian does not even try to identify a genuine dispute of material fact as to its

[7] Of course, willfulness "covers both knowing *and* reckless disregard of the law." *Safeco*, 551 U.S. at 59 (emphasis added). "Evidence of knowing violations of FCRA is relevant to a claim of willfulness . . . but then *Safeco*'s recklessness analysis would not apply." *Fuges v. Sw. Fin. Servs., Ltd.*, 707 F.3d 241, 249 n.14 (3d Cir. 2012). Thus, where a defendant is alleged to have *knowingly* disregarded the FCRA, evidence of its subjective intent to violate the law is obviously important.

recklessness, this Court should affirm the district court's determination that Experian is liable as a matter of law.

A. Experian's conduct was objectively unreasonable under *Safeco*.

1. In *Safeco*, the Supreme Court held that "willful failure" under the FCRA, as set out in 15 U.S.C. § 1681n(a), "covers a violation committed in reckless disregard of the notice obligation." 551 U.S. at 52. Drawing on the "common law understanding" of recklessness, the Court concluded that whether a defendant's conduct was reckless for the purposes of the FCRA required the application of "an objective standard: action entailing 'an unjustifiably high risk of harm that is either known or so obvious that it should be known.'" *Id.* at 68 (quoting *Farmer v. Brennan*, 511 U.S. 825, 836 (1994)). Thus, the Court held, "a company subject to FCRA does not act in reckless disregard of it unless the action is not only a violation under a reasonable reading of the statute's terms, but shows that the company ran a risk of violating the law substantially greater than the risk associated with a reading that was merely careless." *Id.* at 69. In other words, where the defendant's "reading" is "not objectively unreasonable," it is not liable for a willful violation under the FCRA. *Id.* at 70. Moreover, "the Court explicitly rejected the argument that subjective bad faith must be taken into account in determining whether a

defendant has acted recklessly, and therefore willfully, under FCRA." *Fuges*, 707 F.3d at 249 (citing *Safeco*, 551 U.S. at 70 n.20).[8]

The Court then provided some guidance to courts applying this "objective reasonableness" test. Where the FCRA provision at issue has "less-than-pellucid statutory text," as was the case in *Safeco*, the court must determine whether, at the very least, the defendant's "reading has a foundation in the statutory text." 551 U.S. at 69–70. Bearing on that determination is whether any "court of appeals ha[s] spoken on the issue," or whether any "authoritative guidance has yet come from the FTC." *Id.* at 70; *see Fuges*, 707 F.3d at 251–52 (applying the "three bases" of *Safeco*'s test). Nevertheless, "[w]hile the absence of contrary authority to a particular FCRA interpretation is persuasive as to the reasonableness of the adoption of that interpretation, it is not dispositive." *Id.* at 253 n.21. "It merely establishes that the issue has not been presented to a court of appeals before. The credit agency whose conduct is first examined under that section of the [FCRA] should not receive a pass because the issue has never been decided." *Cortez v. Trans Union, LLC*, 617 F.3d 688, 722 (3d Cir. 2010).

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[8] *Safeco* considered a case in which the defendant put forward a mistaken "reading" of the statute. By contrast, where there is "no evidence that" the credit reporting agency "actually adopted" such an interpretation and was instead "uninformed by any analysis," the "'objective reasonableness' analysis called for by *Safeco*" supplies no defense. *Milbourne v. JRK Residential Am., LLC*, 2016 WL 4265741, at *6 (E.D. Va. Aug. 11, 2016).

2. Applying the framework set forth by the Supreme Court in *Safeco*, the district court concluded that the term "sources" in 15 U.S.C. § 1681g(a) "clearly includes, at the very least, the entity that gives that information directly to the consumer reporting agency," JA 398—here, CardWorks. That was correct.

As an initial matter, Experian's contrary position drastically overstates *Safeco*'s "objectively reasonable" standard, repeatedly invoking (at 12, 16–18, 32–34, 38) the qualified-immunity doctrine's clearly established standard. That is much to make of the Supreme Court's single "*cf.*" cite to *Saucier v. Katz*, 553 U.S. 194 (2001). *See Safeco*, 551 U.S. at 70. "[N]owhere did the Supreme Court hold, or even suggest, that it intended to substitute the qualified immunity analysis for the determination of willfulness under the FCRA that the Court so thoroughly laid out in the rest of its opinion." *Milbourne*, 2016 WL 4265741, at *7; *see also Heaton v. Soc. Fin., Inc.*, 2015 WL 6744525, at *6 (N.D. Cal. Nov. 4, 2015) (dismissing defendant's argument that *Safeco* analysis "mirrors a qualified immunity analysis" as "overstat[ing] *Safeco*'s holding"). "[D]espite comparisons made to qualified immunity analysis," a court explained, the *Safeco* inquiry "is not a question of whether a legal principle is clearly established in constitutional jurisprudence where existing circuit court or Supreme Court precedent is usually required." *Lengel v. HomeAdvisor, Inc.,* 102 F. Supp. 3d 1202, 1211 (D. Kan. 2015). "Instead, it is an issue of statutory interpretation where there is a greater potential for the relevant

text to provide clear guidance." *Id.*; *see also Levine v. World Fin. Network Nat'l Bank*, 554 F.3d 1314, 1319 (11th Cir. 2009) ("What matters under *Safeco* is the text of the Act and authoritative interpretations of that text.").

Here, the answer is clear: "the statutory text indicates that [Experian's] position is not objectively reasonable." *Lengel,* 102 F. Supp. 3d at 1211. Section 1681g(a)(2) requires reporting agencies to disclose their "sources of information." Experian does not dispute that a "source" is defined as "one that supplies information."[9] Under any plain reading of section 1681g(a)(2), then, CardWorks is the direct "source" for the information Experian received, given that CardWorks services all Advanta accounts. *See* JA 322–23, 346–47.

Experian nevertheless attempts to inject ambiguity into section 1681g(a)(2)'s plain text, arguing (at 35–36) that the text "does not specify whether a 'source[]' should be disclosed using its formal corporate name . . . or . . . the name under which it interacts with customers in servicing their accounts." In Experian's view, "the provision does not dictate one choice or the other." But Experian creates an entirely false choice; as the district court recognized, "Experian easily could have disclosed both Advanta and CardWorks." JA 403. At the very least, because there can be no doubt that CardWorks was *a source* (indeed, the immediate source) of the information, Experian should have included its name on the trade line. That is

[9] Merriam-Webster.com, http://bit.ly/22DW5s1 (last visited Aug. 23, 2016).

exactly what Experian does for other accounts—and its employees first suggested that the company do the same here. *See* JA 221–23, 249, 403 n.12. The sole reason Experian didn't in this case is because it deferred to CardWorks' demand to be listed only under the "Advanta" name. But obliging a customer's request in the defiance of a clear statutory command is not the same as "objective reasonableness." As Judge Posner once noted, where "a completely adequate precaution would have cost nothing"—as would be the case with listing both names on the credit report—"failing to take any precaution . . . [is] indicative of willful violation." *Redman*, 768 F.3d at 638.

Next, Experian points to an entirely separate provision of the FCRA, 15 U.S.C. § 1681i(a)(6)(B)(iii), which provides that notices of reinvestigation results should include "the business name . . . of any furnisher of information." This language, Experian asserts, "provides textual support for Experian's position," given that CardWorks "was, in all relevant respects, doing business under the name 'Advanta' in its interactions with Advanta account holders." Experian Br. 36–37. But this misstates the record. There is no evidence that Advanta was a trade name or alias for CardWorks. And the "business name" requirement in section 1681i(a)(6)(B)(iii) actually *undermines* Experian's position. It shows that, when Congress wanted reporting agencies to disclose the operating or business name of the information furnisher, Congress knew how to say it. And it didn't do so here.

"[W]here Congress includes particular language in one section of a statute but omits it in another . . . it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993); *see also* Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* 170 (2012) ("[W]here the document has used on term in one place, and a materially different term in another, the presumption is that the different term denotes a different idea."). Instead of using the "business name" language—as it did in section 1681i(a)(6)(B)(iii)—Congress wrote section 1681g(a)(2) to require that reporting agencies disclose their "*sources* of information" to consumers. Any reasonable reading of that section indicates that it covers a *direct* source like CardWorks.

Although it argued in the district court that "it acted under the [FDIC's] guidance," JA 400, Experian now accepts that there is an "absence" of regulatory guidance concerning the FCRA's "sources of the information" requirement. *See* Experian Br. 34. And for good reason. The FDIC never opined—let alone issued "authoritative guidance," *Safeco*, 551 U.S. at 70—on whether listing "Advanta" without mentioning "CardWorks" would comply with the FCRA. Indeed, despite Experian's factual misstatement (at 5) that "[t]he FDIC determined that it preferred credit-reporting agencies such as Experian to continue to use the name 'Advanta Credit Cards,'" the FDIC actually said nothing at all about reporting

agencies. Rather, as the district court found, the FDIC email and the CardWorks letter co-signed by the FDIC receiver only "summarize[ed] CardWorks' internal practice on how it identifies itself to consumers" and "provide[d] formal documentation of Advanta's dissolution and CardWorks' role in taking over Advanta's old accounts." JA 401. In any event, *Safeco* held that only FTC guidance was relevant, given that agency's FCRA enforcement authority over consumer-reporting agencies (since supplemented by that of the new Consumer Financial Protection Bureau). *See* 551 U.S. at 70. And courts have even disregarded *the FTC's* informal opinions and documents. *See Long v. Tommy Hilfiger U.S.A., Inc.*, 671 F.3d 371, 377 n.3 (3d Cir. 2012); *Safeco*, 551 U.S. at 70, n.19 ("[P]laintiffs point to a letter, written by an FTC staff member to an insurance company lawyer . . . [b]ut the letter does not canvass the issue, and it explicitly indicated that it was merely 'an informal staff opinion . . . not binding on the Commission.'"). Thus, even if the informal FDIC correspondence said what Experian says it does—and it doesn't—it should be given no deference.

In any case, Experian categorically claims (at 34) that the "absence of guidance *defeats* a willfulness claim." This again confuses the *Safeco* standard with qualified immunity's "clearly established" standard. Nothing in *Safeco* indicates that a defendant's interpretation of the FCRA is automatically reasonable where authoritative guidance is lacking; the Court simply said that it was *relevant* in light of

the disputed provision's "less-than-pellucid statutory text." 551 U.S. at 70. Here, by contrast, though it is true that "no appeals court or regulatory agency has given a definitive definition of the scope of 'sources of information,'" the district court correctly observed that that the dearth of guidance shows only that "the term's meaning is self-evident." JA 399–400. That this Court "will be the first court of appeals to address whether the FCRA applies [in this context] . . . does not . . . result in a borderline case of liability as [Experian] suggests." *Cortez*, 617 F.3d at 722. Rather, "[t]he statute is far too clear to support any such license." *Id.*

B. The district court correctly concluded that Dreher had established the willfulness of Experian's violation as a matter of law.

Experian alternatively argues that, even if the district court correctly concluded that its interpretation of section 1681g(a)(2) was objectively unreasonable under *Safeco*, the question whether it willfully violated that section should have been sent to the jury, because, in its view, "willfulness is a classic state of mind determination that is for the jury to decide." Experian Br. 32, 39–42. If that were true—if willfulness indeed *required* a subjective inquiry into the defendant's state of mind—then Experian could very likely be right that summary judgment was inappropriate here. As Experian correctly points out, "'[a] defendant's 'state of mind' is 'seldom . . . beyond reasonable dispute.'" *Id.* at 40.

But *Safeco* expressly held that the defendant's subjective state of mind—its "conscious choice of a course of action," as Experian puts it (at 41)—is irrelevant when the question is whether a defendant acted in reckless disregard of the statutory text—particularly a "pellucid" one like section 1681g(a). *See Safeco*, 551 U.S. at 69–70 & n.18. As Judge Easterbrook has explained, the Supreme Court reached that conclusion because "the statutory standard concerns *objective* reasonableness, not anyone's state of mind." *Van Straaten v. Shell Oil Prods. Co. LLC*, 678 F.3d 486, 491 (7th Cir. 2012); *see also id.* at 491 (Cudahy, J., concurring) ("[T]he appropriate and sole measure of recklessness is objective reasonableness," which "may be determined as a matter of law and without [a] trial."); *Levine*, 554 F.3d at 1319 ("*Safeco* instructs us not to consider the subjective intent of Experian."). Indeed, Experian itself argued earlier that the recklessness standard is one of "objective culpability"—no matter what Experian's "'subjective intent may have been.'" ECF No. 180, at 25 (quoting *Safeco*, 551 U.S. at 70 n.20). Thus, whatever evidence Experian may have concerning its state of mind—and it does not point to any in its brief—cannot justify a jury trial on Experian's willfulness.

As it did with standing, Experian again mischaracterizes the district court's analysis, claiming (at 39) that it "erred by treating *Safeco*'s 'objective reasonableness' test not as a safe harbor but as the ultimate standard of liability." Far from it: The district court actually held that, "by blatantly ignoring the Act's clear and simple

command to disclose the 'sources of information' for the Advanta trade lines, the most obvious of which was the company that *actually gave Experian the information*," Experian's conduct involved "an unjustifiably high risk of harm that is either known or so obvious that it should be known." JA 396 n.7 (quoting *Safeco*, 551 U.S. at 68). That is, the district court applied *Safeco*'s common-law "recklessness" standard and simply found, after reviewing the evidence in the record (none of which Experian disputes), that Experian's conduct here satisfied that standard as a matter of law; it did not "automatically" conclude that because Experian's interpretation of section 1681g(a)(2) was "objectively unreasonable," it was liable for a willful violation. And the court's conclusion is particularly correct in light of the undisputed fact that Experian's employees originally intended to comply with the Act by listing CardWorks along with Advanta. JA 249, 403 n.12. The record shows that the company then changed its mind at the behest of Cardworks, which "specifically requested to go unlisted. . . . Experian happily obliged." JA 392.

Indeed, throughout its *Safeco* argument, Experian does not identify a single genuine dispute of material fact—or even cite a single piece of evidence—indicating that a reasonable jury could find it was *not* reckless when it failed to identify CardWorks to consumers. *See Foster v. Univ. of Md.-E. Shore*, 787 F.3d 243, 250 n.8 (4th Cir. 2015) (holding that, because the plaintiff's "opening brief limit[ed] its discussion of direct evidence to an isolated footnote," she "waived this argument

on appeal"); *Cavallo v. Star Enter.*, 100 F.3d 1150, 1152 n.2 (4th Cir. 1996) (noting that "an issue first argued in a reply brief" is waived). To defeat summary judgment, a "nonmoving party" like Experian "must rely on more than conclusory allegations, mere speculation, the building of one inference upon another, or the mere existence of a scintilla of evidence." *Dash v. Mayweather*, 731 F.3d 303, 311 (4th Cir. 2013). Because Experian does not even attempt to make that showing here, there is no reason for this Court to overturn the district court's well-considered conclusion that Dreher was entitled to summary judgment on his class claim.

III. The calculation of statutory damages does not preclude class certification.

Experian's final argument, that decertification is warranted "because the determination of the amount of statutory damages due to each class member is inherently individualized," plainly lacks merit. Experian Br. 42.

Rule 23(b)(3) requires that common questions "predominate" over individual issues. That is true here: There is a single theory of liability, and damages are tied directly to that theory. As the district court explained, the "violation—in this case, Experian's alleged failure to disclose Cardworks as a source of information about consumer credit—is the same for each plaintiff, in each instance." JA 334. The only variable is how many times Experian's policy deprived each class member of the information to which they're entitled. That ministerial task is no bar to

certification. And this inquiry "is reduced to mouse-clicking simplicity by virtue of Experian's own advanced, data-sorting software." *Id.*

Indeed, this Court held precisely that in *Stillmock v. Weis Markets*, 385 F. App'x 267, 273 (4th Cir. 2010), an FCRA case seeking statutory damages. There, the district court denied certification "on the ground that determining the quantum of damages with respect to each class member would be too individualized for class-wide treatment under Rule 23(b)(3)." *Id.* at 272. The district court "rejected [the plaintiffs'] contention that a jury could decide that every class member should receive the same amount of statutory damages by considering only matters pertaining to [the defendant] and common to each and every class member." *Id.* at 271. This Court reversed, holding that Rule 23(b)'s predominance requirement was met because "the qualitatively overarching issue by far is the liability issue of the defendant's willfulness, and the purported class members were exposed to the same risk of harm every time the defendant violated the statue in the identical manner." *Id.* at 273. When that's the case, as here, "individual statutory damages issues are insufficient to defeat class certification under Rule 23(b)(3)," particularly when they do "not complicate matters very much" because damages can be calculated based on how many times each class member's rights were violated. *Id.*

Experian does not even mention the majority's analysis in *Stillmock*. Instead, seeking to escape *Stillmock*'s clear holding, Experian presses the novel argument (at

43–44) that it was impliedly overruled by this Court's unpublished decision in *Soutter v. Equifax Info. Servs.*, 498 F. App'x 260 (4th Cir. 2012), which cites to a single sentence in Judge Wilkinson's *concurring* opinion in *Stillmock*. But *Soutter* did nothing of the sort. The Court in *Soutter* held that the plaintiff's claim was not sufficiently typical of the class's claims, as required by Rule 23(a), and so resolving liability as to her wouldn't necessarily resolve liability as to everyone else—the opposite of what we have here.[10] 498 F. App'x at 265. The Court noted that this defect was "exacerbated because Soutter [was] claiming only statutory damages, which typically require an individualized injury," and cited Judge Wilkinson's *Stillmock* concurrence for support. *Id.* The question here, however, isn't whether statutory damages are "individualized." It's whether common questions predominate. Thus, Experian's repeated warnings that selecting a level of statutory damages would require some individualized inquiries are immaterial. "Indeed," as this Court recently noted, "common issues of liability may still predominate even when some individualized inquiry is required." *Ealy v. Pinkerton Gov't Servs., Inc.*, 514 F. App'x 299, 305 (4th Cir. 2013) (citing *Stillmock*, 385 Fed. App'x at 273). They did in *Stillmock*, and they do here.[11]

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[10] On appeal, Experian does not challenge the district court's conclusion that all of the Rule 23(a) prerequisites are met here.

[11] Experian suggests in passing (at 45) that decertification is also required under *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1433 (2013). That too is wrong. The plaintiffs there alleged four antitrust injury theories, only one of which was capable

As for Judge Wilkinson's concurrence in *Stillmock*, he did not express disagreement with the majority's holding on predominance. To the contrary, he wrote separately to explain why in his view—"[r]egardless of whether common liability issues . . . predominate over individualized damages determinations"—it is "well within a district court's discretion to consider the magnitude of the costs upon the company and its employees that class certification may impose" by "forcing a defendant to settle in the face of billions in liability." 385 F. App'x at 276, 281–82. That concern isn't present here: Experian hasn't shown that it faces "annihilative liability," *id.* at 276; it repeatedly told the district court that "this case cannot be settled," Hearing Tr. 6/10/14, 6:20; and the district court exercised its discretion to grant certification under Rule 23.

Experian attempts to distinguish *Stillmock* by arguing that the case "arguably involved an identical harm suffered by each class member (an increased risk of identity theft)." Experian Br. 46. But that conflates harm (the injury) with damages (the remedy)—the same mistake Experian makes in mischaracterizing the district

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of classwide proof. 133 S. Ct. at 1430–31. The plaintiffs thus had to show "that the damages resulting from *that* injury" could be measured using a "common methodology." *Id.* at 1430, 1433 (emphasis added). The plaintiffs' model, however, "failed to measure damages resulting from the particular antitrust injury on which" liability was premised, instead "assum[ing] the validity of all four theories of antitrust impact" even though only one "remained in the case." *Id.* at 1433–34. Here, by contrast, there is a single theory of liability, damages are tied directly to that theory, and damage calculations will be ministerial. *Comcast* is therefore inapplicable.

court in its standing argument. Once this elementary distinction is understood, Experian's attempt to sidestep *Stillmock* falls apart.

Finally, Experian asserts (at 46) that the district court's certification decision is inconsistent with *Wal-Mart v. Dukes*, 131 S. Ct. 2541 (2011), which disapproved of a "Trial by Formula." But the class in *Dukes* sought "to sue about literally millions of employment decisions at once" without any "glue holding the alleged *reasons* for all those decisions together." 131 S. Ct. at 2552. The Supreme Court rejected the "novel project" of getting around this shortcoming by using a "sample set of the class members" to determine liability and then extrapolating from that set "to the entire remaining class." *Id.* at 2561. That is nothing like this case, where liability is common to the class and the only question is how to calculate statutory damages. Although Experian attempts to dismiss it as dicta, *see* Experian Br. 44 n.6, this Court put it clearly in *Berry*: Statutory damages claims like those here "are not the kind of individualized claims that threaten class cohesion and are prohibited by *Dukes*." 807 F.3d at 609. "When it comes to statutory damages under the FCRA," this Court continued, "what matters is the conduct of the *defendant*," which, as here, "was uniform with respect to each of the class members." *Id.* And, just like in *Berry*, once Experian's common willful violation is established, "every class member [is] entitled uniformly to the same amount of statutory damages, set by rote calculation." *Id.* at 610.

Said differently, the district court's decision does not, as Experian contends (at 46), "eliminat[e] plaintiff-specific arguments and defenses"; rather, "[t]he only variation among the individual plaintiffs . . . concerns the number of discrete statutory violations as to each." JA 334. And this Court has held, under essentially the same circumstances, that "this difference does not complicate matters very much at all." *Stillmock*, 385 Fed. App'x at 273. Thus, this Court should affirm the district court's order granting class certification.

CONCLUSION

The district court's judgment should be affirmed in its entirety.

Respectfully submitted,

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August 29, 2016

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 13,293 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because this brief has been prepared in proportionally spaced typeface using Microsoft Word 2010 in 14 point Baskerville font.

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CERTIFICATE OF SERVICE

I hereby certify that on August 29, 2016, I electronically filed the foregoing brief with the Clerk of the Court for the U.S. Court of Appeals for the Fourth Circuit by using the CM/ECF system. All participants are registered CM/ECF users, and will be served by the appellate CM/ECF system.

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