

ORAL ARGUMENT NOT YET SCHEDULED

Nos. 15-2329 & 15-2330

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

DAVID ALAN SMITH,
Plaintiff-Appellee/Cross-Appellant,

v.

LEXISNEXIS SCREENING SOLUTIONS, INC.
Defendant-Appellant/Cross-Appellee.

On appeal from the United States District Court
for the Eastern District of Michigan, Case No. 4:13-cv-10774
The Honorable Mark A. Goldsmith

**BRIEF OF AMICUS CURIAE ELECTRONIC PRIVACY INFORMATION
CENTER (EPIC) IN SUPPORT OF PLAINTIFF-APPELLEE/
CROSS-APPELLANT**

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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INTEREST OF AMICUS

EPIC is a public interest research center in Washington, D.C., established in 1994 to focus public attention on emerging privacy issues.¹ EPIC routinely participates as amicus curiae in federal cases concerning important consumer privacy issues, including enforcement of the Fair Credit Reporting Act and record accuracy. *See, e.g., ACA Int'l v. FCC*, No. 15-1211 (D.C. Cir. filed Jan. 22, 2016) (defending an order interpreting the Telephone Consumer Protection Act by arguing that the widespread adoption of cell phones has magnified the harm of unwanted communications); *Spokeo v. Robins*, 135 S. Ct. 1892 (2015) (arguing that the violation of a consumer's privacy rights under the Fair Credit Reporting Act constitutes an injury-in-fact sufficient to confer Article III standing); *In re Nickelodeon Consumer Privacy Litig.*, No. 15-1441 (3d Cir. filed May 4, 2015) (addressing the definition of personally identifiable information as applied to Internet addresses and other unique persistent identifiers); *FTC v. Wyndham Hotels & Resorts, LLC*, 799 F.3d 236 (3d Cir. 2015) (arguing that regulation of data security practices is necessary to protect consumers from identity theft and fraud); *Gordon v. Softech Int'l*, 726 F.3d 42 (2d Cir. 2012) (arguing that resellers of driver

¹ Plaintiff-Appellee/Cross-Appellant has consented to the filing of this brief. Defendant-Appellant/Cross-Appellee has declined to consent. Concurrent with this brief, EPIC has filed a motion to file an amicus brief. In accordance with Federal Rule of Appellate Procedure 29, the undersigned states that no monetary contributions were made for the preparation or submission of this brief. This brief was not authored, in whole or in part, by counsel for a party.

records should be strictly liable for downstream misuses); *Kehoe v. Fidelity Federal Bank and Trust*, 421 F.3d 1209 (11th Cir. 2005) (arguing that individuals need not prove actual damages to recover under the Driver's Privacy Protection Act); *Remsburg v. Docusearch, Inc.*, 816 A.2d 1001 (N.H. 2003) (arguing that a data broker should be liable for harms caused by the sale of personal information).

SUMMARY OF THE ARGUMENT

When Congress considered the Fair Credit Reporting Act (“FCRA”), it was well aware of the harm that consumers would suffer from the sale of inaccurate reports about their credit history and personal background. In order to prevent such harm, Congress required that all consumer reporting agencies (“CRAs”) follow reasonable procedures to ensure the maximum possible accuracy in the consumer reports they sold to others. Despite this clear congressional mandate, companies routinely fail to take reasonable care, producing erroneous and incomplete reports that cause significant harm to consumers. This is especially true of CRAs that provide background check services.

CRAs, such as the defendant in this case, routinely provide detailed background investigations to employers that can make or break a job application. These Employment Screening CRAs gather detailed personal information and sell it to the employer, often without regard for the consequences. Despite the clear intent of Congress that CRAs ensure maximum possible accuracy in the information they provide, these reports are often inaccurate, associating the criminal and bankruptcy records of other individuals with job applicants who are entirely innocent. These negligent reports can have devastating effects on job applicants, as this case shows. Moreover, economic theory makes clear that the Employment Screening CRA, not the applicant, is the best—and indeed, the only—party in a position to assure “maximum possible accuracy” for reports that they generate and sell. When they fail to do so, they are liable under the FCRA.

ARGUMENT

Congress passed the Fair Credit Reporting Act to “insure that consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer’s right to privacy.” 15 U.S.C. § 1681(a)(4). The goal of the Act was to “prevent consumers from being unjustly damaged because of inaccurate or arbitrary information in a credit report.” Fair Credit Reporting, S. Rep. No. 91-517, at 1 (1969). To achieve this goal, Congress required CRAs to establish and follow “reasonable procedures to assure *maximum possible accuracy* of the information” that they disseminate in consumer reports. 15 U.S.C. § 1681e(b) (emphasis added).

There are many different types of reporting agencies. *See* Consumer Fin. Prot. Bureau, List of Consumer Reporting Agencies 2 (2015) [hereinafter “CRA List”].² In addition to the three largest CRAs—Equifax, Experian, and TransUnion—that handle credit reports, there are thousands of “specialty reporting companies that focus on certain market areas and consumer segments.” *Id.* at 5; *see also* 15 U.S.C. § 1681a(x) (defining nationwide specialty consumer reporting agencies).

A substantial segment of the specialty reporting companies, such as the defendant in this case, provide reports for employment screening purposes. CRA List, *supra*, at 9; *see also* § 1681a(x) (defining nationwide specialty consumer reporting agencies to include CRAs that “compile[] and maintain[] files on

² http://files.consumerfinance.gov/f/201501_cfpb_list-consumer-reporting-agencies.pdf.

consumers on a nationwide basis” relating to “(4) employment history”). These Employment Screening CRAs produce reports based on a variety of sources including “credit checks, criminal background checks, public records—such as bankruptcy filings and other court documents—and information related to your employment history.” Consumer Fin. Prot. Bureau, *I’ve Been Looking For A Job. What Do Employers See When They Do Credit Checks And Background Checks?* (Jan. 21, 2015) [hereinafter “CFPB Employment Checks”].³

Recent studies estimate that 69 percent of employers conduct criminal background checks for all job candidates. Soc. for Human Res. Mgmt., *Background Checking: The Use of Criminal Background Checks in Hiring Decisions* (July 19, 2012).⁴ Although the “exact number of private companies that conduct criminal record checks, the number of checks conducted each year, and the number of employers and industries requesting checks are generally unknown,” they “appear to be increasing.” U.S. Gov’t Accountability Office, GAO-15-162, *Criminal History Records: Additional Actions Could Enhance the Completeness of Records Used for Employment-Related Background Checks* 33 (2015) [hereinafter “GAO Report”].⁵

It is clear that consumers suffer substantial harm from inaccurate background checks. These reports sometimes contain erroneous credit information,

³ <http://www.consumerfinance.gov/askcfpb/1823/ive-been-looking-job-what-do-employers-see-when-they-do-credit-checks-and-background-checks.html>.

⁴ <http://www.shrm.org/research/surveyfindings/articles/pages/criminalbackgroundcheck.aspx>.

⁵ <http://www.gao.gov/assets/670/668505.pdf>.

and incomplete or misleading criminal records. *See* Nat'l Consumer Law Ctr., *Broken Records: How Errors by Criminal Background Checking Companies Harm Workers and Businesses* 3–4 (Apr. 2012)⁶ [hereinafter “Broken Records”]. But an even more common problem is the inclusion of information in a background check report that is about an entirely different person (a “mismatch error”). *Id.*

Mismatch errors pose especially difficult challenges to consumers because they have no ability to proactively protect themselves from harm. An individual has no way of knowing in advance which Employment Screening CRA her prospective employer might use to conduct the background check. The Consumer Financial Protection Bureau (“CFPB”) lists 15 Employment Screening CRAs, *CRA List*, *supra*, at 8–12, but other sources indicate that there are hundreds, *ConcernedCRAs, Background Check Consumer Protection Group Grows to 200 Firms* (Nov. 7, 2013),⁷ or even thousands of these companies, *Broken Records*, *supra*, at 32 (stating that there are 2,137 members of the National Association of Professional Background Screeners).

But even if a consumer knew which Employment Screening CRA her prospective employer would use, many of these companies do not obtain records about a consumer until after the employer requests a report. *CRA List*, *supra*, at 8. At this point, it is too late for the consumer to preemptively review the report and dispute errors. And even if a consumer could review the records before their

⁶ <https://www.nclc.org/images/pdf/pr-reports/broken-records-report.pdf>.

⁷ <http://www.concernedcras.com/2013/11/background-check-consumer-protection-group-grows-to-200-firms/>.

background check is conducted, the consumer could not review for the type of mismatch error that occurred in this case. Here, the defendant *created* the error when it included the criminal records of David Oscar Smith in the background check report for David Alan Smith.

The *raison d'être* of an Employment Screening CRA is to compile “credit checks, criminal background checks, public records . . . and information related to [an individual’s] employment history.” CFPB Employment Checks, *supra*. In other words, the responsibility of an Employment Screening CRA is to match information from different sources with a *particular* person. When a company fails to meet this fundamental baseline of accuracy, their procedures should be *per se* unreasonable and they should be strictly liable under the FCRA.

I. Reliance on inadequate industry practices does not relieve a credit reporting agency of the duty to ensure accuracy under the FCRA.

A. Consumer reporting agencies routinely produce inaccurate reports.

Inaccurate consumer reports are a widespread problem for American consumers. More than three-quarters of complaints received by the CFPB stem from erroneous information distributed by a CRA. Consumer Fin. Prot. Bureau, *Consumer Response Annual Report 20–21* (Mar. 2015).⁸ According to the Federal Trade Commission, 21 percent of American consumers surveyed had “confirmed material errors” on at least one of their reports issued by the three major credit reporting bureaus (Experian, Equifax, and TransUnion). FTC, Report to Congress

⁸ <https://www.ftc.gov/sites/default/files/documents/reports/section-319-fair-and-accurate-credit-transactions-act-2003-fifth-interim-federal-trade-commission/130211factareport.pdf>.

Under Section 319 of the Fair and Accurate Credit Transactions Act of 2003, at iv (Dec. 2012).⁹ A follow-up report showed that the vast majority of consumers were not able to correct all of the inaccurate information on their reports, even after contacting the relevant CRA. FTC, Report to Congress Under Section 319 of the Fair and Accurate Credit Transactions Act of 2003, at iii (Jan. 2015).¹⁰

Employment Screening CRAs compound the problem of inaccurate reports by failing to adequately screen records before compiling them into background check reports. While these companies may not be directly responsible for errors in records produced by other companies, they are responsible for the errors that they create as well as the decision to sell inaccurate personal information to others. This includes incorrectly “matching” records that are not actually about the same individual.

One of the most widely reported problems caused by Employment Screening CRAs is the failure to correctly correlate credit and criminal history for the same individual. According to the National Consumer Law Center, “many private background screening companies rely solely on first name, last name, and date of birth” when matching records. Broken Records, *supra*, at 15. The report also found that many Employment Screening CRAs have sufficient information to prevent these mismatch errors, but “they do not design their products to utilize this

⁹ http://files.consumerfinance.gov/f/201503_cfpb_consumer-response-annual-report-2014.pdf.

¹⁰ <https://www.ftc.gov/system/files/documents/reports/section-319-fair-accurate-credit-transactions-act-2003-sixth-interim-final-report-federal-trade/150121facta-report.pdf>.

information” and “appear to consider making information instantly available for employers and/or utilizing less costly methods to be a higher priority than ensuring accurate information for the workers whose livelihoods are affected.” Broken Records, *supra*, at 19.

Problems arise frequently for consumers with common names. For example, plaintiff Catherine Taylor, an Arkansas resident with no criminal history, had her records repeatedly mismatched with the criminal history records of an Illinois resident with the same name and date of birth. As a consequence, the plaintiff’s employment and housing prospects were repeatedly threatened. *Id.* at 16–17. The Employment Screening CRA that produced the plaintiff’s report was ChoicePoint, *id.*, which was subsequently acquired by the defendant in this case. ChoicePoint had access to the plaintiff’s address, Social Security Number, and credit report, which would have prevented the mismatch from occurring had ChoicePoint used these data points in generating the background report. *Id.* But the company’s background check service was “designed to give an instant result, and *thus was not designed to access*” information that would have prevented the error. *Id.* at 17.

Employment Screening CRAs also routinely distribute criminal history information even when they are unable to obtain complete and accurate records. GAO Report, *supra*, at 37. Reports frequently include sealed or expunged records and incomplete disposition data. *See* Broken Records at 3. Many errors arise from Employment Screening CRAs’ common practice of purchasing bulk criminal records from state courts but subsequently failing to properly update the data. *See id.* at 21. Employment Screening CRAs also fail to use the most reliable sources of

criminal records or to independently verify certain records that raise red flags. *See id.* at 21–26.

B. Government agencies and private litigants have filed numerous actions against credit reporting agencies for producing reports based on mismatch errors.

Mismatch errors have prompted numerous FCRA enforcement actions and private lawsuits against prominent members of the Employment Screening industry.

The CFPB recently brought actions against two of the largest Employment Screening CRAs based on mismatch errors. General Information Services, Inc. & e-Backgroundchecks.com, Inc., CFPB No. 2015-CFPB-0028 (Oct. 29, 2015). The Bureau found that the companies did not satisfy the FCRA requirements where their procedures “permit[ted], but [did] not require, employers to provide middle names for applicants for the purpose of matching criminal records to consumers.” *Id.* at 5. In response, the Bureau issued an order requiring the company to include, at a minimum:

use of middle names for matching public records to consumers, including affirmatively matching middle names when provided, or in the event an applicant’s middle name is not provided, deriving a middle name by running a social security trace and using the middle name from records matching an applicant’s first name, last name, and social security number to affirmatively match criminal records with the same first, middle, and last names with one or more additional personal identifiers, such as date of birth or social security number; algorithms for distinguishing records by middle name; algorithms for matching common names; algorithms for matching nicknames; and algorithms to distinguish between names that vary by generational suffix.

Id. at 11–12.

In 2012, the FTC brought an action against another Employment Screening CRA for failing to prevent mismatch errors. Compl. at 5, *U.S. v. HireRight Solutions, Inc.*, No. 1:12-cv-01313 (D.D.C. Aug. 8, 2012).¹¹ The FTC took particular umbrage with the fact that “some reports listed convictions for people other than the applicant or employee—even though the person with the criminal record had a different middle name or date of birth.” FTC, *Where HireRight Solutions Went Wrong* (Aug. 8, 2012).¹²

The FTC has pursued actions against companies for committing similar mismatch errors for more than twenty years. For example, the FTC ordered one Texas company to “[m]aintain reasonable procedures to prevent the occurrence or reoccurrence of Mixed Files” which includes using, “for matching and identification purposes, a Consumer’s Full Identifying Information.” *FTC v. TRW Inc.*, 784 F. Supp. 361, 362 (N.D. Tex. 1991). The order defined “Full Identifying Information” as “full last and first name; *middle initial*; full street address; zip code; year of birth; any generational designation; and social security number.” *Id.* at 362 (emphasis added).

Similar disputes have been brought by consumers directly. In a recent case, the judge wondered whether plaintiff Richard Williams was “incredibly unlucky,” or whether the company was “not very good at performing public records searches

¹¹ <https://www.ftc.gov/sites/default/files/documents/cases/2012/08/120808hirerightcmpt.pdf>.

¹² <https://www.ftc.gov/news-events/blogs/business-blog/2012/08/where-hireright-solutions-went-wrong>.

on individuals with common names.” *Williams v. First Advantage LNS Screening Sols., Inc.*, No. 1:13CV222, 2015 WL 9692872, at *1 (N.D. Fla. Oct. 14, 2015). That case involved the same defendant as this one, and the company conducted a similar background check using only plaintiff’s first and last name and date of birth. Def.’s Mem. Supp. Mot. Summ. J. at 7, *Williams, v. First Advantage LNS Screening Sols., Inc.*, 2015 WL 9692872 (N.D. Fla. 2015) (No. 1:13CV222). As a result of a mismatch error, the company produced multiple criminal drug sale records that had nothing to do with the plaintiff. *Williams*, 2015 WL 9692872, at *1. Because of this, the prospective employer hired another applicant. *Id.* at *2. The harm was compounded further when the plaintiff, after disputing the original report, applied for a job with a different employer who used the same background check service. *Id.* at *2. Incredibly, the defendant again produced inaccurate records due to a mismatch error, and the plaintiff was again denied employment. *Id.* As the court observed, the fact that the company mismatched the records “after making a similar error in the past does not speak well for the reasonableness of its procedures, to put it mildly.” *Id.* at *5.

In another similar case, a company furnished a report to an employer that contained significant mismatch errors. *Smith v. E-Backgroundchecks.com, Inc.*, 81 F. Supp. 3d 1342, 1348 (N.D. Ga. 2015). The court noted that “while requiring a [CRA] to go beyond the face of court records to determine whether [those records] correctly report the outcome of the underlying action may be too much to ask, requiring a [CRA] to correctly determine which public records belong to which

individual consumers is not.” *Id.* at 1358–59 (alterations in original) (citation and internal marks omitted).

C. A credit reporting agency cannot satisfy its duty of reasonable care by following industry practices that produce inaccurate reports.

As this Court has explained, a “generally accepted [industry] practice may still be negligence.” *Complaint of Paducah Towing Co., Inc.*, 692 F.2d 412, 426 (6th Cir. 1982). *See also Ins. Co. of the West v. Island Dream Homes, Inc.*, 679 F.3d 1295, 1299 (11th Cir. 2012) (“Because a custom itself may be substandard, the fact that a defendant acted according to custom is just ‘some evidence’ of due care.”); *Hoemke v. New York Blood Ctr.*, 912 F.2d 550, 552 (2d Cir. 1990) (“Of course, if a given industry lags behind in adopting procedures that reasonable prudence would dictate be instituted, then we are free to hold a given defendant to a higher standard of care than that adopted by the industry.”); *The T.J. Hooper*, 60 F.2d 737, 740 (2d Cir. 1932) (“Indeed in most cases reasonable prudence is in fact common prudence; but strictly it is never its measure; a whole calling may have unduly lagged in the adoption of new and available devices. It never may set its own tests, however persuasive be its usages. Courts must in the end say what is required; there are precautions so imperative that even their universal disregard will not excuse their omission.”). “[W]here the risks of injury are so substantial and foreseeable,” an accepted industry practice “will not shield” a party from liability. *Complaint of Paducah Towing Co., Inc.*, 692 F.2d at 426 (finding that despite an industry practice by tug boats of turning off their engines when moored, a tug boat was negligent when it “placed itself in a hazardous location,

inadequately moored with a single line, and then turned off its engines so that it could not respond immediately”).

LexisNexis asserts that it followed the industry practice for Employment Screening CRAs by relying solely on an employee’s first name, last name, and date of birth in matching records for a background check. Br. Def.-Appellant/Cross-Appellee at 34; *see also* Broken Records, *supra*, at 15 (“[M]any private background screening companies rely solely on first name, last name, and date of birth”). But, regardless of whether it is standard in the industry, this practice generates countless erroneous background reports that include criminal histories with no connection to the person being screened. The instant case is just one more example of this substandard practice, which has caused substantial harm to individuals’ livelihoods and reputations. *See, e.g.*, Susan Adams, *How a Criminal Background Check Can Cost You the Job*, *Forbes* (Sept. 19, 2014)¹³ (involving a background check for Kevin A. Jones that included criminal history for convicted criminal Kevin M. Jones, with same date of birth but different middle name and different race); Stephen Davis & Bryan Polcyn, *Background Check Error Leaves Worker “Humiliated,”* *Fox 6 Now* (July 22, 2012)¹⁴ (involving a background check for female Donnie Ward, which included criminal history for male Don Ward, convicted criminal with same date of birth); Jeff Rossen & Avni Patel,

¹³ <http://www.forbes.com/sites/susanadams/2014/09/19/how-a-criminal-background-check-can-cost-you-the-job/#1288672f7f08>.

¹⁴ <http://fox6now.com/2012/07/22/broken-records/>.

Background Check Firms Making Errors, Today News (Nov. 8, 2012)¹⁵ (involving a background check for Catherine Taylor that included criminal history for repeat drug offender Catherine Taylor who had the same date of birth but nothing else in common).

Where an Employment Screening CRA is aware of errors in its reports, “it must review its procedures for assuring accuracy and take any necessary steps to avoid future problems.” FTC, *40 Years of Experience with the Fair Credit Reporting Act* (July 2011).¹⁶ As indicated by the numerous enforcement actions, private lawsuits, and media reports, Employment Screening CRAs are well aware of errors caused by using insufficient criteria to match criminal records. The failure to mitigate this risk is negligent and a violation of Employment Screening CRAs obligation to “follow reasonable procedures to assure maximum possible accuracy” of the background checks they produce. 15 U.S.C. § 1681e(b).

II. Credit reporting agencies should be strictly liable for inaccuracies caused by their own failure to match names or maintain records.

The FCRA places obligations on companies that traffic in the collection and sale of personal information. The Act does not prohibit the practice; instead, it seeks to ensure accuracy and transparency so that personal consumer information is fairly obtained, used for appropriate purposes, and does not result in unjust determinations. The Act specifically assigns obligations to companies that collect

¹⁵ <http://www.today.com/news/background-check-firms-making-errors-1C9255107>.

¹⁶ <https://www.ftc.gov/sites/default/files/documents/reports/40-years-experience-fair-credit-reporting-act-ftc-staff-report-summary-interpretations/110720fcrareport.pdf>.

and use personal data and provides rights to those whose personal information is at risk.

The rights and responsibilities that provide the basis of the FCRA and other modern privacy laws have come to be known as “Fair Information Practices” (“FIPs”). See EPIC, *The Code of Fair Information Practices*.¹⁷ “Fair information Practices provide the central conceptual framework for privacy rights in the digital age.” Marc Rotenberg, *EPIC: The First Twenty Years, in Privacy in the Modern Age: The Search for Solutions* 1, 5 (Marc Rotenberg, Julia Horwitz, & Jeramie Scott eds., 2015). The Privacy Act of 1974, 5 U.S.C. § 552a, incorporated the FIPs as outlined by the HEW Report in 1973, see U.S. Dep’t. of Health, Educ. & Welfare, Secretary’s Advisory Committee on Automated Personal Data Systems, *Records, Computers, and the Rights of Citizens* (1973).¹⁸ One of the core FIPs principles is that any organization maintaining a database of personal information must maintain that data with accuracy, relevance, and completeness. *Id.* at xx.

Indeed, a central issue before Congress when it passed the FCRA was “to prevent consumers from being unjustly damaged because of inaccurate or arbitrary information in a credit report . . . [and] to prevent an undue invasion of an individual’s right of privacy in the collection and dissemination of credit information.” Fair Credit Reporting, S. Rep. No. 91-517, at 1; see also FTC, 40

¹⁷ http://epic.org/privacy/consumer/code_fair_info.html.

¹⁸ <http://www.justice.gov/opcl/docs/rec-com-rights.pdf>.

*Years of Experience with the Fair Credit Reporting Act*¹⁹ (noting that the FCRA was enacted to “improve the accuracy and integrity of consumer reports”).

The FCRA, like other federal privacy laws, places the burden of preventing harm on the party with control over the collection, dissemination, and use of personal information. *See, e.g.*, Brief for EPIC as Amicus Curiae Supporting Appellants, at 3–4, *Gordon v. Softech Intern., Inc.*, 726 F.3d 42 (2d Cir. 2013) (No. 12-661) (“As the reseller is in the best position to determine whether the subsequent use of the data would be permissible under the [Driver’s Privacy Protection] Act, it is the reseller that must bear the burden of ensuring that an impermissible use does not occur.”).²⁰

Employment Screening CRAs compile sensitive personal information about consumers, and sell it to third parties, and must therefore bear the legal burden of ensuring that the records in their reports actually belong to the subjects of those reports. The FCRA rules do not forbid Employment Screening CRAs from providing these screening services but the companies must exercise a high level of care when taking on the “grave responsibilities” that dramatically affect individual lives, 15 U.S.C. § 1681(a)(4).

Basic tort principles, which underlie much of modern privacy law, place liability on the party who is in the best position to avoid the harm, the “least-cost avoider.” *See* Guido Calabresi, *The Costs Of Accidents: A Legal And Economic*

¹⁹ <https://www.ftc.gov/sites/default/files/documents/reports/40-years-experience-fair-credit-reporting-act-ftc-staff-report-summary-interpretations/110720fcrareport.pdf>.

²⁰ <https://epic.org/amicus/dppa/softech/EPIC-Amicus-Brief.pdf>.

Analysis 135 (1970) (“A pure market approach to primary accident cost avoidance would require allocation of accident costs to those acts or activities (or combinations of them) which could avoid the accident costs most cheaply.”); *see also* Richard Coase, *The Problem of Social Cost*, 3 J. Law & Econ. 1 (1960) (articulating a theory of cost allocation to promote efficient allocations of property resources).

The least-cost avoider theory is particularly relevant where transaction costs are high, as in the case of one party causing harm to a large and diffuse group of individuals. Calabresi, *supra*, at 135–38; *see* Harold Demsetz, *When Does the Rule of Liability Matter?*, 1 J. Legal. Stud. 13, 27–28 (1972) (arguing that when transaction costs are high, the legal system can “improve the allocation of resources by placing liability on that party who in the usual situation could be expected to avoid the costly interaction most cheaply”). Liability rules that hold a least-cost avoider responsible allocate rights and responsibilities such that privacy rights are protected and statutory violations are avoided.

In enacting the FCRA, Congress sought to ensure “maximum possible accuracy” by holding CRAs liable for the unreasonable errors in their reports. *See* 15 U.S.C. § 1681e(b) (“Whenever a consumer reporting agency prepares a consumer report it shall follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates.”); § 1681(a)(4) (“There is a need to insure that consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer’s right to privacy.”). Making consumers responsible for preventing

inaccurate or erroneous consumer reports is not reasonable, sensible, or efficient. Consumers do not exercise control over the data that a CRA chooses to include in its databases, nor are they given the opportunity to review a consumer report prior to its sale to a CRA client. Congress correctly placed the burden of accuracy and reliability on the company that actually creates and distributes the report.

Database operators such as Employment Screening CRAs “constitute the cheapest cost avoiders vis-à-vis individuals whose information sits in a private entity’s database.” Danielle Keats Citron, *Reservoirs of Danger: the Evolution of Public and Private Law at the Dawn of the Information Age*, 80 Southern Cal. L. Rev. 241, 284 (2007) (arguing that data brokers should be strictly liable for unsecure databases and data breaches); *cf.* Brief for EPIC as Amicus Curiae Supporting Appellants, at 15–17, *Gordon v. Softech Intern., Inc.*, *supra* (arguing for similar liability for resellers of driver’s records). An Employment Screening CRA “has exclusive knowledge about, and control over, its information system.” Citron, *supra*, at 285. Consumers might be the least-cost avoiders if they knew what CRA had their personal information and could correct or remove it. *Id.* “But individuals have no information about, and have no practical means to find out, where their personal data resides.” *Id.* at 285–86; *see also Understanding Consumer Attitudes About Privacy: Hearing Before the Subcomm. on Commerce, Manufacturing, and Trade of the House Comm. on Energy and Commerce* 102–03 (Oct. 13, 2011) (testimony of Prof. Alessandro Acquisti)²¹ (“Research has

²¹ <https://www.gpo.gov/fdsys/pkg/CHRG-112hrg74605/pdf/CHRG-112hrg74605.pdf>.

suggested that US consumers are often ill-informed about the collection and usage of their personal information, and the consequences of those usages. This puts them in a position of asymmetric information, and sometimes disadvantage, relative to the data holders that collect and use that information.”). Indeed, consumers are actually loss bearers, because they are unable to pass along the harm of an inaccurate consumer report through insurance. *See Citron, supra*, at 285.

Even if consumers knew which Employment Screening CRA had access to their records, they would be unable to prevent that company from distributing mismatched records to third parties. *See id.* And bringing together hundreds of millions of consumers to bargain over how a company retrieves, compiles, and distributes a wide range of aggregate records would be prohibitively expensive and logistically challenging. *See id.* at 286.

Thus, an Employment Screening CRA “sits in the best position to make decisions about the costs and benefits of its information-gathering” and distribution. *Id.* at 285. As such, they must bear the legal liability whenever their procedures fail to meet the most basic element of accuracy—ensuring that all records in the employment background report actually match the prospective employee.

CONCLUSION

For the reasons explained above, EPIC respectfully request that this Court affirm the lower court decision and rule in favor of the Plaintiff in this case.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6). The brief is composed in a 14-point proportional typeface, Times New Roman, and complies with the word limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 4,653 words, excluding the parts of the brief exempted under Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and Circuit Rule 32(b)(1).

/s/ Alan Butler
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CERTIFICATE OF SERVICE

The undersigned counsel certifies that on this 29th day of February 2016, he caused the foregoing “Brief Of Amicus Curiae Electronic Privacy Information Center (EPIC) In Support Of Plaintiff-Appellee/Cross-Appellant” to be electronically filed using the Court’s CM/ECF system, which served a copy of the document on all counsel of record in this case.

/s/ Alan Butler
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