No. 23-80070

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CAT BROOKS and RASHEED SHABAZZ, *et al.*,

Plaintiffs-Respondents

v.

THOMSON REUTERS CORPORATION,

Defendant-Petitioner

On Appeal from the United States District Court for the Northern District of California

District Court Case No. 3:21-cv-01418-EMC

The Honorable Edward M. Chen

MOTION OF *AMICI CURIAE* THE SOFTWARE & INFORMATION INDUSTRY ASSOCIATION AND THE COALITION FOR SENSIBLE PUBLIC RECORDS ACCESS TO FILE BRIEF IN SUPPORT OF DEFENDANT-PETITIONER'S PETITION FOR APPEAL UNDER RULE 23(f)

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MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE*

Pursuant to Federal Rule of Appellate Procedure 29(a), the Software & Information Industry Association and the Coalition of Sensible Public Records Access respectfully move for leave from the Court to file the attached brief as *Amici Curiae* in support of Defendant-Petitioner's Petition for Permission for Appeal Under Rule 23(f).

Consistent with Federal Rule of Appellate Procedure 29(a)(2), *Amici* represent that the Plaintiffs-Respondents do not oppose the filing of this brief and Defendant-Petitioner Thomson Reuters consents to the filing of this brief. Further, consistent with Federal Rule of Appellate Procedure 29(a)(4)(E), *Amici* represent that no party or party's counsel has authored this brief, in whole or in part, or contributed money intended to fund the preparation or submission of this brief. Further, no person other than *Amici* and their non-party members contributed money that was intended to fund the preparation or submission of this brief.

Statement of Interest of the Amici Curiae and Basis of Motion for Leave to File Brief

The Software & Information Industry Association ("SIIA") is the principal trade association for those in the business of information. SIIA represents approximately 600 member companies, among them publishers of software and information products, including databases, enterprise and consumer software, and other products that combine information with digital technology. SIIA member

companies serve nearly every segment of society, including business, education, government, healthcare, and consumers. It is dedicated to creating a healthy environment for the creation, dissemination, and productive use of information. Many of its members rely on access to public records.

The Coalition of Sensible Public Records Access ("CSPRA") is a non-profit organization dedicated to promoting the principle of open public record access to ensure individuals, the press, advocates, and businesses have the continued freedom to collect and use the information made available in the public record for personal, governmental, commercial, law enforcement, and societal benefit. Members of CSPRA are among the many entities that comprise a vital link in the flow of information for these purposes and provide services that are widely used by constituents in every state. Collectively, CSPRA members alone employ over 75,000 persons across the U.S. The economic and societal activity that relies on entities such as CSPRA members is valued in the trillions of dollars and employs millions of people. CSPRA has an interest in this case and qualifications to assist this Court because the availability of complete and accurate public records is central to CSPRA's belief that the economy and society depend on value-added information, and services that include public record data for many important aspects of our daily lives, and to CSPRA's work to protect those sensible uses of public records and the many public benefits that flow from their public and private use.

Plaintiffs-Respondents have lodged an attack on the core business activities of *Amici's* members which are commercial publishers, like Defendant-Petitioner, who collect and share publicly available information on consumers. The district court's order granting Plaintiffs'-Respondents' Motion for Class Certification negatively impacts *Amici's* members and will likely lead to disastrous results for government, businesses, and consumers alike. Urgent review is necessary.

This Court Should Allow Amici to File Their Brief in Support of Defendant's Rule 23(f) Petition for Appeal

Courts routinely permit *amici* to file briefs in support of petitions for permission to appeal class certification orders pursuant to Federal Rule of Civil Procedure 23(f). *See e.g. Reyes v. NetDeposit, LLC*, No. 13-8086 (3d Cir. Nov. 1, 2013) (granting opposed motions to file amicus briefs in support of Rule 23(f) petition); *In re ComScore, Inc.*, No. 13-8007 (7th Cir. May 28, 2013) (also granting leave to file amicus brief in support of Rule 23(f) petition despite opposition); *see also In re High-Tech Emp. Antitrust Litig.*, No. 13-80223 (9th Cir. Jan. 14, 2014) (granting leave to file Rule 23(f) amicus brief to which all parties consented). *Amici's* proposed brief will advance the Court's understanding of the larger data ecosystem of which Defendant-Petitioner is a part, the comprehensive data privacy regime in which these products are offered for sale, and the failure of the putative

class members to establish standing, or demonstrate sufficient commonality of putative plaintiffs and claims to satisfy Rule 23 class certification requirements.

Specifically, Defendant-Petitioner's Petition to Rule 23(f) presents important issues bearing on class certification, the data privacy regime, and the lack of standing under Article III of many putative class members. The district court's decision below diverges from the plain language of Rule 23, well-settled case law and Supreme Court precedent. It threatens to create a dangerous new precedent in the class action system and privacy regimes. The district court's order must be reviewed.

Conclusion

Based on the foregoing, SIIA and CSPRA respectfully request permission to file their brief *Amici Curiae* and request this Court's consideration of the issues raised in the accompanying brief.

Dated: August 21, 2023

Respectfully submitted,

/s/ Jennifer Sarvadi

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing document on this date with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the Appellate Electronic Filing System.

I further certify that, on this date, I caused to be served the foregoing document, and its attachment, by email to the following unregistered case participants:

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1(a), 29(a)(4)(A), the parties state:

The Software & Information Industry Association is an industry trade association that has no parent corporation and no publicly held corporation owns 10% or more of its stock.

The Coalition for Sensible Public Records Access is an industry trade association that has no parent corporation and no publicly held corporation owns 10% or more of its stock.

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INTEREST OF AMICI CURIAE

The district court, in extraordinary fashion, granted class certification of a class which could ultimately consist of nearly every adult resident in California, based on the finding that, under a theory of unjust enrichment, the state may prohibit the collection and dissemination of public domain information about a consumer without the consumer's consent. Apparently, according to the district court, California law recognizes a common law right to privacy that *per se* prohibits the collection of publicly available information about consumers without their consent, notwithstanding that California's various data privacy laws both contemplate the collection of such information and expressly exempt it from such limitations.

The district court's order granting class certification departs from class action precedent, including Supreme Court case law, and its impact could affect each and every adult resident of California, and every business similar to *Amici's* members and Petitioner. Pursuant to Federal Rule of Appellate Procedure 29(a), *Amici* The Software & Information Industry Association ("SIIA") and The Coalition for Sensible Public Record Access ("CSPRA") urge this Court to grant Petitioner's Petition for Permission to Appeal Under Rule 23(f).[1]

[1] Consistent with Federal Rule of Appellate Procedure 29(a)(2), *Amici* represent that the Plaintiffs-Respondents consented to the filing of this brief. Further, consistent with Federal Rule of Appellate Procedure 29(a)(4)(E), *Amici* represent that no party or party's counsel has authored this brief, in whole or in part, or contributed money

INTRODUCTION AND SUMMARY OF ARGUMENT

In an extraordinary move, the district court granted class certification of a class that could reach to include each and every adult citizen of California, based on the theory that a common law privacy right exists that prohibits the collection of publicly available information without a consumer's consent. *Amici's* members include a wide array of companies, including publishers of software and information products, including databases, enterprise and consumer software, that combine information with digital technology. *Amici's* member companies serve nearly every segment of society including business education, government healthcare, and consumers. *Amici*'s members are dedicated to creating a healthy environment for the creation, dissemination, and productive use of information. Many of *Amici's* members rely on access to public records.

The district court theorizes a blanket prohibition on the collection and storage of information based on a generalized right to privacy that is inconsistent with California's data privacy laws and the First Amendment by concluding that the storage and collection of public information is a violation of law. The court further erred by finding that all potential class members consisting of information about

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intended to fund the preparation or submission of this brief. Further, no person other than *Amici* and their non-party members contributed money that was intended to fund the preparation or submission of this brief.

whom Petitioner may retain data have suffered harm, and have Article III standing as a result. *Amici* are gravely concerned with the district court's order and respectfully request the Court grant Petitioner's Petition to Appeal.

ARGUMENT

I. The Benefits That Will Be Stripped From The Public If the District Court's Order Is Not Reversed Are Tremendous.

The data and information industry in which Petitioner operates is an ecosystem that has been in existence for decades. It is an ecosystem that allows Americans to timely and efficiently access varying information, whether accessed through a phone, computer, or even a newspaper. That information is made available by commercial publishers in a variety of sectors. *Amici's* member's customers include both private sector and government clients, including arms of the state of California. Further, *Amici's* members play various roles within this ecosystem, among them, offering products that compete with Petitioner's CLEAR product; offering technology platforms that connect data publishers to government and public interest users nationwide. The publishers in this industry collect information from sources similar to those described by Petitioner, including government agencies who affirmatively share court and other records of the agency, individuals who have made content available voluntarily (whether online or otherwise), and other third-party sources.

The right to collect and disseminate lawfully acquired public record information has been deemed to be (and is) essential for citizens to remain adequately informed about, and have crucial access to information about the workings of government process. For purposes of this Petition, it is important to recognize that the Supreme Court of California and the California General Assembly have recognized the importance of open access to public records for purposes of verifying accountability, even while regulating consumer's rights with respect to such information in adopting and by adopting the California Public Records Act and the California Privacy Rights Act.

With this background in mind, the real value in these data services cannot be understated. Individual consumers will be affected if the district court's ruling stands. For example, a parent searching for a private nanny may want to check state criminal records in the nanny's prior home state to assure herself that the nanny is not a registered sex offender or has been convicted of a violent crime. The parent may also want to investigate whether a day care facility she is considering as an alternative has been cited for child safety violations. Another consumer, this one an adult child, prior to moving a parent into an assisted living facility may want to examine the government-issued health and safety reports of a facility located in a different state. Victims of crimes can elect to receive notice that a prior violent offender is about to be released from prison. Law enforcement is able to locate

suspects or missing persons, and other victims of crime. Consumers' applications for insurance and other financial services are timely and efficiently reviewed because of access to this public information is available. Timely access to information like that leveraged across the industry allows consumers to make informed decisions.

The district court's order has essentially created a blanket prohibition against the collection and use and publication of such data – even though California law expressly allows it. *Amici* are concerned about losing the benefits that lawful data sharing have provided the public, commercial enterprises, and government agencies alike, if the district court's order is not reversed.

II. California State Law (and Federal Law)[2] Expressly Contemplate the Collection of, and Permit the Sharing of, Publicly Available Information.

Much, although likely not all, of the information the Petitioner collects on individuals is public record information. Petitioner's predecessor entity was one of the first companies to begin collecting public court records in this country over 150 years ago,[3] although it is certainly not the only one. The district court has improperly found that there is a common law right to privacy that prohibits both the collection

[2] *Amici* refer the Court to their Amicus Brief supporting Petitioner's Opposition to Motion for Class Certification for a more expansive discussion on federal law.
[3] *See* Robert M. Jarvis, *John B. West: Founder of the West Publishing Company,* 50 Am. J. Legal Hist. 1 *5 (2010).

and sharing of publicly available information. (Order at 10-11.) Not only would such a blanket prohibition run afoul of industry members' rights to such information under the First Amendment, *see infra, Section III*, it ignores the state of existing California statutory law.

While California has heavily regulated activity around the use of information, first through a comprehensive process in enacting the California Consumer Privacy Act,[4] and then via ballot initiative in the California Privacy Rights Act[5], it has not regulated the collection and sharing of information obtained public sources or other third parties. These laws regulate the maintenance and sharing of information collected directly from consumers by restricting the sharing (including sale) of "personal information," which is defined to include information "that identifies, relates to, describes, is reasonably capable of being associated with, or could reasonably be linked, directly or indirectly, with a particular consumer or household."[6] Importantly, "personal information" does not include:

> publicly available information or lawfully obtained, truthful information that is a matter of public concern. For purposes of this paragraph, "publicly available" means: information that is lawfully made available from federal, state, or local government records, or information that a business has a reasonable basis to believe is lawfully made available to the general public by the consumer or from widely distributed media; or information made

[4] Cal. Civ. Code §§ 1798.100 *et seq.* (the "Privacy Act").
[5] California Privacy Rights Act of 2020 (modifying California's data protection law) (the "CPRA").
[6] Cal. Civ. Code § 1798.140(v)(1).

> available by a person to whom the consumer has disclosed the information if the consumer has not restricted the information to a specific audience.[7]

Much of the information that flows into products like Petitioner's CLEAR product are obtained directly from federal, state, and local government records, and/or are those which companies have a reasonable basis to believe is lawfully made available to the general public by the consumer or from widely distributed media (such as a traditional white pages telephone directory). As a result, that data is not subject to CCPA.

In the face of the language of the above ballot initiative, the district court puzzlingly found that the legislature intended to permit an independent, common law general right to informational privacy. The suggestion that the government may restrict the use of lawfully acquired public domain information about an individual in the absence of compensating that individual ignores California's robust of public records statutes and basic First Amendment tenets.

III. The Constitutional Right to Collect, Maintain, and Sell Information Preclude Class Certification.

The district court's creation of an extra- textual general right to privacy as support for its finding of a "concrete" injury sufficient to establish standing ignores existing First Amendment jurisprudence. Publishers, like Petitioner, have a constitutional right to access and use public information and to communicate that

[7] Cal. Civ. Code § 1798.140(v)(2) (emphasis added).

information to third parties under the First Amendment. The Supreme Court has held that the "right to speak is implicated when information [one] possesses is subjected to restraints on the way in which the information might be used or disseminated."[8] State action restraining this right, where the restriction is both content-based and user-based, must withstand heightened scrutiny, particularly where the action reflects an "aversion to what the disfavored speakers have to say."[9] That speech does not lose its protection merely because it is offered for a profit.[10]

Plaintiffs' claim, and the district court agreed, that commercial use of public domain information in public records, social media, and elsewhere, including for purposes of child support, law enforcement, loan securitization, or investigative journalism is violative of their general right to privacy. A general assertion of a right to privacy cannot support a finding of a "substantial state interest," much less a heightened level of scrutiny.[11] The Plaintiffs' desire to prohibit *any* commercial use of public domain information for *any* purpose cannot be tailored to any relevant state interest because the state sells the very same information to the same types of users and for the very same purposes that *Amici* members' customers intend to make of

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[8] *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 568 (2011) (quoting *Seattle Times Co. v. Rhinehard*, 467 U.S. 20, 32 (1984)).
[9] *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 658, 114 S. Ct. 2445, 2467, 129 L. Ed. 2d 497 (1994).
[10] *See Simon and Schuster v. Members of the New York State Crime Victims Board*, 502 U.S. 105, 115-118 (1991).
[11] *U.S.W., Inc. v. F.C.C.*, 182 F.3d 1224, 1235 (10th Cir. 1999).

the data.[12] The district court cannot base a finding of a "concrete" injury sufficient to establish standing on the dissemination of speech that is clearly protected by the First Amendment.

IV. The District Court has Certified a Class so Broad so as to Make the Commonality Requirement of Rule 23 Useless.

Essentially, the district court certified a class based on a generalized grievance on behalf of California consumers based on the lawful collection and publication of information. (Order at 19-20 ("the alleged privacy violations are equally shared by all individual Californians.") In doing so, the district court has distended the rule's commonality requirements to swallow Article III's requirements whole.

"Commonality requires the plaintiff to demonstrate that the class members 'have suffered the same injury.'"[13] It is well-settled law that "if class members are impossible to identify without extensive and individualized fact-finding or 'mini-trials,' then a class action is inappropriate."[14] The data used in products like CLEAR

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[12] In fact, in California, this very same public record information must be aggregated by the local agencies that maintain the original records (i.e., the clerks of the court) who must then share that information with the California Department of Justice, which maintains and organizes the data for the sole purpose of selling reports on consumers in California. *See* Cal. Penal Code § 11105. These reports may be accessed by a number of persons as permitted by law, including certain state agencies, law enforcement officers, and other specifically identified persons. *Id.* There is nothing *per se* untoward in the collection of such information, let alone illegal.

[13] *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349–50 (2011) (citation omitted).

[14] *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 593 (3d Cir. 2012).

and those of *Amici's* members, combine public domain information such as case law, litigation history, journal articles, and other lawfully acquired information (i.e., criminal record, driver's license data, etc.), and other data made available to the public by the consumer (i.e., social media platforms).

The district court failed to understand that if the data is publicly available, then there can be no claim, and the consumer is not proper to be part of the class. The district court also failed to consider that the next question, namely, whether the aggregator has an affirmative right under state or federal law to collect, maintain, and share that data. Just under these two prongs, resolution of the claims of the certified class would require mini-trials where each member would have to litigate separate issues to recover individually.

The erroneously-certified class as it would stand now lacks any limiting principle. Under this theory, a database of newspapers, corporate filings, a professional directory or even a search engine violates plaintiff's privacy rights. The scope of this class warrants immediate review by this Court.

V. The Collection and Storage of Information Does Not Amount to a "Concrete Injury" for Purposes of Article III Standing.

The district court theorizes that there is a "historical right to privacy" and found that there is a "concrete" injury in the mere collection and storage of information regardless of whether that information was lawfully obtained or unshared. (Order at 9-10.) Its conclusion cannot be reconciled with *Trans Union,*

LLC v. Ramirez,[15] which held that where a consumer reporting agency maintained, but did not share, consumer report information on consumers, the individual consumers did not suffer a concrete injury and lacked Article III standing to sue under the Fair Credit Reporting Act.[16] There, as here, plaintiffs argued that the consumer reporting agency violated the law by maintaining the information that could eventually be put into consumer reports sent to third parties.[17] The Supreme Court likened the issue to one of defamation, and explained:

> The standing inquiry in this case thus distinguishes between (i) credit files that consumer reporting agencies maintain internally and (ii) the consumer credit reports that consumer reporting agencies disseminate to third-party creditors**. The mere presence of an inaccuracy in an internal credit file, if it is not disclosed to a third party, causes no concrete harm.** In cases such as these where allegedly inaccurate or misleading information sits in a company database, the plaintiffs' harm is roughly the same, legally speaking, as if someone wrote a defamatory letter and then stored it in her desk drawer. A letter that is not sent does not harm anyone, no matter how insulting the letter is. So too here.[18]

Even the fact that the FCRA provides for statutory damages did not, standing alone, satisfy the concrete harm requirement sufficient for standing to exist; something

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[15] 141 S. Ct. 2190 (2021).

[16] The parties had stipulated, for the purpose of the case, that defendant had violated the law in including potential "OFAC" alerts in its reports that allegedly did not match the consumer, which signaled that the consumer's name was identified on a list that included, among others, potential terrorists." *Id*. at 2221, fn 5. The Supreme Court expressly took no position with regard to that issue. *Id*.

[17] *Id.*

[18] *Id.* at 2210 (emphasis added).

more was required.[19] The plaintiffs then argued that the *risk of future harm* was enough – the likelihood that the information would eventually be communicated to a third party, thereby causing harm.[20] The Supreme Court disagreed, finding their arguments "unavailing" and noting that no harm materialized from the maintenance of such data.[21] In short, under *Ramirez*, the collection of public record information, standing alone, did not create concrete harm for the purpose of satisfying Article III's standing requirements.

The district court dismissed this key element of the holding, finding "Plaintiffs and other subjects of CLEAR's informational sweep were harmed by the breadth of personal information collected and put up for public sale. Plaintiffs were deprived of control over a wide swath of their personal data, which was then made publicly available. They were deprived of the value of their data. They were left without the

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[19] *Id.* at 2205 (citations omitted) ("this Court has rejected the proposition that "a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right." As the Court emphasized in *Spokeo*, "Article III standing requires a concrete injury even in the context of a statutory violation."). Moreover, where statutory damages are available, an individualized inquiry of class members' harms is required. *See Soutter v. Equifax Info. Servs., LLC*, 498 F. App'x 260, 265 (4th Cir. 2012) (reversing class certification where the representative plaintiff's claims were only "typical" only on an "unacceptably general level.").

[20] *Id.* at 2210.

[21] *Id.* at 2211.

practical ability to correct erroneous information before it was seen by third parties."[22] The district court erred, however, as *Ramirez* is on point.

In fact, some of the data maintained by Petitioner and used in the CLEAR product is the same data at issue in *Ramirez* (*i.e.*, OFAC data)*;* therefore, the district court was not free to ignore the Supreme Court's holding.[23] Having already found that, to the extent that such public record information is collected and maintained by an aggregator, but not communicated to a third party, there is no harm to the consumer, and the consumer lacks Article III standing for class certification purposes. *Ramirez*, 141 S. Ct. at 2210. The same must be said for other public record data collected about consumers that aggregators, like *Amici's* members, collect and maintain nationwide. The district court erred in certifying the class in light of this controlling precedent, and this Court should reverse the order certifying the class.

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[22] (Op. 12-13).

[23] The CLEAR product appears to leverage OFAC data from the U.S. Treasury Department's Specially Designated Nationals list, and returns it in a non-FCRA product offering. *See e.g.* https://legal.thomsonreuters.com/en/products/clear-investigation-software/federal-government-investigations. Meaning, that the data is not used for credit decisioning, employment purposes, or other permissible purposes as regulated by the FCRA in 15 U.S.C. § 1681b.

CONCLUSION

For the foregoing reasons, *Amici Curae* respectfully request that this Court grant Petitioner's Petition for Appeal and for other such relief as this Court deems appropriate.

Dated: August 21, 2023

Respectfully submitted,

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CERTIFICATION OF COMPLIANCE

1. This document complies with the type-volume limitations of Fed. R. App. P. 29(a)(5) and Fed. R. App. P. 32(a)(7)(B) because, excluding the parts of the document listed in Fed. R. App. 32(f), this document contains 3,235 words.

2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Word in 14 point font, Times New Roman.

Dated: August 21, 2023

By: *s/Jennifer L. Sarvadi*
Jennifer L. Sarvadi

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of August 2023, I electronically filed the foregoing Brief of Amicus Curiae Software & Information Industry Association and the Coalition for Sensible Public Record Access In Support of Defendant-Petitioner's Request for Appeal with the Clerk of this Court using the CM/ECF system.

I further certify that on the same day, I caused the motion and brief to be served by email on the following:

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