No. 13-1339

# In the Supreme Court of the United States

SPOKEO, INC.,

*Petitioner*,

v.

THOMAS ROBINS, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

*Respondent*.

*On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit*

**BRIEF OF DRI - THE VOICE OF THE DEFENSE BAR AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER**


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## STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae DRI – the Voice of the Defense Bar, is a 22,500-member international association of defense lawyers who represent individuals, corporations, insurance carriers, and local governments involved in civil litigation. DRI is committed to enhancing the skills, effectiveness, and professionalism of defense lawyers around the globe. A primary part of DRI's mission is to make the civil justice system more fair, efficient, and consistent. See http://www.dri.org/About. To that end, DRI participates as amicus curiae in cases that raise issues of importance to its membership and to the judicial system. This is such a case.

DRI's interest in this case stems from its members' extensive involvement in civil litigation. DRI's members are regularly called upon to defend their clients in lawsuits brought merely to pursue public policies rather than to seek redress for a distinct and personalized injury. Left unreviewed by this Court, the Ninth Circuit's decision in this case will have a profound effect on businesses and individuals who may be subject to suits brought under the Fair Credit Reporting Act, 15 U.S.C. § 1681, *et seq*., and other federal and state statutes providing for statutory

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[1] Pursuant to Supreme Court Rule 37.6, amicus curiae states that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from amicus curiae, its members, and its counsel, made any monetary contribution towards the preparation and submission of this brief. Pursuant to Supreme Court Rule 37.2(a), amicus curiae certifies that counsel of record for both petitioner and respondent have, after timely notification, consented to this filing in letters on file with the Clerk's office.

damages because it broadens the doctrine of standing to allow the judiciary to resolve disputes in the absence of an actual injury. The Ninth Circuit's decision, which exacerbates an already-existing circuit split, would encourage the filing of lawsuits by non-injured plaintiffs. DRI has a strong interest in assuring that the many federal and state statutes which confer a statutory cause of action do not provide a "back door" for uninjured litigants to obtain relief in federal court. The Ninth Circuit's alteration of the standing doctrine opens the floodgates of litigation in derogation of the Framers' intent to limit the jurisdiction of the judicial branch to "cases" and "controversies." This, in turn, directly affects the fair, efficient, and consistent functioning of our civil justice system and, as such, is of vital interest to the members of DRI.

The ability of plaintiffs to circumvent Article III's standing requirement and proceed in class action and other litigation absent actual injury presents an ongoing point of concern for DRI's members. The issue of standing and its outer limits is frequently studied and discussed by DRI's membership in a variety of contexts. *See*, *e.g.*, Nora Coleman, et. al., *Stopped Before They Start: Dismissing No-Injury Class Actions*, DRI For Def. 42 (December 2010) (providing strategies for attacking standing in no-injury class actions); Brian A. Bender, et. al., *A Gathering Storm: New Developments in Climate Change Litigation*, DRI for Def. 50 (January 2010) (discussing noteworthy decisions involving proprietary standing and parens patriae standing); Jeffrey A. Holmstrand, *Statutory Consumer Fraud Act Claims: Enforcing the Reliance Requirement*, DRI For Def. 43 (October 2010) (recognizing the exponentially-broadened exposure a

defendant faces as a result of statutory consumer fraud act claims brought on behalf of large numbers of people, many or most of whom did not sustain any actual injury). DRI therefore has a unique vantage point to help this Court understand the importance of proper interpretation of federal statutory damages statutes in light of the constitutionally-mandated standing requirements, not only from a legal standpoint, but also from practical and economic standpoints as well. Based on its members' extensive practical experience, DRI is uniquely suited to explain why this Court should review and ultimately reverse the Ninth Circuit's decision in this case.

Both the bench and the bar need guidance regarding the outer limits of Article III's standing requirement. The current lack of clarity in the law of standing, as exemplified by conflicting circuit decisions, may lead federal courts to inappropriately exercise power beyond the scope authorized by Article III. DRI has a strong interest in assuring that a uniform rule is adopted which recognizes Congress's right to create statutory causes of action while safeguarding the constitutionally-mandated requirement to establish standing for everyone on whose behalf a claim is presented for litigation in federal court.

Left intact by this Court, the Ninth Circuit's decision will have a profound effect on defendants who may be subject to litigation and ultimately forced to pay high-dollar judgments, even in situations where the plaintiff has suffered no harm. This creates the potential for widespread abuse of statutory damages statutes in a way not intended by the Legislature. As such, this case is of vital interest to DRI.

## SUMMARY OF ARGUMENT

The United States Constitution mandates that all persons presenting a claim for litigation in federal court have an actual "Case" or "Controversy" to invoke the power of the federal courts. U.S. Constitution, Article III, Section 2, Clause 1. Article III forms the underpinnings of a constitutionally-required standing doctrine that cannot be abrogated by statutory language purportedly entitling any person to sue. *Allen v. Wright*, 468 U.S. 737, 750-51 (1984). Thus, the Legislature cannot confer standing on any person in the absence of a showing that the person satisfies the constitutional test for standing. That test requires the plaintiff to allege "personal injury fairly traceable to the defendant's allegedly unlawful conduct" that is "likely to be redressed by the requested relief." *Hein v. Freedom from Religion Foundation, Inc.*, 551 U.S. 587, 598 (2007), quoting *Allen v. Wright*, *supra*, at 751. This test comports with the longstanding precept that federal courts are courts of limited jurisdiction. *Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365, 274 (1978).

The Ninth Circuit's decision in *Robins v. Spokeo*, 742 F.3d 409 (9th Cir. 2014), marks a radical departure from the constitutional mandate that all persons presenting a claim for litigation in federal court satisfy Article III standing. In reviewing the uninjured plaintiff's claim brought under the Fair Credit Reporting Act (FCRA), 15 U.S.C. § 1681 *et seq.*, the Ninth Circuit held that the "creation of a private cause of action to enforce a statutory provision implies that Congress intended the enforceable provision to create a statutory right," and that "the violation of a statutory

right is usually a sufficient injury in fact to confer standing." 742 F.3d at 412, citing *Edwards v. First Am. Corp*., 610 F.3d 514, 517 (9th Cir. 2010). Turning the three-part test for Article III standing into a single-factor inquiry satisfied by the availability of a statutory remedy contradicts this Court's precedents and represents a grave misunderstanding of the standing doctrine mandated by Article III's limitation on the judiciary's power to only "cases" or "controversies." As this Court observed in *Lujan v. Defenders of Wildlife*, "[Statutory] broadening [of] the categories of injury that may be alleged in support of standing is a different matter from abandoning the requirement that the party seeking review must himself have suffered an injury." 504 U.S. 555, 578 (1992), quoting *Sierra Club v. Morton*, 405 U.S. 727, 738 (1972). By holding that a plaintiff bringing suit under the FCRA satisfies Article III's injury-in-fact requirement by virtue of the bare statutory violation – here the transmission of allegedly inaccurate personal information – the Ninth Circuit's decision enables individuals who have suffered no "actual injury" to enter federal courts through the "back door", a practice which this Court has expressly disapproved. *Allee v. Medrano*, 416 U.S. 802, 828-29 (1974) (Burger, C.J., concurring).

Now is the time for the Court to rule on this significant issue. The federal circuits that have addressed this standing issue in the context of various federal statutes providing statutory damages have reached inconsistent results. In *David v. Alphin*, 704 F.3d 327, 338 (4th Cir. 2013), the Fourth Circuit held, and DRI submits correctly so, that a theory of Article III standing based solely on the deprivation of a statutory right "is a non-starter as it conflates

statutory standing with constitutional standing." Accordingly, the Fourth Circuit affirmed the district court's decision that it did not have jurisdiction over plaintiffs' ERISA claims absent "both statutory *and* constitutional standing." (*Id*.). See also *Lexmark Intern., Inc. v. Static Control Components, Inc*., 134 S.Ct. 1377, 1388, n. 4 (2014) (discussing "statutory standing"). The Second and Third Circuits have similarly recognized the importance of strict adherence to the constitutional standing requirement even in the context of federal statutes providing statutory damages. See *Kendall v. Employees Retirement Plan of Avon Prods*., 561 F.3d 112, 121 (2d Cir. 2009); *Joint Stock Soc'y v. UDV North America, Inc*., 266 F.3d 164, 176 (3d Cir. 2001) (Alito, J.); *Fair Housing Council of Suburban Philadelphia v. Main Line Times*, 141 F.3d 439, 443-44 (3d Cir. 1998). But the Ninth Circuit reached the opposite conclusion (Pet. App. 1a), in part by looking to the Sixth Circuit, which has allowed claims brought under the FCRA to proceed absent proof of injury. *Beaudry v. TeleCheck Services, Inc*., 579 F.3d 702, 705-07 (6th Cir. 2009). See also *Murray v. GMAC Mortgage Corp*., 434 F.3d 948, 952-53 (7th Cir. 2006). These conflicting decisions leave both bench and bar with no clear directive on whether Congress can create constitutional standing. This Court should therefore grant review to resolve the disagreement among the circuits and provide guidance on whether a suit brought under the Fair Credit Reporting Act or other similar statutes relieves plaintiffs from satisfying Article III's standing requirement. Indeed, given the number of federal and state statutes providing for statutory damages, the implications of the Ninth Circuit's decision will reach well beyond this case and the Fair Credit Reporting Act.

Failure to address and reverse the Ninth Circuit's decision will not only provide a vehicle for individuals with no actual injury to seek and possibly obtain relief, it will also result in the increase of costly litigation against businesses and individuals that was not intended by the Framers of the United States Constitution. Additionally, the Ninth Circuit's decision to excuse plaintiffs from showing Article III injury-in-fact undermines class certification standards and thereby encourages forum shopping. DRI believes that preserving the Legislature's right to create a statutory cause of action while simultaneously requiring a plaintiff to allege actual injury will safeguard the constitutionally-derived balance of powers between and among the three branches of government, by maintaining the longstanding doctrine of standing, which is an indispensable element in our separation of powers.

## ARGUMENT

**This Case Presents The Court With An Opportunity To Resolve Conflicting Circuit Decisions And Clarify That The Actual Injury Requirement Of Article III, Applied In The Context Of The Fair Credit Reporting Act And Other Federal Statutes Granting Statutory Causes Of Action, Requires A Plaintiff To Satisfy The Constitutional Standing Requirement.**

### A. The doctrine of standing is essential to maintaining the equilibrium between the separate but overlapping branches of government embodied in our federal Constitution and must apply to all suits brought pursuant to federal statutes conferring private rights of action – like the Fair Credit Reporting Act.

The United States Constitution establishes three distinct branches of government and grants to each the responsibility for exercising one of the three major types of governmental power. U.S. Const., art. I, § 1; art. II, § 2; art. III, § 1. This separation of powers was not intended to make each branch completely autonomous or result in a "hermetic division" of the branches, but rather to create separate but overlapping branches. *Bowsher v. Synar*, 478 U.S. 714, 748-49 (1986); *Mistretta v. U.S.*, 488 U.S. 361, 381 (1989); *Youngstown Sheet & Tube Co v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring). One of the safeguards developed to preserve this carefully-crafted balance is the doctrine of standing. The doctrine assures that the "courts exercise power 'only in the last

resort, and as a necessity,' and only when adjudication is consistent with a system of separated powers and [the dispute is one] traditionally thought to be capable of resolution through the judicial process." John G. Roberts, *Article III Limits On Statutory Standing*, 42 Duke L. J. 1219, 1223-1224 (1993), quoting *Allen v. Wright*, 468 U.S. 737, 750-51 (1984). This case falls at the heart of the limits on the judiciary's exercise of legislative power and presents the Court with the opportunity to clarify the standing doctrine as it applies to the Fair Credit Reporting Act and the Legislature's right to confer standing on a litigant.

Constitutional standing, a threshold requirement to any suit in federal court, is derived from Article III's limitation of the judicial power of the United States to the resolution of "Cases" and "Controversies." U.S. Constitution, art III, § 2; *Hein v. Freedom From Religion Foundation, Inc*., 551 U.S. 587, 598 (2007); *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560 (1992); *Friends of the Earth, Inc. v. Laidlaw Environmental Services*, 528 U.S. 167 (2000). It has been said that Article III requires a live contest in which to test legal differences. Felix Frankfurter, *A Note on Advisory Opinions*, 37 Harv. L. R. 1002, 1006 (1924). The issue of standing depends upon whether the party has alleged such a personal stake in the outcome of the controversy as to ensure that the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution. Stated otherwise, it is incumbent upon a party to demonstrate more than just a commitment to vigorous advocacy. *Lujan, supra,* at 559-560. See also *Summers v. Earth Island Institute*, 129 S.Ct. 1142, 1148-49 (2009).

Those who seek to invoke the jurisdiction of the federal courts must therefore satisfy the threshold standing requirement imposed by Article III. *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983). That means a plaintiff must demonstrate "a personal stake in the outcome" in order to assure the presence of that concrete adverseness which sharpens the presentation of issues necessary for the proper resolution of constitutional questions. (*Id*. at 101). Under such an approach, abstract injury is not enough. (*Id*.). A plaintiff must show that she sustained or is immediately in danger of sustaining some direct injury as a result of the challenged official conduct and the injury or threat of injury must be both real and immediate, not conjectural or hypothetical. (*Id*. at 102). The plaintiff must also demonstrate that the injury will likely be redressed by a favorable decision. *Friends of the Earth, Inc. v. Laidlaw Environmental Services*, *supra*, at 180-81.

The standing doctrine is a critical element of the separation-of-powers principle and the separation of powers is a fundamental method of protecting liberty. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 340-342 (2006). Under the doctrine of the separation of powers, each branch of government has powers that belong to it and cannot be transferred to another branch of government. The doctrine of standing recognizes and honors those bounds.

When a court encroaches on Article III's standing requirement by permitting a suit to proceed based on a bare statutory violation – even though the plaintiff does not have an actual injury, on the theory that the statutory violation alone confers standing, it strips

Article III of its power. That is exactly what the Ninth Circuit did in this case when it held that standing is demonstrated whenever there is a "violation of a statutory right[.]" 742 F.3d at 412. This holding not only undermines respect for the law, and particularly, our federal Constitution, it also renders it difficult for DRI's members to adequately represent their clients' interests. As a result of the Ninth Circuit's decision, DRI's members are unable to predict with any accuracy the outcome of suits brought by uninjured plaintiffs under the FCRA and other similar no-harm statutes. The current circuit split further exacerbates this problem.

### B. The Court's review is needed to resolve a circuit conflict - exacerbated by the Ninth Circuit's decision in this case- and engender uniformity on the issue of whether a statutory violation, unaccompanied by any actual injury, is sufficient to establish Article III standing.

This Court has long sought to achieve uniform pronouncements of federal law. "Both the Constitution's framers and the Supreme Court have stressed that the articulation of nationally uniform interpretations of federal law is an important objective of the federal adjudicatory process." Evan H. Caminker, *Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmakng*, 73 Tex. L. Rev. 1, 38 (November 1994). Uniformity serves several "laudable goals," including "ensuring the predictability of legal obligations," garnering respect for judicial authority, and ensuring that "similarly situated litigants are treated equally." (*Id*. at 38-39).

Given the desire for uniformity among the circuits, a decision of a circuit that "conflict[s] with the decision of another United States court of appeals on the same important matter" is deemed, for purposes of review on a writ of certiorari, a compelling consideration. See Supreme Court Rule 10(a). And many appellate circuits, including the Ninth Circuit, have expressly recognized the importance of ruling consistent with sister circuits on issues of federal law, viewing deviations from past decisions a last resort to be avoided. See, e.g., *Kelton Arms Condo. Owners Ass'n v. Homestead Ins. Co.*, 346 F.3d 1190, 1192 (9th Cir. 2003); *Aldens, Inc. v. Miller*, 610 F.2d 538, 541 (8th Cir. 1979); *Alternative Sys. Concepts, Inc. v. Synopsys Inc.*, 374 F.3d 23, 31 (1st Cir. 2004); *Wagner v. Pennwest Farm Credit, ACA*, 109 F.3d 909, 912 (3rd Cir. 1997).

The question raised in this case – whether federal statutes like the FCRA confer automatic standing to sue absent actual injury – is an issue of "exceptional importance" this Court should address. The Ninth Circuit's decision in this case exacerbates an already-existing circuit split on this issue and leaves DRI's members unable to predict accurately for their clients the outcome of suits brought under the FCRA and other similar statutes conferring statutory rights of action. Prior to this decision, the Second Circuit refused to allow a claim under ERISA to proceed absent actual injury. *Kendall v. Employees Retirement Plan of Avon Prods.*, 561 F.3d 112, 121 (2d Cir. 2009). That same year, the Sixth Circuit reached the opposite conclusion, holding that a plaintiff had Article III standing to bring an action under the FCRA absent any actual injury. *Beaudry v. TeleCheck Services*, 579 F.3d 702, 705-07 (6th Cir. 2009). The Seventh Circuit has

taken a similar stance, albeit in a more generalized way. See *Murray v. GMAC Mortgage Corp*., 434 F.3d 948, 952-53 (7th Cir. 2006). To the contrary, the Fourth Circuit held just last year (in the context of an ERISA action) that the mere violation of a statutory right does not satisfy Article III's standing requirement. *David v. Alphin*, 704 F.3d 327, 338-39 (4th Cir. 2013).

Intra-circuit splits of authority further add to the bar's confusion. Over a decade ago, the Third Circuit held that plaintiffs must allege actual injury – not just a statutory violation of the Lanham Act, 15 U.S.C. § 1051 *et seq*., - in order to establish Article III standing. *Joint Stock Soc'y v. UDV North America*, 266 F.3d 164, 176 (3d Cir. 2001). This comports with the Third Circuit's earlier pronouncement in *Fair Housing Council of Suburban Philadelphia v. Main Line Times*, 141 F.3d 439, 443-444 (3d Cir. 1998), that "[t]he fact that a housing organization is able to show that a particular advertisement violates the [Fair Housing] Act is not sufficient to satisfy the requirements of Article III; a violation of the Act does not automatically confer standing on any plaintiff, even one who holds the status of a private attorney general." However, in 2009, the Third Circuit, in the context of the Real Estate Settlement Procedures Act of 1974 (RESPA), 12 U.S.C. § 2607(d)(2), held that "[a] plaintiff need not demonstrate that he or she suffered actual monetary damages, because 'the actual or threatened injury required by Art. III may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing." *Alston v. Countrywide Financial Corp*., 585 F.3d 753, 763 (3d Cir. 2009).

At least one federal circuit court is deferring decision on this issue, waiting for guidance from this Court. In a recent opinion, the Eighth Circuit expressed its' reluctance to address the "difficult constitutional question whether congress can drill through this hard floor of injury *in fact* by creating an injury *in law* (i.e., a statutory cause of action requiring no showing that the plaintiff was personally and actually harmed)[.]" *Wallace v. ConAgra Foods, Inc.*, --- F.3d ---, 2014 WL 1356860, at *6 (8th Cir. 2014). It noted that "[t]his constitutional question recently reached the Supreme Court without yielding an answer." (*Id.*, at *7, n. 3 (citing *First Am. Fin. v. Edwards*, 567 U.S. ---,--- (132 S.Ct. 2356 (2012) (per curiam)).

Finally, the Ninth Circuit in this case held that the "creation of a private cause of action to enforce a statutory provision implies that Congress intended the enforceable provision to create a statutory right," 742 F.3d at 412, and that "the violation of a statutory right is usually sufficient injury in fact to confer standing." *Id.* (citing *Edwards v. First Am. Corp.*, 610 F.3d 514, 517 (9th Cir. 2010)). Because "the statutory cause of action does not require a showing of actual harm when a plaintiff sues for willful violations[,]" *id.*, the Ninth Circuit reasoned that actual harm was unnecessary to establish injury in fact. In so ruling, the Ninth Circuit recognized that its analysis essentially turns the three-part test for Article III standing – which requires a showing of causation and redressability – into a single-factor inquiry satisfied by the availability of a statutory remedy. *Id.* at 414. In a remarkable departure from this Court's jurisprudence, the Ninth Circuit rationalized that "[w]hen the injury in fact is the

violation of a statutory right that we inferred from the existence of a private cause of action, causation and redressability will usually be satisfied." *Id*.

Clearly, application of the standing requirement to federal statutes creating private causes of action, like the Fair Credit Reporting Act, has caused much confusion amongst the federal circuits. The time is ripe for this Court to step in and reaffirm that the constitutional injury-in-fact requirement cannot be manufactured by Congress through enactment of a federal statute providing statutory damages for technical violations that result in no harm to plaintiffs. The current unpredictability created by the circuit split makes it difficult for DRI's members to accurately advise their clients on whether to litigate a suit brought under one of these statutes or settle. In addition, the lack of predictability makes it difficult for defense counsel, their clients, or any insurers covering the claim to properly place a value on the case for settlement purposes or to set reserves. This Court has the opportunity to restore uniformity to the nation's courts and clarify the outer limits, if any, of the constitutional standing requirement under federal and state statutes providing statutory damages. Failure to do so will have a devastating impact on the businesses and individuals DRI's members are regularly called upon to defend.

### C. Absent review and clarification by this Court, the relaxed standing requirement adopted by the Ninth Circuit will encourage needless litigation, dramatically increase costs for businesses and individuals, and encourage forum shopping.

The FCRA is just one of a myriad of federal statutes embracing this "no harm" approach to litigation. From the Telephone Consumer Protection Act to the Real Estate Settlement Procedures Act to the Truth in Lending Act, Congress has authorized suits based on a mere statutory violation. For example, the Telephone Consumer Protection Act, 47 U.S.C. § 227(3), allows a private right of action with an alternative-damages provision. Similarly, the Real Estate Settlement Procedures Act, 12 U.S.C. § 2607, prohibits kickbacks in certain mortgage-loan transactions. The Truth in Lending Act, 15 U.S.C. § 1640, contains an alternative-damages provision that has been interpreted to allow a consumer to bring a claim and receive damages upwards of $500,000 without any showing of actual injury or damages. *See, e.g.*, *Gambardella v. G. Fox & Co.*, 716 F.2d 104 (2d Cir. 1983); *Purtle v. Eldridge Auto Sales, Inc.*, 91 F.3d 797 (6th Cir. 1996). Accordingly, absent review by this Court, the Ninth Circuit's decision may be used as a roadmap in suits well beyond those brought under the FCRA. The decision from the Ninth Circuit to narrow the standing doctrine to permit a suit in the absence of an actual injury could be applied to as many as fifteen federal statutes permitting suits based on mere statutory violations alone. *See, e.g.*, 15 U.S.C. § 1692 (Fair Debt Collection Practices Act); 29 U.S.C. § 1854 (Migrant and Seasonal Agricultural Worker Protection Act); 15

U.S.C. § 1693m(a)(2) (Electronic Funds Transfer Act); 12 U.S.C. § 4907 (Homeowners Protection Law); 15 U.S.C. § 1681, *et. seq*. (Fair and Accurate Credit Transactions Act).

These legislatively-conferred statutory suits can be brought through any of a number of means, but are typically brought in the form of a class action, as in this case. "The impact of federal statutes that allow the award of statutory damages for violations that cause no harm is exponentially multiplied by the class-action mechanism of Federal Rule of Civil Procedure 23." Michael O'Neil, *Privacy and Surveillance Legal Issues, Leading Lawyers on Navigating Changes in Security Program Requirements and Helping Clients Prevent Breaches – The Transformation of the "Right to Privacy" and its Unintended Liability Consequences*, 2014 WL 10441, *6 (Aspatore Jan. 2014).

Relaxation of the standing requirement will broaden dramatically the composition of a class litigating a violation of the FCRA or other similar "no harm" statute. This, in turn, will dramatically increase the expense of defending a class action. Even before the Ninth Circuit's decision in this case, the attendant costs of a major lawsuit could sound the death knell for new companies and those suffering under today's current economic climate. Bradley J. Bondi, *Facilitating Economic Recovery and Sustainable Growth Through Reform of the Securities Class-Action System: Exploring Arbitration as an Alternative to Litigation*, 33 Harv. J. L. & Pub. Pol'y, 607, 612 (Spring 2010). With the new lax standing requirement announced by the Ninth Circuit, defendants may be forced to make payouts to hundreds or even thousands

of unharmed class members. In addition, due to the violation of some statutory standard, a non-injured plaintiff might be deemed a "prevailing party" entitled to attorney fees.

The unwarranted economic burden this imposes on defendants cannot be overstated. As one legal scholar noted, "aggregated statutory damages claims can result in absurd liability exposure in the hundreds of millions – or even billions – of dollars on behalf of a class whose actual damages are often nonexistent." Sheila B. Scheuerman, *Due Process Forgotten: The Problem of Statutory Damages and Class Actions*, 74 Mo. L. Rev. 103, 104 (Winter 2009). Stated another way, a class judgment based on a statutory damages claim can have an "annihilating effect" on a defendant. *O'Neil*, *supra*, at *6. Defendants, unwilling to roll the dice, are placed under intense pressure to settle, even if an adverse judgment seems "improbable." See *Thorogood v. Sears, Roebuck and Co.*, 547 F.3d 42, 745 (7th Cir. 2008); *Matter of Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995). See also Barry F. McNiel, *et. al.*, *Mass Torts and Class Actions: Facing Increased Scrutiny*, 167 F.R.D. 483, 489-90 (updated 8/5/96). The Ninth Circuit's holding in this case, if left uncorrected by this Court, will only exacerbate these problems and proliferate more of these "blackmail settlements." *Rhone*, *supra* at 1298, citing Henry J. Friendly, *Federal Jurisdiction: A General View* 120 (1973).

Equally troubling, DRI's members will have no way to predict whether their clients will fall victim to these ills. Certainly, the Ninth Circuit's relaxation of class certification requirements will encourage potential class members to forum-shop, a practice looked upon

with disfavor by the Court. See *Piper Aircraft Co v. Reyno*, 454 U.S. 235, 254 (1981); *Deposit Guaranty Nat. Bank, Jackson, Miss. v. Roper*, 445 U.S. 326 (1980). Beyond that, because of confusion among the federal circuits, DRI's members and clients have no way of knowing what standard a particular court will apply. DRI therefore has a strong interest in assuring that this Court adopts a clear standing rule that is capable of consistent application across the country.

Careful adherence to the standing doctrine serves to guard against the ills set forth above. Litigation brought by entrepreneurial class action attorneys attempting to serve as private attorneys general in lieu of the federal government harms the civil justice system, both because it creates enormous litigation costs with no attendant benefit and because it destabilizes the carefully-calibrated equilibrium between the political branches of government and the judiciary. By limiting suits to the constitutional framework of a "case" or "controversy," standing assures that corporations and individuals will not be subject to academic litigation where the complaining party has suffered no real injury. And it also guards against plaintiff attorneys, and particularly class action attorneys, receiving exorbitant fees that may put a corporation out of business for a statutory violation unaccompanied by any cognizable injury. On the other hand, by allowing Congress to create a statutory cause of action, defendants are incentivized to conform their conduct to the law. Accordingly, it is imperative that this Court review the Ninth Circuit's decision.

## CONCLUSION

For the foregoing reasons, Amicus Curiae DRI respectfully urges the Court to grant Spokeo, Inc.'s Petition for Writ of Certiorari.

Respectfully submitted,

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