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 FOR AMICI CURIAE EBAY INC., FACEBOOK, INC., GOOGLE INC., AND YAHOO! INC. IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE[1]

Amici are leading technology companies that provide services via the Internet to hundreds of millions of users each day.

eBay Inc. is a leader in global commerce that delivers flexible and scalable solutions through eBay, PayPal, and eBay Enterprises and other business units. eBay delivers one of the world's largest online marketplaces, with 128 million users and more than 550 million listings at the end of 2013. PayPal provides flexible and innovative payment solutions for consumers and merchants all over the world; in 2013, PayPal was available in approximately 193 countries and 26 currencies and had 143 million active registered accounts. eBay Enterprises helps companies of all sizes expand commerce by offering engaging shopping experiences online and offline.

Facebook, Inc. provides a free social media service to more than 1.2 billion global users that empowers them to connect with others, to discover what is happening in their communities, and to share their views on the world. The service is now provided in over 100 languages and dialects.

Google Inc. is a technology company that offers a suite of web-based products and services to billions of people worldwide. Google's business started with its

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[1] Pursuant to Rule 37.6, amici certify that no counsel for either party authored this brief, and no person or party other than named amici and their counsel made a monetary contribution to the preparation or submission of this brief. Counsel of record for all parties received notice of amici's intent to file this brief at least ten days prior to its due date and have consented to its filing. Letters of consent have been filed with the Court.

search engine and now includes a variety of other products and services, such as Gmail, YouTube, Google Maps, Drive, and the Android operating system.

Yahoo! Inc., together with its consolidated subsidiaries, is focused on making the world's daily habits inspiring and entertaining. By creating highly personalized experiences for its users, Yahoo keeps people connected to what matters most to them across devices and around the world. Yahoo reaches more than 800 million monthly active users.

The services offered by amici have created or transformed a wide range of industries, including electronic communications of all forms; financial transactions and online commerce; social networking; delivery of video, television, music and other media content; and the organization and accessibility of information. Amici are proven innovators that continue to cultivate valuable technology through significant investments in research and development. However, due to the nature of their businesses, amici engage in many activities that may be subject to federal and state laws that contain private causes of action and statutory damages provisions similar to the provisions contained in the Fair Credit Reporting Act (FCRA). Many of these laws, like FCRA, provide a private right of action for alleged violations and statutory damages. If the Ninth Circuit's rule stands, plaintiffs may pursue suits against amici even where they are not actually harmed by an alleged statutory violation, and in certain circumstances, seek class action damages that could run into the billions of dollars.[2]

[2] Amici's interest in this case is limited to the Article III standing question presented, and should not be construed as expressing any view on the merits of petitioner's alleged statutory violations.

Permitting such "no-injury" lawsuits to proceed has an increasingly negative impact on amici due to the broad-scale nature of their operations. Amici interact with hundreds of millions of users each day, using highly efficient automated mechanisms to process and facilitate billions of transactions and interactions. These mechanisms enable amici to unlock the power of the Internet and to deliver immense value to users. But this structure also makes amici vulnerable to the untoward consequences of the Ninth Circuit's misreading of Article III and this Court's precedent.

Rather than requiring concrete, actual harm to establish a "case or controversy" appropriate for judicial resolution, the Ninth Circuit allows suits for statutory violations with no limiting principle. Thus, if any of the millions of individuals who interact with amici is willing (or is enticed by a plaintiff's attorney) to allege that a generalized practice or act violated a law providing a private cause of action and statutory damages, then she could launch a putative class action on behalf of herself and millions of other "similarly situated" users. She could pursue a multi-billion dollar statutory damages claim despite the lack of injury to herself or any other class member. Even without pursuing a class action, a single plaintiff could attempt to obtain punitive damages through an individual suit under FCRA or other similar statutes, or injunctive relief, which is available under many other statutes that also provide statutory damages. The attendant expense of litigating such actions and the potential for punitive damages or burdensome injunctive relief creates a strong incentive to settle even the most baseless suits, rewarding plaintiffs (and their attorneys) for filing meritless strike suits in circumstances where no one has been harmed. Amici request that this Court grant certiorari to confirm, as

dictated by the Constitution and this Court's precedent, that Article III standing does not exist when no plaintiff alleges an actual injury.

REASONS FOR GRANTING THE PETITION

I. THE QUESTION PRESENTED IS IMPORTANT AND WILL AFFECT FEDERAL LITIGATION INVOLVING MANY FEDERAL AND STATE STATUTES

A. The Decision Below Concludes That Plaintiffs Who Have Suffered No Actual Harm Still Have Standing

Respondent Robins's putative class complaint alleges that Spokeo is a credit reporting agency (Pet. App. 19a-20a) and willfully violated various provisions of FCRA, which provides consumers with a private right of action to recover "any actual damages … *or* damages of not less than $100 and not more than $1,000" for any willful failure to comply with the various requirements imposed by the Act. 15 U.S.C. § 1681n(a)(1)(A) (emphasis added). Robins seeks statutory damages for himself and a putative class that allegedly "consists of millions of individuals." Pet. 15. On Spokeo's motion, the district court dismissed the complaint for lack of Article III standing because Robins had not alleged "any actual or imminent harm." Pet. App. 2a.

The Ninth Circuit reversed, holding that Robins had standing because "alleged violations of [his] statutory rights are sufficient to satisfy the injury-in-fact requirement of Article III." Pet. App. 8a. In so holding, the court relied on *Edwards* v. *First American Corp.*, a case in which this Court granted certiorari to review the same Article III standing question presented in this petition, but later dismissed without opinion.

See Pet. App. 6a, 7a, 9a (citing *Edwards* v. *First Am. Corp.*, 610 F.3d 514 (9th Cir. 2010), *cert. granted*, 131 S. Ct. 3022 (2011), *cert. dismissed*, 132 S. Ct. 2536 (2012)). Because the Ninth Circuit "determine[d] that Robins has standing by virtue of the alleged violations of his statutory rights," the court expressly declined to consider whether Robins' unsubstantiated allegations of "harm to his employment prospects or related anxiety could be sufficient injuries in fact." Pet. App. 9a n.3.

B. The Ninth Circuit's Holding Implicates Numerous Federal Statutes

The Ninth Circuit squarely held that "alleged violations of … statutory rights are sufficient to satisfy the injury-in-fact requirement of Article III." Pet. App. 8a. This holding implicates a broad swath of federal statutes that contain private rights of action and provide for statutory damages.

Amici are concerned that this decision will substantially and improperly lower the bar for invoking the jurisdiction of federal courts, inviting abusive and costly litigation, including class actions seeking millions or even billions of dollars in statutory damages under FCRA and similar statutes. Amici are members of a rapidly growing and transforming technology industry that provides services to hundreds of millions of individuals each day. Users of amici's services routinely conduct financial transactions, share information and content, and interact with people all over the world on platforms offered by amici. The services amici provide, the information they collect, and the interactions they facilitate arguably could be subject to laws that contain private rights of action and allow for statutory damages.

For example, certain amici have already been named as defendants in putative class action suits seeking statutory damages under the Wiretap Act (as amended by the Electronic Communications Privacy Act of 1986), 18 U.S.C. §§ 2510-2522, and the Stored Communications Act (SCA), 18 U.S.C. §§ 2701-2712, and have challenged plaintiffs' Article III standing. Applying the Ninth Circuit's rule, district courts have held that the only "injury" that must be alleged in these suits against amici, like the case at bar, is a statutory violation; actual harm resulting from the purported violations need not be alleged. Thus, as here, plaintiffs have been permitted to maintain their suits against amici, despite no allegation of actual harm, under the rule articulated by the Ninth Circuit in *Edwards* and applied by the court below in this case.

In *In re Facebook Privacy Litigation*, 791 F. Supp. 2d 705, 712 (N.D. Cal. 2011), for example, the complaint alleged in part that the defendant had transmitted user information in violation of the Wiretap Act, which provides a private right of action for "any person whose wire, oral, or electronic communication is intercepted, disclosed, or intentionally used" in violation of the Act, 18 U.S.C. § 2520(a), and establishes "statutory damages of whichever is the greater of $100 a day for each day of violation or $10,000," *id.* § 2520(c)(2)(B). In denying Facebook's motion to dismiss the complaint for lack of standing, the district court concluded that "Plaintiffs allege a violation of their statutory rights under the Wiretap Act" and that such an allegation was "sufficient to establish that they have suffered the injury re-

quired for standing under Article III." *Facebook Privacy Litig.*, 791 F. Supp. 2d at 712.[3]

Similarly, in *Gaos* v. *Google Inc.*, 2012 WL 1094646 (N.D. Cal. Mar. 29, 2012), the plaintiff filed a putative class complaint alleging a violation of the SCA, which provides a private right of action to any "subscriber, or other person aggrieved" by a knowing or intentional violation of the Act, 18 U.S.C. § 2707(a), statutory damages of $1,000 for each plaintiff, *id.* § 2707(c), and the right to recover attorneys' fees and costs, *id.* § 2707(b)(3), (c). The district court rejected Google's argument that the plaintiff lacked standing, stating that "a plaintiff may be able to establish constitutional injury in fact by pleading a violation of a right conferred by statute" and that "the SCA provides a right to judicial relief based only on a violation of the statute without additional injury." *Gaos*, 2012 WL 1094646, at *3.[4]

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[3] The Ninth Circuit recently affirmed the district court's ruling on standing in this suit against Facebook, noting that "a plaintiff demonstrates an injury sufficient to satisfy Article III when bringing a claim under a statute that prohibits the defendant's conduct and grants 'persons in the plaintiff's position a right to judicial relief.'" *In re Zynga Privacy Litig.*, 2014 WL 1814029, at *5 n.5 (9th Cir. May 8, 2014) (consolidated opinion) (quoting *Edwards*, 610 F.3d at 517).

[4] Yahoo has faced similar litigation, though the Article III standing issue has not been addressed in these cases. *See, e.g.*, *Holland* v. *Yahoo! Inc.*, No. 13-cv-4980 (N.D. Cal. Oct. 25, 2013) (consolidated putative class action complaints for statutory damages and injunctive relief under the Wiretap Act); *Sherman* v. *Yahoo! Inc.*, No. 13-cv-41 (S.D. Cal. Jan. 8, 2013) (putative class action complaint for statutory damages and injunctive relief under the Telephone Consumer Protection Act). Other companies in the Internet and technology industries have also faced litigation presenting the same standing issues. *See, e.g.*, *In re iPhone Applica-*

Many other federal statutes couple private rights of action with statutory damages as well. Those statutes include the Telephone Consumer Protection Act, 47 U.S.C. § 227(b)(3); Video Privacy Protection Act, 18 U.S.C. § 2710(c)(1); Real Estate Settlement Procedures Act, 12 U.S.C. § 2607(d); Cable Communications Privacy Act, 47 U.S.C. § 551(f)(1)-(2); Truth in Lending Act, 15 U.S.C. § 1640(a)(1); Fair Debt Collection Practices Act, 15 U.S.C. § 1692k(a)(1), (2)(A); Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. § 1854(a), (c); Electronic Funds Transfer Act, 15 U.S.C. § 1693m(a)(2); Expedited Funds Availability Act, 12 U.S.C. § 4010(a)(2); Homeowners Protection Act, 12 U.S.C. § 4907(a)(1); Equal Credit Opportunity Act, 15 U.S.C. § 1691e(a); Driver's Privacy Protection Act, 18 U.S.C. § 2724(a)-(b); and the Credit Repair Organizations Act, 15 U.S.C. § 1679g(a)(1)(B).

Amici, like other Internet and technology companies, are potentially subject to suit under one or more of these statutes, often in unpredictable contexts far outside the statutes' original purposes. For example, in *In re Hulu Privacy Litigation*, 2013 WL 6773794, at *1 (N.D. Cal. Dec. 20, 2013), the putative class complaint alleges a violation of the Video Privacy Protection Act (VPPA), which provides a private right of action, statutory damages, and the ability to recover punitive damages and attorneys' fees and costs. 18 U.S.C. § 2710.

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tion Litig., 844 F. Supp. 2d 1040, 1055 (N.D. Cal. 2012) (concluding that "a violation of the Wiretap Act or the [SCA] may serve as a concrete injury for the purposes of Article III injury analysis"); *Low* v. *LinkedIn Corp.*, 2011 WL 5509848, at *6 n.1 (N.D. Cal. Nov. 11, 2011) (recognizing open question but not deciding "whether the statutory right created by the [SCA] is sufficient to overcome the standing hurdle in [the] case").

The complaint alleges that defendant Hulu, which provides television shows, movies, and other content to viewers over the Internet, disclosed information about users' viewing selections to advertisers, social networks, and Internet analytics companies, but the complaint did not allege any actual harm resulting from these disclosures. *See Hulu Privacy Litig.*, 2013 WL 6773794, at *1. The district court rejected Hulu's standing challenge, concluding that the plaintiffs need not "show actual injury that is separate from a statutory violation to recover … liquidated damages." *Id.* at *4; *see also In re Hulu Privacy Litig.*, 2012 WL 2119193, at *8 (N.D. Cal. June 11, 2012) ("Plaintiffs establish an injury (and standing) by alleging a violation of a statute.").[5]

C. The Question Presented Also Implicates Standing To Pursue State Law Claims In Federal Court

Many state statutes also provide private rights of action and statutory damages, some of which may be heard in federal courts based on diversity jurisdiction or the Class Action Fairness Act (CAFA), 28 U.S.C. § 1332(d). Accordingly, federal courts are also called upon to decide whether plaintiffs have Article III standing to seek enforcement of these state statutes.

Thus, while the Ninth Circuit below relied on this Court's precedent that Article III "does not prohibit *Congress* from 'elevating to the status of legally cog-

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[5] The *Hulu* litigation is not an outlier. Streaming video provider Netflix recently entered into a settlement with a class estimated to exceed 60 million individuals in a lawsuit alleging that it unlawfully retained viewing information in violation of the VPPA. *In re Netflix Privacy Litig.*, 2013 WL 1120801, at *1 (N.D. Cal. Mar. 18, 2013); *see also infra* p. 13 (discussing settlement terms).

nizable injuries concrete, *de facto* injuries that were previously inadequate in law'" (Pet. App. 7a-8a (emphasis added) (quoting *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 578 (1992))), the question presented in this case is not so limited. Properly understood, the standing question presented in this petition also implicates the ability of *state legislatures* to create new "injuries" that plaintiffs can seek to enforce in *federal courts*.

As with the similar federal statutes, these state statutes providing private rights of action and statutory damages are frequently asserted in federal courts against Internet and technology companies. For example, the following cases all applied the Ninth Circuit's holding in *Edwards* to address the plaintiffs' standing to bring *state law* claims:

- In *C.M.D.* v. *Facebook, Inc.*, 2014 WL 1266291, at *2-3 (N.D. Cal. Mar. 26, 2014), the court analyzed whether plaintiffs had Article III standing to bring a putative class claim, alleging only an injury-in-law, under the Illinois Right of Publicity Act, 765 Ill. Comp. Stat. 1075/1 *et seq.*, which provides for statutory damages of $1,000 per violation and punitive damages for willful violations.

- In *Deacon* v. *Pandora Media, Inc.*, 901 F. Supp. 2d 1166, 1171-1172 (N.D. Cal. 2012), the court considered whether plaintiffs had Article III standing to bring a putative class claim, alleging only an injury-in-law, under the Michigan Video Rental Privacy Act, Mich. Comp. Laws § 445.1712, which provides a private right of action and statutory damages of $5,000 per person along

with the right to recover attorneys' fees and costs.

- In *Goodman* v. *HTC America, Inc.*, 2012 WL 2412070, at *8 (W.D. Wash. June 26, 2012), the court considered whether plaintiffs had Article III standing, based on allegations of injury-in-law alone, in a putative class action alleging violations of multiple state statutes, including statutes providing for statutory damages and injunctive relief.

As these cases demonstrate, the Article III standing question presented in this case is not limited to FCRA or even to the litany of federal statutes providing a private right of action and the right to recover statutory damages.[6] The decision below, if allowed to stand, would potentially permit no-injury lawsuits in federal court not only under federal statutes, but also under numerous state statutes.

[6] In cases where plaintiffs allege multiple causes of action, the Ninth Circuit's erroneous Article III standing jurisprudence has also led district courts to reach the troubling conclusion that the alleged violation of a single statute confers standing to pursue all of a plaintiff's disparate claims. *See, e.g.*, *Low* v. *LinkedIn Corp.*, 900 F. Supp. 2d 1010, 1021 (N.D. Cal. 2012) (allegation that defendant violated SCA and California right to privacy provides standing in suit also alleging violation of California False Advertising Law, common law claims for breach of contract, conversion, unjust enrichment, and negligence); *iPhone Application Litig.*, 844 F. Supp. 2d at 1055 (suggesting that alleged violation of the Wiretap Act provides standing in suit also alleging violations of the California Consumer Legal Remedies Act, California Unfair Competition Law, and common law claims for negligence, trespass, conversion, and unjust enrichment). Yet this Court has squarely held that "a plaintiff must demonstrate standing for each claim he seeks to press." *DaimlerChrysler Corp.* v. *Cuno*, 547 U.S. 332, 352 (2006).

D. The *In Terrorem* Effect Of Statutory Damages May Cause Defendants To Settle Even Meritless Claims

The standing doctrine plays a critical role in our court system. Faithful application of Article III serves an important gatekeeping function by keeping lawsuits that are not suited to judicial resolution—because nobody has actually suffered harm—out of the court system. This gatekeeping function is important even where, as frequently occurs, the targets of these suits have valid defenses on the merits—the standing doctrine prevents both defendants and federal courts from the burden of litigating suits where no plaintiff claims actual injury.

As the district court below correctly reasoned, if an allegation of a "[m]ere violation of the [FCRA]" conferred standing "where no injury in fact is properly pled," then the "federal courts will be inundated by web surfers' endless complaints." Pet. App. 23a-24a. This inundation has already commenced; Internet and technology companies are frequently the targets of class complaints alleging violations of a wide variety of state and federal statutes that combine private rights of action with statutory damages provisions. Amici, and those similarly situated, provide services to millions of users all over the world each day via highly efficient, automated systems that empower users and provide immense value. Because of this, however, amici are particularly vulnerable to both numerous individual complaints and class complaints seeking even modest statutory damages for each violation or user, either of which can threaten absurd potential damage awards and litigation costs. The increasing frequency of such litigation against amici and others in their industry is a

significant, unjustified burden when no plaintiff has suffered an actual harm.

The time and litigation expenses involved in challenging such claims, combined with even a remote risk of a potentially astronomical damage award, can create immense pressure to settle. This is true even when the cases are baseless on the merits. *AT&T Mobility LLC* v. *Concepcion*, 131 S. Ct. 1740, 1752 (2011) (when faced with "even a small chance of a devastating loss," defendants will feel significant "pressure[]" to settle even "questionable claims"); *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 559 (2007) (expensive litigation "will push cost-conscious defendants to settle even anemic cases").

For example, streaming video provider Netflix recently settled a putative class action alleging violations of the VPPA and seeking statutory damages on behalf of an asserted class of approximately 62 million individuals, making the total potential damages exposure more than $150 *billion*. *Netflix Privacy Litig.*, 2013 WL 1120801, at *1. Notably, as frequently occurs in these cases, only a handful of the class members who were purportedly "harmed" received any compensation for their "injuries," while class counsel was well compensated. *Id.* at *1-2 (approving $9 million settlement where $2.25 million went to class counsel; $30,000 went to be shared among the named plaintiffs; and, after administration expenses, the balance of the settlement fund went to *cy pres* recipients).

In another recent case, Google entered into a proposed class settlement of lawsuits alleging that Google had violated the SCA. *In re Google Referrer Header Privacy Litig.*, 2014 WL 1266091 (N.D. Cal. Mar. 26, 2014). In its order preliminarily approving the proposed settlement, the court noted "that the full amount

of statutory damages … is likely *in the trillions* of dollars considering the size of the class," *id.* at *5 n.4 (emphasis added), which the plaintiffs estimated to "exceed[] one hundred million individuals," *id.* at 6, since it "potentially covers all internet users in the United States," *id.* at 7. The court found that Google had "viable" defenses and that it was "entirely possible that Defendant could ultimately prevail." *Id.* at *5. The $8.5 million proposed settlement came years into the litigation, with "the next motion to dismiss … pending at the time [the proposed settlement] was filed." *Id.*

And in another case, Facebook settled a putative class complaint in which the class was estimated to exceed 3.6 million people. *Lane* v. *Facebook, Inc.*, 2010 WL 9013059, at *2 (N.D. Cal. Mar. 17, 2010). The court noted that the plaintiffs sought statutory damages of $2,500 per violation under the VPPA, and $10,000 per violation under the Wiretap Act. *Id.* With Facebook's potential liability in the billions of dollars, the court approved a $9.5 million settlement, of which $3 million went to attorneys' fees, administrative costs, and incentive payments to class representatives and $6.5 million went to a new charity set up by the parties. *Id.* at *1; *Lane* v. *Facebook, Inc.*, 696 F.3d 811, 817 (9th Cir. 2012).

The *in terrorem* effect is not limited to class actions seeking statutory damages multiplied by huge numbers of putative class members. FCRA and many other similar statutes allow plaintiffs to sue for both statutory and punitive damages. *See, e.g.*, *Saunders* v. *Equifax Info. Servs., LLC*, 469 F. Supp. 2d 343, 345 (E.D. Va. 2007) (denying remittitur after jury awarded statutory damages of $1,000 and punitive damages of $80,000 under FCRA). In addition, many such statutes allow plaintiffs to seek injunctive relief. *See, e.g.*, *Goodman* v.

HTC Am., Inc., 2012 WL 1499745 (W.D. Wash. Mar. 2, 2012) (complaint seeking injunctive relief under California statute that also provides for statutory damages).

II. THIS COURT'S GUIDANCE IS NECESSARY TO RESOLVE CONFUSION AMONG THE LOWER COURTS

A. There Is A Deep And Longstanding Circuit Split

The courts of appeals have rendered inconsistent opinions when addressing whether plaintiffs have standing to maintain suits that allege injuries in law with no allegation of actual harm.

The Ninth, Sixth, Tenth, and D.C. Circuits have held that a plaintiff need not allege anything more than a violation of a statutorily imposed duty, so long as the statute also creates a private right of action. Pet. App. 8a; *Edwards*, 610 F.3d at 518; *Beaudry* v. *TeleCheck Servs., Inc.*, 579 F.3d 702, 707 (6th Cir. 2009) (concluding that "[n]o Article III (or prudential) standing problem ar[ose]" in lawsuit alleging bare violation of FCRA); *Day* v. *Bond*, 500 F.3d 1127, 1136 (10th Cir. 2007) ("It is long settled in the law that 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." (internal quotation marks omitted)); *Shaw* v. *Marriott Int'l, Inc.*, 605 F.3d 1039, 1042 (D.C. Cir. 2010) ("[T]he violation of a statute can create the particularized injury required by Article III … when 'an individual right' has been 'conferred on a person by statute.'").

In contrast, the Second and Fourth Circuits have held that allegations of breached statutory duties in the ERISA context do not "in and of themselves constitute[] an injury-in-fact sufficient for constitutional

standing." *Kendall* v. *Employees Ret. Plan of Avon Prods.*, 561 F.3d 112, 121 (2d Cir. 2009); *David* v. *Alphin*, 704 F.3d 327, 338 (4th Cir. 2013) (theory "that the deprivation of [plaintiffs'] statutory right [under ERISA] is sufficient to constitute an injury-in-fact for Article III standing … conflates statutory standing with constitutional standing").

The Third Circuit has recognized that "[t]he proper analysis of standing focuses on whether the plaintiff suffered an actual injury, not on whether a statute was violated." *Doe* v. *National Bd. of Med. Exam'rs*, 199 F.3d 146, 153 (3d Cir. 1999). However, in a more recent case that failed to acknowledge this contrary circuit precedent, the Third Circuit held that a plaintiff bringing suit for a statutory violation "need not demonstrate that he or she suffered actual monetary damages" to satisfy the Article III standing requirement. *Alston* v. *Countrywide Fin. Corp.*, 585 F.3d 753, 763 (3d Cir. 2009).

The Eighth Circuit is in disarray. A panel recently held, over vigorous dissent, that the alleged invasion of the statutory right under FCRA "to obtain a receipt … showing no more than the last five digits of the consumer's credit or debit card number" with no allegation of resulting harm was still "an injury-in-fact sufficient to confer Article III standing." *Hammer* v. *Sam's East, Inc.*, 2014 WL 2524534, at *4 (8th Cir. June 5, 2014); *but see id.* at *10 (Riley, C.J., dissenting) ("Ignoring the last thirty-nine years of Article III standing jurisprudence, the majority adopts an extraordinarily broad reading" of Supreme Court precedent, which "has never actually *held* an unharmed plaintiff had standing by virtue of a bare statutory violation"). Another recent Eighth Circuit decision acknowledged "the difficult constitutional question whether Congress can

drill through th[e] hard floor of injury *in fact* by creating an injury *in law* (i.e., a statutory cause of action requiring no showing the plaintiff was personally and actually harmed)," and specifically held that CAFA "does not … extend federal jurisdiction to state claims—if any exist—permitting recovery for bare statutory violations without any evidence the plaintiffs personally suffered a real, non-speculative injury in fact." *Wallace* v. *ConAgra Foods, Inc.*, 747 F.3d 1025, 1032-1033 (8th Cir. 2014).

B. This Entrenched Circuit Split Has Resulted In Confusion And Inconsistent Rulings Among The District Courts

This conflicting appellate precedent has left the district courts struggling to decide the basic, threshold issue of standing in cases like this. As one district court recently observed, "[t]he current Supreme Court jurisprudence is not entirely clear as to whether a defendant's violation of a statute that confers a private right of action in and of itself constitutes an 'injury in fact' to those protected under the statute." *Tyler* v. *Michaels Stores, Inc.*, 840 F. Supp. 2d 438, 449 n.8 (D. Mass. 2012). Unsurprisingly, the district courts have issued inconsistent decisions as they confront this conflicting precedent.

Indeed, the district court's rulings in this case are illustrative: The district court twice reversed itself in deciding the standing issue. *Compare* Pet. App. 13a (initially finding no standing where Plaintiff alleged "violation of a statute that grants individuals a private right of action"), *with id.* 18a (subsequently concluding that "Plaintiff has alleged an injury in fact" in the form of "alleged FCRA violations"), *with id.* 23a (finally concluding that "[m]ere violation of the [FCRA] does not

confer Article III standing … where no injury in fact is properly pled").

The results are similarly inconsistent across the district courts. Many district courts have concluded that plaintiffs need not allege "any specific injury apart from the statutory violation" to satisfy Article III's standing requirement. *Halaburda* v. *Bauer Publ'g Co.*, 2013 WL 4012827, at *4 (E.D. Mich. Aug. 6, 2013) (finding standing in suit alleging injury in law under Michigan statute); *see also In re Google Inc. Cookie Placement Consumer Privacy Litig.*, 2013 WL 5582866, at *3 (D. Del. Oct. 9, 2013) ("[A] statutory violation, in the absence of any actual injury, may in some circumstances create standing under Article III."); *Hulu Privacy Litig.*, 2012 WL 2119193, at *8 ("Under current law, … Plaintiffs establish an injury (and standing) by alleging a violation of a statute.").

Other district courts, however, have concluded that the bare allegation of a statutory violation is insufficient to establish standing. For example, one district court recently concluded in a case alleging violations of the VPPA that "a plaintiff must plead an injury beyond a statutory violation to meet the standing requirement of Article III." *Sterk* v. *Best Buy Stores, LP*, 2012 WL 5197901, at *4-5 (N.D. Ill. Oct. 17, 2012); *cf. Halaburda*, 2013 WL 4012827, at *4 (expressing "some hesitation in finding that [bare] allegations [of statutory violations] meet the definition of an injury in fact"). Other district courts have similarly held that more than an injury in law is required. *In re Barnes & Noble Pin Pad Litig.*, 2013 WL 4759588, at *3 (N.D. Ill. Sept. 3, 2013) ("Plaintiffs must plead an injury beyond a statutory violation to meet the standing requirement of Article III."); *Wersal* v. *LivingSocial, Inc.*, 2013 WL 3871434, at *3 n.4 (D. Minn. July 26, 2013) ("While a violation of a

statute can create a legal right, the Court is not persuaded that [plaintiff]'s claims of statutory violations do not require satisfaction of Article III's standing requirement.").

This deep confusion in the federal courts pertaining to the fundamental question of standing provides further reason for this Court to grant the petition.

III. THE NINTH CIRCUIT'S DECISION INCORRECTLY PERMITS PLAINTIFFS WHO HAVE SUFFERED NO HARM TO MAINTAIN SUITS MERELY BY SEEKING STATUTORY DAMAGES

A. Injury In Law Alone Cannot Satisfy Article III's "Case Or Controversy" Requirement

"'No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies.'" *Raines* v. *Byrd*, 521 U.S. 811, 818 (1997). The decision below incorrectly held that "alleged violations of Robins's statutory rights" with nothing more "are sufficient to satisfy the injury-in-fact requirement of Article III" (Pet. App. 8a), thereby allowing Robins to pursue his putative class claim for statutory damages despite the lack of any alleged actual harm. The decision relies on the Ninth Circuit's conclusion in *Edwards* that "the standing question in such cases is whether the constitutional or statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief" (Pet. App. 6a (quoting *Edwards*, 610 F.3d at 517)), and this Court's statement that Congress may elevate "to the status of legally cognizable injuries concrete, de facto injuries that were previously inadequate in law" (Pet. App. 7a-8a (citing *Lujan*, 504 U.S. at 578)).

The Ninth Circuit's conclusion that the alleged violation of any "statutory right" confers standing is unduly broad. *Lujan* teaches that Congress cannot create an injury in fact out of whole cloth, but may only create a legal remedy for actual "de facto injuries." Thus, Congress's ability to define new legal rights does not abrogate the Constitution's limitation of the "judicial Power" to "Cases" or "Controversies," U.S. Const. art. III, § 2, a limit designed to ensure "that federal courts will not be asked to decide ill-defined controversies" or "suits … which are feigned or collusive in nature." *Flast* v. *Cohen*, 392 U.S. 83, 100 (1968); *Baker* v. *Carr*, 369 U.S. 186, 204 (1962) (standing requirement "assure[s] that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends"). The decision below flouts this Court's clear pronouncement that "[i]n no event, however, may Congress abrogate the Art. III minima: A plaintiff must always have suffered 'a distinct and palpable injury to himself,' that is likely to be redressed if the requested relief is granted." *Gladstone Realtors* v. *Village of Bellwood*, 441 U.S. 91, 100 (1979); *see also id.* at 99 ("[T]he plaintiff must show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant.").

The existence of a statutory right of action does not eliminate the requirement of injury in fact. "Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing." *Raines*, 521 U.S. at 820 n.3. The panel's holding is fundamentally inconsistent with this Court's clear teaching that even if Congress "grant[s] an express right of action … [o]f course, Art. III's requirement remains: the plaintiff

still must allege a distinct and palpable injury to himself." *Warth* v. *Seldin*, 422 U.S. 490, 501 (1975).

B. Enforcement Of Statutory Violations That Cause No Harm Is The Province Of The Executive Branch, Not The Courts

When a statutory violation causes no actual harm, enforcement is properly left to the executive branch, not to unharmed individual plaintiffs functioning as private attorneys general. This basic principle flows from the separation of powers, which is the foundation for Article III's standing requirement. *Allen* v. *Wright*, 468 U.S. 737, 752 (1984) ("Art. III standing is built on a single basic idea—the idea of separation of powers."); *see also Lexmark Int'l, Inc.* v. *Static Control Components, Inc.*, 134 S. Ct. 1377, 1386 (2014) (standing doctrine derives from "separation-of-powers principles"). The "federal courts may 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.'" *Allen*, 468 U.S. at 752 (citation omitted); *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 102 (1998) (standing doctrine ensures that federal courts adjudicate only disputes "traditionally amenable to, and resolved by, the judicial process"). Thus, only plaintiffs who can demonstrate actual harm sufficient to meet the Article III standing requirement may invoke the jurisdiction of the federal courts.

Moreover, proper application of standing doctrine will not leave statutory violations that do not cause actual harm unaddressed; such violations are appropriately subject to enforcement by the executive branch. Where Congress determines that actual and wide-

spread violations of statutes should be addressed, notwithstanding the absence of any actual injury to consumers, it can and does provide for regulatory and even criminal enforcement. Indeed, FCRA, the Wiretap Act, and the SCA, among others, all include provisions for regulatory enforcement. These provisions are not toothless—the executive branch has demonstrated its willingness to actively scrutinize business's activities under other similar statutes. *See, e.g.*, *In the Matter of Snapchat, Inc.*, FTC File No. 132-3078 (May 8, 2014) (proposed FTC consent agreement regarding alleged privacy violations by Snapchat application); *United States* v. *Path, Inc.*, FTC File No. 122-3158 (Feb. 8, 2013) (consent agreement between FTC and Path regarding alleged privacy violations by a social networking application).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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