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 AMICI CURIAE NEW ENGLAND LEGAL FOUNDATION AND ASSOCIATED INDUSTRIES OF MASSACHUSETTS IN SUPPORT OF PETITIONER

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BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

CONSTITUTIONAL AND OTHER AUTHORITIES

INTEREST OF AMICI CURIAE

Amici curiae New England Legal Foundation ("NELF") and Associated Industries of Massachusetts ("AIM") seek to present their views, and the views of their supporters, on whether certiorari should be granted to decide whether an individual who alleges the violation of a federal statute without alleging any resulting concrete harm has standing to sue in federal court, under Article III of the United States Constitution.[1]

NELF is a nonprofit, nonpartisan, public interest law firm, incorporated in Massachusetts in 1977, and headquartered in Boston. Its membership consists of corporations, law firms, individuals, and others who believe in NELF's mission of promoting balanced economic growth in New England, protecting the free enterprise system, and defending economic rights. NELF's members and supporters include both large and small businesses located primarily in the New England region.

AIM is a 99-year-old nonprofit association, with over 5,000 employer members doing business in the Commonwealth. AIM's mission is to promote the well-being of its members and their employees, and the prosperity of the Commonwealth of

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[1] Pursuant to Supreme Court Rule 37.6, amici state that no counsel for a party authored this brief in whole or in part, and no person or entity, other than amici, made a monetary contribution to the preparation or submission of the brief.

Pursuant to Supreme Court Rule 37.2(a), amici also state that all parties were provided with timely notice of intent to file this brief, and that counsel of record for all parties have consented to its filing. Copies of counsel's written consent are filed herewith.

Massachusetts, by improving the economic climate of Massachusetts, advocating fair and equitable public policy proactively, and by providing relevant and reliable information and excellent services.

Amici are committed to upholding the constitutional limits on the Federal Judiciary's subject matter jurisdiction, and to preserving the separation of powers among the three branches of government. Enforcement of those principles is especially important to amici when, as here, an uninjured plaintiff (and putative representative of a class of similarly uninjured individuals) seeks to impose liability on a business for a potentially large, aggregated award of statutory damages, and reasonable attorney's fees, based on allegations of a technical violation of a statute.

In this connection, amici filed a merits brief in this Court in *Edwards v. First American Corp.,* 610 F.3d 514 (9th Cir. 2010), *cert. granted*, 131 S. Ct. 3022 (2011), *cert. dismissed as improvidently granted,* 132 S. Ct. 2536 (2012). In *Edwards*, as in this case, amici argued that a plaintiff who alleges the violation of a federal statutory right without alleging any resulting "injury in fact" has no standing to sue in federal court, under Article III. Amici also argued in *Edwards*, as they do here, that Congress cannot manufacture the injury in fact necessary to satisfy Article III's case-or-controversy requirement, such as by providing a damages remedy for the bare violation of a statutory right. Instead, a statutory claim must redress a concrete, *de facto* harm to satisfy Article III. Amici are also committed to the related principle, argued in their *Edwards* brief, that the separation of powers should prevent an uninjured plaintiff and the Federal

Judiciary from enforcing general statutory duties, thereby usurping the exclusive law-enforcement powers of the Executive Branch, under Article II of the Constitution.

For these and other reasons discussed below, NELF and AIM believe that their brief will assist the Court in deciding whether to grant certiorari and determine whether a plaintiff who alleges the bare violation of a federal statutory right has established standing under Article III.

SUMMARY OF ARGUMENT

This Court should grant certiorari and decide that an individual who alleges the violation of a federal statute without alleging any resulting concrete harm--i.e. an "injury in fact--has no standing to sue in federal court, under Article III of the United States Constitution. The respondent has sued under the Fair Credit Reporting Act ("FCRA"), which provides a private damages remedy for a willful violation of that statute and does not require a showing of actual harm. Neither the statute nor the plaintiff here has identified any injury in fact resulting from the alleged statutory violation. Accordingly, certiorari should be granted to dismiss this matter.

Article III's standing requirement limits Congress to creating a private right of action that redresses an actual harm. Conversely, Article III prevents Congress from *manufacturing* an injury in fact, such as by providing a damages remedy for the technical violation of a statute under the FCRA. An injury in fact must exist apart from a federal statute and has nothing to do with the text of the statute.

In reaching its decision to the contrary, the Ninth Circuit erroneously conflated an "injury in law," or statutory standing, with an injury in fact, or constitutional standing. According to the Ninth Circuit, a plaintiff generally has Article III standing to enforce a statutory right whenever Congress says he does, and a court should defer to Congress's policy choice. In so holding, the lower court rendered virtually meaningless the independent constitutional requirement of injury in fact under Article III.

The Ninth Circuit erred chiefly by misinterpreting two key precedents of this Court discussing Article III standing. First, the lower court misconstrued language from *Warth v. Seldin,* 422 U.S. 490, 500 (1975) ("The . . . injury required by Art[icle] III *may* exist solely by virtue of statutes creating legal rights, the invasion of which creates standing.") (citations and internal quotation marks omitted) (emphasis added). The lower court misinterpreted this language to mean that constitutional standing is virtually coextensive with statutory standing, and that a court need only consult the text of a statute to find an injury in fact.

Of course, *Warth* says no such thing. Such a reading would eliminate the injury-in-fact requirement altogether. As the Court subsequently explained in *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 578 (1992), this language from *Warth* simply means that the violation of a statutory right *may* satisfy Article III standing, but only when the statutory violation has caused a concrete, *de facto* harm that exists independently of the statute-- i.e., an injury in fact.

But the Ninth Circuit also misinterpreted this explanation of *Warth* in *Lujan*. The lower court misread the "concrete, *de facto* harm" discussed in *Lujan*--i.e., the injury-in-fact requirement under Article III--as merely requiring the plaintiff to establish a violation of a personal statutory right, as opposed to the violation of a statutory right belonging to the general public. According to the lower court, *Lujan* recognizes standing once the plaintiff has established the violation of such a personal statutory right. This is incorrect. Clearly, the Ninth Circuit omitted the crucial Article III requirement that the statutory violation must cause an actual injury to confer standing. Thus, the Ninth Circuit based its decision on its incomplete formulation of Article III standing under *Lujan*.

By conflating statutory standing with constitutional standing, the Ninth Circuit effectively abdicated the Federal Judiciary's independent power and duty to determine whether a federal statute comports with Article III, as established long ago in *Marbury v. Madison*, 1 Cranch 137, 2 L.Ed. 60 (1803). According to the Ninth Circuit, Congress is free to create Article III standing whenever it exercises its plenary powers under Article I, § 8 of the Constitution. A case or controversy is what Congress, and not the Judiciary, says it should be. In so deciding, the Ninth Circuit all but abandoned the injury-in-fact requirement, and with it the Federal Judiciary's exclusive institutional role to interpret and enforce the constitutional limits on a federal court's jurisdiction.

By conflating statutory standing with constitutional standing, the Ninth Circuit also violated the separation of powers, which is a cornerstone of this Court's Article III jurisprudence. In particular, the lower court, acting at the behest of Congress, allowed an uninjured plaintiff (and a putative representative of a class of similarly uninjured individuals), to proceed as if he were a "private attorney general" seeking to enforce the defendant's general duties under the FCRA. In so doing, the Ninth Circuit certainly exceeded the limits of its subject matter jurisdiction under Article III. But the lower court, acting with congressional approval, also intruded upon the exclusive and discretionary role of the Executive Branch to respond to the bare violation of a statute and "take Care that the Laws be faithfully executed . . . ." U.S. Const. art. II, § 3.

ARGUMENT

I. THIS COURT SHOULD GRANT CERTIORARI AND DECIDE THAT AN INDIVIDUAL WHO ALLEGES THE VIOLATION OF A FEDERAL STATUTE WITHOUT ALLEGING ANY RESULTING CONCRETE HARM HAS NO STANDING TO SUE IN FEDERAL COURT, UNDER ARTICLE III OF THE UNITED STATES CONSTITUTION.

At issue is whether this Court should grant certiorari to decide whether an individual who alleges the violation of a federal statute without alleging any resulting concrete harm--i.e. an "injury in fact"--has standing to sue in federal court, under

Article III of the United States Constitution.[2] Article III limits the Federal Judiciary's subject matter jurisdiction to "cases" and "controversies." And this Court has stated repeatedly that "Article III standing . . . enforces the Constitution's case-or-controversy requirement . . . ." *United States v. Windsor*, 133 S. Ct. 2675, 2685 (2013) (citing *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 559–562 (1992)). To establish Article III standing, the plaintiff must plead and prove an "injury in fact," i.e., "an injury [that] must be concrete, particularized, and actual or imminent . . . ." *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013) (citation and internal quotation marks omitted).

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[2] Article III provides, in relevant part:

> The judicial Power shall extend to all *Cases*, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all *Cases* affecting Ambassadors, other public Ministers and Consuls;—to all *Cases* of admiralty and maritime Jurisdiction;—to *Controversies* to which the United States shall be a Party;—to *Controversies* between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

U.S. Const. art. III, § 2 (emphasis added).

Thus, the issue here is whether the bare violation of a statutory right, without more, constitutes an injury in fact sufficient to satisfy Article III. The Ninth Circuit concluded that Article III standing is established under such circumstances. The Ninth Circuit has erred, and certiorari should be granted to correct the lower court's grave error.

The respondent and putative class representative, Thomas Robins, alleges that the petitioner, Spokeo, Inc., a website operator, has transmitted false (yet favorable) personal information about him on its website, such as by overstating his educational level and his financial status. *See Robins v. Spokeo, Inc.*, 742 F. 3d 409, 411 (9th Cir. 2014). Robins also alleges that Spokeo's transmittal of this information has harmed his employment prospects and has caused him anxiety. *See id.*[3]

[3] The Ninth Circuit did not deem it necessary to reach these allegations of purported harm, because the lower court concluded that Robins had established an injury in fact merely by alleging a violation of his rights under the Fair Credit Reporting Act, 15 U.S.C. § 1681n(a)(1)(A). *See Robins*, 742 F. 3d at 414 n.3. Nevertheless, it should be noted that these allegations cannot establish an injury in fact because they are wildly speculative and subjective. In particular, they "rel[y] on a highly attenuated chain of possibilities" that is based impermissibly on "speculation about the decisions of independent actors[,]" such as prospective employers. *Clapper v. Amnesty Int'l USA,* 133 S. Ct. 1138, 1148, 1150 (2013). As such, these allegations "do[] not satisfy the [Article III] requirement that threatened injury must be *certainly impending* to constitute injury in fact." *Id.*, 133 S. Ct. at 1147 (citation and internal quotation marks omitted) (emphasis in original).

Robins sued Spokeo under § 1681n(a) of the Fair Credit Reporting Act, 15 U.S.C. §§ 1681-1681x ("FCRA"), which allows a plaintiff to recover statutory damages, along with costs and reasonable attorney's fees, from any consumer reporting agency that has "willfully fail[ed] to comply" with the FCRA with respect to that plaintiff. 15 U.S.C. § 1681n(a)(1)(A), (3).[4] The Ninth Circuit held that Robins has alleged an injury in fact under Article III because he has alleged a willful violation of his rights under the FCRA, and because § 1681n(a)(1)(A) "does not require a showing of actual harm when a plaintiff sues for willful violations." *Robins*, 742 F. 3d. at 412.

A. The Violation Of A Statutory Right Is Not An Injury In Fact Under Article III Unless The Violation Has Caused The Plaintiff To Suffer A Concrete, *De Facto* Harm.

The Ninth Circuit concluded that Article III is satisfied because Congress has treated a violation of the FCRA, by itself, as a compensable "harm" in federal court. *See Robins*, 742 F. 3d at 412. In short, the Ninth Circuit concluded that an "injury in law" under the FCRA is also an injury in fact under Article III.

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[4] Section 1681n(a)(1)(A) of the FCRA provides, in relevant part: "Any person who willfully fails to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer in an amount equal to . . . damages of not less than $100 and not more than $1,000. . . ." 15 U.S.C. § 1681n(a)(1)(A). Section 1681n(a)(3), in turn, awards the successful plaintiff costs and reasonable attorney's fees.

The Ninth Circuit has erred, because the bare violation of a statutory right is not itself an injury in fact under Article III. "[T]he requirement of injury in fact is a hard floor of Article III jurisdiction that *cannot be removed by statute*." *Summers v. Earth Island Inst.*, 555 U.S. 488, 497 (2009) (emphasis added). Instead, Article III requires the plaintiff to plead and prove that the statutory violation has caused him to suffer an actual harm, i.e., has made him worse off in some concrete, identifiable way. Simply put, the plaintiff must establish an "injury-in-fact *caused by the violation of [a] legal right*." *Lewis v. Casey*, 518 U.S. 343, 353, n.4 (1996) (emphasis in original). *See also Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1386 (2014) ("The plaintiff must have suffered or be imminently threatened with a *concrete and particularized* 'injury in fact' . . . .") (emphasis added).

An injury in fact is therefore a concrete, *de facto* harm that exists in the real world and "has nothing to do with the text of the statute relied upon." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 97 (1998). Accordingly, Article III's standing requirement limits Congress to creating a private right of action that redresses an actual harm. "Congress[] [may] elevat[e] to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law . . . ." *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 578 (1992). Conversely, Article III prevents Congress from *manufacturing* an injury in fact, such as by providing a damages remedy for the technical violation of a statute under the FCRA. "It is settled

that 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 v. Byrd*, 521 U.S. 811, 820 (1997).

In sum, Article III prevents Congress from creating a private remedy for a "harm" that resides solely within the language of a statute. In creating new statutory remedies, then, "Congress must at the very least *identify the injury* it seeks to vindicate . . . . [T]he party bringing suit must show that the action *injures him in a concrete and personal way*." *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring) (emphasis added).

In light of this clear precedent, the statutory right to recover damages for a bare violation of the FCRA cannot satisfy Article III. Accordingly, § 1681n(a)(1)(A) of the FCRA must fail Article III review because it allows a plaintiff such as Robins to recover damages without having to prove any injury in fact.[5] Nor has Robins alleged any such injury here.[6] Consequently, the Ninth Circuit should have dismissed Robins' claim for lack of standing. Certiorari should therefore be granted to correct the Ninth Circuit's error in finding constitutional standing when there was none to be found.

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[5] *See* n.4, above.

[6] *See* n.3, above.

B. The Ninth Circuit Misinterpreted This Court's Key Precedent On Article III Standing And Thereby Conflated Statutory Standing With The Separate Requirement Of Constitutional Standing.

In reaching its decision, the Ninth Circuit erroneously conflated an "injury in law," or statutory standing, with the "irreducible *constitutional* minimum of standing" under Article III. *Lexmark*, 134 S. Ct. at 1386 (citation and internal quotation marks omitted) (emphasis added). According to the Ninth Circuit, "the violation of a statutory right is usually a sufficient injury in fact to confer standing." *Robins*, 742 F. 3d at 412. In the Ninth Circuit's view, then, a plaintiff generally has Article III standing to enforce a statutory right whenever Congress says he does, and a court should defer to Congress's policy choice. *See id.*, 742 F. 3d at 413.

In so holding, the lower court rendered virtually meaningless the independent constitutional requirement of injury in fact under Article III. If the Ninth Circuit were correct, then there would be no constitutional limits to Congress's expansion of the Federal Judiciary's jurisdiction, other than Congress's broad, plenary powers to legislate under Article I, § 8. The Ninth Circuit's decision plainly contravenes this Court's oft-repeated statement that injury in fact is a "hard floor" requirement of Article III standing that Congress can neither eliminate nor manufacture. *See Summers*, 555 U.S. at 497; *Citizens for a Better Env't*, 523 U.S. at 97; *Raines*, 521 U.S. at 820; *Lewis*, 518 U.S. at 353 n.4.

In particular, the Ninth Circuit went astray in its opinion when it misinterpreted two key precedents of this Court discussing Article III standing. First, the lower court misconstrued language from *Warth v. Seldin,* 422 U.S. 490 (1975), in which the Court stated that "'[t]he actual or threatened injury required by Art[icle] III *may* exist solely by virtue of statutes creating legal rights, the invasion of which creates standing.'" *Robins*, 742 F. 3d at 412 (quoting *Warth*, 422 U.S. at 500) (citations and internal quotation marks omitted) (emphasis added). *See also Robins*, 742 F. 3d at 412 (citing *Edwards v. First Am. Corp.*, 610 F. 3d 514, 517 (9th Cir. 2010), *cert. granted*, 131 S. Ct. 3022 (2011), *cert. dismissed as improvidently granted,* 132 S. Ct. 2536 (2012) (discussing *Warth*)).

The Ninth Circuit mistook this language from *Warth* to mean that constitutional standing is virtually coextensive with statutory standing, and that a court need only consult the text of a statute to find an injury in fact. *See Robins*, 742 F. 3d at 412 (citing *Edwards*, 610 F. 3d at 517). Of course, *Warth* says no such thing. Such a reading would eliminate the injury-in-fact requirement altogether. As the Court subsequently explained in *Lujan*, this "invasion of rights" language from *Warth* simply means that the violation of a statutory right *may* satisfy Article III standing, but only when the statutory violation has caused a concrete, *de facto* harm that exists independently of the statute--i.e., an injury in fact. *See Lujan*, 504 U.S. at 578 (Article III permits "Congress [to] elevat[e] to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law . . . ."). *See also id.* (discussing two prior Court decisions

illustrating Article III requirement that federal statutory violation must cause plaintiff actual harm).

But the Ninth Circuit compounded its error by misinterpreting this very explanation of *Warth* that the Court provided in *Lujan*. In particular, the lower court misread the "concrete, *de facto* harm" discussed in *Lujan*--i.e., the injury-in-fact requirement under Article III--as merely requiring the plaintiff to establish the violation of a personal statutory right, as opposed to the violation of a statutory right belonging to the general public. *See Robins*, 742 F. 3d at 413. According to the lower court, *Lujan* and Article III are satisfied once the plaintiff has established the violation of such a personal statutory right.

This is incorrect. Clearly, the Ninth Circuit omitted the crucial Article III requirement that the statutory violation must cause an actual injury to confer standing. Thus, the Ninth Circuit based its decision on its incomplete formulation of Article III standing under *Lujan*. To be sure, the plaintiff who brings a statutory claim must allege the violation of a personal statutory right to establish Article III standing. But that plaintiff must *also* allege that the statutory violation caused him to suffer a concrete, identifiable harm. *See Lewis*, 518 U.S. at 353 n.4; *Lujan*, 504 U.S. at 578.

In short, the lower court all but eliminated the injury-in-fact requirement when it misinterpreted both *Warth* and *Lujan*. Certiorari should therefore be granted to correct the Ninth Circuit's

misinterpretation of this Court's key Article III precedent and restore the constitutional limits to the Federal Judiciary's subject matter jurisdiction.

C. By Conflating Statutory Standing With Constitutional Standing, The Ninth Circuit Abdicated The Judiciary's Power And Duty, Established In *Marbury v. Madison*, To Decide Whether A Federal Statutory Claim Comports With Article III.

By conflating statutory standing with constitutional standing, the Ninth Circuit abdicated the Federal Judiciary's independent power and duty to determine whether a federal statutory claim comports with Article III, as established famously in *Marbury v. Madison*, 1 Cranch 137, 177, 2 L.Ed. 60 (1803) (invalidating federal statute conferring original jurisdiction on the Court over subject matter not authorized by Article III--i.e., issuance of writ of mandamus to compel public officer to deliver Presidential commission).

According to the Ninth Circuit, Congress is free to create Article III standing whenever it exercises its plenary powers under Article I, § 8 of the Constitution. Under this view, a case or controversy under Article III is simply what Congress says it should be. If Congress has provided a private remedy for the bare violation of a statutory right, as in the FCRA, then the injury-in-fact requirement is satisfied. Following the lower court's approach, then, federal courts should defer to Congress, and not to the Constitution, to define the

outer limits of their jurisdiction. Under such a view, however, Article III's limits are no more. *See* Michael E. Rosman, *Standing Alone under the Fair Housing Act*, 60 Mo. L. Rev. 547, 578 (1995) ("[I]f Congress . . . creates a legal right the violation of which will meet the injury 'in fact' requirement, it can indeed abrogate the Article III minima because the Court will not examine the factual existence of an 'injury' beyond the violation of a legal right.") (internal quotation marks omitted).

In so deciding, then, the Ninth Circuit virtually abandoned the injury-in-fact requirement, and with it the Federal Judiciary's institutional role to interpret and enforce the Constitution--i.e., to "say what the law is" under the Constitution and then hold the other branches of government accountable to this supreme document:

> The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written . . . [as] the fundamental and paramount law of the nation. . . . It is emphatically the *province and duty of the judicial department to say what the law is*. . . . This is of the very essence of judicial duty. . . . [I]f the legislature shall do what is expressly forbidden [by the Constitution], . . . [i]t would be giving to the legislature a practical and real omnipotence . . . .

Marbury, 1 Cranch at 176-78 (emphasis added).

In short, it is the Federal Judiciary, and not Congress, that has the power and the duty to decide whether a federal statutory claim satisfies the injury-in-fact requirement under Article III. After all, "there is an outer limit to the power of Congress to confer rights of action[, which] is a direct and necessary consequence of the case and controversy limitations found in Article III." *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring). *See also id*. at 580-81 (noting "that it would exceed those [Article III] limitations if, at the behest of Congress and in the absence of any showing of concrete injury, we were to entertain citizen suits to vindicate the public's nonconcrete interest in the proper administration of the laws.").

Certiorari should therefore be granted to enforce this fundamental principle of judicial review, established in *Marbury v. Madison*, and dismiss the respondent's claim for lack of standing.

D. By Allowing An Uninjured Plaintiff To Enforce A Business's Statutory Duties In Court, The Ninth Circuit Intruded Upon The Exclusive Power Of The Executive Branch To Enforce The Law, In Violation Of The Separation Of Powers.

The Ninth Circuit, acting at the behest of Congress, allowed Robins, an uninjured plaintiff (and a putative representative of a class of similarly uninjured individuals), to proceed in federal court as if he were a "private attorney general" seeking to enforce Spokeo's general duties under the FCRA. In so doing, the Ninth Circuit certainly exceeded the

limits of its subject matter jurisdiction under Article III. But the lower court, acting with congressional approval, also intruded upon the exclusive and discretionary role of the Executive Branch to respond to the bare violation of a federal statute and "take Care that the Laws be faithfully executed . . . ." U.S. Const. art. II, § 3.

In so doing, the Ninth Circuit offended the separation of powers, the system of checks and balances among the three branches of federal government that has been a cornerstone of the Court's Article III jurisprudence. "[T]he law of Article III standing is built on a single basic idea--the idea of separation of powers[--] . . . th[e] overriding and time-honored concern about keeping the Judiciary's power within its proper constitutional sphere . . . ." *Raines*, 521 U.S. at 820 (internal quotation marks omitted). *See also DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006) ("This Court has recognized that the case-or-controversy limitation is crucial in maintaining the tripartite allocation of power set forth in the Constitution.") (citation and internal quotation marks omitted).[7]

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[7] *See also Lewis*, 518 U.S. at 353 n.3 ("[T]his [Article III standing] doctrine has a separation-of-powers component, which keeps courts within certain traditional bounds vis-à-vis the other branches . . . . That is where the 'actual injury' requirement comes from."); *Lujan,* 504 U.S. at 559-560 ("[T]he Constitution's central mechanism of separation of powers depends largely upon common understanding of what activities are appropriate to legislatures, to executives, and to courts."); Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 Suffolk U. L. Rev. 881, 897-98 (1983) ("[S]tanding and separation of powers are

In particular, the separation of powers limits the Federal Judiciary to its proper role under Article III--to adjudicate live disputes involving a party who has suffered, or is likely to suffer, a concrete harm. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102 n.4 (1998) ("The courts must stay within their constitutionally prescribed sphere of action, whether or not exceeding that sphere will harm one of the other two branches."). But the separation of powers also prevents the Judiciary from encroaching upon the exclusive and discretionary law-enforcement powers of the Executive Branch under Article II. *See id*., 523 U.S. at 102 n.4 (discussing "the more specific separation-of-powers concern" that a statutory claim may "interfere[] with the Executive's power to 'take Care that the Laws be faithfully executed,' Art. II, § 3 . . . .") (citation and internal quotation marks omitted).

Here, the separation of powers is violated in both ways. First, the Ninth Circuit exceeded Article III's case-or-controversy limitation by granting standing to a plaintiff who has not alleged an injury in fact. And, in so doing, the lower court also allowed an uninjured plaintiff, potentially representing a class of similarly uninjured individuals, to enforce Spokeo's general duties under the FCRA. In effect, the lower court, acting at the behest of Congress, treated the respondent as if he were an agent of the Executive Branch, seeking to vindicate the public interest in maintaining the

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intimately related. And the essential element that links the two [is] the requirement of *distinctive* injury not shared by the entire body politic . . . .") (emphasis in original).

accuracy of information provided by credit reporting agencies that are regulated by the FCRA. *See* 15 U.S.C. § 1681 ("Congressional findings and statement of purpose").

However, "[v]indicating the *public* interest . . . is the function of Congress and the Chief Executive[,]" and *not* the Judiciary. *Lujan*, 504 U.S. at 576 (emphasis in original). *See also* Craig A. Stern, *Another Sign From Hein: Does The Generalized Grievance Fail A Constitutional Or A Prudential Test Of Federal Standing To Sue?*, 12 Lewis & Clark L. Rev. 1169, 1193 (2008) ("Article II forbids private exercise of federal executive power as much as judicial exercise of federal executive power. If an *uninjured plaintiff* were to bring an action that rightfully must be brought only by the executive power, the court would be countenancing a violation of Article II.") (emphasis added). In this light, then, the Ninth Circuit violated the separation of powers by allowing an uninjured private party to enlist the Federal Judiciary in exercising the exclusive law-enforcement power of the Executive Branch.

To be sure, the Judiciary's proper exercise of its powers under Article III does involve enforcement of the law. But such enforcement is only incidental and necessary to providing the injured party with a remedy to redress a concrete harm. "[C]ourts are permitted to interfere in executive processes only to the extent necessary to vindicate individual rights but no more." James Leonard & Joanne C. Brant, *The Half-Open Door: Article III, The Injury-In-Fact Rule, And The Framers' Plan For Federal Courts Of Limited Jurisdiction*, 54 Rutgers L. Rev. 1, 85 (2001)

(discussing *Marbury*).

In this case, however, the Ninth Circuit enforced an *uninjured* party's statutory rights. In so doing, the lower court intruded upon the exclusive power of the Executive Branch to enforce the law. *See Lujan*, 504 U.S. at 576.[8] Certiorari should therefore be granted to redress this institutional wrong and restore the separation of powers embodied in the Constitution.

In sum, injury in fact is the irreducible constitutional minimum for federal jurisdiction over a claim. Statutory standing is not coextensive with this independent requirement of constitutional standing under Article III. Therefore, a plaintiff has no Article III standing to sue in federal court unless he alleges and proves that the defendant's violation of his statutory rights has caused him actual harm. Neither the FCRA nor Robins' allegations here have identified any such concrete harm. Certiorari should therefore be granted to dismiss this matter.

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[8] In this connection, it should be noted that the FCRA provides for broad administrative enforcement of the statute, at both the federal and state levels. For example, the Federal Trade Commission ("FTC") and other federal agencies are empowered to investigate and enforce the FCRA, and to seek civil penalties against the infringing business. 15 U.S.C. § 1681s(a)(1), (a)(2)(A), (b). Moreover, the FCRA provides that any violation of a consumer's rights thereunder shall constitute an unfair or deceptive act or practice in commerce, in violation of the Federal Trade Commission Act, 15 U.S.C. § 45(a), and is enforceable by the FTC under that statute. 15 U.S.C. § 1681s(a)(1). Finally, the FCRA authorizes a state's law enforcement agencies to investigate and enforce consumers' FCRA rights, and obtain injunctive and monetary relief in state or federal court. *Id*. at § 1681s(c)(1)(A), (c)(1)(B)(i).

CONCLUSION

For the reasons stated above, amici respectfully request that this Court grant the petition for certiorari.

Respectfully submitted,

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