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 THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE INTERNATIONAL ASSOCIATION OF DEFENSE COUNSEL AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE INTERNATIONAL ASSOCIATION OF DEFENSE COUNSEL AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICI CURIAE*[1]

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. It represents approximately 300,000 direct members and has an underlying membership of more than three million businesses and organizations of every size, in every industry, sector, and geographic region of the country—making it the principal voice of American business.

The International Association of Defense Counsel (the "IADC") is an association of corporate and insurance attorneys from the United States and around the globe whose practice is concentrated on the defense of civil lawsuits. It is dedicated to the just and efficient administration of civil justice and continual improvement of the civil justice system. The IADC supports a justice system in which plaintiffs are fairly compensated for genuine injuries, responsible defendants are held liable for appropriate

[1] Counsel of record for all parties received notice of the *amici*'s intent to file this brief at least ten days before its due date. The parties consented to the filing of this brief, and written documentation of their consent is being submitted concurrently. No counsel for a party wrote this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amici curiae*, their members, or their counsel made a monetary contribution intended to fund its preparation or submission.

damages, and non-responsible defendants are exonerated without unreasonable cost.

Amici regularly advocate for the interests of their members in federal and state courts throughout the country in cases of national concern. This is one of those cases.

Like *First American Financial Corp.* v. *Edwards*, 132 S. Ct. 2536 (2012), which presented but did not resolve the same issue (and in which both the Chamber and the IADC participated as *amici curiae*), this case presents both a danger and an opportunity. If the decision below is allowed to stand, there is a serious danger of continued erosion of the minimum requirements for standing under Article III of the Constitution. Such a danger is of grave concern to the business community because (as this case illustrates) alleged technical violations of regulatory statutes can often affect large numbers of people without actually injuring them. If, as the Ninth Circuit held (following its precedent in *Edwards*) such people can bring lawsuits without the need to demonstrate any injury beyond the alleged statutory violation itself, businesses will predictably be tied up in damages litigation over harmless alleged lapses, diverting their resources from more productive uses. This case presents an opportunity to rein in abusive litigation over such trifles, and to restore proper constitutional limitations on no-injury lawsuits.

INTRODUCTION AND SUMMARY OF ARGUMENT

A plaintiff cannot state a case or controversy under Article III without first establishing that he has standing to sue. See, *e.g.*, *Allen* v. *Wright*, 468 U.S. 737, 750-751 (1984). "From Article III's limitation of the judicial power to resolving 'Cases' and 'Controversies,' and the separation-of-powers principles underlying that limitation," this Court has "deduced a set of requirements that together make up the 'irreducible constitutional minimum of standing.'" *Lexmark Int'l, Inc.* v. *Static Control Components, Inc.*, 134 S. Ct. 1377, 1386 (2014) (quoting *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). "The plaintiff must [1] have suffered or be imminently threatened with a concrete and particularized 'injury in fact' that is [2] fairly traceable to the challenged action of the defendant and [3] likely to be redressed by a favorable judicial decision." *Ibid.* Each of the three requirements serves a different, critical role in "enforc[ing] the Constitution's case-or-controversy requirement." *Elk Grove Unified Sch. Dist.* v. *Newdow*, 542 U.S. 1, 11 (2004). "If Congress directs the federal courts to hear a case in which the requirements of Article III are not met, that Act of Congress is unconstitutional." John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 DUKE L.J. 1219, 1226 (1993) (discussing *Defenders of Wildlife*).

Injury-in-fact—a "[c]oncrete injury, whether actual or threatened[—]is that indispensable element of a dispute which serves in part to cast it in a form traditionally capable of judicial resolution." *Schlesinger* v. *Reservists Comm. to Stop the War*, 418 U.S. 208, 220-221 (1974). It is the "foremost" element of the inquiry, *Steel Co.* v. *Citizens for a Better Env't*,

523 U.S. 83, 103 (1998), the one that "adds the essential dimension of specificity to the dispute by requiring that the complaining party have suffered a particular injury caused by the action challenged as unlawful," *Schlesinger*, 418 U.S. at 221. In doing so, it ensures "that the legal questions presented to the court will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action." *Valley Forge Christian Coll.* v. *Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982); see also Roberts, *supra*, 42 DUKE L.J. at 1224 ("The need to insist upon meaningful limitations on what constitutes injury for standing purposes * * * flows from an appreciation of the key role that injury plays in restricting the courts to their proper function in a limited and separated government.").

Though injury-in-fact "incorporates concepts concededly not susceptible of precise definition," *Allen*, 468 U.S. at 751, this Court has worked hard to ensure that the requirement is not rendered "meaningless" or "mere talk," *United States* v. *Richardson*, 418 U.S. 166, 194 n.16 (1974) (Powell, J., concurring). Thus, "the complaining party [is] required to allege a *specific* invasion of th[e] right suffered by him." *Schlesinger*, 418 U.S. at 224 n.14 (emphasis added). That invasion must be "actual," "distinct," "palpable," and "concrete," and not "conjectural" or "hypothetical." *Allen*, 468 U.S. at 750-751, 756, 760 (internal quotation marks omitted). A mere "[a]bstract injury is not enough," *O'Shea* v. *Littleton*, 414 U.S. 488, 494 (1974), because injury-in-fact "is not an ingenious academic exercise in the conceivable * * * [but] requires * * * a factual showing of *perceptible harm*," *Summers* v. *Earth Island Inst.*, 555 U.S. 488, 499

(2009) (emphasis added and internal quotation marks omitted).

The decision below purports to change all that. According to the Ninth Circuit, "alleged violations of [respondent's] statutory rights are sufficient to satisfy the injury-in-fact requirement of Article III." Pet. 8a; see also *id.* at 9a n.3 ("[W]e determine that [respondent] has standing by virtue of the alleged violations of his statutory rights."). Thus, whenever Congress declares that a person who is exposed to an abstract violation of law is entitled to a monetary recovery, that person also has *ipso facto* sustained an injury sufficiently concrete and particularized to have standing to sue in federal court. And because conflating injury-in-fact with injury-in-law effectively removes causation and redressability—as the court of appeals readily admitted, see Pet. App. 9a—the holding below reduces the three-part-standing inquiry to a single-factor test: Constitutional standing exists so long as some statutory remedy can be found. That makes constitutional standing whatever Congress says it is.

But it is not. As this Court put it, "the requirement of injury in fact is a hard floor of Article III jurisdiction that cannot be removed by statute." *Summers*, 555 U.S. at 497. Indeed, it has long been "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 n.3 (1997) (citing *Gladstone, Realtors* v. *Vill. of Bellwood*, 441 U.S. 91, 100 (1979)). After all, a constitutional limit that can be conclusively satisfied by a statutory remedy is no constitutional limit at all. See Roberts, *supra*, 42 DUKE L.J. at 1227 ("a holding

that Congress may override the injury limitation of Article III would [be] remarkable").

As the Petition ably demonstrates, the significance of the Ninth Circuit's error reaches far beyond this particular case. There are dozens of federal laws similar to the one at issue here, all of which could be read to authorize suit by plaintiffs who have suffered no actual, concrete, or particularized injury. See Pet. 16-18. Lower courts are deeply and intractably divided over whether such suits pass constitutional muster. See *id*. at 9-12. The resulting jurisprudential hodge-podge means a suit can be brought to vindicate injuries-in-law under some statutes but not others, and in some courts but not others. See *id*. at 9-12, 18. The need to resolve that confusion alone warrants this Court's review.

But this case is also of great practical significance—particularly to the business community. No matter their size, industry, or geographic location, businesses are subject to all manner of technical legal duties. By the Ninth Circuit's logic, for practical purposes, injury-in-fact (and with it causation and redressability) would no longer be a required element for standing in federal courts. With standing based solely on a technical statutory violation that could be identical for a large swath of potential plaintiffs, the traditional class-certification hurdles of commonality and predominance could be rendered meaningless, as well. As a result, businesses would be significantly more likely to face class actions seeking damages (sometimes annihilating damages) for conduct that caused concrete and particularized harm to only a handful of people or to no one at all—the kind of "frivolous lawsuits" that "essentially force corporate defendants to pay ransom to class attorneys by settling." S. Rep. No. 109-14, at 20 (2005) (Class Action

Fairness Act). This is not idle speculation: Such suits are already being brought, and their pace is accelerating. See Pet. 12-14. This Court's review is necessary to stop these litigious opportunists who have suffered no injury—and the courts that enable them—from playing fast and loose with Article III.

ARGUMENT

I. THE DECISION BELOW TRANSFORMS A TECHNICAL STATUTORY VIOLATION INTO ARTICLE III STANDING

The Ninth Circuit held, in effect, that constitutional standing is whatever Congress says it is. See Pet. App. 6a-9a. Although the class representative here included "sparse" allegations that inaccurate information on Spokeo's website caused him injury, *id.* at 2a, the court of appeals quickly brushed past "whether harm to his employment prospects or related anxiety could be sufficient injuries in fact," *id.* at 9a n.3. The Ninth Circuit chose instead to hold "that [he] has standing by virtue of the alleged violations of his statutory rights" alone. *Ibid.*

But such "injury" does not pass muster under this Court's precedents or the Constitution. A party is not injured by another's mere (alleged) nonobservance of the law. Rather, injury-in-fact results from the *tangible consequences* of another's illegal acts—and here there were none. See, *e.g.*, *Valley Forge Christian Coll.*, 454 U.S. at 485 (holding that a putative plaintiff must identify a "personal injury suffered * * * *as a consequence* of the alleged" violation).

Nevertheless, the Ninth Circuit found respondent's "injury-in-law," without more, sufficient to meet the constitutional requirement of an injury-in-fact.

The court relied in large part on its earlier holding 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) (per curiam), Pet. App. 6a, 9a—which itself purported to rely on *Warth* v. *Seldin*, 422 U.S. 490, 500 (1975) (see *Edwards*, 610 F.3d at 517). On the basis of those precedents, the court held that "alleged violations of Robins's statutory rights are sufficient to satisfy the injury-in-fact requirement of Article III." Pet. App. 8a. It added, "[w]hen, as here, the statutory cause of action does not require proof of actual damages, a plaintiff can suffer a violation of the statutory right without suffering actual damages." *Id.* at 7a.

In so holding, the Ninth Circuit applied this Court's standing precedent in a manner that leaves it almost bereft of force. Congress cannot declare that, so long as a plaintiff can state a claim under a statute, he was necessarily injured by the alleged violation of that statute.

This Court has long emphasized the difference between the violation of a statutory right (which does not *ipso facto* confer Article III standing) and the violation of a statutory right that results in a concrete and particularized injury-in-fact (which *can* result in standing). *Compare Sierra Club* v. *Morton*, 405 U.S. 727 (1972), *with Trafficante* v. *Metro. Life Ins. Co.*, 409 U.S. 205, 209 (1972) (noting that "injury in fact to petitioners, the ingredient found missing in *Sierra Club* * * *, is alleged here"). Thus, when the Court in *Warth* observed that "[t]he actual or threatened injury required by Art. III may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing," 422 U.S. at 500 (internal quotation marks omitted), it was merely observing that a

statutory violation can precipitate a concrete and particularized injury-in-fact.

The Ninth Circuit paid lip service to cases holding that "the Constitution limits the power of Congress to confer standing." Pet. App. 7a (discussing *Defenders of Wildlife*). It nonetheless went on to hold that a statutory violation can *substitute* for an injury. *Id.* at 8a ("alleged violations of * * * statutory rights are sufficient to satisfy * * * Article III"). As this Court held in *Defenders of Wildlife*, "[s]tatutory 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. at 578 (discussing *Warth*, 422 U.S. at 500) (internal punctuation and quotation marks omitted).

Any power Congress may have to dispense with prudential limitations on standing, or to relax the requirements of redressability and immediacy, does not extend to relaxing the core constitutional requirement that injury-in-fact be concrete and particularized. "In no event * * * may Congress abrogate the Article III minima." *Gladstone, Realtors*, 441 U.S. at 100. Congress can relax constitutional standards only where a plaintiff seeks "to protect his *concrete* interests." *Defenders of Wildlife*, 504 U.S. at 572 n.7 (emphasis added). The Ninth Circuit held that such interest was an observance of the statute itself. See Pet. App. 8a. But a desire to seek "vindication of the rule of law * * * does not suffice" to establish standing. *Steel Co.*, 523 U.S. at 106; see also *Schlesinger*, 418 U.S. at 223 n.13 (denying standing for a claim of "the abstract injury in nonobservance of the Constitution"); *Allen*, 468 U.S. at 754 (same); Roberts, *supra*, 42 DUKE L.J. at 1230.

For that reason, this Court has consistently taken care to identify concrete and particularized interests in support of standing. In *Public Citizen* v. *United States Dep't of Justice*, 491 U.S. 440 (1989), for example, the Court held that plaintiffs had standing to challenge the denial of information sought under the Federal Advisory Committee Act about advice given by the American Bar Association (ABA) to the Department of Justice concerning potential judicial nominees. The Court recognized standing *not* because the statute created a private right of action but because of the "distinct injury" resulting from the Department's "refusal to permit appellants to scrutinize the ABA Committee's activities to the extent FACA allows." *Id.* at 449.

Likewise, in *Federal Election Commission* v. *Akins*, 524 U.S. 11 (1998), the Court required a distinct injury—not just the "injury" that comes from an alleged statutory violation—when it recognized standing for plaintiffs seeking relief under the Federal Election Campaign Act of 1971, which requires certain groups to disclose information about campaign involvement and which creates a private cause of action for "'[a]ny person who believes a violation of th[e] Act * * * has occurred,'" *id.* at 19 (quoting 2 U.S.C. § 437g(a)(1)). As in *Public Citizen,* the Court looked for and found the requisite concrete and particularized injury in the *consequences* of the statutory violation. Indeed, the Court expressly stated that a factual injury was a precondition for standing, see *Akins*, 524 U.S. at 20, and that Congress was simply enabling remediation of that particular injury, see *id.* at 24-25 ("the informational injury at issue here * * * is sufficiently concrete and specific").

The Ninth Circuit's sweeping holding rests on a misunderstanding of Congress's powers to define

standing. Although Congress has the power to "expand standing to the full extent permitted by Art. III," *Gladstone*, *Realtors*, 441 U.S. at 100 (internal quotation marks omitted), it does *not* have the power to expand standing *beyond* the limits of Article III. The "requirement of injury in fact is a hard floor * * * that cannot be removed by statute." *Summers*, 555 U.S. at 497; see also Jonathan H. Adler, *Standing Still in the Roberts Court*, 59 CASE W. RES. L. REV. 1061, 1063 (2009) ("Congress may tinker on the edges, but it cannot confer standing on parties that fail to meet the underlying constitutional requirements in a given case."). Congress cannot substitute statutory rights for injuries-in-fact that do not exist.

The problems posed by this case strike at the heart of the Constitution's division of powers between the legislature and the judiciary. If, as the Ninth Circuit held, "alleged violations of [a plaintiff's] statutory rights [we]re sufficient to satisfy the injury-in-fact requirement of Article III," Pet. App. 8a—*i.e.*, if injury-in-law could substitute for injury-in-fact—Congress could essentially dictate access to the federal courts by removing the independent force of the case-or-controversy limitation. Without a requirement of an actual injury or a causal connection between that nonexistent injury and the defendant's violation of a legal duty, the existence of a remedy would bootstrap into standing to pursue the remedy in federal court. See, *e.g.*, *id.* at 9a ("When the injury in fact is the violation of a statutory right * * *, causation and redressability will usually be satisfied.") That radical result would sidestep this Court's standing jurisprudence in a substantial category of cases—a category limited in size only by legislative restraint or the limits of legislative ingenuity. That is neither

what the Framers intended nor what the Constitution allows for the exercise of *judicial* power. See Roberts, *supra*, 42 DUKE L.J. at 1232.

The holding below is particularly worthy of review because there was (and is) no need to set the Fair Credit Reporting Act (FCRA), 15 U.S.C. § 1681 *et seq.*, on a collision course with Article III. As the Petition explains, see Pet. 22-23; Pet. App. 6a-7a n.2, the Ninth Circuit could have sidestepped the constitutional concerns raised here simply by employing the "well-established principle that statutes will be interpreted to avoid constitutional difficulties," *Frisby* v. *Schultz*, 487 U.S. 474, 483 (1988); accord *Bond* v. *United States*, No. 12-158 (June 2, 2014), slip op. 9. By that principle, "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Frisby*, 487 U.S. at 483. It is not hard to find an "otherwise acceptable construction" of the FCRA: As another court of appeals has noted, a "reasonable reading of th[is] statute" is one that would "still require proof of actual damages but simply substitute statutory rather than actual damages for the purpose of calculating the damage award." *Dowell* v. *Wells Fargo Bank, NA*, 517 F.3d 1024, 1026 (8th Cir. 2008) (per curiam).

Congress gave no indication that it wanted to test the boundaries of constitutional standing when it included statutory damages in the FCRA. Courts should not assume that Congress has exercised the full extent of its power to expand standing when it has not said so. See, *e.g.*, *Clark* v. *Martinez*, 543 U.S. 371, 381 (2005) (when "choosing between competing

plausible interpretations of a statutory text," there is a "reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts"). Especially here, where the constitutional problem is as grave as it is, the lower courts need to be reminded that they can and must construe statutes *not* to supplant Article III.

II. THE DECISION BELOW WILL ENCOURAGE ABUSIVE CLASS-ACTION LITIGATION

The Question Presented is not merely of great constitutional significance. It is also of great practical significance. The Petition identifies 18 cases brought under nine different federal statutes, see Pet. 16-18, all of which raise the same question presented by the decision below. The vast majority of those cases—and this one—share another common characteristic, however: They were brought as putative class actions,[2] often seeking damages in the millions, or even billions, of dollars.[3]

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[2] Even some of the cited cases that were not class actions might as well have been. The Plaintiff in *US Fax Law Ctr., Inc.* v. *iHire, Inc.*, 362 F. Supp. 2d 1248 (D. Colo. 2005) (cited at Pet. 16 n.10), for example, is a company that aggregates unwanted faxes from individuals and companies to bring large-scale lawsuits on their behalf "to secure the dollar damages and penalties that are rightfully yours by law" under the Telephone Consumer Protection Act, 47 U.S.C. § 227(b). See http://www.stop-junk-fax-spam.com/services.html (last visited June 3, 2014).

[3] See, *e.g.*, *Beaudry* v. *TeleCheck Servs., Inc.*, 579 F.3d 702, 703-704 (6th Cir. 2009) (cited at Pet. 9) (class representative seeking to represent "hundreds of thousands, if not millions," of Tennessee consumers, each of whom would be entitled to up to $1000—for a total liability in the billions) (internal quotation marks omitted); see also *Trans Union LLC* v. *Fed. Trade*

It is not surprising that the class-action bar has responded to the incentives created by the combination of detailed legislative oversight of business activity and judicial willingness to relax standing requirements. The jettisoning of a meaningful injury-in-fact requirement—and with it a meaningful causation requirement, see Pet. App. 9a ("there is little doubt that a defendant's alleged violation of a statutory provision 'caused' the violation of a right created by that provision")—removes some of the key constraints on class certification. If the only issue that must be proved is an abstract violation of a legal duty, regardless of its widely varying or entirely absent effects on individual class members, then commonality under Fed. R. Civ. P. 23(a)(2) and predominance under Fed. R. Civ. P. 23(b)(3) collapse into a single-issue inquiry.

"Commonality requires the plaintiff to demonstrate that the class members have suffered the same injury." *Wal-Mart Stores, Inc.* v. *Dukes*, 131 S. Ct. 2541, 2551 (2011) (internal quotation marks omitted). Although this Court has emphasized that "[t]his does not mean merely that they have all suffered a violation of the same provision of law," *ibid.*, any distinction disappears when the Article III injury *is* a violation of the same provision of law.

Predominance—which gets at "whether proposed classes are sufficiently cohesive to warrant adjudication by representation"—"trains on the legal or fac-

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[Footnote continued from previous page]

Comm'n, 536 U.S. 915, 917 (2002) (Kennedy, J., dissenting from denial of cert.) ("Because the FCRA provides for statutory damages of between $100 and $1,000 for each willful violation, petitioner faces potential liability approaching $190 billion.").

tual questions that qualify each class member's case as a genuine controversy." *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 623 (1997). But that test too will almost always be satisfied if a common injury-in-fact exists merely by virtue of common exposure to the same injury-in-law, and without any need ever to consider individualized actual harm or causation.

With the requirements of commonality and predominance effectively relaxed to the point of nonexistence, class certification would often be nearly automatic: An assertion of a generalized injury-in-law would be the beginning and the end of the matter. And the result is perverse. The ease with which a statutory violation can surmount the normal roadblocks of commonality and redressability, for instance, would encourage class counsel to forgo traditional claims based on actual injuries in favor of suits where the only injury common to class members is the defendant's alleged technical violation of a statute. In individual cases, named plaintiffs would have an incentive to waive any claim for actual damages in an attempt to increase their chances of obtaining class certification on their statutory damages claims. Indeed, many have already caught on to this trick. See, *e.g.*, *White* v. *E-Loan, Inc.*, No. C 05-02080, 2006 WL 2411420, at *2 (N.D. Cal. Aug. 18, 2006) (named plaintiff "willing to forego actual damages to seek only statutory damages"). Rather than litigate the alleged statutory violations in the context of the actual individual injuries they might cause, entrepreneurial class-action lawyers deliberately seek to litigate their claims of statutory violations in the abstract in order to increase settlement amounts. The resulting payouts from these no-injury lawsuits amount to deadweight economic loss—a wealth transfer that overcompensates for nonexistent inju-

ries and overdeters insubstantial regulatory violations, leading at best to wasteful expenditures aimed at punctilious compliance with technical statutory requirements.

Unlike respondent's purported injury, the injuries inflicted upon businesses by the non-enforcement of constitutional standing requirements are anything but abstract. Indeed, those injuries are often most pronounced when the defendant did not even violate the statute at issue, or did so in only the most *de minimis* way. *Harris* v. *Experian Info. Solutions, Inc.*, No. 6:06-cv-1808-GRA, Docket No. 201, at *4-7 (D.S.C. June 30, 2009), is instructive. There, the plaintiff class claimed that Experian and other credit reporting agencies violated the FCRA by failing to report consumers' credit limits for their Capital One credit cards—information that Capital One refused to provide to the agencies. The omission of credit-limit information hurt some consumers' credit scores, had no impact on certain others, and *increased* the credit scores of a very substantial third group. *Id.* at *3. Even though the named plaintiff had actually benefited from the alleged violation, he was certified to represent a class of more than four million consumers—which, at $100 to $1000 per violation, sought aggregate statutory damages between $400 million and $4 billion. *Id.* at *5. Although Experian ultimately prevailed on the merits—the Court held that omitting the information at issue did not violate the FCRA—it did so only after expending considerable resources to get to summary judgment (and at the risk of a potentially ruinous adverse judgment). *Id.* at *2.

Similarly, in *Bateman* v. *American Multi-Cinema, Inc.,* 623 F.3d 708 (9th Cir. 2010), which concerned a movie theater chain's alleged violation of

amendments to the FCRA by the Fair and Accurate Credit Transactions Act (FACTA), 15 U.S.C. § 1681c(g) (2005), a putative class of plaintiffs sought up to $290 million for the defendant's inclusion, on electronically printed receipts, of more than the last five digits of the plaintiff class's credit or debit card numbers—even though the class suffered no harm from the practice. The district court denied class certification on the ground that the alleged liability "was enormous and out of proportion to any harm suffered by the class." *Id*. at 710. But the Ninth Circuit reversed—finding that any consideration of those factors was an abuse of discretion. *Id*. at 713-723. Predictably, the case then settled—for nearly $6.5 million, exclusive of attorneys' fees and costs. See *Bateman* v. *Am. Multi-Cinema, Inc.*, No. 2:07-CV-00171-FMC-AJWX, Docket No. 114 at *1 (C.D. Cal. Oct. 11, 2011).

The story is much the same in cases involving the many other statutes cited in the Petition. See Pet. 16-19. In one case concerning the Electronic Communications Privacy Act of 1986 (ECPA), 18 U.S.C. §§ 2510 *et seq.*, (discussed at Pet. 18 n.17), for example, the named plaintiffs claimed on behalf of themselves and a putative nationwide class of millions that one of the defendant's computer programs was unlawfully intercepting users' electronic communications in violation of the ECPA. See *Specht* v. *Netscape Commc'ns Corp.*, 150 F. Supp. 2d 585 (S.D.N.Y. 2001) (describing allegations in the complaint), *aff'd*, 306 F.3d 17 (2d Cir. 2002). Because none of the *Specht* plaintiffs alleged any particular or concrete injury, see *Specht* v. *Netscape Commc'ns Corp.*, Nos. 1:00-CV-4871, *et al.*, 2004 WL 5475796, ¶¶ F, N, Q (S.D.N.Y. Sept. 2, 2004) ("Stipulation of Settlement"), the case rightfully should have been

dismissed at the outset for lack of standing, see, *e.g.*, *Kendall* v. *Employees Ret. Plan of Avon Prods.*, 561 F.3d 112, 121 (2d Cir. 2009) (plaintiffs must "allege some injury or deprivation of a specific right" outside the violation of a "statutory duty").

Instead, it tied up the parties and federal courts for years while class counsel sought statutory damages of $10,000 apiece not only for each of the named plaintiffs, but also for each of the many millions of supposedly identically situated putative class members. See *Specht* v. *Netscape Commc'ns Corp.*, Nos. 1:00-CV-4871, *et al.*, 2000 WL 34500293, ¶¶ 13, 41-54 (S.D.N.Y. Aug. 3, 2000). All told, the litigation cost Netscape several million dollars in discovery and other defense costs before resulting in a class-wide settlement in which plaintiffs and their counsel obtained no money. See Stipulation of Settlement ¶¶ F, N, Q; see also *Specht* v. *Netscape Commc'ns Corp.*, Nos. 1:00-CV-4871, *et al.*, Docket No. 94, at *2 (S.D.N.Y. Apr. 22, 2005) (denying class counsel's motion for attorneys' fees on grounds that settlement did not secure any "quantifiable" benefits for the class), *aff'd sub nom. Weindorf* v. *Netscape Commc'ns Corp.*, 173 F. App'x 44 (2d Cir. 2006).

The Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. § 1692, (discussed at Pet. 16), has been equally ripe for abuse. The parties in *Jerman* v. *Carlisle, McNellie, Rini, Kramer & Ulrich LPA.*, 559 U.S. 573 (2010), for instance, spent years litigating whether the words "in writing" can be included in a debt collector's letter. After this Court remanded the case, the parties filed cross-motions for summary judgment, and the district court held that the plaintiff and the class were entitled to zero actual damages and zero statutory damages. See *Jerman* v. *Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, No. 1:06-

cv-1397, 2011 WL 1434679, at *10-*11 (N.D. Ohio Apr. 14, 2011). Undeterred, plaintiff's counsel filed a motion seeking nearly $350,000 in attorneys' fees and costs, arguing that the action was successful because plaintiff "obtained judgment" on a claim. See *Jerman*, No. 1:06-cv-1397-PAG, Docket No. 62-1, at *3-4 (May 3, 2011). Rather than spending yet more money contesting the matter, defendants finally settled. Notwithstanding the court's prior ruling that the plaintiff class was entitled to nothing, the class received a grand total of $17,000—roughly one-ninth of the class lawyers' take. *Jerman*, No. 1:06-cv-1397-PAG, Docket No. 88-1 (Dec. 13, 2011), at *4.[4]

For companies with many customers or mass-market products, these kinds of suits create a risk of crippling damages for conduct that caused no actual harm.[5] It is no secret that class actions are a "pow-

[4] Countless other, equally egregious examples involving statutes identified in the Petition (at 17-18 & n.17) are easy to find. See, *e.g.*, *In re Facebook Privacy Litig.*, 791 F. Supp. 2d 705, 711-712 (N.D. Cal. 2011) (holding that plaintiffs established standing under Article III by alleging a statutory violation despite a lack of injury in fact, but dismissing case on grounds that allegations did not state a claim under the ECPA); *Taylor* v. *Acxiom Corp.*, 612 F.3d 325, 340 n.15 (5th Cir. 2010) (same result under the Driver's Privacy Protection Act (DPPA), 18 U.S.C. §§ 2721-2725, in a suit alleging trillions of dollars in damages).

[5] In an effort to curtail such frivolous suits, some district courts have refused to certify classes where "even the minimum statutory damages would be enormous and completely out of proportion given the lack of any actual harm." *Evans* v. *U-Haul Co. of Cal.*, No. CV 07-2097-JFW, 2007 WL 7648595, at *4 (C.D. Cal. Aug. 14, 2007) (denying certification of a class seeking statutory damages of up to $1.5 billion). But those rearguard attempts to fix problems caused by lax enforcement of constitutional standing principles are at best unevenly applied and,

erful tool [that] can give a class attorney unbounded leverage." S. Rep. No. 109-14, at 20 (2005) (Class Action Fairness Act). As this Court has repeatedly recognized, "[c]ertification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense." *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 476 (1978); see also *AT&T Mobility LLC* v. *Concepcion*, 131 S. Ct. 1740, 1752 (2011) ("[W]hen damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once, the risk of an error will often become unacceptable. Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims."); *Shady Grove Orthopedic Assocs., P.A.* v. *Allstate Ins. Co.*, 559 U.S. 393, 445 n.3 (2010) (Ginsburg, J., dissenting) ("When representative plaintiffs seek statutory damages, [the] pressure to settle may be heightened because a class action poses the risk of massive liability unmoored to actual injury.").

Although class actions will always "present opportunities for abuse," *Hoffmann-La Roche Inc.* v. *Sperling*, 493 U.S. 165, 171 (1989), the likelihood of abuse is particularly great in cases such as this one, where a plaintiff need not show actual harm. It is important that this Court grant certiorari to preserve the ability to resolve these sorts of baseless

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[Footnote continued from previous page]

worse, increasingly foreclosed as a matter of law. See, *e.g.*, *Murray* v. *GMAC Mortg. Corp.*, 434 F.3d 948, 952-953 (7th Cir. 2006) (foreclosing consideration of the size of statutory damages sought under the FCRA, in a suit seeking up to $1.2 billion in damages).

class actions quickly through challenges to standing. The restoration of proper constitutional standing requirements would deter the plaintiffs' bar from filing such meritless suits in the first place—and spare defendants the enormous costs and settlement pressures that accompany such litigation. Now more than ever, "[i]n an era of frequent litigation [and] class actions * * *, courts must be more careful to insist on the formal rules of standing, not less so." *Ariz. Christian Sch. Tuition Org.* v. *Winn*, 131 S. Ct. 1436, 1449 (2011).

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted.

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