13-1339

Supreme Court, U.S.
FILED
MAY 1 - 2014
OFFICE OF THE CLERK

No.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Congress may confer Article III standing upon a plaintiff who suffers no concrete harm, and who therefore could not otherwise invoke the jurisdiction of a federal court, by authorizing a private right of action based on a bare violation of a federal statute.

RULE 29.6 STATEMENT

Petitioner Spokeo, Inc., has no parent company. No publicly held company owns 10% or more of Spokeo.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Spokeo, Inc., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-10a) is reported at 742 F.3d 409. The order of the district court granting defendant's motion to dismiss plaintiff's complaint (App., *infra*, 11a-14a) is unreported but is available at 2011 WL 597867. The order of the district court granting in part and denying in part defendant's motion to dismiss plaintiff's first amended complaint (App., *infra*, 15a-22a) is unreported but is available at 2011 WL 1793334. The order of the district court "correcting prior ruling and finding moot motion for certification," and dismissing the case (App., *infra*, 23a-24a), is unreported but is available at 2011 WL 11562151.

JURISDICTION

The judgment of the court of appeals was entered on February 4, 2014. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III, Section 2 of the U.S. Constitution provides that "[t]he judicial Power shall extend to all Cases, in Law and Equity, arising under * * * the Laws of the United States * * *."

The pertinent provisions of the Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq.*, are reproduced at App., *infra*, 25a-28a.

STATEMENT

This Court recognized the substantial importance of the question presented here when it granted certiorari in *First American Financial Corp.* v. *Edwards*, No. 10-708. But the Court dismissed the writ of certiorari as improvidently granted, and so did not decide whether a technical violation of a federal statute *ipso facto* satisfies the injury-in-fact requirement for Article III standing in the absence of any allegation of concrete and particularized injury. See *First American Financial Corp.* v. *Edwards*, 132 S. Ct. 2536 (2012) (per curiam).

This case presents the same question in the context of a different, frequently litigated federal statute—the Fair Credit Reporting Act. And this case provides a cleaner vehicle. Unlike in *First American*—where the statutory private action and remedy at issue were predicated on the plaintiff's payment of money to the defendant—no such payment took place here. Instead, in the uncluttered context of this case the Ninth Circuit underscored its view that a mere statutory injury-in-law—standing alone—is sufficient to satisfy the Article III injury-in-fact requirement even when the plaintiff did not sustain *any* tangible harm.

Whether Congress can create Article III standing by authorizing a remedy for a bare statutory violation is a recurring question under the FCRA and a wide variety of other federal laws. The courts of appeals have delivered conflicting answers. Unless this Court steps in, the extent and limits of federal jurisdiction will continue to vary circuit by circuit and case by case. And in those circuits where a harmless statutory violation has been held sufficient to confer

standing, class actions presenting huge damages exposure based on harmless conduct will proliferate.

Because this fundamental and unsettled question of Article III jurisdiction has enormous practical significance, this Court's review is plainly warranted.

A. The Statutory Scheme.

The Fair Credit Reporting Act (FCRA), 15 U.S.C. § 1681 *et seq.*, imposes specific obligations on "consumer reporting agencies" with respect to the consumer information they transmit. As pertinent here, the FCRA limits the circumstances in which consumer reporting agencies may provide "consumer reports for employment purposes" (15 U.S.C. § 1681b(b)(1)) and requires such agencies to "follow reasonable procedures to assure maximum possible accuracy of" consumer reports (*id.* § 1681e(b)); to issue notices to providers and users of information (*id.* § 1681e(d)); and to post toll-free telephone numbers to allow consumers to request consumer reports (*id.* § 1681j(a)). See App., *infra*, 4a-5a.

A negligent violation of these requirements "with respect to any consumer" subjects a consumer reporting agency to "actual damages," attorney's fees, and costs. *Id.* § 1681o(a). For a "willful" violation, however, a consumer may choose between "actual damages" and statutory "damages of not less than $100 or not more than $1,000," *id.* § 1681n(a)(1), and also may seek punitive damages. *Id.* § 1681n(a)(2).

B. Factual Background And District Court Proceedings.

Petitioner Spokeo, Inc., operates a "people search engine"—it aggregates publicly available information regarding individuals from phone books, social networks, marketing surveys, real estate listings, busi-

ness websites, and other sources into a database that is searchable via the Internet using an individual's name, and displays the results of searches in an easy-to-read format. During the time relevant to this action, the bottom of every search results page stated:

> Spokeo does not verify or evaluate each piece of data, and makes no warranties or guarantees about any of the information offered. Spokeo does not possess or have access to secure or private financial information.

C.A. Supp. Excerpts of Record (ER) 22.

In particular, Spokeo warned its users that "none of the information offered by Spokeo is to be considered for purposes of determining any entity or person's eligibility for credit, insurance, employment, or for any other purposes covered under FCRA." *Ibid.* Additionally, to access the "Wealth" section of search results, users had to agree that "[n]one of the information offered by Spokeo is to be considered for purposes of determining a consumer's eligibility for credit, insurance, employment, or for any other purpose authorized under the FCRA." C.A. Supp. ER 25.

Respondent Thomas Robins instituted a putative class action against Spokeo, alleging that Spokeo is a "consumer reporting agency" that issues "consumer reports" in violation of the FCRA.[1] See App., *infra*, 19a-20a. Robins alleged that the search results associated with his name included inaccurate information indicating that he has more education and professional experience than he actually has, that he

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[1] Spokeo disputes Robins's claims that it is a "consumer reporting agency" within the meaning of FCRA, and that its search engine results are "consumer reports."

is married (although in fact he is not), and that he is better situated financially than he really is. App., *infra*, 2a; C.A. ER 40:7 ¶¶ 31-32. He did not allege that he had contacted Spokeo to ask it to correct or remove the search results pertaining to him.

The district court dismissed the complaint with leave to amend, holding that Robins had failed to allege an injury in fact because he had not alleged "any actual or imminent harm." See App., *infra*, 2a. The court paraphrased Robins's allegations as stating "that he has been unsuccessful in seeking employment, and that he is concerned that the inaccuracies in his report will affect his ability to obtain credit, employment, insurance, and the like." *Ibid.* The court stated that allegations of possible future injury do not satisfy Article III standing requirements. *Ibid.*

The amended complaint alleged that the inaccurate information collected in Spokeo's search results had caused actual harm to Robins's "employment prospects." App., *infra*, 2a. Robins's continued unemployment, he alleged, had cost him money and caused "anxiety, stress, concern, and/or worry about his diminished employment prospects." *Ibid.* The district court initially held that Spokeo's "marketing of inaccurate consumer reporting information about" Robins amounted to injury-in-fact. App., *infra*, 3a. After Spokeo sought certification of an interlocutory appeal under 28 U.S.C. § 1292(b), however, the district court reconsidered its views and dismissed the case with prejudice based on the Article III analysis in its original dismissal order. *Ibid.*

C. The Court of Appeals' Decision.

The Ninth Circuit reversed, holding that the "creation of a private cause of action to enforce a statutory provision implies that Congress intended

the enforceable provision to create a statutory right," and that "the violation of a statutory right is usually a sufficient injury in fact to confer standing." App., *infra*, 6a (citing *Edwards* v. *First American 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)).

Because "the statutory cause of action does not require a showing of actual harm when a plaintiff sues for willful violations," App., *infra*, 6a, the court reasoned, actual harm is unnecessary to establish injury in fact. Instead, the court held that Robins had satisfied the requirements for Article III standing because "he allege[d] that Spokeo violated *his* statutory rights, not just the statutory rights of other people," and because his "personal interests in the handling of his credit information are individualized rather than collective." App., *infra*, 8a. Thus, the court of appeals concluded, "alleged violations of Robins's statutory rights are sufficient to satisfy the injury-in-fact requirement of Article III." *Ibid.*

The court of appeals specifically refused to rest its ruling on the alleged harm to Robins's employment prospects and related anxiety: "[b]ecause we determine that Robins has standing by virtue of the alleged violations of his statutory rights, we do not decide whether [the alleged harms] could be sufficient injuries in fact." App., *infra*, 9a n.3. The court of appeals declined to construe the statutory damages provision as an alternate measure of damages rather than a substitute for injury-in-fact, perceiving no "difficult constitutional questions" to be avoided. App., *infra*, 6a-7a n.2.

The Ninth Circuit recognized that its analysis had the practical effect of turning the three-part test

for Article III standing into a single-factor inquiry that was satisfied by the availability of a statutory remedy. *See* App., *infra,* 9a. As the court of appeals put it, "[w]hen the injury in fact is the violation of a statutory right * * * inferred from the existence of a private cause of action, causation and redressability will usually be satisfied." *Ibid.* Causation is self-evident, because the statutory violation *is* the injury. *Ibid.* And the presence of a statutory remedy guarantees redressability, since there is no injury to redress apart from the statutory violation itself. *Ibid.*

REASONS FOR GRANTING THE PETITION

To establish standing (and thus federal jurisdiction) under Article III, a plaintiff bears the burden of showing that he

> (1) * * * has suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Friends of the Earth, Inc. v. *Laidlaw Envtl. Servs, Inc.*, 528 U.S. 167, 180–81 (2000).

The injury-in-fact requirement is the "irreducible constitutional minimum" for standing. *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992). Yet the Ninth Circuit held that requirement satisfied by a statutory violation that is unaccompanied by any concrete harm to the plaintiff. That holding has the practical effect of collapsing the three-part standing inquiry into the single question whether the plaintiff has been subjected to a statutory violation. As the

court of appeals itself acknowledged, "[w]hen the injury in fact is the violation of a statutory right * * * inferred from the existence of a private cause of action, causation and redressability will usually be satisfied." App., *infra*, 9a.

The decision below—along with those of two other circuits—directly conflicts with the decisions of at least two other courts of appeals. Those courts have held that a plaintiff pursuing a statutory cause of action still must demonstrate a concrete injury-in-fact (as opposed to a mere injury-in-law) in order to establish Article III standing.

The conflict arises in part from a statement by this Court. The Court has held with unmistakable clarity "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). Yet several courts of appeals have disregarded this "settled" principle (*ibid.*) in favor of what they perceive to be a contrary rule expressed in *Warth* v. *Seldin*, 422 U.S. 490, 500 (1975) (internal quotation marks omitted): "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." App., *infra*, 5a (quoting *Warth*).

The need to resolve the conflict is especially acute because this fundamental question of Article III jurisdiction has significant implications for class action litigation under a statute that generates dozens of class actions in the federal courts every year. The Court should grant review.

A. The Courts Of Appeals Are Divided Over Whether An Injury-In-Law Satisfies Article III's Injury-In-Fact Requirement.

The division among the courts of appeals regarding whether a statutory violation, unaccompanied by any concrete injury, is sufficient to establish Article III standing leaves no doubt that if this case had been filed in the Second or Fourth Circuits the district court's order of dismissal would have been affirmed rather than reversed.

To begin with, the Sixth Circuit—like the Ninth Circuit in this case—has held that a plaintiff had Article III standing to bring a FCRA action against a check verification service even though she never had a check rejected or suffered any other consequence of the challenged practice. *Beaudry* v. *TeleCheck Services, Inc.*, 579 F.3d 702, 705–07 (6th Cir. 2009). And the Seventh Circuit, in reversing a denial of class certification, has held (without mentioning Article III) that statutory damages are available under FCRA "without proof of injury." *Murray* v. *GMAC Mortgage Corp.*, 434 F.3d 948, 952–53 (7th Cir. 2006).[2]

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[2] District courts within the Seventh Circuit have concluded that *Murray* controls the Article III inquiry. *E.g.*, *Armes* v. *Sogro, Inc*, 932 F. Supp. 2d 931, 937–38 (E.D. Wis. 2013); *Brittingham* v. *Cerasimo, Inc.*, 621 F. Supp. 2d 646, 649–50 (N.D. Ind. 2009). And although the Seventh Circuit has not directly addressed the Article III question, it has recently reiterated the holding in *Murray* that "entitlement to statutory damages" does not "require any showing of injury of any sort." *Chapman* v. *Wagener Equities, Inc.*, __ F.3d __, No. 14-8004, 2014 WL 1272786, at *1 (7th Cir. Mar. 31, 2014) (construing Telephone Consumer Protection Act).

Although the Fourth Circuit has not addressed the issue in the context of the FCRA, it has—in the context of an ERISA action—squarely rejected the argument that, in the absence of any concrete injury, the mere "deprivation of [a] statutory right * * * is sufficient to constitute an injury-in-fact for Article III standing." *David* v. *Alphin*, 704 F.3d 327, 338-39 (4th Cir. 2013). The court forthrightly declared that "this theory of Article III standing is a non-starter as it conflates statutory standing with constitutional standing." *Ibid.*

The Second Circuit has reached the same conclusion, squarely rejecting the argument that "either an alleged breach of fiduciary duty to comply with ERISA, or a deprivation of [the plaintiff's] entitlement to that fiduciary duty, in and of themselves constitutes an injury-in-fact sufficient for constitutional standing." *Kendall* v. *Employees Retirement Plan of Avon Prods.*, 561 F.3d 112, 121 (2d Cir. 2009). The court explained that although "plan fiduciaries have a statutory duty to comply with ERISA," a plaintiff cannot maintain a claim for breach of that duty without also "alleg[ing] some injury or deprivation of a specific right that arose from a violation of th[e] duty." *Ibid.*

Faced with a FCRA claim for statutory damages in the absence of concrete injury, the Second and Fourth Circuits would be obligated to apply these precedents and hold that the plaintiffs lack Article III standing. The court below took precisely that approach to its own (diametrically opposite) precedent, applying in the FCRA context its prior holding in *Edwards* v. *First American 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) (involving a claim under Real Estate

Settlement Procedures Act (RESPA)). See App., *infra*, 6a (citing *Edwards*). And it is what the Sixth Circuit did in *Beaudry*, applying to FCRA its decision in *Carter* v. *Welles-Bowen Realty, Inc.*, 553 F.3d 979, 989 (6th Cir. 2009) (also involving a RESPA claim). See 579 F.3d at 705–07.[3]

While it is abundantly clear that the circuits are in marked disagreement over whether, as a general matter, Congress can create constitutional standing in the absence of actual injury, a square conflict in the FCRA context in particular is unlikely to develop.

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[3] Like the Second and the Fourth Circuits, the Third Circuit has twice held that plaintiffs must allege actual injury—not just a violation of a federal statute—to establish Article III standing. For example, the Third Circuit held that Article III standing is lacking in suits for false advertising under the Lanham Act unless the plaintiffs allege that they were actually harmed by the challenged conduct. See *Joint Stock Soc'y* v. *UDV North America, Inc.*, 266 F.3d 164, 176 (3d Cir. 2001) (Alito, J.) (no "injury in fact" from defendants' use of Smirnoff trade name where plaintiffs "never marketed any vodka in the United States"). See also *Fair Housing Council* v. *Main Line Times*, 141 F.3d 439, 443-44 (3d Cir. 1998) (plaintiff who was not actually deterred by discriminatory advertising lacked standing because "a violation of the Act does not automatically confer standing on any plaintiff, even one who holds the status of a private attorney general"); *Doe* v. *National Board of Medical Examiners*, 199 F.3d 146, 153 (3d Cir. 1999) (Becker, C.J., joined by Scirica and Alito, JJ.) ("The proper analysis of standing focuses on whether the plaintiff suffered an actual injury * * * [.] Congress * * * cannot confer standing by statute alone") (discussing Americans with Disabilities Act and finding standing). But see *Alston* v. *Countrywide Financial Corp.*, 585 F.3d 753, 763 (3d Cir. 2009) (holding that "[a] plaintiff need not demonstrate that he or she suffered actual monetary damages" to have Article III standing to sue under the RESPA, without acknowledging contrary circuit precedents, which were not cited in the defendant's brief (see 2009 WL 7170604)).

That is so in light of the decision below and those of the Sixth Circuit in *Beaudry*, the Seventh Circuit in *Murray* (see note 2, *supra*), and the Eighth Circuit's similarly reasoned Article III standing decision under a different statute, see *Charvat* v. *Mutual First Federal Credit Union*, 725 F.3d 819, 822-825 (8th Cir. 2013), cert. denied, 134 S. Ct. 1515 (2014) (Electronic Funds Transfer Act). In almost every case plaintiffs' counsel can choose to bring nationwide class actions under FCRA in one of these four circuits that equate statutory injury-in-law with Article III injury-in-fact—and thereby avoid dismissal under the standards applied in the Second and Fourth Circuits.

In sum, there is broad-based and long-standing disagreement in the lower courts over whether Article III places limitations on Congress's ability to create constitutional standing. That fundamental conflict is ripe for resolution by this Court.

B. Injury-In-Law Class Actions Under FCRA Seeking Huge Damages Are Being Filed With Increasing Frequency.

Class actions invoking the FCRA, and grounded in the injury-in-law theory upheld in this case, are being filed with great frequency. "In the 40 years since FCRA was enacted, litigation has skyrocketed."[4] Indeed, at least 29 putative class actions claim-

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[4] Jonathan D. Jerison & Bradley A. Marcus, *A Brief History of the FCRA and the Potential for New Litigation After Dodd-Frank*, Consumer Fin. Services L. Rep., Apr. 13, 2011, at 3, 4; see also David L. Permut & Tamra T. Moore, *Recent Developments in Class Actions: The Fair Credit Reporting Act*, 61 Bus. Law. 931 (2006) (noting the "proliferation of class action lawsuits brought under" FCRA that "combined with certain class action-friendly provisions of FCRA—such as the availability of fee shifting and statutory damages, and the lack of a class ac-

ing statutory damages under FCRA have been filed in *the first four months of this year* alone.[5] And those lawsuits target a broad range of businesses. As this

tion damages cap—have * * * push[ed] the FCRA to the forefront of consumer financial services class litigation.").

[5] See *Broberg* v. *Experian Information Solutions, Inc.*, No. 14-cv-49 (D. Minn. Jan. 6, 2014); *Lunds* v. *Johns Pizza Cafe Ltd.*, No. 14-cv-63 (D. Minn. Jan. 7, 2014); *Gonzalez* v. *Harris Ranch*, No. 14-cv-38 (E.D. Cal. Jan. 10, 2014); *Haber* v. *Bank of America, N.A.*, No. 14-cv-169 (E.D. Pa. Jan. 13, 2014); *Corliss* v. *Providence Health & Services*, No. 14-cv-119 (D. Or. Jan. 23, 2014); *Pekelney* v. *Horizon Healthcare Services, Inc.*, No. 14-cv-584 (D.N.J. Jan. 28, 2014); *Patel* v. *Trans Union, LLC*, No. 14-cv-522 (N.D. Cal. Feb. 4, 2014); *Henderson* v. *HR Plus*, No. 14-cv-82 (E.D. Va. Feb. 6, 2014); *Gezahegne* v. *Whole Foods Market California, Inc.*, No. 14-cv-592 (N.D. Cal. Feb. 7, 2014); *Lozano-Rivera* v. *Universal City Nissan Inc.*, No. 14-cv-1010 (C.D. Cal. Feb. 10, 2014); *Carsten* v. *University of Miami*, No. 14-cv-20497 (S.D. Fla. Feb. 10, 2014); *Reed* v. *Swatch Group (US) Inc.*, No: 14-cv-896 (D.N.J. Feb. 12, 2014); *Reed* v. *Golf & Tennis Pro Shop, Inc.*, No. 14-cv-895 (D.N.J. Feb 12, 2014); *Steed* v. *Equifax Information Services, LLC*, No. 14-cv-437 (N.D. Ga. Feb. 14, 2014); *Myers* v. *National Tenant Network, Inc.*, No. 14-cv-327 (D. Or. Feb. 26, 2014); *Brown* v. *Delhaize America, LLC*, No. 14-cv-195 (M.D.N.C Mar. 7, 2014); *Knights* v. *Publix Super Markets, Inc.*, No. 14-cv-720 (M.D. Tenn. Mar. 12, 2014); *Plasters* v. *UBS Financial Services, Inc.*, No. 14-cv-1659 (D.N.J Mar. 14, 2014); *Hathaway* v. *Whole Foods Market California, Inc.*, No. 14-cv-663 (S.D. Cal. Mar. 21, 2014); *Ford* v. *CEC Entertainment, Inc.*, No. 14-cv-677 (S.D. Cal. Mar. 24, 2014); *Henderson* v. *Wal-Mart Stores*, No. 14-cv-208 (E.D. Va. Mar. 24, 2014); *Short* v. *Equifax Information Services LLC*, No. 14-cv-471 (D. Or. Mar. 24, 2014); *Scott* v. *KKW Trucking, Inc.*, No. 14-cv-494 (D. Or. Mar. 25, 2014); *Ragland* v. *Guardsmark, LLC*, No. 14-cv-693 (S.D. Cal. Mar. 26, 2014); *Dell'Olio* v. *HCA HealthONE, LLC*, No. 14-cv-885 (D. Colo. Mar. 26, 2014); *Henderson* v. *First Advantage Background Services Corp.*, No. 14-cv-221 (E.D. Va. Mar. 28, 2014); *Manuel* v. *Wells Fargo Bank*, No. 14-cv-238 (E.D. Va. Apr. 1, 2014); *Avery* v. *Werner Enterprises, Inc.*, No. 14-cv-330 (W.D. Mo. Apr. 9, 2014); *Roberson* v. *Laborchex Companies, Inc.*, No. 14-cv-273 (M.D. Ala. Apr. 11, 2014).

case demonstrates, FCRA class actions are being filed with increasing frequency against employers and other entities that are not traditional "consumer reporting agencies," but cannot escape the litigation (and potentially massive exposure) at the pleading stage.[6]

Moreover, the interaction between a no-injury theory of standing and the class action device means that enormous potential liability may result even though no one has suffered *any* concrete injury. The decision below not only lowers the bar for plaintiffs to bring such actions and survive dismissal; it also has the practical effect of relaxing Rule 23's "stringent requirements for [class] certification," *American Express Co.* v. *Italian Colors Restaurant*, 133 S. Ct. 2304, 2310 (2013), because—once the presence of actual harm is out of the equation—issues of injury and causation will be claimed to be much more susceptible to common proof. That is exactly what happened in *Murray*, where the Seventh Circuit—reversing a denial of class certification—held that individualized issues as to injury and damages did not preclude class certification precisely because, in that court's view, statutory damages were available "without proof of injury." 434 F.3d at 952–53.

Magnifying the issue's practical significance, at least two courts of appeals addressing the FCRA remedial provision at issue here have rejected challenges to class certification, declaring class adjudication "superior" (Fed. R. Civ. P. 23(b)(3)) even when

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[6] See note 5, *supra*; see also, *e.g.*, *Ellis* v. *Swift Transp. Co. of Ariz., LLC*, No. 13-cv-00473, Dkt. 36–1 (E.D. Va. Apr. 21, 2014) (proposing settlement for $4.4 million of putative class action that alleged that a trucking company willfully violated the FCRA through its use of consumer reports in its hiring process).

that device threatens to impose billions in damages for technical violations causing infinitesimal harm or no harm at all. See *Murray*, 434 F.3d at 952–53; *Bateman* v. *American Multi-Cinema, Inc.*, 623 F.3d 708 (9th Cir. 2010).[7]

The implication is drastic and absurd: the lesser the injury, the easier the path to class certification, the broader the class, the greater the damages exposure, and—inevitably—the larger the settlement. As this Court has put it, "[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." *AT&T Mobility LLC* v. *Concepcion*, 131 S. Ct. 1740, 1752 (2011); see also *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 741 (1975) (noting risk of *in terrorem* settlements).

This case imposes a similar threat of extraordinary settlement pressure regardless of the merits. Respondent alleges that the putative class he seeks to represent "consists of millions of individuals" on whose behalf he hopes to recover "the maximum statutory damages available under" FCRA—*i.e.*, $1000 per violation. C.A. ER 40:8 ¶ 39, 40:13 ¶ 65, 40:14 ¶¶ 71, 75. In other words, if a class were certified in this case, the potential exposure reaches into the billions of dollars.

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[7] FCRA class actions include litigation (like *Bateman*) under the Fair and Accurate Credit Transactions Act (FACTA), a FCRA provision that governs information on credit-card receipts (see 15 U.S.C. § 1681c(g)(1)) but is subject to standard FCRA remedies and presents identical standing issues.

In light of the high volume of FCRA class actions in the federal courts and the massive stakes at issue, review by this Court is warranted to decide whether those cases may be brought by plaintiffs who lack genuine, concrete injuries.

C. A Decision In This Case Would Resolve Similar Issues Presented Under A Wide Range Of Federal Statutes.

Review here would have the additional practical benefit of resolving the same constitutional issue as it arises under many more federal statutes. Among those statutes are:

- The Truth in Lending Act, which imposes requirements on financial institutions that extend credit to consumers (see 15 U.S.C. §§ 1631-1632) and provides for awards of actual and statutory damages (see 15 U.S.C. § 1640(a)(2)(B)).[8]
- The Fair Debt Collection Practices Act, which prohibits using certain "means to collect or attempt to collect any debt" (15 U.S.C. § 1692f) and imposes liability for actual and statutory damages (see *id.* § 1692k(a)(2)(B)).[9]
- The Telephone Consumer Protection Act, which regulates telephone solicitations and provides for statutory damages. See 47 U.S.C. § 227(b).[10]

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[8] See, *e.g.*, *DeMando* v. *Morris*, 206 F.3d 1300, 1303 (9th Cir. 2000).

[9] See, *e.g.*, *Robey* v. *Shapiro Marianos & Cejda, L.L.C.*, 434 F.3d 1208, 1212 (10th Cir. 2006).

[10] See *Chapman* v. *Wagener Equities, Inc.*, __ F.3d __, No. 14-8004, 2014 WL 1272786, at *1 (7th Cir. Mar. 31, 2014) ("Nor

- The Employee Retirement Income Security Act, which imposes fiduciary duties on sponsors of retirement plans, including a duty to act in accordance with plan terms that are consistent with ERISA's requirements (see 29 U.S.C. § 1104(a)(1)(D)), and authorizes plan participants to bring civil actions against plan fiduciaries for breaches of those duties (see *id.* § 1132(a)(2)).[11]
- The Real Estate Settlement Procedures Act, which prohibits kickbacks in certain mortgage-loan transactions. See 12 U.S.C. § 2607.[12]
- The Lanham Act, which prohibits false advertising and authorizes civil actions for violations. See 15 U.S.C. § 1125.[13]
- The Fair Housing Act, which forbids discriminatory advertising for apartments (see 42 U.S.C. § 3604(c)) and creates a private right

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does entitlement to statutory damages require any showing of injury of any sort * * * ."). See also, *e.g.*, *Palm Beach Golf Ctr.–Boca, Inc.* v. *Sarris*, __ F. Supp. 2d __, No. 12-80178-CIV, 2013 WL 5972173, at *11-12 (S.D. Fla. Oct. 22, 2013); *Manno* v. *Healthcare Revenue Recovery Group, LLC*, 289 F.R.D. 674, 682 (S.D. Fla. 2013); *Smith* v. *Microsoft Corp.*, No. 11-cv-1958, 2012 WL 2975712, at *3-4 (S.D. Cal. July 20, 2012); *US Fax Law Ctr., Inc.* v. *iHire, Inc.*, 362 F. Supp. 2d 1248, 1252-1253 (D. Colo. 2005).

[11] See, *e.g.*, *David* v. *Alphin*, 704 F.3d 327, 338-39 (4th Cir. 2013); *Kendall* v. *Employees Retirement Plan of Avon Prods.*, 561 F.3d 112, 121 (2d Cir. 2009).

[12] See, *e.g.*, *Alston* v. *Countrywide Financial Corp.*, 585 F.3d 753, 763 (3d Cir. 2009); *Carter* v. *Welles-Bowen Realty, Inc.*, 553 F.3d 979, 989 (6th Cir. 2009).

[13] See, *e.g.*, *Joint Stock Soc'y* v. *UDV North American, Inc.*, 266 F.3d 164, 176 (3d Cir. 2001).

of action to challenge discriminatory housing practices in federal court (see *id.* § 3613(a)(1)(A)).[14]

- The Americans with Disabilities Act, which prohibits discrimination on the basis of disability in public accommodations (see 42 U.S.C. § 12182(a)) and authorizes suits by private persons to enjoin such discrimination (see *id.* § 12188).[15]
- The Video Privacy Protection Act, 18 U.S.C. § 2710(b), which prohibits a "video tape service provider" from knowingly disclosing personally identifiable information concerning any consumer, and authorizes consumer lawsuits, *id.* § 2710(c)(1).[16]

Many more federal statutes contain statutory damages provisions.[17] Litigation under those laws is

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[14] See, *e.g.*, *Fair Housing Council* v. *Main Line Times*, 141 F.3d 439, 443-44 (3d Cir. 1998); *Wilson* v. *Glenwood Intermountain Props., Inc.*, 98 F.3d 590, 593-94 (10th Cir. 1996).

[15] See, *e.g.*, *Doe* v. *National Board of Medical Examiners*, 199 F.3d 146, 153 (3d Cir. 1999).

[16] See, *e.g.*, *In re Hulu Privacy Litig.*, No. C 11-03764, 2013 WL 6773794, at *4-5, *8-9 (N.D. Cal. Dec. 20, 2013) (following *Edwards* and finding no injury necessary beyond disclosure in violation of VPPA); *Sterk v. Best Buy Stores, L.P.*, No. 11 C 1894, 2012 WL 5197901, at *7-9 (N.D. Ill. Oct. 27. 2012) (dismissing for want of injury-in-fact despite statutory violation).

[17] See, *e.g.*, Electronic Communications Privacy Act, 18 U.S.C. § 2520(c); Stored Communications Act, 18 U.S.C. § 2707(c); Cable Communications Privacy Act, 47 U.S.C. § 551(f)(2); Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. § 1854(a), (c); 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).

likely to raise the question presented here.[18] And some courts have extended the same principles to state statutes.[19]

The Ninth Circuit's holding would afford plaintiffs Article III standing whenever they bring private actions under any of these statutes—regardless of whether they plead actual harm—so long as they allege a bare statutory violation with some connection to them. Review by this Court would ensure that the lower courts are acting within the scope of their constitutional authority in a broad range of statutory settings beyond FCRA.

D. The Ninth Circuit's Decision Is Contrary To This Court's Standing Jurisprudence.

Review is warranted for the additional reason that the decision below cannot be reconciled with this Court's Article III standing precedents.

1. It long has 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. *Village of Bellwood*, 441 U. S. 91, 100 (1979)).

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[18] For example, although to our knowledge the Article III question has not squarely arisen under the Electronic Communications Privacy Act or the Stored Communications Act, at least one district court has held that the statutory damages provisions in those laws obviate any inquiry into whether plaintiffs "suffered damage or loss." *Harris* v. *comScore, Inc.*, 292 F.R.D. 579, 589 (N.D. Ill. 2013).

[19] See, *e.g.*, *C.M.D.* v. *Facebook, Inc.*, No. C 12-1216, 2014 WL 1266291, at *2-3 (N.D. Cal. Mar. 26, 2014) (Illinois statute); *Deacon* v. *Pandora Media, Inc.*, 901 F. Supp. 2d 1166, 1171-72 (N.D. Cal. 2012) (Michigan statute).

"In no event * * * 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*, 441 U.S. at 100 (internal quotation marks omitted). This "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).

The court below (App., *infra*, 5a), and other courts similarly inclined, have subordinated those principles to this Court's earlier passing observation 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." *Warth* v. *Seldin*, 422 U.S. 490, 500 (1975) (quoting *Linda R.S.* v. *Richard D.*, 410 U.S. 614, 617 n.3 (1973)). But that statement does not mean that Congress can manufacture Article III standing when the asserted injury is insufficiently concrete to satisfy Article III's injury-in-fact requirement. Nor is it enough (as the Ninth Circuit believed, see App., *infra*, 8a) that the interest addressed by the statutory violation is individual to the plaintiff rather than collective. "An interest unrelated to injury in fact is insufficient to give a plaintiff standing." *Vermont Agency of Natural Resources* v. *United States ex rel. Stevens*, 529 U.S. 765, 772 (2000).

As this Court recently reiterated, injury-in-fact requires not only "an invasion of a legally protected interest," but one that is both "(a) concrete and particularized, and (b) 'actual or imminent, not "conjectural" or "hypothetical." ' " *Arizona Christian School Tuition Organization* v. *Winn*, 131 S. Ct. 1436, 1442 (2011) (quoting *Lujan*, 504 U.S. at 560).

Congress may accomplish a "'[s]tatutory broadening of the categories of injury that may be alleged in support of standing,'" but not by "'abandoning the requirement that the party seeking review must himself have suffered an injury.'" *Lujan*, 504 U.S. at 578 (quoting *Sierra Club* v. *Morton*, 405 U.S. 727, 738 (1972)) (brackets omitted). If there is an actual, palpable injury—i.e., one that could qualify as an "injury in fact" under Article III—but no remedy at law, Congress may create a remedy. See *ibid.* In other words, Congress may "elevat[e] to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law." *Ibid.*; see also Hart & Wechsler's The Federal Courts and the Federal System 144 (Richard H. Fallon Jr. et al. eds., 6th ed. 2009).

But Congress may not create the necessary underlying injury by fiat. See *Lujan*, 504 U.S. at 578. No plaintiff can enforce every legal obligation that involves her in some way; she can "enforce" only those "specific legal obligations whose violation works a direct harm" to her that is actual and concrete within the meaning of Article III. *Allen* v. *Wright*, 468 U.S. 737, 761 (1984).

The decision below—like many lower court decisions before it—departs from these firmly established constitutional principles. The Ninth Circuit held that Robins alleged an injury sufficient to satisfy Article III by alleging that Spokeo violated FCRA when it retransmitted inaccurate personal information about him, without alleging a sufficient allegation of tangible harm.

That circular approach to injury would render the case-or-controversy requirement of Article III an empty formality. In excusing a plaintiff from showing

an *actual* injury-in-fact, the decision below necessarily excuses a showing of causation as well. Where the only injury arises from a violation of legal duty that had no effect on the plaintiff, there is nothing to cause, and thus no meaning to the "causal connection" that is otherwise required. *Arizona Christian*, 131 S. Ct. at 1442.

As a consequence, the three-part test of Article III standing—injury-in-fact, causation, and redressability—would collapse into the single question of redressability. Once a congressionally authorized remedy made an abstract complaint "redressable" in the sense that the plaintiff could seek and collect payment, anyone identified in a statute would have standing. The Ninth Circuit recognized and embraced this anomaly. See App., *infra*, 9a.

If the Ninth Circuit were correct, Congress could expand the jurisdiction of the federal courts by authorizing statutory damages for violation of any federal requirement. But Article III's actual injury requirement cannot be evaded simply by making damages available even when injury is absent.

2. Further review is warranted for the additional reason that the serious constitutional questions raised by the decision below, and many others like it, are the unnecessary result of an overbroad statutory construction. "A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score." *Almendarez-Torres* v. *United States*, 523 U.S. 224, 237 (1998) (citation and quotation marks omitted). Accordingly, where a statute is "genuinely susceptible to two constructions," a court is obligated to choose the one that avoids constitutional doubt. *Id.* at 238.

The FCRA can readily be construed in that manner. As the Eighth Circuit has observed, "[a] reasonable reading of the statute could 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). Under that construction, because it can be difficult to prove the *amount* of damages resulting from a failure to comply with FCRA's procedural provisions, plaintiffs who have been *concretely* harmed by willful noncompliance need not *quantify* the harm.[20] This interpretation of Section 1681n(a) of FCRA would not affect the need to show a concrete and particularized injury-in-fact sufficient to satisfy Article III. The federal courts should not "presume—without any basis in the statutory text * * * and in contradiction to long-settled constitutional precedent, see, *e.g.*, *Lujan*, 504 U.S. at 560—that Congress intended to stretch, if not breach, the constitutional limits on federal jurisdiction." *Wallace* v. *ConAgra*, __ F.3d __, 2014 WL 1356860, at *5 (8th Cir. Apr. 4, 2014). Review is warranted to reinvigorate that principle as it applies to the interpretation of private causes of action for violations of federal statutes.

E. This Case Cleanly Presents The Injury-In-Law Question.

This case presents an appropriate vehicle to resolve the question left open by the dismissal of certiorari in *First American*. Unlike the plaintiff in that case, who had paid money to the defendant in a

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[20] Cf. *Doe* v. *Chao*, 540 U.S. 614, 621 (2004) (construing Privacy Act recovery to require actual damages in light of "traditional understanding that tort recovery requires * * * proof of some harm for which damages can reasonably be assessed").

commercial transaction that her lawsuit challenged, Robins did not enter into a commercial transaction with Spokeo and has not paid Spokeo a dime (as frequently is the case in FCRA claims).[21]

Moreover, unless the mere existence of the alleged FCRA violation is sufficient to satisfy Article III, Robins cannot establish standing. In "allegations of injury" that the Ninth Circuit conceded were "sparse," App., *infra*, 2a, Robins asserted that the very existence of inaccurate information about him harmed his "prospects" for employment, and that he was anxious about the possibility that a prospective employer might see that information and use it adversely against him.

This "highly attenuated chain of possibilities * * * does not satisfy the requirement that threatened injury must be certainly impending" to satisfy Article III. *Clapper* v. *Amnesty International USA*, 133 S. Ct. 1138, 1148 (2013). This Court recently "decline[d] to abandon [its] usual reluctance to endorse standing theories that rest on speculation about the decisions of independent actors" like the unknown employers who might have seen Robins's Spokeo search results. *Id.* at 1150. And Robins's pleaded anxiety and stress about his speculation is as insufficient to satisfy the injury-in-fact requirement as was the "subjective fear of surveillance" that this Court found wanting in *Clapper*, *id.* at 1153-1153.

In short, this case provides a clear path to the resolution of the important question presented.

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[21] Indeed, the remedial provision involved in *First American* imposed liability for "three times the amount of *any charge paid*" to the defendant. 12 U.S.C. § 2607(d)(2) (emphasis added).

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By equating a statutory injury-in-law with an Article III injury-in-fact, the Ninth Circuit has opened the federal courts to a large class of lawsuits that do not satisfy Article III. Review by this Court is warranted to ensure that the jurisdiction asserted by the federal courts remains within constitutional limits.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MAY 2014