No. 13-1339

IN THE

Supreme Court of the United States

SPOKEO, INC.,

Petitioner,

v.

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

Respondent.

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

BRIEF FOR EXPERIAN INFORMATION SOLUTIONS, INC., AS *AMICUS CURIAE* SUPPORTING PETITIONER

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June 6, 2014

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INTEREST OF *AMICUS CURIAE* [1]

Experian Information Solutions, Inc. (Experian) is a nationwide consumer reporting agency subject to regulation under the Fair Credit Reporting Act (FCRA). The Ninth Circuit held below that plaintiffs claiming an FCRA violation "with respect to" them, 15 U.S.C. § 1681n, automatically satisfy the injury-in-fact requirement of Article III without any need to inquire into whether the alleged violation caused them any harm.

Consumer reporting agencies like Experian serve, essentially, as warehouses of consumer credit information. Experian maintains credit files on more than 200 million consumers, and, each day, answers 2 million credit inquiries and processes up to 50 million updates to its credit information database from lenders and other data furnishers.

As a nationwide consumer reporting agency, Experian is frequently subject to class action lawsuits by plaintiffs who have experienced no actual harm but seek class-wide statutory damages for alleged technical violations of the FCRA. Such suits are possible because the Act permits plaintiffs to sue for between $100 and $1,000 in statutory damages for any willful departure from FCRA requirements "with respect to" a consumer, without expressly requiring that the consumer be injured by what may be a

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[1] All parties have consented in writing to the filing of this *amicus curiae* brief more than 10 days prior to its due date. No counsel for any party authored this brief in whole or in part, and no person or entity other than *amicus curiae* or its counsel made a monetary contribution to the preparation or submission of this brief.

wholly technical violation. Indeed, it is not uncommon in these cases for significant numbers of class members to have actually *benefited* from the alleged violations. Due to the large number of credit files, updates, and inquiries Experian handles, these suits can involve millions of putative class members, and thereby threaten staggering liability.

Experian accordingly has a strong interest in the enforcement of the constitutional requirement that only plaintiffs who have suffered an injury in fact may sue.

REASONS FOR GRANTING THE PETITION

This case cleanly presents the constitutional issue this Court was unable to resolve in *First American Financial Corp. v. Edwards*, 132 S. Ct. 2536 (2012): whether plaintiffs have Article III standing to sue for statutory damages regardless of whether they have suffered any concrete harm. The FCRA permits statutory damages (in a sum between $100 and $1,000) for any willful violation of the FCRA's requirements "with respect to a consumer." 15 U.S.C. § 1681n. The Ninth Circuit held below that a plaintiff has Article III standing to seek such statutory damages even if the alleged statutory violation did not harm him—according to the Ninth Circuit, a violation of the plaintiff's "statutory rights" *automatically* constitutes a "concrete, *de facto* injury" sufficient to satisfy Article III. Pet. App. 8a.

This holding deepens a circuit split on what constitutes an injury in fact under Article III, and broadens Article III standing well beyond anything this Court has previously endorsed. To be sure, statutory damages have a legitimate role that is consistent with Article III: to provide relief when a

plaintiff has been injured but damages are difficult to quantify. But the Ninth Circuit held here that Article III is satisfied without any real-world injury at all, so long as the defendant allegedly committed a statutory violation "with respect to" the plaintiff.

As the petition explains, the circuits are divided on this question. Plaintiffs injured only in the abstract by a statutory violation, with no accompanying identifiable harm, have standing to seek statutory damages in the Sixth, Seventh, Eighth, and Ninth Circuits, but not in the Second or Fourth. *See* Pet. at 9-12. Moreover, under the FCRA, such consumers (and entrepreneurial lawyers) routinely seek to represent enormous putative classes, and thus threaten defendants with crushing liability on the basis of technical violations that harmed no one. Whether uninjured consumers have standing to seek statutory damages thus has exceptional importance to the many parties regulated by the FCRA. Indeed, this question is deeply significant to litigation under any of the many statutes that, like the FCRA, fix statutory damages without regard to the actual harm suffered.

Moreover, the decision below departs from this Court's jurisprudence on Article III standing. "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 n.3 (1997). Yet the Ninth Circuit reasoned that Respondent has standing "by virtue of the alleged violations of his statutory rights" alone, for which "suffering actual damages" is unnecessary. Pet. App. 7a, 9a n.3. But many statutory violations—even

those "with respect to" a particular consumer—inflict no injury (or even benefit the consumer). If a statutory violation alone automatically suffices under Article III, the injury-in-fact requirement becomes an empty formality—which cannot be squared with the well-settled tenet that "the requirement of injury in fact is the hard floor of Article III jurisdiction that cannot be removed by statute." *Summers v. Earth Island Inst.*, 555 U.S. 488, 497 (2009).

This Court's review is thus strongly warranted, to resolve the conflict among the circuits on this fundamentally important question.

I. THE RULING BELOW PERMITTING LITIGATION OVER STATUTORY VIOLATIONS THAT HARM NO ONE PRESENTS A QUESTION OF GREAT SIGNIFICANCE.

The Ninth Circuit now permits litigation under the FCRA over a statutory violation that merely relates to the plaintiff, even if the violation does not harm the plaintiff. This holding, and others like it, both poses a major threat to the Article III limits on the role of the federal courts, and has enormous real-world consequences.

A. No-Harm Actions Are Filed Regularly and Threaten Defendants with Staggering Liability.

One of the most frequent types of lawsuits filed under the FCRA is a claim of inaccuracy in consumer credit reports, under the FCRA provision requiring "reasonable procedures to assure maximum possible accuracy of the information" in each report. 15 U.S.C. § 1681e(b). Under the holding below, there is no longer any need for the alleged inaccuracy to have harmed the plaintiff. Instead, any inaccuracy

whatsoever "with respect to" a consumer can give rise to a federal action—even if the inaccuracy is inconsequential or, worse, *benefited* the plaintiff (as occurs when, for example, a delinquent debt is incorrectly reported as timely paid). In short, according to the Ninth Circuit, even harmless or beneficial violations related to a consumer constitute injury-in-fact sufficient to satisfy Article III.

Anomalous as they may seem, such no-harm lawsuits are frequent under the FCRA. For example, in *Harris v. Experian Information Solutions, Inc.*, No. 6:06-cv-1808-GRA (D.S.C. June 30, 2009), the plaintiff class claimed that Experian and other credit reporting agencies violated § 1681e(b)'s "reasonable procedures" requirement by failing to report consumers' credit limits for their Capital One credit cards (information that Capital One refused to provide to credit reporting agencies). The omission of credit-limit information had no consistent effect on consumers: it decreased the credit scores of only certain consumers, while *increasing* the scores of many others, and having no effect on yet others. *Harris*, No. 6:06-cv-1808-GRA, slip op. at 5. Although the named plaintiff was one of those who had actually benefited from the alleged violation, he sought to represent a class of over four million consumers—including the many consumers whose credit scores were increased by the alleged inaccuracy—which, at $100 to $1,000 per violation, sought aggregate statutory damages between $400 million and $4 billion. The district court certified a class that included the consumers who benefited from the alleged violation—and therefore plainly had not been harmed or injured (in any ordinary sense of those words) by the alleged violation. *Id.* at 8-12. All

of these consumers would have Article III standing under the decision below, because the Ninth Circuit held that the mere existence of a statutory violation qualifies as "injury" for purposes of Article III.

Likewise, in *White v. Experian Information Solutions, Inc.*, No. 05-cv-1070-DOC-MLG (C.D. Cal. Jan. 26, 2009), the plaintiff claimed that Experian and two other nationwide consumer reporting agencies, Trans Union and Equifax, violated the FCRA by not reporting that certain debts had been discharged in bankruptcy. The claimed error, however, had no impact on many debtors and actually *improved* the credit scores of many others. *White*, No. 05-cv-1070-DOC-MLG, slip op. at 9. Nevertheless, the plaintiffs sought between hundreds of millions and billions of dollars in statutory damages on behalf of a class of nearly eight million consumers. The district court deferred a final ruling on the class's viability, but found "serious constitutional issues" implicated by the class's Article III standing. *Id.* at 11. Any such doubts about the class's standing, however, would be obviated today in the Ninth Circuit, under the decision below.

Dreher v. Experian Information Solutions, Inc., No. 11-cv-624-JAG (E.D. Va.), is a recent example of a putative class action alleging a violation that is entirely irrelevant to most class members. The *Dreher* plaintiff alleges that Experian inaccurately reported the *name* of his creditor, by listing his debt with Advanta Bank instead of CardWorks, a company assigned to handle the accounts after Advanta Bank was placed in receivership. He seeks statutory damages on behalf of roughly 150,000 consumers affected by the same issue, yet most (if not

all) of these consumers will not have been harmed in any way by this technical inaccuracy. Experian has challenged Article III standing in opposition to the plaintiff's class certification motion, which is still pending.

Another theory of no-harm liability, seen regularly under the FCRA, targets 15 U.S.C. § 1681b(b)(2), which requires a party requesting a consumer's credit report "for employment purposes" to have (1) told the consumer about the request "in a document that consists solely of the disclosure," and (2) obtained the consumer's consent. § 1681b(b)(2)(A)(i)-(ii). At least four class actions have been filed this year seeking only statutory damages for an alleged violation of this provision. *See Knights v. Publix Super Markets, Inc.* (M.D. Tenn. No. 14-cv-00720); *Gezahegne v. Whole Foods Market California, Inc.* (N.D. Cal. No. 14-cv-00592); *Hathaway v. Whole Foods Market California, Inc.* (S.D. Cal. No. 14-cv-00663); *Ragland v. Guardsmark, LLC* (S.D. Cal. No. 14-cv-00693). Each suit's only purported basis for liability is the defendant's failure to provide a *standalone* disclosure. *See* § 1681b(b)(2)(A)(i) (requiring "a document that consists *solely* of the disclosure" (emphasis added)). These plaintiffs do not claim to have been unaware of the disclosure, to have not consented to the request, or to have otherwise been harmed in any identifiable way. Nonetheless, they seek $100 to $1,000 per non-standalone disclosure on behalf of sizable putative classes. These injury-free suits would seem prone to dismissal for lack of Article III standing—but were all filed in the Sixth and Ninth Circuits, where that argument is currently unavailable.

Indeed, this very case is an example of a class action concerning no concrete harm. Respondent alleges that Petitioner violated the FCRA by inaccurately reporting a variety of seemingly positive facts about him: that he "has a graduate degree, that his economic health is 'Very Strong,' and that his wealth level [] is in the 'Top 10%.'" Compl. ¶ 32. Respondent further alleges that his consumer report wrongly reports "that he was employed in a professional or technical field," even though he in fact "is currently out of work and seeking employment." *Id.* ¶¶ 31, 34. Despite the fact that Respondent likely benefits from these inaccuracies—which would presumably *improve* his standing with a potential employer—he seeks to represent a class of "millions of individuals," which, at $100 to $1,000 per violation, seeks aggregate statutory damages exceeding $1 billion. *Id.* ¶ 39, p. 16.

Nor are such no-harm statutory damages suits limited to credit reporting. Numerous lawsuits were filed in the wake of the 2003 Fair and Accurate Credit Transactions Act (FACTA), which required retailers to redact the expiration date and all but the last five digits of a credit card number on all electronically printed receipts. 15 U.S.C. § 1681c(g). In many of these putative class actions, the plaintiffs claimed no actual injury from the failure to redact, but nevertheless sought hundreds of millions or even billions of dollars in statutory damages.

In *Lopez v. KB Toys Retail, Inc.*, No. CV 07-144-JFW (CWx), 2007 U.S. Dist. LEXIS 82025, at *14-15 (C.D. Cal. July 17, 2007), for example, the plaintiff sought statutory damages between $290 million and $2.9 billion, even though, as the court noted, the

putative class members could not have been harmed by the inclusion of their credit card numbers' first four (not last five) digits, which merely identify the issuing bank. And in *Evans v. U-Haul Co. of California*, No. CV 07-2097-JFW, 2007 U.S. Dist. LEXIS 82026, at *14-17 (C.D. Cal. Aug. 14, 2007), the plaintiff sought between $115 million and $1.5 billion in statutory damages for the defendant's inclusion of expiration dates on receipts, despite admitting that she suffered no harm from the practice.[2] *See generally* Sheila B. Scheuerman, *Due Process Forgotten: The Problem of Statutory Damages and Class Actions*, 74 Mo. L. Rev. 103, 104-06, 111-14, 134-35 (2009).

Likewise, in *Taylor v. Acxiom Corp.*, No. 2:07cv0001, 2008 U.S. Dist. LEXIS 115940 (E.D. Tex. Sept. 9, 2008), *aff'd*, 612 F.3d 325 (5th Cir. 2010), the plaintiffs sought a staggering $5 trillion in statutory damages for alleged violations of the Driver's Privacy Protection Act (DPPA), 18 U.S.C. §§ 2721-2725, on behalf of a class of 20 million Texas drivers. Although they claimed that the defendants had violated the DPPA by obtaining a database of Texas driver information (to avoid piecemeal requests each time a defendant lawfully needed to access driver information), the plaintiffs did not claim any injury in fact—that is, they did not claim that any

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[2] Although the district court in both *Lopez* and *Evans* denied class certification in part because the staggering amount of statutory damages sought was wholly out of proportion to the harm alleged (*i.e.*, none), the Ninth Circuit subsequently rejected such disproportionality as a basis for denying class certification. *See Bateman v. American Multi-Cinema, Inc.*, 623 F.3d 708, 721 (9th Cir. 2010).

defendant used or disclosed their personal information for any impermissible purpose. *Id.* at *32.[3]

Indeed, the U.S. Code provides ample fodder for no-harm actions like these. As the petition explains, a wide range of federal statutes authorize statutory damages without regard to any actual injury suffered by the plaintiff. *See* Pet. at 16-19 (collecting statutes).[4] Under the decision below and others like it, all of these acts could be used by creative lawyers to launch class actions seeking enormous sums where plaintiffs have suffered no concrete injury—or worse, have actually benefited—from the alleged violations.

Actions of this type, which essentially co-opt the federal courts to enforce abstract statutory violations, are more than just a nuisance. They present a serious threat of staggering liability in the absence of

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[3] The district court dismissed for lack of Article III standing and for failure to state a claim. The Fifth Circuit affirmed on the latter basis, without expressly reaching the standing question—but noted in dicta that the plaintiffs would have standing even though they alleged no unlawful disclosure or use that might constitute a concrete injury. 612 F.3d at 340 n.15.

[4] There are still more examples of such statutes. *See, e.g.*, Anti-Counterfeiting Consumer Protection Act of 1996, 15 U.S.C. §§ 1116(d), 1117(c) (between $1,000 and $200,000 per counterfeit mark and up to $2 million for willful violation); Anti-Cybersquatting Consumer Protection Act of 1999, 15 U.S.C. § 1125(d) (between $1,000 and $100,000 for each bad faith violation); Cable Piracy Act, 47 U.S.C. § 605(e) (between $1,000 and $10,000 per violation, and between $10,000 and $100,000 per willful violation); Cable Privacy Act, 47 U.S.C. § 551(f)(2)(A) (greater of $100 per day of violation or $1,000); Worker Adjustment and Retraining Notification Act of 1988, 29 U.S.C. § 2104(a)(3) ($500 per day of violation).

any actual harm suffered by an individual consumer. Indeed, in many such cases, the named plaintiffs will actually waive any claims for actual damages in an attempt to increase their chances of obtaining class certification on their statutory damages claims. *See*, *e.g.*, *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 54 (2007) (claiming no actual harm); *Murray v. GMAC Mortgage Corp.*, 434 F.3d 948, 952-53 (7th Cir. 2006). Rather than litigate the alleged statutory violations in the context of the actual individual injuries they might cause, these plaintiffs seek to litigate their claims in the abstract in order to maximize recovery, even though they have no concrete interest in the action other than the mere possibility of recovering statutory damages.

Such windfall damages can cripple or destroy businesses. For companies like Experian, for example, the FCRA's statutory damages of $100 to $1,000 per violation can quickly add up to crushing liability, in that credit reporting agencies generally maintain files on millions of consumers (often hundreds of millions) and may be sued over procedures that apply to large numbers of those consumers. *See, e.g.*, *Trans Union LLC v. Federal Trade 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 [a nationwide consumer reporting agency] faces potential liability approaching $190 billion."); Scheuerman, *supra*, 74 Mo. L. Rev. at 104. Moreover, when such suits concern a putative nationwide class—as occurs regularly with Experian and other credit reporting agencies—the cases can often be steered into the circuits with the looser

understanding of Article III standing, where judges must ignore the absence of harm when assessing the action's viability.

Faced with potential liability in the hundreds of millions or billions (or even trillions, *see Taylor*, 2008 U.S. Dist. LEXIS 115940) of dollars—liability that would sink even large companies—defendants are put under tremendous pressure to settle, even when the class's claims are questionable and the defendants have meritorious defenses. This Court has often noted "the risk of '*in terrorem*' settlements that class actions entail." *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1752 (2011) ("Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims."); *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978) ("Certification 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."); *see also In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995) (Posner, J.) (noting "intense pressure to settle"); Henry J. Friendly, *Federal Jurisdiction: A General View*, 120 (1973) (calling settlements induced by small probabilities of immense judgments in class actions "blackmail settlements"). And the risk of defendants being forced into unfair settlements is exacerbated in statutory damages class actions. As Justice Ginsburg recently explained: "When representative plaintiffs seek statutory damages, pressure to settle may be heightened because a class action poses the risk of massive liability unmoored to actual injury." *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 445 (2010) (Ginsburg, J., dissenting);

see also Parker v. Time Warner Entm't Co., 331 F.3d 13, 22 (2d Cir. 2003) (aggregated statutory damages claims can produce "an *in terrorem* effect on defendants, which may induce unfair settlements"); *id.* at 29 (Newman, J. concurring) (same).

For all of these reasons, the law of the Ninth Circuit, like that of the Sixth, Seventh, and Eighth Circuits, threatens liability of staggering proportions decoupled from any actual harm, even where—as here—the consumer may have benefited from the alleged statutory violation. The conflict in the lower courts on this fundamental issue thus has great significance, and warrants this Court's review.

B. The Ninth Circuit's Approval of No-Harm Actions Expands Federal Jurisdiction Significantly.

This Court's review is also warranted because the Ninth Circuit's holding broadens Article III standing well beyond anything this Court has ever endorsed.

"[T]he requirement of injury in fact is the hard floor of Article III jurisdiction that cannot be removed by statute." *Summers*, 555 U.S. at 497. This essential element of Article III's case or controversy "'is founded in concern about the proper—and properly limited—role of the courts in a democratic society.'" *Id.* at 492-93 (quoting *Warth v. Seldin*, 422 U.S. 490, 498 (1975)). That role is limited to vindicating the rights of individuals and "redress[ing] or prevent[ing] actual or imminently threatened injury to persons caused by private or official violation of law." *Id.* at 492; *see also Lewis v. Casey*, 518 U.S. 343, 353 n.3 (1996); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 569-70 (1992). As a necessary corollary, then, Congress can "elevat[e] to the status

of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law," *Lujan*, 504 U.S. at 578, but "[i]t 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*, 521 U.S. at 820 n.3; *see also* Richard H. Fallon, Jr., Daniel J. Meltzer & David L. Shapiro, *Hart and Wechsler's The Federal Courts and the Federal System* 153 (5th ed. 2003).

In keeping with these principles, a mere violation of a statute with respect to a particular individual—absent some actual adverse affect on that individual—is not an "injury" sufficient to confer Article III standing. *Cf. Doe v. Chao*, 540 U.S. 614, 624 (2004) ("[T]he reference in § 552a(g)(1)(D) [which creates a cause of action for statutory damages under the Privacy Act] to 'adverse effect' acts as a term of art identifying a potential plaintiff who satisfies the injury-in-fact and causation requirements of Article III standing, and who may consequently bring a civil action without suffering dismissal for want of standing to sue."). A plaintiff's interest in such a case is no different from the general public interest "in seeing that the law is obeyed," which this Court has repeatedly held is insufficient for a private litigant to invoke the judicial power. *E.g.*, *FEC v. Akins*, 524 U.S. 11, 24 (1998); *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 107 (1998); *Valley Forge Christian Coll. v. Americans United for Separation of Church & State*, 454 U.S. 464, 485 (1982).

Similarly, Congress cannot manufacture standing simply by offering a bounty to private plaintiffs for bringing suits to enforce the law. Although a bounty

may give a plaintiff a concrete interest in the outcome of a suit, this Court has held that an "interest unrelated to injury in fact is insufficient to give a plaintiff standing." *Vt. Agency of Natural Resources v. U.S. ex rel. Stevens*, 529 U.S. 765, 772 (2000). An interest, such as a bounty or an award of attorney's fees, "that is merely a 'byproduct' of the suit itself cannot give rise to a cognizable injury in fact for Article III standing purposes." *Id.* at 773; *see Steel Co.*, 523 U.S. at 107 ("[A] plaintiff cannot achieve standing to litigate a substantive issue by bringing suit for the costs of bringing suit.").

As this Court has repeatedly explained, the "actual injury" component of Article III's case or controversy requirement is necessary to maintain the separation of powers. *Lewis*, 518 U.S. at 353 n.3; *Lujan*, 504 U.S. at 559-60, 576-77. "[F]ederal courts may exercise power only in the last resort, and as a necessity, and only when adjudication is consistent with a system of separated powers and the dispute is one traditionally thought to be capable of resolution through the judicial process." *Allen v. Wright*, 468 U.S. 737, 752 (1984). "We accept the judiciary's displacement of the democratically elected branches when necessary to decide an actual case," but in the absence of the need to remedy an individual's injury, the courts may not reach out to address alleged violations of the law. John G. Roberts, *Article III Limits On Statutory Standing*, 42 Duke L.J. 1219, 1230 (1993).

Consistent with these limitations, Congress cannot authorize roving private attorneys general to seek out violations of the law that have caused them no actual injury and prosecute them in court in the

hopes of obtaining a bounty. *Lujan*, 504 U.S. at 576-77; *id.* at 580-81 (Kennedy, J., concurring). To do so would be to "transfer from the President to the courts the Chief Executive's most important constitutional duty, to 'take Care that the Laws be faithfully executed,' Art. II, § 3." *Id.* at 577 (majority opinion); *see also* Tara Leigh Grove, *Standing as an Article II Nondelegation Doctrine*, 11 U. Pa. J. Const. L. 781 (2009); Harold J. Krent & Ethan G. Shenkman, *Of Citizen Suits and Citizen Sunstein*, 91 Mich. L. Rev. 1793 (1993).

Statutory damages class actions of this type—where plaintiffs have suffered no injury, or worse, have actually *benefited*, from the alleged violations—starkly present the precise dangers this Court has repeatedly warned against in its Article III standing cases. *See, e.g.*, *Vt. Agency*, 529 U.S. at 772-73. In such suits, as in a private-attorney-general scheme, eligible plaintiffs are not differentiated from the general public by any injury they have suffered, and the courts are impermissibly enlisted into hearing abstract claims of FCRA violations unconnected to any concrete individual injury. The plaintiffs in these suits do not seek to "obtain[] compensation for, or prevent[], the violation of a legally protected right"; they seek only a bounty for prevailing in the litigation—little different from "a wager upon the outcome." *Vt. Agency*, 529 U.S. at 772-73.

The allegations in this action serve only to highlight this problem. As noted, Respondent claims that Petitioner violated the FCRA by reporting information that overstated his employment status and creditworthiness. Compl. ¶¶ 31-32, 34. Even though Respondent likely *benefited* from these

alleged inaccuracies, he seeks to represent a class of "millions of individuals," which, at $100 to $1,000 per violation, seeks aggregate statutory damages in excess of $1 billion. *Id.* ¶¶ 39, p. 16. In other words, Respondent has no actual concrete interest in this action other than the mere possibility of recovering statutory damages—an outcome directly at odds with longstanding principles of Article III standing.

In such circumstances, Petitioner, like the targets of other no-harm statutory damages suits under the FCRA, is threatened with one of the very dangers Article III's injury-in-fact requirement is designed to prevent—arbitrary enforcement by plaintiffs who are entirely unaffected by (or even benefited from) the challenged conduct, who lack any accountability, and whose prosecutorial discretion is limited only by the creativity of their claims. *See* Grove, *supra* at 784, 791, 807-09. Entrepreneurial lawyers representing statutory damages classes will not seek out the defendants and violations that cause the most harm to consumers (as we would expect an accountable Executive Branch to do), but will instead have every incentive to seek out violations that maximize class size—and therefore the aggregated statutory damages bounty—regardless of whether the violations actually injure anyone (or, indeed, even benefit class members). And with the *in terrorem* effect of such massive potential damages, opportunistic lawyers need not even bring claims for *actual* violations; so long as the violation is arguable and the class large enough, defendants will be forced to settle or risk bankruptcy.

In short, the consequences of the Ninth Circuit's decision underscore the importance of Article III's

constraints on standing. If left unaddressed, the decision below will all but erase those limits whenever Congress does not require a plaintiff to prove actual damages. This Court should correct the Ninth Circuit's error and bring uniformity to this fundamental question of federal law.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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June 6, 2014