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

BRIEF OF DRI – THE VOICE OF THE DEFENSE BAR AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae DRI – the Voice of the Defense Bar, is an international organization of more than 22,000 attorneys involved in the defense of civil litigation. DRI is committed to enhancing the skills, effectiveness, and professionalism of defense attorneys. Because of this commitment, DRI seeks to promote the role of defense attorneys, to address issues germane to defense attorneys and their clients, and to improve the civil justice system. DRI has long participated in the ongoing effort to make the civil justice system fairer, more consistent, and more efficient. See http://www.dri.org/About. To that end, DRI participates as amicus curiae in cases that raise issues of importance to its membership and to the judicial system. This is one of those cases.

DRI's interest in this case stems from its members' extensive involvement in civil litigation. DRI's members are regularly called upon to defend their clients in lawsuits brought merely to pursue public policies rather than to seek redress for a distinct and personalized injury. If affirmed, the Ninth Circuit's decision in this case will have a profound effect on businesses and individuals who may be subject to suits

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from amicus curiae, its members, and its counsel, made any monetary contribution towards the preparation and submission of this brief. Pursuant to Supreme Court Rule 37.2(a), *amicus curiae* certifies that counsel of record for both petitioner and respondent have, after timely notification, consented to this filing in emails enclosed with this *Amicus* Brief.

brought under the Fair Credit Reporting Act, 15 U.S.C. § 1681, *et seq*., and other federal and state statutes providing for statutory damages because the decision broadens the doctrine of standing to allow the judiciary to resolve disputes in the absence of an actual injury. A decision that follows the Ninth Circuit's rationale will likely result in an increase in the filing of lawsuits by non-injured plaintiffs. DRI has a strong interest in assuring that the many federal and state statutes which confer a statutory cause of action do not provide a "back door" for uninjured litigants to obtain relief in federal court. Alteration of the standing doctrine threatens to open the floodgates of litigation in derogation of the Framers' intent to limit the jurisdiction of the judicial branch to "cases" and "controversies." This, in turn, directly affects the fair, efficient, and consistent functioning of our civil justice system and, as such, is of vital interest to the members of DRI.

The ability of plaintiffs to circumvent Article III's standing requirement and proceed in class action and other litigation absent actual injury presents an ongoing point of concern for DRI's members. The issue of standing and its outer limits is frequently studied and discussed by DRI's membership in a variety of contexts. *See*, *e.g*., Nora Coleman, et. al., Stopped Before They Start: Dismissing No-Injury Class Actions, DRI For Def. 42 (December 2010) (providing strategies for attacking standing in no-injury class actions); Brian A. Bender, et. al., A Gathering Storm: New Developments in Climate Change Litigation, DRI for Def. 50 (January 2010) (discussing noteworthy decisions involving proprietary standing and parens patriae standing); Jeffrey A. Holmstrand, Statutory

Consumer Fraud Act Claims: Enforcing the Reliance Requirement, DRI For Def. 43 (October 2010) (recognizing the exponentially-broadened exposure a defendant faces as a result of statutory consumer fraud act claims brought on behalf of large numbers of people, many or most of whom did not sustain any actual injury). DRI therefore has a unique vantage point to help this Court understand the importance of proper interpretation of federal statutory damages statutes in light of the constitutionally-mandated standing requirements, not only from a legal standpoint, but also from practical and economic standpoints as well. Based on its members' extensive practical experience, DRI is uniquely suited to explain why this Court should adopt a rule which adheres to Article III standing's requirement of injury-in-fact.

SUMMARY OF THE ARGUMENT

The Ninth Circuit's decision in this case casts aside fundamental principles of Article III standing law in order to facilitate federal suits brought by plaintiffs who suffer no concrete harm. With scant legal analysis, the Ninth Circuit ruled 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." *Robins v. Spokeo, Inc*., 742 F.3d 409, 412 (9th Cir. 2014), citing *Edwards v. First Am. Corp*., 610 F.3d 514, 517 (9th Cir. 2010). That ruling, made in the context of the Fair Credit Reporting Act, 15 U.S.C. § 1681, *et seq*., pays no heed to this Court's command that statutory language purportedly entitling any person to sue cannot abrogate

constitutionally-required standing. *Allen v. Wright*, 468 U.S. 737, 750-51 (1984). The ruling also turns the three-part test for Article III standing into a single-factor inquiry satisfied by the availability of a statutory remedy, which contradicts this Court's precedents and represents a grave misunderstanding of the standing doctrine mandated by Article III's limitation on the judiciary's power to only "cases" or "controversies." As this Court observed in *Lujan v. Defenders of Wildlife*, "[Statutory] 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. 555, 578 (1992), quoting *Sierra Club v. Morton*, 405 U.S. 727, 738 (1972).

A rule allowing a plaintiff to invoke the jurisdiction of the federal court under a federal statute creating a private right of action – even though the plaintiff has suffered no concrete harm – promises to encourage others who have suffered no "actual injury" to enter federal courts through the "back door", a practice this Court has expressly disapproved. *Allee v. Medrano*, 416 U.S. 802, 828-29 (1974) (Burger, C.J., concurring). This, in turn, will undoubtedly result in the increase of costly litigation against businesses and individuals that was not intended by the Framers of the United States Constitution. Additionally, a rule excusing plaintiffs from satisfying the Article III injury-in-fact requirement undermines class certification standards. These burdens, moreover, will not be restricted to claims brought pursuant to the Fair Credit Reporting Act; the Ninth Circuit's broad standing analysis, if not reversed by this Court, will be used by opportunistic plaintiffs to bring suits under a myriad of federal

statutes embracing this "no harm" approach to litigation.

The Ninth Circuit's decision should be reversed because a Congressionally-created private right of action based on a bare violation of a federal statute does not dispense with a plaintiff's requirement to establish Article III standing based upon a showing of concrete harm.

ARGUMENT

A Congressionally-Created Private Right Of Action, Based On A Bare Violation Of A Federal Statute, Does Not Satisfy, Dispose Of, Or Otherwise Lessen A Plaintiff's Obligation To Establish Article III Standing, Including The Existence Of Actual Injury.

A. Constitutional standing is an indispensable requirement of any federal suit.

The doctrine of standing assures that the "courts 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." John G. Roberts, *Article III Limits On Statutory Standing*, 42 Duke L. R. 1219, 1223-1224 (1983), quoting *Allen v. Wright*, 468 U.S. 737, 750-51 (1984). A threshold requirement to any suit in federal court, constitutional standing is derived from Article III's limitation of the judicial power of the United States to the resolution of "Cases" and "Controversies." U.S. Constitution, art. III, § 2; *Hein v. Freedom From Religions Foundation, Inc.*, 551 U.S.

587, 598 (2007); *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560 (1992); *Friends of the Earth, Inc v. Laidlaw Environmental Services*, 528 U.S. 167 (2000). It has been said that Article III requires a live contest in which to test legal differences. Felix Frankfurter, *A Note on Advisory Opinions*, 37 Harv. L. R. 1002, 1006 (1924). The issue of standing depends upon whether the party has alleged such a personal stake in the outcome of the controversy as to ensure that the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution. Stated otherwise, it is incumbent upon a party to demonstrate more than just a commitment to vigorous advocacy. *Lujan, supra,* at 559-560. See also *Summers v. Earth Island Institute*, 129 S. Ct. 1142, 1148-49 (2009).

Those who seek to invoke the jurisdiction of the federal courts *must* therefore satisfy the threshold standing requirement imposed by Article III. *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983). It is not optional: constitutional standing is "'the irreducible constitutional minimum' of standing." *Lujan*, *supra*, at 560. That means a plaintiff must demonstrate "a personal stake in the outcome" in order to assure the presence of concrete adverse interests which sharpens the presentation of issues necessary for the proper resolution of constitutional questions. *Lyons*, *supra*, at 101. Under such an approach, abstract injury is not enough. (*Id*.). A plaintiff must show that she sustained or is immediately in danger of sustaining some direct injury as a result of the challenged official conduct and the injury or threat of injury must be both real and immediate, not conjectural or hypothetical. (*Id*. at 102). The plaintiff must also demonstrate that

the injury will likely be redressed by a favorable decision. *Friends of the Earth v. Laidlaw Environmental Services*, *supra*, at 180-81.

B. The mere violation of a statutory right does not satisfy constitutional standing absent a concrete, *de facto* harm.

Statutory standing pursuant to the Fair Credit Reporting Act or some other federal statute does not dispense with the requirement that a plaintiff also possess constitutional standing under Article III. *Loren v. Blue Cross & Blue Shield of Mich*., 505 F.3d 598, 606-07 (6th Cir. 2007). As this Court has previously recognized, "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). This Court made this point perhaps even clearer when it said:

> Congress may grant an express right of action to persons who otherwise would be barred by prudential standing rules. Of course, Art. III's requirement remains: the plaintiff must still allege a distinct and palpable injury to himself, even if it is an injury shared by a large class of other possible litigants.

Warth v. Seldin, 422 U.S. 490, 501 (1975).

In an improper interpretation of *Warth*, the Ninth Circuit in this case held 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," 742 F.3d at 412, and that "the

violation of a statutory right is usually sufficient injury in fact to confer standing." *Id*. (citing *Edwards v. First Am. Corp*., 610 F.3d 514, 517 (9th Cir. 2010)). This was not what *Warth* concluded. *Warth* merely noted that the "injury required by Art[icle] III *may* exist solely by virtue of statutes creating legal rights, the invasion of which creates standing." 422 U.S. at 500 (emphasis added). *Warth* in no way held that constitutional standing was synonymous with statutory standing so that the latter dispenses with the need to establish the former. But this is exactly what the Ninth Circuit concluded. Specifically, the Ninth Circuit reasoned that because "the statutory cause of action does not require a showing of actual harm when a plaintiff sues for willful violations[,]" actual harm was unnecessary to establish injury in fact. 742 F.3d at 412. In so ruling, the Ninth Circuit recognized that its analysis essentially turns the three-part test for Article III standing – which requires a showing of causation and redressability – into a single-factor inquiry satisfied by the availability of a statutory remedy. *Id*. at 414. Departing from this Court's jurisprudence, the Ninth Circuit rationalized that "[w]hen the injury in fact is the violation of a statutory right that we inferred from the existence of a private cause of action, causation and redressability will usually be satisfied." *Id*.

This ruling should be reversed. As this Court made clear in *Lujan v. Defenders of Wildlife*, the language from *Warth* cited by the Ninth Circuit simply means that the violation of a statutory right might satisfy Article III standing, but *only if* the statutory violation has caused a concrete, *de facto* injury independent of the statute. *Lujan*, 504 U.S. at 578 ("Whether or not the principle set forth in *Warth* can be extended beyond

that distinction, it is clear that in suits against the Government, at least, the concrete injury requirement must remain."). See also *Sierra Club v. Morton*, 405 U.S. 727, 738 (1972) ("But [statutory] 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."). In short, while Congress can authorize a private right of action based on a bare violation of a federal statute, it cannot circumvent Article III's requirement of actual injury.

Reversing the Ninth Circuit's decision in this case comports with other circuits that have properly addressed the issue in the context of other federal statutes authorizing a private right of action. Over a decade ago, the Third Circuit held that plaintiffs must allege actual injury – not just a statutory violation of the Lanham Act, 15 U.S.C. § 1051, *et seq*., - in order to establish Article III standing. *Joint Stock Soc'y v. UDV North America*, 266 F.3d 164, 176 (3d Cir. 2001). Similarly, the Third Circuit has held, in the context of the Fair Housing Act, that "[t]he fact that a housing organization is able to show that a particular advertisement violates the [Fair Housing] Act is not sufficient to satisfy the requirements of Article III; a violation of the Act does not automatically confer standing on any plaintiff, even one who holds the status of a private attorney general." *Fair Housing Council of Suburban Philadelphia v. Main Line Times*, 141 F.3d 439, 443-444 (3d Cir. 1998). The Second Circuit reached a like result, refusing to allow a claim under ERISA to proceed absent actual injury. *Kendall v. Employees Retirement Plan of Avon Prods*., 561 F.3d 112, 121 (2d Cir. 2009). Most recently, the Fourth

Circuit held (again in the context of an ERISA action) that the mere violation of a statutory right does not satisfy Article III's standing requirement of an actual, concrete injury. *David v. Alphin*, 704 F.3d 327, 338-39 (4th Cir. 2013).

The standing doctrine is a critical element of the separation-of-powers principle, which is fundamental to the protection of our liberty. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 340-342 (2006). Under the doctrine of the separation of powers, each branch of government has powers that belong to it and cannot be transferred to another branch of government. The doctrine of standing recognizes and honors those bounds. When a court erodes Article III's standing requirement by permitting a suit to proceed based on a bare statutory violation – even though the plaintiff does not have an actual injury, on the theory that the statutory violation alone confers standing -- it strips Article III of its power and upsets the equilibrium among the separate branches of government. That is exactly what the Ninth Circuit did in this case when it held that standing is demonstrated whenever there is a "violation of a statutory right[.]" 742 F.3d at 412. By conflating the constitutionally-derived standing requirement with the statutory right, the Ninth Circuit adopted a rule that essentially granted the Legislature the power to expand the judicial power. This cannot be allowed to stand.

C. Public policy considerations support a reversal.

The FCRA is not the only federal statute embracing this "no harm" approach to litigation. From the Telephone Consumer Protection Act to the Real Estate

Settlement Procedures Act to the Truth in Lending Act, Congress has authorized suits based on a mere statutory violation. For example, the Telephone Consumer Protection Act, 47 U.S.C. § 227(3), allows a private right of action with an alternative-damages provision. Similarly, the Real Estate Settlement Procedures Act, 12 U.S.C. § 2607, prohibits kickbacks in certain mortgage-loan transactions. The Truth in Lending Act, 15 U.S.C. § 1640, contains an alternative-damages provision that has been interpreted to allow a consumer to bring a claim and receive damages upwards of $500,000 without any showing of actual injury or damages. *See, e.g.*, *Gambardella v. G. Fox & Co.*, 716 F.2d 104 (2d Cir. 1983); *Purtle v. Eldridge Auto Sales, Inc.*, 91 F.3d 797 (6th Cir. 1996). Accordingly, this Court's decision may be used as a roadmap in suits well beyond those brought under the FCRA. Paul A. Scrudato, *et al.*, *No Injury? No Prolem.*, Product Liability & Mass Torts Blog (May 31, 2015) (noting that since the Ninth Circuit's decision in this case, 29 FCRA class actions were filed in the first four months of 2014). Specifically, this Court's decision will impact suits brought under approximately fifteen federal statutes permitting suits based on mere statutory violations alone. *See, e.g.*, 15 U.S.C. § 1692 (Fair Debt Collection Practices Act); 29 U.S.C. § 1854 (Migrant and Seasonal Agricultural Worker Protection Act); 15 U.S.C. § 1693m(a)(2) (Electronic Funds Transfer Act); 12 U.S.C. § 4907 (Homeowners Protection Law); 15 U.S.C. § 1681, *et. seq*. (Fair and Accurate Credit Transactions Act).

These legislatively-conferred statutory suits can be brought through any of a number of means, but are typically brought in the form of a class action, as in this

case. "The impact of federal statutes that allow the award of statutory damages for violations that cause no harm is exponentially multiplied by the class-action mechanism of Federal Rule of Civil Procedure 23." Michael O'Neil, Privacy and Surveillance Legal Issues, Leading Lawyers on Navigating Changes in Security Program Requirements and Helping Clients Prevent Breaches – The Transformation of the "Right to Privacy" and its Unintended Liability Consequences, 2014 WL 10441, *6 (Aspatore Jan. 2014).

This is so because relaxation of the standing requirement broadens dramatically the composition of a class litigating a violation of the FCRA or other similar "no harm" statute.[2] This, in turn, dramatically increases the expense of defending a class action.[3] Absent a reversal by this Court, defendants may be forced to make payouts to hundreds or even thousands of unharmed class members. In addition, due to the violation of some statutory standard, a non-injured

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[2] The broadening of class composition in this fashion has been the topic of much conversation in recent times, particularly in light of widespread data breaches where class plaintiffs have not been subjected to fraudulent charges or other injury. Tracy A. Roman, *Stretching – And Straining – The Concept of 'Injury'*, Law360, New York (Feb. 4. 2015).

[3] Even before the Ninth Circuit's decision in this case, the attendant costs of a major lawsuit could sound the death knell for new companies and those suffering under today's current economic climate. Bradley J. Bondi, *Facilitating Economic Recovery and Sustainable Growth Through Reform of the Securities Class-Action System: Exploring Arbitration as an Alternative to Litigation*, 33 Harv. J. L. & Pub. Pol'y 607, 612 (Spring 2010).

plaintiff might be deemed a "prevailing party" entitled to attorney fees.

The unwarranted economic burden this imposes on defendants cannot be overstated. As one legal scholar noted, "aggregated statutory damages claims can result in absurd liability exposure in the hundreds of millions – or even billions – of dollars on behalf of a class whose actual damages are often nonexistent." Sheila B. Scheuerman, Due Process Forgotten: The Problem of Statutory Damages and Class Actions, 74 Mo. L. Rev. 103, 104 (Winter 2009). Stated another way, a class judgment based on a statutory damages claim can have an "annihilating effect" on a defendant. *O'Neil*, *supra*, at *6. Defendants, unwilling to roll the dice, are placed under intense pressure to settle, even if an adverse judgment seems "improbable." See *Thorogood v. Sears, Roebuck and Co.*, 547 F.3d 742, 745 (7th Cir. 2008); *Matter of Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995). See also Barry F. McNiel, *et. al.*, *Mass Torts and Class Actions: Facing Increased Scrutiny*, 167 F.R.D. 483, 489-90 (updated 8/5/96). A relaxation of the standing requirement will only exacerbate these problems and proliferate more of these "blackmail settlements." *Rhone*, *supra* at 1298, citing Henry J. Friendly, *Federal Jurisdiction: A General View* 120 (1973).

Congress acts properly to create a statutory cause of action to incentivize defendants to conform their conduct to the law. But litigation brought by entrepreneurial class action attorneys attempting to serve as private attorneys general in lieu of the federal government harms the civil justice system, both because it creates enormous litigation costs with no

attendant benefit and because it destabilizes the carefully-calibrated equilibrium between the political branches of government and the judiciary. By limiting suits to the constitutional framework of a "case" or "controversy," standing assures that corporations and individuals will not be subject to academic litigation where the complaining party has suffered no real injury. Careful adherence to the standing doctrine also guards against plaintiff attorneys, and particularly class action attorneys, receiving exorbitant fees that may put a corporation out of business for a statutory violation unaccompanied by any cognizable injury.

CONCLUSION

For the foregoing reasons, the Court should reverse the decision below.

Respectfully submitted,

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