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 THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE AMERICAN HOTEL & LODGING ASSOCIATION, THE AMERICAN TORT REFORM ASSOCIATION, THE INTERNATIONAL ASSOCIATION OF DEFENSE COUNSEL, THE NATIONAL ASSOCIATION OF MANUFACTURERS, AND THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICI CURIAE*[1]

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

The American Hotel & Lodging Association ("AH&LA") is the sole national association representing all segments of the 1.8-million-employee U.S. lodging industry, including hotel owners, real estate investment trusts (REITs), chains, franchisees, management companies, independent properties, state

[1] The parties consented to the filing of this brief, and written documentation of their consent is being submitted concurrently. No counsel for a party wrote this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amici curiae*, their members, or their counsel made a monetary contribution intended to fund its preparation or submission.

hotel associations, and industry suppliers. The mission of AH&LA is to be the voice of the lodging industry, its primary advocate, and an indispensable resource. AH&LA serves the lodging industry by providing representation at the national level and in government affairs, education, research, and communications. AH&LA also represents the interests of its members in litigation raising issues of widespread concern to the lodging industry.

The American Tort Reform Association (the "ATRA") is a broad-based coalition of more than 170 businesses, corporations, municipalities, associations, and professional firms that have pooled their resources to promote a civil justice system that produces fairness, balance, and predictability in civil litigation. The ATRA's members have a substantial interest in ensuring that courts follow constitutional and traditional tort-law principles.

The International Association of Defense Counsel (the "IADC") is an association of corporate and insurance attorneys from the United States and around the globe whose practice is concentrated on the defense of civil lawsuits. It is dedicated to the just and efficient administration of civil justice and continual improvement of the civil justice system. The IADC supports a justice system in which plaintiffs are fairly compensated for genuine injuries, responsible defendants are held liable for appropriate damages, and non-responsible defendants are exonerated without unreasonable cost.

The National Association of Manufacturers (the "NAM") is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs over 12 million

men and women, contributes roughly $2.1 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for two-thirds of private-sector research and development. The NAM's mission is to enhance the competitiveness of manufacturers and improve American living standards by shaping a legislative and regulatory environment conducive to U.S. economic growth.

The National Federation of Independent Business ("NFIB") is the Nation's leading small business advocacy association, representing more than 350,000 member businesses in all fifty States and the District of Columbia. NFIB's members range from sole proprietors to firms with hundreds of employees, and collectively they reflect the full spectrum of America's small business owners. Founded in 1943 as a nonpartisan organization, NFIB defends the freedom of small business owners to operate and grow their businesses and promotes public policies that recognize and encourage the vital contributions that small businesses make to our national economy.

Amici regularly advocate for the interests of their members in federal and state courts throughout the country in cases of national concern. This is one such case. The decision below conflates injury-in-law with injury-in-fact, and effectively holds that Congress can circumvent the minimum requirements for standing under Article III of the Constitution. This is of grave concern to the business community. As this case illustrates, alleged technical violations of regulatory statutes can often affect large numbers of people without actually injuring them. If such people can nevertheless bring lawsuits—without the need to demonstrate any injury beyond the alleged statutory violation itself—businesses will predictably be tied up in damages litigation over harmless al-

leged lapses, diverting their resources from more productive uses. *Amici* urge the Court to restore proper Article III limitations and rein in abusive no-injury lawsuits over such regulatory trifles.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Ninth Circuit's conflation of injury-in-law with injury-in-fact runs headlong into this Court's standing jurisprudence. A plaintiff cannot state a case or controversy under Article III without first establishing that he has standing to sue. *Allen* v. *Wright*, 468 U.S. 737, 750-751 (1984). "From Article III's limitation of the judicial power to resolving 'Cases' and 'Controversies,' and the separation-of-powers principles underlying that limitation," this Court has "deduced a set of requirements that together make up the 'irreducible constitutional minimum of standing.'" *Lexmark Int'l, Inc.* v. *Static Control Components, Inc.*, 134 S. Ct. 1377, 1386 (2014) (quoting *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). "The plaintiff must [1] have suffered or be imminently threatened with a concrete and particularized 'injury in fact' that is [2] fairly traceable to the challenged action of the defendant and [3] likely to be redressed by a favorable judicial decision." *Ibid.* Each of the three requirements serves a different, critical role in "enforc[ing] the Constitution's case-or-controversy requirement." *Elk Grove Unified Sch. Dist.* v. *Newdow*, 542 U.S. 1, 11 (2004).

Injury-in-fact—*i.e.*, a "[c]oncrete injury, whether actual or threatened[—]is that indispensable element of a dispute which serves in part to cast it in a form traditionally capable of judicial resolution." *Schlesinger* v. *Reservists Comm. to Stop the War*, 418 U.S. 208, 220-221 (1974). It is the "foremost" ele-

ment of the inquiry, *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 103 (1998); the one that "adds the essential dimension of specificity to the dispute by requiring that the complaining party have suffered a particular injury caused by the action challenged as unlawful," *Schlesinger*, 418 U.S. at 221. In doing so, it ensures "that the legal questions presented to the court will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action." *Valley Forge Christian Coll.* v. *Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982); see also John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 DUKE L.J. 1219, 1224 (1993) ("The need to insist upon meaningful limitations on what constitutes injury for standing purposes * * * flows from an appreciation of the key role that injury plays in restricting the courts to their proper function in a limited and separated government.").

To establish standing, "the complaining party [is] required to allege a *specific* invasion of th[e] right suffered by him." *Schlesinger*, 418 U.S. at 224 n.14 (emphasis added). And that invasion must be "actual," "distinct," "palpable," and "concrete," and not "conjectural" or "hypothetical." *Allen*, 468 U.S. at 750-751, 756, 760 (internal quotation marks omitted). A mere "[a]bstract injury is not enough," *O'Shea* v. *Littleton*, 414 U.S. 488, 494 (1974), because injury-in-fact "is not an ingenious academic exercise in the conceivable * * * [but] requires * * * a factual showing of *perceptible harm*," *Summers* v. *Earth Island Inst.*, 555 U.S. 488, 499 (2009) (emphasis added and internal quotation marks omitted).

Furthermore, "the requirement of injury in fact is a hard floor of Article III jurisdiction that cannot

be removed by statute." *Summers*, 555 U.S. at 497. It has long been "settled that Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing." *Raines* v. *Byrd*, 521 U.S. 811, 820 n.3 (1997) (citing *Gladstone, Realtors* v. *Vill. of Bellwood*, 441 U.S. 91, 100 (1979)). After all, a constitutional limit that can be conclusively satisfied by a statutory remedy is no constitutional limit at all. See Roberts, *supra*, 42 DUKE L.J. at 1227 ("a holding that Congress may override the injury limitation of Article III would [be] remarkable").

According to the Ninth Circuit, however, "alleged violations of [respondent's] statutory rights are sufficient to satisfy the injury-in-fact requirement of Article III." Pet. App. 8a; see also *id.* at 9a n.3 ("[W]e determine that [respondent] has standing by virtue of the alleged violations of his statutory rights."). Under that view, whenever Congress grants a monetary recovery to a person exposed to an abstract violation of law, that person also has *ipso facto* sustained an injury sufficient to support standing to sue in federal court. And because conflating injury-in-fact with injury-in-law effectively removes causation and redressability—as the court of appeals admitted, see *id.* at 9a—the holding below reduces the three-part standing inquiry to a single-factor test: Constitutional standing exists if some statutory remedy can be found.

The Ninth Circuit has lost sight of fundamental constitutional principles, and the significance of its error reaches far beyond this case. There are dozens of federal laws similar to the one at issue here, all of which could be read to authorize suit against businesses by plaintiffs who have suffered no actual, concrete, or particularized injury. No matter their size,

industry, or geographic location, businesses are subject to various technical legal duties. By the Ninth Circuit's logic, injury-in-fact (and with it causation and redressability) would no longer be a required element for standing in federal courts. With standing based solely on a technical statutory violation that could be identical for a large swath of potential plaintiffs, the traditional class-certification hurdles of commonality and predominance could be rendered meaningless, as well. As a result, businesses would be significantly more likely to face costly and cumbersome class actions seeking damages—sometimes annihilating damages—for conduct that caused concrete and particularized harm to only a handful of people or to no one at all. This is already taking place in lower courts. See pp. 12-22, *infra*.

Fortunately, this need not be so. The damages provision at issue here—in the Fair Credit Reporting Act (FCPA), 15 U.S.C. § 1681n(a)(1)(A)—says nothing about standing or no-injury suits. Its reference to statutory damages as an alternative to actual damages can and should be construed as just that—an alternative damages remedy that in no way seeks to supplant the baseline constitutional requirement that a plaintiff actually have suffered injury-in-fact to bring suit. Construing the statute in this manner would avoid the apparent conflict with Article III and comport with the "well-established principle governing the prudent exercise of this Court's jurisdiction that normally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case." *Nw. Austin Mun. Util. Dist. No. One* v. *Holder*, 557 U.S. 193, 205 (2009).

ARGUMENT

I. STATUTORY INJURY-IN-LAW IS NO SUBSTITUTE FOR ARTICLE III INJURY-IN-FACT

This Court has long emphasized the difference between a statutory violation (which does not *ipso facto* confer Article III standing) and a statutory violation that results in a concrete and particularized injury-in-fact (which *can* result in standing). Compare *Sierra Club* v. *Morton*, 405 U.S. 727 (1972), with *Trafficante* v. *Metro. Life Ins. Co.*, 409 U.S. 205, 209 (1972) (noting that "injury in fact to petitioners, the ingredient found missing in *Sierra Club* * * *, is alleged here").

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

For that reason, this Court has gone to great lengths to identify concrete and particularized interests in support of standing. In *Public Citizen* v.

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

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

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[2] Similarly, in *Massachusetts* v. *EPA*, 549 U.S. 497 (2007), the Court did not base standing on the mere fact that Congress had conferred a cause of action on Massachusetts or had defined the effects of global warming to be an injury. Rather, it

All of this was lost on the Ninth Circuit. Although respondent included "sparse" (and implausible) allegations that inaccurate but favorable information on Spokeo's website caused him injury, Pet. App. 2a, the court of appeals brushed aside "whether harm to his employment prospects or related anxiety could be sufficient injuries in fact," *id.* at 9a n.3. It held instead "that [he] has standing by virtue of the alleged violations of his statutory rights" alone. *Ibid.* In the course of doing so, the court paid lip service to cases holding that "the Constitution limits the power of Congress to confer standing." *Id.* at 7a (discussing *Defenders of Wildlife*). But it nonetheless went on to hold that a statutory violation can *substitute* for an injury. See *id.* at 8a ("alleged violations of * * * statutory rights are sufficient to satisfy * * * Article III").

The Ninth Circuit thus applied this Court's standing precedent in a manner that leaves it almost bereft of force. Its sweeping holding rests on a misunderstanding of Congress's powers to define standing. Congress cannot declare that, so long as a plaintiff can state a claim under a statute, he was necessarily injured by the alleged violation of that statute. Although Congress has the power to "expand standing to the full extent permitted by Art. III," *Gladstone*, *Realtors*, 441 U.S. at 100 (internal quotation marks omitted), it *cannot* expand standing *beyond* the limits of Article III. The "requirement of injury in fact is a hard floor * * * that cannot be removed by statute." *Summers*, 555 U.S. at 497; see also Jonathan H. Adler, *Standing Still in the Roberts Court*,

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[Footnote continued from previous page]

emphasized the need for the plaintiff State to "allege[] a particularized injury in its capacity as a landowner." *Id.* at 522.

59 CASE W. RES. L. REV. 1061, 1063 (2009) ("Congress may tinker on the edges, but it cannot confer standing on parties that fail to meet the underlying constitutional requirements in a given case."). Congress cannot substitute statutory rights for injuries-in-fact that do not exist. As this Court held in *Defenders of Wildlife*, "[s]tatutory broadening of the categories of injury that may be alleged in support of standing is a different matter from abandoning the requirement that the party seeking review must himself have suffered an injury." 504 U.S. at 578 (discussing *Warth* v. *Seldin*, 422 U.S. 490, 500 (1975)) (internal punctuation and quotation marks omitted).

Injury-in-law without injury-in-fact does not pass muster under this Court's precedents or the Constitution. A party is not injured by another's mere (alleged) nonobservance of the law. Rather, injury-in-fact results from the *tangible consequences* of another's illegal acts—and here there were none. See, *e.g.*, *Valley Forge Christian Coll.*, 454 U.S. at 485 (holding that a putative plaintiff must identify a "personal injury suffered * * * *as a consequence* of the alleged" violation).

This is no minor matter. "Standing is built on a single basic idea—the idea of separation of powers," *Allen* v. *Wright*, 468 U.S. 737, 752 (1984), and the issue here strikes at the heart of that separation. If "alleged violations of [a plaintiff's] statutory rights [we]re sufficient to satisfy the injury-in-fact requirement of Article III," Pet. App. 8a—*i.e.*, if injury-in-law could substitute for injury-in-fact—Congress could essentially dictate access to the federal courts by removing the independent force of the case-or-controversy limitation. Without a requirement of an actual injury or a causal connection between that

nonexistent injury and the defendant's violation of a legal duty, the existence of a remedy would bootstrap into standing to pursue the remedy in federal court. See, *e.g.*, *id.* at 9a ("When the injury in fact is the violation of a statutory right * * *, causation and redressability will usually be satisfied.").

That radical result would sidestep this Court's standing jurisprudence in a substantial category of cases—a category limited in size only by legislative restraint or the limits of legislative ingenuity. It would conflate injury-in-fact with a legislative bounty—the kind of injury "that is merely a 'byproduct' of the suit itself," and that "cannot give rise to a cognizable injury in fact for Article III standing purposes." *Vt. Agency of Natural Res.* v. *United States ex rel. Stevens*, 529 U.S. 765, 773 (2000). It would license plaintiffs to "seek[] not remediation of [their] own injury * * * but vindication of the rule of law—the 'undifferentiated public interest' in faithful execution of [the law]," *Steel Co.*, 523 U.S. at 106—and in effect "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," *Defenders of Wildlife*, 504 U.S. at 577. That is neither what the Framers intended nor what the Constitution allows for the exercise of *judicial* power. See Roberts, *supra*, 42 DUKE L.J. at 1232.

II. ABANDONING ARTICLE III INJURY-IN-FACT WOULD INVITE ABUSIVE CLASS-ACTION LITIGATION

Allowing a technical statutory violation, standing alone, to replace injury-in-fact not only would upset settled constitutional law, but also would have very real practical consequences for the many corporate

defendants subjected to nuisance suits by putative class members who have suffered no actual harm. Unfortunately, the no-injury suit here is not unique. There have been—and will be—many others, involving the FCRA or any of dozens of statutes with similar statutory damages provisions,[3] where plaintiffs who suffered no tangible harm allege technical statutory violations. The vast majority of these cases are

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[3] These include the Anti-Counterfeiting Consumer Protection Act, 15 U.S.C. § 1116(d) (providing statutory damages of $1,000 to $200,000 per counterfeit activity, up to $2 million for a willful violation), Anti-Cybersquatting Consumer Protection Act, 15 U.S.C. § 1125(d) ($1,000 to $100,000 per bad-faith violation), Cable Piracy Act, 47 U.S.C. § 605(a) ($1,000 to $10,000 per violation, and $100,000 per willful violation), Cable Communications Privacy Act, 47 U.S.C. § 551(f)(2)(A) ($100 per day of violation or $1,000 per plaintiff), Electronic Communications Privacy Act (ECPA), 18 U.S.C. § 2707(c) ($1,000 per plaintiff, plus punitive damages if willful), Electronic Funds Transfer Act (EFTA), 15 U.S.C. § 1693m(a)(2)(A) ($100 to $1,000 per plaintiff), Fair and Accurate Debt Transactions Act (FACTA), 15 U.S.C. § 1681n ($1,000 per violation, plus punitive damages), Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. § 1692k(a)(2) ($1,000 per plaintiff, up to $500,000 or one percent of debt collector's net worth), Homeowner Protection Law, 12 U.S.C. § 4907(a)(2) ($2,000 per plaintiff, up to $500,000 or one percent of liable party's net worth), Migrant and Seasonal Agricultural Worker Protection Act (MSAWPA), 29 U.S.C. § 1854(c)-(e) ($500 per plaintiff per violation, up to $10,000 per plaintiff), Telephone Consumer Protection Act (TCPA), 47 U.S.C. § 227(b)(3)(B) ($500 per violation, trebled if willful), Truth in Lending Act (TILA), 15 U.S.C. § 1640(a)(2) ($500 to $5,000 per violation, up to one percent of debt collector's net worth), Worker Adjustment and Retraining Notification Act (WARN), 29 U.S.C. § 2104(a)(3) ($500 per violation).

brought as putative class actions,[4] often seeking damages in the millions or billions of dollars.[5]

The incentives created by the combination of detailed legislative oversight of business activity and judicial willingness to relax standing requirements has not gone unnoticed by the class-action bar. Just as substituting a statutory violation for injury-in-fact bootstraps causation and redressability for purposes of standing, see pp. 6-7, 11-12, *supra*; Pet. Br. 39, substituting a statutory violation for standing almost necessarily subsumes the class-certification analysis. In this way, the jettisoning of a meaningful injury-in-fact requirement—and with it a meaningful causation requirement, see Pet. Br. 39—removes some of the key constraints on class certification. If, after all, no injury beyond an alleged statutory violation is required, it would be unnecessary in many cases to separate the potentially injured from the set of all

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[4] The few that are not class actions might as well be. The plaintiff in *US Fax Law Ctr., Inc.* v. *iHire, Inc.*, 362 F. Supp. 2d 1248 (D. Colo. 2005), for example, is a company that aggregates unwanted faxes from individuals and companies to bring large-scale lawsuits on their behalf "to secure the dollar damages and penalties that are rightfully yours by law" under the Telephone Consumer Protection Act, 47 U.S.C. § 227(b). See http://www.stop-junk-fax-spam.com/services.html (last visited July 7, 2015).

[5] See, *e.g.*, *Beaudry* v. *TeleCheck Servs., Inc.*, 579 F.3d 702, 703-704 (6th Cir. 2009) (class representative seeking to represent "hundreds of thousands, if not millions," of Tennessee consumers, each of whom would be entitled to up to $1,000—for a total liability in the billions) (internal quotation marks omitted); see also *Trans Union LLC* v. *FTC*, 536 U.S. 915, 917 (2002) (Kennedy, J., dissenting from denial of cert.) ("Because the FCRA provides for statutory damages of between $100 and $1,000 for each willful violation, petitioner faces potential liability approaching $190 billion.").

persons with any identifiable connection to a statutory violation. The only issue that must be proved is an abstract violation of a legal duty, regardless of its widely varying or entirely absent effects on individual class members: Commonality under Fed. R. Civ. P. 23(a)(2) and predominance under Fed. R. Civ. P. 23(b)(3) collapse into a single-issue inquiry.

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

Predominance—which gets at "whether proposed classes are sufficiently cohesive to warrant adjudication by representation"—"trains on the legal or factual questions that qualify each class member's case as a genuine controversy." *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 623 (1997). But that test, too, would almost always be satisfied if a common injury-in-fact exists merely by virtue of common exposure to the same injury-in-law. And this would occur without any need ever to consider individualized actual harm or causation.

With the requirements of commonality and predominance effectively relaxed to the point of nonexistence, class certification would often be nearly automatic: An assertion of a generalized injury-in-law would be the beginning and the end of the matter. This would lead to a perverse result: The ease with which a statutory violation can surmount the normal roadblocks of commonality and predominance

would encourage class counsel to forgo traditional claims based on actual injuries in favor of suits where the only injury common to class members is the defendant's alleged technical violation of a statute. Named plaintiffs would have an incentive to waive any claim for actual damages in an attempt to increase their chances of obtaining class certification on their statutory damages claims.

Enterprising class action attorneys have already caught on to this trick. See, *e.g.*, *Chakejian* v. *Equifax Info. Servs., LLC*, 256 F.R.D. 492, 499-500 (E.D. Pa. 2009) (named plaintiff "elect[ed] to forego actual damages"); *White* v. *E-Loan, Inc.*, No. C 05-02080, 2006 WL 2411420, at *2 (N.D. Cal. Aug. 18, 2006) (named plaintiff "willing to forego actual damages to seek only statutory damages"). Rather than litigate the alleged statutory violations in the context of the actual individual injuries they might cause, entrepreneurial class-action lawyers deliberately litigate their claims of statutory violations in the abstract to increase settlement amounts.[6] The resulting payouts amount to deadweight economic loss—a wealth transfer that overcompensates for nonexistent injuries and over-deters insubstantial regulatory violations, leading to wasteful expenditures aimed at punctilious compliance with technical statutory requirements.

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[6] Indeed, "[w]hat makes these statutory damages class actions so attractive to plaintiffs' lawyers is simple mathematics: these suits multiply a minimum $100 statutory award (and potentially a maximum $1,000 award) by the number of individuals in a nationwide or statewide class." Sheila B. Scheuerman, *Due Process Forgotten: The Problem of Statutory Damages and Class Actions*, 74 MO. L. REV. 103, 114 (2009).

In stark contrast to respondent's purported injury, the injuries inflicted upon businesses by the nonenforcement of constitutional standing requirements are anything but abstract. Those injuries are often most pronounced when the defendant did not even violate the statute at issue, or did so in only the most *de minimis* way. Take, for instance, *Harris* v. *Experian Info. Solutions, Inc.*, No. 6:06-cv-1808-GRA, Docket No. 201, at *4-5 (D.S.C. June 30, 2009), in which the plaintiff class claimed that credit reporting agencies violated the FCRA by failing to report consumers' credit limits for their Capital One credit cards—information that Capital One refused to provide to the agencies. The omission of credit-limit information hurt some consumers' credit scores, had no impact on certain others, and increased the credit scores of a very substantial third group. *Id.* at *3. Even though the named plaintiff had *benefited* from the alleged violation, he was certified to represent a class of more than four million consumers—which, at $100 to $1,000 per violation, sought aggregate statutory damages between $400 million and $4 billion. *Id.* at *5. Although defendants ultimately prevailed on the merits—the court held that omitting the information at issue did not violate the FCRA—they did so only after expending considerable resources to get to summary judgment (and at the risk of a potentially ruinous adverse judgment). *Id.* at *2.

Similarly, in *Bateman* v. *American Multi-Cinema, Inc.,* 623 F.3d 708 (9th Cir. 2010), which concerned a movie theater chain's alleged violation of amendments to the FCRA by the Fair and Accurate Credit Transactions Act (FACTA), 15 U.S.C. § 1681c(g) (2005), a putative class sought up to $290 million for the defendant's inclusion, on electronically printed receipts, of more than the last five digits of

the plaintiff class's credit or debit card numbers—even though the class suffered no harm from the practice.[7] The district court denied class certification on the ground that the alleged liability "was enormous and out of proportion to any harm suffered by the class." *Id.* at 710. But the Ninth Circuit reversed, holding that consideration of those factors was an abuse of discretion. *Id.* at 713-723. Predictably, the case then settled—for nearly $6.5 million, exclusive of attorneys' fees and costs. See *Bateman* v. *Am. Multi-Cinema, Inc.*, No. 2:07-CV-00171-FMC-AJWX, Docket No. 114 at *1 (C.D. Cal. Oct. 11, 2011).

Plaintiffs' lawyers have brought FACTA class actions against businesses in many sectors,[8] yet the

[7] Seeking merely $290 million for a technical statutory violation was rather modest of the *Bateman* plaintiffs. In yet another FACTA case, *Lopez* v. *KB Toys Retail, Inc.*, No. CV 07-144-JFW (CWx), 2007 U.S. Dist. LEXIS 82025, at *13 (C.D. Cal. July 17, 2007), the class sought *$2.9 billion* from the now-defunct toy retailer for the similarly egregious error of including the first, rather than the last, four digits of credit card numbers on customers' receipts. In *Kesler* v. *Ikea U.S. Inc.*, No. SACV 07-568 JVS (RNBx), 2008 WL 413268, at *2 (C.D. Cal. Feb. 4, 2008), the court certified a class seeking *$2.4 billion* from the furniture retailer for including customers' credit-card expiration dates on receipts—despite no evidence that *anyone* in the class suffered any actual injury, see *id.* at *4 ("[E]ven assuming that Kesler suffered no 'out of pocket loss, identity theft, or risk thereof,' these circumstances do not make her atypical of the class, where class recovery is not predicated on actual damages.").

[8] See, *e.g.*, *Cicilline* v. *Jewel Food Stores, Inc.*, 542 F. Supp. 2d 831, 834 (N.D. Ill. 2008) (granting class certification in suit against Jewel supermarkets, seeking up to $1 billion in damages); *Troy* v. *Red Lantern Inn, Inc.*, No. 07 C 2418, 2007 WL 4293014, at *5 (N.D. Ill. Dec. 4, 2007) (granting class certifica-

story is much the same in cases involving many other statutes with similar provisions. In one case concerning the Electronic Communications Privacy Act of 1986 (ECPA), 18 U.S.C. §§ 2510 *et seq.*, for example, the named plaintiffs claimed on behalf of themselves and a putative nationwide class of millions that one of the defendant's computer programs was unlawfully intercepting users' electronic communications in violation of the ECPA. See *Specht* v. *Netscape Commc'ns Corp.*, 150 F. Supp. 2d 585 (S.D.N.Y. 2001) (describing allegations in the complaint), *aff'd*, 306 F.3d 17 (2d Cir. 2002). Because none of the *Specht* plaintiffs alleged any particular or concrete injury, see *Specht* v. *Netscape Commc'ns Corp.*, Nos. 1:00-CV-4871, *et al.*, 2004 WL 5475796, ¶¶ F, N, Q (S.D.N.Y. Sept. 2, 2004) ("Stipulation of Settlement"), the case rightfully should have been dismissed at the outset for lack of standing, see, *e.g.*, *Kendall* v. *Employees Ret. Plan of Avon Prods.*, 561 F.3d 112, 121 (2d Cir. 2009) (plaintiffs must "allege some injury or deprivation of a specific right" outside the violation of a "statutory duty").

Instead, it tied up the parties and federal courts for years while class counsel sought statutory damages of $10,000 apiece, for each of the named plaintiffs and for each of the many millions of supposedly identically situated putative class members. See *Specht* v. *Netscape Commc'ns Corp.*, Nos. 1:00-CV-4871, *et al.*, 2000 WL 34500293, ¶¶ 13,

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tion in suit against Balducci's, seeking up to $5 million in damages); *Medrano* v. *WCG Holdings, Inc.*, No. SACV 07-0506 JVS (RNBx), 2007 WL 4592113, at *7 (C.D. Cal. Oct. 15, 2007) (granting class certification in suit against a Wendy's franchise, seeking up to $3.2 million in damages).

41-54 (S.D.N.Y. Aug. 3, 2000). The litigation cost Netscape several million dollars in discovery and other defense costs before resulting in a class-wide settlement in which plaintiffs and their counsel obtained no money. See Stipulation of Settlement ¶¶ F, N, Q; see also *Specht* v. *Netscape Commc'ns Corp.*, Nos. 1:00-CV-4871, *et al.*, Docket No. 94, at *3 (S.D.N.Y. Apr. 22, 2005) (denying class counsel's motion for attorneys' fees on grounds that settlement did not secure any "quantifiable" benefits for the class), *aff'd sub nom. Weindorf* v. *Netscape Commc'ns Corp.*, 173 F. App'x 44 (2d Cir. 2006).

The Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. § 1692, has been equally ripe for abuse. The parties in *Jerman* v. *Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573 (2010), for instance, spent years litigating whether the words "in writing" can be included in a debt collector's letter. After this Court remanded the case, the parties filed cross-motions for summary judgment, and the district court held that the plaintiff and the class were entitled to zero actual damages and zero statutory damages. See *Jerman* v. *Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, No. 1:06-cv-1397, 2011 WL 1434679, at *10-*11 (N.D. Ohio Apr. 14, 2011). Undeterred, plaintiff's counsel filed a motion seeking nearly $350,000 in attorneys' fees and costs, arguing that the action was successful because plaintiff "obtained judgment" on a claim. See *Jerman*, No. 1:06-cv-1397-PAG, Docket No. 62-1, at *3-4 (N.D. Ohio May 3, 2011). Defendants finally settled. Notwithstanding the court's prior ruling that the plaintiff class was entitled to nothing, the class received a grand total of $17,000—roughly one-ninth of the class lawyers' take. *Jerman*, No. 1:06-cv-1397-PAG, Docket No. 88-1, at *4 (N.D. Ohio Dec. 13, 2011).

There are countless other, equally egregious examples involving similar statutes. See, *e.g.*, *In re Facebook Privacy Litig.*, 791 F. Supp. 2d 705, 711-712 (N.D. Cal. 2011) (holding that plaintiffs established standing under Article III by alleging a statutory violation despite a lack of injury in fact, but dismissing case on grounds that allegations did not state a claim under the ECPA); *Taylor* v. *Acxiom Corp.*, 612 F.3d 325, 340 n.15 (5th Cir. 2010) (same result under the Driver's Privacy Protection Act (DPPA), 18 U.S.C. §§ 2721-2725, in a suit seeking trillions of dollars in statutory damages). The same pattern emerges time and again: (1) file technical regulatory suit seeking astronomical damages; (2) get the class certified; (3) settle. In *Parker* v. *Time Warner Entm't Co., L.P.*, 631 F. Supp. 2d 242, 248 (E.D.N.Y. 2009), for instance, the millions-strong class sought damages of "at a minimum, hundreds of millions of dollars" for technical violations of the Cable Communications Policy Act, which provides statutory damages of $1,000 per claimant. 47 U.S.C. § 551(f)(2)(A). After class certification, this resulted in a settlement with Time Warner paying "Class Counsel's fees and costs in the total amount of $5 million." 631 F. Supp. 2d at 251. And the "injured" class members? They got a check for $5, one free month of cable service, or "two free Movies on Demand." *Id.* at 249 n.6.

Whether it is for a technical violation of the FCRA, the FACTA, the ECPA, or any of dozens of other statutes of their kind, the combination of class actions and no-injury statutory private actions provides an easy roadmap for class counsel to drive up damages claims "to levels entirely disproportionate to the underlying dispute." Lawyers for Civil Justice et al., White Paper, *Reshaping the Rules of Civil Pro-*

cedure for the 21st Century 18 (May 2, 2010), for 2010 Conference on Civil Litigation, Duke Law School (May 10-11, 2010).[9] Layering class certification "on top of per-violation damages" in these statutes ultimately "distort[s], rather than facilitate[s], the [statutory] remedial scheme." Richard N. Nagareda, *Aggregation and Its Discontents: Class Settlement Pressure, Class-Wide Arbitration, and CAFA*, 106 COLUM. L. REV. 1872, 1887 (2006). And it leads to absurd lawsuits with bet-the-company damages amounts. Take, for instance, the FACTA claim a class brought against pizzeria Chuck E. Cheese in *Blanco* v. *CEC Entm't Concepts L.P.*, No. CV 07-0559 GPS (JWJx), 2008 WL 239658, at *2 (C.D. Cal. Jan. 10, 2008). There, the plaintiffs "sought $1.9 billion, even though the company's net income the prior year was only $68 million." Scheuerman, *supra*, at 106; see also *Lopez*, 2007 U.S. Dist. LEXIS 82025, at *14 (plaintiffs sought a minimum statutory damages award of "more than 600% of [d]efendant's net worth"). Piling on one no-injury plaintiff after another serves one very simple goal: "The larger the claim, the greater the leverage plaintiffs' attorneys have to obtain a settlement." 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, 617 (2010).

For companies with many customers or mass-market products, suits like these create a risk of crippling damages for conduct that caused no actual

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[9] Available at http://www.dri.org/ContentDirectory/Public/WhitePapersReports/Reshaping%20the%20Rules%20of%20Civil%20Procedure%20for%20the%2021st%20Century%20(2010).pdf (last visited July 7, 2015).

harm.[10] It is no secret that class actions are a "powerful tool [that] can give a class attorney unbounded leverage." S. Rep. No. 109-14, at 20 (2005) (Class Action Fairness Act); *ibid.* (discussing "frivolous lawsuits" that "essentially force corporate defendants to pay ransom to class attorneys by settling"). As this Court has repeatedly recognized, "[c]ertification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense." *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 476 (1978); see also *AT&T Mobility LLC* v. *Concepcion*, 131 S. Ct. 1740, 1752 (2011) ("[W]hen damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once, the risk of an error will often become unacceptable. Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims."); *Shady Grove Orthopedic Assocs., P.A.* v. *Allstate Ins. Co.*, 559 U.S. 393, 445 n.3 (2010) (Ginsburg, J., dissenting) ("When representative plaintiffs seek statutory damages, [the]

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[10] In an effort to curtail such frivolous suits, some district courts have refused to certify classes where "even the minimum statutory damages would be enormous and completely out of proportion given the lack of any actual harm." *Evans* v. *U-Haul Co. of Cal.*, No. CV 07-2097-JFW, 2007 WL 7648595, at *4 (C.D. Cal. Aug. 14, 2007) (denying certification of a class seeking statutory damages of up to $1.5 billion). But those rearguard attempts to fix problems caused by lax enforcement of constitutional standing principles are at best unevenly applied and, worse, increasingly foreclosed as a matter of law. See, *e.g.*, *Murray* v. *GMAC Mortg. Corp.*, 434 F.3d 948, 952-953 (7th Cir. 2006) (foreclosing consideration of the size of statutory damages sought under the FCRA, in a suit seeking up to $1.2 billion in damages).

pressure to settle may be heightened because a class action poses the risk of massive liability unmoored to actual injury.").

Frivolous class actions like these take an enormous toll on U.S. businesses. The cost to defend against a class action can range from "$5 million to $100 million." Adeola Adele, Dukes v. Wal-Mart: *Implications for Employment Practices Liability Insurance* 1 (July 2011).[11] Although the costs are high enough to hit the bottom line of even the largest company, frivolous class actions "particularly hit[] small business because it is the small business that gets caught up in the class action web without the resources to fight." 151 Cong. Rec. 1664 (Feb. 8, 2005) (statement of Sen. Grassley); see also U.S. Chamber Institute for Legal Reform, *Tort Liability Costs for Small Business* 9 (July 2010)[12] (noting that small businesses took in only 22% of total revenue but bore the brunt of 81% of business tort liability costs); NFIB, *National Small Business Survey* vol. 5, issue 2 (2005) (noting that, on average, the cost of settling a legal dispute consumes 10% of a small business owner's salary); Matthew Grimsley, *What*

[11] Available at http://usa.marsh.com/Portals/9/Documents/FINPROFocusDukesvWalMartJuly2011.pdf (last visited July 7, 2015). See also Carlton Fields Jorden Burt, *Class Action Survey: Best Practices in Reducing Cost and Managing Risk in Class Action Litigation* 14 (2015), available at http://classactionsurvey.com/pdf/2015-class-action-survey.pdf ("In 25 percent of bet-the-company class actions, companies spend more than $13 million per year per case on outside counsel. In 75 percent of such actions, the cost of outside counsel exceeds $5 million per year per case.").

[12] Available at http://www.instituteforlegalreform.com/uploads/sites/1/ilr_small_business_2010_0.pdf (last visited July 7, 2015).

Effect Will Wal-Mart *v.* Dukes *Have on Small Businesses?*, 8 OHIO ST. ENTREPRENEURIAL BUS. L.J. 99, 116-117 (2013) (discussing how small businesses, with fewer resources, are particularly ill equipped to fight frivolous class actions). And, in addition to the direct costs of time and expense, there is the not-insignificant indirect cost to a business's reputation that comes with being embroiled in a class action. See, *e.g.*, Grimsley, *supra*, at 100-101 & n.7.

It is a well-known fact that class actions can drag on for years. See, *e.g.*, U.S. Chamber Institute for Legal Reform, *Do Class Actions Benefit Class Members? An Empirical Analysis of Class Actions* 1, 5 (Dec. 2013)[13] ("Approximately 14% of all class action cases remained pending four years after they were filed, without resolution or even a determination of whether the case could go forward on a class-wide basis."). The prospect of paying several years' worth of attorney fees to maintain a defense works in tandem with the astronomical damages sought in these no-injury statutory damages cases to make class certification, "in effect, the whole case." FTC Workshop, *Protecting Consumer Interests in Class Actions* (Sept. 13-14, 2004), in *Panel 2: Tools for Ensuring that Settlements are "Fair, Reasonable, and Adequate*," 18 GEO. J. LEGAL ETHICS 1197, 1213 (2005).[14] In the

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[13] Available at http://www.instituteforlegalreform.com/uploads/sites/1/Class_Action_Study.pdf (last visited July 7, 2015).

[14] Moreover, a district court's certification of a class is often conclusive because it is difficult for parties to obtain appellate review of class certification. U.S. Chamber Institute for Legal Reform, *A Roadmap for Reform: Lessons from Eight Years of the Class Action Fairness Act* 14 (Oct. 2013), available at http://www.instituteforlegalreform.com/uploads/sites/1/A_

end, businesses subjected to these kinds of suits can either fight on, bearing the significant costs to do so and also opening themselves up to potentially ruinous liability, or acquiesce to what amounts to a "blackmail settlement[]." Henry J. Friendly, *Federal Jurisdiction: A General View* 120 (1973); cf. Richard A. Epstein, *Class Actions: Aggregation, Amplification, and Distortion*, 2003 U. CHI. LEGAL. F. 475, 496 (2003) ("[A] 10 percent exposure to a ten billion dollar verdict counts as real money, even today.").

Class actions will probably always "present opportunities for abuse." *Hoffmann-La Roche Inc.* v. *Sperling*, 493 U.S. 165, 171 (1989). But the likelihood of abuse is particularly great in cases such as this one, where a plaintiff need not show actual harm. These sorts of baseless class actions can and should be resolved quickly through challenges to standing. The restoration of proper constitutional standing requirements would deter the plaintiffs' bar from filing such meritless suits in the first place and spare defendants the enormous costs and settlement pressures that accompany such litigation. In this "era of frequent litigation [and] class actions * * *, courts must be more careful to insist on the formal rules of standing, not less so." *Ariz. Christian Sch. Tuition Org.* v. *Winn*, 131 S. Ct. 1436, 1449 (2011).

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Roadmap_For_Reform_pages_web.pdf (last visited July 7, 2015); *id.* at 13 ("[B]etween September 30, 2006 and April 24, 2013, federal appellate courts granted fewer than *one fourth* of the [Rule 23(f)] petitions seeking interlocutory review of lower court class certification rulings.").

III. THE FCRA SHOULD BE CONSTRUED TO AVOID CONFLICT WITH ARTICLE III

There is no need to set the FCRA (or many other statutes like it) on a collision course with Article III. As Petitioner ably explains, Pet. Br. 53-56, the Ninth Circuit could have sidestepped the constitutional concerns raised here through statutory construction, with or without employing the "well-established principle that statutes will be interpreted to avoid constitutional difficulties." *Frisby* v. *Schultz*, 487 U.S. 474, 483 (1988); accord *Bond* v. *United States*, 134 S. Ct. 2077, 2088 (2014).

We leave to petitioner the detailed construction of the statute, and focus on the constitutional-avoidance canon. By that principle, "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Pub. Citizen*, 491 U.S. at 466. Indeed, when construing a statute, "this Court will first ascertain whether a construction of the statute is fairly possible by which the constitutional question may be avoided." *United States* v. *Sec. Indus. Bank*, 459 U.S. 70, 78 (1982) (internal quotation marks omitted); see also *Arizona* v. *Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. 2247, 2259 (2013) (construing state law in a manner "to avoid serious constitutional doubt"); Adrian Vermeule, *Saving Constructions*, 15 GEO. L.J. 1945, 1960-1961 (1997) (discussing several other instances where the Court has construed statutes to avoid potential constitutional problems).

It is not hard to find an "otherwise acceptable construction" of the FCRA. The statute provides

consumers a statutory remedy of "any actual damages sustained by the consumer as a result of the failure or damages of not less than $100 and not more than $1,000." 15 U.S.C. § 1681n(a)(1)(A). A "fair reading" (*Bond*, 134 S. Ct. at 2088) of the FCRA's damages provision is that it gives a plaintiff the option of seeking statutory damages in place of actual damages in the event, for instance, that his actual damages are worth less than $1,000 or are difficult to prove. As another court of appeals has noted, a "reasonable reading of th[is] statute" is one that would "still require proof of actual damages but simply substitute statutory rather than actual damages for the purpose of calculating the damage award." *Dowell* v. *Wells Fargo Bank, NA*, 517 F.3d 1024, 1026 (8th Cir. 2008) (per curiam); *ibid.* ("It does not necessarily follow from [Section 1681n(a)(1)(A)] that statutory damages are available where a plaintiff fails to prove actual damages.").[15] Nothing in the Act itself suggests the broader, constitutionally problematic reading that the alternative statutory damages provision was meant to displace traditional standing requirements. See Pet. Br. 55.

Congress indicated no desire to test the boundaries of constitutional standing when it provided for statutory damages in the FCRA. Courts should not assume that Congress has exercised the full extent of its power to expand standing when it has not said so. When "choosing between competing plausible inter-

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[15] See also *Wallace* v. *ConAgra Foods, Inc.*, 747 F.3d 1025, 1032 (8th Cir. 2014) (declining to find congressional intent to permit no-injury suits in the Class Action Fairness Act). But see *Hammer* v. *Sam's East, Inc.*, 754 F.3d 492, 499 (8th Cir. 2014) (holding—incorrectly—that a statutory violation of the FCRA constituted injury-in-fact, but not rejecting *Dowell*).

pretations of a statutory text," there is a "reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts." *Clark* v. *Martinez*, 543 U.S. 371, 381 (2005). Especially here, where the constitutional problem is as grave as it is—see pp. 11-12, *supra*; see also Roberts, *supra*, 42 DUKE L.J. at 1226 ("If Congress directs the federal courts to hear a case in which the requirements of Article III are not met, that Act of Congress is unconstitutional.") (discussing *Defenders of Wildlife*, 504 U.S. at 560)—courts can and should construe statutes *not* to supplant Article III.

A construction that avoids conflict with Article III would also refute respondent's contention that "[t]he likely result of a victory for Spokeo would be a shift of class actions from federal courts, which have limited jurisdiction, to state courts of general jurisdiction." Br. in Opp. 17. This Court's construction of the FCRA, as a "question[] of federal law," would be "binding on all state courts under the supremacy clause of the United States Constitution." *Pierce* v. *San Mateo County Sheriff's Dept.*, 232 Cal. App. 4th 995, 1006 (Cal. Ct. App. 2014); accord *Pippen* v. *State*, 854 N.W.2d 1, 10 (Iowa 2014) ("[O]f course, the decisions of the United States Supreme Court constitute binding authority which we must faithfully apply in our interpretation of federal law."); *State Bank of Cherry* v. *CGB Enters., Inc.*, 984 N.E.2d 449, 458 (Ill. 2013) ("United States Supreme Court interpretation of federal law is clearly binding on this court."); *State* v. *Maddox*, 825 N.W.2d 140, 144 (Minn. 2013) ("Supreme Court precedent on matters of federal law * * * is binding on this court."). It is beyond dispute that the "binding application of federal law" is "ultimately subject to control by this Court." *ASARCO Inc.* v. *Kadish*, 490 U.S. 605, 622 (1989).

In any event, respondent's touted distinction between "federal courts * * * [of] limited jurisdiction" and "state courts of general jurisdiction" (Br. in Opp. 17) greatly oversimplifies the matter. Although the "constraints of Article III do not apply to state courts," *ASARCO*, 490 U.S. at 617, States nevertheless look to federal standing requirements to interpret their own standing rules, particularly with regard to the element that a plaintiff must show "injury in fact." Indeed, many state courts have expressly incorporated federal standing requirements into their own law. See, *e.g.*, *Wasden* v. *State Bd. of Land Comm'rs*, 280 P.3d 693, 697 (Idaho 2012) ("This Court has articulated a standing doctrine analogous to the federal rule."); *Ex parte McKinney*, 87 So. 3d 502, 513 (Ala. 2011) ("our concepts of justiciability are not substantially dissimilar" to the "case-or-controversy requirement of Article III of the United States Constitution"); *Dover Historical Soc'y* v. *City of Dover Planning Comm'n*, 838 A.2d 1103, 1111 (Del. 2003) ("[T]he *Lujan* requirements for establishing standing under Article III to bring an action in federal court are generally the same as the standards for determining standing to bring a case or controversy within the courts of Delaware."); *Town of Parker* v. *Milton*, 726 A.2d 477, 480 (Vt. 1998) ("The judicial power, as conferred by the Constitution of this State upon this Court, is the same as that given to the Federal Supreme Court by the United States Constitution."); *Toxic Waste Impact Grp., Inc.* v. *Leavitt*, 890 P.2d 906, 910-911 (Okla. 1994) (noting that Oklahoma's standing "jurisprudence is similar" to federal law).

Still other States look to federal standing case law as a guide to their own standing requirements. See, *e.g.*, *Godfrey* v. *State*, 752 N.W.2d 413, 418 (Iowa

2008) ("[O]ur doctrine on standing parallels the federal doctrine, even though standing under federal law is fundamentally derived from constitutional strictures not directly found in the Iowa Constitution.") (discussing injury-in-fact element); *Feminist Women's Health Ctr.* v. *Burgess*, 651 S.E.2d 36, 38 (Ga. 2007) ("[W]e frequently have looked to United States Supreme Court precedent concerning Article III standing to resolve issues of standing to bring a claim in Georgia's courts."); *Sea Pines Ass'n for the Protection of Wildlife, Inc.* v. *S.C. Dep't of Natural Res.*, 550 S.E.2d 287, 291-292 (S.C. 2001) (noting that standing "requires the plaintiff to suffer an injury in fact, or a particularized harm," and looking to *Defenders of Wildlife* and other federal case law to assess the "actual or imminent" nature of that injury); *Cincinnati City Sch. Dist.* v. *State Bd. of Educ.*, 680 N.E.2d 1061, 1066 (Ohio 1996) ("[I]n deciding issues of standing in the courts of Ohio, the Ohio Supreme Court relies on federal court decisions."); *Carter* v. *Mont. Dep't of Transp.*, 905 P.2d 1102, 1105 (Mont. 1995) (Nelson, J., concurring) ("This Court has interpreted [standing in state courts] to embody the same limitations as the Article III 'case or controversy' provision in the United States Constitution.").

And state courts routinely assess whether plaintiffs have alleged the requisite injury-in-fact to have standing to bring suit. See, *e.g.*, *Save the Pine Bush, Inc.* v. *Common Council of the City of Albany*, 918 N.E.2d 917, 924 (N.Y. 2009) (Pigott, J., concurring) ("In order to have standing, a party must demonstrate an 'injury in fact'—an actual legal stake in the matter being adjudicated."); *Glisson* v. *City of Marion*, 720 N.E.2d 1034, 1039 (Ill. 1999) (recognizing the "general principle that standing requires some injury

in fact to a legally cognizable interest"); *Coleman* v. *Sopher*, 459 S.E.2d 367, 372 n.6 (W. Va. 1995) ("[P]laintiffs * * * must have suffered an 'injury-in-fact'—an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent and not conjectural or hypothetical.") (looking to *Defenders of Wildlife*); *Tex. Ass'n of Bus.* v. *Tex. Air Control Bd.*, 852 S.W.2d 440, 444 (Tex. 1993) ("Under the Texas Constitution, standing is implicit in the open courts provision, which contemplates access to the courts only for those litigants suffering an injury."); Gavin L. Charlston, *When Silence Means Everything: The Application of Proposition 64 to Pending Actions*, 58 HASTINGS L.J. 623, 623 (2007) (discussing Proposition 64, through which California voters amended the State's Unfair Competition Law, under which "far more time and money [had been] spent on actions brought by plaintiffs who had suffered no cognizable injury" than on legitimate claims, to require litigants to "prove that they have suffered an injury-in-fact").

Indeed, even those States that have been most reluctant to adopt the full import of federal standing requirements part ways only in circumstances that require addressing matters of exceptional public importance. See, *e.g.*, *ACLU* v. *Albuquerque*, 188 P.3d 1222, 1226-1227 (N.M. 2008) (noting that state courts apply traditional standing requirements, with an exception turning on the "public importance of the issues involved"); *Sierra Club* v. *Dep't of Transp.*, 167 P.3d 292, 312 (Haw. 2007) (noting that state courts generally follow federal standing requirements, with limited exceptions to serve "the needs of justice"); *Utah Chapter of Sierra Club* v. *Utah Air Quality Bd.*, 148 P.3d 960, 967, 972 (Utah 2006) (noting that state courts generally apply the "traditional" federal

standing test, with limited exceptions for "issues of significant public importance"); *Fernandez* v. *Takata Seat Belts, Inc.*, 108 P.3d 917, 921 (Ariz. 2005) ("[A]lthough, as a matter of discretion, we can waive the requirement of standing, we do so only in exceptional circumstances generally in cases involving issues of great public importance that are likely to recur."). It would strain credulity to think that the sort of technical statutory violation here—where the named plaintiff cannot so much as muster even a minimal showing of actual harm—would rise to the level of exceptional public importance.

CONCLUSION

The judgment of the Ninth Circuit should be reversed.

Respectfully submitted.

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