

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 AMICUS CURIAE OF PACIFIC LEGAL
FOUNDATION IN SUPPORT OF PETITIONER**

—◆—
DEBORAH J. LA FETRA
Counsel of Record
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
Facsimile: (916) 419-7747
E-mail: dlafetra@pacificlegal.org

Counsel for Amicus Curiae Pacific Legal Foundation

QUESTION PRESENTED

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

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
INTEREST OF AMICUS CURIAE	1
INTRODUCTION AND SUMMARY OF ARGUMENT	2
ARGUMENT	3
I. CONGRESS CANNOT CREATE INJURY-FREE ARTICLE III STANDING VIA STATUTE WHERE IT OTHERWISE DOES NOT EXIST	3
II. PLAINTIFFS WITHOUT INJURY LACK STANDING TO PURSUE A CLASS ACTION	10
A. “Representative” Plaintiffs Must Have Suffered the Same Injury as the Class They Seek To Represent ...	11
B. “Noninjury” Class Actions Are Ripe for Abuse Because They Are Conducted for the Benefit of Lawyers, Not Any Individually Harmed Person ...	13
CONCLUSION	20

TABLE OF AUTHORITIES

	Page
Cases	
<i>Aetna Life Ins. Co. of Hartford,</i> <i>Conn. v. Haworth</i> , 300 U.S. 227 (1937)	9
<i>Allee v. Medrano</i> , 416 U.S. 802 (1974)	5
<i>Allen v. Wright</i> , 468 U.S. 737 (1984)	3
<i>Am. Immigration Lawyers Ass’n v. Reno</i> , 199 F.3d 1352 (D.C. Cir. 2000)	7
<i>Angelucci v. Century Supper Club</i> , 41 Cal. 4th 160 (2007)	16
<i>Ass’n of Cmty. Orgs for Reform Now v. Fowler</i> , 178 F.3d 350 (5th Cir. 1999)	7
<i>Bailey v. Patterson</i> , 369 U.S. 31 (1962)	11
<i>Bennett v. Spear</i> , 520 U.S. 154 (1997)	1, 6, 10
<i>Castano v. Am. Tobacco Co.</i> , 84 F.3d 734 (5th Cir. 1996)	18
<i>Clapper v. Amnesty Int’l. USA</i> , 133 S. Ct. 1138 (2013)	3, 6
<i>Consumer Defense Group v. Rental</i> <i>Housing Industry Members</i> , 137 Cal. App. 4th 1185 (2006)	16
<i>Consumer Watchdog v. Wisconsin</i> <i>Alumni Research Found.</i> , 753 F.3d 1258 (Fed. Cir. 2014)	8
<i>Coopers & Lybrand v. Livesay</i> , 437 U.S. 463 (1978)	11, 18

TABLE OF AUTHORITIES—Continued

	Page
<i>DaimlerChrysler Corp. v. Inman</i> , 252 S.W.3d 299 (Tex. 2008)	18
<i>Doe v. Governor</i> , 412 N.E.2d 325 (Mass. 1980)	13
<i>Fernandez v. Takata Seat Belts, Inc.</i> , 210 Ariz. 138 (2005)	12
<i>First American Financial Corp. v.</i> <i>Edwards</i> , 132 S. Ct. 2536 (2012)	1
<i>Gladstone Realtors v. Village of</i> <i>Bellwood</i> , 441 U.S. 91 (1979)	6
<i>Gonzales v. Carhart</i> , 550 U.S. 124 (2007)	9
<i>Hamilton v. Ohio Sav. Bank</i> , 694 N.E.2d 442 (Ohio 1998)	13
<i>Harris v. Mexican Specialty Foods, Inc.</i> 564 F.3d 1301 (11th Cir. 2009)	1
<i>Hollingsworth v. Perry</i> , 133 S. Ct. 2652 (2013)	6
<i>In Matter of Rhone-Poulenc Rorer, Inc.</i> , 51 F.3d 1293 (7th Cir.), <i>cert. denied</i> , 516 U.S. 867 (1995)	17-18
<i>In re Gen. Motors Corp. Pick-Up Truck</i> <i>Fuel Tank Products Liab. Litig.</i> , 55 F.3d 768 (3d Cir.), <i>cert. denied</i> , 516 U.S. 824 (1995)	14-15, 18
<i>Kid’s Care, Inc. v. Alabama Dep’t of Human</i> <i>Resources</i> , 843 So. 2d 164 (Ala. 2002)	13

TABLE OF AUTHORITIES—Continued

	Page
<i>Landesman v. General Motors Corp.</i> , 377 N.E.2d 813 (Ill. 1978)	12
<i>Lujan v. Defenders of Wildlife</i> , 504 U.S. 555 (1992)	1, 5-7
<i>M.D. Anderson Cancer Ctr. v. Novak</i> , 52 S.W.3d 704 (Tex. 2001)	12
<i>Mahon v. Ticor Title Ins. Co.</i> , 683 F.3d 59 (2d Cir. 2012)	7
<i>Mars Steel Corp. v. Continental Ill. Nat’l Bank & Trust Co.</i> , 834 F.2d 677 (7th Cir. 1987)	15
<i>Massachusetts v. E.P.A.</i> , 549 U.S. 497 (2007)	1
<i>Matte v. Sunshine Mobile Homes, Inc.</i> , 270 F. Supp. 2d 805 (W.D. La. 2003)	12
<i>Newton v. Merrill Lynch</i> , 259 F.3d 154 (3d Cir. 2001)	18
<i>North Shore Gas Co. v. EPA</i> , 930 F.2d 1239 (7th Cir. 1991)	16
<i>O’Shea v. Littleton</i> , 414 U.S. 488 (1974)	11
<i>Parker v. Time Warner Entm’t Co.</i> , 331 F.3d 13 (2d Cir. 2003)	18
<i>People Organized for Welfare & Employment Rights v. Thompson</i> , 727 F.2d 167 (7th Cir. 1984)	16-17
<i>Phillips Petroleum Co. v. Shutts</i> , 472 U.S. 797 (1985)	14

TABLE OF AUTHORITIES—Continued

	Page
<i>Raines v. Byrd</i> , 521 U.S. 811 (1997)	8
<i>Robins v. Spokeo, Inc.</i> , 742 F.3d 409 (9th Cir. 2014)	2
<i>Savannah R-III School Dist. v. Public School Retirement System of Mo.</i> , 950 S.W.2d 854 (Mo. 1997)	13
<i>Sierra Club v. Morton</i> , 405 U.S. 727 (1972)	8
<i>Simon v. Eastern Kentucky Welfare Rights Org.</i> , 426 U.S. 26 (1976)	7
<i>Smith v. Bayer Corp.</i> , 131 S. Ct. 2368 (2011)	2, 10
<i>Soualian v. Int’l Coffee & Tea</i> , No. 07-56377 (9th Cir., <i>appeal dismissed</i> , Sept. 16, 2008)	1
<i>Summers v. Earth Island Institute</i> , 555 U.S. 488 (2009)	1, 8
<i>Susan B. Anthony List v. Driehaus</i> , 134 S. Ct. 2334 (2014)	6
<i>Tanoh v. Dow Chem. Co.</i> , 561 F.3d 945 (9th Cir.), <i>cert. denied</i> , 558 U.S. 934 (2009)	17
<i>Thompson v. N. Am. Stainless, LP</i> , 562 U.S. 170 (2011)	7
<i>Thorogood v. Sears, Roebuck and Co.</i> , 627 F.3d 289 (7th Cir. 2010)	18
<i>United Pub. Workers of Am. v. Mitchell</i> , 330 U.S. 75 (1947)	5

TABLE OF AUTHORITIES—Continued

	Page
<i>United States v. Appalachian Elec. Power Co.</i> , 311 U.S. 377 (1940)	5
<i>United States v. Morrison</i> , 529 U.S. 598 (2000)	9
<i>Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.</i> , 454 U.S. 464 (1982)	5
<i>Van Gemert v. Boeing Co.</i> , 573 F.2d 733 (2d Cir. 1978), <i>aff'd</i> 444 U.S. 472 (1980)	16
<i>Vignaroli v. Blue Cross of Iowa</i> , 360 N.W.2d 741 (Iowa 1985)	13
<i>Wal-Mart Stores, Inc. v. Dukes</i> , 131 S. Ct. 2541 (2011)	11
<i>Wallace v. ConAgra Foods, Inc.</i> , 747 F.3d 1025 (8th Cir. 2014)	8
<i>Warth v. Seldin</i> , 422 U.S. 490 (1975)	6-7, 11
<i>Weiner v. Bank of King of Prussia</i> , 358 F. Supp. 684 (E.D. Pa. 1973)	12
<i>West v. Prudential Sec., Inc.</i> , 282 F.3d 935 (7th Cir. 2002)	17
<i>Youngman v. Tahmoush</i> , 457 A.2d 376 (Del. Ch. 1983)	14
Constitution	
U.S. Const. art. II, § 3, cl. 4	3

TABLE OF AUTHORITIES—Continued

	Page
Rules	
Fed. R. Civ. P. 23	5, 10, 11, 18
Sup. Ct. R. 37	1, 12
R. 37.3(a)	1
R. 37.6	1
Miscellaneous	
Alder, Jonathan H., <i>Standing Still in the Roberts Court</i> , 59 Case W. Res. L. Rev. 1061 (2009) . . .	10
Araiza, William D., <i>Deference to Congressional Fact-Finding in Rights-Enforcing and Rights-Limiting Legislation</i> , 88 N.Y.U. L. Rev. 878 (2013)	9
Bressman, Lisa Schultz, <i>Judicial Review of Agency Inaction: An Arbitrariness Approach</i> , 79 N.Y.U. L. Rev. 1657 (2004)	3
Chemerinsky, Erwin, <i>Constitutional Law: Principles and Policies</i> (2d ed. 2002)	5
Elliott, Heather, <i>Congress’s Inability To Solve Standing Problems</i> , 91 B.U. L. Rev. 159 (2011)	8-9
Elliott, Heather, <i>The Functions of Standing</i> , 61 Stan. L. Rev. 459 (2008)	4
Gaston, Jeremy, <i>Standing on Its Head: The Problem of Future Claimants in Mass Tort Class Actions</i> , 77 Tex. L. Rev. 215 (1998)	4, 11, 14-15

TABLE OF AUTHORITIES—Continued

	Page
Hill, Samuel M., <i>Small Claimant Class Actions: Deterrence and Due Process Examined</i> , 19 Am. J. Trial Advoc. 147 (1995)	15
Mullenix, Linda S., <i>Dueling Class Actions</i> , Nat'l L.J., Apr. 26, 1999	17
Nagareda, Richard A., <i>The Preexistence Principle and the Structure of the Class Action</i> , 103 Colum. L. Rev. 149 (2003)	14, 18
Partridge, Scott S. & Miller, Kerry J., <i>Some Practical Considerations for Defending and Settling Products Liability and Consumer Class Actions</i> , 74 Tul. L. Rev. 2125 (2000)	17
Posner, Richard A., <i>The Problematics of Moral and Legal Theory</i> (1999)	4
Post, Robert C. & Sievel, Reva B., <i>Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power</i> , 78 Ind. L.J. 1 (2003)	9
Raymond, Casey L., Note, <i>A Growing Threat to the ADA: An Empirical Study of Mass Filings, Popular Backlash, and Potential Solutions Under Titles II and III</i> , 18 Tex. J. on C.L. & C.R. 235 (2013)	19
Re, Richard M., <i>Relative Standing</i> , 102 Geo. L.J. 1191 (2014)	4

TABLE OF AUTHORITIES—Continued

	Page
<p>Redish, Martin H. and Joshi, Sopan, <i>Litigating Article III Standing: A Proposed Solution to the Serious (But Unrecognized) Separation of Powers Problem</i>, 162 U. Pa. L. Rev. 1373 (2014)</p>	10
<p>Redish, Martin H., <i>Class Actions and the Democratic Difficulty: Rethinking the Intersection of Private Litigation and Public Goals</i>, 2003 U. Chi. Legal F. 71.</p>	16
<p>Scalia, Antonin, <i>The Doctrine of Standing as an Essential Element of the Separation of Powers</i>, 17 Suffolk U. L. Rev. 881 (1983)</p>	3
<p>Sunstein, Cass R., <i>What’s Standing After Lujan? Of Citizen Suits, “Injuries,” and Article III</i>, 91 Mich. L. Rev. 163 (1992)</p>	4
<p>Taylor, Robert P., <i>Antitrust Standing: Its Growing—Or More Accurately Its Shrinking—Dimensions</i>, 55 Antitrust L.J. 515 (1986)</p>	4

INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation respectfully submits this brief amicus curiae in support of Petitioner, Spokeo, Inc.¹ Pacific Legal Foundation (PLF) was founded in 1973 and is widely recognized as the most experienced nonprofit legal foundation of its kind. PLF litigates matters affecting the public interest at all levels of state and federal courts and represents the views of thousands of supporters nationwide. PLF advocates for limited government, individual rights, and free enterprise. PLF has litigated numerous cases involving Article III standing, *see, e.g., First American Financial Corp. v. Edwards*, 132 S. Ct. 2536 (2012); *Summers v. Earth Island Institute*, 555 U.S. 488 (2009); *Massachusetts v. E.P.A.*, 549 U.S. 497 (2007); *Bennett v. Spear*, 520 U.S. 154 (1997); *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), as well as cases involving the abuse of class action lawsuits for private gain under the guise of public protections, including *Harris v. Mexican Specialty Foods, Inc.* 564 F.3d 1301 (11th Cir. 2009), and *Soualian v. Int'l Coffee & Tea*, No. 07-56377 (9th Cir., *appeal dismissed*, Sept. 16, 2008).

¹ Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored 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 Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

INTRODUCTION AND SUMMARY OF ARGUMENT

Spokeo Inc., runs a website that collects and publishes information about individuals. Thomas Robins, an unemployed man, sued Spokeo for willful violations of the Fair Credit Reporting Act, alleging that Spokeo published false information, such as Robins was married, had a graduate degree, and was wealthy. The Ninth Circuit held that Robins' allegation that Spokeo "willfully" violated the Fair Credit Reporting Act (FCRA) by retransmitting inaccurate personal information was sufficient for Article III standing. The court collapsed the three-part standing inquiry—injury, causation, and redressability—into a single question of whether the plaintiff properly alleged a statutory violation. *Robins v. Spokeo, Inc.*, 742 F.3d 409, 412, 414 (9th Cir. 2014).

Article III permits federal courts to hear only "cases or controversies," defined as cases brought by plaintiffs who have suffered actual (not speculative) harm that can be redressed by court action. Article III provides the outside limit on Congress's authority to grant standing. Absent some injury caused by the statutory violation, plaintiffs lack standing to proceed in federal court. The standing issue presented in this case gains extra importance because the named plaintiff seeks to represent a class. The class action overlay adds complex procedural and policy concerns that impact not only the named parties, but all nonparties similarly situated who would be bound by the case resolution. *Smith v. Bayer Corp.*, 131 S. Ct. 2368, 2380 (2011). The requirement that a litigant fulfill the injury, causation, and redressability elements of standing recognizes that courts are not

super-legislatures deciding broad questions of policy but rather tribunals best equipped to resolve individual disputes and clearly defined questions of law and fact.

The decision below should be reversed.

ARGUMENT

I

CONGRESS CANNOT CREATE INJURY-FREE ARTICLE III STANDING VIA STATUTE WHERE IT OTHERWISE DOES NOT EXIST

The text of Article III gives the federal courts authority to hear only “Cases” and “Controversies” and serves to maintain the constitutional balance between the branches. Indeed, standing “is built on a single basic idea—the idea of separation of powers.” *Allen v. Wright*, 468 U.S. 737, 752 (1984); *Clapper v. Amnesty Int’l. USA*, 133 S. Ct. 1138, 1146 (2013) (Article III standing prevents “the judicial process from being used to usurp the powers of the political branches”). Specifically, courts do not impinge upon the Executive’s duties to “take Care that the Laws be faithfully executed” under Article II. U.S. Const. art. II, § 3, cl. 4 (Take Care Clause). *See also* Lisa Schultz Bressman, *Judicial Review of Agency Inaction: An Arbitrariness Approach*, 79 N.Y.U. L. Rev. 1657, 1684 (2004); Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 Suffolk U. L. Rev. 881, 881 (1983).

The “Take Care” Clause reflects a structure that does not permit Congress to use citizen suits and other private enforcement actions to conscript the courts in

its battles with the Executive, which would result in an imbalance among the branches. Heather Elliott, *The Functions of Standing*, 61 *Stan. L. Rev.* 459, 492-500 (2008). Suits against private entities for violations of the law particularly raise “a lurking issue about private interference with the exercise of prosecutorial discretion, and hence with the President’s ‘Take Care’ power.” Cass R. Sunstein, *What’s Standing After Lujan? Of Citizen Suits, “Injuries,” and Article III*, 91 *Mich. L. Rev.* 163, 231 n.300 (1992).

The constitutional structure also reflects the fact that courts—lacking independent fact-finding ability—are well equipped to handle actual disputes between adverse parties, but are poorly equipped to handle theoretical disputes. See Robert P. Taylor, *Antitrust Standing: Its Growing—Or More Accurately Its Shrinking—Dimensions*, 55 *Antitrust L.J.* 515, 518 (1986) (noting that “the judicial process is poorly equipped to deal with highly speculative claims of injury”); Richard M. Re, *Relative Standing*, 102 *Geo. L.J.* 1191, 1232 (2014) (“Unfettered authority to confer standing would empower the political branches to compel adjudication of controversies that are, as presented, poorly suited to judicial resolution.”). Put simply, “courts should not make unnecessary decisions, because unnecessary decisions are often bad decisions.” Jeremy Gaston, *Standing on Its Head: The Problem of Future Claimants in Mass Tort Class Actions*, 77 *Tex. L. Rev.* 215, 221 (1998). Rather, courts, “at their best,” are “councils of wise elders meditating on real disputes.” Richard A. Posner, *The Problematics of Moral and Legal Theory* 257-58 (1999). The standing requirement assures “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 College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982). Deciding cases in “an actual factual setting” ensures that a court’s decisions “will not pave the way for lawsuits which have some, but not all, of the facts of the case actually decided by the court.” *Id.*

Requiring an actual, concrete injury for a private plaintiff to have standing to sue serves both prudential and constitutional policies. See Erwin Chemerinsky, *Constitutional Law: Principles and Policies* 50-51 (2d ed. 2002) (describing policies of conserving judicial resources, optimizing judicial decisionmaking, and promoting fairness as underlying the justiciability doctrines, including standing). This Court has emphasized that parties who have suffered an actual injury-in-fact test present concrete issues more amenable to concrete resolution. See *United Pub. Workers of Am. v. Mitchell*, 330 U.S. 75, 89-90 (1947) (identifying “ ‘concrete legal issues, . . . not abstractions’ ” as requisite for constitutional litigation and expressing concern regarding the lack of specific facts about which of plaintiff’s activities the challenged Hatch Act prohibited (quoting *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 423 (1940))); *Aetna Life Ins. Co. of Hartford, Conn. v. Haworth*, 300 U.S. 227, 240-41 (1937) (describing a “justiciable controversy” as a controversy satisfying requirement for a concrete dispute touching a legal relationship between parties).

These constitutional and prudential concerns were at the forefront of the analysis in *Lujan*, 504 U.S. 555, which outlined the essence of current standing

doctrine. To have standing, a plaintiff must claim to have suffered an injury-in-fact caused by the defendant, that is redressable by some court action. *Id.* at 560-61. The injury must be “concrete and particularized,” and “actual or imminent, not ‘conjectural’ or ‘hypothetical.’” *Id.* (citations omitted). For causation, the injury must be “‘fairly . . . trace[able] to the challenged action of the defendant.’” *Id.* at 560 (brackets in original; citation omitted). In terms of redressability, the requested relief must be reasonably capable of redressing the injury rather than “speculative.” *Id.* at 561 (citation omitted). *See also Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341 (2014) (reaffirming *Lujan* elements of Article III standing); *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2661 (2013) (“For a federal court to have authority under the Constitution to settle a dispute, the party before it must seek a remedy for a personal and tangible harm.”); *Amnesty Int’l.*, 133 S. Ct. at 1143 (“Respondents cannot manufacture standing by choosing to make expenditures based on hypothetical future harm that is not certainly impending.”).

Congress can, by statute, require the federal courts to abandon *prudential* standing requirements. *See, e.g., Bennett*, 520 U.S. at 163 (“Congress legislates against the background of our prudential standing doctrine, which applies unless it is expressly negated.”). And Congress may create rights, the deprivation of which gives rise to a cognizable Article III injury. *Warth v. Seldin*, 422 U.S. 490, 500 (1975). However, these cases and their progeny do not alter Article III’s outside limit on Congress’s authority to confer standing. *See Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 100 (1979) (While Congress could eliminate prudential barriers to expand standing

to sue under the Fair Housing Act to the full extent permitted by Article III, “[i]n no event . . . may Congress abrogate the Article III minima.”) (citing *Warth*, 422 U.S. at 501, and *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38 (1976)); *Mahon v. Ticor Title Ins. Co.*, 683 F.3d 59, 63 (2d Cir. 2012) (same); *Ass’n of Cmty. Orgs for Reform Now v. Fowler*, 178 F.3d 350, 365 (5th Cir. 1999) (because statute eliminated prudential standing requirements, plaintiff organization needed “only to satisfy the standing requirements arising under Article III.”); *Am. Immigration Lawyers Ass’n v. Reno*, 199 F.3d 1352, 1364 (D.C. Cir. 2000) (“Congress may relax the prudential standing rules the judiciary has created . . . in the exercise of its Article I power, so long as it keeps within the limits of Article III.”). *Cf. Thompson v. N. Am. Stainless, LP*, 562 U.S. 170, 176 (2011) (declining to interpret Title VII’s grant of a private cause of action to any “aggrieved person” as conferring standing coextensive with Article III where such an expansive grant of standing would lead to “absurd consequences”).

Whether the courts were to act on their own, or at the invitation of Congress, in ignoring the concrete injury requirement described in our cases, they would be discarding a principle fundamental to the separate and distinct constitutional role of the Third Branch—one of the essential elements that identifies those “Cases” and “Controversies” that are the business of the courts rather than of the political branches.

Lujan, 504 U.S. at 576. That is, a plaintiff’s claim that a defendant failed to follow the law—without more—is

insufficient to satisfy Article III. *See also Sierra Club v. Morton*, 405 U.S. 727, 740 n.16 (1972) (“[J]udicial review is effective largely because it is not available simply at the behest of a partisan faction, but is exercised only to remedy a particular, concrete injury.”).

This point was further firmly established as part of constitutional standing doctrine in *Raines v. Byrd*, 521 U.S. 811, 820 n.3 (1997), holding that “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.” *See also Summers*, 555 U.S. at 497 (rejecting environmentalist groups’ efforts to challenge revised procedures the U.S. Forest Service adopted to streamline timber removal on small parcels affected by forest fires because “the requirement of injury in fact is a hard floor of Article III jurisdiction that cannot be removed by statute”); *Wallace v. ConAgra Foods, Inc.*, 747 F.3d 1025, 1032 (8th Cir. 2014) (Congress’s ability to “creat[e] legal rights, the invasion of which creates standing . . . remains firmly circumscribed by Article III itself.”) (citations omitted); *Consumer Watchdog v. Wisconsin Alumni Research Found.*, 753 F.3d 1258, 1261-62 (Fed. Cir. 2014) (no Article III standing where sharp disagreement with agency action involved no invasion of the plaintiff’s legal rights and no particularized concrete stake in the outcome).

Harmonizing the approaches of both the statutory and constitutional cases, Professor Heather Elliott concludes, “Congress can only identify injuries that the Court would agree are concrete and can only elevate to de jure status injuries that the Court would already recognize as de facto.” Heather Elliott, *Congress’s*

Inability To Solve Standing Problems, 91 B.U. L. Rev. 159, 187 (2011). She explains two inter-related reasons for this limitation on Congress. First, it is unclear whether a statute that “deems” a person to have standing is a *factual* finding of the sort typically granted deference by the courts. Second, even if a pronouncement of standing is considered to be a factual one, courts give only limited deference to congressional fact-finding when it comes to matters implicating constitutional structure. See William D. Araiza, *Deference to Congressional Fact-Finding in Rights-Enforcing and Rights-Limiting Legislation*, 88 N.Y.U. L. Rev. 878, 902 (2013) (“[T]he Court’s hesitance to defer to congressional fact-finding in some federalism doctrines reflects the Court’s suspicion that Congress cannot be trusted to be a faithful guardian of the federal-state balance.”). Thus, in *United States v. Morrison*, 529 U.S. 598, 614 (2000), for example, this Court rejected congressional fact-finding that purported to demonstrate that gender violence had a nontrivial effect on interstate commerce: “Simply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so.” *Id.* (alterations, citations, and internal quotation marks omitted). See also *Gonzales v. Carhart*, 550 U.S. 124, 165 (2007) (“The Court retains an independent constitutional duty to review factual findings where constitutional rights are at stake.”).

Because “it is the Court’s special responsibility to mark where Congress has exceeded its constitutional bounds,” Robert C. Post & Reva B. Siegel, *Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power*, 78 Ind. L.J. 1 (2003), to the extent Congress can confer standing on

a plaintiff, it is limited to “tinker[ing] at the edges,” of prudential standing. Jonathan H. Adler, *Standing Still in the Roberts Court*, 59 Case W. Res. L. Rev. 1061, 1063 (2009); *Bennett*, 520 U.S. at 163 (finding plaintiffs had standing under “zone of interests” prudential standing doctrine due to congressional authorization of suit by “any person”). A statute may not “confer” Article III standing on a private person to sue a private defendant for regulatory errors that caused no injury beyond violation of the statute or regulation itself. “To the extent that the federal courts coercively impact the lives of citizens in a manner not incident to the resolution of live disputes, they have exceeded their legitimate role in a democratic society and seriously undermined our constitutionally dictated system of separation of powers.” Martin H. Redish and Sopan Joshi, *Litigating Article III Standing: A Proposed Solution to the Serious (But Unrecognized) Separation of Powers Problem*, 162 U. Pa. L. Rev. 1373, 1377-78 (2014).

II

PLAINTIFFS WITHOUT INJURY LACK STANDING TO PURSUE A CLASS ACTION

The standing issue presented in this case gains extra importance because Thomas Robins seeks to represent a class. The class action overlay adds complex procedural and policy concerns that affect not only Robins as the named party, but all nonparties similarly situated who would be bound by the case resolution. *Smith*, 131 S. Ct. at 2380 (“Neither a proposed class action nor a rejected class action may bind nonparties. What does have this effect is a class action approved under Rule 23.”). In short, class

actions are “a special kind of litigation,” *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 470 (1978), in which the standing of the named plaintiff assumes even greater importance.

A. “Representative” Plaintiffs Must Have Suffered the Same Injury as the Class They Seek To Represent

Adjudicating the rights of third parties in their absence without some compelling need is unfair, both to present and future litigants. *See, e.g., Warth*, 422 U.S. at 509-10 (denying third party standing when no special relationship existed between the litigants and the third parties and a denial of standing would not harm the third parties); *Gaston*, 77 Tex. L. Rev. at 258 (“Standing is about letting the presently affected litigate their adversarial claims, not about binding the countless and unaware to the decisions of lawyers who have only their self-interest at stake.”). Thus, class representatives must actually be members of the class. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2550 (2011) (To satisfy standing, the class representative must suffer an injury and must have the “same interest” and the “same injury” as the class members.); *O’Shea v. Littleton*, 414 U.S. 488, 494 (1974) (“[I]f none of the named plaintiffs purporting to represent a class establishes the requisite of a case or controversy with the defendants, none may seek relief on behalf of himself or any other member of the class.”); *Bailey v. Patterson*, 369 U.S. 31, 32-33 (1962) (rejecting a class claim, holding that plaintiffs “cannot represent a class of whom they are not a part”).

The representative plaintiffs cannot use the procedural requirements of Federal Rule of Civil Procedure 23 to create standing if it otherwise does not

exist. See *Allee v. Medrano*, 416 U.S. 802, 828-29 (1974) (“[A] named plaintiff cannot acquire standing to sue by bringing his action on behalf of others who suffered injury which would have afforded them standing had they been named plaintiffs; it bears repeating that a person cannot predicate standing on injury which he does not share. Standing cannot be acquired through the back door of a class action.”) (Burger, C.J., concurring in the result in part and dissenting in part). That is, Robins cannot assert that *other people* may have been actually harmed by Spokeo’s alleged publication of false information, if he cannot identify any concrete harm to his own legal interests. See also *Weiner v. Bank of King of Prussia*, 358 F. Supp. 684, 690, 694-95 (E.D. Pa. 1973) (“[A] procedural rule cannot supply a necessary substantive element” and thereby confer standing upon the plaintiff.). “Standing is one of the keys necessary to open the door to the federal courthouse. Rule 23 merely provides a procedural doorstep which holds the door open for qualified class members, once it has been opened by the person or persons initially seeking entry.” *Matte v. Sunshine Mobile Homes, Inc.*, 270 F. Supp. 2d 805, 826 (W.D. La. 2003) (citation omitted). This has not been a controversial principle; both federal and state courts (relying on federal law as persuasive authority) have long demanded standing from lead plaintiffs in class actions.² This Court

² See *Fernandez v. Takata Seat Belts, Inc.*, 210 Ariz. 138, 141 (2005) (plaintiff who cannot state an individual claim for lack of injury has no standing to represent a class of potentially injured plaintiffs); *M.D. Anderson Cancer Ctr. v. Novak*, 52 S.W.3d 704, 707-78 (Tex. 2001) (without actual injury, plaintiff had no standing to bring class action); *Landesman v. General Motors Corp.*, 377 N.E.2d 813, 815 (Ill. 1978) (where the plaintiff has no
(continued...)

should not abandon a strong standing requirement and replace it with an open-ended theory permitting people who offer only speculative theories of harm to sue in the name of others who may (or may not) be able to allege such harm.

B. “Noninjury” Class Actions Are Ripe for Abuse Because They Are Conducted for the Benefit of Lawyers, Not Any Individually Harmed Person

Permitting a noninjury claim to move forward invites abuse of the class action procedure. Even under the best circumstances, most class actions proceed under the leadership of lawyers who have never entered into contractual representation—or even met—the vast majority of the class members whom

² (...continued)

individual cause of action, it necessarily follows that any attempted class action must also fail); *Kid’s Care, Inc. v. Alabama Dep’t of Human Resources*, 843 So. 2d 164, 167 (Ala. 2002) (if named plaintiff has not been injured by wrong alleged in complaint, then no case or controversy is presented and plaintiff has no standing to sue either on his own behalf or on behalf of a class); *Hamilton v. Ohio Sav. Bank*, 694 N.E.2d 442, 450 (Ohio 1998) (to have standing to sue as a class representative, the plaintiff must possess the same interest and suffer the same injury shared by all members of the class that he seeks to represent); *Savannah R-III School Dist. v. Public School Retirement System of Mo.*, 950 S.W.2d 854, 857-58 (Mo. 1997) (named plaintiffs who represent class must allege and show that they personally have been injured, not that injury has been suffered by other members of class which they purportedly represent); *Vignaroli v. Blue Cross of Iowa*, 360 N.W.2d 741, 746 (Iowa 1985) (while class membership is not expressly required by the Iowa class actions rule, it is implicit in that rule that class representative be class member); *Doe v. Governor*, 412 N.E.2d 325, 327 (Mass. 1980) (if the individual plaintiffs may not maintain the action on their own behalf, they may not seek relief on behalf of class).

they purport to represent. The “class representative” whose claims are supposed to typify those of absent class members usually is a figurehead who exercises little, if any, meaningful supervision over the litigation. As a practical matter, the class counsel themselves serve as agents for the class. Richard A. Nagareda, *The Preexistence Principle and the Structure of the Class Action*, 103 Colum. L. Rev. 149, 150-51 (2003).

Class members need an increased level of judicial protection because they are not there to defend themselves. Their only chance to avoid unfair practices by a “representative” who is not a member of the class is to opt-out, and it is hardly fair to place the “risk and burden on the essentially innocent party who happens to have the least information.” Gaston, 77 Tex. L. Rev. at 244. Because the class action binds these absent and informationally-impooverished “litigants,” due process requires a class representative both capable of and willing to act in the interest of all the members of the class. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985) (opining that “the Due Process Clause . . . requires that the named plaintiff at all times adequately represent the interests of the absent class members”). Careful consideration of the needs of absent class members benefits courts as well, because without adequate representation, any judgment obtained through the class action becomes subject to collateral attack. *See id.*; *Youngman v. Tahmoush*, 457 A.2d 376, 379 (Del. Ch. 1983) (an adequate representative is one who is “qualified to serve in a fiduciary capacity as a representative of a class, whose interest is dependent upon the representative’s adequate and fair prosecution.”); *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Products*

Liab. Litig., 55 F.3d 768, 784 (3d Cir.), *cert. denied*, 516 U.S. 824 (1995).

Denying representative status to uninjured, non-class members is the only way to protect the interests of the class members. “Foremost, they do not get ‘sold down the river’ by having their future claims devalued and decided before they even accrue.” *Gaston*, 77 Tex. L. Rev. at 237. For “it is not obvious that the settling of future plaintiffs’ claims—essentially without their knowledge—is desirable, necessary, or worthwhile to anyone except the defendants and possibly the current claimants.” *Id.* at 238. Lawsuits holding the potential only for a small recovery for each class member, such as this one, are particularly susceptible to abuse:

The plaintiffs’ potential recoveries in a small claimant case are, by definition, minimal. Even if the case succeeds, the plaintiff and class members will receive a minute sum. By contrast, the plaintiffs’ attorneys, whose fee is determined by reference to the aggregate amount of the recovery, stand to gain immense financial rewards. Consequently, plaintiffs have little incentive to participate in or monitor the litigation. For all practical purposes, plaintiff’s lawyers are the real parties in interest who initiate, finance, and control the litigation. *See, e.g., Mars Steel Corp. v. Continental Ill. Nat’l Bank & Trust Co.*, 834 F.2d 677, 678 (7th Cir. 1987) (Posner, J.).

Samuel M. Hill, *Small Claimant Class Actions: Deterrence and Due Process Examined*, 19 Am. J. Trial Advoc. 147, 148 (1995).

Permitting a plaintiff who lacks Article III standing to represent a class of claimants who may (or may not) have standing will open the floodgates to “lawyer’s lawsuits” and clog the courts with dozens of similar claims. *See Van Gemert v. Boeing Co.*, 573 F.2d 733, 735 (2d Cir. 1978), *aff’d* 444 U.S. 472 (1980).³ The Seventh Circuit correctly surmised that plaintiffs “would be tripping over each other on the way to the courthouse if everyone remotely injured by a violation of law could sue to redress it.” *North Shore Gas Co. v. EPA*, 930 F.2d 1239, 1242 (7th Cir. 1991). How much more so when plaintiffs who have not even been injured may sue? For “[i]f passionate commitment plus money for litigating were all that was necessary to open the doors” of the courts, they “might be overwhelmed.” *People Organized for Welfare &*

³ These types of “suits are not, in any realistic sense, brought either by or on behalf of the class members,” but by “private attorneys who initiate suit and who are the only ones rewarded for exposing the defendants’ law violations.” Martin H. Redish, *Class Actions and the Democratic Difficulty: Rethinking the Intersection of Private Litigation and Public Goals*, 2003 U. Chi. Legal F. 71, 77. Injured parties “neither make the decision to sue . . . nor receive meaningful compensation.” *Id.* Rather, the prospect of significant attorneys’ fees “provide[] the class lawyers with a private economic incentive to discover violations of existing legal restrictions on corporate behavior.” *Id.* Thus, noninjury class actions to recover compensation simply permit the “private attorneys [to] act[] as bounty hunters.” *Id.* *See also Consumer Defense Group v. Rental Housing Industry Members*, 137 Cal. App. 4th 1185, 1189-90 (2006) (reversing trial court-approved settlement where “bounty hunter lawyers wanted to get paid hefty fees, which is what the whole thing was obviously about in the first place.”); *Angelucci v. Century Supper Club*, 41 Cal. 4th 160, 178 n.10 (2007) (Private rights of action can lead “to an explosion of assertedly unwarranted or unduly burdensome individual lawsuits brought by professional plaintiffs and bounty-hunting attorneys against business establishments.”).

Employment Rights v. Thompson, 727 F.2d 167, 172 (7th Cir. 1984).

These concerns are compounded and especially worrisome in the context of class action litigation.

The filing of one class action is often the harbinger of more class action filings. As Professor Mullenix has observed, “Class-action litigation has the propensity to propagate, spreading amoeba-like across federal and state courts. No sooner has an attorney filed a class action than, within days, ‘copycat’ class actions crop up elsewhere. This spontaneous regeneration of class litigation presents challenging issues for litigants and the judiciary.”

Scott S. Partridge & Kerry J. Miller, *Some Practical Considerations for Defending and Settling Products Liability and Consumer Class Actions*, 74 Tul. L. Rev. 2125, 2146 (2000) (quoting Linda S. Mullenix, *Dueling Class Actions*, Nat’l L.J., Apr. 26, 1999, at B18); see also *Tanoh v. Dow Chem. Co.*, 561 F.3d 945, 954 (9th Cir.), *cert. denied*, 558 U.S. 934 (2009) (Class Action Fairness Act’s “primary purpose was to prevent plaintiffs’ lawyers from abusing the class action device, often by filing several ‘copycat’ actions alleging the same injuries on behalf of the same class of plaintiffs in different state courts.”).

Moreover, “noninjury” standing, combined with the class action procedure, results in targeted businesses facing what federal appellate judges bluntly term, “blackmail.” *West v. Prudential Sec., Inc.*, 282 F.3d 935, 937 (7th Cir. 2002); *In Matter of Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1299-1300

(7th Cir.), *cert. denied*, 516 U.S. 867 (1995); *Parker v. Time Warner Entm't Co.*, 331 F.3d 13, 26 (2d Cir. 2003) (Newman, J., concurring); *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996); *Gen. Motors Corp.*, 55 F.3d at 784-85, 789. The “blackmail” charge comes from the fact that few class actions actually proceed to judgment—the vast majority settle. *See Thorogood v. Sears, Roebuck and Co.*, 627 F.3d 289, 293 (7th Cir. 2010) (“[T]he structure of class actions under Rule 23 of the federal rules gives class action lawyers an *incentive* to negotiate settlements that enrich themselves but give scant reward to class members, while at the same time the burden of responding to class plaintiffs’ discovery demands gives defendants an *incentive* to agree to early settlement that may treat the class action lawyers better than the class.”). In fact, counsel on both sides of class action litigation recognize the decision to certify as the most defining moment in the litigation. As this Court noted, “[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*, 437 U.S. at 476. *See also Newton v. Merrill Lynch*, 259 F.3d 154, 164 (3d Cir. 2001) (Once the class is certified, defendant companies are under “hydraulic pressure” to settle). “In short, class actions today serve as the procedural vehicle not ultimately for adversarial litigation but for dealmaking on a mass basis.” Nagareda, 103 Colum. L. Rev. at 151.

To interpret Article III as allowing a noninjured plaintiff like Thomas Robins to sue would “drain virtually all meaning” from the standing requirements, *DaimlerChrysler Corp. v. Inman*, 252 S.W.3d 299, 307 (Tex. 2008), and would serve only to enrich

enterprising class action attorneys, rather than remedying injuries as the legal system is intended to do. See Casey L. Raymond, Note, *A Growing Threat to the ADA: An Empirical Study of Mass Filings, Popular Backlash, and Potential Solutions Under Titles II and III*, 18 Tex. J. on C.L. & C.R. 235, 248 (2013) (empirically detailing the Americans with Disabilities Act “litigation boom” with “identifiable repeat players in identifiable repeat districts” and concluding, “Profit-motivated private enforcers will continue to litigate if they can make money.”).

CONCLUSION

The requirement that a litigant have standing recognizes that courts are not super-legislatures deciding broad questions of policy but rather tribunals best equipped to resolve individual disputes and clearly defined questions of law and fact. Article III requires an actual injury in fact to maintain standing. “Noninjury” lawsuits—particularly “noninjury” class actions, as in this case—are a drain on both economic and judicial resources, to no one’s benefit except the plaintiffs’ bar.

The decision below should be reversed.

DATED: July, 2015.

Respectfully submitted,

DEBORAH J. LA FETRA
Counsel of Record
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
Facsimile: (916) 419-7747
E-mail: dlafetra@pacificlegal.org

Counsel for Amicus Curiae
Pacific Legal Foundation