No. 13-1339

In the
Supreme Court of the United States

SPOKEO, INC.

Petitioner,

v.

THOMAS ROBINS, individually and on behalf of all others similarly situated,

Respondent.

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

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

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

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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 largest and 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. EPA*, 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).

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[1] Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the Amicus Curiae's intention to file 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 REASONS FOR GRANTING THE PETITION

Whether Article III limits Congress's authority to create new statutory rights enforceable through private rights of action is a question of recurring importance for federal jurisdiction over lawsuits invoking many consumer protection laws and other regulatory schemes. The question of whether Congress can create injury-free Article III standing via statute, where it otherwise does not exist, has resulted in deep circuit splits that can be resolved only by this Court. The Ninth Circuit in this case abandoned a strong standing requirement and replaced it with an open-ended theory permitting people who are not harmed and who need not claim to be harmed to sue in the name of those who may (or may not) be able to allege such harm. *Robins v. Spokeo, Inc.*, 742 F.3d 409, 413-14 (9th Cir. 2014).

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.

This Court should grant the petition for writ of certiorari to resolve the recurring and important

question of whether a mere allegation of a statutory violation suffices for Article III standing.

REASONS FOR GRANTING THE PETITION FOR A WRIT OF CERTIORARI

I

THE QUESTION PRESENTED IS ONE OF RECURRING IMPORTANCE NATIONWIDE

This Court will grant certiorari to resolve important and recurring questions of federal law. *Glus v. Brooklyn Eastern Dist. Terminal*, 359 U.S. 231, 232 (1959); *Hamilton v. Texas*, 498 U.S. 908, 909 (1990). This case certainly qualifies. Federal courts simply have been unable to anticipate how this Court will resolve the tension between Article III standing doctrine and Congress's power to define statutory conduct, the violation of which carries civil penalties. In *Arizona Christian School Tuition Organization v. Winn*, 131 S. Ct. 1436, 1442 (2011), this Court held that Article III standing rests on an injury-in-fact, defined as "an invasion of a legally protected interest," that is both "(a) concrete and particularized, and (b) 'actual or imminent, not "conjectural" or "hypothetical."'") (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. at 560). *See also Raines v. Byrd*, 521 U.S. 811, 820 n.3 (1997) ("Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing."). On the other hand, *Warth v. Seldin*, 422 U.S. 490, 500 (1975), holds that "[t]he actual or threatened injury required by Art. III may

exist solely by virtue of statutes creating legal rights, the invasion of which creates standing."

The injury in fact requirement ensures that plaintiffs in federal court are asserting their own individual rights as opposed to the kinds of generalized public rights that should be pressed in the political branches. *Allen v. Wright*, 468 U.S. 737, 750-52 (1982); *Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743, 2752 (2010) (Article III requires "an injury [to] be concrete, particularized, and actual or imminent."). *See also* Jonathan S. Massey, *The Two That Got Away: First American Financial Corp. v. Edwards and Kiobel v. Royal Dutch Petroleum Co.*, 7 Charleston L. Rev. 63, 80 (2012) ("Congress does not have a blank check when it comes to Article III."). Plaintiffs may not simply speculate that an injury might occur; the injury in fact must be "fairly traceable to" the alleged source. *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1148 (2013). "For the federal courts to decide questions of law arising outside of cases and controversies would be inimical to the Constitution's democratic character. And the resulting conflict between the judicial and the political branches would not, 'in the long run, be beneficial to either.'" *Winn*, 131 S. Ct. at 1442 (quoting *United States v. Richardson*, 418 U.S. 166, 188-89 (1974) (Powell, J., concurring)).

As the Petition thoroughly documents, circuit courts are split on whether a statutory violation alone encompasses the injury, causation, and redressability requirements of Article III standing. Pet. at 9-11. In those circuits that permit federal court actions based solely on a statutory violation, some courts not only permit non-injured plaintiffs to pursue claims based on the technical violations of a statute, but go so far as to

assume constitutional standing for plaintiffs who *benefit* from the violation. *See, e.g.*, *Kedziora v. Citicorp Nat. Svcs., Inc.*, 901 F. Supp. 1321, 1326 (N.D. Ill 1995), *aff'd in part, rev'd in part on other grounds sub. nom Channell v. Citicorp Nat. Svcs. Inc.*, 89 F.3d 379 (7th Cir. 1996) ("[T]he fact that an undisclosed rebate policy actually enured to the benefit of a consumer is inconsequential. '[T]he broad remedial purposes of TILA . . . empower[ ] anybody who signs a lease to recover upon proof of nondisclosure in violation of the statute, whether or not the particular nondisclosure produced a demonstrable injury.'") (citation omitted). This expansion of Article III standing to permit plaintiffs who benefit from statutory violations to seek damages in federal court has particular resonance in this case, where the plaintiff argues that his credit report contained information that made him appear more educated, financially successful, and stable than his actual circumstances warranted. Petition at 4-5 (citing *Robins*, 742 F.3d at 411, and the complaint).

The Ninth Circuit's willingness to accept Robins' speculative theory that erroneously favorable information about his life harmed his employment prospects contrasts with the Fourth and Eighth Circuits' rejection of speculated injury as a basis for Article III standing. In *David v. Alphin*, 704 F.3d 327 (4th Cir. 2013), the plaintiff participants in a defined benefits pension plan brought a class action against plan administrators and others, alleging violations of the Employment Retirement Income Security Act (ERISA). The statute certainly authorized the lawsuit, *id.* at 333, but the court questioned whether the plaintiffs had constitutional standing under Article III. The plaintiffs could point to no loss of benefits under

the plan, which was overfunded; they asserted instead that the plan's future investments were at greater risk of underfunding. *Id.* at 336. The Fourth Circuit held "these risk-based theories of standing unpersuasive, not least because they rest on a highly speculative foundation lacking any discernible limiting principle." *Id.* at 338. Therefore, the court found the potential future risk to be "insufficiently 'concrete and particularized' to constitute an injury-in-fact for Article III standing purposes." *Id.* The court noted that the employer would be required to make additional contributions if the plan became underfunded, and that if the employer was insolvent and unable to make those contributions, the federal government guaranteed the benefits. "Thus, the risk that Appellants' pension benefits will at some point in the future be adversely affected as a result of the present alleged ERISA violations is too speculative to give rise to Article III standing." *Id.* The inability to bring a lawsuit in federal courts did not leave the plaintiffs without any remedy should their fears come to pass, because "in situations where plan participants lack standing, the Secretary always remains empowered under the statute to investigate the continuing viability of ERISA plans and to bring suit to enforce ERISA." *Id.* at 339 (citing 29 U.S.C. §§ 1001, *et seq*.; *Secretary of Labor v. Fitzsimmons*, 805 F.2d 682, 689-94 (7th Cir. 1986) (en banc).).

The Eighth Circuit decision in *Wallace v. ConAgra Foods, Inc.*, ___ F.3d ___ , 2014 WL 1356860 (8th Cir. Apr. 4, 2014), also conflicts with the decision below because it firmly rejects the use of speculation to generate the injury-in-fact needed for Article III standing. In *Wallace*, consumers alleged that some unidentified fraction of beef used to make Hebrew

National hot dogs was not kosher, although the packaging identified the hot dogs as made from kosher beef, in violation of state consumer protection laws. *Id.* at *1, n.1. They could not identify any particular package containing non-kosher meat or the percentage of allegedly tainted packages, however, nor could they allege that they had consumed non-kosher meat. *Id.* at *3-4. The court concluded:

> As we cannot discern from the complaint how many packages were tainted with non-kosher beef, it is unclear whether even a bare majority of Hebrew National packages were not kosher. Which means, it is pure speculation to say the particular packages sold to the consumers were tainted by non-kosher beef, while it is quite plausible ConAgra sold the consumers *exactly what was promised*: a higher quality, kosher meat product. Time and again the Supreme Court has reminded lower courts that speculation and conjecture are not injuries cognizable under Article III. *See, e.g., Clapper*, 568 U.S. at___, 133 S. Ct. at 1148.

Id. at *4. These courts' analyses, rejecting speculative harm as a constitutionally required injury, cannot be reconciled with the Ninth Circuit's uncritical acceptance of Robins' theory of future harm that simply equates, *ipse dixit*, statutory standing with constitutional standing.

Courts are anxious for an answer to the questions presented in this case. When *First Am. Corp. v. Edwards* was pending, district courts across the country stayed proceedings to await the answer. *See,*

e.g., *Colby v. Publix Super Markets, Inc.*, 2012 WL 2357745 (N.D. Ala. June 15, 2012) (noting circuit split as to whether statutory violations without actual harm may confer Article III standing and staying proceedings pending outcome in *Edwards*); *Munoz v. PHH Corp.*, 2011 WL 4048708 *4 (E.D. Cal. Sept. 9, 2011) ("[T]he Supreme Court's resolution of *Edwards* will provide direct authority on the standing issue; that is, whether allegations of unlawful kickbacks/fee splitting under RESPA, in the absence of an actual, distinct injury, are sufficient to confer Article III standing."); *Charvat v. First Nat. Bank of Wahoo*, 2012 WL 2016184 *5 (D. Neb. June 4, 2012) ("[T]he pending decision of the Supreme Court in *First American* may alter this Court's understanding of the constitutional minimum requirement of standing. Therefore, it is in the best interest of Charvat that all further proceedings in this matter to be stayed pending the Supreme Court's decision."); *Tyler v. Michaels Stores, Inc.*, 840 F. Supp. 2d 438, 449 n.8 (D. Mass. 2012) ("[C]urrent Supreme Court jurisprudence is not entirely clear as to whether a defendant's violation of a statute that confers a private right of action in and of itself constitutes an "injury in fact" to those protected under the statute. . . . [but] [c]larity on this issue is likely forthcoming [because certiorari was granted in *First American*.]"). The splits among the circuits have only deepened since this Court dismissed *First American*. The Court should delay no longer in resolving these questions.

II

WHETHER ARTICLE III STANDING REQUIREMENTS APPLY TO NON-INJURY CLASS ACTIONS DETERMINES THE EXTENT TO WHICH FEDERAL COURTS ARE MADE COMPLICIT IN CLASS ACTION ABUSES

The Fair Credit Reporting Act (FCRA) created a triple enforcement scheme by combining criminal, civil, and administrative remedies. *See* 15 U.S.C. §§ 1681q-r (criminal penalties); 15 U.S.C. §§ 1681n-o (civil penalties); 15 U.S.C. § 1681s and Pub. L. No. 111-203 § 1088, 124 Stat. 1376 (July 21, 2010) (Federal Trade Commission and Bureau of Consumer Financial Protection have enforcement power over all portions of the FCRA). Meredith Schramm-Strosser, *The "Not So" Fair Credit Reporting Act: Federal Preemption, Injunctive Relief, and the Need to Return Remedies for Common Law Defamation to the States*, 14 Duq. Bus. L.J. 165, 182 (2012); *In re Trans Union Corp. Privacy Litig.*, 211 F.R.D. 328, 351 (N.D. Ill. 2002) ("[A]ny 'uninformed victims' who have suffered no actual economic damage, have been and continue to be protected by the FTC's enforcement of the [FCRA] and regulations."), *appeal dismissed sub nom, Albert v. Trans Union Corp.*, 346 F.3d 734 (7th Cir. 2003).

A consumer actually injured by violations of the statute obviously would be entitled to file a lawsuit seeking damages under the civil penalty provisions of the law. A consumer who identified a statutory violation but who was not injured may request administrative or criminal enforcement. In this case, however, a non-injured consumer not only seeks civil damages, but does so purporting to represent a large

class of consumers. Whether any of these class members, or even the named class member, has been injured in any way by the statutory violation, is irrelevant to the Ninth Circuit. *Robins*, 742 F.3d at 413-14. This approach is flatly contrary to the general rule that Article III standing requirements apply equally to class actions. *Lewis v. Casey*, 518 U.S. 343, 357 (1996); *Grant ex rel. Family Eldercare v. Gilbert*, 324 F.3d 383, 390 (5th Cir. 2003). The class representative must allege an individual, personal injury in order to seek relief on behalf of himself or any other member of the class. *Id*. Article III standing is a necessary bulwork against demonstrated abuses of class litigation, particularly in the context of aggregated statutory claims.

Class action lawsuits unfortunately provide a unique opportunity for avaricious plaintiffs and, more particularly, plaintiffs' lawyers, to exploit the judicial system. *See* Sheila B. Scheuerman, *Due Process Forgotten: The Problem of Statutory Damages and Class Actions*, 74 Mo. L. Rev. 103, 111 (2009) ("Separately, statutory damages and class actions aim to respond to the risk that certain wrongs, namely those resulting in paltry financial losses, will go unaddressed. Combining the litigation incentives of statutory damages and the class action in one suit, however, creates the potential for absurd liability and over-deterrence."). This is particularly true of cases where the aggregation of *de minimis* infractions combined with statutory damages creates the leverage to force the defendant into a payoff settlement. Richard A. Epstein, *Class Actions: Aggregation, Amplification, and Distortion*, 2003 U. Chi. Legal F. 475, 505 (combining the class action with the Sherman Act's treble damages provision creates a "form of

double counting"); Richard A. Nagareda, *Aggregation and Its Discontents: Class Settlement Pressure, Class-Wide Arbitration, and CAFA*, 106 Colum. L. Rev. 1872, 1878 (2006) ("Aggregation of statutory damages in this setting would make for a kind of double counting discordant with the underlying remedial scheme."); *see also id.* at 1887 ("[C]lass certification layered on top of per-violation damages in the Cable Act would distort, rather than facilitate, the remedial scheme of the statute."); *Parker v. Time Warner Entm't Co.*, 331 F.3d 13, 22 (2d Cir. 2003) (When statutory damages claims are aggregated into a class action, the potentially enormous amount of damages at stake "potentially distorts the purpose of both statutory damages and class actions.").

In such cases, plaintiffs' attorneys know that class certification will effectively function as a finding of liability. *See AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1752 (2011) ("Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims."); *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978) ("Certification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense."); *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 165 (3d Cir. 2001) ("[A]n adverse certification decision will likely have a dispositive impact on the course and outcome of the litigation."); *Castano v. American Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996) ("In addition to skewing trial outcomes, class certification creates insurmountable pressure on defendants to settle."). This results in a "troubling

dynamic of allowing certain actors in the system to spin even good-faith, technical violations of federal law into lucrative litigation, if not for themselves then for the attorneys who conceive of the suit." *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA, et al.*, 559 U.S. 573, 617 (2010) (Kennedy, J., dissenting).

Class action abuse weakens the rule of law and drives up the costs of living for consumers. The justice system was created to allow injured parties an opportunity for redress, not to allow profiteers to seize on insubstantial legal pretexts as a chance to enrich themselves at others' expense. "Any device which is workable only because it utilizes the threat of unmanageable and expensive litigation to compel settlement is not a rule of procedure—it is a form of legalized blackmail." Milton Handler, *The Shift from Substantive to Procedural Innovations in Antitrust Suits—The Twenty-Third Annual Antitrust Review*, 71 Colum. L. Rev. 1, 9 (1971). Professor Sheila B. Scheuerman examined the growth industry in these lawsuits. Scheuerman, *supra*, at 113. She notes that plaintiffs' attorneys alleging "statutory damages class actions under the [Fair and Accurate Credit Transactions Act (FACTA), 15 U.S.C. § 1681(c)(g) (part of the FCRA)], have become so numerous that the Judicial Panel on Multidistrict Litigation has faced several requests to consolidate pre-trial proceedings." *Id.* (citations omitted). FACTA was just the beginning. "Plaintiffs' attorneys have combined numerous other state and federal statutory damages regimes with the class action device, including the Telephone Consumer Protection Act, the Cable Communications Policy Act, the Fair Credit Reporting Act, and state consumer fraud statutes." *Id.* at 113-14 (citations omitted). Given the number of federal statutes that, according to

some courts, create congressional standing simply by virtue of their enactment, the liability implications cut wide swaths through every part of the American economy.

Article III standing requirements ensure that federal courts do not provide a vehicle for these types of abusive, non-injury class action lawsuits. *See Lujan*, 504 U.S. at 559-77 (Article III standing doctrine includes a concrete injury requirement to prevent citizen bystanders from suing about an alleged statutory violation that does not affect them personally and could be addressed by the political branches instead.). The Constitution was designed to protect the people from governmental overreach by curtailing the orbit of all three branches. *American Federation of Labor v. American Sash and Door Co.*, 335 U.S. 538, 545 (1949) ("[T]he Government–the organ of the whole people–is restricted by the system of checks and balances established by our Constitution."). Federal courts must act within the constraints of Article III, resolving only the true cases and controversies presented to them. *See* Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 Suffolk U. L. Rev. 881, 881 (1983) (The "judicial doctrine of standing is a crucial and inseparable element" of separation of powers principles required by the structure and original intent of the Constitution, "which successively describes where the legislative, executive and judicial powers, respectively, shall reside."). The decision of the court below, and several other circuits, significantly weakens these constitutional constraints.

CONCLUSION

The petition for a writ of certiorari should be granted.

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Respectfully submitted,

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