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 AMERICAN BANKERS ASSOCIATION, THE CONSUMER BANKERS ASSOCIATION, THE MORTGAGE BANKERS ASSOCIATION, THE CLEARING HOUSE, AND THE FINANCIAL SERVICES ROUNDTABLE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE[1]

The American Bankers Association ("ABA") is the principal national trade association of the financial services industry in the United States. Founded in 1875, the ABA is the voice for the nation's $13 trillion banking industry and its million employees. ABA members are located in each of the fifty States and the District of Columbia, and include financial institutions of all sizes and types, both large and small. ABA frequently submits *amicus curiae* briefs in state and federal courts in matters that significantly affect its members and the business of banking.

Member institutions of the Consumer Bankers Association ("CBA") are the leaders in consumer financial services, including mortgage and home equity lending, nationwide. They include most of the nation's largest bank holding companies, as well as regional and super community banks that collectively hold two-thirds of the industry's total assets. The CBA frequently appears as an *amicus curiae* or a party in litigation where the issues in dispute are of widespread importance or concern to the banking industry.

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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici*, their members, or their counsel made any monetary contributions intended to fund the preparation or submission of this brief. Pursuant to this Court's Rule 37.3(a), letters from all parties consenting to the filing of this brief have been submitted to the Clerk.

The Mortgage Bankers Association ("MBA") is the national association representing the real estate finance industry, an industry that employs more than 280,000 people in virtually every community in the country. Headquartered in Washington, D.C., the association works to ensure the continued strength of the nation's residential and commercial real estate markets, to expand homeownership, and to extend access to affordable housing to all Americans. Its membership of over 2,200 companies includes all elements of real estate finance: mortgage companies, mortgage brokers, commercial banks, thrifts, REITs, Wall Street conduits, life insurance companies and others in the mortgage lending field.

Established in 1853, The Clearing House is the United States' oldest banking association. It is owned by the world's largest commercial banks, which collectively employ 1.4 million people in the United States and hold more than half of all U.S. deposits. The Clearing House is a nonpartisan advocacy organization representing, through regulatory comment letters, *amicus* briefs, and white papers, the interests of its member banks on a variety of systemically important banking issues.

As *advocates for a strong financial future*™, the Financial Services Roundtable ("FSR") represents 100 integrated financial services companies providing banking, insurance, and investment products and services to the American consumer. Member companies participate through the Chief Executive Officer and other senior executives nominated by the CEO. FSR member companies provide fuel for America's economic engine, accounting directly for $98.4 trillion in

managed assets, $1.1 trillion in revenue, and 2.4 million jobs.

Amici, on behalf of their members, have a significant interest in the consequences of a view of standing that enables class action lawyers to recruit plaintiffs who have suffered no injuries, seek staggering statutory damages for what are often technical or trivial violations, and leverage the *in terrorem* effect of the threatened liability to extract lucrative settlements. An important premise of these actions, accepted by the court of appeals below, is that an individual can pursue a statutory damages claim in federal court on the strength of a bare statutory violation, despite having suffered no injury from the alleged violation. This view renders the "injury in fact" requirement for standing a dead letter, and in so doing delegates to the private bar the Executive Branch's responsibility for law enforcement. The abusive class actions that affect *amici* are a direct consequence of a diluted standing requirement that disrupts the Constitution's separation of powers.

INTRODUCTION AND SUMMARY OF ARGUMENT

In this case about the limits of Article III standing, Article II of the Constitution looms large. Under the constitutional design, the Executive – not the courts, not private plaintiffs, and not class action lawyers – has the duty to "take Care that the Laws be faithfully executed." U.S. Const. art. II, § 3. The separation of powers leaves the courts open to individuals seeking redress for actual injuries they claim to have suffered. But when an uninjured

individual asserts an abstract objection to a violation of the law, it is improperly seeking to exercise the Executive's power over law enforcement.

The advent of no-injury class actions, seeking to impose massive punishments for what are often (at most) technical violations, confirms the wisdom of leaving law enforcement out of private hands. Regulatory agencies have the responsibility, as well as the expertise and incentives, to enforce the law in the public interest. Private class action lawyers have a different interest: profit. The very factors that might lead a responsible and accountable agency to take no enforcement action – the minor nature of the violation, the lack of harm to individuals, the disproportionate nature of the penalties – make for an attractive case from the class action lawyer's perspective. Delegating law enforcement power to uninjured private plaintiffs is thus a recipe for arbitrary, abusive, and unfair litigation. The Court should hold that the federal courts may not entertain such actions.

1. a. The line between an injured plaintiff and an uninjured plaintiff is constitutionally decisive: it distinguishes between an individual seeking redress for personal harm – the traditional office of Article III courts – and an individual seeking to enforce the law. When the purported "injury in fact" is just a bare violation of a law, the plaintiff's goal is simply to enforce that law, a task that is constitutionally committed to the Executive. Allowing private plaintiffs to play this role contravenes the separation of powers. This Court has recognized that principle in cases seeking to compel the Executive to obey the law; it applies with

even greater force where, as here, the Executive acts as a neutral third party with enforcement discretion.

b. The Framers' decision to vest law enforcement authority in the Executive Branch promotes the vital objective of accountability. Rules of law are almost invariably overinclusive, and the Executive plays a critical role in determining whether, and to what extent, potential violations should be prosecuted. As this Court has long recognized, the decision not to enforce is a policy decision generally left to the discretion of agencies. But when private plaintiffs are able to bring "injury in law" class actions, they are able to act as private enforcers of the law without any accountability. The factors that might lead an agency not to take action – the triviality of the violation, the disproportionality of the sanction – are the very factors that may make a case more attractive from the perspective of the class action lawyer. When states such as California have experimented with "private attorney general" suits unmoored from an injury-in-fact requirement, the predictable result has been abusive litigation that is not in the public interest.

2. These concerns have manifested themselves in a rash of abusive class actions. A number of episodes involving the financial services industry are illustrative:

- One bank, faced with the prospect of statutory damages that could have put it out of business, was forced into a settlement after it purchased a list of addresses for a penny apiece from the Florida Department of Motor Vehicles. Florida, alone among the states, had failed to comply with a federal law requiring

consent for such disclosures, and for this technical violation (which the bank may not have had reason to know about), the bank faced a class action suit by a plaintiff who did not even receive any solicitation using his information.

- For a number of years, banks faced class actions for statutory damages based on the lack of a physical placard giving notice of Automated Teller Machine ("ATM") fees – even though an *identical* notice appeared on the machine itself. Many of these lawsuits were brought by the same plaintiffs who roamed cities looking for missing placards, and even by plaintiffs who removed the signs and then sued.
- A round of costly class action litigation was launched when the Seventh Circuit issued a controversial interpretation of the Fair Credit Reporting Act ("FCRA"). The court held that when a defendant purchased credit information in order to make an offer of credit (which the FCRA allows), plaintiffs may make the nebulous allegation that the offer lacks sufficient "value." The result of this interpretation was a series of class actions for staggering damages. The Seventh Circuit specifically instructed district courts that they had no discretion to deny certification based on the triviality of the violation or the disproportionality of the claimed statutory damages.

ARGUMENT

I. "Injury In Law" Claims Are Incompatible With Separation Of Powers Principles And The Protections They Provide.

This Court's standing decisions have refused to "permit Congress to transfer from the President to the courts the Chief Executive's most important constitutional duty, to 'take Care that the Laws be faithfully executed." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 577 (1992) (quoting U.S. Const. art. II, § 3). The "irreducible constitutional minimum of standing," *id.* at 560, guards against an undue enlargement of the judicial role, but it also does more than that. Standing limitations serve the complementary function of ensuring – indeed, requiring – that an accountable Executive remains responsible for enforcing the law, with all of the important and sensitive judgments that role entails.

Abandoning a meaningful "injury in fact" requirement carries real costs to this constitutional principle. It is not just a particular president or the institution of the Executive that is injured if Article II authority is delegated away. "The structural principles secured by the separation of powers protect the individual as well," *Bond v. United States*, 131 S. Ct. 2355, 2365 (2011), and are "critical to preserving liberty," *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 480 (2010) (quoting *Bowsher v. Synar*, 478 U.S. 714, 730 (1986)).

By charging an elected and accountable Executive with enforcing the law, the Constitution protects parties subject to government regulation from unreasonable, arbitrary, and abusive

enforcement measures. The availability of "injury in law" claims subverts this protection. Almost invariably brought as class actions, no-injury claims for an agglomeration of statutory damages are in practical effect law enforcement actions. But they are law enforcement actions divorced from the responsibility and accountability of an Executive Branch agency.

A. The Injury In Fact Requirement Ensures That The Executive – Not Private Class Action Lawyers – Retains Ultimate Responsibility For Enforcing The Law.

Article III courts exist "to adjudicate cases and controversies as to claims of infringement of individual rights, whether by unlawful action of private persons or by the exertion of unauthorized administrative power." *Lujan*, 504 U.S. at 577 (quoting *Stark v. Wickard*, 321 U.S. 288, 309-10 (1944)); *see also id.* at 576 ("'The province of the court,' as Chief Justice Marshall said in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803), 'is, solely, to decide on the rights of individuals.'"). Even when the Court has permitted Congress to "broaden[]" the "categories of injury that may be alleged in support of standing," it has never "abandon[ed] the requirement that the [plaintiff] must himself have suffered an injury." *Id.* at 578 (quoting *Sierra Club v. Morton*, 405 U.S. 727, 738 (1972)).

The line between an injured plaintiff and an uninjured plaintiff is constitutionally momentous: it does nothing less than identify what the litigant seeks to accomplish in court. If an individual comes

to court after suffering an injury in fact, her objective is to achieve redress for an individualized harm. If, on the other hand, an individual comes to court *without* having suffered an actual injury, she necessarily has a different goal – enforcing the law. That makes all the difference, because the Judicial Branch is responsible for hearing claims for redress of injury, whereas it is the Executive Branch that enforces the law. As the now-Chief Justice has explained:

> The Article III standing requirement that the judiciary act only at the behest of a plaintiff suffering injury in fact . . . ensures that the court is carrying out *its* function of deciding a case or controversy, rather than fulfilling the *executive*'s responsibility of taking care that the laws be faithfully executed.

John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 Duke L.J. 1219, 1229 (1993).

Understood through this separation of powers lens, there are important constitutional reasons why an "injury in law" cannot substitute for an injury in fact. If a plaintiff's "injury" is *only* that she had a statutory right that was violated, then the only possible objective of her lawsuit – aside from collecting the "bounty" that this Court has said cannot give rise to standing, *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 772 (2000) – is to sanction the defendant for that violation. It is, in other words, to enforce the law, an agenda that falls within the Executive's role, not the

Judiciary's or the bar's. Even if an "injury in law" could qualify as an "injury in fact" without doing violence to the English language, it could not do so without doing violence to the substantive separation of powers concerns underlying the standard.

This Court has noted the relevance of Article II values to standing in an administrative law context, *Lujan*, 504 U.S. 555; the species of "injury in law" claim at issue here presents even more clear-cut separation of powers concerns. Defenders of the "citizen suits" at issue in *Lujan* have urged that there is no separation of powers problem when the Executive is breaking the law and a court simply orders it comply. *See Lujan*, 504 U.S. at 605 (Blackmun, J., dissenting) (arguing that *Lujan* effected an "unseemly solicitude for an expansion of power of the Executive Branch"); Cass R. Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, 'Injuries,' and Article III*, 91 Mich. L. Rev. 163, 212-13 (1992) (arguing that the role of the Take Care clause in the standing analysis should be "nonexistent" because there is no "constitutional difficulty" with an order "that the President is violating the law"). This Court rejected that view, because it is "the function of Congress and the Chief Executive" to enforce the law, including to vindicate "the public interest in Government observance of the Constitution and laws." *Lujan*, 504 U.S. at 576. But even if there were force to the argument that uninjured citizens should be permitted to compel a disobedient Executive to comply, there would still be no ground for usurping the Executive's enforcement role vis-à-vis third parties. Unlike in an administrative law case, the statutory damages

context is one where the Executive is neutral and able to exercise appropriate enforcement discretion. There is no constitutionally sound basis for transferring that law enforcement decision outside of the Executive Branch.

It is no answer that the Executive, by signing the laws that give rise to "injury in law" claims, has acquiesced in the delegation of its law enforcement power to private class action lawyers. "[T]he separation of powers does not depend on the views of individual Presidents, nor on whether 'the encroached-upon branch approves the encroachment.'" *Free Enter. Fund*, 561 U.S. at 497 (internal citation omitted) (quoting *New York v. United States*, 505 U.S. 144, 182 (1992)). That principle applies with special force to constitutional standing. "[S]tanding – like other doctrines of judicial self-restraint – compels the other branches of government to do a better job in carrying out their responsibilities under the Constitution." Roberts, *supra*, at 1229. The political branches may find it convenient to deputize private attorneys to enforce the law, but doing so undermines the important *reasons* the Framers assigned that role to the Executive. *See infra* pp. 12-16.

Neither does the historical tradition of *qui tam* actions justify the modern innovation of a wholly private no-injury class action. This Court has held that False Claims Act ("FCA") relators have standing to assert the federal government's injuries. *Vt. Agency of Nat. Res.*, 529 U.S. 765. The Court deemed the history of *qui tam* actions, stretching back to colonial America and beyond, "well nigh conclusive."

Id. at 777. It also grounded the relator's standing in an assignment of the underlying claim from the government, emphasizing that this assignment is "partial." *Id.* at 773 & n.4. As the lower courts have pointed out in rejecting Article II challenges to *qui tam* actions (an issue this Court has left open), "the Executive retains significant control over litigation pursued under the FCA by a qui tam relator." *Riley v. St. Luke's Episcopal Hosp.*, 252 F.3d 749, 753 (5th Cir. 2001) (en banc). It is one thing for Congress to follow a historical model and invite private attorneys to enforce the law under the watchful gaze (and ultimate veto power) of the Executive; it is quite another to depart from historical precedent and delegate law enforcement powers wholesale to uncontrolled and unaccountable private attorneys.

B. The Injury In Fact Requirement Helps Ensure Accountability And Prevent Harmful And Unreasonable Enforcement Actions Against Regulated Parties.

"Liberty requires accountability." *Dep't of Transp. v. Ass'n of Am. R.Rs.*, 135 S. Ct. 1225, 1234 (2015) (Alito, J., concurring). That "vital constitutional principle," *id.*, is especially critical when it comes to wielding the coercive power of the federal government against those accused of violating the law. Thus, "[o]ne reason the Founders opted for a unitary executive was to ensure that one executive would be accountable for law enforcement choices." Saikrishna Prakash, *The Chief Prosecutor*, 73 Geo. Wash. L. Rev. 521, 583 (2005).

The exercise of enforcement discretion by public officials, subject to the political process and

answerable to the people, is a necessary counterbalance to the ubiquity of government regulation. "[R]ules of law are almost always overinclusive," and "discretionary nonenforcement" is a means by which "the costs of overinclusion can be reduced without a corresponding increase in underinclusion (loopholes)." William M. Landes & Richard A. Posner, *The Private Enforcement of Law*, 4 J. Legal Stud. 1, 38 (1975). Just as "[t]he police overlook minor infractions of the traffic code," *id.*, so too do Executive Branch agencies determine that various technical violations ought not to be enforced to the fullest extent. Indeed, laws that are "[y]esterday's herald" can become "today's bore," and the Executive's "ability to lose or misdirect laws can be said to be one of the prime engines of social change." Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 Suffolk Univ. L. Rev. 881, 897 (1983).

This Court has recognized the complexities of agency enforcement decisions, and the concomitant need for discretion:

> The agency must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake the action at all. An agency generally cannot act against

> each technical violation of the statute it is charged with enforcing. . . .
>
> [A]n agency's refusal to institute proceedings shares to some extent the characteristics of the decision of a prosecutor in the Executive Branch not to indict – a decision which has long been regarded as the special province of the Executive Branch, inasmuch as it is the Executive who is charged by the Constitution to "take Care that the Laws be faithfully executed." U.S. Const., Art. II, § 3.

Heckler v. Chaney, 470 U.S. 821, 831-32 (1985).

The availability of "injury in law" actions undercuts the constitutional design of law enforcement undertaken by Executive Branch officials, who have both the duty and the incentive to pursue the public interest. "Virtually none of the checks on executive enforcement discretion apply to private parties." Tara Leigh Grove, *Standing as an Article II Nondelegation Doctrine*, 11 U. Pa. J. Const. L. 781, 818 (2009); *see also* Harold J. Krent, *Fragmenting the Unitary Executive: Congressional Delegations of Administrative Authority Outside the Federal Government*, 85 Nw. U. L. Rev. 62, 104 (1990) ("Delegations to private attorneys general . . . are immune from most external supervision. . . ."). While an Executive Branch agency is responsible for making enforcement decisions based on policy considerations, private class action attorneys pursue the most lucrative lawsuits. There is nothing

inherently improper about private actors pursuing private gain – but that is precisely why the constitutional structure requires *public* actors to enforce the law based on the *public* interest.

Indeed, from the perspective of a financially interested "private attorney general," the ability to focus on the most technical and trivial violations is a feature, not a bug. Less serious violations are often easier to prove, and pursuing statutory damages rather than actual damages makes it easier to avoid the sort of individualized inquiries that could impede class certification. Moreover, while the Executive Branch has the obligation to seek proportionality and fairness in enforcement, for a private lawyer the more disproportionate the claimed damages – and thus the greater pressure to settle – the better. Thus, there is a sharp divergence between private incentives and the public interest.

This lesson has been tested and confirmed in the "laboratory" of the States. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (Brandeis, J., dissenting). California experimented with a sweeping Unfair Competition Law (UCL), Cal. Bus. & Prof. Code § 17200 *et seq.*, that "authorize[d] a private individual, acting as a 'private attorney general,' effectively to prosecute a business for unfair competition or false advertising," despite experiencing no personal injury. *Nike, Inc. v. Kasky*, 539 U.S. 654, 665 (2003) (Breyer, J., dissenting from dismissal of the writ of certiorari as improvidently granted). The results were unsurprising: "unscrupulous lawyers . . . exploited the generous standing requirement of the UCL to file 'shakedown'

suits to extort money from small businesses"; they "scour[ed] public records on the Internet for what [were] often ridiculously minor violations of some regulation or law"; and they filed "frivolous lawsuits as a means of generating attorney's fees without creating a corresponding public benefit." *In re Tobacco II Cases*, 46 Cal. 4th 298, 316 (2009) (quoting Proposition 64).[2]

The federal Constitution's insistence that the Executive "take care that the laws be faithfully executed," and the corollary that core law enforcement decisions may not be delegated to private attorneys general, is thus much more than formalism. The constitutional structure locates the power to enforce the law in the Executive Branch for important reasons of accountability and responsibility. Congress cannot delegate that power to private parties without inviting arbitrary and unfair results.

II. "Injury In Law" Claims Enable Abusive Class Actions On Matters That Are More Appropriately Dealt With Through Government Enforcement.

The functional problems with delegating law enforcement powers to private class action lawyers

[2] Having experienced a private attorney general regime, California voters decided to rein in these "abuses" by requiring "injury in fact." *Tobacco II*, 46 Cal. 4th at 305-06. However, a sharply divided California Supreme Court ruled that this requirement applies only to named plaintiffs but not absent class members who stand to recover. *Id.* at 306.

are not abstract. Rather, the availability of no-injury class actions has led to harmful litigation and extreme settlement pressure across a range of federal statutes, as the breadth of amicus briefs in this case attests. The experience of the financial services industry is particularly illustrative.

Congress, of course, heavily regulates the financial services industry. *See, e.g.*, Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act"), Pub. L. No. 111-203, 124 Stat. 1376 (2010); National Bank Act, 12 U.S.C. § 21 *et seq.*; *infra* p. 18 (additional statutes). Moreover, various Executive Branch agencies investigate financial institutions and bring enforcement actions. Regulatory enforcement can often be aggressive, and can concern the same statutes that frequently give rise to no-injury private actions. For example, the Consumer Financial Protection Bureau ("CFPB") recently issued an order requiring a company to pay $109 million for kickbacks in violation of the Real Estate Settlement Procedures Act ("RESPA"), 12 U.S.C. § 2601 *et seq.* – the exact issue that gave rise to the no-injury class action in *First American Financial Corp. v. Edwards*, 132 S. Ct. 2536 (2012), *writ of certiorari dismissed as improvidently granted*. *See* Press Release, CFPB Director Cordray Issues Decision in PHH Administrative Enforcement Action (June 4, 2015), http://tinyurl.com/PHH-CFPB.[3]

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[3] The President's direct control over the CFPB is limited by the statute's provision that the Director may be removed only "for cause." *See* 12 U.S.C. § 5491(c)(3). Although this Court has previously upheld for-cause removal of agency heads, it has also (continued…)

Notwithstanding the Executive Branch's broad enforcement powers, financial institutions (like many other businesses) are frequent targets of no-injury, statutory damage class actions alleging often-technical violations of federal law. These actions are brought under a range of federal laws, including the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. § 1681 *et seq*. (the law at issue here); RESPA (the law at issue in *First American Financial*); the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227 *et seq*.; the Truth in Lending Act ("TILA"), 15 U.S.C. § 1631 *et seq*.; and the Electronic Funds Transfer Act ("EFTA"), 15 U.S.C. § 1693 *et seq*. As one court described a TILA claim, the violations in question can amount to nothing more than "technical nit-picking." *Kurz v. Chase Manhattan Bank*, 273 F. Supp. 2d 474, 479 (S.D.N.Y. 2003). A few examples of this species of litigation illustrate how no-injury class actions diverge from the constitutional vision of an accountable Executive enforcing the law in the public interest.

1. In a case that elicited a statement respecting the denial of certiorari, plaintiffs filed a $1.4 billion class action alleging that a bank violated the Driver's Privacy Protection Act ("DPPA"), 18 U.S.C. § 2721 *et seq*. *See Fid. Fed. Bank & Trust v.*

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recognized the dangers of even greater in-roads on accountability, for example by insulating an agency with two layers of for-cause protection. *See Free Enter. Fund*, 130 S. Ct. at 497-98. Whatever degree of independence the CFPB and certain other agencies have, a wholly private enforcer of the law is many steps further away from Executive control and accountability.

Kehoe, 547 U.S. 1051 (2006) (Scalia, J., joined by Alito, J., concurring in the denial of certiorari). That law limited the disclosure and use of personal information related to motor vehicle records without the consumer's consent. *Id.* But Florida – "alone among the States" – failed to comply with the law, and its Department of Highway Safety and Motor Vehicles ("DMV") did not obtain express consent from its customers to share their information. *Id.* The DMV nonetheless "sold to [the bank], for a penny apiece, the names and addresses of 565,600 individuals in three counties who registered cars with the DMV," which the bank intended to use to mail solicitations. *Id.* For each name, class action lawyers sought $2,500 (or 25,000,000% of the amount the bank paid) in statutory damages. *Id.* Combined with other Florida class actions arising from the same circumstance, "the total amount at stake may reach $40 billion." *Id.*

The case involved no injury – the plaintiff did not even "allege that he ever received any solicitations from [the bank]." *Kehoe v. Fid. Fed. Bank & Trust*, No. 03-80593, 2004 WL 1659617, at *1 (S.D. Fla. June 14, 2004). The Eleventh Circuit, however, held that actual damages were not a prerequisite to recovering statutory damages. *Kehoe v. Fid. Fed. Bank & Trust*, 421 F.3d 1209, 1210 (11th Cir. 2005), *cert. denied*, 547 U.S. 1051 (2006). The bank also maintained that it had no reason to know that the DMV had not obtained consent to disclose the information it purchased, as required by law, and so for that reason as well should not be liable. 547 U.S. 1051 Although Justices Scalia and Alito noted that the *scienter* issue remained open, *id.*, the bank

settled the case rather than risk "annihilating" damages; in opposing class certification after remand, it noted that the damages sought were "more than 3 times [the bank's] net worth." Defs.' Opp. to Class Cert. at 9, No. 9:03-cv-80593, Dkt. No. 133 (S.D. Fla. Mar. 10, 2006); Order Preliminarily Approving Class Action Settlement, No. 9:03-cv-80593, Dkt. No. 194 (S.D. Fla. Aug. 2, 2006).

The Florida DPPA litigation illustrates the significant harms of delegating the Executive's law enforcement power to bounty-hunting private attorneys. From a public interest perspective, it would have made no sense to push an aggressive reading of a statute in order to threaten to put a bank out of business as punishment for at most a technical violation, one which was caused by a state government's failure to follow the law, and resulted in no material harm. But to a private lawyer, the technical nature of the violation, the measure of the regulated party's culpability, and the disproportionality of the sanction make no difference (indeed, they make a case more attractive). What matters instead is the ability to leverage a threat to the defendant's very existence into a lucrative settlement.

2. Banks have been targeted in a series of class actions under the EFTA for failing to post a physical notice of Automated Teller Machine ("ATM") fees. Prior to 2012, "the EFTA required ATM operators to give notice [of transaction fees] in two locations, both 'in a prominent and conspicuous location on or at the [ATM] at which the electronic fund transfer is initiated by the consumer,' and 'on

the screen of the [ATM] . . .'" *Frey v. First Nat'l Bank Sw.*, 602 F. App'x 164, 165 (5th Cir. 2015) (quoting 15 U.S.C. § 1693b(d)(3) (2011)). Even plaintiffs who "admit[ted] that [they] received the on-screen notice of the transaction fee" were permitted to file lawsuits and claim statutory damages based on the absence of a second notice. *Traylor v. United Cash Sys., LLC*, No. 3:12-cv-01006, 2014 WL 7404558, at *1 (D. Conn. Nov. 10, 2014).

As a result, and as Congress ultimately found, class action attorneys exploited the dual-notice requirement by bringing "frivolous" lawsuits against banks, credit unions, and retailers, seeking statutory damages "up to half a million dollars." H.R. Rep. No. 112-576, at 2, *reprinted in* 2012 U.S.C.C.A.N. 731, 732. One credit union, for example, was targeted by a plaintiff who had already "sued 32 financial institutions over fee disclosures on ATMs." *'ATM Vigilante' Files Suit Against North Coast Credit Union*, Anthem, Apr. 17, 2012, http://tinyurl.com/ATM-Vigilante. Congress even heard "evidence that some plaintiffs are purposefully removing these superfluous notices from ATMs and then filing suits against ATM operators for failing to provide adequate notice on the machine." H.R. Rep. No. 112-576, at 2.

This abuse ultimately became so extreme that Congress was compelled to act, prospectively eliminating the physical notice requirement. Amendment – Electronic Funds Transfer Act, Pub. L. No. 112-216, 126 Stat. 1590 (2012); *see Frey*, 602 F. App'x 166-171 (holding that the amendment does not apply retroactively and certifying a class seeking

statutory damages based on the presence of only one notice). But Congress cannot and should not be expected to respond to every innovative form of class action abuse developed by enterprising lawyers. *See* Landes & Posner, *supra*, at 38 (noting that "loopholes" would be inevitable if legislatures attempted to "precisely tailor[]" the law to only conduct that ought to give rise to enforcement actions). This would not pose a problem if uninjured plaintiffs were denied standing, because then a responsible and accountable Executive would be able to determine whether substantively trivial violations ought to be prosecuted. But again, the triviality of a violation like failing to post a superfluous notice is no reason why a private attorney should turn down a quick payday.

3. Financial institutions faced a spate of lawsuits concerning the FCRA's regulation of "prescreened" offers of credit. *See* Richard E. Gottlieb et al., *Fair Credit Reporting Act Update: Firm Offers, Willfulness, Adverse Action, and Receipt Truncation*, 63 Bus. Law. 677 (Feb. 2008). The FCRA permits the purchase of a consumer's credit report for purposes of making a "firm offer of credit," 15 U.S.C. § 1681b(c), but a 2004 decision of the Seventh Circuit announced that courts would investigate whether the offer had "sufficient value." *Cole v. U.S. Capital, Inc.*, 389 F.3d 719, 726 (7th Cir. 2004); *see also Gelman v. State Farm Mut. Auto Ins. Co.*, 583 F.3d 187, 194 (3d Cir. 2009) (suggesting that *Cole* had "effectuat[ed] a judicial amendment of the statute"). The *Cole* decision led to much confusion and disagreement, but it also led to something else:

"more than 250 putative class action filings." Gottlieb et al., *supra*, at 677, 680.

In one such case, the district court denied class certification on the ground that the proposed class representative was a "professional plaintiff" who sought no compensatory damages, and statutory damages that, "if awarded to a class, would be ruinously high." *Murray v. GMAC Mortg. Corp.*, 434 F.3d 948, 951 (7th Cir. 2006). Rejecting this basis for denying class certification, Judge Easterbrook wrote that the potential damages of "billions of dollars for purely technical violations of the FCRA" is simply a consequence of the "authorize[d] awards" and the defendant's "decision to obtain the credit scores of more than a million persons." *Id.* at 953. The court refused to allow the district judge "to curtail the aggregate damages for violations he deemed trivial," because "it is not appropriate to use procedural devices to undermine laws of which a judge disapproves." *Id.* at 953-54; *accord Bateman v. Am. Multi-Cinema, Inc.*, 623 F.3d 708, 710-11 (9th Cir. 2010) (holding, in a case brought under the Fair and Accurate Credit Transactions Act ("FACTA"), Pub. L. No. 108-159, 117 Stat. 1952 (amending the FCRA), seeking up to $290 million for including more than 5 digits of a credit card number on receipts, that "the disproportionality between the potential liability and the actual harm suffered, the enormity of the potential damages, or [the defendant's] good faith

compliance" could not "justif[y] the denial of class certification").[4]

Whether or not the courts are genuinely that constrained, the larger point is correct: courts are not the best equipped branch to supply the enforcement discretion called for in these types of cases. That limitation is not a problem when the judiciary is asked to play its traditional role and decide the claims of individuals who have actually been injured. The Executive Branch, by contrast, does have the wherewithal to determine whether a business should be threatened with ruin for a potential technical violation. The availability of no-injury class actions invites and incentivizes private attorneys to circumvent that needed discretion and pursue disproportionate sanctions.

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These are just a few examples, under just a few federal statutes, involving just one industry. The full scope of the problem is much larger, with

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[4] Like the ATM placard litigation, the absurdity of some of the litigation concerning "prescreened" offers of credit and the FACTA's credit card redaction requirements were apparent and led to some degree of change. *See Murray v. New Cingular Wireless Servs., Inc.*, 523 F.3d 719, 721-22 (7th Cir. 2008) (limiting *Cole* to offers of merchandise, as opposed to pure offers of credit); Credit and Debit Card Receipt Clarification Act of 2007, Pub. L. No. 110-241, 122 Stat. 1565 (creating a temporary safe harbor for failures to comply with credit card redaction requirements). Again, the ultimate recognition that these particular situations were untenable – after much costly litigation – does not minimize the harms of allowing no-injury class actions. *See supra* p. 22.

many cases extracting settlements before there can be any published opinion addressing the merits. What these examples illustrate is the practical consequence of "injury in law" standing. The Constitution vests in the Executive the power to enforce the law because that power is too sensitive to be wielded by private parties based on a profit motive. When individuals suffer injury in fact, the courts have traditionally been open to them to seek redress. But when they allege a bare statutory violation, they are enforcing the law (or their view of it) and pursuing a bounty. Particularly in "an era of . . . class actions," *Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436, 1449 (2011), the practical consequences of allowing no-injury standing confirm the wisdom of the Framers of limiting the courts to true "cases or controversies," and leaving to the Executive Branch the role of "tak[ing] Care that the Laws be faithfully executed."

CONCLUSION

For the foregoing reasons, as well as the reasons set forth in Petitioner's brief, the decision of the court of appeals should be reversed.

Respectfully submitted,

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