No. 13-1339

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 ACA INTERNATIONAL AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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BRIEF OF ACA INTERNATIONAL AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER AND REVERSAL

Interest of the *Amicus Curiae*[1]

ACA International, the Association of Credit and Collection Professionals, is a not-for-profit corporation based in Minneapolis, Minnesota. Founded in 1939, ACA brings together nearly 3,400 member organizations and their more than 300,000 employees worldwide, including third-party collection agencies, asset buyers, attorneys, creditors, and vendor affiliates. ACA produces a wide variety of products, services, and publications, including educational and compliance-related information; and articulates the value of the credit-and-collection industry to businesses, policymakers, and consumers. ACA regularly files briefs as an amicus curiae in cases of interest to its membership.

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[1]No counsel for any Party authored this brief in whole or in part. Neither any such counsel nor any Party made a monetary contribution intended to fund this brief's preparation or submission. No person (other than Amicus Curiae ACA International, its members, and its counsel) made such a monetary contribution.

All the Parties have granted their written consent under Rule 37.3(a) for ACA International to file an *amicus curiae* brief.

ACA's members include sole proprietorships, partnerships, and corporations ranging from small businesses to firms that employ thousands of workers. These members include the very smallest of businesses, which operate within a limited geographic range of a single state; and the very largest of multinational corporations, which operate in every state and outside the United States. About three-quarters of ACA's company members have fewer than 25 employees. ACA helps its members serve their communities and meet the challenges created by changing markets through leadership, education, and service.

Through their attempts to recover outstanding accounts, ACA's members act as an extension of every community's businesses. ACA's members represent the local hardware store, the retailer down the street, and the family doctor. They work with these businesses, large and small, to obtain payment for the goods and services received by consumers, and each year, their combined effort results in the recovery of billions of dollars that are returned to businesses and reinvested in local communities. Without an effective collection process, these businesses' economic viability — and, by extension, the local and national economies in general — are threatened. At the very least, absent effective collections, consumers would be forced to pay more for their purchases to compensate for uncollected debts.

Finally, ACA's members also help governments in recovering unpaid obligations — a function that is increasingly important as many governments face record budget deficits.

Summary of Argument

The statute at issue is one of a class of statutes that creates liability without requiring injury in fact. Consumer credit protection is a field that Congress has regulated extensively in the last several decades, beginning with the Consumer Credit Protection Act in 1968. Many consumer-credit statutes created private rights of action to redress injuries for which there was no adequate remedy at common law. But sometimes the remedies that Congress devised for the practices that it prohibited have gone beyond the harms that Congress was trying to address. More to the point, Congress sometimes enacted laws that have been interpreted to provide remedies to plaintiffs who were never harmed at all.

This case's implications go beyond the statute at issue, and affect the credit-and-collection industry at every level. The Fair Credit Reporting Act is far from the only consumer-protection statute that provides for statutory damages independent of whether the plaintiff suffered actual damages. These statutes affect the credit-and-collection industry, daily, and at every level, from the issuance of credit to the collection of debt in default.

ACA therefore joins the Petitioner in asking that this Court reverse the Court of Appeals' judgment.

Standing is a fixed constitutional principle that Congress cannot expand by statute. Congress can enact statutes that create new rights, and Congress can create remedies for those rights. But Congress cannot abrogate the constitutional principle of standing altogether: "broadening the categories of injury that may be alleged in support of standing is a different matter from abandoning the requirement that the party seeking review must himself have suffered an injury." That requirement of injury in fact — "that the party seeking review be himself among the injured" — is an "irreducible constitutional minimum" without which a federal court lacks jurisdiction.

Several federal courts of appeals have allowed plaintiffs to recover statutory damages under consumer-protection statutes without any proof of actual damages — that is, they have let the plaintiffs recover for an injury in law without having suffered an injury in fact. A statute may be "blind when it comes to distinguishing between plaintiffs who have suffered actual damages and those who have not," but the Constitution is not. Most courts of appeals that have upheld liability against a defendant without injury to the plaintiff did not even consider the standing requirement's constitutional dimensions. Other courts of appeals that have considered the constitutional issue have concluded that a statutory violation confers constitutional standing. Yet other courts of appeals

have delved adequately into this Court's standing jurisprudence and correctly held that an uninjured plaintiff lacks constitutional standing.

The credit-and-collection industry operates in a nationwide market, and thus depends on the consistent and predictable application of the federal laws that apply to the issuance of credit and the collection of unpaid debt. But the inconsistent approaches that the courts of appeals have taken have frustrated the consistent and predictable application of the relevant federal laws, and have subjected the credit-and-collection industry to constitutionally unwarranted liability in several jurisdictions. This Court should resolve the various approaches that the courts of appeals have taken, and insist upon consideration of the standing requirement's constitutional dimensions. This Court should therefore reverse the Court of Appeals' judgment.

Argument

I. The statute at issue is one of a class of statutes that creates liability without requiring injury in fact.

Consumer credit protection is a field that Congress has regulated extensively in the last several decades, beginning with the Consumer

Credit Protection Act in 1968.[2] Since its original enactment, the Consumer Credit Protection Act has been amended dozens of times, and many of those amendments are very familiar to most federal courts because they have been so heavily litigated — among them the the Fair Debt Collection Practices Act;[3] the Electronic Fund Transfer Act;[4] and the Fair Credit Reporting Act,[5] the statute at issue in this case.

Many consumer-credit statutes created private rights of action to redress injuries for which there was no adequate remedy at common law. For example, the Restatement of Torts is both clear and explicit that an unwanted communication in an attempt to collect a debt is not an invasion of privacy, even where the creditor knows that the communication is unwanted: "A, a landlord, calls upon B, his tenant, at nine o'clock on Sunday morning, to demand payment of the rent, although he knows that B is not ready to pay it and that B

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[2]Pub. L. No. 90-321, 82 Stat. 176 (1968) (codified at 15 U.S.C. ch. 41).

[3]Pub. L. No. 95-109, 91 Stat. 874 (1977) (codified at 15 U.S.C. ch. 41, subch. V).

[4]Pub. L. No. 95-630, tit. XX, 92 Stat. 3641, 3728, *in* Financial Institutions Regulatory & Interest Rate Control Act of 1978 (codified at 15 U.S.C. ch. 41, subch. VI).

[5]Pub. L. No. 91-508, 84 Stat. 1127 (1970) (codified at 15 U.S.C. ch. 41, subch. III).

objects to such a visit on Sunday. B is seriously annoyed. This is not an invasion of B's privacy."[6] When Congress enacted the Fair Debt Collection Practices Act in 1977, it found that "[t]here is abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors,"[7] but that "[e]xisting laws and procedures for redressing these injuries are inadequate to protect consumers."[8] Congress passed the Fair Debt Collection Practices Act both "to eliminate abusive debt collection practices by debt collectors" and "to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged."[9]

Likewise, when Congress enacted the Telephone Consumer Protection Act of 1991[10] (which is not a part of the Consumer Credit Protection Act), it found that "[o]ver half the States now have statutes restricting various uses of the telephone for marketing, but telemarketers can

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[6]Restatement (Second) of Torts § 652B cmt. d, illus. 8 (1977).

[7]15 U.S.C. § 1692(a) (abusive practices).

[8]15 U.S.C. § 1692(b) (inadequacy of laws).

[9]15 U.S.C. § 1692(e) (purposes).

[10]Pub. L. No. 102-243, 105 Stat. 2394 (1991) (codified at 47 U.S.C. § 227).

evade their prohibitions through interstate operations; therefore, Federal law is needed to control residential telemarketing practices."[11] Congress also found that "[i]ndividuals' privacy rights, public safety interests, and commercial freedoms of speech and trade must be balanced in a way that protects the privacy of individuals and permits legitimate telemarketing practices."[12]

But sometimes the remedies that Congress devised for the practices that it prohibited have gone beyond the harms that Congress was trying to address. More to the point, Congress sometimes enacted laws that have been interpreted to provide remedies to plaintiffs who were never harmed at all.

The Fair Debt Collection Practices Act, for example, mandates or prohibits conduct by debt collectors "in connection with the collection of any debt" in 43 separate paragraphs, each containing one or more specific mandates or prohibitions.[13] One such prohibition applies to "[c]ausing a telephone to ring or engaging any person in telephone conversation repeatedly or continuously with intent to annoy, abuse, or harass any person

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[11] *Id.*, § 2(7) (not codified in U.S.C.).

[12] *Id.*, § 2(9) (not codified in U.S.C.).

[13] *See* 15 U.S.C. § 1692b–92g.

at the called number."[14] A person whom a debt collector "engag[es] . . . in telephone conversation repeatedly or continuously" surely has standing to complain of the statutory violation. So would a consumer who had to listen to "a telephone . . . ring . . . repeatedly or continuously." But what if a debt collector "[c]aus[ed] a telephone to ring . . . repeatedly or continuously," but nobody was home, so nobody heard the telephone? Even if the debt collector was calling "with intent to annoy, abuse, or harass any person at the called number," that intent was fruitless; it calls to mind one federal judge's analysis of why intent is irrelevant without effect (in that case, in connection with the alleged violation of a discharge injunction in bankruptcy):

> A plaintiff proves nothing by proving an intent to violate the discharge injunction as such. Certainly it is relevant to know whether the defendant intended to do the *act* that *constitutes* a violation of the discharge, because, without that intent, an action for contempt would fail. But it is unnecessary to demonstrate an intent to violate the discharge injunction as such.
>
> It is also irrelevant. An example helps to explain why. A creditor, smarting from the write-off of his loan,

[14] 15 U.S.C. § 1692d(5).

> privately sacrifices a goat to Mercury, the Roman god of merchants, believing devoutly that Mercury will see to it that the debtor repays the creditor in full. The creditor takes no actions to publicize his sacrifice. He has no reason to believe that the debtor believes in Mercury, or cares about goats. Certainly, the sacrifice is an intentional act, and it was subjectively intended to collect the debt. Indeed, it might be easy to show that the creditor, "with malice aforethought," had every intent to violate the dickens out of the bankruptcy discharge. But so what? All the intention in the world would not convert the creditor's sacrifice into "an act to collect, recover, or offset" the debt in question. Intentionally performing a useless and ineffective act cannot violate section 524(a) because a useless and ineffective act will not count as a proscribed act within the meaning of the statute — regardless of the avowed "intent to violate the discharge injunction."[15]

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[15] *Mahoney v. Wash. Mut., Inc. (In re Mahoney)*, 368 B.R. 579, 587 (Bankr. W.D. Tex. 2007) (court's emphasis; citation omitted).

Yet the Fair Debt Collection Practices Act would let a consumer who never heard the phone ring, but who learns about a debt collector's calls long after the fact by looking at his phone records for some totally unrelated purpose, assert a claim under the Act.

Similar issues arise under the Telephone Consumer Protection Act. One of the Act's most frequently litigated provisions says that

> It shall be unlawful for any person within the United States, or any person outside the United States if the recipient is within the United States—
>
> (A) to make any call (other than a call . . . made with the prior express consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice—
>
> . . .
>
> (iii) to any telephone number assigned to a . . . cellular telephone service . . . .[16]

[16] 47 U.S.C. § 227(b)(1) (prohibitions).

The prohibited act is merely "to make any call" to a cell phone using "any automatic telephone dialing system or an artificial or prerecorded voice," regardless of whether the called party is even aware of the call being made.[17]

II. This case's implications go beyond the statute at issue, and affect the credit-and-collection industry at every level.

The Fair Credit Reporting Act provides for "any actual damages sustained by the consumer as a result of the failure or damages of not less than $100 and not more than $1,000," plus punitive damages, for willful noncompliance.[18] But the Fair Credit Reporting Act is far from the only consumer-protection statute that provides for statutory

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[17] *See, e.g.*, *Golan v. Veritas Entm't, LLC*, No. 4:14CV000069 ERW, 2014 U.S. Dist. LEXIS 68910, at *39 (E.D. Mo. May 20, 2014) ("The sum of [Plaintiffs'] knowledge about their alleged injury was based upon what someone else told them, after the fact."), *rev'd*, No. 14-2484, 2015 U.S. App. LEXIS 9489, *3 (8th Cir. June 8, 2015) (reversing the district court's dismissal "concluding that the Golans did not have standing and were inadequate class representatives"); *City Select Auto Sales, Inc. v. David Randall Assocs.*, 296 F.R.D. 299, 304 (D.N.J. 2013) (certifying class even though named plaintiff "does not presently have any information about, recollection of, or record of the faxes that he received from [defendant]").

[18] 15 U.S.C. § 1681n(a).

damages independent of whether the plaintiff suffered actual damages:

- The Truth in Lending Act provides for "any actual damage sustained by [the plaintiff] as a result of the failure" and for statutory damages based on the finance charge, as well as costs and fees.[19]
- The Fair Debt Collection Practices Act provides for "any actual damage sustained by [the plaintiff] as a result of such failure" and for "such additional damages as the court may allow."[20]
- The Telephone Consumer Protection Act provides for "an action to recover for actual monetary loss from such a violation, or to receive $500 in damages for each such violation, whichever is greater."[21]

These statutes affect the credit-and-collection industry, daily, and at every level, from the issuance of credit to the collection of debt in default.

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[19] 15 U.S.C. § 1640(a).

[20] 15 U.S.C. § 1692k(a).

[21] 47 U.S.C. § 227(b)(3)(B) (private right of action).

III. Standing is a fixed constitutional principle that Congress cannot expand by statute.

Standing is "the threshold question in every federal case, determining the power of the court to entertain the suit."[22] Standing is "an essential and unchanging part of the case-or-controversy requirement of Article III,"[23] and it requires that "a plaintiff must present an injury that is concrete, particularized, and actual or imminent; fairly traceable to the defendant's challenged action; and redressable by a favorable ruling."[24]

Congress can enact statutes that create new rights, and Congress can create remedies for those rights. But Congress cannot abrogate the constitutional principle of standing altogether: "broadening the categories of injury that may be alleged in support of standing is a different matter from abandoning the requirement that the party seeking review must himself have suffered an injury."[25] That requirement of injury in fact — "that the party seeking review be himself among

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[22] *Warth v. Seldin*, 422 U.S. 490, 498 (1975).

[23] *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992), *quoted in Horne v. Flores*, 557 U.S. 433, 445 (2009).

[24] *Horne*, 557 U.S. at 445 (citing *Lujan*, 504 U.S. at 560–61).

[25] *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 39 (1976).

the injured"[26] — is an "irreducible constitutional minimum"[27] without which a federal court lacks jurisdiction: "The Art. III judicial power exists only to redress or otherwise to protect against injury to the complaining party, even though the court's judgment may benefit others collaterally. A federal court's jurisdiction therefore can be invoked only when the plaintiff himself has suffered 'some threatened or actual injury resulting from the putatively illegal action . . . .'"[28] To abandon that requirement "would convert the judicial process into 'no more than a vehicle for the vindication of the value interests of concerned bystanders,'" and the "courts of the United States into judicial versions of college debating forums."[29]

Thus, "the requirement of injury in fact is a hard floor of Article III jurisdiction that cannot be removed by statute,"[30] and "Congress cannot erase

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[26] *Lujan*, 504 U.S. at 563 (quoting *Sierra Club v. Morton*, 405 U.S. 727, 734 (1972)).

[27] *Id.* at 560.

[28] *Warth v. Seldin*, 422 U.S. 490, 499 (1975) (quoting *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 (1973)).

[29] *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 473 (1982) (quoting *United States v. SCRAP*, 412 U.S. 669, 687 (1973)).

[30] *Summers v. Earth Island Inst.*, 555 U.S. 488, 497 (2009).

Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing."[31]

IV. The court below, and other courts that have upheld liability against a defendant without injury to the plaintiff, did not adequately consider the standing requirement's constitutional dimensions.

Several federal courts of appeals have allowed plaintiffs to recover statutory damages under consumer-protection statutes without any proof of actual damages — that is, they have let the plaintiffs recover for an injury in law without having suffered an injury in fact.[32] As one such

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[31] *Raines v. Byrd*, 521 U.S. 811, 820 n. 3 (1997) (citing *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 100 (1979)).

[32] *See, e.g.*, *Edwards v. First Am. Corp.*, 610 F.3d 514, 516–18 (9th Cir. 2010) ("the damages provision in RESPA gives rise to a statutory cause of action whether or not an overcharge occurred"); *Beaudry v. TeleCheck Servs., Inc.*, 579 F.3d 702, 705–07 (6th Cir. 2009) ("The [Fair Credit Reporting] Act does not require a consumer to wait for unreasonable credit reporting procedures to result in the denial of credit or other consequential harm before enforcing her statutory rights."); *Keele v. Wexler*, 149 F.3d 589, 593–94 (7th Cir. 1998); *Carroll v. Wolpoff & Abramson*, 53 F.3d 626, 629 (4th Cir. 1995) (affirming award of statutory damages where plaintiff abandoned claim for actual damages); *Harper v. Better Bus. Servs., Inc.*, 961 F.2d 1561, 1563 (11th Cir. 1992)

court explained in a case under the Fair Debt Collection Practices Act, "The FDCPA does not require proof of actual damages as a precursor to the recovery of statutory damages. In other words, the Act is blind when it comes to distinguishing between plaintiffs who have suffered actual damages and those who have not."[33]

A statute may be "blind when it comes to distinguishing between plaintiffs who have suffered actual damages and those who have not," but the Constitution is not. Most courts of appeals that have upheld liability against a defendant without injury to the plaintiff did not even consider the standing requirement's constitutional dimensions. Other courts of appeals that have considered the constitutional issue have concluded that a statutory violation confers constitutional standing: "Congress may expand the range or scope of injuries that are cognizable for purposes of Article III standing by enacting statutes which create legal rights."[34] Yet

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(affirming award of statutory damages where plaintiff "offered no proof of actual damages"); *Baker v. G.C. Servs. Corp.*, 677 F.2d 775, 780 (9th Cir. 1982) ("no indication in the statute than [an] award of statutory damages must be based on proof of actual damages").

[33]*Keele v. Wexler*, 149 F.3d at 593–94 (citations omitted).

[34]*Robey v. Shapiro, Marianos & Cejda, LLC*, 434 F.3d 1208, 1212 (10th Cir. 2006); *see also Charvat v. Mut. First Fed. Credit Union*, 725 F.3d 819, 823 (8th Cir. 2013)

other courts of appeals have delved adequately into this Court's standing jurisprudence and correctly held that an uninjured plaintiff lacks constitutional standing.[35]

("plaintiffs need not show actual damages, beyond a statutory violation, in order to recover statutory damages"); *Edwards v. First Am. Corp.*, 610 F.3d 514, 517 (9th Cir. 2010) ("we must look to the text of RESPA to determine whether it prohibited Defendants' conduct; if it did, then Plaintiff has demonstrated an injury sufficient to satisfy Article III"); *Alston v. Countrywide Fin. Corp.*, 585 F.3d 753, 755 (3d Cir. 2009) ("Countrywide's invasion of that statutory right, even without a resultant overcharge, was an injury-in-fact for purposes of Article III standing").

[35] *See David v. Alphin*, 704 F.3d 327, 338–39 (4th Cir. 2013) ("Appellants failed to plead that they personally have sustained a concrete and particularized injury-in-fact"); *Kendall v. Employees Ret. Plan of Avon Prods.*, 561 F.3d 112, 121 (2d Cir. 2009) ("While plan fiduciaries have a statutory duty to comply with ERISA . . . , Kendall must allege some injury or deprivation of a specific right that arose from a violation of that duty in order to meet the injury-in-fact requirement.").

Conclusion

The credit-and-collection industry operates in a nationwide market, and thus depends on the consistent and predictable application of the federal laws that apply to the issuance of credit and the collection of unpaid debt. Congress, in enacting consumer-protection statutes, has occasionally recognized both the credit-and-collection industry's national scope and its significant impact on interstate commerce.[36] But the inconsistent approaches that the courts of appeals have taken have frustrated the consistent and predictable application of the relevant federal laws, and have subjected the credit-and-collection industry to constitutionally unwarranted liability in several jurisdictions.

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[36] *See, e.g.*, 12 U.S.C. § 2601(a) ("The Congress finds that significant reforms in the real estate settlement process are needed to insure that consumers throughout the Nation are provided with greater and more timely information on the nature and costs of the settlement process and are protected from unnecessarily high settlement charges caused by certain abusive practices that have developed in some areas of the country."); 15 U.S.C. § 1681(a) ("The banking system is dependent upon fair and accurate credit reporting."); 15 U.S.C. § 1692(d) (interstate commerce) ("Abusive debt collection practices are carried on to a substantial extent in interstate commerce and through means and instrumentalities of such commerce. Even where abusive debt collection practices are purely intrastate in character, they nevertheless directly affect interstate commerce.").

This Court should resolve the various approaches that the courts of appeals have taken, and insist upon consideration of the standing requirement's constitutional dimensions. This Court should therefore reverse the Court of Appeals' judgment.

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