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,

Respondents.

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

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* 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*[1]

Washington Legal Foundation (WLF) is a public-interest law firm and policy center with supporters in all 50 states. WLF devotes a substantial portion of its resources to defending and promoting free enterprise, individual and business civil liberties, a limited, accountable government, and the rule of law. To that end, WLF regularly appears as *amicus curiae* before this and other federal courts to urge the judiciary to confine itself to deciding only true "Cases or Controversies" under Article III of the Constitution. *See, e.g., Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138 (2013); *Boumediene v. Bush*, 553 U.S. 723 (2008). WLF also frequently participates in litigation to advance its view that separation-of-powers principles embedded in the Constitution bar any one branch of the federal government from exercising powers rightfully reserved to another branch. *See, e.g., Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.* 561 U.S. 477 (2010); *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83 (1998).

WLF is concerned that the Ninth Circuit's decision, by conferring Article III standing on a plaintiff who suffered no concrete injury, dramatically expands the legislative and judicial

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[1] Pursuant to Supreme Court Rule 37.6, *amicus* WLF states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than WLF and its counsel, made a monetary contribution intended to fund the preparation and submission of this brief. All parties have consented to the filing of this brief; letters of consent have been lodged with the Clerk.

powers—at the expense of the executive power—by transferring to private plaintiffs and the courts the power to enforce federal statutes in contexts far removed from what has traditionally been understood to constitute an adversarial judicial proceeding. WLF fears that the holding below, unless reversed by this Court, will authorize uninjured individuals to invoke federal court jurisdiction based on alleged injuries consisting of little more than an affront to their sensibilities caused by the belief that someone somewhere is not complying with federal law.

STATEMENT OF THE CASE

This case asks the Court to decide whether a person who sues a website operator for allegedly violating the Fair Credit Reporting Act (FCRA)—but who asserts no concrete harm or injury—has satisfied Article III's injury-in-fact requirement. The FCRA requires consumer reporting agencies to "adopt reasonable procedures for meeting the needs of commerce … in a manner which is fair and equitable to the consumer." 15 U.S.C. § 1681(b). In relevant part, § 1681n states that anyone who "willfully fails to comply" with the FCRA is subject to either actual or statutory damages of between $100 and $1,000. *Id.* § 1681n(a). Further, § 1681p provides that "[a]n action to enforce any liability created under this subchapter may be brought in any appropriate United States district court, without regard to the amount in controversy." *Id.* § 1681p.

Petitioner operates a website that aggregates publicly available information about individuals into a "people search engine" that allows users to easily

locate and view the search results. The collected information ranges from address and phone number to "economic health" and available online purchase history. At all times relevant to this action, the bottom of each search results page expressly stated that "none of the information offered by Spokeo is to be considered for purposes of determining any entity or person's eligibility for credit, insurance, employment, or for any other purpose authorized under the FCRA." Pet. at 4.[2]

Respondent brought a putative class action against Petitioner under the FCRA, alleging that Petitioner qualifies as a "consumer reporting agency" that issues "consumer reports." Pet. App. 19a-20a. Specifically, Respondent alleged that Petitioner's website contained false information about him—namely, that he is wealthier than he is, that he is married (he is not), and that he holds a graduate degree (he does not)—which might "affect his ability to obtain credit, employment, insurance, and the like." Pet. App. 2a. Petitioner moved to dismiss the complaint for lack of subject-matter jurisdiction on the ground that Respondent lacked a requisite injury-in-fact under Article III. *Id.* at 17a. In response, Respondent contended that the FCRA's

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[2] The bottom of each search results page also provided the following disclaimer:

> Spokeo does not verify or evaluate each piece of data, and makes no warranties or guarantees about any of the information offered. Spokeo does not possess or have access to secure or private financial information.

Pet. at 4.

private right of action entitled him to bring suit even in the absence of a concrete injury. *Id.*

Emphasizing that allegations of possible future injury do not satisfy the threshold injury requirement for Article III standing, the district court dismissed the initial complaint without prejudice for failure to allege "any actual or imminent harm." Pet. App. 2a. Following that dismissal, Respondent's amended complaint alleged that, as a result of misinformation provided on Petitioner's website, Respondent suffered actual harm to his "diminished employment prospects." *Id.* In addition, Respondent alleged that his ongoing unemployment gave him "anxiety, stress, concern, and/or worry." *Id.* Petitioner again moved to dismiss for lack of Article III standing.

Although initially concluding that Petitioner's "marketing of inaccurate consumer reporting information" constituted an injury sufficient to confer standing on Respondent, the district court later reconsidered that ruling and dismissed the suit on the basis that a "[m]ere violation of the [FCRA] does not confer Article III standing … where no injury-in-fact is properly pled." *Id.* at 23a. The district court found that Respondent did not sufficiently plead a concrete injury because "the alleged harm to [Respondent's] employment prospects is speculative, attenuated and implausible." *Id.* at 23a-24a.

On appeal, the Ninth Circuit reversed, holding that because Congress intended to create a statutory right under the FCRA, a bare violation of that right was "sufficient to satisfy the injury-in-fact

requirement of Article III." Pet. App. 8a. Adopting the Sixth Circuit's position in *Beaudry v. TeleCheck Servs., Inc.*, 579 F.3d 702, 705-07 (6th Cir. 2009), the panel held that Respondent was "among the injured" because Petitioner allegedly "violated *his* statutory rights, not just the statutory rights of other people." *Id.* at 8a. Likewise, because the FCRA protects against "individual, rather than collective, harm" the appeals court concluded that Respondent's "personal interests in the handling of his credit information are individualized rather than collective." *Id.* Expressly refusing to premise Respondent's standing on the alleged harm to Respondent's employment prospects or any resulting anxiety, the panel clarified that Respondent satisfied the injury-in-fact threshold of Article III solely on the basis of Petitioner's alleged violation of Respondent's statutory rights. *Id.* at 9a.

SUMMARY OF ARGUMENT

The principle of separation of powers has long been a central feature of our constitutional republic. By denying any one branch of the federal government too much power, the Framers sought to prevent the kind of accumulation of power that inevitably leads to tyranny. Article III, § 2 of the Constitution safeguards the separation of powers among the three branches of the government by extending the "judicial Power" of the United States to only "Cases" and "Controversies." A concrete, particularized injury-in-fact is part of what this Court requires to establish standing to bring a justiciable suit in federal court. *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

The Ninth Circuit held that an individual satisfies Article III standing whenever he sues for violation of a federal statute that was adopted for his benefit, regardless whether the violation caused him to suffer any actual harm. By authorizing federal courts to enforce federal statutes at the behest of individuals who suffered no concrete injury caused by the alleged statutory violation, the decision below constitutes a significant relaxation of Article III's standing requirements and thus erodes the separation of powers. Simply put, a plaintiff does not establish an injury-in-fact under Article III merely by demonstrating a violation of federal law, even a law adopted for his particular benefit.

The Framers' reliance on Article III standing to limit judicial review reflects their view that "neither department may invade the province of the other and neither may control, direct or restrain the action of the other." *Frothingham v. Mellon*, 262 U.S. 447, 488 (1923). The Ninth Circuit's holding is sharply at odds with this Court's historic understanding of Congress's power to confer Article III standing on individual litigants. Because the injury-in-fact requirement of Article III limits the accumulation of power by the Judicial Branch, this Court has consistently rejected assertions that federal courts may entertain citizen suits to vindicate the public's generalized interest in the proper administration of the laws, even when Congress has explicitly authorized such suits by statute.

Unless the lower courts adhere strictly to Article III's injury-in-fact requirement, the inevitable tendency of such statutes is to transfer to

private plaintiffs and the judiciary responsibility for ensuring that the laws are enforced—a role exclusively reserved to the Executive Branch. The Framers viewed it as the Executive's "most important constitutional duty" to "take Care that the Laws be faithfully executed." *Lujan*, 504 U.S. at 577. Under the Take Care Clause of Article II, § 3, the President has the exclusive duty to ensure that federal law is obeyed. The cornerstone of the Executive's enforcement authority is the exercise of prosecutorial discretion—the power to control the initiation, prosecution, and termination of actions brought to vindicate the federal law. Where, as here, a plaintiff alleges a bare statutory violation without any resulting harm, permitting such suits to proceed in federal court removes from the Executive the prosecutorial discretion that lies at the heart of the President's power to execute the laws.

Under this Court's precedents, congressional delegation of the Executive Branch's prosecutorial discretion to private parties is permissible only when the Executive retains "sufficient control" over that party to ensure that the Executive is able to perform its constitutional duties under the Take Care Clause. *Morrison v. Olson*, 487 U.S. 654, 696 (1988). Because the FCRA does not give the Executive any control over private lawsuits, much less "sufficient control," the Ninth Circuit's holding impermissibly transfers a core Article II function to private plaintiffs. This it cannot do. By authorizing federal courts to enforce compliance of federal law at the behest of uninjured individuals, the decision below does violence to the Constitution's careful separation of powers and should be reversed.

ARGUMENT

I. INJURY-IN-FACT STANDING IS A CRUCIAL ARTICLE III BULWARK PROTECTING THE SEPARATION OF POWERS

A. The Constitution Demands a Clear Separation of Powers Among the Three Branches of Government

It was the French political philosopher Montesquieu who, in his famous *Spirit of the Laws*, provided the classic formulation of the separation of powers:

> When the legislative and executive powers are united in the same person, or in the same body of magistracy, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.
>
> Again, there is no liberty if the power of judging be not separated from the legislative and executive powers, the life and liberty of the subject would be exposed to arbitrary control; for the judge would then be the legislator. Were it joined to the executive power, the judge might behave with all the violence of the oppressor.

Charles de Montesquieu, SPIRIT OF THE LAWS 151-52 (O. Piest ed., T. Nugent trans. 1949) (1748).

Heavily influenced by Montesquieu, the Framers viewed tyranny not merely as the abuse of power, but as the *accumulation* of power. In praising the importance of dividing the concentration of powers within the federal government, James Madison stated, "[n]o political truth is certainly of greater intrinsic value, or is stamped with the authority of more enlightened patrons of liberty." THE FEDERALIST NO. 47 (James Madison). As this Court has recognized, the "principle of separation of powers was not simply an abstract generalization in the minds of the Framers: it was woven into the document that they drafted in Philadelphia in the summer of 1787." *Buckley v. Valeo*, 424 U.S. 1, 124 (1976).

The Constitution thus divides federal power among three co-equal branches, with specific duties to be performed by each. It separates that power into "legislative Powers," Art. I, § 1, "[t]he executive Power," Art. II, § 1, and "[t]he judicial Power," Art. III, § 1. This tripartite distribution of power "is not merely a matter of convenience or of governmental mechanism." *O'Donoghue v. United States*, 289 U.S. 516, 530 (1933). Rather, this Court has long recognized that the "ultimate purpose" of the separation of powers is "to protect the liberty and security of the governed." *Metro. Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 272 (1991); *Clinton v. New York*, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring) ("Liberty is always at stake when one or more of the

branches seek to transgress the separation of powers.").

The Constitution's separation of powers was implemented "to assure full, vigorous, and open debate on the great issues affecting the people and to provide avenues for the operation of checks on the exercise of governmental power." *Bowsher v. Synar*, 478 U.S. 714, 722 (1986). "While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

Although "[v]iolations of the separation-of-powers principle have been uncommon because each branch has traditionally respected the prerogatives of the other two," this Court has not hesitated to enforce adherence to that principle when necessary. *See, e.g., Morrison*, 487 U.S. at 693 ("Time and again we have reaffirmed the importance in our constitutional scheme of the separation of governmental powers into the three coordinate branches.").

B. Article III's Injury-in-Fact Requirement for Standing Is Grounded Entirely in Separation-of-Powers Concerns

Article III, § 2 of the Constitution extends the "judicial Power" of the United States to only "Cases" and "Controversies." To be justiciable, every suit brought in federal court must seek to redress an "injury-in-fact" caused by the defendant. *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990). This Court has

explained Article III's standing requirements as follows:

> The irreducible constitutional minimum of standing contains three requirements. … First, and foremost, there must be alleged (and ultimately proven) an "injury in fact"—a harm suffered by the plaintiff that is "concrete" and "actual and imminent, not 'conjectural' or 'hypothetical.'" … Second, there must be causation—a fairly traceable connection between the plaintiff's injury and the complained-of conduct of the defendant. … And third, there must be redressability—a likelihood that the requested relief will redress the alleged injury.

Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 102-103 (1998) (citations omitted). A plaintiff thus lacks standing unless he has suffered "a distinct and palpable injury to himself." *Warth v. Seldin*, 422 U.S. 490, 501 (1975). This bedrock requirement of Article III jurisdiction "cannot be removed." *Summers v. Earth Island Inst.*, 555 U.S. 488, 497 (2009).

Article III's narrow limits on federal jurisdiction are "founded in concern about the proper—and properly limited—role of the courts in a democratic society." *Warth*, 422 U.S. at 498. Accordingly, "federal courts may exercise power only 'in the last resort' … and only when adjudication is 'consistent with a system of separated powers and [the dispute is one] traditionally thought to be

capable of resolution through the judicial process.'" *Allen v. Wright*, 468 U.S. 737, 752 (1984) (citations omitted).

In particular, Article III's concrete injury-in-fact requirement is "a crucial and inseparable element" of separation-of-powers principles embedded in the Constitution, "which successively describes where the legislative, executive, and judicial powers, respectively, shall reside." Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 881-82 (1983). It is the injury-in-fact requirement that "makes possible the gradual clarification of the law through judicial application." *Allen*, 468 U.S. at 752. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006) ("This Court has recognized that the case-or-controversy limitation is crucial in maintaining the tripartite allocation of power set forth in the Constitution.") (internal quotations omitted).

Failure to enforce Article III's core standing requirements invariably leads to "an over-judicialization of the processes of self-governance." Scalia, *supra*, at 881. Unfortunately, as elaborated below, the Ninth Circuit's decision in this case, left unchecked, will severely erode the Constitution's carefully balanced separation of powers..

II. PERMITTING FEDERAL COURTS TO ADJUDICATE SUITS BROUGHT BY PLAINTIFFS WHO LACK A CONCRETE INJURY VIOLATES THE SEPARATION OF POWERS

The separation of powers is violated any time one branch of government (1) aggrandizes itself at the expense of another or (2) undermines the constitutionally granted powers of another, even without aggrandizement of its own power. *See, e.g., Clinton v. Jones*, 520 U.S. 681, 701 (1997). Allowing uninjured persons who lack Article III standing to bring suit in federal court, as authorized by the Ninth Circuit's decision, infringes the separation of powers by enlarging judicial and legislative power at the expense of the Executive. At the same time, authorizing federal courts to enforce federal statutes at the behest of private individuals who have suffered no concrete injury permits Congress to interfere unduly with the Executive Branch's constitutional duty to enforce the nation's laws under the Take Care Clause in Article II.

A. The decision below contravenes Article III's requirement that the judicial power extends to only true "Cases" or "Controversies"

A federal court's exercise of jurisdiction over litigants absent a legitimate "case" or "controversy" under Article III (*i.e.*, absent a cognizable injury-in-fact) flies in the face of fundamental separation-of-powers principles. "[I]f the judicial power extended … to every question under the laws … of the United States," Chief Justice John Marshall warned, "[t]he

division of power [among the three branches of government] could exist no longer, and the other departments would be swallowed up by the judiciary." 4 *Papers of John Marshall* 95 (C. Cullen ed., 1984).

Ultimately, the Court's arrogation of power comes at the expense of the people and their elected representatives. By preventing an unelected, life-tenured judiciary from exercising executive or legislative powers—which are the exclusive province of the politically accountable branches of government—Article III's injury-in-fact requirement cabins the federal judiciary to its historic adjudicatory role:

> In limiting the judicial power to "Cases" and "Controversies," Article III of the Constitution restricts it to the traditional role of Anglo-American courts, which is to redress or prevent actual or imminently threatened injury to persons caused by private or official violation of the law. Except when necessary in the execution of that function, courts have no charter to review and revise legislative and executive action.

Summers, 555 U.S. at 492-93. The injury-in-fact requirement thus "ensures that the courts will more properly remain concerned with tasks that are, in Madison's words, 'of a Judiciary nature.'" John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 DUKE L.J. 1219, 1232 (1993) (citation omitted).

Moreover, the requirement that every case before the court be anchored in some concrete injury ensures that the legal questions presented will be resolved "not in the rarified atmosphere of a debating society" but rather with "a realistic appreciation of the consequences of judicial action." *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State*, 454 U.S. 464, 472 (1982). As the Court explained more than 40 years ago:

> To permit a complainant who has no concrete injury to require a court to rule on important constitutional issues would create the potential for abuse of the judicial process, distort the role of the Judiciary in its relationship to the Executive and the Legislature, and open the Judiciary to an arguable charge of providing "government by injunction."

Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 222 (1974) (citation omitted).

Contrary to the view of the Ninth Circuit, an injury-in-law is *not* an injury-in-fact. The panel below attempted to vitiate this crucial distinction by suggesting that "alleged violations of [a plaintiff's] statutory rights are sufficient to satisfy the injury-in-fact requirement of Article III." Pet. App. 8a. But this Court has already considered and squarely rejected that suggestion:

> [T]here is absolutely no basis for making the Article III inquiry turn on

> the source of the asserted right. Whether the courts were to act on their own, or at the invitation of Congress, in ignoring the concrete injury requirement …, they would be discarding a principle so 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. Indeed, "[i]t is settled that Congress cannot erase Article III standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing." *Raines v. Byrd*, 521 U.S. 811, 820 n.3 (1997); *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 100 (1979) ("[I]n no event … may Congress abrogate the Art. III minima: A plaintiff must always have suffered a 'distinct and palpable injury to himself.'") (quoting *Warth*, 422 U.S. at 501).

Nor is this a situation in which Congress has statutorily broadened the categories of injury through legislation and then allowed individuals to sue to recover for that injury. *See Lujan*, 504 U.S. at 578; *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982). In such cases, litigation is authorized only to enforce preexisting substantive rights and to redress the plaintiff's injury-in-fact. But as this Court has cautioned, "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." *Sierra Club v. Morton*, 405 U.S. 727, 738 (1972). In the absence of any concrete injury-in-fact on the part of the plaintiff, the Ninth Circuit's holding below violates Article III and must be reversed.

B. The decision below contravenes Article II's requirement that the President "take Care" that the laws are faithfully executed

Granting standing to an individual who has suffered no concrete injury also invades the exclusive province of the Executive Branch to enforce federal law under the Take Care Clause in Article II, § 3 ("[The President] shall take Care that the Laws be faithfully executed."). "As Madison stated on the floor of the first Congress, 'if any power whatsoever is in its nature Executive, it is the power of appointing, overseeing, and *controlling* those who execute the laws.'" *Free Enter. Fund*, 561 U.S. at 492 (quoting 1 Annals of Cong. 463 (1789)) (emphasis added).

As this Court has recognized, "[t]he Constitution does not leave to speculation who is to administer the laws enacted by Congress; the President, it says, 'shall take Care that the Laws be faithfully executed,' Art. II, § 3, personally and through officers whom he appoints." *Printz v. United States*, 521 U.S. 898, 922 (1997). The Take Care Clause thus imposes on the Executive Branch a duty to undertake all necessary means, including bringing suit in federal court, to ensure that federal law is obeyed. *Allen*, 468 U.S. at 761 ("The Constitution,

after all, assigns to the Executive Branch, and not to the Judicial Branch, the duty to 'take Care that the Laws be faithfully executed.'").

Lacking any concrete injury-in-fact, the plaintiff in this case seeks, in essence, to vindicate the general public interest triggered by a bare violation of federal law. But "[v]indicating the public interest … is the function of Congress and the Chief Executive." *Lujan*, 504 U.S. at 576. Indeed, the separation of powers precludes Congress from converting the general public interest in enforcement of the law, which is the exclusive province of the Executive Branch, into a private right of action for an uninjured plaintiff. "A lawsuit is the ultimate remedy for a breach of the law, *and it is to the President, and not to the Congress*, that the Constitution entrusts responsibility to 'take Care that the Laws be faithfully executed.'" *Buckley*, 424 U.S. at 138 (emphasis added).

By broadly construing the FCRA's standing provision to permit suits by uninjured persons, the Ninth Circuit's holding effectively transfers the Executive Branch's enforcement duty under the Take Care Clause to politically unaccountable private parties. This it may not do. Such a construction "violates the basic principle that the President 'cannot delegate ultimate responsibility or the active obligation to supervise that goes with it,' because Article II 'makes a single President responsible for the actions of the Executive Branch.'" *Free Enter. Fund*, 561 U.S. at 496 (quoting *Clinton*, 520 U.S. at 712-13) (Breyer, J., concurring).

Consistent with Article II, a plaintiff lacks standing to seek the mere "vindication of the rule of law." *Steel Co.*, 523 U.S. at 106. Indeed, this Court's precedents weigh "against recognizing standing in a case brought, not to enforce specific legal obligations whose violation works a direct harm, but to seek a restructuring of the apparatus established by the Executive Branch to fulfill its legal duties." *Allen*, 468 U.S. at 761. A contrary view, which would allow any private individual to sue whenever the law is violated, diminishes the political accountability of the Executive for enforcement of the laws:

> Enforcement of the law is a political decision left to the Executive Branch; it becomes the concern of the courts only when individually aggrieved plaintiffs appear before them. Permitting Congress to confer standing on anyone by denominating rights as individualized entitlements would disrupt the balance that the Framers created to protect the executive from legislative power.

James Leonard & Joanne C. Brant, *The Half-Open Door: Article II, the Injury-In-Fact Rule, and the Framers' Plan For Federal Courts of Limited Jurisdiction*, 54 RUTGERS L. REV. 1, 115 (2001).

The Executive's ability to control the initiation, prosecution, and termination of actions brought to vindicate the Executive's obligation to ensure that federal law is obeyed is crucial to carrying out its enforcement duties. The keystone of this enforcement authority is the exercise of

prosecutorial discretion—the power to decide when, how, and against whom the laws should be enforced. Such discretion "creates a troubling potential for abuse, even when it is exercised by a governmental entity that is subject to constitutional and other legal and political constraints." Tara Leigh Grove, *Standing as an Article II Nondelegation Doctrine*, 11 U. PA. J. CONST. L. 781, 790 (Apr. 2009). That is why "the Constitution prohibits Congress and the Executive Branch from delegating such prosecutorial discretion to private parties, who are subject to no such requirements." *Id.*

In *Morrison v. Olson*, 487 U.S. 654 (1988), this Court clarified that, to avoid violating the Take Care Clause, a statute divesting the Executive Branch of some measure of prosecutorial discretion must "give the Executive Branch sufficient control … to ensure that the President is able to perform his constitutionally assigned duties." 487 U.S. at 696. *Morrison* involved a constitutional challenge to the Ethics in Government Act of 1978, which authorized the appointment of an independent counsel to investigate and prosecute high-ranking government officials. *Id.* at 660-61. In sustaining the law, the Court emphasized that the challenged statute included "several means of supervising or controlling the prosecutorial powers that may be wielded by an independent counsel," which satisfied the Executive's obligation under the Take Care Clause to maintain sufficient control over any prosecution. *Id.* at 696. [3]

[3] For Justice Scalia, even the statutory controls retained by the Executive Branch in *Morrison* could not excuse the independent counsel's "utter incompatibility" with the

Specifically, the statute at issue in *Morrison* ensured that the Executive Branch, acting through the Attorney General, (1) "retained the power to remove the counsel for 'good cause,'" (2) retained the discretion "not to request appointment if [the Attorney General] finds 'no reasonable grounds to believe that further investigation is warranted,'" (3) controlled the scope of the litigation because "the jurisdiction of the independent counsel is defined with reference to the facts submitted by the Attorney General," and (4) could ensure that the prosecution was pursued in the public interest by requiring the independent counsel to "abide by Justice Department policy" whenever possible. *Id.*

None of the statutory safeguards identified in *Morrison* is present in the FCRA. The plaintiff in this case is subject to no control or oversight whatsoever by the Executive Branch or the Attorney General. In fact, the FCRA omits any mention of Executive involvement, nor does the statute require that the Attorney General receive notice of FCRA litigation. Further, in stark contrast to the independent counsel at issue in *Morrison*, uninjured private plaintiffs are motivated by financial gain wholly unrelated to the "public good." In the absence of "sufficient control" by the Executive, the Ninth Circuit's understanding of the reach of FCRA standing violates Article II and must be reversed.

Constitution's separation of powers. *See* 487 U.S. at 708 (Scalia, J., dissenting) (stating that "it is ultimately irrelevant *how much* the statute reduces Presidential control" because "*all* purely executive power" must remain with the President).

C. The Executive Branch may not acquiesce to encroachments on its constitutionally assigned powers

In its brief in opposition to discretionary review in this case, the United States contends that "[t]he court below correctly concluded that the publication of such false information is a cognizable Article III injury." Br. of the United States as *Amicus Curiae* (March 15, 2015). Not only is the Solicitor General's view on this question undeserving of deference, it is wholly irrelevant. It is well settled that one branch of government cannot consent to another branch's encroachment on its constitutional role. Indeed, the Constitution's division of powers among the three branches of government is violated any time one branch invades the territory of another, "whether or not the encroached-upon branch approves the encroachment." *New York v. United States*, 505 U.S. 144, 182 (1992) ("The Constitutional authority of Congress cannot be expanded by the 'consent' of the governmental unit whose domain is thereby narrowed.").

For example, in *Buckley v. Valeo*, the Court held that Congress had infringed upon the President's appointment power even though the President had consented to the statute that caused the infringement by signing it into law. 424 U.S. at 118-37. Likewise, in *INS v. Chadha*, the Court held that the legislative veto violated the Constitution's requirement that legislation be "presented to" the President, despite the fact that Presidents had for decades approved hundreds of statutes containing legislative veto provisions. 462 U.S. 919, 944-45 (1983).

CONCLUSION

For the foregoing reasons, *amicus curiae* Washington Legal Foundation respectfully requests that the Court reverse the judgment of the Ninth Circuit.

Respectfully submitted,

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