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 FOR AMICI CURIAE EBAY INC., FACEBOOK, INC., GOOGLE INC., IAC/INTERACTIVECORP, LINKEDIN CORP., NETFLIX, INC., TWITTER, INC., YAHOO! INC., THE CONSUMER ELECTRONICS ASSOCIATION, DIGITAL CONTENT NEXT, AND THE INTERNET ASSOCIATION IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE[1]

Amici are leading media and technology companies that provide a wide variety of services via the Internet to hundreds of millions of users each day.

eBay Inc., with 157 million active buyers globally and more than 800 million items listed for sale, is one of the world's largest online marketplaces, where practically anyone can buy and sell practically anything. Founded in 1995, eBay connects a diverse and passionate community of individual buyers and sellers, as well as small businesses, whose collective impact on e-commerce is staggering.

Facebook, Inc. provides a free social media service to more than 1.4 billion people that empowers them to connect with others, to discover what is happening in their communities, and to share their views on the world. The service is now provided in over 100 languages and dialects.

Google Inc. is a technology company that offers a suite of web-based products and services to billions of people worldwide. Google's search engine processes more than 3.5 billion searches per day and more than 1 trillion searches per year. Google's Gmail service provides email for 900 million global users. Google Maps is used by more than 1 billion people each month.

IAC/InterActiveCorp is a diversified online media company with more than 150 brands and products.

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[1] Pursuant to Rule 37.6, amici certify that no counsel for either party authored this brief, and no person or party other than named amici, their members, and their counsel made a monetary contribution to the preparation or submission of this brief. Letters of consent have been filed with the Clerk.

IAC's businesses are leaders in numerous sectors of the Internet economy and include Match.com, OkCupid, Ask.com, About.com, HomeAdvisor, The Daily Beast, Investopedia, and Vimeo. IAC's family of websites receive more than 2.5 billion visits each month from users in over 200 countries.

LinkedIn Corp. hosts the world's largest professional network, with more than 364 million members in over 200 countries and territories globally, including more than 115 million members in the United States. LinkedIn's mission is to connect the world's professionals to make them more productive and successful, and LinkedIn members have access to people, jobs, news, updates, and insights that help them be great at what they do.

Netflix, Inc. is a pioneer in the delivery of movies and television over the Internet and is now the world's leading Internet television network. Netflix has more than 62 million subscribers in over 50 countries who watch more than 100 million hours of television shows and movies per day, including original series, documentaries, and films.

Twitter, Inc. offers a free service to more than 300 million active monthly users that allows them to connect with others, express ideas, and discover new information. Roughly 500 million short messages (known as "Tweets") are posted on Twitter every day.

Yahoo! Inc., together with its consolidated subsidiaries, is a guide focused on making users' digital habits inspiring and entertaining. By creating highly personalized experiences for its users, Yahoo keeps people connected to what matters most to them across devices and around the world. In 2014, Yahoo's global user

base across search, communications, and digital content grew to more than 1 billion monthly active users.

The Consumer Electronics Association (CEA) is the preeminent technology trade association promoting growth in the $208 billion U.S. consumer electronics industry through market research, education, and public policy representation. CEA members lead the consumer electronics industry in the development, manufacturing, and distribution of audio, video, mobile electronics, communications, information technology multimedia, and accessory products, as well as related services sold to consumers.[2]

Digital Content Next is a trade association that represents high-quality digital content companies, including some of the world's most well-known and respected media brands, such as The Associated Press, ESPN, The Financial Times, Fox News, The New York Times, National Public Radio, and The Washington Post.[3]

The Internet Association represents the interests of thirty-five leading Internet companies. It seeks to protect Internet freedom, promote innovation and economic growth, and empower customers and users.[4]

The services and technology offered by amici have created or transformed a wide range of industries, including electronic communications in all forms, financial

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[2] A list of the CEA's members is available at https://www.ce.org/Membership/Membership-Directory.aspx.

[3] A list of Digital Content Next's members is available at https://digitalcontentnext.org/membership/members/.

[4] A list of the Internet Association's members is available at http://internetassociation.org/our-members/.

transactions and online commerce, social networking, the generation and delivery of media content, and the organization and accessibility of information. Amici are proven innovators that continue to generate valuable technology and services through significant investments in research and development. The volume and type of communications and interactions that amici's technologies facilitate, however, make amici disproportionately susceptible to the consequences of the Ninth Circuit's misreading of Article III's injury-in-fact requirement. Amici's activities may fall within the ambit of many federal and state laws that confer private causes of action and contain statutory damages provisions similar to the provisions at issue in this case. Indeed, in recent years, amici have increasingly been subjected to litigation under these types of statutes, in which the only "harm" alleged is a bare statutory violation.

Thus, amici are concerned that the Article III standing rule adopted by the Ninth Circuit, which allows plaintiffs to bring suits in federal court based on nothing more than an allegation of a bare statutory violation without any requirement of actual harm, is contrary to this Court's precedent and renders technology companies, including amici, uniquely vulnerable to baseless and abusive litigation. Amici, and the billions of individuals they serve worldwide (often with free or very low-cost services), thus have an interest in this Court reaffirming the injury-in-fact requirement. Accordingly, amici ask that this Court confirm that Article III standing exists only when the plaintiff alleges concrete, actual harm, and reverse the judgment below.[5]

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[5] Amici's interest in this case is limited to the Article III standing question presented and should not be construed as expressing any view on the merits of petitioner's alleged statutory violations.

SUMMARY OF ARGUMENT

Amici provide a wide variety of innovative and important services that rely on highly sophisticated computer programming and systems to serve millions of people each day. These systems are essential to amici's ability to automatically process and facilitate billions of complex transactions and interactions efficiently for people across the globe. This automation enables amici to unlock the power of modern communications technology to deliver immense value to users, usually at no or very little cost. But this model, which is deployed by amici on an immense scale, also makes amici and similar businesses uniquely vulnerable to the untoward consequences of the Ninth Circuit's misreading of Article III.

The services and products amici provide may be subject to federal and state laws that confer private rights of action and contain statutory damages provisions similar to the provisions in the Fair Credit Reporting Act (FCRA) at issue in this case. These statutes include the Wiretap Act (as amended by the Electronic Communications Privacy Act of 1986), 18 U.S.C. §§ 2510-2522, the Stored Communications Act, *id.* §§ 2701-2712, the Video Privacy Protection Act, *id.* § 2710, and the Telephone Consumer Protection Act, 47 U.S.C. § 227. Amici are frequently targeted by opportunistic lawsuits based on alleged violations of these and similar statutes, in which the only alleged harm is a bare statutory violation—an injury-in-law, not an injury-in-fact. Rather than requiring concrete, actual harm to establish a "case or controversy" appropriate for judicial resolution, the Ninth Circuit's reasoning in this and other cases allows such suits for bare statutory violations to proceed with no limiting principle. Amici ask the Court to reverse the Ninth Circuit and clarify that Article III standing requires an allegation of actual injury.

Amici are concerned that the misguided Article III standing jurisprudence embodied by the decision below creates incentives for plaintiffs to pursue such no-injury lawsuits in federal court with increased frequency, with a concomitant increase in the negative effects these suits have on the technology industry. Permitting these abusive no-injury lawsuits to proceed beyond the pleading stage has a particularly negative impact on amici due to the broad scale of their operations. Amici's successful innovations and use of easily replicated computer processes allow billions of people to benefit from the valuable services and products they provide, usually at little or no cost to consumers. Yet, under the Ninth Circuit's standing rule, if any of the millions of individuals who interact with amici each day is willing (or is enticed by the plaintiffs' bar) to allege that a generalized act or practice by amici violated a statute that provides a private cause of action and statutory damages, she can, without more, launch a putative class action on behalf of herself and millions of other "similarly situated" users. Exploiting the lax Ninth Circuit standing rule, a named plaintiff in such a suit can (and, as explained below, often does) pursue a multi-billion dollar statutory damages claim despite the lack of any actual injury to herself or any other class member. Even without pursuing a class action, a single plaintiff who suffered no injury could attempt to obtain punitive damages through an individual suit under FCRA or other similarly structured statutes, or the injunctive relief that is available under many other statutes that also provide for statutory damages.

The rigors of Article III must be applied to these suits in the same way they are applied to any other lawsuit brought in federal court—the plaintiffs must allege an actual, redressable injury. If the injury re-

quirement does not apply, then companies like amici will continue to be wrongly subjected to the substantial expense of defending such actions and the risks of massive class-wide statutory damages or burdensome injunctive relief, creating a strong incentive to settle even the most frivolous suits. That creates a perverse incentive that rewards plaintiffs (and their attorneys) for filing meritless strike suits in circumstances where not a single person has been harmed. Article III's standing requirement exists to prevent precisely this result.

ARGUMENT

I. THE ARTICLE III STANDING REQUIREMENT IS FUNDAMENTAL TO THE INVOCATION OF FEDERAL JUDICIAL POWER

A. Article III Standing Requires An Actual Injury

"'No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies.'" *Raines* v. *Byrd*, 521 U.S. 811, 818 (1997). To meet the case or controversy requirement, a plaintiff's complaint "must establish that [the plaintiff] ha[s] standing to sue." *Id.* To have standing, "the plaintiff must have suffered an 'injury in fact'" which is both "concrete and particularized" and "'actual or imminent, not "conjectural" or "hypothetical."'" *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 (1992); *see also Valley Forge Christian Coll.* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 473 (1982) ("The exercise of judicial power, which can so profoundly affect the lives, liberty, and property of those to whom it extends, is … restricted to litigants who can show 'injury in fact' resulting from the action which they seek to have the court adjudicate."). Thus, the injury-in-fact alleged in a plaintiff's

complaint "must *affect the plaintiff* in a personal and individual way." *Lujan* v. *Defenders of Wildlife*, 504 U.S. at 560 n.1 (emphasis added); *see also id.* at 581 (Kennedy, J., concurring in part and concurring in the judgment) ("[T]he party bringing suit must show that the action injures him in a concrete and personal way.").

Respondent Robins's putative class complaint alleges that Spokeo is a credit reporting agency that willfully violated various provisions of FCRA (Pet. App. 2a, 19a-20a), which provides consumers with a private right of action to recover "any actual damages … *or* damages of not less than $100 and not more than $1,000" for any willful failure to comply with the various requirements imposed by the Act, 15 U.S.C. § 1681n(1)(A) (emphasis added). Robins seeks statutory damages for himself and a putative class that allegedly "'consists of millions of individuals.'" Pet. 15. The district court dismissed the complaint for lack of Article III standing because Robins had not alleged "any actual or imminent harm." Pet. App. 13a. The Ninth Circuit reversed, holding that Robins had standing because "alleged violations of [his] statutory rights are sufficient to satisfy the injury-in-fact requirement of Article III." *Id.* 8a. The Ninth Circuit's holding follows its earlier decision in *Edwards* v. *First American Corp.*, 610 F.3d 514 (9th Cir. 2010), a case in which this Court's grant of certiorari was later dismissed as improvidently granted, 132 S. Ct. 2536 (2012). The decision below is also consistent with subsequent precedent from the Ninth Circuit. *See In re Zynga Privacy Litig.*, 750 F.3d 1098, 1105 n.5 (9th Cir. 2014) (rejecting argument that "plaintiffs lack standing because they have not suffered any concrete or particularized injury" and holding that "a plaintiff demonstrates an injury sufficient to satisfy Article III when bringing a claim under

a statute that prohibits the defendant's conduct and grants persons in the plaintiff's position a right to judicial relief" (internal quotation marks omitted)).

By allowing plaintiffs to maintain lawsuits in federal court based solely upon injuries-in-law and in the absence of any actual harm, the Ninth Circuit's rule contravenes this Court's longstanding precedent that, "[i]n order to satisfy Art[icle] III, the plaintiff must show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant." *Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. 91, 99 (1979). This Court's holdings make plain that Congress cannot confer Article III standing through legislation. While Congress has the authority to create legal remedies for actual "*de facto* injuries" that were not previously recognized in law, *Lujan* v. *Defenders of Wildlife*, 504 U.S. at 578, it is also "settled that Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing," *Raines*, 521 U.S. at 820 n.3. *See also Gladstone, Realtors*, 441 U.S. at 100 ("[I]n no event, however, may Congress abrogate the Art[icle] III minima: A plaintiff must always have suffered 'a distinct and palpable injury to himself,' that is likely to be redressed if the requested relief is granted." (citation omitted)). "[T]he requirement of injury in fact is a hard floor of Article III jurisdiction that cannot be removed by statute." *Summers* v. *Earth Island Inst.*, 555 U.S. 488, 497 (2009).[6]

[6] The question presented in this case implicates not only Article III standing for bare violations of federal statutes that cause no actual harm, but also the ability of federal courts to adjudicate alleged violations of state statutory rights and remedies despite the lack of any actual injury to the plaintiff. The Ninth Circuit's broad recognition of standing based on alleged injuries-in-law has been

This Court has taught that an actual injury-in-fact is required to invoke the federal judicial power, a constitutional requirement that cannot be abrogated by legislation. But the Ninth Circuit has concluded that Congress's conferral of a private right of action coupled with a right to judicial relief through statutory damages is sufficient to confer Article III standing without regard to actual injury. Indeed, the court of appeals expressly disclaimed any analysis of whether the alleged statutory violations in this case caused palpable injury or actual harm to Robins, such as "harm to his employment prospects or related anxiety." Pet. App. 9a n.3. Just as this Court has previously found plaintiffs' complaints lacking when they allege a bare violation of law that causes no actual harm, the Court should conclude here that Robins's bare allegation of a statutory violation, without more, is insufficient to confer Article III standing. *E.g.*, *Summers* v. *Earth Island Inst.*, 555 U.S. at 496 ("[D]eprivation of a procedural right without some concrete interest that is affected by the deprivation … is insufficient to create Article III standing."); *Lujan* v. *Defenders of Wildlife*, 504 U.S. at 572 (procedural injury does not confer standing unless it also "impair[s] a separate concrete interest"); *Valley Forge*, 454 U.S. at 485 (plaintiffs' "claim that the Constitution has been violated" is insufficient to confer standing where plaintiff failed to "identify any personal injury suffered by them *as a consequence* of the alleged constitutional error").

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applied to state law claims alleging bare violations of state statutes with no allegation of actual harm, *see infra* pp.18-19, and therefore this Court's resolution of the Article III standing question presented in this case could have a profound impact on similar state law claims brought in federal courts.

B. The Article III Standing Requirement Protects The Separation Of Powers

The Ninth Circuit's unduly broad standing rule threatens to undermine the carefully calibrated separation of powers established by the Constitution. It has long been understood that "Art[icle] III standing is built on … the idea of separation of powers." *Allen* v. *Wright*, 468 U.S. 737, 752 (1984); *see also Lexmark Int'l, Inc.* v. *Static Control Components, Inc.*, 134 S. Ct. 1377, 1386 (2014) (recognizing that standing doctrine derives from "separation-of-powers principles"). The Founders envisioned the federal judiciary as a forum of "'last resort'" to settle concrete disputes. *Allen*, 468 U.S. at 752. This Court has previously rejected the contention that private plaintiffs may "roam the country in search of … wrongdoing" in order "to reveal their discoveries in federal court" because "[t]he federal courts were simply not constituted as ombudsmen of the general welfare." *Valley Forge*, 454 U.S. at 487. The power and responsibility to enforce the law belong to the political branches—in particular, the Executive Branch, upon which the Constitution confers the authority and obligation to ensure "that the Laws be faithfully executed." U.S. Const. art. II, § 3; *see also United States* v. *Raines*, 362 U.S. 17, 27 (1960).

In contrast, this Court's precedents explain that the judicial "power to declare the rights of individuals … 'is legitimate only in the last resort, and as a necessity in the determination of real, earnest and vital controversy.'" *Valley Forge*, 454 U.S. at 471 (quoting *Chicago & Grand Trunk Ry. Co.* v. *Wellman*, 143 U.S. 339, 345 (1892)). The standing requirement limits the categories of litigants who may invoke the jurisdiction of the federal courts and thus "prevent[s] the judicial process from being used to usurp the powers of the politi-

cal branches." *Clapper* v. *Amnesty Int'l USA*, 133 S. Ct. 1138, 1146 (2013). Yet the Ninth Circuit's broad standing rule empowers private litigants to do just what this Court has prohibited—go out in search of potential violations of state and federal statutes in order to bring their claims in federal court.

This transfer of law enforcement power and authority from the Executive Branch to private litigants who allege no actual injury has important, negative consequences. Significantly, "[v]irtually none of the checks on executive enforcement discretion apply to private parties…. Nor are there political constraints." Grove, *Standing as an Article II Nondelegation Doctrine*, 11 U. Pa. J. Const. L. 781, 818 (2009); *see also id.* at 820 (explaining that while "the Executive Branch exercises considerable prosecutorial discretion in fulfilling its constitutional duty to enforce federal law," it is also "subject to a degree of judicial and congressional oversight"). The Ninth Circuit's rule transforms private litigants into roving attorneys general who operate with vastly different incentives than actual executive officials and a dearth of safeguards to constrain their conduct, and transforms the federal courts into quasi-administrative or advisory tribunals in which uninjured litigants seek to vindicate abstract legal rights.

II. EROSION OF THE INJURY-IN-FACT REQUIREMENT INVITES ABUSIVE LITIGATION AGAINST TECHNOLOGY COMPANIES

A. Courts Following The Ninth Circuit's Reasoning Routinely Find Standing Based Solely On Alleged Injuries-In-Law

The Ninth Circuit's broad holding that any "alleged violation of … statutory rights [is] sufficient to satisfy the injury-in-fact requirement of Article III" (Pet. App.

8a) broadly implicates numerous federal and state statutes that confer private rights of action and provide for statutory damages or other forms of relief regardless of demonstrated or alleged harm. By its reasoning and terms, the Ninth Circuit's rule—and similar rules adopted by other courts of appeals[7]—allows any plaintiff to invoke federal jurisdiction based on the allegation of a "colorable" statutory violation that causes no harm. In practice, this allows plaintiffs to pursue lawsuits seeking billions of dollars in statutory damages, sweeping injunctive relief, and even punitive damages based on novel legal theories or technical statutory violations that are not alleged to have "affect[ed] the plaintiff" or harmed anyone. *Lujan* v. *Defenders of Wildlife*, 504 U.S. at 560 n.1.

Due to the widespread adoption and use of the Internet-based services and related products that amici provide, amici interact with millions of individuals or more each day who use their services to conduct transactions, share information and content, and interact with people all over the world. Indeed, it is the very

[7] For example, the Tenth Circuit has held that "[t]he actual or threatened injury required by Art[icle] III may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing." *Day* v. *Bond*, 500 F.3d 1127, 1136 (10th Cir. 2007) (internal quotation marks omitted); *see also Shaw* v. *Marriott Int'l, Inc.*, 605 F.3d 1039, 1042 (D.C. Cir. 2010) ("[T]he violation of a statute can create the particularized injury required by Article III … when 'an individual right' has been 'conferred on a person by statute.'"); *but see David* v. *Alphin*, 704 F.3d 327, 338 (4th Cir. 2013) (theory "that the deprivation of [plaintiffs'] statutory right is sufficient to constitute an injury-in-fact for Article III standing" "conflates statutory standing with constitutional standing"); *Kendall* v. *Employees Ret. Plan of Avon Prods.*, 561 F.3d 112, 121 (2d Cir. 2009) (breaches of statutory duty do not "in and of themselves constitute[] an injury-in-fact sufficient for constitutional standing").

efficiency and worldwide reach of amici's operations that enable them to deliver such enormous value at such low (sometimes no) cost to their users. At the same time, however, amici's huge volume of daily interactions with millions of different people renders them particularly vulnerable to putative class actions that allege bare statutory violations and claim statutory damages for enormous putative classes. Any process or practice that applies to a particular user of services or websites provided by any one of the amici may well be alleged to apply equally or similarly to many thousands or millions of other users.

With increasing frequency, amici and other technology companies have been named as defendants in suits brought under statutes that provide private rights of action coupled with the ability to obtain statutory damages. Among other statutes, plaintiffs have brought suit under the Wiretap Act (as amended by the Electronic Communications Privacy Act of 1986), 18 U.S.C. §§ 2510-2522,[8] the Stored Communications Act (SCA), *id.* §§ 2701-2712,[9] the Video Privacy Protection

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[8] The Wiretap Act provides a private right of action for "any person whose wire, oral, or electronic communication is intercepted, disclosed, or intentionally used" in violation of the Act, 18 U.S.C. § 2520(a), establishes "statutory damages of whichever is the greater of $100 a day for each day of violation or $10,000," *id.* § 2520(c)(2)(B), and allows plaintiffs to seek "a reasonable attorney's fee," *id.* § 2520(b)(3).

[9] The SCA provides a right of action to any "subscriber, or other person aggrieved" by a "knowing or intentional" violation of the Act, 18 U.S.C. § 2707(a), statutory damages of $1,000 for each plaintiff, *id.* § 2707(c), and the right to recover "a reasonable attorney's fee," *id.* § 2707(b)(3).

Act (VPPA), *id.* § 2710,[10] and the Telephone Consumer Protection Act (TCPA), 47 U.S.C. § 227.[11] In addition, amici and other technology companies often face claims brought under similar state statutes that also provide private rights of action combined with statutory damages. Claims under these state statutes can be brought in federal court based on diversity jurisdiction, 28 U.S.C. § 1332(a), supplemental jurisdiction, *id.* § 1367, or the Class Action Fairness Act, *id.* § 1332(d).

Under the Ninth Circuit's rule, plaintiffs are able to maintain these suits against amici and other technology companies despite their inability to allege any actual harm that would support standing. The suits typically are styled as putative class actions and seek millions or even billions of dollars in statutory damages based on allegations of technical or trivial statutory violations and/or novel, untested legal theories. Such suits for statutory damages are particularly attractive to the plaintiffs' class action bar because at least some courts have concluded that the pursuit of statutory damages based solely on an alleged injury-in-law effectively bypasses the strict commonality and typicality requirements that often preclude class certification in other contexts. *E.g.*, *Ramirez* v. *Trans Union, LLC*, 301

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[10] The VPPA provides a cause of action to "[a]ny person aggrieved by any act of a person in violation of [the Act]," 18 U.S.C. § 2710(c)(1), and entitles plaintiffs to seek statutory damages of $2,500, punitive damages, reasonable attorneys' fees, and equitable relief, *id.* § 2710(c)(2).

[11] The TCPA provides a cause of action "based on a violation of [the Act] or the regulations prescribed under [the Act]," 47 U.S.C. § 227(b)(3)(A), and entitles plaintiffs to seek statutory damages of $500 for each violation, *id.* § 227(b)(3)(B). The statutory damages may be trebled for willful or knowing violations of the Act. *Id.* § 227(b)(3).

F.R.D. 408, 419 (N.D. Cal. 2014) (explaining in typicality analysis that "as Plaintiff is seeking statutory damages and not actual damages, whether he was actually denied credit or received inferior credit terms … is not at issue"); *Cobb* v. *Monarch Fin. Corp.*, 913 F. Supp. 1164, 1172 (N.D. Ill. 1995) ("[Plaintiff] … seeks to recover statutory damages, a claim typical to the class."). The Ninth Circuit's failure to require an actual injury thus threatens to undermine the "stringent requirements for [class] certification that … exclude most claims." *American Express Co.* v. *Italian Colors Rest.*, 133 S. Ct. 2304, 2310 (2013); *see also Comcast Corp.* v. *Behrend*, 133 S. Ct. 1426, 1432 (2013) (explaining that class actions are an "'exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only'"). Where the only injury alleged is an injury-in-law, the requirement of a common injury may no longer serve the intended gating function to limit the availability of the class action mechanism.

District courts in the Ninth Circuit now presume it to be settled law "that alleged colorable violations of the Wiretap Act and the SCA alone suffice … to establish Article III standing without any independent showing of injury." *Perkins* v. *LinkedIn Corp.*, 53 F. Supp. 3d 1190, 1208 (N.D. Cal. 2014) (emphases added). In one suit, plaintiffs alleged that a software bug inadvertently resulted in the transmittal by a Facebook user's browser of "referrer headers" to advertisers that sometimes may have included a user's Facebook identification number or name when the user clicked on an advertisement on Facebook's website. *In re Facebook Privacy Litig.*, 791 F. Supp. 2d 705, 708-709 (N.D. Cal. 2011), *aff'd*, 750 F.3d 1098 (9th Cir. 2014). There was no allegation that any advertiser had ever actually received, much less used, the referrer header information

in any way, or that any user was actually harmed by the alleged disclosure. Nonetheless, the district court denied a motion to dismiss a complaint alleging violations of the Wiretap Act and seeking statutory damages, despite the plaintiffs' failure to allege any actual harm, because "Plaintiffs allege a violation of their statutory rights," which the court found "sufficient to establish that they have suffered the injury required for standing under Article III." *Id.* at 712.

Similarly, another suit claimed that amicus Google violated the SCA when it allegedly included user search queries in the URLs of Google search results pages, URLs that could in turn be transmitted (via "referrer headers") to a third-party landing site if and when the user clicked on a search result. *Gaos* v. *Google Inc.*, 2012 WL 1094646, at *1 (N.D. Cal. Mar. 29, 2012). According to the complaint, the "[s]earch terms *could* be linked together with the identity of the user," though there was no allegation that this had actually occurred. *Id.* (emphasis added). The district court denied Google's motion to dismiss the putative class complaint seeking statutory damages because "a plaintiff may be able to establish constitutional injury in fact by pleading a violation of a right conferred by statute" and "the SCA provides a right to judicial relief based only on a violation of the statute without additional injury." *Id.* at *3; *see also In re iPhone Appl. Litig.*, 844 F. Supp. 2d 1040, 1055 (N.D. Cal. 2012) ("Plaintiffs have alleged a violation of their statutory rights under the Wiretap Act … as well as the [SCA] …. Thus, the Court finds that Plaintiffs have established injury in fact for the purposes of Article III standing.").

Other district courts have extended this misinterpretation of Article III to cases involving the TCPA and VPPA. Thus, a district court sustained a putative

class action brought under the TCPA where the defendant was alleged to have sent unauthorized text messages because merely "by alleging he received a text message in violation of the TCPA, [plaintiff] has established a particularized injury in satisfaction of Article III" even in the absence of an actual alleged injury-in-fact. *Smith* v. *Microsoft Corp.*, 2012 WL 2975712, at *6 (S.D. Cal. July 20, 2012).

Another district court sustained a putative class complaint under the VPPA despite the lack of any alleged actual injury. In that case, the plaintiffs alleged that Hulu, which provides online access to television shows, films, and other video content, had "wrongfully disclosed" anonymized information about users' viewing histories to a metrics company that Hulu had hired to analyze its audience and to Facebook, and that the metrics company and Facebook somehow might link this information to users' identity. *See In re Hulu Privacy Litig.*, 2014 WL 1724344, at *1-5 (N.D. Cal. Apr. 28, 2014). The court concluded that the case could proceed because plaintiffs need not "show actual injury that is separate from a statutory violation to recover … liquidated [statutory] damages." *In re Hulu Privacy Litig.*, 2013 WL 6773794, at *4 (N.D. Cal. Dec. 20, 2013); *see also In re Hulu Privacy Litig.*, 2012 WL 2119193, at *8 (N.D. Cal. June 11, 2012) ("Plaintiffs establish an injury (and standing) by alleging a violation of a statute.").

District courts have also applied the Ninth Circuit's rule to allow cases alleging bare violations of state law to proceed. Thus a plaintiff has been found to have standing for a putative class claim alleging an injury-in-law under the Illinois Right of Publicity Act, 765 Ill. Comp. Stat. 1075/1 *et seq.*, which provides for statutory damages of $1,000 per violation and punitive damages for willful violations. *C.M.D.* v. *Facebook, Inc.*, 2014

WL 1266291, at *2-3 (N.D. Cal. Mar. 26, 2014). A plaintiff has been found to have standing based on the bare allegation that the defendant violated Michigan's Video Rental Privacy Act, Mich. Comp. Laws § 445.1712, which provides a private right of action and statutory damages of $5,000 per person along with the right to recover attorneys' fees and costs. *Deacon* v. *Pandora Media, Inc.*, 901 F. Supp. 2d 1166, 1171-1172 (N.D. Cal. 2012) (alleging that public and Facebook "friends" could see a user's music preferences). And a plaintiff has been found to have standing, based on allegations of injury-in-law alone, in a putative class action alleging violations of multiple state statutes that provide for statutory damages and injunctive relief. *Goodman* v. *HTC Am., Inc.*, 2012 WL 2412070, at *8 (W.D. Wash. June 26, 2012); *see also id.* at *1 (alleging that transmission of location data by AccuWeather applications installed in plaintiffs' smartphones "transform[s] the phones into surreptitious tracking devices").

B. The Ability To Seek Class-Wide Statutory Damages For Mere Injuries-In-Law Allows Plaintiffs To Extract *In Terrorem* Settlements

Erosion of the Article III standing requirement in this context and the corresponding inability of defendants to obtain dismissal of no-injury suits for lack of standing, combined with the widespread availability of statutory damages under many of these types of statutes, has led to abusive, costly class-action litigation against technology companies in the federal courts. Since any technology company practice that applies to a single user may often be replicated with respect to thousands or millions of other users each day, the potential class size in such lawsuits is enormous. Indeed,

it is the very success of technology companies that have developed valuable and efficient services that are used and accessed every day by millions of people, often at no or little cost to the user, that makes them especially vulnerable to such opportunistic suits. Of particular concern, the combination of potentially huge classes with the prospect of even modest per-plaintiff statutory damages presents a threat of absurdly high potential damages that can force *in terrorem* settlements of meritless, no-injury cases unless they can be dismissed at an early stage.

As the district court below recognized, if a mere statutory violation "confer[s] Article III standing … where no injury in fact is properly pled," then "federal courts will be inundated by web surfers' endless complaints." Pet. App. 23a-24a. Unfortunately, the district court's prediction has already become reality—technology companies are routinely subjected to suits seeking billions (or even trillions) of dollars in damages for alleged statutory violations that are not alleged to have caused any actual harm to anyone. And the *in terrorem* effect of the damages exposure often leads to high-dollar settlements, even in the face of strong defenses.

For example, amicus Facebook settled a putative class action complaint alleging violations of a state statute in which the proposed settlement class "consist[ed] of some 150 million members" of Facebook's social network. *Fraley* v. *Facebook, Inc.*, 966 F. Supp. 2d 939, 940 (N.D. Cal. 2013). The complaint alleged that Facebook misappropriated users' names and likenesses in alleged advertisements displayed to their friends on Facebook (the *same* friends with whom these users had chosen already to share the *same* information). *Id.* at 942. The district court explained that "[w]hile plaintiffs

pleaded a sufficient basis for injury to support constitutional standing, it [was] far from clear that they could ever have shown they were actually harmed in any meaningful way." *Id.* The district court also noted "the theoretical availability of statutory damages of $750 per violation" under state law, yielding exposure to potential statutory damages that would "threaten Facebook's existence." *Id.* at 944 & n.4. The court approved a $20 million settlement, of which the plaintiffs' attorneys would receive 25 percent after payment of administration expenses, costs, and incentive awards of $1,500 to each named plaintiff. *Fraley* v. *Facebook, Inc.*, 2013 WL 4516806, at *1-4 (N.D. Cal. Aug. 26, 2013).

Similarly, amicus Netflix recently entered into a settlement with a class estimated to exceed 60 million individuals in a lawsuit alleging that it had unlawfully disclosed personal information to analytics companies hired by Netflix and impermissibly retained viewing information in violation of the VPPA. *In re Netflix Privacy Litig.*, 2013 WL 1120801, at *4-5 (N.D. Cal. Mar. 18, 2013). There was no allegation of actual harm, and the plaintiffs themselves estimated that their "'unlawful disclosure' claim would have a 5% chance of success on the merits." *Id.* The district court noted that Netflix had "potentially potent defenses" on all claims and might receive a "dismissal upon a dispositive motion." *Id.* at *5. But the potential statutory damages exceeded $150 *billion* and the case was settled for $9 million, of which $2.25 million went to class counsel and $30,000 went to the named plaintiffs. No other class members received any monetary compensation. *Id* at *1-2.

Likewise, amicus Google recently entered into a settlement of claims brought under the SCA on behalf

of a class estimated to "comprise[] … approximately 129 million individuals." *In re Google Referrer Header Privacy Litig.*, 2015 WL 1520475, at *2 (N.D. Cal. Mar. 31, 2015); *see also supra* p.17 (describing facts of same case, which was captioned *Gaos* v. *Google Inc.* before consolidation). The court had previously noted that "the full amount of statutory damages … is likely in the *trillions* of dollars considering the size of the class." *In re Google Referrer Header Privacy Litig.*, 2014 WL 1266091, at *5 n.4 (N.D. Cal. Mar. 26, 2014) (emphasis added). The case was settled for $8.5 million, despite the plaintiffs' concession that "the alleged privacy violation underlying all of their claims is novel and was potentially one of first impression in th[e] circuit," and the district court's conclusion that "there was no guarantee that any claims would survive pre-trial challenges." *In re Google*, 2015 WL 1520475, at *5. The plaintiffs' attorneys received $2.125 million, an estimated $1 million will go to administrative costs, the representative plaintiffs will each receive $5,000, and the balance of the fund will go to various *cy pres* recipients. None of the other class members received any monetary compensation. *Id.* at *4.

Amicus Facebook settled another putative class action alleging violations of the VPPA and Wiretap Act in which the class was estimated to exceed 3.6 million people, none of whom alleged any actual injury. *Lane* v. *Facebook, Inc.*, 2010 WL 9013059, at *2 (N.D. Cal. Mar. 17, 2010). The district court acknowledged that "Plaintiffs' claims raise novel legal theories" and that the case's "outcome … would have been uncertain." *Id.* at *4. However, the plaintiffs sought $2,500 per alleged violation of the VPPA and $10,000 per alleged violation of the Wiretap Act, putting the defendants' potential liability exposure in the billions of dollars. *Id.* at *2.

The court approved a $9.5 million settlement, of which $3 million went to plaintiffs' attorneys' fees, administrative costs, and incentive payments to class representatives. *Lane* v. *Facebook, Inc.*, 696 F.3d 811, 817 (9th Cir. 2012).

Finally, amicus Google recently settled a putative class action brought under the TCPA, in which the class was estimated to include the holders of more than 185,000 unique telephone numbers, making the potential statutory damages exposure at least $200 million. Final Judgment Order 4-5, Dkt. 107, *Pimental* v. *Google Inc.*, No. 11-cv-2585 (N.D. Cal. June 26, 2013). The only "injury" alleged in the suit was receipt of a text message, and Google noted that all recipients were either members of the challenged text-messaging service that facilitated the text or had provided their phone number to the member who sent the text. *Pimental* v. *Google, Inc.*, 2012 WL 1458179, at *1 (N.D. Cal. Apr. 26, 2012). The parties settled for $6 million, of which $1.5 million went to attorneys' fees, $5,000 went to the named plaintiffs, and the balance went into a settlement fund that would be disbursed to *cy pres* recipients if funds went unclaimed. *Pimental*, Final Judgment Order 4-5, 7.

These examples offer a disturbing commentary on the consequences of the Ninth Circuit's no-injury standing jusrisprudence and the readiness of the class-action plaintiffs' bar to exploit it with opportunitistic lawsuits. Plaintiffs' ability to file these types of cases based on alleged injuries-in-law without identifying any one who has suffered any actual harm has an extreme and chilling effect on technology companies including amici. Perversely, the primary consequences of the expensive litigation and resulting *in terrorem* settlements of these no-injury controversies are the diversion of re-

sources away from technology companies' efforts to develop and provide increasingly innovative services and products to the users who often comprise the putative classes in these cases. Thus, at least in the Internet-based technology sector represented by amici, the ultimate losers under the Ninth Circuit's standing ruling may be members of the vast consuming public, who now or in the future may face limited or more costly access to these highly beneficial services and products that they now often receive for free or at very low cost.

III. The Executive Branch Can And Does Act On Bare Statutory Violations And Private Litigants May Vindicate Legal Rights Where Actual Harm Occurs

There is no need for private federal lawsuits, brought by litigants who allege no actual injury, to ensure that these statutes are given their full force and effect. Executive officials routinely exercise their considerable authority to enforce statutes like the FCRA, the Wiretap Act, the SCA, and the TCPA. Accordingly, the Executive Branch can be reasonably expected to scrutinize business activity for compliance with the obligations imposed by these statutes.

The agencies charged with enforcing the FCRA regularly enforce its provisions against a variety of different companies. *E.g.*, Order, Dkt. 5, *United States* v. *Instant Checkmate, Inc.*, No. 14-cv-675 (S.D. Cal. Apr. 1, 2014) (consent agreement with FTC imposing $525,000 fine and injunctive relief for FCRA violations); Stipulated Final J., Dkt. 3, *United States* v. *Infotrack Info. Servs., Inc.*, No. 14-cv-2054 (N.D. Ill. Mar. 25, 2014) (consent agreement with FTC imposing $1 million fine and injunctive relief for FCRA violations); Order, *In re DriveTime Automotive Group, Inc.*, No. 2014-17

(CFPB Nov. 19, 2014) (consent order imposing $8 million fine and injunctive relief for violations of the FCRA and other statutes).

The FTC has recently entered into consent agreements with various technology companies alleged to have committed privacy violations. *E.g.*, Order, *In re Snapchat, Inc.*, No. 132-3078 (FTC May 8, 2014) (proposed consent agreement regarding alleged privacy violations by Snapchat application); Order, *In re Goldenshores Techs., LLC*, No. 132-3087 (FTC Dec. 5, 2013) (consent agreement regarding alleged privacy violations by creator of popular flashlight smartphone application); Consent Decree, Dkt. 8, *United States* v. *Path, Inc.*, 13-cv-448 (N.D. Cal. Feb. 8, 2013) (consent agreement regarding alleged privacy violations by a social networking application). In total, the FTC has brought more than 170 enforcement actions related to privacy since 1997, including 60 separate actions from 2012-2014. Solove & Hartzog, *The FTC and the New Common Law of Privacy*, 114 Colum. L. Rev. 583, 600 (2014); FTC, *Legal Resources*, *available at* https://www.ftc.gov/tips-advice/business-center/legal-resources (search "TYPE=Case" and "TOPIC=Privacy and Security" for each year) (last visited July 8, 2015). In light of the significant influence the FTC exerts in privacy regulation, scholars have concluded that "the FTC has become the dominant enforcer of privacy" rights in America. Solove & Hartzog, 114 Colum. L. Rev. at 602.

And the TCPA is routinely enforced by the FCC, which has levied significant fines on violators. *E.g.*, Forfeiture Order, *In re Security First of Ala., LLC*, No. 12-258 (FCC Feb. 13, 2015) (imposing $342,000 fine for TCPA violations); Notice of Apparent Liability, *In re Dialing Servs., LLC*, No. 12-1812 (FCC May 8, 2014)

(proposing $2.9 million fine for TCPA violations); Forfeiture Order, *In re Presidential Who's Who, Inc.*, No. 12-217 (FCC Mar. 28, 2014) (proposing $640,000 fine for TCPA violations).

While executive enforcement of these and similar statutes is robust, it bears noting that private litigants who are *actually injured* are also entitled to bring claims under these statutes. Moreover, these statutes provide individual litigants with numerous tools to ensure that they are incentivized and able to vindicate their statutory rights. The Wiretap Act, SCA, VPPA, and TCPA all provide for injunctive relief. 18 U.S.C. § 2520(b)(1); *id.* § 2707(b)(1); *id.* § 2710(c)(2)(D); 47 U.S.C. § 227(b)(3)(A). The VPPA and TCPA provide for enhanced damages. 18 U.S.C. § 2710(c)(2)(B); 47 U.S.C. § 227(b)(3). And the Wiretap Act, SCA, and VPPA provide for attorneys' fees. 18 U.S.C. § 2520(b)(3); *id.* § 2707(b)(3); *id.* § 2710(c)(2)(C). This Court has long recognized that the availability of attorneys' fees alone provides a strong incentive for litigants to pursue important public interest litigation. *Newman* v. *Piggie Park Enters., Inc.*, 390 U.S. 400, 402 (1968) ("Congress … enacted the provision for counsel fees … to encourage individuals *injured* by racial discrimination to seek judicial relief under Title II." (emphasis added)); *see also Boggs* v. *Alto Trailer Sales, Inc.*, 511 F.2d 114, 118 (5th Cir. 1975) (recognizing the incentive to bring individual claims when "each claimant is provided with reasonable attorney's fees and costs"); *Rowden* v. *Pacific Parking Sys., Inc.*, 282 F.R.D. 581, 586 (C.D. Cal. 2012) (recognizing that the availability of attorneys' fees and punitive damages "give individuals truly harmed by a [statutory] violation a more than sufficient incentive to bring an action even if the amount of recovery is difficult to quantify or relatively small");

Kline v. *Security Guards, Inc.*, 196 F.R.D. 261, 274 (E.D. Pa. 2000) ("[T]he very purpose of a fee-shifting statute such as the one at issue here is to provide incentive to counsel to pursue otherwise unprofitable litigation."). Accordingly, fidelity to Article III's injury-in-fact requirement will still leave private litigants harmed by statutory violations with strong incentives and numerous remedies to enforce their rights when violations cause real harm and the federal judicial power may be properly invoked.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted.

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