NO. 16-1524

In the
Supreme Court of the United States

M-I, LLC, A DELAWARE LIMITED LIABILITY COMPANY,

PETITIONER,

v.

SARMAD SYED, AN INDIVIDUAL, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED,

RESPONDENT.

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

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION

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July 21, 2017

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF PETITIONER

Pursuant to Rule 37.2(b), the Chamber of Commerce of the United States of America respectfully requests leave to submit a brief as *amicus curiae* in support of the petition for writ of certiorari. As required under Rule 37.2(a), the Chamber provided timely notice to all parties' counsel of its intent to file this brief more than 10 days before its due date. Petitioner's counsel consented to the filing of this brief. Respondent's counsel withheld his consent.

The Chamber often files *amicus* curiae briefs to represent the interests of the business community in cases before this Court. It participated as *amicus curiae* in *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016), and emphasized that, if the Ninth Circuit's decision there had been allowed to stand, it would have further eroded the minimum requirements for standing under Article III of the Constitution. That erosion is of grave concern to the nation's businesses because alleged technical violations of regulatory statutes can often relate to large numbers of people without causing anyone to suffer actual injury. When individuals are allowed to seek damages despite having suffered no concrete injury, businesses find themselves trapped in abusive litigation over allegations of harmless technical violations, burdening the courts and diverting resources from more productive uses.

Spokeo held that Article III standing requires a plaintiff to demonstrate a concrete, real-world injury,

even in the context of an alleged statutory violation. But the lower courts have struggled to apply that decision faithfully and consistently. Instead, they have splintered over when a statutory violation can give rise to a concrete, real-world injury, especially when "informational injuries" are involved. As a result, whether a plaintiff has standing is less a function of the facts of a particular case than of the forum in which the case is brought. Because the concerns that prompted the Chamber to participate in *Spokeo* remain a serious problem for the nation's businesses, the Chamber seeks leave to file this brief urging this Court to intervene once again to enforce proper constitutional limits on no-injury lawsuits.

Respectfully submitted,

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INTEREST OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. A central function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts, including this Court. The Chamber regularly files *amicus curiae* briefs in cases that raise issues of vital concern to the nation's business community. This is one of those cases.

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[1] Counsel for all parties received notice of the Chamber's intent to file this brief 10 days before its due date; because respondent did not consent, the Chamber has submitted a motion for leave to file this brief. Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* state that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court's decision in *Spokeo* held that "Article III standing requires a concrete injury even in the context of a statutory violation." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016). A plaintiff may not allege a "bare procedural violation, divorced from any concrete harm, and satisfy the injury-in-fact requirement of Article III." *Id.* *Spokeo* confirmed longstanding constitutional requirements and, many believed, would limit abusive class-action suits by unharmed plaintiffs.

Based on the allegations in the complaint, this case should not have been allowed to proceed because the plaintiff has not alleged a concrete injury in fact. Instead, his complaint identifies only a bare technical violation of a procedural statutory requirement. Specifically, the complaint alleges that the plaintiff's rights under the Fair Credit Reporting Act, 15 U.S.C. § 1681b, were violated because when his prospective employer asked for permission to obtain background information on him, the disclosure that his employer wanted to obtain a credit report and the requested liability waiver were contained in one document, instead of two. That is the only "injury" properly alleged in the complaint.

A finding of standing based on these allegations cannot be reconciled with the constitutional principles recognized in *Spokeo* and should not be allowed to stand. Because standing does not exist on these allegations, the Court should summarily reverse the decision below. If it does not summarily reverse, the Court should grant the petition and

order briefing on the merits. The decision below falls on one side of a division in authority that has developed over the proper interpretation of *Spokeo* and when, if ever, a mere technical violation of a statute's procedural requirement can qualify as an injury in fact. Moreover, the practical consequences of this split are significant. Businesses continue to face massive class actions seeking statutory damages for conduct that caused concrete and particularized injury to only a handful of people or to no one at all. Such abusive lawsuits force corporate defendants to settle and benefit no one but the class-action lawyers who bring them. The risk of such abuse is even greater in light of the Ninth Circuit's finding of willfulness in this case, which expands the scope of "willful violations" under the Fair Credit Reporting Act to include nearly any violation at all. This Court's intervention is again needed to stop these abuses and to enforce the basic requirements of Article III.

ARGUMENT

I. The Allegations In The Complaint Are Not Sufficient To Establish Article III Standing.

Spokeo reaffirmed the bedrock principle that a suit by an uninjured plaintiff does not present a justiciable "case or controversy" under Article III. *See* 136 S. Ct. at 1547; *see also Allen v. Wright*, 468 U.S. 737, 750–51 (1984). To satisfy that basic standing requirement—the "irreducible constitutional minimum"—a plaintiff must allege an injury in fact that is concrete and particularized, fairly traceable to the challenged action of the defendant, and likely to be redressed by a favorable decision. *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1386 (2014). The injury-in-fact requirement is the "foremost" element of standing, *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 103 (1998), for it ensures that "the legal questions presented to the court will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequence of judicial action," *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982).

Spokeo also reaffirmed that Congress has no ability to erase or relax the constitutional injury-in-fact requirement. *Spokeo*, 136 S. Ct. at 1547–48 (quoting *Raines v. Byrd*, 521 U.S. 811, 820 (1997)). That requirement 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); a*ccord Gladstone Realtors v. Village of*

Bellwood, 441 U.S. 91, 100 (1979) ("in no event" may Congress abrogate Article III's requirements). If Congress were to direct "the federal courts to hear a case in which the requirements of Article III are not met, that Act of Congress [would be] unconstitutional." John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 DUKE L.J. 1219, 1226 (1993). Accordingly, "even in the context of a statutory violation," a plaintiff must still allege an actual injury that is concrete and particularized in order to have standing to bring suit. *Spokeo*, 136 S. Ct. at 1549. A plaintiff cannot "automatically" establish an injury in fact merely because a statute grants the plaintiff a right and also purports to authorize a lawsuit to vindicate that right. *Id.*

The plaintiff's complaint in this case alleges nothing more than a bare statutory violation. The complaint does not allege that the company failed to tell him that it intended to obtain a credit report or that he had the right to refuse consent. *See* Case No. 1:14-cv-00742-WBS-BAM First Am. Compl. ¶¶ 12–34. Nor does it allege that the plaintiff was harmed in any way by the fact that the information provided to him was contained in one form, rather than two. Instead, the complaint merely alleges that the plaintiff uncovered the statutory violation when he later obtained and reviewed his personnel file and discovered that the defendant had used the combined form. *Id.* ¶ 34. The complaint does not allege that the form omitted any necessary information, that the plaintiff's consent was not knowing and voluntary, or that he would have withheld consent had the same information been provided in two separate forms. *Id.* ¶¶ 12–34. In other words, the only injury alleged in

the complaint is the technical violation of the statute—that the required disclosure and waiver appeared in one document instead of two. That should not be surprising given that the complaint was filed in September of 2014, seven months after the Ninth Circuit said in *Spokeo* that plaintiffs need not allege anything beyond a statutory violation in order to establish standing.

Accordingly, for the same reasons the Court rejected the Ninth Circuit's approach in *Spokeo*, the allegations in this case—which assert a statutory violation devoid of any harm—likewise fail to establish standing. Although this Court recognized in *Spokeo* that Congress may choose to "elevat[e] to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law," 136 S. Ct. at 1549 (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 578 (1992)), it also made clear that Congress's "role in identifying and elevating intangible harms does not mean that a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right." *Id.* To infer injury-in-fact from the bare existence of a statutory cause of action disregards that clear holding and warrants this Court's intervention.

II. The Error Below Is Emblematic Of A Much Larger Problem In The Lower Courts.

A finding of standing based on these narrow allegations is part of a disturbing trend in the lower courts. The abusive, no-injury lawsuits that *Spokeo* was intended to abate remain a serious, recurrent

problem, and lower courts are deeply divided over how to interpret and properly apply *Spokeo*. As one court has noted, it remains unclear under what circumstances "the mere technical violation of a procedural requirement of a statute [can], in and of itself, constitute an injury in fact." *In re Horizon Healthcare Servs. Inc. Data Breach Litig.*, 846 F.3d 625, 638 (3d Cir. 2017). These divisions show no signs of resolving themselves without this Court's intervention and further direction.

Since this Court decided *Spokeo*, lower courts have issued over 400 opinions—an average of more than one a day—interpreting this Court's holding. Those lower-court opinions have often reached diametrically opposing results, even with respect to violations of the same statute. *See* Ezra Church *et al.*, *The Meaning of* Spokeo*, 365 Days and 430 Decisions Later*, LAW360 (May 15, 2017), *available at* goo.gl/k4j94R (collecting cases). The upshot is that a plaintiff's standing still depends more on the forum selected than on the facts of the individual case. *See id.* ("We have found numerous cases that are essentially indistinguishable on the facts presented, yet courts have reached opposite results").

In Fair Credit Reporting Act cases, the divisions are especially startling. While the Fourth Circuit and district courts in the Seventh and Eighth Circuits have repeatedly found a lack of standing to pursue statutory damages for mere technical violations, the Ninth Circuit and some courts in the Eleventh Circuit have trended in the opposite direction. *Compare, e.g.*, *Dreher v. Experian Info. Sols., Inc.*, 856 F.3d 337, 345–46 (4th Cir. 2017) (a

credit reporting agency's failure to disclose a source to a consumer was a mere technical violation that did not cause any concrete injury), *Fields v. Beverly Health & Rehab. Servs., Inc.,* No. 16-cv-527, 2017 WL 812104, *4 (D. Minn. Mar. 1, 2017) (providing a required disclosure in the wrong form did not cause a sufficiently concrete injury to confer standing), *and Gunther v. DSW Inc.*, No. 15-cv-1461, 2016 WL 6537975, at *2–6 (E.D. Wis. Nov. 3, 2016) (failure to provide a stand-alone disclosure was a mere technical violation that did not cause a concrete injury), *with In re Ocwen Loan Servicing LLC Litig.*, No. 16-cv-200, 2017 WL 1289826, at *5 (D. Nev. Mar. 3, 2017) (the mere batch retrieval of consumers' credit reports, without more, qualified as a concrete injury); *see also Hancock v. Urban Outfitters, Inc.,* 830 F.3d 511, 514 (D.C. Cir. 2016) (alleged informational injury under two similar District of Columbia consumer protection statutes did not cause a concrete injury). For example, district courts in the Ninth and Eleventh Circuits have held that the mere printing of more than five numbers of a consumer's credit card is sufficient to confer standing in cases under the Fair Credit Reporting Act and Fair and Accurate Credit Transactions Act. *See Deschaaf v. Am. Valet & Limousine Inc.*, No. 16-cv-3464, 2017 WL 610522, at *4 (D. Ariz. Feb. 15, 2017) (named plaintiff had standing even though "no potential identity thief actually s[aw] the receipt"); *see also Guarisma v. Microsoft Corp.,* 209 F. Supp. 3d 1261, 1266 (S.D. Fla. 2016); *Wood v. J Choo USA, Inc.*, 201 F. Supp. 3d 1332, 1340 (S.D. Fla. 2016); *but cf. Meyers v. Nicolet Rest. of De Pere, LLC*, 843 F.3d 724, 728 (7th Cir. 2016) (finding that standing did not

exist, particularly given that plaintiff retained the receipt and no third-party had seen it).

The confusion also extends to many other statutes. Courts have split in cases involving technical violations of the Fair and Accurate Credit Transaction Act, 15 U.S.C. §§ 1681–1681x, the Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692–1692p, and the Telephone Consumer Protection Act, 47 U.S.C. § 227. *See* Church, *supra,* at 1–4. As a recent study notes, although the individual facts of the cases were relevant to those decisions, "the jurisdiction of the litigation and the individual judge [we]re just as critical." *Id.* at 1.

There is no reason the Court should allow these divisions to fester. The hundreds of lower-court decisions struggling to apply *Spokeo* make clear that there will be no uniform, national approach to evaluating plaintiffs' standing to sue over technical statutory violations until this Court provides further guidance. Indeed, as the decision below suggests, courts in the Ninth Circuit have been reluctant to find any circumstances under which a technical violation of a statute's procedural requirements does not give rise to an injury in fact. Without this Court's guidance, thousands of businesses in states throughout the nation's largest circuit will be subject to a different constitutional rule than businesses elsewhere.

Nor should the Court allow the essential, minimum requirements of Article III standing to be enforced in such a haphazard manner. The fact that a lawsuit can be brought to vindicate mere "injuries-in-law" under some statutes but not others, and in

some courts but not others, cries out for this Court's intervention. The Court should grant review to clarify whether a mere informational injury arising from a technical procedural violation is sufficient to satisfy the standing requirements recognized in *Spokeo*.

III. The Questions Presented Are Incredibly Important.

The Court's review is also warranted because the stakes are so high. The problem of courts' failing to enforce standing requirements is part of a broader problem of courts' failing to enforce proper limitations on class actions. *See Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 146 (2011) ("In an era of frequent litigation [and] class actions . . . courts must be more careful to insist on the formal rules of standing, not less so."). It should be no surprise that the vast majority of no-injury lawsuits are brought as putative class actions, seeking statutory damages in the millions, or even billions, of dollars. *See* Sheila B. Scheuerman, *Due Process Forgotten: The Problem of Statutory Damages and Class Actions*, 74 MO. L. REV. 103, 114 (2009).

As long as the lower courts fail to enforce Article III's injury-in-fact requirements, the class-action bar will continue to respond by pursuing abusive class actions. The jettisoning of a meaningful injury-in-fact requirement—and with it a meaningful causation requirement—removes critical constraints on class certification. If plaintiffs can recover damages simply by proving the defendant's abstract violation of a legal duty, regardless of that violation's widely varying or entirely absent effects on

individual class members, then commonality under Rule 23(a)(2) and predominance under Rule 23(b)(3) collapse into a single inquiry, for which the answer is automatic.

Commonality is not supposed to depend solely on whether the class members "have all suffered a violation of the same provision of law." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349–50 (2011) (quoting *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 157 (1982)). Instead, "[c]ommonality requires the plaintiff to demonstrate that the class members 'have suffered the same injury.'" *Id.* Similarly, predominance asks "whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 (1997); *see also Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1433–34 (2013). To determine whether the predominance requirement is satisfied, a court must look for "legal or factual questions that qualify each class member's case as a genuine controversy." *Amchem Prods.,* 521 U.S. at 623. Both requirements are rendered meaningless, however, if injury-in-fact exists merely by virtue of common exposure to the same technical violation of a statute, without any need to consider individualized harm or causation.

The failure to properly and uniformly apply Article III's injury-in-fact requirement carries significant real-world consequences. The availability of statutory damages, in lieu of *actual* damages based on *actual* injury, creates huge incentives for enterprising class-action lawyers to bring aggressive, overreaching claims on behalf of plaintiffs who have

suffered no real-world harm. *See* John Nadolenco, *Too High A Price? The Perilous Combination of Statutory Damages and Class Certification*, 18 WESTLAW J. CLASS ACTION 1 (2011). It also encourages class-action lawyers to forgo claims for actual damages, which would complicate class certification and require proof of causation, for the prospect of easy class certification and no need to prove actual harm. As Judge Wilkinson has recognized, when used together, statutory damages and class actions produce a "perfect storm" in which they "combine to create commercial wreckage far greater than either could alone." *Stillmock v. Weis Mkts.*, 385 F. App'x 267, 276 (4th Cir. 2010) (Wilkinson, J., concurring).

Class-action lawyers' strategy of relying on statutory-damages provisions also increases settlement pressure, as the defendant's potential damages exposure can be calculated by simply "multiply[ing] a minimum $100 statutory award (and potentially a maximum $1,000 award) by the number of individuals" in the class. Scheuerman, *supra*, at 114. Layering class certification "on top of per-violation damages" thus "distort[s,] rather than facilitate[s], the [statutory] remedial scheme." Richard N. Nagareda, *Aggregation and Its Discontents: Class Settlement Pressure, Class-Wide Arbitration, and CAFA*, 106 COLUM. L. REV. 1872, 1887 (2006). In short, the combination of class actions and no-injury statutory private actions provides an easy roadmap for class counsel to drive up damages claims to levels entirely disproportionate to the underlying dispute.

For businesses, these types of no-injury lawsuits pose a significant threat. For example, under the Fair and Accurate Credit Transactions Act, retailers can face statutory damages for failing to redact from a printed receipt the expiration date and all but the last five digits of the customer's credit card number. *See* Scheuerman, *supra*, at 104. When pursued as part of a statewide or nationwide class action, those statutory damages can yield liability large enough to put the defendant out of business for technical missteps that did not actually harm even a single customer. Under the Ninth Circuit's analysis below, the fact that Congress created a private right of action in such cases is enough to establish injury-in-fact. *See Deschaaf*, 2017 WL 610522, at *4 (finding that a concrete injury occurred as soon as the expiration date was printed on the receipt, regardless of whether any actual harm materialized).

When damages allegedly owed to hundreds or even thousands of potential claimants are aggregated, even a small risk of liability is unacceptable and defendants are "pressured into settling questionable claims." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011); *see also Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 445 n.3 (2010) (Ginsburg, J., dissenting) ("When representative plaintiffs seek statutory damages, [the] pressure to settle may be heightened because a class action poses the risk of massive liability unmoored to actual injury."). As this Court has recognized, "[c]ertification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon

a meritorious defense." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978). Faced with such an enormous risk of liability, corporate defendants can be "essentially force[d] . . . to pay ransom to class attorneys by settling." S. Rep. No. 109-14, at 20 (2005) (Class Action Fairness Act). In fact, a "study of certified class actions in federal court in a two-year period (2005 to 2007) found that all 30 such actions had been settled." *Eubank v. Pella Corp.*, 753 F.3d 718, 720 (7th Cir. 2014) (citing Emery G. Lee III, *et al.*, *Impact of the Class Action Fairness Act on Federal Courts* 2, 11 (Fed. Judicial Ctr. 2008)).

Finally, failing to enforce the requirements of Article III almost inevitably leads to other abuses. This case provides a good example. Even though the plaintiff did not allege that he suffered any actual or imminent harm, his case was allowed to proceed merely because he alleged that the defendant provided a statutorily mandated disclosure and a liability waiver in one document, instead of two documents at the same time. This opportunity for abuse is further exacerbated by the Ninth Circuit's erroneous finding of a willful violation. Under *Safeco Insurance Co. v. Burr*, 551 U.S. 47 (2007), the plaintiff was supposed to show both that the defendant's interpretation of the statute was unreasonable or deeply flawed and that the defendant ignored an "unjustifiably high risk of harm" resulting from that interpretation. *Id.* at 68. The Ninth Circuit, however, focused only on the alleged unreasonableness of the defendant's interpretation in analyzing whether the violation was willful. It did not consider whether there was also an "unjustifiably high risk of harm" resulting from that

interpretation. That holding allows a plaintiff who has not alleged any actual or imminent harm to pursue not just statutory damages, but also punitive damages and attorney's fees. By defining harm so loosely for purposes of standing and excising it entirely from the willfulness analysis under *Safeco*, remedies that should be reserved for exceptional cases instead become a common tool for pressuring defendants into settlement.

CONCLUSION

The petition for a writ of certiorari should be granted.

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