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No. 10-708

IN THE

Supreme Court of the United States

FIRST AMERICAN FINANCIAL CORPORATION,
SUCCESSOR IN INTEREST TO
THE FIRST AMERICAN CORPORATION, AND
FIRST AMERICAN TITLE INSURANCE COMPANY,
Petitioners,

v.

DENISE P. EDWARDS, 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 FACEBOOK, INC., LINKEDIN CORP., YAHOO! INC., AND ZYNGA INC. IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Section 8(a) of the Real Estate Settlement Procedures Act of 1974 ("RESPA" or "the Act") provides that "[n]o person shall give and no person shall accept any fee, kickback, or thing of value pursuant to any agreement or understanding ... that business incident to or a part of a real estate settlement service involving a federally related mortgage loan shall be referred to any person." 12 U.S.C. § 2607(a). Section 8(d)(2) of the Act provides that any person "who violate[s]," inter alia, § 8(a) shall be liable "to the person or persons charged for the settlement service involved in the violation in an amount equal to three times the amount of any charge paid for such settlement service." *Id.* § 2607(d)(2).

The question presented is:

In the absence of any claim that the alleged violation affected the price, quality, or other characteristics of the settlement services provided, does a private purchaser of real estate settlement services have standing to sue under Article III, § 2 of the United States Constitution, which provides that the federal judicial power is limited to "Cases" and "Controversies" and which this Court has interpreted to require the plaintiff to "have suffered an 'injury in fact,'" *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 (1992)?

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INTEREST OF AMICI CURIAE[1]

Amici are technology companies providing services or products via the Internet to hundreds of millions of users. Facebook, Inc. is a social media service with more than 750 million users. LinkedIn Corp. is the world's largest professional network on the Internet with more than 120 million members. Yahoo! Inc., together with its consolidated subsidiaries, is a digital media company that delivers personalized digital content to vast global audiences and provides opportunities for advertisers to connect to their target audiences on Yahoo! properties and beyond, including through an extensive distribution network of affiliated sites or offerings. In April 2011, Yahoo! reached more than 187 million unique users. Zynga Inc. is a social gaming company with more than 200 million monthly active users.

Amici are at the forefront of technological development, and provide great societal value by capitalizing on new technologies to effectively deliver innovative and valuable services and products to people. The "extraordinary advance[s]" in the availability of educational, social, and intellectual resources provided by companies such as amici have been made possible by the "vibrant and competitive free market" in which they operate. 47 U.S.C. § 230. It is accordingly critically important to the continued development of this

[1] Pursuant to Rule 37.6, amici certify that no counsel for a party authored this brief in whole or in part, and that no person or party, other than amici or their counsel, made a monetary contribution to the preparation or submission of this brief. Letters from the parties consenting to the filing of amicus briefs in support of either party are on file with the Clerk.

robust industry, and by extension the United States economy, to ensure companies like amici can continue to innovate and offer new services and products unfettered by unjustified and burdensome litigation.

Due to the nature of their businesses, many of the activities in which amici engage are subject to a number of federal and state laws that contain statutory damages provisions similar to the provision contained in RESPA. Like RESPA, these laws afford individuals a private right of action for alleged violations, and, as an alternative to recovery for actual damages suffered by the plaintiff, provide for statutory damages in set amounts that may be awarded, in certain circumstances, to a plaintiff who succeeds in proving that the law was violated.

Also like RESPA, these other laws have at times been invoked by litigants, including putative class representatives, who have suffered no harm or injury whatsoever. In certain of these lawsuits, courts have ruled, like the Ninth Circuit below, that the mere allegation of a violation of one of these laws, and nothing more, suffices to confer constitutional standing on plaintiffs who allege no injury. *E.g.*, *In re Facebook Privacy Litig.*, No. 10-02389, 2011 WL 2039995, at *4 (N.D. Cal. May 12, 2011) ("The injury required by Article III can exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing,'" (quoting *Edwards* v. *First Am. Corp.*, 610 F.3d 514 (9th Cir. 2010))); *Ramirez* v. *Midwest Airlines, Inc.*, 537 F. Supp. 2d 1161, 1166 (D. Kan. 2008) ("[Defendant's] lack of standing argument erroneously presumes that plaintiff must establish that the alleged [statutory] violation caused her to suffer some form of actual harm.").

The Ninth Circuit's erroneous ruling is of particular concern to amici because permitting these types of "no-injury" lawsuits (often class actions with great attendant expense and burden) to proceed beyond the threshold motion to dismiss stage could have significant negative impacts on amici due to the broad-scale nature of their operations. Many technology companies such as amici interact on a daily basis with millions of (mostly non-paying) users via the Internet through highly efficient and systematized mechanisms. The inherent nature of this class of businesses, which enables them to unlock the great powers of the Internet and deliver significant value to consumers, at the same time makes them especially vulnerable to the untoward consequences that the Ninth Circuit's misreading of Article III would engender.

Specifically, under the Ninth Circuit's ruling, if any of the millions of consumers who interact with one of these companies is willing (or can be enticed by a plaintiffs' attorney) to allege that a generalized practice or act of the company violated a law providing for statutory damages, she could launch a putative class action on behalf of herself and millions of other "similarly situated" users—and pursue a concomitant multi-*billion* dollar statutory damages claim—without herself or a single other class member having suffered any injury from the practice or act at issue. Allowing plaintiffs to file such no-injury class action lawsuits could subject businesses such as amici to damages demands that, at least on their face, would be potentially bankrupting. Just the threat of these massive damages claims create strong incentives to end even baseless suits with settlement payments, essentially rewarding plaintiffs (and their opportunistic counsel) for filing extortionate strike suits. While Internet businesses such as amici

would almost certainly have valid defenses on the merits to such lawsuits, if they were unable to eliminate these strike suits "at the courthouse door," the *in terrorem* effect of even a small chance of a devastating loss, as well as the prospect of significant litigation costs, would increase the likelihood of meritless suits being settled by monetary payments that benefit only plaintiffs' attorneys.[2]

Because of the similar standing questions presented in this case and in suits seeking statutory damages under various other laws to which amici may be subject, this Court's determination of respondent's standing to seek statutory damages under RESPA is of great importance to amici. The Court's decision in this case may affect the standing analysis to be applied in suits under such other laws, and therefore the ability of Internet enterprises to seek prompt dismissal of suits by plaintiffs who suffer no injury and seek statutory damages on behalf of millions of putative class members.

SUMMARY OF ARGUMENT

This Court's cases are clear that, although Congress has the power to create new legal rights and causes of action where none previously existed, Article III of the Constitution requires a plaintiff to have suf-

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[2] In addition to merits-based defenses, companies such as amici also would likely have non-Article III procedural defenses to these types of lawsuits—for example, due process challenges to the availability of astronomical, compounded damages awards for a violation that injured no one, and unsuitability challenges to certification of a class where statutory damages and the availability of attorneys' fees for successful plaintiffs make individual actions superior to class actions.

fered injury in fact before she can avail herself of the federal courts. Congress's establishment of laws that contain statutory damages provisions does not change this fundamental separation of the legislative and judicial functions, and the Ninth Circuit's decision to the contrary cannot be reconciled with this Court's long-standing Article III jurisprudence.

Not only is this constitutional requirement of the utmost importance in maintaining the separation of powers, it also has practical significance in that it limits the availability of the federal courts to those who have at least a plausible claim to have suffered a concrete injury from an alleged legal violation. This requirement in turn ensures that federal laws protect those who are injured in fact and prevents these same laws from being used as a tool by opportunistic plaintiffs. While this Court's standing jurisprudence does not require that a plaintiff always have suffered a demonstrable *financial* loss to have injury in fact (nor do amici argue here that it should), Article III clearly requires that a plaintiff have suffered a concrete and individualized harm to have a cognizable case or controversy within the jurisdiction of the federal courts. This limitation is of particular interest to amici, who are potentially exposed due to the nature of their businesses to very large class action suits, claiming potentially enormous statutory damages for alleged technical violations. This Court should reaffirm that the constitutional standing limitations apply with equal force to laws providing for statutory damages, to ensure that amici and similarly situated businesses are not forced to settle meritless claims to avoid even the remote possibility of enormous damages awards.

ARGUMENT

I. ARTICLE III'S STANDING REQUIREMENTS ARE A CORNERSTONE OF OUR LEGAL SYSTEM

"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) (internal quotation marks and citation omitted). The doctrine of standing implements Article III's restriction on judicial power "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 law." *Summers* v. *Earth Island Inst.*, 129 S. Ct. 1142, 1148 (2009).

The importance of the injury-in-fact requirement in our judicial system cannot be overstated. In addition to "preserv[ing] the vitality of the adversarial process" by ensuring that the parties to a case have an actual stake in the outcome, the requirement ensures that legal questions will be aired and resolved "in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action" and not "in the rarified atmosphere of a debating society." *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 581 (1992) (Kennedy, J., concurring in part and concurring in the judgment) (internal quotation marks omitted). "In addition, the requirement of concrete injury confines the Judicial Branch to its proper, limited role in the constitutional framework of Government." *Id.*; *see also id.* at 576 (Opinion of the Court) (principle of injury in fact is "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").

The "irreducible constitutional minimum of standing" consists of three elements: (1) injury in fact; (2) causation; and (3) redressability. *See Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 103–104 (1998). To demonstrate an "injury in fact," a party must allege "a harm that is both 'concrete' and 'actual or imminent, not conjectural or hypothetical.'" *Vermont Agency of Natural Res.* v. *United States ex rel. Stevens*, 529 U.S. 765, 771 (2000) (quoting *Whitmore* v. *Arkansas*, 495 U.S. 149, 155 (1990)); *see also Steel Co.*, 523 U.S. at 103–104. The test for an injury in fact "requires more than an injury to a cognizable interest … [i]t requires that the party seeking review be himself among the injured." *Lujan*, 504 U.S. at 563 (internal quotation marks omitted).

Congress, through its legislative powers, may create a new cause of action and allow for a private right of action to enforce it in the courts. *See, e.g.*, *Vermont Agency of Natural Res.*, 529 U.S. at 773. But the fact that Congress may create new causes of action or legal rights does not mean that the injury requirement of standing has been eliminated. "[T]he requirement of injury in fact is a hard floor of Article III jurisdiction that cannot be removed by statute." *Summers*, 129 S. Ct. at 1151; *see also Raines*, 521 U.S. at 820 n.3 ("It is 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."); *Valley Forge Christian Coll.* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 487 n.24 (1982) ("Neither the Administrative Procedure Act, nor any other congressional enactment, can lower the threshold requirements of standing under

Art. III."); *Lujan*, 504 U.S. at 580–581 (Kennedy, J., concurring in part and concurring in judgment) ("[I]t would exceed [Article III's] limitations if, at the behest of Congress and in the absence of any showing of concrete injury, we were to entertain citizen suits to vindicate the public's nonconcrete interest in the proper administration of the laws.... [T]he party bringing suit must show that the action injures him in a concrete and personal way.").

Thus, as this Court stated in *Warth* v. *Seldin*, even where Congress creates a new cause of action, "[o]f course, Art. III's requirement remains: the plaintiff still must allege a distinct and palpable injury to himself, even if it is an injury shared by a large class of other possible litigants." 422 U.S. 490, 501 (1975). The legislative branch cannot manufacture an injury, nor eliminate the need for a litigant to show some individualized harm. Rather, in enacting a new cause of action, Congress is "elevating to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law." *Lujan*, 504 U.S. at 578. As numerous cases have held, even where a statutory violation exists a party must show some concrete and particularized injury to him or herself. *See, e.g.*, *Summers*, 129 S. Ct. at 1149 ("Here, respondents can demonstrate standing only if application of the regulations by the Government will affect *them* in the manner described above." (emphasis in original)); *United States ex rel. Kreindler & Kreindler* v. *United Techs Corp.*, 985 F.2d 1148, 1154 (2d Cir. 1993) ("Nevertheless, some injury-in-fact must be shown to satisfy constitutional require-

ments, for Congress cannot waive the constitutional minimum of injury-in-fact.”).[3]

II. FEDERAL INFORMATION PRIVACY LAWS THAT PROVIDE FOR STATUTORY DAMAGES DO NOT ELIMINATE ARTICLE III'S INJURY-IN-FACT REQUIREMENT

Amici are leading members of a rapidly developing industry that provides a myriad of services and products to hundreds of millions of users via the Internet. In order to benefit from these businesses’ products and services, users often provide certain personal identifying information, such as their names, addresses, and e-mail addresses. The Internet industry’s products and services often also operate as a platform for users to communicate with providers and among themselves and to share additional personal identifying information with one another, as well as to conduct financial trans-

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[3] *See also United States* v. *Weiss*, 467 F.3d 1300, 1310–1311 (11th Cir. 2006) (“While it is true that Congress may enact statutes creating legal rights ... [a] federal court’s jurisdiction ... can be invoked only when the plaintiff himself has suffered some threatened or actual injury resulting from the putatively illegal action[.]” (internal citations and quotation marks omitted) (alteration and second ellipses in original)); *Friends of Earth, Inc.* v. *Gaston Copper Recycling Corp.*, 204 F.3d 149, 156–157 (4th Cir. 2000) (standing exists where plaintiff “brings this suit to vindicate his private interests in his and his family’s well-being—not some ethereal public interest”); *Robins* v. *Spokeo, Inc.*, No. 10-05306, 2011 WL 597867, at *1 (C.D. Cal. Jan. 27, 2011) (allegation of statutory violation insufficient to confer standing without allegation of “actual or imminent” harm); *Lee* v. *Chase Manhattan Bank*, No. 07-04732, 2008 WL 698482, at *5 (N.D. Cal. Mar. 14, 2008) (“[T]he mere allegation of a violation of a California statutory right, without more, does not confer Article III standing. A plaintiff invoking federal jurisdiction must also allege some actual or imminent injury resulting from the violation[.]” (citing *Lujan*, 504 U.S. at 560–561)).

actions and purchases, which may involve the transmission of still more information such as credit card or other payment information.

With the purpose of protecting personal privacy interests, Congress has enacted laws that, in some contexts, regulate the acquisition, use, and disclosure of certain information by companies, such as amici, who receive or store that information. Some of these information privacy laws contain, in addition to substantive provisions, private rights of action permitting certain individuals to bring suit against defendants (who may include companies like amici) alleged to have violated the laws. In connection with these private causes of action, these laws establish statutory damages amounts that may be awarded to prevailing plaintiffs, and may also provide for punitive damages and attorneys' fees and costs. Several such laws are described below.[4]

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[4] Amici focus on these information privacy laws because of their potential applicability to entities within the Internet industry. There are a host of other laws raising this same issue—statutes containing a private right of action and a statutory damages remedy, some of which courts have found to confer standing even where an alleged statutory violation did not result in any injury to the plaintiff. *See, e.g.*, Telephone Consumer Protection Act, 47 U.S.C. § 227(b)(3); Video Privacy Protection Act, 18 U.S.C. § 2710(c)(1); Cable Communications Privacy Act, 47 U.S.C. § 551(f)(1); Fair Credit Reporting Act, 15 U.S.C. § 1681n(a)(1); Truth in Lending Act, 15 U.S.C. § 1640(a)(1); Fair Debt Collection Practices Act, 15 U.S.C. § 1692k(a)(1), (2)(A); Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. § 1854(a), (c); Electronic Funds Transfer Act, 15 U.S.C. § 1693m(a)(2); Expedited Funds Availability Act, 12 U.S.C. § 4010(a)(2); Homeowners Protection Act, 12 U.S.C. § 4907(a)(1); Equal Credit Opportunity Act, 15 U.S.C. § 1691e(a); Driver's Privacy Protection Act, 18 U.S.C. § 2724(a).

A. Electronic Communications Privacy Act

The Electronic Communications Privacy Act of 1986 (ECPA), 18 U.S.C. §§ 2510 *et seq.*, protects the contents of wire, oral, and electronic communications while those communications are being made, are in transit, and are in certain forms of storage on computers. It also protects certain other information about those communications and their senders and recipients. Title I of ECPA amended the preexisting Wiretap Act, and Title II created what is referred to as the Stored Communications Act.

1. Wiretap Act (18 U.S.C. §§ 2511–2522)

The Wiretap Act, with certain exceptions, subjects to criminal and civil fines and penalties, including imprisonment, any person who intentionally intercepts, discloses, or uses the contents of any wire, oral, or electronic communication in violation of the Act. In addition to its criminal and civil enforcement provisions, the Wiretap Act authorizes "any person whose wire, oral, or electronic communication is intercepted, disclosed, or intentionally used" in violation of the Act to recover "such relief as may be appropriate" from the purported violator of the Act. 18 U.S.C. § 2520(a).

The Wiretap Act also authorizes, in some circumstances, awards of statutory damages to successful private litigants. For the types of actions to which enterprises such as amici could be subject, the potential damages are set as the greater of: "(A) the sum of the actual damages suffered by the plaintiff and any profits made by the violator as a result of the violation; or (B) statutory damages of whichever is the greater of $100 a day for each day of violation or $10,000." 18 U.S.C. § 2520(c)(2).

2. Stored Communications Act (18 U.S.C. §§ 2701–2712)

The Stored Communications Act (SCA) protects the privacy of the contents of electronic communications stored by some types of service providers and of other information and records such service providers may hold about a subscriber, such as billing records or IP addresses. It restricts the circumstances in which such information may be disclosed to law enforcement or other government authorities and, in the case of contents of communications, to other private parties.

The SCA also affords a private right of action to any "provider of electronic communication service, subscriber, or other person aggrieved" by a knowing or intentional violation of the law. 18 U.S.C. § 2707(a). The damages that may be available in a private action under the SCA are established by the statute as "the sum of the actual damages suffered by the plaintiff and any profits made by the violator as a result of the violation, but in no case shall a person entitled to recover receive less than the sum of $1,000." *Id.* § 2707(c). The SCA also allows for recoupment of attorneys' fees and costs. *Id.* §§ 2707(b)(3), 2707(c).

As with RESPA, some courts have interpreted both the Wiretap Act and SCA to confer standing on a class action plaintiff based on the bare allegation that the defendant has violated the statute, regardless of whether the named plaintiff or any member of the class has alleged or could allege any harm resulting from the alleged violation. *See, e.g.*, *In re Facebook Privacy Litig.*, No. 10-02389, 2011 WL 2039995, at *4 (N.D. Cal. May 12, 2011) (finding plaintiffs established standing under Article III by alleging statutory violation despite lack of injury in fact, but dismissing case on grounds

that allegations did not state a claim under ECPA); *cf. Pure Power Boot Camp, Inc.* v. *Warrior Fitness Boot Camp, LLC*, 759 F. Supp. 2d 417, 428 (S.D.N.Y. 2010) (finding, where plaintiffs expressly waived any claim of actual damages or "harm" under SCA, they were nonetheless entitled to statutory damages for SCA violations).

B. Fair and Accurate Credit Transactions Act (15 U.S.C. §§ 1681 *et seq.*)

The Fair and Accurate Credit Transactions Act (FACTA) is an amendment to the Fair Credit Reporting Act (which requires credit-reporting agencies and companies that use credit reports to comply with various procedures to protect consumers) that requires, among other things, that persons accepting credit or debit cards omit the expiration date and all but the last five digits of a customer's credit card number on receipts. 15 U.S.C. § 1681c(g). In addition to authorizing enforcement of the statute by federal and state regulators including the Federal Trade Commission (*id.* § 1681s), the statute also provides for civil liability for willful noncompliance with the requirements of the statute.

The civil liability provision sets damages as "any actual damages sustained by the consumer as a result of the failure or damages of not less than $100 and not more than $1,000." 15 U.S.C. § 1681n(a)(1)(A). The statute also allows a court to award punitive damages, attorneys' fees, and costs to a prevailing plaintiff. *Id.* § 1681n(a)(2).

Like RESPA, the Wiretap Act, and the SCA, some courts have interpreted the allegation of a FACTA violation, without any separate allegation of actual injury

resulting from the alleged violation, as sufficient to confer standing to sue under FACTA. *See Ramirez* v. *Midwest Airlines, Inc.*, 537 F. Supp. 2d 1161 (D. Kan. 2008).[5]

III. ADHERENCE TO THIS COURT'S LONG-ESTABLISHED STANDING DOCTRINES IS ESSENTIAL TO MAINTAINING THE INTEGRITY OF OUR JUDICIAL SYSTEM AND PREVENTING PLAINTIFFS FROM MANIPULATING THE SYSTEM TO EXTORT SETTLEMENT PAYMENTS THROUGH NO-INJURY CLASS ACTIONS

The Wiretap Act, the SCA, FACTA, and other statutes that, like RESPA, provide a private right of action with a statutory damages remedy exist to protect the rights of individuals, including, where applicable, amici's users. These statutes do not, however, exist to allow for opportunistic strike suits by plaintiffs (and class action plaintiffs' attorneys) who allege viola-

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[5] When FACTA was first enacted, "[a]lmost immediately after the deadline for compliance passed, hundreds of lawsuits were filed alleging that the failure to remove the expiration date was a willful violation of the Fair Credit Reporting Act even where the account number was properly truncated." Pub. L. No. 110-241, § 2, 122 Stat. 1565, 1565 (2008). In response to this deluge of lawsuits, Congress made findings that "[n]one of these lawsuits contained an allegation of harm to any consumer's identity" and that these lawsuits "represent[ed] a significant burden on the hundreds of companies that have been sued." It further found that an amendment clarifying that inclusion of an expiration date on a receipt from 2004 to 2008 did not violate the Act was necessary "to ensure that consumers suffering from any *actual harm* to their credit or identity are protected while simultaneously limiting abusive lawsuits that do not protect consumers but only result in increased cost to business and potentially increased prices to consumers." *Id.*, 122 Stat. 1566 (emphasis added). The amendment did not, however, have any effect on violations occurring after 2008.

tions of law without ever suffering any actual injury from the alleged violations. The requirements to state a claim under these statutes are in *addition* to the baseline standing requirements of Article III—they do not replace Article III's "irreducible constitutional minimum."

And for good reason: permitting a lawsuit to proceed where the plaintiff has suffered no concrete, particularized, individual injury gives plaintiffs and their attorneys license to use the class action mechanism to attempt to "enforce" claimed widespread violations of law. Allowing plaintiffs to act as roving attorneys general, however, is precisely what the Article III standing requirements are meant to avoid—and the injury-in-fact requirement exists to prevent. *See Lujan*, 504 U.S. at 573 (rejecting lower court's holding that "the injury-in-fact requirement had been satisfied by congressional conferral upon *all* persons of an abstract, self contained, noninstrumental 'right' to have the Executive observe the procedures required by law") (emphasis in original).[6]

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[6] California's Unfair Competition Law and False Advertising Law provide instructive examples of the perils of permitting no-injury suits to proceed. Cal. Bus. & Prof. Code §§ 17200, 17500. Until 2004, these laws authorized individuals acting on behalf of the general public to sue for relief from unfair competition in state court, regardless of whether they had in fact been injured—or were even affected—by the alleged unfair competition. *See People ex rel. Lockyer* v. *Brar*, 9 Cal. Rptr. 3d 844 (Cal. Ct. App. 2004), describing a typical scheme under the pre-2004 versions of these laws:

> Attorneys form a front "watchdog" or "consumer" organization. They scour public records on the Internet for what are often ridiculously minor violations of some

The ability to quickly resolve no-injury class actions through challenges to standing—which in turn will deter the plaintiffs' bar from filing such suits in the first place—is important to avoiding the enormous litigation costs and settlement pressures that accompany these cases, as this Court has repeatedly recognized. *See, e.g.*, *AT&T Mobility LLC* v. *Concepcion*, 131 S. Ct. 1740, 1752 (2011) (noting that where confronted with "even a small chance of a devastating loss," litigants will face "pressure[]" to compromise even "questionable claims"); *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 559 (2007) (noting expenses of litigation "will push cost-conscious defendants to settle even anemic cases"); *Dura Pharms., Inc.* v. *Broudo*, 544 U.S. 336, 347 (2005) (noting need for sufficient allegations at pleading stage

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> regulation or law by a small business, and sue that business in the name of the front organization. Since even frivolous lawsuits can have economic nuisance value, the attorneys then contact the business ... and point out that a quick settlement (usually around a few thousand dollars) would be in the business's long-term interest.

Id. at 845; *see also Stop Youth Addiction, Inc.* v. *Lucky Stores, Inc.*, 950 P.2d 1086 (Cal. 1998). In response to widespread abuses of these statutes' permissive approach to standing, and the proliferation of frivolous lawsuits benefitting only the plaintiffs' class action bar, in 2004 the California electorate sponsored and enacted Proposition 64, a ballot initiative that amended these statutes to impose a standing requirement that restricts the ability to bring suit to an individual who has "suffered injury in fact and has lost money or property" (Cal. Bus. & Prof. Code §§ 17204, 17535). *See generally* Butler & Johnston, *Reforming State Consumer Protection Liability, An Economic Approach,* 2010 Colum. Bus. L. Rev. 1 (2010) (discussing negative economic consequences and harm to consumers that result from overbroad state consumer protection laws, including abuse of California's unfair competition law before enactment of Proposition 64).

to prevent plaintiff with "a largely groundless claim" from being allowed to "take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value" (internal quotation marks omitted)); *see also In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995) ("[S]ettlements induced by a small probability of an immense judgment in a class action [have been called] 'blackmail settlements.'" (quoting Friendly, *Federal Jurisdiction: A General View* 120 (1973))).

The cost of the Ninth Circuit's contrary rule could be extremely high for amici and those similarly situated. These companies could be subjected to huge damages demands in a statutory damages lawsuit because of the very large numbers of users who typically obtain free services and products from amici, rendering even a seemingly token statutory damages figure of $500 or $1,000 enormous when applied to each member of a several-million-strong class. As noted, Facebook, for example, has over 750 million users. Under the Ninth Circuit's ruling, a class action purporting to join just one percent of its users (*i.e.*, 7.5 million) alleging a claim providing statutory damages of $1,000 could give rise to a potential claim of $7.5 *billion*, even if none of those users suffered any injury at all and, to the contrary, enjoyed substantial benefits from using the free service.[7]

This is not to say that any true violations of these laws will go unchecked. Where Congress determines

[7] These statutes also nearly always provide for prevailing party attorneys' fees, adding millions to the potential costs to Internet businesses of the Ninth Circuit's decision, on top of the millions they would be forced to expend on their own costs of defense.

that actual and widespread violations of statutes should be addressed notwithstanding the absence of any actual injury to consumers, it can provide for regulatory and even criminal enforcement. Indeed, RESPA, the Wiretap Act, and the SCA each contain, in addition to private rights of action, provisions for regulatory enforcement of these laws up to and including criminal penalties. Regulatory or criminal enforcement provide a superior mechanism for policing compliance with law without creating the extortionate effects of no-injury class actions.

In fact, federal and state regulatory and law enforcement agencies already actively scrutinize Internet and technology companies' (like amici's) compliance with laws such as the Wiretap Act and SCA, as well as other laws that do not contain private rights of action, further lessening any need for roving private attorneys general. *See*, *e.g.*, *In the Matter of Google, Inc.*, FTC File No. 102 3136 (Mar. 30, 2011) (proposed consent agreement between Federal Trade Commission and Google, Inc. in connection with alleged privacy violations stemming from Google's "Buzz" social networking product); *In the Matter of Facebook, Inc. d/b/a Facebook.com* (Oct. 15, 2007), *available at* http://www.ag.ny.gov/media_center/2007/oct/Executed%20Facebook%20AOD.pdf (Assurance of Discontinuance entered between Facebook and New York Attorney General relating to handling of complaints and reports related to pornographic, harassing, or abusive content); *United States* v. *Playdom, Inc.*, No. 11-00724 (C.D. Cal. May 24, 2011), *available at* http://www.ftc.gov/os/caselist/1023036/110512playdomconsentorder.pdf (consent de-

cree relating to collection and disclosure of minors' personal information by online gaming companies).[8]

IV. THE NINTH CIRCUIT'S DECISION IS INCONSISTENT WITH ARTICLE III AND MUST BE REVERSED

The Ninth Circuit's holding that the violation of a statutorily-protected right that causes no injury to the plaintiff constitutes an injury in fact for purposes of Article III cannot be squared with this Court's interpretation of Article III and the requirement of concrete, particularized injury that is a prerequisite to suit.

A. Congress May Create New Causes Of Action, But Only Where A Plaintiff Has Suffered Injury In Fact Does She Have Standing To Bring A Claim Using Congress's Newly-Created Cause Of Action

As discussed *supra* at 7–9 and in Petitioners' Brief at 20–24, Congress may create a cause of action, but only an actual injury can create a case or controversy within the meaning of Article III. In arriving at the contrary conclusion, the Ninth Circuit below and other courts interpreting RESPA and analogous laws have relied heavily on a statement in this Court's cases that "Congress may enact statutes creating legal rights, the invasion of which creates [constitutional] standing, even though no injury would exist without the statute." *See, e.g.*, *Robey* v. *Shapiro, Marianos & Cejda, L.L.C.*, 434 F.3d 1208, 1211 (10th Cir. 2006) (quoting *Linda R.S.*

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[8] *See also* Letter from FTC to Albert Gidari, Esq. (Oct. 27, 2010), *available at* http://www.ftc.gov/os/closings/101027googleletter.pdf (discussing Federal Trade Commission investigation into Google's collection of data about consumers' wireless network access points and determination not to pursue regulatory action).

v. *Richard D.*, 410 U.S. 614, 617 n.3 (1973)); *Edwards* v. *First American Corp.*, 610 F.3d 514, 517 (9th Cir. 2010) (quoting *Warth*, 422 U.S. at 500). But as this Court made clear in *Lujan* and several subsequent decisions, this principle "involve[s] Congress' elevating to the status of legally cognizable injuries *concrete, de facto injuries* that were previously inadequate in law." 504 U.S. at 578 (emphasis added).

Accordingly, Congress cannot legislate for judicial recovery without injury—all Congress can do is create a cause of action that confers legal recognition on an injury in fact. *See Gladstone Realtors* v. *Village of Bellwood*, 441 U.S. 91, 100 (1979) ("In no event, however, may Congress abrogate the Art. 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." (internal quotation marks omitted, emphasis added)).[9] The Court should correct any misconception by the lower courts that the ability of Congress to define new legal rights equates to a repudiation of its categorical statements that "[i]n no event ... may Congress abrogate the Art. III minima."

[9] *See also Kendall* v. *Employees Ret. Plan of Avon Prods.*, 561 F.3d 112, 121 (2d Cir. 2009) ("While plan fiduciaries have a statutory duty to comply with ERISA," the plaintiff "must allege some injury or deprivation of a specific right that arose from a violation of that duty in order to meet the injury-in-fact requirement."); *Joint Stock Soc'y* v. *UDV N. Am., Inc.*, 266 F.3d 164, 176 (3d Cir. 2001) (Alito, J.) (holding that plaintiffs lacked standing for violations of the Lanham Act because they failed to allege that defendants' alleged misconduct "harmed" them and thus could not show the required "injury in fact"); *Doe* v. *National Bd. of Med. Exam'rs*, 199 F.3d 146, 153 (3d Cir. 1999) ("The proper analysis of standing focuses on whether the plaintiff suffered an actual injury, not on whether a statute was violated.").

Gladstone, 441 U.S. at 100; *see also Summers*, 129 S. Ct. at 1151 ("[I]njury in fact is a hard floor of Article III jurisdiction that cannot be removed by statute.").

B. A Concrete And Particularized Injury Or Harm Is The *Sine Qua Non* Of Injury In Fact, But That Does Not Necessarily Preclude Article III Standing For A Plaintiff Who Suffers A Substantial Injury That Involves No Provable Monetary or Economic Loss

Amici are not contending here that plaintiffs claiming statutory violations must always allege a provable economic injury to maintain standing as a constitutional matter. But the plaintiff must allege a substantial and palpable injury of some sort—whether economic or otherwise—that is cognizable under Article III—*i.e.*, concrete, particularized, and redressable. *E.g.*, *Gladstone*, 441 U.S. at 113–115 (plaintiffs alleging denial of benefits of interracial association and racially integrated housing have standing).

For example, an inadvertent disclosure in violation of the SCA of the contents of an exchange of emails between two individuals that reveals their previously secret adulterous love affair to their family, friends, and colleagues may not cause any demonstrable economic or monetary injury to either of the parties to the exchange. But depending on the content and context, one or both of the exchange's participants might be able to plausibly allege a sufficiently concrete, redressable, and particularized injury—going beyond merely conclusory assertions of a generalized sense of embarrassment or

some other vague emotional impact—so as to satisfy Article III's actual injury requirement.[10]

In contrast, *Specht* v. *Netscape Communications Corp.*, a relatively early ECPA case against an Internet company that was litigated without the Article III standing issue being explicitly confronted or decided, provides a good example of plaintiffs' misuse of the federal courts, purportedly in pursuit of *billions* of dollars in claimed statutory damages, in the absence of any actual injury (economic or otherwise). 150 F. Supp. 2d 585 (S.D.N.Y. 2001), *aff'd*, 306 F.3d 17 (2d Cir. 2002).

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[10] Notably, even if this hypothetical disclosure is treated as having caused an actual injury sufficient to satisfy the constitutional minimum, there may well be distinct statutory standing requirements that must also be met. For example, unlike RESPA, some of the other statutory damages laws discussed in this brief explicitly limit private rights of action to persons who are "aggrieved" or "adversely affected" by the violation, thus further restricting the availability of judicial relief. *See Thompson* v. *North Am. Stainless, LP*, 131 S. Ct. 863, 869–870 (2011) (interpreting "aggrieved" to impose prudential standing requirement over and above the Article III minima). Moreover, even if a concrete injury to a particular plaintiff is sufficient to establish her own standing, that does not mean that other persons whose different communications or information may have been disclosed, even if the disclosure stemmed from the same challenged act or practice, also have standing, either individually or as members of a class. Rather, whether any such other persons have standing to sue would depend on a fact-specific, case-by-case analysis of each of their own alleged injuries (if any). And of course, even if a plaintiff had standing to bring suit, whether the conduct that caused the hypothetical disclosure constituted a violation of the SCA (or any other law) would involve a host of separate considerations not addressed here. *See Doe* v. *Chao*, 540 U.S. 614, 624–625 (2004) (noting that a plaintiff with standing to sue may have "injury enough to open the courthouse door, but without more ha[ve] no cause of action for damages").

The plaintiffs in *Specht*, on behalf of themselves and a putative national class of many millions of users of a Netscape software product called SmartDownload, claimed that the software's automatic transmission to Netscape of the Internet addresses of certain types of electronic files, as those files were being downloaded from third-party websites to the users' computers, constituted an unlawful "interception" of the users' electronic communications in violation of ECPA. *Id.* at 587 (describing allegations in complaint). But none of the *Specht* plaintiffs alleged any particular or concrete injury of any sort (and in fact nothing ever happened to any of the transmitted information aside from its temporary storage in disaggregated and unusable form on an internal Netscape server). *Specht* v. *Netscape Commc'ns Corp.*, Dkt. 67, Nos. 00-4871, et al., *available at* 2004 WL 5475796, ¶¶ F, N, Q (S.D.N.Y. Sept. 2, 2004) (*Specht* Stipulation of Settlement).

In those circumstances, the *Specht* case rightfully should have been dismissed at the outset due to lack of standing. Yet, for several years, the case wended its way through federal court with class counsel all the while claiming an entitlement to recover statutory damages of $10,000 apiece not only for each of the named plaintiffs, but also for each of the many millions of supposedly identically situated putative class members. *See, e.g.*, *Specht* v. *Netscape Commc'ns Corp.*, Nos. 00-4871, et al., Dkt. 2, *available at* 2000 WL 34500293, ¶¶ 13, 41–54 (S.D.N.Y. Aug. 3, 2000) (Amended Complaint). All told, the litigation cost Netscape several million dollars in discovery and other de-

fense costs[11] before resulting in a class-wide settlement in which plaintiffs and their counsel obtained no money. *Specht* Stipulation of Settlement ¶¶ F, N, Q. The correct, and far preferable, result would have been for the case to be dismissed at the outset due to lack of Article III standing.[12]

C. Several Lower Courts Have Erroneously Conflated Congress's Provision Of A Statutory Damages Remedy With The Constitutional Requirement Of Injury In Fact

Several cases interpreting standing requirements in the context of laws providing for statutory damages have concluded, like the Ninth Circuit, that no allegation of injury is needed—or that only a conclusory allegation of some generalized harm is sufficient—to bring suit under these statutes. *See, e.g.*, *In re Facebook Privacy Litig.*, 2011 WL 2039995, at *4 (finding plaintiffs established standing under Article III by alleging statutory violation despite lack of injury in fact); *Claridge* v. *RockYou, Inc.*, No. C09-6032, 2011 WL

[11] *Netscape Commcn's Corp.* v. *Federal Ins. Co.*, Dkt. 5-1 ¶ 33, No. 06-198 (N.D. Cal. Jan. 12, 2006) (Complaint) (Netscape incurred over $4 million in attorneys' fees and costs from commencement of the *Specht* litigation through settlement).

[12] During the *Specht* litigation, Netscape advanced a number of merits defenses to the ECPA claim. The district court ruled some of those defenses were insufficient to require dismissal on the face of the pleadings, but indicated a willingness to revisit them after discovery. *Specht* v. *Netscape Commcn's Corp.*, Dkt. 47, Nos. 00-4871, et al. (S.D.N.Y. Apr. 9, 2003). Ultimately, the district court never decided the merits of the ECPA claim. In the settlement agreement approved by the district court, Netscape explicitly denied that the conduct at issue violated ECPA. *Specht* Stipulation of Settlement ¶¶ F, N, Q.

1361588, at *4–5 (N.D. Cal. Apr. 11, 2011) (concluding that plaintiff may have adequately alleged standing under SCA where plaintiff argued that alleged data-privacy breach injured plaintiff by diminishing the value of that personal information); *DeMando* v. *Morris*, 206 F.3d 1300, 1303 (9th Cir. 2000) (standing to assert Truth in Lending Act Violation conferred by "loss of a statutory right to disclosure").

Many of these cases appear to arrive at this erroneous conclusion by conflating the provision in these statutes for relief without proving actual *monetary damages* with the constitutional requirement to show actual *injury* to establish standing. *E.g.*, *Robey*, 434 F.3d at 1213 ("Because [plaintiff] is claiming that defendants violated the FDCPA by attempting to collect attorney's fees that were not permitted under Oklahoma law ... [he] has been injured under the terms of the FDCPA and can seek legal redress of his claims under that act. He has thus satisfied the 'injury in fact' and other requirements of constitutional standing."). These cases incorrectly reason that because the statutes do not require a plaintiff to have suffered an actual monetary loss to receive damages if the suit is successful, the statutes also do not require any claim of harm aside from a violation of the statute to establish standing.

This approach, however, erroneously equates the method by which damages awards may be calculated under these statutes with the requirement of injury in fact. *E.g.*, *Martinez* v. *Shinn*, 992 F.2d 997, 999 (9th Cir. 1993) ("The civil remedy was provided not only to compensate injuries, but also to promote enforcement of the Act and deter violations" (internal quotation marks omitted)); *Ehrich* v. *I.C. Sys., Inc.*, 681 F. Supp. 2d 265, 269–270 (E.D.N.Y. 2010) ("Specifically, the

FDCPA allows a plaintiff to recover statutory damages despite the absence of actual damages; in other words, the 'injury in fact' analysis is directly linked to the question of whether plaintiff has suffered a cognizable statutory injury and not whether a plaintiff has suffered actual damages."). Yet, for the reasons discussed above, the fact that these statutes may not require a plaintiff to prove a demonstrable monetary loss to be eligible for statutory damages,[13] does not mean that plaintiffs can have Article III standing to bring suit under these statutes without suffering actual injury.

To the extent lower court decisions addressing the question presented in this case have incorrectly answered the question due to the confusion engendered by statutory damages provisions, this Court should in this case correct that confusion and clarify that a plaintiff's standing to sue bears no relation to the potential availability of a predetermined statutory damage amount upon the conclusion of the putative lawsuit.

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[13] *But see Chao*, 540 U.S. at 624–625 (construing Privacy Act to allow award of statutory damages only where plaintiff proves "actual damages" within the meaning of 5 U.S.C. § 552a(g)(4)(A)); *Cooper* v. *FAA*, 622 F.3d 1016 (9th Cir. 2010), *cert. granted*, 79 U.S.L.W. 3494, 3705, 3710 (U.S. June 20, 2011) (No. 10-1024) (presenting question whether mental or emotional injuries can qualify as "actual damages" under same provision of the Privacy Act).

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted.

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