No. 13-679

In the Supreme Court of the United States

FIRST NATIONAL BANK OF WAHOO AND MUTUAL FIRST FEDERAL CREDIT UNION

Petitioners,

v.

JAREK CHARVAT, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED

Respondent.

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

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

KATE COMERFORD TODD
TYLER R. GREEN
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, NW
Washington, D.C. 20062

ROY T. ENGLERT, JR.
Counsel of Record
ARIEL N. LAVINBUK
ROBBINS, RUSSELL, ENGLERT, ORSECK, UNTEREINER & SAUBER LLP
1801 K Street, NW
Suite 411L
Washington, D.C. 20006
(202) 775-4500
renglert@robbinsrussell.com

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BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. It represents approximately 300,000 direct members and has an underlying membership of more than three million businesses and organizations of every size, in every industry, sector, and geographic region of the country. As the principal voice of American business, the Chamber regularly advocates for the interests of its members in federal and state courts throughout the country in cases of national concern.

This is one of those cases. Like *First American Financial Corp.* v. *Edwards*, 132 S. Ct. 2536 (2012), which presented but did not resolve the same issue (and in which the Chamber participated as *amicus curiae*), this case presents both a danger and an opportunity. If the decision below is allowed to stand, there is a serious danger of continued erosion of the minimum requirements for standing under Arti-

[1] Counsel of record for all parties received notice of the Chamber's intent to file this brief at least ten days before its due date. The parties consented to the filing of this brief, and written documentation of their consent is being submitted concurrently. No counsel for a party wrote this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae*, its members, or its counsel made a monetary contribution intended to fund its preparation or submission.

cle III of the Constitution. Such a danger is of grave concern to the business community because (as this case illustrates) alleged technical violations of regulatory statutes can often affect large numbers of consumers without actually injuring them. If such consumers can bring lawsuits without the need to demonstrate any injury beyond the alleged statutory violation itself, businesses will predictably be tied up in damages litigation over harmless alleged lapses, diverting their resources from more productive uses. This case presents an opportunity to rein in abusive litigation over such trifles, and to restore proper constitutional limitations on no-injury lawsuits.

INTRODUCTION AND SUMMARY OF ARGUMENT

To state a case or controversy under Article III, a plaintiff must first establish standing. *Allen* v. *Wright*, 468 U.S. 737, 750-51 (1984). In *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992), this Court explained that constitutional standing incorporates three core elements – (1) injury-in-fact, (2) causation, and (3) redressability – each of which serves a different, critical role in "enforc[ing] the Constitution's case-or-controversy requirement," *Elk Grove Unified School Dist.* v. *Newdow*, 542 U.S. 1, 11 (2004).

Injury-in-fact – a plaintiff's ability to identify a "[c]oncrete injury, whether actual or threatened [–] is that indispensable element of a dispute which serves in part to cast it in a form traditionally capable of judicial resolution." *Schlesinger* v. *Reservists Comm. to Stop the War*, 418 U.S. 208, 220-221 (1974). It is the "foremost" element of the inquiry, *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 103 (1998), the one that "adds the essential dimension of specificity

to the dispute by requiring that the complaining party have suffered a particular injury caused by the action challenged as unlawful," *Schlesinger*, 418 U.S. at 221. In doing so 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 consequences of judicial action." *Valley Forge Christian Coll.* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982).

Though injury-in-fact "incorporates concepts concededly not susceptible of precise definition," *Allen*, 468 U.S. at 751, this Court has worked hard to ensure that the requirement is not rendered "meaningless" or "mere talk," *United States* v. *Richardson*, 418 U.S. 166, 194 n.16 (1974) (Powell, J., concurring). Thus, "the complaining party [is] required to allege a *specific* invasion of th[e] right suffered by him." *Schlesinger*, 418 U.S. at 224 n.14 (emphasis added). That invasion must be "actual," "distinct," "palpable," and "concrete," and not "conjectural" or "hypothetical." *Allen*, 468 U.S. at 750-751, 756, 760 (internal quotation marks omitted). This "is not an ingenious academic exercise in the conceivable * * * [but] requires * * * a factual showing of *perceptible harm*." *Summers* v. *Earth Island Inst.*, 555 U.S. 488, 499 (2009) (emphasis added and internal quotation marks omitted). "Abstract injury is not enough." *O'Shea* v. *Littleton*, 414 U.S. 488, 494 (1974).

The Eighth Circuit's holding below makes these requirements all but meaningless. Under the decision below, whenever Congress declares that a person who is exposed to an abstract violation of law is entitled to a monetary recovery, that person also has *ipso facto* sustained an injury sufficiently concrete

and particularized to have standing to sue in federal court. And, because removing injury from the equation also effectively removes causation, the holding below reduces the three part-standing inquiry to a single-factor test: Constitutional standing exists so long as a remedy is available or can be devised. That means constitutional standing is whatever Congress says it is.

But a constitutional limitation that can be conclusively satisfied by a legislative *ipse dixit* is no constitutional limit at all. For that reason, "[i]t 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." *Raines* v. *Byrd*, 521 U.S. 811, 820 n.3 (1997) (citing *Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. 91, 100 (1979)). More specifically, "the requirement of injury in fact is a hard floor of Article III jurisdiction that cannot be removed by statute." *Summers*, 555 U.S. at 497. The Eighth Circuit's decision below lost sight of these fundamental constitutional principles.

As the Petition ably demonstrates, the significance of the Eighth Circuit's error reaches far beyond this particular case or the statute under which it arises. Myriad federal laws appear to authorize suit in federal court by plaintiffs who have suffered no actual, concrete or particularized injury. *See* Pet. 9-12. The lower courts are deeply divided about whether such suits pass constitutional muster – and have been for years. *See id*. at 12-16. The result is an incoherent, unsustainable hodge-podge: Suit can be brought to vindicate injuries-in-law under some statutes but not others – and, even then, only in some courts and not others. *Ibid*. That confusion alone warrants this Court's intervention.

But the Question Presented is not merely of great constitutional significance. It is also of great practical significance – particularly to the business community. No matter their size, industry, or geographic location, businesses are subject to all manner of technical legal duties. If, for practical purposes, injury and therefore causation were no longer required elements for standing in the federal courts, businesses would be significantly more likely to face class actions seeking damages (sometimes annihilating damages) for conduct that caused concrete and particularized harm to only a handful of customers or to no one at all. This is not idle speculation: Such suits are already being brought, and their pace is accelerating. This Court should grant certiorari to make clear that cases such as this one are as unconstitutional as they are susceptible to abuse.

ARGUMENT

I. THE DECISION BELOW MAKES CONSTITUTIONAL STANDING WHATEVER CONGRESS SAYS IT IS

By respondent's own admission, the interest he seeks to vindicate is a creature of Congress. He cannot claim ignorance of the ATM fees he was charged; to the contrary, he is constrained to admit both that petitioners timely notified him of those fees, and that he agreed to pay them. *See* Pet. App. 2a-3a. So he frames his injury as a pure legal violation: He was not "provide[d fee] information *in the manner prescribed by Congress*." Pet. App. 5a (emphasis added and internal quotation marks omitted).

The Eighth Circuit found this "injury-in-law" sufficient to meet the constitutional requirement of an injury-in-fact. Citing *Warth* v. *Seldin*, 422 U.S. 490,

500 (1975), the Eighth Circuit held that "Congress may * * * create legal rights via statute, the invasion of which can create standing to sue." Pet App. 4a. But the Eighth Circuit took *Warth* out of context and applied this Court's standing precedent in a manner that leaves it almost bereft of force. Congress cannot declare that, if a plaintiff can state a claim, he was injured *ipso facto* by the alleged violation of statutory duties.

Any power Congress may have to dispense with prudential limitations on standing, or to relax the requirements of redressability and immediacy, does not extend to relaxing the core constitutional requirement that injury-in-fact be concrete and particularized . As this Court first observed in *Defenders of Wildlife*, Congress can relax constitutional standards only where a plaintiff seeks "to protect his *concrete* interests." 504 U.S. at 572 n.7 (emphasis added). "[D]eprivation of a procedural right without some concrete interest that is affected by the deprivation – a procedural right *in vacuo* – is insufficient to create Article III standing." *Summers*, 555 U.S. at 496. *See also id.* at 501 (Kennedy, J., concurring) ("[t]he procedural injury must impair a *separate concrete* interest") (emphasis added and internal quotation marks omitted).

This Court has consistently taken care to identify those concrete and particularized interests to drive home the point. In *Public Citizen* v. *United States Dep't of Justice*, 491 U.S. 440 (1989), for example, the Court held that plaintiffs had standing to challenge the denial of information sought under the Federal Advisory Committee Act about advice given by the American Bar Association (ABA) to the Department of Justice concerning potential judicial nominees. The Court recognized standing *not* because the stat-

ute created a private right of action, but because of the "distinct injury" resulting from the Department's "refusal to permit appellants to scrutinize the ABA Committee's activities to the extent FACA allows." *Id.* at 449.

Likewise, in *Federal Election Comm'n* v. *Akins*, 524 U.S. 11 (1998), the Court required a distinct injury, not just an alleged statutory violation, when it recognized standing for plaintiffs seeking relief under the Federal Election Campaign Act of 1971, which requires certain groups to disclose information about campaign involvement and which creates a private cause of action for "'[a]ny person who believes a violation of th[e] Act * * * has occurred,'" *id.* at 19 (quoting 2 U.S.C. § 437g(a)(1)). As in *Public Citizen,* the Court looked for and found the requisite concrete and particularized injury in the *consequences* of the statutory violation. Indeed, the Court expressly stated that a factual injury was a precondition for standing, *see Akins*, 524 U.S. at 20, and that Congress was simply enabling remediation of that particular injury, *see id.* at 24-25 ("the informational injury at issue here * * * is sufficiently concrete and specific"). The Court was *not*, as the Eighth Circuit seemed to believe, *see* Pet. App. 7a, creating a new type of injury out of thin air. Unlike the plaintiffs in *Akins*, respondent here has not articulated a concrete and particularized injury that exists separately from (or even is the consequence of) the statutory violation. And the mere alleged violation itself is not enough.

The Court has for decades emphasized the difference between the violation of a statutory right (which does not *ipso facto* confer Article III standing) and the violation of a statutory right that results in a concrete and particularized injury-in-fact (which *can*

result in standing). *Compare Sierra Club* v. *Morton*, 405 U.S. 727 (1972), *with Trafficante* v. *Metropolitan Life Ins. Co.*, 409 U.S. 205, 209 (1972) (noting that "injury in fact to petitioners, the ingredient found missing in *Sierra Club* * * *, is alleged here"). Thus, when the Court in *Warth* observed that "[t]he actual or threatened injury required by Art. III may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing," 422 U.S. at 500 (internal quotation marks omitted), it was merely observing that a statutory violation can precipitate a concrete and particularized injury-in-fact. The Court was not suggesting, as the Eighth Circuit believed, *see* Pet. App. 7a, that a statutory violation *substitutes* for such an injury.

Extending that error, the Eighth Circuit cited *Akins* for the proposition "that an informational injury alone is sufficient to confer standing, even without an additional economic or other injury." Pet. App. 7a. But *Akins* stands for no such principle. As the Court explained in *Defenders of Wildlife*, 504 U.S. at 578, the concrete and particularized injury in cases like *Akins* does not exist by virtue of statute but rather by virtue of the underlying "*de facto*" injuries that arise as a *consequence* of the violation of the rights created by Congress. In *Akins*, the *de facto* injury identified by the Court was the inability to make informed voting decisions caused by the denial of access to certain information guaranteed by statute. *See* 524 U.S. at 21. There is no corollary here: respondent does not allege any freestanding injury caused by his failure to receive redundant "sticker notice" of the very same ATM fees for which he received "on-screen notice" – fees he then agreed to pay. "Statutory broadening of the categories of injury that may be alleged in support of standing is a dif-

ferent matter from abandoning the requirement that the party seeking review must himself have suffered an injury." *Defenders of Wildlife*, 504 U.S. at 578 (internal punctuation and quotations marks omitted).

Congress has power to "expand standing to the full extent permitted by Art. III, thus permitting litigation by one who otherwise would be barred by prudential standing rules." *Gladstone*, 441 U.S. at 100 (internal quotation marks omitted). But Congress has no power to expand standing *beyond* the limits of Article III, nor should courts assume that Congress has exercised the full extent of its power to expand standing to the limit when Congress has not said so. The constitutional problems posed by a case like this one, in which the plaintiff has suffered no concrete injury and the argument in favor of standing is that Congress has supposedly "create[d] legal rights via statute, the invasion of which can create standing to sue" (Pet App. 4a), are grave enough that a court legitimately could and should construe the statute *not* to create such legal rights. *See Clark* v. *Martinez*, 543 U.S. 371, 380-81 (2005).

Were the Eighth Circuit correct that injury-in-law could substitute for injury-in-fact, Congress could essentially dictate access to the federal courts by removing the independent force of the case-or-controversy limitation. The existence of a remedy would bootstrap into standing to pursue the remedy in federal court because there would be no requirement of an actual injury or a causal connection between that nonexistent injury and the defendant's violation of a legal duty. Such a principle would sidestep this Court's standing jurisprudence in a substantial category of cases – a category prospectively limited in size only by legislative restraint or the limits of legislative ingenuity. That is neither

what the Framers intended nor what the Constitution allows.

II. THE DECISION BELOW INVITES ABUSIVE CLASS ACTION LITIGATION

The Question Presented is not merely of great constitutional significance. It is also of great practical significance. The Petition identifies nineteen cases brought under ten different federal statutes, all of which raise the same question presented by the decision below. The vast majority of those cases – and this one – share another common characteristic, however: They were brought as putative class actions,[2] often seeking damages in the millions, or even billions, of dollars.[3]

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[2] To be precise, fourteen of nineteen were brought as class actions. And even some of the five that were not might as well have been. The Plaintiff in *US Fax Law Ctr., Inc.* v. *iHire, Inc.*, 362 F. Supp. 2d 1248 (D. Colo. 2005) (cited at Pet. 10 n.5), for example, is a company that aggregates unwanted faxes from individuals and companies to bring large-scale lawsuits on their behalf "to secure the dollar damages and penalties that are rightfully yours by law" under the Telephone Consumer Protection Act, 47 U.S.C. § 227(b). *See* http://www.stop-junk-fax-spam.com/services.html (last visited December 31, 2013).

[3] *See, e.g.*, *Beaudry* v. *TeleCheck Servs., Inc.*, 579 F.3d 702, 703-04 (6th Cir. 2009) (cited at Pet. 10 n.3) (seeking to represent "hundreds of thousands, if not millions," of Tennessee consumers, each of whom would be entitled to up to $1000 – for a total liability in the billions); *Ramirez* v. *MGM Mirage, Inc.*, 524 F. Supp. 2d 1226, 1231 (D. Nev. 2007) (cited at Pet. 10 n.4) ("seek[ing] millions in statutory and punitive damages but with no actual damages"). *See also Trans Union LLC* v. *Federal Trade Comm'n*, 536 U.S. 915, 917 (2002) (Kennedy, J., dissenting from denial of cert.) (noting that, "[b]ecause the FCRA provides for statutory damages of between $100 and $1,000 for

It is not surprising that the class action bar has responded to the incentives created by the combination of detailed legislative oversight of business activity and judicial willingness to relax standing requirements. The elimination of a meaningful injury-in-fact requirement – and with it a meaningful causation requirement – by several courts of appeals removes some of the principal constraints on class certification. If the only issue that must be proved is an abstract violation of a legal duty, regardless of its widely varying or entirely absent effects on individual class members, commonality under Fed R. Civ. P. 23(a)(2) and predominance under Fed R. Civ. P. 23(b)(3) collapse into a single-issue inquiry.

"Commonality requires the plaintiff to demonstrate that the class members have suffered the same injury." *Wal-Mart Stores, Inc.* v. *Dukes*, 131 S. Ct. 2541, 2551 (2011) (internal quotation marks omitted). Although this Court has emphasized that "[t]his does not mean merely that they have all suffered a violation of the same provision of law," *ibid.*, any distinction disappears when the injury *is* a violation of the same provision of law.

Similarly, "[t]he Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Products, Inc.* v. *Windsor*, 521 U.S. 591, 623 (1997). It "trains on the legal or factual questions that qualify each class member's case as a genuine controversy." *Ibid*. That test will almost always be satisfied *ipso facto* if a common injury-in-fact exists

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[Footnote continued from previous page]

each willful violation, petitioner faces potential liability approaching $190 billion").

merely by virtue of a common exposure to the same injury-in-law, and without any need ever to consider individualized actual harm or causation.

If no injury beyond an alleged statutory violation is required, it would be unnecessary in many cases to separate the potentially injured from the set of all customers of a particular good or service (such as petitioners' ATMs here). Such separation is likely to be unnecessary because, so long as a court perceived that a statute afforded a remedy to all persons with any identifiable connection to a violation of legal duty – and not just those who sustained an actual injury caused by the violation – the set of all customers would be co-extensive with a class. Class certification would often be nearly automatic.

Indeed, in many cases, named plaintiffs will expressly waive any claim at all for actual damages in an attempt to increase their chances of obtaining class certification on their statutory damages claims. *See, e.g., Safeco Ins. Co. of Am.* v. *Burr,* 551 U.S. 47, 54 (2007) (claiming no actual harm); *White* v. *E-Loan, Inc.*, No. C 05-02080, 2006 WL 2411420, at *2 (N.D. Cal. Aug. 18, 2006) (named plaintiff "willing to forego actual damages to seek only statutory damages"). Rather than litigate the alleged statutory violations in the context of the actual individual injuries they might cause, entrepreneurial class action lawyers deliberately seek to litigate their claims of statutory violations in the abstract in order to maximize their bounty.

For companies with many customers or mass-market products, the permissibility of these tactics creates a risk of annihilating damages for conduct that actually harmed nothing but the sensibilities of a judge. As this Court has repeatedly 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). *See also AT&T Mobility LLC* v. *Concepcion*, 131 S. Ct. 1740, 1752 (2011) ("[W]hen damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once, the risk of an error will often become unacceptable. Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims."); *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."). Worse, these payoffs are nothing more than deadweight economic loss – a wealth transfer that wildly overcompensates for nonexistent injuries and overdeters insubstantial regulatory violations, leading at best to wasteful expenditures aimed at punctilious compliance with trivial requirements.

Some district courts have attempted to counterbalance these concerns by refusing to certify classes where "even the minimum statutory damages would be enormous and completely out of proportion given the lack of any actual harm." *Evans* v. *U-Haul Co. of California*, No. CV 07-2097-JFW, 2007 WL 7648595, at *4 (C.D. Cal. Aug. 14, 2007) (denying certification of a class seeking statutory damages of up to $1.5 billion).[4] But those rearguard attempts to fix problems

[4] *See also id.* at *5 (observing that the lead plaintiff "was so unconcerned about identity theft that she attached the debit

caused by lax enforcement of constitutional standing principles are at best unevenly applied and, worse, increasingly foreclosed as a matter of law. In *Bateman* v. *American Multi-Cinema, Inc.,* 623 F.3d 708 (9th Cir. 2010), for example, a putative class of plaintiffs sought up to $290 million for the defendant's inclusion, on electronically printed receipts, of more than the last five digits of the plaintiff class's credit or debit card numbers, in alleged violation of FACTA – even though the class suffered no harm from the practice. The district court denied class certification on the ground that the alleged liability "was enormous and out of proportion to any harm suffered by the class." *Id*. at 710. But the Ninth Circuit reversed – finding that any consideration of those factors was an abuse of discretion. *Id*. at 713-23.[5] *See also Murray* v. *GMAC Mortgage Corp*., 434 F.3d 948, 952-53 (7th Cir. 2006) (foreclosing consideration of the size of statutory damages sought under the Fair Credit Reporting Act (FCRA), 15 U.S.C. § 1681, in a suit seeking up to $1.2 billion).

Unlike respondent's purported injuries, those inflicted upon businesses by the non-enforcement of constitutional standing requirements are anything but abstract. Indeed, those injuries are often most pronounced when the defendant did not even violate

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card and credit card receipts from Defendant's stores to her declaration without redacting the expiration date," as she claimed defendant was required to do under the Fair and Accurate Credit Transactions Act of 2003 (FACTA), 15 U.S.C. § 1681c(g)).

[5] As is typical, the case then quickly settled – for nearly $6.5 million, exclusive of attorneys' fees and costs. *See Bateman* v. *American Multi-Cinema, Inc*., No. 2:07-CV-00171-FMC-AJWX, Docket No. 114 at 1 (C.D. Cal. Oct. 11, 2011).

the statute at issue, or did so in only the most *de minimis* way.

Specht v. *Netscape Communications Corp.*, 150 F. Supp. 2d 585 (S.D.N.Y. 2001), *aff'd*, 306 F.3d 17 (2d Cir. 2002), a relatively early case brought under the Electronic Communications Privacy Act of 1986 (ECPA), 18 U.S.C. §§ 2510 *et seq.,* is a good example. On behalf of themselves and a putative nationwide class of millions, the plaintiffs in *Specht* claimed that one of defendant's computer programs was unlawfully intercepting users' electronic communications in violation of the ECPA. *See* 150 F. Supp. 2d at 587 (describing allegations in complaint). But none of the *Specht* plaintiffs alleged any particular or concrete injury of any sort. *See Specht* v. *Netscape Commc'ns Corp.*, Nos. 1:00-CV-4871, *et al.*, 2004 WL 5475796, ¶¶ F, N, Q (S.D.N.Y. Sept. 2, 2004) ("Stipulation of Settlement"). Under the circumstances, the case rightfully should have been dismissed at the outset for lack of standing. Instead, it tied up the parties and federal courts for years while class counsel claimed 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. 1:00-CV-4871, *et al.*, 2000 WL 34500293, ¶¶ 13, 41-54 (S.D.N.Y. Aug. 3, 2000). All told, the litigation cost Netscape several million dollars in discovery and other defense costs before resulting in a class-wide settlement in which plaintiffs and their counsel obtained no money. *See* Stipulation of Settlement ¶¶ F, N, Q. *See also Specht* v. *Netscape Commc'ns Corp.*, Nos. 1:00-CV-4871, *et al.*, Docket No. 94, at *2 (S.D.N.Y. Apr. 22, 2005) (denying class counsel's motion for attorneys' fees on grounds that settlement

did not secure any "quantifiable" benefits for the class), *aff'd sub nom. Weindorf* v. *Netscape Commc'ns Corp.*, 173 F. App'x 44 (2d Cir. 2006).

Harris v. *Experian Information Solutions, Inc.*, No. 6:06-cv-1808-GRA, Docket No. 201, at 4-7 (D.S.C. June 30, 2009), is also representative. The plaintiff class claimed that Experian and other credit reporting agencies violated a section of the FCRA by failing to report consumers' credit limits for their Capital One credit cards – information that Capital One refused to provide to the agencies. The omission of credit-limit information hurt some consumers' credit scores, had no impact on certain others, and *increased* the credit scores of a very substantial third group. *Id.* at 3. Even though the named plaintiff had actually benefited from the alleged violation, he was certified to represent a class of more than four million consumers – which, at $100 to $1000 per violation, sought aggregate statutory damages between $400 million and $4 billion. *Id.* at 5. Though Experian ultimately prevailed on the merits – the Court held that omitting the information at issue did not violate the FCRA – it did so only after expending considerable resources to get to summary judgment (and at the risk of a potentially ruinous adverse judgment). *Id.* at *2.

The Fair Debt Collections Practices Act (FDCPA), 15 U.S.C. § 1692, has been equally ripe for abuse. The parties in *Jerman* v. *Carlisle, McNellie, et al.*, 559 U.S. 573 (2010), spent years litigating whether the words "in writing" can be included in a debt collector's letter. After this Court remanded the case, the parties filed cross-motions for summary judgment, and the district court held that the plaintiff and the class were entitled to <u>zero</u> actual damages and <u>zero</u> statutory damages. *See Jerman* v. *Car-*

lisle, McNellie, et al., No. 1:06-cv-1397-PAG, 2011 WL 1434679, at *10-*11 (N.D. Ohio Apr. 14, 2011). Undeterred, plaintiff's counsel filed a motion seeking nearly $350,000 in attorneys' fees and costs, arguing that the action was successful because plaintiff "obtained judgment" on a claim. *See Jerman*, No. 1:06-cv-1397-PAG, Docket No. 62-1 (May 3, 2011) at 3-4. Rather than spending yet more money contesting the matter, defendants finally settled. The result: Notwithstanding the court's prior ruling that the plaintiff class was not entitled to anything, they received $17,000. *Jerman*, No. 1:06-cv-1397-PAG, Docket No. 88-1 (Dec. 13, 2011), at 4. And the lawyers? Nearly $143,000. *Ibid.*[6]

Class actions will always "present opportunities for abuse." *Hoffmann-La Roche Inc.* v. *Sperling*, 493 U.S. 165, 171 (1989). But the likelihood of abuse is at its greatest in cases such as this one, where a plaintiff need not show actual harm. For that reason, it is essential that this Court grant certiorari to preserve the ability to resolve these class actions quickly through challenges to standing – which in turn will deter the plaintiffs' bar from filing such suits in the first place – to avoid the enormous litigation costs and settlement pressures that accompany these cases.

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[6] Countless other, equally egregious examples – involving many of the statutes identified in the Petition (at 9-12) – are not difficult to find. *See, e.g.*, *In re Facebook Privacy Litig.*, 791 F. Supp. 25 705, 711-12 (N.D. Cal. 2011) (finding that plaintiffs established standing under Article III by alleging a statutory violation despite a lack of injury in fact, but dismissing case on grounds that allegations did not state a claim under the ECPA); *Taylor* v. *Acxiom Corp.*, 612 F.3d 325 (5th Cir. 2010) (same result under Driver's Privacy Protection Act (DPPA), 18 U.S.C. §§ 2721-2725, in a suit alleging trillions of dollars in damages).

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted.

KATE COMERFORD TODD
TYLER R. GREEN
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, NW
Washington, D.C. 20062

ROY T. ENGLERT, JR.
Counsel of Record
ARIEL N. LAVINBUK
ROBBINS, RUSSELL,
ENGLERT, ORSECK,
UNTEREINER & SAUBER
LLP
1801 K Street, NW
Washington, D.C. 20006
(202) 775-4500
renglert@robbinsrussell.com

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