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ATTORNEY GENERAL STRANGE HAILS U.S. SUPREME COURT DECISION LIMITING CLASS ACTION LAWSUITS WHERE PERSONS SUFFER NO ACTUAL HARM

(MONTGOMERY) – Attorney General Luther Strange hailed a U.S. Supreme Court decision Monday clarifying that persons filing lawsuits must be able to prove actual harm. The ruling serves to place limits on costly class action lawsuits based on technical violations of the law in which persons have suffered no actual damage.

On May 16, the Supreme Court ruled 6-2 in favor of the on-line company Spokeo in a lawsuit from a plaintiff who had been unable to prove actual harm. The high court returned the case to the lower court for reconsideration.

"The Supreme Court's decision in *Spokeo, Inc. v. Robins* addressed a legal flaw exposing American businesses to class actions seeking millions—if not billions—of dollars in awards for litigants who have suffered no actual damages," said Attorney General Strange. "These no-harm, windfall class actions are the result of a startling loophole in the law.

"Over the past several decades, Congress has enacted an alphabet soup of statutes with acronyms like RESPA, the FCRA, the FDCPA, and the DPPA that are intended to protect consumers from abusive practices. These laws allow aggrieved parties to not only recover for their injuries, but also award statutory damages, typically $1,000 per violation. But what was intended as a mechanism to streamline recovery for consumers with legitimate complaints has allowed creative litigants to file actions based on technical statutory violations that harm no one.

"Laws protecting consumers from unfair practices are important, but they have been abused. On July, 9, 2015, my office led a coalition of eight states urging the Supreme Court via an amicus brief to follow the principles enshrined in the Constitution and restore the actual harm requirement to our system of litigation. The Supreme Court's decision ensures that these laws are used as they were intended—not to line the pockets of innovative plaintiffs, but to right wrongs and to make the injured whole," Attorney General Strange observed.

Joining Alabama in the July 9, 2015, amicus brief in the Spokeo case were the states of Colorado, Michigan, Nebraska, Tennessee, West Virginia, Wisconsin and Wyoming.

A copy of the Alabama-led amicus is attached.

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No. 13-1339

In the Supreme Court of the United States

SPOKEO, INC.,
PETITIONER,

v.

THOMAS ROBINS,
RESPONDENT.

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

BRIEF OF ALABAMA, COLORADO, MICHIGAN, NEBRASKA, TENNESSEE, WEST VIRGINIA, WISCONSIN, AND WYOMING AS AMICI CURIAE IN SUPPORT OF PETITIONER

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May Congress confer Article III standing upon a plaintiff who suffers no concrete harm, and who therefore could not otherwise invoke the jurisdiction of a federal court, by authorizing a private right of action based on a bare violation of a federal statute?

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INTRODUCTION AND INTEREST OF AMICI CURIAE

The *amici curiae* are States concerned that lower court decisions have upset the balance between providing injured parties access to the courts and ensuring that businesses are not faced with abusive, no-harm lawsuits.[1] By eliminating the injury-in-fact requirement of standing, these decisions have unleashed a torrent of potentially firm-killing class actions for technical statutory violations that have caused no actual harm to plaintiffs. This Court should reaffirm that actual harm is necessary to establish Article III standing and restore a balance that respects the interests of both consumers and businesses.

The experience of the *amici* States demonstrates the need for balance in our system of civil litigation. In response to widespread abuse of the class action, many of the *amici* States, working with Congress and the courts, have enacted thoroughgoing reforms of class action litigation designed to eliminate abuse while maintaining a vehicle to redress widespread injuries. The lower court's decision undermines the standing requirements of Article III and threatens to return us to the "bad old days" of class-action abuse, where lawyer-driven actions were designed to produce large fees rather than to make injured parties whole.

By all but eliminating its core component—injury in fact—the lower court's decision strips standing of

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[1] The *amici* States do not need consent of the parties to file this brief. *See* Sup. Ct. R. 37(4).

its constitutional role as the "essential and unchanging part of the case-or-controversy requirement of Article III." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Equating injury in fact with technical statutory violations, named plaintiffs can drive classes numbering in the millions. These actions often seek billions or even trillions of dollars in statutory damage awards on behalf of putative class members who have suffered no actual harm. So perverse are the incentives created under this standing regime that class members have begun to forgo actual damages altogether, seeking instead to simplify the expansion of the class and, consequently, the statutory damage award.

Requiring concrete injury in fact for statutory damages restores needed balance. It ensures that the plaintiffs seeking statutory damages are those who have been actually harmed by a defendant's conduct and have a stake in the litigation beyond the damage award itself. It ensures that the defendants in such lawsuits are businesses whose actions have actually harmed consumers. And it ensures that enforcement is targeted to practices that have caused actual harm—as opposed to those most conducive to class certification.

The Court should reverse the decision of the lower court and reaffirm that the standing analysis requires actual harm to establish injury in fact in statutory damages litigation.

SUMMARY OF ARGUMENT

The consequences of the Court's decision in this case go far beyond whether Robins can continue his suit against Spokeo. The Court has the opportunity to restore balance to a system that has been upset by the unwillingness of the lower courts to enforce the injury-in-fact requirement of standing in statutory damages class actions. This reticence has led to a wave of no-injury, windfall class actions that undermine the goals of statutory-damages laws. By reestablishing the injury-in-fact requirement, this Court can restore balance to our system of litigation.

I. The States have worked with Congress and the judiciary to limit class action abuse and ensure balance in the judicial system.

A. By restoring injury in fact to its rightful place, the Court can avoid a return to the Wild West of class action abuse that states, Congress, and the judiciary have tried to civilize. The experience of the *amici* States demonstrates that class actions are uniquely vulnerable to abuses that subordinate the interests of the class members to the interests of the class's counsel and representative. In the 1990s, class actions were out of control. Certain judges routinely certified nationwide classes without scrutiny and approved inequitable class settlements that provided little compensation for absent class members.

B. Many states recognized these abuses and instituted significant class-action reforms, such as heightened certification procedures and interlocutory appeal of certification orders. The State of Alabama,

the lead *amicus* here, was at the vanguard of both of these trends. Alabama suffered from its share of class-action abuses and the economic damage they cause, but it implemented reforms after those abuses came to light. If the injury-in-fact requirement is weakened and abusive statutory class actions are allowed to proceed, much of this work will be undone.

II. By eliminating the need for actual harm, the lower court's approach to injury in fact upsets the balance and invites a new wave of abusive statutory damages class actions.

A. The class action and statutory damages are both important tools that enable an aggrieved party to vindicate injuries that might otherwise go unredressed. Combined they are particularly powerful, as they allow consumers to pursue significant damages against defendants for widespread abuses that Congress has sought to stamp out. But although these devices can do much good, unmoored from traditional procedural limitations on litigation, they can also cause great destruction. By weakening the injury-in-fact requirement of standing, lower courts have allowed massive class actions seeking firm-killing damages to proceed against defendants that have caused no harm. Doing so not only undermines standing as a gatekeeper against class-action abuse; it undermines the class certification process as well.

B. The rule announced by the lower court collapses the standing analysis and undermines the four part test of Rule 23(a). The three elements of injury in fact, causation, and redressability are "the irreducible constitutional minimum of standing."

Lujan, 504 U.S. at 560. The lower court's rule, however, further reduces the analysis down to one question—did the defendant allegedly fail to conform its behavior to the statute? This approach obviates the need for any substantive inquiry into injury in fact, causation, and redressability.

Similarly, the Rule 23(a) requirements of numerosity, commonality, typicality, and adequate representation are a necessary check on class-action abuse. In no-harm class actions, however, these requirements have no real force. No-harm classes tend to number in the millions, and since they seek compensation for mere technical statutory violations, commonality and typicality present no bar to class certification. In fact, class members may even agree to forgo actual damages so as to make the class as homogeneous as possible. The goal of the class action—making injured parties whole—becomes subordinate to the goal of creating a bigger and more lucrative class.

C. No-harm class actions routinely seek statutory damages in the billions or even trillions of dollars for class members that suffer no concrete injury. Although a windfall for class counsel, these massive suits are often potential firm killers with substantial *in terrorem* effect. Since class certification in these cases is a foregone conclusion, defendants are faced with a "your money or your life" choice. They can either settle or bet the firm on a favorable outcome.

III. The Court can restore needed balance by reaffirming that injury in fact requires actual harm.

The Court can end this confusion and stave off a new wave of class-action abuse by simply

acknowledging that Congress passes statutes against the backdrop of constitutional requirements, including standing. Doing so restores injury in fact to its proper place and ensures that statutory-damages schemes better accomplish their goals. Defendants would face parties they had harmed by their conduct. Plaintiffs would have a stake in the litigation beyond the damage award itself, directing litigation towards practices that cause harm to consumers and against parties who engage in those practices. Restoring balance would thus better accomplish the goals Congress set out to achieve in passing statutory-damages laws while avoiding the danger of overenforcement.

This Court should reverse the lower court.

ARGUMENT

Our system strikes a hard-fought balance between the right of the injured to recover damages and the right of defendants to be free from abusive litigation. By failing to enforce the injury-in-fact requirement, lower courts have upset that balance, allowing windfall class actions to continue against defendants who have harmed no one. By restoring injury in fact to its rightful place in the standing analysis, this Court can reset that balance while vindicating the purpose of statutory-damages laws.

I. The States have a strong interest in ensuring a balanced legal system.

In the *amici* States' experience, class actions are an important procedural device for efficient consumer litigation, but also uniquely vulnerable to

abuse. These vulnerabilities are driven in large part by the huge damage awards waiting at the end of a successful litigation, leading to two problems. First, class counsel has "a powerful financial incentive to [litigate] the case on terms favorable to themselves, but not necessarily favorable to their unknown clients," and certainly not favorable to the public at large. *Dukes v. Wal-Mart, Inc.*, 509 F.3d 1168, 1199 (9th Cir. 2007) (Kleinfield, J., dissenting), *rev'd*, *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011). Secondly, because of the leverage of aggregated claims, a court's preliminary decision to certify a class may coerce a defendant to settle, especially when the only alternative is to "bet[] [the] company on a single jury verdict." *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 672 F.3d 482, 491 (7th Cir. 2012). Without proper safeguards to prevent the certification of abusive class actions, class counsel have an incentive to bring bigger and bigger classes seeking larger and larger damages, with defendants all but compelled to settle.

A. The *amici* States have borne witness to the magnitude of abuse the class action can invite.

The threat of class-action abuse is not speculative. During the 1990s, the *amici* States were inundated with frivolous class actions that came with significant economic cost. The lead *amicus* here, Alabama, had a front-row seat to many of the worst of these abuses. Alabama judges in certain counties were known to certify nationwide class actions with little or no analysis. From 1995 to 1997, a total of 91 putative class actions were filed in six Alabama

counties. Stateside Assocs., *Class Action Lawsuits in State Courts: A Case Study in Alabama* (1998) (attached to Statement of Dr. John B. Hendricks at Mass Torts and Class Actions: Hearings Before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary, 105th Cong. (Mar. 5, 1998)).[2] Judges certified classes in 43 of those cases; in at least 38, the certification was *ex parte* and entered on or shortly after the day the complaint was filed. *Id.* Lawyers coined a colorful term for these quick, *ex parte* certification orders: the "drive-by" class action. *See, e.g.*, *Mitchell v. H & R Block, Inc.*, 783 So. 2d 812, 818 (Ala. 2000) (Hooper, C.J., dissenting).

Compounding this problem, many judges were similarly lax in reviewing proposed class settlements. This lack of diligence led to collusion between named plaintiffs and defendants and unfairness to absent class members. In *Hoffman, et al. v. Bank of Boston*, for example, a homeowner challenged the Bank of Boston's practice of holding too much money in its mortgage escrow accounts, which prevented the homeowners from spending that money until they had paid off their mortgages. *See Kamilewicz v. Bank of Boston Corp.*, 92 F.3d 506 (7th Cir. 1996) (discussing *Hoffman, et al. v. BancBoston Mortg. Corp.,* No. CV-91-1880 (Ala. Cir. Ct., Jan. 24, 1994)). The settlement in that case, approved by an Alabama judge, required the bank to return the overages immediately, but also awarded more than $8.5 million in attorneys' fees to be paid by class

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[2] *Available at* http://commdocs.house.gov/committees/judiciary/hju59921.000/hju59921_0f.htm (last visited July 7, 2015).

members out of pocket. *Kamilewicz*, 92 F.3d at 508-09. The upshot was that many absent class members paid out more in fees than they received in refunds. For one Maine resident, the settlement resulted in a $2.19 credit and $91.33 debit from his bank account. *See Kamilewicz*, 100 F.3d at 1349 (Easterbrook, J., dissenting); *see also, e.g.*, Barry Meier, *Math of a Class-Action Suit: 'Winning' $2.19 Costs $91.33*, N.Y. TIMES, Nov. 21, 1995, at A1.[3] Similarly, a Texas resident received no credit and a $144 debit. *See Benn v. BancBoston*, No. 3:96-CV-0974-J, at 2-4 (N.D. Tex. Oct. 4, 1996); Eddie Curran, *You Win, You Pay*, MOBILE REG. (Ala.), Dec. 29, 1999, at 1A, *available at* 1999 WLNR 7248175; Susan P. Koniak & George M. Cohen, *Under Cloak of Settlement*, 82 VA. L. REV. 1051, 1054-68 (1996).

Alabama was far from alone, particularly in the area of settlement abuse. In Illinois, a class compromised its false-advertising claims against Poland Spring for a settlement of discounted water and charitable contributions. *See* Edward D. Murphy, *Poland Spring Settles Purity Suit*, PORTLAND PRESS HERALD, Nov. 6, 2003, at 6B, *available at* 2003 WLNR 13471684 (discussing *Ramsey v. Nestle Waters N. Am., Inc. d/b/a Poland Spring Water Co.*, No. 03 CHK 817 (Ill. Cir. Ct., Nov. 5, 2003)). The named plaintiff received $12,000, and the plaintiffs' lawyers received $1.35 million. *Id.* A class in Texas compromised its claim that Blockbuster charged excessive late fees for a settlement of coupons giving plaintiffs $1 off a video

[3] *Available at* http://www.nytimes.com/1995/11/21/us/math-of-a-class-action-suit-winning-2.19-costs-91.33.html (last visited July 7, 2015).

rental; meanwhile, the class attorneys received $9.25 million in fees. *See Blockbuster Settles Late-fee Suit with Certificate Plan*, HOUSTON CHRON., Jan. 13, 2002, *available at* 2002 WLNR 13576864 (discussing *Scott v. Blockbuster Inc.*, No. DI62-535, (Jefferson Cnty., Tex., 2001)). And, in Georgia, a class compromised its claim that Coca-Cola improperly added sweeteners to its drinks for a settlement of 50-cent coupons; the class's counsel received $1.5 million. *Lawyers Get $1.5 Million, Clients Get 50 Cents Off*, FULTON COUNTY DAILY REP., Nov. 21, 1997. *See generally* S. Rep. No. 109-14, at 10-20 (Feb. 28, 2005) (citing examples from Alabama, California, Delaware, Florida, Illinois, Kansas, Minnesota, New York, and Texas).

B. Many states recognized the problem and, together with Congress and the judiciary, implemented reforms.

Happily, through sustained legislative and judicial effort, many states have recognized the inherent problems with class litigation and have implemented important reforms to mitigate them. These state reforms run the gamut from venue rules to certification procedures.

For example, states have adopted rigorous procedures for class certification. In 1997, the Supreme Court of Alabama adopted the rigorous "federal approach" to certification, *Ex parte Am. Bankers Life Assur. Co. of Fla.*, 715 So. 2d 186, 187 (Ala. 1997), and held that "[a] class should not be certified without notice to the defendant." *Ex parte*

Citicorp Acceptance Co., Inc., 715 So. 2d 199, 205 (Ala. 1997). The Alabama Legislature later established detailed procedures to govern class certification. *See* ALA. CODE § 6-5-641. The Texas Legislature likewise enacted comprehensive class-action reform, which set out procedures that parties must follow during class-action litigation. *See* H.B. 4, 78 Leg. Reg. Sess. (Tex. 2003) (codified in part at TEX. CIV. PRAC. & REM. CODE § 26.001 et seq.); *see also Compaq Computer Corp. v. Lapray*, 135 S.W.3d 657, 671 (Tex. 2004) (holding that Texas state courts "must perform a 'rigorous analysis' before ruling on class certification to determine whether all prerequisites to certification have been met"). Similarly, Florida now requires that a trial court may "certify a class action only after it determines through rigorous analysis that the elements of the class action rule have been met." *Seminole Cnty. v. Tivoli Orlando Assocs. Ltd.*, 920 So. 2d 818, 823-24 (Fla. Dist. Ct. App. 2006) (reversing a class certification order). Other states have adopted similar reforms. *See, e.g.*, H.B. 1984 (La. 1997) (codified at LA. CODE CIV. PROC. ANN. arts. 591-97) (setting out procedures that Louisiana courts must follow when certifying a class action); *Beegal v. Park W. Gallery*, 925 A.2d 684, 691 (N.J. 2007) (holding that New Jersey courts "should undertake a 'rigorous analysis' to determine if the requirements of the [class-certification] rule have been met").

Reform has focused on class certification for good reason—because of settlement pressure, the class certification decision is often the *only* contested decision that a court makes in a class-action case. One mechanism to lessen the weight attached to a

certification (and to prolong the period during which the class representative and defendant are truly adverse) is to provide for immediate appellate review of the certification order. Many states have done so. *See* H.B. 1027 (Colo. 2003) (codified at COLO. REV. STAT. § 13-20-901); S.B. 19 (Ga. 2005) (codified at GA. CODE ANN. § 9-11-23(g)); H.B. 2764 (Kan. 2004) (codified at KAN. STAT. ANN. § 60-223(f)); H.B. 1211 (Mo. 2004) (codified at MO. REV. STAT. § 512.020(3)); H.B. 394 (Ohio 1998) (codified at OHIO REV. CODE ANN. § 2505.02(B)(5)); H.B. 2008/S.B. 1522 (Tenn. 2011) (codified at TENN. CODE ANN. § 27-1-125); H.B. 4 (Tex. 2003) (codified at TEX. CIV. PRAC. & REM. CODE § 51.014(a)(3)).

States did not act alone. Congress also got involved, passing the Class Action Fairness Act in 2005. And a number of decisions from this Court also helped to restrain some of the worst class-action abuses. *See*, *e.g.*, *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013); *Standard Fire Ins. Co. v. Knowles*, 133 S. Ct. 1345 (2013); *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011); *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336 (2005).

II. Lower court decisions weakening the injury-in-fact requirement have upset the balance of our judicial system.

The result of state and federal reforms is that class-action abuses, although not eliminated, have been lessened in many states, to the benefit of their citizens. The lead *amicus* is a prime example. Thanks to a combination of legislation and judicial decisions, the American Tort Reform Association no

longer lists any locality in Alabama as a "judicial hellhole." *See* AM. TORT REFORM ASS'N, 2014/2015 JUDICIAL HELLHOLES 7-43 (2015). And Alabama has consistently topped lists of states with the most favorable business climates. *See*, *e.g.*, SITE SELECTION, TOP TEN BUSINESS CLIMATES (2014); SMALL BUSINESS & ENTREPRENEURSHIP COUNCIL, SMALL BUSINESS POLICY INDEX 2014: RANKING THE POLICY MEASURES AND COSTS IMPACTING SMALL BUSINESS AND ENTREPRENEURSHIP 2 (2014) (listing Alabama as 7 of 50).

But the cavalier non-application of the standing doctrine to Rule 23 class actions raises the same concerns about due process and fairness that the States and Congress have worked so hard to redress. In combination, statutory damages and no-harm lawsuits upset the balance in our litigation system and threaten to return us to the "bad old days" of abusive class litigation.

A. Our Constitution and judicial system create a balance between securing the right of the injured to receive restitution and protecting defendants from abusive litigation.

Fundamental fairness requires that a balance be struck between the rights of plaintiffs and defendants. On the one hand, our system generally allows anyone who is harmed to sue to recover for their damages. On the other, certain procedural safeguards—some prudential, others constitutional—exist to protect defendants from unfair litigation. For instance, in cases involving punitive damages, this

Court has pointed to "[e]lementary notions of fairness" in invalidating awards wholly disproportionate to the underlying offense. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574-76 (1996). This Court has spoken of the need to "strike a balance" between copyright holders and those accused of infringing that copyright. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 442 (1984). And this Court has examined efforts by Congress in *qui tam* actions to balance the government's interest in "root[ing] out fraud" against the threat of "stifling parasitic lawsuits." *Graham Cnty. Soil & Water Conservation Dist. v. U.S. ex rel. Wilson,* 559 U.S. 280, 294-95 (2010).

The Constitution itself helps to maintain this balance by limiting the jurisdiction of federal courts to "cases" and "controversies." U.S. CONST. art. III, § 2, cl. 1. "[T]he core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III." *Lujan*, 504 U.S. at 560. That core component is itself made up of three elements—injury in fact, causation, and redressability—which are "the irreducible constitutional minimum of standing." *Id.* at 560-61.

These requirements exist for a reason. They ensure that plaintiffs are those who have themselves been injured and have "a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 804 (1985). They prevent bounty hunting litigators from bringing suits where their only concrete interest is the damage award itself. *Vermont Agency of Natural Res. v. U.S. ex rel.*

Stevens, 529 U.S. 765, 773 (2000) ("[A]n interest that is merely a 'byproduct' of the suit itself cannot give rise to a cognizable injury in fact for Article III standing purposes."). And they ensure that a party is not subject to suit unless it has caused harm.

B. The statutory-damages class action and the effective elimination of the injury-in-fact requirement have upset the balance.

The combination of the class action and statutory damages, without a robust injury-in-fact requirement to constrain them, makes abuse inevitable. Statutory damages and the class action are both powerful tools that enable an aggrieved party to vindicate injuries that might otherwise go unredressed. But together, they create "a perfect storm in which two independent provisions combine to create commercial wreckage far greater than either could alone." *Stillmock v. Weis Markets, Inc.*, 385 F. App'x 267, 276 (4th Cir. 2010) (Wilkinson, J., concurring).

Class actions and statutory damages serve essentially the same function. They encourage "litigation by offsetting disincentives to suit where the alleged wrongdoing involves nominal financial harm." Sheila B. Scheuerman, *Due Process Forgotten: The Problem of Statutory Damages and Class Actions*, 74 MO. L. REV. 103, 111 (2009). In other words, they seek to make litigation both more marketable and more attractive to plaintiffs' attorneys.

Class actions, by their nature, endanger the judicial process by creating immense pressure to settle. *See, e.g.*, *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1752 (2011) ("But when 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."); *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978) ("Certification 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."). And members of this Court have recognized that when the class action and statutory damages meet, that danger is magnified.[4]

Where class members have suffered actual loss, such massive class actions might be the necessary—and even desirable—consequence of legislation designed to make the aggrieved whole. But if actual harm is not required to bring such an action, then the traditional gatekeepers of standing and class certification fail, and parties who have not hurt

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[4] *See 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, pressure to settle may be heightened because a class action poses the risk of massive liability unmoored to actual injury."); *Trans Union LLC v. Federal Trade Comm'n*, 536 U.S. 915 (2002) (Kennedy, J., dissenting from denial of cert.) (noted that the petitioner faced a class action of 190 million individuals seeking statutory damages "approaching $190 billion," "crushing liability" that held consequences for "both the national economy and petitioner's thousands of employees.").

anyone face the prospect of devastating—and possibly firm-killing—windfall judgments.

C. Weakening the injury-in-fact requirement collapses the standing analysis and the test for class-action certification.

If a mere statutory violation can be an injury in fact, standing's traditional role as a gatekeeper to litigation falls away, and meaningful class-action certification analysis goes with it. Despite this Court's repeated assertion that injury in fact, causation, and redressability are "the irreducible constitutional minimum of standing," *Lujan*, 504 U.S. at 560, the lower courts have further reduced the test when determining standing in statutory-damages litigation. As the court below admitted in its decision, "[w]here statutory rights are asserted, however, our cases have described the standing inquiry as boiling down to essentially the injury-in-fact prong." *Robins v. Spokeo, Inc.*, 742 F.3d 409, 414 (9th Cir. 2014) (internal citations and quotation marks omitted) *cert. granted*, 135 S. Ct. 1892 (2015). And yet the lower court's rule would actually reduce the standing analysis even further to one question—did the defendant allegedly fail to conform its behavior to the statute? If the answer to that question is yes, the standing inquiry would essentially end.

Weakening the injury-in-fact requirement does more than undermine Article III standing; it also collapses the class-action certification analysis. This Court has described the class action as an

exceptional legal device, one that must meet exceptional standards to move forward. *Wal-Mart*, 131 S. Ct. at 2550-51. Those standards of numerosity, commonality, typicality, and adequate representation, set forth in Rule 23, must be "affirmatively demonstrate[d]" by the party seeking class certification. *Id.* at 2551. These standards are indispensible, the analysis of whether they are met, rigorous. *Id.*

But under the precedent set by the lower court, the Rule 23 standards are all but dispensed with and the analysis of whether or not they are met rendered perfunctory. Classes seeking statutory damages tend to number in the hundreds of thousands, if not the millions. Since these actions allege a bare technical violation of the statute, issues of commonality and typicality are swept away. In fact, named plaintiffs may simply waive claims of actual damages in order to avoid raising any question about commonality or typicality. *See, e.g.*, *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 54 (2007); *Murray v. GMAC Mortg. Corp.*, 434 F.3d 948, 953 (7th Cir. 2006) ("Unless a district court finds that personal injuries are large in relation to statutory damages, a representative plaintiff must be allowed to forego claims for compensatory damages in order to achieve class certification."). This situation stands in direct contrast to traditional class-certification analysis, where the plaintiff cannot prevail by showing "merely that they have all suffered a violation of the same provision of law." *Wal-Mart*, 131 S. Ct. at 2551.

Of course, once the class is certified, the case is essentially over, with settlement following quickly. Thus, the class action is turned on its head. The

more insignificant the actual damages, the more likely a windfall class action will survive the certification process and force a profitable settlement.

Efforts by the district courts to manufacture some sort of restraint on no-harm class actions have failed. Faced with an explosion of new litigation, district judges have been fighting a rear-guard action against windfall class actions, refusing to certify them under the "superiority" analysis. *See generally* Holly S. Hosford, *Avoiding Annihilation: Why Trial Judges Should Refuse to Certify A FACTA Class Action for Statutory Damages Where the Recovery Would Likely Leave the Defendant Facing Imminent Insolvency*, 81 MISS. L.J. 1941 (2012). Under Rule 23(b)(3), a party seeking class certification must show that a class action is "superior to other available methods for the fair[] and efficient[] adjudicat[ion] of the controversy." FED. R. CIV. P. 23(b)(3). Some district courts have held that because damages sought are so out of proportion to the actual harm suffered, the class action is not superior to an individual action and certification is inappropriate.

This approach, however, has an undeniable flaw—it lacks support in Rule 23. The Seventh Circuit overturned, on abuse of discretion grounds, a district court's refusal to certify a class action brought by professional plaintiffs with more than fifty no-harm class actions under their belt. Judge Easterbrook, writing for the Seventh Circuit, rejected what he viewed as an attempt by the district judge to "curtail the aggregate damages for violations he deemed trivial," noting that statutes "must be enforced rather than subverted." *Murray*,

434 F.3d at 953-54. Following the Seventh Circuit's lead, the Ninth Circuit in *Bateman v. American Multi-Cinema, Inc.* found a district court judge abused his discretion in refusing to certify, on superiority grounds, a class seeking $290 million for technical violations of the Fair and Accurate Credit Transactions Act (FACTA). 623 F.3d 708, 712-13 (9th Cir. 2010). Both courts concluded that any excessive award could be reduced after trial, a small comfort to defendants pressured to settle after certification.

III. The Court can restore balance by reiterating that injury in fact requires actual harm.

What district judges cannot accomplish through ad hoc justifications, this Court can do simply by reiterating what it has said again and again—standing requires a concrete injury. No new rules or tests are needed. The Constitution's Article III case or controversy requirement provides the answer. By reaffirming this constitutional principle, the Court can restore balance to the system, ensuring access to the courts for those who have been harmed while protecting the due process rights of defendants against abusive litigation.

At the same time, the Court can help to ensure that statutory damages accomplish their objectives. By requiring actual harm, the Court will encourage action by plaintiffs who have a stake in the litigation beyond the damage award itself. The powerful tools Congress included in statutory-damages legislation will be directed at harmful practices as opposed to mere technical violations.

A. A proper application of the injury-in-fact requirement will eliminate unfair windfall class actions.

An actual injury is foundational to the constitutional standing inquiry. In order to sue, a plaintiff must have been harmed by a defendant in a way that is redressible in court. The principle of "no harm, no tort" is axiomatic in the law; no matter how reckless the driver, no matter how many laws he breaks, without harm there is no cause of action.

But in statutory-damages cases, lower courts have dramatically departed from these principles based on a misinterpretation of this Court's precedent.

1. Lower courts have whittled away the injury-in-fact requirement by relying extensively upon dicta in a line of cases—*Sierra Club v. Morton*, 405 U.S. 727 (1972), *Linda R.S. v. Richard D.*, 410 U.S. 614 (1973), and *Warth v. Seldin*, 422 U.S. 490 (1975). *Warth* has been particularly influential. There, quoting from a footnote in *Linda R.S.*, the Court explained 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. 490, 500 (1975).

This statement cannot be read to eliminate the injury-in-fact requirement. It instead supports the innocuous proposition that Congress can create new legal rights and new causes of action; Congress "has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before." *Lujan*, 504 U.S. at 580

(Kennedy, J., concurring) (citing *Warth*). That the Court did not intend to launch a radical departure from the injury-in-fact requirement is supported by the fact that the Court "has seldom invoked its formulation [of actual or threatened injury]" set forth in the *Warth* line of cases. John S. Haddock, *Articulating A "Rational Connection" Requirement in Article III Standing*, 66 STAN. L. REV. 1423, 1427 (2014).

Lower courts, however, have shown no reticence in applying *Warth* broadly, particularly when statutory damages are involved. *See id*. ("In contrast, circuit courts regularly recite this language to find Article III standing on the basis of a statutory violation."); *Hammer v. Sam's E., Inc.,* 754 F.3d 492, 498 (8th Cir. 2014) *cert. denied*, 135 S. Ct. 1175 (2015) ("Notably, this language is without limitation: the actual-injury requirement may be satisfied *solely* by the invasion of a legal right that Congress *created*."); *Tourgeman v. Collins Fin. Servs., Inc.,* 755 F.3d 1109, 1114 (9th Cir. 2014); *Donoghue v. Bulldog Investors Gen. P'ship*, 696 F.3d 170, 175 (2d Cir. 2012).

But as this Court has explained, *Warth* does not support the proposition that Congress has the constitutional power to confer standing without actual harm. Instead, Congress creates new chains of causation against a constitutional backdrop, subject to the same standing requirement of injury in fact as any other cause of action.

2. The lower courts' reading of *Warth* would give Congress plenary authority over standing. It is black

letter law that every litigation requires a cause of action, an injury in fact, and a remedy. Congress can provide the cause of action and the remedy, but only the litigant can supply the harm, making injury in fact "a hard floor of Article III jurisdiction that cannot be removed by statute." *Summers v. Earth Island Inst.*, 555 U.S. 488, 497 (2009).

The lower court's opinion crashes through that floor. It allows no-injury plaintiffs to use the existence of a cause of action and a remedy to bootstrap themselves straight past the injury-in-fact requirement and into court. But although the violation of a statute can provide a cause of action and a remedy, it cannot, by itself, result in an injury in fact.

Congress has no constitutional authority to pass a statute that says otherwise. The *Lujan* court, in interpreting the *Warth* line of cases, explained, "[Statutory] broadening [of] the categories of injury that may be alleged in support of standing is a different matter from abandoning the requirement that the party seeking review must himself have suffered an injury." 504 U.S. at 578. And the Court in *Warth* recognized this limitation as well—"Of 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." *Warth*, 422 U.S. at 501.

Although Congress has the power to create a statutory cause of action and remedy, it cannot confer standing on a plaintiff who is not actually harmed. For example, prior to the passage of the Fair Credit Reporting Act (FCRA), an aggrieved

party might have been able to sue a credit reporting agency under any number of common law or statutory causes of action. But in order to have Article III standing to do so, he or she would need to allege an actual injury.

Congress cannot remove that requirement by passing a new statute. It can create a new cause of action to simplify recovery for injured parties. It can create statutory damages in cases where actual damages are small or difficult to ascertain, and it can create a right of action in cases otherwise barred by prudential standing rules. It can even create a new legal right the violation of which may give rise to a lawsuit, such as calling to collect a debt after a certain hour at night. What it cannot do is eliminate the requirement for an injury in fact that is more than the mere violation of the statute itself. It 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). Otherwise, standing would be limited only by the will of Congress, not the letter of the Constitution.

B. A robust standing requirement helps accomplish, rather than hinders, the goals of statutory-damages laws.

Requiring a party seeking statutory damages to show actual harm would not only constrain abusive and unfair class actions. It would also better serve the goals of statutory-damages laws than the lower court's unbounded approach to standing.

Statutory damages serve several purposes. They encourage citizens to enforce the law, which is particularly important at a time of strapped state and federal budgets. They ease access to the courts by allowing for recovery, even when damages are small or difficult to quantify. And they help to ensure compliance by the industries they regulate. Windfall class actions undermine these goals.

1. Legislative history demonstrates that Congress enacted statutory-damages laws to correct serious abuses and fill gaps in the law, not to allow windfall class actions for technical violations. For instance, when it enacted the Fair Debt Collections Practices Act, Congress pointed to "the use of abusive, deceptive, and unfair debt collection practices" that "contribute to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy." 15 U.S.C. § 1692(a). It also noted that existing laws were "inadequate to protect consumers." 15 U.S.C. § 1692(b). Congress described the accurate credit reporting requirements in the FCRA as "essential to the continued functioning of the banking system," and necessary to ensure that reporting agencies "exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer's right to privacy." 15 U.S.C. § 1681(a)(1), (a)(4). The lead House sponsor of FACTA described the legislation as critical in the fight against identity theft, which at the time was estimated to cost American consumers $50 billion a year. 149 Cong. Rec. 21734 (2003) (statement of Rep.

Bachus).[5] In urging his colleagues to support FACTA, he suggested it was as "important in finance as the national interstate highway system is to us in transportation." *Id*.

These laws and others like them were enacted to address serious abuses that threatened not only consumers, but the foundations of the economy. Congress created powerful tools to end those abuses and make the injured whole. But a weakened injury-in-fact requirement allows enterprising parties to direct these tools at narrow technical statutory violations that bear little relation to the problems Congress sought to address.

2. The lower courts' rule encourages litigation to redress technical violations, instead of focusing litigation on the most serious violations of statutory rights. The judicial system is already expending significant resources adjudicating these no-harm, windfall class actions. In *Leysoto v. Mama Mia I., Inc.*, the plaintiff sought to bring a windfall class action on behalf of 46,000 members for up to $46,000,000 for technical violations of FACTA that caused no harm to the class members. 255 F.R.D. 693, 694-95 (S.D. Fla. 2009). The defendant was a local restaurant with approximately $40,000 in assets. In another FACTA case, *Lopez v. KB Toys Retail, Inc.*, plaintiff sought up to $2.9 billion in damages because the defendant printed the first four, rather than just the last five, digits of his credit card number. No. CV 07-144-JFW (CWx) (C.D. Cal. July 18, 2007) (Doc. 28). The first four digits of a

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[5] *Available at* http://www.gpo.gov/fdsys/pkg/CREC-2003-09-10/pdf/CREC-2003-09-10.pdf (last visited July 7, 2015).

credit card number provide no information about the customer, but rather identify the issuing bank. *Id.* In *Parker v. Time Warner Entertainment Co., L.P.*, plaintiff sought certification of a class of 12 million to pursue up to $12 billion for violations of the Cable Privacy Act. 331 F.3d 13, 25-26 (2d Cir. 2003) (Newman, J, concurring). The Second Circuit noted that the "prospect of a stunningly large damages award looms as the result of technical violations of the Cable Act that affect potentially millions of subscribers." *Id.* at 21. And in *Taylor v. Acxiom Corporation*, plaintiffs launched a no-harm class action seeking statutory damages under the Drivers' Privacy Protection Act of $2,500 for 20 million class members—for a total award of $5 trillion. No. 2:07-cv-0001 (E.D. Tex. Jan. 4, 2007) (Doc. 1). These are only a few of the many no-harm, windfall class actions that have been filed under statutory-damages laws. *See, e.g.*, Scheuerman, *supra* at 104-07, 111-15.

Decades of experience have demonstrated that class actions tend to follow the path of least resistance. This problem is most obviously demonstrated by the phenomenon of the "piggy-back" or "coat-tail" class action that has plagued efforts to encourage private enforcement of the law. Instead of filling enforcement gaps, "[e]mpirical data show that . . . class action lawyers predominantly file 'copycat' or 'coattail' lawsuits that follow on the heels of government investigations." John H. Beisner, Matthew Shors, Jessica Davidson Miller, *Class Action "Cops": Public Servants or Private Entrepreneurs?*, 57 STAN. L. REV. 1441, 1453 (2005). The reason is pure dollars and cents—class counsel

"prefer 'no research' lawsuits that appear likely (from the investigation itself) to yield lucrative settlements with only a minimal investment of time and money." *Id.* at 1453-54. As a result, this type of class action fails to "broaden the scope of law enforcement, but rather only intensifies the penalty." John C. Coffee, Jr., *Rescuing the Private Attorney General: Why the Model of the Lawyer As Bounty Hunter Is Not Working*, 42 MD. L. REV. 215, 223 (1983).

Much ink has been spilled on ways to better channel so-called "private attorneys general" toward filling the gaps in public enforcement of the law. But weakening the injury-in-fact requirement does not help. Because of the commonality and typicality analysis of Rule 23(a), class counsel have an incentive to seek out narrow, technical violations of the law. These actions are more likely to survive the certification process and result in a profitable settlement. On the other hand, the more serious the violation, the more serious the harm—and the more complicated the fact pattern. If given the choice between a difficult case involving actual harm and a straightforward, no-harm class action, class counsel will choose the latter.

3. Finally, although Congress certainly intended for citizen-enforcement of the law, doing so without a meaningful standing requirement raises the specter of overenforcement. As this Court has recognized, when a government agency is involved, a complex balancing act helps to limit actions to those that are most important. "An agency generally cannot act against each technical violation of the statute it is charged with enforcing." *Heckler v. Chaney*, 470 U.S.

821, 831 (1985). Rather, an agency faced with a decision about whether to pursue an enforcement action "must not only assess whether a violation has occurred," but must also look to "whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake the action at all." *Id.*

In private actions, the doctrine of standing, and particularly its injury-in-fact requirement, serves a role as a similar check on overenforcement. Courts are not "publicly funded forums for the ventilation of public grievances or the refinement of jurisprudential understanding." *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 473 (1982). Violations of the law, no matter how serious, do not give litigants "a special license to roam the country" in search of wrongs to right. *Id.* at 487. Even in *qui tam* cases, this Court has found that relators have standing not on the basis of a statutory violation or the bounty they will receive if the suit is successful, but rather as an assignee of the injury in fact suffered by the United States. *Vermont Agency*, 529 U.S. at 772-74.

Overenforcement comes at a cost; it strains judicial resources, chills productive activities, and generates unfair results. As commentators examining this problem have recognized, "Not all substantive principles necessarily warrant enforcement to the nth degree." Richard A. Nagareda, *Aggregation and Its Discontents: Class*

Settlement Pressure, Class-Wide Arbitration, and CAFA, 106 COLUM. L. REV. 1872, 1884 (2006).

The injury-in-fact requirement channels litigation towards productive ends. It ensures that those who have actually suffered harm as a result of another's conduct are directing litigation towards those activities and against those parties that caused the harm. Without the injury-in-fact requirement to constrain them, class representatives will simply seek the most lucrative action for themselves, regardless of the social benefit or the purpose of the statute in question.

* * *

Statutory damages serve an important purpose, but they can be abused, particularly when combined with class actions. If this Court were to adopt the standing rule enunciated by the lower court, the very problems the States worked so hard to solve—eliminating abusive class actions through robust certification procedures and reduced pressure to settle—are likely to return.

A balance must be struck between robust enforcement of laws meant to protect consumers and costly, economically destructive windfall class actions. Fortunately, the Constitution has already struck that balance by requiring actual harm for Article III standing.

CONCLUSION

The Court should reverse the Ninth Circuit.

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