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 EXPERIAN INFORMATION SOLUTIONS, INC., AS *AMICUS CURIAE* SUPPORTING PETITIONERS

DANIEL J. MCLOON
JONES DAY
555 South Flower Street
50th Floor
Los Angeles, CA 90071
(213) 489-3939

MEIR FEDER
Counsel of Record
D. THEODORE RAVE
JONES DAY
222 East 41st Street
New York, NY 10017
(212) 326-3939
mfeder@jonesday.com

Counsel for Amicus Curiae

August 26, 2011

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

CONSTITUTIONAL AUTHORITIES AND STATUTES

OTHER AUTHORITIES

INTEREST OF *AMICUS CURIAE* [1]

Experian Information Solutions, Inc., is a nationwide consumer reporting agency subject to regulation under the Fair Credit Reporting Act (FCRA). Like the Real Estate Settlement Procedures Act (RESPA), the FCRA includes a statutory damages provision, which plaintiffs have argued (and some courts have held) allows plaintiffs to sue for between $100 and $1000 per violation whether or not they suffered any actual harm. 15 U.S.C. § 1681n.

Consumer reporting agencies like Experian serve, essentially, as warehouses of consumer credit information. Experian maintains credit files on more than 200 million consumers, and, each day, answers 2 million credit inquiries and processes up to 50 million updates to its credit information database from lenders and other data furnishers.

As a nationwide consumer reporting agency, Experian is frequently subject to class action lawsuits by plaintiffs who have experienced no actual harm but seek class-wide statutory damages for alleged technical violations of the FCRA. Such suits are possible because the Act permits plaintiffs to sue for any willful departure from FCRA requirements "with respect to" a consumer, without expressly requiring that the consumer be injured by what may be a wholly technical violation. Indeed, it is not uncommon in these cases for significant numbers of

---

[1] All parties have consented in writing to the filing of this *amici curiae* brief. No counsel for any party authored this brief in whole or in part, and no person or entity other than *amici curiae*, their members, or counsel made a monetary contribution to the preparation or submission of this brief.

class members to have actually *benefited* from the alleged violations. Due to the large number of credit files, updates, and inquiries Experian handles, these suits can involve millions of putative class members, and thereby threaten staggering liability.

Experian accordingly has a strong interest in the enforcement of constitutional restrictions on suits by plaintiffs who have suffered no actual injury. Decisions that allow such plaintiffs to bring statutory damages suits—in effect awarding them a bounty for suing over claimed legal violations that have caused them no injury—are inconsistent with the bedrock separation of powers concerns embodied in Article III.

SUMMARY OF THE ARGUMENT

A. Congress's authorization of a cause of action for statutory damages cannot confer Article III standing on plaintiffs who have suffered no injury in fact. Injury in fact is an essential component of Article III's case and controversy requirement that cannot be eliminated by statute. Congress can elevate a *de facto* injury to a legally cognizable injury, but it cannot authorize suit for a mere statutory violation that has no actual adverse effect on the plaintiff. Nor can it confer standing on a party who has suffered no actual injury by offering a bounty for bringing suit to enforce the law.

B. These limitations are essential to maintaining the separation of powers. Article III's injury-in-fact requirement ensures that bounty-hunting private litigants cannot extend the courts beyond their traditional and proper roles of redressing individual injuries, which would encroach on the Executive's duty to take care that the laws are faithfully executed and would risk arbitrary enforcement.

C. Congress has authorized statutory damages divorced from any showing of actual harm in numerous statutory schemes in addition to RESPA, creating the potential for lawyer-driven class actions for technical statutory violations that have caused no actual harm to the plaintiffs. Under the FCRA, for example, entrepreneurial lawyers, adopting an approach endorsed by the Ninth Circuit's decision below, have brought class actions on behalf of plaintiffs who not only have suffered no injury, but have even *benefited* from the alleged statutory violation. Nevertheless, these suits seek class-wide statutory damages in amounts that often exceed the net worth of the defendants.

D. Allowing plaintiffs to bring suits for statutory damages where they have suffered no actual injury would take courts far beyond their traditional and proper roles of vindicating rights and remedying injuries. Such suits function like roving private-attorney-general actions, by which private litigants hoping to receive a bounty seek out statutory violations and enlist courts into law enforcement functions constitutionally assigned to the Executive. And the targets of such suits are threatened with one of the very dangers Article III was designed to prevent: arbitrary enforcement at the whim of private bounty hunters, unconstrained by the legal and political checks that cabin the discretion of the Executive.

These dangers are exacerbated when no-harm statutory damages claims are brought as class actions. Aggregation of statutory damages claims can lead to massive potential liability unconnected to any actual injury suffered by the plaintiff class. The

potential for such windfalls drives entrepreneurial lawyers to target technical violations that result in the largest possible classes rather than violations that cause the most harm. And because the *in terrorem* effect of such staggering liability can force defendants to settle even when they have meritorious defenses, bounty-hunting plaintiffs need not even target actual statutory violations; so long as the violations are arguable, defendants will be forced to settle or risk bankruptcy.

E. Finally, there is little risk that statutes like the FCRA and RESPA would go unenforced if Article III's limits are observed. Both the FCRA and RESPA, like most statutory schemes that incorporate statutory damages, provide for enforcement by executive agencies. And private suits by plaintiffs who actually *have been* harmed—which are facilitated by the availability of attorneys' fees—will act as a deterrent to statutory violations.

ARGUMENT

The implications of the Court's decision in this case extend far beyond RESPA. Numerous other statutes, like the Fair Credit Reporting Act (FCRA), 15 U.S.C. § 1681 *et seq.*, authorize statutory damages whose amount or range is fixed without regard to any actual injury suffered by the plaintiff.[2] While these schemes

---

[2] *See, e.g.*, Anti-Counterfeiting Consumer Protection Act of 1996, 15 U.S.C. §§ 1116(d), 1117(c) (between $1000 and $200,000 per counterfeit mark and up to $2 million for willful violation); Anti-Cybersquatting Consumer Protection Act of 1999, 15 U.S.C. § 1125(d) (between $1000 and $100,000 for each bad faith violation); Cable Piracy Act, 47 U.S.C. § 605(e) (between $1000 and $10,000 per violation, and between $10,000 and $100,000 per willful violation); Cable Privacy Act, 47 U.S.C.

may to some extent aim to facilitate litigation of claims involving damages that are small and/or difficult to quantify or prove, in practice these statutes frequently result in claims by plaintiffs who have not suffered the injury in fact that is a prerequisite for Article III standing.

Litigation under the FCRA provides a prime example. Unlike many statutes that expressly limit statutory damages to individuals *adversely affected* by the challenged conduct, *see, e.g.*, *Doe v. Chao*, 540 U.S. 614, 624 (2004), the FCRA on its face requires only a willful violation "with respect to any consumer"—with no express requirement that the consumer have been injured in any way by the alleged violation. In the event of such a violation, a consumer-plaintiff may recover "any actual damages . . . *or damages of not less than $100 and not more than $1000*," in addition to punitive damages and attorneys' fees. 15 U.S.C.

(continued)

§ 551(f)(2)(A) (greater of $100 per day of violation or $1000); Copyright Act, 17 U.S.C. § 504(c) (between $750 and $30,000 for each act up infringement and up to $150,000 for willful infringement); Fair Debt Collection Practices Act of 1978, 15 U.S.C. § 1692k(a) (up to $1000 per violation, with cap on class action recovery of $500,000 or 1% of defendant's net worth); Stored Communications Act of 1986, 18 U.S.C. § 2707(c) (minimum of $1000 per violation); Telephone Consumer Protection Act of 1991, 47 U.S.C. § 227(b)(3)(B) ($500 per violation, treble damages for willful violations); Truth in Lending Act of 1968, 15 U.S.C. § 1640(a)(2) (between $100 and $5000 per violation, with cap on class action recovery of $500,000 or 1% of defendant's net worth); Worker Adjustment and Retraining Notification Act of 1988, 29 U.S.C. § 2104(a)(3) ($500 per day of violation).

§ 1681n(a)(1)(A). Many plaintiffs have argued (and some courts have accepted) that this authorizes a cause of action for statutory damages without the need to show any actual injury. *See, e.g.*, *Beaudry v. Telecheck Servs., Inc.*, 579 F.3d 702, 705-08 (6th Cir. 2009) (holding that consumer need not plead any injury stemming from alleged inaccuracy in her credit report where defendant systematically used wrong drivers license numbers in check verification system); *Murray v. GMAC Mortgage Corp.*, 434 F.3d 948, 953 (7th Cir. 2006) (holding that plaintiff class could seek statutory damages for alleged improper access to their credit information "without proof of injury").

This ability to assert claims without a showing of individual injury—coupled with the fact that the challenged credit reporting procedures often apply to thousands or even millions of consumers—regularly gives rise to lawyer-driven class actions for alleged technical violations where the named plaintiffs and class members have suffered no actual harm. *See* Sheila B. Scheuerman, *Due Process Forgotten: The Problem of Statutory Damages and Class Actions*, 74 Mo. L. Rev. 103, 114 & nn.78-80 (2009) (listing examples of lawyer-driven statutory damages suits). Indeed, not only are such suits regularly brought on behalf of classes of plaintiffs who have suffered no injury, but such claims are even brought on behalf of putative class members who have *benefited* from the alleged violations of FCRA requirements—such as consumers who seek damages for an alleged inaccuracy in their credit files that *raises* their credit scores.

Such plaintiffs are in the classic position of litigants without Article III standing, seeking judicial enforcement of legal requirements despite the absence of any actual injury to vindicate. Contrary to the Ninth Circuit, Congress's authorization of a statutory damages remedy in such cases cannot substitute for the bedrock requirement of injury in fact. For a plaintiff who suffers no injury from the violation of which he complains, statutory damages amount to nothing more than a windfall or bounty that cannot create a "Case[]" or "Controvers[y]" where one does not otherwise exist.

I. CONGRESS'S AUTHORIZATION OF STATUTORY DAMAGES CANNOT CONFER ARTICLE III STANDING ON PLAINTIFFS WHO HAVE SUFFERED NO INJURY IN FACT.

A. "[T]he requirement of injury in fact is the hard floor of Article III jurisdiction that cannot be removed by statute." *Summers v. Earth Island Inst.*, 129 S. Ct. 1142, 1151 (2009). As this Court has explained, the "actual injury" component of Article III's case or controversy requirement is necessary to maintain the separation of powers. *Lewis v. Casey*, 518 U.S. 343, 353 n.3 (1996); *see Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-60, 576-77 (1992). "This limitation 'is founded in concern about the proper—and properly limited—role of the courts in a democratic society.'" *Summers*, 129 S. Ct. at 1148 (quoting *Warth v. Seldin*, 422 U.S. 490, 498 (1975)). The role of courts is limited to vindicating the rights of individuals and "redress[ing] or prevent[ing] actual or imminently threatened injury to persons caused by private or official violation of law." *Id.* Vindicating the broader *public* interest in seeing that the laws are obeyed is

the province of the political branches. *Lujan*, 504 U.S. at 576-77.

Thus the judicial power may only be invoked by a party who can show that he has been injured "in a concrete and personal way," ensuring the "vitality of the adversarial process" and that legal questions are answered, not in the abstract, "'but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action.'" *Id.* at 581 (Kennedy, J., concurring) (quoting *Valley Forge Christian College v. Am. United For Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982)). The judiciary's role in setting and enforcing legal rules is purely a by-product of its role in deciding cases. "[F]ederal courts may exercise power only in the last resort, and as a necessity, and only when adjudication is consistent with a system of separated powers and the dispute is one traditionally thought to be capable of resolution through the judicial process." *Allen v. Wright*, 468 U.S. 737, 752 (1984). "We accept the judiciary's displacement of the elected branches when necessary to decide an actual case," but in the absence of the need to remedy an individual's injury, the courts may not reach out to address alleged violations of the law. John G. Roberts, *Article III Limits On Statutory Standing*, 42 Duke L.J. 1219, 1230 (1993).

The injury-in-fact requirement thus prevents the judicial power from turning into a roving commission to enforce compliance with all laws and regulations; it ensures that the judiciary will act only to the extent necessary to resolve actual disputes involving actual injuries. As a necessary corollary, Article III thus places "an outer limit [on] the power of Congress

to confer rights of action." *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring). Congress can "elevat[e] to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law," but it cannot confer standing in the absence of an injury in fact. *Id.* at 578 (majority opinion); *see also Raines v. Byrd*, 521 U.S. 811, 820 n.3 (1996) ("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."); Richard H. Fallon, Jr., Daniel J. Meltzer & David L. Shapiro, *Hart and Wechsler's The Federal Courts and the Federal System* 153 (5th ed. 2003).

To be sure, not all injuries cognizable for standing purposes must be pecuniary. Congress can create causes of action to redress noneconomic injuries. *See, e.g.*, *Federal Election Comm'n v. Akins*, 524 U.S. 11 (1998) (inability to obtain information necessary to evaluate candidates for public office); *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982) (withholding of truthful information about availability of housing); *Sierra Club v. Morton*, 405 U.S. 727, 735 (1972) (lessened "aesthetic and recreational values" of wilderness). And Congress may appropriately provide for statutory damages when the amount of injury may be difficult to quantify or prove, as in the case of copyright infringement. *See, e.g.*, *Douglas v. Cunningham*, 294 U.S. 207, 209 (1935) (explaining that statutory damages in Copyright Act of 1909 "give the owner of a copyright some recompense for injury done him, in a case where the rules of law render difficult or impossible proof of damages or discovery of profits").

But in order for Congress to authorize a private party's invocation of the judicial power, there must be some "concrete, *de facto* injur[y]." *Lujan*, 504 U.S. at 578. A mere violation of a statute with respect to a particular individual—absent some actual adverse effect on that individual—is not an "injury" sufficient to confer Article III standing. *Cf. Chao*, 540 U.S. at 624 ("[T]he reference in §552a(g)(1)(D) [which creates a cause of action for statutory damages under the Privacy Act] to 'adverse effect' acts as a term of art identifying a potential plaintiff who satisfies the injury-in-fact and causation requirements of Article III standing, and who may consequently bring a civil action without suffering dismissal for want of standing to sue."). A plaintiff's interest in such a case is no different from the general public interest "in seeing that the law is obeyed," which this Court has repeatedly held is insufficient for a private litigant to invoke the judicial power. *E.g.*, *Akins*, 524 U.S. at 24; *Steel Co. v. Citizens For A Better Environment*, 523 U.S. 83, 107 (1998); *Valley Forge*, 454 U.S. at 485. In creating a cause of action for a statutory violation, "Congress must at the very least identify the injury it seeks to vindicate and relate the injury to the class of persons entitled to bring suit." *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring).

Similarly—and crucially, for purposes of this case and for statutes like the FCRA—Congress cannot manufacture standing in the absence of actual individual injury simply by offering a bounty to private plaintiffs for bringing suits to enforce the law. As the Court explained in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, while a bounty may give a plaintiff a concrete interest in the outcome of a suit, an "interest

unrelated to injury in fact is insufficient to give a plaintiff standing." 529 U.S. 765, 772 (2000); *see also Crabill v. Trans Union, L.L.C.*, 259 F.3d 662, 666 (7th Cir. 2001) (Posner, J.) ("[T]he Supreme Court appears to have limited the right to create a bounty system enforceable in federal courts to the situation in which the bounty deters the defendant from inflicting a future injury on the particular plaintiff bringing the suit, *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 185 (2000), unless the plaintiff can be viewed as a kind of assignee of the prospective victims, as suggested in *Vermont Agency*."). An interest, such as a bounty or an award of attorneys' fees, "that is merely a 'byproduct' of the suit itself cannot give rise to a cognizable injury in fact for Article III standing purposes." *Vermont Agency*, 529 U.S. at 773; *see Steel Co.*, 523 U.S. at 107 ("[A] plaintiff cannot achieve standing to litigate a substantive issue by bringing suit for the costs of bringing suit.").[3]

B. This limitation on Congress's ability to create a bounty system for enforcing the law is critical to maintaining the separation of powers. Congress cannot authorize roving private attorneys general to seek out violations of the law that have caused them no actual injury and prosecute them in court in the hopes of obtaining a bounty. *Lujan*, 504 U.S. at 576-77; *id.* at 580-81 (Kennedy, J., concurring). To do so

---

[3] The basis for the *qui tam* relator's standing in *Vermont Agency* was not his interest in the bounty he would receive if he prevailed in his False Claims Act suit, but rather the fact that he was suing as the partial assignee of the *Government's* damages claim. 529 U.S. at 773-74 & n.4.

would be "to transfer from the President to the courts the Chief Executive's most important constitutional duty, to 'take Care that the Laws be faithfully executed,' Art. II, § 3." *Id.* at 577 (majority opinion); *see also* Tara Leigh Grove, *Standing as an Article II Nondelegation Doctrine*, 11 U. Pa. J. Const. L. 781 (2009); Harold J. Krent & Ethan G. Shenkman, *Of Citizen Suits and Citizen Sunstein*, 91 Mich. L. Rev. 1793 (1993).

Article III's injury-in-fact requirement prevents private litigants from extending the role of the courts beyond their traditional and proper function. A private litigant may sue only the party whose conduct caused him injury and may seek redress only for that harm; he may not exercise the discretion of the Executive in "roam[ing] the country in search of" legal violations and deciding which to prosecute. *Valley Forge*, 454 U.S. at 487; *see* Grove, *supra* at 784, 808-09, 828.[4] And it limits courts to their

[4] If Congress were permitted to delegate the enforcement power that Article II assigns to the Executive branch—and its attendant prosecutorial discretion—to uninjured private parties tasked with seeking out violations of the law and bringing them to federal court in exchange for a bounty, there would be a serious risk of arbitrary enforcement. Grove, *supra* at 783-84, 807-08, 814-819. Private bounty hunters lack the political and legal constraints that cabin the Executive's prosecutorial discretion. *Id.* at 801, 815-19. And, critically, they lack any electoral accountability for their enforcement decisions. *Id.* at 817-18; Krent & Shenkman, *supra* at 1801-04, 1808-09. Thus private parties may have their own motives for bringing suit (*e.g.*, to target a competitor, an ideological opponent, or a particular ethnicity, or to maximize their bounty) irrespective of public importance of the suit, resulting in arbitrary, uneven enforcement or overenforcement of the law. Grove, *supra* at 816-17; Krent & Shenkman, *supra* at 1808-09; *see Nike, Inc. v.*

traditional and proper function—"decid[ing] on the rights of individuals" and remedying individual injuries. *Lujan*, 504 U.S. at 576 (quoting *Marbury v. Madison*, 1 Cranch 137, 170 (1803)). Congress can no more enlist the courts into the general enforcement of the laws than it can authorize them to offer advisory opinions. *Cf. Muskrat v. United States*, 219 U.S. 346, 362 (1911); *Hayburn's Case*, 2 U.S. (Dall.) 409 (1792).

C. Interpreting statutory damages schemes as allowing private plaintiffs who have suffered no actual injury (or who may even have benefited) from an alleged legal violation to bring class actions for statutory damages—as the decision below would do—violates Article III and the separation of powers principles it embodies.

Recent litigation under the Fair Credit Reporting Act, highlights this problem. Under the interpretation of the FCRA pressed by many plaintiffs—and adopted by some courts, *see, e.g.*, *Beaudry*, 579 F.3d at 705-08; *Murray*, 434 F.3d at 953—creative lawyers can bring statutory damages class actions on behalf of consumers who not only have suffered no injury (*e.g.*, when the alleged violation results in no inaccuracies on a consumer's

---

(continued)

Kasky, 539 U.S. 654, 678-80 (2003) (Breyer, J., dissenting from dismissal of cert.) (observing that under California law, private parties may bring certain suits "even though they themselves have suffered no harm," and expressing concern that "such plaintiffs potentially constitute a large and hostile crowd freely able to bring prosecutions designed to vindicate their beliefs, and to do so unencumbered by the legal and practical checks" on "public enforcement agencies").

credit report), but who have even *benefited* from the alleged violation (*e.g.*, when inaccuracies favor the consumer). Such suits are not just a theoretical possibility. They happen with some frequency.

For example, in *Harris v. Experian Information Solutions, Inc.*, No. 6:06-cv-1808-GRA (D.S.C. June 30, 2009), the plaintiff class claimed that Experian and other credit reporting agencies had violated the FCRA's requirement to "follow reasonable procedures to assure maximum possible accuracy" of consumer credit reports, 15 U.S.C. § 1681e(b), by failing to report consumers' credit limits for their Capital One credit cards (information that Capital One refused to provide). 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. *Harris*, No. 6:06-cv-1808-GRA, slip op. at 5. Despite the fact that he had actually benefited from the alleged violation, the named plaintiff sought to represent a class of over four million consumers, which, at $100 to $1000 per violation, sought aggregate statutory damages between $400 million and $4 billion.[5]

Likewise, in *White v. Experian Information Solutions*, *Inc.*, No. 05-cv-1070-DOC-MLG (C.D. Cal. Jan. 26, 2009), the plaintiff claimed that Experian and the two other nationwide consumer reporting

---

[5] The court ultimately granted summary judgment for Experian on the ground that the omitted information did not violate the FCRA's accuracy and reasonable procedures requirements, but only after first certifying a class that *included* the consumers who benefited from the alleged violation. *Harris*, No. 6:06-cv-1808-GRA, slip op. at 8-12.

agencies, Trans Union and Equifax, violated the FCRA by failing to report that certain debts had been discharged in bankruptcy. The claimed error, however, had no impact on many debtors and actually improved the credit scores of many other debtors. *Id.* slip op. at 9. Nevertheless, the plaintiffs sought between hundreds of millions and billions of dollars in statutory damages on behalf of a class of nearly eight million consumers.[6]

Similarly, in *Geiger v. Consumerinfo.com, Inc.*, No. SACV11-455 JVS (C.D. Cal.), the plaintiff claims that an Experian affiliate violated FCRA disclosure requirements on three websites that offered promotional deals on credit reports when consumers signed up for trial memberships in a credit monitoring service. Even though the named plaintiff conceded that he was not deceived by any statements on the websites and, in fact, left the website he visited without signing up, paying any money, or entering any transaction with the defendant, he seeks to represent a class of "all visitors" to the three websites—which receive over 12,000 visits per day.

---

[6] In a "tentative" ruling, the district court refused to certify a nationwide class of consumers whose debts were discharged in bankruptcy but whose credit reports showed discharged debts as due and owing, noting "that serious constitutional issues are at issue in this case due to the requirement, under Article III of the U.S. Constitution, that each plaintiff 'allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief' in order to have standing to bring suit." *White*, No. 05-cv-1070-DOC-MLG, slip op. at 11. The case settled, however, before any definitive ruling.

Thus without claiming any injury in fact, the plaintiff seeks billions of dollars in statutory damages.[7]

Such no-harm statutory damages suits are not limited to the credit reporting industry. Numerous lawsuits were filed in the wake of the 2003 Fair and Accurate Credit Transactions Act (FACTA), which required retailers to redact the expiration date and all but the last five digits of a credit card number on all electronically printed receipts. 15 U.S.C. § 1681c(g). In many of these putative class actions the plaintiffs claimed no actual injury from the failure to redact, but nevertheless sought hundreds of millions or even billions of dollars in statutory damages—damages that, in many cases, exceeded the net worth of the defendants. In *Lopez v. KB Toys Retail, Inc.*, No. CV 07-144-JFW (CWx), 2007 U.S. Dist. LEXIS 82025, at *14-15 (C.D. Cal. July 17, 2007), for example, the plaintiff sought statutory damages between $290 million and $2.9 billion—the low end of which was more than 600% of the defendant's net worth—even though, as the court noted, the putative class members could not have been harmed by the inclusion of the first four (instead of last five) digits of their credit card numbers, as those digits merely identify the issuing bank—information which is properly included on a receipt. And in *Evans v. U-Haul Co. of California*, No. CV 07-2097-JFW, 2007 U.S. Dist. LEXIS 82026, at *14-17 (C.D. Cal. Aug. 14, 2007), the plaintiff sought between $115 million and $1.5 billion in statutory damages (compared to the defendant's net worth of

[7] The defendants' motion to dismiss on standing and other grounds is currently pending.

$118 million) for the defendant's inclusion of expiration dates on receipts, even though she admitted she suffered no harm from the practice. As the court noted: "In fact, Plaintiff was so unconcerned about identity theft that she attached the debit card and credit card receipts from Defendant's stores to her declaration without redacting the expiration date." *Id.* at *17.[8] *See generally* Scheuerman, *supra* at 104-06, 111-14, 134-35.

Likewise, in *Taylor v. Acxiom Corp.*, No. 2:07cv0001, 2008 U.S. Dist. LEXIS 115940 (E.D. Tex. Sept. 9, 2008), *aff'd*, 612 F.3d 325 (5th Cir. 2010), the plaintiffs sought a staggering $5 trillion in statutory damages for alleged violations of the Driver's Privacy Protection Act (DPPA), 18 U.S.C. §§ 2721-2725, on behalf of a class of 20 million Texas drivers.

---

[8] Although the district court in both *Lopez* and *Evans* denied class certification in part because the staggering amount of statutory damages sought was wholly out of proportion to the harm alleged (*i.e.*, none), it is not clear that the district court would reach the same decision today in light of the Ninth Circuit's subsequent decision in *Bateman v. American Multi-Cinema, Inc.*, 623 F.3d 708, 721 (9th Cir. 2010), which held that a district court abused its discretion in failing to certify a FACTA credit-card receipt class on the ground that an aggregate statutory damages award of between $290 million and $2.9 billion would be out of proportion to any harm suffered. *See also Kesler v. Ikea U.S., Inc.*, No. SACV 07-568 JVS (RNBx), 2008 WL 413268, at *7 n.4 (C.D. Cal. Feb. 4, 2008) (noting, in certifying FACTA expiration-date class seeking statutory damages of $240 million to $2.4 billion, that risk of actual harm was "irrelevant"), *superseded in part by statute*, Pub. L. No. 110-241, 122 Stat. 1565 (June 3, 2008) (retroactively exempting expiration-date violations that occurred between December 4, 2004 and June 3, 2008 from FACTA willfulness liability).

Although they claimed that the defendants had violated the DPPA by obtaining the entire database of Texas driver information from the Texas Department of Public Safety (to avoid the need for piecemeal requests each time a defendant had a lawful need to access driver information), the plaintiffs did not claim any injury in fact—that is, they did not claim that any defendant used or disclosed their personal information for any impermissible purpose. *Id.* at *32.[9]

D. Statutory damages class actions of this type—where plaintiffs have suffered no injury, or worse, have actually benefited, from alleged violations—starkly present the precise dangers this Court has repeatedly warned against in its Article III standing cases.

A statutory damages scheme that allows plaintiffs to bring suit without the need to show any actual injury functions much like the bounty based private-attorney-general actions that Article III forbids. *See Vermont Agency*, 529 U.S. at 772-73; *Nike Inc. v. Kasky*, 539 U.S. 654, 661 (2003) (Stevens, J., concurring in dismissal of cert.) (plaintiff "proceeding as a private attorney general . . . does not have Article III standing"). While such statutory damages

[9] The district court dismissed for lack of Article III standing and for failure to state a claim. The Fifth Circuit affirmed the district court's determination that the plaintiffs failed to state a claim under the DPPA without expressly reaching the standing question. But it noted in dicta that the plaintiffs would have standing to challenge the bulk distribution of the entire Texas driver database despite the fact that they alleged no unlawful disclosure or use that might constitute a concrete injury. 612 F.3d at 340 n.15.

suits are not pure private-attorney-general actions in which any member of the general public can sue any defendant to enforce the law, eligible plaintiffs are not differentiated from the general public by any injury they have suffered. Under the FCRA, for example, the private right of action extends to statutory violations "with respect to any consumer." 15 U.S.C. § 1681n. But on the interpretation pressed by many plaintiffs (and accepted by some courts), an FCRA violation need not cause consumers any actual harm to be "with respect to" them.[10] *Cf. Chao*, 540 U.S. at 624 (noting that many statutory causes of action require "adverse effect," which is "term of art identifying a potential plaintiff who satisfies the injury-in-fact and causation requirements of Article III standing.").

Thus in no-harm statutory damages suits, as in a private-attorney-general scheme, the courts are impermissibly enlisted into hearing abstract claims of statutory violations unconnected to any concrete individual injury. The plaintiffs in such suits are not seeking to "obtain[] compensation for, or prevent[], the violation of a legally protected right," they seek only a bounty for prevailing in the litigation—little different from "a wager upon the outcome." *Vermont Agency*, 529 U.S. at 772-73. Indeed, in many FCRA

---

[10] Moreover, "with respect to any consumer" is not a meaningful limitation on suits against nationwide consumer reporting agencies like Experian. There is no meaningful distinction between a consumer reporting agency's practices "with respect to" consumers and the general public because consumer reporting agencies maintain files on just about everyone who engages in economic transactions in the United States.

cases, for example, the named plaintiffs will actually waive any claims 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); *Murray*, 434 F.3d at 952-53. 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.

Moreover, the targets of no-harm statutory damages suits are threatened with one of the very dangers Article III's injury-in-fact requirement is designed to prevent—arbitrary enforcement by private bounty hunters who lack any accountability and whose prosecutorial discretion is limited, not by any injury inflicted upon them, but only by the creativity of their claims. *See* Grove, *supra* at 784, 791, 807-09.

These dangers are exacerbated when no-harm statutory damages suits are brought as class actions. Aggregation of statutory damages claims in a class action can lead to staggering liability that can cripple or destroy businesses, even in the absence of any actual harm. For companies like Experian, for example, the FCRA's statutory damages of $100 to $1000 per violation can quickly add up to crushing liability, considering that Experian maintains credit files on over 200 million customers. *See Trans Union LLC v. Federal Trade Comm'n*, 536 U.S. 915, 917 (2002) (Kennedy, J., dissenting from denial of cert.) ("Because the FCRA provides for statutory damages

of between $100 and $1000 for each willful violation, petitioner [a nationwide consumer reporting agency,] faces potential liability approaching $190 billion."); Scheuerman, *supra* at 104. The potential for such enormous windfalls, drives entrepreneurial lawyers to seek out even arguable violations of the FCRA with respect to largest possible classes of consumers.

Faced with potential liability in the hundreds of millions or billions (or even trillions, *see Taylor*, 2008 U.S. Dist. LEXIS 115940) of dollars—liability that would cripple or destroy even large companies—defendants are put under tremendous pressure to settle, even when the class's claims are questionable and the defendants have meritorious defenses. This Court has often noted "the risk of '*in terrorem*' settlements that class actions entail." *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1752 (2011) ("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."); *see also In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995) (Posner, J.) (noting "intense pressure to settle"); Henry J. Friendly, *Federal Jurisdiction: A General View*, 120 (1973) (calling settlements induced by small probabilities of immense judgments in class actions "blackmail settlements"). And the risk of defendants being forced into unfair settlements is exacerbated in statutory damages class actions. As Justice Ginsburg recently explained: "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." *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1465 n.3 (2010) (Ginsburg, J., dissenting); *see also Parker v. Time Warner Entm't Co.*, 331 F.3d 13, 22 (2d Cir. 2003) (aggregated statutory damages claims can produce "an *in terrorem* effect on defendants, which may induce unfair settlements"); *id.* at 29 (Newman, J. concurring) (same).[11]

Worse still, if the availability of statutory damages on an aggregated basis is decoupled from any actual injury suffered by the plaintiffs—as the decision below would allow—private enforcement of consumer protection statutes threatens to become arbitrary. *Cf.* Grove, *supra* at 808-09, 828. Entrepreneurial lawyers representing statutory damages classes will

---

[11] Further, because statutory damages schemes are typically intended "to encourage the filing of individual lawsuits as a means of private enforcement of consumer protection laws" where damages are frequently small and difficult to quantify, when statutory damages claims are combined with the class action mechanism—also designed to facilitate litigation of low-value claims which there would otherwise be no incentive to bring—the resulting potentially enormous aggregate liability "distorts the purposes of both statutory damages and class actions." *Parker*, 331 F.3d at 22. The sort of double counting that results when claims for statutory damages, which are decoupled from actual harm precisely to enable individual litigation, are aggregated into a class action can distort Congress's underlying remedial scheme, resulting in both overenforcement and overdeterrence that is counterproductive to the overarching statutory goal. *See* Richard A. Nagareda, *Aggregation and its Discontents: Class Settlement Pressure, Class-wide Arbitration, and CAFA*, 106 Colum. L. Rev. 1872, 1878, 1885-87 (2006); Scheuerman, *supra* at 107-08, 111-15.

not seek out the defendants and violations that cause the most harm to consumers (as we would expect an accountable Executive Branch to do), but will instead have every incentive to seek out violations that maximize class size—and therefore the aggregated statutory damages bounty—regardless of whether the violations actually injure anyone (or, indeed, even benefit class members). *See, e.g.*, *Harris v. Experian Information Solutions, Inc.*, No. 6:06-cv-1808-GRA (D.S.C. June 30, 2009); *White v. Experian Information Solutions*, *Inc.*, No. 05-cv-1070-DOC-MLG, (C.D. Cal. Jan. 26, 2009); *Geiger v. Consumerinfo.com, Inc.*, No. SACV11-455 JVS (C.D. Cal.). And with the *in terrorem* effect of such massive potential damages, entrepreneurial lawyers need not even bring claims for *actual* violations; so long as the violation is arguable and the class large enough, defendants will be forced to settle or risk bankruptcy.

For these reasons, allowing plaintiffs to sue for statutory damages without the need to show any injury in fact—as the decision below does—would result in private suits that an accountable Executive would never consider bringing, either because of the absence of harm or merit. And such no-harm statutory damages suits would infringe on the Executive's power and duty to "take Care that the Laws be faithfully executed." *Lujan*, 504 U.S. at 577 (quoting Art. II, § 3). The result would be arbitrary and uneven enforcement—targeting the largest classes rather than the clearest or most harmful violations—and a role for the courts that goes well beyond the properly limited Article III function of adjudicating actual disputes involving actual injuries.

E. Finally, there is little worry that adhering to Article III's requirements and barring private actions by individuals who have suffered no actual injury will cause statutes like the FCRA and RESPA to go unenforced. Like many other statutory schemes that incorporate statutory damages, both the FCRA and RESPA provide for agency enforcement as well. *See* 15 U.S.C. § 1681s (providing for enforcement of FCRA by the Federal Trade Commission, other executive agencies, and state attorneys general); 12 U.S.C. § 2607(d)(1), (4) (providing for criminal penalties and civil enforcement of RESPA by Secretary of Housing and Urban Development or state attorneys general). Under the separation-of-powers principles embodied in the Constitution, enforcement by executive agencies—who are accountable to the public and whose prosecutorial discretion is cabined by legal and political checks—is the proper means for vindicating the public's interest in ensuring that the law is obeyed. *See Lujan*, 504 U.S. at 576-77; *see also In re Trans Union Corp. Privacy Litig.*, 211 F.R.D. 328, 351 (N.D. Ill. 2002) ("[A]ny 'uninformed victims' who have suffered no actual economic damage, have been and continue to be protected by the FTC's enforcement of the [FCRA] and regulations."), *appeal dismissed sub nom*, *Albert v. Trans Union Corp.*, 346 F.3d 734 (7th Cir. 2003).

Moreover, private suits by plaintiffs who *have* suffered actual injury will serve as a further deterrent to statutory violations—without the need to expand judicial authority beyond the limits set by Article III . *See, e.g.*, *In re Trans Union*, 211 F.R.D. at 351 ("[T]he court concludes that regulation by the FTC, coupled with individual actions for damages (and attorney fees), is superior to a class action for

statutory damages by tens of millions of consumers who claim no actual economic loss."). And Congress can (and does with respect to both the FCRA and RESPA) make individual suits by plaintiffs with only small damages practicable by providing for an award of reasonable attorneys' fees to prevailing plaintiffs. Such suits advance statutory purposes without exceeding the courts' traditional and proper role of vindicating individual rights and remedying individual injuries. *See Summers*, 129 S. Ct. at 1148; *Lujan*, 504 U.S. at 576.

CONCLUSION

For the foregoing reasons, the judgment of the Ninth Circuit should be reversed.

Respectfully submitted.

MEIR FEDER
Counsel of Record
D. THEODORE RAVE
JONES DAY
222 East 41st Street
New York, NY 10017
(212) 326-3939
mfeder@jonesday.com

DANIEL J. MCLOON
JONES DAY
555 South Flower Street
50th Floor
Los Angeles, CA 90071
(213) 489-3939

Counsel for Amicus Curiae

August 26, 2011