No. 17-806

In The
Supreme Court of the United States

SPOKEO, INC.,

Petitioner,

v.

THOMAS ROBINS, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF RETAIL LITIGATION CENTER, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the injury in fact requirement is satisfied by claimed intangible harm to an interest protected by the underlying statute, even if the plaintiff cannot allege that she suffered either real-world harm or an imminent risk of such harm.

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INTEREST OF *AMICUS CURIAE*[1]

The Retail Litigation Center, Inc. (RLC) is a public-policy organization that identifies and engages in legal proceedings affecting the retail industry. The RLC's members include many of the country's largest and most innovative retailers. They employ millions of workers throughout the United States, provide goods and services to tens of millions of consumers, and account for tens of billions of dollars in annual sales. The RLC seeks to provide courts with retail-industry perspectives on important legal issues and to highlight the potential industry-wide consequences of significant pending cases.

This case is important to the RLC's members because they continue to be subjected to no-harm lawsuits, even after this Court's exhortation in *Spokeo I* that Article III standing requires demonstration of actual harm beyond the mere recitation of a statutory violation. This is a matter of pressing importance for the RLC's membership, because defending against no-harm lawsuits does nothing to benefit consumer welfare or protect their employees; rather, it robs resources from substantive compliance efforts and innovation.

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[1] Counsel of record for all parties received timely advance notice of the intent to file this brief and consented to the filing of the brief. S. Ct. R. 37(2)(a). No counsel for any party authored this brief in whole or in part, and no person or entity other than *amicus curiae* or its counsel made a monetary contribution intended to fund the brief's preparation or submission.

INTRODUCTION AND SUMMARY OF ARGUMENT

The federal and state statutes that retailers must master are all but infinite. From mom-and-pop stores to nationwide chains, retailers invest significant time, money, and personnel into meeting each and every one of their statutory obligations. It does their customers, employees, and communities no good for retailers to be forced to divert those resources toward defending against purposefully manufactured lawsuits seeking huge monetary penalties for alleged statutory violations that harmed no one.

But such is the result that will inexorably flow from the rule adopted by the Ninth Circuit and at least two other courts of appeals, which departs from several other circuits in permitting plaintiffs (and, perhaps more precisely, plaintiffs' attorneys) to bring lawsuits based on harm to some statutory interest rather than harm to an actual real-world person. The wave of such cases has already begun, notwithstanding this Court's admonition in *Spokeo I* that a bare procedural violation without concrete real-world harm is not enough to establish a "case or controversy" within the meaning of Article III. This rising trend toward multi-million-dollar, no-harm cases will only get worse absent this Court's intervention.

ARGUMENT

I. Retailers Are Particularly Vulnerable To Multi-Million-Dollar, No-Harm Suits Under A Wide Variety Of Statutes And Regulations.

As the Petition explains (Pet. 14-21), a circuit split has arisen in the wake of this Court's decision in *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016) (*Spokeo I*). In *Spokeo I*, the Court held that merely alleging a statutory violation is not enough to show a "concrete" injury that satisfies Article III standing requirements. *Id.* at 1549 (A plaintiff does not "automatically satisf[y] the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right."). Rather, a plaintiff alleging a statutory violation must still show "concrete" harm in the form of "*de facto*" or "real" harm, or the "risk of real harm." *Id.* at 1548, 1549.

That pronouncement has not settled the divergent approaches to evaluating standing in statutory-violation cases involving intangible harms. Rather, the courts of appeals have divided into two camps. The Fourth, Fifth, Seventh, and Eighth Circuits require the plaintiff to allege that the statutory violation resulted in real-world harm, or an imminent risk of such harm, to the plaintiff. *See* Pet. 14-17 (collecting cases). The Second, Third, and Ninth Circuits, on the other hand, permit standing to rest only on allegations that some interest protected by the statute is harmed, even if the plaintiff did not suffer actual or imminent real-world

harm. *See* Pet. 17-21 (collecting cases). Reflecting the disarray, the Eleventh Circuit has decisions on both sides of the split. *See* Pet. 15, 18.

This divide has major adverse consequences for retailers as plaintiffs' attorneys bypass this Court's *Spokeo I* ruling by litigating in circuits that effectively do not require a showing of concrete harm. Many laws and regulations governing the industry are subject to enforcement by class actions seeking per-violation statutory damages, without need for proof of actual damages. In such cases, whether a court follows the injury-to-plaintiff rule or the injury-to-statutory-interest rule is likely to be outcome dispositive, with the case dismissed in the former court, and the retailer facing huge potential liability wholly disproportionate to any harm in the latter.

A. The retail industry is the nation's largest private-sector employer, generating some five million jobs, supporting millions others in related sectors like wholesaling and transportation, and contributing significantly to the national economy. Kimberly Amadeo, *What is the Retail Industry? Its Impact on the Economy*, The Balance (Jul. 19, 2017).[2] Beyond employing millions of people, retailers furnish goods and services to virtually every American resident and account for billions of dollars in annual sales. In 2016, the U.S. retail industry generated $1.087 trillion, or 5.9 percent of U.S. gross domestic product. *Id.*

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[2] *Available at* https://www.thebalance.com/what-is-retailing-why-it-s-important-to-the-economy-3305718.

The industry is diverse and deeply woven into the fabric of American life. Retailers span the gamut from grocery stores to jewelers, restaurants to home improvement stores, and everything in between. As an industry that resides in the heart of every community and touches virtually every facet of the American economy, retailers take their compliance obligations seriously.

Retailers, like other businesses, expend substantial resources on regulatory compliance. The Office of Management and Budget, which considers only the costs of "major" federal rules, estimates that the major rules promulgated between fiscal year 2005 and 2014 imposed annual costs of $68 to $103 billion in 2010 dollars. Office of Mgmt. & Budget, *2015 Report to Congress on the Benefits and Costs of Federal Regulations and Agency Compliance with the Unfunded Mandates Reform Act*, at 2.[3]

While this may include a few rules that do not generally impact retailers directly, that already substantial figure is an underestimate of the compliance burden that retailers face. For example, it does not include the cost of compliance with any of the major rules adopted before fiscal year 2005 (but still on the books), nor any minor rules, which vastly outnumber the "major" ones. In the same 10-year period covered by the Office of Management and

[3] *Available at* https://obamawhitehouse.archives.gov/sites/default/files/omb/inforeg/2015_cb/2015-cost-benefit-report.pdf. Major rules are generally those rules expected to have an economic impact of $100 million or more in a single year. *Id.* at 7-8.

Budget estimate, federal agencies published 36,457 rules (about a pace of 10 per day), only 549 of which were considered "major." *Id.* at 7. Beyond this federal regulatory burden, retailers must also grapple with obligations imposed by federal statutes, state statutes, state rules, and an excessive array of local ordinances.

Retailers meet these obligations with the knowledge that compliance helps serve the safety and welfare of their customers, employees, and communities. Yet given the vast expanse of the regulatory terrain retailers must travel, and the ambiguity of many of the regulations, there are countless opportunities for even retailers with strong, good-faith compliance efforts to fall short, especially on minor, detailed technical requirements. Thus, retailers with extensive good-faith compliance programs are likely to be upended by a standing doctrine—like that adopted by the Second, Third, and Ninth Circuits—that encourages attorneys and others to scour the United States Code, the Code of Federal Regulations, and countless state and local statutes to identify technical misses that harmed nobody and then sue for billions in statutory damages.

B. In those circuits following the defined-statutory-interest-is-enough standing doctrine, there are virtually limitless possibilities for large-monetary-demand, no-harm lawsuits. Many federal and state statutes authorize statutory damages for violations of technical or procedural requirements, where it is only remotely possible that a violation could result in actual harm in the rarest of cases, and typically it does not.

Given the risks, and the high cost of class action litigation, a retailer facing a lawsuit involving no actual harm, and a very weak theory of substantive liability, nevertheless often will feel strong pressure to pay a substantial sum to settle the frivolous litigation.

But as this Court attempted to clarify in *Spokeo I*, the purpose of statutory damages is to ensure that plaintiffs who were truly harmed, but whose injuries are small or difficult to quantify, still have the possibility of recovery (and therefore an incentive to sue). *See*, *e.g.*, *Perrone v. Gen. Motors Acceptance Corp.*, 232 F.3d 433, 436 (5th Cir. 2000) ("[S]tatutory damages are reserved for cases in which the damages caused by a violation are small or difficult to ascertain."). It is unlikely that Congress or state legislatures intended statutory damages to serve as jackpots (predominantly for the attorneys promoting litigation) where no one was actually harmed. And even if there were such an intent, allowing recovery without concrete real-world injury violates Article III.

Just a few examples illustrate how easy it is, in the absence of strict adherence to Article III's standing requirements, to generate claims for millions of dollars in statutory damages based on violations of procedural requirements that caused no harm to anyone at all.

The Fair Credit Reporting Act ("FCRA"), 15 U.S.C. § 1681 *et seq.*, one of the provisions of which is at play in this case, imposes extensive technical requirements on any entity reporting, obtaining, or furnishing consumer reporting information as defined by the

statute. *See*, *e.g.*, *id.* §§ 1681b–1681x. Retailers are frequently targeted in no-harm class-action lawsuits for alleged violations of technical requirements, like the FCRA's mandate that companies include a "stand-alone disclosure" during the job-application process. *See id.* § 1681b(b)(2)(A)(i). The statute's broad and, as this Court has noted, "less-than-pellucid . . . text," *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 70 (2007), has made procedural FCRA claims an increasingly attractive endeavor for the plaintiffs' bar. Automatic statutory damages of $100 to $1,000 per violation are available in the case of "willful" violations, as well as punitive damages and attorneys' fees and costs. 15 U.S.C. §§ 1681n, 1681o.[4] The highly technical statutory framework combined with the large dollar amounts attached to each alleged violation can add up to enormous potential paydays in class actions—paydays that are not warranted in the absence of actual harm.

The Fair and Accurate Credit Transactions Act ("FACTA"), 15 U.S.C. § 1681 *et seq.*, likewise poses a land mine for retailers, while offering a treasure trove for attorneys hunting for nuisance-settlement-value no-harm suits. Take, for example, the mandate that "no person that accepts credit cards or debit cards for the transaction of business shall print more than the last 5 digits of the card number or the expiration date upon any receipt provided to the cardholder at the point of the sale or transaction." *Id.* § 1681c(g)(1). If proof of actual harm is not required, a single receipt with too

[4] A "willful" violation need not be knowing. *Safeco*, 551 U.S. at 57.

much credit card information that no one actually saw could expose a merchant to anywhere from $100 to $1,000 in statutory damages without proof of any actual harm, as well as punitive damages, attorneys' fees, and costs. *Id.* § 1681n(a). Imagine this multiplied across millions of consumers making countless purchases from the same retailer in a nationwide class action.

Retailers could also face potential liability under the Truth in Lending Act ("TILA"), 15 U.S.C. § 1601 *et seq*. For example, under section 1637(a)(5) and its implementing regulation, 12 C.F.R. § 1026.5(b)(3), if retailers do not adequately disclose how returned payment or late payment fees are calculated, they might be subject to statutory damages—even if no such fees are ever charged. Statutory damages here too can add up fast, with each bare technical violation potentially subjecting a retailer that offers credit to between $100 and $5,000 in damages, depending on the type of credit. *See* 15 U.S.C. § 1640(a)(2)(A).

Federal employment statutes likewise pose a trap for retailers, one of the nation's largest private-sector employers. Even absent any demonstrated harm to employees, failure to comply meticulously with every letter of highly technical laws can yield exposure to potentially devastating damages. For example, the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001–1461, imposes fiduciary duties on sponsors of retirement plans, as well as specific procedural notice and disclosure requirements. *E.g.*, *id.* §§ 1022(b), 1102(a)(1). ERISA authorizes plan

participants to bring civil actions against plan fiduciaries for breaches of those duties, *see id.* § 1132(a)(2), with statutory damages available, *e.g.*, *id.* § 1132(c)(3) (up to $100 per day for each day requisite notice not provided).

Retailers engaging in e-commerce face yet more liability exposure from violations of statutes such as the Electronic Communications Privacy Act, 18 U.S.C. § 2511 *et seq.*, also known as the Federal Wiretap Act, under which creative lawyers attempt to characterize certain information gathering practices on retailers' websites as illegal wiretaps, irrespective of intent or actual harm. The Wiretap Act permits statutory damages of the greater of $100 a day for each day of violation or $10,000. *Id*. § 2520(c)(2)(B).

Or, if their web sites or mobile apps have video content, every time a customer watches a video that describes how to use or wear a product, retailers face the possibility of a lawsuit. Every computer and cell phone has a unique identification number that could constitute "personally identifiable information" that could potentially be shared with third parties in the process of finalizing a transaction, and at least arguably (or arguably enough to leverage a settlement) violate the consumer's "statutorily defined rights to privacy" under the Video Privacy Protection Act ("VPPA"), 18 U.S.C. § 2710. The VPPA entitles plaintiffs to statutory damages of $2,500 per violation. *See id.* § 2710(c)(2)(A).

The above sampling is but a drop in the bucket of the vast array of federal statutes that retailers strive to comply with, and if they fall short even on the smallest detail, technical violations can yield boundless statutory damages even in the absence of actual harm in those circuits that take the Ninth Circuit's approach. And for every federal statute, there are possibly 50 state laws and even more local requirements, often with broader liability and higher damages than their federal counterparts. Plus there are unique state statutes, beyond federal-law copycats, that expose retailers to potentially unbounded liability.

For example, New Jersey's Truth-in-Consumer Contract, Warranty and Notice Act ("TCCWNA"), N.J. Stat. Ann. § 56:12-14 *et seq*., has brought a wave of class action complaints in recent years alleging that retailers violated the statute by including certain provisions in their online terms and other consumer-facing notices and agreements. *See* Jeffrey Jacobson, *New Jersey's TCCWNA: New Year, Same Uncertainty*, LAW360 (Jan. 25, 2017).[5] TCCWNA is an umbrella liability statute under which a plaintiff need only allege that he was provided with (or possibly even shown) a warranty, contract or notice pertaining to personal, family or household merchandise which includes language that violates a "clearly established" right under New Jersey or federal law. N.J. Stat. Ann. § 56:12-15. Even a statement that the contractual

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[5] *Available at* https://www.law360.com/articles/884730/new-jersey-stccwna-new-year-same-uncertainty.

provision does not apply if contrary to applicable state law will not protect the merchant unless the statement specifically identifies that the provision in its nationwide contract does not apply in New Jersey. This New Jersey statute then bootstraps statutory damages on to any and every other potentially-implicated federal or New Jersey statute, providing for a $100 minimum "civil penalty" per violation, actual damages, or both, at the election of the consumer, plus attorneys' fees, costs and injunctive relief. *Id.* § 56:12-17.

A California law affords a second example of retailers' vast liability exposure under state law, particularly given that State's friendliness to class-action suits.[6] California's Song-Beverly Credit Card Act of 1971, Cal. Civ. Code § 1747.08, prohibits retailers from requesting and recording personal identification information from customers during the course of a credit card transaction, such as, e.g., zip codes. *See* pp. 16-17, *infra*. Repeat violations of section 1747.08 can result in civil penalties of $1,000 per violation. Cal. Civ. Code § 1747.08(e). Thus, if a merchant has an information gathering policy that violates section 1747.08, that merchant may be subject to a $1,000 penalty for every credit card transaction in which it engages.

These examples, taken from only a handful of state and federal statutes, are but the tip of the iceberg.

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[6] Carol Williams, *Small cases are big business in California courtrooms*, LOS ANGELES TIMES (Jan. 1, 2012), *available at* http://articles.latimes.com/2012/jan/01/local/la-me-legal-peanuts-20120102.

And the limitless possibilities offered by similar statutes across the nation mean that entrepreneurial but destructive no-harm litigation will only increase with the imprimatur of those courts of appeals that have effectively allowed bare statutory violations to satisfy Article III's concrete-harm requirement. Nationwide retailers that are subject to jurisdiction in every State will pay the price, as will their consumers and employees, as resources are increasingly directed to defending against lawsuits where no one has been harmed.

II. There Is A Pressing Need For This Court's Intervention To Resolve The Outcome-Dispositive Circuit Split On Standing That Increasingly Encourages No-Harm Suits.

The possibility of million—or even billion—dollar suits for the kinds of technical statutory violations outlined above is not just a hypothetical. It is the ever-growing reality, fostered by courts in those circuits that permit standing to be established by an intangible injury to a statutory interest, instead of requiring a plaintiff to show that he or she personally suffered, or is likely to suffer, actual or imminent harm. Nationwide retailers and those subject to jurisdiction in no-harm circuits will be subject to expensive private enforcement for every even arguable technical violation of a statute, while others in circuits enforcing Article III limits more vigorously will risk litigation only if their actions cause harm. Such divergent results cry out for this Court's intervention.

A few examples illustrate how some courts have permitted suits against retailers alleging only bare statutory violations, without real-world harm, to move forward during the year and a half following *Spokeo I*. Contrary to Respondent's supposition that divergent results stem only from divergent claims (BIO 19-20), courts in those circuits requiring actual or imminent harm, on the other hand, have stopped virtually identical suits in their tracks.

In *Wood v. J Choo USA, Inc.*, 201 F. Supp. 3d 1332 (S.D. Fla. 2016), a plaintiff purchased a pair of sunglasses at Jimmy Choo in Palm Beach Gardens and received a receipt that displayed her credit card's expiration date. *Id.* at 1334. She alleged that displaying the expiration date violated the FACTA. *Id.* Her suit was brought on behalf of a nationwide class of people receiving such a receipt at a Jimmy Choo store for a two-year period, approximately 135,000 consumers. *Wood v. J Choo USA, Inc.*, No. 15-CV-81487, 2017 WL 4304800, at *1, *5 (S.D. Fla. May 9, 2017). The district court denied the retailer's post-*Spokeo* motion to dismiss for lack of standing, holding that the allegation that "Jimmy Choo presented [the plaintiff] with a printed receipt containing her credit card expiration date" was by itself sufficient to "demonstrate an injury in fact" because "Congress created a substantive legal right for [her] . . . to receive receipts truncating [her] . . . expiration date[ ]." *Wood*, 201 F. Supp. 3d at 1340. Even if the receipt had been immediately shredded without having been handed to anyone, it would not have mattered to the court's

analysis, which concluded that the plaintiff "suffered a concrete harm as soon as Jimmy Choo printed the offending receipt." *Id*.

Willful FACTA violations are subject to statutory damages under the FCRA of up to $1,000 per violation. 15 U.S.C. § 1681n(a)(1). Multiplied by the approximately 135,000 class members, Jimmy Choo faced potentially upwards of $135 million in statutory damages. *See Wood*, 2017 WL 4304800, at *5. The case settled for $2.5 million, of which about $840,000 went to class counsel for fees and expenses, leaving enough in the settlement fund for approximately $12 per class member. *Id.* at *5-6. In courts on the other side of the split, the suit would have been dismissed at the outset. *See Meyers v. Nicolet Rest. of De Pere, LLC*, 843 F.3d 724, 727 (7th Cir. 2016) (dismissing putative class action based on display of expiration date on receipt because the violation created no harm nor "any appreciable risk of harm"); *see also Llewellyn v. AZ Compassionate Care Inc.*, No. CV-16-04181, 2017 WL 1437632 (D. Ariz. 2017), at *2-5 (describing conflicting FACTA standing rulings across circuit and district courts), *appeal filed*, No. 17-16074 (9th Cir. May 24, 2017).

Other examples abound. In *Hargett v. Amazon.com DEDC LLC*, 235 F. Supp. 3d 1320 (M.D. Fla. 2017), three applicants for positions with an Amazon fulfillment center sued on behalf of a nationwide class, alleging that Amazon willfully violated the FCRA's so-called stand-alone disclosure requirement. *Id.* at 1322-1323. The FCRA provides

that before obtaining certain kinds of background information for employment purposes, a prospective employer must disclose, "in a document that consists solely of the disclosure, that a consumer report may be obtained for employment purposes." 15 U.S.C. § 1681b(b)(2)(A)(i). The district court held that inclusion of additional information on a form (such as information under a heading captioned "Additional State Law Notices") satisfied standing requirements, reasoning that the inclusion of extraneous information "is the type of violation for which plaintiffs need not allege any harm beyond that which Congress identified." *Hargrett*, 235 F. Supp. 3d at 1323, 1327. Courts in circuits that require actual or imminent personal harm, on the other hand, have dismissed very similar claims for lack of standing. *See Landrum v. Blackbird Enters., LLC*, 214 F. Supp. 3d 566, 571–573 (S.D. Tex. 2016) (dismissing FCRA action for lack of standing when prospective employee received disclosure of background check in application but not in a separate disclosure).

State statutes, too, have formed the basis of no-harm class actions seeking large aggregate statutory damages. A final example demonstrates not only the incredible mismatch between potential liability (huge) and harm (zero) in suits that are allowed to go forward in permissive-standing circuits, but also how counterproductive such suits can be for the actual welfare of consumers.

A district court in the Ninth Circuit denied a motion to dismiss for lack of standing in a class action

based on Wal-Mart's alleged policy of requesting or recording zip codes when customers used certain credit cards. *Fraser v. Wal-Mart Stores, Inc.*, No. 2:13-CV-00520, 2016 WL 6094512, at *6 (E.D. Cal. Oct. 18, 2016). Requesting zip codes was alleged to violate California's Song-Beverly Credit Card Act, which prohibits a retailer from requesting "'personal identification information' when a consumer makes a credit card purchase." *Id.* at *4 (citing Cal. Civ. Code § 1747.08(a)(2)).

There was no allegation that recording the zip codes resulted in any "undesired marketing contact, credit card fraud, identity theft, stalking," or hacking—or even that Wal-Mart did anything with the zip codes that increased the risk of any of these harms. *Id.* at *6. The only allegation was that collection of zip codes in some undefined way "exposed" plaintiffs to such harms. *Id.* The certified class included every consumer in California for which Wal-Mart collected a zip code from 2012 through the date of trial. *Id.* at *2. The California statute imposes civil penalties of up to $1,000 per violation. Cal. Civ. Code § 1747.08(e). Even a conservative back-of-the-envelope calculation would suggest that Wal-Mart faced potentially millions, if not billions, in statutory penalties despite the absence of even an allegation that any customer suffered any harm from collection of a zip code.[7]

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[7] Wal-Mart estimates that more than 260 million customers visit its 11,695 stores each week, an average of about 22,231 customers per store per week. *See* Wal-Mart, About Us, https://corporate.walmart.com/our-story. If that average holds for

The result would have been different, and the case dismissed, in a court of appeals on the other side of the circuit split. In *Hancock v. Urban Outfitters, Inc*., 830 F.3d 511, 514 (D.C. Cir. 2016), the court held that a plaintiff had no standing to bring suit alleging violations of two District of Columbia consumer-protection statutes based on Urban Outfitters' practice of collecting customers' zip codes while processing credit card transactions. Where the only injury was being "'asked for a zip code when . . . [under] the law they should not have been,'" the plaintiff had not alleged the requisite "risk of real harm." *Id.* (citation omitted).

This disparate outcome based only on geography is bad enough, but it is also directly contrary to the purpose of the underlying statute. The California statute at issue was designed to protect against harms such as credit card theft. *Fraser*, 2016 WL 6094512 at *5. Wal-Mart collected zip codes to serve precisely that same purpose. Some credit card issuers required collection of zip code data at the point of sale to stop fraudulent transactions that could be uncovered if the consumer could not correctly identify the billing zip

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Wal-Mart's 304 stores in California, some 6.76 million customers visit a Wal-Mart-owned store in California each week. *See* Wal-Mart, Our Locations, https://corporate.walmart.com/our-story/locations/united-states/california. Even if zip codes were requested in only a tiny fraction of those transactions, potential civil penalties would likely reach hundreds of millions of dollars over the course of the five-years-and-counting span of the class.

code associated with the card at the time of payment. *Id.* at *1.

Ultimately, if this litigation forces retailers to change their practices on pain of huge penalty judgments, the topsy-turvy result will be that efforts to prevent real-world credit-card-fraud harm will be replaced by efforts to achieve technical compliance that remedies no harm at all. This single micro-level example of putting compliance form over substance speaks volumes. Absent this Court's review, irrational litigation results will occur over and over as more and more litigation is driven into permissive-standing circuits, seeking significant money penalties from businesses for their failure to do the impossible—achieve regulatory perfection.

Many of the RLC's members have stores nationwide. For them, permissive venue rules will make it easy for plaintiffs to sue only in districts where circuit law on standing permits suits to go forward without actual or imminent harm. *See* 28 U.S.C. § 1391(b)(1), (c)(2) (providing for venue, *inter alia*, "in a judicial district in which any defendant resides, if all defendants are residents of the State in which the district is located," where "residence" means being "subject to the court's personal jurisdiction"). Plaintiffs, moreover, will often bring such claims on a nationwide-class basis, at least where the national retailer is subject to general jurisdiction in that venue.

This recipe of statutory damages, no-harm standing, and a nationwide class is likely to yield one

consistent result: settlements, even for cases that lack merit. *Cf. 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."); *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 559 U.S. 393, 445 n.3 (2010) (Ginsburg, J., dissenting) ("Even in the mine-run case, a class action can result in 'potentially ruinous liability.' . . . 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.").

That settlement pressure will apply with added force to national retailers or retailers with a more limited geographic scope that happen to fall within a no-harm-needed circuit. Some retailers will thus be at a competitive disadvantage solely due to the vagaries of geography, and forced to shift their resources from innovation, providing quality products and services and savings to consumers, and preventing actual harm to defending (or settling) no-harm lawsuits. This destructive trend toward high-dollar, no-harm litigation—imposed only on some businesses, not others—will only get worse absent this Court's intervention.

CONCLUSION

The petition should be granted.

Respectfully submitted.

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