No. 20- ______

In the Supreme Court of the United States

ASHLEY NETTLES, PETITIONER,

v.

MIDLAND FUNDING LLC & MIDLAND CREDIT MANAGEMENT, INC.

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

PETITION FOR A WRIT OF CERTIORARI

CURTIS C. WARNER
5 E. Market St., Suite 250
Corning, NY 14830
(888) 551-8685
cwarner@warner.legal

JAMES C. PHILLIPS
Donald P. Kennedy Hall
One University Dr.
Orange, CA 92866
714-628-2543
jcphillips@chapman.edu

GENE C. SCHAERR
Counsel of Record
HANNAH C. SMITH
SCHAERR | JAFFE LLP
1717 K Street NW, St. 900
Washington, DC 20006
(202) 787-1060
gschaerr@schaerr-jaffe.com

Counsel for Petitioner

QUESTIONS PRESENTED

Congress enacted the Fair Debt Collection Practices Act to protect individuals against debt collectors' abusive and deceptive tactics. With eighty percent of Americans in debt, and conditions only worsening with the pandemic-induced recession, few statutes have more relevance to the average American. Yet five years after *Spokeo* v. *Robins*, 136 S.Ct. 1540 (2016), the circuits are almost evenly split on what a plaintiff must allege under the Act to satisfy Article III standing's concrete-injury requirement. The questions presented are:

1. Whether, under *Spokeo*, it is sufficient for standing simply to allege a violation of the procedural rights created by the Fair Debt Collection Practices Act, as six circuits have held, or must a plaintiff also always allege an additional injury beyond such a violation, as five circuits (including the Seventh in this case) have held?

2. If some additional injury is required for standing under the Act, is it sufficient to allege mental distress or lost time dealing with a violation of the Act, as the Fourth, Eleventh, and D.C. Circuits have held, or is something more than mental distress or lost time required, as the Seventh (in this case) and Ninth Circuits have held?

PARTIES TO THE PROCEEDING

Petitioner Ashley Nettles was Plaintiff-Appellee in the court of appeals in No. 19-3327.

Respondents Midland Funding LLC and Midland Credit Management, Inc., were Defendants-Appellants in the court of appeals in No. 19-3327.

TABLE OF CONTENTS

QUESTIONS PRESENTED..i

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES......................................vi

INTRODUCTION...1

OPINIONS BELOW 2

JURISDICTION 2

RELEVANT STATUTORY PROVISIONS 2

STATEMENT 3

A. Legal Framework: *Spokeo* and the Fair Debt Collections Practices Act 3

B. Factual Background 8

C. Procedural History...12

REASONS FOR GRANTING THE PETITION........14

I. The First Question Involves A Wide And Widely Acknowledged Circuit Split That Is in Dire Need of Resolution by this Court. 14

A. To Establish Standing, Six Circuits Merely Require That A Plaintiff Allege a Violation of the Act. 14

B. By Contrast, Five Circuits Require an Allegation of Additional Harm Beyond a Violation of the Act. 21

C. The Decision Below, and the Multiple Circuits that Agree with Its Analysis and Conclusion,

Misinterpret This Court's Standing Doctrine. 24

II. The Second Question Is The Subject Of A Separate Circuit Split That Needs Resolution Depending Upon How the Court Resolves the First Question. 26

III. The Questions Presented Are of National Scope and Growing Importance. 29

A. Millions of Americans are in Debt and Protected by the Act. 29

B. The Pandemic-induced Recession Has Significantly Increased the Number of Americans in Need of the Act's Protections... 30

C. By Raising the Standing Bar Higher Than Article III Requires, Many Circuits are Violating the Separation of Powers. 31

IV. The Facts in This Case Make It an Ideal Vehicle to Resolve these Issues. 33

A. This Case Presents Both Issues, Allowing for More Efficient Resolution. 33

B. The Court Has Often Granted Certiorari with Only Eight Justices Participating. 34

CONCLUSION 35

APPENDIX

Seventh Circuit, No. 19-3327
(Dec. 21, 2020).. 1a

Seventh Circuit Oral Argument Transcript
(June 4, 2020)... 9a

Northern District of Illinois,
No. 18-cv-7766 Memo. Opinion & Order
(Sept. 30, 2019) 22a

TABLE OF AUTHORITIES

Cases

Adams v. *Skagit Bonded Collectors, LLC*, 836 F. App'x 544 (9th Cir. 2020) 23, 28

Beckles v. *United States*, 136 S.Ct. 2510 (Mem) (2016) 34

Beckles v. United States, 137 S.Ct. 886 (2017) 34

Ben-Davies v. *Blibaum & Assocs., P.A.*, 695 F. App'x 674 (4th Cir. 2017) 23, 27

BP P.L.C. v. *Mayor and City Council of Baltimore*, 141 S.Ct. 222 (Mem) (2020) 34

Cohen v. *Rosicki, Rosicki & Assocs., P.C.*, 897 F.3d 75 (2d Cir. 2018) 17, 18, 24

Dahda v. *United States,* 138 S.Ct. 1491 (2018) 34

Dahda v. *United States*, 138 S.Ct. 356 (Mem) (2017) 34

Demarais v. *Gurstel Chargo, P.A.*, 869 F.3d 685 (8th Cir. 2017) 16

DiNaples v. *MRS BPO, LLC*, 934 F.3d 275 (3d Cir. 2019) 19

Donovan v. *FirstCredit, Inc.*, 983 F.3d 246 (6th Cir. 2020) 16

Fern Kottler v. *Gulf Coast Collection Bureau, Inc.*, No. 20-12239, 2021 WL 529425 (11th Cir. Feb. 12, 2021) 26

Frank v. *Autovest, LLC*, 961 F.3d 1185 (D.C. Cir. 2020) 21, 24, 27

Henson v. *Santander Consumer USA Inc.*, 137 S.Ct. 1718 (2017) 6

Honig v. *Doe*, 484 U.S. 305 (1988) 5

Johnson v. *Riddle*, 305 F.3d 1107 (10th Cir. 2002) 7

Macy v. *GC Services Ltd. Partnership*, 897 F.3d 747 (6th Cir. 2018) 14, 15, 16, 24

Midland Funding, LLC v. *Johnson*, 137 S.Ct. 1407 (2017) 11

Opati v. *Republic of Sudan*, 139 S.Ct. 2771 (Mem) (2019) 34

Opati v. Republic of Sudan, 140 S.Ct. 1601 (2020) .. 34

Pennell v. *Global Trust Management, LLC,* No. 20-1524, 2021 WL 925494 (7th Cir. Mar. 11, 2021) ... 28

Pollard v. *Law Office of Mandy L. Spaulding*, 766 F.3d 98 (1st Cir. 2014) 20

Royal v. *Murphy*, 138 S.Ct. 2026 (Mem) (2018) 34

Sayles v. *Advanced Recovery Sys., Inc.*, 865 F.3d 246 (5th Cir. 2017) 19

Sharp v. *Murphy,* 140 S.Ct. 2412 (Mem) (2020) 34

Sierra v. *City of Hallandale Beach, Fla.,* No. 19-13694, 2021 WL 1799848 (11th Cir. May 6, 2021) 24

Spokeo v. *Robins*, 136 S.Ct. 1540 (2016) .... *passim*

St. Pierre v. *Retrieval-Masters Creditors Bureau, Inc.*, 898 F.3d 351 (3d Cir. 2018) 18

Thornley v. *Clearview Ai*, 984 F.3d 1241 (7th Cir. 2021) 1

Trichell v. *Midland Credit Mgmt., Inc.*, 964 F.3d 990 (11th Cir. 2020) 22, 24

United States Agency for Int'l Dev. v. *All. for Open Soc'y Int'l, Inc.*, 140 S.Ct. 2082 (2020).......... 35

United States Agency for Int'l Dev. v. *All. for Open Soc'y Int'l, Inc.*, 140 S.Ct. 660 (Mem) (2019).......... 35

Statutes

15 U.S.C. §1692 7

15 U.S.C. §1692a 30

15 U.S.C. §1692b 7

15 U.S.C. §1692c 7

15 U.S.C. §1692d 7

15 U.S.C. §1692e 2, 7, 12, 16

15 U.S.C. §1692f 2, 7, 12, 16

15 U.S.C. §1692g 7

15 U.S.C. §1692j 7

15 U.S.C. §1692k 8, 15

Other Authorities

Adam McCann, *What is the Average Credit Card Interest Rate?*, WalletHub (Jan. 5, 2021) 9

Alan Goforth, *Rising Household Debt in 2020 Could Have Snowball Effect*, BenefitsPRO (Nov. 16, 2020, 3:42 PM) 31

Average American Household Debt in 2020: Facts and Figures, The Ascent (Nov. 18, 2020) 29

Comptroller of the Currency Administrator of National Banks, *Public Disclosure*, Community Reinvestment Act Performance Evaluation (Mar. 31, 2007) 8

Erin El Issa, *2020 American Household Credit Card Debt Study*, NerdWallet (Jan. 12, 2021) 30

Federal Reserve Bank of New York, *Quarterly Report on Household Debt and Credit—2020: Q3* (Nov. 2020) 29

Heather Elliott, *Balancing as Well As Separating Power: Congress's Authority to Recognize New Legal Rights*, 68 Vand. L. Rev. En Banc 181 (2015) 32

Jeff Desjardins, *$69 Trillion of World Debt in One Infographic*, Visual Capitalist (Nov. 14, 2019) 29

Jessica Dickler, *51 Million Americans Increased Their Credit Card Debt Because of Covid*, CNBC 31

Jon Romberg, *Trust the Process: Understanding Procedural Standing Under* Spokeo, 72 Okla. L. Rev. 517 (2020) 33

Megan DeMatteo, *The Average American Has $90,460 in Debt—Here's How Much Debt Americans Have at Every Age*, CNBC 29

Ronald J. Mann, *Bankruptcy Reform and the "Sweat Box" of Credit Card Debt*, 2007 U. Ill. L. Rev. 375 (2007) 11

INTRODUCTION

This is a separation-of-powers case—but an unusual one. The typical such case involves one branch of the federal government attempting to tread on the constitutional turf of another. Here instead, one branch is pulling back to nullify the power of another: Lower federal courts are refusing to exercise Article III judicial power because of a crabbed and erroneous reading of standing doctrine, thus subverting Congress's attempt to grant certain statutory protections and private rights of action to individual debtors under the Fair Debt Collection Practices Act.

This is also a case affecting scores of millions of Americans. While in the past, few things were as American as baseball and apple pie, it is now quintessentially American to be in debt: According to a recent study, 80% of Americans carry debt. Thus, few statutes touch more American lives than the one here. And the Act's importance has only increased as the COVID-19 pandemic has caused a major recession, resulting in more Americans going further into debt.

Finally, nearly every U.S. Court of Appeals has weighed in on the questions presented. And the circuits, some of which have acknowledged the split, are nearly evenly divided. There is no need for further percolation below. What is needed now, for both lower courts and the millions of Americans in debt, is clarity from this Court. See *Thornley* v. *Clearview Ai*, 984 F.3d 1241, 1251 (7th Cir. 2021) (Hamilton, J., concurring) ("Sooner or later, *** I hope, the Supreme Court will revisit the problem of standing in private actions based on intangible injuries under a host of federal consumer-protection statutes.")

OPINIONS BELOW

The Seventh Circuit's opinion was filed on December 21, 2020 and is reprinted at Pet.App.1a. The district court's order denying Respondent's motion to compel arbitration was filed on September 30, 2019 and is reprinted at Pet.App.22a.

JURISDICTION

The Seventh Circuit entered judgment on December 21, 2020. Pet.App.1a. This Court has jurisdiction under 28 U.S.C. §1254(1).

RELEVANT STATUTORY PROVISIONS

15 U.S.C. §1692e(2)(A) & (10) provide in part:

> A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section: *** (2) The false representation of—(A) the character, amount, or legal status of any debt. *** (10) The use of any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer.

15 U.S.C. §1692f & f(1) provide in part:

> A debt collector may not use unfair or unconscionable means to collect or attempt to collect any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section: (1) The collection of any amount (including any interest, fee, charge, or

expense incidental to the principal obligation) unless such amount is expressly authorized by the agreement creating the debt or permitted by law.

STATEMENT

A. Legal Framework: *Spokeo* and the Fair Debt Collections Practices Act

1. In *Spokeo* v. *Robins*, 136 S.Ct. 1540 (2016), this Court clarified how an alleged violation of a federal statute's so-called "procedural" rights could satisfy Article III standing. The case dealt with a statute closely related to the one at issue here: the Fair Credit Reporting Act. *Id*. at 1544. That act "imposes a host of requirements concerning the creation and use of consumer reports." *Id*. at 1545. It "also provides that '[a]ny person who willfully fails to comply with any requirement [of the Act] with respect to any [individual] is liable to that [individual]' for, among other things, either 'actual damages' or statutory damages of $100 to $1,000 per violation, costs of the action and attorney's fees, and possibly punitive damages." *Ibid*. (quoting 15 U.S.C. §1681n(a)).

In *Spokeo,* Thomas Robins discovered that a search for him on Spokeo's informational website showed incorrect data regarding his marital status, parental status, age, job type, wealth level, economic health, and education status, as well as an incorrect profile picture. See 136 S.Ct. at 1546, 1554. So Robins sued Spokeo for allegedly violating the statute. *Id*. at 1546. This Court granted certiorari to determine whether Robins had satisfied the concreteness prong of Article III standing's injury-in-fact element by merely

alleging a violation of the Act without any additional harm. *Id*. at 1546, 1548.

Subsequently, the Court in *Spokeo* defined a "'concrete' injury" as one that "must actually exist." 136 S.Ct. at 1548. But the Court "confirmed *** that intangible injuries can nevertheless be concrete." *Id*. at 1549. To "determin[e] whether an intangible harm constitutes injury in fact," *Spokeo* taught that "both history and the judgment of Congress play important roles." *Ibid*. As to history, "it is instructive to consider whether an alleged intangible harm has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts." *Ibid*.

As to Congress's judgement, "because Congress is well positioned to identify intangible harms that meet minimum Article III requirements, its judgement is also instructive and important." 136 S.Ct. at 1549. Thus, "Congress may elevate to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law." *Ibid*. (cleaned up). In other words, "Congress has the power to define injuries *** that will give rise to a case or controversy where none existed before." *Ibid*. (citation omitted).

Granted, *Spokeo* cautioned that one cannot "allege a bare procedural violation, divorced from any concrete harm, and satisfy the injury-in-fact requirement of Article III." 136 S.Ct. at 1549. Yet "[t]his does not mean *** that the risk of real harm cannot satisfy the requirement of concreteness." *Ibid*. Hence, "the violation of a procedural right granted by statute can be sufficient in some circumstances to constitute injury in fact." *Ibid*. Therefore, "a plaintiff

in such a case need not allege any *additional* harm beyond the one Congress has identified." *Ibid*.

In the end, the Court took "no position as to whether the [lower court's] ultimate conclusion—that Robins adequately alleged an injury in fact—was correct," and remanded the case because the lower court "did not address *** whether the particular procedural violations alleged in this case *** meet the concreteness requirement." 136 S.Ct. at 1549.

Justice Thomas concurred, but raised two points. 136 S.Ct. at 1550-1554. (Thomas, J., concurring). First, he noted that, historically, "[c]ommon-law courts more readily entertained suits from private plaintiffs who alleged a violation of their own rights, in contrast to private plaintiffs who asserted claims vindicating public rights." *Id*. at 1550. This is important, he observed, because, "[t]o understand the limits that standing imposes on 'the judicial Power,' *** we must 'refer directly to the traditional, fundamental limitations upon the powers of common-law courts.'" *Id*. at 1550-1551 (quoting *Honig* v. *Doe*, 484 U.S. 305, 340 (1988) (Scalia, J., dissenting)). And "[h]istorically, common-law courts possessed broad power to adjudicate suits involving the alleged violation of private rights, even when plaintiffs alleged only the violation of those rights and nothing more." *Id*. at 1551. So "[i]n a suit for the violation of a private right, courts historically presumed that the plaintiff suffered a *de facto* injury merely from having his personal, legal rights invaded." *Ibid*. In contrast, "[c]ommon-law courts *** have required a further showing of injury for violations of 'public rights'—rights that involve duties owed 'to the whole

community, considered as a community, in its social aggregate capacity.'" *Ibid.* (quoting 4 W. Blackstone, Commentaries *5).

Second, Justice Thomas pointed out that "[t]hese differences between legal claims brought by private plaintiffs for the violation of public and private rights underlie modern standing doctrine." 136 S.Ct. at 1552. Based on precedent, Justice Thomas concluded that "Congress can create new private rights and authorize private plaintiffs to sue based simply on the violation of those private rights." *Id.* at 1553. In short, a "plaintiff seeking to vindicate a statutorily created private right need not allege actual harm beyond the invasion of that private right." *Ibid.* (citing cases). But Justice Thomas agreed a remand was necessary for the lower court to determine in the first instance whether the statutory provision upon which Robins' claim rests on provides a private or a public right. *Id.* at 1553-1554.

In a dissent joined by Justice Sotomayor, Justice Ginsburg saw no need to remand to the lower court because, in her view, Robins had clearly satisfied Article III standing. 136 S.Ct. at 1554-1556. (Ginsburg, J., dissenting).

2. The statute at issue in this case, the Fair Debt Collection Practices Act ("Act"), preceded *Spokeo* by nearly forty years. At that time, "[d]isruptive dinnertime calls, downright deceit, and more besides drew Congress's eye to the debt collection industry." *Henson* v. *Santander Consumer USA Inc.*, 137 S.Ct. 1718, 1720 (2017). And "[f]rom that scrutiny emerged *** a statute that authorizes private lawsuits and weighty fines designed to deter wayward collection

practices." *Ibid.* Specifically, Congress enacted the Act after finding "abundant evidence of *** abusive, deceptive, and unfair debt collection practices by many debt collectors." 15 U.S.C. §1692(a). Further, Congress found that "[a]busive debt collection practices contribute to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy." *Ibid*. Thus, one of the Act's purposes is "to eliminate abusive debt collection practices by debt collectors." *Id*. §1692(e).

To that end, the Act "takes a strict liability approach to prohibiting misleading and unfair debt collection practices," *Kaiser* v. *Cascade Capital, LLC*, No. 19-35151, 2021 WL 868522, at *1 (9th Cir. Mar. 9, 2021), imposing a series of requirements on debt collectors. These requirements fall into two categories. First are per se violations that are expressly spelled out, such as how debt collectors can communicate with others about a consumer's debt, see 15 U.S.C. §1692b, or with the consumer, see *id.* §1692c; how debt collectors can validate debts, see *id.* §1692g; or what forms they can provide, see *id*. §1692j.

Other subsections prohibit more general behavior, such as "any conduct *** which *** harass[es], oppress[es], or abuse[s] any person," 15 U.S.C. §1692d, "any false, deceptive, or misleading representation[s] or means," *id.* §1692e, or "unfair or unconscionable means to collect or attempt to collect any debt," *id*. §1692f. These three subsections are the "substantive heart of the [Act]." *Johnson* v. *Riddle*, 305 F.3d 1107, 1117 (10th Cir. 2002). And these general prohibitions also include specific examples that the Act considers to be a violation of a particular section. So, for

example, Congress deemed it a violation of §1692e for a debt collector to provide "[t]he false representation of *** [the] amount *** of any debt," 15 U.S.C. §1692e(2)(A), or "[t]he use of any false representation *** to collect or attempt to collect any debt," *id.* §1692e(10).

Finally, to ensure harmed consumers could have their day in federal court, Congress provided that "[a]n action to enforce any liability created by this subchapter may be brought in any appropriate United States district court without regard to the amount in controversy." 15 U.S.C. §1692k(d). And to give the Act bite, Congress imposed civil liability for violations, including not only actual damages, but *additional* damages "not exceeding $1,000," and costs and attorneys' fees. See *id.* §1692k(a). Thus, if a debt collector violates the Act with respect to someone, that person can still collect up to $1,000—even if there were no actual damages.

B. Factual Background

Like millions of Americans, Ashley Nettles opened her first credit card to build credit. But with no credit history, her only option was a predatory card that targets consumers with subprime credit.[1] The card had a limit of only $300 and a well-above-average

---

[1] See Comptroller of the Currency Administrator of National Banks, *Public Disclosure*, Community Reinvestment Act Performance Evaluation, 2 (Mar. 31, 2007) ("Credit One's target market is subprime borrowers who desire to either build or repair credit"), https://www.occ.gov/static/cra/craeval/Nov07/20291.pdf.

interest rate of 23.9%.[2] See 19-1 Exhibits, at 26. And $75 of that limit was instantly gone because of the card's annual fee. *Ibid*.

Ashley made purchases with the card for only the first month after she received it. See 19-1 Exhibits, at 27. She used the card at K-Mart, Target, The Children's Place, Meijer Superstore, Value Center Marketplace, and A & W to buy food for her family, clothes for her kids, and various household necessities. See *ibid*.

But then misfortune struck. Ashley suffered a cerebral spinal fluid leak that took years to investigate, diagnose, and treat. As a result, for a three-year period, she had to repeatedly take medical leaves from work as she dealt with symptoms from the leak, including chronic fatigue, migraines, and pain. Additionally, appointments and procedures for the ongoing medical treatments led to additional missed work, with her husband also taking time off from his job to accompany Ashley to doctor's appointments. When she was at work, she often worked second and third shifts to try and make up for lost pay.

Furthermore, her husband's own medical condition of cluster headaches would leave him out of work with no paychecks coming in for weeks. Her oldest child was also diagnosed with anxiety and ADHD, with Ashley often called to school to deal with his

---

[2] "The average credit card interest rate is 17.87% for new offers." Adam McCann, *What is the Average Credit Card Interest Rate?*, WalletHub (Jan. 5, 2021), https://wallethub.com/edu/cc/average-credit-card-interest-rate/50841.

behavioral issues, attend counseling appointments, and the like. And to add injury to injury, she had to undergo left hip surgery, putting her out of work for a while, followed a year later by right hip surgery. Not surprisingly, she and her family were living paycheck to paycheck, when those even came.

Despite this, initially Ashley dutifully sought to make a monthly minimum payment, though the byzantine website for making online payments was hard to navigate. She also called once to make a payment, but was placed on perpetual hold and couldn't get through to a live person.

As often happens, Ashley was losing more ground than she was gaining. Two months after receiving the card, she made her first minimum payment of $25, but that month she also incurred a $35 late fee and $5.68 in interest, putting her further in the hole despite not making a single purchase that month. See Doc. 19-1 Exhibits, at 28. The same thing happened the next month. See *id.* at 29. After this, making payments slipped through the cracks of her chaotic life.

Yet late fees and interest continued to accrue. See Doc. 19-1 Exhibits, at 30-35. And the interest rate crept even higher. See *ibid.* In the first six months after she stopped making payments, Ashley's account accrued $245 in fees and $57.26 in interest. See *id.* at 35. She now owed more than $600—almost triple what she had charged on the card and double the card's limit. See *ibid.* All of this is not unusual, though, because to turn a healthy profit, credit card companies count on folks like Ashley who rack up late fees and interest. See Ronald J. Mann, *Bankruptcy Reform and the "Sweat Box" of Credit Card Debt*, 2007 U. Ill. L.

Rev. 375, 385 (2007) ("The successful credit card lender profits from the borrowers who become financially distressed. Financially secure customers or 'convenience users' do not generate any interest income, late fees, or overlimit penalties.").

As is also common in the industry, the bank that had issued Ashley's card sold her account, which then passed through multiple affiliated entities under common ownership until Respondent Midland Funding purchased her account as part of a portfolio of debts. Pet.App.3a. "Because creditors themselves have given up trying to collect the debts they sell to debt buyers, they sell those debts for pennies on the dollar[:] *** close to eight cents per dollar for debts under three years old[.]" *Midland Funding, LLC* v. *Johnson*, 137 S.Ct. 1407, 1416 (2017) (Sotomayor, J., dissenting) (quoting Consumer Financial Protection Bureau, Fair Debt Collection Practices Act: Annual Report 23-24 (2016)).

Shortly after acquiring the account, Midland Funding sued Ashley in Michigan state court, demanding she pay the $601.97 past due on her account. Pet.App.3a. After negotiations, the state court entered a consent judgment that required Ashley to make a monthly payment of $50 until the balanced was paid. Pet.App.3a. The judgement expressly excluded statutory interest. Pet.App.3a. And the amount she owed after the consent judgment increased to $689.37 because of court costs. Pet.App.3a.

For the next three months, Midland Funding's law firm withdrew the $50 monthly payment from Ashley's bank account. Pet.App.4a. Then the firm

suddenly dissolved and stopped withdrawing the amounts. Pet.App.4a.

About six months later, Ashley received a letter—addressed to her but mailed to her attorney—from a related entity, Midland Credit, informing her that it had taken over her account, which letter, as admitted by stipulation, "was an attempt to collect on the Consent Judgment." Pet.App.11a. The letter also alleged that she owed $104.22 more than she did, and nowhere did the letter reference the consent judgment or her three $50 monthly payments. Doc. 46, PageID#:405.[3] While, at first blush, a little over $100 might not seem like a big deal, it was to Ashley, given her finances and family situation.

C. Procedural History

Ashley sued both Midland Funding and Midland Credit (collectively, "Midland") in federal district court as part of a putative class action, alleging that they violated the Fair Debt Collection Practices Act. In particular, she alleged that Midland violated the Act by misrepresenting the amount she owed in the letter, failing to credit her past payments, and thereby attempting to collect more money than she actually owed. Midland's actions, she claimed, violated 15 U.S.C. §1692e(2)(A) & (10), as well as §1692f & f(1). See Doc. 1 ¶¶, 37-38, 50-51, PageID #:6-7.

---

[3] The District Court transposed the 9 with a 4 in the amount Ashley claimed she still owed, according to the briefing the District Court was relying on. See Doc. 25, PageID #:180. She owed $539.37. See Doc. 1, PageID #:5 ¶ 29.

Midland countered by arguing that Ashley's federal claim must be arbitrated under her credit card's agreement. Pet.App.4a. The District Court ultimately denied Midland's motion to compel arbitration as Midland's collection activities and Ashley's claims under the Act were solely based upon the state court consent judgment. Pet.App.32a.

On appeal, the Seventh Circuit ignored the arbitration issue and dismissed the case on standing grounds. The panel[4] noted that Ashley's "complaint does not allege that the statutory violations harmed her in any way or created any appreciable risk of harm to her." Pet.App.7a. The panel reached this conclusion even though, during oral argument, Ashley's attorney had raised additional injuries: that she was "upset," "completely confused," and "fearful," because she might owe more money than she thought, and she "ha[d] to go consult an attorney" and suffered "loss of time" in dealing with the letter. Pet.App.18a. The panel, however, concluded that under circuit precedent, these kinds of injuries are not cognizable for standing purposes. Pet.App.7a-8a.

Having so limited the types of injuries it would consider real, and relying on circuit precedent that had interpreted *Spokeo*, the panel ruled that, "[b]ecause Nettles has not alleged that she suffered an injury from the claimed [statutory] violations, she has

---

[4] Justice Barrett was part of the original Seventh Circuit panel below and participated in oral argument in June 2020. But she was not part of the Seventh Circuit's decision, as that issued about three months after her nomination to this Court. Pet.App.1a n.1.

failed to plead facts to support her standing to sue." Pet.App.8a. In so concluding, the panel did not conduct the *Spokeo* inquiry of looking first to Congress's judgment and then to history to determine whether standing existed. Thus, the Seventh Circuit vacated the district court's denial of Midland's motion to compel arbitration and remanded the case, instructing the lower court to dismiss for lack of jurisdiction. Pet.App.8a.

REASONS FOR GRANTING THE PETITION

I. The First Question Involves A Wide And Widely Acknowledged Circuit Split That Is in Dire Need of Resolution by this Court.

Eleven Circuits have considered the first question presented here, that is, whether a plaintiff must allege something more than a mere violation of the Act to establish standing. In conflict with the Seventh Circuit here, six circuits *allow* an allegation of a simple violation of the Act's procedural requirements to satisfy the concrete injury requirement, and four other circuits agree with the Seventh Circuit that an allegation of additional harm is required.

A. To Establish Standing, Six Circuits Merely Require That A Plaintiff Allege a Violation of the Act.

The First, Second, Third, Fifth, Sixth, and Eighth Circuits hold that Article III standing can be satisfied simply by alleging a violation of the Act in regard to the plaintiff. For example, as the Seventh Circuit pointed out below, the Sixth Circuit is in direct conflict with it in *Macy* v. *GC Services Ltd. Partnership*, 897 F.3d 747 (6th Cir. 2018). See Pet.App.7a n.3. In *Macy*,

plaintiffs sued after receiving debt collection letters that left out information on how they were to properly dispute their debts under the Act. 897 F.3d at 751. The defendant challenged the plaintiffs' standing. *Ibid*.

The court determined that *Spokeo* left undisturbed Supreme Court precedent "recognizing that a direct violation of a specific statutory interest recognized by Congress, standing alone, may constitute a concrete injury without the need to allege any additional harm." 897 F.3d at 751. Thus, *Macy* interpreted *Spokeo* as providing two categories of violations of the Act. *Id*. at 756. The first is "where the violation of a procedural right granted by statute is sufficient in and of itself to constitute concrete injury in fact because Congress conferred the procedural right to protect a plaintiff's concrete interests and the procedural violation presents a material risk of real harm to that concrete interest." *Ibid*. The second is "where there is a 'bare' procedural violation that does not meet this standard, in which case a plaintiff must allege '*additional* harm beyond the one Congress has identified.'" *Ibid*. (quoting *Spokeo*, 136 S.Ct. at 1549). *Macy* also observed that the Act provides "consumers a private right of action to enforce its provisions against debt collectors." *Id*. at 757 (citing 15 U.S.C. §1692k(a)).

The Sixth Circuit further noted that the debt collector's "letters [there] present a risk of harm to the [Act's] goal of ensuring that consumers are free from deceptive debt-collection practices because the letters provide misleading information." 897 F.3d at 757. Further, the court observed that "[p]laintiffs allege a risk of harm that is traceable to [the debt collector's]

purported failure to comply with federal law, namely, the possibility of an unintentional waiver of [the Act's] debt-validation rights, including suspension of collection of disputed debts under Section 1692g(b)." *Id*. at 758.

Thus, *Macy* found that the alleged violation fell in the first category because the plaintiffs "demonstrated a sufficient 'risk of real harm' to the underlying interest to establish concrete injury without the "need [to] allege any *additional* harm beyond the one Congress has identified." *Id*. at 757 (cleaned up) (quoting *Spokeo* 136 S.Ct. at 1549). So *Macy* concluded that the plaintiffs' allegations of violations were alone sufficient to satisfy the concreteness requirement of injury in fact for Article III standing. *Id*. at 761. See also *Donovan* v. *FirstCredit, Inc.*, 983 F.3d 246, 251-252 (6th Cir. 2020) (concluding the same for alleged violation of §1692f(8)).

The Eighth Circuit joined this side of the split in *Demarais* v. *Gurstel Chargo, P.A.*, 869 F.3d 685 (8th Cir. 2017). With facts very similar to those in this petition, see *id*. at 689-690, plaintiff sued in federal district court, alleging the defendants had "violated 15 U.S.C. §§1692e and 1692f by falsely representing the amount of debt, falsely threatening to take action, using unfair means to attempt to collect debt, and attempting to collect debts not owed." *Id*. at 690.

On appeal, defendants argued that plaintiff failed to allege that he suffered a concrete injury, and thus lacked standing. 869 F.3d at 690. And the court acknowledged that the plaintiff "d[id] not allege any tangible harms from the *** letter." *Id*. at 691. But applying *Spokeo*, the court recognized that "[w]ith

§ 1692f(1), Congress identified a harm—being subjected to attempts to collect debts not owed." *Id*. at 691. And applying the history prong of the *Spokeo* inquiry, the Eighth Circuit determined that the harm "is similar to the harm suffered by victims of the common-law torts of malicious prosecution, wrongful use of civil proceedings, and abuse of process." *Ibid*. "The harm of being subjected to baseless legal claims," which the court noted necessarily "creat[es] the risk of mental distress, provides the basis for both § 1692f(1) claims and the common-law unjustifiable-litigation torts." *Id*. at 692.

Turning to the congressional-judgment prong of *Spokeo*, the Eighth Circuit observed that "Congress recognized that abusive debt collection practices contribute to harms that can flow from mental distress, like 'marital instability' and 'the loss of jobs.'" 869 F.3d at 692. (quoting 15 U.S.C. §1692(a)). Thus, "Congress created a statutory right to be free from attempts to collect debts not owed, helping to guard against identified harms." *Ibid*. And "[t]his is not a situation where it is difficult to imagine how the violation of a statutory right alone could cause concrete harm." *Ibid*. (cleaned up). So the court concluded that the "alleged violations of [plaintiff's] § 1692f(1) rights were concrete injuries in fact." *Ibid*.

The Second Circuit is also in this camp. In *Cohen* v. *Rosicki, Rosicki & Assocs., P.C.*, 897 F.3d 75 (2d Cir. 2018), the plaintiff, alleging violations of sections 1692e and 1692g of the Act, brought a putative class action against his mortgage-loan servicer and its law firm when they attempted to start foreclosure proceedings on his home. *Id*. at 78. The defendants

challenged plaintiff's standing "because he has alleged only a bare statutory procedural violation, divorced from any concrete harm." *Id*. at 80 (cleaned up).

Cohen observed that "Congress enacted the [Act] to protect against the abusive debt collection practices likely to disrupt a debtor's life," and determined that "[s]ections 1692e and 1692g further this purpose." 897 F.3d at 81 (cleaned up). "Congress thus sought to protect consumers' concrete economic interests in enacting these provisions." *Ibid.* Therefore, the court concluded that "§§ 1692e and 1692g protect an individual's concrete interests, so that an alleged violation of these provisions satisfies the injury-in-fact requirement of Article III." *Ibid.* The Second Circuit so held because the written misrepresentations plaintiff identified "might have deprived [plaintiff] of information relevant to the debt prompting the foreclosure proceeding, posing a 'risk of real harm' insofar as it could hinder the exercise of his right to defend or otherwise litigate that action." *Id.* at 81-82. Hence, *Cohen* held that the plaintiff had alleged injury-in-fact and so had standing. *Id*. at 82.

Likewise, the Third Circuit found standing when a plaintiff alleged a mere violation of §1692(f) of the Act. In *St. Pierre* v. *Retrieval-Masters Creditors Bureau, Inc.*, 898 F.3d 351, 355 (3d Cir. 2018), the defendant "argue[d] that [plaintiff] failed to make that showing [of standing] because he alleged only a *de minimis* procedural violation of the [the Act] and not an injury-in-fact." *Id.* at 356-357. The Third Circuit read *Spokeo* as "reemphasizing that Congress has the power to define injuries that were previously inadequate at law, rather than erecting any new barriers that might

prevent Congress from identifying new causes of action though they may be based on intangible harms." *Id*. at 357 (cleaned up). And the court noted *Spokeo*'s two-part test. "[F]irst ask 'whether an alleged intangible harm has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American Courts.'" *Id*. at 357 (quoting *Spokeo*, 136 S.Ct. at 1549). If the answer is yes, then "it is likely to satisfy the injury-in-fact element of standing." *Ibid*. "[I]f not, we next ask whether Congress has expressed an intent to make an injury redressable by 'elevating it to the status of a legally cognizable injury' even if that injury was previously inadequate in law." *Ibid*. (quoting *Spokeo*, 136 S.Ct. at 1549) (cleaned up). If Congress has, then Article III is likely satisfied. *Ibid*.

The Third Circuit thus concluded that the plaintiff's allegation of defendant's behavior "implicates a core concern animating the [Act]—the invasion of privacy—and thus is closely related to harm that has traditionally been regarded as providing a basis for a lawsuit in English and American courts." 898 F.3d at 357-358. So the court concluded that standing was satisfied. *Id*. at 358. See also *DiNaples* v. *MRS BPO, LLC*, 934 F.3d 275 (3d Cir. 2019) (same).

In the same vein is the Fifth Circuit's decision in *Sayles* v. *Advanced Recovery Sys., Inc.*, 865 F.3d 246 (5th Cir. 2017). There the plaintiff alleged a debt collection agency violated the Act by failing to communicate to credit bureaus that he disputed his debts. *Id*. at 248. Defendant challenged plaintiff's standing, arguing that he "did not suffer, nor did he

risk suffering, a concrete injury as is required under *Spokeo*." *Id.* at 250. The Fifth Circuit disagreed. Turning to *Spokeo*, the court pointed out that "the violation of a procedural right granted by statute can be sufficient in some circumstances to constitute injury in fact," and "[a]mong those circumstances are cases where a statutory violation creates the risk of real harm." *Ibid.* (citations omitted). The court determined that the defendant's statutory "violation exposed [plaintiff] to a real risk of financial harm caused by an inaccurate credit rating." *Ibid.* Hence, the Fifth Circuit concluded the plaintiff's "injury was concrete." *Ibid.*

Finally, the First Circuit is on this side of the split because of a pre-*Spokeo* decision, *Pollard* v. *Law Office of Mandy L. Spaulding*, 766 F.3d 98 (1st Cir. 2014). There a consumer alleged a debt collection letter violated the Act. *Id.* at 100. On appeal, the defendant challenged plaintiff's Article III standing. *Id.* at 101. But the court rejected the defendant's argument "that the plaintiff lacks a constitutionally cognizable injury because she was not flummoxed about her statutory rights after reading the collection letter, as evidenced by the fact that she exercised those rights." *Id.* at 102. That is because, "[r]efined to its bare essence, the [Act] bestows upon consumers a right not to receive communications that overshadow or are inconsistent with the validation notice." *Ibid.* The First Circuit recognized that "[t]he invasion of a statutorily conferred right may, in and of itself, be a sufficient injury to undergird a plaintiff's standing even in the absence of other harm." *Ibid.* "That is the case here: the [Act] does not require that a plaintiff actually be confused." *Id.* at 103. So the court concluded that "the

plaintiff adequately alleged that her personal right was violated when she received the collection letter." *Ibid*. "That comprised an injury attributable to the defendant's actions—an injury that will be redressed by an award of damages." *Ibid*. Hence, "[n]o more is exigible to confirm the plaintiff's Article III standing." *Ibid*.

B. By Contrast, Five Circuits Require an Allegation of Additional Harm Beyond a Violation of the Act.

On the other hand, the Fourth, Seventh, Ninth, Eleventh, and D.C. Circuits always require additional harm beyond a violation of the Act to find standing.

For instance, in *Frank* v. *Autovest, LLC*, 961 F.3d 1185, 1186 (D.C. Cir. 2020), after plaintiff lost her job and became homeless, she defaulted on her auto loan and surrendered her vehicle. After her debt changed hands several times, defendant acquired it and sued to collect. *Ibid*. Plaintiff subsequently filed a putative class action against defendant and its debt collection agent for three misrepresentations in the court filings, alleging such violated sections 1692e and 1692f of the Act. *Id*. at 1886-1887.

On appeal the D.C. Circuit found that, while plaintiff had satisfied her burden at the pleading stage for standing, at the summary judgment stage she failed to demonstrate a concrete injury sufficient for standing. The court found she had not taken any action based on the alleged misrepresentations. 961 F.3d at 1188. Further, the court rejected plaintiff's argument "that the alleged [Act's] violations encompass injuries of the type Congress sought to

curb, and thus that she need not prove any additional harm, such as reliance on false information." *Ibid.* (cleaned up). The court did so because, while "[a] misrepresentation in a debt collector's court affidavit—including a false statement about the affiant's employer—is certainly *capable* of causing a concrete and particularized injury," plaintiff "ha[d] not demonstrated that *these* statements had that effect." *Id.* at 1189.

The Eleventh Circuit is also in this camp in a case involving these very Respondents, namely, *Trichell* v. *Midland Credit Mgmt., Inc.*, 964 F.3d 990, 995 (11th Cir. 2020). In *Trichell*, the plaintiffs alleged the Act was violated when they received misleading and unfair letters from Midland that gave them the false impression their previously owed debts were still legally enforceable. On appeal, the court rejected a historical analog "to causes of action for fraudulent or negligent misrepresentation." *Id.* at 998. The court opined that the "serious harms" Congress identified in enacting the Act "are a far cry from whatever injury one may suffer from receiving in the mail a misleading communication that fails to mislead [plaintiffs]." *Id.* at 999. Further, the court concluded that "any risk that the letters may have posed to them had dissipated by the time they filed suit." *Id.* at 1000. So, over a dissent, the court found the plaintiffs lacked standing. *Id.* at 1005. And the majority acknowledged that it was following the Seventh and D.C. Circuits, and disagreeing with the Sixth and Second Circuits. See *id.* at 1002.

The Ninth Circuit joined this camp just last year, in *Adams* v. *Skagit Bonded Collectors, LLC*, 836 F.

App'x 544, 545 (9th Cir. 2020). There a plaintiff sued a debt collector for violating the Act, including its prohibition on false or misleading representations under section 1692e, after receiving debt collection letters. The Ninth Circuit observed that plaintiff's "[c]omplaint include[d] a bare allegation of confusion." *Id.* at 547. But the court concluded that more than a mere violation of the Act is required, and that "confusion does not constitute an actual harm to [plaintiff's] concrete interests." *Ibid.* Given that "[n]othing in the Complaint suggests [plaintiff] took or forewent any action because of the allegedly misleading statements in the letters," the court held that he lacked standing. *Ibid.*

Likewise, in the Fourth Circuit case of *Ben-Davies* v. *Blibaum & Assocs., P.A.*, 695 F. App'x 674, 676 (4th Cir. 2017), a debt collector attempted to collect a debt arising out of a state court judgment by demanding payment of an incorrect sum from calculating an interest rate unauthorized by law. The court noted that this was not a case in which the plaintiff had alleged what in the court's view would be insufficient, namely, "a bare procedural violation of the [Act], divorced from any concrete harm." *Ibid.* Rather, the plaintiff "sufficiently established the existence of an injury in fact" because her "complaint alleged that, as a 'direct consequence' of [the debt collector's] alleged violations of the [Act's] proscribed practices, she 'suffered and continues to suffer' actually existing intangible harms that affect her personally: 'emotional distress, anger, and frustration.'" *Id.* at 676-677. Thus, the Fourth Circuit clearly required more than a mere allegation of a violation of the Act.

In sum, the circuits are irreconcilably in conflict and require this Court's guidance. And numerous circuit judges—including, most recently, Judge Newsom of the Eleventh Circuit—have acknowledged the conflict.[5]

C. The Decision Below, and the Multiple Circuits that Agree with Its Analysis and Conclusion, Misinterpret This Court's Standing Doctrine.

The Seventh Circuit below, and the four circuits that join it in concluding that a plaintiff must always allege an additional harm besides a violation of the Act, are out-of-line with this Court's standing doctrine. *Spokeo* confirmed "that intangible injuries can nevertheless be concrete." 136 S.Ct. at 1549. To "determin[e] whether an intangible harm constitutes

---

[5] "[T]he courts have divided over whether certain statutory violations are *per se* injuries in fact. For instance, the Second and Sixth Circuits have held that any plaintiff who receives an objectively misleading debt-collection letter in violation of the Federal Debt Collection Practices Act suffers a concrete injury. *See Cohen v. Rosicki, Rosicki & Assocs., P.C.*, 897 F.3d 75, 81–82 (2d Cir. 2018); *Macy v. GC Servs. Ltd. P'ship*, 897 F.3d 747, 756–58 (6th Cir. 2018). We, by contrast, have joined the D.C. Circuit in holding that there is no concrete injury unless the letter actually misled the plaintiff herself. *See Trichell v. Midland Credit Mgmt., Inc.*, 964 F.3d 990, 1001–02 (11th Cir. 2020); *Frank v. Autovest, LLC*, 961 F.3d 1185, 1188 (D.C. Cir. 2020)." *Sierra* v. *City of Hallandale Beach, Fla.,* No. 19-13694, 2021 WL 1799848, at *5 (11th Cir. May 6, 2021) (Newsom, J., concurring).

injury in fact," *Spokeo* taught that "both history and the judgment of Congress play important roles." *Ibid.*

Yet these five circuits have failed to perform this two-part inquiry, instead latching on to language in *Spokeo* that one cannot "allege a bare procedural violation, divorced from any concrete harm, and satisfy the injury-in-fact requirement of Article III." 136 S.Ct. at 1549. But as *Spokeo* plainly noted, "[t]his does not mean *** that the *risk* of real harm cannot satisfy the requirement of concreteness." *Ibid.* (emphasis added) Hence, "[t]he violation of a procedural right granted by statute can be sufficient in some circumstances to constitute injury in fact." *Ibid.* And "a plaintiff in such a case need not allege any *additional* harm beyond the one Congress has identified." *Ibid.*

These five circuits missed this critical point of *Spokeo*. If they had not, they would have looked to Congress's judgment. And as this Court observed, "because Congress is well positioned to identify intangible harms that meet minimum Article III requirements, its judgement is also instructive and important." 136 S.Ct. at 1549. Thus, "Congress may elevate to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate at law." *Ibid.* (cleaned up). In other words, "Congress has the power to define injuries *** that will give rise to a case or controversy where none existed before." *Ibid.* (citation omitted).

In the Act, moreover, "Congress plainly sought to curb the dissemination of false information by adopting procedures designed to decrease that risk." *Id.* at 1550. Thus, under *Spokeo*, alleging a violation

of the Act suffices to provide a concrete injury given the risks and harms Congress identified. The Seventh Circuit and the four circuits joining it are thus mistaken, and the six that have gone the other way are correct.

II. The Second Question Is The Subject Of A Separate Circuit Split That Needs Resolution Depending Upon How the Court Resolves the First Question.

If the Court decides that Article III standing requires plaintiffs to allege additional harm besides a mere violation of the Act, then additional guidance is needed, as lower courts disagree regarding what satisfies that requirement.

For instance, in *Fern Kottler* v. *Gulf Coast Collection Bureau, Inc.*, No. 20-12239, 2021 WL 529425, at *1 (11th Cir. Feb. 12, 2021) (per curiam), the Eleventh Circuit faced the issue of whether a plaintiff suffered a concrete injury after receiving a letter and a telephone call that the plaintiff argued violated the Act because they "falsely suggested she was liable for medical bills owed by her employer." In reaction to receiving these communications, she "testified that she was 'clustered and jumbled' why she was receiving collection calls, the messages 'scared' her into calling back, and she feared that the company would 'ruin her credit.'" *Ibid*. The court determined that these allegations constituted a concrete, particularized, and imminent injury that invades a legally protected interest because she (1) "was entitled to avoid communication concerning collection of a debt she did not owe" under the Act; (2) "she expended time addressing unwarranted collection calls"; and (3)

"those calls upset her." *Ibid*. So the panel concluded Article III standing was satisfied. *Ibid*.

Likewise, in *Frank* v. *Autovest, LLC*, 961 F.3d 1185, 1188 (D.C. Cir. 2020), the D.C. Circuit refused to find standing when the plaintiff *failed* to "testify that she was otherwise confused [or] misled" by the affidavits that allegedly provided misrepresentations in violation of the Act. "And although [the plaintiff] stated that [the defendant's] suit caused her stress and inconvenience, she never connected those general harms to the [alleged misrepresentations she claimed violated the Act]." *Ibid*. (citation omitted). Additionally, while the plaintiff "points to pocketbook injuries in the form of 'court costs and attorney's fees' she incurred 'defending [defendant's] lawsuit,'" she never "link[ed] these expenses to the alleged statutory violations," which occurred after litigation had begun. *Ibid*. Thus, the court found "no evidence that the contested statements rendered litigation more expensive or onerous." *Ibid*.

Also, in *Ben-Davies* v. *Blibaum & Assocs., P.A.*, 695 F. App'x 674, 676 (4th Cir. 2017), a consumer established that a debt collector "attempted to collect from her a debt arising out of a state court judgment by demanding payment of an incorrect sum based on the calculation of an interest rate not authorized by law." The Fourth Circuit determined that the plaintiff "sufficiently established the existence of an injury in fact" because her "complaint alleged that, as a 'direct consequence' of [the debt collector's] alleged violations of the [Act's] proscribed practices, she 'suffered and continues to suffer' actually existing intangible harms

that affect her personally: 'emotional distress, anger, and frustration.'" *Id.* at 676-677.

But the Seventh Circuit came out the opposite way here. When at oral argument Ashley alleged the mental distress of being "upset," "completely confused," and "fearful," the court concluded that was insufficient to confer standing. Pet.App.18a. See also *Pennell* v. *Global Trust Management, LLC,* No. 20-1524, 2021 WL 925494, *1-3 (7th Cir. Mar. 11, 2021) (refusing to find Article III standing when plaintiff claimed "stress and confusion" after receiving a letter that allegedly violated the Act). Likewise, when a plaintiff alleged a violation of the Act, the Ninth Circuit concluded he lacked standing because his complaint "include[d] a bare allegation of confusion," and "confusion does not constitute an actual harm to [plaintiff's] concrete interests" under the Act. *Adams* v. *Skagit Bonded Collectors, LLC*, 836 F. App'x 544, 547 (9th Cir. 2020).

Furthermore, when during oral argument Ashley alleged she had to spend time and consult an attorney to address the false letter and Midland's attempt to collect more money than she owed, this lost time and confrontation with her attorney were dismissed by the Seventh Circuit as not rising to an injury in fact. Pet.App.7a-8a.

Ashley thus had the misfortune of not living in the Fourth, Eleventh, or D.C. Circuits—or in any of the other circuits that recognize a simple violation of the Act as sufficient to confer standing. Yet standing under a federal law should not differ based on one's address. Assuming it provides a negative answer to the first Question Presented, this Court needs to bring

clarity and uniformity to what qualifies as an additional harm sufficient to satisfy the requirements of a concrete injury under the Act.

III. The Questions Presented Are of National Scope and Growing Importance.

The issues presented here, moreover, are of enormous importance, both legally and practically.

A. Millions of Americans are in Debt and Protected by the Act.

For one thing, scores of millions of Americans are protected by the Act because they are in debt. And those amounts are not trivial: "the average American has $90,460 in debt,"[6] and the average household is about $145,000 in debt.[7] In total, Americans have an astonishing $14.35 trillion in household debt.[8] That is more debt than any country's *government* debt, except for the United States'.[9]

---

[6] Megan DeMatteo, *The Average American Has $90,460 in Debt—Here's How Much Debt Americans Have at Every Age*, CNBC, https://www.cnbc.com/select/average-american-debt-by-age/ (last updated Jan. 22, 2021).

[7] *Average American Household Debt in 2020: Facts and Figures*, The Ascent (Nov. 18, 2020), https://www.fool.com/the-ascent/research/average-american-household-debt/.

[8] Federal Reserve Bank of New York, *Quarterly Report on Household Debt and Credit—2020: Q3* 3 (Nov. 2020), https://www.newyorkfed.org/medialibrary/interactives/householdcredit/data/pdf/hhdc_2020q3.pdf.

[9] See Jeff Desjardins, *$69 Trillion of World Debt in One Infographic*, Visual Capitalist (Nov. 14, 2019),

The Act's protections are essential for many of these Americans as they strive to stay financially afloat—something that has only become more difficult in recent years. That is why the Act covers all Americans who are in debt if the "money, property, insurance, or services" so obtained are used "primarily for personal, family, or household purposes." 15 U.S.C. §1692a(5); *see also id.* §1692a(3) ("The term 'consumer' means any natural person obligated or allegedly obligated to pay any debt."). Thus, millions of Americans in debt for those reasons currently rely on the Act's protections.

B. The Pandemic-induced Recession Has Significantly Increased the Number of Americans in Need of the Act's Protections.

These debt burdens are exacerbated by the COVID-19 recession, which is financially straining Americans. For example, one survey indicated that 42 percent of Americans said that "their household financial situation has gotten worse since the pandemic began," and of that group, "45% say they've taken on debt because of it."[10] Additionally, "[d]uring the coronavirus crisis, more than half *** of adults with credit card debt—roughly 51 million people—added to their balances, according to a report by

---

https://www.visualcapitalist.com/69-trillion-of-world-debt-in-one-infographic/.

[10] Erin El Issa, *2020 American Household Credit Card Debt Study*, NerdWallet (Jan. 12, 2021), https://www.nerdwallet.com/blog/average-credit-card-debt-household/.

CreditCards.com. And 44% blame the pandemic, the report found."[11]

This additional debt greatly increases the likelihood of late payments or even complete default. For example, "54 percent of Americans said they've missed or deferred at least one payment in 2020 compared to the 29 percent who were worried about missing a payment in January [2020]."[12] As more Americans become financially unstable and take on more debt during the pandemic, they need the Act's protections now more than ever.

C. By Raising the Standing Bar Higher Than Article III Requires, Many Circuits are Violating the Separation of Powers.

At the end of the day, this case is really about the Constitution's separation of powers. As the Court noted in *Spokeo,* "to remain faithful to this tripartite structure, the power of the Federal Judiciary may not be permitted to intrude upon the powers given to the other branches." 136 S.Ct. at 1547. Standing helps ensure that the judiciary does not intrude on the other branches. But just as the "irreducible constitutional minimum" for standing cannot be "erase[d],"

---

[11] Jessica Dickler, *51 Million Americans Increased Their Credit Card Debt Because of Covid*, CNBC, https://www.cnbc.com/2021/01/27/millions-of-americans-boosted-their-credit-card-debt-because-of-covid.html (last updated Jan. 27, 2021).

[12] Alan Goforth, *Rising Household Debt in 2020 Could Have Snowball Effect*, BenefitsPRO (Nov. 16, 2020, 3:42 PM), https://www.benefitspro.com/2020/11/16/rising-household-debt-in-2020-could-have-snowball-effect/?slreturn=20210027182323.

consistent with separation-of-powers principles, neither can it be "add[ed]" to. *Id.* at 1549. For that too alters the balance of power between the Legislature and the Judiciary.

That, moreover, is why "Congress has the power to define injuries *** that will give rise to a case or controversy where none existed before." 136 S.Ct. at 1549. Because "Congress is well positioned to identify intangible harms that meet minimum Article III requirements," *ibid.*, if the judiciary narrows the scope of standing by adding requirements to show an injury-in-fact, the judiciary necessarily intrudes on Congress's authority. And that is exactly what the five circuits mentioned above—including the Seventh Circuit in this case—have done.

The holdings of these circuits threaten the separation of powers by thwarting Congress's constitutionally "enumerated" power to "legislate." 136 S.Ct. at 1546-1547. These additional requirements "usurp" Congress's ability to enact statutes that protect growing numbers of individuals, such as Ashley, from being injured by unfair debt collection practices. *Id.* at 1547.

Indeed, "[w]hen the Court rules whole categories of plaintiffs out of the federal courts, it interferes with Congress's authority to recognize new societal problems and to choose judicial mechanisms for addressing those problems." Heather Elliott, *Balancing as Well As Separating Power: Congress's Authority to Recognize New Legal Rights*, 68 Vand. L. Rev. En Banc 181, 182 (2015). Accordingly, "[j]udicial respect for separation of powers *** includes respecting Congress's judgment underlying the

procedural rights it enacts" and "defer[ing] to 'Congress['s] *** power to define injuries and articulate chains of causation that *** give rise to a case or controversy where none existed before.'" Jon Romberg, *Trust the Process: Understanding Procedural Standing Under* Spokeo, 72 Okla. L. Rev. 517, 576-577 (2020) (quoting *Spokeo*, 136 S.Ct. at 1549) (citations omitted).

In sum, the judiciary can violate the separation of powers as much by contracting its own power as by expanding it. That is what has happened here. And that is another powerful reason demanding this Court's review.

IV. The Facts in This Case Make It an Ideal Vehicle to Resolve these Issues.

This case is also an ideal vehicle for resolving the questions presented.

A. This Case Presents Both Issues, Allowing for More Efficient Resolution.

Perhaps most important, if the Court decides to answer the first Question Presented to always require the allegation of an additional harm beyond just a violation of the Act, it will need to answer the second Question Presented. Otherwise, lower courts will continue to be divided on that issue, leaving debtors uncertain as to what types of harm will satisfy standing.

This petition squarely presents both issues. The lower court held that Ashley had not alleged any harm beyond a mere violation of the Act. And it so held because it found her allegations of additional harm did

not qualify as harm under its precedent. Thus, in this case, the Court can kill two conflicts with one grant of certiorari—and in so doing provide much needed guidance to the badly divided lower courts.

B. The Court Has Often Granted Certiorari with Only Eight Justices Participating.

Justice Barrett's potential recusal in this case should not deter a grant of certiorari. This Court has frequently granted certiorari when only eight or fewer Justices could hear the case on the merits.

For instance, the Court granted cert in *Beckles* v. *United States*, 136 S.Ct. 2510 (Mem) (2016), despite having only *seven* Justices to hear the merits because Justice Kagan recused herself and Justice Scalia had not yet been replaced, see 137 S.Ct. 886 (2017). And just this term, the Court granted certiorari in *BP P.L.C.* v. *Mayor and City Council of Baltimore*, 141 S.Ct. 222 (Mem) (2020), even though Justice Alito was recused.

Furthermore, recusals of new Justices previously involved in lower court decisions have not provided an obstacle to granting certiorari. Thus, for example, the Court granted certiorari in *Dahda* v. *United States*, 138 S.Ct. 356 (Mem) (2017), and *Royal* v. *Murphy*, 138 S.Ct. 2026 (Mem) (2018), despite Justice Gorsuch's recusal from considering the petitions and not participating at the merits stage, see *Dahda* v. *United States,* 138 S.Ct. 1491, 1493-1494 (2018); *Sharp* v. *Murphy,* 140 S.Ct. 2412 (Mem) (2020). Similarly, the Court granted certiorari when Justice Kavanuagh was recused in *Opati* v. *Republic of Sudan*, 139 S.Ct. 2771 (Mem) (2019), 140 S.Ct. 1601 (2020).

Not only has certiorari been granted when new Justices are recused, but also even when a more senior Justice recuses because of previous involvement in a long-running case. See *United States Agency for Int'l Dev.* v. *All. for Open Soc'y Int'l, Inc.*, 140 S.Ct. 660 (Mem) (2019), and 140 S.Ct. 2082 (2020) (Justice Kagan recused from considering the petition and the merits). And these examples do not include the more than twenty petitions in recent terms when the Court has granted certiorari and heard oral arguments where the Court's short-handedness was due to a vacancy. In sum, under this Court's common practice, there is no reason to deny certiorari here on account of Justice Barrett's possible recusal.

CONCLUSION

The issues presented are in dire need of the Court's guidance, as almost every circuit has weighed in and the lower courts are nearly evenly split. The issues here also affect the majority of American adults—scores of millions—given the ubiquity of debt and debt collection. And that national importance has only increased given the pandemic-induced recession. The Court should grant this petition to provide clarity to the lower courts and ensure the protection Congress sought to provide with the Fair Debt Collection Practices Act. Alternatively, given the important federal interests reflected in that Act, the Court should at least call for the views of the Solicitor General.

Respectfully submitted,

CURTIS C. WARNER
5 E. Market St., Suite 250
Corning, NY 14830
(888) 551-8685
cwarner@warner.legal

JAMES C. PHILLIPS
1 University Dr.
Orange, CA 92866
714-628-2543
jcphillips@chapman.edu

GENE C. SCHAERR
Counsel of Record
HANNAH C. SMITH
SCHAERR | JAFFE LLP
1717 K Street NW, St. 900
Washington, DC 20006
(202) 787-1060
gschaerr@schaerr-jaffe.com

May 20, 2021