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

BRIEF OF AMERICAN ESCROW ASSOCIATION, AMERICAN LAND TITLE ASSOCIATION, NATIONAL ASSOCIATION OF REALTORS®, AND REAL ESTATE SERVICES PROVIDERS COUNCIL (RESPRO®) AS AMICI CURIAE IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST[1]

Amici Curiae are four national non-profit trade associations that collectively represent thousands of providers from all segments of the residential home buying and financing industry, including real estate brokers, banks, mortgage lenders/brokers, mortgage insurers, title insurers/title agents, casualty insurers, escrow agents, and other settlement service providers. Their members are subject to numerous federal statutes including the Real Estate Settlement Procedures Act ("RESPA"), 12 U.S.C. § 2601 *et seq.*; the Truth in Lending Act ("TILA"), 15 U.S.C. § 1601 *et seq.*; the Electronic Fund Transfer Act ("EFTA"), and the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. § 1681 *et seq.* These statutes typically provide for a private right of action and have other features, such as damages and attorney's fee provisions, that have spurred a "cottage industry" of class action lawsuits.

Amici's members have litigated several class actions brought under such statutes by consumers who were solicited to represent a proposed class even though he or she suffered no real-world harm from the claimed conduct. These lawsuits expose

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[1] No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than amici curiae, their members, or their counsel made a monetary contribution to this brief's preparation or submission. Counsel of record received timely notice, pursuant to Supreme Court Rule 37, of Amici's intent to file this brief and the parties have consented to its filing.

defendants to significant discovery costs, high dollar exposure, and great pressure to settle, even when the claim is wholly without merit.

This, unfortunately, has not been resolved in the wake of the Court's prior opinion in this case, *Spokeo, Inc.* v. *Robins*, 136 S. Ct. 1540 (2016) (*Spokeo I*), because the lower courts are using inconsistent approaches to determining when an alleged intangible harm qualifies as injury-in-fact. The analysis exemplified by the Ninth Circuit's decision on remand, which conflated broad statutory purposes with a concrete injury-in-fact to the plaintiff, is untenable and will only increase the volume of opportunistic class actions by plaintiffs who do not meet threshold Article III requirements.

The American Escrow Association ("AEA"), formed in 1980, is a national association of real estate settlement agents. Representing a large number of "mom and pop" operations in the mortgage closing business, AEA has approximately 3,000 members.

The American Land Title Association ("ALTA"), founded in 1907, is a national trade association and voice of the real estate settlement services, abstract and title insurance industry. ALTA represents over 6,300 member companies. ALTA members operate in every county in the United States to search, review and insure land titles to protect home buyers and mortgage lenders who invest in real estate.

The National Association of REALTORS® represents real estate professionals engaged in all phases of the real estate business, including, but not limited to, brokerage, appraising, management and counseling. Its membership includes 54 state and territorial associations of REALTORS®,

approximately 1,100 local associations of REALTORS®, and more than 1.3 million REALTOR® and REALTOR-ASSOCIATE® members.

The Real Estate Service Providers Council ("RESPRO®") is a non-profit trade association comprised of approximately 175 members from all segments of the residential home buying and financing industry whose common bond is to offer so-called "one-stop shopping programs" for homebuyers through so-called "affiliated business arrangements" under RESPA. RESPRO®'s members consist of real estate brokerage firms, title agencies, escrow companies, home warranty companies, and mortgage providers.

SUMMARY OF ARGUMENT

Amici agree with petitioner that the analysis exemplified by the Ninth Circuit's decision on remand would render this Court's holding in *Spokeo I*—that Article III standing requires a concrete and particularized injury even in the context of a statutory violation—a nullity. The petition for a writ of certiorari illustrates the inconsistent treatment that lower courts have accorded to *Spokeo I* under FCRA and certain other statutes.

Amici write to advise the Court that the concerns identified by petitioner also extend to other statutes that are not discussed in the petition but which further support the need for this Court's guidance. In particular, amici believe that the "intangible harm" standard urgently requires further development from this Court so that lower courts can properly determine when a particular plaintiff asserting claims has suffered sufficient harm to satisfy constitutional standing, instead of erroneously

focusing on the generalized aim of a given statute, as the Ninth Circuit did on remand.

ARGUMENT

I. THE QUESTION PRESENTED IMPLICATES NUMEROUS FEDERAL STATUTES NOT ADDRESSED IN THE PETITION.

A. Abusive, No-Injury Lawsuits Under RESPA Are Common And Continue To Be Brought Post-*Spokeo I*.

Many of amici's members have been subject to class action lawsuits under RESPA brought by consumers who have not alleged, and have no intention of proving, that they experienced financial or other concrete harm from the claimed conduct. All too often, the plaintiffs were solicited by attorneys who told them that they and other consumers had been subjected to a technical violation of RESPA and could recover apparently automatic statutory damages.[2] *Spokeo I* has not staunched the flow of such cases.

Proper Article III standing is critical because RESPA Section 8 cases have long been a magnet for the plaintiffs' bar, in part because the statute

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[2] Section 8 of RESPA prohibits the payment of referral fees and splitting unearned fees in residential real estate transactions, subject to certain exemptions. 12 U.S.C. § 2607(a)-(c). Congress enacted the Section 8 prohibitions in 1974 based on a concern that referral fees "tend to increase unnecessarily the costs of certain settlement services," 12 U.S.C. § 2601, although this is not always the case. In fact, in many RESPA cases—including the *Baehr* and *Minter* cases discussed herein—the plaintiffs do not and cannot allege that settlement service costs were higher than they would have been without the challenged conduct.

purports to provide for: (i) an automatic damages remedy consisting of three times the value of the settlement service (*e.g.*, mortgage origination) involved in the violation,[3] often yielding a sum that vastly exceeds actual damages, if any; and (ii) an award of attorney's fees for the "prevailing party," which has not been construed in favor of prevailing defendants.[4] RESPA does not include a damages cap, and even discrete statutory damage amounts, when aggregated across a proposed class of consumers, can accumulate very quickly. Unfortunately, some federal courts have held that RESPA statutory damages are available even when—as is often the case—the challenged conduct is not alleged to have caused any real harm to the plaintiff.

This Court is familiar with the uninjured plaintiff who asserted a RESPA claim in *Edwards* v. *First Am. Corp.*, 610 F.3d 514 (9th Cir. 2010), *cert. granted*, 131 S. Ct. 3022 (2011); *cert. dismissed as improvidently granted*, 132 S. Ct. 2536 (2012). In that case, pursuant to RESPA Section 8(a), the plaintiff alleged that First American unlawfully paid a "kickback" to numerous title agencies by purchasing an interest in the agencies for more than their market value, in expectation of future referrals. *Edwards*, 610 F.3d at 516. Ms. Edwards did not claim that she suffered any financial or other actual harm, since, as the Court of Appeals recognized, she did not contend that

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[3] 12 U.S.C. § 2607(d)(2).

[4] *See, e.g., Lane* v. *Residential Funding Corp.*, 323 F.3d 739, 746-48 (9th Cir. 2003) (construing 12 U.S.C. § 2607(d)(5) in this fashion).

these alleged kickbacks increased the cost of her title insurance or otherwise affected the quality of services she received from First American. *Id.*

To give the Court further appreciation of the types of cases that are brought when lower courts do not require the named plaintiff to show direct, financial, or other harm, amici briefly provide an account of two additional RESPA class action cases in which their counsel participated and in which certain of their members have had to litigate despite the complete lack of injury to the claimants.

Baehr v. *The Creig Northrop Team P.C.*, a class action currently pending in federal court, involves a single-count RESPA claim based on a long-expired marketing agreement between Lakeview Title Company, Inc. ("Lakeview"), a now defunct title company, and The Creig Northrop Team, P.C. (the "Northrop Team"), a real estate team.[5] Plaintiffs contend that the marketing agreement was a "sham" used to hide referral fees that Lakeview paid to the Northrop Team, as opposed to a legitimate and widely-used arrangement to provide and pay for marketing and advertising services.[6] The *Baehr* named plaintiffs seek over $11 million in statutory damages on behalf of themselves and other former Lakeview customers, plus attorney's fees.[7] The case

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[5] *See* Amended Complaint at ¶¶ 1, 42-45, *Baehr*, No. 1:13-cv-00933 (D. Md. Aug. 15, 2014), ECF No. 89.

[6] *Id.* Because they filed the complaint beyond RESPA's one-year statute of limitations, the Baehrs also allege that the one-year RESPA statute of limitations can be equitably tolled. *Id.* at ¶ 22.

[7] *See id.* at VIII (Prayer for Relief).

has involved extensive and costly discovery from the defendants; while the two named plaintiffs produced a handful of documents and each sat for a deposition.[8]

As is unfortunately commonplace in these cases, the discovery in *Baehr* revealed no evidence that the named plaintiffs suffered any actual harm due to the claimed conduct. Neither of the *Baehr* plaintiffs had an issue with their transaction until they were contacted, unsolicited, by class counsel.[9] Before receiving the solicitation letter from class counsel, the *Baehr* plaintiffs were not seeking legal counsel and were happy with their home purchase, including all services they received from the Northrop Team and Lakeview.[10] During their depositions, the plaintiffs admitted that the service they received from Lakeview was fine and there was no problem with the fees charged.[11] Indeed, the fees that the Baehrs paid to Lakeview for services in the transaction at issue were comparable to fees they paid for the same services in a previous home purchase eight years earlier, on a less expensive property.[12] Patrick Baehr

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[8] *See generally* Declaration of Jennifer M. Keas, *Baehr*, No. 1:13-cv-00933 (D. Md. June 19, 2015), ECF No. 158-2.

[9] *See* Defendants' Memorandum of Law in Support of Joint Motion for Summary Judgment on Plaintiffs' Claim for Equitable Tolling and RESPA § 8(a) Claim for Lack of Standing at Part III (Rule 56 Undisputed Material Facts), ¶¶ 19, 64, *Baehr*, No. 1:13-cv-00933 (D. Md. June 19, 2015), ECF No. 158-1.

[10] *Id.*

[11] *See id.* at ¶ 65.

[12] *See id.* at ¶ 68. Indeed, the only harm that the Baehrs could

even conceded that it would not have mattered to him if he had known about the marketing agreement at issue.[13] Based on this record, in 2015, the defendants moved for dismissal, including on the grounds that the plaintiffs lack Article III standing.[14] Although the motion was subject to some stays, including in anticipation of *Spokeo I*, it is currently fully briefed and has been awaiting decision for just over 21 months, not including stay periods.

In a previous RESPA class action, *Minter* v. *Wells Fargo Bank, N.A.*, the plaintiffs challenged a longstanding mortgage joint venture between an affiliate of Wells Fargo Bank, N.A. ("Wells Fargo") and an affiliate of Long & Foster Real Estate, Inc. ("Long & Foster"), a large real estate broker.[15] The *Minter* plaintiffs alleged that the joint venture, Prosperity Mortgage Company ("Prosperity"), was a "sham" provider under criteria contained in a RESPA policy statement, and that it existed solely as a pretext to pay unlawful referral fees, in claimed violation of RESPA Section 8. The plaintiffs claimed

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articulate when faced with the standing challenge was the deprivation of an alleged right to a taint-free referral process, a right that Section 8 of RESPA does not confer (except possibly in the affiliated business arrangement context (*see* 12 U.S.C. 2602(7)), which is not at issue in *Baehr*.

[13] *See id.* at ¶ 63.

[14] *See* Defendants' Joint Motion for Summary Judgment on Plaintiffs' Claim for Equitable Tolling and RESPA Claim for Lack of Standing, *Baehr*, No. 1:13-cv-00933 (D. Md. June 19, 2015), ECF No. 158.

[15] No. 07-cv-3442, 2013 U.S. Dist. LEXIS 122344 (D. Md. Aug. 28, 2013), *aff'd*, 762 F.3d 339 (4th Cir. 2014).

that the former Prosperity customers in each of the approximately 150,000 loan transactions at issue[16] were entitled to automatic damages in the amount of three times the mortgage fees paid by each borrower, an amount in excess of a billion dollars, and many times the sum of Prosperity's net income over its then twenty year history and Long & Foster's net worth.[17]

None of the named plaintiffs in *Minter* had any issue with their transactions until they were solicited by class counsel to participate in the lawsuit; two of the plaintiffs had been so pleased with their transaction that they sent their Prosperity loan officer and Long & Foster real estate agent thank you notes and gifts after their closing, and the other plaintiff at one point made inquiry about potentially obtaining a commercial loan.[18] The *Minter* litigation

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[16] The total number of Prosperity loans in *Minter*, obtained by members of a timely class as well as an untimely class that sought to toll the RESPA statute of limitations, was 143,495. *See* [Proposed] Joint Pretrial Order at 3, 77, *Minter*, No. 07-cv-3442 (D. Md. Apr. 19, 2013), ECF No. 513. Just before trial, the untimely class was decertified and the timely class was narrowed. *See* Memorandum at 7-18, *Minter*, No. 07-cv-3442 (D. Md. Apr. 26, 2013), ECF No. 541.

[17] *See* Declaration of Brian M. Forbes at ¶ 11, *Minter*, No. 07-cv-3442 (D. Md. Apr. 19, 2013), ECF No. 421.

[18] *See* Day Four Transcript Of Proceedings Before The Honorable William M. Nickerson, United States District Senior Judge at 120-21, 180-82, *Minter*, No. 07-cv-3442 (D. Md. Jul. 9, 2013), ECF No. 643 (before she received an attorney solicitation letter, Ms. Minter was satisfied with her transaction and had even gone back to Prosperity to inquire about a possible commercial loan); Day Fourteen Transcript Of Proceedings Before The Honorable William M. Nickerson, United States District Senior Judge at 84-85, *Minter*, No. 07-cv-3442 (D. Md.

further revealed that neither the named plaintiffs nor the class members had suffered any financial or other injury.[19] At trial, the court excluded all testimony, evidence, and argument about whether plaintiffs in fact suffered economic injury, purportedly because the plaintiffs were not required to establish such injury to prove their RESPA claim, notwithstanding that they sought over a billion dollars in damages at the time of that ruling. *See* 762 F.3d 339, 350 (D. Md. 2014). While some testimony was ultimately admitted regarding Prosperity's generally competitive loan pricing, the court instructed the jury that there was no requirement that the plaintiffs prove economic harm and no other harm was alleged. *See id.* at 350-51. After a long trial, the defendants prevailed, with the jury rendering a verdict in less than three hours.[20] Despite the verdict, the plaintiffs' capacity to sustain such a meritless non-injury claim cost the defendants millions of dollars in attorneys' fees and taxed the resources of the court.

The *Baehr* and *Minter* cases illustrate how no-injury class actions under RESPA Section 8 can lead

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Jul. 9, 2013), ECF No. 653 (the Alboroughs also thanked their Long & Foster real estate agent for helping them with their home purchase and sent him a thank you card and gift card).

[19] The uncontroverted evidence showed that Prosperity's loan prices were lower than the marketplace generally. *See* Plaintiffs' Motion *In Limine* No. 1 (Courchane Testimony) and Plaintiffs' Memorandum in Support of Motion *In Limine* No. 1 (Courchane Testimony), *Minter*, No. 07-cv-3442 (D. Md. Jul. 9, 2013), ECF Nos. 484 and 484-1.

[20] *See Minter*, 762 F.3d at 351; *see also Minter*, 2013 U.S. Dist. LEXIS 122344, at *3 & n.2.

to potentially enormous exposure and significant costs involved with protracted litigation and discovery,[21] not to mention the burden placed on the courts. *Minter* was unusual only because the defendants were willing to risk so much to prevail. But many other defendants with viable defenses simply settle rather than risk litigation. It is not uncommon to see settlements in such cases yielding millions of dollars in funds for plaintiffs' attorneys and for consumers who never have been injured by the purported violation.

To date, no federal court of appeals has specifically addressed the requirements for Article III standing under RESPA Section 8 in the wake of *Spokeo I*, and the lower courts unfortunately lack sufficient guidance to make that determination appropriately and consistently. The ample room for confusion among the lower courts is illustrated by *Dolan v. Select Portfolio Servicing,* No. 03-CV-3285, 2016 U.S. Dist. LEXIS 101201 (E.D.N.Y. Aug. 2, 2016). In *Dolan*, plaintiff brought claims under a different provision of RESPA dealing with mortgage loan servicing. In evaluating constitutional standing for those claims, the court, *in dicta*, offered its view of RESPA Section 8 after *Spokeo I*. The *Dolan* court cited the Ninth Circuit's problematic 2010 holding in

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[21] Significantly, statutory consumer class actions like these have asymmetrical discovery costs. Consumer class representative plaintiffs typically have scant documents to search and produce (and class discovery of absent class members is rarely permitted), whereas corporate defendants have substantial repositories of electronic documents and data that will be subject to costly and time-intensive discovery.

Edwards—and struggled to consider how it was affected by *Spokeo I*—concluding that a plaintiff asserting a RESPA Section 8 claim need not prove an overcharge to meet Article III standing requirements. But in *Edwards*, the Ninth Circuit erroneously focused its standing analysis on the issue of whether under the RESPA Section 8 damages provision—12 U.S.C. 2607(d)(2)—a plaintiff was required to show an overcharge, thereby improperly conflating and confusing *statutory standing* with *constitutional standing*. 610 F.3d 514, 517 (9th Cir. 2010). The *Dolan* court carried that same error forth in 2016, despite the fact that this Court held in *Spokeo I* that a plaintiff cannot satisfy the demands of Article III "by alleging a bare procedural violation" because a "violation of one of the [statute's] procedural requirements may result in no harm." *Spokeo*, 136 S. Ct. at 1550.

In short, members of amici were forced to defend no-injury RESPA class actions before *Spokeo I* and, despite what appeared to be clear guidance from this Court, they continue to be at risk of such actions. Even when amici and others successfully defend such actions, no one really "wins," as it often takes years of distraction, millions of dollars, and hundreds of hours of the court's time.[22]

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[22] It is also worth noting that the Ninth Circuit's interpretation of *Spokeo I* could have the unintended effect of making class certification easier for many plaintiffs to achieve. Specifically, if for plaintiffs to have standing they need only allege a technical violation of a statute—divorced from any effect on the named plaintiff or any putative class member—they are unlikely to include any allegations of the real-world effect on plaintiff. This

B. Members Of Amici Have Also Been Subject To Problematic Applications Of *Spokeo I* In Connection With Claims Under TILA And EFTA.

The struggle to consistently apply the test articulated in *Spokeo I* also is evident in cases brought under the Truth in Lending Act ("TILA") and the Electronic Fund Transfer Act ("EFTA"), where courts have used problematic tests to justify decisions regarding their Article III jurisdiction.

In *Strubal* v. *Comenity Bank*, for example, plaintiff brought a putative class action under TILA, alleging that a bank failed to provide her with four different required disclosures at the time she was issued a credit card. 842 F.3d 181 (2d Cir. 2016). Ms. Strubal did not claim to have suffered any real world injury in connection with her claims, but instead alleged technical violations of TILA. *Id.* at 190-91. The Second Circuit attempted to apply this Court's

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real world effect often requires individualized inquiries (such as the fact of damage, causation, or ascertainable loss), which can defeat class certification under the predominance requirement of Federal Rule of Civil Procedure 23(b)(3). Predominance, of course, "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation," and often considers whether the alleged wrongful conduct affected the putative class members in the same way. *See Amchem Prods.* v. *Windsor*, 521 U.S. 591, 623 (1997) (citing 7B C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 1777, at 518-19 (2d ed. 1986)). The Ninth Circuit's approach permits financially motivated plaintiffs' counsel to focus on technical or trivial violations of a statute while avoiding inquiries about effect, causation and injury that keep improper class action at bay. It is doubtful that Congress intended this result.

holding in *Spokeo I* by considering the stated purpose of TILA and each of the challenged disclosures, but focused on whether it could "reasonably assume" that there was risk to an amorphous general "consumer," instead of whether the individual plaintiff before the court had experienced any kind of concrete and particularized injury. *Id.* Based on the court's assumptions regarding the absent "consumer," it found the plaintiffs to have standing to assert claims for two of the alleged disclosure errors despite the plaintiff's failure to allege that she suffered any real-world injury. *Id.* ("[H]aving alleged such procedural violations, Strubal was not required to allege 'any additional harm' to demonstrate the concrete injury necessary for standing"); *see also* Brief for Petitioner at 19-20, *Spokeo, Inc.,* v. *Thomas Robins*, No. 17-806 (Dec. 4, 2017) ("Brief for Petitioner").

Likewise, in *Aikens* v. *Portfolio Recovery Assocs., LLC*, the plaintiff brought a putative class action alleging that defendant violated the EFTA by obtaining consent for an electronic account transfer orally rather than in writing, as required by the statute. No. 17-cv-1132, 2017 U.S. App. LEXIS 23448, at *1-3 (2d Cir. Nov. 21, 2017).[23] The court focused its inquiry on the plaintiff and her allegations, and found that there was no Article III standing because "[Aikens] failed to allege in her

[23] The EFTA provides that "[a] preauthorized electronic fund transfer from a consumer's account may be authorized by the consumer only in writing," and provides for individual and class actions against "any person who fails to comply with any provision of [the EFTA] with respect to any consumer." 15 U.S.C. § 1693e(a); § 1693m(a).

complaint that she herself was exposed to any such risks" and did not allege that the failed disclosure would have an effect on consumers generally. *Id.* at *6-7. Yet again, the proper Article III view should have begun and ended with the fact that Aikens had not alleged that she was exposed to any risk.

The approach taken by the Second Circuit—and Ninth—differs from other circuit decisions in a manner that amici believe is troubling. *See* Brief for Petitioner at 14-21. This difference cannot be attributed, as respondents claim, to a difference in the underlying statutes. Brief for Respondent at 20, *Spokeo, Inc.,* v. *Thomas Robins*, No. 17-806 (Dec. 20, 2017) ("Brief for Respondent"). Rather, it is a fundamental difference in the underlying constitutional analysis and demonstrates the confusion courts face when determining where the injury must lie to confer Article III standing. *See Curtis* v. *Propel Prop. Tax Funding, LLC,* No. 3:16-cv-00731, 2017 U.S. Dist. LEXIS 125757, at *9-10 (E.D. Va. Aug. 8, 2017) (finding standing for putative class action plaintiff in EFTA case based on "abridging rights established by the EFTA" but immediately certifying its ruling for interlocutory appeal because there is "substantial ground for difference of opinion").

II. THE NINTH CIRCUIT'S MISGUIDED APPLICATION OF THE "INTANGIBLE HARM" STANDARD, AND ITS CLASS ACTION IMPLICATIONS, NECESSITATES FURTHER GUIDANCE FROM THIS COURT.

The proper scope and application of Article III's "intangible harm" requirement is a subject of considerable importance to the proper administration

of justice and the courts. Faithful application of Article III serves an important gatekeeping function by keeping lawsuits that are not suited to judicial resolution—because nobody has actually suffered harm—out of the federal court system. This Court granted certiorari in *Spokeo I* because there was a longstanding circuit split with respect to this crucial issue. Yet, as petitioner correctly identifies, the disarray among the lower courts has only increased since the Court's *Spokeo I* opinion.

A. The Analysis Respondent Wants To Leave In Place Is Not Viable.

On remand, the Ninth Circuit in this case conflated the generalized purpose of the underlying statute with a concrete injury-in-fact experienced by the respondent. Petitioner details this error and others by the Ninth Circuit and amici will not rehash those points. However, respondent's brief illustrates additional problems with the Ninth circuit's *Spokeo I* interpretation.

Respondent acknowledges that Congress's power to define intangible injuries is not limitless and that Article III requires a concrete injury even in the context of a statutory violation. Brief for Respondent at 19-20. But respondent offers no reasonable way to identify limits of Congress's authority. At the same time, respondent urges the Court not to grant the petition under the view that all that is at stake are different applications of *Spokeo I* to various factual scenarios, not an actual circuit split. *Id.* at 20-22. However, members of amici and other defendants can attest that they are struggling with the lower courts' different applications of *Spokeo I*, with courts

drawing arbitrary lines and reaching irreconcilable results.

Respondent suggests that the solution to any confusion among the lower courts is to focus the lens tightly on the apparent purpose of each statute, *id*. at 20, leaving courts to assess whether a plaintiff's allegations coincide with the conduct that Congress attempted to regulate generally, thereby often obviating the need to examine whether the alleged conduct actually adversely and concretely affected the plaintiff. Yet all relevant statutes and regulations presumably try to prohibit conduct that Congress has identified as undesirable or potentially harmful or, alternatively, to direct conduct that Congress believes is necessary or beneficial. Thus, one can discern from almost any federal statute—including those to which amici's members are subject—some practice or procedural right that Congress sought to address. Undoubtedly, savvy plaintiffs will claim a legal entitlement to be free from all conduct that the statute sought to prohibit and to receive all that the statute sought to bestow.

The impracticability of respondent's approach and the need for guidance from this Court is illustrated by respondent's attempt to distinguish the decision in *Dreher* v. *Experian Info. Solutions, Inc.*, 856 F.3d 337 (4th Cir. 2017). The claim in *Dreher* was that Experian had violated a duty under FCRA to disclose the sources of information that it used in its consumer reports. The Fourth Circuit held that the plaintiff lacked constitutional standing because his claimed intangible injury—not receiving statutorily required information from Experian—did not actually adversely affect him. *Id.* at 347.

Respondent argues that the harm the *Dreher* plaintiff claimed to have suffered was not the type of harm Congress sought to prevent when it enacted FCRA. Brief for Respondent at 22. But this takes an unduly narrow approach to statutory purpose that cannot be consistently applied across all statutes or jurisdictions. With respect to the FCRA, for example, Congress presumably thought it important to specify the sources of the credit information to be used so that the consumer could review those sources to ensure the credit information was accurate. In any event, the Fourth Circuit appropriately held that the claimed statutory violation alone was insufficient, explaining that the plaintiff had to show not only a statutory entitlement to the information but also that the alleged denial of that information created a "'real'" harm with an adverse effect." 856 F.3d at 345.

One cannot discern a principled difference between the *Spokeo I* and *Dreher* decisions based on whether Congress sought to give consumers a procedural right. Indeed, as with the plaintiff in *Dreher,* respondent here also was unable to make such a showing of an adverse effect, other than to point to a theoretical possibility of adverse effect that could primarily pose risk to others from such a course of conduct.

Left unchecked, the Ninth Circuit approach advocated by respondents would invite arbitrary and unfair results with respect to the statutes governing amici's members.

B. The Ninth Circuit's Interpretation Of *Spokeo I* Undermines The Purpose Of Article III And Promotes The Opportunity For No-Harm Plaintiffs To Bring Private Lawsuits And Class Actions.

The Ninth Circuit's focus on the risk of harm to an abstract general group, and not the particular plaintiff, goes too far in permitting bare statutory violations to confer constitutional standing. The Ninth Circuit's interpretation of Article III views the courts as the only mechanism for enforcement of statutory intent, and does so at the expense of Article III's requirement of a concrete injury that can be redressed by a lawsuit. Yet federal statutes, such as the consumer finance statutes discussed here, often have intense regulatory enforcement mechanisms, empowering agencies like the Federal Trade Commission, the Department of Justice, the Consumer Financial Protection Bureau, the Federal Deposit Insurance Corporation, and the Office of the Comptroller of the Currency, among others, to investigate, prosecute, and seek civil money penalties, injunctions, and other relief. Such agencies have the authority and specialized knowledge to address technical, no-harm violations, and many regularly invite consumer feedback and complaints about industry.

Moreover, as amici are painfully aware, the Ninth Circuit's interpretation further incentivizes the filing of extortionate class actions, too often brought by representative plaintiffs who were solicited to be the vehicle through which a claimed statutory violation is

alleged, but who themselves experienced no concrete adverse effect.

While the class action device offers important and beneficial functions, stretching Article III's limits exacerbates the device's well-known abuses. This is particularly true when plaintiffs can survive a motion to dismiss by merely alleging a statutory violation—divorced from any real world harm to *them*—based on an argument that Congress sought to regulate the practice at issue and the alleged violation presents risk of harm to a generalized group. This presents a real risk of exposure, and even a defendant with meritorious defenses must decide whether to engage in costly discovery under the threat of potentially crippling liability or succumb to a "blackmail settlement" to resolve a meritless claim. *See In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995) (quoting Henry J. Friendly, Federal Jurisdiction: A General View 120 (1973)).

"[C]ourts benefit from straightforward rules under which they can readily assure themselves of their power to hear a case." *Hertz Corp.* v. *Friend*, 559 U.S. 77, 94 (2010). Competing interpretations of *Spokeo I* have left the lower courts in disarray. A more sensible interpretation of Article III—that can be consistently applied and is fully supported by Supreme Court precedent—would make clear that a statutory violation constitutes a concrete injury in and of itself only under plainly identifiable circumstances, where it is clear that the deprivation of the procedural right was viewed by Congress as virtually always causing intangible, yet *real-world*, harm to any person experiencing the violation. Examples of such harm include a political rights

injury related to voting under the Federal Election Campaign Act,[24] a stigmatizing injury to persons who allege they were personally denied equal treatment because of discriminatory conduct,[25] or the alleged receipt of discriminatory misinformation about the availability of housing in violation of the Fair Housing Act.[26] Violations of many other federal statutes, which may have been designed to provide protections or avoid harm but whose provisions will not necessary result in a concrete intangible injury if violated (*e.g.*, RESPA, TILA, EFTA), should not automatically confer Article III standing. Instead, a plaintiff should be required to allege and ultimately prove that the claimed statutory violation produced real-world harm, or imminently poses a significant risk of real-world harm, to the *plaintiff*.

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[24] *E.g.*, *FEC* v. *Atkins*, 524 U.S. 11 (1998).

[25] *E.g.*, *Heckler* v. *Mathews*, 465 U.S. 728, 739-740 (1984).

[26] *E.g.*, *Havens Realty Corp.* v. *Coleman*, 455 U.S. 363, 373-374 (1982).

CONCLUSION

For the reasons stated above, amici respectfully request that the Court grant the petition for writ of certiorari to provide the lower courts with additional guidance regarding Article III standing.

Respectfully submitted,

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