No. 13-1339

IN THE

Supreme Court of the United States

SPOKEO, INC.,

Petitioner,

v.

THOMAS ROBINS,

Respondent.

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

BRIEF OF THE COALITION FOR SENSIBLE PUBLIC RECORDS ACCESS; AMERICAN ESCROW ASSOCIATION; AMERICAN LAND TITLE ASSOCIATION; CONSUMER MORTGAGE COALITION; NATIONAL ASSOCIATION OF REALTORS®; AND REAL ESTATE SERVICES PROVIDERS COUNCIL, INC. (RESPRO®) AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

MICHAEL D. LEFFEL
FOLEY & LARDNER LLP
Verex Plaza
150 East Gilman Street
Madison, WI 53703
(608) 257-5035
mleffel@foley.com

CHRISTI A. LAWSON
SEAN P. SMITH
FOLEY & LARDNER LLP
111 N. Orange Avenue
Suite 1800
Orlando, FL 32801
(407) 244-3235
clawson@foley.com

JOSEPH W. JACQUOT
Counsel of Record
FOLEY & LARDNER LLP
One Independent Dr.
Suite 1300
Jacksonville, FL 32202
(904) 359-8769
jjacquot@foley.com

JAY N. VARON
JENNIFER KEAS
FOLEY & LARDNER LLP
3000 K Street, N.W.
Washington, D.C. 20007
(202) 672-5300
jvaron@foley.com

Counsel for Amici Curiae

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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STATEMENT OF INTEREST[1]

The members of amici are subject to numerous federal statutes including, among others, the Fair Credit Reporting Act ("FCRA") and the Real Estate Settlement Procedures Act ("RESPA"). Many of these statutes provide a private right of action to pursue alleged violations, and recovery of significant statutory damages. Plaintiffs frequently pursue claims under these types of statutes on behalf of putative classes, exposing defendants to the threat of overwhelming liability—even if no plaintiff was harmed by the conduct (and some may even have benefitted) and even if the claim is wholly without merit. Litigating in the face of such exposure in these circumstances presents an overwhelming risk that defendants should not, and are not required to, take.

Amici's members are all too familiar with this issue, and have frequently been confronted with the prospect of a class action lawsuit brought against them by a consumer who suffered no injury, including some who were solicited to represent the proposed class. As a result, amici's members—some of whom supply lending, insurance or transactional information, or facilitate residential real estate purchases—face increased costs of doing business and are significantly less willing to bear risk and to

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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, their members, or their counsel made a monetary contribution to this brief's preparation or submission. The parties have consented to the filing of this brief.

innovate, to the ultimate detriment of all consumers and the economy.

The Coalition for Sensible Public Records Access ("CSPRA"), a nonprofit organization, promotes open public records access to ensure consumers and businesses have the ability to collect and use the information available in government records. CSPRA's members include credit reporting agencies and other public record information providers and users, including those serving industries for mortgage lending, auto, insurance, and law enforcement. The business of collecting and utilizing public records provides critical infrastructure of our data-driven economy, from supporting marketing campaign decisions, identifying and verifying consumer and businesses qualifications, facilitating rapid and accurate credit decisions, to expanding the range, convenience and confidence of payment mechanisms and consumer transactions.

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. AEA seeks to further the knowledge and professionalism of its members and to educate and advise policy-makers at the national level on issues of consequence to the settlement industry as a whole.

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 5,600 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. ALTA members include title insurance companies, title agents, independent abstracters, title searchers and attorneys, ranging from small, one-county operations to large national title insurers.

The Consumer Mortgage Coalition ("CMC") is a trade association of national mortgage lenders, mortgage servicers and mortgage origination-service providers, committed to the nationwide rationalization of consumer mortgage laws and regulations. The CMC appears as *amicus curiae* in litigation with implications for the national mortgage-lending marketplace.

The National Association of Realtors ("NAR") represents 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 1,400 local associations of REALTORS®, and more than 1 million REALTOR® and ASSOCIATE® members. NAR represents the interests of these real estate professionals in important matters before the legislatures, courts and executives of the federal and state governments. NAR has previously participated as *amicus curiae* in numerous cases before this court including *Edwards* v. *First Am. Fin. Corp.*, 610 F.3d 514 (9th Cir. 2010), *cert. granted*, 131 S. Ct. 3022 (U.S. 2011); *cert. dismissed*, 132 S. Ct. 2536 (U.S. 2012) (hereafter, "*Edwards*").

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. RESPRO® authored an *amicus* brief in the *Edwards* case before this Court.

SUMMARY OF ARGUMENT

The Ninth Circuit's decision, and others like it, poses a major threat to the Constitution's apportioned role for the federal courts. This Court has been clear that, although Congress has the power to create new legal rights and causes of action where none previously existed, Article III requires a plaintiff to have suffered injury-in-fact before he can avail himself of the federal courts. Congress's enactment of statutes containing damages provisions cannot change the fundamental separation of the legislative and judicial functions, and the Ninth Circuit's decision to the contrary cannot be reconciled with this Court's longstanding Article III jurisprudence.

Amici agree with Petitioner that the Constitution does not provide a judicial remedy to an uninjured plaintiff due to the mere violation of a statute providing statutory rights or penalties. Amici write for two purposes. First, amici write to provide examples of the unique and severe exposure their members have faced, and will face if the Court affirms, for alleged violations under the statutes they must contend with as part of their routine business operations. This includes a discussion of potential

exposure under the Fair Credit Reporting Act ("FCRA") and other statutes due to government public records whose content they do not control. It also includes a discussion of similar liability exposure faced under RESPA and other similar laws. Second, amici write to highlight other robust enforcement mechanisms, apart from private litigation, that currently exist to address conduct that these statutes were enacted to prevent or regulate, including dramatically increased federal enforcement and remedial powers as well as state-pursued remedies.

The Ninth Circuit's decision has significant real-world consequences. The proliferation of class action lawsuits places many businesses and individuals, including amici's members, at risk of being sued for annihilative damages even when the plaintiff does not allege, and does not intend to prove, any actual injury as a result of the claimed violation. Some of amici's members have been subject to multiple such lawsuits under RESPA. But RESPA, FCRA, and other similar laws do not and should not exist to sponsor opportunistic strike-suits by plaintiffs who allege widespread technical violations of law that caused them no financial or other actual harm. Allowing such lawsuits to proceed licenses plaintiffs, and the class action plaintiffs' attorneys who typically heavily recruit them, to use the class action device and the federal courts to "enforce" claimed widespread conduct that caused no actual harm, which is precisely what Article III standing requirements are intended to prevent.

This is not to say that such claimed statutory violations would go unchecked. Congress can and does provide for regulatory and even criminal enforcement for no-harm conduct that offends the

statute, such as conduct that Congress prohibited based on the belief that it ultimately could have a deleterious effect on the marketplace. Indeed, when Congress created the Consumer Financial Protection Bureau ("CFPB") as part of the Dodd Frank Wall Street Reform and Consumer Protection Act ("Dodd Frank"), it gave the CFPB greatly expanded powers to enforce FCRA, RESPA, and other federal consumer financial laws and an enormous budget with which to do so. Further, state enforcement and private litigation for which there is Article III jurisdiction will remain intact. These enforcement opportunities provide a substantial mechanism for policing compliance with the law without creating the extortionate effects of no-injury class actions.

ARGUMENT

I. ADOPTION OF THE NINTH CIRCUIT'S INJURY-IN-LAW APPROACH FOR STANDING WILL LEAD TO SETTLEMENT OF MERITLESS CLAIMS, BECAUSE THAT APPROACH EXPOSES INDIVIDUALS AND BUSINESSES TO THE THREAT OF OVERWHELMING LIABILITY, EVEN WHEN THERE IS NO ACTUAL HARM TO PLAINTIFFS.

Amici seek to describe and illustrate the serious problems that result from permitting no-injury lawsuits to proceed with the threat of statutory damages, particularly in class actions. This Part includes an analysis of potential exposure for members of amici who deal with public records, whether under FCRA or other statutes. It then discusses examples, most notably under RESPA, of

the types of claims that other members of amici must face in dealing with similar no-injury claims.

The discussions in Parts I.A. and I.B., are real world examples of what members of this Court, and other courts, have repeatedly recognized—that an unchecked class action device can pose an unacceptable threat to potential defendants. *See, e.g., AT&T Mobility LLC* v. *Concepcion*, 131 S. Ct. at 1740, 1752 (2011) ("[W]hen damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once, the risk of an error will often become unacceptable."); *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 476 (1978) ("Certification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense."); *see also, e.g., Shady Grove Orthopedic Assocs., P.A.* v. *Allstate Ins. Co.*, 559 U.S. 393, 445 n.3 (2010) (Ginsburg, J., dissenting) ("When representative plaintiffs seek statutory damages, pressure to settle may be heightened because a class action poses the risk of massive liability unmoored to actual injury." (internal citation omitted)); *Nike, Inc.* v. *Kasky*, 539 U.S. 654, 678-80 (2003) (Breyer, J., dissenting from dismissal of certiorari) (warning of private plaintiffs bringing suit "even though they themselves have suffered no harm"); *Trans Union LLC* v. *Fed. Trade Comm'n*, 536 U.S. 915, 916-17 (2002) (Kennedy, J., dissenting, from denial of certiorari) (noting that potential billion dollar exposure in FCRA class action posed risk to nation's economy and raised First Amendment concerns).

In the words of Judge Henry Friendly, the class action device alone can at times result in "blackmail

settlements," where even defendants with meritorious defenses feel compelled to settle based on the enormous threat of liability that a class action can present. *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)). Expanding the ability to pursue class claims in federal court by altering the traditional injury-in-fact requirement for plaintiffs will simply make this practice more prevalent and class actions more abusive.

Amici are not suggesting that claims under these statutes are never actionable or that class actions may not be properly employed to redress real injuries. To have Article III standing, however, the class plaintiffs must allege certain types of injuries, and in this case (and in many other cases) they do not. Moreover, where the claim is brought as a class action for damages, the claim must be provable with common evidence and facts that predominate. *See* Fed. R. Civ. P. 23; *see also, e.g.*, *Wal-Mart Stores, Inc.* v. *Dukes*, 131 S. Ct. 2541, 2551 (2011) ("That common contention, moreover, must be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke."). Often, however, cases involving consumer class actions are specifically pled in order to make it more likely that a class could be certified, by claiming that all putative class members were injured in the same way. That is particularly simple to do in a no-injury class when the allegation is that the defendant "harmed" everyone in the same way simply by alleging a violation of a statute, even

though there is no evidence of actual harm to any plaintiff.

But Article III does not permit a plaintiff, even one trying to certify a class action, to avoid pleading an actual injury-in-fact. While class actions have a proper and important role to play in our judicial process, permitting them (or any litigation in federal court) to proceed without the important limitations of Article III's standing requirements is not what Congress or the framers of our Constitution envisioned. The examples below demonstrate the problems associated with abandoning this requirement.

A. Members Of Amici Are Subject To Significant Litigation Risk Based On Their Dealings With Public Records, Even When There Is No Injury To A Plaintiff, And No Merit To The Claims.

As noted above, many members of the amici are public record information providers and users. They acquire, utilize and distribute public records for beneficial purposes such as assessing credit in lending, risk in insurance, product history in purchases or background in law enforcement. These public records describe and define legal relationships, status and rights.[2] Government records, however, are not completely free of error,[3] and yet courts and

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[2] "Public records are those records which a government unit is required by law to keep or which it is necessary to keep in discharge of duties imposed by law." *Black's Law Dictionary* (6th ed. 1990).

[3] For example, the Government Accountability Office has cited "governmental agencies that provide information on bankruptcies, liens, collections and other actions noted in public

others consider public records a reliable source of information. *See Sec'y of State for Defence* v. *Trimble Navigation Ltd.*, 484 F.3d. 700, 705 (4th Cir. 2007) ("we may properly take judicial notice of matters of public record") (citing *Papasan* v. *Allain*, 478 U.S. 265, 268 n.1 (1986)). That is one significant reason why they are heavily relied on to facilitate commerce, including credit decisions, purchases, or other decisions requiring certain background checks. *See, e.g., Cooper* v. *BB Syndication Servs.* (*In re 222 S. Caldwell St., Ltd. P'ship*), 409 B.R. 770, 793 (Bankr. W.D.N.C. 2009) ("The Recording Acts are intended to . . . allow potential purchasers and creditors to rely completely on the public record to safely determine the title being obtained.")(citing *e.g.*, *Schuman* v. *Roger Baker & Assocs.*, 70 N.C. App. 313, 326-17, 319 S.E.2d 308, 311 (N.C. Ct. App. 1984)).

Public records—as distributed through aggregators, furnishers, credit reporting agencies ("CRAs"), resellers and other providers—are an essential ingredient in our information economy. They are utilized for decisions relating to proving and protecting consumer identities, employment,

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records as major sources of errors." U.S. Gen. Accounting Office, GAO-03-1036T, Statement for the Record Before the Committee on Banking, Housing and Urban Affairs, U.S. Senate, Consumer Credit, Limited Information Exists on Extent of Credit Report Errors and Their Implications for Consumers, p.ii (July 31, 2003), *available at* http://www.gao.gov/new.items/d031036t.pdf. Also New York's Division of Consumer Protection website advises consumers to check for credit report accuracy poses the introspective query: "Public Records – Are there any errors?" New York Department of State, Division of Consumer Protection *Unraveling the Mystery Behind Credit Reports,* http://www.dos.ny.gov/consumerprotection/identity_theft/protect_yourself_from_identity_theft/unravel.html.

insurance, consumer credit, lending, and retail purchases. Yet fear of litigation may have a chilling effect on such distribution of public record information for economic decision-making, leading to more time-consuming transactions for consumers or increased costs due to unknown risks.

The widespread importance of this type of information is well-recognized, but its use and reporting comes with limitations. FCRA regulates the use and reporting of certain personal information, including information contained in public records, and requires that certain "consumer reporting agencies" "follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the [consumer] report relates." 15 U.S.C. § 1681e(b).[4] A negligent violation of FCRA exposes a defendant to "actual damages," attorney fees, and costs. 15 U.S.C. § 1681o(a). A "willful" violation permits a consumer to seek "actual damages" and statutory "damages of

[4] For employment purposes, when a CRA utilizes adverse public record information for a report, FCRA requires the CRA to "notify the consumer of the fact that public record information is being reported," or "maintain strict procedures to ensure it "is complete and up to date." 15 USC § 1681k(a). Further, FCRA provides, only "[f]or purposes of this paragraph," that certain public record items are to be considered up to date "if the current public record status of the item at the time of the report is reported." 15 USC § 1681k(a). Yet, as one court has held, nothing in section 1681k relieves an entity of its section 1681e(b) obligation for "maximum possible accuracy." *See Henderson* v. *Infomart, Inc.,* No. 1:14-cv-01609, Dkt. 59 at 16 (N.D. Ga. Aug. 8, 2014)(report and recommendation of magistrate); Dkt. No. 61 (N.D. Ga. Sept. 2, 2014) (order adopting report and recommendation).

not less than $100 and not more than $1,000," and punitive damages. 15 U.S.C. §§ 1681n(a)(2).

As government records are held to be reliable, the accuracy requirements of 1681e, and similar provisions of FCRA, as applied to reporting public records should be measured by fidelity to the underlying record, not subjective opinions concerning the inaccuracy of the factual information. Strictly speaking, a "more accurate" version of the current public record is a misnomer.

A faithful reporting of a public record, however, is not enough to avoid a class action lawsuit under FCRA.[5] The fact that some courts let such claims proceed is reflected in *Yourke* v. *Experian Information Solutions*, No. C 06-2370, 2007 WL 1795705, 2007 U.S. Dist. LEXIS 47558 (N.D. Cal. June 20, 2007). Based on public records, Experian indicated that plaintiff had certain tax liens. *Id.* at 2. Upon plaintiff's dispute, Experian reinvestigated and updated its report to show that all of plaintiff's liens were released, yet plaintiff further complained that the information was still inaccurate, because the plaintiff argued that the liens should be expunged

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[5] Indeed, "FCRA does not require credit reporting agencies to alter inaccuracies in the public record." *Evans* v. *Credit Bureau*, 904 F. Supp. 123, 126 (W.D.N.Y. 1995). Otherwise, an entity may violate its obligations where "[FCRA] imposes the obligation to correctly report that which appears on the public records…" *Id.* at 3, citing *Williams* v. *Colonial Bank*, 826 F. Supp. 415 (M.D. Ala. 1993), *aff'd* 29 F.3d 641 (11th Cir. 1994). Instead, a "consumer's recourse for an inaccurate record is to contact the… clerk's office to correct misinformation… [T]hat responsibility is not shifted to the credit reporting agency." *Id.* at 3-4. Plaintiffs continue, however, to pursue the types of cases discussed in the body of the brief, generating potential exposure to defendants.

from the report altogether. *Id.* at 3. Upon receiving Experian's written response stating that the tax liens were in the public records and therefore were properly reflected on the plaintiff's report, plaintiff sued. *Id.* at 4.

The court denied Experian's motion for summary judgment on claims of willful and negligent conduct under 1681e (requiring maximum possible accuracy). In doing so, the court also allowed the plaintiff to proceed with his willful and negligent 1681i claims (requiring a reasonable investigation of any disputes), because Experian continued to report the information. *Id.* at 9, 11 (relying on *Cahlin* v. *General Motors Acceptance Corporation,* 936 F.2d 1151, 1159 (11th Cir. 991) (citing *Koropolous* v. *Credit Bureau, Inc.,* 236 U.S. App. D.C. 136, 734 F.2d 37 (D.C. Cir. 1984))). In other words, the court held that Experian could not simply rely on the fact that the information it was reporting accurately reflected what was in the public record.[6]

The court's decision in *Yourke* was in contrast to the Federal Trade Commission's ("FTC") guidance from the same year that made clear that obtaining information from a reputable source, with no further evaluation of reasonable procedures, satisfies FCRA's standard of accuracy for information faithfully reproduced. 16 C.F.R. pt. 600, App., Commentary on

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[6] The court allowed a claim for punitive damages for willful conduct causing emotional distress to proceed because the defendant argued its conduct did not violate FCRA *at all.* The court noted that Yourke attributed his anxiety to the feeling he was being ignored by Experian after all his efforts. *Id.* at 12. Of course, under the Ninth Circuit's view, to pursue statutory damages under FCRA the plaintiff need not allege any personal injury or harm.

Fair Credit Reporting Act (2007).[7] However, the FTC rescinded that guidance.[8]

Unable to rely on FTC guidance in this area, defendants face potential liability for reporting public information as the government entity published it, because the courts apply FCRA differently. For example, defendants in some circuits may be able to assert reliance on public records as a defense at the motion to dismiss stage. *See, e.g., Sarver* v. *Experian Info. Solutions*, 390 F.3d 969, 972 (7th Cir. 2004); *Henson* v. *CSC Credit Servs.*, 29 F.3d 280, 286-87 (7th Cir. 1994) (involving a CRA's reported judgment information obtained from a state court judgment docket); *Frost* v. *Experian*, 1998 U.S. Dist. LEXIS 17276, 1998 WL 765178 (S.D.N.Y. Oct. 30, 1998) (addressing Experian reported information obtained from a court docket). That view, however, is not universally held. *See, e.g, O'Brien* v. *Equifax Info Servs.,* 382 F. Supp. 2d 733, 739 (E.D. Pa. 2005) ("There is no reason to believe that the Third Circuit would adopt the Seventh Circuit's holding in *Sarver*,

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[7] Commentary Section 607(3):

> A. *General.* The section does not require error free consumer reports. If a consumer reporting agency accurately transcribes, stores and communicates consumer information received from a source that it reasonably believes to be reputable, and which is credible on its face, the agency does not violate this section simply by reporting an item of information that turns out to be inaccurate.

[8] FTC Statement of General Policy or Interpretation, Commentary on the Fair Credit Reporting Act, Rescission of Commentary, 76 Fed. Reg. 44,462, 44,463 (July 26, 2011). Interagency and CFPB guidelines provide new guidance, but reference to reputable sources is notably absent. 12 C.F.R. § 1022.42, App. E (2011).

as interpreted by Equifax, that a credit reporting agency's procedures are reasonable as a matter of law whenever the credit reporting agency simply repeats information from a reputable source."). While accurate reporting of matters of public record should be per se "reasonable," divergent interpretations of FCRA thrusts providers and users into a precarious position of liability.[9]

A similar example of the potential exposure under the Ninth Circuit's interpretation of standing for defendants dealing with public records is found in cases involving the Driver Privacy Protection Act ("DPPA") 18 U.S.C. § 2721, which permits liquidated damages for plaintiffs of not less than $2,500 for violations. 18 U.S.C. § 2724(b)(1). DPPA prohibits a private individual from "knowingly… obtain[ing] or disclos[ing] personal information, from a motor vehicle record, for any use not permitted under section 2721(b)." 18 U.S.C. § 2722(a). DPPA also provides for a private right of action for those whose information was obtained or disclosed in violation of the Act. 18 U.S.C. § 2724(a).

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[9] Beyond sound policy and statutory reasons for records to be faithfully reproduced, companies reporting public records have First Amendment rights to do so. As this Court has recognized, transmitting information contained in consumer reports is a form of speech. *See Dun & Bradstreet, Inc.* v. *Greenmoss Builders, Inc.*, 472 U.S. 749, 762 n.8 (1985); *see also Sorrell* v. *IMS Health*, 131 S. Ct. 2653, 2667 (2011). In considering California's so-called "Freeze Statute" that enables a consumer to put a hold on her credit report, a state appellate court held, in favor of a credit reporting agency, the provision "unconstitutional as applied to plaintiff who… provides credit reports drawn in material part from public records including court documents." *U.D. Registry, Inc.* v. *State of California*, 2006 Cal. App. LEXIS 1693 (Cal. App. 2d Dist., Oct. 30, 2006).

In *Graczyk* v. *West Publ'g Corp.,* No. 09-C-4760, 2009 WL 5210846, 2009 U.S. Dist. Lexis 120256 (N.D. Ill. Dec. 23, 2009), the defendant's "liability under [DPPA] would potentially be in the billions of dollars in liquidated damages." *Id.* at *18. Plaintiff alleged that defendant obtained plaintiff's personal information from state Department of Motor Vehicle ("DMV") records and resold the information in violation of DPPA. *Id.* at *2. The district court held that the plaintiff lacked standing. *Id.* at *20. The Seventh Circuit reversed the finding of no standing. *See Graczyk* v. *West Publ'g Corp.,* 660 F.3d 275 (7th Cir. 2011); *see also Taylor* v. *Acxiom Corp.*, 612 F.3d 325 (5th Cir. 2010). The court held that standing existed based purely on DPPA's private right of action. *Graczyk*, 660 F.3d at 278.[10]

B. No-Injury Lawsuits Under RESPA, With Treble Damages, Are Commonplace, Even When The Consumer Was Satisfied And Was Provided With Good Service And Pricing.

Many of amicis' members have also been subject to RESPA class action lawsuits in which the named plaintiffs were completely uninjured and only brought suit after being solicited and told they were wronged and could recover apparently automatic damages.

RESPA claims are a magnet for the plaintiff's bar because Section 8(d)(2) provides that any "person or persons who violate the prohibitions or limitations of this section shall be jointly and severally liable to the

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[10] While defendants withstood massive exposure on alternative grounds for dismissal, interpreting Article III to permit such no-injury cases, as the Seventh Circuit did, will no doubt force some companies to settle in this type of "bet-the-company" case.

person or persons charged for the settlement service involved in the violation in an amount equal to three times the amount of any charge paid for such settlement service," 12 U.S.C. § 2607(d)(2), and many courts have held such treble damages to be available even when—as is often the case—there is no actual injury.[11]

This Court is familiar with the facts of *Edwards* v. *First Am. Corp.* 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. App. 58a (Compl. ¶ 41).[12] Plaintiff

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[11] In addition, while Section 8(d)(5) expressly provides for costs and reasonable attorney's fees "to the prevailing party," *id.* at § 2607(d)(5), the few courts that have interpreted that provision have held that RESPA is analogous to the civil rights laws (even though RESPA does not even provide a private right to seek injunctive relief) and have denied attorneys' fees for prevailing defendants unless the cases were "frivolous, unreasonable or without foundation." *See, e.g.*, *Lane* v. *Residential Funding Corp.*, 323 F.3d 739, 746-48 (9th Cir. 2003). These circumstances unfortunately have created a "cottage industry" of lawsuits brought under § 8, many of which involve lawyers who shop for representative plaintiffs and file class action lawsuits in their name based on a purported technical violation of the statute, hoping to obtain a quick settlement. Based on the potentially enormous exposure involved in a putative class action under RESPA Section 8 (not to mention the costs involved with protracted litigation and discovery) plus an interpretation that only provides prevailing plaintiffs with attorneys' fees, it is not uncommon to see settlements in such cases yielding millions of dollars in funds for attorneys' fees and for consumers who never have been damaged or injured by the purported violation.

[12] Citations to the Appendix accompanying the petition for a writ of certiorari are cited as "App. _" and citations to the Joint

did not claim that she suffered any financial or other actual harm, since, as the Court of Appeals recognized, she did not contend that these alleged kickbacks increased the cost of her title insurance or otherwise affected the quality of services she received from First American. *See, e.g.*, App. 4a; App. at 49a (Compl. ¶ 5) (complaining only of allegedly missing "information about the costs").[13]

Ms. Edwards' claims are typical of class actions brought under RESPA, which are often pursued without the plaintiffs having any ability to allege injury-in-fact, and appear to be more driven by plaintiffs' counsel than any desire on the part of the plaintiff to have an injury rectified.

To give the Court a ground-level appreciation of these types of cases, many occurring under RESPA Section 8,[14] amici briefly provide an account of another bet-the-company RESPA case, which certain

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Appendix are cited as "J.A. _."

[13] In fact, it was undisputed that, based on the State of Ohio's filed rate regulatory regime, all title insurance available in Ohio at the time of Ms. Edwards' purchase was offered at the same price. App. 14a (noting that Ms. Edwards "admit[ted] that the cost of title insurance in Ohio is regulated so that all insurance providers charge the same price"); *cf.* Br. in Opp. at 6 & n.3. As recognized below, Ms. Edwards did not allege that "the charge for title insurance was higher than it would have been without the [alleged] exclusivity agreement." App. 4a. "Plaintiff does not and cannot make this allegation because Ohio law mandates that all title insurers charge the same price." *Id.* Ms. Edwards also did not allege she received inadequate (or less) value from First American. In other words, she did not allege that she could have received better service from another title insurer.

[14] Section 8 of RESPA prohibits the payment of referral fees and splitting unearned fees in residential real estate transactions. 12 U.S.C. § 2607(a).

of their members have had to litigate despite the complete lack of any injury to the plaintiffs.

In *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"), the largest privately owned real estate broker in the country.[15] No. WMN-07-3442, 2013 U.S. Dist. LEXIS 122344 (D. Md. Aug. 28, 2013), aff'd, 762 F.3d 339 (4th Cir. 2014). The case was one of many similar types of cases pursued as class actions, frequently by the same class counsel. *See, e.g.*, *Robinson* v. *Fountainhead Title Group Corp.*, 252 F.R.D. 275 (D. Md. 2008); *see also Benway* v. *Res. Real Estate Servs., LLC*, 239 F.R.D. 419 (D. Md. 2006).

The *Minter* case is unusual, not because the plaintiffs pursued a class action under RESPA despite suffering no injury-in-fact, but because the defendants were willing to risk so much to prove that they were right. Many other defendants facing similar allegations (against the same plaintiffs' counsel) had simply settled rather than risking further litigation.[16] The *Minter* case demonstrates

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[15] Wells Fargo and Long & Foster are members of one and two amici, respectively.

[16] *See* Order Granting Mot. by Pls. to Approve Am. Settlement Agreement and Certifying Settlement Class, *Benway*, No. 1:05-cv-03250-WMN (D. Md. Oct. 12, 2011), ECF No. 191; *see also* Final Order Approving Settlement and Certifying Settlement Class, *Robinson*, No. 1:03-cv-03106-WMN (D. Md. Oct. 7, 2010), ECF No. 198; Order Granting Pls.' Mot. for Final Approval of Class Action Settlement, *Brittingham* v. *Prosperity Mortg. Co.*, No. 1:09-cv-00826-WMN (D. Md. Aug. 24, 2010), ECF No. 77; Final Order Approving Settlement and Certifying Settlement

the risk, and costs, of seeing such litigation through to the end.

The *Minter* plaintiffs alleged that the joint venture, Prosperity Mortgage Company ("Prosperity"), was a "sham" provider under criteria contained in a RESPA policy statement[17] and existed as a pretext to pay unlawful referral fees, in claimed violation of RESPA Section 8. The plaintiffs claimed that the former Prosperity customers in each of the approximately 150,000 loan transactions at issue[18] were entitled to automatic treble damages under RESPA Section 8(d)(2), which would have surpassed a billion dollars in total,[19] an amount that was many

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Class, *Yates* v. *All Am. Abstract Company, Inc.*, No. 2:06-cv-02174-HB (E.D. Pa. July 8, 2008), ECF No. 71; Final Order Approving Settlement and Certifying Settlement Class, *McManus* v. *Fountainhead Title Grp. Corp.*, No. 1:03-cv-02813-WMN (D. Md. Jan. 18, 2006), ECF. No. 26; Final Order Approving Settlement and Certifying Settlement Class, *Gray* v. *Fountainhead Title Grp. Corp.*, No. 1:03-cv-01675-WMN (D. Md. Aug. 30, 2004), ECF. No. 43.

[17] Statement of Policy 1996-2 Regarding Sham Controlled Business Arrangements, 61 Fed. Reg. 29,258 (June 7, 1996), issued by the United States Department of Housing and Urban Development ("HUD"), which until July 2011 had the authority to enforce RESPA.

[18] 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 and 77, *Minter*, No. WMN-07-3442 (D. Md. Apr. 19, 2013), ECF No. 513. The untimely class was decertified and the timely class was narrowed just before trial. *See* Memorandum at 7-18, *Minter*, No. WMN-07-3442 (D. Md. Apr. 26, 2013), ECF No. 541.

[19] The *Minter* timely class originally involved approximately 63,349 Prosperity loans. *See* [Proposed] Joint Pretrial Order at 24, *Minter*, No. WMN-07-3442 (D. Md. Apr. 19, 2013), ECF No.

times the sum of Prosperity's net income over its then-twenty year history.[20]

As is unfortunately commonplace in these cases, none of the named representative plaintiffs had had any issue with their transactions until they were contacted unsolicited by class counsel to participate in the lawsuit;[21] two of the plaintiffs had been so pleased with their transaction that they sent their

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513. The plaintiffs claimed that the fees subject to damages trebling included: (a) all Prosperity fees listed on class member settlement statements for "origination," "application," "processing," "underwriting," and similar services, and (b) all service release fees for such loans (*i.e.*, payments Prosperity received from the sale of those closed loans to the secondary mortgage market). *Id.* at 70-71. This theory would have yielded $9,965.01 in statutory damages (trebled) for representative plaintiff Ms. Minter alone, and hundreds of millions of dollars in statutory damages for the class. Had the untimely class not been decertified, damages likely would have exceeded a billion and a half dollars. *Id.* at 77.

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

[21] The regulation of attorney solicitation is addressed by laws and ethics rules of the states. Amici raise the factual points here only to highlight that these types of class actions are frequently not initiated by plaintiffs seeking to right some perceived wrong. Another example of this, from another member of an amici, is a RESPA case, *Busby* v. *JRHBW Realty Inc.*, No. 2:04-CV-2799-VEH, 2012 U.S. Dist. LEXIS 145037 (N.D. Ala 2012), which took eight years to litigate before the defendant prevailed. In *Busby*, the named plaintiff had been contacted by an attorney several months after her closing transaction to see if she wanted to pursue a case. *See Busby*, 513 F.3d 1314 (11th Cir. 2008), and record thereto including Exhibit F to RealtySouth's Memorandum in Opposition to Plaintiff's Motion for Class Certification (excerpts from the Deposition of Vicky V. Busby) at 111-13, *Busby*, No. 2:04-CV-2799-VEH (N.D. Ala. Apr. 13, 2006), ECF No. 67-3.

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.[22]

Nonetheless, the *Minter* litigation further revealed that neither the named plaintiffs nor the class members had suffered any financial injury. The *Minter* trial court excluded expert testimony regarding Prosperity's loan prices (which was uncontroverted and showed the loans typically were lower than other Wells Fargo branches and the marketplace generally[23]), and excluded all other

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[22] *See* Day Four Transcript Of Proceedings Before The Honorable William M. Nickerson, United States District Senior Judge at 120-21, 180-82, *Minter*, No. WMN-07-3442 (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); *see also* Day Eight Transcript Of Proceedings Before The Honorable William M. Nickerson, United States District Senior Judge at 153-54, *Minter*, No. WMN-07-3442 (D. Md. Jul. 9, 2013), ECF No. 647 (the Alborough plaintiffs in the case had been satisfied with their transaction and had sent a thank you card and gift card to their Prosperity loan officer); Day Fourteen Transcript Of Proceedings Before The Honorable William M. Nickerson, United States District Senior Judge at 84-85, *Minter*, No. WMN-07-3442 (D. Md. 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).

[23] *See* Plaintiffs' Motion *In Limine* No. 1 (Courchane Testimony) and Plaintiffs' Memorandum in Support of Motion *In Limine* No. 1 (Courchane Testimony), *Minter*, No. WMN-07-3442 (D. Md. Jul. 9, 2013), ECF Nos. 484 and 484-1; *see also* Exhibit C to Plaintiffs' Motion *In Limine* No. 1 (Courchane Testimony) at 6-8, 23, *Minter*, No. WMN-07-3442 (D. Md. Jul. 9, 2013), ECF No. 484-5 (Dr. Marsha Courchane expert report for the defense, concluding that Prosperity borrowers received competitive loan

testimony, evidence or argument about whether plaintiffs suffered economic injury. The purported rationale was that the plaintiffs were not required to establish economic injury to prove their RESPA claim, notwithstanding that they sought over a billion dollars in damages at the time of that ruling. *See* n.19 *supra*; *see also Minter v. Wells Fargo Bank, N.A.*, 762 F.3d 339, 350 (D. Md. 2014).

While the *Minter* trial court ultimately allowed the defendants to adduce some limited testimony from their own witnesses and cross-examination testimony about Prosperity's generally competitive loan pricing, it 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 trial that lasted seventeen days and had over twenty witnesses, the defendants prevailed on the RESPA claims with a jury verdict in less than three hours.[24] Yet the *Minter* plaintiffs' ability to demand potentially annihilative treble damages when the class was not even injured is contrary to Article III and untenable. *See, e.g., Stillmock* v. *Weis Mkts., Inc.*, 385 Fed. Appx. 267, 278 (4th Cir. 2010)(Wilkinson, J., concurring)("Certifying a class action that would impose annihilative damages where there has been no actual harm from identity theft could raise serious constitutional concerns, as plaintiffs themselves admit."). Moreover, this no-injury class action cost the three defendants millions of dollars to successfully defend.

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prices that "were not inflated or distorted" and that "reflect[ed] no systematic overcharging of Prosperity . . . borrowers.").

[24] *See Minter v. Wells Fargo Bank, N.A.*, 762 F.3d at 351; *see also Minter*, 2013 U.S. Dist. LEXIS 122344, at *3 & n.2.

* * *

The examples above are just some of the cases, and some of the statutes, that raise threats of virtually, or actual, annihilative damages for companies even when they have meritorious defenses. There are numerous other federal and state statutes that pose similar risks to defendants in connection because they provide private rights of action along with statutory damages for violations, and thus would likewise permit no-injury cases to be pursued under the Ninth Circuit's rule.[25]

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[25] Articles abound about the class actions pursued under the Telephone Consumer Protection Act, 47 U.S.C. § 227(3), even when the calls are related to health care messages that the Department of Health and Human Services tries to encourage. *See, e.g.,* Anna Watterson, *Expect TCPA Suits Over Prescription Messages in 2015*, Law 360 (January 6, 2015, 12:51 PM ET), http://www.law360.com/articles/608314/expect-tcpa-suits-over-prescription-messages-in-2015. To cite just a couple of additional examples, courts also have permitted claims to proceed with no allegation of actual injury in fact under the Truth In Lending Act ("TILA"), 15 U.S.C. § 1601, *et. seq.*, and the Electronic Funds Transfer Act ("EFTA"), 15 U.S.C. § 1693m(a)(2). *See, e.g.*, *Charvat* v. *Mut. First Fed. Credit Union*, 725 F.3d 819, 822-24 (8th Cir. 2013) (holding that an ATM customer had standing to bring a claim against two banks for an alleged violation of the former "on machine" notice provision of the EFTA because the denial of a statutory right to receive information was sufficient injury that was directly related to his claim for damages); *Purtle* v. *Eldridge Auto Sales, Inc.*, 91 F.3d 797, 802 (6th Cir. 1996) (holding claim could proceed under TILA without any "actual damage"); *Gambardella* v. *G. Fox & Co.*, 716 F.2d 104, 108 n.4 (2d Cir. 1983) (same); *see also Traylor* v. *United Cash Sys., LLC*, No. 3:12-cv-01006 (MPS), 2014 U.S. Dist. LEXIS 179496, at *7 (D. Conn. Nov. 10, 2014)("[E]ven if Traylor has not shown actual economic damages . . . Traylor is still entitled to bring an action under the EFTA purely for statutory damages.").

The Ninth Circuit's decision, and others like it, poses a major threat to the Article III limits on the role of federal courts. As this Court has repeatedly recognized, while Congress has the power to create new legal rights and causes of action where none previously existed, Article III of the Constitution requires a plaintiff to have suffered injury-in-fact before he or she can take advantage of federal courts. Congress's establishment of laws that contain statutory damages provisions does not change this fundamental separation of the legislative and judicial functions, and the Ninth Circuit's decision to the contrary cannot be reconciled with this Court's longstanding Article III jurisprudence.

While defendants may (if they are willing to accept the risks) ultimately prevail in a federal class action that is based solely on an alleged statutory violation without an injury-in-fact, allowing such an action to go forward is inefficient and wasteful. More to the point, the Constitution requires that a defendant in such circumstances should not need to continue litigating a case through class certification, or summary judgment, or trial.

II. ENFORCEMENT OF THE LAW AND DETERRENCE ARE STILL ACHIEVED IF PRIVATE DAMAGE RECOVERIES ARE RESTRICTED TO SITUATIONS WHERE INJURY IS ACTUALLY ALLEGED AND CAN BE PROVEN.

A. Congress Provided Multiple Avenues For Enforcement Of The Consumer Protection Statutes.

Full enforcement of Article III's requirements will not permit no-harm statutory violations to go

unchecked. Where Congress determines that actual and widespread violations of statutes should be addressed notwithstanding the absence of any actual injury to consumers, it can (and generally does) provide for regulatory enforcement and even criminal enforcement.[26] FCRA, RESPA, and many other statutes with apparently automatic damages provisions are enforced or subject to audit by multiple regulatory agencies, including the CFPB, the FTC, the federal banking agencies, the Administrator of the National Credit Union Administration, the Secretary of Transportation, the Secretary of Agriculture, the Commodity Futures Trading Commission, the Securities and Exchange Commission, a host of state financial and insurance agencies, and the state attorneys general. *See* 15 U.S.C. § 1681s(b)(1)(A)-(G); 12 U.S.C. §§ 1818(b)(1) and 1818(i)(2).

In particular, since its creation in 2011, the CFPB has had enforcement authority over RESPA and FCRA.[27] When Congress created the CFPB, it

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[26] For example, section 8 of RESPA provides for both civil and criminal remedies. *See* 12 U.S.C. § 2607(d)(1)(providing for a one-year imprisonment term and/or a $10,000 fine.).

[27] *See* 12 U.S.C. §§ 5581 and 5582 (providing that the CFPB assumed responsibility for its functions on July 21, 2011). As of January 20, 2012, the CFPB and the FTC (which previously had primary enforcement authority for FCRA) entered into an Interagency Cooperation Agreement concerning the enforcement of FCRA. *See* Memorandum of Understanding Between the Consumer Financial Protection Bureau and the Federal Trade Commission, *available at* https://www.ftc.gov/policy/cooperation-agreements/ftc-cfpb-interagency-cooperation-agreement(last modified March 12, 2015); *see also* 15 U.S.C. §§ 1681(a)(1) and 1681(b)(1).

provided the agency with an enormous budget,[28] increased the agency's regulatory authority and gave the CFPB the power to regulate "the offering and provision of consumer financial products or services under the Federal consumer financial laws." 12 U.S.C. § 5491(a). The CFPB's enforcement power includes the ability to conduct investigations and bring enforcement actions, including issuing civil investigation demands ("CIDs"). 12 U.S.C. § 5562. CIDs provide the CFPB with administrative subpoena power to demand the production of documents or to provide oral testimony. *Id.* Moreover, the CFPB has a choice of forums. It may bring an administrative proceeding before an administrative law judge, or commence a civil enforcement action in federal district court. *Id.*; *see also* 12 U.S.C. § 5565.[29]

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[28] The CFPB's operations are funded principally by transfers made by the Board of Governors of the Federal Reserve System from the combined earnings of the Federal Reserve System, up to the limits set forth in the Dodd-Frank Act, which in FY 2015 were $618.7 million and are expected to be $631.7 million in FY 2016. *See* The CFPB Strategic Plan, Budget, and Performance Plan and Report (February 2015), *available at* http://files.consumerfinance.gov/f/201502_cfpb_report_strategic-plan-budget-and-performance-plan_FY2014-2016.pdf.

[29] In its Bulletin regarding FCRA's requirement that furnishers conduct investigations of disputed information, the CFPB reminded furnishers that if it "determines that a furnisher has engaged in any acts or practices that violate FCRA or other Federal consumer financial laws and regulations, it will take appropriate corrective measures, including remediation of harm to consumers." CFPB Bulletin 2014-01 (February 27, 2014), *available at* http://files.consumerfinance.gov/f/201402_cfpb_bulletin_fair-credit-reporting-act.pdf; *see also* CFPB Bulletin 2013-09 (September 4, 2013), available at http://files.consumerfinance.gov/f/201309_cfpb_bulletin_furnishe

In the event that the CFPB identifies a violation, it has the ability to levy civil money penalties ranging from $5,000 per day to $1,000,000 per day for each day the violation occurred. *See* 12 U.S.C. § 5565(c)(2). In addition, Dodd Frank requires the CFPB to use these civil penalty funds for payments to the victims of activities for which civil penalties have been imposed. *See* 12 U.S.C. § 5497(d) (establishing Civil Penalty Fund to collect any civil penalty that the CFPB collects against any person in any judicial or administrative action under Federal consumer financial laws and providing that amounts in the Civil Penalty Fund shall be available to the CFPB for payments to the victims of activities for which civil penalties have been imposed). The CFPB also has access to equitable remedies, including comprehensive injunctive relief, disgorgement, rescission, restitution, public notification regarding the violation, including the costs of notification, and the ability to limit the activities or functions of the person, among others. *See* 12 U.S.C. § 5565.

The CFPB has not been shy about utilizing its enforcement authority. It has aggressively enforced RESPA. For example, in April 2013, the CFPB brought RESPA enforcement actions against four mortgage insurers alleging, *inter alia*, unlawful kickbacks related to certain captive reinsurance arrangements.[30] The CFPB settled its allegations with those defendants (*see id.*), but tried similar

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rs.pdf.

[30] *See* Press Release, CFPB, *The CFPB Takes Action Against Mortgage Insurers to End Kickbacks to Lenders* (Apr. 4, 2013), http://www.consumerfinance.gov/newsroom/the-cfpb-takes-action-against-mortgage-insurers-to-end-kickbacks-to-lenders/.

RESPA claims against mortgage provider PHH Corp. ("PHH") before an administrative law judge ("ALJ") in 2014.[31] When PHH appealed the ALJ's Recommended Decision finding that PHH's captive reinsurance practices had violated RESPA Section 8(a) to the Director of the CFPB, the Director increased the amount PHH was ordered to pay the CFPB from approximately $6 million to $109 million. *In the Matter of PHH Corporation, et al.,* Decision of the Director, No. 2014-CFPB-0002, Dkt. 226 (June 4, 2015).[32]

In the past four years, the CFPB has brought numerous other public RESPA enforcement actions, in federal court and administratively, against both large and small residential real estate service providers (mortgage lenders, mortgage brokers, real estate brokerage companies, title insurance companies, homebuilders and law firms), and has investigated many more privately. In connection with its RESPA enforcement actions, the CFPB has imposed millions of dollars in penalties and other remedies, enjoined defendants from future violations, and has restricted conduct (and in some cases the

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[31] *See* Press Release, CFPB, *CFPB Takes Action Against PHH Corporation for Mortgage Insurance Kickbacks* (Jan. 29, 2014), http://www.consumerfinance.gov/newsroom/cfpb-takes-action-against-phh-corporation-for-mortgage-insurance-kickbacks/; *see also In the Matter of PHH Corporation, et al.*, Recommended Decision, No. 2014-CFPB-0002, Dkt. 205 (Nov. 25, 2014).

[32] PHH appealed this decision to the United States Court of Appeals for the District of Columbia Circuit. *PHH Corporation, et al.* v. *CFPB*, *appeal docketed*, No. 15-1177 (D.C. Cir. June 19, 2015).

ability to participate in the industry), among other relief.[33]

The CFPB also has actively enforced FCRA. *See, e.g., In the Matter of: First Investors Financial Serv. Grp., Inc.*, Administrative Proceeding File No. 2014-CFPB-0012, Consent Order, Dkt. 1 (filed August 20, 2014) (Administrative action against a furnisher of information alleging that the furnisher failed to establish and/or implement reasonable written policies and procedures regarding the "accuracy" and "integrity" of the information relating to consumers that it furnishes); *see also In the Matter of DriveTime Automotive Grp., Inc. and DT Acceptance Corp.*, Administrative Proceeding File No. 2014-CFPB-0017, Dkt. 1 (filed November 19, 2014) (Administrative action alleging among other claims that a furnisher of information furnished information to consumer reporting agencies that it had reasonable cause to believe was inaccurate). In addition to the CFPB's authority, the FTC retained its authority for FCRA and is active as well.[34]

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[33] *See, e,g.*, numerous CFPB Press Releases regarding similar regulatory actions that resulted in differing civil money penalties, at http://www.consumerfinance.gov/newsroom/Press Release.

[34] *See United States* v. *Telecheck Servs., Inc., et. al.*, No. 1:14-cv-00062 (D.D.C. Jan. 16, 2014), ECF No. 3. The FTC settled its claims against a consumer reporting agency that alleged that the consumer reporting agency failed to follow procedures to ensure the accuracy of consumer credit information. In that case, the consumer reporting agency agreed to pay $3.5 million, to modify its business practices and to submit to the FTC's compliance monitoring for the next ten years. *Id.* The Stipulated Final Judgment and Order for Civil Penalties, Permanent Injunction and Other Equitable Relief are available at https://www.ftc.gov/enforcement/cases-proceedings/112-

In fact, Spokeo agreed to the entry of a Consent Decree and Order For Civil Penalties, Injunction and Other Relief, pursuant to which it agreed to pay the FTC $800,000 as a civil penalty for violations of FCRA.[35]

B. The States, With Their Attorneys General, Have Extensive Authority To Enforce FCRA, RESPA And Similar Statutes To Provide Superior Relief For Consumers.

In addition to federal agency enforcement, state attorneys general provide consumer protection in pervasive ways. Certain federal statutes containing statutory damages provisions, including FCRA and RESPA, explicitly empower state attorneys general to enforce violations. *See* 15 U.S.C. § 1681s(c)(1); 12 U.S.C. § 2607(d)(4). In doing so, attorneys general can join federal agencies. In January 2015, the CFPB and the Maryland Attorney General took action against two banks for alleged RESPA violations requiring $26.6 million in civil penalties plus $11.1 million redress directly to consumers. *State of Maryland et al.* v. *Wells Fargo Bank, N.A. et. al.*, Case No. 1:15-cv-00179-RDB (D. Md. 2015).

Second, attorneys general and other state enforcers can enforce any CFPB regulation, including rules under TILA, with new authority gained under Dodd Frank. *See* 12 U.S.C. § 5552. In December 2014, the New York Department of Financial Services brought an action relying on Dodd Frank authority with a TILA allegation against an auto

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3183/telecheck-services-inc (last modified Jan. 16, 2014).

[35] *United States* v. *Spokeo*, Case No. 2:12-cv-05001-MMM-SH, Dkt. 4 (C.D. Cal. June 19, 2012).

lender resulting in the surrender of all licenses, a $3 million penalty and restitution to consumers nationwide. *See Lawsky* v. *Condor Capital Corp., et al.*, Case No. 1:14-cv-02863-CM (S.D.N.Y 2014).

Third, attorneys general can bring their own state claims to bolster federal claims. In June 2014, the Mississippi Attorney General brought an action based on FCRA, Dodd-Frank and his state consumer protection act seeking statutory damages and consumer restitution. See *State of Mississippi* v. *Experian Info. Solutions*, *Inc.* Case No. 1:14-cv-243LG-JMR (S.D. Miss. 2014).

Fourth, attorneys general form multi-state actions to enforce federal law and state laws. On May 20, 2015, thirty-one (31) state attorneys general settled FCRA and state unfair and deceptive acts and practices claims with the three major credit bureaus for $6 million and an agreement to revamp their practices on disputed consumer information. *In the Matter of: Equifax Info. Servs. LLC, et al.*, Assurance of Voluntary Compliance/Assurance of Voluntary Discontinuance (May 20, 2015), *available at* http://www.ohioattorneygeneral.gov/Files/Briefing-Room/News-Releases/Consumer-Protection/2015-05-20-CRAs-AVC.aspx; *see also Minnesota* v. *U.S. Bank N.A.,* Case No. 0:99-cv-872 (D. Minn. 1999) (complaint brought by 29 states, and settled, for alleged violations of FCRA and state consumer-fraud and deceptive-advertising laws).

Fifth, in bringing state claims, attorneys general can sue *parens patriae*, acting on behalf of citizens suffering injury, under state consumer protection statutes. *See West Virginia* v. *CVS Pharm., Inc.*, 646 F.3d 169 (4th Cir. 2011) (seeking treble damages

relief for consumers, in addition to civil penalties under West Virginia Consumer Credit Protection Act).

In sum, there are robust mechanisms in place to police statutory violations, and those mechanisms are far superior than the phenomenon of the no-injury class action, which does violence to well-established Article III standing requirements.

CONCLUSION

For the reasons stated above, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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MICHAEL D. LEFFEL
FOLEY & LARDNER LLP
Verex Plaza
150 East Gilman Street
Madison, WI 53703
(608) 257-5035
mleffel@foley.com

JOSEPH W. JACQUOT
Counsel of Record
FOLEY & LARDNER LLP
One Independent Dr.,
Suite 1300
Jacksonville, FL 32202
904.359.8769
jjacquot@foley.com

JAY N. VARON
JENNIFER KEAS
FOLEY & LARDNER LLP
3000 K Street, N.W.
Washington, D.C. 20007
202.672.5300
jvaron@foley.com

CHRISTI A. LAWSON
SEAN P. SMITH

FOLEY & LARDNER LLP
111 N. Orange Avenue
Suite 1800
Orlando, FL 32801
407.244.3235
clawson@foley.com