No. 13-1339

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

BRIEF FOR *AMICI CURIAE* LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AND NATIONAL FAIR HOUSING ALLIANCE IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI*[1]

Amici are civil rights organizations committed to the effective enforcement of anti-discrimination laws, particularly fair housing laws, and the preservation of access to the courts for victims of discrimination.

The Lawyers' Committee for Civil Rights Under Law ("Lawyers' Committee") is a nonprofit civil rights organization that was founded in 1963 by the leaders of the American bar, at the request of President Kennedy, to help defend the civil rights of racial minorities and the poor. The Lawyers' Committee has independent local affiliates in Boston, Chicago, Denver, Los Angeles, Philadelphia, San Francisco, Jackson, MS, and Washington, D.C. Among its fields of specialization, the Lawyers' Committee works with communities across the nation to combat, protest, and remediate discriminatory employment, voting, education, housing, and lending practices, including consumer protection practices that adversely affect minorities. In the past, the Lawyers' Committee has been involved as amicus curiae in cases before the Supreme Court involving standing issues in fair housing cases. *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), and *Warth v. Seldin*, 422 U.S. 490 (1975).

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* state that no counsel for a party authored this brief in whole or in part, and no person or entity, other than *amici*, made a monetary contribution to the preparation or submission of the brief. Pursuant to Supreme Court Rule 37.3, *amici* note that counsel for Petitioner and for Respondent both have consented to the filing of this brief.

The National Fair Housing Alliance ("NFHA") is a consortium of private, nonprofit fair housing organizations, state and local civil rights groups, and individuals. NFHA was founded in 1988 to identify and eliminate discrimination in housing markets and ensure equal access to housing for all people protected by national, state, and local civil rights laws. Through education, outreach, policy initiatives, advocacy, and enforcement, NFHA promotes equal housing and equal lending opportunities. Relying on the Fair Housing Act and Supreme Court standing decisions interpreting it, including *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), and *Gladstone, Realtors v. Vill. of Bellwood*, 441 U.S. 91 (1979), NFHA and its members have undertaken important enforcement initiatives across the country, including suits against private landlords and property management companies who provide false information and engage in discriminatory practices discovered as a result of fair housing "testing." *Havens,* 455 U.S. at 373. Those efforts have contributed significantly to the nation's efforts to eliminate discriminatory housing practices.

SUMMARY OF THE ARGUMENT

Amici Lawyers' Committee and NFHA submit this brief in support of Respondent. They do so because they are concerned that Petitioner, though not explicitly asking this Court to overrule or modify Fair Housing Act decisions that have been critical to vigorous enforcement of that Act and other civil rights laws, makes arguments that may be in tension with those decisions. *Amici* ask this Court to reaffirm its settled doctrine that Congress can identify and define new classes of injuries, the invasion of which will

create injury for purposes of Article III standing without a further showing of other harm.

This Court has applied that doctrine with respect to the landmark Fair Housing Act of 1968. That law, among other things, bars certain false statements – such as false representations that housing is not available – from being made because of race or other protected classification. *See* 42 U.S.C. § 3604(d). The Act creates a private right of action for any party "aggrieved" by conduct it makes unlawful. 42 U.S.C. § 3613(a)(1)(A).

In a trilogy of important cases construing the Fair Housing Act, this Court found that the Act authorizes, and Article III permits, challenges to discriminatory practices brought by plaintiffs beyond those directly excluded from housing. First, it found that white tenants may challenge the exclusion of black would-be residents, *see Trafficante v. Metro. Life Ins. Co.,* 409 U.S. 205, 208-10 (1972). Next, it recognized that both a village and its current residents could challenge racial steering practices that excluded would-be new residents. *Gladstone, Realtors v. Vill. of Bellwood*, 441 U.S. 91, 109-15 (1979).

Finally, this Court recognized that "testers" – people who seek information about the availability of housing though they have no intention of making a bona fide offer for that housing – may challenge false information given to them because of race or other protected characteristics. *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982). It found that Congress intended for testers to have standing and that Congress did so to make the Fair Housing Act effective in combatting the systemic problem that those seeking to maintain

segregated housing often lie about housing's availability. Once Congress identified that problem and created a broad right of action to combat it, this Court found that Article III standing required no more than a showing that a plaintiff had experienced a violation of the statutory right. Article III did not require a further showing that the tester plaintiff had suffered additional harm, such as emotional distress.

These rulings gave force to Congress's intent that the Act would meaningfully address widespread, entrenched racial segregation and discrimination in the nation's housing markets. See *Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc.*, 135 S. Ct. 2507, 2015 U.S. LEXIS 4249 (June 25, 2015) (recounting historical conditions that led to passage of the Fair Housing Act). Congress since then has continually recognized the need for effective private enforcement of civil rights protections, including in its adoption of the Fair Housing Amendments Act of 1988, Pub. L. 100-430, 102 Stat. 1619-39 (1988), strengthening the Act's enforcement provisions, and adding protections for persons with disabilities and families with children.

Petitioner now asks this Court to limit Congress's authority to identify and define rights previously unrecognized by the law and then create private rights of action to remedy violations. Petitioner argues that, in addition to showing a violation of the right created by Congress, a plaintiff must *also* show some other type of harm in order to have Article III standing. Thus, Petitioner argues, it is insufficient that Mr. Robins has alleged that Petitioner willfully propagated false information about him in violation of the Fair Credit

Reporting Act; instead, Petitioner contends, Mr. Robins must also allege that he suffered some other harm (Petitioner does not spell out what harm would suffice) as a result of that violation.

This Court has never required an additional showing of harm beyond that specified by Congress, and it should not do so in this case. Instead, following *Havens*, this Court should find it sufficient that Respondent has alleged that he was the victim of the exact type of false statements that Congress found sufficiently harmful that it banned them and created a private right of action for those who are the subject of them. It should decline Petitioner's invitation to graft onto the statute an additional element regarding harm that Congress did not want, that courts are ill equipped to enforce without legislative guidance, and that would undermine the effectiveness of the statutory scheme.

ARGUMENT

I. This Court Should Not Rewrite *Havens Realty v. Coleman* and Other Cases Providing For Broad Standing To Enforce Civil Rights Laws To Add New Standing Requirements Not Articulated In Those Cases

This Court, in *Havens Realty Corp. v. Coleman,* 455 U.S. 363 (1982), unanimously held that fair housing testers can have standing to sue under the Fair Housing Act, 42 U.S.C. § 3601, *et seq.* (2011).[2] For over

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[2] The Court defined testers as "individuals who, without an intent to rent or purchase a home or apartment, pose as renters or purchasers for the purpose of collecting evidence of unlawful steering practices." 455 U.S. at 373.

thirty years, federal courts have followed *Havens* in cases brought to enforce Congress's fair housing mandate.[3] Broad standing to privately enforce the Fair Housing Act remains essential today, as the nation's housing market continues to be marked by a high degree of segregation and widespread discriminatory practices. "Much progress remains to be made in our Nation's continuing struggle against racial isolation." *Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project*, 135 S. Ct. at 2525.[4] *Havens* remains

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[3] See *e.g., Lincoln v. Case*, 340 F.3d 283, 289 (5th Cir. 2003); *Fair Hous. of Marin v. Combs,* 285 F.3d 899, 902 (9th Cir. 2002); *Cent. Ala. Fair Hous. Ctr., Inc. v. Lowder Realty Co.,* 236 F.3d 629, 639 (11th Cir. 2000); *Bangerter v. Orem City Corp.*, 46 F.3d 1491, 1497 (10th Cir. 1995); *Ragin v. Harry Macklowe Real Estate Co.,* 6 F.3d 898, 904 (2d Cir. 1993); *Hooker v. Weathers*, 990 F.2d 913, 915 (6th Cir. 1993); *United States v. Balistrieri*, 981 F.2d 916, 929 (7th Cir. 1992); *Spann v. Colonial Vill., Inc.,* 899 F.2d 24, 27 (D.C. Cir. 1990).

[4] *See generally* U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, HOUSING DISCRIMINATION AGAINST RACIAL AND ETHNIC MINORITIES (2012), *available at* http://www.huduser.org/portal/Publications/pdf/HUD-514_HDS2012.pdf; WILLIAM H. FREY, AMERICA'S DIVERSE FUTURE: INITIAL GLIMPSES AT THE U.S. CHILD POPULATION FROM THE 2010 CENSUS 8-11 (2011), *available at* http://www.brookings.edu/~/media/research/files/papers/2011/4/06-census-diversity-frey/0406_census_diversity_frey.pdf; RESIDENTIAL SEGREGATION AND HOUSING DISCRIMINATION IN THE UNITED STATES: VIOLATIONS OF THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION, A REPORT TO THE U.N. COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION (2008), *available at* http://www.nationalfair housing.org/FairHousingResources/ReportsandResearch/tabid/3917/Default.aspx; MARGERY A. TURNER, ET AL., REPORT TO THE U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, DISCRIMINATION IN METROPOLITAN HOUSING MARKETS: NATIONAL

critically important to achievement of Congress's ambitious goal of ending our long history of segregation and creating a fair, truthful, open, and non-discriminatory housing market.[5]

While purporting to follow *Havens*, Petitioner characterizes that case in a manner that is inconsistent both with *Havens* itself and other Fair Housing Act jurisprudence. Petitioner erroneously suggests that *Havens* found tester standing appropriate only because the tester "was the direct victim of discrimination" and so must have suffered stigmatic and other harms. Petitioner's Br. at 41. This is a misreading of *Havens*, which makes no such finding, and this Court has specifically rejected attempts to create a "direct victim" requirement for enforcement of the Fair Housing Act's protections.

Havens presented the question whether testers have standing to sue under Section 804(d) of the Fair Housing Act, 455 U.S. at 373, which provides that it is unlawful:

> [t]o represent to any person because of race, color, religion, sex, or national origin that any

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RESULTS FROM PHASE I HDS 2000 (2002); DEBBIE G. BOCIAN, ET AL., CENTER FOR RESPONSIBLE LENDING, UNFAIR LENDING: THE EFFECT OF RACE AND ETHNICITY ON THE PRICE OF SUBPRIME MORTGAGES (2006).

[5] For the history of housing discrimination in the United States see JOHN YINGER, CLOSED DOORS, OPPORTUNITIES LOST: THE CONTINUING COSTS OF HOUSING DISCRIMINATION (1995); DOUGLAS MASSEY & NANCY DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS (1993).

> dwelling is not available for inspection, sale or rental when such dwelling is in fact so available.

42 U.S.C. 3604(d). The case involved two testers, one white and one black. 455 U.S. at 368. The Complaint alleged that on four separate occasions the black tester had been told (untruthfully) by the defendant that apartments were not available, while the white tester was told (truthfully) that apartments were available. *Id.* at 374 (citing App. 16, ¶ 13). The Court found that the black tester who received false information because of race had experienced a violation of the statute and so had standing under Article III; by contrast, the white tester who received accurate information had not experienced a statutory violation and so did not have standing. *Id.* at 374-75.

As these results suggest, *Havens* found that the presence or absence of Article III standing turned entirely on whether a tester had suffered "injury to her statutorily created right to truthful housing information." 455 U.S. at 374. The Court stated that "a tester who has been the object of a misrepresentation made unlawful under § 804(d) has suffered injury in precisely the form the statute was intended to guard against . . . ." *Id*. at 373.[6] And it

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[6] In addition to tester standing, *Havens* also reaffirmed the concept of "neighborhood" standing, where a black or white resident might show that the racial steering practices of the defendants deprived her of the benefits of living in an integrated community, which is a cognizable injury for purposes of Article III standing. 455 U.S. at 375-78. This injury is based on the fact that in the Fair Housing Act Congress identified a valuable interest in integrated neighborhoods, *see* ROBERT G. SCHWEMM, HOUSING DISCRIMINATION: LAW AND LITIGATION § 2.3 (2010), the denial of

observed: "As we have previously recognized, '[the] actual or threatened injury required by Article III may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing . . . .''' *Id.* This Court thus made clear that the tester's standing rested solely on violation of the right defined by Congress, which was the right not to receive false information about housing on the basis of race or other protected classes.

Petitioner attempts nonetheless to harmonize *Havens* with its position that a Fair Credit Reporting Act plaintiff must demonstrate injury beyond the one that Congress found sufficient to underlie a private cause of action under that statute. Citing several other decisions in which the Court recognized racial discrimination as a form of "concrete harm" because it leads to stigmatization and other non-economic injuries, Petitioner implies that similar reasoning underlies *Havens*. Petitioner's Brief at 41. This amounts to rewriting *Havens*.

To be sure, the Court *could* have described in *Havens* how the plaintiffs suffered the intangible injuries or harms often caused by discrimination, such as losing the benefits of living in integrated communities, *Gladstone, Realtors v. Vill. of Bellwood*, 441 U.S. 91, 112 (1979); *Trafficante v. Metro. Life Ins. Co.,* 409 U.S. 205, 210 (1972), or the stigmatization of being classified as "innately inferior," *Heckler v. Mathews*, 465 U.S. 728, 740 (1984). Those are real injuries that, in appropriate cases, can be the basis of

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which will establish injury in fact*, id.*; *see also Gladstone, Realtors v. Vill. of Bellwood*, 441 U.S. 91 (1979).

Article III standing. But *Havens* chose not to rest its decision on such injury. It did not require the tester plaintiffs to articulate some harm different from or in addition to the injury Congress defined. In particular, there is no indication that the tester in *Havens* alleged any emotional distress or humiliation upon learning that she had been given false information or that the Court viewed such a showing as a requirement for tester standing, 455 U.S. at 369.

In upholding broad standing for testers without a further showing of harm, *Havens* affirmed the validity of a choice specifically made by Congress in order to ensure the effectiveness of the Fair Housing Act. Whereas Section 804(a) of the Act – which prohibits discriminatory refusals to sell or rent – requires a "bona fide offer" to rent or purchase, Congress "plainly omitted any such requirement insofar as it banned discriminatory representations. . . ." to "any person." 455 U.S. at 373-74. Congress thus declined to require an additional showing of harm, in order to provide effective challenges to one of the key devices by which housing discrimination was accomplished — the provision of false information. *Id*. at 374 n.14. And this Court found that the receipt of false information about the availability of housing on the basis of race or other protected classification, having been recognized by Congress as sufficient harm for a private right of action, also was sufficient injury for purposes of Article III standing. *Id.* at 373-74.

While nothing in *Havens* or any other part of the Court's jurisprudence requires Congress to make such a record, *Havens* alluded to evidence before Congress showing that the use of discriminatory

misrepresentations about the availability of housing was a particularly widespread and effective device used to maintain segregation. *See* 455 U.S. at 374 n.14 ("Various witnesses testifying before Congress recounted incidents in which black persons who sought housing were falsely informed that housing was not available."). Such misrepresentations not only had the effect of denying particular individuals housing, they had a broader effect on the housing market.

In particular, Congress understood that individuals who actually sought housing were dissuaded from seeking it in certain areas because of the chilling effect of these widespread misrepresentations. Robert Weaver, Secretary of the U.S. Department of Housing and Urban Development, testified that people accustomed to being lied to about the availability of housing were deterred from continuing to seek housing outside of "ghetto" areas: "You know, after a man hits his head up against a brick wall time and time again, he then even doubts when he sees a little opening in that wall lest it be a snare and a delusion."[7] Tester standing thus is vital to combatting the problem; otherwise many of the worst discriminators could effectively insulate themselves from scrutiny or suit by making their own properties – and, indeed, their entire neighborhoods – sufficiently discouraging for those actually seeking housing to even bother trying. Moreover, as *Havens* illustrates, testers working in tandem often are better positioned to detect and

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[7] *Hearings on S. 1358, S. 2114 and S. 2280 Before the Subcomm. on Housing and Urban Affairs of the Senate Comm. on Banking and Currency*, 90th Cong., 1st Sess., 43 (1967) (statement of Robert Weaver, Sec. of U.S. Dep't of Housing and Urban Dev.).

challenge discriminatory practices than is an individual seeking housing; that person knows only that she has been told housing is unavailable, and not that she has received false information based on race. At the same time, as *Havens* also demonstrates, tester standing is still limited to a discrete, constitutionally permissible group of people who are well positioned to bring suit. It does not amount to generalized authority to enforce the law.

Havens not only recognized this important role for testers under the Fair Housing Act, but also cited to earlier cases involving testers who participated in civil rights sit-ins, specifically, *Pierson v. Ray*, 386 U.S. 547, 558 (1967), and *Evers v. Dwyer*, 358 U.S. 202, 204 (1958) (per curiam). *Evers* is particularly instructive. That case involved an African-American passenger who attempted to ride at the front of a bus but was told "to go to the back of the bus, get off, or be arrested," whereupon he left the bus. 358 U.S. at 204. The Court stated that the bus rider was not "bound to continue to ride . . . at the risk of arrest" if he refused to sit in the back, in order to show an "actual controversy." *Id.* The Court further held that the fact that the bus rider "may have boarded this particular bus for the purpose of instituting this litigation is not significant." *Id.*

As *Evers* makes clear, and as subsequent cases have affirmed, the denial of equal treatment on the basis of a protected classification alone constitutes a cognizable injury for Article III purposes, without any showing of further harm caused by the violation. *See, e.g., City of Chicago v. Matchmaker Real Estate Sales Ctr., Inc.*, 982 F.2d 1086, 1095 (7th Cir. 1992) (housing testers had standing where they were treated in a "racially

discriminatory fashion, even though they sustained no harm beyond the discrimination itself") (quoting *Vill. of Bellwood v. Dwivedi*, 895 F.2d 1521, 1526 (7th Cir. 1990)). A black tester who was lied to about the availability of apartments was lied to "because of" her race. This injury is a real one. So is the one experienced by a tester who, because of his race, was not served at a lunch counter. He never has been required to prove that he even wanted that sandwich – much less that the failure to obtain that sandwich caused him further injury – in order to show injury for purposes of Article III standing. Indeed, it is immaterial whether the plaintiff can show that he ultimately would have received the benefit absent the discriminatory treatment. *See Ne. Fla. Chapter of the Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 666 (1993).

Havens should control this case. The injury at issue here – the willful dissemination of untruthful information with respect to a particular consumer in a consumer report[8] – also involves the dissemination of untruthful information, with some level of intent, in a way that Congress has found is systemically harmful when the industry in question is permitted to engage in this conduct. *See* 455 U.S. at 373 ("Congress has thus conferred on all 'persons' a legal right to truthful information about available housing."). Moreover,

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[8] The statutory damages Respondent seeks in this case are available only where the violations of the FCRA are willful. *See* 15 U.S.C. § 1681n. By contrast, damages for negligent violations are available only upon a showing of actual damages, *see* 15 U.S.C. § 1681o, which would seem to satisfy any formulation of Article III's requirements.

Congress crafted the FCRA remedial scheme as it exists today in response to concerns that, if plaintiffs had to prove real damages rather than statutory damages, victims of inaccurate credit reports would have little incentive to sue and credit agencies would have little incentive to comply with the law. *See* Br. for Respondent at 5-6. As in *Havens*, Congress reasonably concluded that requiring plaintiffs to show specific harm beyond a violation of the statute would seriously undermine the effectiveness of the statutory enforcement scheme.

Thus, this Court can resolve this case without categorically deciding whether an additional showing of personal harm beyond the one defined by Congress is ever required to satisfy Article III. *Havens* provides that the violation of a statutory right to the provision of truthful information suffices in a context where Congress reasonably has found both (1) that the widespread provision of false information is particularly damaging and (2) that requiring a plaintiff to show more would be counterproductive to the enforcement scheme. This Court need go no further.

Accordingly, *Amici* submit that this Court need not and should not accept Petitioner's invitation to describe the injury that *could* have been presented by the facts in *Havens* or other cases involving testers. It would be especially inappropriate to recast *Havens* as based on a finding that someone was a "direct victim" of discrimination, since this Court has specifically rejected the argument that anything turns on such a factual showing. *See Gladstone*, 441 U.S. 102-09 (overturning court of appeals decision construing Fair Housing Act to require "direct victim" showing); *id.* at

113-15 (finding such broad standing constitutionally permissible).

II. Following *Havens* Here Would Be Consistent With This Court's Well-Established Standing Jurisprudence and Would Pose No Separation of Powers Problems

Nothing in this Court's jurisprudence over the past 30 years has unsettled the reasoning and continued validity of *Havens*. Both before and after *Havens*, this Court repeatedly has affirmed the principle that Congress can identify new injuries – including intangible injuries and those not recognized under common law – and create causes of action to remedy them consistent with Article III standing requirements. It has required plaintiffs alleging such injuries to show only that they suffered the harm Congress identified, not additional harm found nowhere in the statute.

This Court has recognized a broad range of intangible, non-monetary, nonphysical injuries as adequate bases for Article III standing once identified by Congress, including under the Fair Housing Act. In *Trafficante,* this Court found that white tenants had standing to challenge an apartment complex's exclusion of minorities because they had lost social, business, and professional advantages and suffered embarrassment and economic damages due to living in a non-integrated apartment complex. 409 U.S. at 208-10. Similarly, in *Gladstone*, this Court recognized that both a village and its residents could challenge racial steering practices that robbed the village "of its racial balance and stability" and caused the individuals to lose the social, professional, and economic benefits of living in an integrated community. 441 U.S. at 109-15.

Finally, in *Havens*, this Court recognized both that testers who had no intention of making a bona fide offer nonetheless had standing to challenge false information given to them regarding housing's availability and that a fair housing organization had standing to challenge discriminatory practices that frustrated the accomplishment of its mission and diverted its scarce resources. 455 U.S. at 373-75, 378-79.[9]

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[9] In other contexts, this Court similarly has acknowledged that Congress can identify a broad range of harms that will support Article III standing without abandoning the requirement of injury. *Sierra Club v. Morton*, 405 U.S. 727, 738 (1972). For example, the harm may involve an aesthetic, conservational, or recreational interest. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc*., 528 U.S. 167, 181-84 (2000) (damage to environmental group members' recreational, aesthetic, and economic interests satisfied Article III requirements, even without showing that environment had actually been harmed); *accord Summers v. Earth Island Inst.*, 555 U.S. 488, 494 (2009) (it will suffice even if the harm affects the "mere aesthetic interests of the plaintiff"). For more examples of the diverse types of harm that have been to satisfy Article III requirements, see, *e.g.*, *Plains Commerce Bank v. Long Family Land and Cattle Co*., 554 U.S. 316, 326 (2008) (judicially imposed requirement to undo a sale of land and to sell land to a different buyer, even for same amount of money); *Sprint Commc'ns Co., L.P. v. APCC Servs., Inc.*, 554 U.S. 269, 274-75 (2008) (payphone operator's contractual claim for payment from long-distance carrier as assigned to billing and collection agency for flat fee regardless of outcome of suit); *Gratz v. Bollinger*, 539 U.S. 244, 262 (2003) (denial of opportunity to compete on an equal basis without regard to race); *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 773-74 (2000) (injury suffered by United States in suit by *qui tam* relator); *Meese v. Keene*, 481 U.S. 465, 473 (1987) (damage to personal, political, and professional reputation of attorney and politician due to Justice Department's designation of films he wished to show as "political

This Court has consistently deferred to Congress's decision to authorize private enforcement to remedy various types of harms, and has appropriately limited its standing inquiry to whether the plaintiff actually has suffered the harm Congress intended to remedy.[10] As Justice Scalia has explained, whether a given plaintiff has Article III standing thus "is largely within the control of Congress." Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 Suffolk U.L. Rev. 881, 885 (1983). "Congress has the power to define new injuries and articulate chains of causation that will give rise to a case or controversy where none existed before . . . ." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 580 (1992) (Kennedy, J., concurring). The limit on Congress's authority is not with respect to the type of injury, but rather the requirement that Congress "identify the injury it seeks to vindicate and relate the injury to the class of persons entitled to bring suit." *Id.* And no decision of this Court holds that Congress may authorize suit to redress only those injuries with an analog in common-law jurisprudence. *See* Petitioner

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propaganda"); *Heckler v. Mathews*, 465 U.S. 728, 739-40 (1984) (stigmatization and perpetuation of stereotypes due to discriminatory treatment); *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979) (credible threat of prosecution for activity protected by First Amendment).

[10]*See, e.g.*, *Pub. Citizen v. Department of Justice*, 491 U.S. 440, 449 (1989) (Court has "never suggested that those requesting information under [FOIA] need show more than that they sought and were denied specific agency records); *FEC v. Akins*, 524 U.S. 11, 21 (1998) (group of voters suffered injury in fact based on their inability to obtain information that, they contended, was required to be publicly disclosed).

Br. at 22-23. Such a rule would severely and inappropriately inhibit Congress's authority to remedy problems that, at common law, either were unknown or were not considered governmental priorities – including but not limited to housing discrimination. *See Lujan*, 504 U.S. at 580 (Kennedy, J., concurring). Here, Congress created personal FCRA rights and a private right of action for those whose FCRA rights are violated. *See* 15 U.S.C. § 1681n(a). It has "identif[ied] the injury it seeks to vindicate and relate[d] the injury to the class of persons entitled to bring suit." *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring). That should be enough. There is no basis in this Court's jurisprudence for imposing an extra-statutory requirement that persons who are the subjects of the untruthful reports that the FCRA makes unlawful – and who thus have suffered the exact injury recognized and defined by Congress – must also allege *additional* injuries or harms that Congress chose not to make elements of the cause of action. Moreover, Petitioner and their amici make arguments so abstracted from the facts of this case, and the law in question, as to leave unclear what further harm they think plaintiff must plead to satisfy Article III. Petitioner would have this Court simply declare that *some kind* of additional harm must be alleged and then leave the lower courts and litigants at sea, both in FCRA cases and in cases brought under other statutes that arguably would be subject to that new rule.[11]

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[11] Indeed, the briefing of Petitioners and their amici suggest that their real concern is not this individual action, but rather plaintiff's intent to serve as the representative of a large class action. *See, e.g.*, Br. for Chamber of Commerce at 12-26. Whatever the merits of that concern may be as a matter of policy, it is beyond

To be sure, this Court has held that Congress cannot create Article III standing to sue over purely procedural "injuries" that are entirely untethered from any substantive harm. *See Summers v. Earth Island Inst.*, 555 U.S. 488, 495 (2009) (organization may not sue over denial of right to comment on proposed action once that action was cancelled); *id.* at 500 (Kennedy, J., concurring). But here, Congress created a right that is substantive, not procedural. The gravamen of the complaint is that the defendant gave out false information regarding the plaintiff, not that it denied the plaintiff the right to comment on it.

This Court's precedents similarly foreclose Petitioner's argument that continuing to give Congress broad leeway in defining the harm that permits private individuals to invoke judicial authority would pose a "significant separation-of-powers concern." *See* Petitioner's Brief at 26-32. Congress does not purport to give private citizens Article II authority to enforce the laws so long as it confines the private right of action to enforce a right to particular individuals who are uniquely affected by a violation.

Far from finding constitutional concern, this Court repeatedly has upheld and endorsed Congress's authority to authorize "private attorneys general" to

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the scope of Article III jurisprudence. Rather, Petitioners and their amici should direct their attention to Congress, which can determine whether FCRA suits are used for harassment rather than legitimate ends and, if so, how that should affect the scope of the law. *Cf. Gladstone*, 441 U.S. at 108 (searching history of Fair Housing Act for indications "that Congress attempted to deter possible harassment by limiting standing under § 812," and finding none).

enforce the most important and ambitious federal policies. As this Court explained with respect to the Fair Housing Act, "the enormity of the task" of assuring fair housing throughout the entire country precludes the federal government itself from accomplishing it; rather, "the main generating force must be private suits in which . . . the complainants act not only on their own behalf, but also 'as private attorneys general vindicating a policy Congress considered to be of the highest priority.'" *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 211 (1972).

For private attorneys general to play this vital role requires the sort of expansive but constitutionally permissible standing recognized in *Havens* and other Fair Housing Act jurisprudence. Where appropriately authorized by Congress to combat the most pressing problems, private litigation by a defined set of plaintiffs serves an important role in protecting not only those against whom specific discriminatory acts are directed, but also those in the broader community. *See, e.g., Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 401-402 (1968) (enforcement of the Civil Rights Act of 1964 must rely on private plaintiffs serving the role of "private attorney general" to vindicate federal policy); *Bennett v. Spear*, 520 U.S. 154, 165 (1997) (Endangered Species Act encourages enforcement by "private attorneys general"). The Executive Branch simply does not have the human and financial resources to prosecute and enforce every violation of federal civil law. Accordingly, this Court has made clear many times that Congress, having identified a problem and those best suited to enforce it, may authorize private citizens to challenge specific violations of its laws

consistent with well-settled principles of Article II as well as Article III.

Constitutional issues might arise if Congress purported to give the authority to enforce its laws to people with only an attenuated stake in the controversy. But Congress does not generally do so, nor does this Court generally construe ambiguous statutory language in such a way. Moreover, this Court has had no trouble construing statutory private rights of action within Article III boundaries using ordinary principles of statutory interpretation, leaving no reason for resort to a new clear statement rule. *See* Petitioner Br. at 53-56.

If anything, separation of powers considerations should counsel this Court to reject Petitioner's argument. *See* Respondent Br. at 50-52. This Court has always shown proper deference to Congress's construction of a private right of action to enforce federal law. To require a further showing of harm here would be to rewrite the remedial scheme created by Congress, adding an additional element to the cause of action that Congress did not want and that the courts are ill equipped to implement without the benefit of legislative guidance.

Resolution of this case thus requires this Court to do no more than reaffirm the reasoning of *Havens*, which is fully consistent with this Court's later Article III jurisprudence. This Court should not in any way call into doubt the holding or reasoning of *Havens*, which has been fundamental to successful enforcement of the Fair Housing Act and other civil rights laws. Instead, this Court should respect Congress's deliberate and reasoned decision not to require

plaintiffs to show the specific damage caused by willful violations of the Fair Credit Reporting Act in order to sue for statutory damages.

CONCLUSION

Amici Lawyers Committee and NFHA urge the Court to affirm the judgment below.

Respectfully submitted,

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