No. 15-17188

In the United States Court of Appeals
for the Ninth Circuit

KEVIN J. KEEN, TAMRA E. KEEN,
CURT CONYERS, and KELLY E. CONYERS,
Plaintiffs-Appellants,

v.

JPMORGAN CHASE BANK, NA,
Defendant-Appellee.

On Appeal from the
United States District Court for the Northern District of California
Case No. 3:15-cv-01806
Hon. William H. Orrick, III

BRIEF OF *AMICUS CURIAE* CONSUMER FINANCIAL PROTECTION BUREAU IN SUPPORT OF PLAINTIFFS-APPELLANTS' STANDING

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The Consumer Financial Protection Bureau (Bureau) respectfully submits this brief as *amicus curiae* in response to Plaintiffs-Appellants' June 3, 2016, motion for the Court to determine its own subject matter jurisdiction (ECF No. 23). Plaintiffs-Appellants (Borrowers) brought this suit against JPMorgan Chase Bank (Bank) for allegedly inaccurately disclosing the cost of their mortgage loan in violation of the Truth in Lending Act (TILA or Act). ER 316-21. The Borrowers' June 3 motion requests that the Court determine whether they have Article III standing to assert their TILA claim in light of the Supreme Court's recent decision in *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016). For the reasons set forth below, the Bureau urges the Court to conclude that the Borrowers have alleged an injury-in-fact sufficient to support their Article III standing.

INTEREST OF THE BUREAU

The Bureau has a substantial interest in plaintiffs' standing under Article III to bring suit in federal court to assert their rights under TILA. The Bureau has the authority to promulgate rules implementing TILA and shares authority to enforce the Act with various other federal agencies. *See* 15 U.S.C. §§ 1604(a), 1607(a). TILA also authorizes consumers to bring private actions and, in certain circumstances, to recover statutory damages from creditors who fail to comply with specified provisions of the Act "with

respect to" that consumer. *Id.* § 1640(a). This private right of action serves as an important supplement to the Bureau's own enforcement efforts. An unduly narrow understanding of Article III standing would limit consumers' ability to exercise this private right of action. The Bureau therefore has a substantial interest in the standing issue presented in this case.

BACKGROUND

A. The Truth in Lending Act

Congress enacted TILA in 1968 in response to growing concern that "divergent, and at times fraudulent, practices by which consumers were informed of the terms of the credit extended to them" prevented consumers "from shopping for the best terms available and, at times, ... prompted [them] to assume liabilities they could not meet." *Mourning v. Family Publ'ns Serv., Inc.*, 411 U.S. 356, 363 (1973). TILA "impos[es] mandatory disclosure requirements on those who extend credit to consumers in the American market," *id.*—requirements that aim to "assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit," 15 U.S.C. § 1601(a).

As relevant here, TILA requires creditors to disclose, "before the credit is extended," information about the terms and cost of the loan—such as the "finance charge," *i.e.*, "the cost of consumer credit as a dollar amount," 12 C.F.R. § 1026.4(a), the total of payments, and the annual percentage rate (APR). 15 U.S.C. § 1638(a), (b). Under the Act's implementing regulation, Regulation Z, these disclosures must "reflect the terms of the legal obligation between the parties," 12 C.F.R. § 1026.17(c)(1), as "determined by applicable State law or other law," 12 C.F.R. Pt. 1026, Supp. I, ¶ 17(c)(1)-1.

TILA grants consumers a private right of action against creditors who fail to provide them with the required disclosures. In particular, section 1640 of the Act provides that a creditor "who fails to comply with" these disclosure requirements "with respect to any person is liable to such person" for actual and statutory damages, among other things. 15 U.S.C. § 1640(a)(1), (2). Creditors, however, are liable for statutory damages only for violations of certain disclosure requirements. *See id.* § 1640(a). In particular, in 1980, Congress determined that statutory damages should be available only for those disclosures that it deemed to be "of material importance in credit shopping." S. Rep. No. 96-73, at 17 (1979). Among the disclosures that Congress deemed to be "of material importance"—and for

which it ensured that statutory damages would remain available—was the disclosure of the finance charge associated with a loan. 15 U.S.C. § 1640(a) ("In connection with the disclosures referred to in section 1638 of this title, a creditor shall have a liability determined under [§ 1640(a)(2)] only for failing to comply with" specified requirements including that of "paragraph ... (3) ... of section 1638(a).").

B. The *Spokeo* Decision

In *Spokeo*, the Supreme Court reaffirmed the well-established principle that a plaintiff invoking the jurisdiction of an Article III court must establish "injury in fact." *Spokeo*, 136 S. Ct. at 1547. In particular, "a plaintiff must show that he or she suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Id.* at 1548 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). *Spokeo* also reaffirms the longstanding principle that the required "legally protected interest" may be an interest that Congress has granted legal protection by creating a statutory right. *See id.* at 1549 (reaffirming that "Congress may 'elevate to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law'" (quoting *Lujan*, 504 U.S. at 578) (alteration omitted)); *accord Warth v. Seldin*, 422 U.S. 490, 500 (1975) ("The actual or

threatened injury required by Art. III may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing" (quotations omitted)). Nonetheless, the invasion of such a statutory right will not "automatically" satisfy the "injury-in-fact requirement" in every instance; the fact that Congress has "grant[ed] a person a statutory right and purport[ed] to authorize the person to sue to vindicate that right" is not necessarily enough. *Spokeo*, 136 S. Ct. at 1549. For example, a plaintiff cannot "allege a bare procedural violation, divorced from any concrete harm, and satisfy the injury-in-fact requirement of Article III." *Id.* Rather, the invasion of a statutory right must itself be "concrete and particularized" and "actual or imminent." *Id.* at 1548.

A particularized injury is one that "affect[s] the plaintiff in a personal and individual way," *id*. (quotations omitted), while a "concrete" injury is one that is "*de facto*," *id.* That is, to be "concrete," the injury must "actually exist"; it must be "real," not "abstract." *Id.* A concrete injury need not be tangible, however. *Id*. at 1549. An intangible injury can also be concrete. *Id*. In assessing whether an intangible injury is sufficiently "concrete," the Court recognized that "Congress is well positioned to identify intangible

harms that meet minimum Article III requirements" and, thus, that "its judgment is ... instructive and important." *Id.*[1]

ARGUMENT

The Borrowers Have Article III Standing.

The Borrowers have alleged facts showing they suffered an injury in fact—because they have alleged they suffered the invasion of a "legally protected interest" that is actual, particularized, and concrete.

A. The Borrowers have alleged they suffered an actual and particularized invasion of a "legally protected interest."

The Borrowers have alleged that they suffered the "invasion of a legally protected interest." TILA requires creditors to disclose the "finance charge" (among other things) "before the credit is extended." 15 U.S.C. § 1638(a)(3), (b). That finance charge must accurately reflect the consumer's legal obligation. *See* 12 C.F.R. §§ 1026.17(c), 1026.18(d); *see*

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[1] The Borrowers misread *Spokeo* as holding that a plaintiff must have suffered either "tangible concrete injury" or "a risk of subsequent tangible concrete injury" to have standing. Mot. at 2 (ECF No. 23). In fact, *Spokeo* recognizes that an injury-in-fact encompasses other types of harms. Thus, *Spokeo* reaffirms that "*in*tangible injuries can ... be concrete" and cites as examples of concrete yet intangible injuries the violation of First Amendment rights to free speech and the free exercise of religion. *Spokeo*, 136 S. Ct. at 1549 (emphasis added). Such violations are by themselves "concrete" even absent any risk of subsequent "tangible" injury. *Spokeo*, to be sure, recognizes that "the risk of real harm" *can* "satisfy the requirement of concreteness"—but it in no way suggests that such a risk (or an existing tangible injury) is the *only* way to satisfy that requirement. *Id.*

also 15 U.S.C. § 1605(f). The Act further makes a "creditor who fails to comply with" that requirement "with respect to any person ... liable to such person" for actual and statutory damages. 15 U.S.C. § 1640(a)(1), (2). These provisions grant legal protection to consumers' interest in receiving accurate information about the cost of their loans. Here, the Borrowers have alleged that the Bank failed to disclose accurately the finance charge of their mortgage loan, as required by TILA and Regulation Z, 12 C.F.R. § 1026.18(d)(1). ER 317-19. The complaint therefore alleges that the Bank invaded the Borrowers' legally protected interest in receiving an accurate disclosure of their finance charge.

There is no dispute here that the alleged invasion of this interest is both actual and particularized. The Borrowers allege "actual" injury because they allege that the Bank in fact failed to provide them with the required disclosures. And that alleged failure was particularized: It "affect[ed] [the Borrowers] in a personal and individual way," *Spokeo*, 136 S. Ct. at 1548, because the Bank failed to provide *to them* the information that *they* were entitled to receive before obtaining *their* loan. The injury that the Borrowers allege is personal to them and is not a "nonjusticiable generalized grievance." *See id.* at 1548 n.7.

B. The Borrowers have alleged a concrete injury.

The alleged invasion of the Borrowers' right to receive an accurate disclosure of the finance charge also constitutes a "concrete" injury. The Supreme Court has long recognized that the invasion of a legally protected interest in receiving information satisfies Article III's injury-in-fact requirement. Here as well, the alleged invasion of the Borrowers' legally protected interest in receiving information that accurately describes the finance charge that they were legally obligated to pay is a sufficiently concrete injury-in-fact. And, as *Spokeo* reaffirms, that injury is enough by itself to satisfy Article III even if the Borrowers did not suffer any additional injury beyond the deprivation of the information that they allege they were entitled to receive under TILA.

1. The deprivation of a right to receive information to which one is entitled by law has long been recognized as a constitutionally sufficient injury-in-fact (and thus necessarily sufficiently concrete). Thus, for example, in *Public Citizen v. Department of Justice*, the Supreme Court recognized that a refusal to provide "the names of candidates [for federal judgeships] under consideration by the ABA Committee, reports and minutes of the Committee's meetings, and advance notice of future meetings ... to the extent [required by the Federal Advisory Committee Act

(FACA)] constitutes a sufficiently distinct injury to provide standing to sue." 491 U.S. 440, 449 (1989). Likewise, the Court noted, "those requesting information under [the Freedom of Information Act (FOIA)]" need not "show more than that they sought and were denied specific agency records" to establish standing to sue. *Id.* Similarly, in *Federal Election Commission v. Akins*, the Court held that "[t]he 'injury in fact' that respondents have suffered consists of their inability to obtain information ... that, on [their] view of the law, the [Federal Election Campaign Act of 1971 (FECA)] requires that [an alleged political committee] make public." 524 U.S. 11, 21 (1998).

The Supreme Court has also made clear that the deprivation of a right not to be "the object of a misrepresentation made unlawful under" a statute—that is, a right not to be given false information—satisfies Article III's injury-in-fact requirement. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373-74 (1982). In *Havens Realty*, a housing-discrimination "tester"—*i.e.*, a person who, "without an intent to rent or purchase a home or apartment, pose[d] as [a] renter[] or purchaser[] for the purpose of collecting evidence of unlawful steering practices"—brought suit under the Fair Housing Act (FHA) against a realty company that had falsely informed her that no housing was available. *Id.* at 373-74. The Court held that that

plaintiff had standing because the FHA barred misrepresentations about available housing and thereby created a "legal right to truthful information about available housing." *Id.* at 373 (citing 42 U.S.C. § 3604(d)). As the Court explained, "the Art. III requirement of injury in fact is satisfied" because the tester "allege[d] injury to her statutorily created right to truthful housing information." *Id.* at 374.

The Borrowers' alleged injury here is no different from the injuries at issue in *Public Citizen*, *Akins*, and *Havens Realty*. Just as FACA, FOIA, and FECA grant individuals rights to receive certain information, and just as the FHA grants individuals a right not to be given false information, TILA grants consumers a right to receive an accurate disclosure of "[t]he finance charge" associated with their loan. 15 U.S.C. § 1638(a)(3) (internal quotations omitted); *see also* 12 C.F.R. § 1026.18(d). Whether the disclosures here in fact violated TILA is a question for the merits. But, whatever the merits of their claim, the Borrowers have standing under Article III because they allege that they were deprived of information that, on their view of the law, TILA entitles them to receive. *See Akins*, 524 U.S. at 21 (holding that "inability to obtain information ... that, *on [plaintiffs'] view of the law*, the state requires [be] ma[d]e public" was "injury in fact" (emphasis added)); *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89

(1998) (holding that plaintiff has Article III standing where it "wins under one construction of [the statute] and loses under another"). As in *Public Citizen*, *Akins*, and *Havens Realty*, the deprivation of information to which one may be legally entitled is an injury that satisfies "the Article III requirement of injury in fact," *Havens Realty*, 455 U.S. at 374, including the concreteness requirement.

2. Under *Spokeo*, moreover, the Borrowers have standing to challenge the allegedly incorrect disclosures even if they are never charged a finance charge in excess of the amount that was disclosed. *Spokeo* confirms that a person who is denied information to which she is entitled, or who is given false information, need not allege or prove additional consequential harm to satisfy the requirements of Article III. In particular, *Spokeo* specifically reaffirms that plaintiffs in certain cases "need not allege any *additional* harm beyond the one Congress has identified"—and it identifies *Akins* and *Public Citizen* as cases in which no such additional harm was required. *Spokeo*, 136 S. Ct. at 1549-50 (emphasis in original). As the Court in *Spokeo* recognized, the deprivation of a right to information—in particular, the "voters' 'inability to obtain information' that Congress had decided to make public," *id.* at 1549 (quoting *Akins*, 524 U.S. at 20-25), and the "failure to obtain information subject to disclosure under

the Federal Advisory Committee Act," *id.* at 1549-50 (citing *Public Citizen*, 491 U.S. at 449)—was, without more, a sufficiently concrete injury to support standing to sue.

Spokeo also left undisturbed *Havens Realty*'s holding that being "the object of a misrepresentation made unlawful" under a statute suffices to support standing, even if the plaintiff does not rely on that misrepresentation, and that misrepresentation does not cause any additional consequential harm. *See Shalala v. Ill. Council on Long Term Care, Inc.*, 529 U.S. 1, 18 (2000) ("This Court does not normally overturn, or so dramatically limit, earlier authority *sub silentio*."). The plaintiff in *Havens Realty* had standing even though he "may have approached the real estate agent fully expecting that [s]he would receive false information, and without any intention of buying or renting a home." *Havens Realty*, 455 U.S. at 374. The violation of the right not to be given inaccurate information sufficed to constitute injury in fact—even though no additional harm resulted. *Id.*

The alleged TILA violation here is no different.[2] In TILA, as in FACA, FOIA, FECA, and the FHA, Congress granted individuals a right to certain

[2] Indeed, given these precedents, it is no surprise that the Supreme Court has addressed the merits of disclosure violations under TILA even where the consumers "did not contend that they had suffered any actual damages

information and identified the failure to receive that information as an injury. Congress thereby exercised its "power to define injuries and articulate chains of causation that will give rise to a case or controversy where none [may have] existed before," *Spokeo,* 136 S. Ct. at 1549 (quoting *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring in part and concurring in judgment)). When a person suffers the injury that Congress defined—not being given "information which must be ... disclosed pursuant to a statute," *Akins,* 524 U.S. at 21 or being denied "truthful information," *Havens Realty,* 455 U.S. at 374—Article III's injury-in-fact requirement is met, and the person "need not allege any *additional* harm beyond the one Congress has identified," *Spokeo*, 136 S. Ct. at 1549 (emphasis in original).

3. The Borrowers miss the mark in suggesting (Mot. at 12) that the right to information at issue here might be distinguishable from the rights to information in *Public Citizen*, *Akins*, and *Havens Realty*. First, it makes no difference that this case does not involve a "duty by the government to disclose some information to its citizens" as in *Akins* and *Public Citizen* (Mot. at 12). The denial of accurate information is no less concrete, or "de facto," *Spokeo,* 136 S. Ct. at 1548, simply because a private company rather

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as a result of the alleged TILA violation." *Anderson Bros. Ford v. Valencia*, 452 U.S. 205, 209 n.7 (1981) (addressing 15 U.S.C. § 1638(a)(10)).

than the government is under a statutory obligation to provide it. Indeed, *Havens Realty* involved the failure by a private party (there, a realty company) to provide truthful information as required by the FHA, and the Court there held that the failure by that private party was a constitutionally sufficient injury in fact. *Havens Realty*, 455 U.S. at 374.

Second, the Borrowers err in suggesting that the alleged violation of their TILA rights may not be concrete because TILA does not protect a right to important information, but rather (in their view) a right to "extremely accurate information" and "'down to the last penny' calculations" that "no consumers ever actually rely on." *See* Mot. at 9, 12. For starters, the Borrowers are incorrect in suggesting that lenders may be subject to statutory damages for failing to provide "down to the last penny" disclosures of finance charges. Under the statute and Regulation Z, the finance charge disclosed for a closed-end mortgage loan "shall be treated as accurate" if the disclosed amount "[i]s understated by no more than $100." 12 C.F.R. § 1026.18(d)(1)(i); *see also* 15 U.S.C. § 1605(f)(1).

Moreover, contrary to the Borrowers' suggestion, the financial information that TILA entitles consumers to receive before entering into a loan transaction is critically important. Before TILA, the absence of accurate information about credit terms led to "blind economic activity

[that was] inconsistent with the efficient functioning of a free economic system." *Mourning*, 411 U.S. at 364 (citing Hearings on H.R. 11601 before the Subcommittee on Consumer Affairs of the House Committee on Banking and Currency, 90th Cong., 1st Sess., pt. 1, p. 76 (1967)). In response to this problem, Congress enacted TILA to "assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit." 15 U.S.C. § 1601(a). Congress, moreover, distinguished between "disclosures which are of material importance in credit shopping" and "more technical requirements"—and it gave consumers a right to recover statutory damages only in connection with those "material[ly] importan[t]" disclosures. S. Rep. No. 96-73, at 17 (1979).

Congress deemed the finance charge disclosure to be materially important, and it accordingly authorized consumers who do not receive an accurate disclosure of their finance charge to vindicate their rights under TILA without having to show that any "actual damage" resulted. *Id.*; *see also* 15 U.S.C. § 1640(a). In so doing, Congress identified the failure to receive an accurate disclosure of the finance charge as an "intangible harm[] that meet[s] minimum Article III requirements," *Spokeo*, 136 S. Ct.

at 1549. Under *Spokeo*, this congressional "judgment is ... instructive and important." *Id.* And, as in *Akins*, *Public Citizen*, and *Havens Realty*, there is no basis to second-guess that judgment that the deprivation of "information which must be ... disclosed pursuant to a statute" is an "injury in fact" that satisfies Article III. *Akins*, 524 U.S. at 21.

CONCLUSION

For these reasons, the Court should hold that the Borrowers have Article III standing to pursue their claim under TILA.

Respectfully submitted,

Dated: June 16, 2016 /s/ Kristin Bateman

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)

This brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 29(d) and 32(a)(7)(B) in that it contains 3,400 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on June 16, 2016.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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