No.

In the Supreme Court of the United States

SPOKEO, INC.,

Petitioner,

v.

THOMAS ROBINS, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Court's prior opinion in this case held that a statutory violation is not by itself sufficient to satisfy Article III's injury in fact requirement—because the Constitution requires an injury that "actually exist[s]" and is "'real,' and not 'abstract.'" 136 S. Ct. 1540, 1548 (2016). The Court recognized that some "intangible" harms can qualify as injuries in fact and identified "history and the judgment of Congress" as considerations relevant to that determination. *Id.* at 1549. But the Court left for remand the application of that standard to the allegations in this case.

In the nearly two years since this Court's decision, hundreds of lower courts have adopted conflicting interpretations of this Court's standard in addressing the sufficiency of intangible injury allegations. Some courts require the plaintiff to allege that the statutory violation resulted in real-world harm, or an imminent risk of such harm, *to the plaintiff*.

Other courts hold that as long as a statute protects "concrete interests," alleging a statutory violation can establish injury in fact, even if the plaintiff did not herself suffer actual or imminent real-world harm. Here, the Ninth Circuit held that the Fair Credit Reporting Act protects a concrete interest in accurate credit reporting, and that the alleged inaccuracies are of the type that injure that interest because they *could* harm *someone* like the plaintiff.

The question presented is:

Whether the injury in fact requirement is satisfied by claimed intangible harm to an interest protected by the underlying statute, even if the plaintiff cannot allege that she suffered either real-world harm or an imminent risk of such harm.

RULE 29.6 STATEMENT

Petitioner Spokeo, Inc., has no parent company. No publicly held company owns 10% or more of Spokeo.

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OPINIONS BELOW

The opinion of the court of the appeals on remand (App., *infra*, 1a-19a) is reported at 867 F.3d 1108. This Court's opinion is reported at 136 S. Ct. 1540. The initial opinion of the court of appeals (App., *infra*, 20a-29a) is reported at 742 F.3d 409. The order of the district court granting defendant's motion to dismiss plaintiff's complaint (App., *infra*, 30a-33a) is unreported but is available at 2011 WL 597867. The order of the district court granting in part and denying in part defendant's motion to dismiss plaintiff's first amended complaint (App., *infra*, 34a-42a) is unreported but is available at 2011 WL 1793334. The order of the district court "correcting prior ruling and finding moot motion for certification," and dismissing the case (App., *infra*, 43a-44a), is unreported but is available at 2011 WL 11562151.

JURISDICTION

The judgment of the court of appeals was entered on August 15, 2017. On November 8, 2017, Justice Kennedy granted Spokeo's application to extend the time to file this petition until December 4, 2017. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III, Section 2 of the U.S. Constitution provides that "[t]he judicial Power shall extend to all Cases, in Law and Equity, arising under * * * the Laws of the United States * * *."

The pertinent provisions of the Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq.*, are reproduced at App., *infra*, 45a-48a.

STATEMENT

This Court recognized the substantial importance of the Article III standing issues presented in this case when it granted review of, and subsequently reversed, the Ninth Circuit's holding that a bare statutory violation—an injury in law—automatically satisfies the injury-in-fact requirement for Article III standing. 136 S. Ct. 1540 (2016).

The Court held that "Article III standing requires a concrete injury even in the context of a statutory violation." *Id.* at 1549. The Court recognized that "concrete" is "not necessarily synonymous with 'tangible,'" and that "intangible injuries can nevertheless be concrete." *Ibid.* And the Court identified considerations for determining when an intangible injury is concrete, observing that "both history and the judgment of Congress play important roles," while also cautioning that "Congress' role in identifying and elevating intangible harms does not mean that a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right." *Ibid.*

This Court did not apply that test, but left that question to be addressed in the first instance on remand. The result has been confusion among the scores of lower court decisions that have taken very different approaches in determining whether an asserted "intangible harm" allegedly caused by a statutory violation is sufficient to satisfy Article III's injury-in-fact requirement. This conflict has been acknowledged by at least one court of appeals. *In re Horizon Healthcare Servs. Inc. Data Breach Litig.*, 846 F.3d 625, 637 n.17 (3d Cir. 2017).

Some courts have recognized that Congress' identification of a general problem and creation of a cause of action does not mean that Congress meant to expand the class of intangible injuries that satisfy Article III. They hold that the injury-in-fact standard requires real-world harm, or imminent real-world harm, to the plaintiff.

Other lower courts, including the Ninth Circuit in the decision below, have adopted a different approach that effectively renders this Court's opinion a nullity. These courts focus on the concreteness of the generalized *interest* a statute is purportedly designed to protect and broadly infer, based on Congress' creation of prohibitions and a cause of action, that some or all violations of those prohibitions infringe on that interest and, for that reason, satisfy Article III. That approach is little different in practice than the "injury in law" theory rejected by this Court: it upholds standing without any showing of resulting or imminent harm *to the plaintiff* or evidence that Congress intended to permit plaintiffs who have not suffered real-world harm or imminent risk of harm to sue.

This deep conflict among the lower courts on the question of standing to sue—a fundamental aspect of the jurisdiction of the federal courts that arises in every case—should not be allowed to persist. Otherwise, the exercise of federal jurisdiction will continue to vary circuit by circuit and case by case. Given the issue's enormous practical significance, this Court's review is plainly warranted.

A. The Statutory Scheme.

The Fair Credit Reporting Act (FCRA), 15 U.S.C. § 1681 *et seq.*, imposes specific obligations on "consumer reporting agencies" with respect to the consumer information they transmit. As pertinent here,

the FCRA requires consumer reporting agencies to "follow reasonable procedures to assure maximum possible accuracy of" consumer reports. 15 U.S.C. § 1681e(b)). See App., *infra*, 45a-48a.

When Congress enacted that provision, it provided private plaintiffs with a cause of action that required proof of "actual damages." Pub. L. No. 91-508, § 616, 84 Stat. 1127, 1134 (1970). And Congress created this private cause of action for every violation of the FCRA. See 15 U.S.C. § 1681*o*(a).[1]

Over two decades later, Congress subsequently authorized an award of statutory damages for every "willful" violation of the FCRA's requirements. See Pub. L. No. 104-208, § 2412(b), 110 Stat. 3009-446 (1996)).

Accordingly, under the current statutory scheme, a negligent violation of the FCRA's requirements "with respect to any consumer" subjects a consumer reporting agency to "actual damages," attorney's fees, and costs. 15 U.S.C. § 1681*o*(a). For a "willful" violation, however, a consumer may choose between "actual damages" and statutory "damages of not less than $100 or not more than $1,000," *id.* § 1681n(a)(1), and also may seek punitive damages. *Id.* § 1681n(a)(2).

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[1] Other FCRA requirements include: providing certain notices to providers and users of information (15 U.S.C. § 1681e(d)); providing toll-free numbers for particular purposes (*id.* §§ 1681g(c)(2)(B), 1681j(a)(1)(c)); ensuring that users of information for employment purposes comply with statutory disclosure obligations (*id.* § 1681b(b)(1)); and disclosing a range of information about consumer rights and law enforcement agencies (*id.* § 1681g(c)(1)(B)-(E)).

B. Factual Background And Initial Lower Court Proceedings.

1. Petitioner Spokeo, Inc., operates a "people search engine"—it aggregates publicly available information regarding individuals from phone books, social networks, marketing surveys, real estate listings, public records, and other sources into a database that is searchable via the Internet using an individual's name, and displays the results of searches in an easy-to-read format. During the time relevant to this action, the bottom of every search results page stated:

> Spokeo does not verify or evaluate each piece of data, and makes no warranties or guarantees about any of the information offered. Spokeo does not possess or have access to secure or private financial information.

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Spokeo warned users that "none of the information offered by Spokeo is to be considered for purposes of determining any entity or person's eligibility for credit, insurance, employment, or for any other purposes covered under FCRA." *Ibid.* Additionally, to access the "Wealth" section of search results, users had to agree that "[n]one of the information offered by Spokeo is to be considered for purposes of determining a consumer's eligibility for credit, insurance, employment, or for any other purpose authorized under the FCRA." SER 25.

Respondent Thomas Robins instituted a putative class action against Spokeo, alleging that Spokeo is a

"consumer reporting agency" that issues "consumer reports" in violation of the FCRA.[2] App., *infra*, 2a-3a.

In his operative amended complaint, Robins alleged that the search results associated with his name incorrectly stated "that he is married, has children, is in his 50's, has a job, is relatively affluent, and holds a graduate degree." 136 S. Ct. at 1546; C.A. Excerpts of Record (ER) 40 ¶ 31. The search results allegedly also were incorrect in stating that "his economic health is 'Very Strong,' and that his wealth level is in the 'Top 10%.'" ER 40 ¶¶ 32-33.

The complaint asserted that these alleged inaccuracies were "particularly harmful to Plaintiff in light of the fact that he is currently out of work and seeking employment," although Robins did not identify any specific harm from the inaccuracies. ER 40 ¶ 34. Robins alleged only that he had been "actively seeking employment throughout the time that Spokeo has displayed inaccurate consumer reporting information about him and he has yet to find employment." *Ibid.*

The complaint alleged that Spokeo had violated four procedural requirements of the FCRA. But on remand, Robins made clear that his sole remaining claim is the allegation that Spokeo violated Section 1681e(b) by failing "to follow reasonable procedures to assure the maximum possible accuracy of the information concerning the individual about whom the

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[2] Spokeo disputes Robins's claims that it is a "consumer reporting agency" within the meaning of the FCRA, and that its search engine results are "consumer reports," but at this stage of the litigation a court must accept those allegations for the purposes of addressing Spokeo's standing arguments. See 136 S. Ct. at 1546 n.4.

report relates." 15 U.S.C. § 1681e(b); see App., *infra*, 14a n.2 ("Robins now states that he has alleged only 'a single claim for relief under Section 1681e(b).'").

2. After initially holding that the complaint sufficiently alleged injury in fact (App., *infra* 34a-42a), the district court reconsidered its views and dismissed the case for lack of standing (App., *infra*, 43a-44a). The district court found the alleged harm to Robins's employment prospects "speculative, attenuated and implausible." App., *infra*, 43a.

The Ninth Circuit reversed, concluding that the appeal was governed by circuit precedent holding that the allegation of a statutory violation was sufficient to establish Article III standing. App., *infra*, 25a (citing *Edwards* v. *First Am. Corp.*, 610 F.3d 514, 517 (9th Cir. 2010)).

C. This Court's Decision.

This Court vacated the Ninth Circuit's decision. 136 S. Ct. 1540.

It explained that, to satisfy Article III, a plaintiff must demonstrate that he or she suffered "an injury in fact" that is not only "particularized," but also "concrete." 136 S. Ct. at 1548. That is, the plaintiff must show that his or her alleged injury "actually exist[s]" and that it is "'real,' and not 'abstract.'" *Ibid.* In addition, "the risk of real harm can[] satisfy the requirement of concreteness." *Id.* at 1549 (citing *Clapper* v. *Amnesty Int'l USA*, 568 U.S. 398 (2013)).

Noting that "intangible injuries can * * * be concrete," the Court explained that in assessing whether a particular claim of intangible harm satisfies the concreteness standard, "it is instructive to consider whether an alleged intangible harm has a close relationship to a harm that has traditionally been re-

garded as providing a basis for a lawsuit in English or American courts." *Ibid.* In addition, the Court stated that Congress may attempt to "identify intangible harms that meet minimum Article III requirements," and that Congress's judgment is "instructive and important." *Ibid.*

The Court cautioned, however, that "Congress's role * * * *does not mean* that a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right. Article III standing requires a concrete injury even in the context of a statutory violation." *Ibid.* (emphasis added).

Applying its analysis to "the context of this particular case," the Court held that "Robins cannot satisfy the demands of Article III by alleging a bare procedural violation" because a "violation of one of the FCRA's procedural requirements may result in no harm." *Id.* at 1550. For example, the Court explained, a consumer reporting agency could violate a procedural requirement but the information reported "regardless may be entirely accurate." *Ibid.* "In addition," the Court continued, "not all inaccuracies cause harm or present any material risk of harm"; for example, the dissemination of "an incorrect zip code" would be harmless. *Ibid.*

The Court remanded the case to the Ninth Circuit to answer "the question framed by [its] discussion, namely, whether the particular procedural violations alleged in this case entail a degree of risk sufficient to meet the concreteness requirement." *Ibid.*

D. The Ninth Circuit's Decision On Remand.

On remand, the Ninth Circuit concluded that Robins's remaining FCRA claim alleged a sufficiently concrete intangible harm. App., *infra*, 1a-19a.

The Ninth Circuit held that a plaintiff must satisfy two requirements to establish standing based upon an alleged statutory violation. He must show (1) that "the statutory provisions at issue were established to protect his concrete interests (as opposed to purely procedural rights)"; and (2) that "the specific procedural violations alleged in th[e] case actually harm, or present a material risk of harm, *to such interests*." App., *infra*, 8a (citing *Strubel* v. *Comenity Bank*, 842 F.3d 181 (2d Cir. 2016) (emphasis added)).

Relying on broad statements of the FCRA's purpose "to ensure fair and accurate credit reporting" and to "protect consumer privacy," App., *infra*, 9a (quoting *Safeco Ins. Co. of Am.* v. *Burr*, 551 U.S. 47, 52 (2007)), the Ninth Circuit concluded that Section 1681e(b) satisfies the first prong of its test because the "interests protected by FCRA's procedural requirements are 'real,' rather than purely legal creations." *Ibid.* According to the court, a "threat to a consumer's livelihood is caused by the very existence of inaccurate information in his credit report and the likelihood that such information will be important to one of the many entities who make use of such reports." App., *infra*, 10a.

The court of appeals further stated that "historical practice" bolstered its conclusion. App., *infra*, 12a. It recognized that common-law defamation typically requires "a showing of reputational harm" while the "FCRA protects against the disclosure of merely inaccurate information." *Ibid.* But it considered Section

1681e(b) to be sufficiently "similar *in kind*" to common-law claims for defamation or libel per se. *Ibid.*

On the second prong of its test, the Ninth Circuit acknowledged that "determining whether any given inaccuracy in a credit report would help or harm an individual (or perhaps both) is not always easily done." App., *infra*, 16a. But the court held that "information of this sort (age, marital status, educational background, and employment history) is the *type* that *may* be important to employers or others making use of a consumer report," and that "[e]nsuring the accuracy of this sort of information * * * seems directly and substantially related to FCRA's goals." *Ibid.* (emphasis added).

The Ninth Circuit recognized this Court's holding that not all inaccuracies in a credit report will "'cause [real] harm or present any material risk of [real] harm.'" App., *infra*, 15a (alterations the Ninth Circuit's). But it lamented that "[u]nfortunately, the [Supreme] Court gave little guidance as to what varieties of misinformation should fall into the harmless category, beyond the example of an erroneous zip code." *Ibid.*

The court of appeals declined to conduct a "searching review," concluding that even if the alleged inaccuracies' "likelihood actually to harm Robins's job search could be debated, they suffice for purposes of Article III standing because the inaccuracies "d[id] not strike" the Ninth Circuit as "the sort of 'mere technical violation[s]' which are too insignificant to present a sincere risk of harm to the real-world interests that Congress chose to protect with FCRA." App., *infra*, 16a-17a; see also *ibid.* (citing *Spokeo*, 136 S. Ct. at 1556 (Ginsburg, J., dissenting)).

Finally, the Ninth Circuit determined that under its approach, the intangible harm occurred at the moment the alleged inaccuracies were published, and that Robins therefore was not required to show that the alleged inaccuracies "present a material or impending risk" of hurting his employment prospects under the impending-harm standard set forth in *Clapper*. App., *infra*, 17a-19a.

REASONS FOR GRANTING THE PETITION

To establish Article III standing (and thus federal jurisdiction), a plaintiff bears the burden of showing that he has

> (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision.

Spokeo, 136 S. Ct. at 1547; accord *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992); *Friends of the Earth, Inc.* v. *Laidlaw Envtl. Servs, Inc.*, 528 U.S. 167, 180-81 (2000).

Some "intangible" harms plainly constitute injury in fact. *Spokeo*, 136 S. Ct. at 1549. This Court, for example, has upheld standing based on impairments to plaintiffs' First Amendment rights to free speech and free exercise, see *ibid.* (citing *Pleasant Grove City* v. *Summum*, 555 U.S. 460 (2009); *Church of Lukumi Babalu Aye, Inc.* v. *Hialeah*, 508 U.S. 520 (1993)), or "aesthetic and recreational" interests in an area, see *Friends of the Earth*, 528 U.S. at 183. The challenged conduct in these cases has a real-world impact on the plaintiff, even though that impact is not easily quantified.

The question addressed in *Spokeo I* and again presented here is how courts should analyze an in-

tangible injury claimed to result from a statutory violation that does not produce a real-world harm or imminent risk of such harm to the plaintiff.

Spokeo I held that merely invoking a statutory violation is not enough. "Article III standing requires a concrete injury even in the context of a statutory violation." 136 S. Ct. at 1549. That is because the injury-in-fact requirement is the "irreducible constitutional minimum" for standing. *Id.* at 1547 (quoting *Lujan*, 504 U.S. at 561). And "'[i]t is settled that Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing.'" *Id.* at 1547-48 (quoting *Raines* v. *Byrd*, 521 U.S. 811, 820 n.3 (1997)).

But the Ninth Circuit's decision on remand undermined this Court's holding by deciding that Congress's enactment of the FCRA enabled Robins to allege a concrete injury in fact from the publication of particular inaccurate information about him even though he identified no real-world harm—and no material risk of imminent harm—to *him* from the alleged inaccuracies. The risk of harm to someone from the alleged violation of the concrete "interests" protected by the statute was sufficient—but the court did not identify any evidence that Congress intended to expand the class of persons entitled to sue beyond those individuals who themselves suffer real harm satisfying the ordinarily-applicable Article III standard, relying only on the generalized interests the FCRA protects.

Some courts of appeals have followed the same approach: (1) a statute protects concrete interests; and (2) some or all violations of the statute's prohibitions infringe sufficiently on those interests to permit

a plaintiff to sue for those violations. Notably absent from this reasoning is a finding of harm or risk of imminent harm *to the plaintiff* or evidence that Congress intended to make actionable an intrusion on a statutory interest without the real-world impact on the plaintiff ordinarily required to satisfy Article III.

Other courts of appeals take a different approach—recognizing that Congress' identification of a general problem and creation of a cause of action does not mean that Congress meant to expand the class of intangible injuries that satisfy Article III to every violation of the statute, and instead requiring plaintiffs in those circumstances to identify a real-world harm or imminent risk of harm to themselves resulting from the violation.

This conflict over a fundamental question of federal jurisdiction has significant implications for litigation under a wide variety of statutes. Without further guidance from this Court, the test for standing—an "essential and unchanging part of the case-or-controversy requirement of Article III" (*Lujan*, 504 U.S. at 560)—will continue to vary circuit by circuit and statute by statute. And, as a practical matter, plaintiffs' counsel will bring nationwide class actions in circuits that infer concrete harm from generalized statutory interests to avoid dismissal under the more robust approach to standing employed in other circuits.

The lower courts' disarray over how to determine when an alleged intangible harm qualifies as injury-in-fact exists cries out for this Court's review.

A. The Courts Of Appeals Are Divided Over Whether And Under What Circumstances A Claimed Intangible Harm From A Statutory Violation Can Be A Concrete Injury In Fact.

There is widespread confusion over the frequently recurring issue of how to determine when a statutory violation produces an intangible harm that qualifies as injury in fact—and, in particular, whether Congress has identified and elevated a claimed intangible harm to the level of a concrete injury in fact. Significantly, at least one court of appeals has expressly recognized the conflict. See pages 17-18, *infra*.

1. Several courts of appeals take a different approach from the Ninth Circuit here—requiring that the plaintiff show that she suffered harm, or an imminent risk of harm, from the statutory violation.

For example, in another FCRA case, the Fourth Circuit found that the plaintiff lacked standing because he alleged merely that he did not receive information to which he was entitled under the statute—namely, the sources of the information on his credit report. The Fourth Circuit explained that the plaintiff had to show *both* that the statute creates a legal entitlement to the information "*and* that the denial of that information creates a 'real' harm with an adverse effect." *Dreher* v. *Experian Info. Solutions, Inc.*, 856 F.3d 337, 345 (4th Cir. 2017).[3]

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[3] The court below read *Dreher* to mean that "FCRA violations that undermine 'the fairness or accuracy' of an individual's credit report are concrete harms." App., *infra*, 13a (quoting *Dreher*, 856 F.3d at 346). That misreads *Dreher*. The Fourth Circuit noted that the absence of injury in fact was bolstered by

The Fifth Circuit has similarly held that a beneficiary of a benefits plan governed by the Employee Retirement Income Security Act (ERISA) lacked standing to bring claims for breach of ERISA's fiduciary requirements unless the plaintiff alleged that the breach adversely impacted him—namely, by affecting the plan's ability to pay his benefits. *Lee* v. *Verizon Communications, Inc.*, 837 F.3d 523 (2016), *cert. denied*, 137 S. Ct. 1374 (2017).

The plaintiff argued that "the judgment of Congress supports finding standing in this case, as Congress's expressed concern in enacting ERISA was to protect 'the interests of participants in employee benefit plans.'" *Id.* at 530 (quoting 29 U.S.C. § 1001(b)). The Fifth Circuit deemed that statement of Congressional purpose too slender a reed to support standing; risk to the plaintiff's "actual benefits" under the plan is required to "meet the dictates of Article III." *Ibid.*; see also *Soehnlen* v. *Fleet Owners Ins. Fund*, 844 F.3d 576, 582-83 (6th Cir. 2016) (citing *Lee* in explaining that "[p]laintiffs never show precisely what concrete harm they suffer as a result of Defendants' violations of their ERISA rights.").

In *Nicklaw* v. *CitiMortgage, Inc.*, 839 F.3d 998 (11th Cir. 2016), the Eleventh Circuit held that the plaintiff lacked standing for a claim that his former lender recorded the satisfaction of his mortgage after the statutory deadline. The court found no indication from the New York legislature's "creat[ion] of a right to have a certificate of a discharge recorded in a

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the fact that the plaintiff in that case did *not* allege "any difference at all in the 'fair[ness] or accura[cy]' of his credit report." 856 F.3d at 346. But the Fourth Circuit was careful to underscore that the plaintiff must suffer a "real harm"—i.e., he must be "adversely affected by the alleged error on his credit report"—in order to have standing. *Ibid.*

timely manner" that the plaintiff himself had suffered an intangible harm or should be permitted to sue for the violation in federal court. *Id.* at 1002-03. Instead, it held plaintiff to the generally-applicable Article III standard of real-world harm or risk of imminent harm—such as "alleg[ing] that his credit suffered" or that his title to the property was clouded by the late filing. *Id.* at 1003.

In a published opinion denying rehearing *en banc*, the *Nicklaw* panel adhered to its analysis over the dissent's argument that "[t]he New York legislature identified and elevated the intangible harm" of untimely recordings of a satisfaction of a mortgage and that such recordings "can seriously impact a person's credit, as well as his ability to sell his then-unencumbered property." 855 F.3d 1265, 1272-73 (11th Cir. 2017) (Martin, J., dissenting).

The Seventh and Eighth Circuits also have rejected standing based on claims that cable companies failed to discard plaintiffs' personal information in violation of the Cable Communications Policy Act. See *Gubala* v. *Time Warner Cable, Inc.*, 846 F.3d 909 (7th Cir. 2017); *Braitberg* v. *Charter Commc'ns, Inc.*, 836 F.3d 925 (8th Cir. 2016). The plaintiff in *Gubala*, for example, asserted that Congress had identified a "risk to subscribers' privacy created by the fact that cable providers have 'an enormous capacity to collect and store personally identifiable data about each cable subscriber.'" *Gubala* v. *Time Warner Cable, Inc.*, 2016 WL 3390415, at *4 (E.D. Wis. June 17, 2016) (citing H.R. Rep. No. 98-934 at 4666-67 (1984)), *aff'd*, 846 F.3d 909. But this reference to a statutory interest was not enough to show that the plaintiff himself suffered a concrete harm from the statutory violation: as the Seventh Circuit put it, "the absence of allegation let alone evidence of any concrete injury in-

flicted or likely to be inflicted *on the plaintiff* as a consequence" of the alleged statutory violation "precludes the relief sought." 846 F.3d at 913 (emphasis added).

2. Other courts, like the court below, have effectively neutered this Court's holding in *Spokeo I* by pointing to generalized statutory "interests" rather than actual or imminent harm to the plaintiff.

Here, the Ninth Circuit did not rest its holding on a determination that Robins's sole remaining claimed statutory violation—that Spokeo failed to use reasonable procedures to assure the accuracy of the purported consumer report about him (15 U.S.C. § 1681)—inflicted or threatened imminent real-world injury to Robins *himself*. Rather, the Ninth Circuit focused more generally on the "real-world *interests* that Congress chose to protect with FCRA." App., *infra*, 16a-17a (emphasis added). The court made clear that Robins was required to allege specific types of inaccuracies in order to establish standing, but based its finding of injury in fact on a generalized determination that the particular inaccuracies Robins alleged are of "the *type* that *may* be important to employers or others making use of a consumer report"—nonetheless acknowledging that "their likelihood *actually to harm* Robins's job search could be debated." *Id*. at 16a (emphasis added).

In another FCRA case, the Third Circuit concluded that Congress "created a private right of action to enforce the provisions of FCRA, and even allowed for statutory damages for willful violations—which clearly illustrates that Congress believed that the violation of FCRA causes a concrete harm to consumers." *In re Horizon*, 846 F.3d at 637. The court refused to read *Spokeo I* "as creating a requirement

that a plaintiff show a statutory violation has caused a 'material risk of harm' before he can bring suit," instead holding that the statutory violation alone supplied the requisite injury in fact. *Id.*; see also App., *infra*, 11a-13a, 17a (repeatedly relying on *In re Horizon*).

The Third Circuit acknowledged that its reading of *Spokeo I* squarely conflicts with the Eighth Circuit's decision in *Braitberg* and the district court's decision in *Gubala*, which was subsequently affirmed by the Seventh Circuit. *In re Horizon*, 846 F.3d at 637 n.17.

Reflecting the confusion in the lower courts, an Eleventh Circuit panel held in *Perry* v. *Cable News Network, Inc.*, 854 F.3d 1336 (11th Cir. 2017) that the plaintiff had standing to pursue a claim for violation of the Video Privacy Protection Act (VPPA)'s prohibition on disclosing video rental or sale records without "alleg[ing] any additional harm beyond the statutory violation." *Id.* at 1340. The court held that "[t]he structure and purpose of the VPPA supports the conclusion that it provides actionable rights," pointing to the statute's cause of action and its broad purpose "'to preserve personal privacy.'" *Ibid.* (quoting 134 Cong. Rec. S5396-08 (May 19, 1988)).[4] Just a few

[4] In fact, the relevant portion of the VPPA creates a cause of action only for "[a]ny person *aggrieved*" by the violation. 18 U.S.C. § 2710(c)(1) (emphasis added). This Court has held in a number of contexts that the statutory term "aggrieved" is at least synonymous with the generally-applicable Article III standard, and may be even more restrictive. See *Thompson* v. *N. Am. Stainless, LP*, 562 U.S. 170, 176-78 (2011). Thus, the text of the VPPA appears to reflect an express congressional judgment *not* to expand the class of persons entitled to sue under the statute beyond those who have suffered real injury from the statutory violation.

days ago, a Ninth Circuit panel followed suit, holding that "*every* disclosure of an individual's 'personally identifiable information' and video-viewing history offends the interests that the statute protects," even without "harms such as embarrassment and harassment." *Eichenberger* v. *ESPN, Inc.*, --- F.3d ----, 2017 WL 5762817, at *2-3 (9th Cir. Nov. 29, 2017); see also *id.* at *3 (expressly "join[ing]" the reasoning in *Perry*).[5]

Finally, the Second Circuit's approach to standing, expressly adopted by the court below, also focuses on statutory interests rather than specific harm to the plaintiff. In *Strubel*, the court held that the plaintiff had standing to pursue two out of her four claims under the Truth in Lending Act related to statutorily-required notices in connection with the plaintiff's opening of a credit card account. In that opinion, the court referred to potential consequences "a consumer" in general rather than to the plaintiff herself. 842 F.3d at 190. In the court's view, the relevant statutory prohibitions "each serve[] to protect a consumer's concrete interest in 'avoid[ing] the uninformed use of credit,' a core object of the TILA." *Ibid.* (quoting 15 U.S.C. § 1601(a)). And the court stated, without addressing any harm to the plaintiff herself, that "[a] consumer who is not given notice of his obli-

[5] The Ninth Circuit also appeared to hold that any violation of a "substantive" statutory right automatically supplies Article III standing, noting that "*Spokeo* concerned *procedural* violations of the FCRA" while "the VPPA identifies a *substantive* right to privacy." *Eichenberger*, 2017 WL 5762817, at *3. That approach squarely conflicts with the Seventh Circuit's recognition of "the irrelevance of the attempted distinction between substantive and procedural statutory violations" for standing purposes; what matters is a "concrete injury" resulting from the violation. *Gubala*, 846 F.3d at 912.

gations is likely not to satisfy them and, thereby, unwittingly to lose the very credit rights that the law affords him." *Ibid.*

The consequence of this untethered approach is apparent: it authorizes standing whenever a court concludes that the challenged violation "'would have [] an effect on consumers generally,' *even if the plaintiff herself was not directly harmed*." *Aikens* v. *Portfolio Recovery Assocs., LLC*, --- F. App'x ----, 2017 WL 5592341, at *3 (2d Cir. Nov. 21, 2017) (emphasis added) (quoting *Strubel*, 842 F.3d at 193).

"Applying *Strubel*," another Second Circuit panel recently concluded that a plaintiff lacked standing to pursue a claim under the Fair and Accurate Credit Transactions Act (FACTA) for printing credit card expiration dates on receipt in violation of the statute. *Crupar-Weinmann* v. *Paris Baguette Am., Inc.*, 861 F.3d 76, 81 (2d Cir. 2017).[6] But it reached that holding only on the basis of a subsequent enactment by Congress in 2007 that "*expressly* observed that the inclusion of expiration dates *did not* raise a material risk of identity theft." *Ibid.* The court thus turned on its head the requirement that Congress "identify intangible harms" that, in its "judgment," should be actionable in the absence of real-world harm, *Spokeo*, 136 S. Ct. at 1549—instead presuming such a judgment unless Congress expressly finds that a "particular bare procedural violation does not increase the risk of the relevant material harm." *Crupar-Weinmann*, 861 F.3d at 81 n.1.

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[6] FACTA is an amendment to the FCRA that governs information on credit-card receipts (see 15 U.S.C. § 1681c(g)(1)), but is subject to standard FCRA remedies.

As these decisions show, the limited guidance afforded by this Court's opinion in *Spokeo* has resulted in disagreement and confusion among the lower courts over Congress's role in the Article III standing inquiry and whether a claimed intangible harm resulting from a statutory violation is sufficiently concrete. That deep conflict over a fundamental question of jurisdiction is ripe for resolution by this Court.

B. The Question Presented Is A Frequently Recurring One Of Exceptional Importance.

The disarray among the courts of appeals is only the tip of the iceberg. The issue presented here arises virtually every single day in courts across the country, as plaintiffs bring putative class actions alleging violations of federal and state statutes authorizing statutory damages without any claimed harm beyond the statutory violation.

Spokeo I has been cited in over a *thousand* decisions since May 2016—with over six hundred discussing this Court's opinion in detail.[7]

Given this massive number of cases, it is no surprise that courts have reached conflicting results for virtually identical claims—meaning that jurisdiction continues to vary court by court and statute by statute. As one set of commentators summarized, "[w]e have found numerous cases that are essentially indistinguishable on the facts presented, yet courts have reached opposite results." Ezra Church et al.,

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[7] As of December 1, 2017, Westlaw reports 1,131 cases citing this Court's opinion. Of those cases, 364 cases discuss this Court's opinion at the highest "Depth Of Treatment" and 311 cases discuss it at the second-highest depth of treatment—a total of 675 decisions.

The Meaning of Spokeo*, 365 Days and 425 Decisions Later*, Law360 (May 15, 2017), https://tinyurl.com/y7h3lt4m.

For example, lower courts are divided over whether claims under the following statutes satisfy Article III when the alleged intangible harm consists of a statutory violation without any allegation of actual or imminent harm to the plaintiff:

- FACTA, which prohibits printing the expiration date or more than the last five digits of a credit card number on the receipt provided to the cardholder. See 15 U.S.C. § 1681c(g).[8]
- The Fair Debt Collection Practices Act, which prohibits using certain "means to collect or attempt to collect any debt" (15 U.S.C. § 1692f) and requires debt collectors to make disclosures in a manner regulated by the statute (*id.* § 1692g).[9]

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[8] Compare, *e.g.*, *Meyers* v. *Nicolet Rest. of De Pere, LLC*, 843 F.3d 724, 727-29 (7th Cir. 2016) (no standing for printing expiration date on receipt, without more); *Kamal* v. *J Crew Grp., Inc.*, 2017 WL 2587617, at *3-5 (same for printing first six digits of card number); with *Deschaaf* v. *Am. Valet & Limousine Inc.*, 234 F. Supp. 3d 964, 968-70 (D. Ariz. 2017) (standing for printing expiration date; recognizing the conflict as "[c]ourts around the country have grappled with the application of *Spokeo* to cases under FCRA and FACTA"); *Guarisma* v. *Microsoft Corp.*, 209 F. Supp. 3d 1261, 1264 (S.D. Fla. 2016) ("violation of the FACTA constitutes a concrete injury in and of itself because Congress created a substantive right for individuals to receive printed receipts that truncate their personal credit card information").

[9] See, *e.g.*, *Jackson* v. *Abendroth & Russell, P.C.*, 207 F. Supp. 3d 945, 959-961 (S.D. Iowa 2016) (no injury in fact from bare violation of disclosure requirements "mandated by section 1692g"; collecting contrary cases).

- ERISA, which imposes fiduciary duties on sponsors of retirement plans, including a duty to act in accordance with plan terms that are consistent with ERISA's requirements. See 29 U.S.C. § 1104(a)(1)(D).[10]

This confusion in the wake of *Spokeo I*, and contrary to the well-settled principle that "jurisdictional rules should be clear." *Lapides* v. *Bd. of Regents of Univ. Sys. of Georgia*, 535 U.S. 613, 621 (2002); accord *Hertz Corp.* v. *Friend*, 559 U.S. 77, 95 (2010) (emphasizing importance of "straightforward rules under which [courts] can readily assure themselves of their power to hear a case").

As long as this confusion is permitted to stand, the flood of litigation—and in particular class actions—premised on statutory violations without real-world injury specific to the plaintiff will continue. Encouraged by decisions like the one below, and lured by the combination of statutory damages and the class action device, plaintiffs will continue to argue that the real-world impact of the alleged legal violation on plaintiffs is irrelevant.

Indeed, the economic incentives for plaintiffs' lawyers to sue are enormous: "[w]hen representative plaintiffs seek statutory damages"—as Robins does here—"pressure to settle may be heightened because

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[10] Compare, *e.g.*, *Lee*, 837 F.3d at 530; *Soehnlen*, 844 F.3d at 582-83; with *Limbach* v. *Weil Pump Co.*, 2017 WL 1379360, at *3 (E.D. Wis. Apr. 14, 2017) (standing for claims that plan failed to timely provide summary plan description, even though the defendant's "failures to provide the plaintiff with summary plan descriptions as required by ERISA did not cause her any harm apart from the failure to receive information about the plan," such as "prevent[ing] her from obtaining benefits under the plan or otherwise prejudic[ing] her claim for benefits").

a class action poses the risk of massive liability unmoored to actual injury." *Shady Grove Orthopedic Assocs.* v. *Allstate Ins. Co.*, 559 U.S. 393, 445 n.3 (2010) (Ginsburg, J., dissenting); see also *Trans Union LLC* v. *FTC*, 122 S. Ct. 2386, 2387 (2002) (Kennedy, J., dissenting from denial of certiorari) (noting that "[b]ecause the FCRA provides for statutory damages of between $100 and $1,000 for each willful violation, petitioner faces potential liability approaching $190 billion," an amount that is "crushing").

To be sure, the high stakes of class actions do not alter the requirements of Article III. See *Spokeo*, 136 S. Ct. at 1547 n.6. But they do highlight the practical significance of insisting that a plaintiff satisfy the constitutional minimum of concrete injury in fact. As this Court has observed, "courts must be more careful to insist on the formal rules of standing, not less so," in this "era of frequent litigation [and] class actions." *Arizona Christian Sch. Tuition Org.* v. *Winn*, 563 U.S. 125, 146 (2011).

C. The Ninth Circuit's Decision Is Contrary To This Court's Article III Standing Jurisprudence.

Review is warranted for the additional reason that the decision below cannot be reconciled with *Spokeo I* or this Court's prior precedents.

1. Contrary to the Ninth Circuit's holding, the FRCA does not embody any "instructive" judgment by Congress (136 S. Ct. at 1549) that some types of inaccuracies should be actionable in the absence of real-world harm to the plaintiff.

In other contexts where Congress legislates against the backdrop of default rules, courts have

consistently held that Congress must expressly state its intent to displace the generally applicable rule.[11] The same approach should govern here: A statute cannot be interpreted to expand the class of persons entitled to sue without (at minimum) some indication in the text that Congress intended that effect.

Indeed, in explaining Congress's ability to elevate a *de facto* harm to the status of injury in fact, this Court cited (*Spokeo*, 136 S. Ct. at 1549) "Justice Kennedy's concurrence" in *Lujan*, which in turn explained that, if Congress seeks "to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before[,] * * * Congress must at the very least *identify the injury* it seeks to vindicate and *relate the injury to the class of persons entitled to bring suit*." 504 U.S. at 580 (Kennedy, J., concurring) (emphasis added). It would be "remarkable" and "unfortunate" to "hold[] that Congress may override the injury limitation of Article III" when "there is no indication that Congress embarked on such an ambitious undertaking." John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 Duke L.J. 1219, 1227 (1993).

In purporting to find such a congressional judgment, the Ninth Circuit pointed to Section 1681e(b)—the FCRA provision requiring consumer reporting agencies to "follow reasonable procedures to assure maximum possible accuracy of" consumer reports—and scattered statements about the FCRA's broad purpose. App, *infra*, 9a-10a. That effort to recharacterize the statute cannot withstand scrutiny.

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[11] See, *e.g., Kirtsaeng* v. *John Wiley & Sons, Inc.*, 133 S. Ct. 1351, 1363 (2013); *Astoria Fed. Sav. & Loan Assn.* v. *Solimino*, 501 U.S. 104, 108 (1991).

First, when Congress enacted Section 1681e(b), Congress allowed private plaintiffs to sue only upon proof of "actual damages," expressly requiring plaintiffs to demonstrate tangible harm. Congress therefore plainly did not identify a new class of intangible harms justifying access to court. Pub. L. No. 91-508, § 616, 84 Stat. 1127, 1134 (1970). Indeed, the Senate Report quoted by the court below stated that the statute's purpose "'is to prevent consumers from being unjustly *damaged* because of inaccurate or arbitrary information in a credit report.'" App, *infra*, 9a (quoting S. Rep. No. 91-517, at 1 (1969)).

Moreover, Congress created a private cause of action for *every* violation of the FCRA (see 15 U.S.C. § 1681*o*(a))—most of which have nothing to do with inaccurate statements. See note 2, *supra*. Accordingly, there is no evidence of a determination that violations of Section 1681e(b) in particular should be specially actionable.

Nor did Congress make any judgment about the harm inflicted by inaccurate statements when it subsequently authorized statutory damages—because it authorized them for *every* willful violation, including those that have nothing to do with inaccuracy (see 15 U.S.C. § 1681n).

Second, Section 1681e(b) does not target all instances of dissemination of inaccurate information, but rather prohibits "failure to follow reasonable procedures"; it does not expressly require inaccuracy as an element of the violation. The Ninth Circuit here, like other *courts*, inserted the element of inaccuracy. App., *infra*, 14a ("[T]o prevail Robins will have to show that Spokeo did prepare a report that con-

tained inaccurate information about him.").[12] A judicial inference of that kind cannot evidence a clear judgment by *Congress* about the status of inaccurate but potentially harmless statements. As Justice Scalia succinctly put it, "in fact, Congress has not identified misinformation as a suable harm. That's not what this statute does." Tr. of Oral Arg., *Spokeo*, 2015 WL 6694910, at *21 (Nov. 5, 2015).

Third, there is no basis in the statute for the Ninth Circuit's distinction between supposedly "trivial" inaccuracies and those about "age, marital status, educational background, and employment history" that the Ninth Circuit deemed actionable in virtually all circumstances. App., *infra*, 16a. Congress did not determine that some types of inaccuracies are inherently harmful while others are not—the line must instead be drawn based on the real-world impact of the claimed inaccuracy on the plaintiff. See 136 S. Ct. at 1550 (recognizing both that "Congress plainly sought to curb the dissemination of false information by adopting procedures designed to decrease that risk" and that "not all inaccuracies cause harm or present any material risk of harm").

Although the Ninth Circuit also purported to "caution that our conclusion on Robins's allegations does not mean that *every* inaccuracy in these catego-

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[12] Other courts have held—in the context of claims for *actual*, not statutory, damages—that falsity, or an allegation "tending to show" falsity, is necessary to establish a violation of Section 1681e(b). *Dalton* v. *Capital Associated Indus., Inc.*, 257 F.3d 409, 415 (4th Cir. 2001); see also, *e.g.*, *DeAndrade* v. *Trans Union LLC*, 523 F.3d 61, 66 (1st Cir. 2008); *Washington* v. *CSC Credit Servs. Inc.*, 199 F.3d 263, 267 n.3 (5th Cir. 2000); *Koropoulos* v. *Credit Bureau, Inc.*, 734 F.2d 37, 39 (D.C. Cir. 1984).

ries of information (age, marital status, economic standing, etc.) will necessarily establish concrete injury," App., *infra*, 17a n.4, the statute offers no basis for this further line drawing. "If flattering information about Robins's income level or education is sufficient to result in concrete harm, it's tough to see what inaccuracy is not sufficient." Venkat Balasubramani, *On Remand, Ninth Circuit Says Robins Satisfied Standing*, Technology & Marketing Law Blog (Aug. 29, 2017), https://tinyurl.com/y88vo6vr.

Finally, the Ninth Circuit's approach also proves far too much: Whenever Congress enacts a regulatory requirement, its goal is to further a statutory purpose. In nearly every case, therefore, a regulatory violation arguably hinders full accomplishment of the statute's purpose. If courts can infer from broad statements of purpose that Congress intended to expand the class of persons who can invoke the federal judicial power beyond those who have suffered a real-world harm or been placed at imminent risk of harm of the kind that would ordinarily be required to satisfy Article III, then Article III's well-established constraints on congressional power to confer standing are merely rhetorical rather than real.[13]

2. Injury in fact also may exist when "an alleged intangible harm has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts." 136 S. Ct. at 1549. The Ninth Circuit, however, was

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[13] The Ninth Circuit did not appear to entertain Robins' further argument on remand that Spokeo's alleged misrepresentation of his marital status also creates a real risk of harm to his dating prospects. For good reason: that alleged harm is nowhere to be found in Robins' complaint.

mistaken in concluding that there was a "close relationship" between the FCRA cause of action for failure to use reasonable procedures to assure maximum possible accuracy and the common law of defamation. App., *infra*, 12a-13a.

The focus of analysis is the claimed "intangible harm" and the "harm" that was required to maintain an action at common law. 136 S. Ct. at 1549. And the relevant time is the period when the Constitution was ratified: the injury-in-fact requirement ensures that the jurisdiction of federal courts does not expand beyond the "cases" and "controversies" permitted by Article III. See, *e.g.*, *Vermont Agency of Nat. Res.* v. *United States ex rel. Stevens*, 529 U.S. 765, 775-77 (2000).

Robins's alleged harm does not have a "close relationship" to the reputational injuries that underpinned the early common law's prohibition of defamatory statements. Common-law defamation actions required proof that the false statement was injurious to the plaintiff's reputation. See, *e.g.*, *Milkovich* v. *Lorain Journal Co.*, 497 U.S. 1, 11 (1990) ("Since the latter half of the 16th century, the common law has afforded a cause of action *for damage to a person's reputation* by the publication of false and defamatory statements.") (emphasis added).

For that reason, the common law required proof of *actual damage* for the vast majority of allegedly false statements. Harm was presumed only for a small category of statements that by their nature were highly likely to harm an individual's reputation. *Carey* v. *Piphus*, 435 U.S. 247, 262 (1978) ("[S]tatements that are defamatory *per se* by their very nature are likely to cause mental and emotional distress, as well as injury to reputation.").

The court of appeals recognized these distinctions, but brushed them aside by vaguely deeming FCRA's cause of action "similar *in kind*" to common-law harms that "have traditionally served as the basis for a lawsuit." App., *infra*, 12a. Yet the alleged inaccuracies in Robins's Spokeo search results bear no comparison to accusations that "will of course be injurious." 3 Wm. Blackstone, Commentaries on the Laws of England *124 (1st ed. 1768) (giving as examples accusations of crime, infectious disease, or conduct that would automatically disqualify the subject from "a trade or livelihood"). At best, the relationship is remote rather than "close," as this Court requires. 136 S. Ct. at 1549.

That does not mean that Congress cannot expand the category of false statements that could be actionable without proof of accompanying harm. For example, Congress might identify certain types of falsehoods, such as a false statement that an individual had been involuntarily terminated, that would be actionable without proof of injury. Or Congress might recognize that a false statement that would have been harmless to reputation in 1789—for example, an accusation of discrimination on the basis of race or sex—was now *per se* harmful.

In each instance, the inquiry would be: (a) did Congress make the relevant determination; and (b) is the false statement by itself as likely to inflict concrete harm to reputation approximately equivalent to that resulting from the false statements that were actionable without proof of harm at the time of the Founding. Neither requirement is satisfied here.

3. Finally, the Ninth Circuit's failure to adhere to this Court's Article III precedents is underscored by its brusque dismissal of *Clapper* as "beside the

point." App., *infra*, 18a. According to the court below, "*Clapper* did not address the concreteness of intangible injuries like the one Robins asserts," and Robins's intangible injury occurred at the moment the alleged inaccuracies were published. *Ibid.* In other words, the Ninth Circuit concluded that publication of inaccurate information is itself a "concrete harm" even if there are no future consequences.

The Ninth Circuit's cavalier dismissal of *Clapper* defies this Court's instruction in remanding the case to determine "whether the particular procedural violations alleged in this case entail a degree of *risk* sufficient to meet the concreteness requirement." 136 S. Ct. at 1550 (emphasis added). This Court pointed directly to *Clapper* in suggesting when "the risk of real harm" might satisfy the concreteness requirement. *Id.* at 1549. And in *Clapper*, the Court reiterated "the well-established requirement that threatened injury must be 'certainly impending.'" 568 U.S. at 401 (quoting *Whitmore* v. *Arkansas*, 495 U.S. 149, 158 (1990)). In contrast, "'[a]llegations of *possible* future injury' are not sufficient" to establish standing. *Id.* at 409 (quoting *Whitmore*, 495 U.S. at 158).

Robins's allegations do not permit him to establish what *Spokeo I* requires: actual harm or impending risk of harm to his job prospects. A court would have to presume that one or more prospective employers, at some point in the near term, will: (1) use Spokeo to check Robins's background—although he does not allege that any person other than he or his lawyers searched for him prior to this litigation; (2) encounter the pleaded inaccuracies; (3) conduct no further research that would reveal accurate information; (4) consider the marital, wealth, and educational information to be both material and adverse to employment; and (5) base an adverse decision not to

interview or not to hire on that information. Nothing in the complaint explains why each of these steps is likely, let alone certain, to occur.

But the Ninth Circuit absolved Robins from making that showing, instead speculating that the decision-making of a hypothetical prospective employer *could* be affected by the pleaded inaccuracies. The court below required Robins only to allege as a general matter that the inaccuracies concerned information that is of "the type that *may* be important to employers or others making use of a consumer report." App., *infra*, 16a (emphasis added). In so holding, the court of appeals subordinated the inquiry this Court required—whether the plaintiff has suffered "real," or actual, harm—to *ad hoc* judicial determinations about whether an alleged statutory violation should be actionable. The latter standard is unpredictable and unworkable.

D. This Case Cleanly Presents The Question Presented.

This case presents an ideal vehicle for the Court to address the question it previously left open: how a court should determine whether an alleged intangible harm from a statutory violation constitutes injury in fact.

To begin with, the Court is thoroughly familiar with the background of this case from its prior grant of certiorari and decision.

In addition, there are no alternative bases under which Robins could claim standing. Robins did not enter into a commercial transaction with Spokeo and has not paid Spokeo any money (in contrast to other cases involving FCRA claims). Moreover, if Robins is required to show actual harm to his employment

prospects from his sole remaining claim, he cannot establish standing. That is because showing such harm rests on a "highly attenuated chain of possibilities" that "does not satisfy the requirement that threatened injury must be certainly impending" to satisfy Article III." *Clapper*, 568 U.S. at 410; see pages 31-32, *supra*.

Finally, this case is a much better vehicle to resolve the issue presented here than *Syed* v. *M-I, LLC*, 853 F.3d 492 (9th Cir. 2017), in which this Court recently denied review, --- S. Ct. ----, 2017 WL 2671483 (Nov. 13, 2017).

The plaintiff in *Syed* alleged that the company violated the FCRA "stand-alone" disclosure requirement (that no other information may be included on the same page as the required FCRA disclosures). See 15 U.S.C. § 1681b(b)(2)(A). The panel initially held that the failure to comply with the statutory requirement automatically established standing. 846 F.3d 1034 (9th Cir. 2017).

As a result of a rehearing petition, however, the panel amended its opinion to find standing based on *real-world consequences* from the statutory violation—namely, the plaintiff agreeing to a liability waiver that he would not have accepted absent the statutory violation. The panel "fairly infer[red]" from the complaint "that Syed was confused by the inclusion of the liability waiver with the disclosure and *would not have signed it* had it contained a sufficiently clear disclosure, as required in the statute." 853 F.3d at 499-500 (emphasis added).

Thus, unlike here, there is no clear conflict between *Syed* and this Court's decision—nor did *Syed* create a clear conflict among the circuits. A district court in the Ninth Circuit recently held, post-*Syed*,

that a plaintiff lacked standing for claims based on the same provision of the FCRA because he "failed to allege a concrete injury" resulting from the violation. *Saltzberg* v. *Home Depot USA, Inc.*, 2017 WL 4776969, at *2 (C.D. Cal. Oct. 18, 2017). The recusal in *Syed* of Justice Alito—author of the Court's opinion in this case—also created a further impediment to review not present here.

* * *

By devising a standing inquiry that, at the end of the day, impermissibly conflates broad statutory purposes with a concrete injury in fact to the plaintiff, the Ninth Circuit has yet again opened the federal courts to a large class of lawsuits that do not involve an Article III injury-in-fact. Review by this Court is warranted to ensure that the jurisdiction asserted by the federal courts remains within constitutional limits.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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