No. 17-806

IN THE

Supreme Court of the United States

SPOKEO, INC.,

Petitioner,

v.

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

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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I. STATEMENT OF THE CASE

Less than two years ago, this Court held that intangible harms can, in some circumstances, satisfy the concreteness requirement of Article III. And, in those instances, the plaintiff "need not allege any *additional* harm beyond the one Congress has identified." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016). On remand, the Ninth Circuit faithfully applied this Court's framework and held that the Fair Credit Reporting Act ("FCRA") protects subjects of credit reports from the concrete harm of having certain categories of false information about their employment qualifications and credit worthiness disseminated. Petition Appendix ("App.") 16a-17a. That case-specific determination is correct, and Spokeo barely argues otherwise.

Spokeo instead asks this Court to reconsider the *same* issue it decided the last time this case was before it, *viz*., "[w]hether 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." Pet. *i*. "Real-world harm" is just Spokeo's way of saying "tangible harm," and this Court unanimously agreed that "'[c]oncrete' is not ... necessarily synonymous with 'tangible.'" *Spokeo*, 136 S. Ct. at 1549.

Seeking to mask its reconsideration request, Spokeo asserts that review is warranted to resolve a circuit split. But no such split exists. Every court of appeals to address the issue has recognized that intangible harms can satisfy Article III's concreteness requirement. That different courts have reached different conclusions about whether

different intangible harms are concrete under different factual circumstances is not disagreement. It is merely the application of a statute-specific framework that naturally will lead to different outcomes. No court has disagreed with the Ninth Circuit's holding that, under circumstances as alleged in this complaint, Section 1681(b) of the FCRA protects against a concrete, intangible harm. The Court should deny review.

A. The Fair Credit Reporting Act

Congress enacted the FCRA, Pub. L. No. 91-508, 84 Stat. 1128 (1970), among other things to "ensure fair and accurate credit reporting[.]" *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 52 (2007). Congress recognized that "[p]erhaps the most serious problem in the credit reporting industry [was] the problem of inaccurate or misleading information." 115 Cong. Rec. 2411 (1969). Credit bureaus "frequently confuse[d] one individual with another" and reproduced "[b]iased information[,] ... malicious gossip and hearsay." *Id.* To solve that problem, the FCRA requires "that consumer reporting agencies adopt reasonable procedures … with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information[.]" 15 U.S.C. § 1681(b).

The FCRA's passage was preceded by decades of concern over inadequate protections against false statements regarding an individual's creditworthiness. Historically, "injuries that resulted from the dissemination of erroneous information by credit reporting agencies could be redressed through the common law action of defamation." Virginia G. Maurer, *Common Law Defamation and the Fair Credit Reporting Act*, 72 Geo.

L.J. 95, 97 (1983). Under the common law, certain words (written or spoken) were considered so inevitably injurious that actual injury was presumed. An "action on the case" could proceed "without proving any particular damage to have happened." 3 William Blackstone, Commentaries *124.

By the early twentieth century, however, most American jurisdictions had adopted a "qualified privilege" for credit reporting agencies accused of defamation. *See* Maurer, *supra*, at 100. The effect of this privilege was to "place the burden of proving actual malice and actual damages on the plaintiff." *Id.* By mid-century, then, an individual who was "the subject of a credit report [was] all but unprotected in most jurisdictions." *Id.*

As the post-World War II economy boomed, "a vast credit reporting industry … developed to supply credit information." S. Rep. No. 91-517, at 2 (1969). Credit bureaus, aided by "the growth of computer technology," began to supply information on millions of individuals' "financial status, bill paying record and items of public record such as arrests, suits, [and] judgments," as well as "information on a person's character, habits, and morals," and "highly sensitive and personal information about a person's private life, such as racial or ethnic descent, domestic trouble, housekeeping habits, and conditions of yard." *Id.* at 2, 4.

By the 1960s, there was a consensus in Congress that the state legal regimes had failed to adapt their regulatory approach to the modern credit industry. In addition, Congress understood that because "unfair credit reporting methods undermine the public confidence which

is essential to the continued functioning of the banking system," it needed "to insure that consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer's right to privacy." 15 U.S.C. §§ 1681(a)(1), (a)(4).

The FCRA thus imposed "a comprehensive series of restrictions on the disclosure and use of credit information assembled by consumer reporting agencies." *FTC v. Manager, Retail Credit Co.*, 515 F.2d 988, 989 (D.C. Cir. 1975). As relevant here, the FCRA required consumer reporting agencies preparing a consumer report to follow "reasonable procedures" to "assure maximum possible accuracy of the information concerning the individual about whom the report relates," Pub. L. No. 91-508, 84 Stat. 1128 § 607, and provided individuals with a means of ensuring that the information being distributed about them is accurate and updated, *id.* § 611. To enforce these provisions, the FCRA made any consumer reporting agency that had been "negligent in failing to comply with any requirement imposed under [the act] with respect to any consumer … liable to that consumer in an amount equal to the sum of any actual damages sustained by the consumer as a result of the failure[.]" *Id.* § 617. Punitive damages were available for willful violations. *Id.* § 616.

At the same time, the FCRA preempted certain state law claims by prohibiting "any action or proceeding in the nature of defamation, invasion of privacy, or negligence with respect to the reporting of information against any consumer reporting agency … based on information disclosed pursuant to [the FCRA], except as to false information furnished with malice or willful intent to injure such consumer." *Id.* § 610; *see also id.* § 622 (preempting

any law "inconsistent with any provision of this title"). These provisions "federalized and transformed" "common law defamation in the credit reporting context … into an action for negligence." Maurer, *supra*, at 115.

B. The Consumer Credit Reporting Reform Act

While the FCRA increased protections for consumers, it remained inadequate in several respects. One criticism was that the damages regime did "not always serve as a viable remedy." Lawrence D. Frenzel, *Fair Credit Reporting Act: The Case for Revision*, 10 Loy. L.A. L. Rev. 409, 429 (1977). "Civil actions brought pursuant to the [FCRA] tend[ed] to result in nominal—if any—damages to the consumer-plaintiff," and there was "little incentive on the part of the consumer to bring an action under the statute." *Id.* at 429-30. "[A]s a result, reporting agencies [felt] no real compulsion to comply with the protective mechanisms of the Act." *Id.* at 430. There were numerous calls to amend the FCRA to "provid[e] for minimum liability or presumed damages when a violation is proven." Robert R. Stauffer, Note, *Tenant Blacklisting: Tenant Screening Services and the Right to Privacy*, 24 Harv. J. on Legis. 239, 311 (1987).

Responding to "horror stories about inaccurate credit information and the inability of consumers to get the information corrected," 141 Cong. Rec. 10916 (1995), Congress amended the FCRA in 1996 to allow victims of "willful" violations to recover statutory damages of "not less than $100 and not more than $1,000," 15 U.S.C. § 1681n(a)(1)(A). Congress was "aware of concerns expressed by furnishers of information and the consumer reporting agencies that these provisions will result in

unwarranted litigation" but believed they were necessary to protect "consumers who have been wronged." S. Rep. No. 104-185, at 49 (1995).

C. Spokeo's Business Practices

Spokeo owns and operates a website that in response to Internet queries provides in-depth reports containing "an array of details about a person's life, such as the person's age, contact information, marital status, occupation, hobbies, economic health, and wealth." App. 2a.

Spokeo markets its services to employers who want to evaluate prospective employees, as well as to those who want to investigate prospective romantic partners or seek other personal information. *Spokeo, Inc. v. Robins*, No. 13-1339, Joint Appendix ("JA") 9, 13, 38 n.12. This information includes, among other things, mortgage value, estimated income, and investments. JA 11. It also describes the subject's "economic health" on a scale from low to high, or as "average," "below average," or "very strong." JA 10-11. Spokeo users can also receive a report on a subject's "wealth level," rated on a scale from low to high, including a percentile such as "Bottom 40%" or "Top 10%." JA 11, 14.

Although Spokeo's reports contain extensive personal information, much of it is inaccurate. JA 11. Numerous investigative studies have documented the falsehoods in Spokeo's reports, including false statements concerning employment history, economic background, and home value. *Id.* n.1. Its founder, Harrison Tang, acknowledged these deficiencies in 2009, admitting that Spokeo "know[s] there are a lot of things we need to improve. There are

algorithms we can do that we haven't had time to improve the inaccuracies [sic]. There's a lot of holes." JA 12.

Despite that admission, when individuals do learn of these falsehoods about themselves, they have little recourse. They face barriers in correcting inaccuracies or removing their reports, as Spokeo has no effective system for allowing them to do so. *Id.* For example, individuals seeking to remove or correct their information will often receive emails informing them to "try again tomorrow" because Spokeo "limit[s] the frequency of privacy requests" to "prevent abuse." *Id.* Even when successfully removed, an inaccurate report can reappear. JA 49. There often is nothing the subject of a report can do to keep Spokeo from disseminating a report filled with inaccurate personal information.

D. Initial Proceedings Below

Robins sued Spokeo in federal court under the FCRA alleging that Spokeo created and made available for purchase an inaccurate report of his personal information. App. 3a. While some of Spokeo's basic information about him in the report was accurate, it falsely reported (among other things) that Robins (1) has a graduate degree (he does not); (2) is employed in a professional or technical field, his "economic health" is "very strong," and his wealth level is in the "Top 10%" (he is out of work and seeking employment); and (3) is in his 50s, is married, and has children (he is not in his 50s, is unmarried, and has no children). JA 14. The report also included a photograph purporting to be of Robins that was not, in fact, of him. *Id.*

Robins further alleged that when Spokeo created this inaccurate report about him, it was aware of the inadequacies in its processes, was aware of its failure to follow the procedures the FCRA requires to assure maximum possible accuracy of the reports it generates, and, as a result, had willfully violated the FCRA. JA 20-23. Because Spokeo failed to satisfy these obligations with respect to Robins, he is entitled to, among other things, declaratory relief, injunctive relief, and statutory damages. JA 25; 15 U.S.C. § 1681n(a) ("Any person who willfully fails to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer[.]").

The district court dismissed Robins's complaint for lack of Article III standing. App. 4a. The Ninth Circuit reversed, holding that Spokeo's alleged violations of Robins's rights under the FCRA satisfied Article III's standing requirements. *Id.*

E. This Court's Decision

The Court vacated the Ninth Circuit's judgment, reiterating that Article III requires the plaintiff to show he has "suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Spokeo*, 136 S. Ct. at 1548 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). Though the Court took no issue with the Ninth Circuit's determination that Robins had alleged a "particularized" violation of his FCRA rights, it held that the ruling had "elided" Article III's independent "concreteness" requirement. *Id.*

For an injury to be concrete, it must be "'real,' and not 'abstract.'" *Id.* But an injury can be "real" without being "tangible." *Id.* at 1548-49. "In determining whether an intangible harm," such as one identified in a federal statute, "constitutes injury in fact, both history and the judgment of Congress play important roles." *Id.* at 1549. The Court affirmed that "Congress is well positioned to identify intangible harms that meet minimum Article III requirements," *id.*, and has the power to "define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before," *id.* (quoting *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring in part and concurring in the judgment)). Likewise, "it is instructive to consider whether an alleged intangible harm has a close relationship to a harm that had traditionally been regarded as providing a basis for a lawsuit in English or American courts." *Id.* (citing *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 775-77 (2000)).

True, a plaintiff does not "automatically satisf[y] 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." *Id.* "Robins could not," the Court explained, "allege a bare procedural violation, divorced from any concrete harm, and satisfy the injury-in-fact requirement of Article III." *Id.* (citing *Summers v. Earth Island Inst.*, 555 U.S. 488, 496 (2009); *Lujan*, 504 U.S. at 572). There must be at least "the risk of real harm" to the interest protected by Congress to "satisfy the requirement of concreteness." *Id.* (citing *Clapper v. Amnesty Int'l USA*, 568 U.S. 398 (2013)). But the Court was clear that "the violation of a procedural right granted by statute can be sufficient in some circumstances to constitute injury in fact" and, in those

circumstances, a plaintiff "need not allege any additional harm beyond the one Congress has identified." *Id.* (citing *FEC v. Akins*, 524 U.S. 11, 20-25 (1998); *Public Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 449 (1989)).

Applied here, the Court held that Congress, through the FCRA, "plainly sought to curb the dissemination of false information by adopting procedures designed to decrease that risk." *Id.* at 1550. Yet it also recognized that "[a] violation of one of the FCRA's procedural requirements may result in no harm" and would therefore not "satisfy the demands of Article III[.]" *Id.* That might be the case if—contrary to Robins's allegations—Spokeo's poor procedures had not actually led to any inaccuracy, or if the flawed information published as a result of Spokeo's poor procedures did not involve the "types of false information" (like a wrong zip code) that could "cause harm or present any material risk of harm" to Robins. *See id.* & n.8.

Justice Thomas joined the Court's opinion but wrote separately to explain why the ruling was faithful to Article III's common-law tradition. Article III does not require a "plaintiff seeking to vindicate a statutorily created private right" to "allege actual harm beyond the invasion of that private right." *Id.* at 1553 (Thomas, J., concurring) (citing *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373-74 (1982); *Tenn. Elec. Power Co. v. TVA*, 306 U.S. 118, 137-38 (1939)). But Article III requires more when the suit involves a public right. *Id.* Remand was the appropriate course because while some of Robins's allegations invoked public rights, "one claim in [his] complaint rests on a statutory provision that could arguably establish a private cause of action to vindicate the violation of a privately held right." *Id.* Thus, if the FCRA "has created a private duty

owed personally to Robins to protect *his* information, then the violation of the legal duty suffices for Article III injury in fact." *Id.* at 1554.

Justice Ginsburg, joined by Justice Sotomayor, "agree[d] with much of the Court's opinion" but dissented, as she did not see "the necessity of a remand" because "Robins' allegations carry him across the threshold" of a concrete injury. *Id.* at 1554-55 (Ginsburg, J., dissenting). "Robins complains of misinformation about his education, family situation, and economic status, inaccurate representations that could affect his fortune in the job market." *Id.* at 1556. In her view, "[t]he FCRA's procedural requirements aimed to prevent such harm." *Id.* (citing 115 Cong. Rec. 2410-2415 (1969)).

F. The Ninth Circuit's Remand Decision

On remand, the Ninth Circuit held that Robins had Article III standing. App. 6a-19a. As an initial matter, the Ninth Circuit recognized that the only open question on remand was whether Robins had alleged a concrete injury given that "[this] Court noted that ... [the Ninth Circuit's] analysis properly addressed whether the injury alleged by Robins was particularized as to him" and did not "call into question [the Ninth Circuit's] conclusions on any of the other elements of standing." *Id.* 4a-5a.

As to concreteness, the Ninth Circuit recognized that "the mere fact that Congress said a consumer like Robins may bring such a suit does not mean that a federal court necessarily has the power to hear it." *Id.* 6a. Rather, "even when a statute has allegedly been violated, Article III requires such violation to have caused some real—as

opposed to purely legal—harm to the plaintiff." *Id.* At the same time, a "congressional judgment still plays an important role in the concreteness inquiry, especially in cases—like this one—in which the plaintiff alleges that he suffered an *intangible* harm." *Id.* "Just as Congress's judgment about an intangible harm is important to our concreteness analysis," moreover, "so is the fact that the interest Congress identified is similar to others that traditionally have been protected." *Id.* 11a. Under this Court's framework, Robins "sufficiently pled a concrete injury" for two independent reasons. *Id.* 5a, 8a-17a.

First, "Congress established the FCRA provisions at issue to protect consumers' concrete interests." *Id.* 8a. The Ninth Circuit explained that "given the ubiquity and importance of consumer reports in modern life—in employment decisions, in loan applications, in home purchases, and much more—the real-world implications of material inaccuracies in those reports seem patent on their face." *Id.* 9a-10a. "Indeed," the court added, "the legislative record includes pages of discussion of how such inaccuracies may harm consumers in light of the increasing importance of consumer reporting nearly fifty years ago." *Id.* 10a (citations omitted). "In this context, it makes sense that Congress might choose to protect against such harms without requiring any additional showing of injury." *Id.*

The Ninth Circuit understood, however, that Robins does not have Article III standing unless the "alleged FCRA violations ... actually harm, or at least ... actually create a 'material risk of harm' to" the interests Congress identified. *Id.* 13a (quoting *Spokeo*, 136 S. Ct. at 1550). Thus, "in many instances, a plaintiff will not be able to

show a concrete injury simply by alleging that a consumer-reporting agency failed to comply with one of FCRA's procedures." *Id.* In short, this Court's ruling "requires some examination of the *nature* of the specific alleged reporting inaccuracies to ensure that they raise a real risk of harm to the concrete interests that FCRA protects." *Id.* 15a (emphasis in original).

In some cases, the Ninth Circuit recognized, drawing this line might prove difficult. But that is not the case here because "Robins's allegations relate facts that are substantially more likely to harm his concrete interests than [this] Court's example of an incorrect zip code." *Id.* As the court explained, "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. Ensuring the accuracy of this sort of information thus seems directly and substantially related to FCRA's goals." *Id.* 16a.

Second, the Ninth Circuit concluded that these FCRA violations followed from the common law given that they "resemble other reputational and privacy interests that have long been protected in the law." *Id.* 10a-11a. "For example, the common law provided remedies for a variety of defamatory statements, including those which falsely attributed characteristics 'incompatible with the proper exercise of [an individual's] lawful business, trade, profession, or office.'" *Id.* 11a (quoting Restatement (First) of Torts § 570 (1938)). At common law, moreover, "publication of such a libel was 'actionable per se, that is irrespective of whether any special harm has been caused to the plaintiff's reputation or otherwise,' because the 'publication is itself an injury.'" *Id.* (quoting Restatement (First) of Torts § 569 cmt. c.).

To be sure, "there are differences between the harms that FCRA protects against and those at issue in common-law causes of action like defamation or libel per se." *Id.* 12a. But this Court "observed that 'it is instructive to consider whether an alleged intangible harm *has a close relationship* to a harm that has traditionally been regarded as providing a basis for a lawsuit,' not that Congress may recognize a de facto intangible harm only when its statute exactly tracks the common law." *Id.* "Even if there are differences between FCRA's cause of action and those recognized at common law, the relevant point is that Congress has chosen to protect against a harm that is at least closely similar *in kind* to others that have traditionally served as the basis for lawsuit." *Id.*

Last, the Ninth Circuit rejected Spokeo's reliance on *Clapper* to argue "that Robins's allegations of harm are too speculative to establish a concrete injury." *Id.* 17a. "In *Clapper*," the court explained, "the plaintiffs sought to establish standing on the basis of harm they would supposedly suffer from threatened conduct that had not happened yet but which they believed was reasonably likely to occur." *Id.* 17a-18a. "Here, by contrast, both the challenged conduct and the attendant injury have already occurred." *Id.* 18a. "It is of no consequence," then, "how likely Robins is to suffer *additional* concrete harm as well (such as the loss of a specific job opportunity)." *Id.*

II. REASONS FOR DENYING THE PETITION

A. Spokeo seeks to relitigate this Court's prior decision.

Spokeo claims to want resolution of a circuit split that purportedly has developed in the wake of this Court's prior ruling. Pet. 14-21. In truth, however, Spokeo is simply dissatisfied with this Court's decision and seeks to relitigate whether intangible harms can meet Article III's concreteness requirement. Spokeo's attempt to revisit an issue that was decided less than two years ago should be rejected.

The Court need look no further than the question presented to see Spokeo's objective: "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." Pet. *i*; *see id.* at 3 (Article III "requires real-world harm, or imminent real-world harm, to the plaintiff"). That is of course the very issue the Court has just decided.

After all, there is a name for it when a plaintiff has "suffered either real-world harm or an imminent risk of such harm." It is called "tangible" harm. *Spokeo*, 136 S. Ct. at 1549. And, rejecting Spokeo's argument, the Court held that tangible harm is *not* required to establish injury in fact. *See id.* (holding that "'[c]oncrete' is not ... necessarily synonymous with 'tangible'" and "that intangible injuries can nevertheless be concrete"). Far from having "left open" the question of how to "determine whether an alleged intangible harm from a statutory violation

constitutes injury in fact," Pet. 32, the Court identified criteria that the lower courts should consider in making that exact assessment, *see Spokeo*, 136 S. Ct. at 1549. If those criteria are met, then a plaintiff "need not allege any *additional* harm"—real-world or otherwise—"beyond the one Congress has identified." *Id.*

The Ninth Circuit's remand decision thus would not render "this Court's opinion a nullity." Pet. 3. Rather, what would render the Court's opinion meaningless is Spokeo's attempt to impose on a plaintiff alleging an *intangible* harm the duty to show that he also has suffered, or soon will suffer, a *tangible* harm. To be certain, Spokeo claims to accept that "[s]ome 'intangible' harms plainly constitute injury in fact." Pet. 11 (citation omitted). But that claim is belied by Spokeo's question presented.[1]

Removing all doubt, Spokeo requests for "the question addressed in *Spokeo I* and again presented here" to be "how courts should analyze an intangible injury claimed to result from a statutory violation that does not produce

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1. The only intangible harms *Spokeo* begrudgingly accepts arise from First Amendment and environmental claims. Pet. 11. But decisions recognizing intangible harms are legion and date back to the founding. *See Spokeo*, 136 S. Ct. at 1550-51 (Thomas, J., concurring). Indeed, if Spokeo truly believes that "real-world" harm is required, no species of cases could be excepted from that requirement. As the Court has explained, "there is absolutely no basis for making the Article III inquiry turn on the source of the asserted right." *Lujan*, 504 U.S. at 576. Spokeo's rule would at least require this Court to overrule *Havens*, where the plaintiffs (who were given false information when testing for housing discrimination) indisputably suffered no "real world harm." *See* 455 U.S. at 373.

a real-world harm or imminent risk of such harm to the plaintiff." Pet. 11-12. That Spokeo asks the Court to address the same question "again" says it all. The Court squarely held that "both history and the judgment of Congress play important roles" in distinguishing a claim that "allege[s] a bare procedural violation" from one protecting a concrete intangible interest. *Spokeo*, 136 S. Ct. at 1549. If Spokeo is dissatisfied with the ruling, it should candidly ask for reconsideration. But it should not pretend that a question the Court has answered somehow remains open for debate.

Spokeo responds that "real-world" harm must be an indispensable element of injury in fact because the Court's opinion "held that merely invoking a statutory violation is not enough." Pet. 12. But that concern has been addressed too. "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." *Spokeo*, 136 S. Ct. at 1549 (emphasis added). That is why the "alleged intangible harm" either must have "a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts" or must be based on a legislative determination that the statute will protect individuals from a "material risk of harm." *Id.* at 1549-50. Spokeo's grievance thus is not that the Court's prior opinion failed to explain "how courts should analyze an intangible injury claimed to result from a statutory violation." Pet. 11. Rather, Spokeo is dissatisfied with the Ninth Circuit's application of that inquiry to the peculiar facts of this case.

Again, Spokeo is free to disagree with the rejection of its "real-world harm" standard. But it may not ignore that it lost that argument. *Compare, e.g.*, Pet. 12 (complaining that Robins has "identified no real-world harm"), *with, e.g.*, Brief for Petitioner, *Spokeo, Inc. v. Robins*, No. 13-1339, at 2 (U.S. July 2, 2015) (complaining that Robins was allowed "to maintain a lawsuit in federal court ... without any real-world injury"). It is now settled that intangible harms can satisfy Article III's concreteness requirement, and this Court set out a framework for determining when that is the case. Spokeo's petition to have the question revisited should be rejected.

B. This case does not implicate a circuit split.

In alleging a split, Spokeo focuses on how the lower courts have decided whether "Congress has identified and elevated a claimed intangible harm to the level of a concrete injury in fact." Pet. 14. As noted above, however, a court need not reach that issue if the harm the statute protects against has "a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts." *Spokeo*, 136 S. Ct. at 1549-50 (citing *Vt. Agency*, 529 U. S. at 775-77). That is what the Ninth Circuit, in the alternative, held on remand. App. 12a ("Congress has chosen to protect against a harm that is at least closely similar in kind to others that have traditionally served as the basis for lawsuit.") (emphasis omitted). This holding is thus an independent basis for affirming the judgment below.

Spokeo wisely does not assert a circuit split over this aspect of the decision below. No other decision—let alone a published appellate decision—has confronted

whether the dissemination of "untruthful disclosures about individuals" in violation of the FCRA follows from the common law. *See* App. 12a. That is presumably why the question presented does not cover this issue. Even Spokeo concedes that the "injury in fact requirement" can be "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," Pet. *i*., if the harm follows from the common law, Pet. 28-30. Spokeo believes the Ninth Circuit wrongly concluded that Robins's claim has a common-law analogue. *See infra* 23-27. But the existence of this alternative holding creates an obstacle to reaching the issue Spokeo asks the Court to hear. Review should be denied for this reason alone.

In any event, there is no circuit split. Spokeo mainly claims that the lower courts have divided over whether a plaintiff must show the kind of "real-world" harm it claims that Article III demands. Pet. 14-21. That is wrong. The lower courts have all accepted that "an alleged procedural violation can by itself manifest concrete injury where Congress conferred the procedural right to protect a plaintiff's concrete interests and where the procedural violation presents a 'risk of real harm' to that concrete interest." *Strubel v. Comenity Bank*, 842 F.3d 181, 190 (2d Cir. 2016); *see also Gubala v. Time Warner Cable, Inc.*, 846 F.3d 909, 911 (7th Cir. 2017); *In re Horizon Healthcare Servs. Inc. Data Breach Litig.*, 846 F.3d 625, 640 (3d Cir. 2017); *Dreher v. Experian Info. Sols., Inc.*, 856 F.3d 337, 344 (4th Cir. 2017); *Lyshe v. Levy*, 854 F.3d 855, 859 (6th Cir. 2017); *Friends of Animals v. Jewell*, 828 F.3d 989, 992 (D.C. Cir. 2016); *Hancock v. Urban Outfitters, Inc.*, 830 F.3d 511, 514-15 (D.C. Cir. 2016); *Braitberg v. Charter*

Commc'ns, Inc., 836 F.3d 925, 930 (8th Cir. 2016); *Lee v. Verizon Commc'ns, Inc.*, 837 F.3d 523, 529 (5th Cir. 2016); *Nicklaw v. Citimortgage, Inc.*, 839 F.3d 998, 1002 (11th Cir. 2016). Unlike Spokeo, no court has ignored this Court's clear instruction that an intangible harm can meet the concreteness requirement of Article III if the required showing is made.[2]

To be sure, different courts have reached different conclusions about whether different claims can make the required showing under different statutes. Pet. 15-20. But that is not a circuit split. Because the *Spokeo* framework is by definition statute-specific, some plaintiffs alleging an intangible harm will succeed in meeting the concreteness requirement while others will not. That makes sense. Each statute has a different purpose, each procedural violation interacts differently with that purpose, and each plaintiff alleges an intangible injury arising from different events. This does not mean there is agreement as to whether these cases all correctly applied this Court's decision. Far from it. But it does mean that these are context-specific cases confronting unique situations.

Accordingly, there is no split here unless Spokeo can identify some division over the same violation of the same

2. To the extent the Third Circuit went a step further and questioned whether the plaintiff must show a "'material risk of harm' before he can bring suit," *Horizon*, 846 F.3d at 637, it has no bearing on this case. Like the decisions upon which Spokeo relies, *see id.* at n.17, the Ninth Circuit required Robins to make that showing, App 13a. But the Third Circuit's statement was dicta and thus would not create a circuit split anyway. *See Horizon*, 846 F.3d at 638 ("In some future case, we may be required to consider the full reach of congressional power to elevate a procedural violation into an injury in fact, but this case does not strain that reach.").

statute. Spokeo devotes significant attention to decisions about other statutes, Pet. 21-23, yet only points to a single FCRA case on its side of the purported circuit split, *see Dreher v. Experian Info. Sols., Inc.*, 856 F.3d 337 (4th Cir. 2017). *Dreher* and the decision below do not conflict, however.

Foremost, the cases involve different provisions of the FCRA. Dreher claimed that Experian had violated its duty to disclose the "sources of ... information," 15 U.S.C. § 1681g(a)(2), because the report "list[ed] a defunct credit card company, rather than the name of its servicer," *Dreher*, 856 F.3d at 340. Dreher thus did not allege that his report included untruthful statements about him. He instead claimed to have suffered "a cognizable 'informational injury' because he was denied 'specific information to which he was entitled under the FCRA.'" *Id.* at 345 (citations and alterations omitted). In contrast, Robins alleged that because "Spokeo failed to 'follow reasonable procedures to assure maximum possible accuracy' of the information in his consumer report," 15 U.S.C. § 1681e(b), it "published a report which falsely stated his age, marital status, wealth, education level, and profession, and which included a photo of a different person." App. 3a.

The difference in the nature of the claims is what led to the different outcomes. Both courts recognized that "the FCRA aims 'to ensure fair and accurate credit reporting'" and to "'protect consumer privacy.'" App. 9a. (quoting *Safeco*, 551 U.S. at 52); *see Dreher*, 856 F.3d at 346. Moreover, the courts both understood that not every "violation of the statute sufficed to create an Article III injury in fact." *Dreher*, 856 F.3d at 342; *see* App. 14a-15a. Rather, as both courts explained, what matters is whether

the plaintiff alleges "the type of harm Congress sought to prevent when it enacted the FCRA." *Dreher*, 856 F.3d at 346. Indeed, as Spokeo concedes, the Ninth Circuit cited *Dreher* for this precise point. App. 8a.

Dreher failed that test because the informational injury that he alleged was not "the type of harm *Congress sought to prevent* by requiring disclosure." *Dreher*, 856 F.3d at 345-46 (quoting *Friends of Animals*, 828 F.3d at 992). Robins passed that test, on the other hand, because "[e]nsuring the accuracy of" the "sort of information" that Spokeo disseminated about him is "directly and substantially related to FCRA's goals." App. 16a.

Spokeo's suggestion that the Fourth Circuit required Dreher to show "real-world" harm thus misses the mark. Like its sister circuits, the Fourth Circuit recognized that "in order to decide whether an intangible harm constitutes an injury in fact, 'history and the judgment of Congress play important roles.'" *Dreher*, 856 F.3d at 344 (quoting *Spokeo*, 136 S. Ct. at 1549). Dreher's problem was not the absence of real-world harm. The problem was he "failed to show how the knowledge that he was corresponding with a CardWorks employee, rather than an Advanta employee, would have made any difference at all in the 'fairness or accuracy' of his credit report, or that it would have made the credit resolution process more efficient." *Id.* (quoting *Safeco*, 551 U.S. at 52) (alterations omitted). That is, "the harm Dreher alleges he suffered is not the type of harm Congress sought to prevent when it enacted the FCRA." *Id.*[3]

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3. The Fourth Circuit also explained that Dreher "does not propose a common law analogue for his alleged FCRA injury," and

C. The remand decision is correct.

Last, the Court should reject Spokeo's plea for case-specific error correction. As explained, the Ninth Circuit held that Robins's claim followed from the common law and, even if not, Congress identified a concrete intangible harm. In so ruling, the Ninth Circuit correctly applied the Court's prior opinion to hold that Robins adequately alleged injury in fact at the pleadings stage.

1. The protection against dissemination of false credit reports follows closely from the common law.

The Ninth Circuit held that "the harms that FCRA protects against" follow in the tradition of "those at issue in common-law causes of action like defamation or libel per se." App. 12a. Notably, Spokeo does not dispute that there is a relationship between these common-law actions and the FCRA's action for dissemination of false credit reports. Pet. 29. Rather, Spokeo disputes whether the relationship is "close" enough to provide a basis for injury in fact. Pet. 30. Setting aside just how case-specific and narrow this disagreement is, Spokeo's objection is misplaced in any event.

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found "no traditional right of action that is comparable." *Dreher*, 856 F.3d at 345. Again, though, the courts were looking at different analogues because the claims were different. The Fourth Circuit was comparing Dreher's "informational injury" claim to the right of access discussed in cases like *Akins* and *Public Citizen*. *See Dreher*, 856 F.3d at 345. In contrast, the analogues for the claim concerning the dissemination of false information about Robins are "the common-law causes of action like defamation or libel per se." App. 12a.

Spokeo argues that Congress's judgment that willful dissemination of false credit reports should be actionable without a showing of consequential harm has a "remote" relationship to the common law because "the common law required proof of *actual harm* for the vast majority of allegedly false statements." Pet. 29-30. But Spokeo ignores that, at common law, "*all libel, of whatever kind*, was held to be actionable without proof of any damage," William T. Prosser, *Libel Per Quod*, 46 Va. L. Rev. 839, 842 (1960) (emphasis added); *see, e.g.*, *R v. Langley* (1702) 90 Eng. Rep. 1261 (KB). By 1812, the distinction permitting recovery for *any* libel had "been recognized by the Courts for at least a century back." *Thorley v. Lord Kerry* (1812) 128 Eng. Rep. 367, 371 (KB). At common law, harm was likewise presumed for slander that "touch[ed]" the plaintiff "in his profession." *Jenkins v. Smith* (1620) 79 Eng. Rep. 501 (KB).

These common-law rules—permitting courts to hear claims for all libel, as well as for any defamation touching upon trade or business, without proof of consequential harm—were adopted in America as well. Blackstone noted, for example, that for certain categories of slander, including "scandalous words that ... may impair [a man's] trade ... an action may be had, without proving any particular damage to have happened, but merely upon the probability that it might happen." 3 William Blackstone, Commentaries *124; *see also* 2 Kent, Commentaries on American Law 16 (1827). Early American cases thus applied the English common-law rule that general damages were permissible for any statement that touched upon the trade or credit of those engaged in business. *See Hermann v. Bradstreet Co.*, 19 Mo. App. 227, 232 (1885); *Lansing v. Carpenter*, 9 Wis. 540, 542 (1859); *Newbold v.*

J.M. Bradstreet & Son, 57 Md. 38, 52-53 (1881); *Dun v. Maier*, 82 F. 169, 173 (5th Cir. 1897).

A showing of consequential harm was unnecessary because these false statements "necessarily or naturally and presumptively cause[] pecuniary loss to the person of whom it is published." *Mitchell v. Bradstreet Co.*, 22 S.W. 358, 362 (Mo. 1893) (quoting *Newell v. How*, 17 N.W. 383 (Minn. 1883)). Early American courts also evidenced widespread acceptance of the established principle that general damages, without proof of consequential harm, were available in all libel cases. *See Pollard v. Lyon*, 91 U.S. 225, 228 (1875) ("[M]any things are actionable when written or printed and published which would not be actionable if merely spoken, without averring and proving special damage."); *see, e.g.*, *Runkle v. Meyer*, 3 Yeates 518 (Pa. 1803); *McClurg v. Ross*, 5 Binn. 218 (Pa. 1812); *Norfolk & Wash. Steamboat Co. v. Davis*, 12 App. D.C. 306, 331-32 (D.C. Cir. 1898).

In sum, Anglo-American common law has long permitted claims by those who, like Robins, were the subject of false and defamatory reports, particularly reports that had the potential to harm their standing, credit, trade, or business. Such claims were actionable "without evidence of actual loss," *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974), because the "experience and judgment of history" is "'that proof of actual damage will be impossible in a great many [defamation] cases'" even though "'it is all but certain that serious harm has resulted in fact.'" *Dun & Bradstreet v. Greenmoss Builders*, 472 U.S. 749, 760 (1985) (plurality opinion) (quoting W. Prosser, Law of Torts § 112 (4th ed. 1971)). Hence, "the existence of injury is presumed from the fact of publication." *Gertz*, 418 U.S. at 349.

The FCRA follows directly in this tradition. In fact, this Court recognized that "the law has long permitted recovery by certain tort victims," including victims of "libel" and "slander *per se*," "even if their harms may be difficult to prove or measure." *Spokeo*, 136 S. Ct. at 1549 (citing Restatement (First) of Torts §§ 569, 570 (1938)). That is what the FCRA does. It allows the subject of a credit report, like Robins, to recover when a consumer reporting agency disseminates false information about him. Like the common law, the FCRA makes such false dissemination actionable because it is likely to "deter third persons from associating or dealing with him," Restatement (Second) of Torts § 559 (1977), even if "there is no proof that serious harm has resulted from the defendant's attack upon the plaintiff's character and reputation," *id.* § 620 cmt. a.

By making this intangible harm actionable, the FCRA therefore is "consonant with what was, generally speaking, the business of the Colonial courts and the courts of Westminster when the Constitution was framed." *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 150 (1951) (Frankfurter, J., concurring). That is all this Court's decisions require. The Article III question is not whether Robins could have successfully sued Spokeo for defamation in the late eighteenth century, but whether the statute authorizes an action "of the sort traditionally amenable to, and resolved by, the judicial process." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102 (1998). Congress is not so constrained that it may protect rights derived from the common law only when it accepts them in their fossilized form. Whether the FCRA perfectly "duplicate[s] the recovery at common law," it provides "a reasonably just substitute for the common law or state

tort law remedies it" partially "replaces." *See Duke Power Co. v. Carolina Envtl. Study Grp., Inc.*, 438 U.S. 59, 87-88 (1978).

Spokeo's only response is that Congress can "expand the category of false statements that could be actionable without proof of accompanying harm," Pet. 30, so long as it does so in the way Spokeo finds acceptable. But the judgment as to whether a private interest warrants legal protection generally involves subjective, value-laden choices. In the main, such judgments are the province of democratic lawmaking, and when Congress chooses to protect an interest, courts respect that choice.

That is not to say that Congress' power to define intangible injuries is limitless. Article III "requires a concrete injury even in the context of a statutory violation." *Spokeo*, 136 S. Ct. at 1549. It cannot be, however, that Congress has the authority to make a false statement that an individual was "involuntary terminated" actionable but may not protect against other falsehoods that it has determined can "cause a prospective employer to question the applicant's truthfulness or to determine that he is overqualified for the position sought." App. 16a. Spokeo's transparent attempt to concede that Congress has latitude to update the common law to the modern era but fashion a rule just narrow enough to avoid liability here should be rejected.

2. Robins has not alleged a bare procedural violation that is divorced from the FCRA's goal of curbing the dissemination of false credit reports.

In affirming that Robins has alleged injury in fact, the Ninth Circuit also held that he had not asserted a bare procedural violation. Rather, he "alleged FCRA violations that actually harm, or at least that actually create a 'material risk of harm' to" the "concrete interest" that the FCRA protects. App. 13a (quoting *Spokeo*, 136 S. Ct. at 1550). The complaint's allegations, the court concluded, "relate facts that are substantially more likely to harm his concrete interests than [this] Court's example of an incorrect zip code" because "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." App. 16a. The Ninth Circuit's reasoning is correct.

Spokeo does not take issue with the Ninth Circuit's conclusion. It *never* explains why Robins's allegations are not the type of inaccuracies that create a material risk of harm to the interests the FCRA protects. Consistent with its quest for reconsideration of settled issues, Spokeo instead objects to the court's mode of inquiry. But the Ninth Circuit merely followed this Court's instructions.

In particular, Spokeo appears to argue that the Ninth Circuit needed to impose some sort of presumption against standing because Robins was not relying on real-world harm. In Spokeo's view, "Congress must expressly state its intent to displace the generally applicable rule." Pet. 25. But nothing in this Court's prior ruling imposes such

a novel requirement. The point of the decision is that legitimate intangible harms are no less concrete than their tangible counterparts. Spokeo thus ultimately concedes that all Congress must do is "identify the injury it seeks to vindicate and relate the injury to the class of persons entitled to bring suit." *Id.* (emphasis omitted) (quoting *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring)). This clear-statement argument has no more merit than the first time the Court rejected it. *See* Brief for Petitioner, *Spokeo, Inc. v. Robins*, No. 13-1339, at 53-56.

But the dispute is academic here anyway. Congress's intent in enacting the relevant provisions of the FCRA is no mystery. As this Court explained, "Congress plainly sought to curb the dissemination of false information by adopting procedures designed to decrease that risk." *Spokeo*, 136 S. Ct. at 1550. Accordingly, when Spokeo complains that Congress made no "judgment about the harm inflicted by inaccurate statements," Pet. 26, and that a "judicial inference ... cannot evidence a clear judgment by Congress about the status of inaccurate but potentially harmless statements," Pet. 27 (emphasis omitted), it is not taking issue with the Ninth Circuit's remand decision. It is challenging the inference *this* Court correctly drew about the FCRA in *this* case.

Indeed, Spokeo's contention that 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'" confirms that it really just wants reconsideration. Pet. 27. It was this Court that instructed the Ninth Circuit to focus on the "types of false information" at issue in the dispute. *Spokeo*, 136 S. Ct. at 1550 n.8. That was the

point of the "incorrect zip code" example. *See id.* at 1550. The Court remanded the case to allow the Ninth Circuit to determine on which side of that line these specific inaccuracies fell. Again, Spokeo wishes this Court had instead drawn the line "based on the real-world impact of the claimed inaccuracy on the plaintiff." Pet. 27. But it lost that argument.

Finally, Spokeo protests that the Ninth Circuit gave short shrift to its argument that "Robins's allegations of harm are too speculative" under this Court's decision in *Clapper v Amnesty International USA*. App 17a; *see* Pet. 30-32. But that is all the argument deserved. The Ninth Circuit saw Spokeo's argument for what is obviously was: one more attempt to force Robins to establish tangible harm, *i.e.*, that Robins must establish "actual harm or impending risk of harm to his job prospects." Pet. 32.[4]

As the Ninth Circuit explained, this Court "did not suggest that Congress's ability to recognize [intangible] injuries turns on whether they would also result in

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4. At times, Spokeo appears to argue that Robins is alleging a harm to consumers generally rather than to him specifically, and that he has therefore not met the particularized prong of the injury-in-fact test. *See, e.g.*, Pet. 3 (arguing for a showing "of resulting or imminent harm *to the plaintiff*"). If that is the case, the argument is meritless and is yet one more request for reconsideration. App. 4a ("The Supreme Court noted that although our analysis properly addressed whether the injury alleged by Robins was particularized as to him, we did not devote appropriate attention to whether the alleged injury is sufficiently concrete as well.") (emphasis omitted). Robins's claim is particularized because "Spokeo violated specifically *his* statutory rights, which Congress established to protect against individual rather than collective harms." App. 4a.

additional future injuries that would satisfy *Clapper*." App. 19a. A litany of this Court's decisions "recognize that such statutorily recognized harms alone may confer standing (without additional resulting harm), none of which the Court purported to doubt or to overrule[.]" *Id.* (citing *Spokeo*, 136 S. Ct. at 1553 (Thomas, J., concurring)). This Court has "the prerogative of overruling its own decisions." *Rodrigues de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477, 484 (1989).

The Court referenced *Clapper* for the straightforward point that Congress need not determine that individuals have already suffered the concrete harm against which the law protects before granting them a right of action. Rather, so long as the legislature identifies and the plaintiff alleges "the risk of real harm," then "the requirement of concreteness" is satisfied. *Spokeo*, 136 S. Ct. at 1549. That is why the Court emphasized that "the law has long permitted recovery by certain tort victims even if their harms may be difficult to prove or measure." *Id.*

In line with that tradition, Congress determined that inaccurate credit reports create the risk of real harm to the subjects of those reports because of the role they play in employment, credit, insurance, housing, or any number of other important decisions that are made about consumers. App. 16a. This link is the kind of "chain[] of causation" that Congress may recognize when defining injuries by statute. *See Spokeo*, 136 S. Ct. at 1549 (quoting *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring)). Moreover, Congress recognized that, in most cases, this harm would be difficult to prove. That is why the FCRA allows for statutory damages when the violation is willful. Thus, as explained, Article III is no barrier to enforcing

Section 1681e(b) so long as the types of inaccuracies that Robins alleges "present [a] material risk of harm" to the concrete interest the FCRA protects. *Spokeo*, 136 S. Ct. at 1550. The Ninth Circuit's conclusion that these alleged inaccuracies present that risk was correct.

III. CONCLUSION

The petition for certiorari should be denied.

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