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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER[1]

Robins's brief in opposition rests entirely on his mischaracterization of the question presented. The issue here is not whether intangible harm can sometimes constitute the "concrete," "real" injury required by Article III. *Spokeo I*, 136 S. Ct. 1540, 1548 (2016). Of course it can: this Court held in *Spokeo I* that intangible harms can qualify as injury in fact.

Rather, this case squarely presents the question, not resolved in *Spokeo I*, of how courts should determine whether a claimed intangible injury satisfies the Article III standard. That issue is recurring frequently in post-*Spokeo I* litigation, and the lower courts are in conflict. The court below concluded that Article III's injury-in-fact requirement is satisfied when a claimed intrusion on a statutory *interest* could inflict intangible harm on *someone*—even if the plaintiff herself did not suffer that harm. Other courts hold that *the plaintiff* must show that *she* suffered intangible harm or *she* faced an imminent risk of harm.

Indeed, Robins recognizes this distinction, conceding that neither he nor the panel below is "relying on real-world harm" (Opp. 28) to Robins himself. Consistent with that concession, the brief in opposition does not even attempt to defend the decision below by reference to any intangible harm to Robins from the claimed statutory violation, such as harm or imminent risk of harm to his employment prospects.

Equally misguided is Robins's argument that there is no conflict among the lower courts. This case

[1] The Rule 29.6 Statement in the petition remains accurate.

would have been dismissed had it been decided by the Fourth, Fifth, or Seventh Circuits—all of which have insisted that the plaintiff show that *she herself* suffered intangible harm or risk of imminent harm from a statutory violation. In fact, both the Fourth and Seventh Circuits have expressly required plaintiffs to allege "real world harm"—which Robins concedes he has not done. The Second and Third Circuits, by contrast, have, like the court below, focused on harm to the *interests* protected by the underlying statute rather than actual harm or risk of imminent harm to the plaintiff.

Robins fares no better in defending the decision below on the merits. The attempted analogy to common-law defamation stretches well past the breaking point, and he fails to rebut our demonstration that there is no evidence that Congress made a "judgment" (136 S. Ct. at 1549) that an intrusion on a statutory interest should be actionable without the "real" impact (*id.* at 1548) on the plaintiff ordinarily required to satisfy Article III.

Finally, Robins barely engages with our showing that the question presented is frequently recurring and exceptionally important. The issue's importance will be underscored further by the filing of six *amicus* briefs urging this Court to grant review.[2]

A. The Question Presented Here Was Left Unresolved In *Spokeo I*.

The question before this Court in *Spokeo I* was whether alleging a statutory violation directed at the plaintiff is by itself sufficient to satisfy Article III's

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[2] *Amicus* briefs in support of the petition are due on January 5, 2018; Robins filed his brief in opposition 16 days before its due date.

injury-in-fact requirement. The Court held that it is not: "Article III standing requires a concrete injury even in the context of a statutory violation." 136 S. Ct. at 1549.

The Court recognized that some intangible harms can qualify as "concrete injur[ies]" and directed the Ninth Circuit to assess "both history and the judgment of Congress" in determining on remand whether the intangible injury alleged by Robins was sufficiently "concrete." *Ibid.*

Citing the petition's reference to "real-world harm," Robins claims that Spokeo is asking the Court "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." Opp. 15-18.

That is wrong. Robins falsely equates "real-world harm" with "tangible harm." But the *Spokeo I* Court held that the "concrete" injury in fact required by Article III must be "real" and "actually exist." 136 S. Ct. at 1548. Far from rejecting the "real-world harm" standard, as Robins claims (Opp. 18), the Court thus confirmed that Article III requires harm that is "real" and recognized that some forms of intangible harm satisfy that test.

Robins acknowledges the petition's recognition of intangible harms (Pet. 11), but then argues (Opp. 16) that the discussion is "belied by Spokeo's question presented." That is untrue: the harms discussed in the petition are *examples* of intangible harms that satisfy Article III's mandate. Someone who cannot speak or practice her religion freely suffers "real" harm that "actually exist[s]" beyond mere exposure

to a legal violation. Other intangible harms that meet that standard will also satisfy Article III.[3]

Robins's focus on the non-issue of intangible versus tangible harm is designed to divert attention from the real question presented here: how a court should determine whether a claimed intangible harm is "real" and therefore sufficient to invoke the authority of a federal court. That is the issue this Court directed the Ninth Circuit to resolve on remand; it is the issue that has arisen in hundreds of post-*Spokeo I* cases; and it is the issue on which the lower courts are in conflict.

B. The Conflict Among The Lower Courts Is Genuine And Substantial.

According to the Ninth Circuit, a plaintiff who has not suffered harm or an imminent risk of harm nonetheless can meet the injury-in-fact standard as long as the alleged statutory violation is one that, if directed toward others, might harm someone else. Other courts similarly ask whether the alleged violation infringes the interests protected by the statute, not whether the plaintiff herself suffered harm.

Robins defends that approach, claiming that his allegations suffice because they involve "the type of inaccuracies that create a material risk of harm to

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[3] Spokeo took that position in *Spokeo I*. Tr. of Oral Arg., 2015 WL 6694910, at *9 ("It's not just economic harm. It can be psychic harm. * * * [I]t can be discrimination").

Robins incorrectly describes *Havens Realty Corporation* v. *Coleman*, 455 U.S. 363 (1982) as a case lacking "real world harm." Opp. 16 n.1. *Havens* involves another form of actionable intangible harm—suffering discrimination on the basis of a protected characteristic. *Heckler* v. *Mathews*, 465 U.S. 728, 739-40 (1984).

the *interests the FCRA protects*," rather than harm or an imminent risk of harm to him. Opp. 28 (emphasis added). And he concedes that he is "not relying on real-world harm" to himself, such as "'actual harm or impending risk of harm to his job prospects.'" *Id.* at 28, 30.

Other courts apply a fundamentally different standard. The Fourth and Seventh Circuits (among others) require a plaintiff to show that she has suffered "real world harm" (or the risk of such harm) from the statutory violation. An alleged intrusion on the interests protected by the statute is insufficient without harm to the plaintiff.

Robins's efforts to diminish the conflict among the lower courts are unconvincing.

Robins first argues that all of the circuits agree that intangible harms can satisfy Article III. Opp. 19-20. But that is a fluorescent red herring: as already discussed, no one denies that *some* intangible harms can amount to an injury in fact.

Rather, the conflict involves whether an infringement of a statutory *interest* that does not result in actual or threatened harm to the *plaintiff* herself can qualify as an injury in fact. On that question, the courts of appeal have diametrically opposed views.

For example, the Fourth Circuit held that the plaintiff himself must suffer a "real harm" from a violation of the FCRA—in other words, he must be "adversely affected by the alleged error on his credit report"—in order to have standing. *Dreher* v. *Experian Info. Solutions, Inc.*, 856 F.3d 337, 346 (4th Cir. 2017). It is true that, as Robins points out, "the cases involve different provisions of the FCRA," but it does not follow that "[t]he difference in the nature of the

claims is what led to the different outcomes." Opp. 21.

Robins asserts—as did the panel below—that *Dreher* held that violations that affect the accuracy of a credit report are concrete harms regardless of whether the inaccuracies result in consequences for the plaintiff. But that is not what the Fourth Circuit's opinion says. See Pet. 14 & n.3. The Fourth Circuit was careful to insist that the plaintiff show a "real world harm" from the violation. 856 F.3d at 346; see also *Meyers* v. *Nicolet Rest. of De Pere, LLC*, 843 F.3d 724, 729 (7th Cir. 2016) (requiring a plaintiff to demonstrate a "real-world harm").

Moreover, the conflict with *Dreher* does not stand alone. Robins says virtually nothing about the other appellate decisions that refuse to uphold standing based on the claimed infringement of broad interests protected by a statute:

- The Fifth Circuit required a plaintiff in an ERISA case to show that a statutory violation adversely impacted *his* benefits. *Lee* v. *Verizon Commc'ns, Inc.*, 837 F.3d 523, 530 (5th Cir. 2016).
- The Seventh and Eighth Circuits have both rejected the argument that a statutory interest in the privacy of cable subscribers' personal information is enough to show concrete harm. *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 Ninth Circuit's conclusion that certain types of inaccuracies satisfy Article III because they *could* conceivably harm *someone* is indistinguishable from the *dissenting* opinion

> in *Nicklaw* v. *CitiMortgage, Inc.*, which argued that standing should be upheld because untimely recordings of a satisfaction of a mortgage "*can* seriously impact a person's credit, as well as his ability to sell his then-encumbered property." 855 F.3d 1265, 1272-73 (11th Cir. 2017) (Martin, J., dissenting) (emphasis added).

In sharp contrast, the Second Circuit's approach (which the decision below endorsed) finds standing when the challenged violation is of the type that "'would have [] an effect on consumers generally,' even if the plaintiff herself was not directly harmed." *Aikens* v. *Portfolio Recovery Assocs., LLC*, 2017 WL 5592341, at *3 (2d Cir. Nov. 21, 2017).

The Third Circuit similarly holds that a plaintiff need not show a "material risk of harm" from a statutory violation "before he can bring suit," and has expressly recognized that its rule conflicts with standing tests applied by the Seventh and Eighth Circuits. *In re Horizon Healthcare Servs. Data Breach Litig.*, 846 F.3d 625, 637 n.17 (3d Cir. 2017). Robins tries to brush off that statement as "dicta" (Opp. 20 n.2), but he makes no serious response to our showing that the Third Circuit's reading of *Spokeo I* does indeed conflict with those courts (Pet. 17-18), and he does not deny that the court below relied extensively on *Horizon* (Pet. App. 11a-13a, 17a).

Robins attempts to distance the decision below from *Horizon* by claiming that the Ninth Circuit *did* require Robins to show a material risk of harm from the statutory violation. Opp. 20 n.2. But that is a plain misreading of the decision below, which makes it crystal clear—as Robins acknowledges elsewhere (Opp. 28)—that the Ninth Circuit did *not* require

Robins to show a material risk of harm to *him*. Instead, it required only an allegation that the claimed violation is of the type that harms "the statute's underlying concrete interests." Pet. App. 13a-14a. That sleight-of-hand—removing from the standing inquiry the question of "real" impact to the *plaintiff* that "actually exist[s]" (136 S. Ct. at 1548)—is at the heart of the conflict that has arisen in the wake of *Spokeo I*.

Robins also contends that there is no conflict because these other courts did not address the precise provision of the FCRA at issue here. Opp. 20. But the same was true in *Spokeo I*, where the conflict identified in the petition involved cases interpreting different statutes. *Spokeo I* Pet., 2014 WL 1802228, at *9-12 (May 1, 2014). That posed no barrier to review because the lower courts' tests for Article III standing conflicted: some courts held that alleging a statutory violation was sufficient, while others required that the plaintiff allege that she suffered harm as a result of the violation.

In the wake of *Spokeo I*, lower courts are again applying different tests for determining standing. That confusion and conflict over how to determine when a statutory violation causes the concrete intangible harm required by Article III is just as acute and important as the conflict addressed in *Spokeo I*.

If anything, the fact that this conflict spans "different claims" under "different statutes" (Opp. 20) *favors* review. Businesses are subject to a vast array of statutory duties under federal and state statutes. And plaintiffs continue to bring cases—often putative class actions—alleging violations of these duties without claiming any harm beyond the statutory violation itself. Pet. 22-24.

Finally, Robins's argument that there is no conflict on the question whether the violation alleged here has a sufficiently close relationship to common-law defamation (Opp. 18-19) merely reprises the theme that a statute-specific conflict is required. Moreover, the Ninth Circuit's analogy was transparently incorrect. Pet. 28-30; pages 9-11, *infra*. And that aspect of the Ninth Circuit's decision was not an "alternative holding." Opp. 19. It is instead part and parcel of the panel's conclusion that standing exists not because of any harm or risk of harm to *Robins*, but rather based solely on the generalized interests in accurate credit reporting that the statute was purportedly enacted to protect. Pet. App. 12a.

If this case had arisen in the Fourth, Fifth, or Seventh Circuits, those courts would reject Robins's claim of standing based on his concession that he is not relying on any real-world consequence to him from the alleged inaccuracies on Spokeo's website. Those courts of appeals recognize the difference between harm to a statutory interest and harm to the plaintiff seeking to invoke the power of a federal court; others, like the Ninth, Second, and Third Circuits, do not. This deep conflict over a fundamental—and frequently recurring—jurisdictional question cries out for this Court's review.

C. The Ninth Circuit's Holding Is Wrong.

Nothing in *Spokeo I* justifies the Ninth Circuit's holding that the possibility of harm to another person permits suit by a plaintiff who suffered neither harm nor an imminent risk of harm. To the contrary, the lower court's holding that the alleged inaccuracies satisfy Article III because they "*may* be important to employers or others" (Pet. App. 16a) cannot be squared with the admonition in *Clapper*—

cited by this Court in *Spokeo I*—that "speculative" harms or "allegations of *possible* future injury are not sufficient." 568 U.S. 398, 409 (2013); Pet. 30-32.

Robins's attempt to invoke the factors cited in *Spokeo I*—history and a judgment by Congress—similarly falls flat.

1. The alleged inaccuracies about Robins lack 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.

At the time of the Founding, false statements were not actionable as libel or slander unless they inflicted reputational or economic harm. Pet. 29-30; see, *e.g.*, *Runkle* v. *Meyer*, 3 Yeates 518, 519 (Pa. 1803) (statements must "render a man ridiculous, or throw contumely on him" to be actionable). And harm was presumed (authorizing claims for libel or slander *per se*) only for the narrow category of false statements that, on their face, were "virtually certain to cause serious injury to reputation." *Carey* v. *Piphus*, 435 U.S. 247, 262 (1978); Pet. 30.

Robins applies the label "defamatory" to the alleged inaccuracies about him (Opp. 25), but neither he nor the panel below explains how that common-law standard is satisfied—arguing instead that he need not show harm to his "standing, credit, trade, or business." *Ibid*; see Pet. App. 12a. The absence of "virtually certain" reputational harm (*Carey*, 435 U.S. at 262) from the alleged inaccuracies here also distinguishes the present case from Robins's example (Opp. 27) of a false statement that an individual was involuntarily terminated—a situation where reputational harm would virtually always be present.

Similarly, Robins's reliance on the willingness of courts to presume injury for a broader set of published defamatory statements (Opp. 24-25) is beside the point. That doctrine reflects the judgment that published defamatory statements are more likely to cause harm because of their broader distribution. See, *e.g.*, *McClurg* v. *Ross*, 5 Binn. 218, 219 (Pa. 1812). It does not eliminate the requirement that the statement be harmful in order to be actionable.

In short, harm to reputation is the very essence of a defamation claim. Yet that harm is precisely what the Ninth Circuit held Robins was not required to allege here. Pet. App. 12a.

2. As the petition details (at 24-28), the FCRA 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.

Robins does not meaningfully contest that showing, instead returning to his erroneous contention that "real" harm is not required. Opp. 30.

That failure is not surprising: this Court already has recognized that Congress's broad interest in ensuring accurate credit reporting cannot transform any alleged inaccuracy into a source of "concrete" injury in fact, because "not all inaccuracies cause harm or present any material risk of harm." 136 S. Ct. at 1549. And because nothing in the statutory text draws a distinction between different types of inaccuracies, there is no congressional judgment that some inaccuracies should be actionable even when the plaintiff cannot establish concrete harm under generally-applicable Article III standards.

Finally, Robins discusses the enactment of the FCRA's statutory damages provision, but the creation of a presumed measure of damages does not show that Congress intended to relax the requirements of Article III: Congress simply spared plaintiffs actually harmed by willful noncompliance from quantifying that harm.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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