No. 13-1339

IN THE

Supreme Court of the United States

SPOKEO, INC.,

Petitioner,

v.

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

Respondent.

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

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

Table of Contents

Page

Table of Contents

TABLE OF CITED AUTHORITIES

Page

CASES

Cited Authorities

Page

Cited Authorities

Page

Page

Page

Page

Page

STATUTES, LEGISLATIVE MATERIALS & SECONDARY SOURCES

Cited Authorities

Page

Page

BRIEF FOR RESPONDENT

Respondent Thomas Robins ("Robins"), on behalf of himself and others similarly situated, respectfully requests that this Court affirm the judgment of the United States Court of Appeals for the Ninth Circuit.

STATEMENT

Article III of the Constitution extends the judicial power of federal courts to "Cases" and "Controversies." U.S. Const. art. III, § 2. One private party alleging that another private party has invaded a personal legal right conferred on him by federal law is just such a case or controversy. After all, "[p]rivate-rights disputes"—those involving "the liability of one individual to another under the law as defined"—"lie at the core of the historically recognized judicial power." *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 70 (1982). That a case or controversy exists is even more apparent when, like here, it is a private dispute over a sum of money and the federal cause of action is one that would have been well known to the Framers.

Petitioner Spokeo, Inc. ("Spokeo") argues that Robins lacks Article III standing to bring his Fair Credit Reporting Act ("FCRA") claim in federal court because—according to Spokeo—its invasion of Robins's rights did not cause him "real-world" harm. Brief for Petitioner ("Pet. Br.") 9. Spokeo's novel "real-world" injury test, however, not only lacks any foundation in the Court's decisions or founding-era history, it does nothing to safeguard the separation-of-powers principles animating Article III's standing requirement. To the contrary, Spokeo's proposal

would create separation-of-powers problems by asking federal courts to encroach upon Congress's power to define and create remedies for private interests that it found important enough to warrant statutory protection.

I. The Fair Credit Reporting Act

Congress enacted the FCRA, Pub. L. No. 91-508, 84 Stat. 1128 (1970), to, among other things, "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. 2414 (1969); S. Rep. No. 91-517, at 2-3 (1969). Credit bureaus "frequently confuse[d] one individual with another" and reproduced "[b]iased information" and "malicious gossip and hearsay." 115 Cong. Rec. 2414. 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 on the Laws of England *124 (1768).

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.* In addition, only the State of Oklahoma sought to regulate credit reporting agencies in any fashion. *See* 115 Cong. Rec. 2414. As a result, by the mid-twentieth century an individual who was "the subject of a credit report [was] all but unprotected in most jurisdictions." *Id.*

With the growth of consumer credit after World War II, "a vast credit reporting industry … developed to supply credit information." S. Rep. No. 91-517, at 2. 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, 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). In particular, the FCRA limited the purposes for which information could be supplied to third parties, FCRA § 604, banned disclosure of outdated information, *id.* § 605, 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," *id.* § 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; *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; S. Rep. No. 91-517, at 3 (noting that credit reporting agencies facing the possibility of new regulations in 29 states "expressed a preference for Federal regulation rather than State legislation").

II. The Consumer Credit Reporting Reform Act

Although 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." *Id.* at 429-30; *see also* Robert R. Stauffer, Note, *Tenant Blacklisting: Tenant Screening Services and the Right to Privacy*, 24 Harv. J. on Legis. 239, 311 (1987) ("[I]t is often difficult to prove monetary damages for invasions of privacy. Privacy, after all, is not an economic right but a basic necessity of one's individuality."). There was "little incentive on the part of the consumer to bring an action under the statute, and as a result, reporting agencies [felt] no real compulsion to comply with the protective mechanisms of the Act." Frenzel, *supra*, at 430. There were numerous calls to amend the FCRA to "provid[e] for minimum liability or presumed damages when a violation is proven." Stauffer, *supra*, at 311; *see* Consumer Information: Hearings Before

the Subcomm. on Consumer Affairs of the Comm. on Banking, Currency, and Hous., 94th Cong., 1st Sess. 6, 62, 79, 105-06 (1975).

In 1996, Congress responded to "horror stories about inaccurate credit information and the inability of consumers to get the information corrected," 141 Cong. Rec. 10,916 (1995), by amending the FCRA 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 it was warranted to protect "consumers who have been wronged." S. Rep. No. 104-185, at 48-49 (1995).

Congress also recognized that "the consumer reporting system handles almost two billion pieces of data per month and will never be perfectly accurate." *Id.* at 43. Consequently, it did not impose strict liability for the creation or dissemination of false credit reports. *Id.* Congress instead believed that adopting certain prophylactic and corrective measures designed to limit inaccuracies to the maximum extent possible would appropriately "balance the rights of consumers with those of consumer reporting agencies[.]" *Id.* at 49.

III. Spokeo's Business Practices

Spokeo owns and operates a website that in response to a free Internet query provides in-depth reports containing extensive personal information about individuals. The reports can include the person's address, an image of their

residence, their phone number, marital status, names of their siblings and parents, as well as age, occupation, education, ethnicity, property value, and hobbies. Joint Appendix ("JA") 7, 10-11. Spokeo's reports also include other personal information about their subjects, such as whether the individual "[h]as children," "[d]onates to environmental issues," "[h]as a swimming pool," or "[i]s not interested in politics." JA 10, 26. At no point does Spokeo ask permission from the individuals to publish their personal information. JA 49.

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. JA 9, 13, 38 n.12. Spokeo's webpage, for example, has featured a banner reading "HR Recruiters—Click Here Now!" *Id.* 36. Spokeo provides in-depth financial information about—and economic analysis of—the individuals on whom it reports. JA 7, 10, 40-41. 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. JA 11 n.1. Indeed, Spokeo itself is aware of

inaccuracies in the information it reports. 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 often 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 "[p]lease 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.

IV. Procedural History

Robins sued Spokeo in federal court under the FCRA. JA 6. Robins alleged that Spokeo created and made available for purchase an inaccurate report of his personal information. JA 13-14. While some of Spokeo's basic information about him in the report was accurate, almost everything else in its profile was not. In particular, Spokeo falsely reported that Robins (1) had a graduate degree (he does not); (2) is employed in a professional or technical field, his "economic health" was "very strong," and his wealth level was 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 had failed to satisfy these obligations with respect to Robins, he was 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*[.]") (emphasis added).

The district court initially denied Spokeo's motion to dismiss the amended complaint for lack of Article III standing. Petition Appendix ("App.") 17a-21a. The district court found that Robins had "alleged an injury in fact—the 'marketing of inaccurate consumer reporting information about Plaintiff'—that is fairly traceable to Defendant's conduct—alleged FCRA violations—and that is likely to be redressed by a favorable decision from this Court." App. 18a. After Spokeo sought interlocutory review, however, the district court reconsidered its previous ruling and granted Spokeo's motion to dismiss. App. 23a-24a. Robins timely appealed. JA 3.

The Ninth Circuit reversed, holding that Spokeo's alleged violations of Robins's FCRA rights met Article III's standing requirements for three reasons. App. 8a-9a.

First, although Congress's power to confer standing is not limitless, the "interests protected by the statutory rights at issue are sufficiently concrete and particularized that Congress can elevate them." App. 8a. Second, Robins had alleged that Spokeo "violated *his* statutory rights, not just the statutory rights of other people." *Id.* Third, Robins's personal interest in the proper handling of his credit information was "individualized rather than collective." *Id.*

SUMMARY OF ARGUMENT

Robins alleges that Spokeo willfully violated the personal rights that he holds under the FCRA. To redress that violation, he brought a private right of action that Congress created and seeks the statutory-damages remedy Congress provided. Article III demands no more. Centuries of common-law precedent, this Court's standing decisions, and separation-of-powers principles all disprove Spokeo's claim that a "bare" statutory violation without additional "real-world" harm is not a cognizable injury. No decision of this Court holds that Article III bars Congress from creating personal legal rights and fashioning monetary relief to redress them in federal court. Spokeo's plea to overturn this settled body of law should be rejected.

First, Robins has Article III standing because "the actual or threatened injury required by [Article] III may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing." *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373 (1982) (citation and quotations omitted). Since the fourteenth century, the law has allowed litigants to bring actions asserting the invasion of legal rights of all sorts without having to demonstrate consequential harm. Chief Justice Marshall

understood it to be the "general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803). To that end, courts have long provided nominal damages to ensure that legal rights can be redressed. Congress likewise has, from the Nation's earliest days, provided statutory damages to ensure legal rights can be remedied in federal court. The FCRA follows this well-worn path.

To be sure, Article III imposes limits. Congress may not enact a statute, for example, giving every citizen the right "to require that the Government be administered according to law," and to expect it to be enforceable in federal court. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 574 (1992). Article III requires that the invasion of a plaintiff's statutory right be "personal, particularized, concrete, and otherwise judicially cognizable." *Raines v. Byrd*, 521 U.S. 811, 820 (1997). But when it is, no more is required to establish standing.

Havens and *Public Citizen v. Department of Justice*, 491 U.S. 440 (1989), can be explained only on those terms. In both cases, the Court found Article III standing *only* because the plaintiffs' statutory rights had been invaded. In neither case did the Court require an allegation or proof of consequential harm. Those claims could be heard because Congress had created a statutory entitlement to information whose violation could be remedied through a private right of action to obtain monetary or equitable relief. That is, Congress met its Article III obligation to "identify the injury it seeks to vindicate and relate the injury to the class of persons entitled to bring suit." *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring in part and concurring in the judgment).

The FCRA meets this standard. The statute clearly identifies the interest Congress sought to vindicate: the harm individuals suffer from the dissemination of false credit reports created with inadequate procedures. The FCRA also clearly identifies the class of persons entitled to bring suit: the individual subjects of those inaccurate reports. Congress therefore granted that class of persons the right to enforce the "reasonable procedures" the FCRA requires credit reporting agencies to follow in order to protect this concrete statutory interest. And, when the violation is willful, the FCRA affords the subject of the inaccurate report statutory damages.

That is the claim Robins pleaded. The amended complaint alleged that the credit report Spokeo generated about him was inaccurate. It alleged that Spokeo willfully failed to comply with the FCRA. It alleged a connection between Robins's inaccurate report and Spokeo's violation of the FCRA. And it sought statutory damages as a remedy. Article III is no obstacle to hearing this dispute in federal court.

Second, Robins has standing to bring this claim even if a "real-world" injury were required. He has suffered a classic harm: Wallet Injury. Robins and Spokeo have a legal dispute over a fixed sum of money that turns on whether Spokeo violated Robins's legal interest under the FCRA. This right to statutory damages is not a "bounty" Robins "will receive if the suit is successful." *Vermont Agency of Natural Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 772 (2000). His right to statutory damages arose as soon as Spokeo violated his rights, and the monetary claim is his alone. Just as this Court would never, for purposes of Article III standing, look behind a liquidated-damages

clause to see if a breach of contract caused consequential harm, there is no basis to look behind FCRA's statutory-damages provision for some additional harm. Robins's monetary interest, which Congress determined would compensate him for the violation of his FCRA rights, satisfies even Spokeo's novel "real-world" injury test.

Third, the Court can find standing even without reaching the broader issues mentioned above because Robins's claims follow from the common law of defamation. At common law, written defamation and statements about one's trade or business were actionable absent special harm. The false statements the FCRA protects against (including those Spokeo made about Robins) are of the sort the common law would recognize. But even if the FCRA diverges from the common law to account for modern developments in the credit reporting industry, there is no reason to doubt Robins's standing. Article III does not force Congress to accept defamation law in its fossilized form. Indeed, the FCRA preempts state-law defamation claims and limits liability in many ways. The FCRA at its core protects a traditional private interest, but in a measured way that balances the interests of consumers and industry. These are the types of policy choices that legislatures are supposed to make.

Fourth, Spokeo's broad-brushed separation-of-powers argument is meritless. Congress's imposition of certain obligations on credit reporting agencies in order to protect the rights of consumers does not raise any of the separation-of-powers concerns that inform Article III. To the contrary, the only threat to separation of powers here is if the Court asserts broad authority to revisit Congress's determination that certain concrete interests

are worthy of legal protection, or if the Court assumes for itself the authority to hold that a statutory-damages remedy is categorically off-limits for certain violations of federal law. Either would be an unprecedented expansion of judicial power at Congress's expense.

Fifth, Spokeo's last-ditch statutory argument should be rejected. Not only is the constitutional avoidance doctrine inapplicable, Spokeo cannot even bring itself to explain how its interpretation of the statute can plausibly follow from the FCRA's text. That is because the FCRA authorizes a plaintiff to choose between actual *or* statutory damages. Actual damages are not a gateway to statutory damages. There is no other way to read the statute.

Sixth, and last, Spokeo dresses up policy concerns regarding class actions as a reason to distort Article III or rewrite the FCRA. It is inappropriate to ask the Court to weigh in on a longstanding policy dispute under the guise of constitutional or statutory interpretation. This Court decides cases according to neutral principles—not based on whether class actions are good or bad. If Spokeo believes legislative changes regarding class-action procedures are needed, it should address those complaints to Congress.

ARGUMENT

I. Spokeo's Invasion Of Robins's Statutory Rights Under The Fair Credit Reporting Act Gives Him Article III Standing.

Where, as here, one private party accuses another of invading a personal legal right conferred on him by federal statute, a case or controversy exists. Robins alleges that by creating a false credit report about him using inadequate procedures, Spokeo invaded his legal rights under the FCRA. This gives him Article III standing to sue over that personal violation without needing to show consequential harm.

A. A Concrete And Particularized Invasion Of A Statutory Right Is An Article III Injury.

The Framers understood "Cases" and "Controversies" to include suits asserting invasion of a private legal right, irrespective of consequential harm. Early American courts shared this understanding. And this Court's modern standing jurisprudence has repeatedly confirmed that the invasion of an individual's legal right—including a private right created by statute—is alone injury sufficient to support Article III standing.

1. A centuries-long tradition supports courts hearing cases that allege violations of legal rights without any showing of consequential harm.

"[H]istory and tradition offer a meaningful guide to the types of cases that Article III empowers federal

courts to consider." *Sprint Commc'ns Co., L.P. v. APCC Servs., Inc.*, 554 U.S. 269, 274 (2008). This is because "the framers of the Judiciary Article" understood that "[j]udicial power could come into play only in matters that were the traditional concern of the courts at Westminster and only if they arose in ways that to the expert feel of lawyers constituted 'Cases' or 'Controversies.'" *Coleman v. Miller*, 307 U.S. 433, 460 (1939) (opinion of Frankfurter, J.). Consequently, the judicial power applies to "cases and controversies 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).

Here, history and tradition demonstrate that federal courts have long embraced the power to hear cases asserting—in Spokeo's words—a "bare violation" of an individual's legal rights. Contrary to Spokeo's contention, Pet. Br. 20-26, the rule that the invasion of a legally protected interest is actionable without consequential harm has a long history in Anglo-American law. Spokeo's ahistorical attack on the federal protection of individual legal rights should be rejected.

a. The tradition of hearing actions without consequential harm was well-established by the time of the Framing.

As early as the fourteenth century, courts recognized that the invasion of a private legal right was actionable without any further showing of harm. Indeed, in the "great-grandparent of all assault cases," Victor E. Schwartz *et al.*, Prosser, Wade, and Schwartz's Torts 34 (10th ed. 2000), the court allowed a suit (and awarded

damages) where the defendant swung a hatchet at a woman, but missed and "did no other harm." *I. De S. & Wife v. W. de S., Y.B. Liber Assisarum*, 22 Edw. 3, f. 99, pl. 60 (1348 or 1349) (reprinted in Prosser & Wade, Cases and Materials on Torts 36 (5th ed. 1971)). As Blackstone said, assault was "inchoate violence," and "no actual suffering is proved, yet the party injured may have redress[.]" Blackstone, *supra*, at *120. As to battery, too, Blackstone noted that every unlawful touching is actionable, whether "accompanied with pain … [or] attended with none." *Id.*

Early English common-law decisions also recognized that actions could be maintained without any showing of "real-world" damage or "actual" harm by landholders who were the victims of harmless trespass, *see, e.g.*, *Robert Marys's Case*, (1613) 77 Eng. Rep. 895 (K.B.); by persons who were the subject of numerous classes of slander, *see, e.g.*, *Crittal v. Horner*, (1618) 80 Eng. Rep. 366 (K.B.); and by persons who were denied entry to exercise a right to inspect for waste, even though no waste was shown, *see, e.g.*, *Hunt v. Dowman*, (1617) 79 Eng. Rep. 407 (K.B.).[1]

1. Spokeo cites *Robert Marys's Case* and several other decisions for the principle that damage must always be proven, Pet. Br. 23, but fails to note the legal distinction made between commoners and landholders: "the lord of the soil shall have an action for trespass done in the waste or common, as an immediate trespass to him, be it greater or less, but the commoner shall not have an action but by consequence[.]" *Robert Marys's Case*, 77 Eng. Rep. at 899; Blackstone, *supra*, at *237 (noting that "for a trivial trespass the commoner has no action; but the lord of the soil only, for the entry and trespass committed"); *see, e.g.*, *Crogate v. Morris*, (1611) 123 Eng. Rep. 751 (C.P.).

The principle permitting courts to hear suits alleging the invasion of a private right without any consequential damages was cemented in *Ashby v. White*, (1703) 92 Eng. Rep. 126 (Q.B.). In that case, the plaintiff alleged that his right to vote had been invaded, though the candidate for whom he intended to vote had won. In his seminal dissent, Lord Holt set forth the principle that still controls today: "Where a new Act of Parliament is made for the benefit of the subject, if a man be hindered from the enjoyment of it, he shall have an action against such person who so obstructed him." *Id.* at 136 (Lord Holt, C.J., dissenting). He rejected the view that infringement of the right to vote caused "no hurt or damage to the plaintiff." *Id.* at 137.

Lord Holt surveyed a number of common-law decisions supporting his view that "surely every injury imports a damage, though it does not cost the party one farthing, and it is impossible to prove the contrary; for a damage is not merely pecuniary, but an injury imports a damage, when a man is thereby hindered of his right." *Id.* It did not matter in *Ashby* that the plaintiff was unable to allege consequential harm; he had a legally protected right to vote, had been "obstructed of his right, and shall therefore have his action." *Id.* Lord Holt emphasized, and the House of Lords ultimately agreed, Pet. Br. 24, that the "bare" violation of a statutory right was just as actionable as violation of legal rights extended by the common law. *Ashby*, 92 Eng. Rep. at 136.

Forced to reframe *Ashby*, Spokeo selectively quotes from the journal of the House of Lords in an attempt to recast it as a case about ordinary property law, rather than impairment of the right to vote. Pet. Br. 25. This novel view is inconsistent with hundreds of years of case law

interpreting the decision. *See, e.g.*, *Lincoln v. Hapgood*, 11 Mass. 350, 355 (1814) (holding, without mention of any property interest, that "[t]he right of voting … cannot be infringed without producing an injury to the party; and although the injury is not of a nature to be effectually repaired by a pecuniary compensation … the suffering party should be permitted" to maintain a cause of action); *Weckerly v. Geyer*, 11 Serg. & Rawle 35, 39 (Pa. 1824) (applying Lord Holt's opinion to voting rights in a church election, with no mention of property interests).

The rule that where "any injury has been done by the defendant to the plaintiff … the plaintiff is entitled to an action, without proving any specific damage," *Hobson v. Todd*, (1790) 100 Eng. Rep. 900, 901 (K.B.), continued to be a central tenet of English law in the late eighteenth and early nineteenth centuries. *See Wells v. Watling*, (1788) 96 Eng. Rep. 726 (K.B.) (allowing an action without consequential harm because "[i]t is sufficient if the right be injured, whether it be exercised or not"); *Marzetti v. Williams*, (1830) 109 Eng. Rep. 842 (K.B.) (permitting action for delay in payment of a note, from which no harm accrued); Blackstone, *supra*, at *23. The Framers' understanding of "Cases" and "Controversies" certainly would have included actions like these.

b. This tradition continued in American courts after the Framing.

The principle permitting individuals to vindicate invasions of their personal legal rights without pleading consequential damages was adopted in American courts without hesitation. Chief Justice Marshall understood it to be "'a general and indisputable rule, that where there is a

legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded.'" *Marbury*, 5 U.S. at 163 (quoting Blackstone, *supra*, at *23). And Justice Story did not mince words in rejecting, 175 years ago, precisely the argument Spokeo makes here:

> I am not able to understand, how it can correctly be said, in a legal sense, that an action will not lie, even in case of a wrong or violation of a right, unless it is followed by some perceptible damage, which can be established, as a matter of fact…. On the contrary, from my earliest reading, I have considered it laid up among the very elements of the common law, that, wherever there is a wrong, there is a remedy to redress it; and that every injury imports damage in the nature of it…. *Actual, perceptible damage is not indispensable as the foundation of an action.* The law tolerates no farther inquiry than whether there has been the violation of a right. If so, the party injured is entitled to maintain his action[.]

Webb v. Portland Mfg. Co., 29 F. Cas. 506, 507-08 (C.C.D. Me. 1838) (emphasis added). Indeed, Justice Story's decision in *Webb* surveyed more than twenty decisions in English and American courts applying the principle that "whenever there is a clear violation of a right, it is not necessary in an action of this sort to show actual damage; that every violation imports damage[.]" *Id.* at 509. Justice Story considered the case law so strong that the principle was "absolutely, in a juridical view, incontrovertible." *Id.* at 508.

Honoring this legal tradition, American courts have consistently heard common-law actions in a wide variety of contexts involving allegations of "bare violations" of legal rights without any showing of consequential harm. They hear assault cases even though "[i]t is not necessary that [the assault] should directly or indirectly cause any tangible and material harm[.]" Restatement (Second) of Torts § 21 cmt. c (1977). They hear trespass cases although the "presence on the land causes no harm to the land, its possessor, or to any thing or person in whose security the possessor has a legally protected interest," *id.* § 163, and, indeed, trespass is actionable even when "the possessor *benefits* from the trespass, as where the trespasser tears down a worthless building or prepares a field for cultivation," *id.* cmt. d (emphasis added). Courts also hear defamation cases "although no special harm results from the publication." *Id.* § 569; *infra* 42-44. They hear voter-interference cases "although the candidate for whom he would have voted would have been defeated even though he had voted." *Id.* § 865 cmt. a. And they hear contract cases "although no real loss be proved." *Clinton v. Mercer*, 7 N.C. (3 Mur.) 119, 120 (1819); *Wilcox v. Plummer's Ex'rs*, 29 U.S. (4 Pet.) 172, 182 (1830).

Such invasions of legal rights have often been redressed by nominal damages. *See, e.g.*, Restatement (Second) of Torts § 163 cmt. e (1977) (property rights); Restatement (Second) of Contracts § 346(2) (1981) (breach of contract). "Wherever there is a breach of an agreement, or the invasion of a right, the law infers some damage, and if no evidence is given of any particular amount of loss, it gives nominal damages, by way of declaring the right, upon the maxim, *ubi jus ibi remedium*." *Bond v. Hilton*, 47 N.C. (2 Jones) 149, 150-51 (1855); *see Whittemore v.*

Cutter, 29 F. Cas. 1120, 1121 (C.C.D. Mass. 1813) (Story, J.) ("Every violation of a right imports some damage, and if none other be proved, the law allows a nominal damage."). That longstanding tradition continues today. Nominal damages remain "the appropriate means of 'vindicating' rights whose deprivation has not caused actual, provable injury[.]" *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 308 n.11 (1986); *Carey v. Piphus*, 435 U.S. 247, 266 (1978).

Spokeo tries to minimize the widespread availability of nominal damages as a remedy for the invasion of legal rights, claiming they were merely an early substitute for declaratory judgments. Pet. Br. 45-46. But the availability of nominal damages was not limited only to the settlement of ongoing legal disputes, or the clearing of one's name. Rather, they implement the principle that "[t]he law tolerates no farther inquiry than whether there has been the violation of a right. If so, the party injured is entitled to maintain his action for nominal damages, in vindication of his right, if no other damages are fit and proper to remunerate him." *Webb*, 29 F. Cas. at 507. In any event, even after the enactment of the Declaratory Judgment Act, actions for "nominal damages without proof of actual injury" were made available in the constitutional-rights context. *Carey*, 435 U.S. at 266.

Moreover, Congress has long provided remedies, in the form of statutory damages, for the invasion of rights—even absent consequential harm. In 1790, for example, the First Congress required those infringing an individual's copyright to "pay the sum of fifty cents for every sheet," half to the owner and half to the government; no proof of actual loss was required. Act of May 31, 1790, ch. 15, § 2,

1 Stat. 124, 124-125; Theodore Sedgwick, *A Treatise on the Measure of Damages* 571 (1847) (describing the "large class of cases" where legislatures "endeavored to put a stop to all inquiry into the actual damages by fixing an arbitrary sum as the measure of relief").

Simply put, for centuries—both before and after the Framing—the courts and Congress have provided a variety of remedies to redress the invasion of legal rights irrespective of consequential damage. History thus shows that Robins's case against Spokeo is "of the sort traditionally amenable to, and resolved by, the judicial process." *Steel Co.*, 523 U.S. at 102. Adherence to the common-law tradition means that courts will "always hear the case of a litigant who asserts the violation of a legal right." Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 Suffolk U. L. Rev. 881, 885 (1983).

2. The invasion of a concrete and particularized statutory right is an Article III injury under this Court's decisions.

Consistent with this long tradition, it is settled that "Congress may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute." *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 n.3 (1973); *see O'Shea v. Littleton*, 414 U.S. 488, 493 n.2 (1974) (same); *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 487 n.24 (1982) (same). That rule follows from first principles and precedent, and there is no basis for overturning it in this case.

a. The statutory right invaded must be concrete and particularized to the plaintiff.

Statutory rights are as worthy of judicial protection as common-law and constitutional rights because "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. Accordingly, "the actual or threatened injury required by Art[icle] III may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing." *Havens*, 455 U.S. at 373 (internal quotations omitted). For that reason, "[standing's] existence in a given case is largely within the control of Congress." Scalia, *supra*, at 885.

That said, this principle—that Congress can define new legal rights, the invasion of which is an injury sufficient to support Article III standing—is not without limits. "Abstract injury is not enough." *O'Shea*, 414 U.S. at 494. Congress may not "abandon[] the requirement that the party seeking [redress in federal court] must himself have suffered an injury." *Lujan*, 504 U.S. at 578. "'The province of the court,'" after all, "'is, solely, to decide on the rights of individuals.'" *Id.* at 576 (quoting *Marbury*, 5 U.S. at 170). "While it does not matter how many persons have been injured by the challenged action, the party bringing suit must show that the action injures him in a concrete and personal way." *Id.* at 580 (Kennedy, J., concurring in part and concurring in judgment). "To have standing," then, "a plaintiff must have more than 'a general interest common to all members of the public.'" *Lance v. Coffman*, 549 U.S. 437, 440 (2007) (*per curiam*) (quoting *Ex Parte Levitt*, 302 U.S. 633, 634 (1937)). "[N]o

court sits to determine questions of law *in thesi*." *Marye v. Parsons*, 114 U.S. 325, 330 (1885).

This bar on suits asserting abstract, speculative, and generalized grievances—not Spokeo's "real-world" harm test—is the "hard floor" of Article III that Congress cannot remove by statute. *Summers v. Earth Island Inst.*, 555 U.S. 488, 497 (2009). This Court has never held that "injury in fact" excludes legal injuries. Indeed, *Lujan* could not be clearer: "the plaintiff must have suffered an injury in fact—*an invasion of a legally protected interest* which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." 504 U.S. at 560 (citations and quotations omitted) (emphasis added). This line between abstract, speculative, and generalized grievances on the one hand, and concrete, actual, and particularized invasions of legal rights on the other, is what defines Article III standing. When the statutory right meets these criteria, the invasion of it is the "injury in fact."[2]

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2. Spokeo seeks in vain for support in *Lujan*'s statement "that Congress may 'elevat[e] to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law.'" Pet. Br. 14 (quoting *Lujan*, 504 U.S. at 578). But *Lujan* did not purport to resolve the issue here. The Court explained that it was not deciding whether Article III "can be extended beyond that distinction." *Lujan*, 504 U.S. at 578. Moreover, Justice Kennedy explained that Congress does have the authority to create new legal rights, and joined that part of the decision on the understanding that it did not "suggest a contrary view." *Id.* at 580 (Kennedy, J., concurring in part and concurring in the judgment). Indeed, holding that Congress lacks such Article I authority would create significant separation-of-powers problems. *See infra* 48-52.

As a consequence, while the "public's … interest in the proper administration of the laws" is "nonconcrete," *Summers*, 555 U.S. at 497 (quotation omitted), an *individual's* interest in vindicating *her own* legal rights *is* concrete, Scalia, *supra*, at 895 (defining "concrete injury" to mean "an injury apart from the mere breach of the social contract, so to speak, effected by the very fact of unlawful government action"). Consistent with this settled understanding, only those statutes creating concrete legal interests will satisfy Article III, and even then, only those persons who can allege and prove that they themselves have suffered an invasion of that statutory interest will have standing.

To that end, "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." *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring in part and concurring in the judgment). For their part, plaintiffs "must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent." *Warth v. Seldin*, 422 U.S. 490, 502 (1975). When these conditions are satisfied (as they are here, *see infra* 31-36), the violation of the plaintiff's statutory right is an Article III injury.

b. Spokeo's argument would require the Court to overturn *Havens* and *Public Citizen*.

"Like most legal notions, the standing concepts have gained considerable definition from developing case law." *Allen v. Wright*, 468 U.S. 737, 751 (1984). *Havens* and

Public Citizen apply the principle, set forth above, that "Congress may create a statutory right or entitlement the alleged deprivation of which can confer standing to sue even where the plaintiff would have suffered no cognizable injury in the absence of the statute." *Warth*, 422 U.S. at 514; *Massachusetts v. EPA*, 549 U.S. 497, 516 (2007) ("Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before.") (quoting *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring in part and concurring in judgment)). The Court should adhere to these decisions.

Havens involved a challenge under the Fair Housing Act ("FHA"), which, among other things, made it unlawful "[t]o represent to any person because of race … that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available." 42 U.S.C. § 3604(d). In doing so, the FHA "establishe[d] an enforceable right to truthful information concerning the availability of housing[.]" *Havens*, 455 U.S. at 373. In that case, a black "tester" employed by a public-interest organization inquired about the availability of certain apartments. *Id.* at 368. When the apartment complex owner told her—falsely—that there were no apartments for rent, she (among others) brought suit. *Id.* at 367-68. This Court squarely held that the tester had Article III standing because she "alleged injury to her statutorily created right to truthful housing information." *Id.* at 374. The tester "suffered injury in precisely the form the statute was intended to guard against, and therefore ha[d] standing to maintain a claim for damages under the [statute's] provisions." *Id.* at 373-74.

This concrete and particularized invasion of her statutory right *alone* was an injury sufficient to support standing: "That the tester may have approached the real estate agent fully expecting that [s]he would receive false information, and without any intention of buying or renting a home, does not negate the simple fact of injury within the meaning of [the statute]." *Id.* In other words, the tester did not need to allege anything more than the "bare violation" of the FHA; the defendant's invasion of her personal legal right under the statute was all Article III required.

Spokeo claims that "the plaintiff in *Havens* was the direct victim of discrimination—which is itself a well-established form of concrete harm." Pet. Br. 40-41. But that is not how the Court characterized the tester's injury. The Court explained that the tester, who claimed to have been lied to four separate times, had sufficiently "alleged injury to her statutorily created right to truthful information." *Havens*, 455 U.S. at 374. Spokeo may wish that the Court had resolved Article III standing on discrimination, but that is not what *Havens* holds.

The Court's dismissal of the claim of a white tester who had not been given false information by the property owner proves the point. Because he had not alleged being misled, the white tester "alleged no injury to his statutory right to accurate information concerning the availability of housing." *Id.* at 374-75. The failure to plead that he was the victim of discrimination was relevant only to whether he stated a claim. By not "alleg[ing] that he was a victim of a discriminatory misrepresentation, he [had] not pleaded a cause of action under [the statute]." *Id.* at 375. But that had nothing to do with whether the white

tester's legal right to truthful housing information had been invaded, *viz.*, whether he suffered an injury. If, as Spokeo argues, the "real-world" injury of discrimination were the foundation for Article III standing in *Havens*, the Court would not have described it as merely an element of the cause of action.

Public Citizen likewise depends on the principle that a concrete and particularized invasion of a legal right alone supports Article III standing. 491 U.S. at 449-50. There, the Court held that persons seeking access to public records under the Federal Advisory Committee Act ("FACA") had Article III standing to challenge the defendant's refusal to permit them such access. *Id.* at 451. No other harm was needed beyond the denial of the statutory right of access. The Court understood that any other conclusion would raise questions about the kind of showing needed to allege Article III standing under the Freedom of Information Act ("FOIA") because there had been no suggestion—by any court—"that those requesting information under" FOIA needed to "show more than that they sought and were denied specific agency records." *Id.* at 449 (collecting cases).

The fact that FACA and FOIA plaintiffs need not show any consequential injury from denial of access defeats Spokeo's theory. By Spokeo's logic, denial of a FACA or FOIA request alone would never be enough to establish Article III standing; the requester would need to allege some "real-world" harm from the denial of access. But that was not the conclusion the Court reached in *Public Citizen*. Instead, FACA and FOIA plaintiffs suffer an Article III injury solely because their statutory right to these records has been infringed.

Spokeo weakly contends there was consequential harm underlying the plaintiff's FACA claim in *Public Citizen*: the inability "to scrutinize the 'workings' of government … to 'participate more effectively in the judicial selection process.'" Pet. Br. 43 (quoting *Pub. Citizen*, 491 U.S. at 449). But this was not an independent harm the Court required to establish Article III standing; it was the reason why Congress created the statutory right. *Compare Pub. Citizen*, 491 U.S. at 449, *with id.* at 445-46. Adhering to the FOIA line of decisions, the Court held that no such showing was needed for Article III standing. *Id.* at 449-50.

Spokeo also claims that, unlike *Havens* and *Public Citizen*, this case is about providing information to other people—not to Robins. Pet. Br. 42. But of course the class of persons entitled to bring suit will differ based on the contours of the interest Congress created. The fact that the FHA, FACA, and FOIA protect seekers of information while the FCRA protects the subjects of informational reports about their creditworthiness has absolutely no relevance to the fact that a concrete and particularized invasion of the individual legal rights those statutes created is an Article III injury. Spokeo's theory of "real-world" injury cannot be reconciled with either *Havens* or *Public Citizen*.[3]

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3. In two decisions in which the plaintiffs lacked standing, the Court illustrated how Congress could have created a legal right. *See Lewis v. Casey*, 518 U.S. 343, 353 n.4 (1996) ("Unless prisoners have a freestanding right to libraries, a showing of the sort Justice Souter describes would establish no *relevant* injury in fact, *i.e.*, injury-in-fact *caused by the violation of legal right*."); *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 224 n.14 (1974) ("The District Court made analogy to conflict-of-interest statutes

B. Robins Has Alleged A Concrete And Particularized Invasion Of His Statutory Rights By Spokeo.

Application of these longstanding principles shows that Robins has Article III standing. Because his amended complaint was dismissed at the pleading stage, his factual allegations must be treated as true. *Warth*, 422 U.S. at 521. As explained below, Robins's amended complaint clearly alleged a concrete and particularized invasion of *his* own legal rights under the FCRA, and this invasion is the injury needed to establish standing.

To begin, the FCRA is trained on a specific, congressionally-identified harm. The FCRA's purpose "is to prevent consumers from being unjustly damaged because of inaccurate or arbitrary information in a credit report." S. Rep. No. 91-517, at 1; *see supra* 2-6. The statute seeks to ensure that credit reporting agencies create reports only "in a manner which is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information[.]" 15 U.S.C. § 1681(b). The FCRA's centerpiece provision thus requires credit reporting agencies to take "reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates." *Id.* § 1681e(b). Such procedures similarly ensure that the subject of a credit report is protected

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which, it said, are directed at avoiding circumstances of potential, not actual, impropriety. We have no doubt that if the Congress enacted a statute creating such a legal right, the requisite injury for standing would be found in an invasion of that right."). The Court's hypotheticals presume that Congress has the very power that Spokeo claims it lacks.

from the mishandling of his information. *See supra* 4. Congress "identif[ied] the injury it seeks to vindicate" when it created a federal cause of action under the FCRA. *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring in part and concurring in the judgment).[4]

Congress also has "relate[d] the injury to the class of persons entitled to bring suit." *Id.* The FCRA is intended to protect "consumers who have been wronged" by credit reporting agencies. S. Rep. No. 104-185, at 48-49. To that end, the statute provides that "[a]ny person who willfully fails to comply with any requirement imposed under this subchapter *with respect to any consumer is liable to that consumer*[.]" 15 U.S.C. § 1681n(a)(1)(A) (emphasis added). In other words, Congress identified inaccurate credit reports as causing harm to their subjects, it mandated procedures designed to prevent the creation of such inaccurate reports, and it provided a cause of action to consumers about whom false credit reports are created in willful noncompliance of those procedures.

4. Spokeo asks the Court to require a "clear statement" from Congress before finding that "plaintiffs who are unable to demonstrate concrete harm" have Article III standing. Pet. Br. 53. But Congress is not affording standing to such plaintiffs. Impairment of Robins's statutory interest under the FCRA *is* concrete and particularized harm. If Spokeo instead is arguing that a clear statement is required before Congress may define injuries, there is no basis for it given the lack of any separation-of-powers concerns raised here. *See infra* 48-52. Regardless, as discussed above, the FCRA could not be clearer in its intention to give a right to sue to consumers whose interest in an accurate credit report has been impaired.

In sum, the FCRA affords wronged consumers a legal right to enforce "procedural requirement[s] the disregard of which could impair" their "concrete interest" in an accurate credit report. *Lujan*, 504 U.S. at 572. That is the claim Robins brought. In particular, he alleges that "Spokeo maintains an inaccurate consumer report about [him] on its website." JA 13. The amended complaint thereby alleges that Robins's concrete statutory right was "affect[ed] in a personal and individual way." *Lujan*, 504 U.S. at 560 n.1; *see id.* at 581 (Kennedy, J., concurring in part and concurring in the judgment) (same). Because he alleges that *his* statutory rights were invaded when a false report was created about *him*, Robins's claim that Spokeo violated the FCRA "will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action." *Id.* (quoting *Valley Forge*, 454 U.S. at 472).

After detailing many ways in which Spokeo failed to comply with the FCRA, JA 30, the amended complaint alleged that Spokeo willfully and "continually failed to follow reasonable procedures" that are designed "to assure the maximum possible accuracy of the information that it provides in its consumer reports," JA 21.[5] Robins

5. In passing, Spokeo asserts that Robins lacks standing to bring certain ancillary claims relating to FCRA violations set forth in the amended complaint. Pet. Br. 40 n.7. As the lower courts recognized, those allegations are appropriately understood as supporting Robins's overarching claim that Spokeo's inadequate procedures led to its inaccurate report about him and his inability to correct those inaccuracies. *See* App. 4a-5a, 16a. To the extent those allegations raise issues separate and apart from that question, such issues were not decided below and are not before the Court. *M&G Polymers USA, LLC v. Tackett*, 135 S. Ct. 926 (2015).

met his burden to plead Article III standing. *See Lujan*, 504 U.S. at 561 ("At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we presume that general allegations embrace those specific facts that are necessary to support the claim.") (citation and quotations omitted).

In addition, Spokeo does not and cannot contest that the injury alleged by Robins "is fairly traceable to the challenged action of the defendant" and "will be redressed by a favorable decision." *Friends of Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000). As to traceability, the amended complaint alleges that Spokeo's willful failure to follow the procedures mandated by the FCRA resulted in the inaccurate credit report about him. JA 21-23. That is sufficient: Robins need not "establish"—let alone plead—"with any certainty" that the credit report created about him would have been accurate if Spokeo had followed the proper procedures. *Lujan*, 504 U.S. at 572 n.7; *Massachusetts*, 549 U.S. at 518 ("A [litigant] who alleges a deprivation of a procedural protection to which he is entitled never has to prove that if he had received the procedure the substantive result would have been altered. All that is necessary is to show that the procedural step was connected to the substantive result.") (citations and quotations omitted).

Regarding redressability, the FCRA has afforded Robins statutory damages for Spokeo's willful violation of the FCRA's procedural requirements and concomitant dissemination of false information about him. JA 21-23. Damages are the paradigmatic remedy for a completed statutory violation. "Generally, any person whose injury can be redressed by a favorable judgment has standing to

litigate, and injuries compensable in monetary damages can always be redressed by a court judgment." *Wernsing v. Thompson*, 423 F.3d 732, 745 (7th Cir. 2005) (internal citations and quotations omitted). Robins's "continued active pursuit of monetary relief" ensures that "this case remains definite and concrete, touching the legal relations of parties having adverse legal interests." *Havens*, 455 U.S. at 371 (citations and quotations omitted). His injury is redressable.

Finally, resolution of this appeal in favor of Robins would not call *Lujan* or *Summers* into doubt. As an initial matter, *Lujan* was resolved on imminency and redressability grounds inapplicable here. *See* 504 U.S. at 564-71. More importantly, neither statute at issue in those cases protected a concrete statutory interest afforded to a specific class of persons. The "citizen-suit provision" of the Endangered Species Act is a "congressional conferral upon *all* persons of an abstract, self-contained, noninstrumental 'right' to have the Executive observe the procedures required by law." *Id.* at 572-73. The Forest Service Decisionmaking and Appeals Reform Act also afforded the general public "a procedural right without some concrete interest that [was] affected by the deprivation—a procedural right *in vacuo*[.]" *Summers*, 555 U.S. at 496. In short, the legal claims in both *Lujan* and *Summers* failed because neither statute "indicate[d] Congress intended to identify or confer some interest separate and apart from a procedural right." *Id.* at 501 (Kennedy, J., concurring).

That is not true here, though. The FCRA's procedural requirements were specifically designed to protect a wronged consumer's concrete interest in the accuracy of

a credit report created about him. Far from a generalized grievance, Robins brings a claim for relief from the unlawful preparation of an inaccurate credit report about *him*. Robins has Article III standing.

II. Robins Has Standing Even Under Spokeo's "Real-World" Injury Test.

Robins also has suffered precisely the kind of "real-world" injury Spokeo demands: Wallet Injury. "Wallet Injury"—an injury with tangible economic consequences—"is the type of concrete and particularized injury" that provides the basis for standing. *Hein v. Freedom from Religion Found., Inc.*, 551 U.S. 587, 619 (2007) (Scalia, J., concurring in the judgment); *see Nixon v. Fitzgerald*, 457 U.S. 731, 744 (1982). It is the typical interest that can be "settled, bought, and sold." *Casey*, 518 U.S. at 353 n.3.

As soon as Spokeo willfully invaded Robins's legal rights under the FCRA by creating a false report about him without using procedures mandated by the statute, he was entitled to statutory damages. *See* 15 U.S.C. § 1681n(a). His claim for those damages created a classic legal dispute over whether one party (here, Spokeo) owes another (Robins) a fixed sum of money. Spokeo's failure to compensate Robins is a monetary—or wallet—injury. The FCRA's provision for statutory damages thus affords Robins the "personal stake in the outcome of the controversy" that Article III requires. *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341 (2014) (quoting *Warth*, 422 U.S. at 498). At bottom, the central question has always been "whether a plaintiff personally would benefit in a tangible way from the court's intervention."

Steel Co., 523 U.S. at 103 n.5 (citations and quotations omitted). Because he would, Robins has Article III standing, even under the misguided test that Spokeo advances.

Spokeo's responses all miss the mark. Spokeo principally argues that "the potential recovery of a statutory bounty cannot serve as injury in fact." Pet. Br. 47 (citing *Vermont*, 529 U.S. at 772). But Spokeo's attempt to elide the distinction between a *qui tam* relator's bounty and a private litigant's statutory damages is unavailing. A relator has standing only as an assignee because he has sued "to remedy an injury in fact suffered by the United States." *Vermont*, 529 U.S. at 771. Article III standing, however, requires the vindication of a personal "interest" in "obtaining compensation for, or preventing, the violation of a legally protected right." *Id.* at 772 (citation omitted).

Because the relator in *Vermont* only had "an interest *in the lawsuit*," he "suffered no such invasion—indeed, the 'right' he seeks to vindicate does not even fully materialize until the litigation is completed and the relator prevails." *Id.* at 772-73. That was "not to suggest that Congress cannot define new legal rights, which will confer standing to vindicate an injury caused by the claimant." *Id.* at 773 (citing *Warth*, 422 U.S. at 500). But the relator's "bounty" was "an interest that is merely a byproduct of the suit itself" and, therefore, it could not "give rise to a cognizable injury in fact for Article III standing purposes." *Id.*

Robins's statutory interest is fundamentally different. Unlike the relator, Robins holds his own legally protected right under the FCRA; it is *that* interest he seeks to vindicate. In other words, he does not seek to enforce

someone else's rights; the interest is his alone. There can be no question, then, that "the *complaining party's* injury is likely to be redressed" by the award of statutory damages. *Sprint*, 554 U.S. at 302 (Roberts, C.J., dissenting).

An illustration proves the point. Robins could have sent Spokeo a demand letter as soon as his FCRA rights were violated. Had Spokeo agreed to the demand, the parties' settlement would have averted litigation and resolved Robins's FCRA claim. In contrast, the defendant in *Vermont* would have had no interest in responding to a demand letter from the *qui tam* relator because the relator lacked the authority to settle the government's False Claims Act action (at least before the initiation of litigation). *Vermont*, 529 U.S. at 769-70; Pet. Br. 31 n.5.

Accordingly, Robins's monetary interest is not "a 'byproduct' of the suit itself" or derived from any other "interest unrelated to injury in fact." *Vermont*, 529 U.S. at 772-73. Robins's statutory claim to damages under the FCRA derives from Spokeo's failure to comply with duties it owed to him and materialized the moment Spokeo disseminated false information about him.

The point is crucial. The plaintiff must "aver an injury peculiar to himself, as distinguished from the great body of his fellow citizens" to have Article III standing. *Lance*, 549 U.S. at 440 (citation and quotations omitted); *Warth*, 422 U.S. at 501 ("[T]he plaintiff still must allege a distinct and palpable injury to himself, even if it is an injury shared by a large class of other possible litigants."). Unlike a *qui tam* relator, Robins avers a statutory "injury to himself that is likely to be redressed by a favorable decision[.]" *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 38 (1976).

The fact that the statutory damages are liquidated is immaterial. At common law, courts did not require a plaintiff to allege independent consequential harm in order to bring a claim to recover contractual liquidated damages (even if certain jurisdictions require it in order to prevail on the merits). 2 Samuel Comyn, *A Treatise of the Law Relative to Contracts and Agreements Not Under Seal* 537-38 (1807). This Court has not hesitated to enforce contractual stipulations "without proof of the damages actually sustained." *United States v. Bethlehem Steel Co.*, 205 U.S. 105, 119 (1907). A contrary assertion would be "wrong in principle, was unknown to the common law, does not prevail in the courts of England at the present time, and it is not sanctioned by the decisions of this court." *Sun Printing & Publ'g Ass'n v. Moore*, 183 U.S. 642, 660 (1902).

Therefore, a federal court would not, for purposes of evaluating Article III standing, look behind a stipulation to determine if the breach caused consequential harm. The contractual claim to a stipulated sum is all that would be required. For example, a suit brought by A—who holds a mortgage on Blackacre—to recover $75,000.01 in stipulated damages because C, who lives in a different state, made a payment five minutes after the deadline established in the note would properly be in federal court. The plaintiff need not allege or prove that a payment late by five minutes caused consequential harm to establish Article III standing.

It would be wrong to arrive at a different outcome here. Robins alleged that Spokeo violated a legally protected right for which the remedy is a stipulated sum of money. The fact that his legal right derives from statute, rather than contract, makes no difference. *See Lujan*, 504

U.S. at 576. Both at common law and under Article III, it is the breach of a legal duty for which money is due that creates the necessary "personal stake"—not the source of the obligation.

Spokeo contends that this approach "would collapse" the "three-part test for Article III standing." Pet. Br. 39. That contention rings hollow. In the first place, it would be a mistake to consider "the elements of standing as separate strands rather than as interlocking and related elements meant to ensure a personal stake." *Sprint*, 554 U.S. at 302 (Roberts, C.J., dissenting). Even so, standing analysis is ordinarily "straightforward" when the case involves "economic or physical harms." *Hein*, 551 U.S. at 642 (Souter, J., dissenting). The particularized claim for damages based on the FCRA violation is "concrete and actual or imminent, not conjectural or hypothetical[;]" the claim (unlike most taxpayer suits, for instance) is "fairly traceable" to the FCRA violation; and the entitlement to damages ensures there is "a likelihood that the requested relief will redress the alleged injury." *Steel Co.*, 523 U.S. at 103 (quotations omitted). The three-part test is no more collapsed here than it is in any breach-of-contract action for liquidated damages.

Last, Spokeo incorrectly suggests, almost as an afterthought, that allowing for statutory damages to serve as Wallet Injury amounts to the collection of "public fines by private litigants." Pet. Br. 29. Foremost, this merits argument about the as-applied constitutionality of the statute, raised for the first time in Spokeo's opening brief in this Court, has no bearing on whether Robins has standing. *Cf. Laidlaw*, 528 U.S. at 197 (Kennedy, J., concurring).

In any event, statutory damages are not a public fine. Congress has long provided for statutory damages as "compensation, not a penalty or punishment," for losses that are "too obscure and difficult of proof for estimate other than by liquidated damages." *Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572, 583-84 (1942). This case is thus far afield from one in which a plaintiff seeks to have the defendant held liable for damages payable only to the public fisc. *See Laidlaw*, 528 U.S. at 173; *id.* at 202 (Scalia, J., dissenting). The statutory damages available under the FCRA vindicate Robins's particular interest in Spokeo's use of proper procedures to ensure it generates an accurate credit report about him. This is not an action driven by an "injury to the interest in seeing that the law is obeyed." *FEC v. Akins*, 524 U.S. 11, 24 (1998).

III. The Fair Credit Reporting Act's Relationship To Common-Law Defamation Confirms That Robins Has Standing.

Because the deprivation of a personalized statutory right constitutes Article III injury, Congress need not ensure that *this* particular statutory right has common-law roots. Nevertheless, this Court has explained that while a common-law analog is not required, its existence can be "well nigh conclusive with respect" to Article III standing. *Vermont*, 529 U.S. at 777. The case can be decided on this basis without reaching broader issues.

A direct common-law analog exists here in the law of defamation. Long before the FCRA, a common-law defamation action could be brought against a credit reporting agency for disseminating false information. Maurer, *supra*, at 96; William T. Prosser, *Libel Per Quod*,

46 Va. L. Rev. 839, 842-43 (1960). Congress enacted the FCRA to build upon this established body of law by federalizing the interest and modifying it to overcome obstacles to recovery that had developed under state legal regimes. Maurer, *supra*, at 115. Hence, Robins's action follows directly from the common-law rules of defamation. Like the FCRA's allowance of statutory damages, those rules "for centuries have allowed juries to presume that some damage occurred from many defamatory utterances and publications." *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 760-61 (1985).

After the English Reformation, defamation, once the province of ecclesiastical or manorial officers, came within the common law's province. Van Vechten Veeder, *History and Theory of the Law of Defamation*, 3 Colum. L. Rev. 546, 549-69 (1903). But while courts increasingly heard such actions, some traditional restrictions remained. One key limitation was the requirement that the plaintiff prove a "temporal loss," or actual damages, arising from the defamation. *See, e.g.*, *Bernard v. Beale*, (1617) 79 Eng. Rep. 1241 (K.B.). Even then, however, exceptions were made for claims from which harm was presumed even in the absence of evidence—including, notably, slander claims that "touch[ed] [the plaintiff] in his profession." *Jenkins v. Smith*, (1620) 79 Eng. Rep. 501 (K.B.).

But with the rise of the printing press and wider dissemination of written works, a legal distinction took root between written defamation (libel) and spoken defamation (slander). "As the English law developed, *all libel, of whatever kind*, was held to be actionable without proof of any damage; or, as it was sometimes stated, from any libel some damage was conclusively presumed."

Prosser, *Libel*, *supra*, at 842 (emphasis added); *see, e.g.*, *R v. Langley*, (1702) 90 Eng. Rep. 1261 (K.B.). 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 (K.B.).

These common-law rules—permitting courts to hear claims for all libel, or any defamation touching upon trade or business, without proof of consequential harm—were well known to the Framers. Blackstone noted, for example, that for certain categories of slander, including "scandalous words that … may impair [a man's] trade … an action on the case may be had, without proving any particular damage to have happened, but merely upon the probability that it might happen." Blackstone, *supra*, at *124; 2 Kent, Commentaries on American Law 16 (1827). Consequential harm was not needed because this kind of false statement "necessarily or naturally and presumptively causes pecuniary loss to the person of whom it is published." *Mitchell v. Bradstreet Co.*, 22 S.W. 358, 362 (Mo. 1893).

Early American decisions similarly demonstrate widespread acceptance of the established principle that general damages, without proof of consequential harm, were available in all cases of libel. *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). American courts also adopted 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).

In sum, the legal tradition familiar to the Framers had 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 cognizable absent "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.'" *Greenmoss Builders*, 472 U.S. at 760 (1985) (quoting W. Prosser, Law of Torts § 112 (4th ed. 1971)). In this category of cases, "the existence of injury is presumed from the fact of publication." *Gertz*, 418 U.S. at 349.

Robins's claim fits neatly within this common-law tradition. He alleges that Spokeo disseminated a false written report that misrepresented his age, marital status, earnings history, employment circumstances, and physical appearance. Such information creates a substantial risk that his employment prospects will be negatively affected, and would "deter third persons from associating or dealing with him." Restatement (Second) of Torts § 559. Employers may decide not to pursue a candidate they believe is overqualified, has a high salary expectation, or may have family commitments preventing the candidate from accepting the relevant responsibilities. Nor may they be inclined to pursue candidates whose Spokeo-generated reports vary from the (accurate) information the applicant might himself provide the

employer.[6] Robins's claim thus would have been actionable at common law even assuming that Spokeo's dissemination of falsehoods were of "insignificant character" and there was "no proof that serious harm has resulted from the defendant's attack upon the plaintiff's character and reputation." Restatement (Second) of Torts § 620 cmt. a (1977).

Spokeo's efforts to downplay the connection between Robins's FCRA claim and common-law defamation fall short. After begrudgingly conceding, as it must, that no proof of "actual harm" was required in a number of broad categories of defamation, Pet. Br. 50-51, Spokeo still ignores the rule that "many things are actionable when written or printed and published which would not be actionable if merely spoken, without averring and proving special damage." *Pollard v. Lyon*, 91 U.S. 225, 228 (1875). Spokeo is left to argue that Robins cannot "satisfy the common law standard" for the recovery of general damages for defamatory statements. Pet. Br. 51-52. As explained, that is incorrect.

Even if this were true, however, it would not help Spokeo. The question, for purposes of Article III, is not whether Robins could have brought a successful claim for defamation in the late eighteenth century, but whether the statutory scheme permits an action "*of the sort* traditionally amenable to, and resolved by, the judicial process." *Steel Co.*, 523 U.S. at 102 (emphasis added). Like any legislature, Congress has considerable authority to

6. Spokeo's misrepresentation of Robins's marital status also is inherently harmful, given that Spokeo itself promotes its service for use by prospective romantic partners. JA 38 n.12.

adjust the common law, including with respect to classes of misrepresentations that warrant some form of presumed damages. Congress is not so constrained that it may protect rights derived from the common law only if it accepts them in their fossilized form.

Indeed, this Court has long held that "[t]he judiciary clause of the Constitution … did not crystallize into changeless form the procedure of 1789 as the only possible means for presenting a case or controversy otherwise cognizable by the federal courts." *Nashville, C. & St. L. Ry. Co. v. Wallace*, 288 U.S. 249, 264 (1933); *see Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 239-40 (1937) ("In dealing with methods within its sphere of remedial action the Congress may create and improve as well as abolish or restrict."). Congress has the power to update legal rights to the modern era, even if those statutory actions do not "have clear analogs in our common-law tradition." *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring in part and concurring in the judgment).

The credit-reporting context illustrates why Congress must have the latitude to adjust the common law. The FCRA was enacted at a time when many states had extended a qualified privilege that served to insulate credit reporting agencies from any consequences of the "serious problem … of inaccurate or misleading information." 115 Cong. Rec. 2414. As a result, credit reporting agencies lacked any incentive to ensure the accuracy and completeness of consumer data—even as the volume and uses of that data multiplied rapidly. Moreover, although harm was almost certain to occur from these erroneous reports, it was "very difficult to prove." Consumer Information, *supra*, at 6 (statement of John Brown). Without transparency,

consumers had no way to know whether their reports were accurate, let alone whether any falsehoods may have caused them to be passed over for a loan, a job, or some other benefit that society offers.

The FCRA was Congress's measured response. It provided consumers with important new rights to review and correct information maintained by the credit reporting agencies. It also included restrictions on the disclosure and use of information and mandated the implementation of reasonable procedures to ensure compliance with the law's requirements. *Supra* 4-6.

In exchange, Congress largely preempted the strict-liability scheme of defamation with a more forgiving negligence-based regime. *Id.* And while Congress created a civil action against credit reporting agencies, it limited the availability of punitive damages to egregious behavior. *Id.* In 1996, Congress made further adjustments to the FCRA—including the addition of the statutory damages provision at the center of this dispute, which it reasonably capped at $1,000 per violation. *Id.* In other words, whether or not 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." *Duke Power Co. v. Carolina Envtl. Study Grp., Inc.*, 438 U.S. 59, 87-88 (1978); *see* Maurer, *supra*, at 115.

At base, the FCRA permits both an action (a claim for the wrongful dissemination of false information) and a remedy (presumed damages for harm that is difficult to identify or measure) that are "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). The Court can affirm on that basis alone.

IV. Spokeo's Standing Test Undermines, Rather Than Promotes, The Separation Of Powers.

Article III's standing requirement is built "on a single basic idea—the idea of separation of powers." *Allen v. Wright*, 468 U.S. 737, 752 (1984). But this lawsuit—a dispute between private parties—does not implicate separation-of-powers concerns. Rather, the inherently subjective Article III standing rule Spokeo asks this Court to adopt—in which courts can substitute their own normative views of what constitutes injury for Congress's—would actually undermine the separation-of-powers principles that have guided this Court for over two centuries.

The separation-of-powers principle undergirding Article III's injury requirement reflects a concern that the judiciary not "undertak[e] tasks assigned to the political branches." *Casey*, 518 U.S. at 349. The requirement that a litigant suffer a personalized injury ensures that courts respect the other branches' roles by not adjudicating generalized grievances shared by the entire populace. *Lujan*, 504 U.S. at 575. Generalized grievances require democratic solutions and must be resolved legislatively. *See* John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 Duke L.J. 1219, 1229-30 (1993). Limiting the federal judicial power to "controvers[ies] between parties which ha[ve] taken a shape for judicial decision" prevents courts from inserting themselves into "almost every

subject proper for legislative discussion and decision" or "on which the executive could act." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006) (quoting 4 Papers of John Marshall 95 (C. Cullen ed. 1984)). Moreover, concerns about the judiciary's proper place in our tripartite system are at their apex "'when reaching the merits of the dispute would force [the court] to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional.'" *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013) (quoting *Raines*, 521 U.S. at 819-20).

Those separation-of-powers concerns are not present here. Robins did not ask the district court to order a government agency to take, or to refrain from taking, any action. Nor does he challenge executive action or an act of Congress on constitutional grounds. Rather, Robins seeks nothing more than a traditional remedy for the "loss of [a] private right" protected by statute. *Raines*, 521 U.S. at 821. He has asked the federal court solely to determine that Spokeo—a private entity—created a false credit report about him in violation of the FCRA, to enjoin Spokeo from continuing to disseminate that false report, and to award him the statutory damages to which he is entitled for that violation. This is the very model of a case or controversy.

Spokeo's assertion that Article III separation-of-powers concerns arise in this private litigation are misguided. Pet. Br. 27-29. That would be true only if Robins were asserting a "generally available grievance" in which he is "claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large[.]"

Lujan, 504 U.S. at 573-74. But he is not. *See supra* 31-36. Consequently, Robins's FCRA lawsuit "does not … require" federal courts "to participate in any legislative, administrative, political or other nonjudicial function[.]" *National Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 591 (1949) (plurality opinion).

Spokeo's novel position, in contrast, raises serious separation-of-powers concerns. Spokeo candidly asks this Court to override Congress's determination that the failure to follow reasonable procedures to assure maximum possible accuracy in the creation of credit reports causes concrete harm to the subjects of resulting inaccurate reports. Pet. Br. 38-39. Spokeo's position represents a sweeping and unsustainable conception of Article III.

The judgment as to whether a private interest warrants legal protection generally involves subjective, value-laden choices. In the main, such judgments are the essence of democratic lawmaking, and when Congress chooses to protect a particular interest, courts respect that choice. *See United States v. Oakland Cannabis Buyers' Co-op.*, 532 U.S. 483, 497 (2001) ("A district court cannot, for example, override Congress' policy choice, articulated in a statute, as to what behavior should be prohibited."). That is not to say that Congress *alone* has the power to define injuries. Following in the tradition of the common law, federal courts have the power to decide if a non-statutory interest is sufficiently concrete to invoke the judicial power. Indeed, that is what the Court did in *Hardin v. Kentucky Utilities Co.*, 390 U.S. 1 (1968), as to economic competition, and in *Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205 (1972),

as to discrimination. *See Lujan*, 504 U.S. at 578. But that tradition does not license federal courts to substitute their normative judgment for Congress's when Congress has determined that a private interest warrants *statutory* protection.

Spokeo's conception of Article III results in a strange constitutional imbalance: Under Spokeo's view, Congress cannot decide for itself whether certain private interests (like those protected by the FCRA) warrant legal protection. Rather, only federal courts may determine which types of interests qualify as concrete. But neither the common law nor the Constitution grants federal courts the exclusive authority to deem such interests worthy of protection.

The same holds true for remedies. Courts have the power to fashion relief to ensure that constitutional and common-law harms can be remedied. But "the authority to fashion private remedies to enforce federal law belongs to Congress alone." *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2417 (2014) (Thomas, J., concurring in the judgment). When Congress creates remedies for individuals personally harmed by private conduct it considers injurious, it does so based on a collective judgment about how the wronged party should be compensated. The Court therefore leaves it to Congress, as it must, to decide whether to provide a remedy for the invasion of a statutory right and what that remedy should be. *Shepard v. NLRB*, 459 U.S. 344, 351 (1983) ("Congress is free to provide a damage remedy for some violations of federal law, and not for others.").

Far from promoting the proper division of authority between the three branches, then, Spokeo invites improper judicial second-guessing of Congress's quintessentially legislative finding that an individual consumer suffers an injury when a credit reporting agency fails to use reasonable procedures and thereby creates a false report about him, and that monetary damages appropriately remedy that injury. It is difficult to comprehend a greater incursion into Congress's authority than the one Spokeo proposes. Congress has granted statutory protection to Robins, has held Spokeo accountable to him in the form of statutory damages, and has provided a cause of action to adjudicate their private dispute in federal court. Contrary to Spokeo's protests, no separation-of-powers problem arises here unless the Court holds that Congress was without the authority to do so.

V. The Fair Credit Reporting Act Permits Recovery Of Statutory Damages For Willful Violations Without Proof Of Actual Damages.

In a last-ditch effort, Spokeo argues that the FCRA should be interpreted to require Robins to show actual damage before he may receive statutory damages. Pet. Br. 55-56. Spokeo rests this atextual construction of the statute on the doctrine of constitutional avoidance. But there are no difficult constitutional questions to avoid here. And even if there were, "constitutional avoidance is a tool for choosing between competing *plausible* interpretations of a provision." *Warger v. Shauers*, 135 S. Ct. 521, 529 (2014) (emphasis added). It is not a license to "distort[] plain statutory text in order to produce a 'more sensible' result." *INS v. St. Cyr*, 533 U.S. 289, 334 (2001) (Scalia, J., dissenting); *Bond*, 134 S. Ct. at 2094-97 (2014) (Scalia,

J., concurring in the judgment); *Pub. Citizen*, 491 U.S. at 481-82 (Kennedy, J., concurring in the judgment).

The FCRA's text could not be plainer. The statute provides that a credit reporting agency is liable to "any consumer" who is the subject of a willful violation "in an amount equal to the sum of … any actual damages sustained by the consumer as a result of the failure *or* damages of not less than $100 and not more than $1,000[.]" 15 U.S.C. § 1681n (emphasis added). The "ordinary use" of the word "or" is "almost always disjunctive, that is, the words it connects are to be given separate meanings." *United States v. Woods*, 134 S. Ct. 557, 567 (2013) (citations and quotations omitted); *see* 1A Sutherland Statutes and Statutory Construction § 21:14 (7th ed. 2009) ("The use of the disjunctive usually indicates alternatives and requires that those alternatives be treated separately."). The FCRA's deliberate use of the disjunctive "or" is strong evidence that Congress did not consider "actual damages" a prerequisite to recovery of statutory damages for willful violations.

Here, the evidence is conclusive. Congress knew what it was doing. The impetus for this amendment was the difficulty of proving actual damages for statutory violations. *See supra* 5-6. To address this issue, Congress gave wronged consumers a choice between actual damages and statutory damages of between $100 and $1000 for willful violations. And for violations involving specified kinds of fraudulent activity, the consumer may recover "actual damages sustained … *or* $1,000, *whichever is greater*." 15 U.S.C. § 1681n(a)(1)(b) (emphasis added). In other words, a consumer whose FCRA rights are willfully violated may elect actual *or* statutory damages, while only

"actual damages sustained by the consumer" are available for negligent violations. *Id.* § 1681o. The FCRA cannot be fairly interpreted to make recovery of statutory damages depend on proof of actual damages.

If Congress had wanted to make actual damages a gateway to statutory damages, it knew how to do so. *See, e.g.*, 5 U.S.C. § 552a(g)(4)(A) (providing that an individual subjected to "willful" violations of the Privacy Act may recover "actual damages … but in no case shall a person entitled to recovery receive less than the sum of $1,000"). But Congress did not employ "the critical limiting phrase 'entitled to recovery'" that led to the interpretation of the Privacy Act that Spokeo asks the Court to shoehorn into the FCRA. *Doe v. Chao*, 540 U.S. 614, 626 (2004); *cf. FAA v. Cooper*, 132 S. Ct. 1441, 1454-55 (2012) ("Neither the FHA nor the FCRA contains text that precisely mirrors the Privacy Act. In neither of those statutes did Congress specifically decline to authorize recovery for general damages as it did in the Privacy Act.").

VI. Policy Objections To Class Actions Are Irrelevant To The Question Of Article III Standing.

Finally, Spokeo argues that the "practical effect" of class actions should factor into the Court's constitutional and statutory interpretation. Pet. Br. 32. Indeed, Spokeo and its supporting *amici* devote significant attention to all the problems they see with class-action litigation. But this line of argument is irrelevant to the meaning of Article III, which applies to all cases. Nor is it relevant to the proper interpretation of the FCRA. Neutral principles—not policy disputes—are the only solid footing for interpreting the Constitution and laws of the United States.

Those involved in class-action litigation obviously have strong disagreements about whether they should be curtailed or reformed. Spokeo and its *amici* argue that class actions are "used as cudgels in extracting massive windfall settlements." Pet. Br. 35. *Amici* supporting Robins surely will argue that class actions root out and stop unlawful practices that are harmful to the public, that settlement amounts are much lower than Spokeo suggests, *see, e.g.*, Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. of Empirical Legal Stud. 811, 828 (2010), and that the class-action settlement rate is similar to the rate for other civil litigation, *see, e.g.*, Charles Silver, *"We're Scared to Death": Class Certification and Blackmail*, 78 N.Y.U. L. Rev. 1357, 1399-1402 (2003). In other words, this is a classic policy dispute.

The fact that Spokeo thinks the Court would not only choose sides in this policy dispute, but would then allow whatever policy judgment it reached to pervade its legal reasoning, is disconcerting. The Court is in "no position to judge the comparative force of these policy arguments." *Microsoft Corp. v. i4i Ltd. P'ship*, 131 S. Ct. 2238, 2252 (2011). It does "not sit as a committee of review," nor is it "vested with the power of veto." *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 194-95 (1978). The Court is tasked with deciding whether Robins has Article III standing to enforce legal rights he holds under the FCRA. "[T]he wisdom of Congress's judgment on this matter is not [the Court's] concern." *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2785 (2014). "This is no less true with respect to class actions than with respect to other suits." *Casey*, 518 U.S. at 357.

If Spokeo believes that the FCRA should be amended to require actual harm for willful violations, it should take the issue up with Congress.[7] But policy issues have no bearing on the meaning of the Constitution or this statute. "These are battles that should be fought among the political branches and the industry. Those parties should not seek to amend the statute by appeal to the Judicial Branch." *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 462 (2002).

7. Indeed, a pending bill would limit injuries in all federal class actions to "the alleged impact of the defendant's actions on the plaintiff's body or property." Fairness in Class Action Litigation Act, H.R. 1927, 114th Cong. (2015).

CONCLUSION

The Court should affirm the judgment below.

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