No. 13-1339

In the Supreme Court of the United States

SPOKEO, INC.,

Petitioner,

v.

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

Respondent.

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

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

The exceptional importance of the question presented—whether a mere statutory violation, without more, satisfies the constitutional requirement of an injury-in-fact—is underscored by the ten *amicus* briefs (on behalf of 17 individual companies, trade associations, and other organizations) urging the Court to grant review. It is difficult to imagine a more suitable case, given the Ninth Circuit's stark holding that "alleged violations of [a plaintiff's] statutory rights are sufficient to satisfy the injury-in-fact requirement of Article III." Pet. App. 8a.

Respondent tries mightily to obfuscate the court of appeals' ruling, devoting most of his brief in opposition to a series of imaginative injury-in-fact arguments. But the court of appeals specifically disavowed reliance on those grounds: having "determine[d] that [respondent] has standing by virtue of the alleged violations of his statutory rights," the court of appeals did "*not* decide whether harm to his employment prospects or related anxiety could be sufficient injuries in fact." Pet. App. 9a & n.3 (emphasis added). And for good reason—respondent's claim of hypothetical harm to indistinct future "prospects" and his speculative "subjective fear" are not cognizable injuries-in-fact. *Clapper* v. *Amnesty Int'l USA*, 133 S. Ct. 1138, 1150, 1153 (2013).

Equally misguided is respondent's argument—made for the first time in this Court—that he suffered "reputational" injury from information that inaccurately portrayed him as more educated and wealthier than he apparently is. Because respondent did not raise this argument below, the court of appeals did not address it. In any event, such favorable

information falls well outside the narrow category of falsehoods for which injury is presumed.

Respondent's claim that there is no conflict among the lower courts is equally unavailing. This case would have been dismissed if it had been filed in the Second or Fourth Circuits. And the Federal Circuit has now adopted the same rule. See *Consumer Watchdog* v. *Wis. Alumni Research Found.*, 753 F.3d 1258, 1262 (Fed. Cir. 2014).

When it comes to the significance of the Ninth Circuit's actual holding, respondent does not dispute that allowing injury-in-law to substitute for injury-in-fact effectively replaces the three-part standing test with a single question: whether the plaintiff has *alleged* a statutory violation. See Pet. 7–8, 22 & Pet. App. 9a. Respondent also does not dispute the dramatic expansion in the availability of class certification (and massive damages exposure) that results from eliminating the actual injury requirement. See Pet. 14.

Review by this Court is plainly warranted.

A. This Case Squarely Presents The Article III Question.

The question presented is whether the court of appeals' express holding—that "alleged violations" of a plaintiff's "statutory rights" automatically "satisfy the injury-in-fact requirement of Article III" (Pet. App. 8a)—is correct. Respondent studiously ignores this holding for the bulk of his argument (Opp. 4-18), urging this Court to deny review because the decision supposedly could have rested on other grounds.

Even if those other grounds were potentially meritorious, that argument would provide no reason to deny review of the legal issue that the court of ap-

peals indisputably *did* decide—particularly when, as here, the court of appeals expressly declined to address these alternative arguments. Pet. App. 9a n.3. Respondent would be free to raise those contentions on remand if this Court reverses the judgment below.

But it is not surprising that the Ninth Circuit declined to rest its holding on respondent's claims of actual injury. They are entirely meritless.

Respondent first asserts that information retrieved by Spokeo's search engine caused him concrete and particularized injury by (1) portraying him as more educated and wealthier than he is, and (2) making him worry that some potential employer might hold that favorable information against him. Opp. 3. Those contentions are foreclosed by this Court's rejection of "standing theories that rest on speculation about the decisions of independent actors" or on "subjective fear" about the same speculation. *Clapper*, 133 S. Ct. at 1150, 1153.[1]

And respondent's brand-new theory, not raised in the court of appeals—that nonderogatory information about his education, wealth, and marital status caused reputational injury merely because the information was inaccurate—is similarly flawed. Respondent points to the presumption of injury in defamation law, but that presumption applies only to false statements that ineluctably expose one "to hatred, contempt, or ridicule," *Milkovich* v. *Lorain*

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[1] Respondent is wrong to relabel as a "causation" analysis (Opp. 9) the holding in *Clapper*, which makes clear that "injury in fact" (133 S. Ct. at 1148) cannot arise from speculation about third-party responses to a defendant's activity or from subjective fear about those hypothetical responses. See *id.* at 1150, 1153.

Journal Co., 497 U.S. 1, 13 (1990); *White* v. *Nicholls*, 44 U.S. 266, 286 (1845), and that consequently are so "virtually certain to cause *serious* injury to reputation" that the law presumes an injury without demanding additional proof that it occurred. *Carey* v. *Piphus*, 435 U.S. 247, 262 & n.18 (1978) (emphasis added); see also *Dun & Bradstreet, Inc.* v. *Greenmoss Builders, Inc.*, 472 U.S. 749, 760 (1985) (quoting William Prosser, Law of Torts § 112, p. 765 (4th ed. 1971)).

Respondent's allegations here thus fall far short of what is needed to trigger presumed injury at common law. He argues instead for a much more expansive theory of presumed injury under which *any* factual error would be sufficient: injury-in-fact would exist whenever search results reflected transposed digits on an address or a misspelled middle name. Article III's injury-in-fact requirement bars litigation over such trifles. See also TransUnion Br. 15-17 (noting First Amendment concerns).

Respondent seems to contend that the mere fact that the complaint asserts "actual injury"—even though the court of appeals refused to rest its decision on that ground and even though the complaint's allegations do not satisfy the Article III standard set forth in this Court's decisions—makes this case a less attractive vehicle for resolving the issue presented than *First American Financial Corp.* v. *Edwards*, 132 S. Ct. 2536 (2012), or *First National Bank of Wahoo* v. *Charvat*, 134 S. Ct. 1515 (2014). See Opp. 7–9. But that would mean that any plaintiff could insulate an erroneous legal argument from review by this Court by including in the complaint allegations supporting multiple, legally deficient "fall-

back" contentions, even if those contentions are never addressed by any court.

Moreover, respondent cannot explain away the key distinctions favoring this case. The plaintiffs in *First American* had a direct relationship with the defendant that involved the payment of money and, the plaintiffs claimed, the equivalent of a transaction tainted by a breach of trust actionable at common law without proof of monetary injury. See Pet. 23–24; Tr. of Oral Arg. 41–45, *First American*, 132 S. Ct. 2536 (No. 10–708). The plaintiffs in *Charvat* claimed injury based on a fee charged by the defendants, alleging violation of a statute that had been repealed. *Charvat* v. *Mut. First Fed. Credit Union,* 725 F.3d 819, 821 (8th Cir. 2013), cert. denied, 134 S. Ct. 1515 (2014).

Respondent here, by contrast, had no commercial relationship of any sort with petitioner and paid no money to petitioner, and the FCRA is alive and well, generating dozens of new class actions every year. See Pet. 12–13 & n.5.

Finally, respondent mentions the other statutory violations alleged in the complaint (see Opp. 9–10; Pet. App. 4a–5a), but the complaint just asserts that Spokeo violated the cited statutes (Am. Compl. ¶¶ 61–74) without indicating whether or how respondent was injured; respondent told the Ninth Circuit only that his "personal statutory rights" were violated. C.A. Br. 39.

Under the holding below, the alleged failures to issue proper notices to providers and users of information (15 U.S.C. § 1681e(d)), or to post toll-free telephone numbers to allow consumers to request consumer reports (*id.* § 1681j(a)), arguably provide

standing to anyone who ventured on Spokeo's website without any further claim of harm. Respondent's reliance on these allegations confirms that his standing claim rests only on allegations of statutory violations without any actual injury.

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

Respondent contends (Opp. 10–12) that there is no conflict because the holdings of the Ninth and Sixth Circuits, on one hand, and the Second or Fourth Circuits, on the other, did not all involve FCRA claims.

But respondent offers no way to reconcile the holding in this case (and *Beaudry* v. *TeleCheck Services, Inc.,* 579 F.3d 702 (6th Cir. 2009)) that "alleged violations of [a plaintiff's] statutory rights are sufficient to satisfy the injury-in-fact requirement of Article III" (Pet. App. 8a) with the Fourth Circuit's diametrically opposite constitutional holding that the mere "deprivation of [a] statutory right" cannot be "sufficient to constitute an injury-in-fact for Article III standing" (*David* v. *Alphin*, 704 F.3d 327, 338–39 (4th Cir. 2013)), because that "theory of Article III standing * * * conflates statutory standing with constitutional standing." *Ibid.*

There can be no doubt that, if this case had arisen in the Fourth Circuit, that court of appeals would apply *David* to reject respondent's claim of standing based on injury-in-law—the bare fact of a statutory violation without any proof of factual injury. Or that the Second Circuit would have rejected respondent's argument based on *Kendall* v. *Employees Retirement Plan of Avon Products*, 561 F.3d 112, 121 (2d Cir. 2009). See also *Doe* v. *Nat'l Bd. of Med. Exam'rs*, 199 F.3d 146, 153 (3d Cir. 1999) (Becker, C.J., joined by

Scirica and Alito, JJ.) ("Congress * * * cannot confer standing by statute alone."); *Joint Stock Soc'y* v. *UDV N. Am., Inc.*, 266 F.3d 164, 176 (3d Cir. 2001) (Alito, J.). Indeed, the Sixth and Ninth Circuits followed that precise approach, applying to FCRA claims their prior non-FCRA decisions holding that injury-in-law suffices to establish Article III standing. Pet. 10–11.

This conflict has deepened since we filed the petition. The Federal Circuit rejected the argument that a party's statutory right to judicial review of agency action sufficed to confer Article III jurisdiction over an appeal from a patent reexamination proceeding. The court acknowledged that "Congress may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute," but—in square conflict with the decision in the present case—held that Congress's creation of a statutory right "does not eliminate the requirement that [the plaintiff] have a particularized, concrete stake in the outcome" of the case. *Consumer Watchdog*, 753 F.3d at 1262. Determining that the party invoking the statutory right lacked "an injury in fact for Article III purposes" (*ibid.*), the Federal Circuit dismissed the case for lack of standing.

Meanwhile, another court of appeals has joined the other side of the conflict: a divided panel of the Eighth Circuit followed the decision below. See *Hammer* v. *Sam's East, Inc.*, 754 F.3d 492, 500 (8th Cir. 2014).

Respondent does not dispute the ability of plaintiffs' counsel to prevent development of a conflict regarding the FCRA itself by choosing a favorable forum for nationwide class actions. See Pet. 11–12; DRI Br. 18–19; Experian Br. 11–12. Nevertheless, it is unmistakably clear that some courts of appeals

discern a difference between statutory violations and constitutional standing, that others do not, and that the ruling in this case would have differed based on where the lawsuit was filed.

C. As The Ten *Amicus* Briefs Explain, The Petition Presents A Question Of Very Substantial Importance.

Respondent claims (Opp. 15–18) that all seventeen *amici* misstate the importance of the question presented by this case. But there is a reason these parties expended the time and resources to file *amicus* briefs: The Ninth Circuit's holding has "great practical significance" because businesses are subject to a vast array of "technical legal duties" under myriad federal laws. Chamber of Commerce Br. 6.

As *amici* eBay, Facebook, Google, and Yahoo! explain, the decision below "implicates a broad swath of federal statutes that contain private rights of action and provide for statutory damages," and "invit[es] abusive and costly * * * class actions seeking millions or even billions of dollars in statutory damages under FCRA and similar statutes," including "numerous state statutes." eBay Br. 5, 11; see also Chamber of Commerce Br. 17–18 (providing examples); ACA Int'l Br. 16-17.

Specifically, "'aggregated statutory damages claims can result in absurd liability exposure in the hundreds of millions—or even billions—of dollars on behalf of a class whose actual damages are often nonexistent.'" DRI Br. 17–18 (citation omitted); see also eBay Br. 13–14 (noting $150 billion claim); Experian Br. 11–12 (exposure in another case reached "trillions"). "Under the Ninth Circuit rule, all it takes is one technical mistake to bankrupt a company."

Nat'l Ass'n of Prof'l Background Screeners Br. 12; see also Consumer Data Indus. Ass'n Br. 15, 18.

Respondent's arguments serve only to confirm the very substantial importance of this frequently recurring question.

1. Respondent scoffs (Opp. 18) at our description of the frequency with which FCRA class actions are filed (see Pet. 12–14 & nn.4–6), but the flood of lawsuits continues.[2]

That is not surprising given the impact of the decision below. Class certification is easier when injury-in-law can establish standing, because otherwise-disparate claims of causation and damages are transformed into class-wide common issues. See Pet. 15–16; *Ramirez* v. *Trans Union LLC*, 2014 WL 3734525, at *9-11, *14 (N.D. Cal. July 24, 2014) (certifying class because decision below rendered irrelevant "individualized question" whether class members were "actually injured"). Indeed, almost any FCRA class action could be recast in terms of an abstract, purely statutory harm. See Pet. 14–15.

2. Respondent also contends (Opp. 16) that the question here whether injury-in-law satisfies Article III standing for claims under the FCRA differs from whether a bare violation of other statutes satisfies Article III. But respondent does not explain why the same constitutional standard would apply differently, and cannot identify any material differences in the respective statutory formulations. See also Pet. 16–19.

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[2] Since the petition was filed, 46 additional putative class actions seeking statutory damages under the FCRA have been filed.

In fact, recent decisions demonstrate that courts embracing the injury-in-law theory apply it broadly to claims under different statutes. Thus, the Ninth Circuit has applied the very same theory to the Electronic Communications Privacy Act. See *In re Zynga Privacy Litig.*, 750 F.3d 1098, 1105 n.5 (9th Cir. 2014) ("Because the plaintiffs allege that Facebook and Zynga are violating statutes that grant persons in the plaintiffs' position the right to judicial relief, we conclude they have standing to bring this claim.").

The Ninth Circuit also relied on the decision below to find standing in a Fair Debt Collection Practices Act class action where the named plaintiff "could not have suffered any pecuniary loss or mental distress as the result of a letter that he did not encounter until months after it was sent—when related litigation was already underway." *Tourgeman* v. *Collins Fin. Servs., Inc.*, 2014 WL 2870174, at *5 (9th Cir. June 25, 2014). It was sufficient for Article III purposes, the court concluded, that the plaintiff asserted a "violation of his right not to be the target of misleading debt collection communications." *Ibid.* See also *Lea* v. *Buy Direct L.L.C.*, 755 F.3d 250, 254 (5th Cir. 2014) (court did "not perceive any harm here," but concluded, without addressing Article III, that "harm is not a prerequisite for relief" under the Truth in Lending Act); *Opperman* v. *Path, Inc.*, 2014 WL 1973378 (N.D. Cal. May 14, 2014) (applying decision below to find standing for several federal and state statutory claims).

3. Respondent maintains (Opp. 17) that reversing the decision below would simply displace no-injury class actions from federal to state court. That possibility provides no basis to disregard the limits of Article III, and is unlikely for several reasons, among

them that many state courts apply standing principles that restrict access to the courts by uninjured parties and nationwide class actions in state court would often violate constitutional limits on state court authority.

D. The Ninth Circuit's Holding Is Wrong.

Respondent offers only a cursory defense of the actual holding below. See Opp. 12–15. That effort chiefly consists of repackaging this Court's observation that "[t]he actual or threatened injury required by Art. III may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing.'" *Warth* v. *Seldin*, 422 U.S. 490, 500 (1975) (quoting *Linda R.S.* v. *Richard D.*, 410 U.S. 614, 617 n.3 (1973)).

But respondent never mentions, let alone explains, this Court's more recent clarification "that Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing." *Raines* v. *Byrd*, 521 U.S. 811, 820 n.3 (1997). Respondent instead assumes a contrary conclusion: that, by providing a statutory cause of action without explicitly requiring proof of harm, Congress can confer constitutional standing on parties who have no injury-in-fact. And he does not dispute that the Ninth Circuit's circular approach to injury-in-fact would mean that the causation and redressability requirements were automatically met in such cases (see Pet. 7–8, 21–22), and that as a result Congress could massively expand the jurisdiction of the federal courts whenever it authorized statutory damages (see Pet. 22).

Respondent also advances a strained analogy to copyright (Opp. 14), but copyright confers a "property" interest—"the right to exclude others"—upon which an infringer trespasses. *Fox Film Corp.* v. *Doyal,* 286 U.S. 123, 127 (1932). Nothing remotely similar is at issue under FCRA (or other statutes with similar private-action provisions).

Ultimately, respondent is reduced to relying on the chestnut that every wrong has a remedy. Opp. 13. But respondent has not in fact been injured by any "wrong" here. And Article III limits the federal courts to claims involving an actual injury.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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