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

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether Congress may confer Article III standing upon a plaintiff who suffers no concrete harm, and who therefore could not otherwise invoke the jurisdiction of a federal court, by authorizing a private right of action based on a bare violation of a federal statute.

RULE 29.6 STATEMENT

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

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 742 F.3d 409. The order of the district court granting petitioner's motion to dismiss the complaint (Pet. App. 11a-14a) is unreported but is available at 2011 WL 597867. The order of the district court granting in part and denying in part petitioner's motion to dismiss the first amended complaint (Pet. App. 15a-22a) is unreported but is available at 2011 WL 1793334. The order of the district court "correcting prior ruling and finding moot motion for certification" for interlocutory appeal, and dismissing the case (Pet. App. 23a-24a), is unreported but is available at 2011 WL 11562151.

JURISDICTION

The judgment of the court of appeals was entered on February 4, 2014. The petition for a writ of certiorari was filed on May 1, 2014, and was granted on April 27, 2015. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

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

The pertinent provisions of the Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq.*, are set forth at App., *infra*, 1a-6a.

STATEMENT

The "doctrine of standing" is "an essential and unchanging part of the case-or-controversy require-

ment of Article III." *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 (1992). The "irreducible constitutional minimum" for establishing standing is that a "plaintiff must have suffered an 'injury in fact,'" by sustaining an "actual or imminent" harm that is "concrete and particularized." *Ibid.* (quotation marks omitted).

Yet the court of appeals permitted respondent Thomas Robins to maintain a lawsuit in federal court based solely on an injury in law untethered to any concrete harm—in other words, without any real-world injury. Respondent alleges that petitioner Spokeo, Inc. violated the Fair Credit Reporting Act (FCRA) by publishing inaccurate information about him and by failing to provide third parties with various notices required by the statute. Relying on these bare statutory violations, respondent filed a putative class action, seeking the maximum statutory damages of $1,000 per violation on behalf of a putative class with millions of potential members.

Because respondent did not allege any concrete harm, the district court dismissed his claims for lack of standing. See Pet. App. 13a-14a. The Ninth Circuit reversed, however, holding that the allegation of a violation of the FCRA with respect to information about respondent by itself establishes injury in fact even when there is no concrete harm. See Pet. App. 8a.

If allowed to stand, that decision would eviscerate Article III's standing requirements by rendering the injury-in-fact requirement an empty formality. A dispute could engage the federal judicial power whenever a plaintiff alleged a violation of any technical requirement imposed under the FCRA or many other statutes. As we explain, however, Article III

does not extend standing to a plaintiff who has not suffered concrete harm.

A. The Fair Credit Reporting Act.

The FCRA imposes specific obligations on "consumer reporting agencies" with respect to the consumer information they transmit. As pertinent here, the FCRA limits the circumstances in which consumer reporting agencies may provide "consumer report[s] for employment purposes" (15 U.S.C. § 1681b(b)(1)) and requires such agencies to "follow reasonable procedures to assure maximum possible accuracy of" consumer reports (*id.* § 1681e(b)); to issue notices to providers and users of information (*id.* § 1681e(d)); and to post toll-free telephone numbers to allow consumers to request consumer reports (*id.* § 1681j(a)). See Pet. App. 4a-5a.

A negligent violation of these requirements "with respect to any consumer" subjects a consumer reporting agency to "actual damages," attorney's fees, and costs. 15 U.S.C. § 1681*o*(a). For "willful" violations such as those alleged here, however, a consumer may choose between "actual damages" and statutory "damages of not less than $100 and not more than $1,000," *id.* § 1681n(a)(1), and also may seek punitive damages. *Id.* § 1681n(a)(2).

B. Spokeo's Search Engine.

Petitioner Spokeo, Inc., operates a "people search engine." Spokeo's search engine aggregates publicly available information regarding individuals from phone books, social networks, marketing surveys, real estate listings, business websites, and other sources into a database that is searchable via the Internet using an individual's name, phone number, email, or physical address, and displays the results

of searches in an easy-to-read format. During the time relevant to this action, the bottom of every search results page stated:

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

C.A. Supp. Excerpts of Record (ER) 22.

In particular, Spokeo warned its users that "none of the information offered by Spokeo is to be considered for purposes of determining any entity or person's eligibility for credit, insurance, employment, or for any other purposes covered under FCRA." C.A. Supp. ER 22. Additionally, to access the "Wealth" section of search results, users had to agree that "[n]one of the information offered by Spokeo is to be considered for purposes of determining a consumer's eligibility for credit, insurance, employment, or for any other purpose authorized under the FCRA." C.A. Supp. ER 25.

C. Respondent's Lawsuit.

Respondent Thomas Robins instituted a putative class action against Spokeo, alleging that Spokeo is a "consumer reporting agency" that issues "consumer reports" in violation of the FCRA.[1] See Pet. App. 19a-20a. Respondent alleged that the search results associated with his name included inaccurate information indicating that he has more education and professional experience than he actually does have;

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[1] Spokeo disputes Robins's claims that it is a "consumer reporting agency" within the meaning of the FCRA, and that its search engine results are "consumer reports."

that he is married (although in fact he is not); and that he is better situated financially than he really is. Pet. App. 2a; J.A. 14. Respondent did not allege that he had contacted Spokeo to ask it to correct or remove the search results pertaining to him.

In addition, respondent alleged several other theories of liability, contending that Spokeo: (1) failed to issue notices to providers and users of information pursuant to § 1681e(d); (2) failed to ensure that employers who sought consumer reports for purposes of making employment decisions complied with the FCRA's disclosure requirements under § 1681b(b)(1); and (3) violated § 1681j(a)(1)(c) and 12 C.F.R. § 1022.136 by failing to provide consumers with a toll-free number to request annual reports. Pet. App. 4a-5a; J.A. 18-23.

D. Proceedings In The District Court.

The district court dismissed respondent's initial complaint with leave to amend, holding that he had failed to allege an injury in fact because he had not alleged "any actual or imminent harm." See Pet. App. 2a. The court explained that respondent's allegations of possible future effects on "his ability to obtain credit, employment, insurance, and the like" do not satisfy Article III's standing requirements. *Ibid.* (quotation marks omitted).

Respondent's amended complaint alleged that the inaccurate information collected in Spokeo's search results had harmed his "employment prospects." Pet. App. 2a (quotation marks omitted). He also alleged that his continued unemployment had cost him money and that he had experienced "anxiety, stress, concern, and/or worry about his diminished employment prospects." *Ibid.* (quotation marks omitted). The district court initially held that the amend-

ed allegations amounted to injury in fact. Pet. App. 3a. After Spokeo sought certification of an interlocutory appeal under 28 U.S.C. § 1292(b), however, the district court reconsidered its views and dismissed the case with prejudice based on the Article III analysis in its original dismissal order. *Ibid*.

E. The Court of Appeals' Decision.

The Ninth Circuit reversed, holding that the "creation of a private cause of action to enforce a statutory provision implies that Congress intended the enforceable provision to create a statutory right," and that "the violation of a statutory right is usually a sufficient injury in fact to confer standing." Pet. App. 6a (citing *Edwards* v. *First American Corp*., 610 F.3d 514, 517 (9th Cir. 2010), cert. granted, 131 S. Ct. 3022 (2011), cert. dismissed as improvidently granted, 132 S. Ct. 2536 (2012)).

In the court of appeals' view, "the statutory cause of action *does not require a showing of actual harm* when a plaintiff sues for willful violations." Pet. App. 6a (emphasis added). The court therefore concluded that actual harm is also unnecessary to establish constitutional injury in fact. Instead, the court held that respondent had "satisf[ied] the injury-in-fact requirement of Article III" because "he allege[d] that Spokeo violated *his* statutory rights, not just the statutory rights of other people," and because his "personal interests in the handling of his credit information are individualized rather than collective." Pet. App. 8a.

The court of appeals specifically refused to rest its ruling on the alleged harm to respondent's employment prospects and related anxiety: "[b]ecause we determine that Robins has standing by virtue of the alleged violations of his statutory rights, we do

not decide whether [those alleged harms] could be sufficient injuries in fact." Pet. App. 9a n.3. The court of appeals declined to construe the statutory damages provision as an alternate measure of damages rather than a substitute for injury in fact, perceiving no "difficult constitutional questions" to be avoided. Pet. App. 6a-7a n.2.

The Ninth Circuit recognized that its analysis had the practical effect of turning the three-part test for Article III standing into a single-factor inquiry that was satisfied by the availability of a statutory remedy. See Pet. App. 9a. As the court of appeals put it, "[w]hen the injury in fact is the violation of a statutory right * * * inferred from the existence of a private cause of action, causation and redressability will usually be satisfied." *Ibid.* In other words, causation is self-evident, because the statutory violation *is* the injury. *Ibid.* And the presence of a statutory remedy guarantees redressability, since there is no injury to redress apart from the statutory violation itself. *Ibid.*

SUMMARY OF THE ARGUMENT

Article III's restriction of the "judicial power of the United States" to "cases" and "controversies" requires a private plaintiff to demonstrate his or her standing to maintain an action in federal court. The most important element of the standing inquiry is the existence of an injury in fact that is "concrete," "actual," and "particularized." *Lujan*, 504 U.S. at 560. This Court has recognized a variety of types of harm that can constitute injury in fact, including pecuniary loss; lost business opportunities; loss of enjoyment of public resources; and discriminatory treatment based on race, sex or some other prohibited characteristic.

The Ninth Circuit held that respondent could satisfy the injury-in-fact requirement without alleging any of these concrete harms. It concluded that his allegation of a violation of "his statutory rights"—standing alone—sufficed to establish injury in fact. Pet. App. 8a. That determination is inconsistent with this Court's precedents and with the Constitution's text and history.

To begin with, this Court has consistently held that Congress may not override Article III's requirement of injury in fact. "[T]he requirement of injury in fact is a hard floor of Article III jurisdiction that cannot be removed by statute." *Summers* v. *Earth Island Inst.*, 555 U.S. 488, 497 (2009).

That "hard floor" necessitates allegations of concrete harm: the Constitution's text and history—and the common law tradition at the time of the Founding—show that concrete harm is essential to establish injury in fact. The "case" or "controversy" requirement limits the federal judicial power to matters that the Framers would have recognized as appropriate for resolution by courts—the types of disputes familiar to lawyers trained in the Anglo-American legal tradition. That tradition confined courts' authority to disputes involving concrete harms.

Separation-of-powers principles confirm that the federal judicial power is limited to resolving cases involving concrete harm. Requiring a plaintiff to demonstrate concrete harm ensures that courts do not stray beyond their limited sphere of authority, prevents Congress from impermissibly delegating to private plaintiffs the Executive's duty to enforce the law, and protects individual liberty against the unaccountable, arbitrary exercise of private discretion.

The requirement of concrete harm is particularly important in cases like this one, where use of the class-action device to aggregate millions of statutory damages claims allows private plaintiffs to encroach more significantly upon the prosecutorial role of the Executive Branch, and pose a greater threat of arbitrariness, heightening separation-of-powers concerns.

Respondent's allegations of violations of the FCRA do not satisfy Article III's concrete harm requirement for multiple reasons.

First, a legal violation without concrete harm (*i.e.*, an injury in law) does not satisfy the injury-in-fact requirement. The court of appeals' contrary conclusion cannot be squared with Article III itself, this Court's standing precedents, or the separation-of-powers principles on which they rest. Injury in fact requires real-world harm, not just a bare statutory violation.

Second, the availability of statutory damages cannot substitute for concrete harm. It has long been established that the "private interest" in the outcome of a suit created by a statutory bounty is "insufficient to give a plaintiff standing." *Vermont Agency of Natural Res.* v. *United States ex rel. Stevens*, 529 U.S. 765, 772 (2000). Nor is the requirement of concrete harm somehow vitiated by the ability of plaintiffs in certain circumstances to recover presumed damages. That is because presumed damages are limited to those who suffer concrete harm: their purpose is to ensure a recovery in situations in which there may be problems of quantification and proof, not to provide damages to uninjured plaintiffs.

Third, respondent cannot avoid the concrete harm requirement by analogizing his claims to a

common law defamation action. Most of respondent's claims do not require proof of a false statement, and therefore bear no relationship to defamation. Moreover, defamation at common law required proof of harm. The narrow circumstances in which injury is presumed—when the false information exposes the plaintiff "to hatred, contempt, or ridicule," *Milkovich* v. *Lorain Journal Co.*, 497 U.S. 1, 13 (1990)—are not presented here, where the claimed false statements asserted that respondent was married with children and overstated his financial resources and education.

Fourth, respondent's allegations of possible harm to his employment prospects—contentions that the court of appeals did not address—fall far short of the concrete harm required to establish a case or controversy. Respondent alleges only a "highly attenuated chain of possibilities" that depend upon the "decisions of independent actors"—the precise situation that his Court has held insufficient to demonstrate injury in fact. *Clapper* v. *Amnesty Int'l USA*, 133 S. Ct. 1138, 1148, 1150 (2013).

This Court accordingly should hold that respondent's allegations of bare violations of federal statutes, without any accompanying concrete harm, are insufficient to establish injury in fact and, consequently, respondent lacks Article III standing.

But even if the Court concludes that a naked allegation of a statutory violation might satisfy the injury-in-fact standard, it should hold that the FCRA does not open the federal courts to plaintiffs who are unable to demonstrate concrete harm, because Congress has not clearly stated its intent to do so. In a variety of contexts, this Court has required Congress to speak clearly before interpreting a statute to disrupt the constitutional balance.

That rationale applies here. Because Congress did not clearly state its intent to displace the long-established concrete harm requirement—it did not "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)—the FCRA should be interpreted to preserve that requirement, and permit recovery of statutory damages only if the plaintiff demonstrates concrete harm from the statutory violation.

ARGUMENT

I. THE CONSTITUTION'S INJURY-IN-FACT REQUIREMENT IS NOT SATISFIED BY AN INJURY IN LAW UNACCOMPANIED BY CONCRETE HARM.

Article III limits the federal "judicial Power" to the resolution of "Cases" or "Controversies." U.S. CONST. art. III, § 2. "'No principle is more fundamental to the judiciary's proper role in our system of government than th[is] constitutional limitation of federal-court jurisdiction to actual cases or controversies.'" *Raines* v. *Byrd*, 521 U.S. 811, 818 (1997) (quoting *Simon* v. *E. Ky. Welfare Rights Org.*, 426 U.S. 26, 37 (1976)).

Standing principles delineate "the 'Cases' and 'Controversies' that are of the justiciable sort referred to in Article III." *Lujan*, 504 U.S. at 560. To demonstrate standing, a plaintiff bears the burden of showing that he

> (1) * * * has suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and

> (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Friends of the Earth, Inc. v. *Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 180-81 (2000). Injury in fact is the "indispensable element of a dispute which serves in part to cast it in a form traditionally capable of judicial resolution." *Schlesinger* v. *Reservists Comm. to Stop the War*, 418 U.S. 208, 220-21 (1974).

The question in this case is whether respondent's assertion of statutory violations relating to information about him—unaccompanied by any concrete and particularized harm—constitutes injury in fact sufficient to satisfy Article III. This Court's precedents make clear that the answer to that question is "no."

First, Article III establishes a minimum injury requirement that Congress may not override. *Second*, that constitutional minimum requires actual or imminent concrete harm—a violation of law without harm does not suffice. The concrete harm requirement was applied by the English courts familiar to the Framers and is necessary to ensure the Judiciary's limited role in our system of separated powers, to prevent Congress from transferring to private parties authority that the Constitution reserves to the Executive Branch, and to protect the liberty that is the Constitution's fundamental guarantee.

Third, respondent cannot satisfy the concrete harm requirement. His allegation of legal violations without pecuniary or any other harm does not suffice. That the violations relate to information about him—as opposed to information about someone else—does not create the harm that Article III requires. Nor does Congress's authorization of a bounty

in the form of statutory damages substitute for concrete harm. Finally, the treatment of defamation actions at common law confirms that respondent's claim does not qualify as a case or controversy.

A. This Court Has Consistently Held That Congress May Not Vitiate Article III's Requirement Of Injury In Fact.

It is "settled that Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing." *Raines*, 521 U.S. at 820 n.3 (citing *Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. 91, 100 (1979)).

Of course, Congress may "expand standing to the full extent permitted by Art. III, thus permitting litigation by one 'who otherwise would be barred by *prudential* standing rules.'" *Gladstone*, 441 U.S. at 100 (emphasis added).

But "[i]n no event * * * may Congress abrogate the Art. III minima" requiring that the plaintiff has "suffered a distinct and palpable injury to himself that is likely to be redressed if the requested relief is granted." *Ibid.* (quotation marks and citation omitted); see also *Valley Forge Christian Coll.* v. *Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 487 n.24 (1982) ("Neither the Administrative Procedure Act, nor any other congressional enactment, can lower the threshold requirements of standing under Art. III.").

Indeed, the injury-in-fact requirement is the element of standing *most* insulated from congressional override. Congress arguably may "loosen the strictures of the redressability prong," for instance, by creating a statutory cause of action and providing for

a statutory remedy, but "the requirement of injury in fact is a hard floor of Article III jurisdiction that cannot be removed by statute." *Summers*, 555 U.S. at 497.

Some lower courts, including the court below (Pet. App. 5a-6a), have nonetheless held that Congress may override the Constitution's injury-in-fact requirement. They rely on this Court's statement 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)). That interpretation of *Warth* is wrong for three reasons.

First, the Court in *Warth* itself explained that while "Congress may grant an express right of action to persons who otherwise would be barred by *prudential* standing rules," "Art. III's requirement remains: the plaintiff still must allege a *distinct and palpable injury* to himself." *Id.* at 501-02 (emphases added). And the Court concluded that none of the plaintiffs in *Warth* had standing, because none had "allege[d] specific, concrete facts demonstrating that the challenged practices harm[ed] him," *id.* at 508—making clear that the constitutional requirement remained in full force.

Second, the Court has explained that *Warth* and *Linda R.S.* stand only for the proposition that Congress may "elevat[e] to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law." *Lujan*, 504 U.S. at 578. If the plaintiff has suffered concrete harm sufficient to qualify as an "injury in fact" under Article III—but there is no remedy at law for that injury—Congress

may create a remedy. See *ibid.*; see also *Vermont Agency*, 529 U.S. at 773 (citing *Warth* for the proposition that "Congress can[] define new legal rights, which in turn will confer standing to vindicate *an injury* caused to the claimant") (emphasis added); RICHARD H. FALLON, JR. ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 144 (6th ed. 2009).

It is only in this way that "'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.'" *Massachusetts* v. *EPA*, 549 U.S. 497, 516 (2007) (quoting *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring)); see also *id.* at 517 (emphasizing that "'the party bringing suit must show that the action injures him in a concrete and personal way'") (quoting *Lujan*, 504 U.S. at 581 (Kennedy, J., concurring)).

Third, the Court in *Lujan* explained that the elevation of a concrete injury in fact into a cognizable legal claim is the situation that the Court addressed in *Trafficante* v. *Metropolitan Life Insurance Co.*, 409 U.S. 205 (1972), and *Hardin* v. *Kentucky Utilities Co-op.*, 390 U.S. 1 (1968)—the two cases on which *Linda R.S.* (and thus *Warth* as well) relied. See *Lujan*, 504 U.S. at 578.

Trafficante involved the standing of the white tenants of an apartment complex to assert claims under the Civil Rights Act of 1968 challenging the racially-discriminatory practices of their landlord. The Court held that the tenants had alleged "injury in fact" in "the loss of important benefits from interracial associations" caused by the landlord's "exclusion of minority persons from the apartment complex." *Trafficante*, 409 U.S. at 209-10.

In particular, the tenants alleged that they "had suffered embarrassment and economic damage in social, business, and professional activities from being 'stigmatized' as residents of a 'white ghetto,'" missing "business and professional advantages which would have accrued if they had lived with members of minority groups." *Id.* at 208. That concrete harm was elevated to a legally cognizable cause of action by the Civil Rights Act of 1968.

Hardin is an even clearer example of an injury in fact rendered legally cognizable by statute. The *Hardin* Court held that a private utility company had standing to seek to enjoin the Tennessee Valley Authority (TVA) from supplying cheap power to a new municipal power system that competed with the private utility. The private company suffered palpable economic harm—the loss of customers to the cheaper municipal competitor. Ordinarily, "economic injury which results from lawful competition [could not], in and of itself, confer standing on the injured business to question the legality of any aspect of its competitor's operations"—because very few laws create a private cause of action for damages suffered from mere competition. *Hardin*, 390 U.S. at 5-6. But Congress—by enacting a statute restraining the operations of the TVA in order to protect private competitors—had created a new legal claim to vindicate that already-existing economic injury. *Id.* at 6-7.

In sum, this Court's precedents make clear that Congress may create new causes of action that elevate concrete harm into a cognizable legal claim, but it may not create injury in fact by fiat. *Summers*, 555 U.S. at 497; *Lujan*, 504 U.S. at 578. "[The Court's] prior cases * * * were consistent with the injury in fact requirement, because in those cases the statutes in question elevated injuries that were not previously

legally cognizable to the status of legally enforceable rights." John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 Duke L.J. 1219, 1228 (1993).

The Court's recognition "that Article III is a constraint on Congress's power to assign matters to the federal courts" is hardly surprising, "because the legislature is not supreme in our system of government—the Constitution is." *Id*. at 1229.

B. The Constitution's Text And History—And The Controlling Common Law Background—Establish That Concrete Harm Is Essential For A Dispute To Qualify As A "Case" Or "Controversy."

The terms "case" and "controversy" derive their meaning from "the Constitution's central mechanism of separation of powers" and the "common understanding of what activities are appropriate to legislatures, to executives, and to courts." *Lujan*, 504 U.S. at 559-60; accord *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 102 (1998). That "common understanding" requires proof of concrete harm, not just violation of a legal requirement, because both were recognized as necessary to render a dispute a proper "case" or "controversy" for judicial resolution at the time the Constitution was adopted—and the Framers incorporated that standard into Article III. Moreover, any other rule would extend judicial authority beyond its proper sphere, enable Congress to encroach upon the Executive Branch's law enforcement prerogatives, and threaten the liberty that the separation of powers protects.

1. Article III, Section 2 Limits The Federal Judicial Power To Disputes The Framers Would Have Recognized As Appropriate For Resolution By Courts.

The Constitution's "cases" and "controversies" requirement ensures that the "[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.); see also *Vermont Agency*, 529 U.S. at 774 (quoting Justice Frankfurter's explanation in *Coleman*); *Steel Co.*, 523 U.S. at 102 (the provision limits federal courts to "cases and controversies of the sort traditionally amenable to, and resolved by, the judicial process").

The drafting history of Article III, Section 2 confirms that limitation on the judicial power.

Initial versions of the constitutional provision would have authorized the federal courts to adjudicate a broad range of disputes. The Virginia Plan did not impose any textual limit restricting the federal courts to suits of a judicial nature. Rather, it extended inferior court jurisdiction to "questions which may involve the national peace and harmony." 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 22 (Max Farrand ed., 1966) ("FARRAND'S RECORDS") (reporting resolutions proposed by Edmund Randolph). The Committee of Detail subsequently expanded this provision, resolving that the lower courts should have jurisdiction over "Cases arising under the Laws passed by the general Legislature, and to such other Questions as involve the national Peace and Harmony." 2 FARRAND'S RECORDS at 132-33.

That very broad conception of judicial power reflected the view of the advocates for a strong national government, who pressed for a federal judiciary with expansive authority to enforce federal law. Alexander Hamilton, for example, would have created a federal judiciary that was not explicitly limited by contemporaneous understandings of the type of cases eligible for judicial resolution, but could "determin[e] * * * all matters of general concern." 1 FARRAND'S RECORDS 292.[2]

Champions of a more limited government, by contrast, argued against a federal judiciary that would displace state courts. See, *e.g.*, *id.* at 242-45 (describing William Paterson's "New Jersey Plan" which would provide only for federal appellate review of state court adjudication of questions arising under federal law).

Article III, Section 2 emerged as a compromise between these two views. It conferred authority sufficient to permit enforcement of federal laws, but limited the types of disputes that federal courts could resolve.

Thus, the Committee of Detail reported a first draft of the Constitution that removed the broad grant of authority to decide "other Questions as involve the national Peace and Harmony." Compare 2 FARRAND'S RECORDS at 133, with *id.* at 186. That language seemingly would have extended the judicial power to issuance of advisory opinions, resolving disputes in the absence of injury in fact, or otherwise

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[2] See also 3 FARRAND'S RECORDS 616 (describing Roger Sherman's proposal that the legislative branch have broad authority to establish lower courts and to "ascertain their respective powers and jurisdictions").

addressing matters not traditionally subject to judicial resolution.

The Committee of the Whole further narrowed this provision by substituting "judicial Power" for "jurisdiction," thereby incorporating the contemporaneous understanding of the scope of judicial authority. *Id.* at 425. See also *id.* at 430 (discussing debate over Madison's proposal to explicitly limit the cases subject to the "judicial power" to those of a "Judiciary Nature," and describing the rejection of that amendment as unnecessary, "it being generally supposed that the jurisdiction was constructively limited to cases of a Judiciary nature").

This drafting history confirms that the federal "judicial Power" is confined to those matters familiar to the Framers as disputes appropriate for resolution in court. The English legal tradition, to which we now turn, is the source of that contemporaneous understanding. See *Sprint Commc'ns Co.* v. *APCC Servs., Inc.*, 554 U.S. 269, 274 (2008) ("We have often said that history and tradition offer a meaningful guide to the types of cases that Article III empowers federal courts to consider."); *Coleman*, 307 U.S. at 460 (opinion of Frankfurter, J.) (in crafting Article III, "the framers * * * gave merely the outlines of what were to them the familiar operations of the English judicial system and its manifestations on this side of the ocean before the Union"). It confirms that concrete harm is a necessary precondition for a judicial "case" or "controversy."

2. The English Legal Tradition Confined The Courts' Authority To Disputes Involving Concrete Harms.

In the English legal tradition familiar to the Framers, a concrete harm was a necessary element

of any judicial dispute—the violation of a legal right by itself did not suffice.

The English legal system began with the King's resolution of disputes that threatened the peace. F.W. MAITLAND, THE FORMS OF ACTION AT COMMON LAW 314 (1929) (describing limited role of royal justice in period from 1066-1154); 1 W.S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 23-26 (1903) (describing emergence of royal courts). The parties were "landowners, many of whom were warriors by trade"; the "claims" involved disputes over ownership of property and similarly grave matters that otherwise would have been resolved by force of arms. JOHN LANGBEIN ET AL., THE HISTORY OF THE COMMON LAW 86 (2009). Indeed, the principal purpose of the early royal civil justice system was to provide an alternative to "the resolution of disputes [by] private warfare." *Ibid*.

The writ of trespass—the root of much of modern law—has similar origins as a mechanism for resolving violent disputes that inflicted serious harm. It emerged from the criminal context, providing a remedy when the "defendant is charged [by the plaintiff] with a breach of the king's peace, though with one that does not amount to felony." MAITLAND at 343-44. The writ permitted lawsuits if, "with force and arms the defendant has assaulted and beaten the plaintiff, broken the plaintiff's close, or carried off the plaintiff's goods, he is sued for damages." *Id.* at 343. The requirement that a plaintiff allege "trespass *vi et armis*" ("trespass with force and arms") became largely fictional, but the writ remained grounded in physical invasion sufficient to "breach the king's peace." *Id.* at 344.

Ultimately, the early English legal system generated a limited set of writs to remedy a defined set of

harms. While it became a truism that every legal wrong had a remedy, see 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *23 (1st ed. 1768), that was because legal wrongs—the category of wrongs justifying the exercise of judicial authority—were in each case defined to require a showing of concrete harm. Maitland thus explained that a plaintiff "may find that, plausible as his case may seem, it just will not fit any of the receptacles provided by the courts and he may take to himself the lesson that where there is no remedy there is no wrong." MAITLAND at 298-99.

Blackstone enumerated the "several injuries cognizable by the courts of common law, with * * * respective remedies applicable to each particular injury." 3 BLACKSTONE, COMMENTARIES *115. Each legal wrong that Blackstone identified involved the infliction of concrete harm on a person or property, making clear that such harm was a prerequisite for asserting a claim in court. These wrongs included, for example, harms "affecting the limbs or bodies of individuals" (*id.* at *120); "threats and menaces of bodily hurt" (*ibid.*); "selling him bad provisions or wine" (*id.* at *122); "exercise of a noisome trade, which infects the air in his neighborhood" (*ibid.*); "neglect or unskillful management of his physician, surgeon, or apothecary" (*ibid.*); "injuries, affecting a man's reputation or good name"—*i.e.*, slander and defamation (*id.* at *123); "preferring malicious indictments or prosecutions against him" (*id.* at *126); "false imprisonment" (*id.* at *127); "injuries that may be offered to a person, considered as a husband" (*id.* at *139), "parent" (*id.* at *140), or "guardian" (*id.* at *141) (*i.e.*, injuries to one's spouse, child, or ward); interfering with performance of a servant's duties (*id.* at *141); injuries to personal property (*id.* at

*145); contract-related wrongs, mainly, breaches of contract (*id.* at *153-66); and "real injuries * * * or injuries affecting real rights" (*id.* at *167)—*i.e.*, injuries to real property (*id.* at *167-253).

English cases confirm that a showing of harm was required for courts to entertain a claim.

For example, Sir Edward Coke reported in *Robert Marys's Case*, 9 Co. Rep. 110b, 113a note (D), 77 Eng. Rep. 895, 898 (K.B. 1613), that *injuria* (legal injury) and *damnum* (damage) must be present in an action on the case regarding overgrazing of the common. See also *Atkinson* v. *Teasdale*, 3 Wils. K.B. 282, 288, 95 Eng. Rep. 1054, 1059 (C.P. 1772) (de Grey, C.J.) (explaining that a plaintiff "must be damaged to intitle him" to bring an action for trespass on the case); *Woolton* v. *Salter*, 3 Lev. 104, 104, 83 Eng. Rep. 599, 599 (C.P. 1683) (same).

Justice Dodderidge likewise stated in *Cable* v. *Rogers*, 3 Bulst. 312, 312, 81 Eng. Rep. 259, 259 (K.B. 1625) that "*injuria absque damno*" ("injury without damage") was not actionable, and a 1611 decision of the Court of Common Pleas explained that a commoner could bring an action against a stranger who inflicted "a damage whereby [the commoner] los[t] [his] common," but "no action lieth" when no harm is suffered by a putative plaintiff—and therefore a master could not maintain suit against a third party for the third-party's assault on his servant if the master did not "lose his service." *Crogate* v. *Morris*, 1 Brown. & Golds. 197, 197, 123 Eng. Rep. 751, 751 (C.P. 1611). See also *Planck* v. *Anderson*, 5 T.R. 37, 40-41, 101 Eng. Rep. 21, 23 (K.B. 1792) (barring action where plaintiff was not prejudiced by sheriff's failure to maintain custody over a defendant because the defendant/prisoner was available at the time he

was required); *Wylie* v. *Birch*, 4 Q.B. 565, 577, 114 Eng. Rep. 1011, 1015 (Q.B. 1843) (no action for breach of a sheriff's duty to levy goods unless the breach causes damage to the plaintiff).

English courts also allowed suits to proceed on the basis of imminent concrete harm. Thus, in *Mayor of London* v. *Mayor of Lynn*, VII Brown 120, 125, 3 Eng. Rep. 78, 82 (H.L. 1796), the House of Lords permitted a suit over the right of Londoners to be toll-free to proceed, "not for an actual damage, nor for an actual injury, but merely for damage and injury feared" from the obligation to pay a toll.

The required concrete harm was not limited to pecuniary losses. In the well-known case of *Ashby* v. *White* for example, the House of Lords reversed a decision of the Queen's Bench regarding an election law dispute. Grounding its decision in the prohibition against suits alleging "*injuria sine damno*" ("injury without damage"), the Queen's Bench had concluded that an elector was not prejudiced by refusal to allow him to vote. *Ashby* v. *White*, 6 Mod. 45, 46, 87 Eng. Rep. 808, 810 (Q.B. 1703). The House of Lords reversed on the ground that a refusal to permit a remedy in this circumstance was "destructive of the Property" of the plaintiff. *Ashby* v. *White*, 17 J. House L. 526, 534 (1704). See *Ashby* v. *White*, 1 Brown 62, 64, 1 Eng. Rep. 417, 418 (H.L. 1704).

Chief Justice Holt's dissent in the Queen's Bench provides the most complete legal analysis supporting the ultimate decision.[3] Chief Justice Holt made clear that not all damage is pecuniary, and that it is no

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[3] The 1704 report of the House of Lords consisted of four short paragraphs reflecting what the House "resolved," along with a "State of the Case." See 17 J. House L. at 534.

"little thing" to obstruct the "privilege of giving a vote in the election of a person in whose power my life, estate, and liberty lie." *Ashby*, 87 Eng. Rep. at 815-16 (Holt, C.J., dissenting).[4]

Thus, while the opinion is famous for its language justifying the judicial vindication of violations of legal rights, *Ashby*, 87 Eng. Rep. at 816 (Holt, C.J., dissenting), the action was nonetheless grounded in a cognizable concrete harm—the denial of the right to vote, which was viewed as a property right. As Justice Frankfurter made clear, "'Private damage' is the clue to the famous ruling in *Ashby v. White*, [citing Chief Justice Holt's dissent], and determines its scope as well as that of cases in this Court of which it is the justification." *Coleman*, 307 U.S. at 469 (opinion of Frankfurter, J.); see also *Nixon* v. *Herndon*, 273 U.S. 536, 540 (1927) (Holmes, J.) ("That private damage may be caused by such political action and may be recovered for in suit at law hardly has been doubted for over two hundred years, since *Ashby v. White*, * * * .").

Ashby v. *White*, moreover, emphasized the importance of vindicating rights that otherwise could be deemed waived. See *Ashby* v. *White*, 2 Ld. Raym. 938, 953-54, 92 Eng. Rep. 126, 136 (Q.B. 1703) (Holt, C.J., dissenting) (arguing that a right not vindicated is a right lost). Courts applied this rationale to property rights, see, *e.g.*, *Marzetti* v. *Williams*, 1 B. & Ad. 415, 426, 109 Eng. Rep. 842, 846 (K.B. 1830) (Taunton, J.) ("Trespass, quare clausum fregit [*i.e.*, by intruding on one's "close," or private land], is maintainable for an

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[4] American courts likewise concluded soon after the Founding that the loss of voting rights could form the basis of a private action. See, *e.g.*, *Swift* v. *Chamberlain*, 3 Conn. 537, 543 (1821); *Lincoln* v. *Hapgood*, 11 Mass. 350, 357 (1814).

entry on the land of another, though there be no real damage, because repeated acts of going over the land might be used as evidence of a title to do so, and thereby the right of the plaintiff may be injured."), and water rights, see, *e.g.*, *Bower* v. *Hill*, 1 Bing. N.C. 549, 555, 131 Eng. Rep. 1229, 1231 (C.P. 1835) (expressing concern about loss of rights by acquiescence in a water rights dispute). In each instance, the threat of a palpable concrete harm from an inability to seek judicial relief—loss of access to water, loss of control over property—supported the action based on a legal right.

Similarly, courts permitted actions based on loss of a bargain or breach of trust. In *Marzetti*, 109 Eng. Rep. at 846, for example, the court permitted a suit based on a breach of contractual rights, and in *Keech* v. *Sandford*, Sel. Cas. T. King 61, 62, 25 Eng. Rep. 223, 223-24 (Ch. 1726), the court permitted recovery of profits achieved through self-dealing by a trustee. Although neither plaintiff suffered economic loss, both actions were underpinned by the loss of the value of the special relationship established by contract or by trust. Concrete actual harm—the loss of a bargained-for or trust obligation—underpinned these suits for violation of long-recognized common law rights.

In sum, the legal tradition familiar to the Framers limited the exercise of judicial authority to disputes in which the claimant could prove actual or imminent concrete harm.

3. Separation-Of-Powers Principles Limit The Judicial Power To Cases Involving Concrete Harm.

In addition to the English legal tradition, fundamental separation-of-powers principles compel the

conclusion that concrete harm is essential to establish a "case" or "controversy." As this Court has observed, "the case-or-controversy limitation is crucial in maintaining the tripartite allocation of power set forth in the Constitution." *DaimlerChrysler Corp.* v. *Cuno*, 547 U.S. 332, 341 (2006) (quotation marks omitted).

Requiring a private plaintiff to demonstrate concrete harm is necessary to prevent the erosion of the Constitution's fundamental structure. *First*, it ensures that courts remain within their constitutionally limited role of redressing or preventing actual or imminently threatened injury. *Second*, it prevents Congress from impermissibly delegating to private plaintiffs the executive's duty to enforce the law. *Third*, it protects individual liberty against the arbitrary exercise of self-interested, unaccountable prosecutorial authority.

a. The Concrete Harm Requirement Ensures That The Judiciary Does Not Exceed Its Limited Role.

Article III's injury-in-fact requirement furthers the "overriding and time-honored concern about keeping the Judiciary's power within its proper constitutional sphere," *Raines*, 521 U.S. at 820, "defin[ing] with respect to the Judicial Branch the idea of separation of powers on which the Federal Government is founded." *Allen* v. *Wright*, 468 U.S. 737, 750 (1984). "In limiting the judicial power to 'Cases' and 'Controversies,' Article III of the Constitution restricts it to the traditional role of Anglo-American courts, which is to redress or prevent actual or imminently threatened injury to persons caused by private or official violation of law." *Summers*, 555 U.S. at 492.

"Whether the courts were to act on their own, or at the invitation of Congress, in ignoring the concrete injury requirement described in [the Court's] cases, they would be discarding a principle fundamental to the separate and distinct constitutional role of the Third Branch—one of the essential elements that identifies those 'Cases' and 'Controversies' that are the business of the courts rather than of the political branches." *Lujan*, 504 U.S. at 576.

Indeed, "the distinction between the two roles"—"the role of courts [and] that of the political branches"—"would be obliterated if, to invoke intervention of the courts, no actual or imminent harm were needed." *Lewis* v. *Casey*, 518 U.S. 343, 349-50 (1996); see also *Lujan*, 504 U.S. at 581 (Kennedy, J., concurring) ("[T]he requirement of concrete injury confines the Judicial Branch to its proper, limited role in the constitutional framework of Government.").

b. Requiring Private Plaintiffs To Demonstrate Concrete Injury Prevents Congress From Delegating Executive Power To Private Parties.

The Court has recognized that the Constitution's limitations on the judicial power help prevent the other branches from exceeding their constitutional roles. For example, the injury-in-fact requirement prevents the courts from "becom[ing] virtually continuing monitors of the wisdom and soundness of Executive action." *Lujan*, 504 U.S. at 577 (quotation marks omitted).

An equally significant separation-of-powers concern would arise if Congress could authorize private individuals to invoke the judicial power even though they have not suffered concrete harm.

The Take Care Clause of Article II confers upon the President the responsibility to "take Care that the Laws be faithfully executed." U.S. CONST. art. II, § 3. By authorizing private parties to seek out and sue over violations of the law that have caused them no harm, Congress would effectively "transfer from the President to [private citizens] the Chief Executive's most important constitutional duty, to 'take Care that the Laws be faithfully executed.'" *Lujan*, 504 U.S. at 577. That would erode individual liberty through the arbitrary exercise of unaccountable enforcement power.

Opening the door to collection of statutory damages—essentially fines—by uninjured parties presents the same "[d]ifficult and fundamental questions [that] are raised when we ask whether exactions of public fines by private litigants, and the delegation of Executive power which might be inferable from the authorization, are permissible in view of the responsibilities committed to the Executive by Article II of the Constitution of the United States." *Laidlaw*, 528 U.S. at 197 (Kennedy, J., concurring); see also Heather Elliott, *Congress's Inability To Solve Standing Problems*, 91 B.U. L. Rev. 159, 203 (2011) (noting the "significant" "Article II problem" that "suits against private individuals" brought by private plaintiffs "raise * * * about private interference with the exercise of prosecutorial discretion, and hence with the President's 'Take Care' power") (quotation marks omitted); see also generally Tara Leigh Grove, *Standing As An Article II Nondelegation Doctrine*, 11 U. Pa. J. Const. L. 781 (2009).

When a plaintiff is required to demonstrate actual, concrete harm, he may sue only the entity that caused him harm and only to redress the harm that he has suffered. Without a requirement of concrete

harm, however, there is nothing to stop private plaintiffs from seeking out and bringing lawsuits over bare statutory violations in the hope of obtaining a statutory bounty—even though such unharmed plaintiffs are asserting little more than a general interest in seeing "that the Nation's laws are faithfully enforced," which does not suffice to establish standing. *Steel Co.*, 523 U.S. at 107.

It matters a great deal—on a practical as well as a constitutional level—whether public prosecutors, as opposed to self-interested private parties, may enforce the laws in the absence of concrete harm. The Executive Branch's duty under the Take Care Clause includes the attendant discretion to decide which cases warrant prosecution—a choice for which the executive is politically accountable, see Grove, *supra*, 11 U. Pa. J. Const. L. at 797-802.

In addition, as this Court has long recognized, a government attorney "is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all," and the government attorney is therefore required to use the power of the sovereign to promote justice for all citizens. *Berger* v. *United States*, 295 U.S. 78, 88 (1935). Any "scheme injecting a personal interest, financial or otherwise, into the enforcement process may bring irrelevant or impermissible factors into the prosecutorial decision." *Marshall* v. *Jerrico, Inc.*, 446 U.S. 238, 249 (1980). Private plaintiffs hunting for a bounty—and their lawyers—lack the political and legal constraints that cabin the executive's discretion,

and naturally respond to their own incentives, not the public interest.[5]

c. Maintaining Judicial And Executive Powers In Their Proper Spheres Is Essential To Protect Individual Liberty.

Because the exercise of judicial power "can so profoundly affect the lives, liberty, and property of those to whom it extends," it is "'legitimate only in the last resort, and as a necessity in the determination of real, earnest, and vital controversy.'" *Valley Forge*, 454 U.S. at 471, 473 (quoting *Chicago & Grand Trunk Ry.* v. *Wellman*, 143 U.S. 339, 345 (1892)).

Permitting private parties to sue over a mere statutory violation that works no concrete harm—in other words, to delegate the executive's duty to see that federal law is obeyed—would turn the judicial power from the "last resort" into the first resort of enterprising would-be plaintiffs. Such a delegation impermissibly subjects private parties to those plaintiffs' unbounded discretion, described above.

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[5] The False Claims Act, the federal *qui tam* statute, does not raise the same concerns of unchecked private enforcement. To begin with, the United States must itself have suffered a concrete harm, and the partial assignment of the claim arising from that harm is the basis for the relator's standing. See *Vermont Agency*, 529 U.S. at 773-74. In addition, the Executive Branch maintains significant control over *qui tam* litigation brought by private relators. For example, "[t]he Government may dismiss [a *qui tam*] action notwithstanding the objections of the person initiating the action." 31 U.S.C. § 3730(c)(2)(A). And a private plaintiff may not settle or dismiss a *qui tam* action without the government's consent. *Id.* § 3730(b)(1).

This Court has repeatedly recognized that the "'structural principles secured by the separation of powers protect'" not only "'the dynamic between and among the branches,'" but "'the individual as well.'" *Stern* v. *Marshall*, 131 S. Ct. 2594, 2609 (2011) (quoting *Bond* v. *United States*, 131 S. Ct. 2355, 2365 (2011)); see also *Bowsher* v. *Synar*, 478 U.S. 714, 721 (1986). "Liberty is always at stake when one or more of the branches seek to transgress the separation of powers." *Clinton* v. *City of New York*, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring).

Thus, in other contexts this Court has disapproved statutes that leave individual liberty and property interests unprotected "from arbitrary encroachment * * * upon the application of and for the benefit of a private party," *Fuentes* v. *Shevin*, 407 U.S. 67, 80-81, 93 (1972), who may act "for selfish reasons or arbitrarily." *Washington ex rel. Seattle Title Trust Co.* v. *Roberge*, 278 U.S. 116, 118, 122-23 (1928); see also Grove, *supra*, 11 U. Pa. J. Const. L. at 824-26.

d. The Class-Action Device Heightens Separation-Of-Powers Concerns.

The class action device amplifies the separation-of-powers concerns—in particular, the threats to individual liberty—that arise when private parties may exercise government enforcement authority. As this Court has cautioned, "[i]n an era of frequent litigation [and] class actions, * * * courts must be more careful to insist on the formal rules of standing, not less so." *Arizona Christian Sch. Tuition Org.* v. *Winn*, 131 S. Ct. 1436, 1449 (2011).

The inevitable practical effect of permitting suits by individuals who have not suffered concrete harm is to relax Rule 23's "stringent requirements for

[class] certification." *American Express Co.* v. *Italian Colors Rest.*, 133 S. Ct. 2304, 2310 (2013). Once concrete harm is no longer an element of the plaintiff's case, the named plaintiff will argue that issues of injury and causation have been transformed from individualized matters to issues susceptible to common proof because, under an "injury-in-law" regime, the actual impact of the alleged legal violation is no longer relevant.

Eliminating individualized issues could ease a plaintiff's path to class certification, permitting a very large class—typically nationwide when the claim is asserted under federal law—with a huge damages claim. That is particularly true when, as under the FCRA, the law provides for statutory damages.

Thus, two courts of appeals have rejected challenges to class certification in FCRA actions, declaring class adjudication "superior" (Fed. R. Civ. P. 23(b)(3)) even when that device threatens to impose billions of dollars in damages for technical violations. See *Bateman* v. *American Multi-Cinema, Inc.*, 623 F.3d 708, 710-12 (9th Cir. 2010); *Murray* v. *GMAC Mortg. Corp.*, 434 F.3d 948, 952-53 (7th Cir. 2006). Indeed, cases seeking hundreds of millions or billions of dollars in damages based upon this standing theory are not unusual. See Experian Pet. Am. Br. 5-10 (collecting other examples of no-harm class actions under several statutes, including the FCRA); eBay Pet. Am. Br. 6-9 (same); Chamber Pet. Am. Br. 13-20 (same).

If a class were certified in this case, the potential exposure would reach into the billions of dollars: The Amended Complaint alleges that there are "millions" of class members (J.A. 15) on whose behalf respond-

ent seeks to recover "the maximum" statutory damages "allowable" (*id.* at 25) under the FCRA—$1,000 per violation.

These nationwide "no-harm" class actions are practically indistinguishable from government enforcement actions. Like government actions, they do not require proof that any individual suffered concrete harm; like government actions they seek relief on a nationwide basis; and like government actions the measure of recovery is unrelated to compensating individuals for economic or other harm. See 15 U.S.C. § 1681s(a)(2).

Moreover, the creation of class actions seeking gigantic claims poses a serious threat to liberty and due process. Few defendants continue to litigate cases after classes are certified; at that point, the pressure on defendants to settle is often overwhelming, even if the plaintiffs' allegations lack merit. See, *e.g.*, *AT&T Mobility LLC* v. *Concepcion*, 131 S. Ct. 1740, 1752 (2011) (explaining the "risk of 'in terrorem' settlements that class actions entail"). In particular, "[w]hen representative plaintiffs seek statutory damages"—as respondent does here—"pressure to settle may be heightened because a class action poses the risk of massive liability unmoored to actual injury." *Shady Grove Orthopedic Assocs.* v. *Allstate Ins. Co.*, 559 U.S. 393, 445 n.3 (2010) (Ginsburg, J., dissenting); see also *Trans Union LLC* v. *FTC*, 122 S. Ct. 2386, 2387 (2002) (Kennedy, J., dissenting from denial of certiorari) (noting that "[b]ecause the FCRA provides for statutory damages of between $100 and $1,000 for each willful violation, petitioner faces potential liability approaching $190 billion," an amount that is "crushing").

To be sure, high stakes and class actions often go hand in hand. But that fact only highlights the importance of strict adherence to the requirements of Article III standing. See *Arizona Christian*, 131 S. Ct. at 1449. Insisting on the constitutional minimum of concrete, palpable injury in fact—as opposed to the mere assertion of a statutory violation—ensures that the class action device remains the "exception to the usual rule" that cases are litigated individually. *Wal-Mart Stores, Inc.* v. *Dukes*, 131 S. Ct. 2541, 2550 (2011) (quoting *Califano* v. *Yamasaki*, 442 U.S. 682, 700-01 (1979)). It reserves the class action device for those circumstances in which a defendant's alleged wrongdoing has caused concrete harm to each of the members of a class—as opposed to permitting allegations of bare statutory violations causing infinitesimal harm or no harm at all to be used as cudgels in extracting massive windfall settlements.[6]

* * * *

In sum, the text and history of the Constitution and the Anglo-American tradition incorporated by the Framers, as well as fundamental separation-of-powers principles, all demonstrate that a private plaintiff has not been injured in fact—and therefore lacks standing to sue—unless he or she can allege an actual or imminent concrete harm.

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[6] Contrary to respondent's suggestion, see Opp. 17, these concerns are not rendered irrelevant by this Court's comment that whether "a suit may be a class action * * * adds nothing to the question of standing." *Simon*, 426 U.S. at 40 n.20. That comment was offered in *defense* of strict adherence to the injury-in-fact requirement—in particular, to explain why named plaintiffs who seek to represent a class still "'must allege and show that they *personally* have been *injured*.'" *Ibid.* (emphases added) (quoting *Warth*, 422 U.S. at 502).

C. The FCRA Violations That Respondent Alleges Do Not Satisfy Article III's Concrete Harm Standard.

The court of appeals, the government, and respondent have advanced four different theories in contending that the claims here satisfy the injury-in-fact requirement. They contend that a legal violation by itself is sufficient; that statutory damages provide the necessary financial interest; that respondent's claims are analogous to a common law defamation action; and that the allegations are sufficient to satisfy the traditional concrete harm standard. Each argument falls short of demonstrating the concrete harm that the Constitution requires.

1. A Legal Violation Without Concrete Harm Cannot Satisfy The Injury-In-Fact Standard.

The principal theory advanced by the court below is that allegations of statutory violations are by themselves always sufficient to plead an injury in fact. That view cannot be squared with the Article III requirement of concrete harm, rooted in the common law and separation of powers, that we have just described. Nor can it be squared with this Court's standing precedents—which make clear that "the Article III requirement of remediable injury in fact * * * has nothing to do with the text of the statute relied upon." *Steel Co.*, 523 U.S. at 97 n.2.

a. A Legal Violation Cannot Substitute For Concrete Harm.

In many contexts, proof of actual or imminent concrete harm is an element of the legal violation. That is true of most torts. See, *e.g.*, 1 DAN B. DOBBS ET AL., THE LAW OF TORTS § 124 (2d ed. 2011) (an el-

ement of negligence is "the existence and amount of damages, based on actual harm"); RESTATEMENT (SECOND) OF TORTS § 402A (1965) (products liability torts require "physical harm"). And, to take just one statutory example, the Clean Water Act requires that a private plaintiff be "adversely affected" by the challenged conduct, 33 U.S.C. § 1365(g)—a phrase that reflects "[t]he constitutional requirement" of "injury in fact." *Gwaltney of Smithfield, Ltd.* v. *Chesapeake Bay Found., Inc.*, 484 U.S. 49, 70 (1987) (Scalia, J., concurring) (citing *Middlesex County Sewerage Auth.* v. *Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 16 (1981)); see also Roberts*, supra*, 42 Duke L.J. at 1227 n.52.

But the FCRA—as construed by the Ninth Circuit—does not include such a requirement. See Pet. App. 6a ("[T]he statutory cause of action [under the FCRA] does not require a showing of actual harm when a plaintiff sues for willful violations.").

Nor did the Ninth Circuit rest its injury-in-fact determination on separate allegations by respondent that he had suffered or was imminently threatened with any of the forms of concrete harm that this Court has found sufficient to satisfy the injury-in-fact requirement, such as pecuniary loss; lost business opportunities; loss of enjoyment of public resources; and discriminatory treatment based on race, sex or some other prohibited characteristic. See, *e.g.*, *Hardin*, 390 U.S. at 5-6 (pecuniary loss); *Lexmark Int'l, Inc.* v. *Static Control Components, Inc.*, 134 S. Ct. 1377, 1386 (2014) (lost business opportunities); *Laidlaw*, 528 U.S. at 704-05 (loss of enjoyment of public resources); *Heckler* v. *Mathews*, 465 U.S. 728, 739-40 (1984) (discriminatory treatment).

The fact that a legal standard has been breached says nothing about whether any harm has been in-

flicted on anyone, let alone one of these "concrete," "actual," and "particularized" harms required to initiate judicial proceedings.

The court of appeals emphasized that respondent's claim of injury was sufficient because he alleged violations of "*his* statutory rights" as opposed to "the statutory rights of other people." Pet. App. 8a. But a plaintiff can almost always find a way to "personalize" a technical statutory violation notwithstanding the absence of any concrete harm. This approach would turn standing into "a lawyer's game, rather than a fundamental limitation ensuring that courts function as courts and not intrude on the politically accountable branches." *Massachusetts*, 549 U.S. at 548 (Roberts, C.J., dissenting).

Labeling a claim as one asserting a violation of "the plaintiff's rights" says nothing about whether the plaintiff has suffered any of the forms of concrete harm that the Court has recognized as sufficient to establish injury in fact.

Indeed, if every statutory violation with some connection to the plaintiff qualified as injury in fact, private plaintiffs and their counsel could "roam the country"—or the Internet—"in search of" legal violations in order "to reveal their discoveries in federal court" in the hopes of obtaining a bounty. *Valley Forge*, 454 U.S. at 487. Yet *Valley Forge* teaches that the assertion of a bare constitutional violation affords plaintiffs no such "special license," *ibid.*, and there is no reason why the assertion of a bare statutory violation should be any different.

The court of appeals' distinction of claims regarding "the statutory rights of other people" rings especially hollow given the close linkage between the "no harm" standing theory and the class action device.

Respondent here is effectively bootstrapping his "no harm" individual claim to justify a class action involving claims of statutory violations for millions of similarly unharmed individuals. At the end of the day, this is very much a case in which respondent is asserting "the statutory rights of other people."

Moreover, claims of statutory violations without concrete harm most clearly trigger the separation-of-powers concerns discussed above—particularly when asserted as class actions. They represent the transfer of the Executive's enforcement authority to private parties and pose a significant risk of fundamental unfairness.

Respondent's theory also would collapse this Court's three-part test for Article III standing—injury in fact, causation, and redressability—into the single question of whether there is an injury at law. Where the only injury arises from a violation of legal duty that had no palpable effect on the plaintiff, there is nothing to cause, and thus no meaning to the "causal connection" that is otherwise required. *Arizona Christian*, 131 S. Ct. at 1442. And once a congressionally authorized remedy made an abstract complaint "redressable" in the sense that the plaintiff could seek and collect payment, anyone authorized to sue by the statute would have standing. The Ninth Circuit recognized and embraced this anomaly, see Pet. App. 9a, despite its inconsistency with this Court's precedents.

And, of course, the "statutory violation equals injury in fact" theory would nullify this Court's decisions holding that Congress may not modify the injury-in-fact requirement. By holding that violation of a statute may qualify as injury in fact, the Ninth Circuit affords Congress carte blanche to circumvent

this Court's definition of injury in fact whenever it wishes to do so.

For all of these reasons, the Ninth Circuit's equation of statutory violation with injury in fact must be rejected.[7]

b. This Court Has Never Found Injury In Fact In The Absence Of Concrete Harm.

Respondent erroneously asserts that this Court's precedents support the Ninth Circuit's holding that injury-in-law may confer standing.

First, respondent relies on *Havens Realty Corp.* v. *Coleman*, 455 U.S. 363 (1982), in which the Court held that a black "tester" had standing to sue under the Fair Housing Act, which made it unlawful to "represent to any person because of race, color, religion, sex, * * * or national origin that any dwelling is not available * * * when such dwelling is in fact so available." 42 U.S.C. § 3604(d).

Contrary to respondent's assertions, *Havens* did not involve a bare violation of a statutory right unaccompanied by concrete harm. Instead, the plaintiff in

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[7] Respondent's claims regarding violations of statutory requirements relating to notices to those who furnish information, those who use information, and those who use information for employment purposes (15 U.S.C. §§ 1681b(b)(1), 1681e(d)(1)-(2)) do not qualify even under the Ninth Circuit's "personal statutory right" theory. Respondent does not explain how these claims about the alleged failure to provide notices to other parties relate to him. Nor does he allege harm to himself from petitioner's alleged failure to provide consumers with a toll-free number to request annual reports, which supposedly violated Section 1681j(a)(1)(C) and 12 C.F.R. § 1022.136 (formerly 16 C.F.R. § 610.3).

Havens was the direct victim of discrimination—which is itself a well-established form of concrete harm.

The facts in *Havens* make clear the concrete nature of the harm. On four separate occasions, the owner of an apartment complex falsely told the black tester that no apartments were available, while accurately telling a white tester on each occasion that apartments were available. *Havens*, 455 U.S. at 368.

Although the black tester had no intention of actually buying or renting a home, he nonetheless suffered the invidious and serious harm of discrimination on the basis of his race—"a type of personal injury [this Court] ha[s] long recognized as judicially cognizable." *Mathews*, 465 U.S. at 738. As this Court has explained, "discrimination itself, by perpetuating 'archaic and stereotypic notions' or by stigmatizing members of the disfavored group as 'innately inferior' and therefore as less worthy participants in the political community, can cause serious non-economic injuries to those persons who are personally denied equal treatment solely because of their membership in a disfavored group." *Id.* at 739-40 (citation omitted); see also *Allen*, 468 U.S. at 755.[8]

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[8] In support of its finding of injury in fact, the *Havens* Court cited another racial "tester" case, *Evers* v. *Dwyer*, 358 U.S. 202 (1958) (per curiam), which held that a black man who was ordered to the back of a bus pursuant to a local ordinance that imposed segregated seating arrangements had standing to challenge the ordinance, even though he appeared to "have boarded this particular bus for the purpose of instituting th[e] litigation." *Id.* at 204. It did not matter that the plaintiff "had ridden a bus * * * on only one occasion," because a person subjected to harmful "special disabilities" on account of his race has "a substantial, immediate, and real interest in the validity of the statute which imposes the disability." *Id.* at 203-04.

While *Havens* relied on a broad reading of the sentence in this Court's opinion in *Warth* discussed above (see pages 14-16, *supra*), *Havens* is entirely consistent with the Court's numerous subsequent decisions—including *Summers*, *Steel Co.*, and *Lujan*—recognizing the limitations imposed by Article III.

Second, respondent (Opp. 9-10) and the government (U.S. Pet. Am. Br. 12 & n.1) also relied on this Court's decisions in cases in which a plaintiff challenges the government's failure to comply with a statutory obligation to disclose information. *FEC* v. *Akins*, 524 U.S. 11, 21 (1998) (citing *Pub. Citizen* v. *Dep't of Justice*, 491 U.S. 440, 449 (1989)). In *Akins*, the Court held that a group of voters had standing to seek court review of the FEC's decision not to bring an enforcement action challenging, as a violation of the Federal Election Campaign Act of 1971, the failure of American Israel Public Affairs Committee to make certain information public. 524 U.S. at 13-14. And in *Public Citizen*, the Court held that interest groups had standing to sue the Department of Justice under the Federal Advisory Committee Act (FACA) for failing to disclose to the public its consultations with the American Bar Association's Standing Committee on Federal Judiciary in connection with evaluating potential judicial nominees. 491 U.S. at 448-51.

These decisions provide no support to respondent. As a threshold matter, respondent is not claiming that Spokeo failed to provide information to him. His contentions are that information about him provided to *other people* was inaccurate, and that certain statutorily required disclosures were not provided to third parties. These cases are therefore wholly inapposite.

Furthermore, neither *Akins* nor *Public Citizen* holds that the violation of a mere statutory right is *itself* the injury in fact. Rather, the Court grounded its decisions in the separate, particularized, concrete *effects* on the plaintiffs of the denial of access to the requested information.

The *Akins* Court stated that "the information would help [plaintiffs] (and others to whom they would communicate it) to evaluate candidates for public office, especially candidates who received assistance from AIPAC, and to evaluate the role that AIPAC's financial assistance might play in a specific election." 524 U.S. at 21. Because of these effects, the Court explained, the plaintiffs' "injury consequently seems concrete and particular." *Ibid.*; see also *id.* at 24-25 (the denial of information necessary to cast an informed vote is a deprivation "directly related to voting, the most basic of political rights," and therefore "sufficiently concrete and specific").

And in *Public Citizen*, the deprivation was of information the interest groups needed to scrutinize the "workings" of government in order to "participate more effectively in the judicial selection process." 491 U.S. at 449.

The Court in *Public Citizen* also considered the FACA claim analogous to one under the Freedom of Information Act (FOIA), 5 U.S.C. § 552. See 491 U.S. at 449 (collecting cases in which the Court implicitly found standing under FOIA when the plaintiffs "sought and were denied specific agency records"). As in the FOIA cases, the interest groups in *Public Citizen* had "sought and were denied specific agency records" that the law required the government to disclose. *Ibid.* That denial—following an actual, specific, concrete request for the information—was "a suffi-

ciently distinct injury to provide standing," *ibid.*, because it distinguished them from other citizens or interest groups who only "*might* make the same complaint," *id.* at 450 (emphasis added). See also Roberts, *supra*, 42 Duke L.J. at 1228 n.60 (discussing *Public Citizen*); cf. *Summers*, 555 U.S. at 496 ("[D]eprivation of a procedural right without some concrete interest that is affected by the deprivation * * * is insufficient to create Article III standing.").

More generally, the right of individuals to sue to compel *government* disclosure of information rests on a long-standing history in this country of mandamus actions—dating back to Marbury's suit against Madison—seeking to compel a government official to perform non-discretionary, ministerial duties required by law. See *Work* v. *U.S. ex rel. Rives*, 267 U.S. 175, 177 (1925) ("Mandamus issues to compel an officer to perform a purely ministerial duty.").

To the extent the kind of informational injury at issue in the FOIA cases or in *Public Citizen* may be transferred at all from the context of government inaction to suits between private parties—something that is far from clear—the fact that a plaintiff is required to make the specific request for information *before* invoking the judicial power ameliorates the separation-of-powers concerns raised above. Plaintiffs cannot simply go to court in the first instance whenever they desire information; rather, they suffer a concrete harm only when they first make a specific request for the information that is then denied. Indeed, if the request is granted, the individual cannot claim an injury and therefore cannot bring suit.

Third, respondent argued that the availability of nominal damages in certain circumstances shows that an injury at law may suffice to confer standing.

Opp. 14 & n.1. Again, respondent's contention is wrong.

Nominal damages at common law largely served the function of what are now declaratory judgments. See *Utah Animal Rights Coal.* v. *Salt Lake City Corp.*, 371 F.3d 1248, 1264-65 (10th Cir. 2004) (McConnell, J., concurring); DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES: CASES AND MATERIALS 561 (3d ed. 2002) ("The most obvious purpose [of nominal damages] was to obtain a form of declaratory relief in a legal system with no general declaratory judgment act."); 1 DAN B. DOBBS, LAW OF REMEDIES § 3.3(2), at 295 (2d ed. 1993).

Nominal damages allowed a party "to obtain an authoritative judicial determination of the parties' legal rights" to settle, for example, disputes over real property or to vindicate the plaintiff's reputation by proving the falsity of defamatory statements. *Utah Animal Rights Coal.*, 371 F.3d at 1264 (McConnell, J., concurring). Just as suits under the Declaratory Judgment Act are subject to Article III's limitations on the judicial power, see *Aetna Life Ins. Co.* v. *Haworth*, 300 U.S. 227, 239-41 (1937), so are suits seeking nominal damages.

Indeed, the kinds of suits in which nominal damages have been permitted involved instances of concrete harm. For example, *Webb* v. *Portland Mfg. Co.*, 29 F. Cas. 506 (C.C.D. Me. 1838), involved the diversion of water from the plaintiff's mill, but the diversion was too slight to have caused measurable damage. The plaintiff could nonetheless sue, Justice Story (riding circuit) explained, because if he "might not maintain an action for an injury, however small, to his right, a mere wrong-doer might, by repeated torts," establish his own adverse water rights and

thereby diminish the plaintiff's rights. *Id.* at 509; see also *Marzetti*, 109 Eng. Rep. at 844 (Taunton, J.) (noting the concern in trespass actions that a plaintiff who does not assert his property right will lose it); see also generally pages 25-26, *supra*.[9]

In sum, nominal damages thus are not available for every bare statutory violation; rather, they are permissible only in situations where the plaintiff can demonstrate actual or imminent concrete harm.

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[9] Nominal damages have also been awarded in patent infringement actions when the patentee failed to prove particular economic damage as a result of the infringement. See *Rude* v. *Westcott*, 130 U.S. 152, 167 (1889); *Black* v. *Thorne*, 111 U.S. 122, 124 (1884); *Blake* v. *Robertson*, 94 U.S. 728, 734 (1876); *Whittemore* v. *Cutter*, 29 F. Cas. 1120, 1121 (C.C.D. Mass. 1813) (Story, J.). But those decisions rest on the principle, well-recognized at the time, that patents protect a concrete property interest, rooted in the common law, in the ownership of one's invention; the injury caused by patent infringement therefore is not mere injury at law dictated by congressional fiat. See *Crown Die & Tool Co.* v. *Nye Tool & Mach. Works*, 261 U.S. 24, 35 (1923) (explaining that "the government did not confer on the patentee the right himself to make, use or vend his own invention," because "such right was a right under the common law").

And in *Carey* v. *Piphus*, 435 U.S. 247 (1978), the Court held that nominal damages are available for a procedural due process violation—there, the failure of school districts to provide the plaintiff students with appropriate procedural protections before suspending them—that, akin to the "wrongful deprivations of the right to vote" (*id.* at 265 n.22), plainly involved allegations of concrete harm. (The *Carey* plaintiffs alleged that the suspensions deprived them of educational benefits (in which the students had a "property interest," *Goss* v. *Lopez*, 419 U.S. 565, 576 (1975)).)

2. A Right To Recover Statutory Damages Cannot Substitute For Concrete Harm.

The Ninth Circuit also concluded that the availability of statutory damages under the FCRA obviated any need for respondent to show concrete harm. See Pet. App. 6a-7a. But as this Court made clear in *Vermont Agency*—which involved the payment afforded relators bringing *qui tam* actions under the federal False Claims Act—the potential recovery of a statutory bounty cannot serve as injury in fact.

The prospect of a statutory damages bounty may give a plaintiff a "concrete private interest" in the outcome of a suit, but that interest is "insufficient to give a plaintiff standing" because it is nothing more than "a wager upon the outcome" of the lawsuit and therefore "unrelated to injury in fact." *Vermont Agency*, 529 U.S. at 772. Indeed, a right to statutory damages "does not even fully materialize until the litigation is completed and the [plaintiff] prevails." *Id.* at 773.

"[A]n interest that is merely a 'byproduct' of the suit itself cannot give rise to a cognizable injury in fact for Article III standing purposes." *Ibid.*; see also *Steel Co.*, 523 U.S. at 107 ("[A] plaintiff cannot achieve standing to litigate a substantive issue by bringing suit for the costs of bringing suit."); *Diamond* v. *Charles*, 476 U.S. 54, 70-71 (1986) (holding that an award of attorney's fees assessed against an intervenor did not provide the intervenor with standing to continue the litigation, because that "injury * * * is only a byproduct of the suit itself" and thus is not "cognizable under Art. III").

For these reasons, the Court in *Vermont Agency* rejected the argument that the relator's interest in obtaining a statutory bounty could be a basis for his

standing. Instead, the Court concluded that the relator had standing *only* as a partial "assignee" of the *government's* "injury in fact." *Vermont Agency*, 529 U.S. at 773.

Statutory damages, moreover, "substitute for ordinary compensatory damages" that are difficult to quantify—"[w]hen a plaintiff seeks compensation for an *injury* that is likely to have occurred but difficult to establish." *Memphis Cmty. Sch. Dist.* v. *Stachura*, 477 U.S. 299, 310-11 (1986) (emphasis added; other emphasis omitted). "In those circumstances, presumed damages may roughly approximate the harm that the plaintiff suffered and thereby compensate for harms that may be impossible to measure." *Id.* at 311; see also *id.* at 311 n.14 (explaining that cases about the deprivation of voting rights, "going back to Lord Holt's decision in *Ashby* v. *White*, * * * involve nothing more than an award of presumed damages for a nonmonetary harm that cannot easily be quantified"); PROSSER ON TORTS, § 116A p. 843 (presumed damages are "an estimate, however rough, of the probable extent of *actual loss* a person had suffered and would suffer in the future") (emphasis added).

Respondent argued at the certiorari stage that the availability of statutory damages under the Copyright Act demonstrates that the violation of a "legal right per se" is sufficient for Article III standing. Opp. 14. But statutory damages for copyright are awarded on the same theory as other presumed damages—to avoid problems of quantification and proof in calculating actual damage. See *Douglas* v. *Cunningham*, 294 U.S. 207, 209 (1935) (explaining that statutory damages in the Copyright Act of 1909 "give the owner of a copyright some recompense for injury done him, in a case where the rules of law

render difficult or impossible proof of damages or discovery of profits").

Copyright confers a concrete "property" interest—"the right to exclude others"—upon which an infringer trespasses. *Fox Film Corp.* v. *Doyal*, 286 U.S. 123, 127 (1932). And the status of copyright as a protected "property" interest is not the product of mere congressional fiat either, but rather is well grounded in the common law. See *Feltner* v. *Columbia Pictures Television, Inc.*, 523 U.S. 340, 348-55 (1998) (observing that "[b]y the middle of the 17th century, the common law recognized an author's right to prevent the unauthorized publication of his manuscript" and collecting cases from English and early American practice); *Millar* v. *Taylor*, 98 Eng. Rep. 201, 252 (K.B. 1769) (Mansfield, C.J.) (the common law of copyright derived from the principle that "it is just, that an author should reap the *pecuniary profits* of his own ingenuity and Labour") (emphasis added).

Far from supporting the proposition that statutory damages suffice to satisfy the injury-in-fact requirement, the copyright laws thus provide yet another example in which Congress elevated to the status of legally cognizable claims the concrete harm that the copyright owner suffers when that interest is infringed.

3. Respondent Cannot Avoid The Concrete Harm Requirement By Analogizing His Claim To Common Law Defamation Actions.

Nor may respondent circumvent Congress's inability to manufacture injury in fact through his strained analogy, echoed by the government, between these alleged violations of the FCRA and a common

law defamation claim. See Opp. 3; U.S. Pet. Am. Br. 12-14.

To begin with, most of respondent's claims do not require proof of a false statement, and therefore cannot be analogized to defamation. See page 5 (citing J.A. 18-23) & page 40 note 7, *supra*.

Even with respect to the one claim that does require proof that information was false, the analogy fails. Publication of a false statement was not automatically actionable at common law. Proof of injury was and is required.

"The ground of the private action [for defamation] is the injury which the party has sustained, and his consequent right to damages as a recompense for that injury." 2 KENT, COMMENTARIES ON AMERICAN LAW 21 (1827); see also RESTATEMENT (SECOND) OF TORTS § 559 (1977) ("A communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.").

Indeed, "[s]ince the latter half of the 16th century, the common law has afforded a cause of action for *damage* to a person's reputation by the publication of false *and defamatory* statements," *Milkovich*, 497 U.S. at 11 (emphases added), or, in other words, a "false publication that would subject [the plaintiff] to hatred, contempt, or ridicule," *id*. at 13 (quotation marks omitted). The law does not permit a claim for defamation unless the allegedly false statement has caused actual harm.

Nor does the presumption of injury in cases involving defamation *per se* help respondent. This Court has explained that the presumption is "an odd-

ity of tort law," *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 349 (1974), which "has been defended on the grounds that those forms of defamation that are actionable *per se are virtually certain to cause serious injury to reputation*, and that this kind of injury is extremely difficult to prove." *Carey* v. *Piphus*, 435 U.S. 247, 262 (1978) (emphasis added).

Under the common law as it existed at the founding, both here and in England, *per se* treatment was accorded only to false statements that would "expose [the plaintiff] to public hatred, contempt, and ridicule." 2 KENT at 13; 4 BLACKSTONE, COMMENTARIES *150; see *Milkovich*, 497 U.S. at 13; see also RESTATEMENT (SECOND) OF TORTS § 559 (1977). The categories were confined to statements falsely accusing the plaintiff of a crime, or of a condition that might "exclude him from society" or "impair or hurt his trade or livelihood." 3 BLACKSTONE, COMMENTARIES *123-24; 2 KENT at 13. Otherwise, the plaintiff was obligated to "aver some particular damage." 3 BLACKSTONE, COMMENTARIES *124 (clergyman slandered as a "bastard" must show that he lost a particular position); 2 KENT at 13. The presumption thus reaches *only* false information that exposes its subject "to hatred, contempt, or ridicule." *Milkovich*, 497 U.S. at 13 (quotation marks omitted); see also RESTATEMENT (SECOND) OF TORTS § 559 (1977).

Respondent cannot claim the benefit of the presumption here, because the alleged false statements do not satisfy the common law standard—indeed, they do not even come close. Petitioner allegedly made available information inaccurately stating that respondent was married with children and overstating his financial resources and education. None of those characteristics elicits "hatred, contempt, or rid-

icule." *Milkovich*, 497 U.S. at 13 (quotation marks omitted).

Finally, the defamation analogy also ignores the constitutional limitations on presuming injury from non-defamatory speech. As a plurality of this Court recently explained, the First Amendment protects false statements as well as true ones except when the statements reflect "defamation, fraud, or some other legally cognizable harm." *United States* v. *Alvarez*, 132 S. Ct. 2537, 2545 (2012) (plurality opinion).

4. Respondent's Allegations Fall Far Short Of The Required Concrete Harm.

Respondent argued below that Spokeo's publication of allegedly incorrect information inflicted concrete harm sufficient to satisfy the injury-in-fact standard. The district court rejected that contention, Pet. App. 13a-14a, 23a, and the Ninth Circuit did not address it, Pet. App. 9a. It is not clear whether respondent plans to advance this argument in support of the judgment below; in any event, the district court's determination was plainly correct.

In allegations that the Ninth Circuit labeled "sparse," Pet. App. 2a, respondent asserted that the very existence of inaccurate information about him harmed his "prospects" for employment, and that he was anxious about the possibility that a prospective employer might see that information and use it adversely against him. J.A. 14-15. That "highly attenuated chain of possibilities[] does not satisfy the requirement that threatened injury must be certainly impending" to satisfy Article III. *Clapper*, 133 S. Ct. at 1148.

This Court in *Clapper* "decline[d] to abandon [its] usual reluctance to endorse standing theories that rest on speculation about the decisions of independent actors" like the unknown employers who might have seen respondent's Spokeo search results. *Id.* at 1150. And respondent's claimed anxiety and stress about his speculation is as insufficient to satisfy the injury-in-fact requirement as was the "subjective fear of surveillance" that this Court found wanting in *Clapper*. *Id.* at 1153.

II. THE FCRA SHOULD NOT BE CONSTRUED TO PERMIT SUITS WITHOUT PROOF OF CONCRETE HARM.

If the Court concludes that a bare statutory violation can satisfy the injury-in-fact standard, the Court should hold that the FCRA does not open the federal courts to plaintiffs who are unable to demonstrate concrete harm, because Congress has not clearly stated its intent to do so.[10]

In a variety of contexts, the Court has required Congress to speak clearly—in the statutory text—before interpreting a law to disrupt the usual constitutional balance. See, *e.g.*, *Gregory* v. *Ashcroft*, 501 U.S. 452, 460 (1991); *Pennhurst State Sch. & Hosp.* v. *Halderman*, 451 U.S. 1, 17 (1981) (requiring Congress to "unambiguously" state any "condition on the

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[10] The Court could reach the same result if it concluded that the constitutional question here is a difficult one. "[W]here a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, [the Court's] duty is to adopt the latter." *Jones* v. *United States*, 529 U.S. 848, 857 (2000) (quotation marks omitted). As the discussion in text below demonstrates, the FCRA is most reasonably interpreted not to relieve plaintiffs from demonstrating concrete harm.

grant of federal moneys" in spending programs involving the States). "[T]he requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." *Bond* v. *United States*, 134 S. Ct. 2077, 2089 (2014) (quotation marks omitted); *Kucana* v. *Holder*, 558 U.S. 233, 237 (2010) ("Separation-of-powers concerns, moreover, caution us against reading legislation, absent clear statement, to place in executive hands authority to remove cases from the Judiciary's domain."); *Boumediene* v. *Bush*, 553 U.S. 723, 738 (2008) ("Congress should 'not be presumed to have effected such denial [of habeas relief] absent an unmistakably clear statement to the contrary.'"). By applying clear statement rules, the Court ensures that settled constitutional relationships will not be disturbed unless Congress has definitely decided to do so.

Indeed, in the standing context itself, Members of the Court have recognized the importance of congressional clarity in order to preserve the separation of powers on which standing doctrine rests. Thus, Justice Kennedy explained in *Lujan* that, because "the requirement of concrete injury confines the Judicial Branch to its proper, limited role in the constitutional framework of Government," when Congress seeks "to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before * * * Congress must at the very least identify the injury it seeks to vindicate and relate the injury to the class of persons entitled to bring suit." *Lujan*, 504 U.S. at 580-81 (Kennedy, J., concurring); see also *Summers*, 555 U.S. at 501 (Kennedy, J., concurring) (respondents had no standing because "[n]othing in the statute at issue here * * * indicates Congress intended to identify or con-

fer some interest separate and apart from a procedural right").

In contrast, it would be "remarkable" and "unfortunate" to "hold[] that Congress may override the injury limitation of Article III" when "there is no indication that Congress embarked on such an ambitious undertaking." Roberts, *supra*, 42 Duke L.J. at 1227.

Any construction of the FCRA that would permit private suits in the absence of concrete harm would—as we have demonstrated—depart dramatically from existing standing doctrine and open the federal courts to a much broader range of claims and also upset the long-established division of powers among the Judiciary, Congress, and the Executive. The Court accordingly should not interpret the FCRA to abrogate the concrete harm requirement unless Congress clearly expressed its intent to do so. The FCRA contains no such clear statement.

The FCRA, in relevant part, provides simply that a negligent violation of its requirements "with respect to any consumer" subjects a consumer reporting agency to "actual damages," attorney's fees, and costs. 15 U.S.C. § 1681*o*(a). For a "willful" violation, meanwhile, a consumer may choose between "actual damages" and statutory "damages of not less than $100 and not more than $1,000," *id.* § 1681n(a)(1), and also may seek punitive damages. *Id.* § 1681n(a)(2). Nothing in these provisions indicates any intent to relieve plaintiffs of the requirement of demonstrating concrete harm as the prerequisite for a private lawsuit.

Indeed, the more plausible reading of Section 1681n is that, because it can be difficult to prove the *amount* of damages resulting from a defendant's failure to comply with the FCRA's procedural provi-

sions, Congress spared plaintiffs who have been concretely harmed by willful noncompliance from the burden of quantifying that harm, permitting an award between $100 and $1,000 at the district court's discretion. As the Court has observed, there is nothing "peculiar" about providing "only to those plaintiffs who can demonstrate actual damages" an award of "some guaranteed damages, as a form of presumed damages not requiring proof of amount." *Doe* v. *Chao*, 540 U.S. 614, 625 (2004) (construing the Privacy Act and pointing out that such a remedial scheme parallels the common law of defamation).

Because Congress has not clearly stated an intent to dispense with the traditional concrete harm requirement, this Court should hold that the FCRA preserves concrete harm as a prerequisite to private suits.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

Fair Credit Reporting Act,
15 U.S.C. § 1681 *et seq.*

15 U.S.C. § 1681a. Definitions; rules of construction

* * *

(d) CONSUMER REPORT.—

(1) IN GENERAL.—The term "consumer report" means any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for—

(A) credit or insurance to be used primarily for personal, family, or household purposes;

(B) employment purposes; or

(C) any other purpose authorized under section 1681b of this title.

* * *

(f) The term "consumer reporting agency" means any person which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties, and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports.

* * *

15 U.S.C. § 1681b. Permissible purposes of consumer reports

* * *

(b) Conditions for furnishing and using consumer reports for employment purposes

(1) Certification from user

A consumer reporting agency may furnish a consumer report for employment purposes only if—

(A) the person who obtains such report from the agency certifies to the agency that—

(i) the person has complied with paragraph (2) with respect to the consumer report, and the person will comply with paragraph (3) with respect to the consumer report if paragraph (3) becomes applicable; and

(ii) information from the consumer report will not be used in violation of any applicable Federal or State equal employment opportunity law or regulation; and

(B) the consumer reporting agency provides with the report, or has previously provided, a summary of the consumer's rights under this subchapter, as prescribed by the Bureau under section 1681g(c)(3) 1 of this title.

* * *

15 U.S.C. § 1681c. Requirements relating to information contained in consumer reports.

* * *

(g) Truncation of credit card and debit card numbers

(1) In general

Except as otherwise provided in this subsection, no person that accepts credit cards or debit cards for the transaction of business shall print more than the last 5 digits of the card number or the expiration date upon any receipt provided to the cardholder at the point of the sale or transaction.

* * *

15 U.S.C. § 1681e. Compliance procedures

* * *

(b) Accuracy of report

Whenever a consumer reporting agency prepares a consumer report it shall follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates.

* * *

(d) Notice to users and furnishers of information

(1) Notice requirement.—A consumer reporting agency shall provide to any person—

(A) who regularly and in the ordinary course of business furnishes information to the agency with respect to any consumer; or

(B) to whom a consumer report is provided by the agency;

a notice of such person's responsibilities under this subchapter.

* * *

15 U.S.C. § 1681j. Charges for certain disclosures

(a) Free annual disclosure

(1) Nationwide consumer reporting agencies

* * *

(C) Nationwide specialty consumer reporting agency

(i) In general

The Commission shall prescribe regulations applicable to each consumer reporting agency described in section 1681a of this title to require the establishment of a streamlined process for consumers to request consumer reports under subparagraph (A), which shall include, at a minimum, the establishment by each such agency of a toll-free telephone number for such requests.

* * *

15 U.S.C. § 1681n. Civil liability for willful noncompliance

(a) In general

Any person who willfully fails to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer in an amount equal to the sum of—

(1)(A) 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; or

(B) in the case of liability of a natural person for obtaining a consumer report under false pretenses or knowingly without a permissible purpose, actual damages sustained by the consumer as a result of the failure or $1,000, whichever is greater;

(2) such amount of punitive damages as the court may allow; and

(3) in the case of any successful action to enforce any liability under this section, the costs of the action together with reasonable attorney's fees as determined by the court.

(b) Civil liability for knowing noncompliance

Any person who obtains a consumer report from a consumer reporting agency under false pretenses or knowingly without a permissible purpose shall be liable to the consumer reporting agency for actual damages sustained by the consumer reporting agency or $1,000, whichever is greater.

(c) Attorney's fees

Upon a finding by the court that an unsuccessful pleading, motion, or other paper filed in connection with an action under this section was filed in bad faith or for purposes of harassment, the court shall award to the prevailing party attorney's fees reasonable in relation to the work expended in responding to the pleading, motion, or other paper.

(d) Clarification of willful noncompliance

For the purposes of this section, any person who printed an expiration date on any receipt provided to a consumer cardholder at a point of sale or transaction between December 4, 2004, and June 3, 2008, but otherwise complied with the requirements of sec-

tion 1681c(g) of this title for such receipt shall not be in willful noncompliance with section 1681c(g) of this title by reason of printing such expiration date on the receipt.

15 U.S.C. § 1681*o*. Civil liability for negligent noncompliance

(a) In general

Any person who is negligent in failing to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer in an amount equal to the sum of—

(1) any actual damages sustained by the consumer as a result of the failure; and

(2) in the case of any successful action to enforce any liability under this section, the costs of the action together with reasonable attorney's fees as determined by the court.

(b) Attorney's fees

On a finding by the court that an unsuccessful pleading, motion, or other paper filed in connection with an action under this section was filed in bad faith or for purposes of harassment, the court shall award to the prevailing party attorney's fees reasonable in relation to the work expended in responding to the pleading, motion, or other paper.