No. 13-1339

In the Supreme Court of the United States

SPOKEO, INC.,

Petitioner,

v.

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

Respondent.

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

SUPPLEMENTAL BRIEF FOR PETITIONER

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SUPPLEMENTAL BRIEF FOR PETITIONER

Given the government's recommendation against certiorari in *First American Financial Corp.* v. *Edwards*, 132 S. Ct. 2536 (2012), and its position on the merits in that case, it is not surprising that the government opposes certiorari here. The government prefers to insulate from this Court's review decisions of courts of appeals that—like the Ninth Circuit's ruling below—uphold standing based on a bare statutory violation.

But the government is unwilling to defend that broad principle in this Court. Instead, it conjures a new rationale to support the Ninth Circuit's judgment—asserting that respondent's claims satisfy Article III because the statutory right allegedly invaded here is analogous to interests whose infringement was cognizable at common law.[1]

Even if the government's alternative theory were correct, that would be a reason to grant review—not deny it. If, as the government apparently contends, the courts of appeals upholding standing are applying the wrong legal principle and routinely failing to address the critical question—whether the statute protects an interest that also was protected at common law—this Court should intervene to clarify the relevant standard. Otherwise, the Court will repeat-

[1] The government's discussion of general standing principles invokes Justice Scalia's 1983 article to suggest that violation of a statutory right necessarily constitutes injury-in-fact. U.S. Am. Br. 9 (citing Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 Suffolk U. L. Rev. 881, 885 (1983)). But a passage omitted by the government refers to "a minimum requirement of injury in fact which not even Congress can eliminate." Scalia, *supra*, at 885.

edly face cases like this one, in which the party opposing certiorari (and sometimes the government) defends the judgment below on grounds not addressed by the lower court.

Moreover, the government's common-law analogy fails. Contrary to the government's contention, defamation claims without proof of injury were cognizable only when the false information exposed the plaintiff "'to hatred, contempt, or ridicule.'" *Milkovich* v. *Lorain Journal Co.*, 497 U.S. 1, 13 (1990) (quoting *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 370 (1974) (White, J., dissenting)). The information alleged to be false here—depicting respondent as better educated, wealthier, and married—does not satisfy that test.

Finally, the government does not, and cannot, dispute the tremendous practical importance of the question presented, demonstrated in the ten amicus briefs filed by seventeen amici. Review by this Court is plainly warranted.

A. The Government's Failure To Defend The Standing Principle Adopted By The Court Below Confirms The Urgent Need For This Court's Review.

The government's brief is remarkable for its failure to defend the legal rule applied by the court below and the other courts of appeals that have held "injury in law" sufficient to satisfy Article III.

The Ninth Circuit's decision rested on its long-held view 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)). Because respondent alleged that Spokeo "violated *his* statutory rights, not just the statutory rights of other people," and because those rights are "individualized rather than collective," the alleged statutory violations were "sufficient to satisfy the injury-in-fact requirement of Article III." *Id.* at 8a.

The court below specifically refused to "decide whether [the purportedly concrete harms alleged by respondent] could be sufficient injuries in fact" because its holding that respondent "has standing by virtue of the alleged violations of his statutory rights" was dispositive of the Article III question. *Id.* at 9a n.3.

The Sixth and Eighth Circuits applied precisely the same rationale in holding allegations of a FCRA violation by themselves sufficient to satisfy Article III, without regard to whether the plaintiff suffered any actual injury. Pet. 9; Reply Br. 7.

The government employs two tactics to avoid defending the validity of the broad legal principle that a statutory violation directed at the plaintiff is sufficient by itself to satisfy Article III. *First*, the government significantly mischaracterizes the ruling below, using selective quotation to create the impression that the Ninth Circuit rested its Article III holding on the alleged falsity of the information concerning respondent.

The government combines a snippet from the very first sentence of the opinion with a snippet from the standing discussion many pages later. U.S. Am. Br. 8 ("The court of appeals held that respondent had established Article III standing to sue petitioner 'for publishing inaccurate personal information about

[respondent]' because petitioner allegedly had violated respondent's 'statutory rights' protecting his 'personal interests in the handling of his credit information.'") (quoting Pet. App. 1a, 8a).

In fact, the Ninth Circuit's standing analysis never once refers to the alleged falsity of the information regarding respondent. Pet. App. 4a-9a. The court relied only on the fact that Congress created a statutory right that was "individualized rather than collective"—in other words, the statute did not confer an "'undifferentiated public interest in executive officers' compliance with the law.'" *Id.* at 8a (quoting *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 577 (1992)).[2]

The government tries to bolster its claim that the ruling below rested on the alleged inaccuracy of the transmitted information by incorrectly asserting that the court below addressed standing with respect to only one of respondent's four claimed Fair Credit Reporting Act (FCRA) violations—his invocation of 15 U.S.C. § 1681e(b), which requires a credit reporting agency to "follow reasonable procedures to assure maximum possible accuracy of" consumer reports. U.S. Am. Br. 10-11, 16. In fact, the Ninth Circuit treated each of the claimed violations identically, list-

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[2] Indeed, the Ninth Circuit's standing analysis described respondent's injury, not in terms of false information, but rather as an affront to his "personal interest[ ] in the *handling* of his credit information." Pet. App. 8a (emphasis added).

The government asserts in passing that respondent pleaded monetary injury (U.S. Am. Br. 5). In fact, respondent alleged only that he was unemployed—a status he did not blame on petitioner; that, "[b]ecause [respondent] is unemployed, he has lost and continues to lose money," FAC ¶ 36; and his "employment prospects" were harmed. *Id.* ¶ 35.

ing them once at the outset of its standing analysis (Pet. App. 4a) but *never* referring to the particulars of any violation again (*id.* at 4a-9a).[3]

Once the government's claimed distinction among respondent's claims collapses, so does its Potemkin opinion. None of the other alleged violations requires proof that the disseminated information was inaccurate. They involve the supposed failure to provide required notices and to post a toll-free number. See U.S. Am. Br. 16. Because proof of inaccuracy is not an element of these claims, the Ninth Circuit could not rely on alleged inaccuracy to support Article III standing, and the government's characterization of the court's opinion is exposed as a fabrication.

Second, the government invents a new, narrower principle for upholding respondent's standing—a rationale neither presented to nor adopted by the court of appeals. In the government's view, the proper inquiry is whether "[c]ourts have long recognized" that infringement of "legally protected interests" that are "similar" to the statutory right provides a basis for suit. U.S. Am. Br. 11. Alternatively, standing may be upheld if the statute effects only "a modest legislative expansion of the circumstances in which" courts traditionally have entertained suit. *Id.* at 14. The government's argument is wrong as a matter of defamation law, as we discuss below (at 7-8). But the critical point is that the government's analysis concedes that a statutory violation can support standing

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[3] The government bizarrely takes petitioner to task for "virtually ignor[ing]" the elements of the causes of action and the allegations of the complaint. U.S. Am. Br. 7. But it is the *court of appeals* that deemed those factors irrelevant to its standing analysis.

only if the injury supporting the cause of action is either the same as or a "modest legislative expansion of" an injury that was cognizable at common law.

The government's argument thus confirms the urgent need for review by this Court, because it demonstrates that the lower courts are applying an erroneous standard to uphold standing based on a bare statutory violation. On the government's view, these courts should not be declaring Article III satisfied on the basis of a statutory violation directed at the plaintiff. Rather, they must inquire whether the statutory violation requires proof of an injury actionable at common law—or at least represents only a modest expansion of such a common-law injury.

Whether petitioner is correct that only actual injury can satisfy Article III or the government's legislatively-authorized analogous injury approach is correct, one thing is crystal clear: the lower courts that uphold "injury in law" standing do not apply either test, but instead invoke the broad principle that *any* statutory violation directed at an individual is sufficient to establish standing, as the Ninth Circuit did here.

This Court should not tolerate a situation in which federal courts frequently reject standing challenges and allow lawsuits to proceed based on an incorrect standard that even the government is unwilling to defend. The Court's guidance regarding the proper approach is urgently needed.[4]

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[4] The government's brief evidences a significant shift from *First American*. At the certiorari stage in that case, the government defended the broad "injury in law" standing principle applied by the Ninth Circuit. Brief for the United States as Amicus Curiae 10-13, No. 10-708 (May 2011). At the merits

B. Respondent Lacks Standing Under The Government's Substitute Article III Standard.

The government's newly-minted Article III test provides no basis for upholding respondent's standing here.

The government contends that the dissemination of "inaccurate information about respondent in violation of respondent's rights *is* a tangible harm." U.S. Am. Br. 11 (emphasis preserved; internal quotation marks omitted). It mistakenly suggests that the common-law action for defamation, which does not require any proof of damage, encompasses all transmissions of inaccurate information. *Ibid.*

In fact, defamation's presumption of injury—"an oddity of tort law" (*Gertz*, 418 U.S. at 349)—reaches *only* false information that exposes its subject "to hatred, contempt, or ridicule." *Milkovich*, 497 U.S. at 13. The government's assertion that all defamation suits may be maintained without proof of actual injury ignores that the defamation tort itself is limited to disparaging statements that meet the *Milkovich* test. 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."). The presumption of injury is thus restricted to disparaging

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stage, the government maintained that position, relying on an analogy to actions permitted at common law only as a fallback position. Brief for the United States as Amicus Curiae 13-27, No. 10-708 (Oct. 2011). Here, the government has abandoned the broad argument, relying only on the analogy to common-law actions.

statements because of the limit on the scope of the defamation tort.

Here, petitioner allegedly permitted searchers to find information inaccurately stating that respondent was married with children and overstating his financial resources and education. None of those characteristics elicits "hatred, contempt, or ridicule." *Milkovich*, 497 U.S. at 13; see Reply Br. 3-4.

Moreover, the First Amendment protects false statements as well as true ones except when the statements reflect "defamation, fraud, or some other legally cognizable harm associated with a false statement." *United States* v. *Alvarez*, 132 S. Ct. 2537, 2545 (2012) (plurality op.). The constitutional limitations on presuming injury from speech undercut the government's contention that, to the extent that Congress made the dissemination of harmless inaccurate information actionable under FCRA, it permissibly undertook, "at the very most, a modest legislative expansion." U.S. Am. Br. 14.

The government also invokes general statements regarding privacy to assert that the harmless dissemination of information about an individual is a tangible harm to the individual's interest in "avoiding public disclosure" of personal information. *Id.* at 12. But neither of the cited cases involved common-law actions by persons claiming invasion of privacy, and they therefore provide no support for the government's assertion that respondent's claim involves traditionally-actionable interests. Indeed, the government does not even try to establish that the disclosure of "personal information regarding marital and employment status" (*Ibid.* (quoting *U.S. Dep't of State* v. *Ray*, 502 U.S. 164, 175 (1991))) is actionable in tort in the absence of harm. And respondent has

never contended that he was injured by the exposure of information that he had a right to keep private.

Casting further afield for analogies to support standing without concrete injury, the government invokes decisions addressing statutory restrictions on the government's own production of records or dissemination of information. *Id.* at 11-12 & n.1. But those cases, too, involve statutory claims, not settled common-law doctrine.

In any event, these merits arguments concerning a legal theory not addressed by the court of appeals provide no reason to deny review—they relate only to one of respondent's multiple FCRA claims (see pages 4-5, supra) and are properly addressed on remand after this Court clarifies the standard for determining whether a statutory violation in the absence of actual injury suffices to establish Article III standing.

C. The Issue Is Extremely Important.

The government does not dispute that numerous federal statutes purport to create standing based on a bare statutory violation; that suits based on such statutes are frequently met by standing challenges; that the lower courts apply conflicting standards in resolving those standing disputes; and that the lower courts upholding standing generally apply the broad principle invoked by the Ninth Circuit here.

If any further demonstration of the issue's importance were required, it is supplied by the ten *amicus* briefs explaining the very substantial impact of these lawsuits in a variety of legal contexts. See also Reply Br. 8-9.

In response, the government presents two reasons why this Court should deny review. Both are insubstantial.

First, the government argues that there is no conflict warranting review because the Second, Fourth, and Federal Circuit decisions address different statutes and those courts inquire whether the plaintiff has suffered an actual injury. U.S. Am. Br. 20-22; see also Reply Br. 9-10.

That is precisely the point. A plaintiff in those circuits must show actual injury, and a statutory violation directed at the plaintiff does not automatically suffice.[5] In the Ninth, Sixth, and Eighth Circuits, by contrast, the allegation of a federal statutory violation is sufficient as long as it is directed at the plaintiff and not someone else or the public at large; actual injury is not required.

The government's claim that there is no conflict is therefore tied to its reimagining of the Ninth Circuit's opinion in this case as turning on the alleged falsity of the information disseminated by petitioner *and* the government's flawed conclusion that all disseminations of false information were actionable at common law without proof of injury. U.S. Am. Br. 17-18. The legal rule that the Ninth Circuit actually ap-

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[5] In addition, Judge Jolly of the Fifth Circuit—dissenting from a decision that found standing on a theory of concrete injury that the plaintiff had not raised—recently stated that, while "Congress's creation of a cause of action can make an injury legally cognizable," it cannot "make a non-injury justiciable in an Article III court." *Mabary* v. *Home Town Bank, N.A.*, 771 F.3d 820, 830 (5th Cir. 2014), *appeal dismissed per stipulation*, No. 13-20211 (Jan 8, 2015).

plied squarely conflicts with the rule applied by at least two other circuits.

Finally, the government reprises respondent's argument that there is no conflicting decision involving claims under FCRA. Why would a plaintiffs' lawyer file a nationwide FCRA class action in a circuit requiring proof of actual injury, when a case filed in the Ninth Circuit benefits from the generous standing test applied below? And no conflict over FCRA is necessary to demonstrate the lower courts' conflicting approaches to Article III.

Second, the government deems irrelevant the inevitable consequences of the standing rule applied below—extraordinarily large damages awards and facilitation of class certification. See Pet. 14-16; Reply Br. 9; U.S. Am. Br. 15, 23.

But those consequences—and the resulting coercion to settle gigantic class actions involving no actual harm—demonstrate the practical importance of ensuring that lower courts undertake the proper standing inquiry. That is why this Court's review is plainly warranted.[6]

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[6] The government asserts (U.S. Am. Br. 17, 19) that the question presented is not properly framed because it does not focus on the government's substitute rationale. The government advocates (*id.* at 19) a question (1) limited to one of respondent's multiple FCRA claims, even though the Ninth Circuit addressed all of the claims (see pages 4-5, *supra*); and (2) emphasizing the alleged inaccuracy of the disseminated information, even though the court below placed no reliance on that allegation (see page 4, *supra*).

But mentioning the statutory provisions is unnecessary, because the Court always addresses a question in the context of the case in which it arises. More significantly, the government's

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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revision mischaracterizes the court of appeals' holding; the question presented, by contrast, mirrors the lower court's broad holding. See pages 3-6, *supra*. No rule of this Court requires petitioners to frame questions presented on the basis of the alternative arguments advanced by those seeking to defend the judgment on other grounds.

A question based on the court of appeals' rationale that encompasses the standing challenges to all of respondent's claims could be:

> Whether respondent's allegations of violations of the Fair Credit Reporting Act, without more, are sufficient to establish standing under Article III to assert causes of action based on those violations.