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,

Respondents.

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

BRIEF OF THE AMERICAN ASSOCIATION FOR JUSTICE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

LARRY A. TAWWATER
President
AMERICAN ASSOCIATION FOR JUSTICE
777 6th Street NW
Suite 200
Washington, DC 20001
(202) 965-3500

JEFFREY R. WHITE
Counsel of Record
CENTER FOR CONSTITUTIONAL LITIGATION, P.C.
777 6th Street NW
Suite 520
Washington, DC 20001
(202) 944-2839
jeffrey.white@cclfirm.com

Counsel for Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Keenley, James, *How Many Injuries Does It Take? Article III Standing in the Class Action Context*, 95 Cal. L. Rev. 849 (2007) 24

Nelson, Caleb, *Adjudication in the Political Branches*, 107 Colum. L. Rev. 559 (2007) 19

Prosser, William, *Privacy*, 48 Cal. L. Rev. 383 (1960) 28, 30

Restatement (Second) of Torts § 652E (1977)..... 28

Roberts, Jr., John G., *Article III Limits on Statutory Standing*, 42 Duke L.J. 1219 (1993) 25, 27

Scalia, Antonin, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 Suffolk U. L. Rev. 881 (1983) 11, 23

Sunstein, Cass R., *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 Mich. L. Rev. 163 (1992) . *passim*

The Supreme Court, 1999 Term—Leading Cases, 114 Harv. L. Rev. 329 (2000)..... 25

Wigmore, John H., *The Right Against False Attribution of Belief or Utterance*, 4 Ky. L.J. No. 8 (1916) 28

Winter, Steven L., *The Metaphor of Standing and the Problem of Self-Governance*, 40 Stan. L. Rev. 1371 (1988)..... 20, 21

IDENTITY AND INTEREST OF AMICUS CURIAE

The American Association for Justice is a voluntary national bar association whose members primarily represent the injured victims of misconduct. American Association for Justice members often represent personal injury plaintiffs as well as those whose civil rights and consumer rights have been violated.

The American Association for Justice believes that the court below correctly decided this case. The American Association for Justice is further concerned that this Court granted certiorari based on Petitioner's description of this case as one in which plaintiff alleged a bare violation of the statute with no concrete impact on the plaintiff. Because that is not this case, and because unwarranted expansion of "injury-in-fact" threatens the right of access to the courts of those for whom Congress has created a remedy, the American Association for Justice suggests that the Petition be dismissed as improvidently granted.[1]

SUMMARY OF ARGUMENT

1. This is a tale of two cases. Petitioner describes plaintiff's lawsuit as based on bare violation of the Fair Credit Reporting Act ("FRCA")—by disseminating false information in a consumer

---

[1] Letters from counsel for all parties evidencing their consent to the timely filing of *amicus curiae* briefs have been filed with the Court. Pursuant to Rule 37.6, *amicus* discloses that no counsel for a party authored any part of this brief, nor did any person or entity other than *amicus*, its members, or counsel make a monetary contribution to its preparation.

report—but no concrete, real-world injury. According to Petitioner, plaintiff's allegations do not include injury-in-fact, which this Court has deemed essential to Article III standing.

In fact, plaintiff alleged that Spokeo violated the FCRA by failing to implement requisite reasonable procedures to ensure accuracy of its consumer reports and to make the requisite disclosures designed to help consumers detect and correct inaccuracies. The dissemination of false information concerning plaintiff is not the alleged violation of the FCRA; it is the consequence of those statutory violations. It is precisely the harm the FCRA was designed to prevent and it is the concrete, real-world injury that Petitioner and supporting amici insist upon.

The Question Presented, whether Congress can confer standing upon a plaintiff who suffers no concrete harm based on bare violation of a federal statute, is not at issue in this case. This is not an instance in which a plaintiff has made out a case based on harm to another or a generalized grievance against violation of a federal statute with no alleged injury to himself. The complaint in this case alleges a concrete harm in the marketing and dissemination of false information regarding plaintiff over the internet to potential employers and others.

Whether Congress could confer standing on a person who suffered no concrete injury may present an important question for this Court. But that is not this case. The Petition was improvidently granted and should be dismissed.

2. Petitioner also erroneously conflates the standing requirements this Court has imposed on causes of action for the enforcement of public rights with the requirements applicable to cases between private parties for the vindication of private rights. Petitioner relies on this Court's Article III standing decisions holding that plaintiffs must allege injury-in-fact separately and in addition to the violation of a legal interest. However, all of those decisions were rendered in the context of public-rights litigation—cases against the federal government or challenging the manner in which a federal agency administers the law. None of the cases Petitioner relies upon holds that a plaintiff in an action vindicating private rights must allege separate injury-in-fact in addition to the elements of the cause of action.

Historically, the business of the judicial branch has been to adjudicate actions between private parties seeking to vindicate private rights. For much of our history, the issues that are now referred to as "standing" were mediated by the common-law forms of action. Violations of legal rights were associated with remedies that prescribed the damages available. Congress has the authority to create private rights and to provide for a right of action in court to remedy violations of those rights. In that context, the notion of injury-in-fact serves no useful purpose.

Following the New Deal expansion of the reach of federal administrative agencies, Congress has also established private rights of action to enforce "public rights." These statutory rights of action, often referred to as "citizen-suit" provisions, allow private plaintiffs to sue to insure that taxpayer dollars are spent appropriately and federal agencies carry out their

functions in accordance with the Constitution and laws of the United States.

Such lawsuits obviously raise separation of powers issues by placing the courts in the position of supervising the federal administrative bureaucracy and by allowing Congress to delegate to private parties the executive function of enforcing the law. The Court developed injury-in-fact as a limiting principle, to require plaintiffs in public-rights cases show concrete, specific injury separate from and in addition to the alleged statutory violation. This Court has given no indication that this requirement should also be applied in private-rights cases. Indeed, such an extension would make little sense: the injury requirement was imposed to make public-rights litigation more closely resemble the private-rights model.

Because Petitioner's arguments and authorities for imposing a separate injury-in-fact requirement are grounded in public-rights cases, this Court should dismiss the Petition in this private-rights case as improvidently granted.

3 This Court has held that a reliable guide to the kinds of cases and controversies within the judicial power under Article III is found in the types of cases at common law that were traditionally viewed as amenable to judicial resolution.

One common law cause of action was defamation, which does not require a plaintiff to plead special damages. Petitioner argues that the false information in this case actually portrayed plaintiff favorably so that damages may not be presumed. To the contrary, false information sent to a prospective

employer concerning an applicant leads to the conclusion that the applicant has lied, and so may be presumed to harm the applicant.

In addition, the common law recognizes the tort of invasion of privacy by portrayal of the plaintiff in a false light. That cause of action will lie even if the false information is laudatory, so long as its publication would be offensive to a reasonable person, an issue that goes to the merits, rather than to standing.

The fact that actual damages for the FCRA cause of action are difficult to calculate is also no obstacle to standing. Indeed, Petitioner and several supporting amici concede that where there is harm that is difficult to discover or to quantify—in this case the dissemination of false information regarding plaintiff—Congress may provide for statutory damages.

Whether Congress could authorize recovery of statutory damages in a private-rights case by a plaintiff who has alleged only violation of a statute with no concrete impact on the plaintiff is not a question squarely presented in this case. The Court should therefore dismiss the petition as improvidently granted.

ARGUMENT

I. This Is Not a Case in Which a Plaintiff Who Has Suffered No Concrete Injury Sues for Bare Violation of a Federal Statute.

A. Plaintiff has alleged violation by defendant of duties imposed by the FCRA, resulting in the dissemination of false information about plaintiff, the harm the FCRA was designed to prevent.

This is a tale of two cases: One is described in the Petition and Petitioner's merits brief. The other is set forth in the Complaint actually filed in the district court and addressed by the Ninth Circuit.

It is true that this Court has consistently maintained that Article III standing "requires the litigant to prove that he has suffered a concrete and particularized injury that is fairly traceable to the challenged conduct, and is likely to be redressed by a favorable judicial decision." *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2661 (2013) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). "In other words, for a federal court to have authority under the Constitution to settle a dispute, the party before it must seek a remedy for a personal and tangible harm" that gives him a "direct stake in the outcome of the case." *Id.* at 2661-62. This is, in fact, the case before this Court.

Petitioner's Question Presented asks whether Congress can constitutionally "confer Article III standing upon a plaintiff who suffers no concrete harm . . . by authorizing a private right of action based on a bare violation of a federal statute." That question

may be an important one for this Court. But that is not this case.

According to Petitioner, "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." Pet. Br. 2. Petitioner paints this case as one alleging "bare statutory violations" "without any real-world injury." *Id*. Repeatedly, Spokeo asserts that Robins's FCRA claim, "require[s] proof that information [in the consumer report] was false." *Id*. at 50. *See also Id*. at 51 (referring to "the alleged false statements"); *id* at 52 (disputing that the "allegedly incorrect information inflicted concrete harm").

Specifically, Spokeo describes plaintiff's First Cause of Action as alleging that the company disseminated "search results associated with his name [that] included inaccurate information indicating that he has more education and professional experience than he actually does have; that he is married (although in fact he is not); and that he is better situated financially than he really is." *Id*. at 4-5.

In fact, Robins's Complaint does not allege the publication of false information as the basis for his First Cause of Action, because the publication of false information does not itself violate the FCRA. Rather, plaintiff alleged that Spokeo violated the requirement in 15 U.S.C. § 1681e(b) that consumer reporting agencies "shall follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates." The dissemination of false information

concerning Robins's family and financial status is the harm caused by Spokeo's violation of its duty under the FCRA. In short, that false portrayal of Robins to potential employers and others is the real-world injury that Petitioner and supporting amici insist upon for standing. *See, e.g.*, Br. of Chamber of Commerce, et al. as Amici Curiae 9 (arguing that "the requisite concrete and particularized injury" is not to be found in the bare violation of a statute, but "in the *consequences* of the statutory violation." (emphasis in original).

In addition, Robins alleges that Spokeo violated 15 U.S.C. § 1681e(d)(1), which requires the consumer reporting agency to provide a notice to furnishers of information concerning their obligations under the FRCA to provide accurate information, and § 1681e(d)(2), which requires the agency to furnish its customers with notice of their obligations under the statute. These may be viewed as essential elements of a set of reasonable procedures to assure accuracy. As Robins alleges in his First Cause of Action, Spokeo's failure to comply with these requirements also resulted in the dissemination of false and inaccurate information in his consumer report. Compl. at ¶¶ 58-64.

Spokeo also argues that plaintiff lacked standing to bring suit under his Second and Third Causes of Action. In his Second Cause of Action, Robins alleged that Spokeo violated of 15 U.S.C. § 1681b(b)(1) by furnishing consumer reports for employment purposes without obtaining certifications from the recipients that they will disclose to affected consumers that a credit report will be used for employment purposes and whether any adverse action was taken based on the report. Compl. at ¶¶ 67-

70. His Third Cause of Action alleges that Spokeo violated 15 U.S.C. § 1681j by failing to comply with statutory disclosure requirements for streamlined process for consumers to obtain free annual file disclosures (free credit reports). *Id*. at ¶¶ 73-74.

Petitioner contends that Robins lacks standing under these counts because they allege mere "informational injury" to third parties. Pet. Br. 44. To the contrary, the purpose of these disclosure requirements is not to provide information to the recipients. Their purpose is to assist the consumer in detecting and correcting false information that might be used to deny them employment. For example, the Bureau of Consumer Financial Protection, which now administers this portion of the FCRA, indicates that the purpose of the requirement that consumers be notified of the availability of free annual file disclosures is "to enable consumers to detect and dispute inaccurate or incomplete information in the files of nationwide CRAs" 75 Fed. Reg. 9726-01 (Mar. 3, 2010). Spokeo's failure to make the required disclosures had a direct impact on Robins by making it more difficult to detect and correct the misstatements contained in Spokeo's consumer report on him.

This Court has made clear that a litigant "raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy." *Lujan*, at 573-74. *See also Lance v. Coffman*, 549 U.S. 437, 439 (2007) ("Our refusal to

serve as a forum for generalized grievances has a lengthy pedigree.").

But this is not the case described by Petitioner. Robins is not an "enterprising would-be plaintiff[]" trying to "sue over a mere statutory violation that works no concrete harm." Pet. Br. 31. Nor did Congress in enacting the private right of action under the FCRA, 15 U.S.C. § 1681n(a)(1)(A), purport to confer standing on plaintiffs simply "seeking out and bringing lawsuits over bare statutory violations in the hope of obtaining a statutory bounty . . . asserting little more than a general interest in seeing 'that the Nation's laws are faithfully enforced.'" *Id.* at 30 (quoting *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 107 (1998)). Nor does the Ninth Circuit's decision commission "private plaintiffs and their counsel [to] 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." Pet. Br. 38 (internal quotes omitted).

Instead, plaintiff alleged that Spokeo's failure to "follow reasonable procedures to assure maximum possible accuracy" of its credit reports resulted in precisely the harm Congress sought to prevent: "Defendant has caused Plaintiff actual and/or imminent harm by creating, displaying, and marketing inaccurate consumer reporting information about Plaintiff." Compl. ¶ 35. The details of the false consumer report concerning plaintiff, set out in the Complaint at ¶¶ 30-35, do not constitute the statutory violations—they are the concrete and particularized harm to Robins that were caused by Spokeo's statutory violations.

B. This case does not squarely present the question whether Congress can create standing by authorizing a person who has suffered no concrete harm to bring a private right of action based solely on a statutory violation.

A crucial contention by Petitioner is 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." Pet. Br. 13 (quoting *Raines v. Byrd*, 521 U.S. 811, 820 n.3 (1997)).

Indisputably, "legal injury is by definition no more than the violation of a legal right; and legal rights can be created by the legislature." Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 Suffolk U. L. Rev. 881, 885 (1983). In addition, this Court has repeatedly held 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)). *See also O'Shea v. Littleton*, 414 U.S. 488, 493 n.2 (1974) ("Congress may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute."); *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring) (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." (citing *Warth*, 422 U. S. at 500)).

Petitioner and supporting amici argue that the Ninth Circuit misconstrued this Court's language in *Warth* as allowing Congress to "override the Constitution's injury-in-fact requirement," Pet. Br. 14, to mean that "a mere breach of statutory duties establishes an injury in fact under Article III and, therefore, that Congress is free to create a private damages remedy for such breach." Amicus Br. of New Eng. Legal Found. 3-4. *See also* Amicus Br. of DRI 8 (*Warth* "simply means that the violation of a statutory right might satisfy Article III standing, but only if the statutory violation has caused a concrete, de facto injury.").

Again, that is not this case. The complaint did not allege a bare violation of Spokeo's duty to employ reasonably accurate procedures and to make FCRA-required disclosures. Robins alleged that, as a consequence of those violations, false information was made available over the internet in a consumer report prepared by Spokeo regarding Robins.

Whether Congress *could* authorize a person who suffered no such adverse impact to bring a private right of action for violation of the FCRA is not presented in this case. To the extent that the Petition asked this Court to address that question, Amicus suggests, the Petition was improvidently granted.

Moreover, in addressing that specific issue in *Lujan*, this Court there strongly suggested that the concrete injury requirement was a separate requirement for standing only in public-rights cases, not in cases such as this one, brought to vindicate private rights. *See Lujan*, 504 U.S. at 578 ("Whether or not the principle set forth in *Warth* can be extended beyond that distinction, it is clear that *in suits against*

the Government, at least, the concrete injury requirement must remain.") (emphasis added).

II. Plaintiffs Who Make Out a Statutory Cause of Action for Violation of Their Private Rights Have Article III Standing Without Pleading Separate Injury In Fact.

A. Petitioner conflates statutory causes of action to vindicate public rights with those that vindicate private rights.

In this tale of two cases, Petitioner's primary argument is that injury-in-fact is a separate and essential element of Article III standing that Congress cannot override. Pet. Br. 13-14. It is true that in public-rights cases, this Court has required plaintiffs to show particularized injury-in-fact in addition to a "generalized grievance" concerning the proper enforcement of the law or spending of tax dollars. *See Lujan*, 504 U.S. at 578. This case, however, is one between private parties to adjudicate private rights. This Court has never required plaintiffs in such cases to establish injury-in-fact in addition to proving the common-law or statutory elements for recovery.

The Question Presented in this case asks whether "Congress may confer Article III standing upon a plaintiff who suffers no concrete harm . . . by authorizing a private right of action based on a bare violation of a federal statute." Amicus American Association for Justice explained in Part I that this is not a case "based on a bare violation of a federal statute." In this Part, the American Association for Justice suggests that the Question Presented conflates this Court's standing jurisprudence in

public-rights cases, which has required a showing of "concrete harm" in addition to statutory violation, with private-rights cases, such as this, where such a requirement serves no purpose. This Court has held that Congress may not authorize plaintiffs to sue to enforce public rights without concrete injury. But that is not this case.

Congress, of course, has the authority to create a statutory right and to create a private right of action to enforce that right. *E.g., Sereboff v. Mid Atlantic Med. Servs., Inc.*, 547 U.S. 356 (2006), construing express private cause of action provided in the Employee Retirement Income Security Act, 29 U.S.C. § 1132(a)(3). *See also Cannon v. Univ. of Chicago*, 441 U.S. 677, 690 n.13 (1979), collecting cases in which this Court recognized a private right of action to enforce a statutory right. Congress has also created private rights of action to enforce "public rights," sometimes referred to as "citizen-suit" provisions. *E.g., Lujan*, 504 U.S. at 571.

The distinction between "public rights" against the Government and "private rights" between private parties is well established. *United States v. Jicarilla Apache Nation*, 131 S. Ct. 2313, 2323 (2011). Private rights arise from the duties owed by one individual to another, the violation of which results in "the liability of one individual to another under the law as defined." *Crowell v. Benson*, 285 U.S. 22, 51 (1932). For example, it is axiomatic that "any matter which, from its nature, is the subject of a suit at common law" is within the judicial power. *Den ex dem. Murray v. Hoboken Land & Improvement Co.*, 59 U.S. 272, 284 (1855).

> At the same time there are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper.

Id. Thus private rights litigation includes "private tort, contract, and property cases, as well as a vast range of other cases." *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 51 (1989) (quoting *Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n*, 430 U.S. 442, 458 (1977)).

However, Congress can also authorize public-rights cases that "arise between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments." *Id.* at 51 n.8 (quoting *Crowell v. Benson*, 285 U.S. at 50). *See also* Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 Mich. L. Rev. 163, 165 n.11 (1992) (collecting statutes in which Congress has included "citizen-suit" provisions).

In "public rights" cases, "the Government is involved in its sovereign capacity under an otherwise valid statute creating enforceable public rights." *Granfinanciera*, 492 U.S. at 51. Public rights are "closely intertwined with a federal regulatory program Congress has power to enact" and either

"belongs to [or] exists against the Federal Government." *Id*. at 54-55.[2]

Separation of powers issues arise in such litigation because in creating a private right of action to enforce public rights, Congress allows private parties to bring to court "matters that historically could have been determined exclusively by" the Executive and Legislative Branches. *Northern Pipeline Const. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 68 (1982) (plurality). "Private-rights disputes, on the other hand, lie at the core of the historically recognized judicial power," and raise no such difficulties. *Id*. at 70.

In a line of "generalized grievance" cases, this Court has held that one "claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy." *Lujan*, 504 U.S. at 573-74. *See also Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1386 (2014) (referring to "the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches"); *ASARCO Inc. v. Kadish*, 490 U.S. 605, 616

---

[2] This Court stated that public-rights cases generally involve "the United States as a proper party to the proceeding." *Northern Pipeline Const. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 69 n.23 (1982) (plurality). Although this Court's subsequent decisions have rejected that limitation, "it is still the case that what makes a right 'public' rather than private is that the right is integrally related to particular federal government action." *Stern v. Marshall*, 131 S. Ct. 2594, 2613 (2011). This case, of course, does not seek to require, prohibit, or alter any federal government action.

(1989) ("The claims raised here, moreover, are the kind of generalized grievances brought by concerned citizens that we have consistently held are not cognizable in the federal courts"); *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 475 (1982) (similar); *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 217 (1974) (similar).

Justice Scalia, writing for the Court in *Lujan*, made clear that the "concrete injury" requirement was a constitutional requisite for standing to vindicate public rights, not the adjudication of private rights, which does not raise separation of powers conflicts.

> Vindicating the *public* interest (including the public interest in Government observance of the Constitution and laws) is the function of Congress and the Chief Executive. . . . To permit Congress to convert the undifferentiated public interest in executive officers' compliance with the law into an "individual right" vindicable in the courts is to permit Congress to transfer from the President to the courts the Chief Executive's most important constitutional duty, to "take Care that the Laws be faithfully executed," Art. II, § 3. It would enable the courts, with the permission of Congress, "to assume a position of authority over the governmental acts of another and co-equal department."

504 U.S. at 576-77 (quoting *Massachusetts v. Mellon*, 262 U.S. 447, 489 (1923)).

It is clear that the basis for requiring injury-in-fact as "a hard floor of Article III jurisdiction that cannot be removed by statute," Pet Br. 14 (quoting *Summers v. Earth Island Inst.*, 555 U.S. 488, 497 (2009)), lies in the limits of judicial authority over the actions of other branches as well as the limit on Congress's authority to delegate such powers. Plaintiff in this case, by contrast, does not sue the United States nor any agency thereof. He does not seek to require or to bar any governmental action. In short, this action gives rise to none of the separation of powers problems that concerned this Court in *Lujan* and other public-rights cases. Yet, every one of this Court's decisions Petitioner has pressed into service in support of requiring injury-in-fact is a public-rights case. None involves a plaintiff suing to vindicate a private right, whether conferred by statute or common law.[3]

Indeed, historically, this Court has never required a party seeking compensation for violation of a private right to establish, separately and additionally, injury-in-fact.

---

[3] The only case relied upon by Petitioner that was not an action against a governmental agency is *Friends of the Earth, Inc. v. Laidlaw Environmental Services*, 528 U.S. 167 (2000), a citizen suit under the Clean Water Act, 33 U.S.C. § 1365(a), alleging that the holder of a permit granted under the CWA to discharge pollutants was not in compliance with the terms of the permit. The case was clearly a public-rights action. Moreover, although the Court found that plaintiffs had alleged an injury-in-fact, the Court did not have occasion to hold that such allegations were essential to standing to bring suit under the CWA. *See* 528 U.S. at 183.

B. Plaintiffs suing to vindicate their private rights have never been required to prove injury-in-fact in addition to defendant's violation of a duty owed to plaintiff.

For most of our history, the province of the judicial power of the United States was "solely, to decide on the rights of individuals, not to inquire how the executive, or executive officers, perform." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803). Until the 20th Century, "[t]he political branches controlled purely public rights." Caleb Nelson, *Adjudication in the Political Branches*, 107 Colum. L. Rev. 559, 571 (2007).

Plaintiffs suing for violation of their property or contract or tort rights pleaded the requisite elements for a writ of trespass or a writ of trespass on the case, and could proceed only by filing the appropriate form of action. "Injury" was subsumed in the cause of action itself. One suing on the case was required to plead damages specially. The writ of trespass, by contrast, presumed that the invasion of the plaintiff's legal interest was itself an injury, and nominal damages could be recovered if no actual damages were proved. *See* F. Andrew Hessick, *Standing, Injury in Fact, and Private Rights*, 93 Cornell L. Rev. 275, 281-82 (2008).

For example, a plaintiff could make out a cause of action for trespass upon his real property without pleading damages specially. "One whose property rights have been invaded by a trespass, although actual damages are not proven, and even absent any actual loss or injury, can recover a nominal amount for the purpose of vindicating this right." 87 C.J.S. *Trespass* § 124. *See also* 75 Am. Jur. 2d *Trespass* § 186

("Nominal damages are presumed from trespass even where the owner has suffered no actual injury to his or her possessory interest."). The notion of pleading injury-in-fact separately and in addition to the elements of the cause of action was unknown to common-law courts. Indeed, the term "injury-in-fact" did not appear in judicial opinions until the 1970s and "standing" appeared only rarely before that time. *See* Sunstein, *supra*, at 169-70.

In adjudicating private rights, the common law took as "a general and indisputable rule" that "where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded." *Marbury*, 5 U.S. at 163 (quoting 4 William Blackstone, Commentaries, at *23). Each remedy, in turn, was accessed through the proper form of action which "defined the rights of citizens and, concurrently and coextensively, provided a remedy to the injured party." Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 Stan. L. Rev. 1371, 1395 (1988). Petitioner's summary of English common law actions, in which legal wrongs "were in each case defined to require a showing of concrete harm," even if presumed or non-pecuniary, acknowledges as much. *See* Pet. Br. at 22-26. Thus, "injury" was the invasion of a legal interest, which "was mediated through the forms of action." Sunstein, *supra*, at 170 n.30.

As Chief Justice Marshall explained,

> [The "cases or controversies"] clause enables the judicial department to receive jurisdiction to the full extent of the constitution, laws, and treaties of the United States, when any question

> respecting them shall assume such a form that the judicial power is capable of acting on it. That power is capable of acting only when the subject is submitted to it by a party who asserts his rights in the form prescribed by law. It then becomes a case.

Osborn v. Bank of United States, 22 U.S. 738, 819 (1824).

Allegation of injury-in-fact as a separate requirement of a case or controversy was thus not a meaningful concept in private rights cases. The violation of a legal right was itself the injury. As Justice Story explained, "[a]ctual, perceptible damage is not indispensable as the foundation of an action." *Webb v. Portland Manufacturing Co.*, 29 F. Cas. 506, 508 (C.C.D. Me. 1838) (No. 17,322). Rather, it was "among the very elements of common law, that, wherever there is a wrong, there is a remedy to redress it; and that every injury imports damage in the nature of it; and, if no other damage is established, the party injured is entitled to a verdict for nominal damages." *Id.* at 507. "The law tolerates no farther inquiry than whether there has been the violation of a right." *Id.* at 508. A separate showing of injury-in-fact was unnecessary because "[t]he forms of action stood as the gatekeepers of this system." Winter, *supra*, at 1395.

This formalistic view persisted until well into the 20th Century. Justice Brandeis observed,

> Whenever the law provides a remedy enforceable in the courts according to the regular course of legal procedure, and

> that remedy is pursued, there arises a case within the meaning of the Constitution.

Tutun v. United States, 270 U.S. 568 (1926). In short, "what we now consider to be the question of standing was answered by deciding whether Congress or any other source of law had granted the plaintiff a right to sue." Sunstein, *supra*, at 170. In the case at bar, the FCRA expressly granted Robins the right to sue for failure to implement reasonable procedures for accuracy and failure to provide the FCRA disclosures designed to enable consumers to detect and correct false information in their reports.

This Court first employed the term "injury in fact" in *Ass'n of Data Processing Serv. Organizations, Inc. v. Camp*, 397 U.S. 150 (1970), a public-rights case in which plaintiffs sought judicial review of a ruling by the Comptroller of the Currency that permitted national banks to make data processing services available to other banks and to bank customers. In an opinion by Justice Douglas the Court rejected the "legal interest test" for standing as a determination that "goes to the merits." *Id*. at 153. Instead, a court must ask "whether the plaintiff alleges that the challenged action has caused him injury in fact, economic or otherwise." *Id*. at 152. The Court also made clear that its new "injury-in-fact" language was a basic constitutional requirement under Article III. *Id*.

The injury-in-fact standard can also be traced to a 1958 treatise addressing section 10(a) of the Administrative Procedure Act, which provides that any "person . . . adversely affected or aggrieved by agency action within the meaning of a relevant

statute, is entitled to judicial review thereof. 5 U.S.C. § 702. Professor Kenneth Culp Davis interpreted that provision to mean that "any person adversely affected *in fact*" has standing. 3 Kenneth C. Davis, Administrative Law Treatise § 22.02, at 211-13 (1958). This "interpretation of the Administrative Procedure Act to create liberalized judicial review provisions where none existed before . . . has been of enormous consequence" and has been sharply criticized as a misreading of the APA text and history. Scalia, *supra*, at 887-89. *See also* Sunstein, *supra*, at 186 ("[T]his was a misreading of the APA; the language and history of that statute suggested no such renovation of standing law.").

Regardless of the merits of that critique, it is clear that this Court did not require injury-in-fact as an essential requirement for Article III standing in response to any defect or deficiency in the justiciability of private-rights cases. Instead, this Court came to require plaintiffs in citizen suits and other public rights actions to demonstrate concrete injury in order to cabin judicial supervision of executive agency action and congressional delegation of enforcement of the law to non-accountable private parties. *See Lujan*, at 573-77.

As one observer as noted,

> Nearly all of the seminal injury-in-fact cases occur in the context of lawsuits commenced by private parties to challenge public/government action or inaction. [But] the big question in the Article III inquiry—whether an alleged injury is sufficiently particularized or concrete to invoke the federal judicial

> power—is not particularly meaningful in lawsuits between private parties because such disputes do not present the constitutional separation of powers concerns that arise when the federal judicial power is invoked against other public bodies. . . . We should not be surprised that injury-in-fact jurisprudence has had little, if any, discernible effect on the conduct of bilateral private lawsuits in federal court.

James Keenley, *How Many Injuries Does It Take? Article III Standing in the Class Action Context*, 95 Cal. L. Rev. 849, 850-51 (2007).

The familiar formula for standing, then, is:

> "First, the plaintiff must have suffered an 'injury in fact'—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) 'actual or imminent, not "conjectural or hypothetical." 'Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be 'fairly . . . trace[able] to the challenged action of the defendant, and . . . Third, it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.' ".

United States v. Windsor, 133 S. Ct. 2675, 2685-86 (2013) (quoting *Lujan*, at 560-61).

This Court in *Lujan* gave no indication that the injury-in-fact requirement should be applied beyond public-rights cases in which it was designed to serve as a limiting principle on judicial review of the actions or non-actions of the other branches of government. Indeed, this Court in *Lujan* expressly stated that its concern was only with public-rights cases. *See Lujan*, at 578 ("[I]t is clear that in suits *against the Government, at least*, the concrete injury requirement must remain.") (emphasis added).

Petitioner offers no rationale for extending the injury-in-fact requirement to litigation involving the private rights of individuals. Indeed, this Court's standing jurisprudence, including all the public law decisions relied upon by Petitioner, reflect a consistent effort by this Court to tailor standing in public-rights cases to conform to the "private law model of standing." Sunstein, *supra*, at 187. *See also The Supreme Court, 1999 Term—Leading Cases*, 114 Harv. L. Rev. 329, 336 (2000) ("Much of the Supreme Court's standing jurisprudence in the past two decades reflects the view that Article III limits the federal courts to a private law litigation model.").

This is not a public-rights case. The FCRA does not authorize a private plaintiff to sue a federal agency merely because "he believes the agency is not living up to its mandate." John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 Duke L.J. 1219, 1232 (1993). Nor does the court's decision below threaten to "transform the courts into ombudsmen of the administrative bureaucracy." *Id.* Nevertheless, Petitioner has relied exclusively on public-rights cases to argue for reversal. To the extent that the Petition argued that the injury rule in private rights of action for the vindication of public rights was at issue, the

American Association for Justice suggests that the Petition was improvidently granted.

III. The Cause of Action Created by Congress in the FCRA Is the Type Traditionally Amenable by the Judicial Process.

This is not a case in which a plaintiff lacking concrete injury has sued on the basis of a bare statutory violation of the FCRA, as Petitioner has claimed. *See* Part I, *supra*. Nor is this a case in which an individual has brought a private cause of action to vindicate public rights—the type of case where this Court has required that a plaintiff separately allege an individualized concrete injury. *See* Part II, *supra*. In fact, plaintiff's statutory right of action under the FCRA is precisely the type of private right of action that has been traditionally amenable to judicial resolution.

This Court has noted that the kinds of actions cognizable at common law "offer a meaningful guide to the types of cases that Article III empowers federal courts to consider." *Sprint Communications Co., L.P. v. APCC Servs., Inc.*, 554 U.S. 269, 274-75 (2008). This Court has "always taken [Article III standing] to mean cases and controversies of the sort traditionally amenable to, and resolved by, the judicial process." *Steel Co. v. Citizens for Better Env't*, 523 U.S. 83, 102 (1998). *See also GTE Sylvania, Inc. v. Consumers Union of United States, Inc.*, 445 U.S. 375, 382 (1980) ("The purpose of the case-or-controversy requirement is to limit the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process"); Roberts, *supra*, at 1224 ("courts exercise power only" in matters "traditionally thought

to be capable of resolution through the judicial process.").

The common law has historically and traditionally recognized tort causes of action for the publication of false information. Petitioner attempts to distinguish defamation actions, arguing that the false information disseminated by Spokeo on the internet was not of the type that is "virtually certain to cause serious injury to reputation" and thus presumed to be injurious. Pet. Br. 51.

At the outset, the American Association for Justice submits that, in the context of a consumer report provided for employment purposes, false personal information is necessarily harmful. The prospective employer who compared Robins's job application and resume with the information contained in the Spokeo report may well conclude that Mr. Robins was experiencing marital problems, was overqualified for the position, or was unlikely to be satisfied with the compensation offered. In any event, it is almost certain that the prospective employer would conclude that Mr. Robins had lied. *See* Amicus Br. of United States on the Petition 14 n.2.

The American Association for Justice submits that another close analogue to the statutory cause of action in this case can be found in the common law tort of invasion of privacy by portrayal in a false light. The Restatement describes this tort as follows.

> One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy, if

> - (a) the false light in which the other was placed would be highly offensive to a reasonable person, and
>
> - (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.

Restatement (Second) of Torts § 652E (1977). Comment c to § 652E explains that "highly offensive to a reasonable person" means "when there is such a major misrepresentation of his character, history, activities or beliefs that serious offense may reasonably be expected to be taken by a reasonable man in his position.

The false-light tort as set forth in the Restatement is a subpart of the tort of invasion of privacy. Dean Prosser gave the tort its first modern articulation, tracing its origin to an early 19th Century common-law decision enjoining the advertisement of poems falsely attributed to Lord Byron. *See* William Prosser, *Privacy*, 48 Cal. L. Rev. 383, 398 (1960) (citing *Lord Byron v. Johnston*, 35 Eng. Rep. 851 (1816)). *See also* John H. Wigmore, *The Right Against False Attribution of Belief or Utterance*, 4 Ky. L.J. No. 8, p.3, 5-6 (1916) (indicating that neither economic loss nor "disreputable" false statement was essential to the decision in Lord Byron's case).[4]

---

[4] It is not essential that the specific tort have been recognized in 1789 to be "of the sort traditionally amenable to, and resolved by, the judicial process." *See e.g. Sprint*

This Court had occasion to address the tort of false-light invasion of privacy in *Time, Inc. v. Hill*, 385 U.S. 374 (1967), where a family that had been held hostage by escaped convicts were falsely portrayed in a Life Magazine article as having been mistreated and as acting more heroically than they did. The Court ascertained that New York had extended its right to privacy statute, N.Y. Civ. Rights Law §§ 50-51, to encompass portrayal in a false light. *Id.* at 381-82.

Unlike defamation, which is based on damage to one's reputation, "the primary damage" in false-light cases "is the mental distress from having been exposed to public view." *Id.* at 386 n.9. Significantly, the Court noted that the false statements in false-light actions need not be defamatory, "and might even be laudatory and still warrant recovery." *Id.*[5] On that point, the Court looked to a New York court's decision upholding liability under the statute of the publisher of an unauthorized biography of baseball great Warren Spahn. The publication had falsely portrayed the legendary left-hander as having been awarded the Bronze Star and performing acts of great heroism during World War II. *Id.* See the recitation of facts in *Spahn v. Julian Messner, Inc.*, 250 N.Y.S.2d 529, 538-39 (Sup. Ct. 1964), *aff'd*, 221 N.E.2d 543 (1966),

---

Communications, 554 U.S. at 79-81, holding that an assignee of a cause of action has Article III standing based in part on developments in state law during the 19th Century.

[5] The Court also held that the First Amendment precluded liability absent proof that defendant knew the representation was false or recklessly disregarded the truth. 385 U.S. at 388. The statutory right of action under 15 U.S.C. § 1681n(a)(1) similarly requires the plaintiff to show that defendant "willfully fail[ed] to comply with any requirement" imposed by the FCRA.

vacated, 387 U.S. 239 (1967). *See also* Prosser, at 400 ("The false light need not necessarily be a defamatory one, although it very often is.").

Whether the false light cast upon plaintiff would be "highly offensive to a reasonable person" under the circumstances "goes to the merits and not to statutory standing." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. at 92. *See, e.g., Liebholz v. Harriri*, No. CIVA 05-5148 DRD, 2006 WL 2023186 (D.N.J. July 12, 2006), where the false statement was not shown to be "highly offensive to a reasonable person," and the district court nonetheless denied the motion to dismiss the false-light claim and did not find lack of standing, stating that the claim was otherwise sufficient and that the party would be permitted to amend the pleading to allege the missing element. *Id.* at *5. *See also Neal v. Elec. Arts, Inc.*, 374 F. Supp. 2d 574, 579 (W.D. Mich. 2005) (where false representation by video game maker was not highly offensive to a reasonable person as a matter of law, the court did not dismiss for lack of jurisdiction, but issued summary judgment on the merits).

The statutory right of action established by Congress in 15 U.S.C. § 1681n(a)(1)(A) is clearly of the type of action that has been traditionally amenable to adjudication. Plaintiff alleged that Spokeo failed to have in place reasonably accurate procedures and failed to make FCRA-required disclosures. As a consequence a consumer report containing false information about plaintiff was marketed and made available to prospective employers and others. The fact that the information was not so damaging to reputation as to be defamatory does not exclude the statutory right of action from the category of disputes

"traditionally amenable to, and resolved by, the judicial process." *Steel Co.*, 523 U.S. at 101.

Nor does the fact that the damages for such harm may be difficult to quantify bar plaintiff. Indeed, Petitioner concedes that Congress can impose statutory damages, as it has in 15 U.S.C. § 1681n(a)(1)(A), where compensatory damages "are difficult to quantify" or "for an *injury* that is likely to have occurred but difficult to establish," Pet. Br. 48 (quoting *Memphis Cmty. Sch. Dist. v. Stachura*, 411 U.S. 299, 310-11 (1986)). Congress could well conclude that the victim of a false consumer report disseminated on the internet faces precisely that difficulty. In fact, Petitioner provides as an example the cause of action for statutory damages for violation of the Copyright Act. *See* 17 U.S.C. § 504(c); *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 349-353 (1998) (reviewing history of statutory damages available for copyright infringements at common law and under state and federal statutes); *F.W. Woolworth Co. v. Contemporary Arts, Inc.*, 344 U.S. 228, 233 (1952) ("Even for uninjurious and unprofitable invasions of copyright the court may, if it deems it just, impose a liability within statutory limits to sanction and vindicate the statutory policy.").

Several amici supporting Petitioner agree that, if defendant's willful statutory violation has had "some real-world impact on the plaintiff," that plaintiff has standing to seek statutory damages under 15 U.S.C. § 1681n(a)(1)(A). Amicus Br. of Trans Union LLC 25-26; Amicus Br. of Chamber of Commerce, et al. 28 (similar).

The dissemination of a false consumer report concerning plaintiff to prospective employers and

others is clearly harm with difficult-to-quantify damages. In that light, there appears to be no real dispute by Petitioner regarding plaintiff's standing to claim statutory damages. Whether Congress can authorize a plaintiff to bring an action against a private party alleging only violation of a statutory duty with no concrete impact on plaintiff may present this Court with an important question of Article III standing. But that is not this case. This Court should dismiss as improvidently granted.

CONCLUSION

For the foregoing reasons, the American Association for Justice urges this Court to dismiss the Petition for Certiorari as improvidently granted, or, alternatively, to affirm the decision of the court of appeals below.

September 8, 2015 Respectfully submitted,

JEFFREY R. WHITE
Counsel of Record
CENTER FOR CONSTITUTIONAL LITIGATION, P.C.
777 6th Street NW, Suite 520
Washington, DC 20001
(202) 944-2839
jeffrey.white@cclfirm.com

Counsel for Amicus Curiae
American Association for Justice