No. 13-1339

In The

Supreme Court of the United States

SPOKEO, INC.,

Petitioner,

v.

THOMAS ROBINS,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR PUBLIC LAW PROFESSORS AS AMICI CURIAE IN SUPPORT OF RESPONDENT

F. ANDREW HESSICK
Counsel of Record
383 South University Street
Salt Lake City, UT 84112
(801) 587-7862
andy.hessick@law.utah.edu
Counsel for Amici Curiae

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED

Whether Congress may confer Article III standing upon a plaintiff who suffers no concrete harm other than the violation of a private right conferred by a federal statute.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
INTEREST OF AMICI CURIAE	1
STATEMENT	3
SUMMARY OF ARGUMENT	7
ARGUMENT	8
I. Congress has validly created judicially enforceable rights under FCRA	9
A. Congress has the power to create rights whose violation alone supports standing	9
B. FCRA creates substantive rights, the violation of which confers standing	14
C. Petitioner's arguments are unpersuasive	18
1. Historically, the violation of a right alone was an adequate basis for judicial relief	18
2. Contrary to Petitioner's contention, requiring a factual injury beyond the violation of a right for standing is unnecessary to protect the separation of powers	23
a. Injury-in-fact is unnecessary for constraining the judiciary for claims alleging violations of private rights	23

TABLE OF CONTENTS – Continued

Page

b. Injury-in-fact unjustifiably constrains Congressional authority... 26

D. Petitioner is wrong to invoke the clear-statement rule 29

II. Respondent Has Satisfied Article Ill's Injury-In-Fact Requirement By Alleging A "Concrete and Particularized" Invasion Of His Legally Protected Interests............ 32

CONCLUSION... 34

TABLE OF AUTHORITIES

Page

CASES

Arbaugh v. Y&H Corp., 546 U.S. 500 (2006)............ 30

Arizona State Legislature v. Arizona Indep. Redistricting Comm'n, 135 S. Ct. 2652 (2015)..... 8, 10

ASARCO Inc. v. Kadish, 490 U.S. 605 (1989).......... 25

Atascadero State Hospital v. Scanlon, 473 U.S. 234 (1985).. 30

Atkinson v. Teasdale, 95 Eng. Rep. 1054 (C.P. 1772).. 20

Beaudry v. TeleCheck Servs., Inc., 579 F.3d 702 (6th Cir. 2009)... 15

Bond v. United States, 134 S. Ct. 2077 (2014)......... 31

Boumediene v. Bush, 553 U.S. 723 (2008).......... 30, 31

Cable v. Rogers, 81 Eng. Rep. 259 (K.B. 1625)......... 20

Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793)..... 26

Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138 (2013).. 11

Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821).. 26

Crogate v. Morris, 123 Eng. Rep. 751 (C.P. 1611.. 21

DaimlerChrysler Corp. v. Cuno, 547 U.S. 332 (2006).. 9, 32

Fed. Election Comm'n v. Akins, 524 U.S. 11 (1998).. 11, 12

TABLE OF AUTHORITIES – Continued

Page

Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974)...... 16

Gladstone Realtors v. Vill. of Bellwood, 441 U.S. 91 (1979).. 14

Gregory v. Ashcroft, 501 U.S. 452 (1991).................. 30

Hamdan v. Rumsfeld, 548 U.S. 557 (2008) 31

Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982)... 11, 12

Heckler v. Matthews, 465 U.S. 728 (1984)................ 12

Hein v. Freedom From Religion Found., Inc., 551 U.S. 587 (2007).. 23

Hilton v. South Carolina Public Railways Commission, 502 U.S. 197 (1991).......................... 29

Hodel v. Virginia Surface Min. & Reclamation Ass'n, Inc., 452 U.S. 264 (1981) 13

Jones v. United States, 529 U.S. 848 (2000)............. 29

Kucana v. Holder, 558 U.S. 233 (2010)............... 30, 31

Libertarian Party of N.H. v. Sec'y of State, 965 A.2d 1078 (N.H. 2008) 25

Linda R.S. v. Richard D., 410 U.S. 614 (1973).... 10, 27

Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992)..*passim*

Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803)... 21, 24

Massachusetts v. EPA, 549 U.S. 497 (2007)..*passim*

TABLE OF AUTHORITIES – Continued

Page

Mayor of London v. Mayor of Lynn, 126 Eng. Rep. 1026 (H.L. 1796) 21

Muskrat v. United States, 219 U.S. 346 (1911) 23

Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1 (1981) 31

Planck v. Anderson, 101 Eng. Rep. 21 (K.B. 1792) 20

Raines v. Byrd, 521 U.S. 811 (1997) 23

Robert Marys's Case, 77 Eng. Rep. 895 (K.B. 1613) 20

Robinson v. Lord Byron, 30 Eng. Rep. 3 (1788)........ 20

Schlesinger v. Reservists Committee to Stop the War, 418 U.S. 208 (1974) 13

Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996) 30

Sierra Club v. Dep't of Transp., 167 P.3d 292 (Haw. 2007) 25

Sierra Club v. Morton, 405 U.S. 727 (1972) 10, 27

Steel Co. v. Citizens for a Better Env't, 523 U.S. 83 (1998) 18

Stuart Kingston, Inc. v. Robinson, 596 A.2d 1378 (Del. 1991) 25

Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180 (1997) 13

United States v. City of Philadelphia, 644 F.2d 187 (3d Cir. 1980) 27

TABLE OF AUTHORITIES – Continued

Page

United States v. Mattson, 600 F.2d 1295 (9th Cir. 1979) 28

Vt. Agency of Nat. Res. v. United States, 529 U.S. 765 (2000) 10, 18, 27, 31

Warth v. Seldin, 422 U.S. 490 (1975) 10, 27

Webb v. Portland Manufacturing Co., 29 F. Cas. 506 (C.C.D. Me. 1838) 22

Wells v. Watling, 96 Eng. Rep. 726 (C.P. 1778) 21

Woolton v. Salter, 83 Eng. Rep. 599 (C.P. 1683) 20

Wylie v. Birch, 114 Eng. Rep. 1011 (Q.B. 1843) 21

CONSTITUTIONAL PROVISIONS

U.S. CONST. amend. V 28

U.S. CONST. amend. XI 29

U.S. CONST. amend. XIV 28

U.S. CONST. art. I 30

U.S. CONST. art. II 31

U.S. CONST. art. III .... *passim*

U.S. CONST. art. III, § 2 9

STATUTES

12 U.S.C. § 2607(d)(2) 3

15 U.S.C. § 1640 3

15 U.S.C. § 1640(a) 3

TABLE OF AUTHORITIES – Continued

Page

15 U.S.C. § 1681 .... 4, 15, 16

15 U.S.C. § 1681(a)(1)... 4

15 U.S.C. § 1681b(b)(1).. 5

15 U.S.C. § 1681e(b) 5

15 U.S.C. § 1681e(d) 5

15 U.S.C. § 1681j(a)(1)(C)... 5

15 U.S.C. § 1681n 9

15 U.S.C. § 1681n(a).. 17, 29

15 U.S.C. § 1681n(a)(1) 5, 29, 33

15 U.S.C. § 1681n(a)(2) 5

15 U.S.C. § 1681n(a)(3) 5

15 U.S.C. § 1681s(c)(1)(B) 28

15 U.S.C. § 1692k 3

42 U.S.C. § 804 12

Fair Credit Reporting Act, 15 U.S.C. §§ 1681-1681x ....*passim*

Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692-1692p... 3

Fair Housing Act, Section 804(d), 42 U.S.C. § 3604(d) 11, 12

Real Estate Settlement Procedures Act of 1974, 12 U.S.C. §§ 2601-2617 3

Truth in Lending Act, 15 U.S.C. §§ 1601-1667f......... 3

TABLE OF AUTHORITIES – Continued

Page

RULES AND REGULATIONS

Fed. R. Civ. P. 12(b)(1) 6

Sup. Ct. R. 37.6 1

OTHER AUTHORITIES

1 J. G. SUTHERLAND, A TREATISE ON THE LAW OF DAMAGES §§ 9-10 (John R. Berryman ed., 4th ed. 1916) 22

Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U.L. REV. 881 (1983).................... 10

F. Andrew Hessick, *Cases, Controversies, and Diversity*, 109 NW. U. L. REV. 57 (2014)................ 25

F. Andrew Hessick, *Standing, Injury in Fact, and Private Rights*, 93 CORNELL L. REV. 275 (2008)... 22, 32

Fair Credit Reporting: Hearings before the Subcomm. on Consumer Affairs of the House Comm. on Banking and Currency, 91st Cong., 2d Sess. 64-65 (1970)...................................17

Fair Credit Reporting: Hearings before the Subcomm. on Consumer Affairs of the House Comm. on Banking and Currency, 91st Cong., 2d Sess. 90 (1970).......................................16

HERBERT BROOM, COMMENTARIES ON THE COMMON LAW 101 (T. & J.W. Johnson & Co. 1856) 22

TABLE OF AUTHORITIES – Continued

Page

Hulle v. Orynge, Y.B. 6 Edw. 4, fol. 7, Mich., pl. 18 (1466), reprinted in A.K.R. KIRALFY, A SOURCE BOOK OF ENGLISH LAW 128-32 (1957) 20

Michael E. Solimine, *Congress, Separation of Powers, and Standing*, 59 CASE W. RES. L. Rev. 1023 (2009)... 14

RALPH SUTTON, PERSONAL ACTIONS AT COMMON LAW 57 (1929) 19

Representative John Marshall, *Speech Delivered in the House of Representatives, of the United States, on the Resolutions of the Hon. Edward Livingston, Relative to Thomas Nash, Alias Jonathan Robbins* (March 7, 1800), THE PAPERS OF JOHN MARSHALL 82, 99 (Charles T. Cullen ed., 1984) 27

RESTATEMENT (SECOND) OF TORTS § 569 note 1...........16

S. Rep. No. 91-517 (1969) 4

THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 896 (3d ed. 1992).....................31

THE SHORTER OXFORD ENGLISH DICTIONARY ON HISTORICAL PRINCIPLES 1319 (6th ed. 2007)...........31

Virginia G. Maurer, *Common Law Defamation and the Fair Credit Reporting Act*, 72 GEO. L.J. 95 (1983)..17

WILLIAM BLACKSTONE, TRACTS, CHIEFLY RELATING TO THE ANTIQUITIES AND LAWS OF ENGLAND 15 (3d ed., Oxford, Claredon Press 1771)...............19

WILLIAM BLACKSTONE, COMMENTARIES 19, 22

INTEREST OF AMICI CURIAE[1]

Amici are public law professors who teach and write in the areas of constitutional and administrative law and take a professional interest in the development of this Court's justiciability jurisprudence. Amici have an important interest in this case because they are concerned that the position advanced by Petitioners misconstrues this Court's precedent and would violate the separation of powers by unduly restricting Congress's authority to confer judicially enforceable rights by federal statute and the federal judiciary's authority to enforce those rights. More information about the specific interest of each law professor is provided below.

Todd Aagaard is Vice Dean and Professor of Law at the Villanova University School of Law. His teaching and research focuses on environmental law and administrative law.

Erwin Chemerinsky is the Dean and Distinguished Professor of Law at the University of California, Irvine School of Law. His areas of expertise are

[1] In accordance with Rule 37.6, Amici certify that no counsel for either party authored this brief in whole or in part, and no person or entity other than named Amici made a monetary contribution for the preparation or submission of this brief. Letters of consent have been filed with the Clerk.

Further, the institutional affiliations of Amici are included for identification purposes only and are not meant to imply that the positions set forth herein represent the views of the institutions.

constitutional law, federal practice, civil rights and civil liberties, and appellate litigation.

Lincoln Davies is Associate Dean and Professor of Law at the University of Utah, S.J. Quinney College of Law. He teaches and writes in administrative and energy law.

Heather Elliott is Professor of Law at the University of Alabama School of Law. She teaches and writes in administrative law, civil procedure, constitutional law, and water law.

F. Andrew Hessick is Professor of Law at the University of Utah, S.J. Quinney College of Law. He teaches and writes in administrative law, civil procedure, and federal courts.

Bradford Mank is the James Helmer, Jr. Professor of Law at the University of Cincinnati School of Law. He teaches and writes in administrative law and environmental law.

Gene Nichol is the Boyd Tinsley Distinguished Professor of Law at the University of North Carolina School of Law. He teaches and writes in civil rights, constitutional law, and federal jurisdiction.

Michael Solimine is the Donald P. Klekamp Professor of Law at the University of Cincinnati College of Law. He teaches and writes in civil procedure, federal courts, conflicts of laws, and complex litigation.

Amy Wildermuth is Associate Vice President for Faculty at the University of Utah and Professor of Law at the University of Utah's S.J. Quinney College of Law. She teaches and writes in the areas of civil procedure, administrative law, environmental law, property, and Supreme Court practice.

STATEMENT

1. Congress has enacted numerous statutes to protect consumers from unscrupulous business practices. *See, e.g.*, the Real Estate Settlement Procedures Act of 1974, 12 U.S.C. §§ 2601-2617 (RESPA) (regulating real estate settlement services); Truth in Lending Act, 15 U.S.C. §§ 1601-1667f (regulating creditor disclosures); Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692-1692p (regulating debt collectors). Many of these statutes contain private rights of action to allow individuals to seek redress against businesses that engage in prohibited practices. *See, e.g.*, 12 U.S.C. § 2607(d)(2) (RESPA); 15 U.S.C. § 1640 (Truth in Lending Act); 15 U.S.C. § 1692k (Fair Debt Collection Practices Act). These federal consumer protection statutes often provide that victimized consumers may recover the actual damages they suffered because of the unlawful act or an amount specified in the statute. *See, e.g.*, 12 U.S.C. § 2607(d)(2) (person who receives settlement kickbacks is liable to victim "in an amount equal to three times the amount of any charge paid for such settlement service"); 15 U.S.C. § 1640(a) (violator is liable to victim "in an

amount equal to the sum of . . . any actual damage sustained by such person as a result of the failure [and] twice the amount of any finance charge in connection with the transaction").

One component of this set of consumer protections is the Fair Credit Reporting Act (FCRA), 15 U.S.C. §§ 1681-1681x, which regulates consumer credit reporting agencies. As the legislative history makes clear, one reason behind FCRA is "to prevent consumers from being unjustly damaged because of inaccurate or arbitrary information in a credit report." S. Rep. No. 91-517, at 1 (1969). Accordingly, FCRA explicitly states that it seeks to "require that consumer reporting agencies adopt reasonable procedures" to ensure that consumer information is produced "in a manner which is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information." 15 U.S.C. § 1681.

FCRA and its legislative history further make clear that another, broader reason for FCRA's protections is to protect the "vital role played by credit reporting agencies in our economy." S. Rep. No. 91-517, at 1 (1969). As FCRA explicitly states, the "banking system is dependent upon fair and accurate credit reporting. Inaccurate credit reports directly impair the efficiency of the banking system, and unfair credit reporting methods undermine the public confidence which is essential to the continued functioning of the banking system." 15 U.S.C. § 1681(a)(1).

To achieve its purposes, FCRA confers various substantive rights on consumers against credit reporting agencies. FCRA prescribes procedures that consumer reporting agencies must follow in providing a "consumer report for employment purposes," such as obtaining written authorization for the report from the consumer. 15 U.S.C. § 1681b(b)(1). It also requires those agencies to "follow reasonable procedures to assure maximum possible accuracy of" consumer reports, *id.* § 1681e(b); to issue various notices regarding the information, *id.* § 1681e(d); and to post toll-free telephone numbers to allow consumers to request consumer reports *id.* § 1681j(a)(1)(C). *See* Pet. App. 4a-5a.

FCRA confers a private right of action against reporting agencies that fail to comply with these provisions. For "willful" violations of these provisions, a consumer whose rights under FCRA have been violated may receive "actual damages" or, in the alternative, he may receive statutory "damages of not less than $100 and not more than $1,000." *Id.* § 1681n(a)(1).[2]

2. Petitioner Spokeo Inc. operates a website that provides information about individuals. Through the website, users may learn about other individuals' marital status, wealth, and education. Pet. App. 1a-2a; J.A. 10.

[2] The consumer may also seek punitive damages, 15 U.S.C. § 1681n(a)(2), and attorneys fees, *id.* § 1681n(a)(3).

Respondent Robins filed in federal district court a putative class action against Petitioner for willful violations of FCRA. Respondent alleged that Petitioner published inaccurate information about Respondent, overstating Respondent's education and financial situation and indicating that he is married although he is not. Pet. App. at 2a; J.A. 14. Respondent further alleged willful violations of the procedures for issuing reports, 15 U.S.C. § 1681b(b)(1), of the notice requirements, 1681e(d), and of the obligation to post telephone numbers, *id.* § 1681j(a)(1)(C).

The district court dismissed the complaint under Federal Rule of Civil Procedure 12(b)(1) for lack of Article III standing. Although acknowledging that Respondent had alleged a violation of his rights under FCRA, the court explained that Respondent lacked standing because he had "failed to allege that [Petitioner] has caused him any actual or imminent harm" as a consequence of those statutory violations. Pet. App. 13a.

The Ninth Circuit reversed. Although acknowledging that Respondent had not alleged a factual injury, the court explained that FCRA "does not require proof of actual damages" for willful violations of the sort alleged by Respondent and that "the violation of a statutory right is usually a sufficient injury in fact to confer standing." Pet. App. 6a. The court rejected the argument that, to have standing under Article III, a plaintiff must allege factual harm instead of merely the violation of a statutory right. It explained that Article III permits standing based

solely on the violation of a statutory right if, as in this case, the plaintiff alleges a violation of "his statutory rights and not just the rights of other people," and the interest protected by that statutory right is "individualized rather than collective." Pet. App. 8a.

SUMMARY OF ARGUMENT

Respondent has standing to vindicate his statutory rights to have consumer reporting agencies follow the procedures prescribed by FCRA when providing information about him. For a plaintiff to have Article III standing, he must demonstrate that he has suffered a concrete and particularized injury in the form of an invasion of a legally protected interest. That legally protected interest may derive from a statutorily created right. Congress accordingly may create new individual rights, the invasion of which support standing.

That understanding is consistent with historical practice. Common law courts traditionally adjudicated tort suits in which the plaintiff established only the violation of an individual right, even if that violation did not result in additional harm. It also properly maintains the separation of powers by limiting the federal courts to their traditional role of deciding on the rights of individuals and by allowing Congress to exercise its power of creating individual rights that are judicially enforceable.

Respondent satisfies the Article III injury requirement by alleging a concrete and particularized violation of his rights under FCRA. Contrary to Petitioner's assertion, allowing Respondent to vindicate his rights under FCRA does not threaten the Executive's power to Take Care that the laws are enforced. The Take Care clause assigns to the responsibility for vindicating public rights, not private individual rights such as the FCRA rights that Respondent alleges have been violated.

ARGUMENT

Respondent alleges that Petitioner has violated his rights under FCRA by publishing inaccurate credit reports about him, and by failing to follow statutorily prescribed procedures in creating and disseminating those reports. The alleged violation of rights conferred by FCRA constitutes an injury sufficient for Article III standing. As this Court recently reiterated, an actual "injury in the form of invasion of a legally protected interest that is concrete and particularized" constitutes an injury-in-fact under Article III. *Arizona State Legislature v. Arizona Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2663 (2015). This Court has further made clear that Congress can create new legally protected interests through the enactment of statutes. Here, Congress conferred on consumers the right to have credit agencies follow various procedures when publishing

credit reports, and respondent alleges that Petitioner violated his rights under FCRA.

I. Congress has validly created judicially enforceable rights under FCRA

FCRA gives consumers substantive statutory rights to various protections that consumer credit reporting agencies must observe and creates a private cause of action for consumers to seek redress for violations of those statutory rights. 15 U.S.C. § 1681n. In creating a private right to enforce FCRA and authorizing suit even when a violation of that right does not produce other consequential harm, Congress acted well within its constitutional authority.

A. Congress has the power to create rights whose violation alone supports standing

Article III of the Constitution extends the "judicial Power" of the United States to "Cases" and "Controversies." U.S. CONST. art. III, § 2. "Article III standing . . . enforces the Constitution's case-or-controversy requirement." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 (2006) (internal quotation marks omitted, alteration in original). For a plaintiff to have standing, he must show "injury in fact," which the Court has defined as "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Lujan v. Defenders of*

Wildlife, 504 U.S. 555, 560 (1992) (internal quotation marks omitted); *see also Arizona State Legislature*, 135 S. Ct. at 2663 (stating standing requires "injury in the form of invasion of a legally protected interest that is concrete and particularized and actual or imminent").

Because standing turns on the "invasion of a legally protected interest," this Court has long recognized that Congress may "define new legal rights, which in turn will confer standing to vindicate an injury caused to the claimant." *Vt. Agency of Nat. Res. v. United States*, 529 U.S. 765, 773 (2000); *see also, e.g.*, *Warth v. Seldin*, 422 U.S. 490, 500 (1975) ("The actual or threatened injury required by Art. III may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing. . . ." (internal quotation marks omitted)); *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 n.3 (1973) ("Congress may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute."); *Sierra Club v. Morton*, 405 U.S. 727, 738 (1972) (Congress may "broaden[ ] the categories of injury that may be alleged in support of standing"); Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U.L. REV. 881, 885 (1983) (arguing that standing depends on "legal injury," which is "no more than the violation of a legal right, [which] can be created by the legislature").

Accordingly, congressional creation of a privately enforceable right is "of critical importance to the

standing inquiry" because "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, 516-17 (2007); *see also Fed. Election Comm'n v. Akins*, 524 U.S. 11, 22 (1998) (finding standing on the ground that "there is a statute which . . . seek[s] to protect individuals such as respondents from the kind of harm they say they have suffered"). This power of Congress to define injuries that support standing is not limited to instances in which the violation of the right results in consequential harm. The violation of a congressionally created right itself may support standing, regardless whether that violation also results in additional harm.[3]

Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982), illustrates Congress's power to create private rights that support standing when they are violated. *Havens* involved alleged violations of Section 804(d) of the Fair Housing Act, which makes it unlawful "[t]o represent to any person because of race, . . . that any dwelling is not available for inspection, sale, or

[3] Petitioner argues, Pet. Br. 39, that allowing a violation of a right to constitute an injury supporting Article III standing obviates the other Article III standing requirements that the injury be "fairly traceable to the challenged action" and "redressable by a favorable ruling." *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013). Not so. A plaintiff still must show that the violation of the right can be fairly traced to the challenged action and that a court can likely redress the violation through a favorable ruling.

rental when such dwelling is in fact so available." 42 U.S.C. § 3604(d). One plaintiff in *Havens* was a black woman who sued a real estate company after she received false information about the availability of housing. Although the plaintiff did not intend to rent the apartment, *Havens*, 455 U.S. at 373, the Court nonetheless held that she had standing. Contrary to Petitioner's suggestion, Pet. Br. 41, the Court did not base its holding on the ground that the plaintiff had suffered a factual injury as a consequence of the misrepresentation. Instead, the basis for standing was that § 804 created an "enforceable right to truthful information" and the plaintiff had alleged injury to that "statutorily created right to truthful housing information." *Id.* at 373-74; *see also Akins*, 524 U.S. at 21 ("[T]his Court has previously held that a plaintiff suffers an 'injury in fact' when the plaintiff fails to obtain information which must be publicly disclosed pursuant to a statute."); *Heckler v. Matthews*, 465 U.S. 728, 737-40 (1984) (recognizing standing for a male social security beneficiary who challenged a provision granting higher benefits to females based on the violation of his "right" to receive benefits without regard to his sex).[4]

[4] This Court has stated that cases recognizing Congress's ability to create standing through the creation of rights stand 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. But that conception of standing does not impose any limit on Congress's power to create rights whose violation supports standing,

(Continued on following page)

Further establishing Congress's authority to define injuries that will establish standing is the principle that courts should defer to legislative judgments. This Court has stressed that courts must accord "deference . . . to [Congress's] findings as to the harm to be avoided and to the remedial measures adopted for that end, lest [they] infringe on traditional legislative authority to make predictive judgments when enacting nationwide regulatory policy." *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 196 (1997). This deference derives in part "out of respect for [Congress's] authority to exercise the legislative power" under the Constitution, *id.*, and in part from the reality that Congress "is far better equipped than the judiciary to 'amass and evaluate the vast amounts of data' bearing upon" legislative questions. *Id.* at 195; *see also*, *e.g.*, *Hodel v. Virginia Surface Min. & Reclamation Ass'n, Inc.*, 452 U.S. 264, 283 (1981) ("[T]he effectiveness of existing laws in dealing

because, in enacting legislation, Congress determines the factual injury that it seeks to prevent. *See Massachusetts*, 549 U.S. at 516-17 ("Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before." (quoting *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring in part and concurring in the judgment))). Moreover, this Court has held that statutes may create rights that establish standing even if they are "directed at avoiding circumstances of potential, not actual, impropriety." *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 224 n.14 (1974). The factual injury that the procedural rights conferred by the FCRA seek to prevent is the potential that credit agencies will generate inaccurate reports about that consumer.

with a problem identified by Congress is ordinarily a matter committed to legislative judgment."); Michael E. Solimine, *Congress, Separation of Powers, and Standing*, 59 CASE W. RES. L. REV. 1023, 1054-55 (2009) (arguing that "federal courts should give some level of deference to Congress statutorily addressing the standing of potential plaintiffs").

To be sure, despite its power to define injuries for standing, Congress cannot "abrogate the Art. III minima" of standing. *Gladstone Realtors v. Vill. of Bellwood*, 441 U.S. 91, 100 (1979). Thus, the congressionally created right giving rise to standing must be "concrete and particularized." *Lujan*, 504 U.S. at 560. Congress cannot confer standing on citizens whose only interest is "to vindicate the public's nonconcrete interest in the proper administration of the laws." *Massachusetts*, 549 U.S. at 517 (quoting *Lujan*, 504 U.S. at 581 (Kennedy, J., concurring in part and concurring in the judgment)). For instance, Congress cannot authorize "any person" to sue for any violation of a statute. *Lujan*, 504 U.S. at 572. Instead, "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." *Massachusetts*, 549 U.S. at 516.

B. FCRA creates substantive rights, the violation of which confers standing

Application of these principles establishes that Congress validly authorized individuals to bring suit

in federal court based solely on the violation of their rights under FCRA. By conferring on consumers substantive rights against credit agencies and creating a cause of action for consumers to enforce those rights, Congress exercised its power "to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before." *Massachusetts*, 549 U.S. at 516-17. The deprivation of that statutory right under FCRA constitutes a valid injury conferring standing, regardless whether the consumer suffers additional consequential damages. *See Beaudry v. TeleCheck Servs., Inc.*, 579 F.3d 702, 705 (6th Cir. 2009) (Sutton, J.) (holding that FCRA "does not require a consumer to wait for . . . consequential harm before enforcing her statutory rights").

Congress's decision to confer that privately enforceable right on consumers who suffer no harm other than violation of their rights is entitled to judicial deference. Congress explicitly stated in FCRA its finding that "[i]naccurate credit reports directly impair the efficiency of the banking system, and unfair credit reporting methods undermine the public confidence which is essential to the continued functioning of the banking system." 15 U.S.C. § 1681. Congress opted to address the risk of inaccurate reports in part by creating privately enforceable protections for consumers against credit agencies, and it chose not to require consumers to prove harm other than a violation of their FCRA rights, instead

affording statutory damages for willful violations of those rights.

That decision corresponds to the reality that any inaccuracies about credit, even ones that benefit the object of the credit report, are detrimental to the banking system and undermine public confidence in banks. *See* 15 U.S.C. § 1681 (stating that "[i]naccurate credit reports directly impair the efficiency of the banking system"). It is also consistent with the aim that a "consumer be assured a minimum damage recovery," *Fair Credit Reporting: Hearings before the Subcomm. on Consumer Affairs of the House Comm. on Banking and Currency*, 91st Cong., 2d Sess. 90 (1970) (statement of Anthony Z. Roisman, General Counsel, Consumer Federation of America), even when the harm from a false credit report is small or difficult to prove.

The decision to confer statutory damages without proof of harm is also consistent with the common law rule of imposing liability for *per se* libel without proof of harm. RESTATEMENT (SECOND) OF TORTS § 569 note 1; *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974) ("Under the traditional rules pertaining to actions for libel, the existence of injury is presumed from the fact of publication."). Like *per se* libel, FCRA does not require proof of harm, instead awarding statutory damages for any willful violation of a procedure designed to produce accurate credit reports. To be sure, as Petitioner notes, Pet. Br. 51, *per se* libel was limited to falsehoods exposing the victim to "hatred, contempt, or ridicule." *Gertz*, 418 U.S. at 370 (White,

J., dissenting). Nevertheless, the similarity between *per se* libel and FCRA reinforces the conclusion that proof of damages is not necessary in suits alleging willful violations of FCRA.[5]

The rights conferred by FCRA are also "individualized" and "concrete." *Lujan*, 504 U.S. at 560. FCRA does not purport to establish a public right in citizens "to vindicate the public's nonconcrete interest in the proper administration of the laws." *Massachusetts*, 549 U.S. at 517. It does not, for example, authorize "any person" to sue for any violations of FCRA. *Cf. Lujan*, 504 U.S. at 572. Instead, it confers on each consumer the personal right to have agencies observe particular procedures in generating and disseminating credit reports *about that person*. It does not authorize anyone to bring suit for those violations; instead, a credit agency is liable only "to that consumer" whose FCRA rights have been violated. 15 U.S.C. § 1681n(a). The violation of those FCRA rights,

[5] The common law presumed damages in defamation actions for credit inaccuracies, but in the late nineteenth century, states began to require proof of actual damages. *See* Virginia G. Maurer, *Common Law Defamation and the Fair Credit Reporting Act*, 72 GEO. L.J. 95, 99-101 (1983). This change made recovery difficult. Testimony before Congress noted this limitation and others of the state remedy, *see, e.g.*, *Fair Credit Reporting: Hearings before the Subcomm. on Consumer Affairs of the House Comm. on Banking and Currency*, 91st Cong., 2d Sess. 64-65 (1970) (testimony of Prof. Alan F. Westin); *id.* at 148-50 (statement of John H. Lashly, General Counsel for Associated Credit Bureaus, Inc.), and presumed damages for willful violations of FCRA combat some of those difficulties.

regardless of the consequences of that violation, constitutes an individualized, concrete harm for the person whose rights have been violated.

C. Petitioner's arguments are unpersuasive

Petitioner argues that Article III limits standing to plaintiffs who suffer a factual injury separate from the violation of statutory right and, therefore, Congress cannot authorize federal actions for plaintiffs who suffer the violation of a right without an additional factual harm. Petitioner offers two primary arguments in support of this theory: first, Article III incorporates the historical requirement of injury-in-fact; second, requiring a factual injury is necessary to preserve the separation of powers. Neither argument is well taken.

1. Historically, the violation of a right alone was an adequate basis for judicial relief

This Court has stated that Article III limits the judicial power to resolving disputes that were "'traditionally amenable to, and resolved by, the judicial process.'" *Vt. Agency*, 529 U.S. at 774 (quoting *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102 (1998)). Petitioner argues that, historically, a factual harm was a necessary element of any judicial dispute – the violation of a legal right by itself did not suffice. Pet. Br. 21.

The English legal system traditionally distinguished between public and private rights. Public rights were those held by the community. *See* 4 WILLIAM BLACKSTONE, COMMENTARIES *5 (referring to "the public rights and duties, due to the whole community, considered as a community, in its social aggregate capacity"). By contrast, private rights were rights held by individuals. *See* 1 *id.* at *117-41 (discussing "absolute" private rights to life liberty, and property); 1 *id.* at *119 (discussing "relative" private rights acquired by "members of society"). The victim of a violation of private right could seek a remedy for that violation by bringing the appropriate form of action, such as a writ of trespass. *See* WILLIAM BLACKSTONE, TRACTS, CHIEFLY RELATING TO THE ANTIQUITIES AND LAWS OF ENGLAND 15 (3d ed., Oxford, Claredon Press 1771) (discussing "[t]he remedial [part of law]; or method of recovering private rights, and redressing private wrongs").

As Petitioner suggests, Pet. Br. 21, private rights developed to protect against particular harms. But the existence of the harm was not essential to maintaining an action for the violation of a right. To the contrary, the violation of a legal right by itself was an adequate basis for some actions. For example, a plaintiff could bring a writ for trespass, which was the action to remedy a direct, forceful invasion of rights, even if the invasion did no harm. *See* RALPH SUTTON, PERSONAL ACTIONS AT COMMON LAW 57 (1929) ("[I]f trespass lies the plaintiff has only to prove the commission of the wrong . . . [and] is entitled to

succeed, even if he proves no actual damage, as in trespass damage is presumed."). Thus, in *Hulle v. Orynge*, Y.B. 6 Edw. 4, fol. 7, Mich., pl. 18 (1466), reprinted in A.K.R. KIRALFY, A SOURCE BOOK OF ENGLISH LAW 128-32 (1957), it was held that an individual could maintain an action in trespass against his neighbor who had entered the plaintiff's land to collect thorns that had blown there, even though the entry had caused no damage. An individual who suffered a violation of rights that did not result in factual harm could bring an action for nominal damages. *See, e.g.*, *Robinson v. Lord Byron*, 30 Eng. Rep. 3, 3 (1788) (recounting award of nominal damages where the plaintiff proved that the riparian rights had been invaded but failed to offer proof of damage).

To be sure, legal injury itself was not sufficient for all actions. For example, to maintain an action on the case, the plaintiff needed to demonstrate both legal injury and damage. All but two of the cases cited by Petitioner stating that plaintiff must prove legal injury and damages presented actions on the case, *see Robert Marys's Case*, 77 Eng. Rep. 895, 898 (K.B. 1613); *Atkinson v. Teasdale*, 95 Eng. Rep. 1054, 1059 (C.P. 1772) (de Grey, C.J.); *Woolton v. Salter*, 83 Eng. Rep. 599, 599 (C.P. 1683); *Cable v. Rogers*, 81 Eng. Rep. 259, 259 (K.B. 1625); *Planck v. Anderson*, 101 Eng. Rep. 21, 23 (K.B. 1792); the other two cases cited by Petitioner likewise involved non-trespassory

actions that required proof of damages.[6] The requirement of damages in those types of actions did not extend to actions in trespass.

In any event, in the 18th century, courts moved towards abandoning the requirement of damages in actions on the case, instead concluding that the violation of rights alone warranted relief. *See, e.g.*, *Wells v. Watling*, 96 Eng. Rep. 726, 727 (C.P. 1778) (de Grey, C.J.) (stating in an action on the case that "[i]t [was] sufficient if the right be injured"); *Mayor of London v. Mayor of Lynn*, 126 Eng. Rep. 1026, 1041 (H.L. 1796) (Eyre, C.J.) (stating that "damage to the right [is] sufficient to warrant the owner in asserting the right against the party infringing it"). Early decisions in the United States adopted this rule that the violation of a right alone supports an action. Thus, in *Marbury v. Madison*, Chief Justice Marshall stated that "it is 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." 5 U.S. (1 Cranch) 137, 163 (1803)

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[6] In *Crogate v. Morris*, 123 Eng. Rep. 751, 751 (C.P. 1611), the Court drew a distinction between the lord, who has an action for trespass on the common against any stranger who enters, and the commoner has no action unless he "lose [his] common." In *Wylie v. Birch*, 114 Eng. Rep. 1011, 1016 (Q.B. 1843), the Court indicated that damages is an element of the cause of action for breach of the Sheriff's duty to levy goods. *Id.* at 1016 ("[D]enial of damage is a denial that the defendant neglected his duty to the plaintiff's injury, and consequently of the cause of action.").

(quoting 3 BLACKSTONE, at *23); *see also* HERBERT BROOM, COMMENTARIES ON THE COMMON LAW 101 (T. & J.W. Johnson & Co. 1856) (observing that "*injuria sine damno* . . . does very frequently suffice as the foundation of an action" and providing a number of examples).

As in England, courts in the United States concluded that nominal damages was the appropriate award for the violation of a right that did not cause any actual damages. For example, in *Webb v. Portland Manufacturing Co.*, which involved a dispute about the diversion of a stream, Circuit Justice Story stated that "[a]ctual, perceptible damage is not indispensible as the foundation of an action." Instead, he explained, "wherever there is a wrong, there is a remedy to redress it; and . . . 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." 29 F. Cas. 506, 508 (C.C.D. Me. 1838) (No. 17,322); *see generally* F. Andrew Hessick, *Standing, Injury in Fact, and Private Rights*, 93 CORNELL L. REV. 275, 286 (2008) (gathering cases). Since that time, courts have continued to award plaintiffs nominal damages to vindicate violations of their private rights even when those violations resulted in no harm. *See* 1 J. G. SUTHERLAND, A TREATISE ON THE LAW OF DAMAGES §§ 9-10 (John R. Berryman ed., 4th ed. 1916) (gathering cases awarding nominal damages).

2. Contrary to Petitioner's contention, requiring a factual injury beyond the violation of a right for standing is unnecessary to protect the separation of powers

Petitioner argues that requiring a factual injury for Article III is necessary to ensure that both the federal judiciary and Congress do not exceed the bounds of their authority under the Constitution. Petitioner is incorrect.

a. Injury-in-fact is unnecessary for constraining the judiciary for claims alleging violations of private rights

Petitioner argues that limiting standing to plaintiffs who have suffered a factual harm, instead of merely the violation of a substantive right, is necessary to achieve the "overriding and time honored concern about keeping the judiciary's power within its proper constitutional sphere." Pet. Br. 27 (quoting *Raines v. Byrd*, 521 U.S. 811, 820 (1997)). But a factual injury is not necessary to confine the judiciary to its proper role. As this Court has repeatedly noted in standing cases, the "province" of the courts is to "decide on the rights of individuals." *Lujan*, 504 U.S. at 576 (1992); *accord Hein v. Freedom From Religion Found., Inc.*, 551 U.S. 587, 598 (2007) (plurality); *id.* at 636 (Scalia, J., concurring in the judgment); *see also Muskrat v. United States*, 219 U.S. 346, 357 (1911) ("By cases and controversies are intended the

claims of litigants brought before the courts for determination by such regular proceedings as are established by law or custom for the protection or enforcement of rights. . . ."). Claims that allege violations of individual rights therefore fall squarely within the constitutional sphere of judicial power, irrespective whether the violations also resulted in factual harm.

Indeed, this Court has made clear that the purpose of the injury-in-fact requirement is to ensure that the judiciary only decides on rights of individuals. *Lujan*, 504 U.S. at 577 (stating that "the concrete injury requirement" enforces the "fundamental principle of confining courts to the 'province' of 'decid[ing] on the rights of individuals'" (quoting *Marbury*, 5 U.S. at 170)). That requirement may be critical for claims that do not rest on traditionally conceived private rights, such as actions challenging rulemaking by administrative agencies. But in cases that allege violations of individual rights, the injury-in-fact requirement is superfluous, because the case already involves the rights of individuals.

This Court's standing decisions make clear that the federal judiciary exceeds its proper sphere when it resolves disputes involving generalized violations of public rights. *Lujan*, 504 U.S. at 573-74 ("We have consistently held that a plaintiff raising only a generally available grievance about government . . . does not state an Article III case or controversy."). Those generalized grievances, the Court has said, should be asserted in the political branches. *Lujan*, 504 U.S. at

576. But recognizing standing based on the violation of individual rights, even when that violation does not cause additional harm, does not empower courts to hear generalized grievances. The violation of a private right is an individualized injury; only the individual whose right has been violated suffers the legal injury.

Prohibiting federal courts from hearing claims brought by individuals whose rights under FCRA have been violated but who have suffered no further harm would have the anomalous consequence of forcing those individuals into state court to vindicate their rights. State courts are not bound by Article III, *see ASARCO Inc. v. Kadish*, 490 U.S. 605, 617 (1989), and many have adopted standing rules that differ from the federal ones, *see, e.g.*, *Libertarian Party of N.H. v. Sec'y of State*, 965 A.2d 1078, 1080 (N.H. 2008) ("In evaluating whether a party has standing to sue, we focus on whether the party suffered a legal injury against which the law was designed to protect."); *Stuart Kingston, Inc. v. Robinson*, 596 A.2d 1378, 1382 (Del. 1991) ("Standing [is] a matter of self-restraint. . . ."); *Sierra Club v. Dep't of Transp.*, 167 P.3d 292, 312 (Haw. 2007) (describing "standing doctrine" as "prudential rules of judicial self-governance"); *see generally* F. Andrew Hessick, *Cases, Controversies, and Diversity*, 109 NW. U. L. REV. 57, 67-68 (2014) (cataloguing state standing rules and demonstrating their divergence from Article III standing rules).

It strains credulity to think that Congress meant to leave a substantial portion of FCRA enforcement exclusively to the state courts, and barring federal courts under Article III from hearing FCRA claims is inconsistent with the general rule that the powers of the branches of the federal government are commensurate under the Constitution. *See Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 384 (1821) ("[T]he judicial power of every well constituted government must be co-extensive with the legislative, and must be capable of deciding every judicial question which grows out of the constitution and laws."); *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 435-36 (1793) (opinion of Iredell, J.) (stating that, except when jurisdiction depends on the identity of the parties, the judiciary is "commensurate with the ordinary Legislative and Executive powers of the general government").

b. Injury-in-fact unjustifiably constrains Congressional authority

Petitioner argues that requiring a factual injury for standing is also necessary to limit the power of Congress. According to Petitioner, if Congress could authorize standing for private individuals based solely on violations of private rights that do not result in further harm, Congress could effectively transfer from the President to private citizens the President's power to take care that the laws are enforced. Pet. Br. 28-29. Petitioner is mistaken.

Under the Constitution, Congress has the authority to create new substantive rights for individuals, and the violation of those individual rights constitutes an injury that supports standing. *See Vt. Agency*, 529 U.S. at 773; *Warth*, 422 U.S. at 500; *Linda R.S.*, 410 U.S. at 617 n.3; *Sierra Club*, 405 U.S. at 738.

Contrary to Petitioner's claim, suits brought by individuals seeking redress for violations of their individual rights do not threaten the Executive power to Take Care that the laws are enforced. The Take Care power confers on the President the responsibility to vindicate public rights. *See Lujan*, 504 U.S. at 576 ("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."). It does not authorize the President to vindicate private, individual rights. The decision whether to vindicate those individual rights rests with the individuals whose rights have been violated. *See, e.g.*, Representative John Marshall, *Speech Delivered in the House of Representatives, of the United States, on the Resolutions of the Hon. Edward Livingston, Relative to Thomas Nash, Alias Jonathan Robbins* (March 7, 1800), in 4 THE PAPERS OF JOHN MARSHALL 82, 99 (Charles T. Cullen ed., 1984) ("A private suit instituted by an individual, asserting his claim to property, can only be controlled by that individual. The executive can give no direction concerning it."); *see also United States v. City of Philadelphia*, 644 F.2d 187, 199-201 (3d Cir. 1980)

(refusing to imply action for United States to vindicate private rights); *United States v. Mattson*, 600 F.2d 1295, 1297 (9th Cir. 1979) (same). Because the Executive does not have the inherent power to bring suit to vindicate private rights, a suit by an individual to vindicate a violation of his individual right does not impinge on the Executive power.[7]

To be sure, Congress cannot circumvent the Take Care Clause by creating private rights that do nothing more than vindicate "the undifferentiated public interest in executive officers' compliance with the law." *Lujan*, 504 U.S. at 577.[8] But the rights conferred by the FCRA are not of that sort. FCRA does not authorize individuals to seek executive compliance with the law. Instead, it confers on each individual consumer various rights to protect against inaccurate credit reports. Those procedural rights are individualized in the same way that the procedural rights protecting against deprivations of life, liberty, or property without due process are individualized. *See* U.S. CONST. amend. V, XIV.

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[7] Congress may authorize the government to bring suit to remedy injuries suffered by individuals. For example, § 1681s(c)(1)(B) authorizes States to bring suit on behalf of their residents for willful violations of FCRA. But that authorization does not limit the ability of individuals to bring suit to enforce their individual rights under FCRA.

[8] Nor can Congress create rights that violate other provisions of the Constitution; for example, Congress cannot create a right to seek impeachment of federal officers, because the Constitution confers that power exclusively on the House.

Nor does FCRA seek to turn private individuals into quasi-executive officials by authorizing them to bring suit for violations of FCRA rights of others. Under FCRA, only "that consumer" whose FCRA rights have been violated may bring suit for statutory damages. 15 U.S.C. § 1681n(a).

D. Petitioner is wrong to invoke the clear-statement rule

Petitioner's clear-statement argument, *see* Pet. Br. 53, should be rejected.

First, as shown above, Congress acted well within the boundaries of Article III in creating a private right of action through 15 U.S.C. § 1681n(a)(1). Because no constitutional boundary is approached, Petitioner cannot invoke the clear-statement rule. *See, e.g.*, *Hilton v. South Carolina Public Railways Commission*, 502 U.S. 197, 209-10 (1991) (O'Connor, J., dissenting) ("[I]n the cases in which we have employed the clear statement rule outside the Eleventh Amendment context, we have recognized the rule's constitutional dimensions." (citations omitted)).[9]

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[9] It might be argued that the constitutional avoidance canon, *see Jones v. United States*, 529 U.S. 848, 857 (2000), requires this Court to interpret § 1681n(a)(1) as incorporating an injury-in-fact criterion, thus avoiding a potential Article III problem. Given that Article III does not limit Congress's ability to create private rights whose violation alone supports standing, *see supra* Part I.A, the constitutional avoidance canon does not apply.

But even if this Court were to determine that the FCRA's private right of action approaches the margins of Article III, Petitioner's clear-statement argument would still fail. This Court has required Congress to satisfy a clear-statement requirement in only two general categories of cases under Article III. First, this Court has required Congress to speak clearly when it intended to *deny* access to the federal courts. *See, e.g.*, *Boumediene v. Bush*, 553 U.S. 723, 738 (2008) (stating that Congress must speak clearly if it intends to suspend the writ of habeas corpus); *Kucana v. Holder*, 558 U.S. 233, 237 (2010) (Congress must speak clearly if it intends to deny judicial review of agency action); *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 515-16 (2006) (Congress must speak clearly if it intends to make a statutory provision jurisdictional). Second, this Court has required a clear statement when Congress purports to waive State sovereign immunity. *See, e.g.*, *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 55-56 (1996); *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 238-39 (1985).

This Court has never even mentioned the clear-statement rule in the context of Article III standing, as the cases cited in Petitioner's Brief make clear: none of them involves Article III standing.[10] To be

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[10] *See* Pet. Br. 53-54. Most of the cases Petitioner cites have nothing to do with Article III. *See Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) (holding that Congress must speak clearly when it uses its Article I powers to alter the traditional federal-state

(Continued on following page)

sure, this Court has suggested that, in exercising its power to define injuries that will support Article III standing, "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." *Massachusetts*, 549 U.S. at 516 (quoting *Lujan*, 504 U.S. at 580-81 (Kennedy, J., concurring)). But this requirement that Congress "identify" injuries obligates Congress only to "recognize" or "establish" an injury. *See, e.g.*, THE SHORTER OXFORD ENGLISH DICTIONARY ON HISTORICAL PRINCIPLES 1319 (6th ed. 2007); THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 896 (3d ed. 1992). That requirement comes nowhere near a mandate of "an unmistakably clear statement." *Hamdan v. Rumsfeld*, 548 U.S. 557, 575 (2008).

It is conceivable – though we still would think it problematic – to apply the clear-statement rule to a statutory provision conferring standing-to-sue in a context involving significant separation-of-powers concerns. For example, this Court has suggested, but never resolved, possible Article II problems with certain Congressional conferrals of standing. *See, e.g.*, *Vt. Agency*, 529 U.S. at 778 n.8. But even if an

balance of powers); *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981) (same); *Bond v. United States*, 134 S. Ct. 2077, 2089 (2014) (same). The cases that *do* have something to do with Article III run counter to Petitioner's position. *See Boumediene*, 553 U.S. at 723 (holding that Congress must state clearly its intention to *deny* access to the federal courts); *Kucana*, 558 U.S. at 237 (same).

argument for the clear-statement rule is colorable in an Article III standing case arising in a separation-of-powers context, it is not colorable here. Standing for one *private* party to sue another *private* party based on the violation of *private* statutory rights does not threaten the Constitution's separation of powers. *See supra* Part I.C.2.a. As one of us has argued elsewhere, standing doctrine has no application to plaintiffs alleging the violation of private rights. *See generally* F. Andrew Hessick, *Standing, Injury in Fact, and Private Rights*, 93 CORNELL L. REV. 275 (2008).

Petitioner thus requests an unprecedented and unjustified application of the clear-statement rule. That request should be rejected.

II. Respondent Has Satisfied Article Ill's Injury-In-Fact Requirement By Alleging A "Concrete and Particularized" Invasion Of His Legally Protected Interests

To have standing to seek a remedy for an "injury to a cognizable interest," "the party seeking review" must "be himself among the injured." *Lujan*, 504 U.S. at 563. Moreover, that injury not only must be to a "legally protected interest." *Id.* at 560. It also must be "concrete" and "particularized" – meaning that it must affect the plaintiff in a "personal and individual way." *Id*. The injury thus cannot be merely a generalized "grievance that [plaintiff] suffers in some indefinite way in common with people generally." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 344 (2006). Respondent satisfies these requirements.

The injury on which respondent bases his standing is a violation by Petitioner of Respondent's rights under FCRA. The rights created by FCRA are not held by the public generally. FCRA confers on each consumer the right to have credit agencies follow certain procedures in generating and disseminating a credit report relating to that consumer, and it authorizes only the consumer whose rights have been violated to seek redress for that violation. *See* 15 U.S.C. § 1681n(a)(1).

Respondent alleges that Petitioner violated his rights under FCRA by creating and disseminating credit reports with inaccuracies about him and by failing to follow the procedures required by FCRA when disseminating his credit report. J.A. 14-23. That injury is to the legally cognizable interests that FCRA creates in individuals to having credit agencies follow certain procedures when publishing credit reports about those individuals. The injury is concrete and personal to Respondent. He alleges a violation of *his* rights under FCRA, not the rights of another individual, resulting from Petitioner's failure to follow FCRA's prescribed procedures when publishing credit information about him.[11] Respondent's allegations therefore establish his standing.

[11] Respondent alleges similar injuries to other members of the class in this class action, but he does not base his standing on those injuries to other individuals.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

F. ANDREW HESSICK
Counsel of Record
383 South University Street
Salt Lake City, UT 84112
(801) 587-7862
andy.hessick@law.utah.edu
Counsel for Amici Curiae