No. 13-1339

In the Supreme Court of the United States

SPOKEO, INC.,

Petitioner,

v.

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

Respondent.

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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER[1]

I. RESPONDENT CAN PREVAIL ONLY IF THE COURT ACCEPTS HIS ARGUMENT THAT VIRTUALLY EVERY STATUTORY VIOLATION QUALIFIES AS INJURY IN FACT.

Respondent and his amici broadly assert that every violation of a statute constitutes injury in fact, even if the plaintiff suffers no adverse effects from the conduct constituting the violation; the only limitations are that the violation must be "personal" to the plaintiff and not "abstract." But their defense of the judgment below rests almost entirely on the narrower contention that, in enacting the Fair Credit Reporting Act (FCRA), Congress "sought to vindicate" the "harm individuals suffer from the dissemination of false credit reports created with inadequate procedures." Resp. Br. 12; see also U.S. Br. 28.

The flaw in that defense is that at least three—and perhaps all four—of respondent's claims do not require proof that the defendant disseminated false information. The judgment below therefore must be reversed unless this Court accepts respondent's broad argument that any statutory violation with any connection to a plaintiff satisfies the injury-in-fact requirement.

First, respondent alleges that petitioner violated the FCRA by failing to:

- give certain notices to providers and users of information (15 U.S.C. § 1681e(d));

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[1] The Rule 29.6 Statement in the opening brief remains accurate.

- ensure that users of information for employment purposes complied with statutory disclosure obligations (*id.* § 1681b(b)(1)); and
- provide a toll-free number for requesting annual reports (*id.* § 1681j(a)(1)(c); 12 C.F.R. § 1022.136).

Pet. Br. 5.

Disseminating false information is not an element of these violations. Nor is proof of falsity required by the provisions creating the private cause of action (15 U.S.C. § 1681n) or authorizing statutory damages (*id.* § 1681n(a)(1)).

Both parties agreed at the certiorari stage that these claims "remain in the case as it comes to this Court." Opp. 9; see Pet. Reply 6.

The government, by contrast, maintained that these claims were not properly before the Court, and contended that review should be denied or the question limited to whether false information constitutes injury in fact. U.S. Cert. Am. Br. 15-19 & n.4. Petitioner explained the errors in the government's analysis (Pet. Cert. Supp. Br. 3-5), and this Court granted review without altering the question presented.

Apparently lacking confidence in their broad argument that any statutory violation by itself satisfies Article III, the government (Br. 31-32)—now joined by respondent (Br. 33 n.5)—asserts that respondent's standing to litigate these claims is not before the Court.

That is wrong: the court of appeals' holding that respondent may litigate these three claims is part of the judgment under review. Indeed, a virtue of this

case is that it squarely presents respondent's broad contention for resolution by this Court.

Second, even respondent's remaining claim—the one on which he and the government focus—may not require proof that petitioner disseminated false information. The provision states only that an entity subject to the FCRA "shall follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual." 15 U.S.C. § 1681e(b).

Some courts of appeals have held—in the context of claims for actual, not statutory, damages—that falsity, or an allegation "tending to show" falsity, is necessary to establish a violation of Section 1681e(b). *Dalton* v. *Capital Associated Indus., Inc.*, 257 F.3d 409, 415 (4th Cir. 2001); see also, *e.g.*, *DeAndrade* v. *Trans Union LLC*, 523 F.3d 61, 66 (1st Cir. 2008); *Washington* v. *CSC Credit Servs. Inc.*, 199 F.3d 263, 267 n.3 (5th Cir. 2000). The D.C. Circuit has suggested that this falsity element might be grounded in the actual damages requirement. *Koropoulos* v. *Credit Bureau, Inc.*, 734 F.2d 37, 39 (D.C. Cir. 1984).

Respondent and the government contend here that Congress in the FCRA determined that concrete harm results from the dissemination of any false information. They therefore bear the burden of demonstrating that Congress in fact made that determination.

But they carefully avoid stating that falsity is an element of respondent's Section 1681e(b) statutory damages claim. They merely repeat respondent's al-

legation that the information about him was false. *E.g.*, Resp. Br. 8-9, 12-13, 44-45; U.S. Br. 4, 8-9, 29.[2]

If Section 1681e(b) does not target dissemination of false information, Congress did not make the determination on which respondent and the government rely. Respondent's standing then must rest (as the opinion below rested) on his broad argument that violation of any statutory standard constitutes Article III injury in fact.

II. THE CONSTITUTION'S INJURY-IN-FACT REQUIREMENT IS NOT SATISFIED BY A LEGAL VIOLATION UNACCOMPANIED BY CONCRETE HARM.

A plaintiff must demonstrate concrete harm—what this Court has described as a "palpable," nonabstract injury—to satisfy Article III's injury-in-fact requirement. That can take the form of pecuniary loss *or* nonpecuniary injuries that are concrete, such as loss of enjoyment of public resources and discriminatory treatment. Pet. Br. 37.

Respondent and his amici mischaracterize our position by asserting that we advocate a "consequential harm" test. *E.g.*, Resp. Br. 10-13; U.S Br. 21, 28-29. Their use of the label "consequential" falsely suggests that concrete harm requires proof of consequential damages—*i.e.*, indirect monetary loss. It does not.

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[2] This was not an oversight by respondent. His proposed class definition does not mention false information, requiring only that "information relating to" class members was "compiled and displayed by" petitioner. J.A. 15. That is because falsity is an individualized issue that could preclude class certification under Federal Rule of Civil Procedure 23(b)(3)'s predominance requirement.

The choice here is between respondent's standard requiring only the violation of a "personal" statutory right, without any palpable harm to the plaintiff; and requiring palpable harm. Only the latter approach accords with history, separation-of-powers principles, and precedent.

A. The Constitution's Common Law Context Demonstrates That Concrete Harm Is Essential For A Dispute To Qualify As A "Case" Or "Controversy."

Respondent and his amici insist that Blackstone and the Framers understood judicial power to reach any harmless infringement of an individual's right.

If that were true, one would expect numerous examples of adjudicated disputes in which the claimant suffered no palpable harm. But respondent and his amici rely instead on broad statements wrenched from their factual context—the shibboleth that "every legal wrong has a remedy" and similar statements. See Resp. Br. 19-20. "[T]o say such things," however, is merely "to talk in a circle" (*Habitat Educ. Ctr.* v. *U.S. Forest Serv.*, 607 F.3d 453, 460 (7th Cir. 2010) (Posner, J.)), because the "legal wrongs" familiar to Blackstone and his contemporaries each involved infliction of concrete harm. Pet. Br. 22-23.

Respondent particularly relies on property cases. But physical encroachment upon real property infringes the owner's right to exclude by effecting a *physical* invasion.[3] Intrusions upon intellectual prop-

[3] Thus a lord did not need to demonstrate economic harm beyond the invasion of the common in which he held a property interest. See, *e.g.*, *Robert Marys's Case*, 9 Co. Rep. 110b, 77 Eng. Rep. 895 (K.B. 1613).

erty rights similarly inflict real-world harm—the claimant's works are copied or otherwise appropriated—and are actionable for the same reason.[4] Related claims, such as the improper exclusion of an individual from land, also require real-world harm to the claimant. *E.g.*, *Hunt* v. *Dowman*, Cro. Jac. 478, 79 Eng. Rep. 407, 408 (K.B. 1617) (permitting suit by lessor when lessee would not "suffer him to enter" and inspect for waste).

Thus, while these common law actions involve the "invasion of a legally protected interest" (RESTATEMENT (FIRST) OF TORTS § 7 cmt. a (1934)), they all are undergirded by palpable harm. See also pages 19-20, *infra*.

Respondent misreads Blackstone to suggest that a concrete-harm requirement would bar actions for assault and battery. Resp. Br. 17. Assault is actionable because it inflicts palpable harm by causing the victim to suffer fear of imminent battery, even though no actual touching occurs. See 3 WM. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *120 (1st ed. 1768); see also *I. de S. & Wife* v. *W. de S.*, *Y.B. Liber Assisarum*, 22 Edw. 3, f. 99, pl. 60 (1348 or 1349) (finding "harm" in the absence of physical contact). As to battery, "[t]he least touching of another's person willfully, or in anger, is a battery; for the law cannot draw the line between different degrees of violence * * * every man's person being sa-

[4] Congress has made administrative patent review procedures available to individuals who would lack standing to challenge a patent in court. Pub. Knowledge Br. 7-9 (discussing 35 U.S.C. § 311). But that statutory right does not confer Article III standing to seek judicial review. *Consumer Watchdog* v. *Wisconsin Alumni Research Found.*, 753 F.3d 1258 (Fed. Cir. 2014), cert. denied, 135 S. Ct. 1401 (2015).

cred, and no other having a right to meddle with it, in any the slightest manner." 3 BLACKSTONE at *120. Each cause of action requires a palpable, concrete harm.

Nor does respondent's erroneous account find support in *Ashby* v. *White*. "[P]rivate damage" is "the clue" to that case. *Coleman* v. *Miller*, 307 U.S. 433, 469 (1939) (opinion of Frankfurter, J.). As the House of Lords recently reiterated, the legal analysis in *Ashby* turned on the infringement of a property right: treating the right to vote "as a matter of property" was "fundamental to Holt CJ's judgment and to his defence of the jurisdiction of the court." *Watkins* v. *Home Dep't*, [2006] UKHL 17 ¶ 55, 2006 WL 755484 (H.L. 2006). It thus was "relatively easy to conclude" that infringement upon that property interest was actionable. *Ibid.*

The other causes of action cited by respondent (at 19) and amici similarly involve palpable harm accompanying the violation of property rights. A "contractual right" is "an interest in property not immediately reducible to possession" (*Sprint Commc'ns Co.* v. *APCC Servs., Inc.*, 554 U.S. 269, 275 (2008)); its breach inflicts palpable harm by depriving the injured party of the benefit that he bargained for in exchange for valuable consideration that he gave up (and perhaps already provided). See, *e.g.*, *Marzetti* v. *Williams*, 1 B. & Ad. 415, 424, 109 Eng. Rep. 842, 845 (K.B. 1830) (permitting suit where "contract was broken"). Breaches of fiduciary duty similarly destroy the trust—something of value—to which the plaintiff was entitled by virtue of the pre-existing fiduciary relationship, which transferred to the fiduciary control over the plaintiff's property and ability to act for himself. See, *e.g.*, *Keech* v. *Sandford*, Sel. Cas.

T. King 61, 25 Eng. Rep. 223 (Ch. 1726). Such breaches inflict harm by sacrificing the value provided in exchange for that obligation of trust, even absent further economic loss—without regard to whether the claim alleges insider trading, kickbacks, or stolen business opportunities. See, *e.g.*, *Tarnowski* v. *Resop*, 51 N.W.2d 801, 803 (Minn. 1952).

The law of unjust enrichment also rests on harm to the plaintiff from the misuse of his property. See RESTATEMENT (FIRST) OF RESTITUTION § 1 (1937) ("A person who has been unjustly enriched *at the expense of another* is required to make restitution to the other.") (emphasis added); *id.* cmt. e (restitution may be available when a defendant "wrongfully disposes of the property of another" even if plaintiff suffered no economic loss); accord *Stone* v. *White*, 301 U.S. 532, 534 (1937). Whether a court ultimately chooses to quantify a remedy based on a defendant's gain—rather than a plaintiff's loss—is beside the point: the plaintiff still must have suffered a palpable, nonabstract harm.[5]

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

Respondent and the government have no substantive response to our demonstration that the concrete harm requirement vindicates separation-of-powers principles—and thus protects individual liberty—by restraining Congress from deputizing private citizens to undertake functions that Article II

[5] The Restitution Scholars ignore the palpable harm associated with the claims they discuss, such as how copyright infringement reduces the value to the author of the right to license the work. See Br. 13-14.

assigns to the Executive. They state only that respondent is not asserting a generalized grievance because he claims a violation "of his *own* statutory rights." U.S. Br. 29; see Pub. Citizen Br. 32-33.

But that purported distinction rings hollow if respondent, like the government, were excused from the obligation to demonstrate palpable harm. Pet. Br. 27-32. Congress then could assign law-enforcement authority to private parties simply by conferring a right to sue whenever a statutory violation bears any connection to the plaintiff.

Indeed, respondent's position defies reality when, as here and in virtually all similar lawsuits, the plaintiff seeks to represent a class of millions of people, none of whom have suffered concrete harm. Respondent, for example, seeks certification of a class composed of every single person about whom Spokeo disseminated information over a ten-year period. See page 4, note 2, s*upra*; Pet. Br. 32-35.[6] A lawsuit seeking to impose a statutory penalty for alleged marketwide violations without proving concrete harm is indistinguishable from a government enforcement action.

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[6] Respondent is flat wrong in asserting (Br. 54-56) that our argument turns on "policy objections" to class actions. The "no palpable harm" standard combined with the real-world effect of the class action device endows private parties with the functional equivalent of the Executive's law enforcement authority. "[C]ourts must be more careful to insist on the formal rules of standing, not less so," in this "era of frequent litigation [and] class actions." *Arizona Christian Sch. Tuition Org.* v. *Winn*, 131 S. Ct. 1436, 1449 (2011).

Nor does it matter whether the Executive acquiesces in the delegation of its law-enforcement responsibilities to private parties. U.S. Br. 29-30. "The Constitution's division of power among the three branches is violated where one branch invades the territory of another, whether or not the encroached-upon branch approves the encroachment." *New York* v. *United States*, 505 U.S. 144, 182 (1992). That is because the structural interests undergirding separation-of-powers principles secure the liberty of the citizenry. Pet. Br. 31-32.

Rather than rebut this showing, respondent counters with his own separation-of-powers argument: that this Court's enforcement of Article III's concrete harm requirement would usurp congressional authority. Resp. Br. 50-52.

That contention relies on an insupportably broad view of Congress's law-making authority. Respondent says that federal courts cannot "substitute their normative judgment for Congress's when Congress has determined that a private interest warrants *statutory* protection." *Id.* at 51. But the question here is not whether Congress may impose a statutory obligation. The question is whether a private party may enforce that obligation in federal court in the absence of concrete harm from the claimed violation. The answer turns on the meaning of Article III. After all, Congress is "not supreme in our system of government—the Constitution is." John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 Duke L.J. 1219, 1229 (1993).

Indeed, respondent's argument proves too much. It would allow Congress to determine that its purposes would be served best by conferring on *any* individual the right to sue for all violations. But re-

spondent elsewhere concedes that the Article III requirement of harm particularized to the plaintiff limits Congress's authority—and he cannot explain why Congress cannot supersede that requirement but may supersede Article III's companion concrete harm requirement.

C. This Court's Decisions Make Clear That Concrete Harm Is Injury In Fact's "Hard Floor."

No decision of this Court holds—or even hints—that Congress may override the injury-in-fact requirement by authorizing suit for statutory violations not accompanied by concrete harm.[7]

1. A legal violation cannot substitute for concrete harm.

Respondent and his amici would remove concrete harm from the standing inquiry by treating every personal connection to a statutory violation as *per se* injury in fact. They rely heavily on this Court's description of injury in fact as "an invasion of a legally protected interest" (*e.g.*, Resp. Br. 25 (quoting *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 (1992))), but that assumes away the question presented here: Whether violation of a statutory requirement that is not alleged to have caused concrete harm implicates

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[7] The government contends that the injury-in-fact requirement as originally articulated was intended to expand the scope of standing. U.S. Br. 16-18. But any expansion reinforced the established principle that only *injured* parties may sue—by permitting suit based on "economic or other[]" concrete real-world injury (*Ass'n of Data Processing Serv. Orgs., Inc.* v. *Camp*, 397 U.S. 150, 152 (1970))—and in no way authorized suit by persons lacking the factual injury that this Court's precedents require.

a "legally protected interest"—or amounts to "an invasion" of it—in the first place.

Their sleight-of-hand switches out Article III's requirement that "'the party bringing suit must show that the action *injures* him in a concrete and personal way'" (*Massachusetts* v. *EPA*, 549 U.S. 497, 517 (2007) (emphasis added) (quoting *Lujan*, 504 U.S. at 581 (Kennedy, J., concurring))), and replaces it with a requirement that the plaintiff merely show that the challenged conduct is *connected* to him personally.

But *Lujan* made clear that the mere creation of a "self-contained" cause of action does *not* suffice to establish standing; rather, a plaintiff must have "a separate concrete interest" that has been impaired by the challenged conduct and that the lawsuit would redress. *Lujan*, 504 U.S. at 572. Congress may "elevat[e] to the status of legally cognizable injuries" only "concrete, *de facto* injuries that were previously inadequate in law." *Id.* at 578.[8]

Respondent and the government pluck phrases from this Court's opinions finding standing to assert "legally recognized" interests. See Resp. Br. 26-30; U.S. Br. 12-15. In each case, however, the plaintiff suffered concrete harm; there were no naked viola-

[8] These actions—not eliminating the concrete harm requirement—are the ways that standing's "existence in a given case is largely within the control of Congress." Antonin Scalia, *The Doctrine Of Standing As An Essential Element Of The Separation Of Powers*, 17 Suffolk U. L. Rev. 881, 885 (1983). See also *ibid.* (there is "a minimum requirement of injury in fact which not even Congress can eliminate").

tions of statutory requirements. See Pet. Br. 40-46; pages 13-15, *infra*.[9]

If a plaintiff has suffered concrete harm, moreover, Congress has broad latitude to set as a remedy liquidated statutory damages that "roughly approximate the harm that the plaintiff suffered" from the violation—because "ordinary compensatory damages" are too difficult to quantify. *Memphis Cnty. Sch. Dist.* v. *Stachura*, 477 U.S. 299, 310-11 (1986); see also Pet. Br. 48-49 (discussing Copyright Act).

2. This Court has never found injury in fact in the absence of concrete harm.

Recognizing that Article III imposes a minimum concrete harm requirement that Congress may not override does not contravene any of this Court's precedents.

Respondent concedes that the plaintiff in *Havens Realty Corp.* v. *Coleman*, 455 U.S. 363 (1982), suffered the harm of discrimination, but claims that the Court did not decide the case on the basis of that harm. Resp. Br. 28; see also U.S. Br. 14 n.2. Not so. As the Court explained, Congress "banned *discriminatory* representations in § 804(d)" of the Fair Housing Act (*Havens*, 455 U.S. at 374 (emphasis added)), and being exposed to such discrimination is how "[a] tester who has been the object of a misrepresentation made unlawful under § 804(d) has suffered injury in

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[9] The same was true in *Northeastern Florida Chapter of the Associated General Contractors of America* v. *City of Jacksonville*, 508 U.S. 656 (1993), which involved minority preferences in municipal contract bidding and stands for the unremarkable proposition that the "denial of equal treatment" due to discrimination is itself an "injury in fact." *Id.* at 666.

precisely the form the statute was intended to guard against" (*id.* at 373-74).

Public Citizen v. *Department of Justice*, 491 U.S. 440 (1989), likewise does not support respondent, for at least two reasons. *First*, while the interest in compelling *governmental* disclosure of information at issue in that case stems from a long historical tradition of mandamus actions, no common-law analog permits one private party to compel disclosure from another. Cf. *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 105 (1998) (noting, in private dispute, unresolved question "whether being deprived of information that is supposed to be disclosed" by statute "is a concrete injury in fact that satisfies Article III").

Second, even if the kind of injury at issue in *Public Citizen* or in Freedom of Information Act cases were relevant in suits between private parties, the requirements that a plaintiff make the specific request for information *and* that the request be denied before invoking the judicial power ameliorate the concerns that attend private enforcement of bare statutory violations. "Another individual who has not made a disclosure request, and therefore has not suffered a wrongful denial, has not been injured and does not have standing to sue, even if he would like to have access to the same documents." Roberts, *supra*, 42 Duke L.J. at 1228 n.60 (discussing *Public Citizen*).

Respondent contends that our position is inconsistent with *Carey* v. *Piphus*, 435 U.S. 247, 266 (1978), where this Court held that nominal damages are available to vindicate procedural due process protections for educational benefits. Resp. Br. 22, 24. But, in *Carey*, nominal damages were available because the underlying allegations, which asserted the

improper suspension of the plaintiffs from school, plainly involved a concrete harm to the plaintiffs' "significant property interest" (435 U.S. at 266 (quotation marks omitted)) in the educational benefits guaranteed to them by law. Pet. Br. 46 n.9.[10]

D. Respondent Has Not Satisfied Article III's Concrete Harm Requirement.

Article III requires that a plaintiff suffer palpable, nonabstract harm analogous to the types of injury that the Court and the common law recognize as sufficient to establish a justiciable case or controversy. None of respondent's claims satisfy that standard.[11]

1. The potential to recover statutory damages is not injury in fact.

Respondent, but not the government, asserts that attaching a monetary bounty to proof of a statutory violation creates a "Wallet Injury" that satisfies Article III. Resp. Br. 36-41.

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[10] The government's extended discussion (Br. 15-16) of the *Zivotofsky* decisions is bizarre. The Court has "often said that drive-by jurisdictional rulings * * * have no precedential effect." *Steel Co.*, 523 U.S. at 91. And that is especially so where the defendant—the government—had no interest in disputing the plaintiff's standing because it endorsed (in *First American*) the broad "injury in law" principle applied by the court of appeals.

[11] Some amici contend that standing requirements should not apply when one private party sues another. *E.g.,* Am. Ass'n for Justice Br. 21-26; Pub. Law Profs. Br. 23-26, 32. But this Court consistently applies standing principles in such suits. *E.g.*, *Lexmark Int'l, Inc.* v. *Static Control Components, Inc.*, 134 S. Ct. 1377, 1386 (2014); *Sprint*, 554 U.S. at 273-75; *Steel Co.*, 523 U.S. at 102-10.

A statutory damages bounty may give a plaintiff a "concrete private interest" in the outcome of a suit, but that interest is "insufficient to give a plaintiff standing" because it is nothing more than "a wager upon the outcome" of the lawsuit and therefore "unrelated to injury in fact." *Vermont Agency of Natural Res.* v. *United States ex rel. Stevens*, 529 U.S. 765, 772 (2000); Pet. Br. 47.

Respondent tries to circumvent this holding by asserting that his claim differs from the *qui tam* action in *Vermont Agency* because "his own legally protected right" was violated. On respondent's view, the claim for payment of the statutory damages supplies the missing concrete harm. Resp. Br. 37-38.

First, this Court has never held that a claimed entitlement to a statutory bounty upon succeeding in a lawsuit can by itself constitute the concrete harm needed to establish standing to bring suit in the first place. The remedy may establish redressability (see *Steel Co.*, 523 U.S. at 103), but cannot satisfy the requirement of concrete harm resulting from the underlying statutory violation.

If the rule were otherwise, the concrete harm requirement could be eliminated by providing for statutory damages for every substantive violation, including respondent's claims for lack of notice to third parties and failure to provide a toll-free telephone number.

Respondent says requiring a violation of "his" statutory rights will limit the impact of this new principle. But the Article III requirement that the injury be personal is an additional limitation, not a substitute for concrete harm. Because Article III requires a plaintiff to allege some kind of palpable

harm independent of the statutory violation, the "concrete private interest" in the outcome of his lawsuit conferred by a statutory damages remedy is "unrelated to injury in fact." *Vermont Agency*, 529 U.S. at 772.

In addition, respondent's claimed limitation is largely illusory. If any "personal" interest is enough, nothing would stop Congress from giving any individual the "personal right" to sue to enforce the good conduct of others. But see *Lujan*, 504 U.S. at 578.

The breadth of respondent's view of "personal" is demonstrated by his apparent view that Congress has conferred upon every individual about whom a consumer reporting agency processes information the "personal" right to a 1-800 number on its website regardless of whether its absence had any concrete effect on him. See page 2, *supra*.

Second, respondent's analogy to contract rights (Br. 39) is deeply flawed. A contract is a bargained-for exchange, and failure to comply with a contractual obligation deprives the plaintiff of the value received for the consideration he gave up—and therefore in every case inflicts concrete harm. That is why a contract is enforceable and a gratuitous unilateral promise is not.

Indeed, a contract provision awarding liquidated damages for the defendant's violation of the rights of a third party would be enforceable in court (if supported by consideration, causing concrete harm); but even respondent recognizes that Congress could not accomplish that result by enacting a statute. Resp.

Br. 24. (The government's contract analogy (Br. 23) is flawed for the same reason.)[12]

2. The defamation analogy fails.

Respondent and his amici invoke common law defamation principles to try to salvage one of the claims. (As discussed above, at 1-4, the analogy does not apply to at least three claims and may not apply to any.)

No action lies for defamation (written or spoken, per se or otherwise) unless the challenged statement harms the plaintiff's reputation. *E.g.*, *Runkle* v. *Meyer*, 3 Yeates 518, 519 (Pa. 1803) (statements must "render a man ridiculous, or throw contumely on him" to be actionable); 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 13 (1827) (statements must "tend[] [to] * * * expose him to public hatred, contempt, or ridicule").

American law has consistently limited presumed damages to specific kinds of statements that, on their face, were "virtually certain to cause serious injury to reputation." *Carey*, 435 U.S. at 262. These include words containing "a plain imputation of some crime liable to punishment," or accusing the plaintiff of something that made him categorically unfit for his office or trade. *McClurg* v. *Ross*, 5 Binn. 218, 219 (Pa. 1812) (emphasis omitted). Respondent's cases confirm this point. See *Crittal* v. *Horner*, Hobart 219, 80 Eng. Rep. 366, 366-67 (K.B. 1618) (statement that

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[12] Our argument that this approach would constitute collection of public fines by private litigants is properly before the Court. That argument explains that a rule permitting bounty-based standing would violate settled separation-of-powers principles. Pet. Br. 29.

man contracted the "French pox" (syphilis) and passed it to his wife was actionable due to "odiousness of the infection").

Contrary to respondent's suggestion (Br. 43), Blackstone confirms that only accusations that "will of course be injurious" (3 BLACKSTONE at *124)—of crime, of infectious disease, or of conduct that would automatically disqualify the subject from a "trade or livelihood, as to call a tradesman a bankrupt, a physician a quack, or a lawyer a knave"—are actionable without proof of special damage. *Id.* at *123.

Any other words, even if derogatory, are actionable only if they "in fact" have "injurious effects." *Id.* at *124. Errors about facially neutral biographical details, such as marital status or education do not "upon the face of them" import an injury and thus do not support presumed damages. *Ibid.*

3. The statutory violations do not otherwise satisfy the concrete harm requirement.

Congress, of course, is not limited to the precise concrete harms recognized at common law. But the real-world impact on respondent here falls far short of what would be required to satisfy Article III.

First, Congress in the FCRA did not grant to each individual property rights associated with the dissemination of their personal information equivalent to the contract rights and intellectual property rights eligible for protection under the Takings Clause or Due Process Clause.

Certainly, the enactment of a statutory standard for third-party conduct combined with a cause of action for its violation does not in every case create a property right. Property rights attach to legal "rules

or understandings that secure certain benefits." *Board of Regents of State Colls.* v. *Roth,* 408 U.S. 564, 577 (1972). The bare right to sue, by contrast, is "an entitlement to nothing but procedure." *Town of Castle Rock* v. *Gonzales*, 545 U.S. 748, 764 (2005) (rejecting asserted entitlement to enforcement of restraining order). The right rejected in *Gonzales* did not "resemble any traditional conception of property" (*id.* at 766), and would have stretched that concept beyond recognition.

The same is true of the regulatory standards that respondent claims were violated here—they do not "secure certain benefits." *Roth*, 408 U.S. at 577. This Court has recognized that not every statutory rule of conduct creates a property interest. *E.g.*, *College Sav. Bank* v. *Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 673-75 (1999) (Lanham Act false-advertising provisions do not create a property interest).

Indeed, Congress properly may be reluctant to create property interests because of the collateral consequences that accompany them, such as the protections of procedural due process or the Takings Clause. See, *e.g.*, *Carey*, 435 U.S. at 266. That is why, if Congress intended to create a property right, "we would expect to see some indication of that in the statute itself." *Gonzales*, 545 U.S. at 765. Moreover, to create a property interest in information disseminated by others would raise significant First Amendment concerns. See Trans Union Br. 13-23; Time Br. 25-28.

Respondent and his amici thus obscure the fundamental differences between an entitlement with real value—whether monetary (Medicare or Social Security benefits) or non-pecuniary (the property in-

terest in a guaranteed education)—and a broad cause of action to enforce violations of the law by others. While a deprivation of the former plainly imposes concrete harm, simply having a cause of action for third-party conduct with which one disagrees—or for which one hopes to obtain a bounty—does not.

Second, the statutory violations alleged here are not inevitably, or even usually, accompanied by palpable harm sufficient to satisfy Article III.

Neither respondent nor the government even attempts to explain how the failure to provide notices or a toll-free telephone number inflicted any palpable harm on respondent whatsoever. Nor do they contend that Congress examined the consequences of these violations and made any determination regarding palpable harm. (Nor could any such determination be credited by this Court.) There simply is no basis for upholding respondent's standing to pursue these claims unless a bare statutory violation always is sufficient to satisfy injury in fact.

Not only is such a conclusion legally insupportable, as we have discussed; it also would carry grave practical consequences. Amici describe, for example, the enormous liability exposure that results from the combination of no-harm class actions and technologies used by hundreds of millions of consumers. See eBay Br. 3. And they detail the huge settlement pressure that reduces our adversary system to an assembly line: "(1) file technical regulatory suit seeking astronomical damages; (2) get the class certified; (3) settle." Chamber of Commerce Br. 21. Indeed, it is exactly because no-harm class actions distort the judicial process that they are so attractive to plaintiffs' lawyers. See Experian Br. 25.

Respondent and his amici attempt to show similar adverse consequences if concrete harm is required. But theirs is a parade of red herrings: anyone who has suffered or faces an imminent threat of real-world harm would be able to proceed in court.

Even assuming that respondent's final claim requires proof that the disseminated information was false (see pages 3-4, *supra*), it nonetheless fails to satisfy the concrete harm requirement.

Respondent contends that Congress in the FCRA "identified inaccurate credit reports as causing harm to their subjects." Resp. Br. 32. But Congress never made any such determination.

When it enacted Section 1681e, the FCRA required proof of actual damages. Pub. L. No. 91-508, § 616, 84 Stat. 1127, 1134 (1970). Congress thus did not determine that false information inevitably inflicts harm.

The addition of the statutory damages remedy for willful violations applies to *all* violations—many of which do not require falsity. Pub. L. No. 104-208, Div. A, tit. II, § 2412(b), 110 Stat. 3009-446 (1996).

There accordingly is no basis to conclude that Congress's enactment of the statutory damages provision reflects any determination about false information, let alone that harm generally results from its dissemination.

Even if Congress had made such a determination, moreover, it would not be binding on this Court. A determination actually made by Congress may be entitled to some deference, but the "outer limit to the power of Congress to confer rights of action" is for

this Court to decide. *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring).[13]

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

If the Court concludes that a statutory violation by itself is sufficient to constitute injury in fact—or that resolving that constitutional question presents a difficult issue—it should hold that the FCRA does not have that effect because Congress has not clearly stated its intent to supplant the otherwise-applicable concrete harm requirement. Pet. Br. 53-56; Chamber of Commerce Br. 27-33.[14]

Respondent does not dispute that this Court has in other contexts required Congress to speak clearly before it disrupts the usual constitutional balance. Pet. Br. 53-54. Nothing in the FCRA evidences Congress's intent to supplant the concrete harm requirement.

The statutory prohibitions invoked by respondent are framed as regulatory requirements, not authorizations for suit regardless of harm. When they were enacted, moreover, a private plaintiff could recover only actual damages—making clear that Con-

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[13] Respondent does not seriously dispute that the allegations regarding the impact on him, apart from the claim of a statutory violation, fall short of demonstrating concrete harm. Pet. Br. 52-53. (Certainly his 11th-hour reference to potential harm to dating prospects, Resp. Br. 45 n.6, does not suffice.)

[14] The government's assertion (Br. 31 n.5) that this issue is not properly before the Court is mystifying. It was mentioned in the petition (at 22-23) and is plainly encompassed within the question presented.

gress did *not* intend to displace the concrete harm requirement. See page 22, *supra*.

The statutory damages provision was added by amendment, and applies across the board. See page 22, *supra*. It therefore is most reasonably interpreted to relieve plaintiffs from quantifying damages, not from proving some concrete harm.

Plaintiffs who prove willfulness can recover either "actual damages" or statutory damages, useful when harms are difficult to quantify. 15 U.S.C. § 1681n(a)(1); Pet. Br. 55-56.

Respondent mischaracterizes our argument as requiring proof of actual damages, and then claims it is inconsistent with the statutory text. Resp. Br. 52-54. We agree that "[a]ctual damages are not a gateway to statutory damages" (*id.* at 14). We contend only that a plaintiff must show the concrete harm ordinarily required to satisfy injury in fact; he need not quantify the amount of damages.

Adopting this rule of statutory interpretation will not only resolve this case, it will provide important guidance to lower courts in resolving similar claims under other federal statutes.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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