No. 13-1339

IN THE

Supreme Court of the United States

SPOKEO, INC.,

Petitioner,

v.

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

Respondent.

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

BRIEF OF AMICI CURIAE PUBLIC CITIZEN, INC., AARP, AND MFY LEGAL SERVICES, INC. IN SUPPORT OF RESPONDENT

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INTEREST OF AMICI CURIAE

This brief is submitted on behalf of three organizations interested in the effective enforcement of consumer-protection laws, including the law at issue in this case, the Fair Credit Reporting Act, or FCRA.[1] Amici are concerned that the argument advanced by petitioner here, that respondent lacks standing to pursue a cause of action for statutory damages conferred on him by Congress under FCRA, would impair the effectiveness of the consumer protections provided for in FCRA by impeding consumers' ability to seek correction of inaccurate credit information and statutory damages for publication of false consumer information. This cause of action closely resembles actions, available at common law at the time of the Constitution's adoption, designed to protect reputational and privacy interests. Amici believe that a ruling in petitioner's favor will adversely affect a broad range of consumer-protection statutes.

Public Citizen, Inc., a consumer-advocacy organization with members and supporters nationwide, works before Congress, administrative agencies, and courts for the enactment and enforcement of laws protecting consumers, workers, and the public. Public Citizen is interested in the effective enforcement of consumer-protection laws, including FCRA. In addi-

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[1] Pursuant to Supreme Court Rule 37.6, amici state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than amici or its counsel, made a monetary contribution intended to fund the preparation and submission of this brief. All parties have consented to the filing of this brief; letters of consent have been lodged with the Clerk.

tion, Public Citizen has often litigated issues of standing as a party or amicus.

AARP is a nonprofit, nonpartisan organization that helps people turn their goals and dreams into real possibilities, strengthens communities, and advocates on the issues that matter most to families, such as healthcare, employment and income security, retirement planning, affordable utilities, and protection from financial abuse. As the leading advocate for people 50+, AARP has a substantial interest in safeguarding the ability of consumers, employees, investors, and others to enforce statutory protections and ensure that the information reported about them is accurate.

MFY Legal Services, Inc. (MFY) has provided free legal assistance to vulnerable and underserved residents of New York City for over 50 years on a wide range of civil legal issues. MFY's Consumer Rights Project provides advice on a range of consumer problems, including the pervasive problem of credit report errors. Such errors, which happen with alarming frequency due to identity theft, mistaken identity, and careless procedures by credit reporting bureaus, prevent MFY's clients from accessing credit, employment, and housing, and perpetuate the cycle of poverty. The issue of standing under the FCRA is of particular concern to MFY and directly impacts its clients.

INTRODUCTION AND SUMMARY OF ARGUMENT

Through the Fair Credit Reporting Act (FCRA), 15 U.S.C. § 1681 *et seq.*, Congress recognized that a consumer's credit information is a highly valuable asset—an asset that requires protection from the harm

of false or irrelevant reporting. The potential for harm is just as real and even more prevalent today than when Congress passed FCRA in 1970. Now, myriad consumer reporting agencies—like petitioner Spokeo, Inc.—issue online consumer profiles on "anyone" and accessible to everyone, including "consumers, businesses, and non-profits," at the click of a button. Spokeo, Frequently Asked Questions, www.spokeo.com/faqs ("What is Spokeo?").

In this case, the plaintiff, Thomas Robins, alleges that the defendant, Spokeo, Inc., compiled a consumer report about him that included false information about his age, marital status, education, economic health, and profession; even the photo in the report was not of him. J.A. 14 ¶¶ 31-32. Robins alleges that Spokeo willfully failed to follow reasonable procedures to ensure the accuracy of its reports, directly leading to these inaccuracies in Spokeo's consumer report about him, violating FCRA, § 1681e(b), and entitling him to statutory damages under § 1681n, as well as an injunction. J.A. 21 ¶ 65. Robins, who is unemployed, alleges that Spokeo actively markets its consumer reports to employers, and that Spokeo's report about him has negatively affected his employment prospects and caused him significant anxiety. J.A. 13-15 ¶¶ 26, 34-37.

Robins's allegations that Spokeo infringed his legally protected interests under FCRA satisfy the requirements for Article III standing. First, Congress has substantial authority to define legally protected interests and to provide standing for claims based on invasions of those interests, including intangible injuries that encompass no physical or pecuniary losses. Early U.S. and English cases had a broad view of the

types of actions amenable to the judicial process, recognizing that violations of individuals' legal rights were actionable injuries. As the Court has recognized, Congress, within the scope of its Article I powers, has broad authority to define individual legal rights by statute and provide judicial remedies for their violation, consistent with Article III.

Second, although the traditional concept of "cases and controversies" has a wide berth, Congress acted narrowly under FCRA and identified harms to personal interests closely related to those protected by privacy and defamation actions under the common law. Congress therefore identified a pre-existing *de facto* injury that warranted protection—the public dissemination of false personal information about an individual—and provided a legal remedy for this injury. Congress also recognized the importance of procedures to ensure consumers' privacy as well as the relevancy and accuracy of consumer information in light of the new and "elaborate mechanism" of credit reporting that had been developed to amass and disseminate great quantities of information about consumers, their "credit worthiness," "character, and general reputation." § 1681. Congress identified concrete harms attributable to credit reporting abuses and created a private cause of action that would fit comfortably within "the traditional concern of the courts at Westminster." *Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 773 (2000) (quoting *Coleman v. Miller*, 307 U.S. 433, 460 (1939) (opinion of Frankfurter, J.)). In making the injury legally cognizable, Congress acted well within whatever boundaries Article III imposes upon its authority to confer standing by defining statutory rights and remedies.

Finally, Robins brings his claims against a private party based on his own injury caused by that party. This case therefore does not pose the separation-of-powers concerns that underscored this Court's decisions involving executive action and "generalized grievances." *See, e.g.*, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561-63 (1992); *United States v. Richardson*, 418 U.S. 166, 176-80 (1974). Congress's power to create rights of action is at its broadest where, as here, its action does not impinge on the interests of the executive.

ARGUMENT

Article III of the Constitution provides that "[t]he judicial Power shall extend to all Cases, in Law and Equity, arising under … the Laws of the United States." U.S. Const. art. III, § 2. This Court has construed Article III's limitation of the judicial power to "Cases" and "Controversies" to require that a plaintiff have standing to maintain an action—that is, the plaintiff must have suffered an injury in fact that is fairly traceable to the defendant and likely to be redressed by a favorable decision. *Lujan*, 504 U.S. at 560-61. The plaintiff must have a "personal stake" in the outcome of the suit, and the case must be "of the sort traditionally amenable to, and resolved by, the judicial process"—that is, similar to matters considered capable of resolution by "the courts at Westminster." *Vermont Agency*, 529 U.S. at 774 (quoting *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102 (1998), and *Coleman*, 307 U.S. at 460 (opinion of Frankfurter, J.)); *see Sprint Commc'ns Co. v. APCC Servs.*, 554 U.S. 269, 288 (2008) ("[T]he general 'personal stake' requirement and the more specific stand-

ing requirements (injury in fact, redressability, and causation) are flip sides of the same coin.").

I. Congress Has Broad Authority to Create Legal Rights and to Provide Remedies for Their Violation.

This Court has recognized that Congress may "define new legal rights," *Vermont Agency*, 529 U.S. at 773, and that injury-in-fact under Article III does not require damage to physical or pecuniary interests but may derive from a range of less tangible concerns—for instance, those that are emotional, "spiritual," "aesthetic, conservational, [or] recreational." *Ass'n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 153-54 (1970); *see also Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC)*, 528 U.S. 167, 181-83 (2000) (finding standing based on frustrated desire to "fish, camp, swim, and picnic in and near [a] river"); *Doe v. Chao*, 540 U.S. 614, 617-18 (2004) (finding standing based on emotional harm).

This Court has recognized that, to determine what the drafters of the Constitution meant by the terms "cases" and "controversies," one should look to the "matters that were the traditional concern of the courts at Westminster." *Vermont Agency*, 529 U.S. at 774 (quoting *Coleman*, 307 U.S. at 460 (opinion of Frankfurter, J.)). This Court's early cases and those of the Westminster courts recognized broad legislative power to identify and provide causes of action for intangible injuries. These cases treated legal rights as a form of property and established that the violation of a legal right is an injury. Consistent with these early cases, this Court has affirmed that Congress's authority to identify injuries and provide judicial remedies for them is broad.

A. Violations of Legal Rights Were Actionable at the Time of the Constitution's Adoption.

To the Framers of the Constitution, recognizing the violation of a person's statutory right as an "injury" would not have seemed strange—no stranger than recognizing deprivation of any other property as an injury. As James Madison explained, "In its larger and juster meaning, property embraces every thing to which a man may attach a value and have a right …. In a word, as a man is said to have a right to his property, he may equally be said to have a property in his rights." James Madison, *Property* (1792), 14 The Papers of James Madison 266.

By the time of the Constitution's adoption, the debate over whether the deprivation of legal rights—even without separate pecuniary or physical injury—was actionable had been settled favorably in English courts for nearly a century. In *Ashby v. White*, (1704) 1 Eng. Rep. 417 (H.L.) 418; 1 Brown. 62 ("*Ashby II*"), the House of Lords reversed the majority decision of the Queen's Bench, which had held that the plaintiff, Ashby, who had been deprived of the right to vote, had no standing for lack of damages and injury, *Ashby v. White*, (1703) 87 Eng. Rep. 808 (Q.B.) 810-11; 6 Mod. 45 ("*Ashby I*") (opinion of Gould, J.), and adopted Chief Justice Holt's dissenting opinion. The Lords held that Ashby had standing to challenge deprivation of his legal right to vote, upheld the jury's award of damages, and awarded costs. *Ashby II*, 1 Eng. Rep. at 418; *see Ashby v. White*, 17 H.L. Jour. 526 (Mar. 27, 1704), *available at* http://www.british-history.ac.uk/lords-jrnl/vol17/pp526-53 ("*Ashby* Lords Rep.").

The House of Lords held that Ashby suffered an injury when he was deprived of the right to vote, even though he incurred no monetary damage and his vote would not have affected the election's outcome. *See Ashby* Lords Rep. at 529; *Ashby I*, 87 Eng. Rep. at 816.[2] The Lords rejected the proposition that Ashby "had no Damage, or at least that there was no such Injury or Damage done to him as would support an Action" because, they held, "the Law will never imagine any such Thing as *Injuria sine Damno*; every Injury imports Damage in the Nature of it." *Ashby* Lords Rep. at 529; *see Ashby I*, 87 Eng. Rep. at 816 ("[F]or damages do not consist in things pecuniary, but in a disturbance of right."). The House of Lords analogized the case to one for trespass where the plaintiff would have a cause of action even if there was "no Pecuniary Damage done to the Value of a Farthing." *Ashby* Lords Rep. at 529. Chief Justice Holt's opinion similarly relied on other causes of action that are actionable without separate harm, including defamation without injury to reputation, trespass, and battery without bodily injury. *Ashby I*, 87 Eng. Rep. at 816.

Having determined that the statute in question created a legal entitlement, the Lords concluded that Ashby could seek to remedy the violation of law with a judicial action for damages and that such a case was precisely the sort where a party should "resort to the courts of *Westminster Hall*." *Ashby* Lords Rep. at 532, 534 (emphasis in original). Indeed, "there [was] no other Court or Jurisdiction appointed by the Law of

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[2] References to *Ashby I* are to Chief Justice Holt's dissenting opinion unless otherwise noted.

England, for determining the Right and repairing this Injury, but the Courts of *Westminster*." *Id.* at 531 (emphasis in original).

Not long after our Constitution was adopted, Justice Story relied on *Ashby* to hold that a plaintiff could maintain an action for diversion of water from a stream leading to his mill, even though the diversion affected only the defendant's share of the water and caused no harm to the plaintiff. *Webb v. Portland Mfg. Co.*, 29 F. Cas. 506, 508, 510-11 (C.C.D. Me. 1838) (No. 17,322). Justice Story explained:

> I am not able to understand, how it can be correctly said, in a legal sense, that an action will not lie, even in case of a wrong or violation of a right, unless it is followed by some perceptible damage, which can be established, as a matter of fact; in other words, that injuria sine damno is not actionable.

Id. at 507. He concluded that when a party suffers a violation of a legal right that causes no pecuniary loss, or where it is "impracticable" to prove actual damages, the party is "entitled to maintain his action for nominal damages, in vindication of his right." *Id.* at 508.

In *Marbury v. Madison*, too, Marbury sought judicial vindication of his statutory right to a five-year term as justice of the peace, and the Court effectively acknowledged his standing to do so when it said that the federal courts had the power to adjudicate his claims because "[the judicial] power is expressly extended to all cases arising under the laws of the United States, and consequently in some form, may be exercised over the present case; because the right claimed is given by a law of the United States." 5 U.S.

(1 Cranch) 137, 153-54, 173-74 (1803) (holding that the Supreme Court did not have original jurisdiction, however). The Court rejected the argument that Marbury's case was not actionable due to a lack of harm. *Id.* at 164. Although most appointments could be revoked by the President at will—and thus there would be no injury where there was no deprivation of a vested right—Marbury's position had been "created by special act of congress, and ha[d] been secured, so far as the laws can give security to the person appointed to fill it, for five years." *Id.* "It is not then on account of the worthlessness of the thing pursued," the Court explained, "that the injured party can be alleged to be without remedy." *Id.*

As these examples illustrate, the early federal courts and the Westminster courts were open to cases seeking vindication for violation of legal rights, regardless of whether separate tangible or pecuniary injury was shown.

B. This Court Has Recognized Congress's Broad Authority to Define Property Rights and Injuries.

This Court has applied this traditional notion of broad legislative authority to create and define legally protected rights, and it has recognized by implication that the deprivation or violation of those rights is an injury. In *Goss v. Lopez*, 419 U.S. 565, 572-74 (1975), for instance, the Court recognized that "[p]rotected interests in property …. are created and their dimensions are defined by … statutes or rules entitling the citizen to certain benefits." This Court has recognized that statutes have created legal rights to public education, continued employment, welfare, and "good-time credits" for prisoners. *Id.* at 573 (citing *Connell v.*

Higginbotham, 403 U.S. 207 (1971) (continued employment), *Goldberg v. Kelly*, 397 U.S. 254 (1970) (welfare), and *Wolff v. McDonnell*, 418 U.S. 539 (1974) (good-time credits)). Implicit in the Court's holdings that the government's withdrawal of such rights requires procedural due process is the recognition that deprivation of these statutory rights is an injury to the individual entitled to them. *See id.* at 572-74. Such interests are protected legally even though, absent the statutes creating them, an individual would have no entitlement to these benefits. *Id.* at 574 ("Although Ohio may not be constitutionally obligated to establish and maintain a public school system, it has nevertheless done so …. [T]he State is constrained to recognize a student's legitimate entitlement to a public education as a property interest which is protected by the Due Process Clause ….").

Particularly relevant here is the Court's holding that receiving false information in violation of a statutory right to receive truthful information is sufficient injury for standing. *See Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373-74 (1982). In *Havens Realty*, the Court considered § 804(d) of the Fair Housing Act, 42 U.S.C. § 3604(d), through which Congress "conferred on all 'persons' a legal right to truthful information about available housing." 455 U.S. at 373. The Court held that "[a] tester who has been the object of a misrepresentation made unlawful under § 804(d) has suffered injury in precisely the form the statute was intended to guard against, and therefore has standing to maintain a claim for damages under the Act's provisions," even though the tester expected to receive false information (and therefore was not misled) and had no intention of buying or renting a home. *Id.* at 373-74.

Petitioner attempts to distinguish *Havens Realty* on the ground that "[a]lthough the black tester had no intention of actually buying or renting a home, he [sic] nonetheless suffered the invidious and serious harm of discrimination on the basis of his [sic] race." Pet. Br. 41. Although it is true that a victim of racial discrimination suffers a concrete injury, the Court did not rest its Article III standing analysis of § 804(d) on that injury, or even mention it in its discussion of standing. Instead, it rested its holding on the violation of legal rights, and in particular the right to truthful information, provided under the Fair Housing Act. *Havens Realty*, 455 U.S. at 373-74.[3]

Based on the traditional concept that the deprivation of a legal right is an injury, this Court has stated that, at least in principle, "[t]he actual or threatened injury required by Art. III may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing.'" *Warth v. Seldin*, 422 U.S. 490, 500 (1975). As Justice Scalia once explained, "Standing requires … the allegation of some particularized injury to the individual plaintiff. But legal injury is by definition no more than the violation of a legal right; and legal rights can be created by the legislature." Antonin Scalia, *The Doctrine of Standing As an Essential Element of the Separation of Powers*, 17 Suffolk U. L. Rev. 881, 885 (1983). Standing based on a statutory

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[3] The Court also considered the testers' argument that they had been deprived of the benefits of living in a racially integrated community, and it accepted that such an injury could provide a basis for Article III standing under § 812 of the Act. *Id.* at 375-76. However, the Court held that the plaintiffs had not sufficiently pleaded this injury and should re-plead if they wished to rely on it. *Id.* at 377-78.

violation thus "depends upon whether the legislature has given *me personally* a right to be free of [the disputed] action." *Id.* And *Havens Realty* demonstrates that the statutory rights of action envisioned in *Warth* can in fact constitutionally exist. *See Havens Realty*, 455 U.S. at 373.

Other statements by the Court appear to be in tension with *Warth* and suggest that Article III may impose additional limits on congressional power. To the extent such additional limits exist, this Court has yet to demarcate the precise constitutional boundary of Congress's authority to provide judicial remedies for violations of statutory rights and has suggested that the limits of this power are unclear. *See Lujan*, 504 U.S. at 578 (discussing *Warth*). The Court has, however, explained that, at a minimum, Congress's authority includes the ability to "elevat[e] to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law." *Id.* That minimum congressional authority is sufficient to decide this case.

II. FCRA Is Narrowly Drafted to Protect Interests Akin to Those Recognized at Common Law.

Although early U.S. and common-law cases, as well as more recent jurisprudence, suggest that the traditional concept of "cases and controversies" was broad and that Congress has significant authority to define legally protected rights, this case does not require the Court to explore the outer limits of congressional authority. In FCRA, Congress did not purport to create some entirely new form of injury hitherto unknown to the law, nor one that strains the common understanding of what it is for an individual to suffer a real harm

to a genuine personal interest. Instead, Congress "elevat[ed] to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law." *Lujan*, 504 U.S. at 578 (citations omitted). Specifically, Congress identified harms to personal interests related to those traditionally protected by privacy and defamation actions under the common law and appropriately exercised its prerogative to determine the means to address those harms.

A. Through FCRA, Congress Elevated the *De Facto* Harm of Inaccurate Consumer Information to a Legally Cognizable Injury.

In enacting consumer protection statutes, Congress identifies prevalent harms to consumers that it seeks to prevent or remedy. In FCRA, Congress addressed the harms of inaccurate consumer information and infringement of consumers' right to privacy. *See* § 1681(a)(4), (b). Indeed, FCRA's stated purpose is to require "the confidentiality, accuracy, relevancy, and proper utilization of [consumer] information" and to ensure that consumer-reporting agencies provide due "respect for the consumer's right to privacy." *Id.*; *see* S. Rep. No. 91-517, at 1 (1969) (FCRA "enable[s] consumers to protect themselves against arbitrary, erroneous, and malicious credit information" and "seeks to prevent an undue invasion of the individual's right of privacy in the collection and dissemination of credit information"). Among the means Congress chose for addressing these harms was the creation of a cause of action for individuals if a consumer reporting agency's willful failure to follow reasonable procedures led to inaccurate reports about them. §§ 1681e(b), 1681n; *see Washington v. CSC Credit Servs.*, 199 F.3d 263, 267 n.3 (5th Cir. 2000).

Aside from the direct injury inherent in the reporting of inaccurate consumer information, Congress also recognized the tendency of false information to cause further consequential harm to consumers. When passing the proposed bill, the Senate Committee noted that the bill would "prevent consumers from being unjustly damaged because of inaccurate or arbitrary information in a credit report." S. Rep. No. 91-517, at 1. The report noted that inaccurate information harms consumers because consumers may not even be aware of inaccurate information in credit reports and when aware, consumers often "have difficulty in correcting inaccurate information." *Id.* at 3. It recognized that inaccurate information can not only make obtaining credit difficult, but also "a consumer's future employment career could be jeopardized because of an incomplete credit report." *Id.* at 4.

Here, Robins pleaded that Spokeo's report about him conveyed a plethora of inaccuracies: that "he was in his 50s, that he was married, that he was employed in a professional or technical field, [] that he ha[d] children," that he had a graduate degree, and that he was in the "Top 10%" wealth bracket. J.A. 14 ¶¶ 31-32. Even the photo on his report was a picture of someone else. *Id.* ¶ 31. Robins alleged that Spokeo's inaccurate report "caused actual harm to [his] employment prospects" and he "has suffered actual harm in the form of anxiety, stress, concern, and/or worry about his diminished employment prospects." J.A. 14-15 ¶¶ 35, 37.[4]

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[4] Robins's allegations of anxiety are more than enough under this Court's decision in *Chao*, 540 U.S. at 617-18, which held that the plaintiff there had Article III standing to bring a claim

(*Footnote continued*)

Spokeo and its amici make much of the fact that the false information in Robins's report was supposedly "positive" and therefore somehow helpful and not harmful to Robins. *See* Pet. Br. 4-5, 10, 51-52; Background Screeners Br. 32-33. However, the plain wording of the statute does not turn on whether inaccurate information is "helpful" or "detrimental." Congress consistently recognized inaccurate information is *inherently* detrimental. *See* § 1681 (four uses of "accurate," "inaccurate," or "accuracy"); § 1681e(b) (requiring procedures to "assure maximum possible accuracy"); *see also generally* S. Rep. No. 91-517 (repeatedly referring to the purpose of ensuring accuracy of credit reports as well as preventing adverse credit reports). Moreover, when Congress intended to limit FCRA provisions to negative information, it did so expressly. *See* §§ 1681c(a)(5), 1681l (referring to "adverse" information); § 1681s-2(a)(7) (requiring notices regarding furnishing of "negative" information). Similarly, the federal courts of appeals have recognized that FCRA targets inaccuracies. *See, e.g.*, *Boggio v. USAA Fed. Sav. Bank*, 696 F.3d 611, 617 (6th Cir. 2012) (discussing term "inaccurate" under §§ 1681s-2(b)(1)(D) and 1681e(b) and recognizing that "false information about a consumer is clearly inaccurate"

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under the Privacy Act even though he had suffered no injury other than emotional distress, and "the only indication of [his] emotional affliction was [his] conclusory allegations that he was 'torn … all to pieces' and 'greatly concerned and worried' because of the disclosure of his Social Security number and its potentially 'devastating' consequences." *See id.* at 641 (Ginsburg, J., dissenting) (agreeing with the Court's holding recognizing Article III standing on this ground but criticizing the Court's holding that the plaintiff could not recover under the statute).

and interpreting the statute to also cover technically accurate material omissions); *Seamans v. Temple Univ.*, 744 F.3d 853, 865 (3d Cir. 2014) (similar).

Inaccurate credit information harms consumers regardless of whether the information is deemed "positive" or "negative." The time and effort required to correct falsely positive information is the same as that required to correct negative falsehoods. False "positive" information can make an individual appear dishonest—or even fraudulent—to a prospective lender or employer. And it is not uncommon for an employer to deny someone employment because she is perceived to be overqualified for the position. *See, e.g.*, Allison Green, *Why Employers Don't Want to Hire Overqualified Candidates*, U.S. News & World Report: On Careers Blog, July 31, 2013, http://money.usnews.com/money/blogs/outside-voices-careers/2013/07/31/why-employers-dont-want-to-hire-overqualified-candidates.

B. The Harms Congress Identified Are Similar to Those Redressed by Causes of Action at Common Law.

That a statutory cause of action is similar to actions available at the common law provides additional confirmation that FCRA actions are of the type traditionally resolved by courts. *Sprint Commc'ns*, 554 U.S. at 274 (stating that "[w]e have often said that history and tradition offer a meaningful guide to the types of cases that Article III empowers federal courts to consider" and examining common-law history of standing to bring assigned actions); *Vermont Agency*, 529 U.S. at 774 (the Court's conclusion that plaintiff had standing to bring *qui tam* action was "confirmed" by "the long tradition of *qui tam* actions in England and the American Colonies"); *see also Steel Co.*, 523

U.S. at 102 (Article III refers to "cases and controversies of the sort traditionally amenable to, and resolved by, the judicial process"). Here, the right to accurate consumer reports protects interests similar to those that underlie common-law actions for defamation and invasion of privacy. And to the extent FCRA broadened the type of injury cognizable for standing purposes, it did so incrementally and constitutionally.

Congress explained that FCRA would seek to remedy harms related to the invasion of privacy and publication of inaccurate consumer information likely to cause reputational harm. *See supra* at 14-15 (discussing § 1681 and S. Rep. No. 91-517). These are just the sort of injuries that the common law has long recognized as actionable without proof of injury, and for which it presumes damages—that is, "a monetary award calculated without reference to specific harm." *Chao*, 540 U.S. at 621 & n.3 (citing Restatement (First) of Torts § 621, cmt. a, and § 867, cmt. d, for the proposition that presumed damages are available for defamation and privacy torts respectively, but holding statutory provision at issue eliminated the ability to recover presumed damages).

For instance, the "common law tort of invasion of privacy" created a remedy for "personal wrongs which result[ed] in injury to plaintiffs' feelings and [were] actionable even though the plaintiff suffered no pecuniary loss nor physical harm." *Parks v. IRS*, 618 F.2d 677, 683 (10th Cir. 1980); *see Pichler v. UNITE*, 542 F.3d 380, 398-99 (3d Cir. 2008) (recognizing same). And "courts for centuries have allowed juries to presume that some damage occurred from many defamatory utterances and publications." *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 760-61

(1985) (plurality opinion) (citing Restatement (First) of Torts § 568, cmt. b (1938)).

Similarly, Chief Justice Holt's dissenting opinion in *Ashby* recognized that deprivation of the right to vote, without more, constitutes injury, by relying in part on the established law of defamation, stating: "If words be spoken of a man whose reputation is so very intire that nobody believes the words, so that he loses nothing by them, yet because it is an injury to a man to be ill spoken of, he shall recover damages." *Ashby I*, 87 Eng. Rep. at 816. Chief Justice Holt's reasoning assumed there was no injury other than the false statement—not even reputational injury—and he did not draw a distinction based on the egregiousness of the defamatory statement. *Id.*

Another common-law case—one from shortly after the founding—allowed an action based in part on inaccurate credit information without a showing of separate harm. In *Marzetti v. Williams*, (1830) 109 Eng. Rep. 842 (K.B.) 842-43; 1 B. & AD. 415, the court allowed the plaintiff to bring an action against his bank for its inaccurate statement to the plaintiff's payee that the plaintiff had insufficient funds in his account to satisfy a check, although the bank cashed the check the following day. *See id.* Ultimately holding that nominal damages were allowed by analogizing the case to a breach of implied contract, Justice Taunton, writing seriatim, recognized that "[t]here are many instances where a wrong, by which the right of a party may be injured, is a good cause of action although no actual damage be sustained" and noted that under the case law, the probable damage where "the credit of the plaintiff was likely to be injured" by the inaccu-

rate statement, was sufficient injury to sustain the action. *See id.* at 846.

The law has long recognized—and expanded over time—protection for such interests at the intersection of property rights and the right to "an inviolate personality." *See* Samuel Warren and Louis Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193, 193, 205, 207 (1890) (recognizing "[that] the individual shall have full protection in person and in property is a principle as old as the common law; but it has been found necessary from time to time to define anew the exact nature and extent of such protection" and discussing the examples of defamation, assault, and the common-law action against unauthorized publication as early protections of the "right to one's personality"). And because these causes of action protect such an important—though intangible—thing as one's person, they do not require any showing of separate injury to be viable. *Cf. id.* at 198-99 & n.6 ("[The common-law action against unauthorized publication] does not turn upon the form or amount of mischief or advantage, loss or gain. The author of manuscripts, whether he is famous or obscure, low or high, has a right to say of them, if innocent, that whether interesting or dull, light or heavy, saleable or unsaleable, they shall not, without his consent, be published." (quoting *Prince Albert v. Strange*, (1849) 2 DeGex & Sm. 652, 694 (opinion of Knight Bruce, V.C.))).

Thus, the common law recognized adversary causes of action based on defamation, invasion of privacy, and similar torts without requiring proof of further injury beyond the offending action itself. Congress was well within its constitutional prerogative to create new legal rights actionable in the federal courts

similar in kind to cases "traditionally thought to be capable of resolution through the judicial process." *Raines v. Byrd*, 521 U.S. 811, 819 (1997) (quoting *Flast v. Cohen*, 392 U.S. 83, 97 (1968)).

C. Inaccurate Consumer Reporting Is a "Concrete Harm."

When Spokeo is forced to confront these strong common law traditions, it relies on tautology to confuse the point. Every example of an injury (no matter how ephemeral) that the common law recognized as sufficient for standing, Spokeo defines as "concrete" or harm to a "property right." Then, Spokeo crafts the rule that "[i]n the English legal tradition familiar to the Framers, a concrete harm was a necessary element of any judicial dispute—the violation of a legal right by itself did not suffice." Pet. Br. 20-21. Spokeo continues the circle by asserting that Robins's allegation of injury due to Spokeo's publication of inaccurate consumer information alleges violation of only intangible, legal rights provided under FCRA. *Ergo*, argues Spokeo, the injuries that Robins alleges and that FCRA targets are lacking.

First, Spokeo's dichotomy between "property" and "legal rights" ignores the Madisonian idea permeating the common-law cases and embraced by the founders that individuals have "a property in [their] rights." Madison, *Property*, at 266. For instance, Spokeo attempts to distinguish *Ashby* as "grounded in a cognizable concrete harm—the denial of the right to vote, which was viewed as a property right." Pet. Br. 25. Neither Chief Justice Holt's opinion nor the House of Lords Report on the case conducted an exegesis on property law and identified the right as a "property" right, as Spokeo's statement suggests. Instead, *Ashby*

relied on an "Act of Parliament," Stat. of *West.* 1 Cap. 5, to determine that the plaintiff had the right to vote and held that the defendants were prohibited from violating that right. *Ashby* Lords Rep. at 529; *see also id.* at 528 ("Thus the Right of Election is explained, and shewed to be a legal Right."). To the extent the House of Lords Report recognized that denying a judicial remedy to vindicate a legal right is "destructive of the Property" of the plaintiff and against the statutory right to "Freedom of Elections," *id.* at 534, the Report simply gave credence to the notion that "property" in its broader and "juster" sense, includes legal rights, Madison, *Property*, at 266; *see also supra* at 10-11 (discussing "property" interests created by statute).

Spokeo also suggests that this Court's opinion in *Coleman* robbed *Ashby* of all meaning when it stated that "'[p]rivate damage' is the clue to the famous ruling in *Ashby v. White*.'" Pet. Br. 25 (quoting *Coleman*, 307 U.S. at 469 (opinion of Frankfurter, J.)). However, *Coleman* used "private damage" to refer to the violation of an individual's legal right. *Coleman* distinguished *Ashby* because *Ashby* involved a private individual seeking to vindicate the violation of his legal rights, whereas *Coleman* held that state legislators suing in their official capacity did not have standing. *See Coleman*, 307 U.S. at 470 ("In no sense are [the issues here] matters of 'private damage.' They pertain to legislators not as individuals but as political representatives executing the legislative process."). The law courts were meant to vindicate personal legal rights. *See id.* at 469. *Coleman*'s distinction of *Ashby* therefore supports, rather than refutes, Robins's position.

Second, Spokeo concedes that the common-law courts provided for actions for trespass, copyright, and "actions based on loss of a bargain or breach of trust" without a separate showing of harm but distinguishes the actions as involving "[c]oncrete actual harm." Pet. Br. 26; *see also id.* at 21, 25, 48, 49. Under closer examination, these injuries are not inherently more "concrete" than the harm at issue here—inaccurate credit reporting.

Spokeo argues that trespass—even a one-time incursion with no damage done—is more "concrete" because "repeated acts of going over the land might be used as evidence of a title to do so, and thereby the right of the plaintiff may be injured." Pet. Br. 25-26 (quoting *Marzetti*, 109 Eng. Rep. at 846). However, a plaintiff in a trespass action need not allege or prove a real or imminent danger of repeated trespasses and thus no showing of the "concrete harm" Spokeo posits—likely legal effect on the plaintiff's land title—is required. Restatement (Second) of Torts § 163 & cmt. d (1965).

Moreover, *Marzetti* cited the trespass example in support of the general proposition that "[t]here are many instances where a wrong, by which the right of a party may be injured, is a good cause of action although no actual damage be sustained." *Marzetti*, 109 Eng. Rep. at 846 (opinion of Taunton, J.). The court extended that principle from trespass law to affirm a cause of action directly analogous to the one here—where "the credit of the plaintiff was likely to be in-

jured"—without suggesting that that injury was somehow dependent upon waiver principles. *See id.*[5]

Similarly, Spokeo's attempt to distinguish copyright actions as involving a "concrete 'property' interest" fails. Pet. Br. 49. Spokeo dismisses out of hand the fact that Congress since 1790 has provided for statutory damages for copyright infringement not dependent on any pecuniary or separate injury to the plaintiff. Indeed, the first U.S. Copyright Act assigned damages at a certain amount per infringing page. *See Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 351 (1998) (citing Copyright Act of 1790). It is well-established that federal courts have discretion to award statutory damages "[e]ven for uninjurious and unprofitable invasions of copyright." *F. W. Woolworth Co. v. Contemporary Arts, Inc.*, 344 U.S. 228, 233 (1952); *see* 4 Melville Nimmer & David Nimmer, *Nimmer on Copyright* § 13.01, at 13–6 (1999).

And Spokeo's distinction of breach-of-contract and breach-of-trust cases that did not involve pecuniary loss as involving a "[c]oncrete actual harm"—"the loss of the value of the special relationship"—does not bear scrutiny. Pet. Br. 26 (citing *Marzetti*, 109 Eng.

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[5] Spokeo also suggests that *Ashby* could be limited to causes of action that are deemed waived as a legal matter if no cause of action is brought within a certain timeframe or after repeated injuries. Pet. Br. 25 (citing Lord Raymond's reporting of *Ashby I*, (1703) 92 Eng. Rep. 126 (Q.B.) 136; 2 Ld. Raym. 938). What *Ashby* actually said was that if the court does not let a plaintiff vindicate a legal right—any legal right—the law "tolerates the Injury" and the plaintiff will no longer have that right because he cannot enforce it. *Ashby* Lords Rep. at 528; *see also Ashby I*, 92 Eng. Rep. 126, 136 ("If the plaintiff has a right, he must of necessity have a means to vindicate and maintain it ….").

Rep. at 846, and *Keech v. Sanford*, (1726) 25 Eng. Rep. (Ch.) 223, 223-24; Sel. Cas. T. King 61). The loss of the "special relationship" Spokeo refers to boils down to the loss of a "relationship" recognized by contract or trust law—that is, the loss of a legal right. *See Marzetti*, 109 Eng. Rep. at 846 (opinion of Parke, J.) ("[W]herever there is a breach of contract or any injury to the right arising out of that contract, nominal damages are recoverable.").

Contrasting with these supposedly "concrete" harms, Spokeo portrays inaccurate consumer reporting as harmless. But there is nothing intuitively more "concretely" harmful about crossing the corner of your neighbor's yard—once, without disturbing the grass; about speaking ill of someone—when no one believes it, *Ashby I*, 87 Eng. Rep. at 816; about poking someone in the chest—when it didn't even hurt, Black's Law Dictionary (10th ed. 2014) (for the tort of "battery," "the slightest degree of force is sufficient, provided that it be applied in a hostile manner; as by pushing a man or spitting in his face" (quotation marks and citation omitted)); or about putting a copy of copyrighted genealogical research on a library shelf—with no indication that anyone looked at the research or would ever have bought a copy, *see Hotaling v. Church of Jesus Christ of Latter-Day Saints*, 118 F.3d 199, 203 (4th Cir. 1997).

Credit reputation is at least as concrete an interest as those vindicated by such traditional rights of action. A person's credit can legitimately be viewed as a highly valuable property right, an asset, even a new stratification of society in the digital age, and depreciation of that asset has quite "concrete" consequences. In 1968, sociologist David Caplovitz predicted:

> As our economy becomes more and more dependent upon credit, a man's credit rating becomes an increasingly important asset. A vast network of information exchange exists in the credit industry …. Automation has been introduced, and soon the credit rating system will be fully automated.
>
> How one achieves or loses status in this ranking system is by no means obvious….
>
> The pressure toward a probabilistic social index for determining credit ratings comes from the fact that such a procedure is easier to administer and fits more neatly into the computer age.

David Caplovitz, *Consumer Credit in the Affluent Society*, 33 Law & Contemp. Probs. 641, 649-50 (1968). Now Professor Caplovitz's vision of an Orwellian credit age dominated by massive databanks of consumer information cultivated and culled by computers has become reality: Careers, property, and livelihoods depend on the information collected and disseminated by computer databases; criminals steal the credit identities of others to enrich themselves; hackers may crash the credit worth of individuals in seconds; and companies sell products by the thousands to protect the valuable commodity that is the consumer's credit reputation. To say that accurate credit information is not valuable and that the dissemination of inaccurate credit information is not an injury is to ignore the modern framework of society. Perhaps the best indicator of the value society places on this consumer and credit information is that, in shorthand, we call it our "identity." *See, e.g.*, Black's Law Dictionary (10th ed. 2014) (defining "identity theft").

Once a credit reporting agency publishes inaccurate information about a consumer, the consumer may have no way of knowing if or when someone will access the information. Mark Twain's aphorism that "[o]ne of the most striking differences between a cat and a lie is that a cat has only nine lives," *Pudd'nhead Wilson's Calendar* (1894), seems woefully understated in an era when the internet can perpetuate false information about a consumer indefinitely. If the consumer must wait to sue until she actually applies for a loan or a new job, there will be insufficient time to correct the errors. Spokeo's claim that Congress cannot create an action for inaccurate consumer information because it is not a "concrete" harm or deprivation of a settled "property right" therefore fails as a matter of logic and law.

D. Congress May Choose the Means to Deter or Remedy the Harm It Identifies.

Once Congress, through FCRA, identified the harm of inaccurate consumer information, Congress was fully within its authority to provide for statutory damages to remedy that harm and the inadequate procedures that led to it. As this Court has long recognized, "'[h]ow to effectuate policy—the adaptation of means to legitimately sought ends—is one of the most intractable of legislative problems'"; the choice of remedy "'is a matter within the legislature's range of choice.'" *Laidlaw*, 528 U.S. at 187 (quoting *Tigner v. Texas*, 310 U.S. 141, 148 (1940)).

Both this Court and the common law have endorsed the idea that presumed or nominal damages are appropriate in cases where there is no physical or pecuniary injury and damages are difficult to prove or quantify. *See Chao*, 540 U.S. at 621 (but holding that

statute at issue eliminated availability of presumed damages). This is particularly true for privacy and defamation torts, which provide "quintessential example[s] of damages that are uncertain and possibly unmeasurable." *Kehoe v. Fidelity Bank & Trust*, 421 F.3d 1209, 1213 (11th Cir. 2005); *see Chao*, 540 U.S. at 621. Thus, Congress's choice of remedy and method of deterrence was rational and based on long-standing common-law traditions.

By providing for statutory damages, Congress ensured that a consumer has an incentive to bring suit to vindicate a violation of his statutory right—precisely because consequential or pecuniary damages may be small, uncertain, or unmeasurable. By doing so, Congress did not create a mere "wager" contingent on the outcome of the suit or a "'byproduct' of the suit itself." *See Vermont Agency*, 529 U.S. at 772-73. Instead, the statutory damages are specifically tied to the harm that Congress sought to prevent—inaccurate credit reporting due to unreasonable procedures. Therefore, the FCRA plaintiff's interest in the suit is sufficiently related to his injury in fact—that is, his interest "consist[s] of obtaining compensation for, or preventing, the violation of a legally protected right." *Id.* at 772; *see Lujan*, 504 U.S. at 580 (Kennedy, J., concurring) (plaintiffs have standing based on a statutory violation where the statute "identif[ies] the injury it seeks to vindicate and relate[s] the injury to the class of persons entitled to bring suit").

Finally, although Robins also seeks injunctive relief, Spokeo apparently does not challenge his standing to do so: such relief is not even mentioned in its opening brief. But the natural consequence of

Spokeo's argument—that inaccurate consumer information is not sufficient injury for Article III standing—would doom FCRA plaintiffs' requests for injunctive relief just as surely as it would doom plaintiffs' statutory-damages claims.[6]

If inaccurate consumer reporting is not an injury for statutory-damages purposes, then it is not an injury for injunctive purposes either. Congress would be disabled from authorizing consumers to seek injunctions to correct false information in their credit reports under FCRA until actual damages were imminent. Consumers would have to wait until they could prove they were about to be denied credit or a job before they could seek a court order to correct the falsities.

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[6] The lower courts disagree as to whether private plaintiffs may obtain injunctive relief under FCRA. *See Andrews v. Trans Union Corp.*, 7 F. Supp. 2d 1056, 1083-84 (C.D. Cal. 1998) (FCRA allows injunction to correct inaccurate report), *rev'd on other grounds*, 225 F.3d 1063 (9th Cir. 2000), *and* 534 U.S. 19 (2001); *Greenway v. Info. Dynamics, Ltd.*, 399 F. Supp. 1092, 1096–98 (D. Ariz. 1974) (certifying class on claim for injunctive relief under FCRA and granting preliminary injunction); *see also Califano v. Yamasaki,* 442 U.S. 682, 705 (1979) ("Absent the clearest command to the contrary from Congress, federal courts retain their equitable power to issue injunctions in suits over which they have jurisdiction."). *But see Washington*, 199 F.3d at 269 (discussing split and holding injunction unavailable). However, whether injunctive relief is available is a question under Federal Rule of Civil Procedure 12(b)(6), not an issue of standing.

III. Recognizing That FCRA Plaintiffs Have Standing Based on Inaccurate Consumer Reports Poses No Separation-of-Powers Problem.

"The law of Art. III standing is built on a single basic idea—the idea of separation of powers" and, as such, "keeping the Judiciary's power within its proper constitutional sphere." *Raines*, 521 U.S. at 820. "At bottom, 'the gist of the question of standing' is whether petitioners have 'such a personal stake in the outcome of the controversy as to assure … concrete adverseness ….'" *Massachusetts v. EPA*, 549 U.S. 497, 517 (2007) (citation omitted). FCRA plaintiffs have such a personal stake: They must personally be the subject of an inaccurate consumer report. And because of FCRA's statutory damages provision, they also have a monetary stake in the suit's outcome. This case therefore does not present the separation-of-powers concerns that have animated previous decisions of this Court.

The Court's jurisprudence recognizes that, generally, the "question whether the litigant is a 'proper party to request an adjudication of a particular issue,' is one within the power of Congress to determine." *Sierra Club v. Morton*, 405 U.S. 727, 732 n.3 (1972). It has identified two exceptions to this principle—statutes or causes of action that merit closer scrutiny—neither of which applies in this case. The first exception involves statutes that authorize private suits to challenge government action or inaction with respect to the regulation of third parties or the promulgation or execution of broad, generally applicable policies. *See generally, e.g.*, *Lujan*, 504 U.S. 555; *Sierra Club*, 405 U.S. 727. In those circumstances, a plaintiff

must demonstrate that the government's action or failure to act harmed him in some way beyond merely infringing an asserted interest in the government's obedience to the laws: "To permit Congress to convert the undifferentiated public interest in executive officers' compliance with the law into an 'individual right' vindicable in the courts is to permit Congress to transfer from the President to the courts the Chief Executive's most important constitutional duty, to 'take Care that the Laws be faithfully executed.'" *Lujan*, 504 U.S. at 577 (quoting U.S. Const. art. II, § 3).

The second, and related, exception involves constitutional or statutory rights that are common to all citizens, so that their violation affects all citizens equally—a so-called "generalized grievance." *See, e.g.*, *Richardson*, 418 U.S. at 176, 178. Under this exception, the Court has largely rejected standing where the plaintiff can show no separate harm to his interests other than his general interest as a taxpayer or citizen. Thus, this Court has held that plaintiffs had no standing as taxpayers or citizens to seek an accounting of CIA expenditures, *id.*, to challenge the reserve status of members of Congress as a violation of the Incompatibility Clause, *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 220-23 (1974), or to challenge the constitutionality of presidential appointments, *Ex parte Levitt*, 302 U.S. 633, 633-36 (1937) (per curiam).

These two exceptions, articulated in cases concerning standing to challenge governmental actions, recognize that "where large numbers of Americans suffer alike, the political process, rather than the judicial process, may provide the more appropriate remedy for

a widely shared grievance." *FEC v. Akins*, 524 U.S. 11, 23 (1998). The majoritarian political branches are better equipped to protect such broadly shared interests than the anti-majoritarian judicial branch. *See id.*

These separation-of-powers concerns are not implicated here, however. Unlike in *Lujan* or *Sierra Club*, Robins is not challenging executive action or inaction, where separation-of-powers concerns would be at their apex. *See Raines*, 521 U.S. at 819-20 ("[O]ur standing inquiry has been especially rigorous when reaching the merits of the dispute would force us to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional."). For instance, in *Lujan*, the plaintiffs sought to require two executive-branch agencies to consult about foreign development projects. Unlike those executive-branch agencies, Spokeo and other consumer reporting agencies have no duty to ensure that the laws are faithfully executed and can make no claim to co-equal constitutional status with the federal courts.

And contrary to Spokeo's argument, Congress is not required to task the executive branch with civil or criminal enforcement of every law it passes. Pet. Br. 27-31 (second-guessing Congress's choice of means for enforcing FCRA because "[p]rivate plaintiffs hunting for a bounty—and their lawyers—lack the political and legal constraints that cabin the executive's discretion"). As this Court has held, it is *Congress's* prerogative to choose the means that it thinks will best effectuate its policies, and "it is reasonable for Congress to conclude that an actual award of civil [damages] does in fact bring with it a significant quantum of deterrence over and above [the threat of possible gov-

ernment enforcement]." *Laidlaw*, 528 U.S. at 186 (discussing civil-penalty actions brought by private plaintiffs). Spokeo's proposed rule would be a radical departure from Congress's current practice and would weaken Congress's ability to protect consumers' interests.

FCRA also does not make a "generalized grievance" actionable. Instead, it specifically grants an *individual* legal right to accurate consumer information and provides statutory damages *only* if the particular plaintiff's legal right is violated—that is, if a consumer reporting agency willfully fails to comply with FCRA requirements "*with respect to any consumer*." § 1681n(a) (emphasis added); *see Beaudry v. TeleCheck Servs.*, 579 F.3d 702, 707 (6th Cir. 2009) (FCRA "does not authorize suits by members of the public at large; it creates an individual right not to have unlawful practices occur with respect to one's own credit information." (quotation marks and citations omitted)).

In this case, for instance, Robins has a right of action because he has pleaded that Spokeo willfully failed to use reasonable procedures, which led to Spokeo's publication of an inaccurate consumer report *about him*. He has alleged that he personally was the subject of an inaccurate credit report, and as such, has provided all the concrete particularity needed to resolve the legal dispute. *See Washington*, 199 F.3d at 267 n.3 (recognizing that "[c]ourts applying § 1681e(b) uniformly limit recovery to cases where the failure to follow procedures causes actual harm (*i.e.*, release of an inaccurate report) to the consumer" and citing cases).

Because this case presents no separation-of-powers concern and falls within Congress's broad authority to create private causes of action to deter and remedy violations of legal rights, rejecting standing in this case would not provide a bulwark against the Judiciary's intrusion upon the powers of its co-equal branches. Instead, it would diminish the constitutionally recognized powers of Congress and undermine the separation-of-powers purposes of the doctrine of Article III standing.

CONCLUSION

The Court should affirm the judgment of the court of appeals.

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