No. 16-1524

In The Supreme Court of the United States

M-I, LLC, a Delaware Limited Liability Company,

Petitioner,

v.

SARMAD SYED, an individual, on behalf of himself and all others similarly situated,

Respondent.

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

REPLY BRIEF FOR PETITIONER

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I. Aside from incantations of this Court's certiorari lexicon—a "splitless" here (at 2, 17), a "fact-bound" there (at 17)—Syed's scattershot arguments against certiorari on the first question presented—whether a bare procedural violation of the Fair Credit Reporting Act satisfies Article III's real-world harm requirement—reduce to two main points. Each confirms the need for this Court's review.

First, Syed assures this Court (at 14-17) that the Ninth Circuit's decision does not implicate this Court's decision in *Spokeo, Inc.* v. *Robins*, 136 S. Ct. 1540 (2016), because, in Syed's view, either *Spokeo* does not apply to "substantive" rights, or the Ninth Circuit applied *Spokeo* correctly. BIO at 14-17, 21-22.

He is wrong either way. Syed's substance-versus-procedure distinction has no basis in *Spokeo*, where the Court never so much as mentioned the word "substantive." And whether the violation of a right regarding how Syed was entitled to receive certain information—such as on two pieces of paper rather than on one—amounts to an injury-in-fact, and thus satisfies Article III's requirements, is precisely the question presented here.

Second, Syed denies the existence of a split among the Circuits on the question presented by substituting a different question on which he postulates no disagreement. BIO at 18-19. But the lower courts plainly disagree on the question presented *here*—whether the

violation of a right such as the one Syed invokes requires a separate showing of concrete harm to satisfy Article III. See Pet. at 14-16. The Ninth Circuit has held that it does; other courts of appeals have held that it does not. This divergence is precisely the sort of question that this Court's intervention alone can resolve.

II. Syed's arguments regarding the second question presented—on the Ninth Circuit's departure from this Court's decision in *Safeco*—similarly confirm the need for this Court's review. The FCRA ordinarily allows only actual damages for violations, but it imposes "actual damages, or statutory damages * * * and even punitive damages" for "willful" violations. *Safeco Ins. Co.* v. *Burr*, 551 U.S. 47, 53 (2007). But these severe penalties may only be imposed for violations incurred at least recklessly—and this Court has defined a "reckless" violation as one both objectively unreasonable *and* imposing "an unjustifiably high risk of harm." *Id.* at 68.

The Ninth Circuit has now held that this Court's recklessness standard is satisfied even though (i) several federal district courts expressly approved the defendant's actions, (ii) no court of appeals decision had reached the opposite conclusion, and (iii) no real-world harm resulted by providing statutorily required disclosures on two pieces of paper rather than on one. This Court's decision in *Safeco* precludes such "gotcha" liability—and in any event, without a serious risk of harm to Syed, M-I's conduct could not have been reckless. The Ninth Circuit's conclusion to the contrary

hopelessly conflicts with this Court's decision in *Safeco*, and review is warranted for that reason, too.

I. Syed's Arguments Confirm That This Court's Review Is Needed Now To Resolve A Recurring, Important Issue Of Article III Standing That Has Divided The Circuits.

Syed's opposition veers between insisting that the Ninth Circuit is correct (at 16, 21), and arguing that if M-I had formulated a different question presented, *that* question might not merit review (at 18). Syed's merits arguments are mistaken, and his discussion of an alternate question presented ignores the circuit split on the question presented here.

A. Respondent's Attempt To Reformulate The Question Presented Only Confirms The Split On That Question.

As M-I demonstrated in its petition (at 14-16), the Ninth Circuit's decision conflicts with those of the Fourth, Seventh, Eighth, and D.C. Circuits. Syed does not deny the existence of that split. Instead, he reformulates the question presented and then claims there is no split on *that* question. But those efforts to avoid contending with this split only confirm its existence.

Syed argues (at 18) that there is no circuit split because all agree that, for some statutory rights, the violation of the right itself supplies the concrete injury required for Article III. Of course: these are the rights

resembling slander *per se*, rather than the ones resembling the right to having one's zip code disclosed correctly. *Spokeo*, 136 S. Ct. at 1549-50.

But the courts of appeals do not disagree about *whether* some rights are like slander *per se*, but *which* rights are like it. The Ninth Circuit has held that rights like the one to receive a disclosure and a liability waiver on two pieces of paper rather than on one are like slander *per se*, and thus require no separate demonstration of a concrete injury. Yet, as Syed hardly addresses, other Circuits disagree.

For example, the Fourth Circuit—addressing the same statute—expressly stated that "a constitutionally cognizable informational injury requires that a person lack access to information to which he is legally entitled *and* that the denial of that information creates a 'real' harm with an adverse effect." *Dreher* v. *Experian Info. Sols., Inc.*, 856 F.3d 337, 345 (4th Cir. 2017) (quoting *Spokeo*, 136 S. Ct. at 1548). But the Ninth Circuit concluded the opposite: that the "disclosure requirement" Syed invokes "creates a right to information," App. 11, that "recognize[s] the harm such violations cause," dispensing with the need for a separate showing of concrete harm. *Id.* at 12. As M-I explained in its petition (at 14-17), other courts of appeals follow the Fourth Circuit's approach, requiring a showing of concrete harm along with so-called "informational injuries"—thus treating these requirements like mistaken zip codes, and not like slander *per se*.

Syed, however, asserts (at 19) that lower courts are not *truly* in conflict over *Spokeo* unless their disagreements arise while interpreting the same sub-sub-subsection of the same statute. But that argument strains to make a vice out of a virtue. The courts of appeals already disagree on the question presented here—whether a violation of a right not to suffer an "informational injury" requires a separate showing of concrete injury for Article III purposes—and that question arises in a host of different statutes. Syed's attempt to define the split out of existence only confirms it.

As demonstrated in the petition (at 12-18), this case cleanly presents the question of whether a violation of one type of right—granted by numerous federal and state laws and regulations—is more like slander *per se* or an incorrectly listed zip code. That question has divided the circuits and warrants this Court's review.

B. Syed's Merits Arguments Confirm The Pressing Need For This Court's Review Of The Conflict Between The Ninth Circuit And This Court's Precedent.

Syed denies the conflict between the Ninth Circuit's decision and *Spokeo* (see Pet. at 12-14, 16) by arguing (at 14) that the decision "does not implicate *Spokeo*" at all—because, Syed contends, the Ninth Circuit's decision is correct on the merits. BIO at 16,

21-24. Syed's attempt to rehabilitate the Ninth Circuit's decision only makes plain its incompatibility with this Court's precedent.

Syed begins (at 14) by describing *Spokeo* as turning on the difference between substantive and procedural rights. On this view, a plaintiff claiming that his *substantive* rights have been violated always states an injury-in-fact for Article III purposes, while *Spokeo* directs courts to inquire further when only a *procedural* right has been violated. BIO at 15.

But if *Spokeo*'s application turns on whether a right is substantive or procedural, one might have expected this Court to have said so. Syed's attempt (at 14) to manufacture a concession by M-I cannot fill this gap, as the word "substantive" appears precisely twice in M-I's petition—once to describe the Ninth Circuit's "substantive additions" to its opinion following M-I's rehearing petition. Pet. at 8 n.1. Nor does the Ninth Circuit ever use the term—even though Syed claims (at 15) that the court hewed to this distinction. And Syed cites no other case making the distinction. If Syed is correct that *Spokeo* turns on whether a right is substantive or procedural, then this Court's clarification is all the more necessary.

Spokeo reaffirmed the "irreducible constitutional minimum" of Article III standing, including the "constitutional requirement" that every plaintiff invoking the federal courts must have suffered an "injury in fact." 136 S. Ct. at 1547-48 (citation omitted). The Court explained that this inquiry depended on

whether a plaintiff suffered a "concrete," "*de facto*," "real" injury. *Id*. at 1548 (citations omitted). As the Court has explained, every plaintiff, claim, and remedy must satisfy this demanding test. *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 103-09 (1998). This remains true whether those claims are procedural or substantive.

While Congress can "elevat[e] to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law," *Spokeo*, 136 S. Ct. at 1549 (citation omitted), Congress cannot use this authority to sidestep Article III's requirements altogether, such as "by statutorily granting the right to sue to a plaintiff who would not otherwise have standing." *Id.* at 1548 (citation omitted). This Court thus affirmed that "Article III standing requires a concrete injury even in the context of a statutory violation," *id.* at 1549, and that both history and Congress's judgment would inform whether a statutory right protected against a real-world injury—and thus whether a plaintiff bringing a claim to vindicate that right must show a concrete harm from that right's violation, or if the violation itself can suffice. *Id*. at 1549-50.

The Court provided two guideposts for answering that question. On one side, a statutory right against slander *per se* protects against a harm that, though "difficult to prove or measure," is clearly real. *Id.* at 1549. Plaintiffs bringing claims to vindicate these sorts of rights need not show any distinct harms separate from the violation of a protected right. On the other side, although Congress may confer a right not

to have "an incorrect zip code" published, "[i]t is difficult to imagine" how the violation of that right, "without more, could work any concrete harm." *Id*. at 1550. Thus, a plaintiff must also show a concrete, real-world harm to maintain suit in federal court for the violation of the right not to have an incorrect zip code published.

The Ninth Circuit, however, has now held that suits enforcing statutory rights like the requirement that M-I provide a statutorily required disclosure and liability waiver on two pieces of paper rather than on one are more akin to actions for slander *per se* than ones for the publication of an incorrect zip code. The Ninth Circuit's holding thus confines this Court's second category—where plaintiffs must show a concrete harm along with a statutory violation—to zip codes and little else.

Syed insists in the alternative (at 15) that he "clearly * * * allege[d] facts demonstrating" a concrete injury flowing from a technical violation of the statute. *Spokeo*, 136 S. Ct. at 1547 (citation omitted). But Syed never lists these facts, even after M-I's petition (at 13-14) highlighted their absence. Instead, Syed relies exclusively on the Ninth Circuit's "inference" that he "was confused by the inclusion of the liability waiver with the disclosure." App. 12. For this, the Ninth Circuit relied on a single paragraph in Syed's complaint, that Syed:

> discovered Defendant M-I's violation(s) within the last two years when he obtained

> and reviewed his personnel file from Defendant M-I and discovered that Defendant M-I had procured and/or caused to be procured a "consumer report" regarding him for employment purposes based on the illegal disclosure and authorization form.

App. 12 (quoting operative complaint). Nowhere does Syed express surprise that a report was taken, that he did not wish a report to be taken, that he mistakenly consented to a report, nor that he did not fully understand both the statutorily required disclosure and liability waiver.[1] This Court can safely disregard the Ninth Circuit's generous "inference" as an attempt to shield its gloss on *Spokeo* from this Court's review.

In the end, Syed focuses primarily on defending the Ninth Circuit's decision on the merits (at 22-24), citing the policy concerns that led to the FCRA's passage and "the tradition of the common law's protection against unauthorized disclosure of private information." BIO at 22, 23. Syed ultimately agrees that the outcome of this case depends on whether this Court concludes that a violation of a statutorily mandated process by which a consumer gathers information is a real-world harm standing alone, or if it instead requires a separate showing of harm. That is the first question presented by M-I's petition—and the Ninth

[1] Syed suggests (at 16) that this Court should deny certiorari because he could always amend his complaint. But the same was true in *Spokeo*, where Robins's complaint had been dismissed without prejudice (and thus with leave to amend). See *Robins* v. *Spokeo, Inc.*, No. CV10-05306 ODW (AGRx), 2011 WL 597867, at *2 (C.D. Cal. Jan. 27, 2011).

Circuit's answer to that question has divided the Circuits and departed from this Court's precedent.

II. Syed's Attempts To Minimize The Ninth Circuit's Departure From This Court's Decision In *Safeco* Only Confirms The Need For Review.

Syed's arguments against review of the second question presented—whether an FCRA violation that causes no harm can satisfy *Safeco*'s recklessness standard—reveal irreconcilable contradictions under even minimal scrutiny. These, too, reveal the pressing need for this Court's review.

Syed first claims (at 25-26) that the Ninth Circuit's disagreement with several federal district court decisions does not "even remotely justify" this Court's review. But then, relying exclusively on the weight of the Federal Trade Commission's disapproval of combined forms such as M-I's, Syed implies (at 26) that the Ninth Circuit's decision was essentially a forgone conclusion. He cannot have it both ways.

This Court's decision in *Safeco* held that an FCRA violation could not have been willful given the absence of judicial and administrative authority that might have "warned [the defendant] away from the view it took." *Safeco Ins. Co.*, 551 U.S. at 70. Here, M-I had *conflicting* guidance—with the FTC and several federal district courts in disagreement. This, too, is "less than pellucid, or at least not as clear as [Syed] claims." App. 92 (quoting *Safeco*, 551 U.S. at 70). At most, these

conflicting authorities are inconclusive; they certainly do not amount to an unequivocal "warn[ing]." *Safeco*, 551 U.S. at 70.

Additionally, Syed's attempt to justify the Ninth Circuit's departure from *Safeco* stumbles on his failure to plead some real-world harm flowing from the statutory violations. This failure is fatal to Syed's willfulness argument, as *Safeco* defines that term as requiring "an unjustifiably high risk *of harm*" attendant to a potential wrong. *Id.* at 68 (emphasis added) (citation omitted). This harm requirement is critical because myriad federal statutes provide consumers with statutory damages even for purely technical violations—and no-injury, no-damages claims encourage "aggressive, overreaching" class actions "on behalf of plaintiffs who have suffered no real-world harm." Br. of Chamber of Commerce as *Amicus Curiae* at 11-12. These injury-free class actions generate the "perfect storm," *Stillmock* v. *Weis Mkts.*, 385 F. App'x 267, 276 (4th Cir. 2010) (Wilkinson, J., concurring specially), for coercive settlements precisely *because* the class need not prove any harm. But if Syed's no-harm, no-problem argument is right, a plaintiff may show *less* in claiming deliberate FCRA violations than for careless ones. That result cannot be reconciled with either the FCRA or this Court's holding in *Safeco*.

III. This Case Is An Ideal Vehicle For Resolving Two Important, Recurring Questions.

While Syed halfheartedly describes the Ninth Circuit's holding as "narrow" and "case-specific" (at 16), the Ninth Circuit's published opinion articulates an important rule with far-reaching consequences—*i.e.*, that a plaintiff who has received information in a technically incorrect way need not show any real-world harm either for purposes of Article III standing or FCRA punitive damages. This case is an ideal vehicle for this Court to reaffirm the crucial limits imposed by the harm requirements in both Article III and the FCRA.

As *amici* highlight, "consumer reporting is both a profoundly important aspect of the economy and a massive and complex undertaking," Br. for Consumer Data Industry Association (CDIA) as *Amicus Curiae* at 6, on which the Nation's "banking system is dependent." 15 U.S.C. § 1681(a)(1), (2). Disregarding constitutional and statutory harm requirements in this context can impose ruinous liability on credit reporting agencies, see *Trans Union LLC* v. *FTC*, 122 S. Ct. 2386, 2387 (2002) (Kennedy, J., dissenting from denial of certiorari), paralyze the Nation's lenders, and harm the economy. If the "lower courts fail to enforce" these requirements, "the class-action bar will continue to respond by pursuing abusive class actions" designed to threaten economically crippling liability. Br. for Chamber of Commerce as *Amicus Curiae* at 10.

The constitutional and statutory issues are cleanly presented here because, notwithstanding multiple opportunities to do so, Syed has not pointed to *any* real-world harm to establish *either* Article III standing *or* statutory damages. The Court therefore need not engage in any case-specific line-drawing because Syed's claims satisfy Article III's requirements and the FCRA if—and only if—real-world harm is unnecessary. This case presents an ideal vehicle for resolving confusion in the lower courts, reinforcing this Court's holdings in *Spokeo* and *Safeco*, and preventing billions of dollars in coercive, no-injury litigation. See Br. for Chamber of Commerce as *Amicus Curiae* at 10; Br. for CDIA as *Amicus Curiae* at 17-18. This Court's review of both questions is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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