No. 11-56843

In the United States Court of Appeals for the Ninth Circuit

THOMAS ROBINS, individually and
on behalf of all others similarly situated
Plaintiff-Appellant,

v.

SPOKEO, INC.,
Defendant-Appellee.

On Appeal from the
United States District Court for the Central District of California
Case No. 2:10-cv-5306
Hon. Otis D. Wright, II

BRIEF OF *AMICUS CURIAE* CONSUMER FINANCIAL PROTECTION BUREAU IN SUPPORT OF PLAINTIFF-APPELLANT

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INTEREST OF THE BUREAU

The Fair Credit Reporting Act (FCRA or Act), 15 U.S.C. § 1681 *et seq.*, imposes various requirements that consumer reporting agencies (CRAs) must follow when they compile and disseminate personal information about individuals. Under the Act, the Consumer Financial Protection Bureau (Bureau), the Federal Trade Commission, and various other federal and state regulators may enforce the Act's requirements. *Id.* § 1681s(a)-(c). FCRA also authorizes individuals to bring private actions and to recover statutory damages from CRAs who "willfully fail[] to comply with any requirement imposed under [FCRA] with respect to [that] consumer." 15 U.S.C. § 1681n(a). This private right of action serves as an important supplement to the Bureau's own enforcement efforts. An unduly narrow conception of Article III standing would limit consumers' ability to exercise this private right of action. The Bureau therefore has a substantial interest in the issue presented in this case.

STATEMENT

A. Statutory Background

Congress enacted FCRA in 1970 in response to "[t]he growth of computer technology," which had "facilitated the storage and interchange of information on consumers and open[ed] the possibility of a nationwide

data bank covering every citizen." S. Rep. No. 91-517, at 2 (1969). As one White House representative explained, this "vast private information network" presented an "obvious" "danger[] of unwarranted invasion of individual privacy or erroneous reports"—and given that the "potential power which the credit reporting agency has over an individual's life is formidable," "[r]eports regarding individuals whose credit worthiness, character and general reputation have been damaged by inaccurate credit reports offer[ed] increasing cause for concern." *Fair Credit Reporting: Hearings before the Subcomm. on Financial Institutions of the Senate Comm. on Banking and Currency on S. 823*, 91st Cong., at 11a (1969) (letter from Virginia H. Knauer, Special Ass't to the President for Consumer Affairs).

To address this concern, Congress enacted FCRA to, among other things, "prevent consumers from being unjustly damaged because of inaccurate or arbitrary information in a credit report." S. Rep. No. 91-517, at 1; *see also* 15 U.S.C. § 1681(b) (stating that the purpose of FCRA is to ensure that the consumer-reporting system is "fair and equitable to the consumer" regarding "the confidentiality, accuracy, relevancy, and proper utilization of [consumer-report] information"). The Act imposes various obligations on "consumer reporting agencies" (CRAs) to achieve this goal.

As relevant here, the Act requires that, in "prepar[ing] a consumer report," a CRA "shall follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates." *Id.* § 1681e(b).[1] A CRA is a person who, for monetary fees, dues, or on a cooperative basis, "regularly engages in … assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties." *Id.* § 1681a(f). A "consumer report," in turn, is (with exceptions not relevant here) a CRA's "communication of any information … bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for" certain specified purposes, such as decisions on whether to extend the consumer credit,

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[1] The Act also requires a CRA to give persons that regularly furnish it information and persons to whom it provides consumer reports notice of their responsibilities, *id.* § 1681e(d)(1)(A), (B); *see also id.* § 1681b(b)(1)(B); to obtain certifications of compliance from those who obtain a report from the CRA for employment purposes, *id.* §§ 1681b(b)(1)(A); and to post a toll-free number on its website for consumers to request a free annual copy of their files, *id.* § 1681j(a)(1)(C)(i), 12 C.F.R. § 1022.137(a)(1). The plaintiff's complaint cites these provisions, but the plaintiff now pursues only his claim that Spokeo willfully violated § 1681e(b) by failing to "follow reasonable procedures to assure maximum possible accuracy of the information" in the consumer report it published about him. Supp. Br. of Plaintiff-Appellant at 2 n.1 (ECF No. 76). This brief accordingly addresses the plaintiff's standing only for his § 1681e(b) claim.

insurance, or employment. *Id.* § 1681a(d); *see also id.* § 1681b (setting forth "permissible purposes" of consumer reports).

Under the Act, an affected consumer may bring suit against any person who negligently or willfully "fails to comply with any requirement imposed under [FCRA]." 15 U.S.C. §§ 1681n(a), 1681*o*(a). A defendant who negligently violates the Act "with respect to any consumer is liable to that consumer" for "actual damages." *Id.* § 1681*o*(a)(1). For willful violations, the defendant "is liable to that consumer" for "any actual damages sustained" or statutory "damages of not less than $100 and not more than $1,000," plus "punitive damages as the court may allow." *Id.* § 1681n(a)(1), (2). The "willful[]" violations subjecting defendants to such statutory and punitive damages are only those where the CRA knowingly violated the statute or acted based on an "objectively unreasonable" interpretation that ran an "unjustifiably high risk of violating the statute." *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 57, 70 (2007) (internal quotations omitted).

B. Facts

This case arises from defendant Spokeo, Inc.'s alleged publication of inaccurate information in a consumer report about plaintiff Thomas Robins. Robins' putative class-action complaint alleges that Spokeo is a CRA that operates a website, spokeo.com, on which users may obtain

information about individuals. Appellant's Excerpts of Record (ER) 40:2 (ECF No. 46) (First Am. Compl. (FAC) ¶ 2). According to the complaint, millions of users search this website for individuals' personal information each day. ER 40:4 (FAC ¶ 16). Any member of the public allegedly can obtain from spokeo.com a wide range of information about the subject of a search, including the person's "address, phone number, marital status, age, employment information, education, [and] ethnicity"; the "names of [his or her] siblings and parents"; and even "items [the individual has] sought from websites such as Amazon.com, and music [the individual has] listened to on websites such as Pandora.com." *Id.* Robins alleges that Spokeo's website also provided information about individuals' "economic health" and "wealth level," including information about their "mortgage value," "estimated income," and "investments." ER 40:4-5 (FAC ¶¶ 18, 20). Spokeo allegedly "actively marketed it[s] services to employers for the purpose of evaluating potential employees." ER 40:6 (FAC ¶ 26); *see also* ER 40:4, 6-7 (FAC ¶¶ 15, 27-29).

Robins alleges that Spokeo's website displayed a consumer report about him that inaccurately reported, among other things, his age and wealth and that he was employed, has a graduate degree, and is married with children. ER 40:7 (FAC ¶¶ 30-32). Robins alleges that Spokeo

disseminated this erroneous information about him while he was "out of work and seeking employment." ER 40:7 (FAC ¶ 34). Robins sought statutory damages under 15 U.S.C. § 1681n, as well as injunctive relief, for Spokeo's allegedly willful violation of its obligation under 15 U.S.C. § 1681e(b) to "follow reasonable procedures to assure maximum possible accuracy" of the information in the consumer report published about him. ER 40:13 (FAC ¶¶ 63-65).

C. Procedural History

1. The district court dismissed Robins' complaint, concluding that a "[m]ere violation of [FCRA] does not confer Article III standing … where no injury in fact is properly pled." ER 66:1. This Court reversed. *Robins v. Spokeo, Inc.*, 742 F.3d 409 (9th Cir. 2014). This Court held that FCRA confers statutory rights, and that "the violation of a statutory right is usually a sufficient injury in fact to confer standing." *Id.* at 412-13. The Court acknowledged that "the Constitution limits the power of Congress to confer standing" and identified "two constitutional limits" on that power: The plaintiff must allege that "the defendants violated *her* statutory rights" and "the statutory right at issue must protect against individual, rather than collective, harm." *Id.* at 413 (internal quotations omitted). The Court concluded that Robins satisfies these requirements because "he alleges that

Spokeo violated *his* statutory rights" and because "the interests protected by the statutory rights at issue"—his "personal interests in the handling of his credit information"—"are individualized rather than collective." *Id.* Thus, the Court held, the "alleged violations of Robins's statutory rights are sufficient to satisfy the injury-in-fact requirement of Article III." *Id.* at 413-14.

2. The Supreme Court vacated this Court's judgment and remanded for further proceedings. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016). The Supreme Court took "no position as to whether the Ninth Circuit's ultimate conclusion—that Robins adequately alleged an injury in fact—was correct" but remanded because this Court's "analysis was incomplete." *Id.* at 1550. In particular, the Supreme Court explained that "the injury-in-fact requirement requires a plaintiff to allege an injury that is both 'concrete *and* particularized,'" but "[t]he Ninth Circuit's analysis ... overlooked" the concreteness requirement. *Id.* at 1545 (quoting *Friends of the Earth, Inc. v. Laidlaw Envt'l Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000)) (emphasis added by *Spokeo*). The Court accordingly vacated this Court's decision and remanded for it "to consider *both* aspects of the injury-in-fact requirement." *Id.* (emphasis in original).

In addressing the "concreteness" requirement, the Court explained that a "concrete" injury is one that is "*de facto*"; that is, it "actually exist[s]" and is "real, and not abstract." *Id.* at 1548 (internal quotations omitted). A concrete harm need not be "tangible," however. *Id.* at 1549. Although they may be more difficult to recognize, "intangible injuries can [also] be concrete." *Id.* In determining whether an intangible harm is sufficiently concrete, "both history and the judgment of Congress play important roles." *Id.* In particular, the Court recognized that "Congress is well positioned to identify intangible harms that meet minimum Article III requirements"—and that "its judgment" is therefore "instructive and important." *Id.* As the Court reaffirmed, "Congress may 'elevate to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law.'" *Id.* (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 578 (1992)) (alteration omitted). In other words, "'Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before.'" *Id.* (quoting *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring in part and concurring in judgment)).

The Court further held that a plaintiff does not "automatically satisf[y] the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate

that right." *Id.* "Article III standing requires a concrete injury even in the context of a statutory violation." *Id.* Thus, for example, "a bare procedural violation, divorced from any concrete harm," does not satisfy Article III. *Id.* Rather, a plaintiff asserting "the deprivation of a procedural right" must show he had "some concrete interest that is affected by the deprivation." *Id.* (quoting *Summers v. Earth Island Inst.*, 555 U.S. 488, 496 (2009)).

But the Court also made clear that "the violation of a procedural right granted by statute can be sufficient in some circumstances to constitute injury-in-fact." *Id.* In such cases, the plaintiff "need not allege any *additional* harm beyond the one Congress has identified." *Id.* In addition, the Court confirmed that the "risk of real harm" can "satisfy the requirement of concreteness." *Id.*

Turning to this particular case, the Court concluded that "Congress plainly sought to curb the dissemination of false information by adopting procedures designed to decrease that risk." *Id.* at 1550. Yet "a bare procedural violation" is not enough to satisfy Article III. *Id.* The Court reasoned that "[a] violation of one of FCRA's procedural requirements may result in no harm," such as where, despite the violation, "th[e] information … may be entirely accurate" or where the inaccuracy does not "cause harm or present any material risk of harm." *Id.* Thus, the Court held that the

question to be decided here was "whether the particular procedural violations alleged in this case entail a degree of risk sufficient to meet the concreteness requirement." *Id.*

SUMMARY OF ARGUMENT

Spokeo reaffirms that "intangible" injuries, including exposure to a "risk of real harm," can satisfy Article III's concrete injury requirement. *Spokeo*, 136 S. Ct. at 1549. It also confirms that "Congress has the power to define injuries" that will support an individual's standing to sue. *Id.* (internal quotations omitted). In FCRA, Congress did just that. It "plainly sought to curb the dissemination of false information" in consumer reports, *id.* at 1550, and it granted consumers a right to seek redress for the dissemination of a false consumer report if it resulted from a CRA's willful failure to "follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates," 15 U.S.C. § 1681e(b). These provisions reflect Congress's judgment that inaccuracies in consumer reports—which by definition are used to make decisions about the individual, such as whether to extend him credit, insurance, or employment, *see* 15 U.S.C. § 1681a(d)—can pose an unacceptable "risk of real harm" and therefore themselves constitute an actionable, intangible injury.

There is no basis for this Court to override that congressional judgment here. It was eminently reasonable for Congress to regard the dissemination of an inaccurate consumer report as an injury to the individual whom the report inaccurately describes. Consumer reports by design contain information that influences employers' and other persons' decisions about the individual, and the additional harms that may result from an inaccurate report (such as the loss of a job or a loan) "may be difficult to prove or measure," *Spokeo*, 136 S. Ct. at 1549.

Although *Spokeo* indicates that an inaccuracy may not amount to concrete injury where it relates to the type of information that, by its nature, does not pose the sort of risk that Congress sought to guard against, the inaccuracies alleged here do not have that shortcoming. The types of false information in Robins' report relate to just the sorts of facts that employers may consider when evaluating job applicants—and thus present precisely the risk that motivated Congress to regard inaccurate consumer reports as a harm from which individuals deserved protection. This Court should give effect to that congressional judgment here and recognize the alleged publication of false, material information in Robins' consumer report as a concrete harm supporting his standing to sue.

Indeed, honoring Congress's judgment that these kinds of inaccuracies amount to concrete harm is particularly warranted given that standing doctrine is designed to prevent the courts from treading on the political branches' constitutional role. By vindicating individuals' rights as Congress defined them in FCRA, the Court respects Congress's role in defining rights and injuries while adhering to the judiciary's proper role of deciding the rights of individuals.

Historical practice, moreover, confirms that the publication of false consumer report information of the kind at issue here is a sufficiently concrete injury to satisfy Article III. As *Spokeo* recognizes, the fact that an intangible harm has a "close relationship" to a harm that has historically "provid[ed] a basis for a lawsuit in English or American courts" is "instructive." *Id.* The harm that Congress identified in FCRA has just such a close relationship to the harms that historically supported suits for defamation at common law, which recognized the mere publication of certain false information as an actionable harm, regardless of whether any additional harm resulted.

ARGUMENT

Spokeo's alleged dissemination of an inaccurate consumer report about Robins is a concrete injury under Article III.

Robins' allegation that Spokeo published an inaccurate consumer report about him in violation of § 1681e(b) satisfies Article III's concrete injury requirement. As the Supreme Court recognized in *Spokeo*, in FCRA, "Congress plainly sought to curb the dissemination of false information by" requiring CRAs to follow "procedures designed to decrease that risk." *Spokeo*, 136 S. Ct. at 1550. Although the Supreme Court noted that violations of those procedures will not always "cause harm or present any material risk of harm," it left it for this Court to answer the "question framed by [the Court's] discussion": "whether the particular procedural violations alleged in this case entail a degree of risk sufficient to meet the concreteness requirement." *Id.*

The answer to that question is "yes." The violations alleged in the only claim remaining in this case—that Spokeo willfully violated § 1681e(b)'s requirement that it "follow reasonable procedures to assure maximum possible accuracy of the information" in the consumer report it prepared about Robins—present a sufficient "degree of risk" to meet the concreteness requirement. Two aspects of Article III standing doctrine, as reaffirmed in *Spokeo*, compel that conclusion. First, "intangible injuries

can … be concrete." *Spokeo*, 136 S. Ct. at 1549. Thus, a plaintiff is not required to wait for tangible harms to arise before bringing suit to vindicate his rights; "the risk of real harm" can suffice to "satisfy the requirement of concreteness." *Id.* Second, Congress's judgment about what intangible harms meet the concreteness requirement is "instructive and important," and Congress may "define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before." *Id.* (internal quotations omitted).

Congress did just that in FCRA. It identified the dissemination of inaccurate consumer reports as an intangible injury from which individuals deserve protection. Under *Spokeo*, that intangible injury is sufficiently concrete where, as here, the inaccuracies present the sorts of risks that Congress intended to guard against. Congress reasonably determined that disseminating inaccurate information in a consumer report—which, by definition, employers, creditors, and others may use in making decisions about the person, *see* 15 U.S.C. § 1681a(d)—presents an unacceptable "degree of risk" to the person to whom the report pertains, and that being subjected to that risk is itself an intangible harm. As *Spokeo* confirms, such a "risk of real harm"—such as the denial of a job or a loan—can meet the "concreteness" requirement. There is no basis to second-guess Congress's

judgment that the risks presented by inaccurate consumer reports amount to concrete, actionable harm where, as here, the inaccuracies do not concern trivial matters unrelated to the risk of harm that Congress aimed to prevent, but rather concern material information at the heart of Congress's objectives in enacting FCRA. Historical practice, moreover, further confirms that the publication of a consumer report with the kinds of inaccuracies alleged here amounts to concrete, actionable harm—for that harm is analogous to harms that historically have provided a basis for suit in common law defamation actions. Because Robins alleged that Spokeo's willful violation of § 1681e(b) resulted in the actual publication of false, non-trivial information in a consumer report about him, he has adequately alleged a concrete injury supporting his standing to sue.

A. This Court should give effect to Congress's judgment that the dissemination of the type of false consumer report information alleged here is a concrete intangible harm.

As *Spokeo* recognized, Congress "is well positioned to identify intangible harms that meet minimum Article III requirements." *Spokeo*, 136 S. Ct. at 1549. In FCRA, Congress identified the "dissemination of false information" in consumer reports, *id.* at 1550, as an intangible harm from which individuals deserved protection. Congress, to be sure, did not grant individuals absolute protection from this harm by, for example, making

CRAs strictly liable for any errors in the consumer reports they produce. Rather, Congress "elevate[d]" the publication of inaccurate consumer reports to "the status of legally cognizable injur[y]," *id.* at 1549 (internal quotations omitted)—such that the individual may obtain redress for that intangible injury without showing that consequential damages resulted—only where the publication resulted from a CRA's willful failure to follow reasonable procedures. *See* 15 U.S.C. §§ 1681e(b), 1681n(a)(1); *cf. id.* § 1681*o*(a) (authorizing consumers to recover only "actual damages" for negligent violations). In this way, Congress sought to balance the need for the "free flow" of information that employers, creditors, and insurers need "to make sound decisions," S. Rep. No. 91-517, at 2, against individuals' interest in "hav[ing] the benefit of accurate information when [employment, credit, and insurance] decisions are made regarding" them, 115 Cong. Rec. 33413 (1969) (statement of Sen. Bennett). But where a CRA willfully fails to follow reasonable procedures to assure maximum possible accuracy of a consumer report and publishes an inaccurate consumer report as a result, Congress has determined that the person to whom that report pertains has suffered an injury that is worthy of redress in court. Congress's decision to "define [this] injur[y]" as one "giv[ing] rise to a case

or controversy" is "instructive and important" under *Spokeo*. *Spokeo*, 136 S. Ct. at 1549.

There is no basis to override that congressional judgment here. It was eminently reasonable for Congress to elevate to the status of an actionable injury being subject to the publication of a consumer report with inaccuracies of the sort here. Consumer reports containing inaccuracies like the ones alleged in this case inherently risk harming the individual whose personal information the report falsely describes. CRAs generally may furnish consumer reports only in specified circumstances where the recipient can be expected to use the report in making a decision that will affect the individual, such as whether to offer him a job or a loan. *See* 15 U.S.C. § 1681b(a)(1)-(6). Given these intended uses of consumer reports, inaccuracies in those reports subject individuals to the risk that the inaccurate information will adversely affect decisions about them, at least where the inaccuracy relates to non-trivial information that decisionmakers could be expected to consider. Congress reasonably determined that being subjected to this risk at all was an intangible harm from which individuals should be protected—and that an affected individual should not have to wait for the misinformation to produce tangible, consequential harms to be

permitted to vindicate his interest in the accuracy of the information disseminated about him.

Congress's determination that individuals should be protected from the "degree of risk," *Spokeo*, 136 S. Ct. at 1550, that inaccurate consumer reports entail was particularly reasonable given that the tangible harms that inaccurate reports can cause—such as the loss of a job opportunity or denial of a loan—in some instances "may be difficult to prove or measure," *id.* at 1549. *See* Lawrence D. Frenzel, *Fair Credit Reporting Act: The Case for Revision*, 10 Loy. L.A. L. Rev. 409, 432 n.150 (1977) ("In most cases it will be difficult, if not impossible, to prove actual damages due to a denial of credit or insurance benefits."). It could be hard to prove, for example, how an inaccuracy in a consumer report influenced the subjective decisionmaking of an employer or other person who reviewed the report.[2] In addition, "exact quantification of the harm suffered by someone whose

[2] *See, e.g.*, Ruth Desmond, *Consumer Credit Reports and Privacy in the Employment Context: The Fair Credit Reporting Act and the Equal Employment for All Act*, 44 U.S.F. L. Rev. 907, 921-22 (Spring 2010) (noting that it can be "hard to prove a credit report is the reason for" an adverse employment decision); Nat'l Consumer Law Ctr., Fair Credit Reporting 529 (8th ed. 2013) (noting that it "may be difficult to establish" that an inaccuracy caused denial of credit to "a consumer whose legitimate credit record is less than enviable"); *cf. also SEC v. Adler*, 137 F.3d 1325, 1337 (11th Cir. 1998) (explaining that "the motivations for" a particular decision "are difficult to prove and peculiarly within the [decisionmaker's] knowledge").

life is disrupted by a flawed credit report may be difficult or impossible to assess." *Fair Credit Reporting Act: Hearing before the Subcomm. on Consumer Affairs and Coinage of the House Comm. on Banking, Finance and Urban Affairs*, 102d Cong., at 330 (1991) (letter from Dan Morales, Att'y Gen. of Texas). The harms can include not only the lost job or loan itself, but also reputational harm and the individual's anxiety about the inaccuracy and the harm it could cause him. *Cf. Drew v. Equifax Info. Servs., LLC*, 690 F.3d 1100, 1109 (9th Cir. 2012) (plaintiff experienced "emotional distress … as a result of the misreporting"). Particularly given these difficulties of proof, it was entirely reasonable for Congress to determine that consumer report inaccuracies expose consumers to a level of risk that is unacceptable, and that the exposure to that risk is in certain circumstances itself an intangible injury for which consumers may seek redress without showing that consequential "actual damages" resulted in the particular instance.

To be sure, *Spokeo* recognizes that not every inaccuracy will "cause harm or present any material risk of harm." *Spokeo*, 136 S. Ct. at 1550. Certain types of inaccuracies may be so far removed from the risks of consequential harm that prompted Congress to enact FCRA's protections that the inaccuracy will be insufficiently concrete to support Article III

standing. The Court cited "an incorrect zip code" as such an inaccuracy, stating that it was "difficult to imagine how the dissemination of an incorrect zip code, without more, could work any concrete harm." *Id.* The Supreme Court declined to opine, however, on what "other types of false information" would similarly fail to satisfy the concrete harm requirement. *Id.* at 1550 n.8.

The "types of false information" alleged here are a far cry from the types of trivial inaccuracies that the Court suggested would not constitute concrete harm. The inaccuracies in Robins' report relate to his education, employment status, and economic health, among other things—just the kinds of facts that employers may look to when evaluating job applicants. These "types of false information," *id.*, pose exactly the risk that Congress intended to guard against by requiring CRAs to follow reasonable procedures to assure the "maximum possible accuracy" of consumer reports. These types of information can reasonably be expected to factor into an employer's or other person's decisionmaking about the individual, and thus pose the risk of further consequential harm—the denial of employment, credit, or the like—that Congress aimed to prevent.[3] This

[3] To establish concrete injury, it is enough that the "type[] of false information" in the report, as a category, poses the sorts of risks that Congress intended to guard against. Congress reasonably deemed false

Court therefore should give effect to Congress's judgment that being subjected to this risk at all (where the risk resulted from a CRA's willful failure to follow reasonable procedures) is an intangible harm for which individuals may obtain redress in court.

Indeed, giving effect to Congress's judgment about what level of risk amounts to actionable harm vindicates the purpose of standing doctrine—"'to prevent the judicial process from being used to usurp the power of the political branches.'" *Spokeo*, 136 S. Ct. at 1547 (quoting *Clapper v.*

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reporting of the types of information that employers, creditors, and others consult in making decisions about the individual as an injury for which individuals could seek redress without proving how the particular false information posed risks to them given their particular circumstances.

But, in any event, the particular inaccuracies here also pose a reasonable threat to Robins' job prospects. The existence of the inaccuracies alone—the discrepancies between Robins' representations and the facts presented in his consumer report—could lead a prospective employer to doubt Robins' truthfulness in his application. *Cf. Lopez v. River Oaks Imaging & Diagnostic Grp., Inc.*, 542 F. Supp. 2d 653, 662 (S.D. Tex. 2008) (referring to employer's "policy against hiring an applicant who lied during the interview process"). In addition, the false representation that Robins is currently employed, for example, could cause a prospective employer to wonder whether and why Robins has not disclosed his (in fact nonexistent) current employment. As another example, the false representation that Robins has a graduate degree could cause an employer to conclude that Robins is overqualified for a job. *See, e.g.*, *Stein* v. *Nat'l City Bank*, 942 F.2d 1062, 1064 (6th Cir. 1991) (applicant turned down based on employer's "policy of not hiring college graduates"); *see also Jordan* v. *City of New London*, 225 F.3d 645, at *1 (2d Cir. 2000) (unpublished) (describing employment manual cautioning that "because overqualified candidates may soon become bored with unchallenging work and quit, simply hiring the highest scoring employee can be self-defeating").

Amnesty Int'l USA, 133 S. Ct. 1138, 1146 (2013)). As the Court recognized in *Spokeo*, standing requirements "confine[] the federal courts to a properly judicial role," *id.*—namely, to "decide on the rights of individuals," *Lujan*, 504 U.S. at 576. Courts do just that when they adjudicate a private plaintiff's claim that a CRA willfully violated his individual right not to have an inaccurate consumer report disseminated about him in violation of § 1681e(b). By vindicating the right as Congress intended, the court *respects* the role of the political branches; it does not tread on it. Because adjudicating this suit does not threaten to expand the courts' power beyond its constitutional bounds, this Court should honor Congress's decision to define the publication of a consumer report with inaccuracies of the sort at issue here as an "injur[y] ... that will give rise to a case or controversy," *Spokeo*, 136 S. Ct. at 1549 (internal quotations omitted).

B. Historical practice confirms that the dissemination of a consumer report containing the type of false information alleged here is a concrete harm sufficient to support Article III standing.

History confirms that the dissemination of inaccurate consumer report information of the kind at issue here is sufficiently concrete to satisfy Article III. As the Court explained in *Spokeo*, "history" plays an "important role[]" in determining whether an intangible harm is sufficiently concrete. *Id.* This is because standing doctrine "derives from the case or controversy

requirement" in Article III, and "that requirement in turn is grounded in historical practice." *Id.*; *see also Vt. Agency of Natural Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 774 (2000) (explaining that "history is particularly relevant to the constitutional standing inquiry since, as we have said elsewhere, Article III's restriction of the judicial power to 'Cases' and 'Controversies' is properly understood to mean cases and controversies of the sort traditionally amenable to, and resolved by, the judicial process" (internal quotations omitted)). Thus, the Court explained, "it is instructive to consider whether an alleged intangible harm has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts." *Spokeo*, 136 S. Ct. at 1549.

The alleged intangible harm here—the dissemination of an inaccurate consumer report about Robins in violation of § 1681e(b)—has a close relationship to just such a traditionally recognized harm. In particular, the common law of defamation historically recognized that "[t]he publication of any libel … is itself an injury." Restatement (First) of Torts § 569 cmt. c (1934); *accord* Dan B. Dobbs, Law of Remedies § 7.3(2) (2d ed. 1993) (explaining that the law of defamation has recognized that certain types of defamation "in themselves really are 'damage' or 'harm'"). That body of law thus traditionally permitted those subjected to libel to sue to recover "at

least nominal damages," without having to show that "any special harm has been caused to the plaintiff's reputation or otherwise." Restatement (First) of Torts § 569 cmt. c.[4] While the law permitted suit and recovery absent a showing of resulting harm in part because it presumed that damage would result from defamatory publications, *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 765 (1985) (White, J., concurring), recovery was permitted even if "no harm whatever has been sustained to the plaintiff's reputation or other legally protected interest," Restatement (First) of Torts § 620 cmt. b; *accord Dun & Bradstreet*, 472 U.S. at 765 (White, J., concurring) (explaining that plaintiffs could recover for defamation even if the defendant showed "that there was no reputational injury"). The inaccurate publication of the defamatory statement was alone enough to "provid[e] a basis for a lawsuit," *Spokeo*, 136 S. Ct. at 1549.

The harm for which Robins seeks redress here—the publication of inaccurate information in a consumer report about him—closely resembles

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4 *See also see also* Restatement (Second) of Torts § 621 (1977) (noting "traditional common law rule allowing recovery [for defamation] in the absence of proof of actual harm"); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974) (explaining that "[t]he common law of defamation … allows recovery … without evidence of actual loss"); 3 William Blackstone, Commentaries on the Laws of England 124 (1768) (explaining that persons subject to certain types of slander could bring an action "without proving any particular damage to have happened").

this traditionally recognized harm. To be sure, the particular kinds of falsehoods that will support a suit under FCRA are not identical to the falsehoods that would have supported a common law action for defamation.[5] But *Spokeo* does not require a congressionally-defined injury to be on all fours with the common law—a "close relationship" between the interests protected is all that is needed to be "instructive" to the standing inquiry. *Spokeo*, 136 S. Ct. at 1549. Indeed, it is well-established that Congress may exercise its legislative authority to "broaden[] … the categories of injury that may be alleged in support of standing." *Lujan*, 504 U.S. at 578. The injury that Congress identified in enacting FCRA—being the subject of a false consumer report—has an obvious "close relationship" to the injuries that traditionally "provid[ed] a basis for suit," *Spokeo*, 136 S. Ct. at 1549, under the common law of defamation. Just as the common law permitted individuals to sue on the basis of certain falsehoods because

[5] Under the common law of defamation, written communications were historically actionable without a showing of actual damages if they "tend[ed] so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." Restatement (First) of Torts §§ 559, 568, 569. Spoken communications were actionable without a showing of actual damages if they imputed to the person "a criminal offense"; a "presently existing venereal or other loathsome and communicable disease"; "conduct, characteristics, or a condition incompatible with the proper exercise of [the person's] lawful business, trade, profession, or office"; or, for women, "unchastity." *Id.* § 570.

those falsehoods inherently posed a risk of harm, *see Dun & Bradstreet*, 472 U.S. at 765 (White, J., concurring), FCRA permits individuals to sue on the basis of falsehoods in consumer reports because false information in that context—in reports that by definition are expected to be used in making decisions about the individual, *see* 15 U.S.C. §§ 1681a(d), 1681b—likewise poses a risk of harm. The common-law history treating the publication of false information about individuals as a harm sufficient to support a lawsuit is "well nigh conclusive" proof that Robins' claim presents a "case[] and controvers[y] of the sort traditionally amenable to, and resolved by, the judicial process." *Stevens*, 529 U.S. at 774.

CONCLUSION

For these reasons, the Court should conclude that the inaccurate consumer report published about Robins constitutes concrete harm, and that Robins therefore has standing to pursue his claim that Spokeo willfully failed to follow reasonable procedures to assure maximum possible accuracy of the report it disseminated about him.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief contains 5,844 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii). It therefore complies with the type-volume limitation that the Court established for the parties' briefs in its order of June 20, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on July 11, 2016.

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