No. 17-806

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 Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Ninth Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the injury in fact requirement is satisfied by claimed intangible harm to an interest protected by the underlying statute, even if plaintiff cannot allege that she suffered either real-world harm or an imminent risk of such harm.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

OTHER AUTHORITIES

INTEREST OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus* briefs in cases that raise issues of concern to the Nation's business community. In particular, the Chamber has participated as an amicus in numerous cases regarding pleading standards.

The members of the Chamber have a strong interest in the outcome of this proceeding. In *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016) ("*Spokeo I*"), the Chamber participated as an amicus at both the certiorari and merits stage. The Court's narrow resolution of that case left unresolved the fundamental question at issue: whether a plaintiff can establish a constitutional injury in fact without an allegation that

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[1] Pursuant to this Court's Rule 37.2(a), *amicus* timely notified all parties of its intention to file this brief. Counsel for all parties have consented to the filing of this *amicus* brief. Pursuant to this Court's Rule 37.6, *amicus* states that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amicus*, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

she suffered either real-world harm or an imminent risk of such harm.

That open question remains just as important today. Respondent in this case, like innumerable other class-action plaintiffs, asserts a technical violation of a regulatory statute without any allegation that he suffered any actual or imminent risk of injury. The entire basis for Respondent's request for class certification is that such technical violations are sufficient to establish liability. Indeed, class action plaintiffs regularly detach their claims from any individualized real-world injury in order to facilitate class certification. Such class-action lawsuits not only threaten businesses with the risk of massive financial liability even when they cause no real-world harm, but also burden courts and divert resources from more productive uses.

Further, in the short time since *Spokeo I*, hundreds of courts have considered the question presented, yielding widely conflicting results. Thus, whether an uninjured plaintiff has standing—and whether a class action may proceed—is a function of the particular circuit in which the class action is brought. This Court's review is needed to bring stability to the law and enforce bedrock limits on the jurisdiction of the federal courts.

SUMMARY OF ARGUMENT

In *Spokeo I*, this Court granted certiorari to decide whether Respondent had standing to pursue a claim under the Fair Credit Reporting Act, even though he did not allege any actual or imminent harm. But the

Court did not fully resolve that question. Instead, it stated that "risk of real harm" can, in some circumstances, constitute an injury-in-fact—while remanding for consideration of "whether the particular procedural violations alleged in this case entail a degree of risk sufficient to meet the concreteness requirement." 136 S. Ct. at 1549-50.

In the wake of *Spokeo I*, the circuits disagree on what "degree of risk" is "sufficient to meet the concreteness requirement." *Id.* at 1550. The Fourth, Fifth, Seventh, Eighth, and Eleventh Circuits hold that the requisite "degree of risk sufficient to meet the concreteness requirement," *id.* at 1550, is imminent risk *to the plaintiff*. By contrast, the Ninth Circuit, along with the Second and Third Circuits, hold that a plaintiff can establish standing by showing imminent risk to *anyone*—not necessarily the plaintiff. Because the circuit split turns on the interpretation of language in this Court's opinion, this Court's review is necessary to resolve the conflict.

The question presented is of great practical importance. Hundreds of lower courts have applied *Spokeo I*, with irreconcilable results. The Ninth Circuit's approach to Article III standing will allow class-action lawyers to pursue class litigation on behalf of large classes of plaintiffs who suffered no concrete injury, opening the door to abusive class action litigation with no social value.

On the merits, the Ninth Circuit's decision is wrong. Article III has always required a plaintiff to allege and prove actual or imminent injury to himself. The mere fact that a defendant's violation of law may harm

someone does not confer standing on a plaintiff. The Ninth Circuit's contrary ruling should be reversed.

ARGUMENT

The Court should grant certiorari in this case because the eight-member Court in *Spokeo I* did not decide the fundamental question at issue in this petition: whether a plaintiff has standing to file suit based on a statutory violation, without any allegation that she suffered either actual or imminent harm. In the wake of *Spokeo I*, hundreds of courts have decided that important question, reaching irreconcilable conclusions. Those inconsistent lower-court decisions do not reflect the application of *Spokeo I* to divergent facts, but instead reflect a deep conflict of authority over how to analyze statutory claims under Article III. The now fully-constituted Court should grant certiorari in this case to resolve this conflict in legal standards.

I. The Court Should Grant Certiorari to Decide the Question It Left Open in *Spokeo I*, Which Is Both The Subject of A Circuit Split and Is Critically Important.

A. *Spokeo I*'s narrow disposition left the critical question in this case undecided.

In *Spokeo I*, this Court granted certiorari to decide whether Respondent "has standing to maintain an action in federal court against petitioner Spokeo under the Fair Credit Reporting Act." 136 S. Ct. at 1544. That question turned on whether a violation of a

plaintiff's *statutory* right sufficed to establish a constitutional "injury in fact." *See id.* at 1547-48.

An eight-Justice Court issued a narrow ruling that did not fully resolve the question of standing that the Court granted certiorari to decide. Instead, the Court vacated the Ninth Circuit decision under review because of a defect in the Ninth Circuit's legal reasoning: the Ninth Circuit had failed to conduct *any* analysis of whether the plaintiff had suffered concrete injury. The Court explained that to establish a constitutional injury in fact, a plaintiff must show "an invasion of a legally protected interest that is concrete and particularized." *Id.* at 1548 (internal quotation marks omitted). It noted that the Ninth Circuit had found that the Respondent's injury was particularized, but had not addressed the distinct question of whether Respondent's injury was concrete. *Id.* Thus, "[b]ecause the Ninth Circuit failed to fully appreciate the distinction between concreteness and particularization, its standing analysis was incomplete." *Id.* at 1550.

The Court went on to lay out certain general principles related to the concreteness requirement, but declined to apply those principles to the case under review. The Court noted, for instance, that "intangible injuries," such as infringements on the right to free speech and free exercise of religion, can be "concrete" for constitutional purposes. *Id.* at 1549. It stated that in deciding "whether an intangible harm … meet[s] minimum Article III requirements," Congress's judgment is "instructive and important," but not conclusive: "Congress' role in identifying and elevating

intangible harms does not mean that a plaintiff automatically satisfies 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.* The Court also observed that the "risk of real harm" can, in some circumstances, "satisfy the requirement of concreteness"—while also acknowledging that an inaccuracy that does not "present any material risk of harm" would not result in a constitutional injury in fact. *Id.* at 1549-50.

But after setting forth these general principles, the Court left open the question of "whether the particular procedural violations alleged in this case entail a degree of risk sufficient to meet the concreteness requirement." *Id.* at 1550.

Thus, the Court left open a critical question: To establish the requisite "degree of risk," must a plaintiff allege imminent risk of harm *to the plaintiff*? Or is it sufficient to allege imminent risk of harm, in the abstract, to *someone* affected by the statutory violation? To put it another way: To establish concreteness, must a plaintiff establish that the harm is concrete in a *particularized* way? Or is it enough to show (a) a particularized statutory violation, and (b) a risk of concrete harm to people in general?

The facts of this case provide a perfect illustration of how those divergent approaches apply in practice. Respondent alleges that his Spokeo profile "states that he is married, has children, is in his 50's, has a job, is relatively affluent, and holds a graduate degree," yet "all of this information is incorrect." *Spokeo I*, 136 S. Ct. at 1546.

Under Petitioner's approach to Article III, Respondent bears the burden of establishing actual or imminent harm *to himself* in order to establish standing. He could meet that burden by, for instance, alleging that he has attended job interviews in which he was deemed overqualified based on the incorrect information on Spokeo, or that he is about to attend such an interview in which Spokeo's listing could render him ineligible for the job. The critical point is that Respondent must make at least some showing of actual or imminent harm *to himself*.

In contrast, under Respondent's approach to Article III, Respondent does not bear the burden of establishing actual or imminent harm. Rather, Respondent can establish standing merely by showing that *in the aggregate*, the publication of false information will lead to actual, or the imminent risk of, harm with respect to *some* people. That approach is reflected in the Ninth Circuit's ruling. The Ninth Circuit "agree[d] with [Respondent] that information of this sort … is the type that may be important to employers or others making use of a consumer report." Pet. App. 16a. It relied on the Consumer Financial Protection Bureau's assessment that "even seemingly flattering inaccuracies can hurt an individual's employment prospects as they may cause a prospective employer to question the applicant's truthfulness or to determine that he is overqualified for the position sought." *Id.* Critically, the Ninth Circuit did not require *Respondent* to show that *his* employment prospects were at imminent risk of being harmed by the alleged misstatements about *him*; rather, in the

court's view, the concreteness requirement could be satisfied if misstatements would harm people in general, thus causing actual or imminent harm to *someone*.

Spokeo I did not resolve whether Petitioner's approach or Respondent's approach to Article III is correct. *That* question is the fundamental question on which so many courts have divided; it is the question on which the outcome of so many cases depend; and it is the question Petitioner asks the Court to resolve in this case.

B. The circuits are split on what "degree of risk" is "sufficient to meet a concreteness requirement" under *Spokeo I*.

In the short time since its issuance, *Spokeo I* has been applied in published cases from multiple courts of appeals—not to mention hundreds of district court cases—leading to a conflict of authority. Courts have disagreed on the answer to the core question that *Spokeo I* leaves open: whether a plaintiff must establish the requisite "degree of risk" by alleging imminent risk of harm *to the plaintiff*, or whether it is sufficient to allege imminent risk of harm to *anyone*. Respondent denies that there is a circuit split, instead attributing these divergent outcomes to the fact that the underlying causes of action differed from case to case. But all the courts apply the same *constitutional* provision—Article III. They simply disagree on what Article III requires.

As Petitioner explains, the Fourth, Fifth, Seventh, Eighth, and Eleventh Circuits construe Article III to require a showing of actual harm or imminent risk of harm *to the plaintiff*. Pet. 14-19. For instance, in *Dreher v. Experian Information Solutions, Inc.*, 856 F.3d 337 (4th Cir. 2017), the court held that the plaintiff lacked standing to sue based on the defendant's failure to provide the sources of information on his credit report. The court did not consider whether the failure to provide such information would cause harm *in the aggregate*, as the Ninth Circuit did below. Instead, it focused on the plaintiff's failure to establish actual or imminent harm *to himself*: "Dreher has failed to demonstrate how [the violation] adversely affected his conduct in any way. He was still able to receive a fair and accurate credit report, obtain the information he needed to cure his credit issues, and ultimately resolve those issues." *Id.* at 347.

Nicklaw v. Citimortgage, Inc., 839 F.3d 998 (11th Cir. 2016), reflects a similar understanding of Article III. The question in *Nicklaw* was whether a mortgagor had standing to file suit based on a mortgagee's failure to file a timely certificate of discharge of a mortgage. Under the Ninth Circuit's legal standard, the answer would have been yes—the mortgagor plainly alleged a particularized harm (*i.e.*, the failure to file *his* certificate), and the failure to file such certificates will, in the aggregate, harm *someone*. Yet the Eleventh Circuit held that the plaintiff did not standing because he did not allege actual or imminent harm *to himself*: "His complaint does not allege that he lost money because CitiMortgage failed to file the certificate. It

does not allege that his credit suffered. It does not even allege that he or anyone else was aware that the certificate of discharge had not been recorded during the relevant time period." *Id.* at 1003. Similar reasoning appears in decisions of the Fifth, Seventh, and Eighth Circuits. *See Lee v. Verizon Commc'ns, Inc.*, 837 F.3d 523, 530 (5th Cir. 2016) (denying standing based on alleged breaches of fiduciary obligations because the plaintiff's "'concrete interest' in the plan—his right to payment—was not alleged to be at risk from the purported statutory deprivation"), *cert. denied*, 137 S. Ct. 1374 (2017); *Gubala v. Time Warner Cable, Inc.*, 846 F.3d 909, 910-11 (7th Cir. 2017) (denying standing based on alleged failure to destroy personally identifiable information because although "[t]here is unquestionably a *risk* of harm in such a case," there was no "allegation or evidence" that the plaintiff's own personal information "had leaked and caused financial or other injury to him or had even been at risk of being leaked"); *Braitberg v. Charter Commc'ns, Inc.*, 836 F.3d 925, 930 (8th Cir. 2016) (denying standing based on alleged failure to destroy personally identifiable information because there was no proof of "material risk of harm from the retention").

By contrast, the Second and Third Circuits agree with the court below that Article III does not require a showing of actual or imminent harm to the plaintiff. In *In re Horizon Healthcare Services Inc. Data Breach Litigation*, 846 F.3d 625 (3d Cir. 2017), the Third Circuit expressly rejected the proposition that under *Spokeo I*, the plaintiff must show an actual or imminent risk of harm in order to establish standing: "Although

it is possible to read the Supreme Court's decision in *Spokeo* as creating a requirement that a plaintiff show a statutory violation has caused a 'material risk of harm' before he can bring suit, we do not believe that the Court so intended to change the traditional standard for the establishment of standing." *Id.* at 637-38 (internal citation and footnote omitted). The Third Circuit expressly acknowledged that it was creating a conflict of authority. *Id.* at 637 n.17 (acknowledging that "[s]ome other courts have interpreted *Spokeo* in such a manner" and citing the Eighth Circuit's decision in *Braitberg*, and the District Court opinion in *Gubala* that was later affirmed by the Seventh Circuit). Likewise, in the Second Circuit, a plaintiff has standing if a violation "'would have [] an effect on consumers generally,' even if the plaintiff herself was not directly harmed." *Aikens v. Portfolio Recovers Assocs., LLC*, No. 17-1132-CV, -- F. App'x --, 2017 WL 5592341, at *3 (2d Cir. Nov. 21, 2017) (quoting *Strubel v. Comenity Bank*, 842 F.3d 181, 193 (2d Cir. 2016)).

The circuit conflict will persist until this Court intervenes. The reason for the circuit conflict is that courts of appeals cannot agree on the meaning of this Court's reference to the "degree of risk sufficient to meet the concreteness requirement." 136 S. Ct. at 1550. Some courts hold that the "degree of risk" is actual or imminent harm to the plaintiff; others do not. Only this Court can clarify the meaning of its own opinions. Thus, the sole way to harmonize the law nationwide is for this Court—now at full strength—to decide the question it was unable to decide in *Spokeo I*:

whether a plaintiff must show actual or imminent harm to establish standing.

C. The question presented is overwhelmingly important.

The Court should grant certiorari because the question presented is enormously important in modern class action litigation.

The vast majority of no-injury lawsuits, including the present case, are brought as putative class actions. It is no coincidence that the question presented arises so frequently in the context of class action litigation. Most ordinary people have better things to do than file lawsuits based on statutory violations that cause them no harm. But class counsel—who can aggregate large numbers of plaintiffs into a single suit and take a percentage of the recovery—view such lawsuits as highly lucrative. Statutory damages for individual violations may be low, but when large numbers of plaintiffs are aggregated into a plaintiff class, they can easily amount to billions of dollars. *See* Sheila B. Scheuerman, *Due Process Forgotten: The Problem of Statutory Damages and Class Actions*, 74 Mo. L. Rev. 103, 114-15 (2009).

Permitting no-injury lawsuits allows a far greater number of class-action lawsuits seeking statutory damages. If a plaintiff must show actual or imminent injury *to himself*, class certification will frequently be impossible, because class counsel will be unable to establish commonality under Rule 23(a)(2)—*i.e.*, that the class members "have suffered the same injury." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349-50

(2011) (quotation marks omitted)). Likewise, class counsel will be unable to establish predominance under Rule 23(b)(3)—*i.e.*, that the "proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 (1997). By contrast, if a plaintiff need only show actual or imminent risk *to anyone*, class certification will be easier. If a showing of risk to some, unspecified class member establishes concreteness as to one plaintiff, it will establish concreteness as to all plaintiffs—thus potentially making the case amenable to class-wide resolution.

Not only will no-injury lawsuits increase the number of class action lawsuits amenable to class-wide resolution, but they will also increase the financial stakes. Eliminating the requirement of actual or imminent injury will allow class counsel to define a putative class much more broadly. In this case, for instance, the class of persons who were incorrectly described on Spokeo's website is dramatically larger than the class of persons who were *harmed* by being incorrectly described on Spokeo's website. And of course, the larger the plaintiff class, the larger the damages exposure.

Thus, permitting no-injury lawsuits simultaneously makes classes easier to certify, and increases class size. The result is an enormous incentive for class-action lawyers to bring claims with little underlying merit on behalf of plaintiffs who have not been damaged. As Judge Wilkinson has recognized, statutory damages and class actions produce a "perfect storm" in which they "combine to create commercial wreckage far

greater than either could alone." *Stillmock v. Weis Mkts., Inc.*, 385 F. App'x 267, 276 (4th Cir. 2010) (Wilkinson, J., concurring).

When large classes of uninjured plaintiffs are certified, the damages exposure can be massive, causing defendants to be "pressured into settling questionable claims." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011); *see also Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 445 n.3. (2010) (Ginsburg, J., dissenting) ("When representative plaintiffs seek statutory damages, [the] pressure to settle may be heightened because a class action poses the risk of massive liability unmoored to actual injury."). In fact, a "study of certified class actions in federal court in a two-year period (2005 to 2007) found that all 30 such actions had been settled." *Eubank v. Pella Corp.*, 753 F.3d 718, 720 (7th Cir. 2014).

Forcing companies to settle weak claims brought by admittedly *uninjured* plaintiffs enriches class-action lawyers while conferring no social benefit. This Court's review is warranted to enforce bedrock jurisdictional limits that prevent such abuses of the class action procedure.

II. The Ninth Circuit's Decision is Wrong.

The Ninth Circuit erred in holding that a plaintiff can establish an injury-in-fact without showing actual or imminent harm.

Spokeo I makes clear that the alleged failure to publish inaccurate information does not constitute *actual* harm, akin to the harm associated with

infringements on the right to free speech or religious liberty. Rather, the question of standing turns on whether "the particular procedural violations alleged in this case entail a degree of risk sufficient to meet the concreteness requirement." 136 S. Ct. at 1550.

This Court has already set forth the requisite degree of risk sufficient to meet the concreteness requirement under Article III. The "well-established requirement" is that "threatened injury must be 'certainly impending.'" *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 401 (2013) (citation omitted). "Allegations of *possible* future injury are not sufficient." *Id.* at 409 (internal quotation marks omitted). That "hard floor of Article III," *Summers v. Earth Island Institute*, 555 U.S. 488, 497 (2009), applies whether the claim for an injunction against state action (as in *Clapper*) or a claim for statutory damages (as in this case). It follows that Respondent must demonstrate that "threatened injury" is "certainly impending" in order to file suit. 568 U.S. at 401.

In this case, Respondent made no such allegations. Respondent's complaint alleges vaguely that Spokeo's inaccurate reports "caused actual harm to [his] employment prospects" and yielded "anxiety, stress, concern, and/or worry about his diminished employment prospects." Pet. App. 16a. These speculative allegations fall far short of the sort of particularized allegations that would establish "certainly impending" harm, *Clapper*, 568 U.S. at 401—and the Ninth Circuit did not even hold otherwise. Instead, it observed that inaccurate reports might cause harm *in the aggregate*: "information of this sort

(age, marital status, educational background, and employment history) is the type that may be important to employers or others making use of a consumer report." Pet. App. 16a. That observation may be correct, but it does not show that Respondent *personally* faced an impending risk of harm. Because Respondent made no such showing, he lacks standing. The case is as simple as that.

This Court's observation in *Spokeo I* that a plaintiff could not ordinarily file suit based on an "incorrect zip code," 136 S. Ct. at 1550, clarifies the required analysis. In the ordinary case, "the dissemination of an incorrect zip code" would not "work any concrete harm." *Id.* But if a plaintiff could prove that publication of an incorrect zip code caused *actual* damage—for instance, that an employer who wanted to hire an employee living in a particular geographical area relied on the incorrect zip code—then Article III would not bar the suit. Thus, Article III requires a *particularized* analysis regarding how the plaintiff is affected by the incorrect zip code.

The same analysis is required if, as here, the plaintiff alleges the publication of incorrect employment, financial, or marital information. To be sure, such publication is, in general, more *likely* to yield actual injury—and so it may be easier for a plaintiff to plead and prove the types of injury that would open the courthouse doors. Yet the fact that injury is easier to prove does not relieve the plaintiff from the burden of proving it.

The Ninth Circuit's reflects a significant departure from basic jurisdictional limits imposed by Article III, and will open the door to abusive and socially useless

class action litigation. The Court should grant certiorari and reverse the judgment below.

CONCLUSION

The petition for writ of certiorari should be granted, and the judgment of the Ninth Circuit should be reversed.

Respectfully submitted,

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