No. 16-1524

In the Supreme Court of the United States

M-I, LLC,

Petitioner,

v.

SARMAD SYED,

Respondent.

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Ninth Circuit's decision that Respondent adequately pled a concrete injury arising from Petitioner's violation of a disclosure and authorization provision in the Fair Credit Reporting Act, 15 U.S.C. § 1681b, departed from the framework set forth in *Spokeo v. Robins*, 136 S. Ct. 1540 (2016).

2. Whether, in the first appellate decision to reach the issue, the Ninth Circuit erred in determining that the violation of a plain statutory command can constitute a "willful" violation under *Safeco Insurance Co. of America v. Burr*, 551 U.S. 47 (2007).

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I. INTRODUCTION

Petitioner M-I, LLC asks this Court to review the decision below for two reasons. First, Petitioner wants the Court to revisit the test for determining when violation of a procedural right constitutes a concrete injury recently announced by the Court in *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016). Second, Petitioner wants the Court to decide whether the allegations set forth in the Complaint are sufficient to establish a "willful" violation of the Fair Credit Reporting Act ("FCRA"). Neither question deserves this Court's review for multiple reasons.

The first question is based on Petitioner's contention that the Ninth Circuit's decision implicates *Spokeo* and widens a conflict on how to apply that recent ruling. But both assumptions are wrong. This case does not implicate *Spokeo*. *Spokeo* provides the framework for determining when an intangible, procedural injury meets Article III's "concreteness" requirement. The Ninth Circuit held—as Petitioner begrudgingly acknowledges—that Mr. Syed suffered the kind of "real-world" harm Petitioner wrongly believes Article III requires. As the Ninth Circuit explained, the FCRA provision that M-I violated expressly grants to consumers the right to receive an important disclosure in a particular form. *See* 15 U.S.C. §1681b(b)(2)(A). This is a substantive— not a procedural—right, which is why the Ninth Circuit's subsequent *Spokeo* remand decision made no reference to this case as binding circuit precedent. Put simply, Petitioner may disagree with the Ninth Circuit's decision, but this dispute has nothing to do with *Spokeo*.

But even if it did, what M-I characterizes as a circuit split is nothing more than the application of *Spokeo* to a wide variety of different statutes. Contrary to what M-I argues, Federal courts have simply come to different conclusions about different procedural injuries in applying a statute-specific inquiry. They have simply engaged in routine application of a common legal test to divergent cases. It is not a circuit split. For there to be a circuit split under *Spokeo*, Petitioner would need to point to court of appeals decisions holding that the violation of 15 U.S.C. §1681b(b)(2)(A) is a procedural injury that does not pass the "concreteness" test. Petitioner can point to no such cases.

Finally, even if the Court granted review to decide that "split-less" question, it would affirm the judgment below. The Ninth Circuit's decision complies entirely with the *Spokeo* framework. Congress enacted the FCRA in general, and this provision in particular, to address concerns about the invasion of privacy by employers and concerns about the scope and nature of consumer consent to the use of their credit information. Section 1681b(b)(2)(A) protects against the risk of those serious harms by ensuring that employees receive clear, conspicuous disclosures that are unencumbered by confusing language having nothing to do with protecting that congressional interest—let alone self-serving waivers of FCRA liability that find no support in the statutory text or scheme. As *Spokeo* explained, that is all Article III requires. Indeed, the statutory provision at issue here would easily satisfy any test formulated to enforce this principle. *See* 136 S. Ct. at 1550-5 (Thomas, J., concurring).

In sum, Petitioner asks the Court to review a question not presented by these facts, a question that it inaccurately contends implicates procedural rights when this statutory provision creates a substantive one, and a question the answer to which does not involve the resolution of any conflict as to what *Spokeo* requires. Even if the Court overcame all of those obstacles and somehow reached the question presented, it would affirm for the same reasons that the Ninth Circuit felt it did not even need to reach. Otherwise, the end result of deciding this question would be to establish a far broader rule of Article III standing than did the decision below.

Petitioner's second question fares no better. M-I concedes that there is no circuit split as to whether the alleged violation of Section 1681b(b)(2)(A) can constitute a "willful" FCRA violation. The existence of two unpublished district court rulings that allegedly conflict with the Ninth Circuit falls far short of the standard for granting certiorari. M-I thus seeks error-correction, but there was no error below. The FCRA plainly prohibits what M-I did, as the FTC had repeatedly warned. M-I's decision to violate the statute by including a liability waiver that independently violates the FCRA easily satisfies the standard for willfulness set forth in *Safeco Insurance Co. v. Burr*, 551 U.S. 47 (2007). As a result, the Court should deny review of this "split-less" question as well.

II. STATEMENT OF THE CASE

A. The Fair Credit Reporting Act

The FCRA is designed to "ensure fair and accurate credit reporting." *Safeco*, 551 U.S. at 52. After studying the industry, Congress identified "abuses which have grown up within the existing credit reporting system," including "the problem of inaccurate or misleading information" in credit reports and the inclusion of "irrelevant information" in those reports that impaired consumers' "right to privacy." 115 Cong. Rec. S1163, 1165 (1969). In addition, Congress identified "the problem of confidentiality," *i.e.*, "the lack of any public standards to insure that the information is kept confidential and used only for its intended purpose." *Id*. More specifically, Congress was concerned with improper use of private information "inconsistent with the purposes indicated when the information was collected," including information an individual provides when he or she "applies for employment." *Id.* at 1166.

Because these "unfair credit reporting methods undermine the public confidence which is essential to the continued functioning of the banking system," Congress took important steps "to insure that consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer's right to privacy." 15 U.S.C. § 1681(a)(4). The FCRA thus imposes "a comprehensive series of restrictions on the disclosure and use of credit information assembled by consumer reporting agencies." *FTC v. Manager, Retail Credit Co*., 515 F.2d 988, 989 (D.C. Cir. 1975).

Some of these requirements are procedural. The statute, for example, requires consumer reporting agencies to follow "reasonable procedures" in order to "assure maximum possible accuracy of the information concerning the individual about whom the report relates." 15 U.S.C. § 1681e(b). Others are substantive. Among other things, the FCRA limits the purposes for which consumer information can be supplied to third parties, *id.* § 1681b, prohibits disclosure of outdated information, *id.* § 1681c(a), and provides consumers a means of ensuring that information disseminated about them is accurate and updated, *id.* § 1681i(a). To enforce these provisions, the FCRA makes any consumer reporting agency that had been "negligent in failing to comply with any requirement imposed under [the statute] with respect to any consumer … liable to that consumer" for damages, *id*. § 1681o, and "any person who willfully fails to comply with any requirement imposed under [the statute] with respect to any consumer" additionally liable for statutory and punitive damages, *id*. § 1681n.

Congress has continued to exercise oversight of the credit industry. To that end, Congress has amended the FCRA to further advance and refine its goals. Among those amendments is the Consumer Reporting and Reform Act of 1996. The CRRA was enacted to further address "the privacy concerns raised by unfettered access to consumers reports[.]" S. Rep. 104-185, at 18 (1995). Because "the FCRA permits employers to obtain consumer reports pertaining to current and prospective employees," Congress was "concerned ... that this provision may create an improper invasion of privacy." *Id.* As a consequence, the CRRA imposed new

restrictions on procurement of credit reports by prospective employers.

Specifically, credit reports could only be procured for employment purposes after:

> (i) a clear and conspicuous disclosure has been made in writing to the consumer at any time before the report is procured or caused to be procured, in a document that consists solely of the disclosure, that a consumer report may be obtained for employment purposes; and
>
> (ii) the consumer has authorized in writing ... the procurement of the report by that person. 15 U.S.C. §1681b(b)(2)(A).

"The reason for specifying a stand-alone disclosure," the Federal Trade Commission has explained, "was so that consumers will not be distracted by additional information at the time the disclosure is given." *Advisory Opinion to Steer*, FTC Informal Staff Opinion Letter, No. 10-21-97 (October 21, 1997); *see Advisory Opinion to Coffey,* FTC Informal Staff Opinion Letter, No. 02-11-98 (Feb. 11, 1998) (explaining that "Congress intended that the disclosure not be encumbered with extraneous information" that would "confuse the consumer or detract from the mandated disclosure").

Indeed, the FTC has explained that "inclusion of [a liability] waiver in a disclosure form will violate Section 604(b)(2)(A) of the FCRA[.]" *Advisory Opinion to Hauxwell*, FTC Informal Staff Opinion Letter, No. 06-12-98 (June 12, 1998). This understanding is consistent with the "general principle of law that benefits provided to citizens by federal statute generally may not be waived by private agreement

unless Congress intended such a result." *Id.* (citing *Brooklyn Savings Bank v. O'Neill,* 324 U.S. 697 (1945)). In short, "no authorization for a waiver is contained in the FCRA; nor does the legislative history show that Congress intended that consumers should be able to sign away their legal rights under the Act." *Id.*

B. Proceedings Below

In 2011, Sarmad Syed sought employment with Petitioner M-I, LLC. D. Ct. Doc. 36, at ¶ 14 (Sept. 2, 2014) ("Am. Compl."). As part of the hiring process, M-I "procures … 'consumer reports' from consumer reporting agencies about its employees or prospective employees for employment purposes." *Id.* ¶ 8. To do so, M-I ordinarily hires Pre-Check, Inc., which is "in the business of assembling, evaluating and disbursing information concerning consumers for the purpose of furnishing consumer reports." *Id.* ¶ 9.

That is what M-I did here. After receiving Syed's employment application, it provided him with a one-page document disclosing that the company may wish to locate and review background information he did not include in his application. App. 30-32. The disclosure contained an expansive list of information that M-I may seek to review. The disclosure identified reports concerning Syed's credit, consumer activity, criminal history, character, driving record, previous employers, work performance, and work habits. App. 30-31 The disclosure further stated that M-I and PreCheck would seek that information from "various federal, State, and other agencies," as well as information related to "claims involving [Syed] in the files of insurance companies." App. 31-32. The disclosure sought Syed's permission for "any party or agency contacted by

PreCheck, Inc. to furnish the above mentioned information." App. 31.

Despite the FCRA requiring a document "that consists solely of the disclosure," and notwithstanding the FTC's contrary guidance, the one-page document also included a sweeping waiver of liability for obtaining the reports. That waiver provided:

> I hereby discharge, release and indemnify [M-I], PreCheck, Inc., their agents, servants and employees, and all parties that rely on this release and/or the information obtained with this release from any and all liability and claims arising by reason of the use of this release and dissemination of information that is false and untrue if obtained from a third party without verification. App. 32.

The combined disclosure/waiver further stated "[i]t is expressly understood that the information obtained through the use of this release will not be verified by PreCheck, Inc." *Id.*

M-I ultimately hired Syed after obtaining his credit report. Am. Compl. ¶ 15. Syed later "discovered Defendant M-I's violation(s)" underlying this lawsuit "when he obtained and reviewed his personnel file … and discovered that Defendant M-I had procured … a 'consumer report' regarding him for employment purposes based on the illegal disclosure and authorization form." *Id.* ¶ 14; *see also* App. 12-13.

1. The Operative Pleadings and M-I's Motion to Dismiss.

In 2014, Syed filed a complaint alleging that M-I and PreCheck "willfully" violated the FCRA by failing to put the disclosure "in a document that consists solely of the disclosure." 15 U.S.C. 1681b(b)(2)(A)(i). *See* D. Ct. Doc. 1 (May 19, 2014). M-I moved to dismiss the complaint, but in doing so did not argue that Syed lacked standing. D. Ct. Doc. 19-1 (July 18, 2014). The district court granted the motion. In its view, any FCRA violation could not be willful because the Ninth Circuit had not yet construed the statute to prohibit the combined disclosure/waiver and because there was disagreement among the district courts that had decided the issue. App. 91-93.

Syed amended the complaint to address the district court's concern that he had not plausibly alleged a "willful" violation. Among other things, the complaint highlighted that the FTC had concluded that combining a disclosure with a liability waiver violated the FCRA. Am. Compl. ¶¶ 21-23.

M-I sought to dismiss the amended complaint, again declining to challenge Syed's standing. D. Ct. Doc. 39-1 (Sept. 19, 2014). The district court granted the motion to dismiss, holding that the amended complaint still did not allege a "willful" violation. App. 75-77.

2. The Ninth Circuit's Decision.

Syed appealed. The parties' briefing focused entirely on the merits of the issues that had been litigated in the district court, including whether the FCRA violation was "willful." The only discussion of standing was a footnote in M-I's brief declaring, without

explanation, that "a decision by the Supreme Court that the *Spokeo* plaintiff lacks standing would similarly mean that Syed lacks standing to pursue this lawsuit." M-I C.A. Br. 13 n.4.

This Court's decision in *Spokeo* was issued on May 17, 2016. The Ninth Circuit did not issue its ruling in this case until January 20, 2017—eight months later. Despite its footnote reservation, M-I never sought additional briefing or filed *any* Rule 28(j) letter addressing *Spokeo*.

The Ninth Circuit reversed. Notwithstanding M-I's notable silence, the court explained that Syed had standing because the amended complaint "alleges more than a 'bare procedural violation.'" App. 44 (quoting *Spokeo*, 136 S. Ct. at 1549). The FCRA "creates a right to information by requiring prospective employers to inform job applicants that they intend to procure their consumer reports as part of the employment application process." *Id.* The disclosure did not fairly provide that information because it combined the liability waiver with the disclosure. Syed therefore had standing because the inadequate disclosure prevented him from "meaningfully authoriz[ing] the credit check." *Id.*

On the merits, the court held that combining the waiver with the disclosure clearly violated the FCRA based on its plain text. Attempting to avoid the requirement that "the disclosure appear on a 'document that consists solely of the disclosure,'" App. 14 (quoting 15 U.S.C. § 1681b(b)(2)(A)), M-I argued that it could nevertheless include the waiver because the provision exempted the subject's authorization from that command, App. 14-15. The court easily rejected this

argument. As it explained, "the authorization clause is an express exception to the requirement that the document consist 'solely of the disclosure.'" App. 15.

The court noted that its interpretation, unlike MI's reading, is consistent "with the purpose of the statute." App. 47. Congress passed the disclosure provision "to protect consumers from 'improper invasions of privacy' and the disclosure and authorization requirements fit hand in glove to achieve that purpose." *Id*. (quoting S. Rep. No. 104-185, at 35 (1995)). "Congress's purpose would have been frustrated" by putting them into different documents "because applicants would not understand what they were authorizing." *Id.* "The disclosure and authorization clauses therefore work in tandem to further the congressional purpose of protecting consumers from 'improper invasions of privacy.'" App. 15-16 (quoting S. Rep. No. 104-185, at 35 (1995)). In contrast, putting the liability waiver on the same page as the disclosure "pulls the applicant's attention away from his privacy rights protected by the FCRA by calling attention to the rights he must forego if he signs the document." App. 50.

The Ninth Circuit also held that the violation was "willful" as a matter of law. Under controlling precedent, the court explained, "willfullness reaches actions taken in 'reckless disregard of statutory duty,' in addition to actions 'known to violate the Act.'" App. 21 (quoting *Safeco*, 551 U.S. at 56-57). "A party does not act in reckless disregard of the FCRA 'unless the action is not only a violation under a reasonable reading of the statute's terms, but shows that the company ran a risk of violating the law substantially greater than the risk associated with a reading that is

merely careless.'" App. 21 (quoting *Safeco*, 551 U.S. at 69).

Applying this standard, the court held that M-I's interpretation was not only objectively unreasonable, App. 21-23, but also reckless, App. 23-27. Although the court cautioned that not *every* violation of the disclosure requirement is reckless, App. 25 (citing *Murray v. New Cingular Wireless Servs., Inc.*, 523 F.3d 719, 726-27 (7th Cir. 2008)), the court concluded that in this case, M-I's violation was objectively unreasonable and reckless: "Here, however, the [statutory requirement]... is not subject to a range of reasonable interpretations. To the contrary, 15 U.S.C. § 1681b(b)(2)(A) unambiguously forecloses the inclusion of a liability waiver in a disclosure document." App. 25. Moreover, the fact that the Ninth Circuit was the first court to resolve this issue did not give M-I a free pass because "this is not a borderline case." App. 26.

M-I sought rehearing *en banc*. In its petition, M-I argued, for the first time, that Syed lacked Article III standing. Without calling for a response, the court denied the petition, issued an amended opinion, and announced that no further requests for rehearing or rehearing *en banc* would be considered.

The amended opinion supplemented the court's reasoning for why Syed has Article III standing. The court emphasized that it was obligated to "accept all factual allegations of the complaint as true and draw all reasonable inference in favor of the moving party," and "what suffices at the Rule 12(b)(6) stage may not suffice at later stages of the proceedings when the facts are tested." App. 11 n.4 (citation omitted).

In applying that standard, the court pointed to the amended complaint's allegation that Syed, to his surprise, discovered M-I had obtained his credit report only after reviewing his employment file. App. 12. That allegation showed "Syed was not aware that he was signing a waiver authorizing the credit check when he signed it." App. 12. "Drawing all reasonable inferences" in Syed's favor, the court thus read the amended complaint to allege "that Syed was confused by the inclusion of the liability waiver with the disclosure and would not have signed it had it contained a sufficiently clear disclosure, as required in the statute." App. 12-13. Accordingly, Syed had alleged "a concrete injury and has Article III standing to bring this lawsuit." App. 13.

III. REASONS FOR DENYING THE PETITION

A. The Ninth Circuit's decision does not conflict with any decision of this Court or of any other court of appeals.

Petitioner claims that the Court should grant review because the Ninth Circuit's determination that Syed has standing "directly contravenes *Spokeo*—and widened an existing circuit split—by concluding that a statutory violation analytically indistinguishable from the one in *Spokeo* could support standing despite the lack of any allegation of real-world harm." Pet. 3. Remarkably, every assertion packed into this one-sentence distillation of Petitioner's theory is wrong.

First, this case does not implicate *Spokeo*. Rather, it involves the violation of a substantive (not procedural) statutory right in which the plaintiff alleges a tangible injury. Second, there is no post-*Spokeo* circuit split. The lower courts instead are

applying the same context-specific legal test to actions asserting varying claims under different statutes. Third, even if *Spokeo* applies here, violation of FCRA's disclosure provision causes a concrete, intangible injury under the framework the Court's ruling established. Indeed, the only conflict with *Spokeo* here is M-I's repeated assertion that Syed must suffer "real-world harm" to have Article III standing.

1. This dispute does not implicate *Spokeo v. Robins*.

M-I's request for certiorari is premised on the faulty assertion that *Spokeo* requires a plaintiff to allege "real-world harm" to satisfy Article III. M-I repeats this assertion over and over. Pet. 3, 9, 15. That is the key proposition *Spokeo* rejected. Indeed, M-I is ultimately forced to confess that, under *Spokeo* and the rulings it interprets, "'concrete' is not ... necessarily synonymous with 'tangible.'" Pet. 12 (quoting *Spokeo*, 136 S. Ct. at 1549). Because "intangible harm may still be concrete," Pet. 12, *a fortiori* no showing of real-world harm is required, *Spokeo*, 136 S. Ct. at 1549. And, as M-I admits, "when a statute involves a substantive right," the violation meets Article III without any further inquiry. Pet. 10.

Spokeo is an important case, because it involved a suit that alleged neither tangible harm nor the violation of substantive statutory right. Instead, the *Spokeo* Court confronted a classic procedural injury. The *Spokeo* Court held that, under the FCRA, inaccuracies in a consumer's credit report are not directly actionable. Rather, only those inaccuracies resulting from the failure to "follow reasonable procedures" are actionable. *Spokeo*, 136 S. Ct. at 1545.

The key issue, accordingly, was whether (and under what circumstances) a procedural violation may be vindicated in Federal court. As the Court explained, a plaintiff cannot "allege a bare *procedural* violation, divorced from any concrete harm, and satisfy the injury-in-fact requirement of Article III." *Id*. at 1549 (emphasis added). For the procedural violation to be actionable in Federal court, the plaintiff must be able to show that the intangible injury either follows from the common law or creates a "material risk of harm" to the underlying interest that Congress sought to protect when it passed the statute. *Id*. at 1550.

The Ninth Circuit's decision below does not implicate this issue. The Ninth Circuit held that Syed *did* allege real-world harm. Specifically, the court found that Syed had alleged that Respondent's violation of the FCRA's disclosure provision caused him to authorize a pre-employment credit check that he would not have otherwise approved. App. 12. Even M-I acknowledges that this allegation satisfies Article III. Pet. 9 (explaining the Ninth Circuit relied on "facts alleged in the complaint" to hold that "Syed had indeed suffered a concrete injury"). Even in M-I's view, then, so long as the plaintiff alleges that "he did not understand the disclosure and would not have signed it if he had," he alleges a concrete injury irrespective of *Spokeo*. Pet. 17. That is exactly what the Ninth Circuit held.

To be sure, M-I disagrees with this reading of the amended complaint. M-I argues that the "'inference of confusion' is nothing more than pure speculation," that Syed would have authorized the credit check "either way," Pet. 13, and that the Ninth Circuit

"manufacture[d] facts to support standing," Pet. 18. While M-I thus clearly disagrees with the decision below, its dissatisfaction has nothing to do with *Spokeo*. The issues in the case below involve nothing more than a narrow, case-specific dispute over how to interpret Syed's factual allegations at the pleading stage. And that dispute does not come close to meeting Rule 10's criteria for certiorari.

But even if this Court were to grant certiorari and agree with M-I's interpretation, Syed could be granted leave to amend to clarify this issue. Moreover, as the Ninth Circuit noted, this factual contention will need to be proven as the case proceeds toward judgment. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). Accordingly, there is no reason for the Court to grant review of this question *sua sponte*. It neither will resolve a circuit split nor provide guidance to the lower courts on an issue of national importance.

In any event, the Ninth Circuit alternatively held that *Spokeo* is not implicated because M-I violated Syed's substantive right under the FCRA to receive a "clear and conspicuous" disclosure. As the Ninth Circuit explained, Syed did not allege a "bare procedural violation," because the FCRA disclosure provision "creates a right to information." App. 12.

Here too, M-I objects to the ruling. Pet. 17. But that statute-specific disagreement does not implicate any purported circuit split. *Spokeo* sets forth a legal test for determining when the "violation of a procedural right granted by statute" is "sufficient ... to constitute injury in fact." 136 S. Ct. at 1549. That is the issue the lower courts have been confronting since the opinion was issued less than two years ago. *See infra* at 13-15.

Petitioner points to no other decision grappling with the antecedent question of whether any particular statutory right (let alone *this* statutory right) is substantive or procedural in the first place—a question the Court would need to answer before reaching the question that M-I asks it to decide.

The decision below did not apply *Spokeo* to decide whether an intangible, procedural injury meets Article III's concreteness requirement. The Ninth Circuit's remand decision in *Spokeo*, which was issued after the petition was filed, bolsters this conclusion. *See Robins v. Spokeo, Inc.*, 867 F.3d 1108 (9th Cir. 2017). In holding that Robins has Article III standing, the Ninth Circuit did not even cite this case—an earlier, published in-circuit ruling. The *Spokeo* panel surely would have discussed this case had it established circuit precedent for applying *Spokeo*, especially had it done so in the sweeping fashion that M-I alleges.

Accordingly, the Court will not be able to reach the question presented if it grants review. This is a "court of review, not of first view." *Cutter v. Wilkinson*, 544 U.S. 709, 719 n.7 (2005). The issue M-I raises was not decided below and was barely briefed. Syed, in fact, has *never* had the chance to brief it. *See supra* at 6-9. At most, then, the Court could decide a fact-bound pleadings dispute and a concededly "splitless" disagreement over whether Section 1681b(b)(2)(A) creates a substantive or procedural right. But that is as far as the Court would be able to go. As a result, this case is not a viable candidate for certiorari.

2. The circuit courts are not divided over how to implement *Spokeo*.

M-I claims the decision below "widened" a circuit split over how to apply *Spokeo*. But even setting aside that the Ninth Circuit never reached this issue, it is unclear why M-I believes that the Ninth Circuit widened a circuit split. M-I does not identify any other lower-court decisions that it contends the Ninth Circuit joined in allegedly misinterpreting *Spokeo.* Pet. 14-17. An existing circuit split is obviously required before a later case can "widen" it.

In fact, there is no split. If M-I is asserting that these courts (unlike the Ninth Circuit) required the plaintiffs to "suffer a real-world consequence" to satisfy Article III, it is wrong. All of the cases (unlike M-I) accept this Court's holding that "an alleged procedural violation can by itself manifest concrete injury where Congress conferred the procedural right to protect a plaintiff's concrete interests and where the procedural violation presents a 'risk of real harm' to that concrete interest." *Strubel v. Comenity Bank*, 842 F.3d 181, 190 (2d Cir. 2016); *see also Dreher v. Experian Info. Solutions, Inc.*, 856 F.3d 337, 344 (4th Cir. 2017); *Gubala v. Time Warner Cable, Inc.*, 846 F.3d 909, 911 (7th Cir. 2017); *In re Horizon Healthcare Services Inc. Data Breach Litigation*, 846 F.3d 625, 640 (3d Cir. 2017); *Hancock v. Urban Outfitters, Inc.*, 830 F.3d 511, 514-15 (D.C. Cir. 2016); *Friends of Animals v. Jewell*, 828 F.3d 989, 992 (D.C. Cir. 2016); *Braitberg v. Charter Communications, Inc.*, 836 F.3d 925, 930 (8th Cir. 2016); *Lee v. Verizon Communications, Inc.*, 837 F.3d 523, 529 (5th Cir. 2016); *Nicklaw v. Citimortgage, Inc.*, 839 F.3d 998, 1002 (11th Cir. 2016).

The Ninth Circuit's view is in accord with all these cases. In the *Spokeo* remand decision, which, unlike the decision below, *did* reach this issue, the Ninth Circuit held that "the Second Circuit's formulation in *Strubel* best elucidates the concreteness standards articulated by the Supreme Court" and adopted that framework. *Robins*, 867 F.3d at 1113. Moreover, the Ninth Circuit expressed its agreement with the Fourth Circuit's approach in *Dreher*. *See id*. In other words, the Ninth Circuit is squarely in line with the cases that M-I contends correctly applies *Spokeo*.

What M-I claims is a "conflict" is, in truth, the application of the same legal test to different unique circumstances. Because the *Spokeo* framework is statute-specific, it is no surprise that some plaintiffs alleging a procedural violation can show a risk of harm to the underlying statutory interest, while other plaintiffs cannot. After all, each law has a different purpose, each procedural violation interacts differently with that purpose, and each plaintiff alleges an intangible injury arising from different events. This does not mean, however, that there is consensus about whether all of these cases correctly applied *Spokeo*. To the contrary, it means that these are context-specific decisions confronting markedly different situations. It means that, unless M-I can point to a conflict over the same violation of the same statute, there is no circuit split. And it is clear that M-I does not assert and cannot that any other Federal court has applied the *Spokeo* framework to Section 1681b(b)(2)(A).

To try to bolster a fatally flawed argument, M-I gamely attempts to lump all of these cases into an omnibus category it calls "informational injuries." Pet.

12. But, there is no such thing. Some laws require companies to protect customer information from disclosure, *see, e.g.*, *Gubala*, 846 F.3d at 911; *Braitberg*, 836 F.3d at 930-31; *Horizon Healthcare*, 846 F.3d at 631, while others require disclosure of information, *see, e.g.*, *Friends of Animals*, 828 F.3d at 992-93. Some laws require companies to refrain from seeking information from their customers, *see, e.g.*, *Hancock*, 830 F.3d at 512, while others require companies to share information with their customers, *see Dreher*, 856 F.3d at 345; *Strubel*, 842 F.3d at 190. Some laws require companies to transmit customer information to third parties, *see, e.g.*, *Nicklaw*, 839 F.3d at 1003, while others require companies to disclose to their customers to what uses they may put their personal information, *see, e.g.*, App. 7.

It confuses rather than advances the inquiry to categorize all these distinct statutory violations as involving an "informational injury" and attempt to create a single uniform rule for resolution of all of these cases. Whether the "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" will differ from statute to statute. *Spokeo*, 136 S. Ct. at 1549. Similarly, whether the so-called informational violation creates "the risk of real harm" to the underlying interest the statute is designed to protect will vary from statute to statute. *Id*. These "informational" cases are simply all quite different.

3. The Ninth Circuit's ruling does not conflict with *Spokeo* or any other of this Court's decisions.

As explained above, Syed's right to receive specific information in a "clear and conspicuous" disclosure is a substantive rather than procedural right. Nothing in *Spokeo* changes this Court's long-accepted view that a plaintiff may bring suit under statutes that "establish[] an enforceable right to truthful information" about particular subjects. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373 (1982) (finding Article III standing to receive truthful information "concerning the availability of housing"); *Public Citizen v. Dep't. of Justice*, 491 U.S. 440, 449-51 (1989) (rejecting argument that FOIA applicants needed to "show more than that they sought and were denied specific agency records"); *FEC v. Akins*, 524 U.S. 11, 20-25 (1998).

Even if the Court granted review and determined that the disclosure provision instead creates a procedural right, it would still affirm the Ninth Circuit's judgment that Syed had Article III standing. Under *Spokeo*, there must be "risk of real harm" to the interest that Congress sought to protect to "satisfy the requirement of concreteness." *Id*. If that requirement is met, a plaintiff "need not allege any *additional* harm beyond the one Congress has identified." *Id*. M-I's violation of Section 1681b(b)(2)(A) satisfies this requirement.

While the focus in *Spokeo* was on the congressional interest in accurate credit reports, Congress was equally concerned with ensuring a fair credit-reporting process. The FCRA was enacted "to insure that consumer reporting agencies exercise their grave

responsibilities with fairness, impartiality, and a respect for the consumer's right to privacy." 15 U.S.C. §1681(a)(4). The specific disclosure and authorization provisions at issue here were added to prevent "an improper invasion of privacy" when credit reports are procured for employment purposes. S. Rep. 104-185, at 18 (1995).

Section 1681b(b)(2)(A) advances these interests in fairness and privacy by requiring employers to clearly disclose—unencumbered by any confusing, distracting or contradictory language—that a report may be procured and by requiring employers to obtain written authorization before procuring it. By ensuring that the consumer's consent is informed and freely given, these provisions protect against the "risk of real harm" arising from the unauthorized disclosure or use of the sensitive information contained within a credit report. *See Spokeo*, 136 S. Ct. at 1549.[1] Accordingly, Syed "need not allege any additional harm beyond the one Congress has identified." *Id*.

It also 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." *Spokeo*, 136 S. Ct. at 1549. Congress's decision to impose a specific disclosure and authorization requirement for credit reports follows in

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[1] Indeed, Congress calibrated Section 1681b(b)(2)(A) to address this risk of harm by creating liability only when the employer actually procures (or causes another to procure) the credit report pursuant to the subject's authorization. A plaintiff therefore cannot bring a claim merely because he or she was presented with a faulty disclosure; the faulty disclosure must result in the dissemination of the individual's protected credit information. *See id.*

the tradition of the common law's protection against unauthorized disclosure of priavte information. *See* Restatement (Second) of Torts § 652A (1977) (setting forth the "general principle" is that "one who invades the right of privacy of another is subject to liability for the resulting harm to the interests of the other"). "[I]t has long been the case that an unauthorized dissemination of one's personal information, even without a showing of actual damages, is an invasion of one's privacy that constitutes a concrete injury sufficient to confer standing to sue." *Thomas v. FTS USA, LLC*, 193 F. Supp. 3d 623, 636 (E.D. Va. 2016) (citing Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193 (1890)).

Whether Section 1681b(b)(2)(A) perfectly replicates a common-law action for invasion of privacy is immaterial. The issue is whether the FCRA authorizes an action "*of the sort* traditionally amenable to, and resolved by, the judicial process." *Steel Co. v. Citizens for Better Environment*, 523 U.S. 83, 102 (1998) (emphasis added) (citing *Muskrat v. United States*, 219 U.S. 346, 356-57 (1911)). Congress did so here. Congress is not so constrained that it may protect a right derived from the common law only when it accepts it in its original form. The FCRA provides "a reasonably just substitute for the common law ... remedies it" partially "replaces." *Duke Power Co. v. Carolina Envtl. Study Grp., Inc.*, 438 U.S. 59, 87-88 (1978). No more is required under Article III.

Finally, it is worth noting how straightforward this case is under Justice Thomas's approach. *See Spokeo*, 136 S. Ct. at 1550-54. As he explained, Article III does not require a "plaintiff seeking to vindicate a

statutorily created private right" to "allege actual harm beyond the invasion of that private right." *Id*. at 1553 (citing *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373-74 (1982); *Tenn. Valley Elec. Power Co. v. TVA*, 306 U.S. 118, 137-38 (1939)). That is because "Congress can create new private rights and authorize private plaintiffs to sue based simply on the violation of those private rights." *Id*. Article III requires more, however, when the suit involves a public right. *See id*. ("Congress cannot authorize private plaintiffs to enforce public rights in their own names, absent some showing that the plaintiff has suffered a concrete harm particular to him.").

The decisive question for purposes of standing, then, is whether M-I violated "duties that [it] owes to the public collectively" or instead violated a "statutory provision that ... establish[es] a private cause of action to vindicate the violation of a privately held right." *Id*. at 1553. Here, Syed had a "privately held right" to a stand-alone disclosure. The statute nowhere "vests any and all consumers with the power to police" Section 1681b(b)(2)(A). *Id*. Rather, only the person who is entitled to the disclosure may bring a claim under the FCRA if he does not receive it. *See* 15 U.S.C. § 1681n.

B. The Ninth Circuit's interpretation of the Fair Credit Reporting Act's "willful" requirement does not warrant this Court's review.

Petitioner only asks the Court to decide whether its FCRA violation was "willful"—not whether it violated the statute (Pet. *i.*[2])—for good reason. As the Ninth Circuit explained, the statute is unambiguous, and M-I's arguments to the contrary were meritless. *See supra* at 8-9. Indeed, M-I's interpretation would read "solely" altogether out of Section 1681b(b)(2)(A). If the disclosure/authorization document may include a liability waiver, there is no limit to what other information the consumer reporting agency could include. M-I's reading would defeat Congress's purpose in imposing this requirement.

Thus, the Court's review would be confined to whether the conceded violation was "willful." Petitioner acknowledges, however, that the Ninth Circuit is "the first court of appeals to weigh in on the question." Pet. 20. Petitioner weakly attempts to characterize the decision below as conflicting with district court decisions. Not only is there no circuit split, Petitioner points only to two unpublished district court decisions that allegedly conflict with the Ninth Circuit's decision. *See id*. at 20-21 & n.6. The Ninth Circuit's purported disagreement with two non-precedential district court

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[2] In passing, Petitioner suggests that the Court should resolve the "conflict" over whether a combined disclosure/release violates the FCRA "too." Pet. 21. But that undeveloped (and untenable) assertion is clearly outside the question presented and thus not before the Court. *See Wood v. Allen*, 130 S. Ct. 841, 851 (2010).

rulings does not even remotely justify this Court's review.

Thus, Petitioner is in reality requesting the Court to engage in error correction. But there is no error for the Court to correct. Even though the FTC had advised that including a liability waiver in the disclosure would violate the FCRA, M-I decided to do so. As a result, M-I's decision to include the liability waiver was clearly reckless. *See supra* at 8-9.

M-I's arguments for why it acted reasonably reveal just how reckless it was. M-I argued, for example, that the express exemption for authorizations extended to liability waivers, that liability waivers had an implied exemption, that a liability waiver is actually a form of authorization, and the inclusion of the liability waiver was not confusing even if it violated the law. App. 17-20. These desperate and meritless arguments—all of which the FTC rejected in writing nearly two decades ago—are not the result of mere negligence. This is instead the definition of a willful violation of a clear statutory command.

Realizing the speciousness of its statutory "interpretation" arguments, M-I argues that, under *Safeco*, Syed "needed to show not only an unreasonable or deeply flawed interpretation of the statute, but also a substantial and likely *harm* resulting from that interpretation." Pet. 19 (citing *Safeco*, 551 U.S. at 69). But that is not what *Safeco* requires. In *Safeco*, the Court explained that a "high risk of harm, objectively assessed, ... is the essence of recklessness at common law," and that it saw "no reason to deviate from the common law understanding in applying the statute." *Safeco*, 551 U.S. at 69. "Thus, a company subject to

FCRA does not act in reckless disregard of it unless the action is not only a violation under a reasonable reading of the statute's terms, but shows that the company ran a risk of violating the law substantially greater than the risk associated with a reading that is merely careless." *Id*. This is standard that the Ninth Circuit applied—*word for word*.

M-I's attempt to add an individualized-harm inquiry to the recklessness inquiry is also baseless. It has no foundation in the statutory text, and it has no basis in logic—given that it would duplicate the Article III standing analysis. Moreover, it clearly has no basis in *Safeco*. Under *Safeco*, M-I's statutory violation was willful if it was reckless, and its actions were reckless if it "*ran a risk of violating the law*" in a way that was more than "merely careless." The Ninth Circuit correctly held that M-I's misreading of Section 1681b(b)(2)(A) was not merely careless.

Here, it is clear that M-I did not inadvertently ignore the FCRA's disclosure provision. It violated the statute to add a liability waiver that independently violates the FCRA. As the FTC has explained, "no authorization for a waiver is contained in the FCRA; nor does the legislative history show that Congress intended that consumers should be able to sign away their legal rights under the Act." *Advisory Opinion to Hauxwell*, *supra*. A determination by this Court that M-I independently breached the FCRA while violating the disclosure provision could only bolster the Ninth Circuit's conclusion that its actions were willfully noncompliant.

The Court grants certiorari to correct lower-court errors only in exceptionally important cases. This is not such a case. This case does not, for example, involve an extraordinary judgment or an attempt to strike down a Federal law on constitutional grounds. Although M-I and its amici make much of the alleged importance of this case in the class-action context, the petition has nothing to do with the application of Federal Rule of Civil Procedure 23. Nor should M-I expect this Court to alter its approach to Article III based on policy disputes regarding class-action litigation. This case involves an application of the Court's standing jurisprudence to specific allegations in the context of a particular statute. No other courts of appeal have addressed that question, and—at this early stage of the proceedings—there is nothing about this case that would justify the Court's intervention.

IV. CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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