In the Supreme Court of the United States

No. 13-1339

SPOKEO, INC., PETITIONER

v.

THOMAS ROBINS

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING RESPONDENT

INTEREST OF THE UNITED STATES

The Fair Credit Reporting Act (FCRA), 15 U.S.C. 1681 *et seq.*, imposes various requirements on certain entities that regularly compile and disseminate personal information about individual consumers. FCRA provides those consumers with a cause of action to recover actual or statutory damages for certain violations of the Act. 15 U.S.C. 1681n, 1681*o*. FCRA's private right of action provides an important supplement to the federal government's own enforcement efforts. Many federal laws contain similar provisions authorizing persons whose statutory rights have been violated to sue for statutory damages. The United States therefore has a substantial interest in the question presented. At the Court's invitation, the United

States filed a brief as amicus curiae at the petition stage of this case.

STATEMENT

1. Congress enacted FCRA to address developments in "computer technology [that] facilitated the storage and interchange of information" and "open[ed] the possibility of a nationwide data bank covering every citizen." S. Rep. No. 517, 91st Cong., 1st Sess. 2 (1969) (*Senate Report*). Congress designed FCRA "to prevent consumers from being unjustly damaged because of inaccurate or arbitrary information," and "to prevent an undue invasion of the individual's right of privacy in the collection and dissemination of credit information." *Id.* at 1.

Under FCRA, a "consumer reporting agency" (CRA) is a person who, for monetary fees, dues, or on a cooperative basis, "regularly engages * * * in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties." 15 U.S.C. 1681a(f). With exceptions not relevant here, a "consumer report" is 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" if that communication "is used or expected to be used or collected in whole or in part" for "the purpose of serving as a factor in establishing the consumer's eligibility for" specified matters, including employment, credit, and insurance. 15 U.S.C. 1681a(d)(1); see 15 U.S.C. 1681b (listing "[p]ermissible purposes of consumer reports").

Two FCRA provisions are principally implicated here. First, FCRA requires that, "[w]henever a [CRA]

prepares a consumer report," it "shall 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). Second, FCRA provides that "[a]ny person who willfully fails to comply with any requirement imposed under [FCRA] with respect to any consumer 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." 15 U.S.C. 1681n(a).[1] "Willful" violations of FCRA are "knowing violations" and reckless violations in which the defendant acts based on an "objectively unreasonable" reading of FCRA, creating an "'unjustifiably high risk' of violating the statute." See *Safeco Ins. Co. of Am.* v. *Burr*, 551 U.S. 47, 57, 68-70 (2007) (citation omitted).

2. Respondent's putative class-action complaint alleged that petitioner is a CRA that operates a website, spokeo.com, on which users can obtain information about individuals. J.A. 7, 18. Respondent alleged that any person can obtain from that website a wide range of information about the subject of a search, including the individual'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." J.A. 10. Petitioner's website also allegedly provides information about the individual's "economic health" (which petitioner formerly labeled a "credit

[1] For negligent violations, the defendant is liable for "actual damages." 15 U.S.C. 1681*o*(a).

estimate"), "wealth level," and, until shortly before respondent's complaint was filed, "mortgage value," "estimated income," and "investments." J.A. 10-11. Respondent alleged that petitioner has "actively marketed it[s] services to employers for the purpose of evaluating potential employees." J.A. 13; see J.A. 9, 13, 20.

Petitioner's website allegedly disseminated a consumer report about respondent that inaccurately reported, *inter alia*, respondent's age and wealth and that respondent was employed, possessed a graduate degree, and was married with children. J.A. 13-14. Respondent alleged that petitioner had disseminated that erroneous information about him when he was "out of work and seeking employment," causing both past and continuing "actual harm to [his] employment prospects," monetary injury, and emotional injury from anxiety about his "diminished employment prospects." J.A. 14-15.

Respondent alleged that petitioner had willfully violated 15 U.S.C. 1681e(b) by failing to "follow reasonable procedures to assure the maximum possible accuracy" of his consumer-report information. J.A. 18-19, 21. Respondent further alleged that petitioner had violated additional FCRA provisions by failing to provide required notices to persons that furnish it information about consumers, J.A. 20; by failing to provide required notices to, and obtain certifications from, users of its consumer reports, J.A. 20-22; and by failing to post on its website a toll-free number for requesting free annual reports, J.A. 22-23. Respondent alleged that those violations had caused him "harm as described [in his complaint]," J.A. 21-23, and

he requested both statutory damages and injunctive relief, J.A. 25.

3. The district court initially denied petitioner's motion to dismiss. Pet. App. 15a-22a. As relevant here, the court concluded that respondent had sufficiently alleged an Article III "injury in fact—the 'marketing of inaccurate consumer reporting information about [respondent].'" *Id.* at 18a (citation omitted).

On reconsideration, the district court dismissed respondent's suit. Pet. App. 23a-24a. The court concluded that a "[m]ere violation of [FCRA] does not confer Article III standing * * * where no injury in fact is properly pled," and that "the alleged harm to [respondent's] employment prospects" was too "speculative, attenuated and implausible" to satisfy constitutional requirements. *Id.* at 23a.

4. The court of appeals reversed and remanded. Pet. App. 1a-10a. The court framed the question before it as "whether [respondent] has Article III standing to sue a website's operator under [FCRA] for publishing inaccurate personal information about [respondent]." *Id.* at 1a. The court held that respondent's complaint satisfied Article III. *Id.* at 4a-9a.

The court of appeals explained that "Congress's creation of a private cause of action to enforce a statutory provision implies that Congress intended the enforceable provision to create a statutory right," and that "the violation of a statutory right is usually a sufficient injury in fact to confer standing." Pet. App. 6a. The court acknowledged that "the Constitution limits the power of Congress to confer standing." *Id.* at 7a. The court explained, however, that those limits do "not prohibit Congress from 'elevating to the status of legally cognizable injuries concrete, *de facto* inju-

ries that were previously inadequate in law.'" *Id.* at 7a-8a (citation omitted).

Respondent's suit, the court of appeals concluded, does not violate any "constitutional limitations on congressional power to confer standing." Pet. App. 8a. The court explained that respondent was "'among the injured'" because petitioner had allegedly "violated *his* statutory rights, not just the statutory rights of other people." *Ibid.* (citation omitted). The court further held that "the interests protected by the statutory rights at issue are sufficiently concrete and particularized that Congress can elevate them" by statute to Article III injuries. *Ibid.* After determining that causation and redressability had been sufficiently pleaded, the court concluded that respondent "adequately alleges Article III standing." *Id.* at 9a. In light of that holding, the court of appeals did not decide "whether harm to [respondent's] employment prospects or related anxiety could be sufficient injuries in fact." *Id.* at 9a n.3.

SUMMARY OF ARGUMENT

A. FCRA confers upon respondent a legal right to avoid the dissemination of inaccurate personal information about himself under the circumstances presented here. Under this Court's precedents, a violation of that legal right is an injury sufficient to satisfy Article III requirements, whether or not respondent can identify further consequential harms resulting from the violation. In a variety of contexts, this Court has recognized the Article III standing of plaintiffs who alleged violations of similar legal rights.

B. In developing the injury-in-fact requirement in a line of decisions beginning in 1970, this Court explicitly sought to *expand* the pre-existing categories of

judicially cognizable injury. The thrust of those decisions was that, even when a plaintiff has no particularized *legal* interest in the challenged government action (as when the plaintiff challenges agency decisions concerning the appropriate use of public lands), he can establish standing to sue if that action will cause him distinct practical harm. That expanded conception of judicially cognizable injury, however, did not eliminate the plaintiff's option of establishing Article III standing by demonstrating an invasion of his own legally protected interests.

C. Historical practice confirms that the violation of a particularized statutory right is a constitutionally sufficient basis for suing in an Article III court. Common-law courts traditionally have adjudicated suits alleging violations of specific legal interests, such as a trespass onto real property or a breach of contract, even if the plaintiff has identified no consequential harm beyond the violation itself.

D. Although Congress can create (and authorize private judicial enforcement of) new statutory rights that have no common-law analog, its power to act is particularly clear when such an analog exists. Common-law defamation provides a close analog to respondent's FCRA claim. Common-law courts distinguished between written and oral defamation, and they treated the former as actionable per se without proof of further consequential harm. Petitioner seeks to distinguish those decisions on the ground that the particular false statements it allegedly made about respondent would not have been treated at common law as defamation per se. But common-law courts routinely modified the scope and contours of existing private rights, and there is no plausible basis for ques-

tioning Congress's power to enact similar adjustments. Any deviation from common-law principles is extremely slight here, since Congress at most has modestly expanded the categories of false statements that will be deemed actionable without proof of further consequential harm.

E. Petitioner's challenges to respondent's Article III standing lack merit. Respondent alleges not simply a statutory violation, but a violation of his *own* statutory rights. Congress's authorization of that suit does not represent a transfer of Executive power to private actors, but simply allows respondent to utilize the traditional means by which individuals enforce their own legal rights. And neither respondent's stated intention to seek certification of a class, nor the extent of the recovery that a class action might entail, is relevant to the Article III analysis.

F. The Court should focus on the principal claim asserted in respondent's complaint, which involves petitioner's alleged dissemination of inaccurate personal information about him. If this Court agrees with the court of appeals that respondent has standing to pursue that claim, the courts below can analyze on remand whether respondent satisfies Article III with respect to his remaining allegations. The FCRA statutory-damages provision at issue here is similar to many other provisions that authorize suits to be filed by private parties whose own statutory rights have been violated, whether or not any further consequential harm is shown. The Article III analysis of any such provision can depend in part on the details of the relevant statutory scheme. Congress did not venture close to the constitutional line, however, in providing a statutory-damages remedy for the public dissemina-

tion of inaccurate personal information about the plaintiff himself.

ARGUMENT

RESPONDENT HAS SUFFICIENTLY ALLEGED HIS ARTICLE III STANDING TO SUE

The court of appeals described the question before it as "whether an individual has Article III standing to sue a website's operator under [FCRA] for publishing inaccurate personal information about himself." Pet. App. 1a. The court correctly answered that question in the affirmative.

This Court has repeatedly recognized that the "actual" invasion of a "legally protected interest" will constitute an Article III injury-in-fact if it is "concrete" and "particularized." Under FCRA, an action for damages can be brought only by a consumer seeking compensation for a violation of a "requirement imposed under [FCRA] with respect to * * * *that* consumer." 15 U.S.C. 1681n(a), 1681*o*(a) (emphasis added). Far from raising a generalized grievance, respondent alleges that his own statutory rights were violated when petitioner disseminated "inaccurate personal information about himself." Pet. App. 1a; see J.A. 13-14. Although Congress has ample power to create new statutory rights and to provide for their effective private enforcement, even in the absence of a common-law analog, its power to authorize private suits is particularly clear where such an analog exists. Respondent's FCRA claim is closely analogous to a defamation suit, which courts have traditionally adjudicated without requiring plaintiffs to allege or prove some further consequential harm beyond the defamatory communication itself.

A. The Invasion Of Respondent's "Legally Protected Interest" In Preventing A CRA From Reporting Inaccurate Personal Information About Him To Others Is An Article III Injury-In-Fact

1. The "[J]udicial Power" of the United States extends only to Article III "Cases" and "Controversies." U.S. Const. Art. III, § 2. This Court developed the doctrine of Article III standing as "an essential and unchanging part of the case-or-controversy requirement." *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (*Defenders*). Under that doctrine, "a party seeking to invoke a federal court's jurisdiction must demonstrate three things": "(1) 'injury in fact,' by which [the Court] mean[s] an invasion of a legally protected interest" that meets certain requirements; "(2) a causal relationship between the injury and the challenged conduct"; and "(3) a likelihood that the injury will be redressed by a favorable decision." *Northeastern Fla. Chapter of the Associated Gen. Contractors of Am.* v. *City of Jacksonville*, 508 U.S. 656, 663 (1993) (*Associated Gen. Contractors*) (quoting *Defenders*, 504 U.S. at 560). The question presented here concerns the injury-in-fact requirement.

To qualify as an "injury in fact," an asserted "invasion of [the plaintiff's] legally protected interest" must be "actual or imminent" and both "concrete" and "particularized." *Defenders*, 504 U.S. at 560. A "[c]oncrete injury," unlike an "abstract" one, provides "the essential dimension of specificity to the dispute." *Schlesinger* v. *Reservists Comm. to Stop the War*, 418 U.S. 208, 220-221 (1974). A "particularized" invasion, in turn, is one that "affect[s] the plaintiff in a personal and individual way," *Defenders*, 504 U.S. at 560 n.1, rather than in "some indefinite way in common with

people generally," *DaimlerChrysler Corp.* v. *Cuno*, 547 U.S. 332, 344 (2006) (citation omitted).

The Court has long recognized that the "injury required by Art. III may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing.'" *Warth* v. *Seldin*, 422 U.S. 490, 500 (1975) (quoting *Linda R.S.* v. *Richard D.*, 410 U.S. 614, 617 n.3 (1973)); accord *Defenders*, 504 U.S. at 578. Because an "injury in fact" is itself an "invasion of a legally protected interest," *Defenders*, 504 U.S. at 560, and because such an injury is "by definition no more than the violation of a legal right," it follows that "legal rights can be created by the legislature," and that their violation will constitute judicially cognizable injury to the individual to whom the legislature has granted the "*personal*[]" right. Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 Suffolk U. L. Rev. 881, 885 (1983) (concluding that a "characteristic of standing" is "that its existence in a given case is largely within the control of Congress"). Accordingly, "Congress has the power to define injuries * * * that will give rise to a case or controversy where none existed before." *Massachusetts* v. *EPA*, 549 U.S. 497, 516 (2007) (quoting *Defenders*, 504 U.S. at 580 (Kennedy, J., concurring in part and concurring in the judgment)).

Congress does not have *unlimited* power to define the class of plaintiffs who may sue in federal court to redress an alleged violation of law. "[T]he requirement of injury in fact is a hard floor of Article III jurisdiction that cannot be removed by statute." *Summers* v. *Earth Island Inst.*, 555 U.S. 488, 497 (2009). "[T]he public interest in proper administration of the laws," for instance, cannot "be converted into an

individual right by a statute that denominates it as such, and that permits all citizens (or, for that matter, a subclass of citizens who suffer no distinctive concrete harm) to sue." *Defenders*, 504 U.S. at 576-577. But Congress can grant individuals new statutory rights, and can authorize persons whose own rights are violated to obtain relief in court, even where the proscribed conduct has not previously been viewed as an actionable wrong.

That principle applies here. FCRA requires a CRA to "follow reasonable procedures to assure maximum possible accuracy of the information concerning [an] individual" when it "prepares a consumer report" about him. 15 U.S.C. 1681e(b). FCRA defines "consumer report" to mean a CRA's actual "communication" of information in certain categories that relates to a consumer and is either used or expected to be used or collected for specified purposes. 15 U.S.C. 1681a(d)(1); see p. 2, *supra*; see also 15 U.S.C. 1681b(a) (identifying the circumstances in which a CRA may disseminate a consumer report). FCRA thus grants an individual consumer a statutory entitlement—a legally protected interest—to be free from a CRA's *actual* reporting of inaccurate information about him to others when the CRA fails to employ "reasonable procedures" to assure the "maximum possible accuracy" of the information. A CRA's violation of that right subjects the consumer involved to a "concrete" and "particularized" injury, even if no other consequential harm results.

2. This Court has repeatedly upheld plaintiffs' Article III standing in similar contexts in which plaintiffs sought judicial relief from allegedly unlawful conduct

that invaded their legally recognized interests, even when no further consequential harm was identified.

In *Associated General Contractors*, the Court held that an association, whose members included non-minority contractors who regularly bid on contracts offered by the City of Jacksonville, had Article III standing to challenge the city's minority set-aside ordinance. 508 U.S. at 659, 664-666. The Court held that the association need not allege that any of its members ultimately would have won a contract in the absence of the ordinance. Rather, the Court held, an Article III "injury in fact" is established by "an invasion of a legally protected interest," and the members' "'injury in fact' [wa]s the inability to compete on an equal footing in the bidding process, not the loss of a contract." *Id.* at 663, 666; see *Adarand Constructors, Inc.* v. *Pena*, 515 U.S. 200, 211 (1995) (similar where contractor failed to show that it would ever be "the low bidder").

In *Havens Realty Corp.* v. *Coleman*, 455 U.S. 363, 374 (1982), the Court held that an "injury to [an individual's] statutorily created right to truthful housing information" was sufficient without more to establish Article III standing. The Court considered the standing of two "testers" who had posed as prospective renters to document unlawful housing practices. *Id.* at 373. The Court held that the tester who had been falsely told that particular housing was unavailable had Article III standing to sue, even though she may have "fully expected that [she] would receive false information" and had no "intention of buying or renting a home." *Id.* at 374. The Court explained that the Fair Housing Act, 42 U.S.C. 3601 *et seq.*, "establishes an enforceable right to truthful information"; that the

"injury required by Art. III may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing'"; and that such an injury had been shown because the defendant had violated the tester's "legal right to truthful information." 455 U.S. at 373 (quoting *Warth*, 422 U.S. at 500). The Court further held that, because the second tester-plaintiff had received truthful information, he had alleged "no injury to his statutory right to accurate information" and therefore lacked Article III standing. *Id.* at 374-375.[2]

Other decisions follow the same course. The Court has held that plaintiffs seeking records under the Federal Advisory Committee Act (FACA), 5 U.S.C. App. 1, or the Freedom of Information Act (FOIA), 5 U.S.C. 552, can establish Article III standing simply by showing "that they sought and were denied specific agency records." *Public Citizen* v. *Department of Justice*, 491 U.S. 440, 449 (1989). In those contexts, "a plaintiff suffers an 'injury in fact' when the plaintiff fails to obtain information which must be publicly disclosed pursuant to a statute." *FEC* v. *Akins*, 524 U.S. 11, 21 (1998) (discussing *Public Citizen*). The same holds true for claims seeking certain disclosures under the Federal Election Campaign Act of 1971 (FECA), 2 U.S.C. 431 *et seq*. In that context, the

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[2] Petitioner contends (Br. 40-42) that the Court in *Havens Realty* found Article III requirements to be satisfied because the tester "was the direct victim of [racial] discrimination." Br. 41. That assertion is inconsistent with the Court's *ratio decidendi*, which rested on the invasion of a statutory right to accurate information, even though no other adverse consequence had been identified. The Court specifically rejected the tester's asserted consequential injuries as bases for standing. 455 U.S. at 376-377.

Court has held that plaintiffs establish an "injury in fact" by showing an "inability to obtain information * * * that, on [their] view of the law, the statute requires [to be] ma[de] public." *Akins*, 524 U.S. at 11, 21.[3]

In *Zivotofsky* v. *Secretary of State*, 444 F.3d 614, 617-619 (2006), the D.C. Circuit reversed the district court by holding that Zivotofsky, a U.S. citizen born in Jerusalem, had Article III standing to challenge the government's refusal to identify "Israel" (rather than "Jerusalem") as his place of birth on his passport. Although Zivotofsky alleged no difficulty using his passport and was too young to allege any nonspeculative psychological or other harm, *id.* at 617 & n.3, the D.C. Circuit concluded that federal courts had Article III power to adjudicate his claim. The court explained that Congress had granted Zivotofsky a statutory right to have "Israel" listed on his passport, and that this Court's decisions had repeatedly based standing on the invasion of a plaintiff's own statutory right, "even though no injury would exist without the statute." *Id.* at 617-619 (citation omitted). When this Court considered *Zivotofsky*, both of its decisions noted the divergent standing holdings of the courts below. Perhaps because the proper resolution of the standing issue seemed clear, the Court did not specifically address its Article III jurisdiction before holding

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[3] Petitioner contends (Br. 42-44) that standing to bring FOIA, FACA, and FECA actions rests on the "*effects* on the plaintiffs of the denial of access." Although some plaintiffs whose requests for information are denied may suffer further consequential harm as a result, the Court has treated the government's "deni[al of their] requests for information" as the "distinct injury [that] provide[s] standing." *Public Citizen*, 491 U.S. at 449.

that "Zivotofsky's claim presents issues the Judiciary is competent to resolve" under the political-question doctrine, *Zivotofsky* v. *Clinton*, 132 S. Ct. 1421, 1426, 1430 (2012), and resolving that claim on the merits, *Zivotofsky* v. *Kerry*, 135 S. Ct. 2076, 2083, 2096 (2015).

B. The Court's Development Of The Injury-In-Fact Requirement Confirms That Standing May Rest On The Invasion Of A Plaintiff's "Legally Protected Interest"

The decisions resting Article III standing on the invasion of a plaintiff's legally protected interest reflect the doctrinal development of the "injury in fact" requirement, which *expanded* the categories of judicially cognizable injuries beyond those attributable to the violation of a legal right.

The Court first articulated the injury-in-fact requirement in *Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U.S. 150, 152 (1970) (*ADPSO*), and *ADPSO*'s companion case, *Barlow* v. *Collins*, 397 U.S. 159, 163 (1970). Before those decisions, standing to challenge governmental action had been limited to plaintiffs who could establish a "legal right—one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege"—that was "invaded" by the challenged action. See, *e.g.*, *Tennessee Elec. Power Co.* v. *TVA*, 306 U.S. 118, 137-138 (1939). By 1970, however, the Court concluded that the "trend [wa]s toward enlargement of the class of people who may protest administrative action." *ADPSO*, 397 U.S. at 154. The Court explained that the standing inquiry should turn on whether "the challenged action has caused [the plaintiff] injury in fact, economic or otherwise." *Id.* at 152. When the Court next addressed the "injury in fact" require-

ment, it confirmed that *ADPSO* and *Barlow* had expanded the scope of standing to seek judicial review of agency action from the Court's earlier, exclusive focus on the existence of a "legal interest" or "legal wrong," by "h[o]ld[ing] more broadly" that judicial review is available when plaintiffs show that a "challenged action had caused them 'injury in fact.'" *Sierra Club* v. *Morton*, 405 U.S. 727, 733 (1972); see *Schlesinger*, 418 U.S. at 218 (*ADPSO* announced a "broaden[ing]" of "the categories of judicially cognizable injury.").

The plaintiff in *Sierra Club* sought to challenge the United States Forest Service's decision to open certain areas within a National Forest to recreational development. 405 U.S. at 728-730. The plaintiff alleged that the planned development would adversely affect the "aesthetics and ecology of the area." *Id.* at 734. The Court held that harm to those interests would suffice to establish the plaintiff's "injury in fact" if, but only if, the plaintiff's members actually used the affected area and therefore would be "among the injured." *Id.* at 734-735. The Court did not suggest that persons who used the area had any *legal* (*e.g.*, property) interest in the land or any *legal* right, not shared by the public generally, to control or influence the area's development. Rather, the Court found it sufficient that such persons would have a distinct *practical* "stake in the outcome." *Id.* at 740.

That expanded conception of judicially cognizable injury, however, did not eliminate the plaintiff's option of establishing Article III standing by demonstrating an invasion of his own legally protected interests. The Court in *Warth* explained that, "[a]lthough standing in no way depends on the merits of the plaintiff's contention that particular conduct is illegal, it

often turns on the nature and source of the claim asserted" because the "injury required by Art. III may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing.'" 422 U.S. at 500 (quoting *Linda R.S.*, 410 U.S. at 617 n.3) (internal citation omitted). Such an invasion of a legally protected right provides a constitutionally sufficient basis for invoking the jurisdiction of an Article III court "even where the plaintiff would have suffered no judicially cognizable injury in the absence of statute." *Id.* at 514.

Since that time, the Court has reiterated that the term "'injury in fact'" can "mean an invasion of a legally protected interest." *Associated Gen. Contractors*, 508 U.S. at 663 (citation omitted); accord, *e.g.*, *Arizona State Legislature* v. *Arizona Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2663 (2015); *United States* v. *Windsor*, 133 S. Ct. 2675, 2685 (2013); *Arizona Christian Sch. Tuition Org.* v. *Winn*, 131 S. Ct. 1436, 1442 (2011); *Defenders*, 504 U.S. at 560. To be sure, the "invasion" will constitute "injury in fact" only if it is actual and concrete; an abstract disagreement as to the scope of the plaintiff's legal rights is insufficient to support Article III jurisdiction. That requirement is satisfied here, however, since respondent has alleged that petitioner's failure to exercise due care resulted in the actual dissemination of inaccurate personal information about respondent. Petitioner identifies no decision of this Court holding that a plaintiff lacked Article III standing to seek relief for an actual violation of his *own* legal rights.

C. Common-Law Courts Have Long Adjudicated Claims Alleging Violations Of A Plaintiff's Legal Rights, Even When The Plaintiff Suffered No Further Consequential Injury

Historical practice "is particularly relevant to the constitutional standing inquiry since * * * 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.'" *Vermont Agency of Natural Res.* v. *United States ex rel. Stevens*, 529 U.S. 765, 774 (2000) (quoting *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 102 (1998)). Courts have long entertained actions for damages based on alleged violations of personal rights, even when a plaintiff shows no further consequential injury beyond the invasion of his own legally protected interest. In tort law, for instance, an "injury" is understood to mean an "invasion of a legally protected interest." 1 Restatement (First) of Torts § 7 cmt. a, at 16-17 (1934). And although "[t]he most usual form of injury is tangible harm," a plaintiff can have an "injury" sufficient to "maintain an action" even when "no harm is done" beyond the invasion of the protected interest. *Id.* at 17; see 4 *id.* § 902 cmt. a, at 539 (1939).

1. That principle has deep roots in the Anglo-American legal tradition. "[E]very American statesman at the time the Constitution was adopted" was "undoubtedly familiar" with the well-known trespass decision of *Entick* v. *Carrington*, which stated the established rule that "'no man can set his foot upon his neighbour's close without his leave; [and] if he does he is a trespasser, though he does no damage at all.'" *United States* v. *Jones*, 132 S. Ct. 945, 949 (2012)

(quoting *Entick* v. *Carrington*, (1765) 95 Eng. Rep. 807, 817 (K.B.)) (citations and some internal quotation marks omitted). Blackstone similarly explained that "the law of England * * * has treated every entry upon another's lands * * * as an injury or wrong, for satisfaction of which an action in trespass will lie," and has provided a "general damage" award even "if no other special loss can be assigned." 3 William Blackstone, *Commentaries on the Laws of England* 209-210 (1768) (*Blackstone's Commentaries*). The "wrong for which a remedy is given" in trespass is thus the invasion of the owner's protected "interest in excluding others from the land," which entitles him to at least nominal damages. 1 Restatement (First) of Torts § 163 cmt. d, at 382. The owner may recover for the invasion of that right even if he tangibly "benefits from the trespass, as where the trespasser tears down a worthless building or prepares a field for cultivation." *Ibid.*; accord 1 Restatement (Second) of Torts § 7 cmt. a, at 13 (1965).

The same holds true in contract. "A breach of contract always creates a right of action," and when "no harm was caused by the breach * * * judgment will be given for nominal damages." 1 Restatement (First) of Contracts § 328 & cmt. a, at 502-503 (1932); see, *e.g.*, *Wilcox* v. *Executors of Plummer*, 29 U.S. (4 Pet.) 172, 181-182 (1830); *Marzetti* v. *Williams*, (1830) 109 Eng. Rep. 842, 845 (K.B.) (Lord Tenterden, C.J.) (A plaintiff "is entitled to recover nominal damages" for any breach of contract even "though he may not have sustained a damage in fact" and has not "prove[n] any actual damage at the trial.").

It thus has long been understood that "the right alone was essential" to sustain various common-law

actions, and that "infringements of right" could be asserted without a claim of consequential harm because "damage to the right [was] sufficient to warrant the owner in asserting the right against the party infringing it." *Mayor of London* v. *Mayor of Lynn*, (1796) 126 Eng. Rep. 1026, 1041 (H.L.) (Eyre, C.J.); see J.G. Sutherland, *A Treatise on the Law of Damages* § 9, at 31, 34 (4th ed. 1916). Early in the Nation's history, Chief Justice Marshall echoed Blackstone's description of this colonial-era principle: "'[I]t is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded.'" *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) (quoting 3 *Blackstone's Commentaries* 23).[4] Justice Story likewise explained that one of the "elements of the common law" was that it "tolerates no farther inquiry than whether there has been the violation of a right" because "the party injured is entitled to maintain his action for nominal damages, in vindication of his right." *Webb* v. *Portland Mfg. Co.*, 29 F. Cas. 506, 507-508 (C.C.D. Me. 1838) (No. 17,322) (action for harmless diversion of water); see *Whittemore* v. *Cutter*, 29 F. Cas. 1120, 1121 (C.C.D. Mass. 1813) (No. 17,600) (Story, J.) (holding in patent suit for the "mak-

[4] That general rule is subject to exceptions. For instance, a plaintiff who has Article III standing nevertheless will lack a judicial remedy against the United States unless Congress has enacted a statutory waiver of sovereign immunity. See, *e.g.*, *Department of the Army* v. *Blue Fox, Inc.*, 525 U.S. 255, 260-261 (1999). Congress is also free, when creating new statutory rights, to limit private judicial enforcement to plaintiffs who have suffered some specified type or amount of consequential harm. Even in those contexts, however, the determination whether particular suits can go forward is subject to the control of Congress.

ing of a[n infringing] machine" that "[e]very violation of a right imports some damage, and if none other be proved, the law allows a nominal damage").

Common-law courts thus have traditionally awarded "nominal" damages against "a wrongdoer who has caused no harm" if he "has invaded an interest of the plaintiff protected against non-harmful conduct." 4 Restatement (First) of Torts § 907 cmts. a & b, at 552; accord 4 Restatement (Second) of Torts § 907 cmt. b, at 463 (1979). Such nominal awards have long been deemed appropriate to "vindicate[] deprivations of certain 'absolute' rights that are not shown to have caused actual injury." *Carey* v. *Piphus*, 435 U.S. 247, 266 (1978); see *Farrar* v. *Hobby*, 506 U.S. 103, 112 (1992); Dan B. Dobbs, *Handbook on the Law of Remedies* § 3.8, at 191-192 (1st ed. 1973) (Nominal damages are available to "vindicate and judicially establish a right * * * even if no harm is done.").

2. Petitioner identifies no sound reason to doubt that plaintiffs at common law could recover (at least nominal) damages to vindicate invasions of various legal rights. Although petitioner asserts (Br. 20-21) that a "violation of a legal right" without some other "concrete harm" was never sufficient to support a cause of action "[i]n the English legal tradition," the decisions on which petitioner relies show only that *certain* actions required a separate showing of harm.

Petitioner notes (Br. 23), for instance, that a commoner—*i.e.*, an individual with a right to pasture livestock on the commons—was required to prove both "*injuria* (legal injury) and *damnum* (damage)" in a damages action for "overgrazing of the common." But because a commoner's right was a non-exclusive one, the common law treated it differently than a

landowner's absolute right to exclude others, the bare invasion of which supported an action of trespass to land (*trespass quare clausum fregit*). See pp. 19-20, *supra*. Petitioner's own citations indicate as much. See, *e.g.*, *Robert Marys's Case*, (1613) 77 Eng. Rep. 895, 898-899 (K.B.) (concluding that a commoner will not have an action "if the trespass be so small, that he has not any loss" from another's overfeeding on the common, but that "the lord of the soil shall have an action for trespass" because the act of entry is "an immediate trespass to him").

Petitioner similarly attempts (Br. 26) to distinguish the nominal damages awarded for any breach of contract and the disgorgement relief granted for breaches of trust (which require no showing of harm) on the ground that such suits provide a remedy only because they involve the "loss of a bargain or breach of trust." But if a particular breach of one's right to the fulfillment of a promise or trust obligation results in no other adverse real-world consequences, it is materially indistinguishable from the violation of one's own statutory right to (for example) avoid dissemination of inaccurate information about oneself. In each context, the cognizable harm is a concrete deprivation of a legally protected right specific to the plaintiff. And because common-law courts traditionally adjudicated various forms of damages actions to redress an invasion of a plaintiff's own rights even when the invasion resulted in no other real-world harm, the Framers would have expected the Article III power of federal courts to extend to similar actions to vindicate personal rights later established by federal law.

D. Because Respondent's Suit Alleges A Violation Of His Own Statutory Rights, And Because His Allegation That Petitioner Disseminated False Information About Him Is Closely Analogous To A Common-Law Defamation Claim, Adjudicating The Suit Would Accord With Traditional Understandings Of The Judicial Role

1. The common-law authorities discussed above establish only that, in various circumstances, a plaintiff could sue for violations of his *own* legal rights, without alleging or proving further consequential harm arising from the violation. Those authorities do not suggest, for example, that every member of the public could sue to complain of a trespass onto a stranger's land. That longstanding conception of the judicial role implies meaningful limits on Congress's power to authorize private suits to redress statutory violations.

For purposes of the established rule that private plaintiffs can seek judicial redress for violations of their own legal rights, Congress could not simply declare that every member of the public has a judicially enforceable "right" to general compliance with a particular statutory command, since "the public interest in proper administration of the laws" cannot "be converted into an individual right by a statute that denominates it as such." *Defenders*, 504 U.S. at 576. Congress likewise could not confer a right to sue on an arbitrarily selected "subclass of citizens who suffer no distinctive concrete harm" apart from the harm shared by the general population. *Id.* at 577. Thus, Congress could not constitutionally have authorized respondent to sue for an alleged FCRA violation that had no concrete and particularized connection to him. But where Congress determines that a specified class

of persons should be regarded as victims of a particular type of statutory violation, that legislative determination should be given substantial weight in the Article III analysis.

FCRA's authorization of private suits is consistent with those principles, both in general and on the facts of this case. By providing that "[a]ny person who willfully fails to comply with any requirement imposed under [FCRA] with respect to any consumer is liable to *that consumer*," 15 U.S.C. 1681n(a) (emphasis added), the statute requires a concrete and particularized link between the plaintiff and the alleged violation. And in this case, respondent seeks redress for the alleged written dissemination of false information about respondent himself. Although Congress has ample power to create (and authorize private judicial enforcement of) new statutory rights that have no common-law analog, Congress's power to act is particularly clear when such an analog exists. Allowing respondent's suit to go forward, even without an allegation of further consequential harm resulting from the disclosures, accords with traditional judicial practices in adjudicating common-law actions for written defamation.

2. By the early 1700s, common-law courts had developed a firm distinction between written defamation (libel) and oral defamation (slander), and had sustained actions for libelous statements even though the same "words, if merely spoken[,] would not [have been] of themselves sufficient to support an action." *Thorley* v. *Kerry*, (1812) 128 Eng. Rep. 367, 371 (Exch. Chamber); see W.S. Holdsworth, *Defamation in the Sixteenth and Seventeenth Centuries*, 41 L.Q. Rev. 13, 16-18 (1925). Written defamation was actionable per

se without "evidence of actual loss" because "injury [wa]s presumed from the fact of publication." *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 349 (1974). But courts permitted plaintiffs to recover even if harm could not be presumed, as where the defendant showed that "no loss" or any reputational harm had "actually occurred." *Ibid.*; see 3 Restatement (Second) of Torts § 621 caveat, at 319 (1977) (noting the "traditional common-law rule allowing recovery [for defamation] in the absence of proof of actual harm"); *id.* § 620 & cmt. b, at 317-318 (all written and certain oral defamations are actionable for at least nominal damages). Courts viewed that recovery as "perform-[ing] a vindicatory function," 3 Restatement (First) of Torts § 569 cmt. b, at 166 (1938), and as "a way of recognizing" that such publications "in themselves really are 'damage' or harm," 2 Dan B. Dobbs, *Law of Remedies* § 7.3(2), at 308 (2d ed. 1993). That history is "well nigh conclusive" proof that respondent's claim arising from the publication of false information about him satisfies Article III's requirements. See *Vermont Agency*, 529 U.S. at 777.

3. Petitioner argues (Br. 49-52) that defamation is different because, although common-law courts would award damages without any proof that a defamatory statement diminished the plaintiff's reputation or produced other real-world harms, such damages for defamation per se were available only for certain categories of statements. In petitioner's view, because the false information about respondent that petitioner disseminated is not defamation per se, the common law does not support Article III jurisdiction in this case. That is incorrect. Neither Congress's power to establish new rights nor the jurisdiction of the federal

courts is limited to the specific categories of wrongs that were actionable at common law.

Even in the absence of legislative intervention, common-law courts have long exercised authority to address new problems that arise over time. "The entire history of the development of Tort law," for instance, "shows a continuous tendency to recognize as worthy of legal protection interests which previously were not protected at all." 1 Restatement (First) of Torts § 1 cmt. e, at 4. That expansion of legal rights "meet[s] the demands of society" in the face of "[p]olitical, social, and economic changes." Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193, 193 (1890).

"[B]oth the common law and the literal understandings of privacy," for instance, are now understood to "encompass the individual's control of information concerning his or her person." *Department of Justice* v. *Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 763 (1989); *Department of State* v. *Ray*, 502 U.S. 164, 175 (1991) (noting the "privacy interest" of named individuals in avoiding public disclosure of their "personal information regarding marital and employment status"). That interest is particularly salient given the modern proliferation of large databases and the ease and rapidity of Internet transmissions, since "[t]he capacity of technology to find and publish personal information * * * presents serious and unresolved issues with respect to personal privacy and the dignity it seeks to secure." *Sorrell* v. *IMS Health Inc.*, 131 S. Ct. 2653, 2672 (2011).

Article III cannot plausibly be read to preclude Congress from exercising the same authority to establish new rights, and to provide effective remedies for

their violation, that common-law courts have traditionally exercised. Congress possesses constitutional authority to "define new legal rights" in new contexts, *Vermont Agency*, 529 U.S. at 773, and thereby to "broaden[]" the "categories of injury that may be alleged in support of standing," *Defenders*, 504 U.S. at 578 (citation omitted). Congress thus possesses "power to define injuries * * * that will give rise to a case or controversy where none existed before," and to establish "new rights of action that do not have clear analogs in our common-law tradition." *Id.* at 580 (Kennedy, J., concurring in part and concurring in the judgment).

In this case, moreover, any deviation from traditional common-law principles is extremely slight. FCRA's authorization of suits for a CRA's publication of inaccurate information in a consumer report is, at the very most, a modest legislative expansion of the circumstances under which the dissemination of inaccurate personal information will be treated as an actionable wrong even without proof of further consequential harm. In this regard, it bears emphasis that CRAs generally are authorized to furnish consumer reports only in specified circumstances where the recipient can be expected to use the report as a basis for some concrete (and often commercial) decision. See 15 U.S.C. 1681b(a)(1)-(6). Congress could reasonably conclude that the inclusion of false information in a report of that character should be treated as a legally cognizable injury to the individual consumer involved, even though the precise nature and extent of any later consequential harms may be difficult to verify in individual cases.

E. Petitioner's Challenges To Respondent's Article III Standing Are Without Merit

1. Petitioner argues (Br. 9) that Article III "requires real-world harm, not just a bare statutory violation." Respondent, however, alleges more than a "bare statutory violation." He alleges that his *own* FCRA rights were violated through the public dissemination of false information about himself. Analogous allegations have long been treated as judicially cognizable, whether or not the plaintiff alleges further consequential injury resulting from the disclosure. See pp. 19-22, 25-26, *supra*.

Under this Court's decisions, a fair-housing "tester" who alleges no harm other than the deprivation of her statutory right to truthful information can bring suit to redress that violation. See pp. 13-14, *supra*. A FOIA requestor who seeks and is denied agency records may bring suit without alleging any harm beyond the denial of his request. See p. 14, *supra*. The principles behind such decisions apply equally in other contexts involving individuals' statutory rights. Allowing respondent to seek redress for unlawful dissemination of false information about himself therefore is consistent with the established understanding that the "province of the court * * * is, solely, to decide on the rights of individuals." *Defenders*, 504 U.S. at 576 (quoting *Marbury*, 5 U.S. (1 Cranch) at 170).

2. Contrary to petitioner's contention (Br. 28-31, 39), treating suits like this one as judicially cognizable would not permit Congress to transfer Executive power to private actors. A plaintiff who seeks relief for a violation of his *own* statutory rights, involving conduct that is directly and substantially connected to him, does not perform an executive function. Such

private suits are the traditional means by which individuals enforce their own legal rights.

3. Petitioner suggests (Br. 32-35) that the Court's Article III analysis should account for respondent's assertion of putative class claims. But the only question presented in this Court concerns a *single* individual's injury-in-fact. Pet. i. The Court's resolution of that question will control future individual actions, including suits seeking only equitable relief to halt ongoing, unlawful conduct. See *Summers*, 555 U.S. at 493 ("To seek injunctive relief, a plaintiff must show that he is under threat of suffering [an] 'injury in fact.'"). Under petitioner's theory, Congress cannot authorize federal courts to enjoin the continued dissemination for commercial purposes of demonstrably inaccurate personal information about a plaintiff unless the plaintiff establishes that further consequential injury is imminent. Such a dramatic restriction of the federal courts' equitable powers is unsupported by this Court's precedents.

If respondent's allegations are otherwise sufficient to establish a "case" or "controversy" in light of the remedial scheme that Congress has created, neither the possibility of class treatment, nor the potential magnitude of the recovery that a successful class action might produce, bears on the Judiciary's Article III power to adjudicate respondent's suit. If a class is certified, petitioner will be free to litigate "whether principles of due process and other doctrines that protect against excessive awards" should limit the amount of aggregate statutory damages that a class

could recover. *Maracich* v. *Spears*, 133 S. Ct. 2191, 2209 (2013).[5]

F. The Court's Article III Analysis Should Focus On Respondent's Principal Claim under 15 U.S.C. 1681e(b)

1. The court of appeals focused on respondent's claim that petitioner had violated Section 1681e(b) by "publishing inaccurate personal information about him[]" in its consumer report. Pet. App. 1a. The court correctly held that respondent had standing to pursue that claim. In addition to the claim that the court below directly addressed, however, respondent has asserted claims based on petitioner's alleged failure to give persons that regularly furnish it information notice of their responsibilities (15 U.S.C. 1681e(d)(1)(A)); to give required notices to, and obtain required certifications from, the persons to whom petitioner provides consumer reports (15 U.S.C. 1681b(b)(1), 1681e(d)(1)(B)); and to post a toll-free number on its website for consumers seeking a free annual report (12 C.F.R. 1022.137(a)(1)). See J.A. 20-23. The court of appeals did not address, on a claim-by-claim basis, whether respondent had standing to bring those claims as well.

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[5] Petitioner also argues (Br. 53-56) that the Court should interpret FCRA's private right of action for certain willful FCRA violations, 15 U.S.C. 1681n(a), as requiring proof of consequential harm. That argument is not fairly encompassed within the question presented, however, and petitioner's statutory argument is in any event implausible. The relevant provision states that "[a]ny person who willfully fails to comply with any requirement imposed under [FCRA] with respect to any consumer is liable to that consumer" for actual or statutory damages. *Ibid.* Nothing in that language suggests that the plaintiff consumer must allege or prove further consequential harm.

This case reached the court below, however, on an appeal from the district court's determination that respondent's failure adequately to allege consequential harm from petitioner's inaccurate disclosures required dismissal of respondent's complaint *in its entirety*. See Pet. App. 23a-24a. In litigating the question whether that disposition was appropriate, the parties did not urge the court of appeals to analyze the various claims separately. Even in this Court, petitioner limits its discussion of respondent's other FCRA claims to a three-sentence footnote and a single-sentence paragraph. See Br. 40 n.7, 50. If this Court affirms the court of appeals' determination that respondent has standing to pursue his false-information claim, the courts below can analyze on remand whether respondent satisfies Article III requirements with respect to his remaining allegations. Cf. *M&G Polymers USA, LLC* v. *Tackett*, 135 S. Ct. 926, 937 (2015) ("This Court is one of final review, not of first view.") (citation omitted).

2. As an adjunct to the creation of substantive statutory rights, Congress often authorizes private suits to be filed by classes of persons whom the proscribed conduct has a natural tendency to injure. Many such laws, however, do not require proof that the feared consequential harms have actually materialized in a particular case, but rather allow awards of statutory damages to plaintiffs who establish a deprivation of the statutory right itself but do not prove any further consequential injury. For example, federal copyright law has long authorized awards of statutory damages to copyright holders in the absence of proof of any harm other than infringement. See 17 U.S.C. 504(a) and (c); *Feltner* v. *Columbia Pictures Television, Inc.*, 523 U.S. 340, 351

(1998) (discussing Copyright Act of 1790, ch. 15, 1 Stat. 124, and its predecessors).[6]

Petitioner's contention that consequential harm must be alleged and proved in each suit represents a frontal assault on that longstanding mode of enforcement. To be sure, Article III places meaningful limits on Congress's ability to treat particular classes of persons as the victims of particular statutory violations. See pp. 11-12, *supra*. Thus, although Congress has broad authority to enact statutory-damages provisions like those described above, the constitutionality of such provisions cannot appropriately be determined through a per se rule either for or against their validity. Congress did not venture close to the constitu-

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[6] See also, *e.g.*, 15 U.S.C. 1117(c) (statutory damages for use of counterfeit marks); 15 U.S.C. 1679g(a)(1)(B) (statutory refund of amount paid to organization that violates Credit Repair Organizations Act); 15 U.S.C. 1693m(a)(2) (statutory damages for failing to comply with any provision of Electronic Fund Transfer Act with respect to a consumer); 17 U.S.C. 911(c) (statutory damages for infringement of semiconductor chip mask work); 18 U.S.C. 2710(b) and (c)(2)(A) (liquidated damages for knowing disclosure of personally identifiable information by videotape service provider); 18 U.S.C. 2724(a) and (b)(1) (statutory damages for knowingly obtaining, disclosing, or using personal information from a motor vehicle record for purposes not permitted by statute); 29 U.S.C. 1821(a) and (b), 1831(a) and (b), 1843, 1854(c)(1) (statutory damages for intentional violations of Migrant and Seasonal Agricultural Worker Protection Act, including by failing to provide written disclosures to a migrant or seasonal agricultural worker at the time of his recruitment and by failing to display posters specifying workers' rights); 47 U.S.C. 227(b)(1)(A)(iii), (B), and (3)(B) (statutory damages for violations of the Telephone Consumer Protection Act of 1991, including by making an automatically dialed or prerecorded call to a cell phone or making a prerecorded call to a residence without consent); 47 U.S.C. 605(a) and (e)(3)(C)(i)(II) (statutory damages for unlawful disclosure of wire or radio communication).

tional line, however, in providing a statutory-damages remedy for the public dissemination of inaccurate personal information about the plaintiff himself. It was clearly reasonable for Congress to treat respondent as the victim of that violation, and analogous wrongs have long been redressable at common law without proof of further consequential harm.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General
MALCOLM L. STEWART
Deputy Solicitor General
ANTHONY A. YANG
Assistant to the Solicitor General

MEREDITH FUCHS
General Counsel
TO-QUYEN TRUONG
Deputy General Counsel
JOHN R. COLEMAN
Assistant General Counsel
NANDAN M. JOSHI
KRISTIN BATEMAN
Counsel
Consumer Financial Protection Bureau

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