16 No. 1524

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In The
Supreme Court of the United States

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

Petitioner,

v.

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

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a so-called "informational injury" satisfies the Article III standing requirement of real-world harm articulated in *Spokeo* v. *Robins*, 136 S. Ct. 1540 (2016), where plaintiff alleges at most a bare procedural violation of the Fair Credit Reporting Act, 15 U.S.C. § 1681b.

2. Whether a bare procedural violation of a statute may be deemed "willful"—*i.e.*, knowing and reckless—under *Safeco Insurance Co. of America* v. *Burr*, 551 U.S. 47 (2007), where no risk of harm resulted from the alleged violation.

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

The parties to the proceedings are those listed on the cover. PreCheck, Inc., a Texas Corporation, was previously involved with the case, but Petitioner believes that PreCheck no longer has an interest in the outcome of this petition. PreCheck and Sarmad Syed reached a settlement during the district court proceedings.

Petitioner M-I, LLC hereby certifies, through its undersigned attorneys of record, that M-I, LLC is a wholly owned subsidiary of Schlumberger Limited, a publicly held corporation. No publicly held entity owns 10 percent or more of Schlumberger Limited's stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner M-I, LLC, respectfully submits this petition for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Ninth Circuit.

OPINIONS AND ORDERS BELOW

The amended panel opinion and order of the court of appeals denying both rehearing *en banc* and panel rehearing (App., *infra* 1-33) were filed together, and are reported at 853 F.3d 492 (9th Cir. 2017). The original panel opinion (App., *infra* 34-65) was withdrawn but was reported at 846 F.3d 1034 (9th Cir. 2017). The memorandum and order of the district court (App., *infra* 69-85) is unreported and available at 2016 WL 5426862 (E.D. Cal.). The district court's original memorandum and order (App., *infra* 86-95) is unreported and available at 2014 WL 4344746 (E.D. Cal.).

STATEMENT OF JURISDICTION

The court of appeals filed its order denying rehearing *en banc* on March 20, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Fair Credit Reporting Act (FCRA) states:

> Except as provided in subparagraph (B), a person may not procure a consumer report, or cause a consumer report to be procured, for employment purposes with respect to any consumer, unless—
>
> (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 (which authorization may be made on the document referred to in clause (i)) the procurement of the report by that person.

15 U.S.C. § 1681b(b)(2)(A).

It further provides:

> Any person who willfully fails to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer in an amount equal to the sum of—

> (1)
>
> (A) any actual damages sustained by the consumer as a result of the failure or damages of not less than $100 and not more than $1,000;
>
> * * *
>
> (2) such amount of punitive damages as the court may allow; and
>
> (3) in the case of any successful action to enforce any liability under this section, the costs of the action together with reasonable attorney's fees as determined by the court.

15 U.S.C. § 1681n(a).

STATEMENT

In *Spokeo* v. *Robins*, 136 S. Ct. 1540, 1549 (2016), this Court made clear that "Article III standing requires a concrete injury even in the context of a statutory violation." Without a real-world harm flowing directly from the alleged violation, it is a mere technical violation incapable of supporting Article III jurisdiction. *Ibid.*

In this case, the Ninth Circuit directly contravened *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. The Ninth Circuit reached this conclusion

based on a theory of "informational injury" that other circuits have explicitly rejected. See, e.g., *Dreher* v. *Experian Info. Sols., Inc.*, 856 F.3d 337, 345 (4th Cir. 2017) (holding that standing was lacking where plaintiff's claimed injury was solely the denial of "specific information to which [he] w[as] entitled under the [Fair Credit Reporting Act]"). This Court's guidance is needed to resolve the conflict and dispel the confusion about whether so-called "informational injuries" arising from bare procedural violations are sufficient to satisfy *Spokeo*'s real-world-harm requirement.

This Court's review is warranted for the additional reason that the Ninth Circuit's decision conflicts with this Court's precedent in *Safeco Insurance Co. of America* v. *Burr*, 551 U.S. 47 (2007), which articulated the legal standard for a "willful" violation of a statute—*i.e.*, a "reckless disregard of statutory duty." *Id.* at 56-57. To rise to the level of willfulness, a defendant's actions must be objectively unreasonable and present a "*high risk of harm*, objectively assessed." *Id.* at 69 (emphasis added). Here, the absence of *any* risk of harm—much less the *high* risk required by *Safeco*—should have precluded any determination of willfulness. The Ninth Circuit's contrary conclusion cannot be squared with *Safeco* and warrants this Court's review for that reason, too.

1. Congress passed the Fair Credit Reporting Act in 1970 to ensure "fair and accurate credit reporting, promote efficiency in the banking system, and protect consumer privacy." *Safeco*, 551 U.S. at 52. The Act expressly allows the use of credit reports for employment purposes, 15 U.S.C. § 1681a(d), but "imposes a host of requirements concerning the creation and use of consumer reports." *Spokeo*, 136 S. Ct. at 1545.

As relevant here, the Act prohibits an employer from seeking personal consumer information from a potential employee without first making a disclosure to the employee clearly, conspicuously, and in writing. 15 U.S.C. § 1681b(b)(2)(A)(i). The disclosure must appear "in a document that consists solely of the disclosure," and must note that the report "may be obtained for employment purposes." *Ibid.* The potential employer may only proceed if the employee then provides a written authorization to obtain the report. *Id.* § 1681b(b)(2)(A)(ii). The Act expressly permits the written authorization to be contained in the same document as the disclosure (notwithstanding the statute's requirement that the disclosure be contained in its own document). *Ibid.*

2. The Act provides a private right of action for violations of its statutory requirements. 15 U.S.C. §§ 1681n(a) & 1681*o*(a). Actual damages are available for negligent violations, *id.* § 1681*o*, while statutory damages, punitive damages, and attorney's fees and costs are available for willful violations. *Id.* § 1681n.

3. Sarmad Syed applied for and obtained a job with M-I, LLC, which supplies drilling fluid systems to oil and gas companies around the world. ER 4. As part of the application process, M-I sought Syed's permission to obtain background information, including a

credit report. *Ibid.* M-I made the request using a pre-printed form created by a consumer reporting agency, PreCheck, which provided:

> Pursuant to the requirements of the Fair Credit Reporting Act, I acknowledge that a credit report, consumer report, and/or investigative report may be made in connection with my application for employment with a prospective employer.
>
> * * *
>
> I understand that the information obtained will be used as one basis for employment or denial of employment. I hereby discharge, release, and indemnify prospective employer [*sic*], 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 by a third party without verification.

Id at 19. Syed signed the form. *Ibid.*

At some point over the two next years, Syed reviewed his personnel file and "discovered" that M-I had indeed obtained his credit report. *Id.* at 11. Syed pointed to no intervening events that prompted him to review his file, and no subsequent consequences from his discovery. Nor did he claim to be surprised that M-I followed through on its request to obtain the report pursuant to his authorization.

Nonetheless, Syed filed a class-action complaint under the Act, 15 U.S.C. § 1681, arguing that M-I was required to seek his authorization by using a form that contained solely a disclosure that M-I intended to do so, and not an accompanying release. *Id.* at 1-2. Pleading no actual damages, Syed instead sought statutory and punitive damages (and attorney's fees) for purportedly willful violations of the Act. *Id.* at 10. In support, Syed alleged that M-I's use of the form amounted to a willful violation *per se*. *Id.* at 3-11.

4. The district court dismissed Syed's claims, concluding that M-I's interpretation of the Act was sufficiently reasonable, in light of current authority, to preclude the inference that M-I violated the Act willfully. App. 57-61. The district court observed not only a "dearth of authority" in the Ninth Circuit addressing M-I's interpretation of the Act to allow combining the disclosure with a release of liability in one document, but also that numerous district courts *agreed* with M-I's interpretation allowing such a combination. *Id.* at 60. Given all that, the district court could not conclude that M-I's interpretation was "erroneous, let alone 'objectively unreasonable.'" *Id.* at 61. Hence, even if M-I violated the Act, that violation was not willful and thus Syed had no claim. *Ibid.*

5. Syed appealed to the Ninth Circuit. App. 10; 43. After briefing was complete but before oral argument, this Court handed down its decision in *Spokeo*, holding that "Article III standing requires a concrete injury even in the context of a statutory violation." 136 S. Ct. at 1549. Nonetheless, the Ninth Circuit held

that Syed had standing because, in the court's view, Congress had recognized a real-world harm in being denied the statutory right to receive a disclosure form containing only certain information, and a violation of that right necessarily established Article III standing. App. 11-12; 44-45. In the Ninth Circuit's view, a "concrete injury" is inflicted "when applicants are deprived of their ability to meaningfully authorize the credit check." *Id.* at 12; 44.

Having found standing, the Ninth Circuit moved on to the merits, holding that the Act was sufficiently clear that M-I's use of the form necessarily amounted to a willful violation, despite the lack of any federal appellate authority and several district-court decisions supporting M-I's position. *Id.* at 20-27; 52-59.

6. M-I filed a petition for rehearing *en banc* or panel rehearing, pointing out that at most the statutory right recognized by the Ninth Circuit was a mere procedural right—ancillary to the harm Congress sought to protect against—and thus failed to establish an injury under *Spokeo*. ECF No. 51, at 5-11. M-I also argued that the Ninth Circuit's holding on willfulness was erroneous and conflicted with both *Safeco* and the decisions of other courts. *Id.* at 12-16.

The Ninth Circuit denied rehearing, but amended its prior opinion by adding a section to further address M-I's argument regarding *Spokeo*. App. 1-33.[1] The

[1] The substantive additions are footnote 4, App. 11, and the majority of the paragraph that begins in the middle of App. 12. Cf. App. 44-45.

court of appeals shifted its focus to the facts alleged in the complaint, holding that those facts allowed it to "infer" that Syed had indeed suffered a concrete injury. *Id.* at 12-13. The court found that his right to information and privacy rights had been violated because Syed was evidently "confused by the inclusion of the liability waiver with the disclosure and would not have signed it had it contained a sufficiently clear disclosure." *Ibid.* Rehearing *en banc* was denied in an order stating that "[n]o further petitions for rehearing or for rehearing *en banc* will be entertained." *Id.* at 3.

REASONS FOR GRANTING THE PETITION

Congress has a role in "identifying and elevating intangible harms," but that "does not mean that a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right." *Spokeo*, 136 S. Ct. at 1549. A plaintiff still must articulate some concrete, real-world harm—as well as legal protection from that harm—to establish an "injury-in-fact," and, in turn, Article III standing. *Id.* at 1548. A concrete injury must be shown "even in the context of a statutory violation." *Id.* at 1549. The Ninth Circuit's decision in this case that it could somehow infer "confusion" sufficient to constitute Article III injury-in-fact based on nothing more than the statutory violation itself cannot be reconciled with *Spokeo*. Indeed, the Ninth Circuit's decision effectively overrules *Spokeo* and would confer

Article III standing virtually any time a plaintiff (or a court) could "infer" some sort of intangible harm from a bare statutory violation of a procedural right.

To be sure, this Court has held that when a statute involves a *substantive* right—such as the inability to obtain public information, see *FEC* v. *Akins*, 524 U.S. 11, 20-25 (1998)—there is standing to sue to obtain that information. But at the same time, this Court has reiterated that "deprivation of a *procedural* right without some concrete interest that is affected by the deprivation * * * is insufficient to create Article III standing." *Summers* v. *Earth Island Inst.*, 555 U.S. 488, 496 (2009). Where, as here, the information at issue is merely related to a procedural mechanism—and not the very thing Congress sought to protect—the deprivation of that procedural right, without more, is insufficient to support standing.

Thus the Fourth Circuit, in an opinion issued the same day as the Ninth Circuit's initial decision in this case, reached the opposite conclusion—holding instead that "it would be an end-run around the qualifications for constitutional standing if any nebulous frustration resulting from a statutory violation would suffice as an informational injury." *Dreher*, 856 F.3d at 346 (citing *Friends of Animals* v. *Jewell*, 828 F.3d 989, 992 (D.C. Cir. 2016)). Just so. The Court should grant the petition, resolve the conflict, and reinforce *Spokeo*'s holding that bare procedural violations cannot support Article III standing.

Even if the Ninth Circuit had not erred in finding standing, this Court's review would still be needed to resolve the serious conflict created with this Court's decision in *Safeco*. That conflict has significant practical consequences—allowing litigants in the Ninth Circuit to seek statutory damages and attorneys' fees based on a "willful"—*i.e.*, "reckless" and "knowing"—violation of a statute with a "high risk" of harm even where, as here, (i) no court of appeals has foreclosed defendant's interpretation of the statute; (ii) multiple district courts have *agreed* with that interpretation; and (iii) plaintiff has not alleged *any* risk of harm by the violation. It is virtually impossible to see how such a combination of events presents an "unjustifiably high risk of harm" amounting to recklessness under *Safeco*, 551 U.S. at 68 (citation omitted). Even courts that *agree* with the Ninth Circuit's interpretation of the Fair Credit Reporting Act in this case have declined to hold violations premised on M-I's contrary interpretation of "willful" under *Safeco*. See, e.g., *Schoebel* v. *Am. Integrity Ins. Co. of Fla.*, No. 8:15-cv-380-T-24 AEP, 2015 WL 3407895, at *10 (M.D. Fla. May 27, 2015).

Further, these issues are exceptionally important and frequently recurring. The impact of the Ninth Circuit's decision will not be limited to the Fair Credit Reporting Act's "sole disclosure" requirement, to the Act itself, or even to the multitude of other statutes that could be construed as entitlements to information. Review is warranted, further percolation is unnecessary, and delay will only further erode Article III limits on federal courts.

The petition should be granted.

I. The Ninth Circuit's Decision Conflicts With Decisions Of This Court And Other Circuits On An Exceptionally Important Issue Of Article III Standing.

The Ninth Circuit's decision reflects a fundamental misunderstanding of this Court's decision in *Spokeo*, especially where "informational injuries" are concerned. While this Court noted that "the violation of a procedural right granted by statute *can* be sufficient in *some circumstances* to constitute injury in fact," *Spokeo*, 136 S. Ct. at 1549-50 (emphases added) (citing *Akins*, 524 U.S. at 20-25, and *Public Citizen* v. *Dep't of Justice*, 491 U.S. 440, 449 (1989)), the Ninth Circuit's reliance on an unpled "inference" of "confusion" based solely on the statutory violation does not come close. This Court's guidance is necessary to resolve the conflict between intangible informational injuries that do not confer standing and those that do.

To safeguard "the judiciary's proper role in our system of government," this Court has time and again enforced "the constitutional limitation of federal-court jurisdiction to actual cases or controversies." *Raines* v. *Byrd*, 521 U.S. 811, 818 (1997) (citation omitted). To ensure that courts do not venture outside of this limitation, the "irreducible constitutional minimum" of standing to sue in federal court requires that a plaintiff must have a concrete injury. *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). To be sure, "'concrete' is not * * * necessarily synonymous with 'tangible.'" *Spokeo*, 136 S. Ct. at 1549. And to define whether an intangible harm may still be concrete, this

Court held that both history and congressional judgment are important. *Ibid.* Yet "Congress' role in identifying and elevating intangible harms does not mean that a plaintiff automatically satisfies the injury-in-fact requirement * * * * Article III standing requires a concrete injury even in the context of a statutory violation." *Ibid.*

In *Spokeo*, the plaintiff alleged injury stemming from a consumer reporting agency's failure to ensure that the information about him being conveyed to the public was accurate. *Id.* at 1546. While acknowledging that the Fair Credit Reporting Act's procedural requirements may not have been fully satisfied, this Court nevertheless held that the plaintiff could not "satisfy the demands of Article III by alleging a bare procedural violation. A violation of one of the [Act's] procedural requirements may result in no harm." *Id.* at 1550. An incorrect zip code on a consumer report, for instance, may technically violate the statute but not cause a plaintiff any actual harm. *Ibid.*

Just so here. Syed at most pleads a technical violation of the Act unaccompanied by any allegation of actual harm or even risk of harm—or even any allegation that he would have done anything differently had the authorization request been on a different piece of paper than the release. The Ninth Circuit's "inference" of "confusion" is nothing more than pure speculation—Syed has not alleged any injury (or risk of injury) flowing from the inclusion of the authorization request in the same document as the release. Nor could he. The end result—a signed authorization form—would have

obtained either way. Just as in *Spokeo*, there is nothing more in this case than a bare procedural violation (at most).[2]

The Ninth Circuit's decision is directly contrary not only to this Court's decision in *Spokeo* but also to the Fourth Circuit's decision in *Dreher*, 856 F.3d at 340. There, the Fourth Circuit squarely held that a company's violation of the Fair Credit Reporting Act's statutory right for a consumer to know the sources of information on his credit report could not, on its own, constitute a concrete injury. *Ibid.* Noting *Spokeo*'s acknowledgement of intangible harms, the Fourth Circuit confirmed this Court's recognition that "'[a] violation of one of the [Act's] procedural requirements may result in no harm' * * * * Thus, * * * a technical violation of the FCRA may not rise to the level of an injury in fact for constitutional purposes." *Id.* at 344 (quoting *Spokeo*, 136 S. Ct. at 1549). Because the plaintiff in *Dreher* failed to show how vindicating the statutory right allegedly violated would have made any difference in the fairness or accuracy of his report, or otherwise furthered Congress's purposes in the Act, he could not show an actual injury—only a technical violation. *Id.* at 345. The claimed "informational injury"—"specific information to which [he] w[as] entitled under the [Act]"—failed to "demonstrate a concrete injury" and

[2] If anything, Syed's claim to injury-in-fact is weaker than Robins's claim in *Spokeo*. Robins alleged that the consumer reporting agency's information—which made him appear more successful than he actually was—prevented him from obtaining certain jobs. See *Spokeo*, 136 S. Ct. at 1554 (Ginsburg, J., dissenting). There is nothing even close to such an allegation in this case.

the plaintiff thus lacked standing. *Ibid.* (alteration in original) (citation omitted).

Similarly, the D.C. Circuit would not have granted standing to a plaintiff complaining of informational injury that did not suffer a real-world consequence as a result of that "injury" either. See *Hancock* v. *Urban Outfitters, Inc.*, 830 F.3d 511, 514 (D.C. Cir. 2016). Plaintiffs there were asked for personal information in violation of the statute—but, as the D.C. Circuit held, "they assert[ed] only a bare violation of the requirements of D.C. law in the course of their purchases." *Ibid.* The court of appeals went on to underscore that this Court's decision in *Spokeo* ensures that "an asserted injury to even a statutorily conferred right 'must actually exist.'" *Ibid.* (quoting *Spokeo*, 136 S. Ct. at 1548).

The D.C. Circuit recognizes some informational injuries, of course, but only in contexts approved by this Court. In explaining how informational standing works, the D.C. Circuit noted that when a plaintiff is not seeking specific disclosures (such as records from an agency), he "may need to allege that nondisclosure has caused [him] to suffer the kind of harm from which Congress, in mandating disclosure, sought to protect individuals or organizations." *Friends of Animals*, 828 F.3d at 992. That is different, of course, from a situation where the information at stake is merely tangential to the harm Congress sought to avoid. In those circumstances, the plaintiff still must show that any information denied him caused a real-world consequence.

The conflict with *Spokeo* (and other cases) is even sharper when the Ninth Circuit's decision is contrasted with the Seventh Circuit's rejection of a similar claim under the Cable Communications Policy Act, 47 U.S.C. § 551(e), which obligates cable companies to destroy customers' personal information after the company no longer needs it. *Gubala* v. *Time Warner Cable, Inc.*, 846 F.3d 909, 911 (7th Cir. 2017). The *Gubala* plaintiff cited the violation of section 551(e) and asserted that it "somehow violated a privacy right or entailed a financial loss."[3] *Id.* at 910. "Gubala's problem," according to Judge Posner, was "that while he might well be able to prove a violation of section 551, he has not alleged any plausible (even if attenuated) risk of harm to himself from such a violation—any risk substantial enough to be deemed 'concrete.'" *Id.* at 911 (citing *Spokeo*, 136 S. Ct. at 1549). Just like Syed.

The Eighth Circuit adopted a similar view in *Braitberg* v. *Charter Communications, Inc.*, 836 F.3d 925, 930-31 (8th Cir. 2016), holding that the plaintiff lacked an injury-in-fact independent from a statutory violation under the Cable Communications Policy Act. So, too, did the Second Circuit, dismissing claims under the Truth In Lending Act based on credit card disclosures that failed to mention certain specific pieces of information. *Strubel* v. *Comenity Bank*, 842 F.3d 181, 190, 192-94 (2d Cir. 2016). Other circuits have

[3] In this respect, Gubala pled *more* than Syed, who has failed even to assert that much anywhere in his complaint. See ER 1-17.

also rejected the Ninth Circuit's position and hold instead that mere proof of a statutory violation does not amount to proof of a concrete injury. See, e.g., *Lee* v. *Verizon Commc'ns, Inc.*, 837 F.3d 523, 529 (5th Cir. 2016); *Nicklaw* v. *Citimortgage, Inc.*, 839 F.3d 998, 1003 (11th Cir. 2016).

It is difficult to see how the Act's requirement that the disclosure be contained on its own piece of paper is anything other than procedural. If the *plaintiff* does not allege, at a minimum, that he did not understand the disclosure and would not have signed it if he had, there can be no harm beyond the bare procedural violation—and that is not enough under *Spokeo*.

That gap cannot be filled with inferences of possible harms manufactured by courts. See App. 12. This is not how pleading works and certainly not how standing in federal court is established. See *Spokeo*, 136 S. Ct. at 1545 ("[T]he injury-in-fact requirement requires *a plaintiff* to allege an injury that is both 'concrete *and* particularized.'" (emphasis added) (quoting *Friends of the Earth, Inc.* v. *Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000))). All Syed alleged here was that federal law entitled him to receive a disclosure on a form containing certain information—and nothing else. ER 1-11.

Syed did not claim to be unaware that he was signing an authorization for the credit check when he signed it; he did not claim that he was confused about the disclosure; and, most importantly, he did not claim

that he would not have signed the form if it had complied with every procedural requirement the statute sets forth. Syed wanted to work for M-I and there is no indication in the record that he would have withheld consent for petitioner to obtain the credit report if the disclosure would have been on a page by itself. Thus the claimed informational injury is the very model of a "bare procedural violation" that under *Spokeo* lacks the concreteness required for standing. 136 S. Ct. at 1549.[4] And the Ninth Circuit's attempt in its amended opinion to manufacture facts to support standing succeeds only in highlighting Syed's failure to allege an Article III injury to begin.

The Ninth Circuit's decision conflicts with *Spokeo* and the decisions of other courts of appeals in determining whether a bare procedural violation can confer standing. The Court should grant the petition, resolve the conflict, and restore the limits of Article III standing.[5]

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[4] The closest Syed comes to alleging injury is his speculation that M-I *intended* to deceive him, ER 10, but he never says (or implies) that he actually *was* deceived, much less that he suffered any harm as a consequence. See ER 3-11.

[5] The Third Circuit has recently noted the conflict without expressly taking sides. See *In re Horizon Healthcare Servs. Inc. Data Breach Litig.*, 846 F.3d 625, 638 (3d Cir. 2017) ("It is nevertheless clear from *Spokeo* that there are some circumstances where the mere technical violation of a procedural requirement of a statute cannot, in and of itself, constitute an injury in fact * * * * Those limiting circumstances are not defined in *Spokeo* and we have no occasion to consider them now.").

II. The Ninth Circuit's Breathtaking Expansion Of "Willfulness" Extends Far Beyond This Court's Decision In *Safeco* And Conflicts With Decisions Of Other Courts.

Under the Fair Credit Reporting Act, a plaintiff can pursue actual damages or, for "willful" violations, statutory damages—which carry with them the potential for punitive damages and attorneys' fees. 15 U.S.C. § 1681n. In this case, Syed is seeking statutory damages (and punitive damages and attorneys' fees) on a class-wide basis—arguing that the inclusion of the one-sentence waiver on the same form as the authorization request is a "willful" violation of the Act. As a result, Syed must satisfy the standard for willfulness set out by this Court in *Safeco*. Reversing the district court, the Ninth Circuit concluded that Syed satisfied that standard as a matter of law because (i) M-I's interpretation of the statute was objectively unreasonable, App. 21-23, and (ii) M-I's interpretation was so manifestly incorrect as to rise to a reckless disregard of the Act's obligations. *Id.* at 24-27. Both premises are not only mistaken but also in serious conflict with *Safeco*. This Court's review is warranted to resolve that conflict, too.

Under *Safeco*, Syed was required to show an "unjustifiably high risk of harm" from the alleged statutory violation. *Safeco*, 551 U.S. at 68 (citation omitted). That is, he 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. *Id.* at 69. Syed has not, and cannot, make

that necessary showing. M-I's interpretation of the Act risked harm to none—at least no harm that Syed articulates—and certainly not a "high risk" of harm. M-I merely requested of Syed a release for performing the background check that Syed had just authorized. This inclusion involved so little chance of harm that Syed bothers naming none—and given the close relationship between the authorization and waiver, no harm even seems possible, much less likely. The Ninth Circuit erred in writing that requirement out of *Safeco*. *Safeco* requires not only a violation, but also one that is objectively unreasonable and that poses an unreasonable risk of harm—yet under the Ninth Circuit's decision, employers can be held liable without any such showing. The Ninth Circuit's approach cannot be reconciled with *Safeco*.

Further, as the Ninth Circuit recognized in its opinion (App. 26), the question whether a combined disclosure and liability release violates the Act has divided the district courts—and the Ninth Circuit in this case became the first court of appeals to weigh in on the question. The division of authority in the district courts—and the dearth of authority at the appellate level—is another reason M-I's interpretation of the Act could not possibly have been objectively unreasonable, much less reckless. See App. 60-61 ("The inability of district courts around the country to agree on whether a combined disclosure and liability release violates the FCRA suggests that the statute is 'less than pellucid,' or at least not as clear as plaintiff claims." (quoting

Safeco, 551 U.S. at 70)).[6] This Court's review is warranted to resolve that conflict, too.

III. The Questions Presented Are Exceptionally Important, Frequently Recurring, And Cleanly Presented.

The serious practical consequences of the Ninth Circuit's decision underscore the need for this Court's review. As numerous legal commentators have observed, exposure to statutory damages under the Fair Credit Reporting Act can be "enormous," David N. Anthony & Julie D. Hoffmeister, American Bar Association, *The Fair Credit Reporting Act: Not Just About Credit*, BUSINESS LAW TODAY, June 2016, at 2, and compliance requires navigating the "virtual minefield of technical obligations" that the Act imposes. Ben James, *5 Tips For Employers Worried About FCRA Class Actions*, LAW360 (May 20, 2015).

"In the 40 years since [the Act] was enacted, litigation has skyrocketed." Jonathan D. Jerison & Bradley A. Marcus, *A Brief History of the FCRA*, 14 No. 19 CONSUMER FIN. SERVS. L. REP., at 3, 4 (2011). And as commentators have noted, the class action-friendly provisions of the Act—such as the statutory damages

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[6] Compare *Schoebel*, 2015 WL 3407895, at *6; and *Smith* v. *Waverly Partners, LLC*, No. 3:10-CV-00028-RLV-DSC, 2012 WL 3645324, at *1 (W.D. N.C. Aug. 23, 2012) (concluding that the combination of the disclosure and the authorization does not recklessly violate the Act); with *Reardon* v. *ClosetMaid Corp.*, No. 2:08-cv-01730, 2013 WL 6231606, at *10 (W.D. Pa. Dec. 2, 2013) (concluding that the combination transparently violates it).

provision at issue here—have contributed significantly to the litigation explosion. David L. Permut & Tamra T. Moore, *Recent Developments in Class Actions: The Fair Credit Reporting Act*, 61 BUS. LAW. 931, 931 (2006); see also Ashley Steiner Kelly & Theresa Y. Kananen, Spokeo*: One Year Later, How High Did the Case Raise the Bar?*, DAILY REPORT, June 6, 2017 ("Perhaps due to the attorneys' fee provisions, in recent years, employers have been bombarded with class actions alleging FCRA violations. A perennial favorite of the plaintiffs' bar is violation of the 'stand-alone disclosure' requirement." (citing 15 U.S.C. § 1681b(b)(2)(A)(i))), Sheila B. Scheuerman, *Due Process Forgotten: The Problem of Statutory Damages and Class Actions*, 74 MO. L. REV. 103, 114 (2009) ("What makes these statutory damages class actions so attractive to plaintiffs' lawyers is simple mathematics: these suits multiply a minimum $100 statutory award (and potentially a maximum $1,000 award) by the number of individuals in a nationwide or statewide class.").

Given all this, the practical implications of the Ninth Circuit's decision for employers across the Nation are staggering. It permits an entire class to seek statutory damages—and attorneys' fees—based on nothing more than a technical violation of a statute with no showing of harm or even risk of harm. But in this "era of frequent litigation [and] class actions," this Court has made clear that "courts must be more careful to insist on the formal rules of standing, not less so." *Ariz. Christian Sch. Tuition Org.* v. *Winn*, 563 U.S. 125, 146 (2011). This case provides the Court a

straightforward but exceptionally important opportunity to enforce those rules in a crucially important context.

This case is an ideal vehicle for doing so. The issues are purely legal, squarely presented, and sufficiently vetted. Indeed, the conflict with this Court's cases is so clear that this Court may wish to consider summary reversal without the need for full briefing and argument. See, e.g., *Tolan* v. *Cotton*, 134 S. Ct. 1861, 1868 (2014) (per curiam) (summarily reversing "because the opinion below reflects a clear misapprehension of [the applicable] standards in light of our precedents"); *Fla. Dep't of Health & Rehab. Servs.* v. *Fla. Nursing Home Ass'n*, 450 U.S. 147, 150 (1981) (per curiam) (summarily reversing an opinion that could not "be reconciled with the principles set out" in this Court's jurisprudence).

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CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Sarmad SYED, an individual, on behalf of himself and all others similarly situated,
Plaintiff-Appellant,
v.
M-I, LLC, a Delaware Limited Liability Company; PreCheck, Inc., a Texas Corporation,
Defendants-Appellees.

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