No. 13-1339

In The
Supreme Court of the United States

SPOKEO, INC.,

Petitioner,

v.

THOMAS ROBINS,

Respondent.

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

BRIEF OF NATURAL RESOURCES DEFENSE COUNCIL, PACIFIC COAST FEDERATION OF FISHERMEN'S ASSOCIATIONS, AND INSTITUTE FOR FISHERIES RESOURCES AS AMICI CURIAE IN SUPPORT OF RESPONDENT

MICHAEL E. WALL
Counsel of Record
RACHEL HERON
NATURAL RESOURCES DEFENSE COUNCIL
111 Sutter Street, 20th Floor
San Francisco, CA 94104
(415) 875-6162
mwall@nrdc.org

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

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INTEREST OF THE AMICI CURIAE[1]

The Natural Resources Defense Council (NRDC) is a nonprofit public-health and environmental membership organization with nearly 300,000 members across the United States. On behalf of its members, NRDC works to safeguard the Earth: its people, its plants and animals, and the natural systems on which all life depends. When an individual joins NRDC, she authorizes the organization to represent and promote her interest in a healthy environment. During its forty-five years of existence, NRDC has regularly brought federal suits for redress when private or governmental action has harmed its members' use or enjoyment of natural resources. Access to the federal courts to remedy injuries that, while not easily monetized, are nonetheless actual, concrete, and particularized, is crucial to NRDC's capacity to represent its members' interests. Petitioner's position, if endorsed by this Court, could erode settled law recognizing

[1] Pursuant to S. Ct. R. 37.6, counsel for amici state that they authored this brief in its entirety and that no party or counsel for any party, nor any other person or entity other than amici or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Both parties have consented to the filing of this brief; evidence of consent has been lodged with the Clerk.

that such injuries are cognizable, just like pecuniary injuries.

The Pacific Coast Federation of Fishermen's Associations (PCFFA) is the largest trade association of commercial fishing families on the West Coast. For more than thirty years, PCFFA has fought for the rights of individual commercial fishermen and fishing families and for the long-term survival of commercial fishing as both a livelihood and a way of life. PCFFA and its members rely on access to the federal courts to protect not only individual fishermen's immediate economic health, but also less-easily monetized interests, including the ecological health and viability of the fishery resources upon which PCFFA's members, and their communities, depend.

The Institute for Fisheries Resources (IFR) is a nonprofit organization, originally founded by PCFFA, that carries out fishery and conservation research, and advocates for and implements environmental protections for the nation's fisheries, for the benefit of working fishing men and women and their fishing-dependent coastal communities. Access to federal courts to remedy threats to the ecological health of the nation's fisheries – even when those threats do not carry immediate economic consequences – furthers IFR's goal of building sustainable global and national fisheries.

SUMMARY OF ARGUMENT

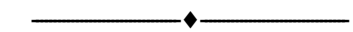
This Court recognizes that the loss of a valuable entitlement is an injury in fact. This is true when the lost benefit's value is measurable in dollars and cents. It is also true, under this Court's precedent, when the benefit is not easily monetized, but has been confirmed as real and meaningful by the source of law that bestows it – whether that is the common law, the Constitution, or legislation passed by Congress. Congress, in particular, has broad latitude to create new statutory entitlements that, in its view, enhance recipients' well-being. Congress's recognition that *receiving* such an entitlement would bestow a substantial benefit on the individual for whom it is intended means that, when that individual is instead *deprived* of the ability to enjoy it, she loses something valuable – and thus suffers a concrete loss.

For these reasons, Petitioner Spokeo, Inc., is incorrect that Respondent has not suffered any "concrete harm." Respondent has alleged that Petitioner's actions deprived him of the enjoyment of a congressionally conferred entitlement to reasonably accurate reputational reporting. Such a loss *is* concrete. It is also actual and particular. It thus bears all the markings of a constitutionally sufficient injury in fact, even when unaccompanied by economic harm.

Petitioner, however, demands more, asking this Court to require certain plaintiffs seeking redress in the federal courts to demonstrate not just a discrete loss but, in essence, some additional collateral consequence

stemming from that loss. Such an addendum to the injury-in-fact test is inconsistent with this Court's precedent, which treats the deprivation of a nonmonetary entitlement, by itself, as a concrete injury. Grafting a collateral-consequences requirement onto the constitutional standing inquiry could render nonjusticiable injuries that this Court has long found sufficient, including the denial of a public records request under the Freedom of Information Act. And adding such a requirement selectively, only in cases where a plaintiff has alleged the loss of a noneconomic entitlement, would undermine decades of settled law holding that nonpecuniary harms – including lost recreational opportunities and lost aesthetic value – are cognizable just as monetary losses are.

The value of the entitlement Respondent claims to have lost may not be easily reduced to a dollar amount. But many essential public benefits, including clean air, pure water, and healthy ecosystems, cannot easily be monetized. That fact does not render them without social value, as this Court's standing jurisprudence recognizes. Moreover, Congress has determined that – just like the myriad nonmonetizeable interests this Court already recognizes – the entitlement Respondent lost *has* value that is now lost to him. Second-guessing that determination would upset the separation of powers that standing jurisprudence is designed to protect.



ARGUMENT

I. The loss of a valuable personal entitlement is a concrete harm

The common law has long provided redress for persons deprived of what rightfully belongs to them. In many actions at common law, the deprivation itself was the only injury the plaintiff needed to show in order to maintain suit, even if it resulted in no collateral harm. What mattered was the interference with a right that the common law deemed sufficiently valuable. By analogy, the federal courts have allowed individuals to bring suit against those who have deprived them of their constitutional rights, even when they cannot point to any measurable economic harm stemming from that deprivation.

Congress, no less than common-law judges, has the authority to create new entitlements and, by so doing, to recognize the benefits those entitlements provide – pecuniary or not. There is no difference for standing purposes between the loss of a benefit whose value is recognized by common law and the loss of a benefit whose value Congress has recognized: both are injurious.

A. A person deprived of a right the common law deemed valuable could bring suit to remedy that loss, regardless of whether the loss resulted in any collateral harm

The common law provided numerous causes of action to redress the loss of something that the law

entitled the plaintiff to have or to keep. Some such entitlements conferred on the plaintiff the right to a physical thing, the monetary value of which could be readily determined. For example, tort law made one who converted another's physical property to her own use liable for the full value of the chattel in question. *See* Restatement (Second) of Torts §§ 222, 222A cmt. c (1965) [hereinafter Restatement].

Other common-law entitlements conferred a right to something less tangible or susceptible to monetization, but which the common law nevertheless acknowledged was valuable and beneficial, and thus worthy of protection. For example, the common law protected the individual's right to be free from unlawful confinement, *see id.* § 35, and the right to vote in a public election or to hold office, *see id.* § 865; *see also* Pet'r Br. 24-25 (describing denial of the right to vote as "a cognizable, concrete harm" for which English common law allowed judicial redress). To maintain an action for interference with these rights, a plaintiff did not need to show that any collateral consequences resulted from the deprivation – only that the deprivation occurred. *See* Restatement § 907 cmt. b.

Likewise, the common law valued so highly the right to exclude others from one's land or personal property that it allowed, and even encouraged, plaintiffs to challenge otherwise harmless interference with those rights, by authorizing the award of nominal damages in such actions. *See id.*; *Carey v. Piphus*, 435 U.S. 247, 266 (1978). Deprivation of the right to exclude can sometimes result in collateral harm: for

example, a property owner may suffer anxiety from the perception that she has lost control over her own land. However, nothing in the cause of action *required* a plaintiff to suffer such insecurity in order to maintain a suit. *See* Restatement §§ 158, 907 cmt. b.[2]

The common law also allowed suit when a plaintiff was deprived of something to which she was contractually entitled – even when the deprivation resulted in no measurable damages. *E.g.*, *Helphenstine v. Downey*, 7 App. D.C. 343, 349-50 (D.C. 1895). In many such cases, a plaintiff may have given up something vanishingly small during negotiations in order to secure the particular corresponding promise that became the subject of her suit. *See, e.g.*, *Lawrence v. McCalmont*, 43 U.S. 426, 452 (1844) (finding that a payment of one dollar constituted sufficient consideration to create a binding contract). In the statutory-entitlement context, Congress's recognition that an entitlement has value is at least as reliable an indicator

[2] Petitioner suggests that the concrete harm that supported common-law trespass actions was not the loss of the right to exclude, but the possibility that repeated, unchallenged trespasses could waive the landowner's right to her property. Pet'r Br. 25-26. Maintaining a trespass suit did not require any showing that a particular invasion of the right to exclude, if unaddressed, was likely to contribute to future waiver – let alone that such an outcome was "certainly impending," as opposed to speculative, as this Court requires Article III injuries to be. *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990). Rather, all that was required was a showing that the defendant intentionally entered land in possession of another, thereby depriving the plaintiff of her right to exclude. *See* Restatement § 158.

that a plaintiff has lost something of value as the supposition – if not outright legal fiction – that she made a meaningful bargaining sacrifice for it.

There is an obvious reason the common law endorsed these varied causes of action to protect deprivations that may not have resulted in any detectable economic harm: our society values many interests that are not easily monetized, and whose worth is not easily proven by objective, external evidence. Notwithstanding their abstract value, the common law recognized that their invasion or loss was itself a meaningful injury, and thus allowed suits to remedy such invasions or losses, regardless of whether any collateral consequences resulted. That the courts are open to a person deprived of *whatever* the law guarantees her is thus a cornerstone of the common-law tradition on which Article III jurisprudence is built.

B. Deprivation of a constitutional right is also sufficient basis for suit

Analogizing to the established common-law tradition, this Court has held that suits for nominal damages are available to rectify the deprivation of rights guaranteed by the Constitution, just as they are available to redress the deprivation of rights valued by the common law. *Carey*, 435 U.S. at 266; *see also*, *e.g.*, *Amnesty Int'l, USA v. Battle*, 559 F.3d 1170, 1177-78 (11th Cir. 2009); *Jacobs v. Clark Cnty. School Dist.*, 526 F.3d 419, 426-27 (9th Cir. 2008); *Irish Lesbian & Gay Org. v. Giuliani*, 143 F.3d 638, 651 (2d

Cir. 1998). The reason for making such suits justiciable, even in the absence of any measurable collateral consequences, is the same as under the common law: "the law recognizes the importance to organized society that those rights be scrupulously observed." *Carey*, 435 U.S. at 266. Thus, while the denial of constitutional rights can result in any number of collateral hardships, even the deprivation itself, standing alone, is a sufficient basis for suit. *See id.*

C. Congress has the authority to create new entitlements, and to acknowledge their value

The common law and the Constitution are not the sole sources of valuable, protectable legal entitlements in our society. Congress may, within the scope of its powers, create laws that give individuals the right to obtain some status or thing that Congress deems valuable. In creating such entitlements, Congress is not confined to recognizing the kinds of rights honored by the common law. *See Massachusetts v. EPA*, 549 U.S. 497, 516 (2007); *see also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 580 (1992) (Kennedy, J., concurring) ("As Government programs and policies become more complex and farreaching, we must be sensitive to the articulation of new rights of action that do not have clear analogs in our common-law tradition.").

Nor is Congress confined to creating entitlements with obvious economic benefits. To be sure, Congress

can create and has created statutory entitlements for certain individuals to receive money payments from the government, *e.g.*, 38 U.S.C. §§ 1110, 1121, 1131, 1141 (wartime and peacetime disability and death benefits for veterans); 42 U.S.C. § 402 (social security payments), as well as to receive credits that defray tax liability by a certain amount, *e.g.*, 26 U.S.C. §§ 25 (home mortgage interest credit), 36 (first-time homebuyer credit), 45R (small-business health insurance credit). But Congress has also created a diverse array of entitlements whose values are not easily monetized.

For example, through the Freedom of Information Act (FOIA), Congress created a universal entitlement to access to government records. 5 U.S.C. § 552(a). In the Americans with Disabilities Act, it created, among other rights, an entitlement for disabled persons to enjoy public accommodations on an equal basis with the rest of the public. 42 U.S.C. § 12182. And Congress has crafted myriad other miscellaneous rights with no clear dollar value. *See, e.g.*, *Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2082-83 (2015) (describing statutory entitlement for persons born in Jerusalem to have Israel listed as their birth country on passport, ultimately struck down on the merits for interfering with President's power to conduct foreign affairs).

In all cases – whether the entitlement at issue is novel or traditional, pecuniary or nonmonetizeable – the courts "defer substantially" when Congress has exercised its power to recognize the entitlement's

value to its recipients. *Eldred v. Ashcroft*, 537 U.S. 186, 204-05 (2003). So long as Congress has acted rationally within its enumerated powers, the courts "are not at liberty to second-guess congressional determinations and policy judgments." *Id.* at 208; *see also R.R. Ret. Bd. v. Alton R.R. Co.*, 295 U.S. 330, 346 (1935) ("Even should we consider [a statute] unwise . . . if it be fairly within delegated power, our obligation is to sustain it.").

Therefore, once Congress has rationally created an entitlement that is within its power to bestow, and thus has recognized that the entitlement is valuable, courts should take the entitlement's value as given when assessing whether the deprivation of that entitlement harms a plaintiff. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 185 (2000) (granting "judicial attention and respect" to "congressional determination" bearing on factual basis of plaintiff's standing claim). In other words, the courts should accept that a person deprived of an entitlement Congress deems beneficial – even a novel or nonmonetary one – has lost something of value.

D. Standing jurisprudence treats deprivations of rights alike, regardless of the source of those rights

When the common law values an entitlement, the deprivation of that entitlement, by itself, is a cognizable injury. *See* Section I.A, *supra*. When the Constitution enshrines a right, the deprivation of the

right, by itself, is a cognizable injury. *See* Section I.B, *supra*. It is axiomatic that the source of a right does not affect whether a plaintiff has standing to vindicate it. *Lujan*, 504 U.S. at 576 ("[T]here is absolutely no basis for making the Article III inquiry turn on the source of the asserted right."). Therefore, when Congress validly recognizes some condition's value by creating an entitlement to that condition, it must follow that the deprivation of that entitlement, by itself, is a cognizable injury, sufficient to satisfy Article III. To hold otherwise would ignore this Court's precedent to that effect. *See* Section II, *infra*. It would also treat a duly enacted legislative determination that an entitlement is valuable differently – and worse – for standing purposes than the same determination made by the common law or the Constitution. Precedent forecloses such discrimination, *see id.*, as does due consideration for the fact that Congress, no less than common-law judges, has authority to determine what benefits are important enough to be protectable rights.

II. Requiring a plaintiff to show more than a concrete injury – even when that injury is not monetizeable – would depart from this Court's Article III jurisprudence

It follows from this Court's treatment of common-law and constitutional rights that deprivation of a valuable statutory entitlement is a justiciable injury in fact. That is what Respondent has alleged. In promulgating Section 1681e of the Fair Credit Reporting

Act, Congress entitled individuals to reasonably accurate reporting of their personal information by consumer reporting agencies, including on the Internet. *See* 15 U.S.C. § 1681e(b). In the Internet era, the ability to control the contents of one's public persona and reputation has taken on special significance: inaccurate personal information posted online – whether positive, negative, or neutral – is globally accessible and can be nearly impossible to erase, even after deleting or removing the original source of the misstatement. The right to a reasonably accurate online dossier gives individuals security and confidence that they will rarely, if ever, have to go through the ordeal of correcting some inaccurate characterization, and then tracking down and correcting every repetition, or living with a misrepresentation that gains a life of its own in the digital ether. By allegedly failing to use reasonable methods to ensure that information it published about Respondent was accurate, Petitioner deprived Respondent of a state of ease that Congress reasonably deemed valuable. That loss is justiciable.

Petitioner claims that this loss, standing by itself, cannot satisfy Article III. *See, e.g.*, Pet'r Br. 2, 9, 36-53. But precedent holds otherwise. There is no good reason to deviate from that established precedent here.

A. Deprivation of a valuable entitlement satisfies all elements of the injury-in-fact test

Under this Court's precedent, the first of the "three elements" comprising "the irreducible constitutional

minimum of standing" – and the only one at issue in this case – provides that "the plaintiff must have suffered an injury in fact." *Lujan*, 504 U.S. at 560 (internal quotation marks omitted). An injury in fact is "an invasion of a legally protected interest," which is "concrete," "particularized," and "actual or imminent, not conjectural or hypothetical." *Id.* (internal quotation marks omitted). Being deprived of a meaningful statutory benefit fits that bill.

As an initial matter, when the "plaintiff is himself an object of the action" challenged, "there is ordinarily little question" that the plaintiff has standing. *Lujan*, 504 U.S. at 561-62; *see also Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009); Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 Suffolk U. L. Rev. 881, 894 (1983). In this case, there is no question that Respondent is the object of the challenged misstatements: Petitioner gathered personal data about Respondent and, from that data, posted allegedly incorrect statements specifically about Respondent. It should therefore be "substantially" easier for Respondent to prove that he has standing than it would be for someone claiming to be harmed by some action that did not involve her. *See Summers*, 555 U.S. at 493.

Applying the *Lujan* injury factors show why Respondent has standing. First, the loss of an entitlement that Respondent would have received, if not for Petitioner's alleged wrongdoing, has long been considered a sufficiently concrete and compelling

basis for suit. *See* Section I, *supra*. When, as here, Congress, through legislation, determines that the right in question has value to individuals, there is no warrant for judges to dispute that the entitlement would have benefited the Respondent if received, and therefore that its loss is injurious. Second, because Respondent is asserting a violation of his own, personal right, and Petitioner targeted him specifically by compiling and sharing information expressly about him, there can be no doubt that Respondent's injury is sufficiently "particularized." *Lujan*, 504 U.S. at 560. Third, because the deprivation has already occurred, Respondent's injury is "actual or imminent." *Id.*

These factors met, the established injury-in-fact test is satisfied. *See Lujan*, 504 U.S. at 560; *Massachusetts*, 549 U.S. at 517.

B. This Court has not required a plaintiff personally deprived of a valuable statutory entitlement to show more to satisfy the injury-in-fact requirement

Petitioner contends that, although Respondent has alleged the deprivation of a valuable (though nonmonetary) statutory benefit, he must point to some additional, harmful consequence stemming from that loss before he can satisfy the injury-in-fact test. Precedent does not support the existence of any such added requirement.

By way of comparison, when a plaintiff is denied a monetary statutory entitlement, courts generally do

not inquire into the existence of any collateral consequences stemming from that loss. For example, when a plaintiff complains of a denied tax refund – a beneficial entitlement bestowed by Congress – courts do not pause to verify that being denied the money had any collateral impacts on plaintiff: they simply find that the loss of the benefit is a concrete injury. *See, e.g.*, *Dunmore v. United States*, 358 F.3d 1107, 1111-12 (9th Cir. 2004) (holding IRS denial of refund was injury in fact, without inquiry into whether denial had collateral impacts). It is easy to imagine scenarios in which denial of that entitlement would have no meaningful collateral impacts on a claimant – for example, if a billionaire were denied a fifty-dollar (or fifty-cent) tax refund. But even then, a court would almost certainly acknowledge that the injury was justiciable. *Cf. Lawrence*, 43 U.S. at 452 (adjudicating breach of contract claim, where contract had been secured by payment of one dollar); *McGowan v. Maryland*, 366 U.S. 420, 424 (1961) (adjudicating challenge to five-dollar fine).

The same rules must apply when a plaintiff is deprived of a discrete benefit whose value is not monetizeable. For all the reasons discussed above, loss of a valuable entitlement can be a concrete injury, even if its value is not easily monetized. Such a noneconomic injury confers Article III standing just as surely as a pecuniary injury does. *E.g.*, *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 154 (1970) ("We mention these noneconomic values to emphasize that standing may stem from

them as well as from . . . economic injury. . . ."); *Sierra Club v. Morton*, 405 U.S. 727, 734 (1972). The values offended by such injuries, including "[a]esthetic and environmental well-being," *Morton*, 405 U.S. at 734, and "spiritual" values, *Ass'n of Data Processing Serv. Orgs., Inc.*, 397 U.S. at 154, are – no less than "economic well-being" – "important ingredients of the quality of life in our society," *Morton*, 405 U.S. at 734. Thus, for the purpose of assessing standing, a plaintiff who has been deprived of a thousand dollars is no differently situated than one who has lost the opportunity to enjoy a favorite hiking spot. *See, e.g.*, *Laidlaw*, 528 U.S. at 182-83. Or one who can no longer fish or hunt in a favorite place. *See, e.g.*, *id.* Or one who has been denied access to records in which she has an interest. *See, e.g.*, *Pub. Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 449-50 (1989). All have lost something of value, and thus all are injured.

Consistent with this precedent, this Court has treated plaintiffs deprived of *non*monetized statutory entitlements the same as those deprived of pecuniary benefits. For instance, the denial of a statutory right to information is an established Article III injury. *E.g.*, *Fed. Election Comm'n v. Akins*, 524 U.S. 11, 21 (1998) (holding inability to obtain information required to be disclosed by statute was injury); *Pub. Citizen*, 491 U.S. at 449 (same); *Shays v. Fed. Election Comm'n*, 528 F.3d 914, 923 (D.C. Cir. 2008) (same).

Petitioner claims that *Akins* and *Public Citizen* actually support its heightened injury test, because the Court in both cases noted that denial of the

informational right at issue would also have "separate, particularized, concrete effects on the plaintiffs." Pet'r Br. 43 (emphasis omitted); *see also* Br. of Amici Chamber of Commerce et al. 8-9. But neither of those cases stands for the proposition that such a showing is *required* when a defendant has extinguished a plaintiff's personal entitlement. In fact, they show the opposite.

Akins invokes collateral consequences not to show that the plaintiffs' injury is concrete, but that it is *particular*. *Akins* states that the "injury in fact" it recognizes "consists of [plaintiffs'] inability to obtain information . . . the statute requires that [defendant] make public." 524 U.S. at 21. It goes on to note that the deprivation in that case hindered the plaintiffs' ability to educate themselves about candidates for elected office. *Id.* But the import of those collateral effects is not to show that the plaintiffs' deprivation is meaningful, but rather to show that it was uniquely felt by them. In violating the disclosure law at issue in *Akins*, the defendant had taken no action specifically directed toward the plaintiffs: it had simply failed to publicize information that the law required be available to the public at large. The threat of collateral effects on plaintiffs' voting behavior thus provided assurance that the plaintiffs were *particularly* injured by the defendant's failure, and thus that they suffered more than a "generalized grievance" common

to all. *See id.* at 23-25.[3] When, as in this case, a defendant targets and specifically deprives a plaintiff of a right personal to him, such assurances are not necessary.

Indeed, *Public Citizen* says so explicitly. The defendant in that case *did* target the plaintiff, by denying the plaintiff's personal request to view certain information. 491 U.S. at 447. This Court was unequivocal that any collateral consequences resulting from the denial of such an individual request are extraneous to the injury analysis:

> Our decisions interpreting the Freedom of Information Act have never suggested that those requesting information under it need show more than that they sought and were denied specific agency records.

Id. at 449; *see also Zivotofsky v. Sec'y of State*, 444 F.3d 614, 617 (D.C. Cir. 2006) ("Anyone whose request for specific information has been denied has standing to bring an action; the requester's circumstances – why he wants the information, what he plans to do with it, what harm he suffered from the failure to disclose – are irrelevant to his standing."). If this Court were to change course and require plaintiffs to

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[3] The potential for collateral consequences plays a similar role in cases where the government's failure to adhere to a generally applicable procedural requirement denies plaintiff (along with everyone else) the opportunity to exercise some procedural right. *See, e.g.*, *Lujan*, 504 U.S. at 572-73; *Summers*, 555 U.S. at 496-97.

"show more" than deprivation of a statutory right to have standing, as Petitioner suggests is necessary in this case, numerous meritorious FOIA actions could be stymied. A plaintiff making a records request does not know in advance what information that inquiry will yield. That being the case, FOIA plaintiffs frequently cannot say, before seeing the information to which they are entitled, whether being denied the information will have any collateral impact, or what that impact will be.

This Court's informational-injury jurisprudence, along with the long-standing treatment of lost entitlements at common law, refutes the claim that a plaintiff deprived of a particularized, nonmonetizeable right must suffer additional harm before she may recover what she has lost. Instead, it confirms that the Court treats injuries to difficult-to-monetize statutory entitlements and injuries to pecuniary benefits the same way for Article III purposes.

C. Grafting a collateral-consequences requirement onto the injury-in-fact test would disrupt this Court's precedent

Petitioner is not seeking to safeguard this Court's injury-in-fact test, but to rewrite it. Accepting Petitioner's reimagining of standing law could render nonjusticiable injuries the courts have found to satisfy Article III – for example, the denial of records under FOIA, as explained above.

Moreover, if Petitioner's collateral-consequences rule were applied *only* in cases like this one, where a plaintiff suffers a nonmonetizeable loss, the disruption to settled precedent could be even greater. Placing a more stringent burden on plaintiffs alleging a nonmonetary injury would break the historic parity between monetizeable and nonmonetizeable injuries. *See* Section II.B, *supra*. Moreover, it would inject into standing jurisprudence the possibility – perhaps the inevitability – that a judge's subjective view of how important a plaintiff's loss was, and how serious its effects were, could defeat that plaintiff's ability to remedy a concrete deprivation.

Suits to vindicate recreational, aesthetic, spiritual, and other interests that some may view as less weighty than economic interests have been long blessed by this Court, and by the common law before that. *See* Sections I.A, II.B, *supra*. Undermining their legitimacy would dramatically shrink the range of interests the federal courts have long been open to protect.

D. There is no justification for deviating from the established injury-in-fact test

Underlying Petitioner's argument is a fear that recognizing the injury suffered by plaintiffs deprived of valuable entitlements will open the floodgates to new types of suits. But, for all the reasons stated above, this Court's precedent *already* recognizes such injury – even when the deprivation carries no obvious

economic consequences. Respecting that precedent in no way undermines standing law's limiting principles.

First, affirming Congress's already-acknowledged power to create entitlements and recognize their value is not tantamount to allowing Congress to "override the Constitution's injury-in-fact requirement." Pet'r Br. 14. When Congress determines that a new right will benefit an individual, it logically follows that losing the right leaves that individual worse off than she would have been. In such a case, Congress has not abrogated the injury requirement: it has simply altered the baseline condition from which injury is assessed. Doing so is Congress's right. *See Massachusetts*, 549 U.S. at 516; *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring). Moreover, it is not an unbounded right. The Court will defer to Congress's determination of an entitlement's value only when Congress has acted rationally, within the reach of its enumerated powers. *See* Section I.C, *supra*. While rational-basis review is not searching, it is still a hurdle that must be cleared – and not one that this Court assumes is met as a matter of course. *See, e.g.*, *Romer v. Evans*, 517 U.S. 620, 632 (1996) (holding that amendment to state constitution lacked a rational relationship to any legitimate governmental end).

Second, reaffirming that the denial of a valuable entitlement constitutes an injury does not mean that *every* statutory violation will confer standing. Not all statutory provisions create valuable rights running to a specific individual. The provision of the Endangered

Species Act at issue in *Lujan*, for example, creates an obligation for federal agencies to consult with the Secretary of the Interior before taking certain actions. 16 U.S.C. § 1536(a)(2); *Lujan*, 504 U.S. at 558. It does not confer a specific privilege on any individual citizen. Thus, while violations of that statute may, and often do, injure individuals within the meaning of Article III, there is no personal deprivation inherent in the violation itself – or in the violation of other statutes like it, unless the plaintiff can show some particularized harm stemming from that violation. *See Lujan*, 504 U.S. at 572-73. And if, as Petitioner fears, a savvy future plaintiff attempts to read a personal entitlement into a statute that does not provide one, *see* Pet'r Br. 38, the courts are more than capable of telling a legitimate statutory interpretation from a feeble one.

Third, affirming that the deprivation of a statutory right is itself a basis for standing does not open the door to Congress's dressing of generalized grievances in individual entitlements' clothing – for example, by creating a so-called right to see that the laws are enforced. There is nothing talismanic about Congress invoking words like "right" or "entitlement." What matters is whether Congress has bestowed something it rationally deems to have value on an individual. Further, injury exists irrespective of collateral consequences where an entitlement has been denied *with respect to a particular individual* – for example, when an agency denies an individual's record request, or when Petitioner published misstatements about

Respondent in particular. *See* Section II.B, *supra*. A plaintiff who has lost a nominal right because of actions not specifically targeting her may still have to show that she raises more than a "generalized grievance" to bring suit. *See Akins*, 524 U.S. at 23-25; *United States v. Richardson*, 418 U.S. 166, 176 (1974). As this Court's *qui tam* jurisprudence makes plain, Congress cannot legislate around this requirement by granting an individual a right to collect a bounty. *See Vt. Agency of Natural Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 772-73 (2000).

III. Respect for separation of powers obliges courts to credit Congress's rational determinations that nonmonetary entitlements have value

There are compelling reasons not to revise the injury-in-fact test as Petitioner wishes. Most salient, erecting an additional bar to standing in this case would undermine Congress's determination that the entitlement it has created has value, such that its loss really is harmful, in the same way that losing even a modest monetary entitlement always is. For the reasons explained above, such selective treatment of nonmonetizeable injuries threatens to disrupt decades of precedent. *See* Section II.C, *supra*. It also allows the intuition of judges to strip Congress of legislative power.

Discounting Congress's judgment that an entitlement has sufficiently substantial value to be

recognized in enacted, enforceable law trammels Congress's acknowledged power to create new "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)); *see also Lujan*, 504 U.S. at 578. "Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before." *Massachusetts*, 549 U.S. at 516 (quoting *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring)). One way for Congress to exercise this power is to determine that receiving some entitlement would benefit an individual, and therefore that losing it makes her meaningfully worse-off. To avoid inflating their power at Congress's expense, the courts should view deferentially such determinations – including when the benefit Congress recognizes is novel or unusual. Judges should "be sensitive to the articulation of new rights of action." *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring).

One guiding principle of Article III jurisprudence is that the courts should not presume to resolve the types of political disputes best left to the other branches. *See Lujan*, 504 U.S. at 559-60, 577; *see also* Scalia, at 881-82 ("[T]he judicial doctrine of standing is a crucial and inseparable element of th[e] principle [of separation of powers], whose disregard will inevitably produce . . . an overjudicialization of the processes of self-governance."). But the courts can also damage the separation of powers by refusing to acknowledge and redress injuries that the Constitution

intends *Congress* to define. The separation of powers is "a zero-sum game": "[i]f one branch unconstitutionally aggrandizes itself, it is at the expense of one of the other branches." John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 Duke L.J. 1219, 1230 (1993). Here, if the courts decline to hear Respondent's case, it is Congress that stands to lose the full measure of a power that this Court has repeatedly acknowledged is Congress's own to exercise: the power to create new, legally enforceable rights. *See Linda R.S.*, 410 U.S. at 617 n.3; *Warth*, 422 U.S. at 500; *Lujan*, 504 U.S. at 578; *Massachusetts*, 549 U.S. at 516.

* * *

A plaintiff who has lost the opportunity to enjoy what Congress determines would benefit her – whether that be an accurate online reputation or a dollar – is concretely harmed. Petitioner cannot draw distinctions between the former and latter cases without slicing into the heart of this Court's Article III jurisprudence.

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CONCLUSION

For these reasons, this Court should reject Petitioner's arguments.

Respectfully submitted,

MICHAEL E. WALL
Counsel of Record
RACHEL HERON
NATURAL RESOURCES DEFENSE COUNCIL
111 Sutter Street, 20th Floor
San Francisco, CA 94104
(415) 875-6162
mwall@nrdc.org