Standing as the Gatekeeper to Privacy Claims: *Spokeo's* Effect

JENNIFER V. NGUYEN*

> Political, social, and economic changes entail the recognition of new rights, and the common law, in its eternal youth, grows to meet the demands of society. . . Recent inventions and business methods call attention to the next step which must be taken for the protection of the person, and for securing to the individual . . . the right 'to be let alone.'[1]

Although this excerpt written by Warren and Brandeis was published over a century ago, it is very much applicable to society today as data mining, which can be used to gather personal information, is a rapidly evolving invention and business method that calls for such protections. Warren and Brandeis wrote that the common law would grow "to meet the demands of society," which was anticipated for the Supreme Court's analysis in *Spokeo, Inc. v. Robins*.[2] Attorneys awaited this decision for guidance on how to bring or defend cases regarding intangible harms, some of which are caused by data mining.

Data mining has evolved into a prevailing business method and its significance will only continue to grow. This has caused a rise in the demand for data and the corresponding need for regulation. In 1994, *Business Week* published a cover story about companies collecting data about consumers in order to construct precisely tailored marketing campaigns to drive sales of a particular product.[3] In 1997, "data mining" became the popular designation for "extracting information from large databases."[4] Today, data mines provide an acute insight into consumers, direct marketing, and business decisions.[5] These data mines consist of collections of information, known as "big data," which is gathered using methods including tracking individuals' mobile phones, scanning emails, and monitoring online purchases.[6] With

*Jennifer V. Nguyen is a 2018 J.D. Candidate at the University of San Francisco School of Law. Prior to USF, Jennifer earned her Bachelor of Science in Psychobiology with a minor in Political Science from the University of California, Los Angeles. After completing the *Information Privacy* course at USF, taught by Prof. Susan Freiwald, Jennifer was inspired to write this article, which she hopes will clarify the standing requirements for statutorily prescribed privacy rights.

1. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

2. *Id.* at 194.

3. Gil Press, *A Very Short History Of Data Science*, FORBES: TECH (May 28, 2013, 9:09 AM), https://www.forbes.com/sites/gilpress/2013/05/28/a-very-short-history-of-data-science/#476146de55cf.

4. *Id*.

5. *See* Julian Mitchell, *BrightFunnel: The Tech Startup Turning Mining Into A B2B Gold Rush*, FORBES (Feb. 13, 2017, 9:27 PM), https://www.forbes.com/sites/julianmitchell/2017/02/13/brightfunnel-the-tech-startup-transforming-data-mining-into-a-b2b-gold-mine/#6166f10a7450; *see also* Susan Freiwald, *Managing the Muddled Mass of Big Data*, https://fpf.org/wp-content/uploads/Freiwald-Big-Datas-Muddy-Mass1.pdf.

6. Lindsay Fortado, et al., *Hedge Funds See a Gold Rush in Data Mining*, FINANCIAL TIMES: THE BUSINESS OF TECHNOLOGY (Aug. 28, 2017), https://www.ft.com/content/d86ad460-8802-11e7-bf50-e1c239b45787.

data being collected from anything with a "digital fingerprint,"[7] it has become increasingly important to regulate the collection of data to protect personal information from being misused or misrepresented, which causes apparent harms such as identity theft and less apparent harms such as diminished job opportunities (that the plaintiff in *Spokeo* suffered).[8] Since 2005, The Privacy Rights Clearinghouse has recorded over 10 billion records breached.[9]

If individuals, who suffer harm from these breaches, want to bring their matter before the court, they must first establish standing.[10] Standing has three requirements, the one of import here being the "injury in fact requirement," which requires that an individual have actually been harmed. The application of this requirement to privacy cases has been unclear, as the harms are not always easily recognized and defined. It was hoped that the Supreme Court decision in *Spokeo* would provide guidelines for how individuals could establish standing and secure their right "to be let alone," or in other words, to privacy.

INTRODUCTION

As consumers invite more technology into their lives through the Internet and the Internet of Things,[11] their personal data becomes more exposed, and the misuse of that data by companies that collect and/or aggregate data becomes imminent. With consumers so freely, and often mindlessly, providing personal data to be mined and sold by large companies, regulations play an important role in ensuring that consumers' privacy rights are protected. That is why the Supreme Court's decision in *Spokeo, Inc., v. Robins*, which addressed whether an individual with regulation-prescribed privacy harm had standing to bring their case before court, generated so much attention.[12]

Between 2015 and 2016, U.S. companies and government agencies suffered a forty-percent increase in data breaches.[13] Despite this alarming growth in data breaches and scandalous headlines such as, "Equifax Says

7. *Id*. ("Many of our online activities leave a digital fingerprint. Our mobile phones can be tracked, our emails scanned and our online purchases monitored." This information is then traded).

8. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1556 (2016).

9. *Data Breaches*, PRIVACY CLEARING HOUSE (Dec. 26, 2018), https://www.privacyrights.org/data-breaches.

10. U.S. CONST. art. III, § 2, cl. 1.

11. H. Michael O'Brien, *The Internet of Things*, 19 J. INTERNET L. 1, 12 (2016) (The Internet of Things ("IoT") refers to consumer products that connect to the Internet. These "smart" devices use sensors to collect and send information to data centers to be used to increase the efficiency of the product. Examples are wearables such as Fitbit).

12. *Spokeo, Inc.*, 136 S. Ct. at 1549.

13. Olga Kharif, *2016 Was a Record Year for Data Breaches*, BLOOMBERG: TECHNOLOGY (Jan. 19, 2017, 4:00 AM), https://www.bloomberg.com/news/articles/2017-01-19/data-breaches-hit-record-in-2016-as-dnc-wendy-s-co-hacked.

Cyberattack May Have Affected 143 Million in the U.S.,"[14] and "Every single Yahoo account was hacked – 3 billion in all,"[15] people are prone to risk their online privacy for things such as free wifi.[16]

In a recent study published by the National Bureau of Economic Research of 3,108 Massachusetts Institute of Technology ("MIT") students, 98% gave away their friends' email addresses in exchange for free pizza.[17] Accordingly, "[p]rivacy advocates are concerned that the advances of the data ecosystem will . . . lead to racial or other profiling, discrimination, over criminalization, and other restricted freedoms"[18]; however, the average consumer (and even an MIT student) does not seem the least bit worried about what can happen when personal information is given to a company. This may be because harm from data breach typically does not occur immediately (e.g. a bank account is not instantaneously drained when a hacker gets a hold of personal identifying information), but sometime in the future, if it even occurs at all. Or it could be because the aggregation and storing of data makes tasks so much more convenient that consumers are willing to give up some of their personal information. For example, this storing of information permits quicker check out by saving credit card information or more efficient use of the air conditioner by allowing Nest to identify when someone is home.[19]

A lack of knowledge and understanding of privacy harms has made it difficult for those harmed as well as those accused of harm to seek justice,[20] which is why the 2016 Supreme Court decision in *Spokeo* is so significant. *Spokeo* tasked the Supreme Court with clarifying what constitutes harm that is sufficient to get a case before a federal court—standing.

In applying *Spokeo*, the circuit courts have issued varied rulings regarding whether a plaintiff suffered a concrete injury capable of satisfying the Article III standing requirement.[21] This paper will show how the Supreme

---

14. Tara S. Bernard, et al., *Equifax Says Cyberattack May Have Affected 143 Million in the U.S.*, NEW YORK TIMES (Sept. 7, 2017), https://www.nytimes.com/2017/09/07/business/equifax-cyberattack.html?_r=0.

15. Selena Larson, *Every Single Yahoo Account was Hacked – 3 Billion In All*, CNN MONEY: TECH (Oct. 4, 2017, 6:36 AM), http://money.cnn.com/2017/10/03/technology/business/yahoo-breach-3-billion-accounts/index.html.

16. *See, e.g.*, Kari Paul, *College Students Would Give Up Their Friends' Privacy for Free Pizza*, MARKET WATCH (Aug. 3, 2017, 9:33 AM), https://www.marketwatch.com/story/college-students-would-give-up-their-friends-privacy-for-free-pizza-2017-06-13?mg=prod/accounts-mw.

17. *Id.*

18. Jules Polonetsky & Omer Tene, *Privacy and Big Data: Making Ends Meet*, 66 STAN. L. REV. 25 (2013).

19. Nest, Nest Thermostat, https://nest.com/thermostats/nest-learning-thermostat/overview/ (last visited on Dec. 29, 2017) (The Nest Thermostat "learns what temperature you like and builds a schedule around yours." It uses sensors and your phone's location to check if you are present and provides a history of your energy use).

20. Nicole Hong, *For Consumers, Injury is Hard to Prove in Data-Breach Cases*, THE WALL STREET JOURNAL (June 26, 2016, 8:06 PM), https://www.wsj.com/articles/for-consumers-injury-is-hard-to-prove-in-data-breach-cases-1466985988.

21. *See, e.g.*, David Stein, *Spokeo Circuit Split?*, CONSUMER LAW WATCH (Jan. 23, 2017), https://clw.girardgibbs.com/spokeo-circuit-split/; Allison Grande, *Post-Spokeo Trends Offer Clues For Standing In Privacy Suits*, LAW360 (Feb. 15, 2017), https://www.law360.com/articles/892029/post-spokeo-trends-offer-clues-for-standing-in-privacy-suits.

Court's decision has successfully served as the gatekeeper role for Article III's standing requirement by either granting plaintiffs an opportunity to present their claims before the court or filtering out trivial claims. Although attorneys have been frustrated by the lack of clarity, the Supreme Court, by not providing a hardline rule, has preserved the legal system's ability to evolve with and adapt to the rapidly changing and growing data-mining ecosystem in order to continue striking a balance between consumer protection and innovation, which is what Warren and Brandeis concluded the common law would do.[22]

I. HOW A PRIVACY CASE IS BROUGHT BEFORE THE COURT

Before a court considers the merits of a case, the plaintiff must establish standing. Standing is the legal right to bring a case. The standing requirement serves as a gatekeeper by "identif[ying] those disputes which are appropriately resolved through the judicial process."[23] "Standing focuses on the party seeking to get his complaint before a federal court [the plaintiff] and not on the issues he wishes to have adjudicated."[24] Standing is derived from Article III, Section 2, clause 1 of the U.S. Constitution, which "limits the jurisdiction of federal courts to 'Cases' and 'Controversies,' . . ."[25] The U.S. Constitution states in part, "[t]he judicial power shall extend to all Cases, in Law and Equity, arising under the Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases . . . [and] to Controversies . . . ."[26]

To establish standing, the plaintiff must prove three elements: (1) the plaintiff suffered an injury in fact; (2) which is fairly traceable to the challenged conduct of the defendant; and (3) is likely to be redressed by a favorable judicial decision.[27] To establish an injury-in-fact—the issue at the center of *Spokeo*—plaintiff must show an invasion of a legally protected interest that is (a) concrete *and* particularized and (b) actual or imminent, not conjectural or hypothetical.[28] A plaintiff who has standing may bring his or her case before a federal court, whereas a plaintiff who lacks standing may not bring his or her case before a federal court.

22. *See* Warren & Brandeis, *supra* note 1, at 193 ("Political, social, and economic changes entail the recognition of new rights, and the common law, in its eternal youth, grows to meet the demands of society").

23. *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990).

24. *Simon v. E. Kentucky Welfare Rts. Org.*, 426 U.S. 26, 38 (1976).

25. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 559 (1992).

26. U.S. CONST. art. III, § 2, cl. 1.

27. *Lujan*, 504 U.S. at 560-61.

28. *Id.* at 560.

II. THE SIGNIFICANCE OF THE *SPOKEO* DECISION

THE ISSUE FOR THE SUPREME COURT

On certiorari review, the question presented to the Supreme Court was whether respondent Thomas Robins ("Robins") had standing to assert his cause of action against petitioner Spokeo, Inc. ("Spokeo") under the Fair Credit Reporting Act of 1970 (FCRA).[29] More specifically, the issue was whether the statutory violations alleged by Robins embodied a concrete harm sufficient to satisfy the injury-in-fact requirement of standing under Article III of the U.S. Constitution.[30]

In 2011, Robins sued Spokeo for violating his rights conferred to him by Congress under the FCRA, including the right to fair and accurate credit reporting.[31] The FCRA required companies, such as Spokeo, "to follow reasonable procedures to ensure maximum possible accuracy of the information" disclosed in its reports.[32] Robins alleged that Spokeo willfully created and made available for purchase an inaccurate report of his personal information.[33] The Spokeo report inaccurately conveyed that Robins had a graduate degree, was employed and very wealthy.[34] Robins alleged that this inaccurate information "caus[ed] actual harm to [his] employment prospects," and that his continued unemployment cost him money and caused him "anxiety, stress, concern and/or worry about his diminished employment prospects"[35] —also forms of actual harm. Nevertheless, the District Court found that Robins could not show injury in fact and dismissed his case for lack of standing.[36]

In 2014, on appeal in the Ninth Circuit, Robins argued that through a private cause of action, the FRCA, created statutory rights that when violated would provide him with a harm sufficient for Article III standing.[37] Conversely, Spokeo argued that Robins could not sue under the FCRA without showing concrete harm.[38] After the Ninth Circuit ruled in favor of Robins, Spokeo petitioned for a writ of certiorari. In its petition, Spokeo asked the Supreme Court to resolve the conflicting decisions of the lower

29. *Spokeo, Inc.*, 136 S. Ct. at 1544; 15 U.S.C. § 1681 (2018).

30. *Id*. at 1549.

31. *See, e.g.*, *Robins v. Spokeo, Inc.*, 742 F.3d 409 (9th Cir. 2014); Brief for Respondent at 2, *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016) (No. 13-1339), 2015 WL 5169094.

32. Amy Howe, *Opinion analysis: Case on standing and concrete harm returns to the Ninth Circuit, at least for now*, SCOTUS BLOG (May 16, 2016, 6:45 PM), http://www.scotusblog.com/2016/05/opinion-analysis-case-on-standing-and-concrete-harm-returns-to-the-ninth-circuit-at-least-for-now/; 15 U.S.C. § 1681 (2018).

33. Brief for Respondent, *supra* note 31, at 9.

34. *Robins*, 742 F.3d at 411.

35. *Id*.

36. *Id*.

37. *Id*. at 412.

38. *Id*.

courts regarding whether statutory violations, alone, could create an injury in fact sufficient for standing.[39]

WHY THE DECISION GENERATED SUCH INTEREST

What generated such interest about the Supreme Court's decision in *Spokeo* was the power of Congress to create standing, as in when Congress creates a legal right, as to whether this automatically authorizes a person to vindicate that right in federal court.[40] Roughly a year after the Supreme Court's decision on May 16, 2016, *Spokeo* continues to make headlines.[41] On average, "at least one decision everyday" cites *Spokeo*, yet courts continue to issue conflicting decisions in cases with similar fact patterns.[42] The decision is particularly significant in privacy cases because injuries are difficult to prove and quantify, which is why Congress created statutory rights.[43] These regulation-prescribed privacy rights are at the center of the debate. Federal circuit courts are divided over whether bare statutory violations establish injury in fact for Article III's standing requirement.[44] Over thirty amicus briefs were submitted to the Supreme Court in support of either side of the divide.[45]

In standing cases that analyze statutorily-prescribed privacy rights created by Congress, federal and district circuit courts have issued conflicting opinions when addressing the harms plaintiffs needed to allege in order to establish the injury in fact requirement of Article III's standing requirement.[46] Attorneys for plaintiffs and defendants urged the Supreme

39. *See* Petitioner's Petition for Writ of Certiorari at 8, Spokeo, Inc. v. Robins, 136 S. Ct. 1540 (No. 13-1339) (May 1, 2014), 2014 WL 1802228, at *9.

40. Stephen Wermiel, *SCOTUS for law students: Standing and the Constitution*, SCOTUS BLOG (Aug. 6, 2015, 12:01 AM), http://www.scotusblog.com/2015/08/scotus-for-law-students-standing-and-the-constitution/; *see also,* Howard M. Wasserman, *Fletcherian Standing, Merits, and Spokeo, Inc. v. Robins*, 68 VAND. L. REV. 257, 258-59 (2015).

41. *See, e.g.*, Allison Grande, *Top Cybersecurity & Privacy Developments Of 2017*, LAW360 (Dec. 20, 2017), https://www.law360.com/articles/996797/top-cybersecurity-privacy-developments-of-2017; Glenn G. Lammi, *Ambiguity Eclipses Clarity in Two Post-"Spokeo" Standing-To-Sue Decisions*, FORBES (Aug. 28, 2017, 9:02 AM), https://www.forbes.com/sites/wlf/2017/08/28/ambiguity-eclipses-clarity-in-two-post-spokeo-standing-to-sue-decisions/#1b047df0a7f9; David Lazarus, *Spokeo lawsuit highlights challenge of protecting privacy in digital age*, LOS ANGELES TIMES (Aug. 29, 2017, 3:00 AM), http://beta.latimes.com/business/lazarus/la-fi-lazarus-spokeo-privacy-ruling-20170829-story.html.

42. Ezra Church, et al., *The Meaning of Spokeo, 365 Days And 430 Decisions Later*, LAW360 (May 15, 2017, 5:02 PM), https://www.law360.com/articles/921836.

43. *See, e.g.*, Brief for Electronic Privacy Information Center (EPIC) et al. as Amici Curiae Supporting Respondent at 12, *Spokeo*, 136 S. Ct. 1540, (No. 13–1339) (Aug. 6, 2014); *A Summary of Your Rights Under the Fair Credit Reporting Act*, FEDERAL TRADE COMMISSION, https://www.consumer.ftc.gov/articles/pdf-0096-fair-credit-reporting-act.pdf (Among the rights granted by the FCRA is the right to seek damages from consumer reporting agencies that violate the FCRA).

44. Case Comment, *Justiciability—Class Action Standing—Spokeo, Inc. v. Robins*, 130 HARV. L. REV. 437 (2016).

45. *Spokeo, Inc. v. Robins*, Electronic Privacy Information Center (last visited on Dec. 29, 2017), https://epic.org/amicus/spokeo/; (Amicus briefs in support of respondent Robins include EPIC, Center for Democracy and Technology, Constitutional Accountability Center and Information Privacy Scholars. Amicus briefs in supper of petitioner Spokeo include Chamber of Commerce et al., Consumer Data Industry Association, eBay et al. and Experian).

46. Petition for a Writ of Certiorari at 8-12, *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (No. 13–1339).

Court in *Spokeo* to "clarify the requirements needed" [47] to grant plaintiffs "Article III standing to bring lawsuits [before federal] court based on the violation of a federal statute."[48] *Spokeo* was important for privacy cases because it addressed whether privacy-orientated federal statutes, such as the FCRA, that grant privacy rights through private causes of action (without additional harm requirements) would suffice for injury-in-fact when violated.[49]

THE NINTH CIRCUIT'S DECISION

Despite initially ruling in favor of Robins after his First Amended Complaint, the district court ultimately concluded that Robins did not have standing because he failed to allege an injury in-fact.[50] Robins appealed to the Ninth Circuit Court of Appeals.[51]

Spokeo operates an online platform that allows users to search for information about other individuals, including "contact data, marital status, age, occupation, economic health, wealth level," ethnicity, names of siblings and parents, and a photo of the individual.[52] At some point, Robins became aware of the inaccurate information about himself and brought a class action suit against Spokeo.[53] Robins alleged that Spokeo's violations of provisions in the FCRA, including the reporting of inaccurate information, entitled him to standing in court.[54] Spokeo argued that Robins must show harm and that the statutory violation, alone, did not grant Robins the right to sue.

On appeal, the Ninth Circuit held in favor of Robins. It reasoned that Robins alleged violations of his statutory rights were sufficient to satisfy the injury-in-fact requirement of Article III's standing requirement because Robins appropriately alleged that his own statutory rights, not those of others, were violated and that the interests protected by the statutory rights were sufficiently concrete and particularized.[55]

THE SUPREME COURT'S DECISION (*SPOKEO I*)

The Supreme Court in *Spokeo* held that a plaintiff did not "automatically satisf[y] 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."[56] It concluded that due to the separation of powers,

47. Maame E. Austin & Krsna N. Avila, *Spokeo, Inc. v. Robins*, CORNELL L. SCH. LEGAL INFO. INSTITUTE: LII SUP. CT. BULL. (Dec. 18, 2017), https://www.law.cornell.edu/supct/cert/13-1339.

48. *Id*.

49. Case Comment, *supra* note 44, at 437.

50. *Robins*, 742 F.3d at 411.

51. *Id*.

52. *See, e.g., id.* at 410; Brief for Respondent, *supra* note 31, at 6.

53. First Amended Complaint at 2, 7, *Robins v. Spokeo Inc.*, 2011 WL 1793334 (No. CV10-05306).

54. *Id.* at 412.

55. *Id.* at 413.

56. *Spokeo, Inc.*, 136 S. Ct. at 1549.

Congress "cannot erase Article III's standing requirement by statutorily granting the right to sue to a plaintiff who would not otherwise have standing."[57] The Court highlighted, however, that a concrete harm could be intangible.[58] To determine "whether an intangible harm constituted an injury-in-fact," the Supreme Court stated that "both history and the judgment of Congress play[ed] important roles."[59] The Supreme Court further noted that while "Congress may 'elevat[e] to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law" this did not mean that "a plaintiff automatically satisfie[d] the injury-in-fact requirement whenever a statute grant[ed] a person a statutory right" that "authorize[d] that person to sue . . . ."[60]

III. ARGUMENTS OPPOSED TO FINDING STANDING IN *SPOKEO*

PETITIONER SPOKEO INC.'S ARGUMENTS

Spokeo contended that Robins did not have standing because he failed to allege an injury -in-fact.[61] It asserted that Robins needed to show an imminent and concrete harm by establishing actual harm.[62] Spokeo further argued that interpreting the FCRA to provide for damages without proof of injury would counter the U.S. Constitution, which delegates the power to review cases to the courts (not Congress).[63] In support of its argument, Spokeo cited the Eighth Circuit's evaluation of Congress's ability to statutorily grant standing which stated in part that "the [FCRA] could still require proof of actual damages."[64] Spokeo warned that granting the right to sue to plaintiffs who did not have standing would increase the frequency of litigation with regards to litigants claiming class action statutory damages under the FCRA.[65]

Spokeo rationalized its argument by explaining that allowing plaintiffs to sue for bare statutory violations would create enormous liability for defendants even when no injury resulted for plaintiffs.[66] The Constitutional requirement of injury-in-fact requirement plays an important role in ensuring that the justice system is not abused and that cases with actual merit are heard. Spokeo explained that if courts embraced the view that statutory damages are available "without proof of [injury]," there would be no

57. *Id*. at 1548.

58. *Id.* at 1549.

59. *Id*.

60. *Id*.

61. Austin & Avila, *supra* note 47.

62. *Robins*, 742 F.3d at 412.

63. *See e.g.*, *Id.*; U.S. CONST. art. III, § 2, cl. 1 ("The judicial Power shall extend to all Cases and . . . to Controversies . . . .").

64. *Id.* at 413 (citing Dowell v. Wells Fargo Bank, 517 F.3d 1024, 1026 (8th Cir. 2008)).

65. Brief for Petitioner at 36, *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016) (No. 13-1339), 2015 WL 4148655..

66. *Id*. at 30, 34.

individualized inquiries of injury and damages to stop meritless class action suits from flooding the courts.[67]

Spokeo further maintained that because of the potential abuse of class action lawsuits "defendants [would] be pressured into settling questionable claims."[68] This would ultimately allow those that did not actually suffer a harm to unjustly profit. For these reasons, Spokeo argued that it was important for the Court to reverse the Ninth Circuit's decision and instead hold that a statutory violation itself would not suffice the standing requirement under the U.S. Constitution.

ARGUMENTS BY AMICI IN SUPPORT OF SPOKEO, INC.

In its amicus brief in support of Spokeo, Experian, a consumer credit reporting agency, argued that an injury-in-fact is required for Article III's standing requirement.[69] It argued that removing this requirement would "open flood gates" for class action lawsuits.[70] Experian continued its support by arguing that with the increased number of class action lawsuits allows the possibility that opportunistic lawyers will use the threat of a class action lawsuit to extort defendants.[71]

The Chamber of Commerce, in its amicus brief in support of Spokeo, similarly asserted that the injury-in-fact requirement is a "hard floor" of the Constitution and removing it would not be true to Article III's standing requirements.[72] It further explained that class action lawsuits would not just be hurting large corporations, but small businesses as well.[73] Small businesses would be crushed by class action lawsuits because they do not have the money or resources to litigate these lengthy cases that accrue legal fees as well as expose the small businesses to the possibility of having to payout out statutory damages to the large class.[74]

ASSESSMENT OF THESE ARGUMENTS

Those supporting Spokeo and asking the Court to require a showing of injury-in-fact, correctly recognize the need for concrete harm as a concrete actual or imminent harm. Ignoring this requirement would be unconstitutional. However, they fail to acknowledge that ruling out intangible harm would do more than minimize meritless class action suits; it

67. *Id*. at 34, 53 (citing Murray v. GMAC Mortgage Corp. 434 F.3d 948, 953 (7th Cir. 2006)).

68. *Id*. at 34; AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 350 (2011)..

69. Brief for Experian Information Solutions, Inc., as Amicus Curiae Supporting Appellee at 4, *Spokeo*, *Inc. v Robins*, 136 S. Ct. 1540 (2016) (No. 11-56843).

70. *Id*.

71. *Id.* at 17.

72. Brief of the Chamber of Commerce of the U.S., The American Hotel & Lodging Ass'n, et al as Amici Curiae in Support of Petitioner at 10, *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016) (No. 13-1339).

73. *Id.* at 24.

74. *Id*. at 24-25.

would prevent plaintiffs with good claims from getting their case before the federal court.

IV. ARGUMENTS IN FAVOR OF FINDING STANDING IN *SPOKEO*

RESPONDENT ROBINS' ARGUMENTS

Robins asserted six different arguments in support of the standing requirement, two of which will be addressed in this paper.[75] In one argument, Robins contended that his legal violation, alone, was sufficient.[76] In a second argument, Robins contended that Spokeo's allegations were sufficient to satisfy the concrete harm standard.[77]

1. Robins argued that his legal violation by itself was sufficient

"Robins allege[d] that Spokeo willfully violated the personal rights that he [held] under the FCRA," and that he only needed to bring his claim under the rights that Congress conferred onto him through the FCRA in order to establish standing under Article III.[78] Robins argued that the violation of rights granted to him by the FCRA were exactly the type of "'Cases' and 'Controversies'" that Article III of the Constitution granted the judicial branch power to review[79] and that "Article III demand[ed] no more."[80]

In support of his argument Robins quoted Chief Justice Marshall who stated the "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."[81] Additionally, this argument was supported by the reasoning that Courts should "preserve and protect congressional primacy in lawmaking."[82] Cases support this argument that Courts should defer to Congress's manufactured standing through the enforcement of its statutes.[83] For example, the Supreme Court in *Massachusetts v. EPA* found that "[t]he parties' dispute turn[ed] on the proper construction of a congressional statute, a question eminently suitable to resolution in federal court."[84] The Supreme Court in *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.,* also found that the company's violation of the Clean Water Act constituted an injury.[85]

---

75. *See* Brief for Respondent, *supra* note 31, at 10-14.

76. *Id*. at 36.

77. *See id.* at 26 (quoting Hein v. Freedom from Religion Found., Inc., 551 U.S. 587, 619 (2007) (Scalia, J., concurring in the judgment); *see also* Nixon v. Fitzgerald, 457 U.S. 731, 744 (1982).

78. Brief for Respondent, *supra* note 31, at 10.

79. *See id*. at 1.

80. *Id.* at 10.

81. Marbury v. Madison, 5 U.S. 137, 163 (1803).

82. Maxwell L. Stearns, *Spokeo, Inc. v. Robins and the Constitutional Foundations of Statutory Standing*, 68 VAND. L. REV. EN BANC 221, 222 (2015).

83. *Id*.

84. Megan Dowty, *Life is Short. Go to Court: Establishing Article III Standing in Data Breach Cases*, 90 S. CAL. L. REV. 683, 699 (2017) (citing Mass. v. EPA, 549 U.S. 497, 510, 514, 526 (2007)).

85. *Id*. (quoting Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 174-76 (2000)).

2. Robins argued that his allegations were sufficient to satisfy the concrete harm standard

Robins contended that he was only required to show that the statutory violation was concrete and particularized, not an additional actual (tangible/measurable) harm, in order to be granted standing.[86] He argued, and the Court agreed, that an intangible harm, such as those created in statutory violations, could (but not always) be sufficient. Robins asserted "the actual or threatened injury" requirement for Article III could exist through the private right of action created by statutes.[87] Thus, his claim, which pled exactly what Congress granted in the FCRA—his right to require companies like Spokeo to use "reasonable procedures" that would prevent harm caused by the dissemination of false credit reports—suffices to satisfy the Article III standing requirement.[88] Robins' argument was not the issue.

In support of this argument, Robins reasoned that the injuries manufactured by Congress through the FCRA met Article III standing requirements because it "identif[ied] the injury it [sought] to vindicate and relate[d] the injury to the class of persons entitled to bring suit."[89] The FCRA clearly identified that Congress sought to vindicate injury "individuals suffer from the dissemination of false credit reports created with inadequate procedures . . ." and related it to the individual subjects of those inaccurate reports"—class of persons entitled to bring suit.[90]

ARGUMENTS BY AMICI IN SUPPORT OF ROBINS

To support that Robins did sufficiently establish an injury, the Information Privacy Law Scholars contended that Congress did not create an injury through the FCRA, but rather recognized one.[91] They explained that Congress had enacted FCRA because it recognized a harm "by improper disclosure and handling of information" that needed to be regulated.[92] They explained that Congress's creation of statutory damages did not mean that there was no injury-in-fact, but rather that Congress recognized the difficulty plaintiffs may face in sufficiently pleading these injuries.[93] Hence, Congress granted these privacy harms because it recognized the difficulties of conceptualizing, proving, and quantifying these abstract and intangible harms.

In regards to meritless class action lawsuits, the U.S. amicus brief explained that there are other legal means to stop a class action, such as

86. Brief for Respondent, *supra* note 31, at 10.

87. *Id*.

88. *Id*. at 12.

89. *Id*. at 11-12; (quoting Lujan v. Defs. of Wildlife, 504 U.S. 555, 580 (1992)).

90. *Id*. 31 at 12.

91. Brief of Amici Curiae Information Privacy Scholars in Support of Respondent at 2, *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016) (No. 13-1339).

92. *Id*.

93. *See* Brief for Respondent, *supra* note 31, at 12-13.

petitioning to quash the class certification or filing a motion for summary judgment.[94]

ASSESSMENT OF THESE ARGUMENTS

Spokeo I will not only have an impact on standing under the FCRA, but also under other statutes that grant remedies for privacy harms, such as the Telephone Consumer Protection Act (TCPA) and the Fair and Accurate Credit Transactions Act where class action sizes may be even larger and the incidence of an intangible harm even more ambiguous. If bare statutory violations are recognized as a harm sufficient for standing, then a sweeping application of *Spokeo I* will increase the number of cases where standing is granted when an individual merely claims a private right of action to sue for statutory damages without proof of any injury.[95]

V. THE *SPOKEO* DECISIONS

A. THE SUPREME COURT'S REASONING AND RESULT

The Supreme Court held that the Ninth Circuit's standing analysis was incomplete because it failed to address whether Robins' alleged injury was concrete.[96] The Supreme Court clarified that by "concrete" it meant "real" and "not abstract"—meaning an injury that was tangible or some intangible injuries that entailed a sufficient degree of risk.[97] This coincides with the Court's previous reasoning in *Clapper v. Amnesty Int'l USA* that a threat of injury (an intangible injury) satisfied Article III when it was "certainly impending."[98]

The Supreme Court acknowledged that "the violation of a procedural right granted by a statute can be sufficient in some circumstances to constitute injury-in-fact."[99] This means that "a plaintiff . . . need not allege any *additional* harm beyond the one Congress has identified."[100] It further explained, however, that even though Congress has the power to elevate the status of intangible harms to concrete *de facto*—actual injuries—does not mean that a plaintiff in the context of a statutory violation "automatically satisfie[d] the injury-in-fact requirement."[101] To satisfy the concreteness requirement of injury-in-fact, a plaintiff must provide a showing of real harm

94. Brief of Public Justice, P.C. et al. as Amici Curiae in support of Respondent at 12, Spokeo, Inc. v. Robins, 136 S. Ct. 1540 (2016) (No. 13-1339).

95. *See* Perrie Weiner, et al., *Defending TCPA Class Actions In The Wake Of Spokeo*, LAW360 (October 20, 2016, 1:04 PM), https://www.law360.com/articles/851390/defending-tcpa-class-actions-in-the-wake-of-spokeo.

96. *Spokeo, Inc.*, 136 S. Ct. at 1545 (The Court did not opine on the correctness of the Ninth Circuit's holding that Robins sufficiently pled an injury-in-fact).

97. *Id*. at 1548.

98. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 410-411 (2013).

99. *Spokeo, Inc.*, 136 S. Ct. at 1549.

100. *Id*.

101. *Id*.

or a risk of real harm.[102] The Supreme Court concluded that "Robins [could] not satisfy the demands of Article III by alleging a bare procedural violation" because "a violation of one of the FCRA's procedural requirements may result in no harm."[103] In other words, a statutory violation, itself, does not automatically constitute injury-in-fact because it must first be determined whether the statutory-prescribed harm constitutes an injury-in-fact—that the harm recognized by Congress is concrete and particularized and actual or imminent.

The Supreme Court's reasoning calls for a careful case-by-case reading of the statutes drafted by Congress. By requiring an analysis of whether the statutory violations satisfy the injury-in-fact requirement, the Court acknowledges the injuries recognized by Congress (what Robins argued for) while acknowledging the constitutionally delegated power of the courts to review cases and controversies (what Spokeo argued for).

However, the Court did not provide guidelines for determining what a statute must elicit to demonstrate a "degree of risk"[104] or "certainly impending"[105] harm sufficient to satisfy the injury-in-fact requirement of Article III standing. This resulted in more inconsistencies among circuit courts in cases of intangible harm (results from circuit courts varied from state-to-state and even from case-to-case within the same circuits).[106]

The Supreme Court vacated and remanded the case to the Ninth Circuit to perform a complete standing analysis that would include an assessment of the concrete harm requirement (which it had previously merged with the particularized requirement).[107]

B. ON REMAND TO THE NINTH CIRCUIT (*SPOKEO II*)

After a long wait, the Ninth Circuit, on August 15, 2017, concluded that Robins had sufficiently pled concrete injuries for Article III's standing requirement—showing that in some cases intangible harm could be sufficiently concrete.[108] The Ninth Circuit noted that Congress providing individuals a right to sue did not automatically give federal courts the power to hear the case.[109] Looking to history and Congress's judgment, the Ninth Circuit explained its two part analysis of harm which included a determination of: "(1) [W]hether the statutory provisions at issue were established to protect [the plaintiff's] concrete interests (as opposed to purely procedural rights), and if so, (2) whether the specific procedural violations alleged in this case actually harm, or present a material risk of harm, to such

102. *Id*.
103. *Id*. at 1550.
104. *Id*.
105. *Clapper*, 568 U.S. at 410.
106. Grande, *supra* note 41, at 4-5.
107. *Id*.
108. *Robins v. Spokeo, Inc.*, 867 F.3d 1108, 1118 (9th Cir. 2017).
109. *Id*. at 1112.

interests."[110] This could be viewed as the more clear test attorneys were asking for.

1. The statutory provisions in the FCRA protect concrete interests

The Ninth Circuit agreed with Robins that Congress had established the FCRA to protect real interests.[111] Robins alleged that Spokeo's website contained false information and the Supreme Court in *Spokeo* understood that, generally, distributing consumer reports with false information could constitute a concrete harm.[112] In accordance with the Supreme Court's reasoning, the Ninth Circuit in its analysis looked at history and the judgment of Congress.[113]

a. Looking to the history of decisions

The Ninth Circuit acknowledged (as the Supreme Court did) that "[j]ust as Congress's judgment about an intangible harm is important to our concreteness analysis, so is the fact that the interest Congress identified is similar to others that traditionally have been protected."[114] In this analysis, the Ninth Circuit referenced cases that have protected privacy rights similar to those created by the FCRA to prevent inaccurate reporting of personal information. It further pointed out that the privacy rights Congress identified in the FCRA are similar to the rights traditionally protected in libel cases, where a publication of false information by itself was an injury without "any special harm."[115] The Ninth Circuit concluded that, historically, courts have recognized harms that are similar to those alleged by Robins.

b. Looking to the judgment of Congress

The Ninth Circuit established that because consumer reports are ubiquitous and important "in employment decisions, in loan applications, in home purchases, and much more," it is obvious that inaccuracies would have real world consequences.[116] Next, it referenced a chronicle of legislative discussions regarding the increasing importance of consumer reports and the harm generated by the inaccuracies. It noted that Congress has even found instances where inaccurate information adversely affected an individual's ability to obtain employment (the same harm Spokeo pled).[117] The Ninth Circuit asserted that a threat to consumers' livelihood caused by inaccurate reports was obvious and evident, and Ninth Circuit concluded that it made sense that Congress would want to protect against these harms without requiring a showing of additional injury.[118]

---

110. *Id*. at 1113.

111. *Id*.

112. *Spokeo, Inc.*, 136 S. Ct. at 1543, 1550.

113. *Id.* at 1543.

114. *Robins*, 867 F.3d at 1115.

115. *Id*.

116. *Id.* at 1114.

117. *Id*. (quoting Dalton v. Capital Associated Indus., Inc., 257 F.3d 409, 414 (4th Cir. 2001)) ("Employers [in 1970] were placing increasing reliance on consumer reporting agencies to obtain information on the backgrounds of prospective employees.").

118. *Id*.

2. The procedural violations alleged present a harm

The Ninth Circuit court next looked at whether the FCRA violations actually harmed or at least created a "material risk of harm" to this concrete interest.[119] The Ninth Circuit clarified that while Robins had a concrete interest in accurate reporting, this did not mean that just any inaccurate disclosure would be sufficient for standing.[120] However, the Supreme Court had provided little guidance as to how to determine whether the inaccurate disclosure created a risk of harm or was simply harmless.[121] The Supreme Court provided the dissemination of incorrect zip codes as the only example of not actual harm.[122] The Ninth Circuit concluded that Robins' allegations, which included the assertion that inaccurate information had harmed his employment prospects and caused him anxiety, were more likely to harm his concrete interest than the zip code example and thus met the requirement.[123] Thus, the Court did provide further guidance for future cases.

After applying this analysis to the facts specific to *Spokeo I* and the alleged violation of the FCRA, the Ninth Circuit concluded that: (1) The FCRA procedures at issue in [*Spokeo I*] were crafted to protect consumers' (like Robins') concrete interest in accurate credit reporting about themselves"[124] and (2) the report's inaccurate information regarding Robins' age, marital status, educational background, and employment history were the type of harm "directly and substantially related to the FCRA's goals."[125] The Ninth Circuit held that Robins "alleged injuries that [were] sufficiently concrete for the purposes of Article III" standing.[126]

C. IMPLICATIONS OF THE DECISIONS

Neither of the *Spokeo* decisions provided a bright line rule. The Ninth Circuit also did not want to draw any such line, stating in part, "we need not conduct a searching review for where that line should be drawn in this case, . . ."[127] In other words, the court stated that it did not have to create a bright line rule in order to come to its conclusion.[128]

Although the Ninth Circuit ultimately ruled in favor of Robins it illustrated that the Supreme Court did not establish that all statutory violations establish standing. By not providing a hardline rule and requiring a deeper analysis of both the statute and the alleged harms, the courts are forced to make determinations on a case-by-base basis. This case-by-case analysis will allow the rules to evolve alongside the rapidly changing and

119. *Id.* at 1115.
120. *Id.* at 1116.
121. *Id.* at 1116-17.
122. *Spokeo, Inc.*, 136 S. Ct. at 1550.
123. *Id*. at 1556.
124. *Id*. at 1548 (citing *Robins*, 867 F.3d at 1111).
125. *Robins*, 867 F.3d at 1117.
126. *Id*. at 1118.
127. *Id.* at 1117.
128. *Id*. at 1117 & 1117 n.4.

growing data-mining ecosystem. Attorneys trying privacy cases have noted that courts are "tak[ing] a harder look at what is an injury, and what we're starting to see is somewhat of a rational common-sense approach to determining whether a plaintiff has plausibly alleged an injury."[129]

VI. *SPOKEO* APPLIED

SPOKEO AS APPLIED TO IN RE UBER

In re Uber is an example of how attorneys applied *Spokeo* to argue their FCRA violation case and settle their case. The plaintiffs in the class action *In re Uber* alleged:

> [T]hat Uber failed to: (i) provide proper notice that complied with the FCRA and the related state laws regarding its intention to procure background check reports; (ii) obtain proper authorization from Plaintiffs and other Class Members allowing Uber to procure the background check reports; and (iii) provide required information and copies of the reports to Plaintiffs and other class members before taking adverse employment actions against them.[130]

Plaintiffs further claimed that they were injured because the information from the background checks that Uber obtained in violation of the FCRA caused them to be denied employment or be terminated.[131]

In negotiating its settlement, Uber argued that the courts' split on standing weakened the plaintiffs' case.[132] Uber contended that although the Ninth Circuit decision was favorable to plaintiffs, it did not clarify the question of standing under the FCRA, which meant plaintiffs may not be able to sufficiently plead harm under Article III's standing requirement.[133] Uber used the lack of clarity to its advantage, arguing that it left plaintiffs' case vulnerable to the discretion of courts.

This case is also interesting as it exemplifies the concerns of both Robins and Spokeo. Robins and his supporters, in response to Spokeo's concerns of large, meritless class action suits, argued that defendants have ways to avoid these class action suits, such as blocking the certification of a class, which is what Uber was able to do.[134] Spokeo and its supporters expressed concerns of being forced to settle, which is what Uber had to do in order to avoid trial.

---

129. Grande, *supra* note 21, at 3.

130. In re Uber FCRA Litig., No. 14-CV-05200-EMC (No. 223), 2017 WL 2806698, at *1 (N.D. Cal. June 29, 2017).

131. *Id*. at 1.

132. *Id*. at 7.

133. *Id*.

134. RJ Vogt, *Uber Driver Objectors Call $7.5M Deal 'Outrageously Low'*, LAW360 (Dec. 15, 2017), https://www.law360.com/articles/995534 (The Ninth Circuit ruled that the drivers suing over background checks "needed to individually arbitrate their labor claims and could not pursue them as a class").

SPOKEO AS APPLIED TO IN RE FACEBOOK BIOMETRIC INFORMATION PRIVACY LITIGATION

This case provides an example of how a lower court applied *Spokeo* to its analysis of whether there was harm was sufficient for standing.[135] The U.S. District Court in *In re Facebook Biometric Information Privacy* held that plaintiffs had standing under the Illinois Biometric Information Privacy Act (BIPA).[136]

The plaintiffs in *In re Facebook Biometric Information Privacy Litigation* alleged that "Facebook amassed users' biometric data secretly and without consent."[137] The plaintiffs argued that they suffered a concrete harm when "they lost control of their private information."[138] The plaintiffs contended that Facebook's actions "ha[ve] raised the risk of tangible harm, a right protected under Illinois' Biometric Information Privacy Act (BIPA)."[139] They further argued that the rights conferred by BIPA are concrete.[140] Facebook argued that plaintiffs could not establish standing under the Supreme Court's ruling in *Spokeo.*[141] It argued that unlike Robins, plaintiffs here have not alleged any harm or risk of harm.

The U.S. District Court judge concluded that "the right to say no is a valuable commodity, particularly when it concerns the most personal thing, your face, your fingerprint, who you are to the world."[142] This is similar to the Ninth Circuit's conclusion that statutory violations would obviously cause harm.

The *In re Facebook* court also looked at whether there was a history of similar rights being protected by courts.[143] There, plaintiffs alleged that their right to deny permission to collect their facial information was violated.[144] The court identified the Ninth Circuit's decision in *Syed v. M-1*, which found that job applicants had the right to deny a prospective employer access to their credit reports, as involving a similar harm.[145]

---

135. In re Facebook Biometric Info. Privacy Litig., 185 F. Supp. 3d 1155, 1158 (N.D. Cal. 2016).

136. *Id*.

137. *Id*. at 1159.

138. Ezra Church, et al., *supra* note 42.

139. *Id*.

140. *Id*.

141. *Id*.

142. Cara Bayles, *Facebook Biometric Data Row May Hinge on the 'Right to Say No'*, LAW360 (Nov. 30, 2017), https://www.law360.com/articles/989879.

143. In re Facebook Biometric Info. Privacy Litig., 185 F. Supp. 3d at 1169.

144. *Id.* at 1158.

145. In re Uber FCRA Litig., 2017 WL 2806698, at 7 (citing Syed v. M-I, LLC, 853 F.3d 492, 499 (9th Cir. 2017)).

Thus, this case conducted a two part analysis of harm that the Ninth Circuit performed in *Spokeo*, which included an analysis of the history of the courts and judgments of Congress as the Supreme Court proscribed.[146]

VII. WHAT *SPOKEO* ACHIEVED

While *Spokeo* did not provide a clear-cut answer that attorneys and their clients were hoping for, its ambiguity will allow it to be applied to a multitude of privacy cases. *Spokeo* calls for a careful look at the statute and the harms that plaintiffs' have alleged were caused by the statutory violations. Attorneys have already noted seeing a "more common-sense approach" by courts.[147] For example, in *In re Facebook Biometric Information Privacy*, Judge Donato stated that it was obvious that people would want to deny access their face and fingerprints.[148] The *Spokeo* analysis permits the standing determination to adjust to new statutes and new threats.

CONCLUSION

The Supreme Court's decision in *Spokeo* has preserved Article III's function as gatekeeper in cases involving statutorily conferred privacy harms. By not clearly favoring one side over the other, the Supreme Court in *Spokeo* conveyed that it can protect the interests of both consumers and businesses. *Spokeo* allows the courts to adapt to new technology and its possible harms without exceeding the powers granted to it by the Constitution.

146. *Id.*

147. Grande, *supra* note 21, at 3.

148. In re Facebook Biometric Info. Privacy Litig., 185 F. Supp. 3d at 1158, 1171.