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Standing, Statutory Violations, and Concrete Injury in Federal Consumer Financial Protection Statutes After *Spokeo, Inc. v. Robins*

I. INTRODUCTION

Since 2011, lower-level employees at Wells Fargo have fraudulently opened more than two million depository and credit card accounts without consumers' authorization.¹ Cross-selling quotas required to remain employed at Wells Fargo motivated these employees.² Despite a settlement, Wells Fargo still faces legal action from consumers as well as employees who were fired for refusing to participate in the fraud.³ This fraud generated \$2.6 million in additional fees that were charged to customers in connection with accounts they had never intended to open.⁴ It is difficult to know how these accounts impacted customers' credit scores and how damaged credit scores impacted their financial well-being.⁵ Federal legislation like the Truth in Lending Act ("TILA"),⁶ the Fair Credit Reporting Act ("FCRA"),⁷ and the Fair Debt Collection Practices Act ("FDCPA"),⁸ (collectively,

1. Dan Freed, *Heat Rises on Wells Fargo CEO After Lawmaker Grilling*, REUTERS (Sept. 21, 2016, 12:13 PM), <http://www.reuters.com/article/wells-fargo-accounts-ceo-idUSL2N1BX171>.

2. Laura J. Keller & Elizabeth Dexheimer, *Wells Fargo CEO Takes Beating as Lawmakers Demand Accountability*, 28 BANKR. L. REP. (BNA) No. 36, at 1176 (Sept. 22, 2016).

3. James Rufus Koren, *Wells Fargo Settled Over its Bogus Accounts, but it Still Faces a Fight from Customers and Ex-Employees*, L.A. TIMES (Sept. 10, 2016), <http://www.latimes.com/business/la-fi-wells-lawsuits-20160909-snap-story.html>.

4. Freed, *supra* note 1.

5. Keller & Dexheimer, *supra* note 2, at 1176.

6. Truth in Lending Act ("TILA") § 102, 15 U.S.C. § 1601(a) (2015) (noting that, "economic stabilization would be enhanced and the competition among the various financial institutions and other firms engaged in the extension of consumer credit would be strengthened by the informed use of credit").

7. Fair Credit Reporting Act ("FCRA") § 602, 15 U.S.C. § 1681(a)(1) (2015) ("The banking system is dependent upon fair and accurate credit reporting.").

8. Fair Debt Collection Practices Act ("FDCPA") § 807, 15 U.S.C. § 1692(e) (2015) ("It is the purpose of this subchapter to eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to

“federal consumer protection statutes”) exist to keep financial institutions, like Wells Fargo, from abusing their power at the expense of consumers.⁹ Consumers¹⁰ rely on the civil liability provisions of federal consumer protection statutes to deter misbehavior by covered entities,¹¹ as well as to recover against those entities when the behavior is not deterred.¹²

FCRA and its civil penalty provision¹³ were at issue in a 2016 Supreme Court opinion in *Spokeo, Inc. v. Robins*.¹⁴ FCRA imposes a duty upon covered entities to follow “reasonable procedures to assure maximum possible accuracy” of consumer information they report.¹⁵ While *Spokeo* specifically addressed an issue in a lawsuit brought under FCRA, the decision’s impact stretches to other federal consumer protection statutes.¹⁶ To date, *Spokeo* has not been adjudicated on the merits.¹⁷ While the eventual result could be interesting,¹⁸ the relevant part of the proceedings for this Note is the treatment of Article III

protect consumers against debt collection abuses.”).

9. See, e.g., FCRA § 602, 15 U.S.C. § 1681(a)(1) (“The banking system is dependent upon fair and accurate credit reporting.”).

10. See FCRA § 603, 15 U.S.C. § 1681a(c) (“The term ‘consumer’ means an individual.”). “Individual” excludes partnerships, corporations, trusts, estates, governments and other associations. See FCRA § 603, 15 U.S.C. § 1681a(b) (defining “person” as including consumers).

11. See Andrew F. Popper, *In Defense of Deterrence*, 75 ALB. L. REV. 181, 185 (2012) (“To deny that judicial decisions provide a deterrent effect is to deny the historic role of the judiciary, not just as a matter of civil justice but as a primary and fundamental source of behavioral norms.”).

12. See, e.g., FCRA § 616, 15 U.S.C. § 1681n(a) (“Any person who willfully fails to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer . . .”).

13. *Id.*

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

15. FCRA § 607, 15 U.S.C. § 1681e(b).

16. See FDCPA § 813, 15 U.S.C. § 1692k(a) (“Except as otherwise provided by this section, any debt collector who fails to comply with any provision of this subchapter with respect to any person is liable to such person . . .”). This excerpt is the civil liability provision in the Fair Debt Collection Practices Act. Since *Spokeo* is about Article III standing, it potentially impacts every federal statute that contains a civil liability provision for a bare statutory violation; Telephone Consumer Protection Act § 3(a), 47 U.S.C. § 227(b)(1)(B) (2015) (“It shall be unlawful for any person within the United States, or any person outside the United States if the recipient is within the United States . . . to initiate any telephone call to any residential telephone line using an artificial or prerecorded voice . . .”).

17. See *Spokeo, Inc.*, 136 S. Ct. at 1550 (“[T]he case is remanded for proceedings consistent with this opinion”).

18. See discussion *infra* Part V (suggesting that consumer class action lawsuits have a significant impact on the financial well-being of financial institutions).

standing¹⁹ in *Spokeo*.²⁰

This Note examines the Supreme Court's opinion in *Spokeo*, critiques the Court's treatment of Article III standing issues, considers *Spokeo*'s impact on financial institutions and consumers, and concludes by suggesting a new test for standing. This Note proceeds in seven parts. Part II reviews the general requirements for Article III²¹ standing as provided by Supreme Court precedent and explains how Article III standing differs for intangible harm in statutory violation cases.²² Part III explores the treatment of *Spokeo*'s standing issue in each level of the federal courts.²³ Part IV argues that Justice Alito's majority opinion in *Spokeo* poses more questions than it answers and suggests that Justice Alito incorrectly applied precedent, and, as a result, the majority and dissenting opinions fail to address the same issues.²⁴ Part V discusses how *Spokeo* benefits both financial institutions and consumers.²⁵ Part VI recommends a new test for Article III standing.²⁶ Part VII concludes by summarizing the major takeaways from *Spokeo*.²⁷

II. ARTICLE III STANDING IN THE CONTEXT OF INTANGIBLE HARM

To sue in federal court, a plaintiff must have standing, a requirement that emerges from the Constitution's "cases and controversies" doctrine.²⁸ The irreducible constitutional minimum of standing contains three elements: (1) injury in fact, (2) a causal connection between the injury and the conduct, and (3) redressability.²⁹

19. U.S. CONST. art. III § 2, cl. 1 (limiting federal jurisdiction to cases and controversies).

20. See *Spokeo, Inc.*, 136 S. Ct. at 1544 ("This case presents the question whether respondent Robins has standing to maintain an action in federal court . . .").

21. U.S. CONST. art. III § 2, cl. 1 (limiting federal jurisdiction to cases and controversies).

22. See *infra* Part II.

23. See *infra* Part III.

24. See *infra* Part IV.

25. See *infra* Part V.

26. See *infra* Part VI.

27. See *infra* Part VII.

28. U.S. CONST. art. III § 2, cl. 1 (limiting federal jurisdiction to cases and controversies); see *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) ("Though some of its elements express merely prudential considerations that are part of judicial self-government, the core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III.").

29. *Lujan*, 504 U.S. at 560.

Since the Court in *Spokeo* only took issue with injury in fact, the latter two elements will not be discussed further.³⁰

“Injury in fact” is defined as “an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent.”³¹ Particularization means “it must affect the plaintiff in a personal and individual way.”³² Concreteness is a far more fleeting idea.³³ In a sense, the injury must be “real.”³⁴ In *Lujan v. Defenders of Wildlife*,³⁵ decided in 1992, Justice Scalia rejected a claim of standing where, in the Court’s view, Congress attempted to convert the public’s undifferentiated interest, meaning an interest not properly held by any single person, in the proper administration of law into an individual right by statute.³⁶ However, even there, it seems that Scalia conflated particularization and concreteness.³⁷ Scalia seemed more concerned that violation of the statute creates an injury that is not personal or distinct in any meaningful way.³⁸

The Supreme Court attempted to distinguish concreteness and particularization in *Federal Election Commission v. Akins* in 1998.³⁹ In *Akins*, a group of voters filed an administrative complaint with the

30. The second element requires that “the injury . . . be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court.” *Id.* The third element is that “it must be likely as opposed to merely speculative that the injury will be redressed by a favorable decision.” *Id.*

31. *Id.* The “actual or imminent” part of the “injury in fact” definition is not addressed by the Supreme Court. *See Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016) (“We discuss the particularization and concreteness requirements below.”). Likewise, this Note does not address it.

32. *See id.* (citing additional cases which use words like “personal” and “distinct” to describe particularization).

33. *See Lujan*, 504 U.S. at 577–78 (using “concrete” as “real”).

34. *See Spokeo, Inc.*, 136 S. Ct. at 1548 (defining “concrete” as “real”).

35. 504 U.S. 555, 560 (1992)

36. *See Lujan*, 504 U.S. at 576–77 (“The question presented here is whether the public interest in proper administration of the law . . . can be converted into an individual right by a statute that denominates it as such, and that permits all citizens . . . to sue.”).

37. *See id.* (writing about cases where generalized public grievances are alleged as individual harm). Throughout this section of the opinion, Scalia wrote about whether the rights at issue belonged to the public generally or to individuals. *See id.* This conversation sounded much more like it related to particularization. *See Spokeo, Inc.*, 136 S. Ct. at 1548 (noting that words like “personal” and “distinct” define particularization).

38. *See Spokeo, Inc.*, 136 S. Ct. at 1548 (noting that words like “personal” and “distinct” define particularization).

39. *See Fed. Elec. Comm. v. Akins*, 524 U.S. 11, 23 (1998) (“The kind of judicial language to which the FEC points . . . invariably appears in cases where the harm at issue is not only widely shared, but is also of an abstract and indefinite nature . . .”).

Federal Election Commission (“FEC”) asserting that the American Israel Public Affairs Committee (“AIPAC”) was required to register as a political committee.⁴⁰ Once registered as a political committee, a group must make certain public disclosures including statements about its membership and contributions.⁴¹ The FEC asserted that the voters did not have standing to bring such a complaint because the harm was neither concrete nor particularized.⁴² The majority opinion described an abstract—in contradistinction from concrete—injury as one that effectively results in the Court issuing an advisory opinion.⁴³ Rather than affirmatively defining concreteness, the Court said that an abstract injury is like harm to the interest in seeing that the law is obeyed, essentially reiterating the notion that an undifferentiated public interest cannot give rise to concrete injury.⁴⁴ However, just because an injury may be widely shared does not mean it lacks concreteness by necessity; where an injury is concrete, yet widely shared, courts have found “injury in fact.”⁴⁵ In *Akins*, the Supreme Court found “injury in fact” where the plaintiffs were unable to access information to which a federal statute entitled them to have access.⁴⁶

Concreteness also does not require that the injury be tangible.⁴⁷ Courts look to Congress for guidance about what sorts of intangible harms can satisfy the minimum Article III requirements.⁴⁸ The Supreme Court acknowledged in *Lujan* that Congress can elevate to the status of legally cognizable concrete injuries those intangible injuries

40. *Id.* at 13–14.

41. *See id.* at 13 (noting that the Federal Election Campaign Act requires public disclosures from political committees).

42. *See id.* at 19 (“The Solicitor General argues that respondents lack standing . . . and that respondents have not shown that they ‘suffe[r] injury in fact.’”).

43. *See id.* at 24 (“The abstract nature of the harm . . . prevents a plaintiff from obtaining what would, in effect, amount to an advisory opinion.”).

44. *See id.* (The abstract nature of the harm—injury to the interest in seeing that the law is obeyed . . . “).

45. *See id.* (“[W]here a harm is concrete, though widely shared, the court has found ‘injury in fact.’”).

46. *See id.* at 21 (“The ‘injury in fact’ that respondents have suffered consists of their inability to obtain information . . . that . . . the statute requires that AIPAC make public.”).

47. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016) (“Although tangible injuries are perhaps easier to recognize, we have confirmed in many of our previous cases that intangible injuries can nevertheless be concrete.”) Justice Alito cites free speech and free exercise of religion cases as examples of intangible harms that meet the concreteness requirement. *Id.*

48. *Id.*

which otherwise would be constitutionally inadequate.⁴⁹ Congress created such a legally cognizable concrete injury in the Civil Rights Act of 1968.⁵⁰ The Court's opinion in *Lujan* implicitly asserts that a violation of a person's interest in living in a racially integrated community would not usually meet the injury in fact standard.⁵¹ However, Congress elevated the injury so that it satisfied the concreteness requirement through legislative means.⁵²

The Supreme Court has acknowledged that the injury required by Article III "may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing.'"⁵³ The violation of a statutorily granted procedural right is sometimes sufficient and a plaintiff need not allege any additional harm.⁵⁴ In *Akins*, the right to access information, a list of AIPAC donors for instance, was created by the Federal Election Campaign Act of 1971.⁵⁵ Congress elevated this right to the status of a right, "the invasion of which creates standing."⁵⁶ In the particular context of "bare" statutory violations, cases like *Akins* and *Lujan* indicate that there is an alternate way to find standing in federal courts.⁵⁷

49. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 578 (1992) ("Both of the cases used by *Linda R.S.* as an illustration of that principle involved Congress' elevating to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law.").

50. See Civil Rights Act of 1968, 42 U.S.C. § 3610(a)(1)(A)(i) (2015) (allowing an aggrieved person to file a complaint within one year of an alleged discriminatory housing practice); see *Lujan*, 504 U.S. at 578 (citing *Trafficante v. Metropolitan Life. Ins. Co.*, 409 U.S. 205, 208–12 (1972)).

51. See *Lujan*, 504 U.S. at 578 (implying that injury to a person's interest in living in a racially integrated community is the sort of injury that Congress needs to elevate in order for it to suffice for standing).

52. *Id.*

53. *Lujan*, 504 U.S. at 578.

54. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016) ("[T]he violation of a procedural right granted by statute can be sufficient in some circumstances to constitute injury in fact. In other words, a plaintiff in such a case need not allege any *additional* harm beyond the one Congress has identified.").

55. See *Fed. Elec. Comm. v. Akins*, 524 U.S. 11, 13 (1998) ("[T]he American Israel Public Affairs Committee (AIPAC) is not a 'political committee' as defined by the Federal Election Campaign Act . . . and . . . the FEC has refused to required AIPAC to make disclosures.").

56. *Lujan*, 504 U.S. at 578.

57. See *Akins*, 524 U.S. at 20 ("Given the language of the statute and the nature of the injury, we conclude that Congress, intending to protect voters such as respondents from suffering the kind of injury here at issue, intended to authorize this kind of suit."); see also *Lujan*, 504 U.S. at 578 (noting that the injury required by Article III "may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing.").

III. DOES MR. ROBINS HAVE ARTICLE III STANDING TO SUE?

The important legal question at issue in *Spokeo* was whether a bare statutory violation constituted a concrete injury sufficient to confer standing.⁵⁸ The Supreme Court demanded a formal application of the three-element standing test: (1) Plaintiff must have suffered an “injury in fact” that is “concrete and particularized” and “actual or imminent”; (2) there must be a causal relationship between the injury and the conduct; and (3) it must be more likely than not that the relief will redress the injury.⁵⁹ In contrast, the Ninth Circuit suggested there is an alternative route to Article III standing when a statutory violation is involved: Congress can confer standing by elevating certain injuries to legally cognizable injuries, subject to two limitations.⁶⁰ The plaintiff must allege *her* statutory rights, not that the defendant simply violated the statute, and the statutory right in question must protect against “individual, rather than collective, harm.”⁶¹

Thomas Robins instituted a lawsuit in federal district court in California alleging that Spokeo, Inc. (“Spokeo”) operated its consumer reporting website in violation of the FCRA.⁶² FCRA mandates that credit reporting agencies “follow reasonable procedures to assure maximum possible accuracy” of consumer reports.⁶³ FCRA also provides that “any person who willfully fails to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer” for actual damages *or* statutorily prescribed damages.⁶⁴ Spokeo owns and operates a website that publishes information about consumers such as education, marital status, and information about the individual’s economic condition.⁶⁵

58. *See Robins v. Spokeo, Inc.*, 742 F.3d 409, 412 (9th Cir. 2014), *vacated*, 136 S. Ct. 1540 (2016) (“The violation of a statutory right is usually a sufficient injury in fact to confer standing.”). *But see Spokeo, Inc.*, 136 S. Ct. at 1548 (“To establish injury in fact, a plaintiff must show that he or she suffered ‘an invasion of a legally protected interest’ that is ‘concrete and particularized’ and ‘actual or imminent, not conjectural or hypothetical.’”).

59. *Lujan*, 504 U.S. at 560–61.

60. *See Robins*, 742 F.3d at 413 (“The court identified two constitutional limitations on congressional power to confer standing.”).

61. *Id.*

62. *Spokeo, Inc.*, 136 S. Ct. at 1554 (Ginsburg, J., dissenting).

63. Fair Credit Reporting Act § 607, 15 U.S.C. § 1681e(b) (2015).

64. *Id.* § 1681n(a).

65. *Robins*, 742 F.3d at 410.

Robins alleged that Spokeo maintained an inaccurate report about him on the website, thereby willfully violating the relevant provision of FCRA.⁶⁶ Specifically, Robins alleged that the profile contained a picture purporting to be him, which was not him.⁶⁷ Robins also alleged that the profile wrongfully stated that he was in his fifties, married with children, and employed in a technical or professional field.⁶⁸ While the website contained this misinformation, Robins claimed that he was “out of work,” looking for a job, single, and without children.⁶⁹ Robins asserted that this misinformation caused actual harm to his employment prospects.⁷⁰

A. *The Central District of California Found Robins Lacked Standing*

FCRA requires consumer reporting agencies to “follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates.”⁷¹ Robins alleged that Spokeo was in violation of this portion of the statute in maintaining its website with the inaccurate information.⁷² The United States District Court for the Central District of California granted Spokeo’s motion to dismiss for lack of standing.⁷³ The court held that Robins failed to allege any injury in fact caused by Spokeo.⁷⁴ The district court pointed out that “even when asserting a statutory violation, the plaintiff must allege ‘the Article III minima of injury-in-fact.’”⁷⁵ In this case, Robins claimed that he had been “unsuccessful in

66. *Spokeo, Inc.*, 136 S. Ct. at 1554 (Ginsburg, J., dissenting); see *Spokeo, Inc.* 136 S. Ct. at 1546 (“Robins filed a class-action complaint . . . claiming . . . that Spokeo willfully failed to comply with the FCRA requirements enumerated above.”).

67. *Id.* at 1554 (Ginsburg, J., dissenting).

68. *Id.* Additionally, the profile claimed that his economic health was very good and that his income was in the top 10%. Mr. Robins alleged that this is not true. *Id.*

69. *Id.*

70. *Id.* In his brief, Robins suggests that “Spokeo’s report made him appear overqualified for jobs he might have gained, expectant of a higher salary than employers would be willing to pay, and less mobile because of family responsibilities.” *Id.*

71. Fair Credit Reporting Act § 607, 15 U.S.C. § 1681e(b) (2015).

72. *Spokeo, Inc.*, 136 S. Ct. at 1554 (Ginsburg, J., dissenting).

73. *Robins v. Spokeo, Inc.*, No. CV10-05306 ODW, 2011 WL 597867, at *2 (C.D. Cal., Jan. 27, 2011), *vacated*, 742 F.3d 409 (9th Cir. 2014), *vacated*, 136 S. Ct. 1540 (2016).

74. *Id.* at *1.

75. *Id.*

seeking employment.”⁷⁶ Additionally, he alleged that he was concerned about *future* harms; he was concerned that the inaccurate reporting “[would] affect his ability to obtain credit [and/or] employment.”⁷⁷ Finding that Robins lacked standing, the court dismissed his case for want of subject matter jurisdiction and Robins appealed to the Ninth Circuit.⁷⁸

B. The Ninth Circuit Found Article III Standing

The U.S. Court of Appeals for the Ninth Circuit, upon wading into this complex legal doctrine regarding standing,⁷⁹ reversed the ruling of the district court.⁸⁰ The court held that “[w]hen . . . the statutory cause of action does not require proof of actual damages, a plaintiff can suffer a violation of the statutory right without suffering actual damages.”⁸¹ FCRA’s civil penalty provision attaches liability to a party who violates the statute without referencing any kind of harm to a victim.⁸² Regardless of whether any actual damages are claimed, there is an alternative clause for damages of a statutory variety.⁸³ The circuit

76. *Id.*

77. *Id.* It is possible that the district court is conflating injury in fact with the causation element of standing. *See id.* (“Plaintiff only expresses that he has been unsuccessful in seeking employment.”). If the inaccurate consumer information is causing Robins not to be able to obtain a job that he otherwise would be able to get, that seems like injury in fact. *See id.* (implicitly acknowledging that a present as opposed to future claim of harm to employment prospects would be sufficient injury in fact). So, although Robins is also worried about possible, continuing future harm, he does allege a present, rather than speculative injury. *See id.* (alleging that his job prospects are currently negatively impacted by Spokeo’s mistakes).

78. *Id.* (“Because Plaintiff does not have standing to bring his claims before this court . . . this case is hereby dismissed . . .”); *see Robins v. Spokeo, Inc.*, 742 F.3d 409, 410 (9th Cir. 2014) (appealing on standing), *vacated*, 136 S. Ct. 1540 (2016).

79. *Robins*, 742 F.3d at 411. After the initial finding of no standing, Robins submitted an amended complaint. *Id.* The district court then decided that the amended complaint sufficiently plead injury in fact. *Id.* When Spokeo moved to certify an interlocutory appeal, the court reversed its order finding standing on the amended complaint. *Id.* This flip-flopping is evidence of the fleeting nature of the standing requirements, particularly injury in fact.

80. *See id.* at 414 (holding that Mr. Robins adequately alleges Article III standing).

81. *Id.* at 411.

82. *See Fair Credit Reporting Act* § 616, 15 U.S.C. § 1681n(a)(1)(A) (2015) (“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 any actual damages . . . or damages of not less than \$100 and not more than \$1,000.”).

83. *See id.* § 1681n(a)(1)(A) (“Any person who willfully fails to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that

court then drew on *Lujan*,⁸⁴ pointing out that Congress can elevate “concrete, *de facto*” injuries to legally cognizable injuries.⁸⁵ The question becomes: are violations of statutory rights created by FCRA injuries that Congress can elevate?⁸⁶

Other circuits have weighed in on whether the violation of statutory rights under FCRA are intangible injuries that Congress can elevate to an injury in fact. The Sixth Circuit addressed whether FCRA statutory violations are injuries Congress can elevate in 2009⁸⁷ and the Seventh Circuit addressed it in 2006.⁸⁸ In *Beaudry v. TeleCheck Services, Inc.*,⁸⁹ the Sixth Circuit offered two constitutional limitations on congressional power to create standing: (1) a plaintiff must be “among the injured” and (2) “the statutory right . . . must protect against individual . . . harm.”⁹⁰ In *Beaudry*, Cheryl Beaudry sued TeleCheck Services (“TeleCheck”), a corporation that provides check verification services, under the civil liability provision of the FCRA.⁹¹ Beaudry claimed that TeleCheck did not account for a change in Tennessee driver’s licenses, which resulted in the incorrect reporting that Beaudry was a first-time check writer.⁹² Over TeleCheck’s insistence that Beaudry needed to allege more injury than a plain statutory violation,⁹³

consumer in an amount equal to the sum of any actual damages . . . or damages of not less than \$100 and not more than \$1,000.”).

84. See discussion *infra* Part II.

85. *Robins*, 742 F.3d at 413.

86. *Id.*

87. See *Beaudry v. TeleCheck Servs., Inc.*, 579 F.3d 702, 705–07 (6th Cir. 2009) (holding that the FCRA allows for recovery when there are no measurable damages).

88. *Murray v. GMAC Mortg. Corp.*, 434 F.3d 948, 953 (7th Cir. 2006) (“That actual loss is small and hard to quantify is why statutes such as the Fair Credit Reporting Act provide for modest damages without proof of injury.”).

89. 579 F.3d 702, 705–07 (6th Cir. 2009).

90. *Robins*, 742 F.3d at 413 (citing *Beaudry*, 579 F.3d at 707). In *Beaudry*, the plaintiff, also under the FCRA, alleged that she was one of the people about whom the false reports were generated and thus met the first requirement. *Beaudry*, 579 F.3d at 704. “She thus has alleged that the defendants’ failure to follow ‘reasonable procedures to assure maximum possible accuracy’ of credit reporting information occurred ‘with respect to her’ as the statute requires.” *Id.* The Sixth Circuit then found that FCRA clears the second constitutional hurdle as well. FCRA “creates an individual right not to have unlawful practices occur ‘with respect to’ one’s own credit information. *Id.*”

91. *Beaudry*, 579 F.3d at 703; see Fair Credit Reporting Act, 15 U.S.C. § 1681n(a) (2015) (“Any person who willfully fails to comply with any requirement imposes under this subchapter with respect to any consumer is liable to that consumer . . .”).

92. See *Beaudry*, 579 F.3d at 703 (stating that TeleCheck failed to account for a change in the way Tennessee licenses are numbered).

93. See *id.* at 705 (“The defendants, however, insist that the statute requires something

the Sixth Circuit found that when actual damages are an alternative form of recovery, there is an implication that a statutory violation alone is sufficient to establish liability.⁹⁴

Regarding the two-prong analysis, Beaudry alleged that she was among the injured.⁹⁵ Therefore, she claimed that TeleCheck failed to follow “reasonable procedures to assure maximum possible accuracy” regarding her information.⁹⁶ The Sixth Circuit held that FCRA’s statutory damages provision aims to protect against individual, rather than collective, harm.⁹⁷ When the plaintiff is “among the injured” and the statutory right protects against individual harm, the “nexus . . . sustain[s] this statutorily created right.”⁹⁸

In contrast to the relatively substantial treatment given to this question by the *Beaudry* court, the Seventh Circuit considered it settled that a claim for statutory damages was sufficient for standing.⁹⁹ In *Murray v. GMAC Mortgage Corp.*,¹⁰⁰ Nancy Murray, the plaintiff representing a potential class of more than one million, sued a mortgage company for allegedly violating two FCRA provisions without causing her any additional harm.¹⁰¹ The Seventh Circuit noted that requiring

more—that Beaudry allege a different form of injury . . .”).

94. *See id.* at 705–06 (“Because ‘actual damages’ represent an *alternative* form of relief and because the statute permits a recovery when there are no identifiable or measurable actual damages, this subsection implies that a claimant need not suffer (or allege) consequential damages to file a claim.”) (emphasis added).

95. *See id.* at 707 (“Beaudry alleged that she was one of the consumers about whom the defendants were generating credit card reports based on inaccurate information due to their failure to update their databases. . . .”).

96. *Id.*

97. *See id.* (“[I]t creates an individual right not to have unlawful practices occur ‘with respect to’ one’s own credit information.”).

98. *Id.* at 704.

99. *See Murray v. GMAC Mortg. Corp.*, 434 F.3d 948, 952–53 (7th Cir. 2006) (disagreeing with the district court’s conclusion that the plaintiffs should have sought compensatory damages instead of the FCRA’s statutory damages remedy).

100. 434 F.3d 948, 953 (7th Cir. 2006).

101. *See id.* at 950–51 (“Murray filed suit, proposing to represent a class of about 1.2 million recipients of similar offers from GMACM and demanding statutory damages, which range from \$100 to \$1,000 per person.”). Murray alleged that the mortgage company’s offer did not contain “a ‘clear and conspicuous’ notice of the recipient’s right to close her credit information to all who lacked prior consent,” and that “GMACM had not made the ‘firm offer of credit’ that is essential when a potential lender accesses someone’s credit history without that person’s consent.” *See id.* at 951; Fair Credit Reporting Act § 604, 15 U.S.C. § 1681b(c)(1)(B)(i) (2015) (“A consumer reporting agency may furnish a consumer report relating to any consumer . . . in connection with any credit or insurance transaction that is not initiated by the consumer only if . . . the transaction consists of a firm offer of credit . . .”); *see also* 15 U.S.C. § 1681m(d)(1)(D) (“Any person who uses a consumer

plaintiffs not to use the statutory damages remedy would make class actions “impossible.”¹⁰² Individual losses are often small or hard to calculate, so litigating consumer class actions when each plaintiff’s damages need to be determined to come up with a compensatory damages amount makes class actions infeasible.¹⁰³ Finally, the Seventh Circuit asserted that this is why some statutes, like FCRA, allow plaintiffs modest damages without the need to prove injury.¹⁰⁴

The Ninth Circuit found that Robins was in the same position as the plaintiff in *Beaudry*.¹⁰⁵ Robins alleged that his statutory rights were violated and the “interests protected by the statutory rights at issue are sufficiently concrete and particularized that Congress can elevate them.”¹⁰⁶ The Ninth Circuit drew a comparison to the types of injuries explicitly mentioned in *Lujan* as examples of those that can be elevated by Congress, likening Robins’s personal interest in the handling of his credit card information to a person’s interest in living in a racially integrated community.¹⁰⁷ In a footnote, the majority noted that “[b]ecause we determine that Robins has standing by virtue of the alleged violations of his statutory rights, we do not decide whether harm to his employment prospects or related anxiety could be sufficient injuries in fact.”¹⁰⁸

C. *The Supreme Court Reverses and Remands*

Spokeo petitioned the Supreme Court for certiorari.¹⁰⁹ The

report on any consumer in connection with any credit or insurance transaction . . . shall provide . . . a clear and conspicuous statement that . . . the consumer has a right to prohibit information contained in the consumer’s file . . . from being used in connection with any credit or insurance transaction that is not initiated by the consumer.”).

102. *Murray*, 434 F.3d at 952.

103. *See id.* at 953 (“Common questions no longer would predominate, and an effort to determine a million consumers’ individual losses would make the suit unmanageable.”).

104. *Id.*

105. *See Robins v. Spokeo, Inc.*, 742 F.3d 409, 413 (9th Cir. 2014), *vacated*, 136 S. Ct. 1540 (2016).

106. *Id.*

107. *Id.* (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 578 (1992)). In *Lujan*, the Supreme Court mentions an individual’s personal interest in living in a racially integrated community and a company’s interest in marketing its product free from competition as those which can be elevated by Congress. *Lujan*, 504 U.S. at 578.

108. *Robins*, 742 F.3d at 414 n.3.

109. *See Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1545 (2016) (“We therefore vacate the decision below . . .”).

Supreme Court's majority opinion rejected the Ninth Circuit's reasoning that Congress elevated a statutory right, which includes injury in fact, to a legally cognizable right as an alternative to the constitutional minimum for standing.¹¹⁰ For an injury to be particularized, it "must affect the plaintiff in a personal and individual way."¹¹¹ The majority then noted that an injury in fact must also be "concrete" and alleged that the Ninth Circuit failed to consider these two distinct ideas in its standing analysis.¹¹² In the majority's view, the Ninth Circuit only considered factors relating to particularization, making it a constitutionally inadequate standing analysis.¹¹³

The majority referred to the two factors for injury elevation the Ninth Circuit adopted from the Sixth Circuit in *Beaudry*.¹¹⁴ In the majority's view, the two *Beaudry* factors both applied to particularization.¹¹⁵ The Supreme Court majority's opinion talked past the Ninth Circuit by insisting that it conducted the traditional, three-pronged standing test incorrectly.¹¹⁶ Actually, the Ninth Circuit declined to apply the traditional test at all.¹¹⁷ The majority continued with a one paragraph explanation of concreteness, pointing to the

110. See *id.* at 1547–48 (“[I]t is settled that Congress cannot erase Article III’s standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing.”).

111. *Id.* at 1548.

112. *Id.* at 1548. The Ninth Circuit would likely agree and with good reason. As referenced in footnote 3 in the Ninth Circuit’s opinion, the court believed it was unnecessary to consider Article III standing fully in that case. *Robins*, 742 F.3d at 414 n.3.

113. See *Spokeo, Inc.*, 136 S. Ct. at 1548 (“Under the Ninth Circuit’s analysis, [the concreteness] requirement was elided.”); see also *Robins*, 742 F.3d at 414 n.3 (noting that a full discussion of the requirements for injury in fact would be legally superfluous).

114. *Spokeo, Inc.*, 136 S. Ct. at 1548; see also *Robins*, 742 F.3d at 413 (adopting the two factors for statutory right elevation from *Beaudry*).

115. See *Spokeo, Inc.*, 136 S. Ct. at 1548 (“Both of these observations concern particularization, not concreteness.”). But see *Robins*, 742 F.3d at 413–14 (“[A]lleged violations of *Robins*’s statutory rights are sufficient to satisfy the injury-in-fact requirement of Article III.”).

116. See *Spokeo, Inc.*, 136 S. Ct. at 1548 (“Both of these observations concern particularization, not concreteness.”). But see *Robins*, 742 F.3d at 413–14 (“[A]lleged violations of *Robins*’s statutory rights are sufficient to satisfy the injury-in-fact requirement of Article III.”).

117. See *Robins*, 742 F.3d at 414 n.3 (“Because we determine that *Robins* has standing by virtue of the alleged violation of his statutory rights, we do not decide whether harm to his employment prospects or related anxiety could be sufficient injuries in fact.”). The Ninth Circuit thought that precedent dictated that there was no need to go through the full standing test, because of this alternate route created for cases like *Beaudry*. *Id.*

Black's Law Dictionary definition.¹¹⁸ "A 'concrete' injury must be '*de facto*'; that is, it must actually exist."¹¹⁹ The majority asserted that concrete means "real" in the sense that it is not "abstract."¹²⁰

The majority agreed that Congress may "elevate to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law."¹²¹ The majority distinguishes its opinion from the Ninth Circuit by holding that even in the case of an elevated statutory violation Article III requires a concrete injury in fact.¹²² The majority added that the *risk* of real harm can satisfy the concreteness requirement.¹²³ "In other words, a plaintiff in such a case need not allege any additional harm beyond the one Congress has identified."¹²⁴ Seemingly out of nowhere, the majority then reached the conclusion that, in this case, Robins cannot satisfy the demands of Article III by alleging a "bare procedural violation," because a "violation of one of FCRA's procedural requirements may result in no harm."¹²⁵ For example, the majority opinion suggested a consumer report containing only an incorrect zip code would conceivably violate the statute, but it is difficult to imagine how that alone would work any harm.¹²⁶

IV. *SPOKEO* AND PRIOR PRECEDENT

In a concurring opinion in *Spokeo*, Justice Thomas essentially endorsed what the Ninth Circuit did, at least with regard to Robins's claim that Spokeo did not follow reasonable procedures to assure maximum possible accuracy.¹²⁷ Justice Thomas would have the Ninth

118. See *Spokeo, Inc.*, 136 S. Ct. at 1548.

119. *Id.*

120. *Id.*

121. *Id.* at 1549 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 578 (1992)).

122. See *Spokeo, Inc.*, 136 S. Ct. at 1549 ("Article III standing requires a concrete injury even in the context of a statutory violation.").

123. See *id.* ("This does not mean, however, that the risk of real harm cannot satisfy the requirement of concreteness.").

124. *Id.*

125. *Id.*

126. *Id.*

127. See *id.* at 1553–54 (Thomas, J., concurring) (acknowledging the *Warth* principle and noting that one of Robins' claims "rests on a statutory provision that could arguably establish a private cause of action to vindicate the violation of a privately held right); see also *Robins v. Spokeo, Inc.*, 742 F.3d 409, 413–14 (9th Cir. 2014), *vacated*, 136 S. Ct. 1540 (2016) ("[A]lleged violations of Robins's statutory rights are sufficient to satisfy the injury-in-fact requirement of Article III.").

Circuit consider whether Robins is trying to enforce a public or individual right.¹²⁸ The difference between the majority and concurring opinions arises out of the majority's misapplication of *Lujan*.¹²⁹

Justice Thomas appreciated the limitations of the Supreme Court's decision in *Lujan*.¹³⁰ The majority opinion used an overbroad conception of *Lujan*, ignoring its limited holding that the concreteness requirement must remain in suits *against the government*.¹³¹ The plaintiffs in *Lujan* relied on a statute that authorized *anyone* to bring a lawsuit based on the government's failure to follow a correct procedure.¹³² The majority rejected this justification for Article III standing and viewed the challenge as a case where a private citizen sues to force the government to act properly.¹³³ The majority affirmed the idea that "the injury required by Article III may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing.'" ¹³⁴ The question, whether this statute creates such a legal right, is the question the Supreme Court majority should have either

128. See *Spokeo, Inc.*, 136 S. Ct. at 1553–54 (Thomas, J., concurring) (noting that Robins can have standing to sue by alleging the invasion of a legal right, if FCRA imposes a duty upon Spokeo to Robins individually, as opposed to the public).

129. See *id.* at 1549 ("Robins could not . . . allege a bare procedural violation, divorced from any concrete harm, and satisfy the injury-in-fact requirement of Article III."). But see *id.* at 1553 (Thomas, J., concurring) ("A plaintiff seeking to vindicate a *public* right embodied in a federal statute, however, must demonstrate that the violation of that public right has caused him a concrete, individual harm distinct from the general population.").

130. See *id.* at 1553 (Thomas, J., concurring) (acknowledging the language in *Lujan* that limits the holding to suits against the government); see also *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 578 (1992) ("Whether or not the principle set forth in *Warth* can be extended beyond that distinction, it is clear that in suits against the government, the concrete injury requirement must remain.").

131. See *Spokeo, Inc.*, 136 S. Ct. at 1549 (suggesting that *Lujan* means a concrete injury is always necessary in the case of a statutory violation); but see *Lujan*, 504 U.S. at 578 ("[I]t is clear that in suits against the Government . . . the concrete injury requirement must remain.").

132. See *Lujan*, 504 U.S. at 572 ("The [Circuit Court] held that, because § 7(a)(2) requires interagency consultation, the citizen-suit provision creates a 'procedural righ[t]' to consultation in all 'persons' – so that *anyone* can file suit in federal court to challenge the Secretary's (or presumably any other federal official's) failure to follow the assertedly correct . . . procedure, notwithstanding his or her inability to allege any discrete injury flowing from the failure.").

133. See *id.* at 573–74 ("We have consistently held that a plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws . . . does not state an Article III case or controversy.").

134. *Id.* at 578 (quoting *Warth v. Seldin*, 422 U.S. 490, 500 (1975)).

answered or asked the Ninth Circuit to answer.¹³⁵ The Ninth Circuit did answer that question in the affirmative.¹³⁶

Even treating the majority's application of *Lujan* and other precedent as correct,¹³⁷ it is unclear what the majority wanted Robins to allege.¹³⁸ The majority suggests that Robins should have alleged a risk of harm coming from these statutory violations, but, more than that, Robins alleged real, existing harm instead.¹³⁹ The dissent agreed that the majority overlooked the concrete injury Robins alleged.¹⁴⁰ There is no need to remand the case when, even on an incorrect legal theory, Robins meets the demands of the majority.¹⁴¹ In addition to the concerns raised by Justice Ginsburg in the dissent, it is difficult to discern just what the Court meant by "real."¹⁴² The majority did not mean that the injury is tangible.¹⁴³ In fact, the opinion discussed how intangible harms can still be concrete.¹⁴⁴ Congress can make certain statutory violations into constructive "real" injuries.¹⁴⁵ At some level, the majority opinion in *Spokeo* recognized that Congress can elevate

135. See *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1554 (2016) (Thomas, J., concurring) ("On remand, the Ninth Circuit can consider the nature of this claim.").

136. See *Spokeo, Inc. v. Robins*, 742 F.3d 409, 413–14 (9th Cir. 2014), *vacated*, 136 S. Ct. 1540 (2016) ("[A]lleged violations of Robins's statutory rights are sufficient to satisfy the injury-in-fact requirement of Article III.").

137. See discussion *infra* PART IV (arguing that the *Spokeo* majority opinion misapplied *Lujan*).

138. See *Spokeo, Inc.*, 136 S. Ct. at 1550 ("[The Ninth Circuit's standing analysis] did not address the question framed by our discussion, namely, whether the particular procedural violations alleged in this case entail a degree of risk sufficient to meet the concreteness requirement.").

139. See *id.* ("[The Ninth Circuit's standing analysis] did not address the question framed by our discussion, namely, whether the particular procedural violations alleged in this case entail a degree of risk sufficient to meet the concreteness requirement."). *But see id.* at 1554 (Ginsburg, J. dissenting) (noting that Robins alleges the misinformation on *Spokeo*'s website is causing imminent and ongoing harm).

140. See *id.* at 1556 (Ginsburg, J., dissenting) ("I therefore see no utility in returning this case to the Ninth Circuit to underscore what Robins' complaint already conveys concretely: *Spokeo*'s misinformation 'cause[s] actual harm to [his] employment prospects.'").

141. See *id.* ("I therefore see no utility in returning this case to the Ninth Circuit to underscore what Robins' complaint already conveys concretely: *Spokeo*'s misinformation 'cause[s] actual harm to [his] employment prospects.'").

142. See *id.* at 1548 ("When we have used the adjective 'concrete,' we have meant to convey the usual meaning of the term— 'real,' and not 'abstract.'").

143. See *id.* at 1549 ("'Concrete' is not, however, necessarily synonymous with 'tangible.'").

144. See *id.*

145. See *id.* (discussing Congress' role in identifying and elevating intangible harms).

intangible harm to constructively meet the concreteness requirement.¹⁴⁶ Acknowledging that Congress can do so, yet still requiring an additional concrete injury, outside of the context of lawsuits against the government,¹⁴⁷ is antithetical to the precedent from various federal circuits.¹⁴⁸

V. SPOKEO BENEFITS CONSUMERS AND FINANCIAL INSTITUTIONS

Spokeo has significant implications for prospective lawsuits under consumer financial protection statutes.¹⁴⁹ To some extent, both consumer advocacy groups and groups representing the interests of financial institutions view the *Spokeo* decision favorably.¹⁵⁰ Perhaps indicating some level of uncertainty over the long-term impact of *Spokeo*, both sides of the issue are attempting to spin the decision for their respective benefits.¹⁵¹ The Consumer Financial Protection Bureau (“CFPB”) has been aggressively submitting amicus briefs that incorporate *Spokeo* since it was decided in early 2016.¹⁵² The strategy

146. See *id.* (discussing Congress’ role in identifying and elevating intangible harms).

147. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 578 (1992) (holding that the injury in fact requirement must remain in suits against the government).

148. See *Beaudry v. TeleCheck Servs., Inc.*, 579 F.3d 702, 705–07 (6th Cir. 2009) (holding that the FCRA allows for recovery when there are no measurable damages); see also *Murray v. GMAC Mortg. Corp.*, 434 F.3d 948, 953 (7th Cir. 2006) (“That actual loss is small and hard to quantify is why statutes such as the Fair Credit Reporting Act provide for modest damages without proof of injury.”).

149. See discussion *supra* PART IV (arguing that *Spokeo* makes it more difficult for consumers to successfully bring class action suits); see also David J. Lender, Greg Silbert, Eric S. Hochstadt, & Gaspard Curioni, *Supreme Court Reiterates Concrete Injury Requirement in Consumer Class Action Statutory Damages Case*, 28 NO. 7 INTELL. PROP. & TECH. L.J. 20, 21 (July, 2016) (pointing to the Telephone Consumer Protection Act as one consumer financial protection statute that will be affected).

150. See *Lee v. Verizon Comm., Inc.*, No. 14-10553, 2016 BL 302784, at *2 (5th Cir., Sept. 15, 2016) (holding that in light of *Spokeo*, the conclusion that “a plaintiff’s bare allegation of incursion on the purported statutory right to ‘proper plan management’ under ERISA is insufficient to meet the injury-in-fact prong of Article III standing.”); but see Brief for Department of Labor as Amicus Curiae Supporting Plaintiff-Appellant at *23, *Fletcher v. Convergenx Group, LLC*, (No. 16-00734), (arguing that *Spokeo* comports with prior holdings that the violation of a statutory right to proper fiduciary conduct is sufficient for injury-in-fact).

151. See Chris Bruce, *Spokeo Test Plaintiff Has Standing, CFPB Says*, 106 Banking rep. (BNA) No. 24, at 885 (June 13, 2016) (“The CFPB said Bock suffered ‘concrete harm sufficient to establish Article III standing.’”).

152. See *id.* (“The CFPB said Bock suffered ‘concrete harm sufficient to establish Article III standing,’ citing his allegations that Pressler & Pressler misrepresented ‘that an attorney was meaningfully involved’ in the suit against him.”). In this case, a plaintiff is

for groups submitting briefs on behalf of consumers seems to be explicitly referring to the alleged harm as “concrete harm.”¹⁵³ The arguments have not changed significantly; rather, the language used by plaintiffs and their supporters has changed.

In at least one brief, the CFPB focused on the *Spokeo* majority’s usage of *Akins*.¹⁵⁴ This case, *Keen v. JPMorgan Chase Bank*,¹⁵⁵ was about a disclosure regarding a finance charge under TILA that JPMorgan allegedly failed to make.¹⁵⁶ In cases where the alleged statutory violation results from plaintiffs not receiving some information to which they are entitled, the CFPB argues that *Spokeo* supports standing for those plaintiffs.¹⁵⁷ In the *Keen* brief, the CFPB also argues that the plaintiffs have standing whether or not a finance charge is actually assessed.¹⁵⁸ This is where the CFPB goes furthest to limit *Spokeo*’s impact by asserting the *Akins* principal that no additional harm needs to be alleged.¹⁵⁹

The National Consumer Law Center (“NCLC”) is recommending that plaintiffs plead actual damages, rather than only statutory damages, when possible.¹⁶⁰ Additionally, as *Spokeo* is only

suing a law firm under the FDCPA, because the FDCPA gives consumers a legal right to truthful information in their dealings with debt collectors. *Id.*

153. *See id.* (“The CFPB said Bock suffered ‘concrete harm sufficient to establish Article III standing.’”).

154. *See* Brief for the Consumer Financial Protection Bureau as Amicus Curiae Supporting Plaintiff-Appellant at *11, *Keen v. JPMorgan Chase Bank*, (No. 15-17188), (“In particular, *Spokeo* specifically reaffirms that plaintiffs in certain cases ‘need not allege any additional harm beyond the one Congress has identified’—and it identifies *Akins* and *Public Citizen* as cases in which no additional harm was required.”).

155. *Keen v. JPMorgan Chase Bank*, No. 15-cv-01806-WHO, 2015 WL 6601775 (N.D. Cal. Oct. 30, 2015).

156. *See* Brief for the Consumer Financial Protection Bureau as Amicus Curiae Supporting Plaintiff-Appellant at *10, *Keen v. JPMorgan Chase Bank*, (No. 15-17188) (citing Truth in Lending Act, 15 U.S.C. § 1683(a)(3) (2015)) (“TILA grants consumers a right to receive an accurate disclosure of ‘the finance charge’ associated with their loan.”).

157. *See id.* at *8 (“[T]he alleged invasion of the Borrowers’ legally protected interest in receiving information that accurately describes the finance charge that they were legally obligated to pay is a sufficiently concrete injury-in-fact. And, as *Spokeo* reaffirms, that injury is enough by itself to satisfy Article III even if the borrowers did not suffer any additional injury beyond the deprivation of information . . .”).

158. *Id.* at *11.

159. *See id.* (“*Spokeo* specifically reaffirms that plaintiffs in certain cases ‘need not allege any additional harm beyond the one Congress has identified.’”).

160. LEGAL TREATISES, NATIONAL CONSUMER LAW CENTER, STATUTE-SPECIFIC SPOKEO ANALYSES EXCERPTED FROM UPDATED NATIONAL CONSUMER LAW CENTER LEGAL TREATISES: STANDING, <http://www.nclc.org/images/pdf/litigation/spokeo/Truth-in-Lending-11-2.pdf> (last visited Feb. 13, 2017).

binding on federal courts, the NCLC recommends considering bringing suit in state court where *Spokeo* is not controlling, but only persuasive.¹⁶¹ Additionally, the NCLC reads *Spokeo* narrowly and suggests that pleading a material risk of real harm may be enough to have standing under *Spokeo*.¹⁶²

At least one district court has limited *Spokeo*'s impact to apply only when the statutory violation is extremely unlikely to cause any actual harm.¹⁶³ In *Larson v. Trans Union, LLC*,¹⁶⁴ the court asked whether it was conceivable for the statutory violation complained of to cause some harm, even just emotional distress.¹⁶⁵ This reading of *Spokeo* places emphasis on the majority's point that an incorrect zip code would be a technical violation of the FCRA.¹⁶⁶ In *Larson*, the plaintiff alleged that Trans Union provided a credit report with misleading information; specifically, the credit report did not make it clear that the plaintiff was not on a terrorist watch list.¹⁶⁷ The United States District Court for the Northern District of California decided that a misleading designation regarding terrorist watch list status that allegedly caused emotional distress is different from a bare procedural violation perpetrated by the dissemination of an incorrect zip code.¹⁶⁸ The *Larson* court also asserted that some other districts have limited the restrictive impact *Spokeo* has on Article III standing.¹⁶⁹

161. *See id.*

162. *Id.*

163. *See Larson v. Trans Union, LLC*, No. 12-CV-05726-WHO, 2016 BL 260668, at *3 (N.D. Cal., Aug. 11, 2016) (noting that "the [Supreme Court] 'expressed no view about any other types of false information' and 'took no position as to whether the Ninth Circuit's ultimate conclusion . . . was correct.'").

164. No. 12-CV-05726-WHO, 2016 BL 260668 (N.D. Cal., Aug. 11, 2016).

165. *See id.* ("[I]t is not 'difficult to imagine how the dissemination of [the OFAC disclosure] could work [some] concrete harm' to consumers.").

166. *See Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1550 (2016) (noting that the mere inaccurate reporting of a zip code is unlikely to work any harm).

167. *See Larson*, No. 12-CV-05726-WHO, 2016 BL 260668, at *3. In *Larson* the plaintiff alleged that Trans Union provided a "misleading" credit report. *See id.* It was misleading as to whether the plaintiff was a possible Office of Foreign Asset Control match. *See id.*

168. *Id.*

169. *See id.* ("[H]is claim is based on the sort of 'informational' injury that the *Spokeo* court implicitly recognized . . . and that a number of other cases . . . have found sufficient to support Article III standing."). The Eleventh Circuit held that a plaintiff had standing under FDCPA when the plaintiff was entitled to receive certain disclosures and the defendant failed to make them. *Church v. Accretive Health, Inc.*, No. 15-15708, 2016 WL 3611543, at *2-3, (11 Cir., July 6, 2016). The Northern District Court in Illinois held that a plaintiff had

While consumer advocacy groups and some district courts might want to limit the impact of *Spokeo*'s holding, it is clear that it presents a sizable obstacle for consumer litigation, specifically class actions.¹⁷⁰ Financial institutions will surely use *Spokeo* to challenge consumer class actions at the early stages of litigation.¹⁷¹ The *Spokeo* decision unequivocally deprives consumers of the ability to bring suits against covered entities while alleging only statutory damages without additional concrete injury.¹⁷² Regardless of what else comes from the opinion, it is clear that alleging a plain statutory violation is not enough to establish standing.¹⁷³ Though the CFPB is trying to emphasize *Spokeo*'s mention of *Akins*, *Spokeo*'s majority opinion makes it clear that notwithstanding cases like *Akins*, "Robins cannot satisfy the demands of Article III by alleging a bare procedural violation."¹⁷⁴ Since Article III standing is now more difficult to allege, fewer lawsuits under consumer financial protection will be initiated.¹⁷⁵ In the suits that are brought, financial institutions will have a more powerful tool at their disposal: a strengthened case for dismissal for want of standing to sue.¹⁷⁶

Consumer class actions are burdensome to financial institutions, which are forced to choose between two unfavorable positions: Settle a suit the financial institution might otherwise win or litigate it and risk taking a serious loss.¹⁷⁷ For example, Bank of America spent \$6 billion

standing under FDCPA because the plaintiff established a concrete injury in that the defendant provided a misleading debt collection notice, which denied the plaintiff the right to information due to him. *Lane v. Bayview Loan Servicing, LLC*, No. 15-CV-10446, 2016 WL 3671467, at *3–5 (N.D. Ill., July 11, 2016).

170. See *Lender, et. al.*, *supra* note 146 ("[T]he Court reaffirmed well-settled doctrine against efforts by plaintiffs' counsel to short-circuit the constitutional standing analysis in actions dealing with statutorily created rights.").

171. See *Lender, et. al.*, *supra* note 146.

172. See *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016) ("Article III standing requires a concrete injury even in the context of a statutory violation.").

173. See *id.*

174. *Id.* at 1550.

175. See NOAH A. LEVINE, DAVID LESSER, JAMIE DYCUS, & FIONA J. KAYE, SUPREME COURT VACATES NINTH CIRCUIT DECISION IN SPOKEO, REMANDS FOR ANALYSIS OF CONCRETE HARMS, WILMERHALE, (2016) ("*Spokeo* is likely to curtail significantly the ability of plaintiffs to pursue class actions for mere procedural or other 'technical' violations under such [consumer financial protection statutes].").

176. See *id.*

177. Scott S. Partridge & Kerry J. Miller, *Some Practical Considerations for Defending and Settling Products Liability and Consumer Class Actions*, 74 TUL. L. REV. 2125, 2162 (June, 2000) ("Plaintiff class action lawyers have always been very creative in seeking to

in the *first quarter* of 2014 on litigation, which includes suits that were settled.¹⁷⁸ Bankers admit that high legal bills can obscure the bottom line when the bank is doing very well.¹⁷⁹ In contrast, a reduction in legal fees can dramatically improve the bottom line: Citigroup's expenses decreased by \$5 billion in 2014, largely as a result of lower legal expenses.¹⁸⁰ Without the legal expenditures, banks like Bank of America can transfer profits down to consumers by paying higher dividends, increasing deposit interest rates, or decreasing interest on loans, for example.

When financial institutions spend less money defending consumer lawsuits, their bottom lines, and, consequently, consumers benefit.¹⁸¹ With the excess capital, those institutions can make new investments. If those investments return additional capital, banks can make even more investments. Furthermore, banks can use the capital to improve their services and branch facilities for consumers. As the world modernizes, banks would do well to keep pace with regard to technology and quality of user interface.¹⁸² Consumers benefit from technological improvements that make financial activity more accessible and more aesthetically interesting. Besides internal investing to improve the consumer experience, the amount of litigation-related expenses incurred can affect whether a holding company disburses dividends to its shareholders and how large those dividends are.¹⁸³

place consumer products companies in a 'catch-22' of 'settling to survive' or 'betting the company' by litigating.”).

178. Polly Mosendz, *Here's How Much America's Biggest Banks Spent on Legal Bills This Quarter*, THE ATLANTIC (April 17, 2014), <http://www.theatlantic.com/business/archive/2014/04/heres-how-much-americas-biggest-banks-spent-on-legal-bills-this-quarter/360773/>.

179. *Id.* (quoting Bank of America CEO Bruce Thompson as claiming the bank would have turned a nice profit without the high legal bills); see Donal Griffin and Dakin Campbell, *U.S. Bank Legal Bills Exceed \$100 Billion*, BLOOMBERG, (Aug. 28, 2013, 12:02 PM) (“The sum, equivalent to spending \$51 million a day, is enough to erase everything the banks earned in 2012.”).

180. See Christina Rexrode & Peter Rudegeair, *Citigroup Profit Soars on Lower Litigation Costs*, WALL ST. J., July 16, 2015, <http://www.wsj.com/articles/citigroup-profit-soars-on-lower-litigation-costs-1437048055> (“Expenses fell 30% to \$10.93 billion from \$15.52 billion a year earlier, largely because of smaller legal costs.”).

181. See Fed. Dep. Ins. Corp., *All Institutions Performance Fourth Quarter 2015*, FDIC QUARTERLY BANKING PROFILE (2015) (“Declines in expenses for litigation at a few large banks . . . lift fourth-quarter income at FDIC-insured institutions. . .”).

182. Penny Crosman, *Why the Retail Store Bank Branch is Making a Comeback*, BANK SYS. & TECH., (Mar. 23, 2011) <http://www.banktech.com/channels/why-the-retail-store-bank-branch-is-making-a-comeback/d/d-id/1294594?>

183. Cf. Beverly Hirtle, *Bank Holding Company Dividends and Repurchases During the*

Holding companies with extra capital due to lower litigation expenses may pay dividends to their shareholders, which benefits those consumers. Since *Spokeo* presents a greater barrier to consumers' lawsuit prospects, financial institutions can expect a positive impact on their bottom lines resulting from decreased litigation expenses.¹⁸⁴

VI. A NEW, COMMON SENSE TEST FOR STANDING IN STATUTORY VIOLATION CASES

There is significant disagreement among federal courts regarding when Congress can elevate statutory violations to the status of concrete injuries.¹⁸⁵ There is disagreement over whether any additional injury needs to be alleged if Congress satisfactorily elevates a statutory violation.¹⁸⁶ The Supreme Court should seek to provide an answer for these disagreements as well as solutions for the other problems left unsolved in *Spokeo*. Standing doctrine is frequently criticized as confusing, "manipulable," and a cover for improper analysis.¹⁸⁷ There is empirical evidence that in cases with substantially similar facts, the standing doctrine was applied in opposite ways.¹⁸⁸ For a doctrine with such dispositive power, that is unacceptable.

In cases of statutory violations under consumer financial protection statutes, federal courts should apply a test of basic reason. The majority opinion in *Spokeo* focused on the idea that it was possible to violate the FCRA without working any concrete harm.¹⁸⁹ Why is that relevant to Robins's case? Robins presented the various inaccuracies contained in the report.¹⁹⁰ Robins then explained why those inaccuracies made him less attractive to employers while he was

Financial Crisis, FED. RESERVE BANK OF N. Y. STAFF REPORTS NO. 666, at 1 (March 2014) (supporting the notion that dividends and other capital distributions are inappropriate and unlikely when capital comes under stress).

184. See Lender, et. al., *supra* note 146 ("Post-*Spokeo* companies facing such putative class actions can be expected to challenge vigorously a named plaintiff's standing at the pleading stage.").

185. See discussion *supra* PART III.

186. See discussion *supra* PART III.

187. Heather Elliott, *The Functions of Standing*, 61 STAN. L. REV. 459, 467 (2008).

188. *Id.*

189. See *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1550 (2016) ("[N]ot all inaccuracies cause harm or present any material risk of harm.").

190. See *id.* at 1554 (Ginsburg, J., dissenting) (listing the inaccuracies including an inaccurate picture, inaccurate age, income level, education level, etc.).

actively seeking employment.¹⁹¹ It is unfair to ask Robins to obtain some kind of proof that an employer chose not to pursue him as a result of the inaccuracies. It is impractical to look for that kind of information. A fact-specific test would be a proper replacement for a test that speculates whether it is possible to violate the statute without causing harm. The Supreme Court's majority opinion in *Spokeo* emphasized that it was *possible* to violate FCRA without doing actual harm.¹⁹² Instead, the new test asks whether the actual facts pled point to the injury complained of.

It is better for financial institutions and consumers if consumers cannot sustain lawsuits on bare statutory violations alone.¹⁹³ Standing based only on statutory violations opens the door to frivolous lawsuits.¹⁹⁴ The Court should articulate a new test, which amounts to: Does the story make sense, or more specifically, is the plaintiff alleging a bare statutory violation? If the answer is yes, does that statutory violation come paired with a provision for statutory damages? If the answer is yes, is the plaintiff alleging some harm? If the answer is yes, does it make sense that *this particular* statutory violation results in the harm the plaintiff sustained? This suggested test does not preclude judicial discretion. It asks the judge to determine if the story is coherent. It is important to ask the question in the context of the specific facts alleged by the plaintiff. So, instead of wondering whether it is possible to violate the statute without working any real harm, like the *Spokeo* majority insisted on doing,¹⁹⁵ ask if the way the statute was allegedly violated could harm the plaintiff in the way the plaintiff alleges.

This test still avoids the pitfalls about which the *Spokeo* majority was concerned.¹⁹⁶ A plaintiff alleging an incorrect zip code

191. *See id.* ("As Robins elaborated on brief, Spokeo's report made him appear overqualified for jobs he might have gained, expectant of a higher salary than employers would be willing to pay, and less mobile because of family responsibilities.").

192. *See id.* at 1550 ("A violation of one of FCRA's procedural requirements may result in no harm.").

193. *See* discussion *supra* PART V.

194. *See* Lender, et. al., *supra* note 146 ("The ruling effectively puts to rest the contention that the availability of statutory damages from an alleged technical violation is by itself sufficient to confer standing.").

195. *See Spokeo, Inc.*, 136 S. Ct. at 1550 ("It is difficult to imagine how the dissemination of an incorrect zip code, without more, could work any concrete harm.").

196. *See id.* ("It is difficult to imagine how the dissemination of an incorrect zip code, without more, could work any concrete harm.").

was reported would not have standing, but Robins clearly would.¹⁹⁷ Robins alleged a statutory violation, namely that Spokeo did not use reasonable efforts to ensure the accuracy of the information reported about Robins. Robins alleged some harm; specifically, he asserted that the inaccurate reporting may have deprived him of employment opportunities. Finally, the story, supported by the available facts, is coherent and reasonable. The employers Robins would be interested in may not have been interested in him because of misconceptions created by the inaccurate credit report.

The proposed test does not conflict with anything in *Lujan*, but it is better to articulate a clear, bright line than to revert to *Lujan*. *Lujan*'s narrow holding was that in suits against the government, the concrete injury requirement must remain.¹⁹⁸ *Lujan* reaffirmed the principle that, outside of suits against the government, "the injury required by Article III may exist solely by virtue of 'statutes creating rights, the invasion of which creates standing.'"¹⁹⁹ The proposed test's most significant advantage is that it does away with the imprecise notion of concreteness with which *Lujan* does not dispense. As an alternative to the traditional standing test, a federal court should find that a plaintiff, or class of plaintiffs, has standing if they allege (1) a statutory violation, (2) that that statutory violation is paired with a civil liability provision, (3) that they have suffered any harm, and (4) that the alleged violation caused that harm. This test is consistent with the principle affirmed in *Lujan*, that Congress can elevate certain otherwise insufficient injuries to the status of concrete injuries.²⁰⁰ The test builds upon *Lujan* by asking the right questions to determine whether Congress conveyed standing in the case of any particular plaintiff.

The new test would inject some clarity into a contentious area of law, even though Robins would have standing under the proposed test. Consumers benefit from clarity because it allows them to assess

197. See *id.* at 1554 (Ginsburg, J., dissenting) (noting the statutory provision Spokeo allegedly violated, the inaccuracies Spokeo allegedly published, and the harm that allegedly resulted).

198. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 578 (1992) ("[I]t is clear that in suits against the Government, at least, the concrete injury requirement must remain.").

199. *Id.*

200. See *id.* ("Nothing in this contradicts the principle that '[t]he . . . injury required by Article III may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing.'")

whether bringing a lawsuit is worthwhile. Financial institutions benefit from clarity, because clarity helps them to conform their behavior to the law in the course of regular operations. Financial institutions seeking to avoid lawsuits are better able to do so when they can be sure of what it takes for a plaintiff to have standing.

VII. CONCLUSION

Standing is a fundamental doctrine; it is a basic constitutional requirement, emerging from the Constitution's "cases and controversies" language, without which a piece of litigation cannot proceed. Article III standing challenges are a powerful tool for those litigants who can make use of them. The Supreme Court's decision in *Spokeo* diminishes the ability of consumers to bring lawsuits under consumer financial protection statutes by depriving consumers of their standing when they can only allege bare statutory violations without a concrete injury. As long as *Spokeo* governs, financial institutions stand to benefit.

While this Note contends that the Supreme Court misapplied the relevant precedent in *Spokeo*, the Court had the correct policy concerns in mind. A new, clear test that circumvents discussions of concreteness in the context of statutory violations would allow federal courts to throw out frivolous lawsuits while allowing suits where harm from the statutory violation is difficult to show concretely at the pleading stage. The clarity benefits both financial institutions and consumers. Consumers, like Robins, can maintain their suits, while consumers also benefit indirectly from a reduction in legal fees paid by financial institutions. Financial institutions benefit primarily through a reduction in legal fees resulting from fewer frivolous consumer lawsuits. The proposed test balances the best interests of both consumers and financial institutions and injects clarity into the crucial, but often misapplied Article III standing doctrine.

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