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Rethinking Article III Standing in Class Action Consumer Protection Cases Following *Spokeo v. Robins*

Joshua Scott Olin*

The Supreme Court recently handed down the landmark decision of Spokeo, Inc. v. Robins, holding that a "bare procedural violation" of a federal consumer protection statute—namely, the Fair Credit Reporting Act—was not enough to satisfy Article III standing because the injury alleged was particularized but not concrete. After Spokeo, those wishing to bring suit based on consumer protection statutes will have a much more difficult time showing that the injury suffered was "concrete" enough to confer Article III standing and, as a result, the term "consumer protection" will be rendered meaningless. Unless the Supreme Court revisits the issue presented in Spokeo, the lack of clarity given by the Spokeo Court in determining whether an injury is concrete will leave consumers without the necessary means to ensure that the consumer protection statutes actually protect them.

In Spokeo, the Plaintiff, Thomas Robins, on behalf of himself and others similarly situated, had false information disseminated about him by Spokeo in a "consumer report," in violation of the Fair Credit Reporting Act. The Court correctly stated that "Congress' role in identifying and elevating intangible harms does not mean that a plaintiff automatically satisfies the injury–in–fact requirement whenever a statute grants a person to sue to

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vindicate that right. Article III standing requires a concrete injury even in the context of a statutory violation." However, as Justice Ginsburg's dissent states, "[j]udged by what we have said about 'concreteness,' Robins' allegations carry him across the threshold." Where the Court argues that a bare procedural violation, such as "an incorrect zip code," is not enough, Justice Ginsburg points out that the misinformation disseminated about Robins could affect his ability to obtain a job, and therefore, the injury was concrete.

Because of this decision, plaintiffs now wishing to bring suit based on federal consumer protection statutes will, on the pleadings, be subjected to a much higher level of scrutiny. Accordingly, "consumer protection" loses much of its meaning because Spokeo protects business interests more than consumer interests. This note argues that the Spokeo decision will negatively impact consumers moving forward and that the issue of when an injury is "concrete" must be revisited, sooner rather than later, if consumer protection is to survive.

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I. INTRODUCTION

Take a moment to think about a time when someone else's wrongdoing caused you to suffer an injury. Maybe it was a physical one, an emotional one, or even one that had a significant financial impact. If the injury was significant, you would likely file a lawsuit against whoever wronged you. Before the suit could proceed, the requirements of Article III must be satisfied. The Supreme Court has interpreted Article III to require that plaintiffs have standing to have their case heard in a court of law.[1] For standing to exist, the plaintiff must point to an injury sustained as a result of a defendant's allegedly unlawful conduct, and the injury must be redressable.[2] Plaintiffs must also show that they have suffered an injury in fact, "*i.e.,* a concrete and particularized, actual or imminent invasion of a legally protected interest."[3] Without meeting these Article III requirements, your lawsuit will not proceed past the pleadings stage.

The court, however, may view what you believe to be a real injury as insufficient to rise to the level of concreteness and particularity mandated by Article III. When it comes to consumer protection and sensitive data, this is particularly troubling. Imagine you signed up for a web service or decided to do some shopping online and the website you are on asks you to store personal information such as your credit card number, address, password, email address, etc., on the website's "secure server." Now, say you know you will be using this web service again in the future, so you agree to store your information to experience a quicker, more convenient checkout upon your next visit. A few weeks later, all of your data is stolen by hackers who managed to breach the network where your information was stored. You are worried that the hackers will be able to use your credit card number and personal information to either steal your identity or make purchases on your behalf. As a result, you and a class of other similarly situated plaintiffs decide to file a class action against the company that failed to protect your information.

The company your information is now stored with argues that you have not suffered a "concrete" injury, because you have not actually been subject to any form of harm. However, because of the data breach, hackers now possess your private information and can do with it what they please. Is this type of lawsuit something that our court system should allow? Should our court system allow litigation to proceed where a plaintiff, especially in the consumer protection context, exhibits an injury that

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1 Warth v. Seldin, 422 U.S. 490, 498 (1975) (whether the plaintiff has established an actual case or controversy between himself and the defendant within the confines of Art. III is the threshold question when determining if a federal court can entertain the suit).

2 *See* Lujan v. Defs. of Wildlife, 504 U.S. 555, 590 (1992).

3 *Id.* at 555.

would ordinarily suffice for Article III standing? The ordinary consumer expects that, should a company cause him or her harm, he or she can receive compensation through the courts.

This note will focus on what it means for an injury to be "concrete" in consumer protection cases, many of which are, by nature, class actions. After the recent Supreme Court decision in *Spokeo, Inc. v. Robins*,[4] it is not the definition of a "concrete" injury that is unclear but rather the threshold a plaintiff must cross in order for the injury to be sufficiently concrete for standing to exist. This note will argue that Justice Ginsburg's dissent in *Spokeo* provides a better approach to Article III standing in consumer protection cases.[5]

Part I of this note introduces *Spokeo* and posits the resulting disconnect that Article III standing has in consumer protection class actions. Part II discusses *Spokeo* in depth. Part III focuses on Article III and analyzes Congress' intentions behind the standing doctrine, the development of the "concrete" injury requirement, Article III standing in the class action setting, and how procedural violations fit into the standing doctrine. Part IV analyzes *Spokeo* in relation to consumer protection cases and analyzes how other courts have already applied *Spokeo*, ending with a discussion of the newly handed down Ninth Circuit opinion. Finally, Part V posits potential ways for future plaintiffs to bypass the incredibly difficult standard *Spokeo* created.

II. SPOKEO, INC. V. ROBINS

As of May 2016, consumers who wish to file a complaint stemming from federal statutory violations, such as a violation of the Fair Credit Reporting Act (FCRA), must overcome a new, major hurdle created by the Supreme Court in *Spokeo*. Because of the decision in *Spokeo*, plaintiffs who seek to bring suit in consumer protection and privacy cases must meet an increasingly difficult standard of standing under Article III, specifically in satisfying the "concreteness" prong of "injury in fact."

Spokeo, Inc. advertises itself as "a people search engine that organizes white pages listings, public records and social network information into simple profiles to help . . . safely find and learn about people."[6] Thomas Robins is a resident of Vienna, Virginia. He initially filed suit in the United States District Court for the Central District of California in 2010, alleging

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[4] 136 S. Ct. 1540 (2016).

[5] As this note was near the completion of its editorial cycle for publication, the Ninth Circuit ruled on *Spokeo* on remand from the Supreme Court. For a discussion of the Ninth Circuit decision, *see infra* Part IV, Section H.

[6] SPOKEO, http://www.spokeo.com (last visited Feb. 17, 2017).

a violation of the Fair Credit Reporting Act, which is a consumer protection statute designed to prevent false reporting of consumer credit information.[7] At the time the complaint was filed, Robins ascertained that the information contained in the consumer report generated by Spokeo correctly described his basic identifying information but most everything else about him was incorrect.[8]

Spokeo went far beyond its mission statement when it falsely reported Robins' credentials. Robins alleged, and proved, that Spokeo incorrectly reported that Robins "was in his 50s, married, employed in a professional or technical field, and had children."[9] Furthermore, Robins found that what Spokeo claimed to be an image of Robins was not in fact Robins.[10] At the time Robins filed suit, he was out of work and actively seeking employment, but was concerned that the inaccuracies listed in Spokeo's consumer report about him were affecting his ability to obtain not only a job, but credit, insurance, and the like.[11]

Initially, the district court denied Spokeo's motion to dismiss Robins' amended complaint for lack of Article III standing, but after Spokeo sought interlocutory appeal, the district court reconsidered its previous ruling and granted Spokeo's motion to dismiss.[12] On appeal, the Ninth Circuit reversed, holding that Spokeo's alleged violations of Robins' rights under the FCRA did in fact confer standing upon Robins because even though Congress' power to confer standing has limits, in this particular case, the interests protected by a statutory right were sufficiently concrete and particularized to be elevated by Congress.[13] That elevation, coupled with the fact that Robins alleged that *his* statutory rights were violated, and not just the rights of other people, was enough to show that Robins' personal interest to have his credit information properly handled was "individualized rather than collective."[14]

In *Spokeo*, Robins sued under the FCRA, a federal statute that aims to protect consumers.[15] The Federal Trade Commission (FTC) is responsible for enforcing many of the consumer protection statutes that exist,

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7 Complaint, Spokeo, Inc. v. Robins, 136 S. Ct. 1540 (2016) (No. 10–5306).

8 *Id.* at 5 (Basic information contains information such as Robins' address, neighborhood, and siblings' names.).

9 *Spokeo*, 136 S. Ct. at 1554.

10 *Id.*

11 Complaint, *supra* note 7, at 5.

12 Brief of Respondent at 9, Spokeo v. Robins, 136 U.S. 1540 (2016) (No. 13–1339), 2015 WL 5169094.

13 See *id.* at 9–10.

14 *Spokeo*, 136 S. Ct. at 1544.

15 *See id.* at 1542–43.

including the FCRA.[16] Under the Act, as Justice Ginsburg pointed out in her dissent, "Congress granted adversely affected consumers a right to sue noncomplying reporting agencies."[17] The purpose of the FCRA is to ensure that consumer reporting agencies adopt reasonable procedures in regards to meeting the needs of commerce for consumer credit, personnel, insurance, and other information in such a way that is fair and equitable to the consumer, especially regarding the confidentiality, accuracy, relevancy, and proper utilization of such information.[18] Accordingly, Congress clearly intended for there to be redressability for those consumers who fall victim to a violation of the FCRA. Indeed, the FCRA is intended to protect consumers against inaccurate reporting.

The Court in *Spokeo*, however, failed to decide whether a concrete injury existed. Rather, the Court found that the Ninth Circuit conducted an incomplete analysis by failing to focus on the "concrete" injury prong and only analyzing the "particularized" prong.[19] In remanding back to the Ninth Circuit, the Court tiptoed around what it means for an injury to be "concrete" and gave minimal guidance on how to determine whether an injury is in fact "concrete." The Court stated that to be a concrete injury, the injury must be "'*de facto*,' that is, it must actually exist."[20]

To determine whether the injury actually exists, *Spokeo* provided two inquiries for the lower courts to consider.[21] First, the Court says that "it is instructive to consider whether an alleged intangible harm has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts."[22] This instruction seems simple enough: compare the injury in the present case to one which would have been actionable when Article III's case or controversy requirement came into effect.[23] The second instruction deals with Congress' judgment regarding whether a particular intangible harm is enough to satisfy the confines of Article III.[24] Essentially the Court provides that the statutory text itself must contain more than just a private cause of action and a

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16 15 U.S.C. § 1681s(a)(1) (2010). ("The Federal Trade Commission shall be authorized to enforce compliance with the requirements imposed by this subchapter under the Federal Trade Commission Act (15 U.S.C. § 41 et. seq.), with respect to consumer reporting agencies and all other persons subject thereto . . . .").

17 *Spokeo*, 136 S. Ct. at 1554; 15 U.S.C. § 1681n (2008); 15 U.S.C. § 1681o (2004).

18 15 U.S.C. § 1681(b) (2012).

19 *Spokeo*, 136 S. Ct. at 1545.

20 *Id.* at 1548.

21 *Id.* at 1549.

22 *Id*.

23 Tim Day, *The Spokeo, Inc. v. Robins Decision and its Impact on Privacy*, U.S. CHAMBER (July 22, 2016, 2:30 PM), https://www.uschamber.com/article/the-spokeo-inc-v-robins-decision-and-its-impact-privacy.

24 *Spokeo*, 136 S. Ct. at 1549.

statutory damages provision; this is evidenced by the fact that Robins was unable to sufficiently allege a concrete injury to fulfill Article III's standing requirement.[25]

Spokeo is the first Supreme Court case to separate the "concrete and particularized" prongs.[26] The Court notes that the "risk of real harm" can satisfy the concreteness prong, but the Court does not explain beyond that what risk of real harm will count moving forward.[27] By attaching to the meaning of "concrete" ideas that were always thought to be a part of the "concrete and particularized" analysis, the Court provides more questions than answers in determining what will actually constitute a "concrete" harm.

III. ARTICLE III

A. Standing: Requirements of Article III of the U.S. Constitution

Article III, Section 2 contains what is commonly known as the "case or controversy requirement."[28] This requirement "limits the exercise of judicial power to 'cases' and 'controversies.'"[29] In relevant part, Article III, Section 2 states:

> The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority . . . between citizens of different states . . . between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.[30]

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[25] *See id.* at 1550 ("In the context of this particular case, these general principles tell us two things: On the one hand, Congress plainly sought to curb the dissemination of false information by adopting procedures designed to decrease that risk. On the other hand, Robins cannot satisfy the demands of Article III by alleging a bare procedural violation."); *see also* Day, *supra* note 23.

[26] *See Spokeo*, 136 S. Ct. at 1555 (Ginsburg, J., dissenting) ("The Court's opinion observes that time and time again, our decisions have coupled the words 'concrete *and* particularized.' True, but true too, in the four cases cited by the Court, and many others, opinions do not discuss the separate offices of the terms 'concrete' and 'particularized.'") (citations omitted).

[27] *Spokeo*, 136 S. Ct. at 1549–50.

[28] *Id.*

[29] Aetna Life Ins. Co. of Hartford, Conn. v. Haworth, 300 U.S. 227, 239 (1937).

[30] U.S. CONST. art. III, § 2.

Article III also requires the plaintiff to allege, at an irreducible minimum, "(1) an injury that is (2) 'fairly traceable to the defendant's allegedly unlawful conduct' and that is (3) 'likely to be redressed by the requested relief.'"[31] Whether a lawsuit is brought by an individual or as a class action, as was the case in *Spokeo*, the Constitution mandates that the plaintiff have standing.[32]

Beyond the minimum articulated in *Lujan*, the Court has also implemented additional requirements into the Article III standing inquiry. The Supreme Court has held that a plaintiff's complaint must "fall within 'the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.'"[33] A causal connection between the injury and the conduct complained of must be fairly traceable to the action being challenged by the plaintiff and not a result of the independent action of some third party who is not before the court.[34] It also must be likely, not merely speculative, that a favorable decision will redress the injury.[35] It is not exactly clear, however, what level of "speculation" the Court requires since the Court has previously allowed the risk of future harm to qualify as an injury for standing purposes.[36] Beyond these requirements, "[p]articularization is [also] necessary to establish injury in fact, but it is not sufficient. An injury in fact must also be 'concrete.'"[37]

B. *Standing Requirements in the Class Action Context*

In a class action, there is one or more named plaintiffs representing a large group of similarly situated people.[38] At a minimum, the plaintiff or plaintiffs who are named in a class action must show that they have some personal stake in the outcome of the case, not that the unnamed class

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[31] Lujan v. Defs. of Wildlife, 504 U.S. 555, 590 (1992); Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 180–81 (2000).

[32] See U.S. CONST. art. III, § 2.

[33] Valley Forge Christian Coll. v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 475 (1982).

[34] *Id.* at 491.

[35] *Lujan*, 504 U.S. at 561.

[36] *See* Krottner v. Starbucks, Corp., 628 F.3d 1139, 1142 (9th Cir. 2010) (After a company computer containing unencrypted names, addresses, and social security numbers of roughly 97,000 employees was stolen from Starbucks, Starbucks sent a letter to affected employees which asked employees to monitor their financial accounts carefully and that Starbucks would be having a credit watch company monitor credit for a year for those affected. The Court found that because there was a credible threat of harm before the actual harm had occurred—which would have been the use of this secure information—plaintiffs had standing under Article III).

[37] Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1548 (2016).

[38] *See e.g.,* Hoffmann–La Roche, Inc. v. Sperling, 493 U.S. 165, 167–68 (1989).

members have necessarily suffered the alleged injury.[39] While there is no magic number for the number of plaintiffs in a class action, essentially, for every named defendant, at least one named plaintiff must be able to assert a claim directly against that defendant, and it is at that point that Article III standing is satisfied. All named plaintiffs must allege and show that they have *personally* been injured.[40] If any of the named class representative plaintiffs cannot establish the requisite case or controversy, then no plaintiff representative can seek redress on behalf of himself or on behalf of any of the class members.[41]

C. Particularized and Concrete: "Real" and Not "Abstract"

To establish a "concrete" injury in fact, the plaintiff must show "the reality of an injury, harm that is real, not abstract, but not necessarily tangible."[42] Injury in fact encompasses the "irreducible constitutional minimum of standing" and refers to "an invasion of a legally protected interest which is (a) concrete and particularized . . . ; and (b) 'actual or imminent,' not 'conjectural' or 'hypothetical[.] . . . '"[43] "Real" is defined as "not artificial," "genuine," and "not imaginary."[44] Conversely, "abstract" is defined as "considered apart from a particular instance."[45] Even in its simplest form, "concrete" derives its definition from these two terms. Simply stated, concrete refers to something that is both not imaginary and a part of a particular instance.[46]

Concrete and particularized are a conjugation of sorts. Courts that have decided Article III standing issues have time and time again coupled the two words together.[47] However, *Spokeo* goes against the grain as the

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39 Hidalgo v. Johnson & Johnson Consumer Cos., 148 F. Supp. 3d 285, 292 (S.D. N.Y. 2015).

40 Attias v. Carefirst, Inc., 199 F. Supp. 3d 193, 198 (D.D.C. 2016); *see also In re* Sony Gaming Networks & Customer Data Sec. Breach Litig., 903 F. Supp. 2d 942, 956 (S.D. Cal. 2012) ("In a class action context, named plaintiffs representing a class 'must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent . . . .' '[I]f none of the named plaintiffs purporting to represent a class established the requisite of a case or controversy with the defendants, none may seek relief on behalf of himself or any other members of the class.'") (citations omitted).

41 *See Sony*, 903 F. Supp. 2d at 956.

42 *Spokeo*, 136 S. Ct. at 1555–56.

43 Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992).

44 *Real*, MERRIAM–WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2003).

45 *Abstract*, MERRIAM–WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2003).

46 *See e.g.*, *Spokeo*, 136 S. Ct. 1540; *see also, e.g.*, Krottner v. Starbucks Corp., 628 F.3d 1139 (9th Cir. 2010).

47 *See Lujan*, 504 U.S. at 555 ("[T]hey have suffered an injury in fact, i.e., a concrete and particularized, actual or imminent invasion of a legally protected interest."); *see also Spokeo*, 136 S. Ct. at 1545 ("As we have explained in our prior opinions, the injury–in–

first Supreme Court case to view the concrete and particularized requirement as two separate requirements.[48] It is here that it becomes quite unclear who actually gets to decide whether an injury has occurred. An incorrect zip code, which may be insignificant on its face, can amount to a concrete injury because of the amount of information that can be inferred about a person based on their geographical location, including guesses about a person's wealth or demographic information, which are both factors that could hinder the ability to obtain a job.[49]

D. Statutory Violations under Article III

Congress has the authority to create new, individualized rights and remedies for a violation of those rights, but Congress does not have the authority to allow plaintiffs to bring forth generalized grievances on behalf of the public as a whole. Standing to sue for statutory damages requires that the plaintiff suffer a personal, individualized violation of a statutory right.[50] For example, imagine a statute requiring that all tax return forms be printed on blue paper. The statutory remedy for a violation of the statute is a penalty of $500. An individual receives a white tax form in violation of this statute. It has not affected the individual's ability to fill out the forms, but it is an individualized injury. However, this violation is nothing more than a bare procedural violation. Although a statutory remedy is provided, the injury is not concrete because the ability to fill out the tax form is no different for a blue form than it is for a white one.

The *Spokeo* court acknowledged that a "bare procedural violation" was not enough to confer standing upon Robins.[51] However, the Court provided little guidance to lower courts, now bound by this decision, in assessing whether an injury in fact is indeed concrete. Standing for injuries stemming from a procedural violation "turn on whether the *underlying*

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fact requirement requires a plaintiff to allege an injury that is both 'concrete and particularized.'") (*quoting* Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. at 180–81 (2000)).

[48] *See Spokeo*, 136 S. Ct. at 1555 (Ginsburg, J., dissenting) ("The Court's opinion observes that time and time again, our decisions have coupled the words 'concrete *and* particularized.' True, but true too, in the four cases cited by the Court, and many others, opinions do not discuss the separate offices of the terms 'concrete' and 'particularized.'") (citations omitted).

[49] *See id.* at 1550; *see also* Daniel Solove, *When Is a Person Harmed by a Privacy Violation? Thoughts on Spokeo v. Robins*, TEACHPRIVACY (May 17, 2016), https://www.teachprivacy.com/thoughts-on-spokeo-v-robins.

[50] Brief for Restitution and Remedies Scholars as Amici Curiae in Support of Respondent at 3, Spokeo, Inc. v. Robins, 136 S. Ct. 1540 (2016) (No. 13–1339).

[51] *Spokeo*, 136 S. Ct. at 1550.

interest protected by the procedure is concrete, not on whether the failure to follow the procedure is itself an individual injury to the plaintiff."[52]

IV. ANALYSIS

A. *Who Decides Who Has Suffered an Injury?*

Clearly, Article III mandates that a plaintiff must have suffered some form of injury.[53] What is less clear, however, is "whether the Court should accept an injury Congress defines via statute as sufficient for constitutional purposes."[54] A plaintiff who wishes to adjudicate his injury, vested upon him by statute, need not allege actual harm beyond the invasion of that right conferred upon him.[55] Accordingly, is it Congress or the Court who decides who has suffered an injury?

Spokeo points out that Congress is authorized to articulate which intangible harms qualify as meeting the irreducible constitutional minimum set forth in Article III. Congress is also able to "elevate to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law."[56] However, *Spokeo* does not indicate whether it is Congress or the Court that gets to decide whether or not standing exists in any given case. In consumer protection cases, one might think that Congress defines when a plaintiff has standing through the enactment of consumer protection statutes, but *Spokeo* goes against this notion, stating that the Ninth Circuit failed to conduct an adequate injury in fact analysis, and remanding the case *even though* there is a Congressional remedy provided by the FCRA.[57]

According to *Spokeo*, the dissemination of false information, leading to lost opportunity and the inability to obtain a job, does not rise to the

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52 Christopher T. Burt, Comments, *Procedural Injury Standing after Lujan v. Defenders of Wildlife*, 62 U. CHI. L. REV. 275, 297 (1995) (citing Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1995)); 62 U. CHI. L. REV. 275, 297 note 102 ("If the standing inquiry looked to whether the procedural violation was itself a concrete injury, procedural plaintiffs would never have standing because 'every citizen's interest in [the] proper application of the Constitution and laws' is not a concrete interest . . . .")).

53 *See, e.g., Lujan*, 504 U.S. at 560.

54 Daniel Townsend, *Who Should Define Injuries for Article III Standing?*, 68 STAN. L. REV. Online 76, 77 (2016).

55 *See Spokeo*, 136 S. Ct. at 1553.

56 *Id.* at 1549.

57 *Id.* at 1550 ("Because the Ninth Circuit failed to fully appreciate the distinction between concreteness and particularization, its standing analysis was incomplete. It 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.").

level of injury required to satisfy the "concreteness" prong of injury in fact.[58] However, *Spokeo* is inconsistent with other cases that have analyzed violations of consumer protection statutes. For example, in *In re Sony Gaming Networks & Customer Data Sec. Breach Litig*.,[59] the court found that the injury alleged sufficiently showed the risk of a future harm where no immediate harm was apparent. *Sony* was a consumer data breach case whereby a class action was filed against multiple Sony companies.[60] The class alleged that Sony and its subsidiaries failed to protect its customers' personal and financial information, creating a foreseeable future injury.[61] This foreseeable injury, according to the court, was that hackers could gain access to millions of Sony customers' personal information, including names, addresses, emails, birthdays, credit and debit information, usernames, and passwords.[62] Sony argued that the plaintiffs did not have standing against all defendants, and as to two Sony subsidiaries, Sony Online Entertainment, LLC ("SOE") and Sony Corporation of America ("SCA"), plaintiffs did not have standing because plaintiffs failed to adequately show any cognizable relationship between Sony and the subsidiaries.[63] Sony proceeded to argue that plaintiffs lacked standing as to all defendants, but the court found that the plaintiffs had articulated enough of a particularized and concrete injury, even though no harm had yet occurred, because the plaintiffs had pled enough of a risk of future harm and a "causal connection" between the "alleged misconduct and a legally protected interest."[64]

The risk of future harm alone can be enough to satisfy the standing requirements. The *Sony* court found that where the plaintiffs alleged that personal information had been stolen, though not yet used by the thieves, the plaintiffs "articulated sufficient particularized and concrete harm" to satisfy the injury in fact requirement—at least at that particular point in the pleadings.[65] Relying on *Krottner v. Starbucks Corp.,*[66] the *Sony* court found that the stolen information was susceptible to an increased risk of future harm and although no harm had yet occurred, "future harm may be regarded as a cognizable loss sufficient to satisfy Article III's injury–in–fact requirement."[67] *Krottner* involved the theft of a Starbucks laptop,

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58 *See id.*

59 903 F. Supp. 2d 942, 958 (S.D. Cal. 2012).

60 *Id.* at 950.

61 *See id.* at 951–52.

62 *Id.* at 950–51.

63 *See id*. at 956–57.

64 *See id.* at 957–59.

65 *Sony*, 903 F. Supp. 2d at 958.

66 628 F.3d 1139 (9th Cir. 2010).

67 *Sony*, 903 F. Supp. 2d at 958 ("A plaintiff may allege a future injury in order to comply with [the injury–in–fact] requirement, but only if he or she 'is immediately in danger of

which contained unencrypted names, addresses, and social security numbers of almost 100,000 employees, from one of its stores.[68] Although the stolen information had not yet been misused, the *Krottner* court found that the risk of future harm was enough of an injury to warrant conferring Article III standing upon plaintiffs.[69] Essentially, the idea was that if the plaintiff in *Krottner* could anticipate a greater level of harm, the plaintiff would not lose standing.[70]

B. *Consumer Protection*

The FTC is responsible for protecting consumers by preventing unfair, deceptive, or fraudulent practices in the marketplace.[71] The FTC conducts investigations into consumer protection, filing lawsuits against those who violate the law; develops rules to ensure a stimulated marketplace; and educates consumers and businesses about their rights and responsibilities.[72] Indeed, the FTC and the Bureau of Consumer Protection set out to, simply put, "protect America's consumers."[73]

The FCRA was meant to give consumers the opportunity to seek redress upon a violation of it.[74] As Justice Ginsburg pointed out in her dissent, under the FCRA, "Congress granted adversely affected consumers a right to sue noncomplying reporting agencies."[75] The purpose of the FCRA is to require consumer reporting agencies to be fair in their reporting of individuals concerning "the confidentiality, accuracy, relevancy, and proper utilization of such information . . . ."[76] Congress

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sustaining some direct injury as the result of the challenged . . . conduct and the injury or threat of injury is both real and immediate, not conjectural or hypothetical.'" (alteration in original) (quoting Krottner v. Starbucks, 641 U.S. 95, 102 (1983))).

[68] *Krottner*, 628 F.3d at 1140.

[69] *Id.* at 1142–43.

[70] *Id.* at 1143 ("As many of our sister circuits have noted, the injury–in–fact requirement can be satisfied by a threat of future harm tor by an act which harms the plaintiff only by increasing the risk of future harm that the plaintiff would have otherwise faced, absent the defendant's actions . . . . Once the plaintiffs' allegations establish at least this level of injury, the fact that the plaintiffs anticipate that some greater potential harm might follow the defendant's act does not affect the standing inquiry." (quoting Pisciotta v. Old Nat'l Bancorp, 499 F.3d 629, 634 (7th Cir. 2007))).

[71] FED. TRADE COMM'N, https://www.ftc.gov/about-ftc (last visited Oct. 22, 2017).

[72] *What We Do*, FED. TRADE COMM'N, https://www.ftc.gov/about-ftc/what-we-do (last visited Mar. 15, 2017).

[73] FED. TRADE COMM'N, https://www.ftv.gov (last visited Mar. 15, 2017).

[74] *See* 15 U.S.C. § 1681(b) (2012).

[75] Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1554 (2016) (Ginsburg, J., dissenting); 15 U.S.C. § 1681n (2012) (willful noncompliance); 15 U.S.C. § 1681o (2012) (negligent noncompliance).

[76] 15 U.S.C. § 1681(b) (2012).

clearly intended for there to be redressability for those consumers who fall victim to a violation of the FCRA.

Because of the decision in *Spokeo*, consumer protection and privacy law cases, which already prove difficult to demonstrate an injury–in–fact, are "now [becoming] increasingly unclear as to what level of harm will constitute 'concrete injury.'"[77] Courts are already applying the *Spokeo* holding and individuals and entities keeping up with the decisions are starting to see exactly how little guidance was given in terms of defining a "concrete injury." Essentially, *Spokeo* indicates that consumers will lose the ability to bring suit against companies. This is especially problematic in an ever–growing technological world because privacy has become a major concern amongst consumers, and many statutes designed to protect consumer privacy can become obsolete if the decision in *Spokeo* is not addressed again soon. Plaintiffs now need to show that they have suffered "'real' concrete harm, or [face] a 'certainly impending' risk that concrete harm will occur."[78]

C. *Before Spokeo*

In 1992, the Court held that "[t]he . . . injury required by Article III standing may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing.'"[79] Since *Lujan*, whether a purely statutory violation could, by itself, create an injury–in–fact for standing purposes, has seemingly split the federal circuits.[80]

Where the FTC seeks to protect consumer rights, *Spokeo* goes against that very ideal. Now, even where a plaintiff possesses a personal stake in the outcome of the case and the injury is particularized, the "concrete" requirement seems hazy at best. Plaintiffs will be deterred from brining

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[77] John Phillips, Behnam Dayim, Sean D. Unger, & Dae Ho Lee, *Spokeo and Article III Standing: You May Be Particularized But Are You Concrete?*, PAUL HASTINGS (May 26, 2016), https://www.paulhastings.com/publications-items/details?id=4b6ce969-2334-6428-811c-ff00004cbded [hereinafter "Paul Hastings"].

[78] Day, *supra* note 23 (Plaintiffs now bringing the "no injury" type claims such as in *Spokeo*, where the injury was that Robins had false information about him disseminated that would make it difficult to obtain a job (i.e., a future injury), the requirement that plaintiffs show they have suffered a "real" concrete injury "will be impossible for plaintiffs to satisfy in the cases formerly brought a 'no injury' class actions – particularly those in which the claim is that personal information has been collected or retained in a manner inconsistent with statutory requirements, but has not been disseminated to a third party.").

[79] Lujan v. Defenders of Wildlife, 504 U.S. 555, 578 (1992) (alteration in original) (quoting Warth v. Seldin, 422 U.S. 490, 500 (1975)).

[80] *Compare*, *e.g.,* Edwards v. First Am. Corp., 610 F.3d 514, 518 (9th Cir. 2010) ("Because [the act] gives Plaintiff a statutory cause of action, we hold that Plaintiff has standing to pursue her claims against Defendants."), *with* David v. Alphin, 704 F.3d 327, 338–39 (4th Cir. 2013) (finding that a statutory injury is not sufficient to satisfy Article III standing requirements).

suit and spending money on litigation because they will be unsure of whether the fact that, even though a statute calls for redress when there is a violation, they must show more than that "bare procedural violation" to prove that their injury meets the concrete prong of the injury in fact test.[81]

D. *Spokeo's Impact*

There have been many consumer protection cases litigated since the *Spokeo* decision and many are either the result of a violation of the FCRA, or a violation of either (1) the Fair and Accurate Credit Transaction Act, (2) the Fait Debt Collection Practices Act, or (3) the Telephone Consumer Protection Act.

Many of the statutory violations courts are seeing now are consumer protection statutes dealing with privacy. In a recent case, a health insurer, CareFirst, experienced a massive data breach and over 1 million policyholders had their information stolen.[82] The information at issue consisted of names, birth dates, email addresses, and subscriber identification numbers.[83] Those who had their information stolen filed suit alleging that CareFirst had failed to adequately safeguard their personal information.[84] Like the Supreme Court in *Spokeo*, the *Attias* court found that the plaintiffs had not suffered any "concrete" injury as a result of having this information stolen,[85] even though having such personal information creates a real and immediate risk of future harm, much like the harm suffered in *Sony*.

The Fair and Accurate Credit Transactions Act ("FACTA") is another consumer protection statute that *Spokeo* has influenced.[86] Whenever a credit card is swiped, the receipt usually contains four or five digits on it preceded by several Xs. FACTA, an amendment to the FCRA, is responsible for ensuring that, among other things, "no person that accepts credit cards or debit cards for the transaction of a business shall print more than the last five digits of the card number . . . ."[87] FACTA has also caused a split amongst the circuits with at least three FACTA cases finding that

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81 *See* Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1549–50 (2016).
82 Attias v. Carefirst, Inc., 199 F. Supp. 3d 193, 197 (D.D.C. 2016), *rev'd*, 865 F.3d 620 (D.C. Cir. 2017).
83 *Id.*
84 *Id.*
85 *Id.* at 203.
86 Fair and Accurate Credit Transactions Act of 2003, Pub. L. No. 108–159, 117 Stat. 1952 (codified at 15 U.S.C. §§ 1601, 1681 (2000)).
87 15 U.S.C. § 1681c(g)(1) (2012); *see also* Ezra D. Church, Christina M. Vitale, Kenneth M. Kliebard, and Brian M. Ercole, *Spokeo 6 Months Later: An Undeniably Dramatic Impact*, LAW360 (Dec. 6, 2016), https://www.law360.com/appellate/articles/869153/spokeo-6-months-later-an-undeniably-dramatic-impact.

plaintiffs had alleged a sufficient injury to satisfy the standing requirement[88] and at least three finding that plaintiffs did not allege a sufficient injury to satisfy the standing requirement.[89]

The Fair Debt Collection Practices Act ("FDCPA")[90] deals with notice, timing, and various other requirements on debt collectors.[91] The FDCPA is meant to protect consumers from abusive debt collection practices.[92] In this facet of consumer protection law, the courts consistently find that plaintiffs did allege sufficient injury to confer standing upon them.[93] *Church v. Accretive Health, Inc.*, a leading case decided by the Eleventh Circuit, heavily involves the FDCPA.[94] Ms. Mahala Church had alleged that Accretive Health sent her a letter advising her that she owed a debt to the hospital, but in doing so, failed to include certain disclosures required by the FDCPA.[95] While Accretive Health argued that the injury that Church suffered was not sufficient for Article III standing purposes,

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88 *See* Flaum v. Doctor's Assocs., Inc., 204 F. Supp. 3d 1337, 1342 (S.D. Fla. 2016) (finding that because the plaintiff had "personally suffered a concrete harm in receiving a receipt that violated this statute, [he] has sufficiently alleged an injury–in–fact"); *see also* Wood v. J Choo USA, Inc., 201 F. Supp. 3d 1332, 1340 (S.D. Fla. 2016) ("Because [Plaintiff] suffered a concrete harm as soon as [Defendant] printed the offending receipt, the Complaint alleges an injury in fact sufficient to confer standing.") (citations omitted); *see also* Guarisma v. Microsoft, Corp., 209 F. Supp. 3d 1261, 1266 (S.D. Fla 2016) ("Congress gave consumers the *legal right* to obtain a receipt at the point of sale showing no more than the last five digits of the consumer's credit or debit card number . . . . Thus, we conclude that appellants have alleged an injury–in–fact sufficient to confer Article III standing." (quoting Hammer v. Sam's E., Inc., 754 F.3d 492, 498–99 (8th Cir.2014))).

89 *See* Stelmachers v. Verifone Sys., Inc., No. 5:14–cv–04912–EJD, 2016 WL 6835084 at *4 (N.D. Cal. 2016) ("While it is true that under certain conditions an increased risk of identity theft can constitute a concrete, 'certainly impending' harm, those conditions have not been alleged in this case . . . . Thus, . . . the risk that Plaintiff will be subjected to the type of "low tech" identity theft identified . . . is too attenuated to constitute a qualifying injury in fact for standing . . . .") (citation omitted)); *see also* Kamal v. J. Crew Grp., Inc., No. 2:15–0190 (WJM), 2016 WL 6133827, at *4 (D.N.J. Oct. 20, 2016) ("But 'Congress' role in identifying and elevating intangible harms does not mean that a plaintiff automatically satisfies the injury–in–fact requirement whenever a statute grants a person a statutory right . . . [.]'") (omission in original) (quoting Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1549 (2016))); *see also id.* at *3 ("printing first six and last four digits amounts to 'purely procedural violation' of FACTA and does not constitute an injury–in–fact." (quoting Thompson v. Rally House of Kansas City et. al., 15–cv–008860GAF, slip op., at *9 (W.D. Mo. 2016)).

90 15 U.S.C. § 1692–1692p (2012).

91 *See* Ezra D. Church, Christina M. Vitale, Kenneth M. Kliebard, and Brian M. Ercole, *Spokeo 6 Months Later: An Undeniably Dramatic Impact*, LAW360 (Dec. 6, 2016), https://www.law360.com/appellate/articles/869153/spokeo-6-months-later-an-undeniably-dramatic-impact [hereinafter "Law360"].

92 *See id.*

93 *See id*.

94 654 F. App'x 990 (11th Cir. 2016).

95 *Id*. at 991.

the court found that, where Church alleged that the FDCPA governed the letter she received, there existed a right to the disclosures required by the statute.[96] Furthermore, the Court stated that "Church has sufficiently alleged that she has sustained a concrete—*i.e.*, 'real'—injury because she did not receive the allegedly required disclosures."[97]

The Telephone Consumer Protection Act ("TCPA") is yet another consumer protection statute that *Spokeo* is impacting.[98] In *Mey v. Got Warranty, Inc.*, consumers were receiving unwanted telephone calls in violation of the TCPA.[99] The TCPA was enacted by Congress to protect consumers from harassment and has become one of the most litigated privacy–related statutes of the last decade—an unsurprising fact given the ever–increasing technological advancements, particularly in the "smartphone" sector. The TCPA regulates how marketers may contact consumers by fax, telephone, or text message without the recipient's consent.[100] In *Mey*, the court found that a concrete injury existed because consumers with pre–paid cell phones would lose minutes, the battery life of their cell phones would drain, and they would have to pay for electricity to ensure that their cell phones were charged.[101]

The iPhone, the *most* popular smartphone sold in the United States,[102] costs about twenty–five cents *per year* to charge.[103] In *Mey*, the court said that this was enough of an injury to confer Article III standing. The current federal minimum wage in the United States is $7.25/hour.[104] Working a forty–hour workweek at minimum wage amounts to a gross income of $15,080, assuming no time is taken off.[105] The disconnect between *Mey* and *Spokeo*, then, is absurd. On the one hand, *Mey* says that a quarter's worth of damage, yearly, is enough to confer standing upon a plaintiff. On

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96 *Id*. at 991, 995.
97 *Id*. at 995.
98 47 U.S.C. § 227(b)(1) (2012).
99 *See e.g.,* 193 F. Supp. 3d 641, 644–46 (N.D.W. Va. 2016).
100 Law360, *supra* note 91.
101 *See Mey*, 193 F. Supp. 3d at 644–45.
102 Ben Lovejoy, *iPhone 6s best–selling smartphone both in U.S. & worldwide, iPhone SE #3 in U.S.,* 9TO5MAC (Sep. 6, 2016), https://9to5mac.com/2016/09/06/iphone-sales-kantar-strategy-analytics/ (affirming that the iPhone has an 11% market share); *Number of iPhone users in the United States from 2012 to 2016,* STATISTA, https://www.statista.com/statistics/232790/forecast-of-apple-users-in-the-us/ (asserting that the number of iPhones currently in use by United States consumers is roughly 90.1 million) (last visited Dec. 2016).
103 *Mobile phone: 25 cents per year*, FORBES, http://www.forbes.com/pictures/ekhf45ffjkj/mobile-phone-25-cents-p/#111b9817666b (last visited Mar. 15, 2017) (source of information: Electric Power Research Institute, Apple).
104 *Minimum Wage*, U.S. DEP'T OF LABOR, https://www.dol.gov/general/topic/wages/minimumwage (last visited Mar. 15, 2017).
105 $7.25 x 40–hour workweek x 52 weeks.

the other hand, Robins, who was unable to obtain a full–time job, effectively lost out on a minimum of $15,080.

Spokeo seemingly goes against the notion of consumer protection and creates new barriers that the FTC must overcome. Where it used to be that "concrete and particularized" were analyzed together, it appears that *Spokeo* has bifurcated that test, requiring "concrete" and "particularized" to each be analyzed independently.[106] Now, where an injury in fact seemingly exists, the Court can objectively decide if such injury does in fact rise to the level required to be both concrete and particularized. This is a dangerous road to follow because consumers will face immense struggles demonstrating injury, especially in cases where the statutes put in place to protect them have been violated, leaving the injured consumer with little chance of receiving redress.

The fact that courts cannot seem to decide whether an injury is "concrete" and sufficiently "real" to warrant conferring standing on plaintiffs demonstrates *Spokeo*'s lack of clarity. The cases that *Spokeo* has already impacted are inconsistent with each other. Where one court says that an injury exists, another says the injury is insufficient.

E. The New Standard: Who Suffers?

What *Spokeo* seems to indicate is that if the Court wants to elevate an injury to a level deemed concrete for standing purposes, it will, and if the Court does not want to elevate an injury to the requisite level of concreteness, it will not. Corporations and agencies that violate consumer protection statutes seemingly now possess much more leeway in cases like *Spokeo*. Where a federal statute has been violated, resulting in injury to one or more plaintiffs, in the post–*Spokeo* world, the court will rarely find that a procedural violation rises to the level of a concrete injury. It used to be that where a plaintiff could show that he or she had suffered an injury that was real, not just hypothetical, the plaintiffs had standing; now, the pleadings themselves undoubtedly will face much heavier scrutiny. In a world where plaintiffs already have enough trouble bringing suit under federal statutory violations, the threshold for what is deemed an injury is now much higher.[107] "*Spokeo* [can significantly] [a]ffect plaintiffs' ability to bring suits based on privacy harms."[108]

Robins sought redress for the jobs he could have had, as well as for the dissemination of false information.[109] While it is unknown whether Robins would have even been hired for those jobs, the fact that he was not

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106 *See Spokeo*, 136 S. Ct. at 1545.
107 *See* Paul Hastings, *supra* note 77.
108 *Id.*
109 Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1556 (2016).

even qualified to interview for them should have been enough for an injury–in–fact to exist. The Ninth Circuit concluded that concrete injury existed where Robins "alleged[d] that Spokeo violated *his* statutory rights, not just the statutory rights of other people . . . [and] 'Robins' personal interests in the handling of his credit information are *individualized rather than collective*.'"[110] Robins' injury was particularized in that obtaining a favorable judgment benefited him much more than the public at large. Had the effect of a judgment been undifferentiated from the rest of the public, then the claim would be nothing more than a generalized grievance and Robins would not have Article III standing because there is no standing for generalized grievances.[111]

Because of the misinformation disseminated by Spokeo, Robins was directly affected. Robins sought to remedy the dissemination of information specifically about *him* and the negative effect it had on his ability to obtain a job. Justice Ginsburg touches on this point, noting that the concreteness requirement "refers to the reality of an injury, harm that is real, not abstract, but not necessarily tangible."[112] This information about Robins, which was false, "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."[113] This incorrect information, then, "cause[d] actual harm to [Robins'] employment prospects."[114]

While Robins was unable to point to specific employers considering him for employment, the injury he suffered was concrete because it was a real and direct violation of the FCRA. The Court relied on the "bare procedural violation" language and found that there was no harm, i.e., "an incorrect zip code," but Justice Ginsburg in her dissent points out that Robins' injury amounts to much more than a mere procedural violation: "Far from an incorrect zip code, Robins complains of misinformation about his education, family situation, and economic status, inaccurate representations that could affect his fortune in the job market."[115] Although Justice Ginsburg uses the word "could," the lost opportunity in and of itself may constitute injury.[116] The FCRA was designed to prevent

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[110] *Id.* at 1546.

[111] United States v. Richardson, 418 U.S. 166, 176–77 (1974) ("This is surely . . . a generalized grievance . . . since the impact on him is plainly undifferentiated and 'common to all members of the public.'") (citations omitted).

[112] *Spokeo*, 136 S. Ct. at 1555–56.

[113] *Id.* at 1554.

[114] *Id.* at 1554, 1556.

[115] *Id.* at 1550, 1556.

[116] 13A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3531.4 (3d ed. 2008) (updated Jan. 2017); *Spokeo*, 136 S. Ct. at 1556 (" . . . inaccurate representations that could affect his fortune in the job market.").

such lost opportunity. Even though Spokeo is a private entity, it is bound to uphold the procedural obligations imposed by the FCRA.

F. *What's Next?*

Besides the FCRA, seventy–two other federal consumer protection statutes are currently in effect, including the Clayton Act[117] and the Do–Not–Call Registry Legislation,[118] as well as a Bill entitled the Personal Data Notification and Protection Act of 2015.[119] These statutes and their intent to protect consumers are now in danger of becoming obsolete and, in that regard, *Spokeo* amounts to a victory for companies—most notably, companies that handle consumer data.[120]

Spokeo will likely have a significant impact on cases involving data breaches. Many plaintiffs in lawsuits dealing with data breaches derive standing from the violation of a federal or state statute.[121] *Spokeo* will significantly limit whether a plaintiff will have standing to sue. Claims will be dismissed and the pleadings will likely take unnecessarily long because plaintiffs who wish to invoke federal jurisdiction bear the burden, at the pleading stage, to "'clearly . . . allege facts demonstrating' each element" of Article III standing.[122] Even if the plaintiff does not initially survive the pleading stage, depending on the facts of each individual case, it may later be found that the harms alleged do, in fact, amount to the requisite level of harm required if pled properly in amended complaints.[123]

Unfortunately, while consumers have all of this so–called protection, most consumers often do not appreciate how much protection is actually afforded to them or how much they are unknowingly relying upon the statutes designed to shield them from harm. Not only was Robins denied standing, but the class of similarly situated people he was representing was also denied a right to redress.[124] The Court essentially follows the rationale asserted by Spokeo that Congress cannot create standing where the Supreme Court says standing does not exist; however, the Court does so without explaining why or how it reaches its decision and how the lower

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[117] 15 U.S.C. §§ 15–27 (2012).
[118] 15 U.S.C. §§ 6151–6155 (2012).
[119] H.R. 1704, 114th Cong. (2015).
[120] Jeff John Roberts, *Supreme Court Rejects Privacy Claim in Data Broker Case*, FORTUNE (May 16, 2016), http://fortune.com/2016/05/16/supreme-court-spokeo-decision/.
[121] Jeryn Crabb, *Data–Breach Class Actions Feel the Effects of "*Spokeo v. Robins*"*, (July 1, 2016) https://wlflegalpulse.com/2016/07/01/data-breach-class-actions-feel-the-effects-of-spokeo-v-robins/.
[122] Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1547 (2016).
[123] *See, e.g.*, Paul Hastings, *supra* note 77.
[124] *See Spokeo*, 136 S. Ct. at 1549–50.

courts should go about determining whether the injury that Robins alleged met the concrete requirement.

With this decision, one that the Court should have made a direct ruling on rather than remanding to the Ninth Circuit, the Court took "no position" on the conclusion reached by the Ninth Circuit that Robins had indeed adequately alleged an injury in fact.[125] All this has done is lead to confusion and chaos amongst the lower courts. Without any "concrete" decision to follow, the split between the lower courts on the interpretation of consumer protection statutes is going to continue to grow, and until *Spokeo* is revisited by the Supreme Court, which seems likely at this point, consumers who have their rights violated may not have any remedies available to them.

After conducting a more thorough analysis of the "concrete" injury requirement, the Ninth Circuit found that the injury alleged poses a real harm. Accordingly, the Supreme Court can expect to see another petition, which hopefully the Court will take, allowing it to render a "concrete" decision to help guide the lower courts. In the interim, however, courts are left to interpret the *Spokeo* decision, and consumers will not be afforded the protection that Congress intended for them to have. Indeed, as can already be seen, where consumer protection statutes are at issue, courts applying *Spokeo* are split on whether a concrete injury exists, and it is entirely possible that the future of consumer protection cases hinges on which court a plaintiff decides to bring suit in because of how courts interpret the statutory language.

Congress should decide when an injury in fact exists in cases where a consumer protection statute has been violated. After all, Congress' intent is to have the statutes enforced; otherwise, why would Congress enact them in the first place? "Congress plainly sought to curb the dissemination of false information by adopting procedures designed to decrease that risk."[126] It should not be up to the courts to decide whether, in a consumer protection case, a "bare procedural violation" should negate a plaintiff's standing when that "bare procedural violation" is exactly what Congress intended to prevent by virtue of an enacted statute. While it does not happen often, Congress does have the ability to "overrule" the Supreme Court, or at least negate decisions, when the Court has interpreted a statute in a way that Congress did not intend.[127] For example, in 1991, Congress passed a new Civil Rights Act that overruled at least five Supreme Court cases, which were decided in 1989.[128]

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[125] *Id.* at 1550.
[126] *Id.* at 1550.
[127] *See* Leon Friedman, *Overruling the Court*, THE AMERICAN PROSPECT (Dec. 19, 2001), http://prospect.org/article/overruling-court.
[128] *Id.*

Furthermore, allowing Congress to define injuries ensures that the statutes are enforced in accordance with the purpose that they are intended to serve. If Congress is allowed to decide what satisfies the injury requirement in this way, "then the judicial task is simply to determine whether the requirements laid out via statute were met."[129] Arguing against this notion, Spokeo, Inc. essentially asks the court to hold that "in order for an injury to be judicially cognizable, the legal injury must correspond to some existing harm that the court can point to outside of the statute's terms."[130]

G. *Can Anything be Done?*

Even if Congress does not act, there remains a chance that the Supreme Court will revisit *Spokeo*. While the Supreme Court is unlikely to overrule itself, it could—and should—clarify its decision in such a way to invite the lower courts to follow set guidelines in determining whether an injury in fact exists, which in turn will expand consumer protection, rather than limit it.

Upon granting certiorari in a pending case, the Court will be able to clarify the issues that the lower courts have split on. For example, where some courts say a violation of FACTA is a sufficient injury to confer standing upon plaintiffs, other courts say that a violation of FACTA amounts to a bare procedural violation and therefore does not constitute a sufficient injury to satisfy the "concreteness" requirement of standing.[131] There are too many inconsistencies following *Spokeo*, and they need to be cleared up as quickly as possible before consumer suits are essentially swept under the rug. If the inconsistencies are not cleared up, the lower courts are going to continue in a downward spiral until the Supreme Court revisits the issue and clarifies its decision.

H. *The Ninth Circuit, on Remand*

Since 2016, Courts have been struggling to extrapolate guidance from the *Spokeo* decision as it relates to the determination of when a concrete injury exists. On August 15, 2017, more than one year after the Supreme Court's *Spokeo* decision, the Ninth Circuit articulated an answer to the question of whether Robins had sufficiently pled a concrete injury to satisfy Article III standing.[132] On remand, Judge O'Scannlain, writing for the Ninth Circuit, considers the Supreme Court's first inquiry whereby the

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[129] Townsend, *supra* note 54, at 78.

[130] *Id.* ("Legal violations cannot be per se injuries, because they are only legitimate when they reflect something more tangible, more 'real,' than a bare statutory violation.").

[131] *See, e.g.*, Paul Hastings, *supra* note 77.

[132] Robins v. Spokeo, Inc., 867 F.3d 1108 (9th Cir. 2017).

lower courts should compare the alleged injury in the present case with one that would have been actionable when Article III's case or controversy requirement came into effect.[133] However, Judge O'Scannlain notes that differences between the FCRA's cause of action and those recognized at common law are not the basis for the inquiry; rather, the relevant point is that "Congress has chosen to protect against a harm that is at least closely similar *in kind* to others that have traditionally served as the basis for lawsuit."[134] Because the FCRA's procedures at issue in the case were crafted specifically to protect consumers' concrete interest in accurate credit reporting about themselves, the Ninth Circuit was satisfied that the alleged harm was enough for Robins to have Article III Standing and to pursue a claim against Spokeo, Inc.[135]

Once the Ninth Circuit determined that there was a concrete interest in the claim, Judge O'Scannlain then answered the question of whether or not Robins alleged FCRA violations that created an actual harm rather than a "bare procedural violation."[136] Because of Spokeo's alleged violations of the FCRA, particularly 15 U.S.C. § 1681e(b),[137] Robins' allegations that Spokeo did not ensure the accuracy of his consumer report, all Robins will have to show is that Spokeo did in fact prepare a report that contained inaccurate information about him.[138] Robins, according to the Ninth Circuit, not only alleged that Spokeo had prepared such a report, but that it also published it on the Internet, thus "clearly implicat[ing]" Robins' concrete interests in truthful credit reporting.[139] However, not every inaccuracy on a reporting is necessarily enough to provide sufficient basis for bringing a lawsuit.[140] There must be "some examination of the *nature* of the specific alleged reporting inaccuracies" and that examination must raise a risk of real harm to the concrete interests that the FCRA has provided to consumers.[141]

In *Spokeo*, Robins alleged that the inaccuracies in his credit report were harming his chance of employment and Justice Ginsburg's dissent bluntly states that "Spokeo's misinformation 'cause[s] actual harm to [his]

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[133] *Id.* at 1115.
[134] *Id.*
[135] *See id.*
[136] *Id.*
[137] 15 U.S.C. § 1681e(b) provides that "[w]henever a consumer reporting agency prepares a consumer report it shall follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates."
[138] *See* Robins v. Spokeo, Inc., 867 F.3d 1108, 1116 (9th Cir. 2017).
[139] *Id.*
[140] *See id.*; Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1550 (2016) (providing that an incorrectly disseminated zip code would not be enough to constitute a concrete harm).
[141] *Robins*, 867 F.3d at 1116.

employment prospects.'"[142] Judge O'Scannlain follows in the footsteps of Justice Ginsburg and notes that where Robins claims that the inaccurate reports misrepresent information that is relevant to employers, subsequently creating mental angst that Robins' employment prospects are diminished, the inaccurate reports could be deemed a real harm.[143] Indeed, it is further noted that "ensuring the accuracy of this sort of information thus seems *directly and substantially* related to [the] FCRA's goals."[144] Accordingly, as Justice Ginsburg argued in the Supreme Court, the Ninth Circuit properly held that Robins' alleged injuries satisfied the "concreteness" inquiry.[145]

V. CONCLUSION

It is not entirely clear what the effects of *Spokeo* will be. The separation of "concrete" and "particularized" in *Spokeo* has caused more questions than answers. Now, it will be very difficult for a plaintiff to show that the injury they have suffered is "concrete," especially in the consumer protection context where much of the harm involved is a risk of future harm.[146] Indeed, it is true that having data stolen in a data–breach case does present an immediate threat of injury in that personal information can easily be misused.

Furthermore, it has been argued that in the consumer protection arena, it should be Congress, through use of the consumer protection statutes, that decides what constitutes a "concrete" injury for Article III standing purposes. Allowing the courts to decide amongst themselves has already proven to be more of a problem than a solution, as evidenced by the massive split that is forming in consumer protection case litigation.[147] Because technology is an ever–increasing aspect of our lives, many harms that we care about are not necessarily tangible in that there is no physical harm, but rather harm that is financial, emotional, etc. For consumers, there are only the harms that Congress has defined and even those definitions are insufficient. An example is *Spokeo* itself: a man's ability to receive a job was greatly diminished because of false information published about him.

Consumer protection statutes exist to protect consumers. If a consumer alleges that he or she has been injured by a procedural violation

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142 *Spokeo*, 136 S. Ct. at 1556.
143 *Robins*, 867 F.3d at 1117.
144 *Id.* (emphasis added).
145 *Id.* at 1118.
146 *See, e.g.,* Paul Hastings, *supra* note 77.
147 *See* Law360, *supra* note 91.

of a statute enacted to prevent such misconduct, that plaintiff should have Article III standing. The consumer should also have standing under prior precedent, which says that even if an injury has not yet been suffered, the risk of a real injury is sufficient to establish standing. This note is not to say that the analysis for standing is incorrect; rather, it is to show that there is a flaw in the *Spokeo* analysis of the injury–in–fact requirement.

Spokeo leaves class actions intact but tarnishes the ability of plaintiffs to bring private causes of action against companies that have violated state and federal consumer protection statutes. Especially in the data–breach context, this will prove to be fatal to consumers who wish to file suit against the companies that have their personal information stored. It is also possible that consumers who feel insecure may no longer store any information or may begin trying to avoid online services. While the latter is highly unlikely, it might be the best solution in some cases. While class actions in general do survive, *Spokeo* was about harm and what is required to allege a sufficient injury to allow the case to proceed through the court system. With *Spokeo*'s lack of clarity, proceeding through the court system could prove to be quite difficult for consumers.