No. 20-297

IN THE
Supreme Court of the United States

TRANS UNION LLC,

Petitioner,

v.

SERGIO L. RAMIREZ,

Respondent.

On Writ of Certiorari to the
U.S. Court of Appeals
for the Ninth Circuit

BRIEF OF *AMICUS CURIAE* ELECTRONIC PRIVACY INFORMATION CENTER IN SUPPORT OF RESPONDENT

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March 8, 2021

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INTEREST OF THE *AMICUS CURIAE*

The Electronic Privacy Information Center ("EPIC") is a public interest research center in Washington, D.C., established in 1994 to focus public attention on emerging privacy issues.[1]

EPIC regularly participates as *amicus* in this Court and other courts in cases concerning individuals' standing to sue for invasions of their privacy rights. *See, e.g.*, Brief for EPIC et al. as *Amici Curiae* Supporting Respondent, *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016) (No. 13-1339) (arguing that violation of statutory privacy rights confers Article III standing); Brief for EPIC as *Amici Curiae* Supporting Plaintiffs-Appellees, *Patel v. Facebook, Inc.*, 923 F.3d 1264 (9th Cir. 2019) (arguing that violations of the Illinois Biometric Information Privacy Act confer standing); Letter Brief for EPIC as *Amici Curiae*, *Eichenberger v. ESPN, Inc.*, 876 F.3d 979 (9th Cir. 2017) (arguing that violations of the Video Privacy Protection Act confer standing); Brief for EPIC as *Amicus Curiae* Supporting Plaintiff-Appellant, *Gubala v. Time Warner Cable, Inc.*, 846 F.3d 909 (7th Cir. 2017) (arguing that violations of the Cable Communications Policy Act confer standing); Brief of *Amicus Curiae* for EPIC Supporting Appellants, *Attias v. CareFirst, Inc.*, 865 F.3d 620 (D.C. Cir. 2017) (arguing that violations of statutory or common law rights confer standing without requiring additional consequential harm); Brief for EPIC as *Amicus Curiae* Supporting Plaintiffs-Appellants/Cross-

[1] Both parties consent to the filing of this brief. In accordance with Rule 37.6, the undersigned states that no monetary contributions were made for the preparation or submission of this brief, and this brief was not authored, in whole or in part, by counsel for a party.

Appellees, *In re SuperValu, Inc. Customer Data Sec. Breach Litig.*, 870 F.3d 763 (8th Cir. 2017) (same); Brief for EPIC as *Amicus Curiae* Supporting Petitioner/Plaintiff, *Rosenbach v. Six Flags Entm't Corp.*, 129 N.E.3d 654 (Ill. 2019) (arguing an "aggrieved party" under BIPA is any individual who suffers a statutory violation). EPIC has also directly experienced the impact of *Spokeo* as a litigant when the D.C. Circuit twice applied it to limit the scope of informational standing. *See EPIC v. Presidential Advisory Comm'n on Election Integrity*, 878 F.3d 371, 401–02 (D.C. Cir. 2017); *EPIC v. Dep't of Commerce*, 928 F.3d 95, 103–04 (D.C. Cir. 2019).

SUMMARY OF THE ARGUMENT

This Court developed standing doctrine "to prevent the judicial process from being used to usurp the powers of the political branches." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013). Standing is meant to ensure a plaintiff has "such a personal stake in the outcome of the controversy as to warrant his invocation of federal-court jurisdiction." *Warth v. Seldin*, 422 U.S. 490, 498 (1975) (internal quotation marks omitted). Whether a plaintiff has a personal stake depends in part on their ability to show they have suffered an injury-in-fact, or the "invasion of a legally protected interest." *Lujan v. Def.'s of Wildlife*, 504 U.S. 555 (1992).

But standing was never meant to be a complicated inquiry or a substantial barrier to the vindication of legal rights. Standing is the bare minimum that is required for a court to exercise its jurisdiction. "[T]he injury-in-fact element is not Mount Everest." *In re Horizon Healthcare Servs. Inc. Data Breach Litig.*, 846 F.3d 625, 633 (3d Cir. 2017). Any alleged invasion of a legally protected interest should give rise to

standing absent special constitutional concerns in limited cases that warrant closer scrutiny. Absent some constitutional infirmity, it is not the business of courts to tell Congress which rights are enforceable, and which are not.

Legislatures have a long history of protecting privacy by establishing new legally protected interests and making those rights enforceable through civil actions. Yet, in recent years, courts have increasingly stepped outside of their judicial role and passed judgment on the enforceability of statutory privacy rights. Specifically, some courts in data protection cases have found that plaintiffs can only satisfy the case and controversy requirement of Article III if they prove that they suffered pecuniary or other tangible harm as a result of a violation of their legally protected interest. But many privacy laws provide for liquidated damages precisely because damages are not easy to measure. Courts that require proof of consequential harm are usurping the legislative role and rewriting these privacy laws.

The Court in *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016), attempted to clarify how the standing test should apply in privacy cases, but the decision has actually created more confusion. Courts applying *Spokeo* now routinely overstep their judicial role. The Court's explanation of what constitutes a "concrete" injury has not provided legal clarity and has led to an increased reliance on analysis of legislative history, purpose, and common law context that has turned a question of constitutional jurisdiction into a subjective guessing game.

This case provides an opportunity to clarify this Court's standing precedents and help steer the lower courts closer to a consistent standing analysis based

on the text of the statutes at issue. This Court should hold that individuals who sue to vindicate their private rights necessarily satisfy the requirements of Article III. This much simpler rule would provide more certainty to litigants and courts and is consistent with Article III. The status quo is unworkable and puts courts in the improper role of second-guessing legislative judgments rather than ruling on the underlying cases and controversies presented by litigants. If the purpose of the standing doctrine is to *avoid* separation of powers concerns, then the Court should jettison the *Spokeo* test and make clear that Article III gives federal courts jurisdiction to adjudicate all private rights disputes.

ARGUMENT

I. The *Spokeo* decision has led to incoherent, conflicting, and unpredictable outcomes as lower courts have struggled to apply the concreteness test.

Federal and state legislatures have the power to create new rights for individuals and to allow individuals to enforce their rights through private rights of action. Congress has frequently used its authority to create enforceable privacy rights for individuals and to impose corresponding obligations on those entrusted with their information. Various privacy rights are enshrined in the Fair and Accurate Credit Transactions Act (FACTA), 15 U.S.C. § 1601 et seq., Fair Credit Reporting Act (FCRA), 15 U.S.C. § 1681 et seq., Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. § 1692–1692p, Cable Communications Policy Act (Cable CPA), 47 U.S.C. § 551, Video Privacy Protection Act (VPPA),

18 U.S.C. § 2710, Telephone Consumer Protection Act (TCPA), 47 U.S.C. § 227, and other laws.

Privacy rights and their corresponding obligations are only effective if they are enforceable. But enforcement through civil litigation is not possible if courts refuse to exercise jurisdiction. And recent standing cases have created a "contradictory mess" of decisions attempting to measure the "concreteness" of nearly every privacy injury. Danielle Keats Citron & Daniel J. Solove, *Privacy Harms* 1, 10 (Feb. 9, 2021).[2] The Court's proclamation in *Spokeo* that "history and the judgement of Congress" can help courts identify "concrete" but "intangible" injuries has not proven to be clear guidance to lower courts. Indeed, *Spokeo* has been interpreted by many courts as a directive to ignore the privacy rights enshrined in the plain language of statutes and instead to speculate about legislative intent, potential risk of downstream harm, and ill-fitting common law analogs. Well-pled claims of privacy violations are dismissed based on judicial second-guessing of legislative determinations about the risk of harm. And judicial speculation has led to contradictory and absurd results. Following *Spokeo,* there is no coherent theory of privacy injuries in the federal courts. *See generally* Citron & Solove, *supra.*

[2] https://ssrn.com/abstract=3782222.

A. Courts have made up ad hoc tests to determine whether "intangible injuries" are concrete, and they ultimately fall back on a limited set of traditional injuries.

Privacy is not tangible, and privacy statutes necessarily address *intangible* injuries. The Court in *Spokeo* emphasized that even intangible injuries can be sufficiently "concrete" to confer Article III standing. 136 S. Ct. at 1543. But drawing the line to identify *which* intangible injuries are sufficiently concrete has baffled courts and led to absurd results.

Notwithstanding the Court's pronouncement that "concrete" need not be synonymous with "tangible," *Spokeo*, 136 S. Ct. at 1543, there is no clear way to disentangle the two concepts. An injury that is both "concrete" and "intangible" is an "obvious linguistic contradiction." *In re Horizon Healthcare Servs. Inc. Data Breach Litig.*, 846 F.3d 625, 637 (3d Cir. 2017). Indeed, dictionaries use "tangible" to define "concrete." Meriam-Webster Dictionary, *Concrete* (2021).[3] The other terms used in *Spokeo* to define a concrete injury are also of little aid in identifying concrete intangible injuries. For instance, the Court states that a concrete injury is "not abstract,"—yet "an abstract quality or attribute" is part of the definition of "intangible." Meriam-Webster Dictionary, *Intangible* (2021).[4] As the D.C. Circuit has observed, "[t]he line between a concrete and an abstract risk is, understandably, hard to draw." *Jeffries v. Volume Servs. Am., Inc.*, 928 F.3d 1059, 1065 (D.C. Cir. 2019). The Sixth Circuit recently

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[3] https://www.merriam-webster.com/dictionary/concrete.

[4] https://www.merriam-webster.com/dictionary/intangible.

noted that the "Maginot Line comes to mind as a metaphor for our efforts." *Huff v. TeleCheck Servs., Inc.*, 923 F.3d 458, 464 (6th Cir. 2019).

Courts have, understandably, struggled with this linguistic confusion. When confronted with an intangible injury, some courts have tried to measure its tangibility, usually by focusing on downstream consequences of the violation. This focus on downstream consequences has led to arbitrary results, as well as inter- and intra-circuit conflicts. For example, the Eleventh Circuit has held that the "brief, inconsequential annoyance" caused by the receipt of a single text message is "[a]nnoying, perhaps, but not a basis for invoking the jurisdiction of federal courts." *Salcedo v. Hanna*, 936 F.3d 1162, 1172 (11th Cir. 2019). But a different Eleventh Circuit panel held that receipt of two unsolicited calls was a sufficient basis for standing. *Cordoba v. DIRECTV, LLC*, 942 F.3d 1259, 1270 (11th Cir. 2019). The Fourth Circuit has said that "nebulous frustration" is not enough to be a concrete injury. *Dreher v. Experian Info. Sols., Inc.*, 856 F.3d 337, 346 (4th Cir. 2017). The Third Circuit only requires "some specific, identifiable trifle of injury," which is a lower bar but still invokes the language of measurement. *In re Horizon*, 846 F.3d at 633. In analyzing whether the violation of a right to an accurate record was an injury that "actually exists," the D.C. Circuit asked (and answered in the negative) "if inaccurate information falls into a government database, does it make a sound?" *Owner-Operator Independent Drivers Ass'n, Inc. v. U.S. Dep't of Transp.*, 879 F.3d 339, 344 (D.C. Cir. 2018).

Other courts have rejected any attempt to measure the consequential harm resulting from a violation

of a legally protected privacy interest. The Eighth Circuit has said that "it does not matter that the harm [from an unsolicited call] was minimal; in the standing analysis, we consider the type of the harm, not its extent." *Golan v. FreeEats.com, Inc.*, 930 F.3d 950, 959 (8th Cir. 2019). The Second Circuit has also rejected arguments that an injury was "too trivial" to be concrete by stating that the degree of consequential harm "goes to the materiality" of the case and is not "part of our standing analysis." *Cohen v. Rosicki, Rosicki & Assocs., P.C.*, 897 F.3d 75, 82 n.6 (2d Cir. 2018).

Because courts do not know what a concrete intangible injury is, they often have difficulty recognizing its characteristics in the "history and the judgment of Congress." 136 S. Ct. at 1543. Indeed, most courts have refused to recognize new, intangible injures as concrete without direct historical analogues or proof of consequential harm (such as lost time, lost money, damage to credit, identity theft, withholding of information, or disclosure of information to a third party).

The confusion over how to recognize a concrete intangible privacy injury has thus led some courts to shift the goalposts for concreteness away from the violation of the data protection right and toward a consequential harm standard. That is precisely what the petitioner in this case is asking the Court to do, and it has no basis in Article III.

B. Courts disagree about the scope and applicability of historical and common law analysis under *Spokeo*.

There is a long tradition of both courts and legislatures recognizing and protecting different dimensions of privacy as society and technology have evolved. But that history has nothing to do with the

scope of federal court jurisdiction under Article III. Yet the Court in *Spokeo* noted that a "close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts" is "instructive" as to whether the violation of a statutory right results in a concrete injury. 136 S. Ct. at 1549. This emphasis on history and tradition has caused a great deal of confusion among the lower courts, especially because historical "privacy torts have little application to contemporary privacy issues." Citron & Solove, *supra*, at 13. Indeed, the Eleventh Circuit sitting en banc has observed that *Spokeo*'s historical analysis test leads to litigants "hammering square causes of action into round torts." *Muransky v. Godiva Chocolatier, Inc.*, 979 F.3d 917, 931 (11th Cir. 2020) (en banc).

The privacy torts were developed in state and common law after Warren and Brandeis's influential article describing the need to establish new privacy rights to protect against intrusions caused by the emerging mass media industry and technological inventions like the camera. Samuel L. Warren & Louis Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193 (1890). After the privacy torts were formally catalogued by William Prosser in 1960, William L. Prosser, *Privacy,* 48 Cal. L. Rev. 383, 389 (1960), courts have applied their elements as set out in the Restatement (or equivalent state law). But these privacy torts have not been sufficient to address most modern data protection concerns. Citron & Solove, *supra*, at 13. Modern privacy statutes are necessary *precisely because* privacy torts alone are not sufficient to protect individual privacy interests in the Cyber Age. So it is entirely backwards for courts to limit the enforcement of new

statutory privacy rights based on their departure from historical privacy torts.

Given the gap between historical privacy torts and modern privacy rights, and the vagueness of the phrase "close relationship," it is little surprise that lower court decisions applying *Spokeo* are inconsistent and unpredictable. For example, the Eleventh Circuit, sitting en banc, proclaimed that the fit between a common law analog and a statutory injury "need not be perfect," yet rejected an analogy between the tort of breach of confidence and improper disclosure of information on a receipt in violation of FACTA because it found two of the elements of the tort—disclosure to a third party and a confidential relationship—were absent. *Muransky*, 979 F.3d at 932. The Third and Ninth Circuits have come to the same conclusion. *Kamal v. J. Crew Grp., Inc.*, 918 F.3d 102, 106, 112–18 (3d Cir. 2019); *Bassett v. ABM Parking Servs., Inc.*, 883 F.3d 776, 780 (9th Cir. 2018). But the D.C. Circuit disagreed when it held that FACTA "establishes a similar relationship of trust between consumer and merchant" as the common law tort. *Jeffries v. Volume Servs. Am., Inc.*, 928 F.3d 1059, 1064 (D.C. Cir. 2019). The D.C. Circuit also concluded that FACTA protects against the *risk* of third-party disclosure and that Congress exercised its power to elevate the risk of harm to a concrete injury in its own right. *Id.* at 1065.

Another panel of the Eleventh Circuit has more explicitly required that every element of a common law cause of action must be present for an intangible privacy claim to have a "close relationship" to a historical injury. *Salcedo*, 936 F.3d at 1171–72. In *Salcedo*, the Eleventh Circuit rejected an analogy between the receipt of a single text message in violation of the TCPA

and the tort of intrusion upon seclusion because the violation fell short of the degree of harm required at common law. *Id.* at 1171. Other circuits have come out the other way. The Seventh Circuit, for example, found that *Spokeo* required "a 'close relationship' in kind, not degree" to a common law analog. *Gadelhak v. AT&T Servs.*, 950 F.3d 458, 462 (7th Cir. 2020) (Barrett, J.). The Eleventh Circuit also rejected an analogy between the nuisance of an unsolicited text message and the tort of nuisance because there was "no invasion of any interest in real property here." *Salcedo*, 936 F.3d at 1171. Other circuits have found the relationship between the two types of nuisance sufficient. *Golan*, 930 F.3d at 959; *Van Patten v. Vertical Fitness Grp., LLC*, 847 F.3d 1037, 1043 (9th Cir. 2017).

History has not aided courts in identifying new privacy injuries. Legislatures enact most privacy laws precisely because existing common law rights are inadequate to protect against new dangers caused by modern technologies. The Court's second suggestion, to look to "the judgment of Congress," has also failed to clarify the line between concrete and not-concrete intangible injuries and has instead invited lower courts to engage in conflicting and arbitrary legislative history analyses. 136 S. Ct. at 1543.

C. Courts applying *Spokeo* focus on legislative intent to the detriment of plain text, leading to absurd results.

Most modern privacy injuries do not have a clear common law analog, which is why legislatures have had to pass new statutes to protect personal data. The Court in *Spokeo* recognized that Congress has the power to "elevate to the status of legally cognizable injuries concrete, *de facto* injuries that were previously

inadequate in law." 136 S. Ct. at 1549 (quoting *Lujan v. Def.'s of Wildlife*, 504 U.S. 555, 578 (1992)). But the Court also suggested that not *all* violations of statutory rights are *concrete* injuries. The Court postulated that some "bare procedural violation[s]" of statutes would not, on their own, result in injury absent a showing of consequential harm. *Id.* Yet, the *Spokeo* decision does provide any guidance to help courts recognize a bare procedural violation or decide when a plaintiff must allege consequential harm.

Courts attempting to apply these standards without clear guidance have, predictably, generated conflicting and indeterminate results. The Third Circuit has admitted that its own "pronouncements in this area have not been entirely consistent." *In re Horizon*, 846 F.3d at 635. The Ninth Circuit has classified rights as substantive or procedural, and then analyzed whether a procedural right protects a substantive (read: concrete) interest. *See, e.g.*, *Eichenberger v. ESPN, Inc.*, 876 F.3d 979, 983–84 (9th Cir. 2017) (classifying the VPPA's protection of individuals' privacy interest as substantive); *Van Patten*, 847 F.3d at 1043 ("[TCPA] establishes the substantive right to be free from certain types of phone calls and texts absent consumer consent."); *Campbell v. Facebook, Inc.*, 951 F.3d 1106, 1117 (9th Cir. 2020) ("[Electronic Communications Privacy Act] codifies a context-specific extension of the *substantive* right to privacy."); *Bassett v. ABM Parking Servs., Inc.*, 883 F.3d 776, 782 (9th Cir. 2018) ("To the extent the FCRA arguably creates a 'substantive right,' it rests on nondisclosure of a consumer's private financial information to identity thieves."); *Dutta v. State Farm Auto. Ins. Co.*, 895 F.3d 1166, 1174 n.5 (9th Cir. 2018) ("Though Dutta characterizes the FCRA violation as a substantive one, we conclude that

Dutta plausibly alleges only the violation of procedural rights"). No other court has systematically classified rights along substantive and procedural lines. One panel of the Sixth Circuit has held that Congress must make explicit findings about a new injury to explain how it is concrete, otherwise consequential harm must be plead to establish standing. *Huff*, 923 F.3d at 466–67. Other courts do not have such a strict requirement.

Many courts have interpreted *Spokeo* to require that they analyze statutory injuries based not on the language of the statute itself but instead on the underlying interests at stake. Even courts that would not otherwise use legislative history for statutory construction on the merits have interpreted this part of the *Spokeo* decision to require an analysis of legislative intent and history as part of the standing inquiry. *See Salcedo*, 936 F.3d at 1169 ("We are not suggesting that legislative history should play a role in statutory interpretation. [The plaintiff's] allegation is undisputedly a violation of the [TCPA] as interpreted by the FCC. Nonetheless, because the Supreme Court has instructed us to consider 'the judgment of Congress' in assessing Article III standing, we will consider the congressionally enacted findings as informative of that judgment.").

But courts are not consistent in the way they analyze or use legislative history and purpose in their rulings on standing. Some courts only analyze legislative intent to determine whether a provision *in general* protects a concrete interest; others use legislative history to impose a requirement that the individual litigant demonstrate how the violation of their right harmed them or caused a risk of harm, even when such an individualized showing is not an element of the

cause of action and is antithetical to the remedial framework. Perversely, *Spokeo*'s instruction to look to "the judgment of Congress" has been interpreted by these courts to license second-guessing of legislative policy choices.

A review of standing decisions involving suits under the TCPA shows how courts have taken divergent views both on their reading of legislative history and the requirement for an individualized showing of harm. Almost every circuit court that has considered the issue has concluded that the TCPA's anti-robocall provisions protect individuals from the intrusive privacy invasion of unsolicited automated calls and that litigants need not make any additional showing of harm beyond the violation of their rights. *Melito v. Experian Mktg. Sols., Inc.*, 923 F.3d 85, 88 (2d Cir. 2019); *Susinno v. Work Out World, Inc.*, 862 F.3d 346 (3d Cir. 2017); *Krakauer v. Dish Network, LLC*, 925 F.3d 643 (4th Cir. 2019); *Gadelhak v. AT&T Servs.*, 950 F.3d 458 (7th Cir. 2020); *Golan v. FreeEats.com, Inc.*, 930 F.3d 950, 958–59 (8th Cir. 2019); *Van Patten v. Vertical Fitness Grp, LLC*, 847 F.3d 1037 (9th Cir. 2017).

But the Eleventh Circuit has disagreed, rejecting the characterization of the underlying interest as "too general." *Salcedo*, 936 F.3d at 1170. Instead, the Eleventh Circuit focused exclusively on legislative findings about the intrusiveness of robocalls into the privacy of the home to conclude that the interest underlying every provision of the TCPA—even the provisions that do not concern calls to residential lines—was "privacy within the sanctity of the home." *Id.* at 1169. The court then posited that this limited interest did "not necessarily apply to text messaging" because cell phones "are often taken outside of the home and

often have their ringers silenced." *Id.* at 1169. The court ultimately held that because the plaintiff did not make an individualized showing that he had received the text message while at home, the plaintiff had not alleged a concrete injury. *Id.* at 1170. The requirement that the text message be received in the home was entirely a creation of the Eleventh Circuit, as was the imposition of an individualized harm standard. The term "home" appears nowhere in the TCPA provision prohibiting automated calls to cell phones. 47 U.S.C. § 227(b)(1)(A)(iii). And the TCPA does not require any specific proof of damage, instead awarding statutory damages for each violation. 47 U.S.C. § 227(b)(3)(B).

Another example of the indeterminacy caused by the discussion of legislative intent in *Spokeo* is the disagreement among courts over whether the violation of a statutory notice requirement results in concrete injury. For example, the FDCPA requires creditors to give notice to individuals that they must request information about their debt in writing. The Sixth and Eleventh Circuits have found that violation of the FDCPA notice requirement was sufficiently concrete without individualized proof of harm because "without the information about the in-writing requirement," individuals generally were "placed at a materially greater risk of falling victim to 'abusive debt collection practices.'" *Macy v. GC Servs. Ltd. P'ship*, 897 F.3d 747, 756, 758 (6th Cir. 2018); *see also Church v. Accretive Health, Inc.*, 654 F. App'x 990, 994–95 (11th Cir. 2016). In a case involving a similar requirement under the Truth In Lending Act (TILA), the Second Circuit also found that a violation of the notice requirement "by itself[ ] gives rise to a risk of real harm to the consumer's concrete interest in the informed use of credit." *Strubel v. Comenity Bank*, 842 F.3d 181, 190

(2d Cir. 2016). The plaintiff did not need to allege any individualized consequential harm to demonstrate that he suffered a concrete injury because a person who lacked notice of their obligations "is likely not to satisfy them and, thereby, unwittingly to lose the very credit rights that the law affords [them]." *Id.*

By contrast, the Seventh Circuit has imposed an individualized burden to demonstrate consequential harm in statutory notice cases, finding that the individual plaintiff was not harmed or at risk of harm from the lack of notice that a debt dispute must be in writing because *she* never disputed her debt, in writing or otherwise. *Casillas v. Madison Ave. Associates*, 926 F.3d 329, 335–36 (7th Cir. 2019). The court declared that "[i]t is not enough that the omission risked harming someone—it must have risked harm to the plaintiff[ ]." *Id.* Three judges dissented from the Seventh Circuit's denial of rehearing en banc. *Id.* at 336 n.4. Similarly, in *Long v. SEPTA*, the Third Circuit found that violation of a FCRA notice requirement did not confer plaintiffs with standing because they were able to "file this lawsuit within the prescribed limitations period," which meant that they knew about their FCRA rights and thus "were not injured" by the deficient notice. 903 F.3d312, 325 (3d Cir. 2018). As privacy experts note, this kind of ruling "all but forecloses enforcement of this provision." Citron & Solove, *supra*, at 38.

Courts are similarly split over whether the injury caused by an employer's failure to provide a copy of an individual's credit report as required under FCRA is sufficiently concrete. Courts have taken divergent views of the FCRA legislative history and do not agree on whether to impose an individualized

harm requirement. The Third and Seventh Circuits have found that violation of the right to receive a credit report resulted in a concrete injury because the right in general protected a concrete interest. *Long*, 903 F.3d at 319; *Robertson v. Allied Solutions, LLC*, 902 F.3d 690, 696 (7th Cir. 2018). Both courts explicitly rejected the argument that individuals must demonstrate a consequential harm to establish standing under the FCRA. *Long*, 903 F.3d at 319 ("[FCRA did] not condition the right to receive a consumer report on whether having the report would allow an individual to stave off an adverse employment action."); *Robertson*, 902 F.3d at 695 ("As one can see, there is no reference [in FCRA's] to potential inaccuracies or any other specific reason for the disclosure."). Interestingly, the Third Circuit in *Long* did impose an individualized harm requirement for the notice violation but not for the disclosure violation.

Meanwhile, the Ninth Circuit has required an individualized showing of harm in a FCRA employment disclosure case and held that the same violation did not cause a concrete injury because the plaintiff failed to allege consequential harm when accurate information in his report disqualified him for the job. *Dutta v. State Farm Auto. Ins. Co.*, 895 F.3d 1166, 1175–76 (9th Cir. 2018). The Ninth Circuit's decision was based on its own interpretation of legislative intent underlying the FCRA. Specifically, the court found that the concrete interest underlying the statute was limited to ensuring that employment decisions are based on accurate credit information. *Id.* at 1174–75. The court reasoned that Congress only enacted FCRA to protect individuals from the transmission of inaccurate personal information. *Id.* But it is not appropriate for courts, as a matter of constitutional interpretation,

to speculate on the intent of Congress in creating new statutory rights. The role of courts is to interpret and apply these statutes in cases brought before them.

D. There is substantial confusion about whether the imminence standard in *Clapper* limits standing in data breach cases.

Many state and federal legislatures have sought in recent years to limit the damage caused by data breaches by passing laws enacting rights for breach victims. Yet courts do not agree on the proper way to apply the standing analysis in data breach cases. Part of this confusion stems from a misreading of this Court's recent standing decisions. When the Court noted in *Spokeo* that an intangible-yet-concrete injury may be based on a "risk of real harm." 136 S. Ct. at 1549, it cited to *Clapper v. Amnesty Int'l USA*, 568 U.S. 398 (2013), a case that focused on Article III's imminence requirement, not concreteness, *Clapper*, 568 U.S. at 409–10. Some courts have mistakenly applied *Clapper*'s requirement that a future injury be "certainly impending" to the data breach context, dismissing otherwise well-pled claims because plaintiffs' risks of identity theft relied on a "highly attenuated chain of possibilities." *Beck v. McDonald*, 848 F.3d 262, 275 (4th Cir. 2017). Other courts have instead recognized that the failure to secure personal data is itself a legally protected interest, the violation of which gives rise to standing.

The Fourth Circuit is one of the courts that required plaintiffs allege an increased risk of identity theft to establish standing in a data breach case. The court then applied *Clapper*'s "certainly impending" standard to ask whether the risk is imminent enough

to constitute a concrete injury. *Beck*, 848 F.3d at 272. In *Beck*, the court held that if identity theft could only occur at the end of an "attenuated chain of possibilities" in which a data thief specifically targeted plaintiffs' information, selected it, and used it to steal their identities, plaintiffs failed to allege a concrete injury. *Id.* at 275. The court also determined that a thirty-three percent chance that the plaintiffs would experience identity theft was not a "substantial risk" because it was insufficiently imminent, citing *Clapper*. *Id.* at 276. After attempting to apply *Clapper*, the Eighth Circuit similarly found that, although plaintiffs had alleged that their breached data appeared on illicit websites where bad actors could purchase it, they failed to establish they faced a "certainly impending" or "substantial risk" of identity theft. *In re SuperValu, Inc. Customer Data Sec. Breach Litig.*, 870 F.3d 763, 769–71 (8th Cir. 2017).

Other courts have come out the other way while also applying *Clapper*. The Sixth Circuit determined that there was "no need for speculation" where a data breach victim pleads that their data was already stolen. *Galaria*, 663 F. App'x 384, 388 (6th Cir. 2016). The D.C. Circuit compared the circumstances in *Clapper* to a data breach case, concluding that, unlike in *Clapper*, "[n]o long sequence of uncertain contingencies involving multiple independent actors ha[d] to occur" before plaintiffs suffered any harm. *Attias v. CareFirst, Inc.*, 865 F.3d 620, 629 (D.C. Cir. 2017). Instead, "a substantial risk of harm exist[ed] already, simply by virtue of the hack and the nature of the data" that plaintiffs alleged was breached. *Id.* Because the risk of identity theft following a data breach was "much more substantial than the risk presented to the *Clapper* Court," it was a concrete injury. *Id.*

Applying *Clapper* to all cases where a plaintiff alleges risk of consequential harm is overly complex and a stretch of the precedent. A more simplified standing analysis would prevent discrepancies like the ones in the data breach context.

E. Treatment of FACTA claims under *Spokeo* illustrates how legislative intent analysis leads to absurd results.

A review of post-*Spokeo* treatment of FACTA claims illustrates how reliance on legislative history analysis in the standing inquiry creates confusion and leads to results that contradict the plain language of a statute.

On a plain text reading of FACTA, the law requires businesses to truncate all but the last five digits of credit and debit card numbers and the card's expiration date on a receipt. 15 U.S.C. § 1681c(g)(1). The provision protects an individual's right to control their financial information. Receipts are often discarded, and Congress recognized that the risk of private card information being obtained by third parties was significant. But Congress did not make vindication of the rights under FACTA contingent on proof that improperly truncated information was actually obtained by a third party, nor did it require that an individual prove an increased risk of identity theft. Congress made the risk assessment through the policymaking process and decided the risk was significant enough to warrant a right that could be enforced through private litigation. But courts have disagreed and replaced the judgment of Congress with their own to deny standing.

Following *Spokeo,* some courts have used a *temporary* safe harbor provision and related legislative findings in a subsequent amendment to limit

individuals' standing to sue for violations of their rights under the truncation provision of FACTA, even though the amendment did not change the plain language of the provision. *See Crupar-Weinmann v. Paris Baguette Am. Inc.*, 861 F.3d 76, 81 (2d Cir. 2017) ("While we acknowledge that the Clarification Act maintained FACTA's prohibition on this practice, we decline to draw plaintiff's proposed inference [that printing expiration dates does pose a material risk of harm]"); *Bassett v. ABM Parking Servs., Inc.*, 883 F.3d 776, 782 (9th Cir. 2018) ("Of course, Congress did not eliminate the FCRA's expiration date requirement in the Clarification Act. But both the Clarification Act's finding[s] . . . and the law's temporary elimination of liability for such violations counsel that Bassett did not allege a concrete injury."); *Meyers v. Nicolet Restaurant of De Pere, LLC*, 843 F.3d 724, 727 (7th Cir. 2016) ("Congress has specifically declared [in the Clarification Act's findings] that failure to truncate a card's expiration date, without more, does not heighten the risk of identity theft.").

This use of legislative findings to contradict the plain text of FACTA led to even more absurd when courts extended the same flawed logic to suits where businesses failed to truncate *card numbers* to the last five digits. Even though the legislative findings that formed the basis of these decisions *reinforced* the importance of truncating card number information, Credit and Debit Card Receipt Clarification Act of 2007, Pub. L. 110-241 § 2(a)(6), 122 Stat. 1565 (June 3, 2008), some courts have denied standing in truncation cases. Courts have also struggled to determine the point at which card number truncation violations result in a concrete injury despite the fact that the plain language of the FACTA clearly protects an individual's

right to have no more than the last five digits printed on a receipt. Many courts have relied on their own factual determinations to decide how many additional numbers it takes to sufficiently increase one's risk of identity theft to the point of a concrete injury, again despite the clear determination made by Congress that the risk was sufficient at six numbers.

For example, the Ninth Circuit decided that printing *six* digits of a credit card number was not a concrete injury because the court had previously determined that one additional digit *in an expiration date* was not enough information to increase the risk of identity theft. *Noble v. Nevada Checker Cab Corp.*, 726 F. App'x 582, 584 (9th Cir. 2018). The Second and Third Circuits found that printing *ten* digits of a card number (first six and last four) was not a concrete injury because that was also not enough information, without disclosure to a third party, to increase the risk of identity theft. *Katz v. Donna Karan Co., LLC*, 872 F.3d 114, 120 (2d Cir. 2017); *Kamal v. J. Crew Grp., Inc.*, 918 F.3d 102, 113, 116 (3d Cir. 2019) (citing to the Clarification Act's findings). The Second Circuit based its conclusion on the district court's finding of fact that the first six digits of a card number revealed nothing about a particular cardholder. 872 F.3d at 118–19, 121. Many district courts have since incorporated the fact findings from *Katz* into their own analyses to find FACTA violations did not create concrete injuries. An Eleventh Circuit panel noted that courts have "transformed the fact-findings of a single district court into a bright-line, no-standing rule." *Muransky v. Godiva Chocolatier, Inc.*, 905 F.3d 1200, 1213, *vacated*, 939 F.3d 1278 (11th Cir. 2019), *reh'g en banc*, 979 F.3d 917 (11th Cir. 2020).

Eventually, one district court hit the bottom of the truncation slippery slope and held that even when a business violated FACTA by printing the *full* credit card number *and* expiration date, the plaintiff did not suffer a concrete injury. under FACTA. *Jeffries v. Volume Servs. Am., Inc.*, 319 F. Supp. 3d 525, 527 (D.C.C. 2018), *rev'd and remanded*, 928 F.3d 1059 (D.C. Cir. 2019). On appeal, the D.C. Circuit reversed. 928 F.3d 1059 (D.C. Cir. 2019). The D.C. Circuit reversed and unrolled the long line of judicial overreach by acknowledging that Congress's judgment about when the risk of harm "becomes intolerable" was reflected in FACTA's clear five-digit number truncation requirement. *Id.* at 1065. In other words, violation of the statutory right, on its own, was sufficient to confer standing. *Id.* at 1067.

Spokeo has created unnecessary confusion by encouraging courts to search legislative history and other sources for evidence of consequential harm, even when Congress has provided a statutory rule to be enforced. This Court should adopt a simpler test that respects traditional statutory construction and Congress's power to create new individual rights.

II. Individuals who sue to vindicate their private rights necessarily satisfy the requirements of Article III standing because they suffer concrete injuries when their legal rights are violated.

The lack of consistent and coherent application of the standing test in lower courts is a direct result of past precedents that "unnecessarily complicate" the analysis. *Thole v. U.S. Bank N.A.*, 140 S. Ct. 1615, 1622 (2020) (Thomas, J., concurring). There is no textual or normative reason to "make standing law more

complicated than it needs to be," and many cases can be decided based on the simpler "private rights and public rights" distinction. *Id.* at 1622–23. This Court should hold that individuals who sue to vindicate their private rights necessarily satisfy the requirements of Article III. In a suit for the violation of a private right, courts have "historically presumed that the plaintiff suffered a *de facto* injury [if] his personal, legal rights [were] invaded." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1551 (2016) (Thomas, J., concurring).

The *Spokeo* decision did not provide clarity or a functional rule that can clearly delineate which claims do or do not give rise to Article III jurisdiction. Instead, the *Spokeo* decision has created substantial uncertainty, confusion, and disagreements among the lower courts. The much simpler rule, articulated by Justice Thomas in his concurring opinion in *Spokeo*, his dissenting opinion in *Frank v. Gaos*, 139 S. Ct. 1041, 1046 (2019) (Thomas, J., dissenting), and his concurring opinion in *Thole v. U.S. Bank, N.A.*, 140 S. Ct. at 1622 (Thomas, J., concurring), should be adopted because it would provide more certainty to litigants and courts and is consistent with the text and history of Article III. Indeed, the outcome in many of the cases decided under the complex *Spokeo* standard is consistent with the historical presumption that federal courts have jurisdiction over cases brought to vindicate private rights.

The close scrutiny of Article III standing emerged in public rights cases such as *Lujan v. Def.'s of Wildlife*, 504 U.S. 555 (1992), and *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167 (2000). Those cases involved public rights claims that implicated the special constitutional

concerns about the scope of judicial versus executive branch authority, but the "separation-of-powers concerns underlying [the Court's] public-rights decisions are not implicated when private individuals sue to redress violations of their own private rights." *Spokeo*, 136 S. Ct. at 1552 (Thomas, J., concurring). Public rights involve "duties owed to the whole community . . . in its social aggregate capacity" which are solely redressable by the government generally, while private rights are "rights belonging to individuals, considered as individuals." *Id.* at 1551 (internal quotations omitted).

The doctrine of standing is "built on a single basic idea—the idea of separation of powers." *Allen v. Wright,* 468 U.S. 737, 752 (1984). By "identify[ing] those disputes which are appropriately resolved through the judicial process," *Lujan*, 504 U.S. at 560, standing "serves to prevent the judicial process from being used to usurp the powers of the political branches." *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341 (2014). Where no act of government is in dispute, there is little chance that recognizing a plaintiff's standing will "usurp the powers of the political branches." *Susan B. Anthony List*, 134 S. Ct. at 2341. But when courts deny standing to litigants who are suing to vindicate their private (individual) rights granted by the legislature, those courts reach beyond their judicial role. Indeed, "the province of the court is, solely, to decide on the rights of individuals[.]" *Maryland v. United States*, 460 U.S. 1001, 1005 (1983) (citing *Marbury v. Madison*, 5 U.S. 137, 170 (1803)). And courts violate their constitutional duty when they refuse to enforce the laws duly enacted by state and federal legislatures.

Separation of powers is offended when a court takes jurisdiction over a generalized grievance and impedes on the Executive's take care authority, but it can be equally offended when a court *denies* standing where Congress has duly authorized it—for example, by demanding that a plaintiff prove consequential harm in order vindicate a statutory right even though the statute imposes no such requirement. As the Court has repeatedly emphasized, "Congress may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute." *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 n.3 (1973); *see also Lujan*, 504 U.S. at 560; *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 492 n.2 (1982). Congress is "well positioned to identify intangible harms that meet minimum Article III requirements," and when it does, it may "elevat[e] to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law." *Spokeo*, 136 S. Ct. at 1549.

A court, of course, is not empowered to override congressional judgments as to which injuries should be legally protected simply because they are "out of harmony with a particular school of thought." *Williamson v. Lee Optical of Oklahoma Inc.*, 348 U.S. 483, 488 (1955). The Court has long rejected the view that the judiciary may "sit as superlegislature to judge the wisdom or desirability of legislative policy determinations[.]" *Metro. Life Ins. Co. v. Ward*, 470 U.S. 869, 901 (1985). But that is precisely the effect of unilaterally imposing a consequential harm standard on congressionally created rights. When a court demands that a plaintiff prove some form of harm *beyond the injury that Congress has deemed actionable*, it is rejecting

Congress's determination of what constitutes a bona fide injury and impermissibly "substitut[ing] its own judgment for that of the legislature." *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2310 (2016). "Just as a court cannot apply its independent policy judgment to recognize a cause of action that Congress has denied, it cannot limit a cause of action that Congress has created merely because 'prudence' dictates." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1388 (2014) (internal citation omitted). By doing so here, the lower court has subverted the core premise of the standing doctrine, converting a shield against judicial overreach into a sword for eviscerating legal rights created by Congress. "[W]here a dispute is otherwise justiciable, the question whether the litigant is a 'proper party to request an adjudication of a particular issue,' is one within the power of Congress to determine." *Sierra Club v. Morton*, 405 U.S. 727, 732 n.3 (1972).

In private rights cases, the injury is the violation of the right held by the litigant, not the consequences that may or may not flow from that violation. "Rights are not limited in their scope to harms, but also protect against conduct that might lead to harm." F. Andrew Hessick, *Standing, Injury in Fact, and Private Rights*, 93 Cornell L. Rev. 275 (2008). Just as a motorist can be cited for speeding without causing an accident, i.e. "consequential harm," so too can private rights protect against the mere *risk* of a particular harm without requiring that the harm come to pass. Nor must a statutory right resemble a common law cause of action in order to confer standing. *See Lujan*, 504 U.S. at 580 (Kennedy, J., concurring) ("As Government programs and policies become more complex and far-reaching, we must be sensitive to the articulation

of new rights of action that do not have clear analogs in our common-law tradition."). Courts long ago abandoned this mode of reasoning. *See Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 166 (1996) (Souter, J., dissenting) ("It was the defining characteristic of the *Lochner* era, and its characteristic vice, that the Court treated the common-law background . . . as paramount," while viewing the congressional legislation on the same matters as "suspect.").

CONCLUSION

For the above reasons, *amicus* EPIC respectfully asks this Court to affirm the judgment of the U.S. Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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March 8, 2021