SPOKEO, INC. V. ROBINS: DETERMINING WHAT MAKES AN INTANGIBLE HARM CONCRETE

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In 1970, Congress enacted the Fair Credit Reporting Act (FCRA) to "prevent consumers from being unjustly damaged because of inaccurate or arbitrary information in a credit report."[1] Congress did so in recognition that "there is a need to insure that consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer's right to privacy."[2] Today, in the Internet Age, companies, policymakers, and courts struggle with the scope of the FCRA's application to the online reporting of consumer data.[3]

Spokeo, Inc. v. Robins[4] illustrates the struggle to apply the FCRA to enforce the modern consumer's right to privacy. In *Spokeo*, the plaintiff brought suit under the FCRA based on inaccurate information about him that was posted online.[5] *Spokeo* also touches on larger questions in the

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1. S. REP. NO. 91-517, at 1 (1969).

2. Fair Credit Reporting Act, 15 U.S.C. § 1681(a)(4) (2012).

3. *See* Natasha Singer, *Congress to Examine Data Sellers*, N.Y. TIMES (Jul. 24, 2012), http://www.nytimes.com/2012/07/25/technology/congress-opens-inquiry-into-data-brokers.html [https://perma.cc/UJP3-X3L3]; *FTC Warns Data Broker Operations of Possible Privacy Violations: Letters Issued As Part of Global Privacy Protection Effort*, FTC.GOV (May 7, 2013), https://www.ftc.gov/news-events/press-releases/2013/05/ftc-warns-data-broker-operations-possible-privacy-violations [https://perma.cc/3R4X-LH5T]; *see*, *e.g.*, Joe Van Acker, *High Court Takes on Spokeo's Challenge to FCRA Standing*, LAW360 (Apr. 27, 2015), https://www.law360.com/articles/648078/high-court-takes-on-spokeo-s-challenge-to-fcra-standing [https://perma.cc/43A4-RE46]; *Spokeo to Pay $800,000 to Settle FTC Charges Company Allegedly Marketed Information to Employers and Recruiters in Violation of FCRA*, FTC.GOV (Jun. 12, 2012), https://www.ftc.gov/news-events/press-releases/2012/06/spokeo-pay-800000-settle-ftc-charges-company-allegedly-marketed [https://perma.cc/BU7N-B3JN].

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

5. First Amended Complaint for: (1) Violations of the Fair Credit Reporting Act, 15 U.S.C. § 1681e; (2) Violations of the Fair Credit Reporting Act, 15 U.S.C. § 1681b; (3) Violations of the Fair Credit Reporting Act, 15 U.S.C. § 1681j; (4) Violations of Cal. Bus. & Prof., Code § 17200 et seq. ¶¶ 30–31, 63–65, Robins v. Spokeo, Inc. No. CV10-05306 ODW (AGRx), 2011 WL 597867 (C.D. Cal. Sept. 19, 2011) (No. 2:10-cv-5306-ODW-AGR), 2011 WL 7782796 [hereinafter Robins's Complaint].

information privacy space: in an era where we conduct many of our transactions and communications online, what is the legal status of the various injuries that may occur?[6] How can statutes enacted long before the Internet's existence provide remedies for these harms?[7]

In *Spokeo*, the Supreme Court addressed these questions by treating the privacy-related injury as an "intangible harm," requiring further analysis to determine whether there is standing to sue in federal court.[8] In the wake of *Spokeo*, the mere violation of statutes regulating internet transactions may be insufficient for standing,[9] because for Article III standing the injury in fact must be both concrete *and* particularized.[10]

This Note addresses *Spokeo*'s impact on data security and information privacy litigation by analyzing how an intangible harm can be concrete. More specifically, this Note considers two key questions: First, what makes an intangible harm a concrete injury according to *Spokeo*? Second, how should courts interpret *Spokeo* and apply this definition of an intangible harm? This Note argues that courts should apply a three-step test, developed from post-*Spokeo* decisions, to determine whether an intangible harm is concrete.

Part I of this Note provides the legal background for Article III and statutory standing and explains the nature of intangible injuries. Part II summarizes the relevant holdings from the *Spokeo* decision. Part III analyzes what makes an intangible harm concrete in light of *Spokeo* and, given this analysis, proposes a three-step test for determining whether an intangible harm is concrete.

I. LEGAL BACKGROUND

This Part first provides a brief overview of Article III standing, focusing on the concreteness requirement of an injury in fact. Next, the nature of intangible injuries is examined. Finally, this Part analyzes modern statutory standing from the 1992 case *Lujan v. Defenders of Wildlife* through the pre-

6. *See* Callie Schroeder, *Intangible Privacy Harms Post-Spokeo*, IAPP.ORG: PRIVACY TRACKER (Dec. 15, 2016), https://iapp.org/news/a/intangible-privacy-harms-post-spokeo/ [https://perma.cc/RA4Y-CFY4].

7. *See, e.g.*, *In re* Nickelodeon Consumer Privacy Litig., 827 F.3d 262, 284–86 (3d Cir. 2015) (describing Congress's attempt to regulate the data sharing practices of online services with the Video Protection Privacy Act (VPPA), in light of the VPPA's legislative history).

8. *See Spokeo*, 136 S. Ct. at 1548–50.

9. *See* Schroeder, *supra* note 6.

10. *Spokeo*, 136 S. Ct. at 1548–50.

Spokeo information privacy cases.[11]

A. ARTICLE III STANDING

Article III of the Constitution grants federal courts power over cases or controversies.[12] Standing, a judge-made doctrine based on the case or controversy requirement,[13] determines whether a litigant is entitled to have a court rule on the merits of a dispute.[14] The doctrine prevents the judiciary from "usurp[ing] the powers of the political branches,"[15] because without standing any act of the legislative or executive branch would be subject to judicial review.[16]

To demonstrate standing, a plaintiff must meet three requirements: (1) the plaintiff must have suffered an injury in fact,[17] (2) this injury in fact must be traceable to the actions of the defendant,[18] and (3) the injury must be likely to be redressed by a favorable judicial decision.[19] This Note addresses only the first requirement, as *Spokeo* is primarily concerned with this requirement.[20]

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11. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992).

12. U.S. CONST. art. III, § 2 (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; . . . to Controversies to which the United States shall be a Party;—to Controversies between two or more States . . . .").

13. *See Lujan*, 504 U.S. at 561; Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc., 528 U.S. 167, 180–81 (2000).

14. Warth v. Seldin, 422 U.S. 490, 498 (1975). If the plaintiff lacks standing at any time during the litigation, the court must dismiss the case. United States v. AVX Corp., 962 F.2d 108, 113 (1st Cir. 1992).

15. Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138, 1146 (2013).

16. U.S. v. Richardson, 418 U.S. 166, 188 n.7 (1974) (noting that the "dramatic changes in standing doctrine" made by the legislature would be "only Act I of any contest . . . Act II would, with the usual brief interlude, follow in the courts . . . ."); *see* 13A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 3531.3 n.17 (rev. 3d ed. Supp. 2016) ("Except when necessary in the execution of that function, courts have no charter to review and revise legislative and executive action."); *see also* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16 (1st ed. 1962) ("The root difficulty is that judicial review is a counter-majoritarian force in our system.").

17. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992).

18. *Id.*; Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc., 528 U.S. 167, 180–81 (2000); *see also* Allen v. Wright, 468 U.S. 737, 750 (1984).

19. *Lujan*, 504 U.S. at 561; *Friends of the Earth, Inc.*, 528 U.S. at 180–81.

20. Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1547 (2016) (noting that injury in fact is the "[f]irst and foremost" of standing's three elements). Because the Court found that the Ninth Circuit failed to do a complete analysis of the injury-in-fact requirement, the Court

To establish an injury in fact, the plaintiff must satisfy two requirements. First, she must show that the injury is "actual or imminent,"[21] not " 'conjectural' or 'hypothetical.' "[22] That is, she must show that she is in immediate danger of an injury because of the defendant's challenged conduct.[23] Second, a plaintiff must show that the injury is "concrete and particularized."[24] This requirement ensures that a plaintiff has a "personal stake in the outcome of the controversy."[25]

A "concrete" injury is distinguishable from an "abstract" injury.[26] For example, in *Schlesinger v. Reservists Committee to Stop the War*, the plaintiffs lacked standing to sue because their claim that the government had failed to comply with the Incompatibility Clause would only affect the "generalized interest of all citizens in constitutional governance."[27] This alleged injury, according to the Court, was abstract.[28] In contrast, to allege a "concrete injury," a plaintiff must suffer harm particular to the alleged unlawful action.[29] The plaintiff's "personal stake" allows her to authoritatively explain the adverse consequences that flow from the specific set of facts.[30]

The concreteness requirement for injuries prevents unnecessary adjudication and abuse of the judicial process.[31] More specifically, the *Schlesinger* Court noted that two policies support this requirement: (1) a plaintiff alleging a concrete injury expresses a "real need" for judicial review to protect her interests; and (2) the specific set of facts behind a concrete injury ensures that the relief provided is no broader than those facts require.[32]

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did not reach the next two questions of whether Robins's injury was traceable or redressable. *See id.* at 1550.

21. *Lujan*, 504 U.S. at 560.
22. City of Los Angeles v. Lyons, 461 U.S. 95, 102 (1983).
23. *Id.*
24. Warth v. Seldin, 422 U.S. 490, 498 (1975) (citing Baker v. Carr, 369 U.S. 186 (1962)).
25. *Id.*
26. *See* WRIGHT ET AL., *supra* note 16, § 3531.4.
27. 418 U.S. 208, 217 (1974); *see also* WRIGHT ET AL., *supra* note16, § 3531.4 n.34.
28. *Schlesinger*, 418 U.S. at 217.
29. *Id.* at 221.
30. *Id.*
31. *Id.*
32. *Id.* at 221–22.

B. INTANGIBLE INJURIES[33]

A concrete injury that satisfies the injury-in-fact requirement may be either tangible or intangible.[34] Courts often expect an injury to produce a "tangible economic or physical harm."[35] For example, a tangible economic harm produced by a violation of the FCRA might be the loss of money or the denial of employment.[36] Intangible injuries, on the other hand, are more amorphous and difficult for courts to analyze.[37] Many injuries in information privacy cases are intangible harms.[38]

Libel and slander are two examples of conduct causing intangible harms.[39] Rather than cause physical or economic harms, these injuries cause loss of reputation.[40] Victims of these injuries may recover nominal damages even when unable to prove the extent of reputational harm, or that an injury even occurred.[41] An injury is presumed because an "injury to reputation is extremely difficult to demonstrate, even when it is obvious that serious harm has resulted."[42] Whether such an intangible injury is sufficient to confer standing in federal court often depends on the relevant statutory scheme, as the next Section explains.

C. STATUTORY STANDING

A plaintiff may achieve standing by alleging an injury that Congress has

33. Note that the Court in *Spokeo* uses the terms "intangible injuries" and "intangible harms" interchangeably. *See* Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1549 (2016) (confirming that "intangible injuries can nevertheless be concrete" and that "Congress is well positioned to identify intangible harms that meet Article III requirements"). For clarity, this Note will use the terms "concrete injury" or "injury in fact" to refer to injuries that meet Article III standing requirements.

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

35. Church v. Accretive Health, 654 Fed. Appx. 990, 995 (7th Cir. 2016).

36. *See* Burke v. Fed. Nat'l Mortg. Ass'n, No. 3:16cv153-HEH, 2016 WL 4249496, at *3 (E.D. Va. Aug. 9, 2016), *vacated*, No. 3:16cv153-HEH, 2016 WL 7451624, at *1 (E.D. Va. Dec. 6, 2016) (dismissing the case after the parties stipulated that the court lacked subject-matter jurisdiction).

37. *See* Schroeder, *supra* note 6; *cf. Spokeo*, 136 S. Ct. at 1549 (noting that "tangible injuries are perhaps easier to recognize").

38. *See* Schroeder, *supra* note 6.

39. *See Spokeo*, 136 S. Ct. at 1549 (citing RESTATEMENT (FIRST) OF TORTS §§ 569, 670 (AM. LAW INST. 1938)).

40. *See* RESTATEMENT (FIRST) OF TORTS §§ 569, 670 (AM. LAW INST. 1938).

41. *Spokeo*, 136 S. Ct. at 1549 (citing RESTATEMENT (FIRST) OF TORTS §§ 569, 670 (AM. LAW INST. 1938)).

42. Eaton, *The American Law of Defamation Through* Gertz v. Robert Welch, Inc. *and Beyond: An Analytical Primer*, 61 VA. L. REV. 1349, 1357 (1975).

created by statute.[43] *Lujan* established that Congress may elevate "concrete, *de facto*[44] injuries that were previously inadequate at law" to become legally recognizable and sufficient to establish standing.[45] By enacting statutes, Congress may create legal rights, and the invasion of these rights is sufficient for standing, "even though no injury would exist without the statute."[46] And the Court has emphasized that an injury sufficient for Article III standing "may exist *solely in virtue* of" such statutes creating legal rights.[47]

This principle is best illustrated with *Havens Realty Corp. v. Coleman*.[48] In *Havens Realty*, the Court held that a tester-plaintiff's assertion of an alleged violation of the Fair Housing Act was sufficient to satisfy the requirements for an injury in fact.[49] The tester-plaintiff's only alleged injury was that she had been given false information about the availability of housing.[50] The Court held that the Fair Housing Act "establishes an enforceable right to truthful information concerning the availability of housing" and that "a tester who has been the object of a misrepresentation . . . has suffered injury in precisely the form the statute was intended to guard against."[51] So, even though the tester never intended to rent an apartment from the defendant, the tester had adequately alleged an injury in fact.[52] The Court emphasized that while Article III sets the floor for standing requirements, Congress intended standing under the Fair Housing Act "to extend to the full limits of Art. III."[53]

Havens Realty also presents an example of an *intangible* statutory violation sufficient for standing: the failure to receive particular housing information mandated by law.[54] The plaintiffs in *Havens Realty* alleged that

43. Linda R.S. v. Richard D., 410 U.S. 614, 617 n.3 (1973).

44. "Actual; existing in fact; having effect even though not formally or legally recognized." *De facto*, BLACK'S LAW DICTIONARY (10th ed. 2014).

45. Lujan v. Defenders of Wildlife, 504 U.S. 555, 578 (1992); *see id.* at 580 (Kennedy, J., concurring).

46. *Linda R.S.*, 410 U.S. at 617 n.3.

47. Warth v. Seldin, 422 U.S. 490, 500 (1975) (emphasis added).

48. Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982).

49. *Id.* at 372–73.

50. *Id.* at 373–74.

51. *Id.*

52. *Id.* at 374.

53. *Id.* at 372. Indeed, *Havens Realty* notes that whether the testers had standing is guided by the *Gladstone Realtors v. Village of Bellwood* decision, *id.*, in which the Court stated that Congress can "expand standing to the full extent permitted by Art. III," Gladstone Realtors v. Vill. of Bellwood, 441 U.S. 91, 100 (1979).

54. *Havens Realty*, 455 U.S. at 367–78.

the defendant's practices deprived them of the "social, professional, and economic benefits" of "interracial associations" free from discriminatory housing practices.[55] In this way, an injury sufficient for Article III standing exists solely because of a statute creating a legal right to particular housing information.[56]

Information privacy decisions before *Spokeo* generally recognized that while courts cannot lower the threshold for standing below what is constitutionally required, standing does not require that a plaintiff show "actual monetary loss" to allege an injury in fact.[57] For example, in *Sterk v. Redbox*, the plaintiffs alleged that Redbox's disclosure of their personally identifiable information (PII) to Stream, a third-party vendor providing Redbox with customer services, constituted a violation of the Video Protection Privacy Act (VPPA).[58] The Seventh Circuit found that these "technical violations" of the statute are "precisely what Congress sought to illegalize" by enacting the violated statute.[59]

In sum, plaintiffs must allege a concrete injury in order to have standing to sue in federal court. These injuries may be tangible or intangible, and may be established by the relevant statute. *Spokeo* provides guidance on what makes an intangible harm concrete in the context of a particular statute designed to protect consumers from informational harm.

II. SPOKEO, INC. V. ROBINS CASE SUMMARY

This Part first provides the facts and procedural history of *Spokeo*. Next, this Part explains the Supreme Court's key holdings and the standing doctrine policies that undergird the majority, concurrence, and dissent.

A. FACTS AND PROCEDURAL HISTORY

Spokeo, Inc. is a search engine company that aggregates data about

55. *Id.* at 369. The loss of these benefits constituted a "palpable injury." *See id.* at 377.

56. *Id.* at 373–74.

57. *In re* Google Inc. Cookie Placement Consumer Privacy Litig., 806 F.3d 125, 134 (3d Cir. 2015) (emphasizing that, in situations involving a breach of laws protecting privacy, a focus on "economic loss is misplaced").

58. Sterk v. Redbox Automated Retail, LLC, 770 F.3d 618, 621 (7th Cir. 2014).

59. *Id.* at 623; *see also* Austin-Spearman v. AMC Network Entertainment LLC, 98 F. Supp. 3d 662, 666 (S.D.N.Y. 2015) (holding that the VPPA establishes a privacy right sufficient to confer standing through its deprivation). The Seventh Circuit reaffirmed that Congress has the power to enact statutes that allow a plaintiff to sue "even though no injury would exist without the statute." *Sterk*, 770 F.3d at 622 (citing Kyles v. J.K. Guardian Sec. Servs., Inc., 222 F.3d 289, 294 (7th Cir. 2000)).

individuals from social networks, white pages listings, business sites, and other public records.[60] This data can include a person's age, occupation, wealth, marital status, email address, and phone number.[61]

Thomas Robins alleged that Spokeo's website listed inaccurate information about him;[62] it incorrectly stated that his wealth put him in the "top 10%," that he was "currently employed in a professional or technical field," and that he had a graduate degree and a family.[63] In reality, Robins was unemployed and actively seeking employment.[64] This misinformation posed actual harm to his employment prospects, Robins argued, because it made him appear "overqualified," "less mobile," and "expectant of a higher salary than employers would be willing to pay."[65]

On this ground, Robins alleged that Spokeo willfully violated provisions of the Fair Credit Reporting Act.[66] His injury stemmed from the violation of 15 U.S.C. § 1681e(b), which requires credit reporting agencies to "follow reasonable procedures to assure maximum possible accuracy" of the reports produced.[67] Because of Spokeo's continued willful failure to follow reasonable procedures to assure the maximum possible accuracy of the information it provided, Robins claimed to have suffered actual, imminent, and ongoing harm.[68] Specifically, Robins alleged that he "lost and continue[d] to lose money," and that he "suffered actual harm in the form of anxiety and stress about his diminished employment prospects."[69] Unconvinced, the district court ruled that Robins had failed to plead an

60. *What is Spokeo?*, SPOKEO, http://www.spokeo.com/ (last visited Dec. 23, 2016).

61. *See* Robins v. Spokeo, Inc., 742 F.3d 409, 410 (9th Cir. 2013), *vacated*, 136 S. Ct. 1540 (2016).

62. Robins's Complaint, *supra* note 5, ¶¶ 30–31.

63. Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1554 (2016) (Ginsburg, J., dissenting).

64. *Id.*

65. *Id.*

66. Robins's Complaint, *supra* note 5, ¶¶ 58-65, 66-71, 72-75. The allegedly violated provisions require credit reporting agencies to "follow reasonable procedures to assure maximum possible accuracy," 15 U.S.C. § 1681e(b) (2012), to notify providers and users of consumer information of their responsibilities under the Act, 15 U.S.C. § 1681e(d) (2012), to limit the circumstances in which such agencies provide consumer reports "for employment purposes," 15 U.S.C. § 1681b(b)(1) (2012), and to establish streamlined processes for consumers to request free annual consumer reports, 15 U.S.C. § 1681j(a) (2012).

67. 15 U.S.C. § 1681e(b) (2012).

68. Robins's Complaint, *supra* note 5, ¶¶ 35, 63–65.

69. *Id.* ¶¶ 36–37.

injury in fact.[70]

On appeal, the Ninth Circuit found that Robins had adequately alleged an injury in fact sufficient to achieve Article III standing.[71] The court considered whether violations of statutory rights created by FCRA are "concrete, *de facto* injuries" that Congress can elevate into legally cognizable injuries.[72] To answer this question, the Ninth Circuit identified two limitations on the power of Congress to confer standing on injuries previously not recognized at law: (1) a plaintiff must allege that the defendant violated *her* statutory right, and (2) the statutory right must protect against an individual harm.[73] The court held that the violation of statutory rights met these requirements[74] and that the harm was sufficiently "concrete and particularized."[75] Spokeo appealed and the Supreme Court granted certiorari.[76]

B. SUPREME COURT OPINION

This Section discusses the Supreme Court's holding in *Spokeo*. First, concreteness and particularization must be analyzed separately. Second, a bare procedural violation of a statute is insufficient for Article III standing. And third, intangible harms may be concrete.

1. Concreteness and Particularization Must be Analyzed Separately

The Court found that the Ninth Circuit erred in its analysis of whether Robins had adequately demonstrated an injury in fact by conflating its analysis of whether Robins's alleged injury met the "concrete" requirement with its analysis of whether Robins's alleged injury met the "particularized" requirement.[77] The Court emphasized that a plaintiff must establish that the alleged injury is both "concrete *and* particularized."[78] The Court then focused on the separate concreteness analysis that it faulted the Ninth

70. Robins v. Spokeo, Inc., No. CV10-05306 ODW (AGRx), 2011 WL 597867 (C.D. Cal. Jan. 27, 2011).

71. Robins v. Spokeo, Inc., 742 F.3d 409, 413 (9th Cir. 2013), *vacated*, 136 S. Ct. 1540 (2016).

72. *Id.*

73. *Id.* at 412.

74. *Id.* at 413.

75. *Id.*

76. *See* Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1546 (2016).

77. *Id.* at 1550.

78. *Id.* at 1548. The Court then remanded so that the Ninth Circuit could conduct a separate analysis of whether Robins's alleged injury was concrete. *Id.*

Circuit for eliding.[79]

2. A Bare Procedural Violation of a Statute is Insufficient for Article III Standing

The Court reaffirmed that Congress may make injuries previously not recognized at law legally cognizable.[80] However, a violation of a statutory right must still satisfy the concreteness requirement for Article III standing.[81] The Court found it unclear whether Robins's alleged statutory violation was a "concrete" harm, because the Ninth Circuit did not conduct a separate analysis of whether the alleged statutory violation was concrete.[82] Implicit in the Court's opinion is that Robins alleged a procedural violation because he alleged that Spokeo had violated what the Court considered the FCRA's "procedural requirements."[83] Absent harm, the Court held that a "bare procedural violation" is insufficient for Article III standing.[84]

3. Intangible Harms May be Concrete

The Court noted that injuries need not be "tangible" to be "concrete."[85] Whether an intangible harm is concrete requires an examination of history and the judgment of Congress.[86] With respect to history, the Court considered whether the alleged harm was closely related to a harm traditionally sufficient for standing at common law.[87] With respect to the judgment of Congress, the Court did not provide specific guidance, but noted that Congress is well-positioned to identify intangible harms that satisfy Article III requirements.[88] The Court recalled its statement in *Lujan* that "Congress has the power to define injuries . . . that will give rise to a

79. *Id.*
80. *Id.* at 1549.
81. *Id.*
82. *Id.* at 1550.
83. *See id.*; 15 U.S.C. § 1681e(b) (2012). The Court did not explicitly explain why the violation was procedural, but noted that the "[D]eprivation of a procedural right without some concrete interest . . . is insufficient to create Article III standing," *Spokeo*, 136 S. Ct. at 1549 (citing Summers v. Earth Island Institute, 555 U.S. 488, 496 (2009)). It was possibly a "bare" procedural violation because a violation of one of the FCRA's procedural requirements "may result in no harm." *See id.* at 1550.
84. *Spokeo*, 136 S. Ct. at 1549.
85. *Id.* at 1549. According to the Court, examples of intangible injuries include violations of the Free Speech Clause and Free Exercise Clause of the First Amendment. *See id*.
86. See *id.*
87. *Id.* at 1549.
88. *Id.*

case or controversy where none existed before."[89] However, a new injury created by Congress does not automatically satisfy the injury-in-fact requirement.[90]

The Court noted an intangible harm that poses a "risk of real harm" may satisfy the concreteness requirement for an injury in fact.[91] According to the Court, common law intangible harms such as libel and slander are analogous to some violations of procedural rights granted by statute.[92] One example is a group of voters' "inability to obtain information" that Congress has made available to the public by statute.[93] Thus, a violation of a procedural right granted by statute can qualify as an injury in fact so long as it presents a "risk of real harm."[94]

Here, the Court viewed the alleged violation as an intangible harm.[95] Because the Ninth Circuit failed to address whether the alleged violation of the FCRA posed a degree of risk sufficient to meet the concreteness requirement, the Court remanded the case for further proceedings.[96]

4. The Majority, Concurrence, and Dissent Look to Standing Doctrine Policies

Spokeo is a divided opinion, but the majority, concurrence, and dissent all touch upon the policy behind standing doctrine.[97] As the *Spokeo* majority noted, standing doctrine ensures that federal courts "do not exceed their authority as it has been traditionally understood."[98] Standing as articulated by Article III prevents the judicial branch from being used to "usurp the powers of the political branches."[99]

Justice Thomas's concurrence echoed this policy behind Article III standing, but added this condition: there is no concern about judicial

89. *Id.*
90. *Id.*
91. *Id.*
92. *Id.* at 1549.
93. See *id.*
94. *See id.* The Court did not explain what constitutes a "real" harm, other than to define "real" in opposition to "not 'abstract.'" *Id.* at 1548.
95. *See id.* at 1549.
96. *Id.* at 1550. On December 13th, 2016, the Ninth Circuit heard oral arguments for *Spokeo* on remand. *See* Cara Bayles, *9th Circ. Hears Landmark Spokeo Row on High Court Remand*, LAW360.COM (Dec. 13, 2016), https://www.law360.com/articles/871165/9th-circ-hears-landmark-spokeo-row-on-high-court-remand [https://perma.cc/F26N-V34W].
97. *Id.* at 1547, 1550–52, 1555.
98. *Id.* at 1547.
99. *Id.* (citing Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138, 1146 (2013)) (internal quotation marks omitted).

overreach when a plaintiff seeks only to enforce his "personal rights" against another private party.[100] Here, the right at issue created by the FCRA is a public right: it is a regulatory duty that Spokeo owes to the public.[101] Therefore, Robins had no standing to sue Spokeo as a private plaintiff for the violation of this public right.[102] However, Thomas granted that one of Robins's claims rested on a statutory provision that might create a private right:[103] § 1681(e)(b) might create a private right because it requires Spokeo to "follow reasonable procedures" with respect to the *individual* reported on.[104]

Justice Ginsburg's dissent briefly addressed Article III standing, noting that Robins's claim was not at odds with standing doctrine because he sought a remedy for Spokeo's misinformation specifically about *him*, not for "harm to the citizenry."[105] Thus, Robins's injury was sufficient for standing.[106]

Justice Ginsburg's dissent also stated that standing doctrine should be flexible enough to grant plaintiffs standing when their injury implicates societally valuable interests.[107] Justice Ginsburg noted that the Court has previously considered various informational injuries to individuals sufficient for standing: the inability to acquire political donor and contributions information from the Federal Election Commission in *Federal Election Commission v. Akins*, the inability to access the ABA Committee's meetings and records on federal judgeship nominees subject to disclosure under the Federal Advisory Committee Act in *Public Citizen v. Department of Justice*,[108] and the failure to acquire truthful information about housing availability in *Havens Realty Corp*.[109] In Justice Ginsburg's view, these

100. *Id.* at 1551 (Thomas, J., concurring).

101. *Id.* at 1553.

102. *Id.*

103. "Private rights" are "rights belonging to individuals" and include "rights of personal security (including security of reputation), property rights, and contract rights." *Id.* at 1551 (citing 3 WILLIAM BLACKSTONE, COMMENTARIES *2).

104. Spokeo, 136 S. Ct. at 1554 (Thomas, J., concurring). Thus, on remand, the Ninth Circuit should consider whether this provision created a duty owed *specifically* to Robins to ensure the accuracy of his specific information, thus creating a private right. *Id.* If so, Robins need not allege any harm beyond the provision's violation because he would be enforcing his "personal rights" against another private party. *See id.*

105. *Id.* at 1555 (Ginsburg, J., dissenting).

106. *Id.*

107. *See id.* at 1554–55.

108. *See* Fed. Election Comm'n v. Akins, 524 U.S. 11, 19–20 (1998); Pub. Citizen v. U.S. Dep't of Justice, 491 U.S. 440, 449 (1989).

109. Havens Realty Corp. v. Coleman, 455 U.S. 363, 373 (1982).

injuries are "substantive harm[s]" that are connected to "procedural requirements."[110] In this way, Justice Ginsburg's dissent implicitly argues that standing doctrine must be flexible enough to grant plaintiffs standing when their injury implicates societally valuable interests, such as an individual's interest in fair elections, a qualified judiciary, and fair housing.[111]

III. ANALYSIS: INTANGIBLE CONCRETE HARMS

This Part focuses on what makes intangible harms concrete and therefore sufficient for Article III standing. The first Section examines the requirement for what makes an intangible harm concrete, using *Spokeo* and decisions interpreting *Spokeo*. The second Section addresses how courts should interpret *Spokeo*.

A. WHAT MAKES AN INTANGIBLE HARM CONCRETE?

While the Court's opinion did not seem to change the definition of intangible harms,[112] *Spokeo* clearly held that intangible injuries may be concrete.[113] This Note proposes that courts should interpret *Spokeo* as establishing a three-step test to determine whether an intangible harm is concrete. First, do both history and the judgment of Congress support the proposition that the intangible harm is concrete? Second, if so, what kind of right is created by statute? A procedural right, or a substantive right? If the right created is substantive, no further harm need be alleged. Third, if the right created is procedural, does the intangible harm pose a "risk of real harm"? The following chart explains the proposed three-step test in *Spokeo*.

110. *Spokeo*, 136 S. Ct. at 1555 (Ginsburg, J., dissenting).
111. *See id.* at 1554–55.
112. *See id.* at 1549.
113. *Id.*

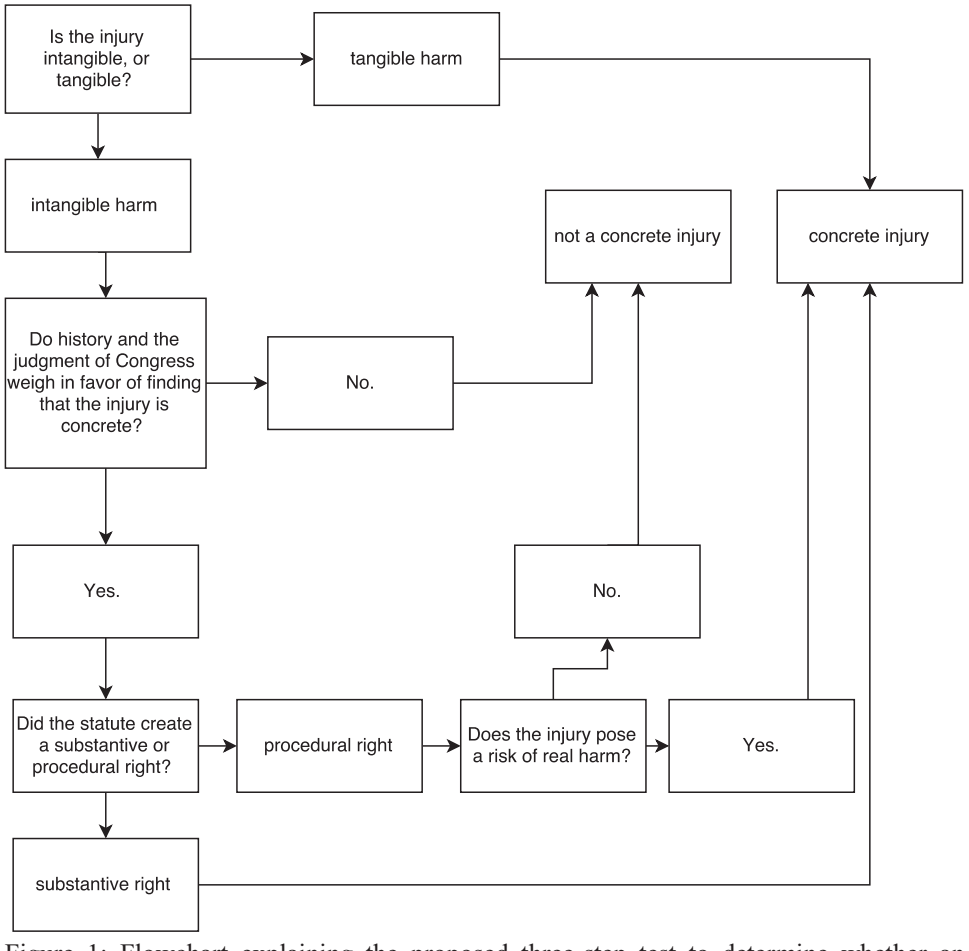

Figure 1: Flowchart explaining the proposed three-step test to determine whether an intangible harm is concrete.

In *Spokeo*, the Court provided two factors to consider in determining whether an intangible harm constitutes a concrete injury: history and the "judgment of Congress."[114] After discussing the important roles played by both factors, the *Spokeo* court offered separate guidance on how an intangible harm may be concrete enough for standing,[115] stating that intangible harms that pose a "risk of real harm" may satisfy the concreteness requirement.[116] For example, intangible harms like libel and slander, which

114. *Spokeo*, 136 S. Ct. at 1549.
115. *Id.*
116. *Id.*

do not require proof of harm to reputation, pose a "risk of real harm" according to the Court, and are thus concrete.[117]

Yershov v. Gannet Satellite Info. Network, Inc.[118] presents a careful reading of *Spokeo* and a convincing framework for interpreting the Court's guidance. In *Yershov*, the plaintiff sued under the VPPA, alleging that the defendant disclosed users' "personally identifiable information" to Adobe Systems, a third-party data analytics company, every time the plaintiff watched a video through the application.[119] The *Yershov* court applied *Spokeo*'s guidance to analyze whether the plaintiff had alleged a "bare procedural violation" of the VPPA.[120] First, the court applied the two-factor test to determine whether history and Congress's judgment weigh in favor of finding that the injury at issue is concrete.[121] Second, it noted that history and Congress's judgment are not dispositive: if the statute created a procedural right, courts must also apply the "risk of real harm" standard.[122] The following sections explain these steps in greater detail by examining how courts have applied *Spokeo*.

1. Step One: Do History and the Judgment of Congress Support the Proposition that the Intangible Harm is Concrete?

As noted by the *Spokeo* majority and Justice Thomas, standing doctrine prevents the judicial branch from usurping the power of the political branches.[123] By asking a court faced with this issue to first look to history and Congress's judgment, this step ensures that the alleged injury is one for which Congress intended to provide a judicial remedy.[124]

In *Yershov*, the court first applied the two-factor test to find that both history and Congress's judgment weighed in favor of finding that the VPPA violation was concrete.[125] With respect to the judgment of Congress, the court examined legislative history and found that the VPPA was necessary

117. *Id.* (citing RESTATEMENT (FIRST) OF TORTS §§ 569–70 (AM. LAW INST. 1938).

118. Yershov v. Gannet Satellite Info. Network, Inc., No. 14-13112-FDS, 2016 WL 4607868 (D. Mass. Sept. 2, 2016).

119. *Yershov*, 2016 WL 4607868, at *1. Yershov claimed that with these disclosures Adobe could identify Yershov and attribute an individualized profile of his video records. In this way, Yershov argued that his "statutorily defined rights to privacy" under the VPPA were violated. *Id.* at *2.

120. *Id.* at *7.

121. *See id.* at *8.

122. *See id.* at *6.

123. *See* Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1549–51 (2016).

124. *See id.* at 1549, 1555.

125. *See Yershov*, 2016 WL 4607868, at *8.

to "preserve personal privacy with respect to the rental, purchase, or delivery of video tapes or similar audio visual materials."[126] With respect to history, the court noted that the right to privacy has long been the basis for a lawsuit in English and American courts.[127] The court also noted that "Congress may create a statutory right to privacy in certain information that strengthens or replaces the common law, and citizens whose statutory right to informational privacy has been invaded to have standing to bring suit under the statute to vindicate that right."[128] The court found that both factors weighed in favor of finding that the violation was concrete.[129]

The court next explicitly noted that history and Congress's judgment are not dispositive: if the statute created a procedural right, courts must also apply the "risk of real harm" standard.[130] However, the court did not perform a "risk of real harm" analysis, finding that because Congress created a statutory right to informational privacy, and specifically because the VPPA created a substantive right to remedy the alleged disclosure, the VPPA provided Yershov with standing.[131] Therefore, a breach of the statute was not a "bare procedural violation" of a technical requirement, but a substantive violation. In the court's view, the VPPA "plainly" provided plaintiffs with standing and the right to relief.[132]

2. *Step Two: If History and the Judgment of Congress Say the Intangible Harm is Concrete, What Kind of Statutory Right is Created?*

After finding that the two-factor test weighs in favor of finding that a bare statutory violation is concrete, courts should ask what kind of right is created by the statute. By examining whether the right created by the statute at issue is substantive or procedural, the test is consistent with the *Spokeo*

126. *Id.* at *8 (citing S. REP. NO. 100-599, at 1 (1988)).

127. *Id.* (citing United States Dep't of Justice v. Reporters Comm. for Freedom of Press, 489 U.S. 749, 763 (1989) ("Both the common law and literal understandings of privacy encompass the individual's control of information concerning his or her person.")).

128. Statutes creating a right to informational privacy include the Electronic Communications Privacy Act, the Right to Financial Privacy Act, and the VPPA. *Id.* (citing Thomas v. FTS USA, LLC, No. 3:13-cv-825, 2016 WL 3653878, at *10 (E.D. Va. June 30, 2016)).

129. *Id.*

130. *Id.* at *6.

131. *Id.* at *8, *8 n.5 ("[A]ccepting the complaint's allegations as true, [Gannett's disclosure of information to Adobe] is the precise type of disclosure for which the VPPA created a substantive right to prevent and remedy.").

132. *Id.* at *8. The court repeated *Spokeo*'s holding that a bare procedural violation is insufficient for Article III standing. *Id.* at *6.

dissent's implicit emphasis on the need for standing doctrine to allow for plaintiffs to claim intangible harms, especially if these implicate societally valuable interests.[133]

a) A bare statutory violation is sufficient for standing if that statute creates a substantive right.

One way that courts have avoided the question of whether a "bare procedural violation" poses a "risk of real harm" is by finding that the violated statute at issue creates a substantive right, rather than a procedural right.[134] In this way, the alleged violation is not a procedural violation at all, but a *substantive* one.[135] This method is clearly articulated in *Burke v. Federal National Mortgage Association.*[136]

In *Burke*, the court found that the plaintiff's alleged violation of the FCRA constituted a concrete injury because the provision of the FCRA at issue created a substantive right to privacy.[137] Burke alleged that the Federal National Mortgage Association violated her rights under the FCRA by unlawfully obtaining credit under false pretense of an "account review" even though no account existed.[138] Burke claimed that this action resulted in an increased risk of identity theft and/or data breach, causing her anxiety and stress.[139]

The court first noted that *Spokeo* requires more than a bare procedural violation to reach the threshold of a concrete injury.[140] The legislative history of the FCRA demonstrated that Congress intended to give consumers the right to privacy in their consumer reports.[141] The court stated that when a defendant fails to comply with statutory rules protecting privacy, the plaintiff's privacy has been unlawfully invaded and the plaintiff

133. Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1555 (2016) (Ginsberg, J., dissenting).

134. In doing so, these courts take a line of reasoning similar to Justice Thomas's concurrence in *Spokeo*, which makes a distinction between statutes that create public rights and statutes that create private rights. *See id.* at 1551–52 (Thomas, J., concurring).

135. *See* Burke v. Fed. Nat'l Mortg. Ass'n, No. 3:16cv153-HEH, 2016 WL 4249496, at *2 (E.D. Va. Aug. 9, 2016), *vacated*, No. 3:16cv153-HEH, 2016 WL 7451624, at *1 (E.D. Va. Dec. 6, 2016) (dismissing the case after the parties stipulated that the court lacked subject-matter jurisdiction).

136. *Id.* at *3.

137. *Id.*

138. *Id.* at *4.

139. *Id.* at *1.

140. *Id.* at *2.

141. *Id.*

has suffered a concrete injury, regardless of actual damages.[142] Given the "purposes, framework, and structure of the FCRA," the court found that the FCRA established a right to privacy that is "more substantive than procedural."[143] Thus, Burke's alleged injury was not a bare procedural violation, but a violation of a substantive right created by the FCRA, and thus a concrete injury.[144]

There is a distinction between substantive rights and procedural rights. While courts can greatly simplify the question of whether an intangible harm is concrete by concluding that the right created is substantive rather than procedural, the difference between substantive and procedural rights is disputed and not entirely clear.[145] Generally, a substantive right is one that can be "protected or enforced by law; a right of substance rather than form."[146] A procedural right is one that "derives from legal or administrative procedure; a right that helps in the protection or enforcement of a substantive right."[147] In *Sibbach v. Wilson*, the Court noted that substantive rights are rights "conferred by law to be protected and enforced in accordance with the adjective law of judicial procedure," one of which is the "right not to be injured in one's person by another's negligence."[148] In this way, "procedure is the essential safeguard that protects substantive rights."[149] However, these general definitions are vague and not particularly helpful. There are various approaches to fleshing out the substantive-procedural distinction,[150] but *Landrum v. Blackbird Enterprises, LLC* is

142. *Id.* at *2. Upon examining the language of the FCRA, the court found that the FCRA makes explicit that Congress limited circumstances in which a consumer report may be legitimately obtained to protect the "consumer's right to privacy," and to ensure the "confidentiality" of consumers' credit information. *Id.* at *3; *see* 15 U.S.C. § 1681 (2012).

143. *Burke*, 2016 WL 4249496, at *4. The FCRA is meant to protect the consumer from the violation of privacy; it does not intend to prevent this violation simply as a means to protect the consumer from other "more tangible" harms.

144. *Id.* at *4.

145. *See, e.g.,* Larry Alexander, *Are Procedural Rights Derivative Substantive Rights?*, 17 L. & PHIL. 19 (1998) (arguing that "procedural rights just are substantive rights, albeit substantive rights of a special (but quite numerous) kind: rights against risks"). *Burke* does not clarify the distinction between a substantive right and a procedural right. *See Burke*, 2016 WL 4249496, at *4.

146. *Substantive Right*, BLACK'S LAW DICTIONARY (10th ed. 2014).

147. *Procedural Right*, BLACK'S LAW DICTIONARY (10th ed. 2014).

148. Sibbach v. Wilson, 312 U.S. 1, 13 (1941).

149. WRIGHT ET AL., supra note 16, § 3531.4, at 249–50 n.141 (citing Ingalls Shipbuilding, Inc. v. Director, Office of Workers' Comp. Programs, U.S. Dept. of Labor, 102 F.3d 1385, 1389–90 (5th Cir. 1996)).

150. *See*, *e.g.*, Erwin Chemerinksy, *Substantive Due Process*, 15 TOURO L. REV. 1501, 1501–02 (1999).

especially relevant.[151] The alleged injuries in *Spokeo* and *Landrum* both arise under the FCRA, and *Landrum* explicitly applies *Spokeo*'s guidance.[152]

In *Landrum*, one of the plaintiff's alleged "concrete" injuries was his failure to receive a disclosure to which he was statutorily entitled under the FCRA.[153] The court defined a substantive right as one that can be "protected or enforced by law; a right of substance rather than form," and found that the FCRA protects a substantive right to be notified of the acquisition and use of a consumer report for employment purposes.[154] The FCRA's requirement that this notice take the form of a stand-alone disclosure is a "procedural protection of that substantive right."[155] In the court's view, "a statutory right to information is substantive. A statutory right to receive that information in a particular format is procedural."[156] The court found that the plaintiff's alleged injury was a bare procedural violation because the plaintiff failed to receive notice in the proper *format*.[157] In this way, an analysis of whether a statutorily created right is substantive or procedural turns on whether that right is a right of "substance rather than form."[158]

3. *Step Three: If the Right Created is Procedural, Does the Intangible Harm Pose a "Risk of Real Harm"?*

Spokeo provided an exception to the "bare procedural violation rule," allowing that a "risk of real harm" presented by a bare procedural violation may satisfy the concreteness requirement.[159] Therefore, if a court finds that the violated statute at issue creates a procedural right, rather than a substantive right, a court should ask whether the violation poses a "risk of real harm."

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151. Landrum v. Blackbird Enterprises, No. H-16-0374, 2016 WL 6075446 (S.D. Tex. Oct. 3, 2016).

152. *See* Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1554–46 (2016); *Landrum*, 2016 WL 6075446, at *1–4.

153. *Landrum*, 2016 WL 6075446, at *1.

154. *Id.* at *3.

155. *Id.* at *4.

156. *Id.*

157. *Id.* Note that the plaintiff did not claim that he substantively failed to receive notice that the Defendants intended to perform a background check. *Id.* at *4.

158. See id.

159. *See* Yershov v. Gannet Satellite Info. Network, Inc., No. 14-13112-FDS, 2016 WL 4607868, at *8 (D. Mass. Sept. 2, 2016) (citing Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1549–50 (2016)).

For example, torts like libel and slander, which do not require proof of harm to reputation, pose a "risk of real harm" according to the Court, and are thus concrete.[160] In contrast are statutory violations that present "no harm" or "no material risk of harm."[161] For instance, a consumer reporting agency's failure to provide a required notice to one of its users may result in no harm, because the information may still be accurate.[162] In addition, inaccuracies like the dissemination of an incorrect zip code cause no harm.[163] These injuries are "bare procedural violations" because they violate procedural requirements (required by law) but cause no harm.[164]

However, in some circumstances, the violation of a procedural requirement may pose a risk of real harm sufficient to make the harm concrete.[165] For example, the inability to acquire campaign donor and contributions information that Congress has decided to make public by statute poses a risk of real harm to voters, because it hinders voters' ability to evaluate candidates for office and to evaluate the role money might play in their election.[166] In these circumstances, "a plaintiff need not allege any *additional* harm beyond the one Congress has identified" because the *risk* of real harm is enough to make the harm concrete.[167]

Two circuit courts' interpretations of *Spokeo* shed some light on what kind of procedural violation constitutes a risk of real harm sufficient to meet the concreteness requirement. In *Strubel v. Comenity Bank*,[168] the Second Circuit found that the plaintiff had standing to sue under the Truth in Lending Act (TILA) because the alleged defects in Comenity's disclosure raised a "degree of the risk of real harm necessary to concrete injury and Article III standing."[169] To determine whether a procedural violation

160. Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1549 (2016) (citing RESTATEMENT (FIRST) OF TORTS §§ 569, 570 (AM. LAW INST. 1938)).

161. *Id.* at 1549.

162. *Id.* at 1550.

163. *Id.*

164. *Id.*

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

166. *Id.* (citing Federal Election Comn'n v. Akins, 524 U.S. 11, 21 (1998) (holding that respondents' injury seems "concrete and particular")).

167. *Id.* The Court cites *Clapper v. Amnesty International USA*, 133 S. Ct. 1138 (2013) to support its statement that the risk of real harm may satisfy the requirement of concreteness. *Id.* However, *Clapper* is an odd case for the Court to cite because (1) the language "risk of real harm" is not used in the opinion, and (2) the closest analog, "risk of harm," is used to analyze a different prong of the injury-in-fact analysis, the "actual or imminent" prong. *See* Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138, 1150 (2013).

168. 842 F.3d 181, 190 (2d Cir. 2016).

169. *Strubel*, 842 F.3d at 190.

demonstrates a "risk of real harm" sufficient to constitute a concrete injury, *Strubel* considered (1) whether Congress created a procedural right "to protect an individual's concrete interests," and (2) whether a procedural violation demonstrates a "risk of real harm" to the underlying interest.[170] The court found that two of the disclosure requirements at issue "protect a consumer's concrete interest in 'avoid[ing] the uninformed use of credit,' a core object of the TILA."[171] The Second Circuit found that the alleged violations were concrete because a consumer who is not given notice of his own obligations is unlikely to fulfill them, leading to the loss of the "very credit rights that the law affords him."[172] Thus, the alleged violation of these disclosure requirements posed a "risk of real harm" to Strubel's underlying interest in avoiding the uninformed use of credit.[173] In this way, the risk of losing the very credit *rights* afforded to Strubel by the law posed a risk of real harm sufficient to constitute a concrete injury.[174]

Using a similar analysis but reaching the opposite conclusion, the Fifth Circuit in *Lee v. Verizon Communications, Inc.* found that the ERISA statutory violation was insufficient to create standing because there was "no allegation of a real risk" that the plaintiff's "concrete interest" in the payment plan was at risk from the violation.[175] The court established that the "concrete interest" was the plaintiff's "right to payment."[176] The court noted that merely alleging "fiduciary misconduct in violation of ERISA" without any allegation of risk to the plaintiff's "actual benefits" did not constitute an injury sufficiently concrete for standing.[177] In other words, we might infer that an allegation of risk of economic harm would weigh in favor of finding that the right to payment was at risk.[178] As in *Strubel*, a "risk of real harm" is a risk that some underlying right will be deprived.[179]

170. *Id.* at 190, 200.

171. *Id.* at 190 (quoting 15 U.S.C. § 1601(a) (1976)). For example, one of these requirements required a creditor to give notice to a consumer of how the consumer's actions can affect his rights with respect to credit transactions. *Id.*

172. *Id.*

173. *Id.* at 190.

174. *Id.*

175. Lee v. Verizon Commc'ns, Inc., 837 F.3d 523, 530 (5th Cir. 2016).

176. *Id.*

177. *Id.*

178. *See id.*

179. *See id.*; *Strubel*, 842 F.3d at 190. Note that these rights are not procedural—while the violation of procedural rights is insufficient for standing without a showing of a risk of real harm, alleging risk to *these* underlying rights would likely be sufficient for standing.

B. HOW SHOULD COURTS INTERPRET *SPOKEO*?: APPLYING THE THREE-STEP TEST TO THE FACTS OF *SPOKEO*

To illustrate how the proposed three-step test would work, this Section applies the three-step test to the facts of *Spokeo*.[180] It assumes that the harm at issue is intangible, and begins by asking whether history and the judgment of Congress weigh in favor of finding that the harm is concrete.

1. Applying History and the Judgment of Congress

In its analysis of history's guidance, the *Spokeo* Court considered "whether the 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."[181]

The FCRA states a need to insure a "respect for the consumer's right to privacy," and the common law has long recognized a right to personal privacy.[182] Here, the alleged intangible harm is Spokeo's posting of inaccurate information about Robins.[183] This alleged injury appears similar to the common law injury of defamation.[184] Defamation requires "(a) a false and defamatory statement concerning another; (b) an unprivileged publication to a third party; (c) fault amounting at least to negligence on the part of the publisher; and (d) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication."[185] Victims of these injuries may recover damages even when they are unable to prove actual harm.[186] Similarly, the inaccurate report posted by Spokeo (a) makes false statements about Robins, (b) is an unprivileged publication to the public at large, (c) is arguably negligent in that it has not been verified before being disseminated for public consumption, and (d) has statements that are demonstrably false and are the

180. In effect, this Section provides guidance as to how *Spokeo should* come out on, given that the Supreme Court remanded so that the Ninth Circuit could conduct a separate analysis of whether Robins's alleged injury was concrete.

181. Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1549 (2016) (citing Vermont Agency of Nat. Res. v. United States ex rel. Stevens, 529 U.S. 765, 775–777 (2000)).

182. Thomas v. FTS USA, LLC, No. 3:13-cv-825, 2016 WL 3653878, at *10 (E.D. Va. June 30, 2016) (citing United States Dep't of Justice v. Reporters Comm. for Freedom of Press, 489 U.S. 749, 763 (1989)).

183. *Spokeo*, 136 S. Ct. at 1544–45; Robins's Complaint, *supra* note 5, ¶¶ 30–37, ¶¶ 63–65.

184. RESTATEMENT (SECOND) OF TORTS § 558 (AM. LAW INST. 1977).

185. *Id.*

186. *Id.* at § 558(d); *see also* RESTATEMENT (FIRST) OF TORTS § 575 cmt. b (AM. LAW INST. 1938).

grounds for legal action irrespective of "special harm" caused by Spokeo—the FCRA provides damages for willfully failing to comply with § 1681e, without requiring actual harm.[187] Thus, history weighs in favor of finding that the alleged injury provides basis for standing.

Although the *Spokeo* Court did not provide guidance for assessing the judgment of Congress,[188] examining Congress's judgment with respect to the FCRA in general, and then with respect to the provisions at issue, seems appropriately rigorous. By enacting the FCRA in 1970, Congress intended (1) to address concerns about abuses in the consumer reporting industry and (2) to guard against technological developments that would open "the possibility of a nationwide data bank covering every citizen,"[189] stating that these data banks put an individual in "great danger of having his life and character reduced to impersonal 'blips' and key-punch holes in a stolid and unthinking machine which can literally ruin his reputation without cause, and make him unemployable."[190] This was not a speculative concern: with the advent of these "computerized data banks," Congress found that "in too many instances agencies were reporting inaccurate information that was adversely affecting the ability of individuals to obtain employment."[191] By passing the FCRA, Congress sought "to prevent consumers from being unjustly damaged because of inaccurate or arbitrary information."[192]

There are four provisions at issue in *Spokeo*, but Robins's alleged injury is most clearly a violation of § 1681e(b), which requires consumer reporting agencies "to follow reasonable procedures to assure maximum possible accuracy of consumer reports."[193] Robins alleged that Spokeo failed to

187. The FCRA imposes liability on "[a]ny person who willfully fails to comply with any requirement [of the Act] with respect to any" individual. 15 U.S.C. § 1681n(a) (2012).

188. Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1549 (2016).

189. S. REP. NO. 91-517, at 2 (1969).

190. 116 CONG. REC. 36570 (1970) (statement of Rep. Sullivan).

191. Dalton v. Capital Associated Indus., Inc., 257 F.3d 409, 414 (4th Cir. 2001) (citing Rep.Sullivan's remarks in 116 CONG. REC. 36570 (1970)).

192. S. REP. NO. 91-517, at 1 (1969) (emphasis added). More generally, the FCRA states that "there is a need to insure that consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer's right to privacy." 15 U.S.C. § 1681(a)(4). This need to respect a consumer's right to privacy in the context of the FCRA first appeared in a Senate bill to amend the Federal Deposit Insurance Act, introduced in the Senate on January 31, 1969. S. 823, 91st Cong. § 162(a)(4) (as reported by S. Comm. on Banking and Currency, Jan. 31, 1969).

193. 15 U.S.C. § 1681e(b). This provision originates from a Senate bill intended to "enable consumers to protect themselves against arbitrary, erroneous, and malicious credit information." S. 823, 91st Cong. § 601 (as reported by S. Comm. on Banking and Currency, Nov. 5, 1969).

follow reasonable procedures.[194] The bill's accompanying Senate committee report states that the title's purpose was to require consumer reporting agencies to adopt "reasonable procedures" to ensure accurate information[195] and to protect consumers "from being unjustly damaged because of inaccurate or arbitrary information in a credit report."[196] Moreover, willful failure to comply with this requirement makes that entity civilly liable to the consumer under the FCRA.[197] Congress understood that actual damages from a violation of the FCRA "may be difficult to quantify or prove," but wanted to provide a statutory remedy for willful failure to comply with the FCRA's requirements.[198]

According to the judgment of Congress, then, the willful failure to comply with § 1681e(b) is an injury sufficient to provide standing to sue. Since all injuries that provide the injured with standing must be concrete, this means that the willful failure to comply with this provision is concrete. Thus, the judgment of Congress appears to weigh in favor of finding that the harm at issue is concrete. However, even if history and judgment of Congress weigh in favor of finding that the alleged intangible harm is a concrete injury, these factors are not dispositive.[199]

2. Applying the Substantive vs. Procedural Distinction

The next question in the three-step test is whether the FCRA provision at issue created a substantive or procedural right. If the FCRA provision created a substantive right, the violation of the provision is a concrete injury and is sufficient for standing.[200] If the FCRA provision created a procedural right, the next step is to ask whether this is a bare procedural violation.

Here, § 1681e(b) requires credit reporting agencies "to follow reasonable procedures to assure maximum possible accuracy of consumer

194. Robins's Complaint, *supra* note 5, ¶¶ 65, 71, 75.

195. S. 823, 91st Cong. § 602(b) (as reported by S. Comm. on Banking and Currency, Nov. 5, 1969).

196. S. REP. NO. 91-517, at 1 (1969).

197. 15 U.S.C. § 1681n. Under § 1681n(a)(1)(A), the entity is then liable to that consumer for either "any actual damages sustained by the consumer as a result of the failure *or* damages of not less than $100 and not more than $1,000" (emphasis added). *Id.*

198. Thomas v. FTS USA, LLC, No. 3:13-cv-825, 2016 WL 3653878, at *11 (E.D. Va. June 30, 2016).

199. Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1549 (2016).

200. Burke v. Fed. Nat'l Mortg. Ass'n, No. 3:16cv153-HEH, 2016 WL 4249496, at *4 (E.D. Va. Aug. 9, 2016), *vacated*, No. 3:16cv153-HEH, 2016 WL 7451624, at *1 (E.D. Va. Dec. 6, 2016) (dismissing the case after the parties stipulated that the court lacked subject-matter jurisdiction).

reports."[201] Using the *Landrum* court's approach, whether a statutorily created right is substantive or procedural turns on whether that right is a right of "substance rather than form."[202] Accordingly, the substantive right protected by the FCRA is the consumers' interest in an accurate report. And the procedural protection of that right is the requirement that credit reporting agencies follow reasonable procedures to assure maximum possible accuracy of consumer reports.[203] Thus, § 1681e(b) creates a procedural right.[204]

3. Applying the "Risk of Real Harm" Standard

Since the provision at issue created a procedural right, the next question is whether Robins's alleged injury posed a "risk of real harm." Applying the Second Circuit's approach in *Strubel*, we consider (1) whether Congress created a procedural right "to protect an individual's concrete interests," and (2) whether a procedural violation demonstrates a "risk of real harm" to the underlying interest.[205]

In § 1681e(b), Congress created a procedural right to have credit reporting agencies follow reasonable procedures to assure maximum possible accuracy of consumer reports.[206] The concrete interest that § 1681e(b) protects is the substantive right to have consumer reports of maximum accuracy.[207] However, both the Second Circuit in *Strubel* and the Fifth Circuit in *Lee* identified broad concrete interests that were the "core object(s)" of the laws at issue, such as the right to "informed use of credit" and the "right to payment."[208] Here, the core object of the FCRA is to protect individuals from being "unjustly damaged because of inaccurate or arbitrary information," particularly in the context of obtaining employment.[209] Therefore, the underlying interest § 1681e(b) protects is the right not to be harmed by inaccurate information.[210]

So, does the alleged procedural violation of § 1681e(b) demonstrate a "risk of real harm" to the underlying interest in an individual's right not to

201. 15 U.S.C. § 1681e(b).
202. Landrum v. Blackbird Enterprises, No. H-16-0374, 2016 WL 6075446, at *4 (S.D. Tex. Oct. 3, 2016).
203. *See* 15 U.S.C. § 1681e(b).
204. *See* id.
205. Strubel v. Comenity Bank, 842 F.3d 181, 190 (2d Cir. 2016).
206. *See* 15 U.S.C. § 1681e(b).
207. *See id.*
208. *Strubel*, 842 F.3d at 190; *Lee*, 837 F.3d at 530.
209. S. REP. NO. 91-517, at 1 (1969).
210. *Cf. Strubel*, 842 F.3d at 190; *Lee*, 837 F.3d at 530; S. REP. NO. 91-517, at 1 (1969).

be harmed because of inaccurate information? In *Lee*, the Fifth Circuit found that the plaintiff's right to payment was not at risk because there was no allegation of risk to the plaintiff's "actual benefits"—in other words, no risk of economic harm alleged.[211] But in *Spokeo*, Robins alleged that the inaccurate information not only posed a *risk* of harm to his employment prospects but also that the creation, display, and marketing of inaccurate information about him had caused *actual* harm to his employment prospects.[212] Spokeo's marketing,[213] in combination with the inaccuracies in Robins's consumer report, affected Robins's ability to find a job by making him seem overqualified, unwilling to move for a job due to family commitments, or likely to require a salary higher than prospective employers were prepared to offer.[214] In addition, Robins alleged that he had suffered actual harm in the form of anxiety and stress about his reduced employment prospects.[215]

Whether the alleged procedural violation poses a "real risk of harm," then, turns on whether a court would find that Robins had sufficiently alleged a "risk of real harm" from the inaccurate information posted about him. As in *Lee*, a court might be persuaded because the allegations include actual economic harm.[216] Justice Ginsburg, for one, found that Robins's complaint "already conveys concretely" that Spokeo's misinformation caused actual harm to his employment prospects.[217]

IV. CONCLUSION

At first glance, *Spokeo* appears to be a win for defendants because it holds that a bare procedural violation is insufficient for Article III standing. Many harms alleged in information privacy and data security cases are

211. *Lee*, 837 F.3d at 530.

212. Robins's Complaint, *supra* note 5, ¶ 35.

213. Spokeo actively marketed its services to employers for the purpose of conducting background checks on potential employees. Robins's Complaint, *supra* note 5, ¶ 35. For example, in Spokeo's list of "Ten Great Uses for Spokeo People Search"—which was posted on its blog—Spokeo included this point: "[L]ooking to hire someone, or maybe work for a company? Spokeo free people search is a great research tool to learn more about prospective employers and employees." Robins's Complaint, *supra* note 5, ¶ 35.

214. Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1554 (2016) (Ginsberg, J., dissenting) (citing Brief for Center for Democracy & Technology et al. as Amici Curiae in Support of Respondent, Spokeo, Inc. v. Robins, 136 S. Ct. 1540 (2016) (No. 13-1339), 2015 WL 5302536, at *13).

215. Robins's Complaint, *supra* note 5, ¶ 37.

216. *See Lee*, 837 F.3d at 530.

217. *Spokeo*, 136 S. Ct. at 1554 (Ginsberg, J., dissenting).

likely bare procedural violations because they are intangible and do not involve economic or physical damage.[218] However, *Spokeo* may be less defendant-friendly than it appears, as the Court explicitly allowed that an intangible harm, such as the inaccurate posting of information about an individual, could in theory constitute a concrete injury if it posed a risk of real harm.[219] With this allowance, the Court opened the door to a greater range of injuries,[220] and lower courts are in the process of developing a framework for evaluating the risks associated with these intangible harms.

As such, this Note proposes a three-step test: (1) Do both history and the judgment of Congress support the proposition that the intangible harm is concrete? (2) If so, what kind of right is created by statute—a procedural right, or a substantive right? If the right created is substantive, no further harm need be alleged. (3) If the right created is procedural, does the intangible harm pose a "risk of real harm"?

This test is consistent with standing doctrine and lends clarity to the decision-making process courts will use to decide whether an alleged statutory violation is concrete. As applied to the facts of *Spokeo*, the proposed three-step test opens the door for a court to find that Robins's alleged injury, which implicates a greater interest in an individual's right to informational privacy,[221] is concrete: the alleged injury very likely poses a risk of real harm, as evidenced by the actual economic and emotional harm incurred by Robins. On a larger scale, this proposed test gives courts greater ability to address new informational harms in the Internet Age,[222] and to balance an individual's right to privacy with the advances of technology.

218. *See* Angelique Carson, *Why the Spokeo Ruling Maybe Isn't What You Thought*, IAPP.ORG: PRIVACY ADVISOR (May 17, 2016), https://iapp.org/news/a/why-the-spokeo-ruling-maybe-isnt-what-you-thought/ [https://perma.cc/M33F-9Z9H].

219. *Spokeo*, 136 S. Ct. at 1549–50.

220. *See id.* at 1549–50.

221. *See* Burke v. Fed. Nat'l Mortg. Ass'n, No. 3:16cv153-HEH, 2016 WL 4249496, at *4 (E.D. Va. Aug. 9, 2016), *vacated*, No. 3:16cv153-HEH, 2016 WL 7451624, at *1 (E.D. Va. Dec. 6, 2016) (dismissing the case after the parties stipulated that the court lacked subject-matter jurisdiction); *cf. Spokeo*, 136 S. Ct. 1551 (Thomas, J., concurring) (noting that the right to personal security (including security of reputation) is a traditional private right).

222. *See* Schroeder, *supra* note 6.