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NOTE: ONLINE BREACH, OFFLINE INJURY: PRIVACY, CLASS ACTIONS, AND BUSINESS IN THE INTERNET AGE

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I. INTRODUCTION

Every day, two and a half quintillion bytes of data are created on the internet.[1] The last two years alone saw the creation of ninety percent of that data.[2] This tremendous amount of data is known as "big data."[3] Big data comes from a variety of different places, such as posts to social media sites, digital pictures and videos, and transaction purchase records.[4]

The massive amount of data available on the internet means that data being lost or stolen is a very real possibility. Last year alone, there were over 121 million incidents of hacking or data theft on the internet and over 13,000 incidents of unintended data disclosure.[5] Data loss comes in many forms. For example, data loss can be hardware or software related.[6] The most common cause of data loss is hardware failure, followed by human error.[7] Human error occurs when someone accidentally deletes the data or accidentally damages the hardware.[8] There are two outcomes in an episode of data loss.[9] The data may be recoverable, or it might be permanently lost.[10]

Data may also be stolen on the internet. Malicious or criminal attacks occur when hackers or thieves steal data with the intent to sell or exploit said data.[11] Hackers may steal the data through means such as pharming, phishing, or viruses.[12] Pharming occurs when a hacker installs malicious software that redirects unsuspecting users to fraudulent websites where they are directed to provide log-in information that can then be exploited.[13] Phishing occurs when a hacker sends out a legitimate looking email that induces a user to provide personal or financial information that can then be exploited.[14]

In addition to the concern of data being lost or stolen, key pieces of

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[1] *What is Big Data?*, IBM, https://www-01.ibm.com/software/data/bigdata/what-is-big-data.html (last visited Oct. 18, 2016).

[2] *Id.*

[3] *Id.*

[4] *Id.*

[5] *See* Wade Williamson, *Data Breaches by the Numbers*, SECURITY WEEK (Aug. 31, 2015), http://www.securityweek.com/data-breaches-numbers.

[6] *See* David D. Smith, *The Cost of Lost Data*, 6 GRAZIADIO BUS. REV. 3 (2003), http://gbr.pepperdine.edu/2010/08/the-cost-of-lost-data/ (last visited Jan. 19, 2017).

[7] *Id.*

[8] *Id.*

[9] *See id.*

[10] *Id.*

[11] *See generally Common Types of Breaches*, CYBER RISK HUB, http://www.cyberriskhub.com/breach/ (last visited Nov. 15, 2016).

[12] *Id.*

[13] *Id.*

[14] *Id.*

personal information may already be readily available online without a consumer's consent.[15] Information that may be readily available about an individual includes his birthdate, home addresses, or political affiliations.[16] A growing number of internet users have expressed concern over this availability of information or have taken steps to reduce the information available about them on the internet.[17] Internet users can take these steps by browsing anonymously, clearing browser history, or asking someone to remove something posted about them.[18] While it is possible to take steps to protect your data online or reduce your online presence, the reality is that your personal information may still be available whether you want it to be or not.[19] This information could even be false or misleading.[20]

The issue of false or misleading information on the internet is especially timely given the informational issues that fake news websites currently pose. Fake news websites are websites that do not conform to typical standards of reporting.[21] A reputable reporting company will have standards on reporting that include rules on fact-checking.[22] For example, CNET, a media website that reports on technology and consumer electronics, requires its reporters to verify information and back it up with links to source material, including press releases, videos, and websites.[23] A fake news website may contain a fake story that has been created simply to get internet users to click on the page because they are enticed by the headline.[24] The website publisher gets revenue from the clicks.[25] This is also referred to as "click bait."[26] Fake news

[15] Lee Rainie, et al., *Anonymity, Privacy, and Security Online,* PEW RESEARCH CTR. (Sept. 5, 2013), http://www.pewinternet.org/2013/09/05/anonymity-privacy-and-security-online/.

[16] *Id.*

[17] *Id.* at 2.

[18] *Id.* at 4.

[19] Michael McFarland, *Unauthorized Transmission and Use of Personal Data*, SANTA CLARA U., https://www.scu.edu/ethics/focus-areas/internet-ethics/resources/unauthorized-transmission-and-use-of-personal-data/ (last visited Oct. 19, 2016).

[20] Matthew Herper, *I Was Impersonated On Facebook*, FORBES (Apr. 27, 2009, 12:01 AM), http://www.forbes.com/2009/04/24/facebook-privacy-herper-business-media-facebook.html.

[21] Laura Hautala, *How to Avoid Getting Conned By Fake News Sites,* CNET (Nov. 19, 2016, 11:10 AM), https://www.cnet.com/how-to/how-to-avoid-getting-conned-by-fake-news-sites/.

[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] James Hamblin, *It's Everywhere, the Clickbait*, THE ATLANTIC (Nov. 11, 2014), http://www.theatlantic.com/entertainment/archive/2014/11/clickbait-what-

stories are frequently spread through social media, such as Facebook.[27] The spread of fake news is especially concerning given that approximately half of American adults rely on Facebook as a news source.[28] When someone has been the center of a fake news story, they currently have limited options for recourse in the courts. For example, a fake news story about news anchor Megyn Kelly trended on Facebook in August 2016.[29] Under § 230 of the Communications Decency Act of 1996, Facebook is not liable for defamation because it is a technology company, not a media company.[30] Thus, Megyn Kelly would have little to no chance at pursuing any recourse against Facebook.

Based on the risks that false information poses, the issue becomes: what options do you have when information posted about you online has the potential to lead to offline injury? Can you sue for the potential future injury you could suffer? Courts are split as to whether informational injuries suffered online constitute injury-in-fact.[31] Reconciling whether online injuries can constitute injury-in-fact has significant implications for businesses and plaintiffs. As data breaches or disclosures frequently affect large numbers of individuals, plaintiffs' attorneys typically bring class action lawsuits against the custodians of personally identifiable data who have allowed the data to be disclosed to third parties.[32] The relevant statutes under which class action lawsuits are brought typically allow for statutory damages, and thus the potential liability of defendants is immense.[33]

In an informational injury class action suit, defendants typically do not admit or deny that the data breach occurred.[34] Instead, they contend that plaintiffs have not suffered injury-in-fact unless they can show that third parties have misused the data to impose economic injury.[35] Deciding whether online informational injuries can be concrete enough to constitute injury-in-fact will give defendants notice of their potential

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[27] Nick Wingfield, Mike Isaac & Katie Benner, *Google and Facebook Take Aim at Fake News Sites*, N.Y. TIMES (Nov. 14, 2016), http://www.nytimes.com/2016/11/15/technology/google-will-ban-websites-that-host-fake-news-from-using-its-ad-service.html.

[28] *Id.*

[29] Robinson Meyer, *Did Facebook Defame Megyn Kelly?*, THE ATLANTIC (Aug. 30, 2016), http://www.theatlantic.com/technology/archive/2016/08/did-facebook-defame-megyn-kelly/498080/.

[30] *Id.*

[31] *See* Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138, 1146–47 (2013).

[32] Seth F. Kreimer, *"Spooky Action at a Distance": Intangible Injury in Fact in the Information Age*, 18 U. PA. J. CON. L. 745, 764 (2015).

[33] *Id.*

[34] *Id.*

[35] *Id.*

liability. It will also conclusively inform plaintiffs of their potential avenues for recourse regarding online informational injuries that have the potential to cause offline damage.

This comment will explore the line of cases leading to the United States Supreme Court decision *Spokeo Inc., v. Robins*. The *Spokeo* decision explored what is required to establish injury-in-fact, but it did not resolve the circuit split related to whether the threat of future harm could constitute injury-in-fact and what level of harm is required.[36]

II. BACKGROUND

The Constitution confers to the judiciary the power to hear "cases or controversies."[37] Federal jurisdiction, and standing to sue, is limited to actual cases or controversies.[38] The doctrine of standing to sue limits a lawsuit in federal court to seek redress for a legal wrong.[39] Without standing to sue, a federal court lacks subject matter jurisdiction.[40] To establish standing to sue, the plaintiff bears the burden of proving three elements.[41] First, the plaintiff must have suffered an "injury-in-fact."[42] Second, the injury must be fairly traceable to the challenged conduct of the defendant.[43] Third, the injury must be "likely" to be "redressed by a favorable judicial decision."[44]

The injury-in-fact requirement is central to cases involving data breach or theft on the internet. To establish injury-in-fact, a plaintiff must show that he or she suffered "an invasion of a legally protected interest" that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical."[45] For an injury to be "particularized," it must affect the plaintiff in a personal and individual way.[46] However, particularization alone is not enough to establish injury-in-fact.[47] A plaintiff must also establish that the injury is concrete, and that it

[36] Parson v. U.S. Dep't of Justice, 801 F.3d 701, 711 (6th Cir. 2015); Nat. Res. Def. Council, Inc. v. U.S. Food and Drug Admin., 710 F.3d 71, 81 (2d Cir. 2013).

[37] U.S. CONST. art. III, § 2; Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1547 (2016).

[38] *Spokeo*, 136 S. Ct. at 1547.

[39] *Id.*

[40] Bilodeau v. McAfee, Inc., No. 12-CV-04589-LHK, 2013 WL 3200658, at *3 (N.D. Cal. June 24, 2013).

[41] *Id.* at *4.

[42] Lujan v. Def. of Wildlife, 504 U.S. 555, 560 (1992).

[43] *Id.*

[44] *Id.* at 561.

[45] *Id.*

[46] *Id.* at n.1.

[47] *See id*. at 560–61.

actually exists.[48] It is possible for intangible injuries to meet the concreteness requirement.[49] However, courts have been in conflict over whether the possibility of future injury is enough to constitute injury-in-fact.

The Supreme Court addressed potential injuries in *Clapper v. Amnesty Int'l USA*. In *Clapper*, legal and media organizations brought a class-action suit because of concerns that their confidential communications would be intercepted under § 1881 of the Foreign Intelligence Surveillance Act.[50] The plaintiffs alleged it was reasonably likely that their confidential data had been exploited, and that as a result they had suffered costly and burdensome measures to protect the confidentiality of certain documents.[51] The district court held the plaintiffs did not have Article III standing to sue, but the Second Circuit Court of Appeals reversed.[52]

The Second Circuit held that the plaintiffs had standing based on the objectively reasonable likelihood that the communications would be intercepted at some time in the future.[53] Thus, the Second Circuit reasoned that the plaintiffs were suffering injury-in-fact from the reasonable fear of future harmful government conduct.[54] The Supreme Court reversed the Second Circuit and held that the plaintiffs lacked Article III standing to sue because they had not suffered actual or imminent harm.[55] The Court observed that the plaintiff's "highly speculative fear" would not result in a "certainly impending" injury.[56] The Court determined that the threatened injury must be "certainly impending" to constitute injury-in-fact and that the Second Circuit's objectively reasonable likelihood standard is inconsistent with the "threatened injury requirement."[57]

While *Clapper* did not specifically deal with data breach or informational injury, the decision became the standard used for evaluating whether the injury-in-fact requirement is met. Courts drew parallels between *Clapper* and data breach cases because data-breach victims might fear future identity theft and may take measures to prevent that theft, such as purchasing credit monitoring services.[58]

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[48] *See id.*
[49] *See id.* at 562–63.
[50] Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138, 1145–46 (2013).
[51] *Id.* at 1146.
[52] *Id.*
[53] *Id.*
[54] *Id.*
[55] *Id.* at 1155.
[56] *Id.* at 1148, 1150.
[57] *Id.* at 1141.
[58] Evan M. Wooten, *The State of Data-Breach Litigation and Enforcement:*

After *Clapper*, many courts dismissed data breach cases where the class of plaintiffs could not allege that actual data misuse or identity theft had already occurred or was currently occurring.[59] In the "lost data" context, the majority rule emerged that plaintiffs who have had their confidential data exposed or possibly exposed, but have not yet had their identity stolen, lack standing to sue the party who failed to protect their data.[60]

The position that plaintiffs cannot establish injury-in-fact sufficient to sue is supported by the idea that there is no way to know if stolen or exposed personal data is actually being misused until identity theft occurs.[61] Courts are reluctant to grant standing based on the alleged future injury alone because whether or not identity theft actually occurs rests on the actions of a third party.[62] Further, the increased risk of identity theft has been rejected as insufficient to satisfy the injury-in-fact requirement needed for standing.[63] Class-action data breach plaintiffs have alternatively tried to argue that the decreased value of personal information is sufficient to establish standing, but courts have similarly rejected that argument.[64]

In the wake of *Clapper*, and as informational injury cases have increased, circuit splits have emerged. Courts in the Seventh[65] and Ninth Circuits[66] have held that the theft of personal information is enough to establish injury-in-fact. The Ninth Circuit early on distinguished its reasoning from the *Clapper* decision. The Ninth Circuit had already addressed Article III standing in *Krottner v. Starbucks* in 2010, before the *Clapper* decision came down.[67] In *Krottner*, as a matter of first impression, the court determined that employees' allegation that the theft of a laptop subjected them to an

Before the 2013 Mega Breaches and Beyond, 24 COMPETITION: J. ANTITRUST & UNFAIR COMPETITION L. SEC. ST. B. CAL. 229, 233 (2015).

[59] *See id.*

[60] *See* U.S. Hotel & Resort Mgmt., Inc. v. Onity, Inc., No. 13–1499 (SRN/FLN), 2014 WL 3748639, at *5 (D. Minn. July 30, 2014), *appeal dismissed* (Jan. 27, 2015).

[61] *See* In re Sci. Applications Int'l Corp. (SAIC) Backup Tape Data Theft Litig., 45 F. Supp. 3d 14, 25 (D.D.C. 2014).

[62] *Id.* (citing Clapper v. Amnesty Int'l USA, 133 S. Ct. 1146, 1150 (2013)).

[63] Strautins v. Trustwave Holdings, Inc., 27 F. Supp. 3d 871, 876 (N.D. Ill. 2014).

[64] *See In re Sci. Applications Int'l Corp. (SAIC) Backup Tape Data Theft Litig.*, 45 F. Supp. 3d at 30; In re Zappos.com, Inc., Customer Data Sec. Breach Litig., 108 F. Supp. 3d 949, 962 (D. Nev. 2015).

[65] *See, e.g.*, Lewert v. P.F. Chang's China Bistro, Inc., 819 F.3d 963 (7th Cir. 2016); Remijas v. Neiman Marcus Grp., LLC, 794 F.3d 688 (7th Cir. 2015).

[66] *See, e.g.*, In re Adobe Sys., Inc. Privacy Litig., 66 F. Supp. 3d 1197 (N.D. Cal. 2014); In re Anthem, Inc. Data Breach Litig., 162 F. Supp. 3d 953 (N.D. Cal. 2016).

[67] *See* Krottner v. Starbucks Corp., 628 F.3d 1139 (9th Cir. 2010).

increased risk of future injury was sufficient to establish injury-in-fact for purposes of Article III standing.[68] The court reasoned that Article III standing existed based on a "credible threat of harm" that was "both real and immediate, not conjectural or hypothetical."[69] After *Clapper*, the Ninth Circuit again affirmed the reasoning from *Krottner* in *In Re Sony Gaming Networks & Customer Data Security Breach Litigation*.[70] In the *Sony* case, plaintiffs alleged that Sony collected the personal information they provided to access online gaming and internet connectivity and that Sony then wrongfully disclosed it.[71] Sony contended that the *Clapper* decision tightened the injury-in-fact requirement and that the prior *Krottner* framework is too broad to be applied.[72] The district court reconciled the two by determining that both *Clapper* and *Krottner* were controlling.[73]

The Seventh Circuit also held that the theft or misuse of personal information is sufficient to establish Article III standing in *Remijas v. Neiman Marcus Group, LLC*.[74] The court distinguished *Remijas* from *Clapper* on the grounds that hackers had specifically targeted Neiman Marcus to obtain plaintiff's credit card information, and thus there was no need to speculate whether the information had been stolen, and what information had been stolen.[75] The Seventh Circuit applied the same reasoning again in a case decided in April 2016, *Lewert v. P.F. Chang's China Bistro, Inc*.[76] In that decision, the Seventh Circuit held that substantial risk of harm and reasonably incurred mitigation costs are sufficient to establish an Article III injury.[77]

At the same time, other courts relied on *Clapper* and held that an informational injury is not enough to establish standing. A decision out of the Southern District of Texas, in the Fifth Circuit, held that, as a matter of first impression, the increased risk of future identity theft or fraud is not a recognized Article III injury.[78] A decision out of the Eastern District of Louisiana, a court also in the Fifth Circuit, followed similar reasoning and determined there is no standing based on the mere

[68] *See id.* at 1143.

[69] *Id.*

[70] *See* In re Sony Gaming Networks & Customer Data Sec. Breach Litig., 996 F. Supp. 2d 942 (S.D. Cal. 2014).

[71] *Id.* at 962.

[72] *Id.* at 961.

[73] *Id.*

[74] Remijas v. Neiman Marcus Grp., LLC, 794 F.3d 688, 693 (7th Cir. 2015).

[75] *Id.*

[76] Lewert v. P.F. Chang's China Bistro, Inc., 819 F.3d 963, 967 (7th Cir. 2016).

[77] *Id.* at 967–969.

[78] Peters v. St. Joseph Servs. Corp., 74 F. Supp. 3d 847, 854–55 (S.D. Tex. 2015).

risk of identity theft.[79]

The Supreme Court had the opportunity to address the emerging circuit split and settle whether an informational injury is sufficient to satisfy Article III standing, in *Spokeo, Inc. v. Robins*, an appeal out of the Ninth Circuit. In that case, the lead plaintiff, Robins, filed a class action lawsuit against Spokeo in 2011.[80] Robins alleged violations of the Fair Credit Reporting Act (FRCA).[81] FRCA requires credit-reporting agencies to ensure "maximum possible accuracy" through "reasonable procedures."[82] Robins contended that Spokeo qualified as a credit-reporting agency.[83]

Spokeo operates a website which allows users to search for information about individuals by name, email, or phone number.[84] Based on the information queried, Spokeo searches a number of databases and gathers the information. Information that can be compiled includes the individual's address, phone number, marital status, approximate age, occupation, hobbies, finances, shopping habits, and musical preferences.[85] The Spokeo service is marketed to "employers who want to evaluate prospective employees" and to "those who want to investigate prospective romantic partners or seek other personal information."[86]

At some point, someone searched for Robins on the Spokeo website and Spokeo generated a profile on him.[87] The profile generated indicated that Robins was married, had children, was in his fifties, had a job, was relatively affluent, and that he held a graduate degree.[88] In reality, Robins was unmarried, unemployed, and did not hold a graduate degree.[89] Robins alleged that all the information provided was incorrect, and because of the misinformation Spokeo supplied, he suffered "[imminent and ongoing] actual harm to [his] employment prospects."[90] In his brief, Robins said that Spokeo's report made him

[79] *See* Green v. eBay Inc., No. 2:14-CV-01688, 2015 WL 2066531, *1 (E.D. La. May 4, 2015).

[80] Robins v. Spokeo, Inc., No. 2:10-CV-10-05306, 2011 WL 597867, at *1 (C.D. Cal. Jan. 27, 2011), *reinstatement granted,* No. 2:10-CV-10-05306, 2011 WL 11562151 (C.D. Cal. Sept. 19, 2011).

[81] *Id.*

[82] Michael Scott Leonard, *Limiting Consumer Standing, Justices Deal Blow to Class Actions in Spokeo Inc. v. Robins*, 12 WESTLAW J. INS. BAD FAITH 7 (2016).

[83] Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1546 (2016).

[84] *Id.*

[85] *Id.*

[86] *Id.*

[87] *Id.*

[88] *Id.*

[89] Robins v. Spokeo Inc., 742 F.3d 409, 411 (9th Cir.2014).

[90] *Spokeo, Inc.*, 136 S. Ct. at 1554.

appear overqualified for jobs he might have applied for, expectant of a higher salary than employers would be willing to pay, and less mobile because of potential family obligations.[91]

The district court dismissed Robins' complaint for lack of standing. However, the Ninth Circuit reversed and held that Robins had alleged injury-in-fact, in satisfaction of standing under Article III.[92] In turn, Spokeo petitioned for certiorari.[93] The Supreme Court determined that the Ninth Circuit had overlooked the concreteness requirement in determining Article III standing, and had only evaluated particularity.[94] As a result, the Supreme Court vacated the decision and remanded to the Ninth Circuit.[95]

The Supreme Court focused on the Ninth Circuit's conclusion that Robins' complaint had alleged "'concrete, *de facto'* injuries."[96] The Supreme Court disagreed with the Ninth Circuit's determination that "Spokeo violated *his* statutory rights, not just the statutory rights of other people," and that "Robins' personal interests in the handling of his credit information are individualized rather than collective."[97] The Supreme Court observed that both of those considerations went to particularization rather than to concreteness.[98] The Court noted that while the risk of real harm can satisfy the requirement of concreteness, not all inaccuracies cause harm or present material risk of harm.[99]

The Court also noted that alleging a bare procedural violation that results in no actual harm is not enough for standing.[100] The procedural violation Robins alleged is that Spokeo had failed to "follow reasonable procedures to assure maximum possible accuracy" of consumer reports.[101] The Court reasoned that not all inaccuracies cause harm or present material risk of harm.[102] In reaching this conclusion, the Court drew a comparison to an incorrect zip code.[103] The Court determined that the Ninth Circuit failed to fully appreciate the distinction between concreteness and particularization, and therefore the Ninth Circuit's

[91] *Id.*
[92] *Id.*
[93] Spokeo Inc., v. Robins, 135 S. Ct. 1892 (2015).
[94] *See Spokeo, Inc.*, 136 S. Ct. at 1545.
[95] *Id.*
[96] *Id.* at 1545, 1548–50.
[97] *Id.* at 1544 (quoting Robins v. Spokeo Inc., 742 F.3d 409, 413 (9th Cir. 2014)).
[98] *Spokeo, Inc.*, 136 S. Ct. at 1549.
[99] *See id.*
[100] *See id.*
[101] 15 U.S.C.A. § 1681e.
[102] *Spokeo, Inc.*, 136 S. Ct. at 1550.
[103] *Id.*

Article III standing analysis was incomplete.[104] The Supreme Court remanded to the Ninth Circuit to address whether the allegations presented were sufficient to meet the concreteness requirement.[105] In doing so, the Court declined to take a position as to whether the Ninth Circuit correctly determined that Robins met the injury-in-fact requirement.[106]

Justice Ginsburg, joined by Justice Sotomayor, dissented.[107] Justice Ginsburg joined with the majority's determination that Robins had met the particularity requirement for standing under Article III.[108] However, Justice Ginsburg differed from the majority as to the necessity of remanding to the Ninth Circuit to determine whether Robins' injury is concrete.[109] Justice Ginsburg noted that concreteness, as a discrete requirement, refers to "reality of an injury, harm that is real, not abstract, but not necessarily tangible."[110] Justice Ginsburg also took issue with the comparison to an incorrect zip code.[111] Because Robins complained that the misinformation could affect how he faired in the job market, Justice Ginsburg reasoned that FRCA's procedural requirements were created to prevent that harm.[112] Because the misinformation caused actual harm to his employment prospects, Justice Ginsburg would have affirmed the judgment of the Ninth Circuit.[113]

III. ANALYSIS

The Supreme Court should have used the *Spokeo* suit to address the circuit split that developed after the *Clapper* decision. The Supreme Court had the opportunity to address whether a claim of informational injury based on misinformation on the internet is sufficient to satisfy the injury-in-fact requirement for Article III standing. Instead of settling the debate, the Court left the decision to the Ninth Circuit.[114] This leaves the door open for courts to continue to consider what constitutes "concreteness" in the context of consumer harm on the internet.[115]

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[104] *Id.*
[105] *Id.*
[106] *Id.*
[107] *Id.* at 1554.
[108] *See id.*
[109] *Id.* at 1555.
[110] *Id.*
[111] *Id.*
[112] *Id.*
[113] *Id.*
[114] *Id.* at 1550.
[115] *See* Jeff John Roberts, *Supreme Court Rejects Privacy Claim in Data Broker*

A. The Court Should Have Adopted Justice Ginsburg's View

The Supreme Court should have followed Justice Ginsburg's line of reasoning and determined that Robins' complaint was sufficient to meet the concreteness requirement necessary for Article III standing. Justice Ginsburg's reasoning would also have addressed the circuit split on whether the threat of future harm is sufficient to confer Article III standing.

The "concrete and particularized" requirement is not new. The Court had previously articulated the requirement as a prerequisite for standing.[116] The requirement has been discussed as far back as 1978 as a requirement for injury-in-fact.[117] However, in *Spokeo*, the Court separated concrete and particularized into separate requirements a plaintiff must meet to allege injury-in-fact.[118] Justice Ginsburg noted that the Supreme Court has continually coupled the words "concrete and particularized" rather than separating the two into distinct requirements that plaintiffs must meet.[119] Justice Ginsburg also noted that the four cases cited by the Supreme Court as requiring concrete and particularized do not discuss the two as separate requirements.[120] In another Article III standing case not cited in the *Spokeo* opinion, the Court also did not separately analyze concrete and particularized as distinct requirements.[121] Thus, the Court should not have separated concrete and particularized into separate requirements that plaintiffs must sufficiently allege.

Therefore, the Court did not need to remand to the Ninth Circuit on the issue of whether a "concrete" injury had been alleged. A concrete injury, as articulated by the majority in *Spokeo*, is "the reality of an injury, harm that is real, not abstract, but not necessarily tangible."[122] The Court previously articulated that the difference between an abstract question and a proper case or controversy is a question of degree, and that there is not a precise test.[123] A real case or controversy is one

Case, FORTUNE (May 16, 2016), http://fortune.com/2016/05/16/supreme-court-spokeo-decision/.

[116] Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992).

[117] *See* Duke Power Co. v. Carolina Envtl. Study Grp., Inc., 438 U.S. 59, 80 (1978).

[118] *See* Aranda v. Caribbean Cruise Line, Inc., No. 12 C 4069, 2016 WL 4439935, at *4 (N.D. Ill. Aug. 23, 2016).

[119] Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1555 (2016) (Ginsburg, J., dissenting).

[120] *Id.*

[121] *See, e.g.*, Friends of the Earth, Inc., et al. v. Laidlaw Envtl. Servs. (TOC), Inc., 120 S. Ct. 693, 703–04 (2000).

[122] *Spokeo, Inc.*, 136 S. Ct. at 1556 (Ginsburg, J., dissenting).

[123] *See* Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 52-53 (1976)

between parties that have a definite dispute, not a hypothetical or abstract dispute.[124]

Under the reasoning of previous Supreme Court cases addressing intangible injuries and concreteness, Robins sufficiently crossed this threshold. Robins and Spokeo did not have a hypothetical dispute. The misinformation about Robins, provided by Spokeo, caused actual harm to his employment prospects. The complaint does not specify who searched for the information about Robins, but had it been a prospective employer, Robins could have potentially looked overqualified for the job, unwilling to relocate for a job due to family obligations, and potentially too expensive to hire.[125] An applicant can lose out on a job for being over-qualified.[126] Thus, the misinformation would cause him actual injury because it would cause him to lose out on employment opportunities.

The majority observed that Robins would not be able to cross the concrete threshold if he alleged a "bare procedural violation," which results in no harm.[127] In reaching this conclusion, the majority used a zip code analogy.[128] Justice Alito, writing for the majority, stated "[i]t is difficult to imagine how the dissemination of an incorrect zip code, without more, could work any concrete harm."[129] However, this analogy is inapposite.

The Court should be wary of using offline analogies in relation to online injury. The dissemination of false information on the internet is not the same as an incorrect zip code. The internet makes it possible for false information to be spread more widely and rapidly than offline.[130] In 2013, the World Economic Forum listed "massive digital misinformation" as one of the main risks that modern society faces today.[131] The internet facilitates this spread of misinformation and can sometimes foster a "collective credulity" where people are too ready to believe something is true.[132] Thus, it is conceivable that a prospective employer who visited Spokeo's website would take the information

(Brennan, J., concurring).

[124] *Id.*

[125] *See Spokeo, Inc.*, 136 S. Ct. at 1554 (Ginsburg, J., dissenting).

[126] *Id.*

[127] *Id.* at 1549.

[128] *Id.* at 1550.

[129] *Id.*

[130] *See supra* notes 21–30 (discussing false information on the internet, specifically fake news websites).

[131] *Digital Wildfires in a Hyperconnected World*, WORLD ECONOMIC FORUM: GLOBAL RISKS 2013, 23 (2013), http://www3.weforum.org/docs/WEF_GlobalRisks_Report_2013.pdf.

[132] *See* Delia Mocanu et al., *Collective Attention in the Age of (Mis)information*, 1 (2014), https://arxiv.org/pdf/1403.3344v1.pdf.

provided as true, and would rely solely on that in assessing Robins' qualifications for a position. Therefore, while an incorrect zip code may not cause harm, false information to an employer about a potential employee could.

Justice Ginsburg similarly viewed this analogy as misleading.[133] In her dissenting opinion, Justice Ginsburg stated, "Far from an incorrect zip code, Robins complains of misinformation about his education, family situation, and economic status, inaccurate representations that could affect his fortune in the job market."[134] Justice Ginsburg's view that the zip code analogy is incorrect rested on the stated purpose of the FRCA.[135] Justice Ginsburg determined that the violation Robins alleged falls under the purpose of the FRCA and caused harm within the scope of FRCA.[136] The purpose of FRCA is to ensure that reporting agencies maintain strict procedures to make sure that information that could have an effect on a consumer's ability to obtain employment is complete and up to date.[137] Robins' allegation that Spokeo maintained inaccurate information, which caused harm to his employment prospects, would thus not be a "bare procedural violation."[138] As Justice Ginsburg aptly pointed out, "The FRCA's procedural requirements aimed to prevent such harm."[139] Because the FRCA requires reporting agencies to maintain up to date information that could affect employment prospects, Robins' injury falls within the FRCA's stated purpose.[140]

Thus, Justice Ginsburg's line of reasoning is correct. Robins alleged a concrete and particularized injury sufficient to establish Article III standing. Robins' injury falls within the stated purpose of the FRCA, and would not be a "bare procedural violation." Robins' alleged injury caused actual harm to his employment prospects, and thus the Court should have ruled that he had Article III standing to sue.

B. Stayed Cases and Article III Standing

Many cases were stayed before the *Spokeo* decision in the hopes that

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[133] *See* Theresa House & Andrew Leff, *In Spokeo, Supreme Court Requires "Particularized" and "Concrete" Harm,* A.B.A. (May 20, 2016), http://apps.americanbar.org/litigation/committees/technology/articles/spring2016-0516-spokeo-supreme-court.html.

[134] *Spokeo, Inc.*, 136 S. Ct. at 1556 (Ginsburg, J., dissenting).

[135] *See id.*

[136] *Id.*

[137] 15 U.S.C. § 1681k(a)(2) (2012).

[138] *Spokeo, Inc.*, 136 S. Ct. at 1556 (Ginsburg, J., dissenting).

[139] *Id.*

[140] *Id.*

the Supreme Court would clarify the requirements for Article III standing.[141] However, those courts that stayed their decisions to wait for the Supreme Court to rule on *Spokeo* were let down. The *Spokeo* decision did not give much guidance as to the level of risk of harm sufficient to meet the concreteness requirement.[142] Three trends have emerged as to the outcomes of those stayed cases.[143] The first trend is to dismiss cases that allege a bare procedural violation.[144] Plaintiffs in two cases, *Smith v. Ohio State University* and *Alaleh Konoudi v. XO Communications LLC*, stated that they had not suffered any concrete harms so the courts, citing *Spokeo*, dismissed the claims.[145] The second trend that emerged is to settle the case.[146] The cases that settled mainly involve statutory violations.[147] In those cases, it is likely that the parties settled because a settlement is more attractive than the prospect of extended litigation over the sufficiency of harms for Article III standing.[148] The third trend that emerged is to remand the case to state court.[149] After *Spokeo*, some plaintiffs have argued that defendants who removed the action to federal court should have the burden to establish Article III standing.[150] Plaintiffs contend that if the defendant cannot establish Article III standing, the case should be remanded to state court rather than dismissed.[151]

C. The Court Should Have Used *Spokeo* to Settle the Circuit Split

The Supreme Court should have used the *Spokeo* decision as an opportunity to articulate whether an informational injury is sufficient to establish injury-in-fact, instead of remanding and leaving that determination for the Ninth Circuit. A circuit split is one of the most

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[141] Claudia Maria Vetesi & Claire Bonelli, *Trending Now: Article III Standing After Spokeo*, MORRISON & FOERSTER: CLASS DISMISSED (Aug. 17, 2016), http://classdismissed.mofo.com/class-action/trending-now-article-iii-standing-after-spokeo/.

[142] *Id.*

[143] *Id.*

[144] *See id.*

[145] *See id.*; Smith v. Ohio State Univ., No. 2:15-CV-3030, 2016 U.S. Dist. LEXIS 74612, at *10, 11 (S.D. Ohio June 8, 2016); Alaleh Konoudi v. XO Commc'ns LLC, No. 2:15-CV-05507 (C.D. Cal. filed July 21, 2015).

[146] *See* Vetesi & Bonelli, *supra* note 141.

[147] *See id.*

[148] *Id.*

[149] *Id.*

[150] *Id.*

[151] *Id.*; *see* Patton v. Experian Data Corp., No. SACV 15-1871 JVS (PLAx), 2016 WL 2626801 (C.D. Cal. May 6, 2016) (exemplifying a case where the court has remanded to state court after finding no Article III standing).

important factors that triggers Supreme Court review of a district court decision.[152] The Supreme Court should address circuit splits to ensure uniformity of federal law, to discourage forum shopping, and to guarantee fairness.[153] The Supreme Court had the opportunity to settle the circuit split with the *Spokeo* decision. However, by failing to determine whether the Ninth Circuit's injury-in-fact determination is correct, the Court left the issue open to further debate.

In the months since *Spokeo*, this circuit split has further deepened. In *Church v. Accretive Health, Inc.*, the Eleventh Circuit found that a hospital's failure to provide certain disclosures to a patient under the Fair Debt Collection Practices Act resulted in concrete injury post-*Spokeo.*[154] The court said that a patient's "right to receive the disclosures is not hypothetical or uncertain" so it meets the concreteness needed for injury-in-fact.[155]

A few days after the *Church* decision, the D.C. Circuit took a more restrictive view of *Spokeo* and denied standing to plaintiffs who alleged a statutory violation without alleging an additional harm.[156] In that case, *Hancock v. Urban Outfitters, Inc.*, the plaintiffs filed a class action alleging that the defendant's conduct violated D.C.'s Consumer Identification Information Act.[157] The plaintiffs argued that their standing to sue was granted based on a statutory right.[158] The D.C. Circuit held that the "naked assertion that a zip code was requested and recorded without any concrete consequence" is insufficient to meet Article III's injury-in-fact requirement.[159]

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[152] *See* Aaron-Andrew P. Bruhl, *Measuring Circuit Splits: A Cautionary Note*, 4 J. OF L. 361, 361 (2014).

[153] *See* Nicholas J. Wagoner, *4 Reasons Why the Supreme Court Reviews Circuit Splits*, CIRCUIT SPLITS (Mar. 15, 2012, 5:32 AM), https://web.archive.org/web/20120911130045/http://www.circuitsplits.com/2012/03/back-in-december-i-wrote-a-series-of-posts-explaining-the-importat-role-that-circuit-splits-play-in-shaping-the-supreme-court.html.

[154] Church v. Accretive Health Inc., No. 15-15708, 2016 WL 3611543 (11th Cir. July 6, 2016); Gretchen A. Ramos & Zerina Curevac, *Nokchan v Lyft: Since Spokeo Decision Privacy Continues to be Hot Topic as Circuit Courts Fracture*, THE NAT'L. L. REV. (Oct. 18, 2016), http://www.natlawreview.com/article/nokchan-v-lyft-spokeo-decision-privacy-continues-to-be-hot-topic-circuit-courts.

[155] *Church*, 2016 WL 3611543, at *3.

[156] Hancock v. Urban Outfitters, Inc., 830 F.3d 511, 514 (D.C. Cir. 2016).

[157] *Id.* at 511.

[158] *Id.* at 514; David Lender, *Less Than a Year After the Supreme Court's "Clarification" of Article III's Concreteness Requirement in* Spokeo v. Robins*, a Circuit Split is Emerging and May Lead the Supreme Court to Have to Take Up This Key Standing Requirement in Class Action Lawsuits Again*, CLASS ACTION MONITOR (Sept. 2016), http://www.weil.com/~/media/publications/class-action-monitor/160770_class_action_monitor_sept2016_v3.pdf.

[159] *Hancock*, 830 F.3d at 514.

On September 8, 2016, the Eighth Circuit followed the D.C. Circuit's approach in *Braitberg v. Charter Communications, Inc.*.[160] A consumer brought a class action suit alleging that his cable television provider stored his personally identifiable information in violation of the Cable Communications Policy Act.[161] The plaintiff alleged that by failing to destroy his information, the defendant cable provider had injured him by invading his federally protected privacy rights and deprived him of the full services he purchased from the defendant.[162] The Eighth Circuit determined that the defendant's retention of his personal information did not meet Article III standing because the defendant had not disclosed or used the information.[163] The Eighth Circuit also did not agree with the Plaintiff's contention that he was deprived of the full value of the defendant's services because the defendant's retention of the information did not cause any concrete harm to that information.[164]

Just four days after the *Braitberg* decision, the Sixth Circuit agreed with the Eleventh Circuit that an informational injury is sufficiently concrete to establish Article III standing.[165] In that case, *Galaria et al. v. Nationwide Mutual Insurance*, the Eleventh Circuit held that a plaintiff's FRCA claim based on data breach is sufficient to allege an injury-in-fact.[166] This decision, in the wake of *Spokeo*, reversed the determination of the district court below that the injury-in-fact was not sufficiently concrete.[167] The court found that there is a concrete injury sufficient for Article III standing because the theft of data placed the plaintiff at a higher risk for fraud or identity theft.[168]

However, most recently, the Northern District of California reached an entirely different result in a FRCA class action suit.[169] In *Nokchan v. Lyft, Inc.*, the court determined that Nokchan's claims of privacy violations under the FRCA were insufficient to meet Article III standing because he failed to show a concrete injury.[170] Nokchan alleged that Lyft violated his privacy and statutory rights by failing to comply with

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[160] Lender, *supra* note 158.

[161] Braitberg v. Charter Commc'ns, Inc., 836 F.3d 925, 926 (8th Cir. 2016).

[162] *Id*. at 927; Lender, *supra* note 158.

[163] *Braitberg*, 836 F.3d at 930.

[164] *Id.* at 931.

[165] *See* Galaria v. Nationwide Mut. Ins. Co., No. 15-3386, 2016 WL 4728027, at *1 (6th Cir. Sept. 12, 2016).

[166] *Id.*

[167] *Id.*

[168] *Id.* at *3.

[169] *See* Nokchan v. Lyft, Inc, No. 15-CV-03008 JCS, 2016 WL 5815287 (N.D. Cal. Oct. 5, 2016); Ramos & Curevac, *supra* note 154.

[170] *Nokchan*, 2016 WL 5815287 at *2.

disclosure requirements under FRCA and state laws.[171] Nokchan tried to distinguish his case from *Spokeo* by arguing that invasion of privacy is a traditionally recognized injury and that he had suffered an "informational injury" sufficient to meet the concreteness requirements of *Spokeo.*[172] The Court noted disagreement with the Eleventh Circuit's broad reading of *Spokeo* and dismissed the case.[173] The plaintiff, Nokchan, has appealed.[174]

This deepening of the circuit split makes it increasingly likely that the Supreme Court will again have to address whether informational injuries are sufficiently concrete for Article III standing. It is also likely that the Court will have to clarify what exactly constitutes a concrete injury sufficient to establish Article III standing. The Court had the opportunity to settle this dispute in *Spokeo*, however because the Court declined to do so, the debate continues to rage on.

D. Class Actions in the Wake of *Spokeo*

Both sides claimed a victory after the Supreme Court *Spokeo* decision.[175] The Court's rejection of the idea that misstatements of fact could trigger a class-action suit was to Spokeo's benefit.[176] Spokeo, in a statement said, "[t]he court's standard will make it much harder to turn individual cases like this one into million-member class actions."[177] The attorney who filed for Robins said that he was happy that the Court will allow suits to proceed when a plaintiff could point to a real injury.[178] He is confident that the Robins case will eventually get to a jury.[179]

Now that the dust has settled, it seems that the *Spokeo* decision favors defendants more than plaintiffs. Class action plaintiffs suing under a federal statute will now have to show a concrete injury, a higher burden than the previous standard.[180] Defendants of class actions can

[171] *Id.*; Ramos & Curevac, *supra* note 154.

[172] *Nokchan*, 2016 WL 5815287 at *6.

[173] *Id.* at *6, *9.

[174] Nokchan v. Lyft, No. 16-16876 (9th Cir. Filed Oct. 17, 2016).

[175] Alison Frankel, *Brace for More Class Action Challenges Post-Spokeo*, REUTERS BLOG (May 16, 2016), http://blogs.reuters.com/alison-frankel/2016/05/16/brace-for-more-class-action-challenges-post-spokeo/.

[176] David G. Savage, *Supreme Court Makes It Harder to Sue 'People Search' Websites for Getting Information Slightly Wrong*, L.A. TIMES (May 16, 2016, 10:57 AM), http://www.latimes.com/nation/la-fi-court-databanks-20160516-snap-story.html.

[177] *Id.*

[178] *Id.*

[179] *Id.*

[180] Frankel, *supra* note 175.

now argue that individual issues predominate over class-wide proof of standing.[181] The framework for establishing "concrete" and "particularized" injury requires investigation of each plaintiff's unique circumstances.[182] Thus, even if a lead plaintiff can establish standing, defendants can argue that the facts of the lead plaintiff's claim do not translate into class-wide claims.[183] Federal Rule of Civil Procedure Rule 23 requires, among other things, that questions common to class members predominate over questions affecting only individual class members.[184] Therefore, class certification for informational injuries could be defeated on these grounds.

IV. CONCLUSION

The *Spokeo* decision was the opportune moment for the Supreme Court to address whether an informational injury suffered online was sufficient to constitute an injury-in-fact in order to satisfy Article III standing. By declining to address that issue, the Court has left it unclear as to whether an informational injury is sufficient to meet the concreteness requirement, in turn making it difficult for lower courts to uniformly determine what level of harm is required to meet the concreteness requirement for Article III standing. Because of this lack of clarity, and the deepening of the circuit splits, it seems likely that the Supreme Court will have to again address the issue of exactly what constitutes a concrete injury sufficient to confer Article III standing. As internet use continues to proliferate, informational injuries will become more and more common, and thus these questions over concreteness are not likely to disappear anytime soon.

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[181] *Id.*

[182] *Id.*

[183] *Id.*

[184] *See* FED. R. CIV. P. 23; Perrie Weiner et. al., *Defending TCPA Class Actions in the Wake of* Spokeo, LAW 360 (Oct. 20, 2016, 1:04 PM), http://www.law360.com/articles/851390/defending-tcpa-class-actions-in-the-wake-of-spokeo.