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The Supreme Court Acknowledges Congress' Authority to Confer Informational Standing in Spokeo, Inc. v. Robins

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THE SUPREME COURT ACKNOWLEDGES CONGRESS' AUTHORITY TO CONFER INFORMATIONAL STANDING IN *SPOKEO, INC. V. ROBINS*

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ABSTRACT

The Supreme Court's 2016 decision in Spokeo, Inc. v. Robins *does not fully resolve when an intangible injury such as a defendant's misreporting of a plaintiff's personal information is sufficient to constitute a "concrete injury" for Article III standing. However, the* Spokeo *decision makes clear that Congress has a significant role in defining intangible injuries for Article III standing beyond what was considered an injury under the American or English common law. Some commentators had thought* Spokeo *might overrule the Court's prior decisions in* Akins *and* Public Citizen, *which both held that a plaintiff may have standing based solely upon his statutory right to information. Instead, the Court in* Spokeo *reaffirmed its informational standing decisions in* Akins *and* Public Citizen.

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INTRODUCTION

In 2016, the U.S. Supreme Court in *Spokeo, Inc. v. Robins*, a 6–2 decision by Justice Samuel Alito, recognized the significant authority of Congress to define intangible injuries such as a statutory right to information for the purposes of Article III standing to sue in federal courts.[1] However, the Court emphasized that a plaintiff must prove a concrete injury and, therefore, a procedural statutory violation may not automatically establish standing.[2] The Court remanded the case back to the Ninth Circuit because the court of appeals had found that the plaintiff had suffered an individualized injury from defendant Spokeo, Inc.'s alleged misreporting of his personal information, but failed to address whether the alleged injury was sufficiently concrete to confer informational standing.[3]

While the *Spokeo* case was pending before the Court, some commentators feared that the Court might require plaintiffs to prove a supplementary personal harm in addition to a statutory right to information and thus limit the ability of citizens to gain access to information from the government.[4] However, the majority opinion observed that a plaintiff enforcing a statutory right "need not allege any *additional* harm beyond the one Congress has identified."[5] The Court cited two prior decisions, *Federal Election Commission v. Akins*[6] and *Public Citizen v. Department of Justice*,[7] which both held the government's refusal to provide information for which Congress has created a statutory right to access constituted a sufficient informational injury for Article III standing.[8] The Court's refusal of an additional harm standard likely means that any plaintiff seeking information pursuant to a federal statute that explicitly grants the right to certain information, such as the Freedom of Information Act ("FOIA"),[9] may have standing based solely upon his statutory right to information without alleging that he will suffer additional harms if he does not obtain that information.[10] The Court's previous decisions in *Akins* and *Public Citizen*

1. Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1549–50 (2016).
2. *Id.* at 1548–50.
3. *Id.* at 1544–46, 1548, 1550.
4. Rebecca Wilhelm, *Standing Case Could Affect Environmental Plaintiffs*, 211 DAILY ENVIRONMENT REPORT (BNA-Bloomberg) A-13, Nov. 2, 2015.
5. *Spokeo*, 136 S. Ct. at 1549–50.
6. 524 U.S. 11, 20–25 (1998).
7. 491 U. S. 440, 449 (1989).
8. *Spokeo*, 136 S. Ct. at 1549–50.
9. 5 U.S.C. § 552 (2012).
10. Bradford Mank, *The Supreme Court's Decision and Remand in Spokeo, Inc. v. Robins Postpones the Difficult Standing Issues in Statutory Standing and Identity Theft Cases*, CASETEXT (May

concluded that Congress may explicitly establish a statutory right to information,[11] while *Spokeo* dispelled concerns that the Court might limit or overrule prior decisions recognizing informational standing.[12] The *Spokeo* decision explicitly recognized that "because Congress is well positioned to identify intangible harms that meet minimum Article III requirements, its judgment is also instructive and important" beyond how the English and American common law defined such injuries.[13]

Part I provides an introduction to standing doctrine. Part II discusses the Supreme Court's informational standing decisions in *Public Citizen* and *Akins*. Part III discusses how some commentators have raised doubts about informational standing, but argues that the *Spokeo* decision reaffirms the validity of informational standing without proof of additional harm.

I. ARTICLE III CONSTITUTIONAL STANDING[14]

While the Constitution does not explicitly mandate that plaintiffs have standing to file suit in federal courts, the Supreme Court has inferred limitations on justiciability from the Constitution's Article III restriction of judicial decisions to "Cases" and "Controversies" to ensure that the plaintiff has a genuine interest and stake in a case.[15] The Court's three-part standing test requires a plaintiff to show that: (1) she has "suffered an injury-in-fact," which is (a) "concrete and particularized" and (b) "actual or imminent, not conjectural or hypothetical"; (2) "there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court"; and

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16, 2016), https://casetext.com/posts/the-supreme-courts-decision-and-remand-in-spokeo-inc-v-robins-postpones-the-difficult-standing-issues-in-statutory-standing-and-identity-theft-cases.

11. *See infra* Part II.

12. *See infra* Part III.

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

14. The discussion of standing in Part I relies upon my earlier standing articles cited in footnote *.

15. *"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 all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States; between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."* U.S. CONST. art. III, § 2, cl. 1. See also DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 339–42 (2006) (explaining why the Supreme Court infers that Article III's case and controversy requirement necessitates standing limitations); Mank, Informational Standing, *supra* note *, at 7; see generally Michael E. Solimine, Congress, Separation of Powers, and Standing, 59 CASE W. RES. L. REV. 1023, 1036–38 (2009) (discussing debate whether Constitution implicitly requires standing to sue).

(3) "it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision."[16] A plaintiff has the burden of establishing all three prongs of the standing test for each form of relief sought.[17] A federal court must dismiss a case without deciding the merits if the plaintiff fails to meet the constitutional standing test.[18]

Standing requirements are related to broader constitutional principles. Standing doctrine prohibits unconstitutional advisory opinions.[19] Additionally, standing requirements support separation of powers principles defining the division of powers between the judiciary and political branches of government so that the "Federal Judiciary respects 'the proper—and properly limited—role of the courts in a democratic society.'"[20] The Court's standing decisions, however, are complicated and arguably inconsistent in defining to what extent separation of powers principles limit the standing of suits challenging alleged executive branch under-enforcement or non-enforcement of congressional requirements mandated in a statute.[21]

For example, in *Lujan v. Defenders of Wildlife*[22] the Supreme Court, in an opinion by Justice Scalia, interpreted the Court's standing doctrine to require a plaintiff to show that she has "suffered an injury-in-fact," which is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical."[23] Justice Scalia's *Lujan* opinion suggested that allowing a plaintiff who has not suffered a concrete injury to sue the U.S. Government to challenge its alleged failure to enforce the law would improperly interfere

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16. Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–61 (1992) (citations and quotation marks omitted); Mank, *Informational Standing*, *supra* note *, at 9.

17. *DaimlerChrysler*, 547 U.S. at 351–52; Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc., 528 U.S. 167, 185 (2000) ("[A] plaintiff must demonstrate standing separately for each form of relief sought."); Mank, *Informational Standing*, *supra* note *, at 9.

18. *See DaimlerChrysler*, 547 U.S. at 340–43; *Friends of the Earth*, 528 U.S. at 180 ("[W]e have an obligation to assure ourselves that [petitioner] had Article III standing at the outset of the litigation."); Mank, *Informational Standing*, *supra* note *, at 7.

19. *DaimlerChrysler*, 547 U.S. at 340; FEC v. Akins, 524 U.S. 11, 23–24 (1998); Mank, *Informational Standing*, *supra* note *, at 7.

20. *DaimlerChrysler*, 547 U.S. at 341 (quoting Allen v. Wright, 468 U.S. 737, 750 (1984)); Mank, *Informational Standing*, *supra* note *, at 7–8.

21. For example, Justice Scalia used separation of powers concerns about protecting the discretion of the Executive Branch to limit the scope of judicial authority in *Lujan*, 504 U.S. at 573–78. *But see id.* at 602 (Blackmun, J., dissenting) (arguing that the "principal effect" of Justice Scalia's majority opinion's restrictive approach to standing was "to transfer power into the hands of the Executive at the expense—not of the Courts—but of Congress, from which that power originates and emanates"). *See generally* Mank, *Informational Standing*, *supra* note * (discussing debate over whether standing requirements support or undermine Constitution's separation of powers principles).

22. 504 U.S. 555 (1992).

23. *Lujan*, 504 U.S. at 560–61 (citations and quotation marks omitted); Mank, *Informational Standing*, *supra* note *, at 8.

with both Article III standing principles and the President's Article II constitutional authority to "take Care that the Laws be faithfully executed."[24]

Some commentators have contended that Justice Scalia's restrictive approach to standing hinders the role of Congress in permitting judicial oversight to guarantee that the executive branch obeys enacted laws.[25] Nevertheless, Justice Scalia in *Lujan* acknowledged that Congress may "elevat[e] to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law."[26] Furthermore, in footnote seven of *Lujan*, the Court created an exception to its otherwise narrow approach to standing by observing that plaintiffs who may suffer a concrete injury resulting from a procedural violation by the government are entitled to a more relaxed application of both the imminent injury and the redressability standing requirements to sue in federal court.[27]

In his concurring opinion in *Lujan*, Justice Anthony Kennedy maintained that Congress may use its legislative authority under Article I of the Constitution to expand common law limitations on what constitutes a concrete injury, although Congress may not entirely eliminate the concrete injury requirement implicit in Article III.[28] The *Spokeo* decision, which Justice Kennedy joined, favorably cited his *Lujan* concurrence when it acknowledged that Congress has a significant role in defining the scope of intangible injuries.[29] Justice Kennedy's concurring opinion in *Lujan* agreed with Justice Scalia's majority opinion that a plaintiff must prove that he has sustained a concrete injury and that the affiants had failed to do so because they had not "acquire[d] airline tickets to the project sites or announce[d] a date certain upon which they will return."[30] Justice Kennedy suggested, however, that courts recognize that the definition of a concrete injury might be broadened "[a]s Government programs and policies become more complex and far reaching" and, therefore, that "we must be sensitive to the articulation of new rights of action that do not have clear analogs in our common-law tradition."[31] He reasoned that "Congress has the power to

24. *Lujan*, 504 U.S. at 576–77 (quoting U.S. CONST. art. II, § 3); Solimine, *supra* note 15, at 1029.

25. *See* Heather Elliott, *The Functions of Standing*, 61 STAN. L. REV. 459, 496 (2008) (arguing courts should not use standing doctrine as "a backdoor way to limit Congress's legislative power").

26. *Lujan*, 504 U.S. at 578; Solimine, *supra* note 15, at 1029 & n.27.

27. *Lujan*, 504 U.S. at 572 n.7; *see* Mank, *Informational Standing*, *supra* note *, at 10–13.

28. *Lujan*, 504 U.S. at 579–81 (Kennedy, J., concurring in part and concurring in the judgment); Mank, *Informational Standing*, *supra* note *, at 4, 47–49.

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

30. *Lujan*, 504 U.S. at 579 (Kennedy, J., concurring in part and concurring in the judgment); Mank, *Informational Standing*, *supra* note *, at 47.

31. *Lujan*, 504 U.S. at 580; Mank, *Informational Standing*, *supra* note *, at 47.

define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before," although he limited his potentially broad interpretation of congressional authority to modify standing requirements with the caution that in "exercising this power, however, Congress must at the very least identify the injury it seeks to vindicate and relate the injury to the class of persons entitled to bring suit."[32] Justice Kennedy explained that separation of powers concerns limit the Judiciary to the resolution of concrete injuries and, thus, that "the requirement of concrete injury confines the Judicial Branch to its proper, limited role in the constitutional framework of Government."[33]

II. INFORMATIONAL STANDING: *PUBLIC CITIZEN* AND *AKINS*

A. Public Citizen v. United States Department of Justice

In its 1989 *Public Citizen* decision, the Supreme Court recognized that the government's denial of information that the public is entitled to by statute constitutes a sufficient injury for Article III standing, although the Court did not fully explore the boundaries of informational standing.[34] The American Bar Association ("ABA") argued that Public Citizen and the Washington Legal Foundation lacked standing to sue because they failed to allege an "injury sufficiently concrete and specific to confer standing" since they "advanced a general grievance shared in substantially equal measure by all or a large class of citizens."[35] Following decisions approving informational standing under the Freedom of Information Act, the Court concluded that the plaintiffs had standing to seek information pursuant to the Federal Advisory Committee Act's ("FACA")[36] statutory mandates.[37] The Court reasoned:

> As when an agency denies requests for information under the Freedom of Information Act, refusal to permit appellants to scrutinize the ABA Committee's activities to the extent FACA allows constitutes a sufficiently distinct injury to provide standing to sue. Our decisions interpreting the Freedom of Information Act have

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32. *Lujan*, 504 U.S. at 580; Mank, *Informational Standing*, *supra* note *, at 47

33. *Lujan*, 504 U.S. at 581; Mank, *Informational Standing*, *supra* note *, at 48.

34. Pub. Citizen v. U.S. Dep't of Justice, 491 U.S. 440 (1989); Mank, *Informational Standing*, *supra* note *, at 15–16. Justice Scalia took no part in the Court's consideration of the case or its decision. *Pub. Citizen* at 442.

35. *Pub. Citizen* at 448–49.

36. 5 U.S.C. app. 2 § 1.

37. *Pub. Citizen*, 491 U.S. at 449; Mank, *Informational Standing*, *supra* note *, at 16.

> never suggested that those requesting information under it need show more than that they sought and were denied specific agency records.[38]

Furthermore, the Court rejected the ABA's argument that the plaintiffs did not have standing because they alleged a generalized grievance shared by many other citizens.[39] The Court stated:

> The fact that other citizens or groups of citizens might make the same complaint after unsuccessfully demanding disclosure under FACA does not lessen appellants' asserted injury, any more than the fact that numerous citizens might request the same information under the Freedom of Information Act entails that those who have been denied access do not possess a sufficient basis to sue.[40]

B. Akins

In its 1998 *Akins* decision,[41] the Supreme Court, in an opinion by Justice Stephen Breyer (joined by five other justices, including Justice Kennedy) concluded that informational injuries resulting from the government's denial of information that a statute requires to be made available to the public are potentially sufficient for Article III standing.[42] *Akins* considered whether the plaintiff voters had standing to challenge a Federal Election Commission decision that a lobbying group, the American Israeli Political Action Committee ("AIPAC"), was not a "political committee" within the definition of the Federal Election Campaign Act of 1971 ("FECA"),[43] and, therefore, was not required to disclose its donors, contributions, or expenditures.[44] FECA "imposes extensive recordkeeping and disclosure requirements upon groups that fall within the Act's definition of a 'political committee.'"[45]

The Court held that the plaintiff voters had suffered a "concrete and particular" injury in fact sufficient for Article III standing because they were deprived of their statutory right to receive designated "information [which] would help them...to evaluate candidates for public office," even though many other voters shared the same informational injury as the plaintiff.[46]

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38. *Pub. Citizen*, 491 U.S. at 449.
39. *Id.* at 449–50; Mank, *Informational Standing*, *supra* note *, at 16.
40. *Pub. Citizen*, 491 U.S. at 449–50.
41. Fed. Election Comm'n v. Akins, 524 U.S. 11 (1998).
42. *Id.* at 21–25; Mank, *Informational Standing*, *supra* note *, at 17–20.
43. 2 U.S.C. §§ 431–457 (2012) (FECA has been recodified as 52 U.S.C. § 30101–30146 (2014)).
44. *Akins*, 524 U.S. at 13–18; Mank, *Informational Standing*, *supra* note *, at 17–18.
45. *Akins*, 524 U.S. at 14–15 (summarizing 2 U.S.C. §§ 432–434).
46. *Akins*, 524 U.S. at 21; Mank, *Informational Standing*, *supra* note *, at 17–20.

Justice Scalia wrote a dissenting opinion arguing that the plaintiffs did not have standing because their injury was common to the public at large, so therefore they did not have a particularized injury essential for standing.[47]

The *Akins* decision held that Congress had "the constitutional power to authorize federal courts to adjudicate this lawsuit."[48] The Court concluded that the government's denial of information to the plaintiff voters for which the Act required disclosure was a constitutionally sufficient "genuine 'injury in fact.'"[49] The Court explained, "[t]he "'injury in fact' that respondents have suffered consists of their inability to obtain information . . . the statute requires that AIPAC make public."[50] Furthermore, the Court specifically found that this deprivation of information that the plaintiffs could use "to evaluate candidates for public office" constituted a "concrete and particular" injury.[51] Additionally, the *Akins* decision reasoned that the Court in *Public Citizen* had "held that a plaintiff suffers an 'injury in fact' when the plaintiff fails to obtain information which must be publicly disclosed pursuant to a statute" and implied that the same reasoning applied to the facts of *Akins*.[52]

The *Akins* decision rejected the government's argument that the informational injury to the plaintiffs was too abstract or generalized to constitute a concrete injury because the statute specifically authorized the right of voters to request information from the Commission.[53] Distinguishing prior cases rejecting standing for generalized grievances, the *Akins* decision reasoned that Article III standing was permissible even if many people suffered similar injuries as long as those injuries were concrete and not abstract.[54] The Court declared that the fact that "an injury is widely shared . . . does not, by itself, automatically disqualify an interest for Article III purposes. Such an interest, *where sufficiently concrete*, may count as an 'injury in fact.'"[55]

Thus, the *Akins* decision recognized that a plaintiff who suffers an actual, concrete injury may sue even though many others have suffered similar

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47. *Akins*, 524 U.S. at 33–37 (Scalia, J., dissenting); Mank, *Informational Standing*, *supra* note *, at 21.

48. *Akins*, 524 U.S. at 20; Mank, *Informational Standing*, *supra* note *, at 18.

49. *Akins*, 524 U.S. at 21; Mank, *Informational Standing*, *supra* note *, at 18.

50. *Akins*, 524 U.S. at 21.

51. *Id.*; Mank, *Informational Standing*, *supra* note *, at 18.

52. *Akins*, 524 U.S. at 21.

53. *Akins*, 524 U.S. at 13–21; Mank, *Informational Standing*, *supra* note *, at 19.

54. *Akins*, 524 U.S. at 24–25; Mank, *Informational Standing*, *supra* note *, at 19.

55. *Akins*, 524 U.S. at 24 (emphasis added); Mank, *Informational Standing*, *supra* note *, at 19.

injuries, such as in a "widespread mass tort."[56] Accordingly, *Akins* clarified that courts should not deny standing merely because large numbers of persons have the same or similar injuries so long as those injuries are concrete.[57] Furthermore, the *Akins* decision stressed that courts should strongly consider Congress' intent in defining statutory rights when determining whether a statutory injury is concrete or abstract.[58]

III. DOUBTS ABOUT INFORMATIONAL STANDING AND SPOKEO'S REASSURANCE OF INFORMATIONAL STANDING

A. Some Commentators Question Informational Standing

Professors Evan Tsen Lee and Josephine Mason Ellis have argued that informational statutes such as FOIA essentially eliminate the requirement for a concrete injury, and, thus, go beyond even Justice Kennedy's approach in his *Lujan* concurring opinion that gave Congress broad authority to define injuries as long as the concrete injury requirement remains.[59] They argue that informational statutes potentially allow anyone to sue the government to receive nonexempt records under the statute for "sheer curiosity."[60] They contrast statutory "birther" cases where plaintiffs were allowed to sue government agencies under FOIA to obtain documents relating to President Barack Obama's birth with a constitutional suit in which a court held that a plaintiff seeking to challenge whether President Obama was a "natural born citizen" could not do so because the complaint was a generalized grievance too vague to confer standing.[61] They interpret informational standing cases as courts allowing Congress to effectively waive the requirement of a genuine concrete injury.[62]

Lee and Ellis argue that the Court's Article III jurisprudence fails to explain the Supreme Court's insistence on a three-part standing test and its

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56. *Akins*, 524 U.S. at 24–25; Mank, *Informational Standing*, *supra* note *, at 19–20.

57. Mank, *Informational Standing*, *supra* note *, at 19–20.

58. *Akins*, 524 U.S. at 24–25; Mank, *Informational Standing*, *supra* note *, at 19–20.

59. Evan Tsen Lee & Josephine Mason Ellis, *The Standing Doctrine's Dirty Little Secret*, 107 NW. U. L. REV. 169, 193–201 (2012).

60. *Id.* at 194.

61. *Id.* at 196–98. *Compare* Berg v. Obama, 574 F. Supp. 2d 509, 512, 514, 519–21 (E.D. Pa. 2008) (dismissing for lack of standing plaintiff's suit under Natural Born Citizen Clause of U.S. CONST., art. II, § 1, cl. 4), *aff'd*, 586 F.3d 234, 239–40 (3d Cir. 2009) *with* Strunk v. U.S. Dep't of State, 770 F. Supp. 2d 10, 17 (D.D.C. 2011) (denying summary judgment in FOIA suit seeking access to documents regarding President Obama's deceased mother's international travel because a genuine issue of material fact remained as to the sufficiency of the Department of Homeland Security's search for the documents).

62. *Id.* at 194–201.

willingness to waive those requirements in informational standing cases.[63] Nor does Justice Kennedy's view in his *Lujan* concurrence that Congress can define concrete injury more broadly than the common law address how courts have eliminated the injury requirement in informational standing cases.[64] Instead, they propose that:

> [The] Court openly recognize Congress's power to relax or eliminate any of the usual Article III requisites where standing to vindicate procedural rights is concerned and to replace those usual requirements with a "naked" zone of interests test. We propose that there are really two tiers to the standing doctrine: one tier for traditional common law review, in which the plaintiff must meet the usual requirements of injury, causation, and redressability, and another tier for procedural rights review, in which the plaintiff need only show that she is within the zone of interests that Congress had in mind when it drafted the statute in question.[65]

Alternatively, a court that takes the concrete injury requirement seriously might follow Justice Scalia's dissenting opinion in *Akins* and overrule prior cases allowing informational standing.[66] Before Justice Scalia's death in February 2016,[67] some commentators at the time of the *Spokeo* oral argument on November 2, 2015 speculated that the Court in *Spokeo* might overrule informational standing.[68] One may hypothesize that his death diminished the possibility of a decision limiting statutory standing, although commentators have disagreed on that point and we cannot know for certain how he would have voted in *Spokeo*.[69]

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63. *Id.* at 221–22.

64. *Id.* at 217–22.

65. *Id.* at 225.

66. Fed. Election Comm'n v. Akins, 524 U.S. 11, 33–37 (1998) (Scalia, J., dissenting).

67. Judy Melinek, *Justice Scalia's unexamined death points to a problem*, CNN (Feb. 20, 2016), http://www.cnn.com/2016/02/18/opinions/justice-scalia-no-autopsy-melinek/.

68. *See* Wilhelm, *supra* note 4 (citing commentators speculating at time of Spokeo oral argument on November 2, 2015 that the Court in *Spokeo* might overrule informational standing doctrine).

69. *Compare* Eric Troutman & Scott Goldsmith, *Spokeo Without Scalia: The Fate Of No-Injury Class Actions*, LAW360 (Feb. 23, 2016), http://www.law360.com/articles/762088/spokeo-without-scalia-the-fate-of-no-injury-class-actions (suggesting Justice Scalia's death dramatically changed the likelihood that the *Spokeo* decision would narrow statutory standing), *with* Maxwell Stearns, *The Powerful Voice: Justice Scalia, Statutory Standing, and Narrowing the* Spokeo *Class*, https://casetext.com/posts/the-powerful-voice-justice-scalia-statutory-standing-and-narrowing-the-spokeo-class (arguing that *Spokeo* was an unsuitable case for Justice Scalia's project of limiting statutory standing).

B. Spokeo Reaffirms Informational Standing

The *Spokeo* decision held that a plaintiff alleging a statutory injury in violation of a federal statute must allege not only an individualized injury, but also a concrete injury to satisfy the standing requirement of an injury in fact.[70] In concluding that the plaintiff had standing, the Ninth Circuit had emphasized that plaintiff Robins alleged an injury to his personal interests in how the defendant Spokeo, Inc. had mishandled his personal credit information and thus had allegedly caused an individualized injury to the plaintiff.[71] The Court remanded the case back to the Ninth Circuit because the court of appeals found only that Robins had an individualized injury and had failed to consider whether he also had a concrete injury.[72]

The *Spokeo* decision emphasized that "[a] 'concrete' injury must be '*de facto*'; that is, it must actually exist."[73] The Court further explained, "[w]hen we have used the adjective 'concrete,' we have meant to convey the usual meaning of the term—'real,' and not 'abstract.'"[74] Accordingly, the *Spokeo* decision reasoned that "[c]oncreteness, therefore, is quite different from particularization."[75] The Court then further observed that the "risk of real harm" can satisfy the concreteness requirement, and, as an example, commented that tort victims may recover "even if their harms may be difficult to prove or measure."[76] On the other hand, Justice Alito's majority opinion explained that a reporting inaccuracy that does not present a "material risk of harm," such as an "incorrect zip code," does not constitute a concrete injury.[77]

Crucially, the *Spokeo* decision treated the government's violation of a statute granting the public access to information held by the government as a concrete injury without the need for the plaintiff to prove an additional harm from the denial of the information.[78] The Court explained, "[j]ust as the common law permitted suit in such instances, the violation of a procedural right granted by statute can be sufficient in some circumstances to constitute injury in fact. In other words, a plaintiff in such a case need not allege any *additional* harm beyond the one Congress has identified."[79] The

70. Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1545, 1548, 1550 (2016).
71. *Id.* at 1544–46.
72. *Id.* at 1545, 1550.
73. *Id.* at 1548.
74. *Id.*
75. *Id.*
76. *Id.* at 1549.
77. *Id.* at 1550.
78. *Id.* at 1549–50.
79. *Id.* at 1549.

majority opinion then cited *Akins* and *Public Citizen* as precedent supporting its view that a plaintiff may suffer a concrete injury from the violation of a procedural right without proving additional harm.[80]

The clear implication of the *Spokeo* decision is that a plaintiff has a concrete injury if the government denies him information that he specifically requests pursuant to an informational statute such as FOIA.[81] In a 1993 article, now Chief Justice John Roberts, who joined the *Spokeo* majority opinion, defended Justice Scalia's relatively strict approach to standing in his *Lujan* opinion,[82] but acknowledged that the *Lujan* decision did not call into question the *Public Citizen* decision's holding that a party who is denied information by a government agency that he is explicitly entitled to under a statute has standing even if other citizens seek that same information.[83] The *Spokeo* decision eliminates any doubts about informational standing where the government denies information to a plaintiff who is entitled to that information by a statute.

CONCLUSION

The Supreme Court's recent decision in *Spokeo* does not fully resolve when an intangible injury such as a defendant's misreporting of a plaintiff's personal information is sufficient to constitute a "concrete injury" for Article III standing .[84] However, the *Spokeo* decision makes clear that Congress has a significant role in defining intangible injuries for Article III standing beyond what was considered an injury under the American or English common law.[85] Some commentators had thought *Spokeo* might overrule the Court's prior decisions in *Akins* and *Public Citizen,* which both held that a plaintiff may have standing based solely upon his statutory right to information.[86] Instead, the Court in *Spokeo* reaffirmed its informational standing decisions in *Akins* and *Public Citizen*.[87]

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80. *Id.* at 1549–50.
81. *Id.*
82. John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 DUKE L.J. 1219.
83. *Id.* at 1228 n.60.
84. *See Spokeo*, 136 S. Ct. at 1548–50.
85. *Id.* at 1549–50.
86. *See supra* Part III.A and Wilhelm, *supra* note 4 (citing commentators speculating that the Court in *Spokeo* might overrule informational standing doctrine).
87. *See supra* Part III.B.