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## Spokeo, Inc. v. Robins: The Illusory “No-Injury Class” Reaches the Supreme Court

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## Spokeo, Inc. v. Robins: The Illusory “No-Injury Class” Reaches the Supreme Court

*Patricia W. Hatamyar Moore*

*SPOKEO, INC. V. ROBINS*: THE ILLUSORY “NO-INJURY CLASS”  
REACHES THE SUPREME COURT

*Patricia W. Hatamyar Moore\**

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## I. INTRODUCTION

The Supreme Court’s grant of certiorari in *Spokeo, Inc. v. Robins*<sup>1</sup> and three other cases involving class actions in the October 2015 term<sup>2</sup> could be a bad sign for those who think the class action should remain a viable species of private regulation. The grant of certiorari in *Spokeo* is also a bad sign for those who think Congress should be able to enact statutes regulating businesses’ behavior for the public good—the petitioner, Spokeo, and its army of business *amici*<sup>3</sup> are urging the Court to cut the legs out from under many such statutes.

Corporate litigation activists such as the U.S. Chamber Litigation Center<sup>4</sup> continue to press a well-orchestrated attack against the class action and plaintiffs’ class-action lawyers by brilliantly conceiving a new catchphrase: the “no-injury” class. The attack is proceeding in

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<sup>1</sup> *Spokeo, Inc. v. Robins*, 135 S. Ct. 1892 (2015) (Mem.) (order granting certiorari).

<sup>2</sup> See generally *Tyson Foods v. Bouaphakeo, Inc.*, 135 S. Ct. 2806 (2015) (order granting certiorari); *Campbell-Ewald Co. v. Gomez*, 135 S. Ct. 2311 (2015) (order granting certiorari); *DIRECTV, Inc., v. Imburgia*, \_\_ S. Ct. \_\_, 2015 WL 8546242 (U.S. Dec. 14, 2015) (upholding, in consumer contract of adhesion, a binding arbitration provision with a class-arbitration waiver).

<sup>3</sup> See *Spokeo, Inc. v. Robins*, SCOTUSBLOG, <http://www.scotusblog.com/case-files/cases/spokeo-inc-v-robins/> (last visited Nov. 10, 2015) (providing access to the twenty-seven *amicus* briefs filed in the Supreme Court for petitioner Spokeo).

<sup>4</sup> See generally U.S. CHAMBER LITIGATION CENTER, <http://www.chamberlitigation.com/cases/issue/class-actions/no-injury-class-actions?page=1> (last visited Dec. 12, 2015) (supplying information relating to recent “no injury” class action case activity).

Congress,<sup>5</sup> in the federal Advisory Committee on Civil Rules,<sup>6</sup> and in lower courts nationwide.<sup>7</sup> But corporate-lawyer activists have had the most success against class actions in the Supreme Court,<sup>8</sup> the battlefield where *Spokeo* is now being fought.

There are two primary manifestations of the “no-injury class” argument. The first is the idea that a class should not be certified if it includes some members who, at the end of the day, turn out not to have suffered the harm that the class representatives are complaining about. This is the second Question Presented (“QP”) in *Tyson Foods, Inc. v. Bouaphakeo*.<sup>9</sup> *Spokeo* invokes the second manifestation of the “no-injury

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<sup>5</sup> Fairness in Class Action Litigation Act of 2015, H.R. 1927, 114th Cong. (2015). The title of H.R. 1927 was termed “Orwellian” by the Los Angeles Times. See *Orwellian-named Fairness in Class Action bill aims to restrict consumers’ access to court*, L.A. TIMES (June 30, 2015, 4:00 AM), <http://www.latimes.com/business/la-fi-lazarus-20150630-column.html>. See also Patricia W. Moore, *Answer to Questions for the Record Submitted to Professor Patricia W. Moore Following the Hearing on “The State of Class Actions Ten Years after the Enactment of the Class Action Fairness Act”* (Feb. 27, 2015), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2605505](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2605505).

<sup>6</sup> E.g., LAWYERS FOR CIVIL JUSTICE, *Comment to the Advisory Committee on Civil Rules and its Rule 23 Subcommittee: Repairing the Disconnect Between Class Actions and Class Members: Why Rules Governing “No Injury” Cases, Certification Standards for Issue Classes and Notice Need Reform*, 1, 4–5 (Aug. 13, 2014), [http://www.lfcj.com/uploads/3/8/0/5/38050985/lcj\\_comment\\_on\\_rule\\_23\\_reform\\_8.13.14.pdf](http://www.lfcj.com/uploads/3/8/0/5/38050985/lcj_comment_on_rule_23_reform_8.13.14.pdf).

<sup>7</sup> See, e.g., *Coghlan v. Wellcraft Marine Corp.*, 240 F.3d 449, 454 (5th Cir. 2001).

<sup>8</sup> See Stephen B. Burbank & Sean Farhang, *Class Actions and the Counterrevolution Against Federal Litigation*, U. PENN. PUB. LAW RESEARCH PAPER SERIES: RESEARCH PAPER NO. 1, 15–12 (June 18, 2015), [http://papers.ssrn.com/sol3/Papers.cfm?abstract\\_id=2622201](http://papers.ssrn.com/sol3/Papers.cfm?abstract_id=2622201).

<sup>9</sup> See Brief of Petitioner at 44–49, *Tyson Foods Inc. v. Bouaphakeo*, No. 14-1146 (U.S. Aug. 7, 2015), <http://www.supremecourt.gov/qp/14-01146qp.pdf> (providing the second QP is “whether a class action may be certified or maintained under Rule 23(b)(3), or a collective action certified or maintained under the Fair Labor Standards Act, when the class contains hundreds of members who were not injured and have no legal right to any damages”). The petitioner’s merits brief seems to have backed off from the absolutist phrasing of the second QP, conceding that “[t]he fact that federal courts lack authority to compensate persons who cannot prove injury does not mean that a class

class”: that the class representative’s “only” alleged harm is the violation of a regulatory statute, which is not the “injury in fact” required for Article III standing.<sup>10</sup> Petitioner Spokeo phrases the QP in the Supreme Court as, “Whether Congress may confer Article III standing upon a plaintiff who suffers no concrete harm, and who therefore could not otherwise invoke the jurisdiction of a federal court, by authorizing a private right of action based on a bare violation of a federal statute.”<sup>11</sup>

Accepting the two variants of the “no-injury class” argument would remove two cornerstones of American jurisprudence: first, the finder of fact decides whether a plaintiff has proved injury, and second,

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action (or collective action) can never be certified in the absence of proof that all class members were injured.” *Id.* at 49.

<sup>10</sup> See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992) (citations omitted):

First, the plaintiff must have suffered an “injury in fact”—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) “actual or imminent, not ‘conjectural’ or ‘hypothetical.’” Second, 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.” Third, it must be “likely,” as opposed to merely “speculative,” that the injury will be “redressed by a favorable decision.”

*Id.*

Several commentators have argued the “injury in fact” component has no historical basis but was invented by Justice William O. Douglas in 1970. *E.g.*, Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 178 (1992) (“There is absolutely no affirmative evidence that Article III was intended to limit congressional power to create standing. There is no affirmative evidence of a requirement of a ‘personal stake’ or an ‘injury in fact’ -- beyond the genuine requirement that some source of law confer a cause of action.”); F. Andrew Hessick, *Standing, Injury in Fact, and Private Rights*, 93 CORNELL L. REV. 275, 277–78 (2008) (“[T]he restriction on a litigant’s ability to seek redress in the courts for a violation of a private right is ahistorical.”).

<sup>11</sup> Brief for Petitioner at i, *Spokeo, Inc. v. Robins*, No. 13-1339 (U.S. July 2, 2015).

Congress may create a cause of action enforceable by one who is the victim of its violation. This article will focus on the second type of “no injury” argument, which threatens enforcement of statutory rights by private attorneys general.<sup>12</sup> Indeed, it threatens separation-of-powers by allowing the Court to overrule Congress’s determination of injury.<sup>13</sup>

The form of the “no-injury class” argument espoused in *Spokeo* is a jurisdictional standing challenge to the named class representative<sup>14</sup> in the pleading stage. The challenge is normally made in the context of a putative class action claiming that the corporate defendant has violated a statutory duty imposed by a consumer-protection statute, a privacy statute, or an anti-discrimination statute. These statutes often authorize statutory damages in addition to or in lieu of actual damages. If statutory damages are aggregated in a class action, the enforcement of such statutes can become economically viable.

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<sup>12</sup> See, e.g., Pamela S. Karlan, *Democracy and Disdain*, 126 HARV. L. REV. 1, 58–60 (2012).

<sup>13</sup> See, e.g., Brief of Respondent at 48–52, *Spokeo, Inc. v. Robins*, No. 13-1339 (U.S. Aug. 31, 2015). Cf. William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 223–24 (1988) (stating “if a duty is statutory, Congress should have essentially unlimited power to define the class of persons entitled to enforce that duty, for congressional power to create the duty should include the power to define those who have standing to enforce it”).

<sup>14</sup> The weight of authority is that in a class action, “the standing inquiry focuses on the class representatives. The class representatives must have individual standing in order to sue. . . . [T]he representative need not prove that each member of the class has standing.” 1 WILLIAM B. RUBENSTEIN, *NEWBERG ON CLASS ACTIONS* §2:1 (5th ed. 2013) (citations omitted). This article will not discuss the few rogue cases that confuse this well-settled rule, but will assume that only the class representative, not the unnamed class members, must show Article III standing. Thus, the argument that a named class representative, such as Thomas Robins, has no Article III standing falls within a very large body of Supreme Court standing jurisprudence. There are no separate standing rules for named representatives.

The corporate interests’ argument is that even if the corporate defendant committed a “technical” violation of some “trifl[ing]” statute, the “harmless alleged lapse[]” did not cause any “actual harm” to the named plaintiff.<sup>15</sup> The statutory violation is ridiculed as a “mere injury in law,” a term recently coined by Chief Justice John Roberts and now endlessly repeated in the briefs of Spokeo and its *amici*.<sup>16</sup> Without “injury in fact” to the named plaintiff, the syllogism goes, there is no Article III standing, and the case must be dismissed for lack of subject matter jurisdiction.

Petitioner Spokeo’s Supreme Court briefs, and most of the twenty-seven *amicus* briefs supporting Spokeo, repeatedly copycat this Article III standing argument.<sup>17</sup> They insist that our entire system of government is threatened if the Court does not accept their argument.<sup>18</sup> But they could have made this very same argument, for the same underlying statute in *Spokeo*—the Fair Credit Reporting Act (“FCRA”),

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<sup>15</sup> *E.g.*, Brief of the Chamber of Commerce of the United States et al. as Amici Curiae in Support of Petitioner at 2–6, *Spokeo, Inc. v. Robins*, No. 13-1339 (U.S. June 6, 2014) [hereinafter *Certiorari Brief of the Chamber of Commerce*].

<sup>16</sup> See *infra* at note 145 and accompanying text.

<sup>17</sup> See, *e.g.*, Brief for Petitioner, *supra* note 11 at 11; Brief for ACA International as Amici Curiae in Support of Petitioner at 7, *Spokeo, Inc. v. Robins*, No. 13-1339 (U.S. June 4, 2014); Brief Amicus Curiae of Pacific Legal Foundation in Support of Petitioner at 3, *Spokeo, Inc. v. Robins*, No. 13-1339 (U.S. July 7, 2015); Brief for National Association of Home Builders as Amicus Curiae in Support of Petitioner at 3, *Spokeo, Inc. v. Robins*, No. 13-1339 (U.S. July 9, 2015).

<sup>18</sup> The many *amicus* briefs asserting that upholding Article III standing in *Spokeo* will violate separation of powers include: Brief for New England Legal Foundation, et al. as Amici Curiae in Support of Petitioner at 17, *Spokeo, Inc. v. Robins*, No. 13-1339 (U.S. June 6, 2014); Brief for DRI – The Voice of the Defense Bar as Amicus Curiae in Support of Petitioner at 8–9, *Spokeo, Inc. v. Robins*, No. 13-1339 (June 6, 2014); Brief for Washington Legal Foundation as Amicus Curiae in Support of Petitioner at 16, *Spokeo, Inc. v. Robins*, No. 13-1339 (U.S. July 9, 2015); and Brief for Amici Curiae eBay Inc., et al. in Support of Petitioner at 11, *Spokeo, Inc. v. Robins*, No. 13-1339 (U.S. July 9, 2015).



nine years ago in the Supreme Court in the case of *Safeco Insurance Co. v. Burr*,<sup>19</sup> and failed to do so.

Part II<sup>20</sup> of this article will describe in some detail the procedural history of *Robins v. Spokeo, Inc.* in order to demonstrate the overbreadth and misdirection of the QP to the Supreme Court. The QP implies that there has been a factual finding that Robins suffered no actual damage, when in reality the case is still at the pleading stage. The QP also suggests that the issue can be generalized beyond the one statute at issue in *Spokeo*, the FCRA,<sup>21</sup> to dozens of other federal statutes that authorize statutory damages, without recognizing the variety of ways these different statutes operate.

Part III<sup>22</sup> sketches the historical legal difference between “injury” and “damage.” “Injury” connotes the violation of a legal right, even if one has not sustained any actual harm, while “damage” means a loss or harm, even if one has no legal right to sue. Given that historical distinction, what corporate activists currently call “no-injury” would more accurately be called “no-damage.” Further, the term “injury in fact” is confusing and self-contradictory, while Spokeo’s newly-discovered phrase “injury in law” is redundant. But the epithet “injury in law” serves as a vehicle to minimize “technical” statutes that presume to regulate corporate behavior.

Part IV<sup>23</sup> notes the modern phenomenon of business-oriented litigation think-tanks filing hundreds of *amicus* briefs every year in cases like *Spokeo* that are thought to affect corporations. These corporate activists have particularly targeted class actions for decades—the continuing invective against class actions in *Spokeo* is nothing new. What is new is the “bare-statutory-violation-is-not-injury-in-fact” argument.

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<sup>19</sup> See *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47 (2007).

<sup>20</sup> See *infra* Part II.

<sup>21</sup> 15 U.S.C. § 1681 (2012).

<sup>22</sup> See *infra* Part III.

<sup>23</sup> See *infra* Part IV.

Business interests could have made this very argument nine years ago in the Supreme Court but did not – probably because they had not thought of it yet.

## II. THE REACH OF THE QUESTION PRESENTED EXCEEDS THE MODEST PROCEDURAL HISTORY OF *ROBINS V. SPOKEO, INC.*

As stated earlier, Spokeo has phrased the QP in the Supreme Court as: “Whether Congress may confer Article III standing upon a plaintiff who suffers no concrete harm, and who therefore could not otherwise invoke the jurisdiction of a federal court, by authorizing a private right of action based on a bare violation of a federal statute.”<sup>24</sup>

The QP contains layers of sophistry. The QP’s essential premise is that the plaintiff, Robins, has “suffer[ed] no concrete harm,” as though this had been factually determined in the lower courts.<sup>25</sup> But no such determination has been made, nor could it have been. This case reaches the Supreme Court on a motion to dismiss the complaint. Procedurally, therefore, the only correct way to phrase the QP is whether Robins’s complaint’s allegations are sufficient to establish Article III standing.

On Spokeo’s motion to dismiss the complaint, all factual allegations in the complaint are deemed to be true.<sup>26</sup> Additionally, under Supreme Court precedent, a plaintiff’s burden of pleading Article III standing requires only “general factual allegations of injury resulting from the defendant’s conduct.”<sup>27</sup>

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<sup>24</sup> Brief for Petitioner, *supra* note 11 at i.

<sup>25</sup> *See id.*

<sup>26</sup> *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (stating that on a motion to dismiss, “a court must accept as true all of the allegations contained in a complaint,” except for “legal conclusions”).

<sup>27</sup> *Bennett v. Spear*, 520 U.S. 154, 168 (1997) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561–62). *Bennett* and *Lujan* predate *Twombly* and *Iqbal*, and a more recent Article III standing case that came to the Supreme Court on a motion to dismiss chose not to formulate a new pleading standard for Article III standing, but simply to cite *Lujan*. *See Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2342 (2014) (citing *Lujan v. Defenders of Wildlife*, 504 U.S.

Even if the QP was properly phrased in terms of a pleading standard, the lower courts never used the term “concrete harm” in discussing the sufficiency of Robins’s allegations for Article III standing. It is unclear what “concrete harm” even means—what is clear is that Spokeo and its *amici* are equating “concrete harm” with “injury in fact.” This is apparent from the QP’s middle clause, “suffers no concrete harm, and who therefore could not otherwise invoke the jurisdiction of a federal court.”<sup>28</sup> The QP does not use the phrase “injury in fact,” which has come to be, under Supreme Court case law, a jurisdictional requirement for Article III standing.<sup>29</sup> By *ipse dixit*, then, Spokeo substitutes “concrete harm” for “injury in fact” as the constitutional minimum for standing.

Further, even if the QP clarified that it was asking the Supreme Court to decide whether a “bare” statutory violation constituted an “injury in fact” under Article III, the QP would still be misleading. The term “bare statutory violation,” without identifying the one statute at issue in this case, obscures and denigrates the Ninth Circuit’s careful analysis of the FCRA as applied to Robins’s allegations. In addition, by using the generic term “bare statutory violation,” Spokeo and its *amici* hope to use this case as a vehicle to disable all regulatory statutes, not just the FCRA. But this device ignores the variety of regulatory statutes that create private rights of action for their violation. Such statutes differ, for example, in what parties they authorize to sue, what relationship the

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555, 561) (stating “the party invoking federal jurisdiction bears the burden of establishing’ standing. . . . “[E]ach element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation”). If given the opportunity, the Court may reformulate the pleading standard for Article III standing to include “plausibility.” I do not think this would affect the analysis here, because Robins’s First Amended Complaint makes specific allegations of fact that plausibly suggest Spokeo’s violations of the FCRA. *See, e.g.,* Johnson v. City of Shelby, 135 S. Ct. 346, 347 (2014) (explaining that “a plaintiff . . . must plead facts sufficient to show that her claim has substantive plausibility.”).

<sup>28</sup> *See* Brief for Petitioner, *supra* note 11 at i.

<sup>29</sup> *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992).

party must have to the violation of the statute, and in what circumstances they allow statutory damages. The statute at issue in this case, the FCRA, cannot be generalized to any other statute.

### A. The Proceedings Below

The First Amended Complaint (the “complaint”)<sup>30</sup> alleges:

- Spokeo operates a website, *spokeo.com*, that “allows users to search for consumers by name” and “provides an in-depth consumer report that displays, among other things, an individual consumer’s address, phone number, marital status, approximate age, occupation, approximate household value, hobbies, economic health (previously entitled ‘credit estimate’), and wealth level”;
- The Spokeo website contains “an inaccurate consumer report about” the plaintiff Thomas Robins. Specifically, a photograph purporting to be Robins was not him, “the profile incorrectly stated he was in his 50s, that he was married, that he was employed in a professional or technical field, and that he has children,” and “that his wealth level is in the ‘Top 10%’”;<sup>31</sup>
- “Spokeo has failed to develop an effective system to allow consumers to remove inaccurate information from their individual reports, or remove the reports from Defendant’s website altogether”;<sup>32</sup>

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<sup>30</sup> *Robins v. Spokeo, Inc.*, 742 F.3d 409, 410 (9th Cir. 2014) (noting that the original complaint contained much of the same alleged FCRA violations as the First Amended Complaint). The First Amended Complaint added further allegations of actual and imminent harm to Robins. See *infra* note 25.

<sup>31</sup> First Amended Complaint at 7, *Robins v. Spokeo, Inc.*, No. 2:10-cv-05306-ODW-AGR (C.D. Cal. Feb. 17, 2011) (alleging that “Spokeo maintains an inaccurate consumer report about Plaintiff Robins on its website”).

<sup>32</sup> *Id.* at 5.

- “Spokeo . . . has actively marketed its services to employers for the purpose of evaluating potential employees”;<sup>33</sup> and
- Robins has been unemployed and unsuccessfully seeking employment throughout the time the inaccurate information about him has been on the Spokeo website.<sup>34</sup>

Based on these allegations, Robins asserted three causes of action under the FCRA.<sup>35</sup> First, the FCRA requires a “consumer reporting agency” (or CRA, which the complaint alleges Spokeo is)<sup>36</sup> to send certain notices to people who furnish information to the CRA (“furnishers”) as well as to people to whom the CRA provides a consumer report (“users”).<sup>37</sup> The complaint alleges that Spokeo has failed to provide any of the statutorily-required notices to furnishers or users.<sup>38</sup> Further, the FCRA “mandates that when a consumer reporting agency prepares a consumer report that it shall follow reasonable procedures to assure the maximum possible accuracy of the information concerning the individual about whom the report relates.”<sup>39</sup> The complaint alleges that Spokeo “has continually failed to follow

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<sup>33</sup> *Id.* at 6.

<sup>34</sup> *See id.* at 7.

<sup>35</sup> *See* 15 U.S.C. § 1681b(b), (e), (j) (2012). A fourth cause of action, under the California Unfair Competition Law, CAL. BUS. & PROF. CODE §17204, was dismissed with prejudice for failure to state a claim on which relief may be granted. The California UCL claim is not at issue in the Supreme Court.

<sup>36</sup> 15 U.S.C. § 1681e (2012). Whether Spokeo is actually a “consumer reporting agency” has not yet been litigated in the case. For purposes of the motion to dismiss, the allegation that Spokeo is a consumer reporting agency is considered true.

<sup>37</sup> *Id.* at § 1681e(d). The notice to the “Furnishers” must remind the Furnisher of his responsibility to furnish accurate information. The notice to the “User” must remind the User to provide “adverse action notices” if it takes any adverse action based upon the consumer report provided.

<sup>38</sup> *See* First Amended Complaint, *supra* note 31, at 12.

<sup>39</sup> *Id.* at 13 (citing 15 U.S.C. § 1681e(b) (2012)).

reasonable procedures to assure the maximum possible accuracy of the information that it provides in its consumer reports.”<sup>40</sup>

Second, the FCRA “mandates that a consumer reporting agency only furnish a consumer report for employment purposes if it ensures that the person who obtains the report complies with certain disclosure requirements” to the consumer “if any adverse action is taken based in whole or in part on the report.”<sup>41</sup> The complaint alleges that Spokeo failed to make those disclosures.<sup>42</sup>

Third, regulations promulgated under the FCRA require a CRA to “have a streamlined process for accepting and processing consumer requests for annual file disclosures, including enabling consumers to request annual file disclosures by a toll-free telephone number.”<sup>43</sup> The complaint alleges that Spokeo has not done this.<sup>44</sup>

The complaint alleges that the plaintiff has “suffered harm as described herein” as a result of the enumerated violations of the FCRA.<sup>45</sup> The complaint further alleges that Spokeo has caused Robins “actual and/or imminent harm by creating, displaying, and marketing inaccurate consumer reporting information about” Robins. Because he is unemployed, he has lost money and “has suffered actual harm in the form of anxiety, stress, concern, and/or worry about his diminished employment prospects.”<sup>46</sup>

The FCRA authorizes a private right of action to a consumer against any person who negligently or willfully violates “any requirement imposed [under the FCRA] with respect to [that] consumer.”<sup>47</sup> For negligent violations, the FCRA authorizes only “actual damages

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<sup>40</sup> *Id.*

<sup>41</sup> *Id.* (citing 15 U.S.C. § 1681b(b)(1) (2012)).

<sup>42</sup> *See id.* at 13.

<sup>43</sup> *Id.* at 14.

<sup>44</sup> *See* First Amended Complaint, *supra* note 31, at 14.

<sup>45</sup> *Id.* at 13–14.

<sup>46</sup> *Id.* at 8.

<sup>47</sup> 15 U.S.C. §§ 1681n, 1681o (2012).

sustained by the consumer.”<sup>48</sup> But if the defendant “*willfully* fails to comply with any requirement imposed under [the FCRA] with respect to any consumer,” the defendant “is liable to that consumer” for “any actual damages sustained” *or* statutory “damages of not less than \$100 and not more than \$1,000.”<sup>49</sup>

Spokeo moved to dismiss the original complaint pursuant to both Rule 12(b)(6), claiming it was not a “consumer reporting agency under the FCRA,” and Rule 12(b)(1), claiming Robins had no standing because he had “not alleged that he has in fact suffered any injury due to Spokeo’s alleged conduct.”<sup>50</sup> Quoting in part from the original complaint, the district court on January 27, 2011 granted the motion to dismiss for lack of standing:

At this point, Plaintiff has not suffered an injury in fact because Plaintiff has failed to allege that Defendant has caused him any actual or imminent harm. Plaintiff only expresses that he has been unsuccessful in seeking employment, and that he is “concerned that the inaccuracies [in] his report *will affect* his ability to obtain credit, employment, insurance, and the like.” The Supreme Court has “said many times before” that [a]llegations of possible future injury do not satisfy the [standing] requirements of Art. III.” Thus, Plaintiff’s concern that he will be adversely affected by Defendant’s website in the future, is an insufficient injury to confer standing.<sup>51</sup>

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<sup>48</sup> 15 U.S.C. §1681o(a)(1) (2012).

<sup>49</sup> 15 U.S.C. §1681n(a)(1)(A) (2012) (emphasis added). The FCRA also allows punitive damages for willful violations. Punitive damages are not at issue in *Spokeo*.

<sup>50</sup> *Robins v. Spokeo, Inc.*, No. CV10-05306 ODW(AGRx), 2011WL 597867, at \*1–3 (C.D. Cal. Jan. 27, 2011).

<sup>51</sup> *Id.* at \*4 (emphasis in original) (citations omitted),

Therefore, the district court dismissed the original complaint for lack of subject matter jurisdiction, without prejudice, but allowed Robins the opportunity to amend his complaint, which he did. The First Amended Complaint added a clearer explanation of the harm to Robins caused by Spokeo’s FCRA violations: “actual and/or imminent harm by creating, displaying, and marketing inaccurate consumer reporting information about” Robins, the loss of money, and “actual harm in the form of anxiety, stress, concern, and/or worry about his diminished employment prospects.”<sup>52</sup>

Spokeo then moved to dismiss the First Amended Complaint, again pursuant to Rules 12(b)(1) and 12(b)(6). This time, on May 11, 2011, the district court denied the 12(b)(1) motion, holding that the First Amended Complaint had added sufficient allegations to confer standing:

[T]he Court finds that Plaintiff has alleged sufficient facts to confer Article III standing. Specifically, Plaintiff has alleged an injury in fact—the “marketing of inaccurate consumer reporting information about Plaintiff—that is fairly traceable to Defendant’s conduct—alleged FCRA violations - and that is likely to be redressed by a favorable decision from this Court.”<sup>53</sup>

But four months later, in September 2011, after Spokeo moved to certify an interlocutory appeal, the district court changed its mind about Robins’s standing in a one-paragraph order:

Upon further review, the Court finds it necessary to strike the standing discussion from its May 11, 2011 Order. In its stead, the Court reinstates the January 27,

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<sup>52</sup> First Amended Complaint, *supra* note 31, at 11–12.

<sup>53</sup> *Robins v. Spokeo, Inc.*, No. CV10-05306 ODW(AGR), 2011 WL 1793334 (C.D. Cal. May 11, 2011), at \*2. The district court then reached and rejected Spokeo’s 12(b)(6) arguments—that it was not a consumer reporting agency under the FCRA and that it was immune from liability under 47 U.S.C. §230(c)—based on the First Amended Complaint’s allegations. *Id.* at \*2–3.



2011 Order, which found that Plaintiff fails to establish standing. Among other things, the alleged harm to Plaintiff's employment prospects is speculative, attenuated and implausible. Mere violation of the Fair Credit Reporting Act does not confer Article III standing, moreover, where no injury in fact is properly pled. Otherwise, federal courts will be inundated by web surfers' endless complaints. Plaintiff also fails to allege facts sufficient to trace his alleged harm to Spokeo's alleged violations. In short, Plaintiff fails to establish his standing before this Court. This action is therefore DISMISSED. Spokeo's motion for certification of appeal is MOOT.<sup>54</sup>

The January 27, 2011 Order had dismissed the original complaint, which had been superseded by the First Amended Complaint, so it is unclear how the district court could simply “reinstate” an order that did not address the operative pleading – but this is not an issue in the Supreme Court. Suffice it to say that the quality of the district court's analysis on Article III standing leaves much to be desired.

In the Ninth Circuit, Judge O'Scannlain, for a unanimous panel, characterized the issue on appeal as "whether an individual has Article III standing to sue a website's operator under the Fair Credit Reporting Act for publishing inaccurate personal information about himself."<sup>55</sup> Spokeo's *amici* had already begun to hover,<sup>56</sup> but the Ninth Circuit resisted their arguments and followed a conventional standing analysis.

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<sup>54</sup> *Robins v. Spokeo, Inc.*, No. CV10-05306 ODW(AGRx), 2011 WL 11562151 (C.D. Cal. Sept. 19, 2011) (citations omitted).

<sup>55</sup> *Robins v. Spokeo, Inc.*, 742 F.3d 409, 410 (9th Cir. 2014), *cert. granted*, 135 S. Ct. 1892 (2015) (Mem.).

<sup>56</sup> *Id.* (noting that Experian Information Solutions, Inc. and Consumer Data Industry Association filed *amicus* briefs in the Ninth Circuit in support of the defendant-appellee Spokeo).

The Ninth Circuit identified the provisions of the FCRA that the complaint alleged Spokeo had violated.<sup>57</sup> Proceeding first to the question of statutory standing,<sup>58</sup> the court noted:

In standing cases that analyze statutory rights, our precedent establishes two propositions. First, Congress's creation of a private cause of action to enforce a statutory provision implies that Congress intended the enforceable provision to create a statutory right. Second, the violation of a statutory right is usually a sufficient injury in fact to confer standing.

....

The scope of the cause of action determines the scope of the implied statutory right. When, as here, the statutory cause of action does not require proof of actual damages, a plaintiff can suffer a violation of the statutory right without suffering actual damages.<sup>59</sup>

It should be noted that in the Supreme Court, Spokeo does not contest Robins' statutory standing. Spokeo does, however, seek to blur

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<sup>57</sup> *Id.* at 412.

<sup>58</sup> A leading treatise on federal procedure explains that discussions of “standing” are frequently confused because the term can be used to refer to three different concepts: constitutional standing under Article III (the requirement of a “case” or a “controversy”), statutory standing (whether a party can invoke a statutory cause of action), and “prudential” standing (where, although there is jurisdictional standing, the court refrains from deciding the case due to concerns about its proper governmental role). CHARLES ALAN WRIGHT & CHARLES H. KOCH, JR., FEDERAL PRACTICE & PROCEDURE §8411 (2015). The petitioner in *Spokeo* is staking its case on Article III, jurisdictional standing, and this article is likewise focused on constitutional standing.

<sup>59</sup> *Spokeo, Inc.*, 742 F.3d at 412–13 (citations omitted).

the careful distinction the Ninth Circuit made between statutory and constitutional standing.<sup>60</sup>

After its treatment of statutory standing, the Ninth Circuit then turned to the question of Article III standing, explicitly recognizing that “the Constitution limits the power of Congress to confer standing.”<sup>61</sup> Citing *Lujan*, the court stated that Congress could “elevat[e] to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law.”<sup>62</sup> The question then became “whether violations of statutory rights created by the FCRA are ‘concrete, *de facto* injuries’ that Congress can so elevate.”<sup>63</sup>

Describing the Sixth Circuit case of *Beaudry v. TeleCheck Services, Inc.*,<sup>64</sup> the Ninth Circuit stated:

The court identified two constitutional limitations on congressional power to confer standing. First, a plaintiff “must be ‘among the injured,’ in the sense that she alleges the defendants violated her statutory rights.” Second, the statutory right at issue must protect against “individual, rather than collective, harm.” The *Beaudry* court held that the plaintiff satisfied both of these requirements.

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<sup>60</sup> See Brief for Petitioner, *supra* note 11, at 6. Spokeo’s merits brief characterizes the Ninth Circuit as holding that “the violation of a statutory right is usually a sufficient injury in fact to confer standing,” blurring it with the Ninth Circuit’s constitutional analysis. But it is clear from the quoted language in text and the structure of the Ninth Circuit’s opinion that the Ninth Circuit was speaking only of statutory standing, not constitutional standing.

<sup>61</sup> *Spokeo, Inc.*, 742 F.3d at 413.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 413; See *Beaudry v. TeleCheck Services, Inc.*, 579 F.3d 702, 707 (6th Cir. 2009), *cert. denied*, 559 U.S. 1092 (2010). Judge Jeffrey Sutton, a conservative jurist who was appointed to the Court of Appeals by President George W. Bush, authored the unanimous *Beaudry* opinion.

Robins is in the same position. First, he alleges that Spokeo violated *his* statutory rights, not just the statutory rights of other people, so he is “among the injured.” Second, the interests protected by the statutory rights at issue are sufficiently concrete and particularized that Congress can elevate them. . . . Robins's personal interests in the handling of his credit information are individualized rather than collective. Therefore, alleged violations of Robins's statutory rights are sufficient to satisfy the injury-in-fact requirement of Article III.<sup>65</sup>

Finally, the Ninth Circuit held that “Robins has adequately pled causation and redressability” for purposes of Article III standing:

Where statutory rights are asserted, however, our cases have described the standing inquiry as boiling down to “essentially” the injury-in-fact prong. When the injury in fact is the violation of a statutory right that we inferred from the existence of a private cause of action, causation and redressability will usually be satisfied. First, there is little doubt that a defendant's alleged violation of a statutory provision “caused” the violation of a right created by that provision. Second, statutes like the FCRA frequently provide for monetary damages, which redress the violation of statutory rights.<sup>66</sup>

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<sup>65</sup> *Spokeo, Inc.*, 742 F.3d at 413–14.

<sup>66</sup> *Id.* at 414.

The Ninth Circuit noted in a footnote: “Because we determine that Robins has standing by virtue of the alleged violations of his statutory rights, we do not decide whether harm to his employment prospects or related anxiety could be sufficient injuries in fact.”<sup>67</sup> A further footnote noted the obvious—because the court was ruling on a motion to dismiss, it stated “we do not intimate any opinion on the merits of this case.”<sup>68</sup>

**B. The “Question Presented” Ignores the Procedural Posture of the Case and the Particular Violations of the FCRA Alleged in the Case.**

Recall the QP by Spokeo to the Supreme Court: “Whether Congress may confer Article III standing upon a plaintiff who suffers no concrete harm, and who therefore could not otherwise invoke the jurisdiction of a federal court, by authorizing a private right of action based on a bare violation of a federal statute.” The foregoing description of the lower court proceedings in *Spokeo* shows how overbroad the QP is.

The only question addressed below, and decided differently by the district court and the court of appeals, is whether one individual’s complaint alleges sufficient injury under the FCRA to create Article III standing. From this simple, run-of-the-mill pleadings decision about one plaintiff’s FCRA allegations has sprung a sweeping indictment by corporate-lawyer activists of all statutes imposing statutory damages (and by extension, of class actions seek to aggregate statutory damages).<sup>69</sup> As the Solicitor General put it in the United States’ brief opposing the grant of certiorari:

The petition for a writ of certiorari virtually ignores the specific statutory elements of respondent’s FCRA cause of action and the specific allegations of respondent’s

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<sup>67</sup> *Id.* at 414 n.3.

<sup>68</sup> *Id.* at 414 n.4.

<sup>69</sup> *See infra* Part IV.

complaint. Petitioner instead seeks to litigate the abstract question whether “a bare violation of a federal statute” satisfies Article III even when the plaintiff has ‘suffer[ed] no concrete harm.’”<sup>70</sup>

Contrary to the QP’s implication, the Fair Credit Reporting Act does not create a private right of action for its “bare” violation: not just anyone can sue another person for violating the FCRA. The FCRA only grants a consumer a private right of action against a person who willfully violates the FCRA “with respect to” that consumer.<sup>71</sup>

In that sense the cause of action created by the FCRA greatly differs from the broad “citizen-suit” provisions of the environmental statutes on which the modern doctrine of Article III standing cut its teeth. For example, the Endangered Species Act (“ESA”), under which the seminal case of *Lujan v. Defenders of Wildlife* arose, enacted a “citizen-suit” provision whereby “any person may commence a civil suit on his own behalf . . . to enjoin any person . . . who is alleged to be in violation of any provision of this chapter.”<sup>72</sup> The Supreme Court held that the

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<sup>70</sup> Brief for the United States as Amicus Curiae at 7, *Spokeo, Inc. v. Robins*, No. 13-1339 (U.S. Mar. 15, 2015). See Stephen Wermiel, *SCOTUS For Law Students: Standing and the Constitution*, SCOTUS BLOG (Aug. 6, 2015, 12:01 AM), [http://www.scotusblog.com/2015/08/scotus-for-law-students-standing-and-the-constitution/?utm\\_source=feedburner&utm\\_medium=email&utm\\_campaign=Feed%3A+scotusblog%2FpFXs+%28SCOTUSblog%29](http://www.scotusblog.com/2015/08/scotus-for-law-students-standing-and-the-constitution/?utm_source=feedburner&utm_medium=email&utm_campaign=Feed%3A+scotusblog%2FpFXs+%28SCOTUSblog%29) (explaining that “the Solicitor General filed a brief in which he argued that Robins had asserted sufficient actual injury from the publication of false information about himself, and he suggested that the major constitutional question raised by Spokeo about Congress’s power to create standing is not really presented by the case. . . . [B]riefs supporting Spokeo seemingly argu[ed] right past Robins and the federal government’s view, and perhaps past the Ninth Circuit, too.”).

<sup>71</sup> 15 U.S.C. § 1681n (providing that “any person who willfully fails to comply with any requirement imposed [by the FCRA] with respect to any consumer is liable to that consumer”).

<sup>72</sup> *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 571–72 (1992).

invocation of this broad statutory cause of action alone was not sufficient for standing: the plaintiff himself must have suffered some sort of harm traceable to a violation of the Endangered Species Act.<sup>73</sup>

The FCRA does not operate like the ESA. The FCRA requires the violation of its terms “with respect to” a particular consumer before that consumer may sue. Thus, the “bare” violation of the FCRA already includes a connection to a particular plaintiff.

Indeed, it is difficult to find a consumer-protection statute such as the FCRA that contains a “citizen-suit” provision such as the one in the ESA. Most consumer-protection or deceptive-practices statutes grant a private right of action only to an individual who is a victim of the statutory violation, not to the public at large.<sup>74</sup> This makes it unnecessary to impose an “injury-in-fact” requirement for standing, as the Court

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<sup>73</sup> *Id.* at 590.

<sup>74</sup> *See, e.g.*, 12 U.S.C. § 2607(d)(2) (2012) (stating that “any person or persons who violate the prohibitions or limitations of this section [the RESPA kickback prohibition] shall be jointly and severally liable *to the person or persons charged for the settlement service involved in the violation* in an amount equal to three times the amount of any charge paid for such settlement service.”) (emphasis added); 15 U.S.C. §1125(1)(A)(B) (2012) (stating that “any person who, on or in connection with any goods or services, . . . uses in commerce any . . . false designation of origin [or] false or misleading description of fact, . . . which--(A) is likely to cause confusion . . . shall be liable *in a civil action by any person who believes that he or she is or is likely to be damaged by such act.*”) (emphasis added); 15 U.S.C. §1125(d)(1)(A) (2012) (stating that “a person shall be liable in a civil action *by the owner of a mark* . . . if, without regard to the goods or services of the parties, that person--(i) has a bad faith intent to profit from that mark, . . . and (ii) registers . . . or uses a domain name that--(I) in the case of a mark that is distinctive at the time of registration of the domain name, is identical or confusingly similar to that mark . . . .”) (emphasis added); 29 U.S.C. § 1132(c)(1) (2012) (stating that “any administrator [of an ERISA plan] . . . who fails or refuses to comply with a request for any information which such administrator is required by this subchapter to furnish to a participant or beneficiary . . . by mailing the material requested to the last known address of the requesting participant or beneficiary within 30 days after such request may in the court's discretion *be personally liable to such participant or beneficiary* in the amount of up to \$100 a day from the date of such failure or refusal . . .”) (emphasis added).

found necessary under the ESA, which on its face authorized anyone to sue anyone who was allegedly violating the ESA.<sup>75</sup>

Further, Spokeo and its *amici* uncritically apply their argument to a host of federal statutes other than the FCRA, arguing that any legislative authorization of statutory damages without actual damages violates Article III’s “injury in fact” requirement,<sup>76</sup> and is even an invasion of the Executive Branch’s responsibility to enforce regulatory law.<sup>77</sup> One has to admire their chutzpah. They have found a sharp new suit in which to clothe their anti-regulatory fervor.<sup>78</sup> If it works for the FCRA, they are hoping that it will also work for all state and federal statutes providing for statutory damages.

But even if the Court wanted to decide anything about any statute that is not part of the case before it, statutes allowing statutory

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<sup>75</sup> Cf. Hessick, *supra* note 10, at 277 (citations omitted) (explaining that “in requiring a factual injury to limit standing in public rights cases, the Court has failed to distinguish cases in which plaintiffs seek to vindicate violations of their private rights. . . The purpose of the factual injury requirement is to ensure that plaintiffs are asserting their own private rights. The requirement therefore is superfluous in cases alleging the violation of a private right.”).

<sup>76</sup> E.g., Brief of the Chamber of Commerce of the United States of America et al. as Amici Curiae in Support of Petitioner at 6, *Spokeo, Inc. v. Robins*, No. 13-1339 (U.S. July 9, 2015) [hereinafter *Merits Brief of the Chamber of Commerce*] (explaining that “there are dozens of federal laws similar to the one at issue here, all of which could be read to authorize suit against businesses by plaintiffs who have suffered no actual, concrete, or particularized injury.”).

<sup>77</sup> E.g., Brief for Washington Legal Foundation as Amicus Curiae In Support of Petitioner, *supra* note 18, at 17.

<sup>78</sup> See Karlan, *supra* note 12, at 61 (highlighting that *First American v. Edwards*, where business interests made the same “injury in fact” argument as they are making in *Spokeo*, “float[ed] the possibility of a new conception of injury-in-fact,” thus “ha[ving] the potential to undermine an enforcement technique Congress has been using in a variety of fields: having proscribed certain conduct, Congress then confers a statutory right to sue on individuals subjected to the conduct without requiring proof of injury beyond violation of the statutory duty.”).



damages are surprisingly varied.<sup>79</sup> As noted above, the statutes use different language to create the private right of action. The statutes also differ in the prerequisites for the imposition of statutory damages. In addition, many statutes explicitly limit recovery of statutory damages in the case of class actions.

A review of some of the other federal statutes imposing statutory damages reveals at least five distinct models:

- Statutory damages alone.<sup>80</sup>

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<sup>79</sup> See PRINCIPLES OF THE LAW: AGGREGATE LITIGATION, 40–41 (2010), at §1.03, Comment e & Reporters’ Notes to Comment e (providing that “a judge must determine whether a decision to permit aggregation would advance or impede a statutory scheme [of statutory minimum damages]. There cannot be a categorical answer that would apply across all statutory causes of action.”).

<sup>80</sup> See, e.g., Cyberpiracy, 15 U.S.C. § 1117(d) (2012) (noting that in case of a violation of 15 U.S.C. § 1125(d)(1), allows “statutory damages in the amount of not less than \$1,000 and not more than \$100,000 per domain name”); ERISA, 29 U.S.C. §1132(c)(1)(B) (2012) (stating that for failure to respond to request for information, up to \$100 a day may be awarded from the date of such failure or refusal, and each violation “with respect to any single participant or beneficiary, shall be treated as a separate violation”); Real Estate Settlement Procedures Act of 1974, 12 U.S.C. § 2607(d)(2) (2012) (stating that “any person or persons who violate the prohibitions or limitations of this section [anti-kickback] shall be jointly and severally liable to the person or persons charged for the settlement service involved in the violation in an amount equal to three times the amount of any charge paid for such settlement service”).

- Actual damages *or* statutory damages, without specifying if the minimum amount of statutory damages applies in a class action.<sup>81</sup> This is the model in the FCRA.<sup>82</sup>
- Actual damages *and* statutory damages (perhaps implying that plaintiff must show actual damages in order to obtain statutory damages).<sup>83</sup>

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<sup>81</sup> *See, e.g.*, AntiCounterfeiting Consumer Protection Act of 1996, 15 U.S.C. § 1117(c) (2012) (stating that instead of actual damages and profits, statutory damages of not less than \$500 or more than \$100,000 per counterfeit mark may be awarded); Copyright Infringement, 17 U.S.C. § 504(a)(1) (2012) (stating that infringer is liable for either the copyright “owner’s actual damages and any additional profits” of the infringer, or statutory damages); Credit Repair Organization Act, 15 U.S.C. § 1679g (2012) (stating that credit repair organization may be liable for any actual damage sustained by the plaintiff, or any amount paid by the plaintiff to the credit repair organization); Telephone Consumer Protection Act, 47 U.S.C. § 227(3)(B) (2012) (stating that actual monetary loss from a violation, or \$500 in damages for each violation, whichever is greater, may be awarded); Federal Odometer Act, 49 U.S.C. § 32710 (2012) (stating that with intent to defraud, violator is “liable for three times the actual damages or \$10,000, whichever is greater”); Wiretap Act, 18 U.S.C. § 2520(c)(1)(A) (2012) (stating that “the greater of the sum of actual damages suffered by the plaintiff, or statutory damages of not less than \$50 and not more than \$500” may be awarded).

<sup>82</sup> 15 U.S.C. § 1681n(a)(1)(A) (2012) (stating that “any person who willfully fails to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer in an amount equal to . . . 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”).

<sup>83</sup> *See, e.g.*, Age Discrimination in Employment Act, 29 U.S.C. § 626 (2012) (stating that court may grant actual damages and same amount in liquidated damages if violation is willful); Fair Labor Standards Act, 29 U.S.C. § 216(b) (2012) (explaining that court may allow recovery of unpaid time (a form of actual damages) plus the same amount as liquidated damages if violation is willful); Right to Financial Privacy Act, 12 U.S.C. § 3417(a)(1)(2) (2012) (providing that a financial institution is liable to the customer if it obtained or disclosed financial records to whom such records relate in an amount equal to “\$100 without regard to the volume of records involved” and “any actual damages sustained by the customer as a result of the disclosure”).

- Actual damages, *but not less than* a specified amount.<sup>84</sup>
- Actual damages *and/or* statutory damages in an individual case, but *limiting the total liability in a class action*.<sup>85</sup>

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<sup>84</sup> See, e.g., Cable Communications Privacy Act, 47 U.S.C. § 551(f)(A) (2012) (stating that “actual damages, but not less than liquidated damages computed at the rate of \$100 a day for each day of violation or \$1,000, whichever is higher” may be awarded); Drivers’ Privacy Protection Act, 18 U.S.C. § 2724(b)(1) (2012) (stating that “actual damages, but not less than liquidated damages in the amount of \$2,500” may be awarded); Electronic Communications Privacy Act, 18 U.S.C. § 2707(c) (2012) (stating that, if there is a knowing or intentional state of mind, the plaintiff is entitled to actual damages plus profits, but in no case shall a person entitled to recover receive less than \$1,000); Video Privacy Protection Act, 18 U.S.C. § 2710(c)(2)(A) (2012) (stating that “actual damages, but not less than liquidated damages in an amount of \$2,500” may be awarded).

<sup>85</sup> See, e.g., Consumer Leasing Act, 15 U.S.C. § 1640, 1667d (2012) (stating that actual damages or some multiple of the finance charge may be awarded, depending on the lease provision violated, but places limits on class actions); Electronic Funds Transfer Act, 15 U.S.C. § 1693m (2012) (stating that actual damages or in case of individual, \$100 to \$1,000 per plaintiff, may be awarded, but the total recovery in a class action is limited to the lesser of \$500,000 or 1% of net worth; also has sanctions against plaintiff for bad faith claim); Expedited Funds Availability, 12 U.S.C. § 4010(a)(2) (2012) (stating that actual damages for individual, between \$100 and \$1000, may be awarded; for class, award limited to lesser of \$500,000 or 1% of net worth); Fair Debt Collection Practices Act, 15 U.S.C. § 1692k(B) (stating that individual statutory damages may be awarded, but if class action, total liability for class is the lesser of \$500,000 or 1% of debt collector’s net worth); Homeowner Protection Law, 12 U.S.C. § 4907(a)(A)(B) (2012) (allowing actual damages and for an individual, statutory damages up to \$2000; for class action, total not to exceed lesser of \$500,000 or 1% of net worth); Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. § 1854(c)(1) (2012) (allowing actual damages, or statutory damages of up to \$500 per plaintiff per violation, except that in a class action, no more than the lesser of up to \$500 per plaintiff per violation, or up to \$500,000); Truth-in-Lending Act, 15 U.S.C. § 1640 (2012) (stating that individual can seek statutory damages; but if class action, no minimum recovery applies and total liability limited to the lesser of \$1,000,000 or 1% of creditor’s net worth).

The QP overreaches in its suggestion that all statutes that authorize statutory damages without proof of actual damages are beyond Congress’ constitutional authority. Such statutes vary widely in their purposes, language, and operation. It is particularly beguiling for Spokeo and its *amici* to use the aggregation of statutory damages in a class action to cast aspersions on statutory damages in general. Many such statutes already impose a limit on statutory damages in the context of a class action.<sup>86</sup>

### III. THE ONGOING HIJACKING OF ARTICLE III STANDING DOCTRINE BY THE TERM “INJURY IN FACT”

The foregoing discussion attempted to show that the QP to the Supreme Court in the *Spokeo* case goes far beyond the only statute involved in the case and is inconsistent with the procedural posture of the case. This part of the article looks more deeply at the term “injury in fact.” Underlying Spokeo’s Article III standing argument is a conflation of the historical legal difference between “injury” and “harm.” The Supreme Court, when it first used the unfortunate and self-contradictory term “injury in fact,” did not intend to deny standing to one whose statutory right had been transgressed. And the recent sudden blooming of the term “injury in law” (often used in a demeaning way, as in a “mere injury in law”), further muddies the waters.

#### A. The Etymology of the Words “Injury” and “Damage”

Considering the Latin roots of the word “injury” and the historical difference in the law between the terms “injury” and “damage,” the unfortunate term “injury in fact” is an oxymoron. It is therefore not surprising that the term “injury in fact” has been the source of endless interpretative difficulties, nor that it is now being misused in a way that the Court did not likely intend when it first coined the term. Compounding the confusion sown by “injury in fact,” corporate

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<sup>86</sup> *See id.*

litigators have also seized on Chief Justice Roberts’ recent “novel”<sup>87</sup> use of a new term, “injury in law,” to denigrate the punishment of a “mere” statutory violation.

In common parlance, “injury” and “damage” may be used as synonyms, but their historical usage in the law reveals two separate concepts. The word “injury” comes from the Latin “*injuria*,” which combines the negative prefix “*in*” (not) with “*jur*” (law) or “*jus*” (right),<sup>88</sup> so that “injury” can literally be rendered “contrary to law” or “against a legal right.”<sup>89</sup> Thus, the first definition of “injury” in *Black’s Law Dictionary* is “[t]he violation of another’s legal right, for which the law provides a remedy.”<sup>90</sup> By contrast, “damage” stems from the Latin “*damnum*,” defined as a “loss”<sup>91</sup> or “hurt.”<sup>92</sup>

*Black’s*, in its definition of “injury,” continues, “[s]ome authorities distinguish *harm* from *injury*, holding that while *harm* denotes any personal loss or detriment, *injury* involves an actionable invasion of a legally protected interest.”<sup>93</sup> For example, the *Second Restatement of Torts*

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<sup>87</sup> See Karlan, *supra* note 12, at 57.

<sup>88</sup> *Injury*, OXFORD ENGLISH DICTIONARY (2015).

<sup>89</sup> See, e.g., *Wrong*, BLACK’S LAW DICTIONARY (10th ed. 2014) (citing JOHN SALMOND, JURISPRUDENCE 227 (1947)) (stating that “wrong” is “[a] synonym of . . . injury, in its true and primary sense of *injuria* (that which is contrary to *jus*”). The first definition in the Oxford English Dictionary for “injury” is “Wrongful action or treatment; violation or infringement of another’s rights; suffering or mischief willfully and unjustly inflicted.” *Injury*, *supra* note 88, (citing WILLIAM BLACKSTONE, III COMMENTARIES ON THE LAWS OF ENGLAND 2 (1768)) (“Private wrongs . . . are an infringement or privation of the private or civil rights belonging to individuals . . . and are thereupon frequently termed civil injuries.”).

<sup>90</sup> *Injury*, BLACK’S LAW DICTIONARY (10th ed. 2014).

<sup>91</sup> *Damnum*, BLACK’S LAW DICTIONARY (10th ed. 2014); *Damages*, BLACK’S LAW DICTIONARY (10th ed. 2014) (defining the plural “damages” to mean “[m]oney claimed by, or ordered to be paid to, a person as compensation for loss or injury”).

<sup>92</sup> *Damage*, OXFORD ENGLISH DICTIONARY (2015) (stating that the etymology of “damage” includes the Latin “*damnum*,” or “loss, hurt”).

<sup>93</sup> *Injury*, *supra* note 90.

preserves this historical distinction between “injury,” as violation of a legal right, and “harm,” as detriment in fact:

*“Injury” and “harm” contrasted.* The word “injury” is used throughout the Restatement of this Subject to denote the fact that there has been an invasion of a legally protected interest which, if it were the legal consequence of a tortious act, would entitle the person suffering the invasion to maintain an action of tort. It differs from the word “harm” in this: “harm” implies the existence of loss or detriment in fact, which may not necessarily be the invasion of a legally protected interest. . . . It is desirable to have a word to denote the type of result which, if the act which causes it is tortious, is sufficient to sustain an action *even though there is no harm for which compensatory damages can be given*. The meaning of the word “injury,” as here defined, differs from the sense in which the word “injury” is often used, to indicate that the invasion of the interest in question has been caused by conduct of such a character as to make it tortious.<sup>94</sup>

The Second Circuit also recognized the difference between “injury” and “harm” in *In re Agent Orange*: “In the strict legal sense, injury means a wrongful invasion of legal rights, and is not concerned with the hurt or damage resulting from such invasion.”<sup>95</sup>

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<sup>94</sup> RESTATEMENT (SECOND) OF TORTS §7 cmt. a (AM. LAW INST. 1965) (emphasis added).

<sup>95</sup> *In re Agent Orange Prod. Liab. Litig.*, 996 F.2d 1425, 1433 (2d Cir. 1993) (emphasis added) (citations and internal quotation marks omitted), *cert. denied sub nom. Ivy v. Diamond Shamrock Chemicals Co.*, 510 U.S. 1140 (1994).

The crucial distinction between “injury” and “damage” means that there can be one without the other: there can be “*injuria absque damno*” (injury without damage)<sup>96</sup> or there can be “*damnum absque injuria*” (damage without wrongful act).<sup>97</sup> Despite the confusing similarity of these two Latin phrases, they mean entirely different things. “*Injuria absque damno*,” or injury without damage, means the violation of a legal right without resulting harm. For some causes of action, the lack of resulting harm did not defeat the lawsuit; the violation of the legal right itself sufficed to sustain a cause of action.<sup>98</sup> Again, the *Second Restatement of Torts* provides examples:

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<sup>96</sup> BLACK’S LAW DICTIONARY (10th ed. 2014) defines *injuria absque damno* as:

Latin “injury without damage” . . . A legal wrong that will not sustain a lawsuit because no harm resulted from it. — Also termed *injuria sine damno*. *Cf.* *damnum sine injuria*. “Just as there are cases in which damage is not actionable as a tort (*damnum sine injuria*), so conversely there are cases in which behavior is actionable as a tort, although it has been the cause of no damage at all (*injuria sine damno*). Torts are of two kinds — namely, those which are actionable per se, and those which are actionable only on proof of actual damage resulting from them. Thus the act of trespassing upon another’s land is actionable even though it has done the plaintiff not the slightest harm. Similarly, a libel is actionable per se, while slander (that is to say, oral as opposed to written defamation) is in most cases not actionable without proof of actual damage.” R.F.V. Heuston, *Salmond on the Law of Torts* 14 (17th ed. 1977).

*Id.*

<sup>97</sup> BLACK’S LAW DICTIONARY (10th ed. 2014) defines *damnum absque injuria* as:

[D]amnum absque injuria (dam-nəm ab-skwee in-joor-ee-ə) [Latin “damage without wrongful act”] (17c) Loss or harm that is incurred from something other than a wrongful act and occasions no legal remedy. • An example is a loss from fair trade competition. — Also termed *damnum sine injuria*; *absque injuria damnum*; *absque injuria*. *Cf.* INJURIA ABSQUE DAMNO.

*Id.*

<sup>98</sup> Hessick, *supra* note 10, at 280.

The most usual form of injury is the infliction of some harm; but there may be an injury although no harm is done. Thus, any intrusion upon land in the possession of another is an injury, and, if not privileged, gives rise to a cause of action even though the intrusion is beneficial, or so transitory that it constitutes no interference with or detriment to the land or its beneficial enjoyment. So too, the mere apprehension of an intentional and immediate bodily contact, whether harmful or merely offensive, is as much an “injury” as a blow which breaks an arm.<sup>99</sup>

The proponents of *Spokeo*’s argument—that the violation of a statutory right without actual harm will not support Article III standing—have sometimes cited the term “*injuria absque damno*” to support their position, but the citation is incomplete and misleading. For example, the dissent in *Hammer v. Sam’s East, Inc.* misquoted *Black’s Law Dictionary* by stating that it defined “*injuria absque damno*” as “injury without damage, [a] legal wrong’ which ordinarily ‘will not sustain a lawsuit because *no harm resulted* from it.”<sup>100</sup> But that is not what *Black’s Law Dictionary* says. The dissent inserted the words “which ordinarily” into the definition and omitted the subsequent discussion, which explains that although one kind of tort is “actionable only on proof of

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<sup>99</sup> RESTATEMENT (SECOND) OF TORTS §7, cmt. a (emphasis added). See also WAYNE R. LAFAVE, 1 SUBSTANTIVE CRIMINAL LAW § 1.3 n.9 (2d ed.) (stating that “in the case of some torts the plaintiff is not required to prove actual damages: libel; slander where the spoken words are actionable per se; assault producing apprehension but not fear; malicious prosecution; trespass; nuisance. With most of these the reason may well be that pecuniary damages are apt to be substantial but hard to prove.”).

<sup>100</sup> *Hammer v. Sam’s East, Inc.*, 754 F.3d 492, 499 (8th Cir. 2014) (the majority held that “an actual, individualized invasion of a statutory right . . . satisfie[s] the injury-in-fact requirement of Article III standing.”), *cert. denied*, 135 S. Ct. 1175 (2015).



actual damage resulting from” the tort, another kind of tort is “actionable *per se*,” requiring no proof of actual damage:

Just as there are cases in which damage is not actionable as a tort (*damnum sine injuria*), so conversely there are cases in which behaviour is actionable as a tort, although it has been the cause of no damage at all (*injuria sine damno*). Torts are of two kinds — namely, those which are actionable *per se*, and those which are actionable only on proof of actual damage resulting from them. Thus the act of trespassing upon another's land is actionable even though it has done the plaintiff not the slightest harm. Similarly, a libel is actionable *per se*, while slander (that is to say, oral as opposed to written defamation) is in most cases not actionable without proof of actual damage.<sup>101</sup>

Another case mistakenly characterized this as the “no harm, no foul” rule, stating categorically that because “plaintiffs suffered no economic loss,” they could not obtain a monetary recovery.<sup>102</sup> Again, the court misquoted the same *Black’s* definition as the dissent in *Hammer*.<sup>103</sup>

The confusingly similar phrase “*damnum absque injuria*,” or damage without injury, means the suffering of harm without having any legal right to recompense for the harm. Thus, a long-time boyfriend or girlfriend can break up with his or her partner, causing the other damage in the form of serious emotional distress to the point of physical illness, but there is no injury in the sense of an actionable cause of action for being dumped. Such a claim would fall prey to a motion to dismiss for

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<sup>101</sup> *Injuria Absque Damno*, BLACK'S LAW DICTIONARY (10th ed. 2014) (citing R.F.V. HEUSTON, SALMOND ON THE LAW OF TORTS 14 (17th ed. 1977)).

<sup>102</sup> *Mira v. Nuclear Measurements Corp.*, 107 F.3d 466, 473 (7th Cir. 1997).

<sup>103</sup> *Id.* at 473 n.7.

failure to state a claim on which relief may be granted. As more classically explained:

There are many forms of harm of which the law takes no account. Damage so done and suffered is called *damnum sine injuria*, and the reasons for its permission by the law are various and not capable of exhaustive statement. For example, the harm done may be caused by some person who is merely exercising his own rights; as in the case of the loss inflicted on individual traders by competition in trade, or where the damage is done by a man acting under necessity to prevent a greater evil.<sup>104</sup>

Starting with *Marbury v. Madison*, older Supreme Court cases employed this meaning of the word “damage” as a harm that may or may not be actionable and “injury” as a wrong that results in the violation of a legal right.<sup>105</sup> For example, in *Alabama Power Co. v. Ickes*, the plaintiffs

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<sup>104</sup> *Injuria Absque Damno*, *supra* note 101. See also Joseph William Singer, *The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld*, 1982 WIS. L. REV. 975, 1026 (1982) (citing EDWARD WEEKS, *THE DOCTRINE OF DAMNUM ABSQUE INJURIA CONSIDERED IN ITS RELATION TO THE LAW OF TORTS* (1879)), which states:

To constitute a tort, two things must concur—actual or legal damage to the plaintiff, and a wrongful act committed by the defendant. Weeks defined *damnum* or damage as “the loss caused by one person to another, or to his property, either with the design of injuring him, or with negligence and carelessness, or by inevitable accident.” *Injuria* on the other hand is a “wrongful act or tort, that relates to the defendant.” *Damnum absque injuria* therefore is damage without legal wrong.

*Id.*

<sup>105</sup> *Marbury v. Madison*, 5 U.S. 137, 162–64 (1803) (finding the withholding of *Marbury*’s commission was “violative of a vested legal right,” the Court quoted Blackstone in stating that “where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded”; querying whether the case fell within “that class of cases which come under the description of *damnum*

were power companies who sought to enjoin the United States from granting four municipalities in Alabama the funds to construct new power plants under the National Industry Recovery Act during the Depression. The plaintiffs alleged that the statute allowing the United States to make such grants was unconstitutional, and that plaintiffs’ business would be hurt by the construction of the new plants. The Supreme Court held that plaintiffs did not have standing to pursue the suit, because even though they would sustain *damage* in the form of reduced business, they had *no legal right* to be free from competition -- in other words, they had no “injury”:

Unless a different conclusion is required from the mere fact that petitioner will sustain financial loss by reason of the lawful competition which will result from the use by the municipalities of the proposed loans and grants, it is clear that petitioner has no such interest and will sustain no such legal injury as enables it to maintain the present suits. . . . [C]ourts have no power to consider in isolation and annul an act of Congress on the ground that it is unconstitutional; but may consider that question ‘only when the justification for some direct injury suffered or threatened, presenting a justiciable issue, is made to rest upon such an act.’ ***The term ‘direct injury’ is there used in its legal sense, as meaning a wrong which directly results in the violation of a legal right.*** ‘An injury, legally speaking, consists of a wrong done to a person, or, in other words, a violation of his right. It is an ancient maxim, that a damage to one, without an injury in this sense (*damnum absque injuria*), does not lay the foundation of an action; because, if the act complained of does not

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*absque injuria* —a *loss* without an *injury*,” the Court concluded that such cases did not include “offices of trust, of honor or of profit.”) (emphasis added).

violate any of his legal rights, it is obvious, that he has no cause to complain.<sup>106</sup>

In *Alabama Power Co.*, the violation of a legal right was what comprised an “injury.”<sup>107</sup> “Damage” was the loss of business occasioned by the increased competition, but since petitioner had no legal right to complain about it, petitioner had no “injury.” Thus, the meaning that petitioner Spokeo ascribes to the term “injury” – “real-world harm”<sup>108</sup> - is the opposite of the meaning used by the Supreme Court in *Alabama Power Co.*<sup>109</sup>

### **B. The Self-Contradiction of the Term “Injury-in-Fact” and the Redundancy of the Term “Injury-in-Law.”**

When petitioner Spokeo and its *amici* call a class action a “no-injury” class, they mean a class that includes one or more members who have not suffered any harm – in Robins’s case, that the class representative himself has supposedly suffered no harm. Strictly speaking, then, they mean a “no-damage” class, not a “no-injury” class. The invasion of plaintiff Robins’ legal right under the FCRA is an “injury” under the classical view described in the previous section.

I do not believe that petitioner Spokeo denies that if the complaint’s allegations are true, Robins’ *legal right* has been violated.<sup>110</sup> Instead, petitioner Spokeo’s argument is that Robins has not suffered

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<sup>106</sup> *Alabama Power Co. v. Ickes*, 302 U.S. 464, 478–80 (1938) (emphasis added).

<sup>107</sup> *Id.* at 480; see *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 399–400 (1970) (“Congress merely declined to disturb state remedies at a time when they appeared adequate to effectuate the substantive duties imposed by general maritime law. That action cannot be read as an instruction to the federal courts that deaths in territorial waters, caused by breaches of the evolving duty of seaworthiness, must be *damnum absque injuria* unless the States expand their remedies to match the scope of the federal duty.”).

<sup>108</sup> Brief for Petitioner, *supra* note 11, at 8.

<sup>109</sup> See also Singer, *supra* note 104, at 1026.

<sup>110</sup> See, e.g., Brief for Petitioner, *supra* note 11, at 2.

harm or damage, and that the latter is required for Article III “injury in fact.”

Because the word “injury” historically connotes “a wrong which directly results in the violation of a legal right,”<sup>111</sup> the unfortunate term “injury in fact” is a bit of an oxymoron. Meanwhile, petitioner Spokeo and its *amici*, apparently taking their cue from Chief Justice Roberts, have coined a new term “injury-in-law,” to mean the “mere” violation of a legal right.<sup>112</sup> But since the word “injury” already means the violation of a legal right, the term “injury-in-law” is redundant. How did these supremely unhelpful terms come to be used in their present incarnations?

### ***1. The Oxymoronic “Injury in Fact”***

The first Supreme Court use of the term “injury in fact” in connection with Article III standing doctrine occurred in a pair of cases in 1970, *Association of Data Processing Service Organizations, Inc. v. Camp*<sup>113</sup> and *Barlow v. Collins*.<sup>114</sup> The use of the term “injury in fact” there was only to emphasize that the plaintiffs in those cases were actually harmed or damaged by the defendants’ actions; no one disputed it. The dispute lay in whether these plaintiffs had a legal right to bring the defendants to account, or whether the cases would be *damnum absque injuria*, damage without injury.

It is fascinating that petitioner Spokeo and its *amici* pin their primary argument on the phrase “injury in fact” while not once – in thirty-one briefs – citing *ADAPSO* or *Barlow*, the Supreme Court cases

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<sup>111</sup> *Ickes*, 302 U.S. at 479.

<sup>112</sup> See *infra* notes 145–146 and accompanying text.

<sup>113</sup> *Ass'n of Data Processing Serv. Organizations, Inc. v. Camp (ADAPSO)*, 397 U.S. 150, 152 (1970).

<sup>114</sup> *Barlow v. Collins*, 397 U.S. 159, 163 (1970).

that first used the term in the context of Article III standing. Fascinating but not surprising, considering that *ADAPSO* and *Barlow* lend no support to their argument.

In *ADAPSO*, plaintiffs sold “data processing services to businesses.”<sup>115</sup> They sought to challenge, under the Administrative Procedure Act,<sup>116</sup> a ruling by the Comptroller of the Currency that allowed national banks to also sell data processing services – thus making banks plaintiffs’ competitors. In addition to the Comptroller of the Currency, the complaint named as a defendant a private entity, American National Bank, which was alleged to have begun marketing its competing data processing services.<sup>117</sup> Plaintiffs argued that performing data processing services was not within the statutory authority granted national banks under the National Bank Act.<sup>118</sup>

The district court dismissed the complaint, denying standing:

Since there are no specific provisions in the National Bank Act providing for a review of the Comptroller's rulings or conferring standing to maintain such actions as the instant case, it would appear that if the plaintiffs are to have what is called statutory standing at all, such must be grounded upon [Section 702] of the Administrative Procedure Act. The Eighth Circuit Court of Appeals however has adhered strongly to the

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<sup>115</sup> *ADAPSO*, 397 U.S. at 151.

<sup>116</sup> 5 U.S.C. § 702 (2012) (“A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.”).

<sup>117</sup> Ass'n of Data Processing Serv. Organizations, Inc. v. Camp, 279 F. Supp. 675, 677 (D. Minn. 1968), *aff'd*, 406 F.2d 837 (8th Cir. 1969), *rev'd*, 397 U.S. 150 (1970). For example, the complaint alleged that one plaintiff had been in negotiations with two potential customers, but that the defendant American National Bank had taken their business instead. *Id.*

<sup>118</sup> *Id.* at 676; *see* National Bank Act, 12 U.S.C. § 24 (2012). Plaintiffs claimed standing under the APA, not the National Bank Act. 279 F. Supp. at 676.

view that the Administrative Procedure Act did not by its passage create any legal rights, which did not otherwise exist and has cited numerous authorities in support thereof.<sup>119</sup>

In other words, while recognizing that plaintiffs had suffered “economic injury” due to the competition,<sup>120</sup> the district court could not find a legal right empowering the plaintiffs to sue under either the National Bank Act or the Administrative Procedure Act (“APA”).

Despite the district court’s reference to “statutory standing,” the Eighth Circuit treated the dismissal as jurisdictional.<sup>121</sup> Referring to a series of Supreme Court cases, including *Alabama Power Co. v. Ickes*,<sup>122</sup> “where the threatened economic loss arises from government-created competition,” the Eighth Circuit affirmed the denial of standing. The Court noted that “the courts uniformly have denied standing to competitors *who otherwise possess no legal right* to be free from competition.”<sup>123</sup>

*ADAPSO* thus reached the Supreme Court with all in agreement that plaintiffs had suffered an “injury in fact, economic or otherwise”<sup>124</sup> – the loss of their business enabled by the Comptroller’s ruling that the banks could engage in competition with them. The lower courts, however, held that neither the National Bank Act nor the APA gave plaintiffs a legal right to challenge the Comptroller’s ruling. The Supreme Court, in an opinion by Justice Douglas, revisited the APA’s grant of standing to a person “aggrieved by agency action within the meaning of a relevant statute.”<sup>125</sup> The Court cited Section 4 of the Bank Service

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<sup>119</sup> *Ass'n of Data Processing Serv. Organizations, Inc.*, 279 F. Supp. at 677.

<sup>120</sup> *Id.*

<sup>121</sup> *Ass'n of Data Processing Serv. Organizations, Inc. v. Camp*, 406 F.2d 837, 838 (8th Cir. 1969), *rev'd*, 397 U.S. 150 (1970).

<sup>122</sup> *Id.* at 839 n.5.

<sup>123</sup> *Id.* at 839.

<sup>124</sup> *See ADAPSO*, 397 U.S. at 152.

<sup>125</sup> *Id.* at 153.

Corporation Act of 1962, which provided, “No bank service corporation may engage in any activity other than the performance of bank services for banks.”<sup>126</sup> Since that arguably prohibited data processing services by banks, the Court stated that Section 4 “arguably brings a competitor [like plaintiff] within the zone of interests protected by it.”<sup>127</sup> Thus, the Bank Service Corporation Act, as well as the National Bank Act, were “relevant” statutes under the APA, making plaintiffs “aggrieved” persons entitled to judicial review of the Comptroller’s ruling.<sup>128</sup>

Now, let’s be honest. The Supreme Court’s opinion in *ADAPSO* is a bit of a mess.<sup>129</sup> It seems to careen from Article III standing<sup>130</sup> to statutory standing<sup>131</sup> to prudential standing.<sup>132</sup> After one general paragraph about Article III standing (which began “[g]eneralizations about standing to sue are largely worthless as such”), Justice Douglas continued (without clear segue): “The first question is whether the plaintiff alleges that the challenged action has caused him injury in fact, economic or otherwise. There can be no doubt but that petitioners have satisfied this test.”<sup>133</sup>

Justice Douglas has been accused of “making up” the “injury in fact” moniker.<sup>134</sup> Indeed, he cited nothing to support the term in *ADAPSO*.

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<sup>126</sup> *Id.* at 155.

<sup>127</sup> *Id.* at 156.

<sup>128</sup> *Id.* at 158.

<sup>129</sup> See Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 185 (1992) (describing *ADAPSO* as “a remarkably sloppy opinion”).

<sup>130</sup> See *ADAPSO*, 397 U.S. at 151–52.

<sup>131</sup> *Id.* at 152–54.

<sup>132</sup> *Id.* at 154–56.

<sup>133</sup> *Id.* at 152.

<sup>134</sup> E.g., Sunstein, *supra* note 129, at 185 (“What was the source of the injury-in-fact test? Did the Supreme Court in *ADAPSO* just make it up? The answer is basically yes”); see Federalist Society Presentation, Hon. William Fletcher, *Judicial Decisionmaking: Precedent and Constitutional Meaning*, ENGAGE, Vol. 3, 54 (Aug.



Justice Douglas also used the phrase “injury in fact” in his opinion for the Court in the companion case of *Barlow*. There, tenant farmers sued the Secretary of Agriculture seeking to declare an amended regulation promulgated by the Secretary as invalid and to enjoin its enforcement. The former regulation had not previously allowed the farmers’ landlords to take an assignment, for financing “the payment of cash rent for land,” of federal payments due to the farmers. The challenged amended regulation lifted the prohibition. As a result, the farmers alleged, their landlords had taken an assignment of all their forthcoming federal payments, rendering the farmers unable to obtain financing elsewhere for any of their other farming needs, in turn allowing the landlords to levy “high prices and rates of interest.”<sup>135</sup>

As in *ADAPSO*, there was no question in *Barlow* that plaintiffs had thus suffered actual harm.<sup>136</sup> The disagreement again was over whether the plaintiffs had a “legally protected interest” and whether the Food and Agriculture Act of 1965 and the Administrative Procedure Act gave plaintiffs a right to sue.<sup>137</sup> Again, Justice Douglas tossed aside Article III concerns in a single sentence: “First, there is no doubt that in the context of this litigation the tenant farmers, petitioners here, have the personal stake and interest that impart the concrete adverseness required by Article III.”<sup>138</sup> Turning without further ado to the statutes, the Court held that “the tenant farmers are clearly within the zone of interests protected by the [Food and Agriculture Act of 1965],” and that the APA allowed judicial review of the Secretary’s action.<sup>139</sup>

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2002), <http://www.fed-soc.org/aboutus/DownloadLibrary?id=453> (“Justice Douglas – that spiritual father of the Federalist Society – invented the term ‘injury in fact’ in his opinion in *Association of Data Processing Service Organizations v. Camp* in 1970. Prior to that case, ‘injury in fact’ had never been seen as a constitutional requirement under Article III. Justice Douglas made it up.”).

<sup>135</sup> *Barlow v. Collins*, 397 U.S. 159, 163 (1970).

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* at 163–64.

<sup>138</sup> *Id.* at 164.

<sup>139</sup> *Id.* at 164–65.

It is certainly reasonable to interpret these opinions as requiring an “injury in fact” for Article III standing, and also that “injury in fact” was meant as actual harm. But that does not mean that the Court’s invention of the term was well-advised, or, more importantly, that it meant to exclude the invasion of a legal right from its ambit. Undoubtedly aware that “injury” in its traditional legal sense meant the invasion of a legal right, Justice Douglas may have added “in fact” to emphasize that these plaintiffs had indisputably suffered actual harm, perhaps as an impetus to finding the disputed legal right to sue in the APA.

The term “injury in fact” was dictum in *ADAPSO* and *Barlow*. No one doubted the plaintiffs there had been harmed. Rather, the opinions opened up an easier path under the APA to obtain judicial review of executive action -- the Comptroller’s ruling in *ADAPSO* and the Secretary’s amended regulation in *Barlow*. Most commentators agree that Justice Douglas meant to make it easier for a plaintiff to establish standing: “In *ADAPSO*, the Court replaced the traditional notion that a person was required to have a cause of action--or an injury in law--with the considerably more lenient, but nonetheless abstract, idea that the claimant was required to have sustained an injury in fact.”<sup>140</sup> Over time, however, the use of “injury in fact” restricted, not enlarged, Article III standing.<sup>141</sup>

## **2. *The Clever Positioning of the “Injury-in-Law” Appellation***

The injury-in-fact requirement only dates from 1970, while a new term, “injury-in-law,” has never been a part of the Court’s Article III standing doctrine. The current use of the term appears to have been

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<sup>140</sup> See, e.g., William V. Dorsaneo, III, *The Enigma of Standing Doctrine in Texas Courts*, 28 Rev. Litig. 35, 40 (2008); see also Kenneth E. Scott, *Standing in the Supreme Court – A Functional Analysis*, 86 HARV. L. REV. 645, 663 (1973).

<sup>141</sup> Sunstein, *supra* note 129; William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 223-24 (1988).

carefully planted by Chief Justice John Roberts during oral argument in *First American Corp. v. Edwards*.<sup>142</sup> In *Edwards*, plaintiff sued for violation of a provision of the Real Estate Settlement Procedures Act (“RESPA”) prohibiting the giving or acceptance of a “kickback . . . pursuant to any agreement . . . that business incident to or a part of a real estate settlement service involving a federally related mortgage loan shall be referred to any person.”<sup>143</sup> The parent company, First American, had bought a minority interest in several title agencies in exchange for the agencies’ agreement to refer their business exclusively to First American’s wholly owned subsidiary, First American Title. The named plaintiff used one of the captive title agencies in Ohio as her settlement agent. Plaintiff claimed that the exclusive nature of the agreement made it a kickback in violation of RESPA. Ohio law requires all title insurers to charge the same price, so defendants argued there was no “injury in fact” supporting Article III standing. RESPA, however, provides that when a violation has occurred, defendants are liable to “the person . . . charged for the settlement service involved in the violation in an amount equal to three times the amount of any charge paid for such settlement service.”<sup>144</sup>

The Ninth Circuit held that plaintiff had established “injury in fact” by virtue of the statutory violation, which allowed for damages even in the absence of an overcharge. The Supreme Court granted certiorari on the constitutional standing question. At oral argument, plaintiff’s counsel argued that the invasion of a statutory right to “conflict-free service” was an injury in fact.<sup>145</sup> Chief Justice Roberts seemed highly skeptical:

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<sup>142</sup> *Edwards v. First Am. Corp.*, 610 F.3d 514 (9th Cir. 2010), *cert. granted*, 131 S. Ct. 3022 (Mem.) (2011), *cert. dismissed as improvidently granted*, 132 S. Ct. 2536 (Mem.) (2012). The case is discussed in Karlan, *supra* note 12, at 55–60, and in John S. Haddock, *Articulating a “Rational Connection” Requirement in Article III Standing*, 66 STAN. L. REV. 1423, 1423–25 (2014).

<sup>143</sup> 12 U.S.C. § 2607(a) (2012).

<sup>144</sup> 12 U.S.C. § 2607(d)(2).

<sup>145</sup> Transcript of Oral Argument at 31, *First Am. Fin. Corp. v. Edwards*, No. 10–708 (U.S. Nov. 28, 2011), 2011 WL 5910176.

You said violation of a statute is injury in fact. I would have thought that would be called injury in law. And when we say, as all our standing cases have, is that what is required is injury in fact, I understand that to be in contradistinction to injury in law. And when you tell me all that you've got or all that you want to plead is violation of the statute, that doesn't sound like injury in fact.<sup>146</sup>

In the fertile soil of activist corporate litigators, the term “injury-in-law” then bloomed at least fifty times in the briefs supporting the petitioner in *Spokeo*.<sup>147</sup> No one who used the term “injury-in-law” provided a single citation to the term – not even to the Chief Justice’s remarks –

to indicate whence it might have come. Most of the briefs used the term without even defining it, other the tautological “bare fact of a statutory violation without any proof of factual injury”<sup>148</sup>—again, without citation to anything to support this “definition.”

The motive for using the term “injury-in-law” is obvious: it seems, superficially, to be the opposite of the constitutionally-required

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<sup>146</sup> *Id.*

<sup>147</sup> *E.g.*, Petition for a Writ of Certiorari at 2, *Spokeo, Inc. v. Robins*, No. 13-1339 (U.S. May 1, 2014), 2014 WL 1802228; Reply Brief for the Petitioner at 2, 6–7, 9, *Spokeo v. Robins*, No. 13-1339 (U.S. Aug. 19, 2014), 2014 WL 4102148; Brief for Petitioner, *supra* note 11, at 11; Brief for Washington Legal Foundation as Amicus Curiae In Support of Petitioner, *supra* note 18, at 15; *Merits Brief of the Chamber of Commerce*, *supra* note 76, at 8; Brief of the Coal. for Sensible Pub. Rec. Access et al. as Amici Curiae in Support of Petitioner at 4–5, *Spokeo, Inc. v. Robins*, No. 13-1339 (U.S. July 9, 2015), 2015 WL 4148653 (injury in law is a bare statutory violation); Brief for Experian Info. Solutions, Inc., as Amicus Curiae Supporting Petitioner at 3, *Spokeo, Inc. v. Robins*, No. 13-1339 (U.S. July 9, 2015), 2015 WL 4194151; Brief of Amicus Curiae Consumer Data Industry Association In Support Of Petitioner at 10, 13–15, *Spokeo, Inc. v. Robins*, No. 13-1339 (U.S. July 8, 2015), 2015 WL 4194153; Brief for Amici Curiae eBay Inc., et al. in Support of Petitioner, *supra* note 18, at 19.

<sup>148</sup> Reply Brief for the Petitioner, *supra* note 147, at 6.

“injury-in-fact.”<sup>149</sup> But as Professor Karlan notes, this distinction is “novel”:

Conventionally, as Edwards’s counsel suggested, the modifier “-in-fact” is used not to invoke the fact/law distinction but to point to the difference between actual and hypothetical states of the world. If a plaintiff’s injury is too speculative, then the plaintiff has not established injury-in-fact.<sup>150</sup>

Using Westlaw’s database of United States Supreme Court cases, I have not been able to find a single case in which the Court used the term “injury-in-law” at all, let alone in connection with Article III standing.<sup>151</sup> Going back to the classical legal definition of “injury” as a wrong that violates a legal right, “injury-in-law” is sort of like saying “violation-of-a-legal-right-in-law.”

To make matters worse, petitioner Spokeo and its *amici* endlessly insert the adjective “mere” in front of “injury-in-law,” so that it becomes “mere injury-in-law.”<sup>152</sup> Think about that. In one clever turn of phrase, the violation of innumerable statutes, the disregard of millions of individuals’ legal rights, is minimized to the point of contempt. This

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<sup>149</sup> *E.g.*, Petition for a Writ of Certiorari, *supra* note 147, at 8 (referring to cases supposedly requiring “a concrete injury-in-fact (as opposed to a mere injury-in-law)”).

<sup>150</sup> Karlan, *supra* note 12, at 60.

<sup>151</sup> In the Westlaw database of United States Supreme Court cases, I used the search terms “injury-in-law” or “injury in law.” I retrieved twelve cases, only one of which used the phrase “injury at law,” not the exact phrase “injury in law.” The case is *State of Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. 421 (1855), and the irrelevant sentence containing the phrase “injury at law” is as follows: “For these reasons, and others contained in the opinion of the court, they came to the decision that the bridge obstructed the navigation of the Ohio, and to the irremediable injury at law of the public works of Pennsylvania.” *Id.* at 439.

<sup>152</sup> *See, e.g.*, Brief for Amici Curiae eBay Inc. et al. in Support of Petitioner, *supra* note 18, at 19 (providing that “mere injuries-in-law”).

contempt is exemplified in the Chamber of Commerce’s *amicus* brief in support of granting certiorari in *Spokeo*:

[The decision below] is of grave concern to the business community because (as this case illustrates) alleged *technical* violations of regulatory statutes can often affect large numbers of people *without actually injuring* them. If, as the Ninth Circuit held . . . such people can bring lawsuits without the need to demonstrate *any injury beyond the alleged statutory violation* itself, businesses will predictably be tied up in damages litigation over *harmless* alleged lapses, diverting their resources from more productive uses. This case presents an opportunity to rein in *abusive* litigation over such *trifles*, and to restore proper constitutional limitations on no-injury lawsuits.<sup>153</sup>

The newly-concocted phrase “mere injury-in-law” adds to the denigration of statutory rights and sets the Court up to judge for itself whether something Congress has deemed harmful is “really” that harmful. But historically, a statute allowing statutory damages may be thought to be the civil equivalent of a criminal statute deemed *malum prohibitum*,<sup>154</sup> which may be violated without showing actual harm to anyone as a result of the violation.<sup>155</sup> For example, if I am driving 35 miles per hour in a 30-mph zone, I can be given a speeding ticket even though I did not harm anyone—even if I was driving at 3:00 a.m. and there was no one else on the road for miles.<sup>156</sup> This is because the

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<sup>153</sup> *Certiorari Brief of the Chamber of Commerce*, *supra* note 15, at 2 (Roy T. Englert, Jr., counsel of record) (emphasis added).

<sup>154</sup> See LAFAVE, *supra* note 99, at § 1.6 (“Crimes are divided for certain purposes into crimes *mala in se* (wrong in themselves; inherently evil) and crimes *mala prohibita* (not inherently evil; wrong only because prohibited by legislation)”).

<sup>155</sup> *Id.* at §1.3 (stating that “driving too fast without an accident is a crime but not a tort; and forgery may be committed although no one has lost a cent on account of the forgery”).

<sup>156</sup> *Id.* at §1.6 (driving a little over the speed limit is *malum prohibitum*).

legislature has made a determination that in general, forcing people to comply with the posted speed limits will lead to fewer accidents.<sup>157</sup> The same idea is at work in statutes that provide a civil right of action for their violation.<sup>158</sup>

Like Chief Justice Roberts, Justice Scalia also seems close to foreclosing the legislature’s ability to enact such statutes. At oral argument in *Edwards*, he too seemed skeptical of plaintiff’s argument that the violation of the anti-kickback provision in RESPA provided “injury in fact”:

Justice Antonin Scalia: How does it -- how does it harm her to get a title insurance policy for the price of \$453 from what you call a kickback-free seller, as opposed to getting the same title insurance for \$453 from a non-kickback-free seller?

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<sup>157</sup> See, e.g., *Shevlin-Carpenter Co. v. State of Minnesota*, 218 U.S. 57, 66, 69 (1910) (rejecting a due process challenge to a state law designed “to protect the timber lands of the state,” and holding that “[d]ouble and treble damages and a criminal prosecution were provided to meet the situation. It would be strange, indeed, if it were not within the competency of the legislature. To hold otherwise would take from the legislature the power to adjust legislation to evils as they arise and to the ways by which they may be effected.”); see also LAFAYE, *supra* note 99, at § 1.3 (“Criminal statutes have played a part in creating civil liability and defenses to civil liability. Statutes are expressions of public policy, and the common law is, after all, merely the courts’ notion of what best promotes public policy. In the absence of any legislative expression of policy, the courts will seek it on their own; but where the legislature has expressed its ideas, the courts will naturally give those ideas great weight.”) (footnotes omitted).

<sup>158</sup> See, e.g., *Shevlin-Carpenter Co.*, 218 U.S. at 67–68, 70 (upholding the award of double damages under a Minnesota law making a trespasser on state lands for the purpose of cutting timber liable to the state for double damages if the trespass was “casual and involuntary”; rejecting the argument of plaintiffs in error that “the legislature cannot, by its mere fiat, make an act otherwise innocent a crime, and punishable as such,” because that argument “would seem, therefore, to destroy the well-recognized distinction between *mala in se* and *mala prohibita*.”).

Is that an injury-in-fact?

Mr. Lamken [attorney for plaintiff]: --Yes.

Justice Antonin Scalia: The -- the -- the vague notion of -- of buying it from -- from -- I don't know, a white knight?

Is -- is that the kind of injury-in-fact that our cases talk about?

Mr. Lamken: Your Honor--

Justice Antonin Scalia: It seems to me purely -  
- I don't know, philosophical.<sup>159</sup>

So the next time I am stopped for driving with a burned-out taillight, perhaps I should explain to the police officer that since no one was hurt by my technical violation of an trifling statute, her insistence that I obey traffic rules is “purely philosophical.” More seriously, the willingness to second-guess Congress’ creation of private rights of action to redress harmful conduct is symptomatic of some of the justices’ disdain for the legislative process.<sup>160</sup>

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<sup>159</sup> Transcript of Oral Argument, *supra* note 145, at 43–44.

<sup>160</sup> *See, e.g.*, Karlan, *supra* note 12, at 68 (asserting “The potential consequences of the current Court's disdain for democracy are potentially . . . profound”). *Cf.* RICHARD A. POSNER, *DIVERGENT PATHS: THE ACADEMY AND THE JUDICIARY* 64 (2016) (“No current member of the Supreme Court was ever a legislator or ever held a senior executive branch position. Sandra Day O’Connor was the last Supreme Court Justice who had a legislative background.”) THOMAS E. MANN & NORMAN J. ORNSTEIN, *IT’S EVEN WORSE THAN IT LOOKS: HOW THE AMERICAN CONSTITUTIONAL SYSTEM COLLIDED WITH THE NEW POLITICS OF EXTREMISM*, 81–103 (2012) (suggesting that the Court’s growing distrust of the legislature may stem from the dwindling number of justices who have held legislative office).



**IV. GROUPTHINK: DESPITE CORPORATE ACTIVISTS’  
CONTINUING ASSAULT ON CLASS ACTIONS IN THE SUPREME  
COURT, THEY ONLY RECENTLY CONJURED UP THE ARTICLE III  
STANDING ARGUMENT THEY NOW FIND SO COMPELLING.**

Leading political scientists note that “[t]he Supreme Court is a political institution that deals with political issues framed as legal controversies.”<sup>161</sup> As early as the 1970s, scholars perceived an increasing incursion by interest groups into the Court’s decision-making, partly in the form of *amicus* briefs.<sup>162</sup> Interest groups’ goals are not only to participate in cases as they arise, but also to set the agenda.<sup>163</sup> Ultimately, their goal is to change some aspect of the status quo. To do this in the Supreme Court, they must first gain access by influencing the Court to grant certiorari. One method of influence is to file *amicus* briefs at the cert stage to attempt to convince the Court of the issue’s importance or to perceive (or manufacture) “circuit splits,” which entice the Court to grant cert.<sup>164</sup> Although both “liberal” and “conservative” groups resort to the courts to effectuate legal change,<sup>165</sup> in recent business litigation, conservative groups have far outnumbered liberal groups in filing *amicus* briefs at the cert stage in the Supreme Court.<sup>166</sup>

Conservative, business-oriented *amicus* brief-writers have proliferated, overwhelming not just the Supreme Court but lower courts

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<sup>161</sup> LEE EPSTEIN & Joseph F. KOBYLKA, *THE SUPREME COURT AND LEGAL CHANGE: ABORTION AND THE DEATH PENALTY* 32 (1992).

<sup>162</sup> *See id.* at 24–25; *see also* Michael Rustad & Thomas Koenig, *The Supreme Court and Junk Social Science: Selective Distortion in Amicus Briefs*, 72 N.C. L. REV. 91, 96–97, 109–10 (1993).

<sup>163</sup> EPSTEIN & KOBYLKA, *supra* note 161, at 29–30.

<sup>164</sup> *See* SUP. CT. R. 10, 37.

<sup>165</sup> SUZANNE UTTARO SAMUELS, *FIRST AMONG FRIENDS: INTEREST GROUPS, THE U.S. SUPREME COURT, AND THE RIGHT TO PRIVACY* 9 (2004).

<sup>166</sup> For example, nine *amicus* briefs were filed at the cert stage urging the Court to grant cert, while only one urged the Court not to grant cert – and even that one brief, by the Solicitor General, came only after the Court had asked for it. *Spokeo, Inc. v. Robins*, 135 S. Ct. 323 (Mem.) (2014).

nationwide. The International Association of Defense Counsel has a typical program:

The International Association of Defense Counsel has an active *amicus curiae* program, submitting briefs on issues of importance to IADC members and their clients. Through its *amicus* participation, the IADC has helped shape the law surrounding product liability, arbitration, class actions, attorney client privilege, punitive damages, civil discovery, standing, jurisdiction, and tort reform.<sup>167</sup>

Well-funded business-oriented interest groups follow and support large numbers of cases in the lower courts, with an eye to advancement to the Supreme Court if possible.<sup>168</sup> For example, the U.S. Chamber Litigation Center’s website has a page, “Recent Case Activity,” which lists the cases “of interest to the business community” in which the Center has participated “as a direct party, as an intervenor, and as an *amicus curiae* (friend of the court).”<sup>169</sup> This page lists over 1,000 cases in which the Chamber has participated since 2007, including the status of each case, such as “Victory,” “Defeat,” or “Awaiting Decision.” The Chamber’s participation is not limited to cases in the United States Supreme Court, although its participation there is the most high-profile.<sup>170</sup> The Chamber has infiltrated every level of the federal court system nationwide, from agency adjudication, to district court, to court of appeals. The Chamber is also active at every level in state courts, from the New York Supreme Court to the Washington Supreme Court.

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<sup>167</sup> IADC *Amicus Brief Program*, 81 DEF. COUNS. J. 404 (2014).

<sup>168</sup> SAMUELS, *supra* note 165 at 30.

<sup>169</sup> See generally U.S. CHAMBER LITIGATION CENTER, <http://www.chamberlitigation.com/cases> (last visited Nov. 12, 2015).

<sup>169</sup> *Id.*

<sup>170</sup> See, e.g., *Wal-Mart Stores, Inc. v. Dukes, et al.*, U.S. CHAMBER OF LITIGATION CENTER, <http://www.chamberlitigation.com/wal-mart-stores-inc-v-dukes-et-al.>

It is no secret that the Court’s “opinions bear the clearly recognizable imprint of the *amici* briefs.”<sup>171</sup> One in-depth study of Supreme Court jurisprudence on abortion and the death penalty identified the factors that cause legal change: the composition of the members of the Court, pressure by other branches of government, and the participation of interest groups. With respect to interest group participation, though, it was not just the number or volubility of groups that mattered: it was the legal arguments they crafted and presented to the Court, “which arguments to tender and which arguments to ignore.”<sup>172</sup>

The sheer volume of litigation backed by corporate-lawyer activists raises the odds that the Supreme Court will grant cert in any of a number of cases in which they are involved. But the odds are sweetened by the business interests’ use of a small number of Supreme Court “ringers” – advocates with whom the Court is familiar. A recent study has shown that this small group of favored advocates is responsible for 43% of all cases heard by the Supreme Court.<sup>173</sup> Counsel of record for petitioner Spokeo in the Supreme Court, Andrew J. Pincus, is in this favored group.

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<sup>171</sup> SAMUELS, *supra* note 165, at 5. See Paul M. Collins, Jr., Pamela C. Corley, & Jesse Hammer, *The Influence of Amicus Curiae Briefs on U.S. Supreme Court Opinion Content*, 109th Annual Meeting of the American Political Science Association (2013), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2300505](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2300505).

<sup>172</sup> EPSTEIN & KOBYLKA, *supra* note 161, at 303–07.

<sup>173</sup> Joan Biskupic, Janet Roberts & John Shiffman, *The Echo Chamber: A Small Group of Lawyers and its Outsized Influence on the U.S. Supreme Court*, REUTERS, <http://www.reuters.com/investigates/special-report/scotus/> (Dec. 8, 2014); See Lincoln Caplan, *The Supreme Court’s Advocacy Gap*, THE NEW YORKER, <http://www.newyorker.com/news/news-desk/supreme-court-advocacy-gap> (Jan 6, 2015). See also Richard J. Lazarus, *Advocacy Matters Before and Within the Supreme Court: Transforming the Court by Transforming the Bar*, 96 GEO. L.J. 1487, 1490 (2008) (documenting “the remarkable success recently enjoyed by the business community in both obtaining Court review and then in prevailing on the merits.”).

Corporate interests clearly see the *Spokeo* case as a “blockbuster,”<sup>174</sup> capable in one fell swoop of releasing them of liability for violating a host of pesky statutes. Seventeen *amicus* briefs favoring the corporate defendant, *Spokeo*, were filed on the merits in the Supreme Court in July 2015.<sup>175</sup> Many of them contain the familiar parade-of-horribles about “class action abuse,” airing the same old myths about “avaricious plaintiffs and . . . plaintiffs’ lawyers,” “payoff settlements,” and “[driving] up the costs of living for consumers.”<sup>176</sup> This has been the unceasing narrative of class actions by corporate-lawyer activists in the Supreme Court for a number of years.<sup>177</sup> They view *Spokeo* as another opportunity to beat the same old drum.<sup>178</sup>

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<sup>174</sup> Alison Frankel, *Media, Tech Companies Ask SCOTUS to Restrict Class Actions in Spokeo*, REUTERS, <http://blogs.reuters.com/alison-frankel/2015/07/15/media-tech-companies-ask-scotus-to-restrict-class-actions-in-spokeo/> (July 15, 2015).

<sup>175</sup> *Id.* See SCOTUSBLOG, *Spokeo, Inc. v. Robins*, <http://www.scotusblog.com/case-files/cases/spokeo-inc-v-robins/>.

<sup>176</sup> *E.g.*, Brief Amicus Curiae of Pacific Legal Foundation in Support of Petitioner, *supra* note 17, at 13 (“Non-injury’ class actions are ripe for abuse because they are conducted for the benefit of lawyers, not any individually harmed person”). Pacific Legal Foundation states that it is a “nonprofit legal foundation” that “advocates for limited government, individual rights, and free enterprise” *Id.* at 1 (indicating some sort of code for the party-line conservative agenda. The *amicus* Washington Legal Foundation is very similar. Washington Legal Foundation’s *amicus* brief says it “promot[es] free enterprise, individual and business civil liberties, a limited, accountable government, and the rule of law.” Brief for Washington Legal Foundation as Amicus Curiae in Support of Petitioner, *supra* note 18, at 1.

<sup>177</sup> See, e.g., Patricia Hatamyar Moore, *Confronting the Myth of “State Court Class Action Abuses” Through an Understanding of Heuristics and A Plea for More Statistics*, 82 UMKC L. REV. 133 (2013).

<sup>178</sup> It should be noted, however, that the district court in *Robins v. Spokeo, Inc.* has not addressed class certification. *Robins* filed a Motion for Class Certification, but the case was stayed pending the Supreme Court’s ruling on the certiorari petition, and it remains stayed. Order Granting Motion for Reconsideration and Staying Cases Pending Resolution of Petition for Cert. in

But although they have been excoriating class actions for some time, the business *amici* did not get the “bare-statutory-violation-isn’t-injury-in-fact” memo until quite recently. The *Spokeo* case involves the FCRA, a statute passed in 1970. Dozens of cases have been litigated under the FCRA in the ensuing forty-five years in which plaintiffs sought only statutory damages.<sup>179</sup> Why did none of the defendants in those cases, represented by some of the best lawyers in the country, think of the “bare-statutory-violation-is-not-injury-in-fact” argument until now, if it is so self-evident?

Indeed, just nine years ago, the Supreme Court decided a case involving the FCRA that presented a clear opportunity for the defendants-petitioners and their business *amici* to raise the “statutory-violation-is-not-injury-in-fact” argument. None of them did.

In *Safeco Insurance Co. v. Burr*,<sup>180</sup> putative class actions against GEICO and Safeco were consolidated in the Supreme Court to decide the question of whether, under the FCRA, an insurance company’s allegedly willful failure to provide a notice of adverse action based on information contained in a consumer credit report “covers a violation committed in reckless disregard of the notice obligation, and, if so, whether petitioners Safeco and GEICO committed reckless violations.”<sup>181</sup> The class alleged that the insurers had not provided them the lowest available insurance rate due to reliance on a less-than-perfect credit report, without complying with the FCRA’s requirement to send

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the Supreme Court, *Robins v. Spokeo, Inc.*, No. 2:10-cv-05306-ODW-AGR (C.D. Cal. Nov. 21, 2014).

<sup>179</sup> See, e.g., James Lockhart, Annotation, *Remedies Available in Private Action Under §§ 616 and 617 (15 U.S.C.A. §§ 1681n, 1681o) of Fair Credit Reporting Act—Other than Attorney’s Fees*, 20 A.L.R. FED. 2d 509, §§ 44–59 (2007).

<sup>180</sup> *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 47 (2007).

<sup>181</sup> *Id.* at 52.

them notice of this “adverse action.”<sup>182</sup> The FCRA does not require the insurer to provide the most favorable rate. Thus, plaintiffs’ only alleged injury was the statutory violation of failing to receive a notice of adverse action. For that, they sought statutory damages—the very same statutory damages under the very same statute that is now at issue in *Spokeo*. However, GEICO, Safeco, and their fifteen business-oriented amici<sup>183</sup> failed to argue that plaintiffs lacked Article III standing.

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<sup>182</sup> Class Action Allegation Plaintiffs’ Fifth Amended Complaint for Violation of Fair Credit Reporting Act ¶¶8–11, *Spano v. Safeco Ins. Co. of Am.*, No. CV 01-1464 BR, 2006 WL 2470127 (D. Or. July 6, 2006).

<sup>183</sup> Brief for Amicus Curiae American Insurance Association in Support of Petitioners at 7, *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47 (2007) (Nos. 06-84, 06-100), 2006 WL 3350576; Brief for Financial Services Roundtable, Chamber of Commerce of the United States of America et al. as Amici Curiae in Support of Petitioner at 4, 7, *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47 (2007) (Nos. 06-84, 06-100), 2006 WL 3350577; Brief of Amicus Curiae Consumer Data Industry Association in Support of Petitioners at 4–5, *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47 (2007) (Nos. 06-84, 06-100), 2006 WL 3350579; Brief of Farmers Insurance Company of Oregon, et al. as Amici Curiae in Support of Petitioners at 2–3, *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47 (2007) (Nos. 06-84, 06-100), 2006 WL 3309504; Brief Amicus Curiae of Ford Motor Company in Support of Petitioners at 3–4, *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47 (2007) (Nos. 06-84, 06-100), 2006 WL 3309505; Brief for Freedomworks Foundation as Amicus Curiae in Support of Petitioners at 5–6, *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47 (2007) (Nos. 06-84, 06-100), 2006 WL 3350578; Brief of Amici Curiae Mortgage Insurance Company of America, Consumer Mortgage Coalition in Support of Petitioners at 2–3, *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47 (2007) (Nos. 06-84, 06-100), 2006 WL 3309503; Brief of Amicus Curiae National Association of Mutual Insurance Company in Support of Petitioners at 2, *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47 (2007) (Nos. 06-84, 06-100), 2006 WL 3350574; Brief of Property Casualty Insurers Association of America at 2, *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47 (2007) (Nos. 06-84, 06-100), 2006 WL 3350575; Brief for Amicus Curiae Trans Union LLC at 5–6, *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47 (2007) (Nos. 06-84, 06-100), 2006 WL 3355849; Brief for Washington Legal Foundation as Amicus Curiae in Support of Petitioners at 4, *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47 (2007) (Nos. 06-84, 06-100), 2006 WL 3350580.

In the district court, GEICO obtained the dismissal of one of the plaintiff's claims on standing grounds—just not the Article III standing grounds argued in *Spokeo*: “The [district] court dismissed Edo's claim against Government Employees [one of the GEICO entities] for lack of standing because Edo was not a government employee or in the military, and therefore was ‘not eligible for insurance coverage from Government Employees regardless of his consumer score.’”<sup>184</sup> Other than the preceding sentence, not a single word of any of the eight briefs filed by GEICO and Safeco in the Supreme Court discussed standing.

Nor did any of the business-oriented *amici* supporting Safeco and GEICO argue that the statutory damages authorized by the FCRA did not constitute the “injury-in-fact” required by Article III. *Amici* repeatedly discussed their concerns with the statutory damages provision of the FCRA, however, without ever linking their concerns to Article III standing.<sup>185</sup>

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<sup>184</sup> Brief for Petitioners at 8, *GEICO Gen. Ins. Co. v. Edo*, 548 U.S. 942 (2006) (No. 06-100).

<sup>185</sup> *See, e.g.*, Brief of Amici Curiae Mortgage Insurance Company of America, Consumer Mortgage Coalition in Support of Petitioners, *supra* note 183, at 8 (“The Ninth Circuit's distorted interpretation of the standard for punitive and statutory damages under FCRA would impair the efficient flow of consumer information, contrary to a central goal of the act.”); Brief of Farmers Insurance Company of Oregon, et al. as Amici Curiae in Support of Petitioners, *supra* note 183, at *i* (“Like other insurance companies, *amici* face a wave of nationwide class action litigation by private plaintiffs alleging ‘willful’ violations of the [FCRA] and seeking to obtain aggregated ‘statutory’ damages”); Brief Amicus Curiae of Ford Motor Company in Support of Petitioners, *supra* note 183, at 2 (“Ford and Ford Credit are also routinely subject to other litigation under state and federal law in which the plaintiff seeks statutory or punitive damages on the basis that they have allegedly acted in conscious or reckless disregard of the plaintiffs' rights, the same standard that the Ninth Circuit adopted in this case for awarding statutory and punitive damages under FCRA.”); Brief for Amicus Curiae American Insurance Association in Support of Petitioners, *supra* note 183, at 8

In fact, four of the *amici* in *Safeco* also filed *amicus* briefs in *Spokeo*: the U.S. Chamber of Commerce, the Consumer Data Industry Association, Trans Union LLC, and the Washington Legal Foundation. In *Spokeo*, these *amici* have all echoed petitioner’s Article III “no injury-in-fact” argument.<sup>186</sup> None of them made that argument, or anything like it, in *Safeco*.<sup>187</sup>

The Chamber of Commerce’s briefs in *Safeco* are particularly striking for their failure to raise the Article III standing argument it now finds so obvious. Its merits brief spoke of “FCRA class actions for billions of dollars **not based on actual harm**”:

Respondents' complaints in the two actions under review are typical of FCRA cases that plaintiffs seek to litigate as class actions. Plaintiffs made no claim that petitioners' actions were negligent **or that the named plaintiffs personally suffered any actual damages**. Instead, their complaints . . . alleged only willful misconduct and sought statutory and punitive damages on behalf of a class. On remand from the Ninth Circuit, plaintiffs amended their complaints to strike their claims for punitive damages, **and now seek \$1,000**

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(“The FCRA ‘Willful Noncompliance’ Provision Limits Statutory And Punitive Damages To Egregious Violations Of The Act”); Brief for Financial Services Roundtable, Chamber of Commerce of the United States of America et al. as *Amici Curiae* in Support of Petitioners, *supra* note 183, at 9–10, 19–20; Brief for Freedomworks Foundation as *Amicus Curiae* in Support of Petitioner, *supra* note 183, at 19.

<sup>186</sup> *Merits Brief of the Chamber of Commerce*, *supra* note 76, at 3–4; Brief of *Amicus Curiae* Consumer Data Industry Association in Support of Petitioner, *supra* note 142, at 2, 8; Brief of Trans Union LLC as *Amicus Curiae* in Support of Petitioner at 2, *Spokeo, Inc. v. Robins*, No. 13-1339 (U.S. July 9, 2015), 2015 WL 4148649; Brief of Washington Legal Foundation as *Amicus Curiae* in Support of Petitioner, *supra* note 18, at 8.

<sup>187</sup> *Id.*



***statutory damages for each member of the putative class.*** The allegations in the two other FCRA cases in which certiorari petitions are pending likewise seek only non-compensatory damages for the putative classes ***and do not bother to allege any actual harm sustained by the named plaintiffs.***<sup>188</sup>

The constitutional provision that the Chamber of Commerce argued was violated by the FCRA’s statutory damages provision was the due process clause, not Article III: “Significant doubt about the constitutionality of the FCRA’s punitive and statutory damages provision arises under the recklessness standard because of the due process limits on excessive or arbitrary awards.”<sup>189</sup> Thus, the Chamber argued that statutory damages might violate the due process clause if they were awarded in the absence of a specifically high standard of intent. The Chamber did not make the constitutional arguments in *Safeco* that it now makes in *Spokeo*: that Congress does not have the power to authorize statutory damages without proof of actual damages, or that statutory damages alone do not constitute Article III “injury-in-fact.”

Finally, the Chamber’s brief in *Safeco* even warned of the large potential liability in a class action for FCRA statutory damages without actual damages, but still failed to raise the Article III standing argument:

A significant litigation risk to defendants sued under the FCRA is caused by the aggregation in class actions (if not billions) of dollars in statutory or punitive damages. . . . [C]ourts hold that the FCRA permits plaintiffs in a class to avoid the need to establish any actual damages if they allege willful FCRA violations since the class can seek

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<sup>188</sup> Brief for the Financial Services Roundtable, Chamber of Commerce of the United States of America, et al. as Amici Curiae in Support of Petitioners, *supra* note 183, at 19–20 (emphasis added).

<sup>189</sup> *Id.* at 5.

only statutory damages ***unrelated to actual individual harm.***

....

The driving force for such class actions is not compensation for individual harm, but professional plaintiffs and attorneys intent on extracting monetary damages from companies (and their shareholders) for themselves and a class of uninjured consumers. . . . Such class action lawsuits could, in the aggregate, cost American businesses billions of dollars that are ***not tied to any actual injury to plaintiffs.***<sup>190</sup>

In *Safeco*, therefore, the Chamber argued repeatedly that there was no “actual injury” to plaintiffs from the violation of the FCRA, but still did not draw the now-trumpeted connection to the Article III standing requirement of “injury-in-fact.” The Chamber’s brief characterized the FCRA’s statutory damages as “penal,” but never suggested that their imposition without a showing of actual damages violated Article III standing.<sup>191</sup>

In short, neither the petitioners in *Safeco* nor any of their *amici* argued that the named plaintiffs in those class actions, whose only claimed injury was the failure to receive a notice required by the FCRA, lacked standing under Article III. Four *amici curiae* that filed briefs in both *Safeco* and *Spokeo* failed to make the standing argument in *Safeco* despite recognizing explicitly at that time that the FCRA statutory

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<sup>190</sup> *Id.* at 6–7 (2006) (alteration in original) (emphasis added).

<sup>191</sup> *Id.* at 12 (“Statutory damages that allow an award of monetary damages against a defendant without regard to the existence or amount of actual injuries sustained by a plaintiff also call for application of the rule of lenity. Such statutes are penal because they ‘compel obedience beyond mere redress to an individual for injuries received.’”) (citations omitted).

damages provision allowed recovery without actual damages.<sup>192</sup> One would think that if the FCRA standing problem was so obvious that it threatened separation of powers and unleashed a torrent of abusive class actions (as is now being argued), someone might have noticed it nine years ago.<sup>193</sup>

### CONCLUSION

Earlier successful pushes by the business community to limit damages focused on non-economic damages and punitive damages.<sup>194</sup> Now the corporate-lawyer activists are taking on statutory damages. The “dual purpose” of statutory damages is “remedying harm to the individual and deterring socially inimical business practices.”<sup>195</sup> A holding that, in essence, destroyed Congress’ ability to enact statutory-damages provisions would be a sharp departure from American constitutional norms in the service of business interests’ never-ending quest to be free of governmental regulation.

The Court should reject the sophistical employment of the labels “no-injury,” “injury-in-fact,” and “injury-in-law.” As used by the

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<sup>192</sup> See *id.* at 5–7, 19–20; Brief of Amicus Curiae Consumer Data Industry Association in Support of Petitioners, *supra* note 183, at 8 (“Consumer reporting agencies are sued literally hundreds of times each year. Because of the availability of statutory damages without any need to establish actual harm, virtually all of these complaints allege that the consumer reporting agencies willfully violated the FCRA.”) (footnote omitted); Brief for Washington Legal Foundation as Amicus Curiae in Support of Petitioners, *supra* note 18, at 3 (“Although Edo [one of the named plaintiffs] did not claim to have suffered injury, he claimed entitlement to statutory damages of \$100 per class member plus attorney fees because, he alleged, GEICO’s violation was “willful[.]” within the meaning of § 616(a) of the FCRA”); Brief for Amicus Curiae Trans Union LLC in Support of Petitioners, *supra* note 183, at 18 (“The Statutory Framework of the FCRA Evidences an Intent to Subject a CRA to Statutory and Punitive Damages Only When the CRA Knows That its Conduct Violates the FCRA”).

<sup>193</sup> It might be argued that if the defendants in *Safeco* and *GEICO* failed to raise the argument below, it was foreclosed in the Supreme Court. But Article III standing is considered to be jurisdictional, and a lack of subject matter jurisdiction is never waived, even on appeal. See, e.g., *Louisville & Nashville R.R. Co. v. Mottley*, 219 U.S. 467 (1911).

<sup>194</sup> E.g., JAY M. FEINMAN, UN-MAKING LAW: THE CONSERVATIVE CAMPAIGN TO ROLL BACK THE COMMON LAW 40–46 (2004).

<sup>195</sup> See *Porter v. Household Fin. Corp. of Columbus*, 46 Ohio Misc. 53 (S.D. Ohio 1974).

petitioner and its *amici* in *Spokeo*, these terms further degrade the already-tortured standing doctrine. The Court should reject the perversion of standing doctrine suggested by petitioner, eschew the wide-ranging judicial activism urged by corporate-lawyer activists, and either affirm the court of appeals, or dismiss the petition as improvidently granted.