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### Spelling Out *Spokeo*

Craig Konnoth

*University of Pennsylvania*

Seth F. Kreimer

*University of Pennsylvania Carey Law School*

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## ESSAY

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### *SPELLING OUT SPOKEO*

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CRAIG KONNOTH<sup>†</sup> & SETH KREIMER<sup>‡</sup>

The modern law of Article III standing in federal courts constitutes an enduring conundrum. It rests on “an idea, which is more than an intuition but less than a rigorous and explicit theory, about the constitutional and prudential limits to the powers of an unelected, unrepresentative judiciary in our kind of government.”<sup>1</sup> Over the years, efforts to capture that idea in doctrine have spawned cycles of refinement and reformulation. But as Justice Harlan observed in dissent at the beginning of the last cycle of reform, the process often threatens to “reduce[] constitutional standing to a word game played by secret rules.”<sup>2</sup>

In 1970, the Court unveiled a new touchstone for standing—the “injury in fact” requirement.<sup>3</sup> Over the next four and a half decades—under the Burger, Rehnquist, and Roberts Courts—“injury in fact” became the “bedrock” Article III prerequisite for a party invoking the power of federal courts.<sup>4</sup> Over one hundred Supreme Court cases turned on the presence or absence of “injury in fact,” festooning the bedrock with adjectives: adequate

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<sup>†</sup> Sharswood Fellow & Lecturer in Law, University of Pennsylvania Law School.

<sup>‡</sup> Kenneth W. Gemmill Professor of Law, University of Pennsylvania Law School.

The authors acknowledge with gratitude the insightful comments of Professor Catherine Struve. Errors are our own.

<sup>1</sup> *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 11 (2004) (internal quotation marks omitted) (quoting *Vander Jagt v. O’Neill*, 699 F.2d 1166, 1178-79 (D.C. Cir. 1983) (Bork, J., concurring)).

<sup>2</sup> *Flast v. Cohen*, 392 U.S. 83, 129 (1968) (Harlan, J., dissenting).

<sup>3</sup> *See Ass’n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 152 (1970) (“The first question is whether the plaintiff alleges that the challenged action has caused him injury in fact, economic or otherwise.”).

<sup>4</sup> *See, e.g., McConnell v. FEC*, 540 U.S. 93, 225 (2003) (“One element of the ‘bedrock’ case-or-controversy requirement is that plaintiffs must establish that they have standing to sue. . . . [W]e have reiterated . . . that . . . a plaintiff must demonstrate an ‘injury in fact’ . . .” (citations omitted)).

“injury in fact” was to be “personal and tangible,” “concrete and particularized,” “actual or imminent,” and/or “distinct and palpable.”<sup>5</sup>

Last Term, in *Spokeo, Inc. v. Robins*, a short-handed Court endeavored to bring order to the adjectives.<sup>6</sup> The case generated more than three-dozen amicus briefs from the defense bar, the business establishment, and the technology sector arrayed against those from academics, public interest advocates, and consumer protection organizations. In resolving the arguments, Justice Alito’s majority opinion distinguished between the requirement of “particularized” injury and the requirement of “concrete” injury and established the proposition that a plaintiff might demonstrate “injury in fact” that is “concrete” but “intangible.”<sup>7</sup> The opacity of these categories refreshes Justice Harlan’s worry about “word game[s] played by secret rules.”<sup>8</sup>

In what follows, we seek to parse the rules of *Spokeo* so that, even if fuzzy, they are a bit less secret. We derive from the cryptic language of *Spokeo* a six-stage process (complete with flowchart) that represents the Court’s current equilibrium. We put each step in the context of standing precedent, and demonstrate that while *Spokeo* added structure to the injury in fact doctrine, each stage of the analysis adds play in the joints, leaving future courts and litigants substantial room for maneuver.

## I. THE WHEEL OF SPOKEO

For decades, Congress has endowed private individuals with statutory causes of action that empower them to enforce federal law as “private attorneys general.” Many of these statutes provide statutory damages and attorneys’ fees for successful litigants.<sup>9</sup> And for decades, skeptics—the late Justice Antonin Scalia prominent among them—have viewed these efforts with distaste. One important field of battle concerns whether Congress may

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<sup>5</sup> For a discussion of thirty-five years of “injury in fact” and an account of the array of intangible informational injuries that have been held to meet the requirement, see Seth F. Kreimer, “Spooky Action at a Distance”: *Intangible Injury in Fact in the Information Age*, 18 U. PA. J. CONST. L. 745, 746-52 (2016). Other commentators have regularly denounced the requirement as moribund, incoherent, and on the verge of dissolution. See, e.g., Cass R. Sunstein, *Informational Regulation and Informational Standing: Akins and Beyond*, 147 U. PA. L. REV. 613, 639-41 (1999). See generally David P. Currie, *Misunderstanding Standing*, 1981 SUP. CT. REV. 41; William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221 (1988). Nonetheless, legions of Supreme Court cases—and lower court cases following them—continue to turn on the presence or absence of “injury in fact.”

<sup>6</sup> 136 S. Ct. 1540 (2016).

<sup>7</sup> *Id.* at 1548-50.

<sup>8</sup> *Flast v. Cohen*, 392 U.S. 83, 129 (1968) (Harlan, J., dissenting).

<sup>9</sup> See generally SEAN FARHANG, *THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE U.S.* (2010) (describing the emergent system of private enforcement of federal law); Stephen B. Burbank et al., *Private Enforcement*, 17 LEWIS & CLARK L. REV. 637, 684-712 (2013) (explicating statutory regimes that rely on private enforcement mechanisms).

grant standing to individuals who have not, themselves, suffered “injury” in the form of physical or economic harm from the malfeasance at issue.

In 1992, the Court, per the late Justice Scalia in *Lujan v. Defenders of Wildlife*, invalidated the citizen standing provision of the Endangered Species Act, holding that Congress could not open courthouse doors to plaintiffs who lacked “injury in fact” by granting them legal claims to enforce environmental statutes.<sup>10</sup> Since *Lujan*, defendants have regularly sought to invoke the Article III “injury in fact” requirement as a shield against plaintiffs lacking tangible physical harm or monetizeable damages—especially plaintiffs seeking large, aggregate statutory awards on behalf of a class.<sup>11</sup>

*Spokeo* was the latest in the series—this time examining the statutory damages provided by the Fair Credit Reporting Act (FCRA). Thomas Robins sued Spokeo, Inc., a website offering a “people search engine,” alleging that Spokeo had disseminated inaccurate information about him.<sup>12</sup> Spokeo reported that Robins was married with children, in his fifties, relatively affluent, and had a job and graduate degree.<sup>13</sup> But according to Robins, all of this information was false.<sup>14</sup> Robins further alleged—in a conclusory paragraph—that dissemination of this information had damaged his employment prospects.<sup>15</sup>

Robins brought suit, on behalf of a class, under the FCRA,<sup>16</sup> which provides statutory damages of “not less than \$100 and not more than \$1,000” for each willful violation “with respect to any consumer.”<sup>17</sup> The FCRA requires reporting agencies to “follow reasonable procedures to assure maximum possible accuracy of . . . information.”<sup>18</sup> Robins alleged that Spokeo had violated this and other procedural requirements of the Act.<sup>19</sup>

The trial court dismissed on the ground that any “alleged harm to Plaintiff’s employment prospects is speculative, attenuated and implausible;” since the alleged inaccuracies actually upgraded Robins’ credentials, Robins had not alleged the “injury in fact” necessary to establish Article III standing.<sup>20</sup> The Ninth Circuit reversed.<sup>21</sup> It acknowledged that allegations of

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<sup>10</sup> 504 U.S. 555, 576-78 (1992).

<sup>11</sup> The last major confrontation before the Court on this issue ended inconclusively, despite armadas of amici arrayed on each side. *See First Am. Fin. Corp. v. Edwards*, 132 S. Ct. 2536-37 (2012) (dismissing the certiorari petition as improvidently granted).

<sup>12</sup> 136 S. Ct. at 1544, 1546.

<sup>13</sup> *Id.* at 1546.

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

<sup>15</sup> *Robins v. Spokeo, Inc.*, 742 F.3d 409, 411 (9th Cir. 2014).

<sup>16</sup> *Spokeo*, 136 S. Ct. at 1546.

<sup>17</sup> 15 U.S.C. §§ 1681n(a)–(a)(1)(A) (2012).

<sup>18</sup> *Id.* § 1681e(b).

<sup>19</sup> *Spokeo*, 136 S. Ct. at 1545-46.

<sup>20</sup> *Robins v. Spokeo, Inc.*, No. 10-05306, 2011 WL 11562151, at \*1 (C.D. Cal. Sept. 19, 2011).

<sup>21</sup> *Robins v. Spokeo, Inc.*, 742 F.3d 409, 414 (9th Cir. 2014).

financial injury “were sparse,” but concluded that Robins had demonstrated “violations of statutory rights created by the FCRA [that] are ‘concrete, *de facto* injuries’” nonetheless.<sup>22</sup>

When the Supreme Court granted certiorari, the defendants and their armada of amici could have expected a staunch ally in Justice Scalia. But by the time the case was decided, Justice Scalia had departed, and Justice Alito wrote for five of eight sitting justices in reversing the Ninth Circuit.<sup>23</sup> Justice Alito’s opinion did not dismiss the case, as defendant and its amici had urged. The opinion instead remanded to the case to the Ninth Circuit and explicitly noted it took “no position” as to whether Robins had alleged a “degree of risk” of harm “sufficient to meet the concreteness requirement.”<sup>24</sup> On one view, the result could be lauded as “judicial minimalism.” On another, to borrow posthumously from Justice Scalia, it “seems perversely designed to prolong the controversy and the litigation.”<sup>25</sup>

## II. THE STEPS OF *SPOKEO*

The *Spokeo* Court’s brief explanation of the current metes and bounds of prerequisite Article III injury identifies no less than six stages on the way to assessing “injury in fact”: (i) a particularization inquiry; (ii) a tangibility inquiry; and, if “intangible”: (iii) a constitutional inquiry; (iv) a historical inquiry; and, if Congress has acted: (v) an inquiry into consequent “real harm;” and (vi) the “material” risk thereof.<sup>26</sup>

### A. *Particularized Injury*

Modern standing doctrine exhibits an aversion to adjudicating claims of “generalized grievances.”<sup>27</sup> Cases reiterate that Article III requires injuries that are “concrete and particularized.”<sup>28</sup> A “personal stake” is said to be necessary to invoke judicial authority.<sup>29</sup> The Ninth Circuit had read “concrete and particularized” as a unified term of art assessing the presence or absence of “generalized grievances.” It found “injury in fact” because Robins

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<sup>22</sup> *Id.* at 410, 413-14.

<sup>23</sup> *Spokeo*, 136 S. Ct. at 1544, 1550.

<sup>24</sup> *Id.* at 1550.

<sup>25</sup> *Grutter v. Bollinger*, 539 U.S. 306, 348 (2003) (Scalia, J., concurring in part and dissenting in part).

<sup>26</sup> A flowchart of our understanding is attached *infra* at page 62.

<sup>27</sup> *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 575 (1992).

<sup>28</sup> *Id.* at 560. The phrase “concrete and particularized” first appeared in *Lujan*, and a Lexis search for “concrete w/3 particularized” in the Supreme Court database generates thirty-two post-*Lujan* hits.

<sup>29</sup> *Baker v. Carr*, 369 U.S. 186, 204 (1962).

complained of mistreatment of information about him—an “*individual rather than collective*” injury.<sup>30</sup>

The Ninth Circuit might be forgiven—in light of prior usage—for treating the phrase as a unitary appellation.<sup>31</sup> But Justice Alito’s majority rejected this understanding, chiding: “We have made it clear time and time again that an injury in fact must be both concrete *and* particularized.”<sup>32</sup> Justice Alito’s majority acknowledged—as it had to in light of prior case law—that a “particularized” injury need not be unique to the plaintiff.<sup>33</sup> And, although less than pellucid on this point, it did not dispute Justice Ginsburg’s statement, in her dissent, that “Robins, the Court holds, meets the particularity requirement for standing under Article III.”<sup>34</sup> So for Robins, the question was whether his injury was “concrete.”

#### B. Concrete Injury: “*Tangible Injuries Are Perhaps Easier to Recognize*”<sup>35</sup>

In explicating the requirement of “concreteness,” Justice Alito deployed a plethora of scare-quote-enveloped epithets: “A ‘concrete’ injury must be ‘*de facto*’; that is, it must actually exist. . . . [It must be] ‘real,’ and not ‘abstract.’”<sup>36</sup> But, he explained, “[c]oncrete’ is not . . . necessarily synonymous with ‘tangible.’”<sup>37</sup> On this not insignificant point, the Court was unanimous—garnering agreement in Justice Thomas’s concurrence and Justice Ginsburg’s dissent.<sup>38</sup>

Still, “tangible injuries,” we are told, “are perhaps easier to recognize.”<sup>39</sup> It appears that a “tangible” injury is a sufficient but not a necessary condition

<sup>30</sup> Robins v. Spokeo, Inc., 742 F.3d 409, 413 (9th Cir. 2014) (emphasis added).

<sup>31</sup> See Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1555 (2016) (Ginsburg, J., dissenting) (“[I]n the four cases cited by the Court, and many others, opinions do not discuss the separate offices of the terms ‘concrete’ and ‘particularized.’”).

<sup>32</sup> *Id.* at 1548 (majority opinion).

<sup>33</sup> See *id.* at 1548 n.7 (“The fact that an injury may be suffered by a large number of people does not of itself make that injury a nonjusticiable generalized grievance.”). In light of the public good characteristics of information, injuries involving information are particularly likely to be widely shared. See Kreimer, *supra* note 5, at 754-55, 766-86.

<sup>34</sup> Spokeo, 136 S. Ct. at 1554 (Ginsburg, J., dissenting).

<sup>35</sup> *Id.* at 1549 (majority opinion).

<sup>36</sup> *Id.* at 1548.

<sup>37</sup> *Id.* at 1549.

<sup>38</sup> See *id.* at 1550 (Thomas, J., concurring) (“[T]he Court explains that ‘concrete’ means ‘real,’ and ‘not abstract,’ but is not ‘necessarily synonymous with tangible.’ . . . I join the Court’s opinion.” (internal quotation marks omitted)); *id.* at 1555-56 (Ginsburg, J., dissenting) (“Concreteness as a discrete requirement for standing, the Court’s decisions indicate, refers to the reality of an injury, harm that is real, not abstract, but not necessarily tangible.”). As detailed in Kreimer, *supra* note 5, the Court has regularly recognized intangible injuries in fact regarding information, notwithstanding periodic eruptions of language regarding “palpable” or “tangible” injury. The Court’s unanimous and explicit recognition of this practice is welcome clarification.

<sup>39</sup> Spokeo, 136 S. Ct. at 1549 (majority opinion).

for showing the constitutionally requisite “concrete” injury in fact. But what is “tangibility”?

One could perhaps equate “tangible injury” with financial or physical injury. As Thomas Jefferson declared: “The legitimate powers of government extend to such acts only as are injurious to others.—But it does me no injury for my neighbour [sic] to say there are twenty gods, or no God. It neither picks my pocket nor breaks my leg.”<sup>40</sup> The Court in *Spokeo* seemed to acknowledge the physical injury accompanying mass torts as a paradigm case of justiciable injury.<sup>41</sup> And in other cases, the Court has uncontroversially regarded financial injuries as justiciable, even when no physical interference takes place.<sup>42</sup> So tangible injuries apparently embrace what Justice Scalia referred to as “Wallet Injury”<sup>43</sup> to the value of economic interests, including intellectual property rights, along with physical interference.

### C. Intangible Constitutional Injury

The *Spokeo* majority opens its explication of intangible injuries by observing that the Court has “confirmed in many . . . previous cases that intangible injuries can nevertheless be concrete. *See, e.g., Pleasant Grove City v. Summum*, 555 U.S. 460 (2009) (free speech); *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520 (1993) (free exercise).”<sup>44</sup> Characterizing these cases as involving intangible injury is puzzling. *Lukumi* involved the threat of a \$500 fine or sixty days in jail for engaging in ritual animal sacrifice,<sup>45</sup> and in *Summum*, efforts by the plaintiffs to erect their “stone monument” would have likely been met with force or legal sanctions.<sup>46</sup>

But the Court surely captures the gist of a solid line of existing case law in observing that it has regularly entertained claims of constitutional injury bare of physical or economic sequelae. In originally framing the “injury in fact” requirement, the Court observed, “[a] person or a family may have a

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40 THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 166 (1832).

41 *See* 136 S. Ct. at 1548 n.7 (“The victims’ injuries from a mass tort, for example, are widely shared, to be sure, but each individual suffers a particularized harm.”).

42 *See, e.g., ASARCO Inc. v. Kadish*, 490 U.S. 605, 618-19 (1989) (concluding that standing existed where a company’s mineral leases were endangered by an adverse state court decision); *Warth v. Seldin*, 422 U.S. 490, 508 n.18 (1975) (indicating that a “plaintiff who challenges a zoning ordinance or zoning practices” may establish standing by demonstrating “a present contractual interest in a particular project” that would be impeded by the ordinance or practices); *Ass’n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 152-53 (1970) (concluding that plaintiffs had standing where they alleged that competition caused them economic injury).

43 *Hein v. Freedom from Religion Found.*, 551 U.S. 587, 619 (2007) (Scalia, J., concurring in the judgment).

44 136 S. Ct. at 1549.

45 508 U.S. at 528.

46 555 U.S. at 464-67. Admittedly stone is not concrete, but still, the dispute seems quite palpable.

spiritual stake in First Amendment values sufficient to give standing to raise issues concerning the Establishment Clause and the Free Exercise Clause,”<sup>47</sup> and it has regularly recognized purely spiritual stakes as injuries in fact for four decades.<sup>48</sup> In addition, the Court in *Spokeo* cites *Clapper v. Amnesty International* for the proposition “that the risk of real harm can[] satisfy the requirement of concreteness.”<sup>49</sup> In *Clapper*, the “real harm” at issue was the National Security Agency’s manifestly intangible acquisition of telephony metadata information in alleged violation of the Fourth Amendment.<sup>50</sup> Both Justice Alito’s majority opinion and Justice Breyer’s dissent acknowledged that acquisition of information as a potential “injury in fact.”<sup>51</sup> So, too, Justice Thomas’s concurrence<sup>52</sup> cites with approval *Carey v. Piphus*, a venerable decision that sanctioned the award of nominal and potentially punitive damages for a violation of procedural due process that had no tangible effect on the plaintiffs’ status.<sup>53</sup> And in other cases during the October 2015 Term, the Court continued its unbroken practice of recognizing the intangible impacts of marginal dilution of voting strength<sup>54</sup> and personalized differential treatment by race<sup>55</sup> as “injuries in fact.”

Not every constitutional provision will be held to import “injury in fact.”<sup>56</sup> But lower courts—like a full complement of Supreme Court Justices—will find in *Spokeo* no limit on their degrees of freedom in regard to the justiciability of constitutional rights.

<sup>47</sup> *Camp*, 397 U.S. at 154.

<sup>48</sup> See Kreimer, *supra* note 5, at 784-89 (examining cases in which the Court found standing because of intangible injuries to plaintiffs’ Establishment Clause interests).

<sup>49</sup> *Spokeo*, 136 S. Ct. at 1549 (citing *Clapper v. Amnesty Int’l USA*, 133 S. Ct. 1138, 1148 (2013)).

<sup>50</sup> 136 S. Ct. at 1143-44.

<sup>51</sup> Compare *id.* at 1147-50 (majority opinion) (concluding that plaintiffs lacked standing because their alleged harm was too conjectural, but never questioning whether the government’s acquisition of telephone metadata could suffice to establish injury in fact), *with id.* at 1155 (Breyer, J., dissenting) (“No one here denies that the Government’s interception of a private telephone or e-mail conversation amounts to an injury that is ‘concrete and particularized.’”).

<sup>52</sup> *Id.* at 1552 (Thomas, J., concurring).

<sup>53</sup> 435 U.S. 247, 260-61, 266-67 (1978).

<sup>54</sup> See, e.g., *Evenwel v. Abbott*, 136 S. Ct. 1120 (2016) (addressing voting malapportionment claims on the merits); *Harris v. Ariz. Indep. Redistricting Comm’n*, 136 S. Ct. 1301 (2016) (addressing the same); see also *Baker v. Carr*, 369 U.S. 186, 204-08 (1962) (holding that plaintiffs had standing to challenge the voting apportionment at issue as unconstitutional).

<sup>55</sup> *Fisher v. Univ. of Tex. at Austin*, 136 S. Ct. 2198 (2016) (adjudicating on the merits claims of racial discrimination by a student who could not show that she would have been admitted to the University of Texas in the absence of an affirmative action program). The practice of recognizing personal differential treatment by race as a free standing “injury in fact” goes back four decades to *Regents of the University of California v. Bakke*, 438 U.S. 265, 280 n.14 (1978) (opinion of Powell, J.).

<sup>56</sup> See, e.g., *United States v. Richardson*, 418 U.S. 166, 171-80 (1974) (holding that a taxpayer lacked standing to challenge the Central Intelligence Agency Act as violative of Article 1, Section 9, Clause 7, because he was asserting a generalized grievance and could not show individual injury).



#### D. Intangible Harms: History

Having touched on constitutional injuries, which were not at issue in *Spokeo*, the Court pays the homage to history that has become customary in opinions on standing:

In determining whether an intangible harm constitutes injury in fact, both history and the judgment of Congress play important roles. Because the doctrine of standing derives from the case-or-controversy requirement, and because that requirement in turn is grounded in historical practice, it is instructive to consider whether an alleged intangible harm has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts.<sup>57</sup>

*Vermont Agency*, the case cited in *Spokeo* for historical support, held that the existence of *qui tam* suits during the framing era provided safe harbor for the standing of modern *qui tam* plaintiffs pursuing bounty actions, in which they could claim no personal harm.<sup>58</sup> And just one month after deciding *Spokeo*, the Court exhibited no jurisdictional qualms about addressing the merits of a claim by a private *qui tam* relator.<sup>59</sup>

There is a certain artificiality to this focus on history. It has long been recognized that the Courts of Westminster entertained requests for advisory opinions alien to the role of the federal courts in the tripartite American constitutional structure.<sup>60</sup> The relevance of “historical practice” to plaintiff standing also is attenuated by the merger of law and equity under the Federal Rules of Civil Procedure, which have superseded the traditional forms of action and rules of equity.<sup>61</sup> And the doctrine of standing as we know it—including the “injury in fact” requirement—was forged in large part through adjudications involving the administrative state during the twentieth century.<sup>62</sup> It thus seems anachronistic and perhaps quixotic to fixate on the

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<sup>57</sup> *Spokeo*, 136 S. Ct. at 1549 (citing *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 775-77 (2000)). Justice Thomas continued even further down the path, exploring common law doctrines from the seventeenth and eighteenth centuries in detail. *See id.* at 1550-52.

<sup>58</sup> *Vt. Agency of Nat. Res.*, 529 U.S. at 776-77.

<sup>59</sup> *Universal Health Servs. v. United States ex rel. Escobar*, 136 S. Ct. 1989 (2016).

<sup>60</sup> *See Flast v. Cohen*, 392 U.S. 83, 96 (1968) (noting that “the power of English judges to deliver advisory opinions was well established at the time the Constitution was drafted”).

<sup>61</sup> *See, e.g., Anthony J. Bellia, Jr., Article III and the Cause of Action*, 89 IOWA L. REV. 777, 818-36, 855-58 (2004) (describing supersession of common law forms of action and equity rules by the Federal Rules of Civil Procedure and the challenges this change poses for a historical account of Article III standing requirements).

<sup>62</sup> *See, e.g., Daniel E. Ho & Erica Ross, Did Liberal Justices Invent the Standing Doctrine? An Empirical Study of the Evolution of Standing, 1921-2006*, 62 STAN. L. REV. 591, 594 (2010) (noting that “conventional accounts” of the origins of the standing doctrine focus on the emergence of the administrative state, and exploring the doctrine’s evolution over the twentieth century).

question of how James Madison and Chief Justice Marshall would view the requirement of “concrete injury” in a class action seeking damages for the improper information processing techniques of a website aggregating data from across the Internet.

Nonetheless, having put history and tradition on the table, one might have expected Justice Alito to address the rather robust Anglo-American history of statutes allowing private parties to collect bounties for enforcing public duties. Early in this nation’s history, Chief Justice Marshall noted that—as one might expect in a new nation lacking an administrative apparatus— “[a]lmost every fine or forfeiture under a penal statute, may be recovered by an action of debt as well as by information.”<sup>63</sup> And a century later, citing a plethora of precedent, Justice Peckham observed:

Statutes providing for actions by a common informer, who himself had no interest whatever in the controversy other than that given by statute, have been in existence for hundreds of years in England, and in this country ever since the foundation of our Government. The right to recover the penalty or forfeiture granted by statute is frequently given to the first common informer who brings the action, although he has no interest in the matter whatever except as such informer.<sup>64</sup>

But Justice Alito’s majority opinion declined to engage with these or other historical statutory analogies to the FCRA.

Alternatively, Justice Thomas suggested that, under the common law, “the concrete-harm requirement does not apply as rigorously” in certain circumstances that could cover Robins’s suit.<sup>65</sup> Justice Alito’s majority, however, did not consider common law analogs, unlike analysis in other recent statutory-damage cases.<sup>66</sup> Courts and litigants thus have the option of seeking a safe harbor for standing for statutory damages via “instructive” history. But they have little guidance on how to find it.

#### E. *Concrete Intangible Injuries: The “Judgment of Congress” and “Real Harm”*

Whatever the parameters of freestanding constitutional or historical injury, Robins came before the Court asserting a claim for which Congress had provided a right to litigate. In *Flast v. Cohen*, Justice Harlan—hardly a judicial activist by the standards of his day—had taken the position that

<sup>63</sup> *Adams v. Woods*, 6 U.S. (2 Cranch) 336, 341 (1805).

<sup>64</sup> *Marvin v. Trout*, 199 U.S. 212, 225 (1905).

<sup>65</sup> See *Spokeo*, 136 S. Ct. at 1552 (Thomas, J., concurring) (noting that the requirement is not rigorous “when a private plaintiff seeks to vindicate his own private rights”).

<sup>66</sup> See, e.g., *Sprint Commc’ns Co. v. APCC Servs., Inc.*, 554 U.S. 269, 275-85 (2008) (relying on English and early American case law in concluding that an assignee, who would not receive any benefit from pursuing a claim, still has standing); *Doe v. Chao*, 540 U.S. 614, 625-26 (2004) (reading a statutory damages scheme against a backdrop of common law tort doctrine).

Congress had broad authority to designate private attorneys “to represent the public interest, despite their lack of economic or other personal interests.”<sup>67</sup> And Justice Kennedy’s pivotal concurrence in *Lujan*, as the Court noted in *Spokeo*, prominently affirmed that “Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before.”<sup>68</sup>

The *Spokeo* opinion reaffirms that Congress has a role in “identifying and elevating intangible harms.”<sup>69</sup> Thus, Justice Alito cites with approval to *Summers v. Earth Island Institute*,<sup>70</sup> *Lujan v. Defenders of Wildlife*,<sup>71</sup> and *Friends of the Earth v. Laidlaw*,<sup>72</sup> all of which recognized the intangible “aesthetic” injury suffered by plaintiffs encountering the results of environmental degradation as sufficiently “real” or “concrete” for justiciability when Congress so directs.<sup>73</sup> This is settled law in environmental cases as old as the “injury-in-fact” locution itself<sup>74</sup> and the Court apparently continues to recognize it. Still, for the *Spokeo* majority, in the face of congressional determination, the Court retains the authority to veto harms that are insufficiently “concrete” or “real” in its view. The opinion states, for example, that “a bare procedural violation, divorced from any concrete harm,” is not itself a sufficient injury.<sup>75</sup>

But all is not lost. Justice Alito’s opinion goes on to acknowledge, with a double negative, that the disparagement of bare procedural violations “does not mean . . . that the risk of real harm cannot satisfy the requirement of concreteness.”<sup>76</sup> Apparently, where Congress identifies a threshold injury that, by itself, is not sufficiently concrete for Article III purposes, standing can be salvaged if there is an adequate risk of a consequent “real harm.”

### 1. Threshold and Consequent Injuries

The analysis suggested by Justice Alito’s majority distinguishes between threshold injuries, such as “bare procedural violations,” and the sturdier “real” injuries to which they lead—and upon which they will piggyback over the

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<sup>67</sup> 392 U.S. 83, 131 (1968) (Harlan, J., dissenting).

<sup>68</sup> *Spokeo*, 136 S. Ct. at 1549 (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 580 (1992) (Kennedy, J., concurring in part and concurring in the judgment)).

<sup>69</sup> *Id.*

<sup>70</sup> 555 U.S. 488 (2009).

<sup>71</sup> 504 U.S. 555 (1992).

<sup>72</sup> 528 U.S. 167 (2000).

<sup>73</sup> *Summers*, 555 U.S. at 494; *Laidlaw* 528 U.S. at 183; *Lujan*, 504 U.S. at 562-63.

<sup>74</sup> See Kreimer, *supra* note 5, at 780-84 (discussing the history of “aesthetic” injuries in the environmental context).

<sup>75</sup> *Spokeo*, 136 S. Ct. at 1549.

<sup>76</sup> *Id.*

Article III finish line.<sup>77</sup> This explanation opens with an analogy: “For example, the law has long permitted recovery by certain tort victims even if their harms may be difficult to prove or measure.”<sup>78</sup> We might deduce from this that slander, like bare procedural violations, is a threshold, non-concrete or unreal harm. But because slander can cause consequent *real* harms, it satisfies Article III.

Plaintiffs apparently need not always make a dual threshold/consequent injury showing. Plaintiffs in some cases “need not allege any *additional* harm beyond the one Congress has identified.”<sup>79</sup> The Court cites to two such cases. In *Federal Election Commission v. Akins*, the Court “confirm[ed] that a group of voters’ ‘inability to obtain information’ that Congress had decided to make public is a sufficient injury in fact to satisfy Article III.”<sup>80</sup> And *Public Citizen v. Department of Justice*, held “that two advocacy organizations’ failure to obtain information subject to disclosure under the Federal Advisory Committee Act ‘constitutes a sufficiently distinct injury to provide standing to sue.’”<sup>81</sup> Similarly, four months before *Spokeo*, the Court held justiciable a class action based on a named plaintiff’s claim for \$1500 in statutory damages for receipt of an unsolicited automatic text message in violation of the Telephone Consumer Protection Act.<sup>82</sup>

The procedural/threshold versus consequent/real injury two-step inquiry introduces considerable play in the joints of analysis. By citing *Akins* and *Public Citizen*, the Court appears to recognize that the inability to obtain information is a sufficiently concrete harm. This position seems in accord with settled practice that treats informational harms as a “real” injury entailed by the violation itself.<sup>83</sup>

However, the majority, unlike Justice Thomas in concurrence and Justice Ginsburg in dissent, does not cite the foundational case of *Havens Realty Corp.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* (citing RESTATEMENT (FIRST) OF TORTS §§ 569 (libel), 570 (slander per se) (AM. LAW. INST. 1938)).

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* (citing 524 U.S. 11, 20-25 (1998)).

<sup>81</sup> *Id.* at 1549-50 (citing 491 U.S. 440, 449 (1989)).

<sup>82</sup> *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 669-72 (2016). Chief Justice Roberts and Justice Alito filed dissents challenging the plaintiff’s standing, based on the named plaintiff having been offered the \$1500 in statutory damages, but neither batted an eyelash at the absence of allegations of “concrete” or “tangible harm” beyond receipt of the prohibited text message. *See id.* at 677-83 (Roberts, C.J., dissenting); *id.* at 683-85 (Alito, J., dissenting).

<sup>83</sup> *See Kreimer, supra* note 5, at 765-72 (reviewing the case law and concluding that “before and after *Lujan*, the Court found that denial of access to information imposes a justiciable ‘injury in fact,’ even in the absence of other tangible impact on plaintiffs”); Sunstein, *supra* note 5, at 654 (suggesting that, after *Akins*, “[i]f Congress granted standing to citizens in general to seek information and information has been withheld, citizens in general can bring suit”).

*v. Coleman*.<sup>84</sup> In *Havens*, the defendant, in alleged violation of the Fair Housing Act, falsely informed a black tester, but not a white tester, that no apartments at a property were available.<sup>85</sup> The Court unanimously held that the black tester, who had no intention of renting an apartment, had suffered an injury in fact.<sup>86</sup> The Fair Housing Act, it observed, prohibited informing “any person because of race, color, religion, sex, or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available.”<sup>87</sup> The fact that “the tester may have approached the real estate agent fully expecting that he would receive false information, and without any intention of buying or renting a home, does not negate the simple fact of injury . . . [to the] statutorily created right to truthful housing information.”<sup>88</sup>

But if inaccurate information per se constitutes a concrete harm in *Havens*, why not in *Spokeo*? And if Robins has to prove some “harm” beyond inaccuracy, is the standing of testers in fair housing cases now in doubt? Perhaps the answer is that a practice of racial steering endangers values of the Fair Housing Act. But if so, is it not also plausible to observe, as Justice Ginsburg does in her dissent, that the practice of disseminating inaccurate information endangers the values of the FCRA?<sup>89</sup>

Readers, litigants, and lower courts are left to ponder whether Justice Alito’s majority here is leaving open the possibility that, in future cases, the Court will treat some informational harm as a mere threshold injury—insufficient to establish Article III standing unless such informational harm is linked to a more concrete sequelae. This would be a remarkably libertarian and disruptive result, given the pervasiveness of informational regulation.<sup>90</sup> On its face, however, *Spokeo* is an acknowledgment that, in the information age, statutory duties regarding information disclosure can generally be enforced by their intended beneficiaries.

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<sup>84</sup> 455 U.S. 363 (1982); see also *Spokeo*, 136 S. Ct. at 1553 (Thomas, J., concurring) (citing *Havens* for the proposition that a plaintiff seeking to vindicate a statutory right “need not allege actual harm beyond the invasion of that private right”); *id.* at 1555 & n.3 (Ginsburg, J., dissenting) (noting Congress’s ability to confer enforceable rights to information).

<sup>85</sup> *Havens*, 455 U.S. at 368.

<sup>86</sup> *Id.* at 373-74.

<sup>87</sup> *Id.* at 373 (quoting 42 U.S.C. § 3604(d)).

<sup>88</sup> *Id.* at 374.

<sup>89</sup> See *Spokeo*, 136 S. Ct. at 1555 n.3 (Ginsburg, J., dissenting) (“Just as the right to truthful information at stake in *Havens* . . . was closely tied to the Fair Housing Act’s goal of eradicating racial discrimination in housing, so the right here at stake is closely tied to the FCRA’s goal of protecting consumers against dissemination of inaccurate credit information about them.”).

<sup>90</sup> See Sunstein, *supra* note 5, at 618-24 (providing examples of a number of statutory frameworks that require various kinds of information disclosures).

## 2. “Material” Risk of “Real Harm”

It is not enough for a plaintiff to identify a threshold and consequent injury. The two must be adequately linked. With each iteration, however, the nature of the link required by Justice Alito’s majority seems to change. The majority opinion in *Spokeo* begins the relevant section by informing readers that there must be a “risk of real harm.”<sup>91</sup> In the slander analogy, however, any discussion of “risk” as probability of occurrence falls away. Rather, injury in fact exists “if [plaintiffs’ consequent] harms *may be* difficult to prove or measure.”<sup>92</sup> Finally, when remanding to the Ninth Circuit, the Court instructs that inaccurate reporting must “present [a] material risk of harm.”<sup>93</sup>

We are here offered three different kinds of links that are not quite congruent. First, we have abstract injuries that create *material* “degrees of risk” of consequent concrete harms. Next, we have consequent concrete harms that are difficult to *measure*. Third, we have consequent concrete harms that are difficult to *prove*. Since these are independent considerations, the factors may combine in various ways. Plaintiffs may show a risk of non-provable or non-measurable harm, or a non-provable or non-measurable risk of harm. They may show a non-provable risk of non-measurable harm, or a non-measurable risk of non-provable harm. And “materiality” may refer to the degree of risk—judged by its probability—or to its gravity—according to statutory or other values. The potential word games evoke Justice Harlan’s admonition.<sup>94</sup>

There is also the issue of quantification: what degree of risk is “material?” How difficult must it be to prove or measure injuries in order to relax the injury in fact requirements? The opinion alludes to *Clapper* for the proposition that “[t]his does not mean . . . that the risk of real harm cannot satisfy the requirement of concreteness.”<sup>95</sup> *Clapper* dismissed the risk of interception of communications in the national security context as an insufficient basis for constitutional standing because the risk of interception fell short of “clearly impending” harm.<sup>96</sup> Is this a triple negative suggesting that harm must be “clearly impending?” We think not. *Clapper* acknowledged in a footnote that “[i]n some instances, we have found standing based on a ‘substantial risk’ that the harm will occur.”<sup>97</sup> The *Spokeo* opinion also cites approvingly *Susan B. Anthony List v. Driehaus*,<sup>98</sup> which glossed *Clapper* and found the requisite “substantial risk” of harm where plaintiffs alleged a

<sup>91</sup> 136 S. Ct. at 1549.

<sup>92</sup> *Id.* (emphasis added).

<sup>93</sup> *Id.* at 1550.

<sup>94</sup> See *supra* note 8 and accompanying text.

<sup>95</sup> *Id.* at 1549 (citing *Clapper v. Amnesty Int’l USA*, 133 S. Ct. 1138 (2013)).

<sup>96</sup> *Clapper*, 133 S. Ct. at 1147-50.

<sup>97</sup> *Id.* at 1150 n.5.

<sup>98</sup> *Spokeo*, 136 S. Ct. at 1548 (citing 134 S. Ct. 2334 (2014)).

“credible threat” of future prosecution under an unconstitutional statute.<sup>99</sup> But like future courts and litigators, we cannot be sure.

Ultimately, identifying this degree of risk is a deeply mysterious business. The Alito majority states that “[i]t is difficult to imagine how dissemination of an incorrect zip code, without more, could work any concrete harm,”<sup>100</sup> and Justice Ginsburg refrains from contradicting this statement.<sup>101</sup> But if the test is imagination, advocates with more fertile vision will fill the gap rapidly.<sup>102</sup> We imagine that the test is not imagination. But if it is not, how is the “degree of risk” to be judged? And is it to be judged in terms of the “risk” that Congress discerned in a particular class of cases, or the “risk” that the plaintiff suffers in the case at hand?

### III. CONCLUSION: THE *SPOKEO* (NON)-SOLUTION

Set against these “general principles,” the Court in *Spokeo* remanded the case to the Ninth Circuit with a final set of directives. “In the context of this particular case,” the Ninth Circuit is instructed, the “general principles” we have discussed so far,

[T]ell us two things: On the one hand, Congress plainly sought to curb the dissemination of false information by adopting procedures designed to decrease that risk. On the other hand, Robins cannot satisfy the demands of Article III by alleging a bare procedural violation. A violation [that] . . . may result in no harm.<sup>103</sup>

This latter “no harm” scenario, in turn, can occur in one of two ways: (a) Information may be “entirely accurate” “even if a consumer reporting agency fails to provide the required notice to a user of the agency’s consumer

<sup>99</sup> *Susan B. Anthony List*, 134 S. Ct. at 2343-46.

<sup>100</sup> *Spokeo*, 136 S. Ct. at 1550.

<sup>101</sup> *See id.* at 1556 (Ginsburg, J., dissenting) (“Robins would not qualify, the Court observes, if he alleged a ‘bare’ procedural violation, one that results in no harm, for example, ‘an incorrect zip code.’ Far from an incorrect zip code, Robins complains of misinformation about his education, family situation, and economic status . . .” (citations omitted)).

<sup>102</sup> To us, it does not take much to imagine that an incorrect zip code could delay or prevent delivery of packages, letters, or checks. We are of course law professors, but actual examples are not lacking. *See, e.g.*, Sarah Fenske, *Any Error in Your Mailing Address Could Send Your Package to Post Office Hell*, L.A. WEEKLY (Dec. 13, 2013, 6:00 AM), <http://www.laweekly.com/news/any-error-in-your-mailing-address-could-send-your-package-to-post-office-hell-4255056> [<https://perma.cc/48NF-P83H>] (“If you put the wrong ZIP code on a package, that simple mistake could land you in post office hell.”). Indeed, the Post Office has an official designation for “mail having an incorrect barcode and/or ZIP Code discovered at a destination for which it is not addressed”: “loop mail.” U.S. POSTAL SERV., HANDBOOK PO-441, REHANDLING OF MAIL BEST PRACTICES 18 (2002).

<sup>103</sup> *Spokeo*, 136 S. Ct. at 1550. By “two things,” the Court apparently means the propositions in text. We count at least four things. *Cf.* DR. SEUSS, *THE CAT IN THE HAT* (1957) (discussing characters “thing one” and “thing two,” which evolve to things three and four).

information,” rendering the failure a non-justiciable “bare procedural violation;”<sup>104</sup> Or, (b), the inaccuracy can fail to “cause harm or present any material risk of harm”; for instance, “an incorrect zip code” does not present a “material risk of harm.”<sup>105</sup> However, the opinion “express[es] no view about any other types of false information.”<sup>106</sup>

What might this mean? Here is our best reconstruction: First, a plaintiff must assert congressional “identification” of procedural, informational, or other intangible harm. For Robins, these threshold harms involve violations of a statute that “sought to curb the dissemination of false information.”<sup>107</sup> If he cannot show that false information has been disseminated about him, he apparently cannot claim any congressionally recognized injury.<sup>108</sup>

Second, the plaintiff must identify, or the Court must discern, some “real” consequent harm of which there is some material (or non-provable or non-measurable) risk. The Court instructs the Ninth Circuit on remand to address “whether the particular procedural violations alleged . . . entail a degree of risk sufficient to meet the concreteness requirement.”<sup>109</sup> As we have noted, the process and standards for defining and proving the requisite “degree” of risk are puzzling.

The outcome of *Spokeo*, like its six steps (represented in the attached flowchart), is indeterminate. It answers some questions, but *Spokeo*’s analysis ultimately resembles its outcome—an unstable equilibrium—leaving courts, litigants, and commentators in considerable doubt as to where the wheel will spin next when the Court reaches full strength.

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<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

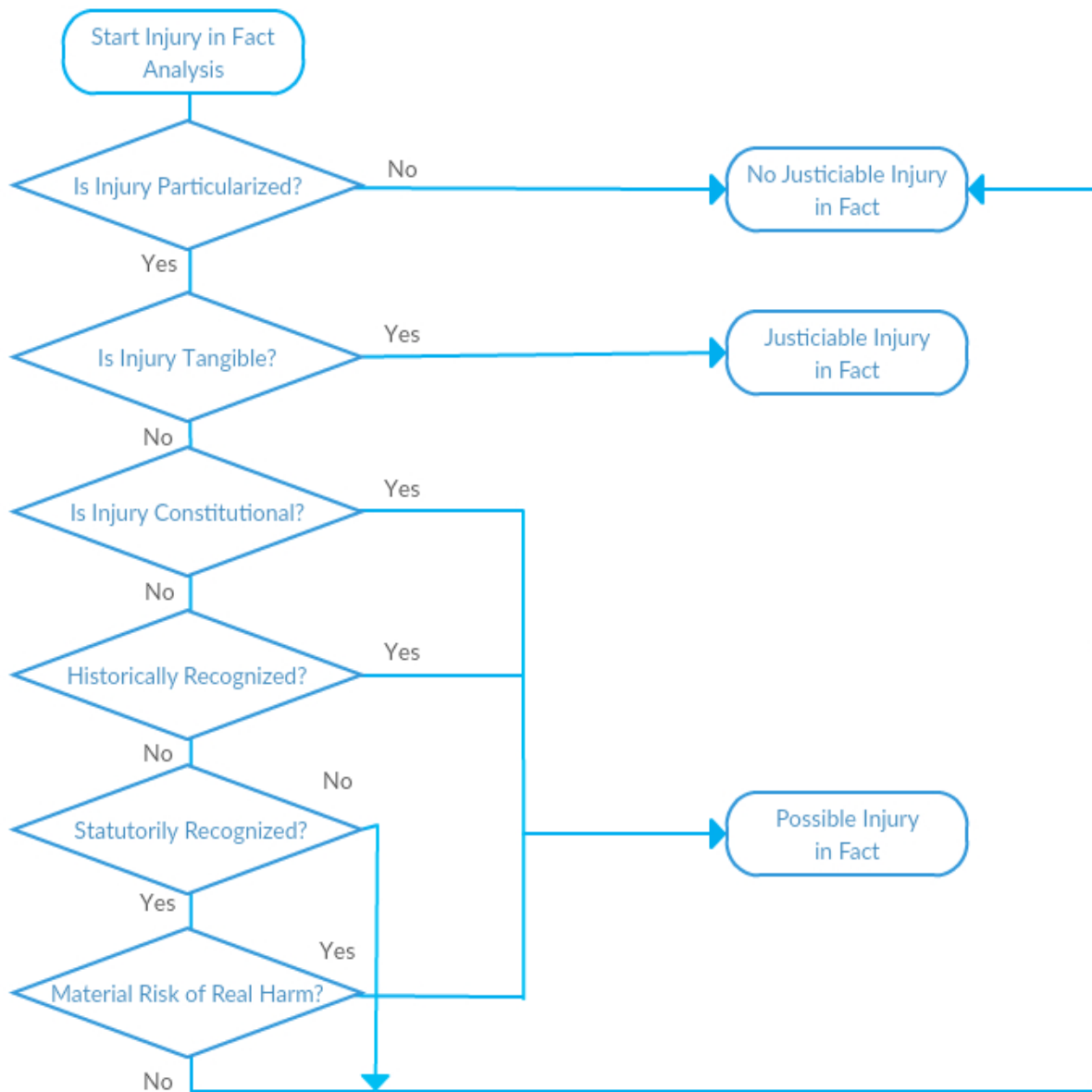
<sup>106</sup> *Id.* at 1550 n.8.

<sup>107</sup> *Id.* at 1550.

<sup>108</sup> This proposition is not self-evident. The FCRA was designed to allow the subjects of information to dispute or put the information in context if employers took adverse action based on the information. *See* Press Release, Fed. Trade Comm’n, Spokeo to Pay \$800,000 to Settle FTC Charges Company Allegedly Marketed Information to Employers and Recruiters in Violation of FCRA (June 12, 2012), <https://www.ftc.gov/news-events/press-releases/2012/06/spokeo-pay-800000-settle-ftc-charges-company-allegedly-marketed> [<https://perma.cc/7WCG-TBJH>] (noting that the FTC had reached a settlement with Spokeo for, inter alia, failing to notify consumers if a consumer report user took an adverse action against the consumer based on information contained in the consumer report in violation of its obligations as a consumer reporting agency under the FCRA). Since there is—as far as we can tell—no analysis by the Court of the text, purpose, context, structure, or history of the FCRA to divine what Congress “sought” to do, this exploration is as yet without guidance for other statutes. Indeed, whether the Ninth Circuit on remand—or other courts—are permitted to discern other statutory purposes for the FCRA is unclear.

<sup>109</sup> *Spokeo*, 136 S. Ct. at 1550.






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