A Post-*Spokeo* Taxonomy of Intangible Harms

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NOTE

A POST-SPOKEO TAXONOMY OF INTANGIBLE HARMs

Jackson Erpenbach*

Article III standing is a central requirement in federal litigation. The Supreme Court’s Spokeo decision marked a significant development in the doctrine, dividing the concrete injury-in-fact requirement into two subsets: tangible and intangible harms. While tangible harms are easily cognizable, plaintiffs alleging intangible harms can face a perilous path to court. This raises particular concern for the system of federal consumer protection laws where enforcement relies on consumers vindicating their own rights by filing suit when companies violate federal law. These plaintiffs must often allege intangible harms arising out of their statutorily guaranteed rights. This Note demonstrates that Spokeo’s standard for what constitutes a cognizable intangible harm has produced inconsistent and arbitrary results in such lower court cases. Courts have come to varying conclusions about which intangible harms are sufficiently concrete to confer standing under the Court’s new standard. This Note makes two contributions. First, it offers a novel taxonomy of these various intangible harms, sorted into five discrete categories. Once these categories are identified, the underlying inconsistencies, both between circuits and between similar consumer protection laws, become evident. Second, it proposes an approach to intangible harms that is more deferential to the judgment of Congress as revealed in its statutes.

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* J.D. Candidate, May 2020, University of Michigan Law School. I am indebted to Professor Nicholas Bagley and Professor Julian Davis Mortenson as well as Aviv Halpern and the Notes Office for their helpful comments, critiques, and edits. I am also deeply grateful for my family and Katherine for their patience and support.
INTRODUCTION

To bring a claim in federal court, plaintiffs must satisfy the standing requirement found in Article III’s “case” or “controversy” language.1 Over time, the Court has refined standing doctrine by framing it in terms of three neat, formalist elements: injury in fact, causation, and redressability.2 The Court’s articulation of standing has provided additional clarification for parties but has also raised new questions regarding the doctrine’s limits.3 Because of standing’s threshold nature, resolving these questions has consequences for countless federal cases.4

One area of significant controversy is what constitutes a cognizable injury in fact. Without one, a plaintiff cannot file suit in federal court. In the past, the Supreme Court has described cognizable injuries as “concrete and particularized, . . . ‘actual or imminent, [and] not “conjectural” or “hypothetical.”’5 Until the Court’s 2016 decision in Spokeo, Inc. v. Robins, lower courts generally treated the “concrete and particularized” language as one requirement: particularized injuries were presumed to be sufficiently con-

2. See infra Section I.A.
4. See Warth v. Seldin, 422 U.S. 490, 498 (1975) (“This is the threshold question in every federal case, determining the power of the court to entertain the suit.”).
crete. But in *Spokeo*, the Court made clear that concreteness is a separate, necessary requirement for a cognizable injury in fact. Yet *Spokeo* only further confused standing doctrine. The Court held that a plaintiff raising a statutory violation under a private right of action must have suffered some concrete injury beyond the mere violation. In doing so, the Court created new distinctions in the doctrine, dividing tangible from intangible harms, and “bare procedural violation[s]” from “risk[s] of real harm.” The interplay between *Spokeo* and the doctrine’s constitutional nature has created significant confusion in the lower courts. A confused jurisprudence could, as Justice Harlan feared, reduce “constitutional standing to a word game played by secret rules.”

A confused standing doctrine is especially troubling in the area of consumer protection because it may prevent consumers from vindicating their interests in a federal forum. The modern patchwork of federal laws can be a powerful tool for consumer interests. Yet since its inception, the system has been underfunded and underenforced. As a result, federal consumer protection statutes are heavily reliant upon private rights of action to police bad behavior. Private right of action provisions enable consumers wronged by fraudulent business practices to vindicate their rights by acting as their own “private attorneys general.” Crucially, standing doctrine limits the reach of

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7. *Spokeo*, 136 S. Ct. at 1548; see also id. at 1555 (Ginsburg, J., dissenting) (observing that *Spokeo* was the first case to explicitly “discuss the separate offices of the terms ‘concrete’ and ‘particularized.’”).
8. Id. at 1549 (majority opinion).
9. Id.
10. See infra Parts II–III.
14. See Mark E. Budnitz, *The Development of Consumer Protection Law, the Institutionalization of Consumerism, and Future Prospects and Perils*, 26 GA. ST. U. L. REV. 1147, 1165 (2010) (“During the Reagan administration . . . the political climate shifted and there were several developments that severely obstructed the expansion of consumer protection law.”); Morris, supra note 13, at 1905 (“[T]hese potentially powerful bodies of consumer protection law are woefully under-enforced.”).
15. See Budnitz, supra note 12, at 664.
16. See id. at 689 (“Public consumer laws are intended to protect the general consumer population, but Congress recognized that government enforcement agencies lack the resources to ensure satisfaction of that goal. The private attorney general provisions can go far toward achieving that goal if other obstacles do not stand in the way.”).
such private rights of action. Because standing is constitutional, it cannot be statutorily conferred. How lower courts apply Spokeo, then, has enormous implications for the future of consumer protection statutes.

This Note argues that lower courts have applied the Spokeo standard for standing to certain consumer protection statutes in an overly strict and inconsistent fashion. Part I tracks the development of Article III standing from the original language of “cases” or “controversies” through the formulation of its modern three-part structure in Lujan v. Defenders of Wildlife to the Court’s decision in Spokeo. Part II introduces an active circuit split between the Third and Ninth Circuits, which concerns standing under the Fair Credit Reporting Act (FCRA), as a heuristic for subsequent discussion. Part III offers a novel taxonomy of intangible harms recognized by lower courts in applying the Spokeo analysis. Finally, Part IV provides a starting point for a more consistent standing doctrine through greater deference to congressional factfinding.

I. BACKGROUND

This Part briefly tracks the development of the Court’s modern standing doctrine, culminating in Spokeo’s “concrete injury” standard. Section I.A describes standing’s constitutional roots, with an emphasis on the Court’s influential Lujan decision. Section I.B provides the background for the Court’s 2016 Spokeo decision and its focus on concreteness. Section I.C explores the standard for intangible harms and highlights persistent ambiguities.

A. The Development of Standing Doctrine

Modern standing has its roots in Article III of the Constitution, which restricts the judicial branch’s authority to “cases” and “controversies.” These terms set familiar baselines: courts preside over legal disputes between adversarial parties that can be resolved with a decision.

But standing as a distinct constitutional doctrine did not gain significant force until the latter half of the twentieth century. Two primary justifications have shaped the doctrine. The first justification concerns separation of

20. William Baude, Standing in the Shadow of Congress, 2016 SUP. CT. REV. 197, 198 (“It is black letter law that these terms require the case to be between the proper sorts of parties, ones who have some legal dispute that the court can resolve.”).
21. See Sunstein, supra note 3, at 169 (“In the history of the Supreme Court, standing has been discussed in terms of Article III on 117 occasions. Of those . . . nearly half . . . occurred after 1985 . . . The explosion of judicial interest in standing as a distinct body of constitutional law is an extraordinarily recent phenomenon.” (emphasis added) (citations omitted)). Others contest Sunstein’s historical claims. E.g., Ann Woolhandler & Caleb Nelson, Does History Defeat Standing Doctrine?, 102 MICH. L. REV. 689, 691, 712 (2004).
powers: the case-or-controversy requirement ensures that courts retain their traditional role as adjudicators of live disputes and are not pushed into legislative or executive roles.\textsuperscript{22} The second is pragmatic: standing conserves judicial resources and ensures that consequential matters are brought by motivated plaintiffs.\textsuperscript{23}

Justice Scalia’s \textit{Lujan} opinion “significantly shift[ed] the law of standing” to its modern tripartite framework.\textsuperscript{24} A plaintiff must first prove that she has suffered an injury in fact, defined as “an invasion of a legally protected interest which is [both] (a) concrete and particularized and (b) ’actual or imminent, not “conjectural” or “hypothetical.”’”\textsuperscript{25} Second, a plaintiff must show a “causal connection between the injury and the conduct complained of,” and third, “it must be ‘likely’ . . . that the injury will be ‘redressed by a favorable decision.’”\textsuperscript{26}

In laying out the modern elements of standing, \textit{Lujan} also demonstrated the impact of the doctrine’s constitutional roots. The case concerned a challenge to a federal regulation that restricted the reach of an Endangered Species Act (ESA) protection to within U.S. territory.\textsuperscript{27} Plaintiffs challenged the regulation under the ESA’s citizen-suit provision.\textsuperscript{28} They alleged that the move risked the extinction of certain species abroad, which would cause aesthetic and vocational injuries to the plaintiffs.\textsuperscript{29} But because the plaintiffs had no plans to even visit the habitats of the threatened species, the Court found no cognizable injury and dismissed plaintiffs’ claim for lack of standing.\textsuperscript{30}

\begin{itemize}
  \item \textsuperscript{22} See, e.g., FEC v. Akins, 524 U.S. 11, 36 (1998) (Scalia, J., dissenting) (“If today’s decision is correct, it is within the power of Congress to authorize any interested person to manage (through the courts) the Executive’s enforcement of any law . . . .”); Martin H. Redish & Sopan Joshi, \textit{Litigating Article III Standing: A Proposed Solution to the Serious (but Unrecognized) Separations of Powers Problem}, 162 U. PA. L. REV. 1373, 1375 (2014).
  \item \textsuperscript{24} Sunstein, \textit{supra} note 3, at 164–65, 198–99 (“\textit{Lujan} may well be one of the most important standing cases since World War II . . . . Indeed, the decision ranks among the most important in history in terms of the sheer number of federal statutes that it apparently has invalidated.”).
  \item \textsuperscript{26} \textit{Lujan}, 504 U.S. at 560–61 (quoting Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 38 (1976)). This Note focuses exclusively on injury in fact’s concreteness requirement.
  \item \textsuperscript{27} \textit{Id.} at 557–58.
  \item \textsuperscript{28} 16 U.S.C. § 1540(g) (2012) (“\textit{A}ny person may commence a civil suit on his own behalf . . . . to enjoin any person . . . . alleged to be in violation of any provision of this chapter . . . .”).
  \item \textsuperscript{29} \textit{Lujan}, 504 U.S. at 562–67.
  \item \textsuperscript{30} \textit{Id.} at 563–64, 578.
\end{itemize}
The Court rejected the claim that plaintiffs could establish standing via the ESA’s citizen-suit provision without alleging an injury in fact.\textsuperscript{31} It reasoned that the statutory procedure in question must protect some “separate concrete interest,” not a “generally available grievance about government.”\textsuperscript{32} This established an important strand in the Court’s standing jurisprudence: because standing is constitutional, Congress lacks the authority to disregard injury in fact.\textsuperscript{33}

Nevertheless, Congress still has a role to play in conferring standing, though that role is imprecise. The majority acknowledged the special nature of “procedural rights”\textsuperscript{34} insofar as they justify loosening the standards for immediacy and redressability.\textsuperscript{35} Justice Kennedy, in an influential concurring opinion, went a step further, observing 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.”\textsuperscript{36} The ESA’s citizen-suit provision failed to do so, however, because it did not “identify the injury it seeks to vindicate and relate [it] to the class of persons entitled to bring suit.”\textsuperscript{37} Beyond these comments, however, Congress’s authority to bestow standing lacked much-needed clarity.

B. Spokeo and the Concrete Injury Requirement

\textit{Spokeo} picked up where \textit{Lujan} left off and gave concreteness meaning independent of particularity. Thomas Robins filed suit against Spokeo, Inc., an online “people search engine” often used for background checks,\textsuperscript{38} for violating the Fair Credit Reporting Act (FCRA).\textsuperscript{39} Robins claimed that Spokeo listed false information—that he was married, had children, was in his 50s, was wealthy, and held a graduate degree—when Robins was actually

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\textsuperscript{31}. \textit{Id.} at 572–73.
\textsuperscript{32}. \textit{Id.} “We do \textit{not} hold that an individual cannot enforce procedural rights; he assuredly can, so long as the procedures in question are designed to protect some threatened concrete interest . . . .” \textit{Id.} at 573 n.8.
\textsuperscript{34}. A procedural right is conferred by statute or regulation and entitles an individual to a particular process, like access to judicial review or information from the government. See Evan Tsen Lee & Josephine Mason Ellis, \textit{The Standing Doctrine’s Dirty Little Secret}, 107 \textit{N.W. U. L. Rev.} 169, 174 n.21 (2012).
\textsuperscript{35}. \textit{Lujan}, 504 U.S. at 572 n.7.
\textsuperscript{36}. \textit{Id.} at 580 (Kennedy, J., concurring); \textit{see also} Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1549 (2016).
\textsuperscript{37}. \textit{Lujan}, 504 U.S. at 580 (Kennedy, J., concurring).
\textsuperscript{38}. \textit{Online Background Reports, SPOKEO}, https://www.spokeo.com/background-check [https://perma.cc/ACB9-HYPC].
young, uneducated, and unemployed. These inaccuracies were caused by Spokeo’s alleged failure to comply with the FCRA’s regulations for consumer reporting agencies, particularly the obligation to “follow reasonable procedures to assure maximum possible accuracy.” The district court dismissed Robins’s claim for want of a cognizable injury. The Ninth Circuit reversed, concluding that Robins’s injury was both concrete and particular because his “personal interests in the handling of his credit information are individualized rather than collective.” The Supreme Court ultimately vacated and remanded, holding that the Ninth Circuit improperly found Robins’s alleged procedural violation to be a concrete injury in fact.

The Court agreed that Robins’s injury was sufficiently particular but found that the Ninth Circuit overlooked the concreteness requirement. In so doing, the Court found that particularity alone is necessary but not sufficient for standing—“an injury in fact must also be ‘concrete.’” The Spokeo Court further explained that an injury is concrete when it is “de facto; . . . it must actually exist.” Concrete means “‘real,’ and not ‘abstract.’” Rather, concrete injuries take two forms: tangible or intangible. Tangible concrete injuries, the Court admitted, are “easier to recognize” than the intangible variety. In fact, commentators generally agree that tangibility is

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40. See Spokeo, 136 S. Ct. at 1546.
41. 15 U.S.C. § 1681e(b) (2012) (“Whenever a consumer reporting agency prepares a consumer report it shall follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates.”). For examples of reasonable procedures that Spokeo could have implemented, see Lauren E. Willis, Spokeo Mis-speaks, 50 LOY. L.A. L. REV. 233, 236–37 (2017).
44. Spokeo, 136 S. Ct. at 1550.
45. Id. at 1545.
46. Id. at 1548.
47. Id. (citing BLACK’S LAW DICTIONARY 479 (9th ed. 2009)).
48. Id. (quoting Concrete, WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY (unabr. ed. 1971), and Concrete, THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE (unabr. ed. 1967)).
49. Id. at 1549.
50. This choice of words contributes to doctrinal confusion. Concrete, for example, is defined as “tangible,” suggesting an intangible entity is no longer concrete. Concrete, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/concrete [https://perma.cc/3NZT-CXQE]. Intangible is further defined as “an abstract quality or attribute.” Intangible, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/intangible [https://perma.cc/SK6S-9Z87] (emphasis added). See also Felix T. Wu, How Privacy Distorted Standing Law, 66 DEPAUL L. REV. 439, 454 (2017) (“These . . . tools of statutory construction . . . are entirely misplaced here because the phrase ‘concrete and particularized’ is . . . invented by the Court itself.”).
51. Spokeo, 136 S. Ct. at 1549.
sufficient to establish concreteness. The more interesting question, and the focus of this Note, is which intangible injuries are sufficiently concrete for purposes of standing.

C. Intangible Harms

Spokeo does not affect standing for harms arising from violations of the Constitution. To help identify intangible concrete injuries that are not constitutionally derived, the Court provided branching lines of inquiry for lower courts to puzzle through. At bottom, an intangible injury is concrete if it is supported, to some indefinite degree, by history and the judgment of Congress, and the injury entails at least a risk of real harm to the plaintiff.

For cognizable intangible injuries, the Court directed that “both history and the judgment of Congress play important roles.” The history component requires a court to inquire “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.” Use of the language “close relationship” is significant—it implies that courts should engage in a process of analogy but need not find a one-to-one analogue between a plaintiff’s alleged harm and the common law.

Further, the judgment of Congress “is also instructive and important” because “Congress is well positioned to identify intangible harms.” The Spokeo Court referred back to Lujan and observed “that Congress may ele-

52. See Craig Konnoth & Seth Kreimer, Spelling Out Spokeo, 165 U. PA. L. REV. ONLINE 47, 51–52 (2016) (“It appears that a 'tangible' injury is a sufficient but not a necessary condition for showing the constitutionally requisite 'concrete' injury in fact.”).

53. Though not every violation of a constitutional right confers standing, Spokeo does not appear to alter the Court’s method of vindicating constitutional injuries. See id. at 52–53. For example, the Court highlights two cognizable intangible injuries, violations of the right to free speech and right to free exercise, that are both constitutionally derived. Spokeo, 136 S. Ct. at 1549.

54. For an insightful flowchart of the Spokeo analysis, see Konnoth & Kreimer, supra note 52, at 62.

55. Spokeo, 136 S. Ct. at 1549.

56. Id. (emphasis added).

57. Id. (quoting In re Horizon Healthcare Servs. Inc. Data Breach Litig., 846 F.3d 625, 639 (3d Cir. 2017)).

58. See Susinno v. Work Out World Inc., 862 F.3d 346, 351 (3d Cir. 2017) (“[A] close relationship does not require that the newly proscribed conduct would 'give rise to a cause of action under common law.' But it does require that newly established causes of action protect essentially the same interests that traditional causes of action sought to protect.” (citation omitted) (quoting In re Horizon Healthcare Servs. Inc. Data Breach Litig., 846 F.3d 625, 639 (3d Cir. 2017))).

59. Spokeo, 136 S. Ct. at 1549.

60. Id. (quoting Lujan v. Defs. of Wildlife, 504 U.S. 555, 578 (1992)).
Yet the Court qualified that a statutory violation that is otherwise “divorced from any concrete harm”—termed “a bare procedural violation”—does not confer standing.62 Congress’s judgment is especially relevant when a plaintiff’s alleged intangible injury manifests as a “risk of real harm.”63 The Spokeo Court recognized that this “real harm” can be uncontroversially concrete even when “difficult to prove or measure,” such as in the case of slander per se.64 Plaintiffs can invoke a congressionally granted procedural right—here, the right to enforce an accurate report—meant to protect the plaintiff from an intangible risk of harm without the “need [to] allege any additional harm beyond the one Congress has identified.”65 As an example, the Court cited its line of cases that upheld standing when plaintiffs suffered various “informational injuries,” like voters who were denied information on campaign contributions to which they were statutorily entitled.66 Some procedural violations are sufficiently concrete in themselves, while others require articulating a consequent risk of harm from the violation.67

Though the majority opinion punted on the resolution of Robins’s standing by remanding the case, it provided two examples of procedural violations of the FCRA that would nevertheless fall short of a concrete injury.68 First, Robins’s information could be entirely accurate but Spokeo simply failed to provide him statutorily required notice.69 Though a procedural violation, this would not constitute an injury sufficient to confer standing. Second, his information could be inaccurate but trivially so.70 For example, an “incorrect zip code” could not, “without more, . . . work any concrete

61. Id. (quoting Lujan v. Defs. of Wildlife, 504 U.S. 555, 580 (1992) (Kennedy, J., concurring)).
62. Id.
63. Id.
64. Id. (citing RESTATEMENT (FIRST) OF TORTS §§ 569–70 (AM. LAW INST. 1938)).
65. Id. (emphasis in original).
67. See Konnoth & Kreimer, supra note 52, at 56.
68. In her dissent, Justice Ginsburg largely agreed with the majority’s articulation of the law but concluded that Robins had already adequately alleged a concrete injury to his employment prospects. Spokeo, 136 S. Ct. at 1554–55 (Ginsburg, J., dissenting). “[M]isinformation about his education, family situation, and economic status . . . could affect his fortune in the job market,” a harm that the FCRA “aimed to prevent.” Id. at 1556. Justice Ginsburg also emphasized that the majority’s clear distinction between concreteness and particularity is a novel explanation of the Court’s standing doctrine. Id. at 1555.
69. Id. at 1550 (majority opinion).
70. Id.
harm.” Whether other inaccuracies were merely trivial or instead resulted in concrete injury became a question for the Ninth Circuit on remand.\footnote{Spokeo, 136 S. Ct. at 1550 n.8. The Ninth Circuit’s remanded opinion, Robins v. Spokeo, Inc., 867 F.3d 1108 (9th Cir. 2017), cert. denied, 138 S. Ct. 931 (2018), is discussed infra Section III.B.}

The Court’s discussion of congressional judgment left lingering questions. First, little was said about the relationship between the dual factors of history and judgment. Is the test, for example, disjunctive or conjunctive? Here, some courts and commentators have adopted a disjunctive interpretation: an intangible injury may be concrete even if one of the two factors is not present.\footnote{Muransky v. Godiva Chocolatier, Inc., 922 F.3d 1175, 1187 (11th Cir. 2019) (describing the two factors as “independent”); Dreher v. Experian Info. Sols., Inc., 856 F.3d 337, 345 (4th Cir. 2017); Konnoth & Kreimer, supra note 52, at 62.} Second, the Court did not explain how to identify Congress’s judgment nor how much weight it carries in the analysis. Here, lower courts have largely cohered around a two-step analysis first articulated by the Second Circuit in Strubel v. Comenity Bank.\footnote{842 F.3d 181, 190 (2d Cir. 2016) (“Spokeo . . . instruct[s] that an alleged procedural violation can by itself manifest concrete injury where Congress conferred the procedural right to protect a plaintiff’s concrete interests and where the procedural violation presents a ‘risk of real harm’ to that concrete interest . . . .” (quoting Spokeo, 136 S. Ct. at 1549)); see also Macy v. GC Servs. Ltd. P’ship, 897 F.3d 747, 754–56 (6th Cir. 2018); Owner-Operator Indep. Drivers Ass’n v. U.S. Dep’t of Transp., 879 F.3d 339, 344 (D.C. Cir. 2018); Meyers v. Nicolet Rest. of De Pere, LLC, 843 F.3d 724, 728 n.4 (7th Cir. 2016).}

The Ninth Circuit, in the remand of Spokeo, summarized the Strubel test as whether (1) the provision at issue was established to protect a plaintiff’s concrete interest and (2) the interest was actually at risk of harm in the case.\footnote{Robins, 867 F.3d at 1118.}

On remand, the Ninth Circuit again granted Robins standing.\footnote{Robins, 867 F.3d at 1113; see also infra Section III.B.1.} In Spokeo’s wake, lower courts have struggled to adopt a consistent methodology for identifying intangible concrete injuries across a range of alleged violations of comparable consumer protection laws. This muddled jurisprudence is exemplified by the conflicting approaches that the Third and Ninth Circuit have embraced, which is the focus of Part II.

II. THE DUTTA–LONG CIRCUIT SPLIT

The divergent outcomes reached in Dutta v. State Farm Mutual Insur-\footnote{895 F.3d 1166 (9th Cir. 2018).} ance\footnote{903 F.3d 312 (3d Cir. 2018).} and Long v. Southeastern Pennsylvania Transportation Authority\footnote{Robins, 867 F.3d at 1118.} demonstrate the lingering confusion left by Spokeo. Ambiguity remained not only for Robins’s particular claim on remand before the Ninth Circuit\footnote{Id. at 1118; see also infra Section III.B.1.} but also for other violations of the FCRA and a host of similarly structured stat-
utes designed to protect consumer interests. This split between the Third and Ninth Circuits constitutes a meaningful issue for plaintiffs challenging violations of the FCRA disclosure requirements but also offers a useful heuristic for conceiving of intangible harms under Spokeo.

The FCRA regulates the use of credit reports for hiring and employment purposes. An employer may, based on information in a properly obtained report, choose to take an “adverse action” against a current or prospective employee. Before taking such an adverse action, however, the employer must first provide the employee a copy of the report and an opportunity to respond. Though Congress’s most obvious concern was to correct inaccurate reports, the provision also allows the employee to “bring additional facts to the employer’s attention” and “present her side of the story ‘even where the facts are clear.’” The Third and Ninth Circuits have split over whether failing to provide an employee a copy of her report constitutes a cognizable injury when there is no likelihood that presenting the employee’s side of the story will alter the ultimate outcome.

The Ninth Circuit in Dutta concluded that such a plaintiff lacks standing. As part of its hiring process, State Farm obtained Bobby Dutta’s credit report in 2014. After identifying issues in his credit history that disqualified him for the position, State Farm informed Dutta that he had been rejected. Dutta was not provided an actual copy of his credit report, which contained several factual errors, until several days after he had been rejected. Even after Dutta identified the report’s mistakes, however, State Farm again informed him that he had been rejected. The Ninth Circuit denied Dutta standing for his claim under the FCRA because State Farm’s procedural violation did not ultimately harm Dutta. Citing State Farm’s undisputed hiring policy, the court concluded that the accurate portions of his credit report “alone disqualified Dutta from” the position. Because any inaccuracies that Dutta provided would be immaterial to his employment, his inability to explain them was not a concrete injury.

81. Id. § 1681(b)(3).
82. Id. The employer must also provide “a description in writing of the rights of the consumer under this subchapter.” Id. § 1681b(b)(3)(A)(ii); see also infra Section III.E.
85. Id. at 1170.
86. Id.
87. Id.
88. Id. at 1170–71.
89. Id. at 1176.
90. Id.
91. Id.
The Third Circuit in *Long*, on the other hand, recognized standing for a similar situation. Three plaintiffs, each with prior drug convictions, applied for employment with the Southeastern Pennsylvania Transportation Authority (SEPTA).\(^{92}\) Though it first appeared that the plaintiffs had been successfully hired, SEPTA later informed each that they were not hired pursuant to SEPTA’s “‘categorical lifetime ban’ on hiring anyone convicted of a [drug] crime.”\(^{93}\) Crucially, SEPTA did not provide the plaintiffs copies of their background checks before informing them of its decisions.\(^{94}\) The plaintiffs filed an FCRA claim, arguing that, while their background checks were accurate, SEPTA nevertheless deprived them of their statutory right to review the reports and respond before an adverse action.\(^{95}\) In recognizing standing, the Third Circuit insisted that “the FCRA does not condition the right to receive a consumer report on whether having the report would allow an individual to stave off an adverse employment action.”\(^{96}\)

These conflicting outcomes stem from the courts’ differing views of the interests protected by the FCRA’s prior disclosure provision. Tellingly, the Ninth Circuit exclusively characterized the disclosure provision’s purpose as correcting “false information” and providing “the opportunity to contest erroneous information.”\(^{97}\) The Third Circuit, however, adopted a broader view of the provision, going beyond merely ensuring the accuracy of reports.\(^{98}\) Specifically, the Third Circuit identified four purposes served: “[A]ccuracy, relevancy, proper utilization, and fairness.”\(^{99}\) Even if the reports had been perfectly accurate, the plaintiffs were still deprived of a fair and transparent process that would have allowed them to present their side of the story. The Third Circuit also emphasized Congress’s prophylactic aims, interpreting the FCRA’s disclosure provision as serving important functions beyond the employment opportunity at issue.\(^{100}\) For the plaintiffs in *Long*, the lack of prior disclosure, while not affecting their immediate employment at SEPTA, did have other repercussions. The court noted that prior disclosure allows “individuals to know beforehand when their consumer reports might be used


\(^{94}\) Id.

\(^{95}\) Id. If SEPTA is found to be noncompliant with the FCRA, the plaintiffs could recover statutory damages and attorneys’ fees. 15 U.S.C. § 1681n(a) (2012).

\(^{96}\) Long, 903 F.3d at 319.


\(^{98}\) Long, 903 F.3d at 318 (“[T]he statute confers a broader right than simply to be free from adverse action based on inaccurate information.”).

\(^{99}\) Id. at 319 (“The advance notice requirement, then, supports both accuracy and fairness.”).

\(^{100}\) See id. at 318–19.
against them . . . either in the current job application process[] or going forward in other job applications.”

These questions—What did Congress intend to accomplish with this statute? And how should the court characterize the injury in question?—are at the center of judicial disagreements after Spokeo. Beyond the FCRA, the enforcement of a host of other consumer protection statutes, including the Telephone Consumer Protection Act (TCPA), Fair and Accurate Credit Transactions Act (FACTA), and the Fair Debt Collection Practices Act (FDCPA), depends on how lower courts treat Congress’s judgment and characterize plaintiffs’ harm.

III. CATEGORIES OF INTANGIBLE HARMs

Spokeo has affected consumer protection laws unevenly. For example, while it risks extinguishing claims arising under FACTA, claims under TCPA are virtually unimpeded.

Having little Supreme Court guidance, lower courts have identified numerous harms when analyzing a plaintiff’s intangible yet concrete injury. This Note analyzes and categorizes the intangible harms recognized by lower courts into five categories.

1. Privacy harms, both those resulting from distribution of plaintiffs’ personal information to third parties as well as claims of intrusion upon seclusion and breach of confidence when third parties are absent.
2. Personal and property torts in which courts have analogized claims of slander, infliction of emotional distress, and several property interests to modern statutory violations.
3. Pecuniary costs that consist of financial harms suffered by plaintiffs.
4. Risks of harm that plaintiffs may suffer from a statutory violation, especially identity theft or potentially fraudulent debt collection.
5. Informational injuries that plaintiffs have suffered by being denied statutorily guaranteed information necessary to exercise some substantive right.

101. Id. at 319. The Third Circuit also noted that SEPTA’s argument has a degree of circularity to it, as “the consumer cannot know whether his report is accurate unless it is disclosed to him.” Id.


105. This Note will focus on the FCRA, FACTA, TCPA, and FDCPA, using other statutes to draw comparisons.
As this Part demonstrates, these categories are not fixed, but they nevertheless provide a starting point for assessing the state of the doctrine.106

A. Privacy Harms

In these cases, plaintiffs allege that defendant’s statutory violation resulted in a concrete injury to their privacy interests by revealing identifying, often sensitive, information about the individual or by entering the plaintiff’s personal space.107 Courts have identified three variants on this core claim: a “traditional” invasion of privacy through dispersion of identifying information,108 intrusion upon a plaintiff’s seclusion,109 and breach of confidence.110 Distinguishing between these categories can be difficult, and much turns on the individual judges’ characterization of the harm.

1. Invasion of Privacy

Under Spokeo’s first factor for intangible harms, courts have identified a robust historical basis on which plaintiffs may allege privacy harms. For example, in Eichenberger v. ESPN, Inc., the Ninth Circuit considered an alleged violation of the Video Privacy Protection Act (VPPA) resulting from sharing customers’ information with a third party.111 The court identified a historical corollary to the alleged harm, observing that “[v]iolations of the right to privacy have long been actionable at common law.”112 Applying this common law conception to modern concerns about individuals’ information, the court continued that “both the common law and the literal understanding of privacy encompass the individual’s control of information concerning his or her person.”113 The Third Circuit similarly identified privacy harms as a distinct injury. In In re Horizon Healthcare Services Inc. Data Breach Litigation, concerning release of information in violation of the FCRA, Judge Shwartz’s

106. “It’s difficult, we recognize, to identify the line between what Congress may, and may not, do in creating an ‘injury in fact.’ Put five smart lawyers in a room, and it won’t take long to appreciate the difficulty of the task at hand.” Hagy v. Demers & Adams, 882 F.3d 616, 623 (6th Cir. 2018).


108. Personal information could include “names, dates of birth, marital statuses, genders, occupations, employers, Social Security numbers, and driver’s license numbers.” Galaria v. Nationwide Mut. Ins. Co., 663 F. App’x 384, 386 (6th Cir. 2016). But not all identifiable information is necessarily private. Cf. Susinno v. Work Out World Inc., 862 F.3d 346, 352 n.3 (3d Cir. 2017) (“[A] party does not satisfy the concreteness analysis ‘simply by appending the word “privacy” to her allegation.’”) (quoting Brief of Amicus Curiae the Chamber of Commerce of the U.S. in Support of Defendant-Appellee at 14, Susinno, 862 F.3d 346 (No. 16-3277)).

109. See RESTATEMENT (SECOND) OF TORTS § 652B.

110. See RESTATEMENT (FIRST) OF TORTS § 757 (AM. LAW INST. 1938).

111. 876 F.3d 979, 981–82 (9th Cir. 2017).

112. Eichenberger, 876 F.3d at 983.

concurring opinion clarified that an individual’s injury premised on a privacy interest is sufficient even without an injury tied to economic loss.\textsuperscript{114} Privacy on its own has “sufficient historical roots to satisfy ... concrete harm for standing purposes.”\textsuperscript{115}

Courts have also found that invasion of privacy satisfies Spokeo’s second factor: the judgment of Congress. Courts inquire, on a statute-by-statute basis, whether Congress intended the procedural requirement in question to safeguard an individual’s privacy interest. For example, courts have held that the VPPA\textsuperscript{116} and the FCRA\textsuperscript{117} both include procedural requirements calibrated to prevent privacy injuries.

Eichenberger and Horizon Healthcare invoked a distinction that separates viable privacy injuries from nonviable ones: the personal information in question must be disseminated.\textsuperscript{118} The centrality of dissemination in privacy harms is demonstrated in a D.C. Circuit opinion.\textsuperscript{119} In that case, four truck drivers sued the Department of Transportation because its database listed inaccurate information about them in violation of the FCRA.\textsuperscript{120} The court recognized standing for the two truckers whose information had been shared with third parties, but not for the two whose information had remained in the department’s control.\textsuperscript{121} This distinction is grounded in both history and the judgment of Congress. First, the court observed that there is “no historical or common-law analog where the mere existence of inaccurate information, absent dissemination, amounts to concrete injury.”\textsuperscript{122} Second, the court recognized that “the harm Congress was concerned about was the dissemination of inaccurate information, not its mere existence.”\textsuperscript{123}

\begin{footnotesize}
\begin{enumerate}
\item[114.] 846 F.3d 625, 643 (3d Cir. 2017) (Shwartz, J., concurring).
\item[115.] Horizon, 846 F.3d at 642.
\item[116.] Eichenberger, 876 F.3d at 983 (concluding that “the VPPA provision at issue here[] codifies a context-specific extension of the substantive right to privacy”).
\item[117.] Horizon, 846 F.3d at 639 (“[W]ith the passage of FCRA, Congress established that the unauthorized dissemination of personal information by a credit reporting agency causes an injury in and of itself . . . .”).
\item[118.] See Eichenberger, 876 F.3d at 981–82; Horizon, 846 F.3d at 638 (“’Unauthorized disclosures of information’ have long been seen as injurious.” (quoting In re Nickelodeon Consumer Privacy Litig., 827 F.3d 262, 274 (3d Cir. 2016))).
\item[119.] Owner-Operator Indep. Drivers Ass’n v. U.S. Dep’t of Transp., 879 F.3d 339 (D.C. Cir. 2018).
\item[120.] Id. at 340. DOT was obligated to comply with the FCRA. 49 U.S.C. § 31150(b)(1) (2012).
\item[121.] Owner-Operator Indep. Drivers Ass’n, 879 F.3d at 345, 347.
\item[122.] Id. at 344–45.
\item[123.] Id. at 345. Claims under the Cable Communications Policy Act similarly demonstrate the centrality of dissemination in privacy claims. See Gubala v. Time Warner Cable, Inc., 846 F.3d 909, 912 (7th Cir. 2017) (“[T]here is no indication of any violation of the plaintiff’s privacy because there is no indication that Time Warner has released, or allowed anyone to disseminate, any of the plaintiff’s personal information . . . .”); Braitberg v. Charter Commc’ns, Inc., 836 F.3d 925, 930 (8th Cir. 2016).
\end{enumerate}
\end{footnotesize}
2. Intrusion upon Seclusion

A second variant of an individual’s privacy interest is the harm of intrusion upon seclusion.124 Unlike the invasion-of-privacy harms, these cases involve intrusions into a person’s space. Courts have most often identified this harm in cases arising under the TCPA in which defendants called or otherwise messaged individuals without their consent.125 For example, in Van Patten v. Vertical Fitness, the Ninth Circuit held that unsolicited text messages sent to the plaintiff satisfied the concrete injury requirement.126 Invoking Spokeo’s two factors, history and the judgment of Congress, the court observed that “[a]ctions to remedy defendants’ . . . intrusion upon seclusion, and nuisance have long been heard by American courts” and, further, that “Congress sought to protect consumers from the unwanted intrusion and nuisance of unsolicited telemarketing phone calls and fax advertisements.”127 The Third Circuit reached the same conclusions in the context of unsolicited phone calls.128 District courts have almost uniformly reached the same conclusion when presented with similar facts.129

3. Breach of Confidence

The third privacy variant is harm resulting from a breach of confidence—a holder of data violates a legal duty to refrain from disclosing spe-

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124. See Susinno v. Work Out World Inc., 862 F.3d 346, 352 n.3 (3d Cir. 2017) (“[I]nterruption upon seclusion is a well-recognized subset of common law invasion of privacy.”). It is unclear whether businesses can invoke rights to privacy or seclusion. Compare Fauley v. Drug Depot, Inc., 204 F. Supp. 3d 1008, 1011–12 (N.D. Ill. 2016) (“[B]ecause businesses do not have privacy interests in seclusion or solitude, Fauley’s allegation that the fax, that was sent to his business, constitutes an invasion of privacy does not allege injury as required under Article III.” (citations omitted)), with Sandusky Wellness Ctr., LLC v. MedTox Sci., Inc., 250 F. Supp. 3d 354, 357 n.1 (D. Minn. 2017) (observing that courts have reached opposing conclusions).


126. Van Patten v. Vertical Fitness Grp., LLC., 847 F.3d 1037, 1043 (9th Cir. 2017) (“Unsolicited telemarketing phone calls or text messages, by their nature, invade the privacy and disturb the solitude of their recipients.”).

127. Id.

128. Susinno, 862 F.3d at 351 ("The TCPA addresses itself directly to single prerecorded calls from cell phones, and states that its prohibition acts 'in the interest of [ ] privacy rights.'" (alteration in original) (quoting 47 U.S.C. § 227(b)(2)(C))).

129. See, e.g., McCall Law Firm, PLLC v. Crystal Queen, Inc., 335 F. Supp. 3d 1124, 1131 (E.D. Ark. 2018); A.D. ex rel. Serrano v. Credit One Bank, N.A., No. 14 C 10106, 2016 WL 4417077, at *6 (N.D. Ill. Aug. 19, 2016), rev’d on other grounds, 885 F.3d 1054 (7th Cir. 2018); Mey v. Got Warranty, Inc., 193 F. Supp. 3d 641, 645–46 (N.D. W. Va. 2016) (“In essence, the TCPA can be seen as merely liberalizing and codifying the application of this common law tort to a particularly intrusive type of unwanted telephone call.”)
pecific information provided by the consumer.¹³⁰ Unlike a traditional privacy tort, there is no third-party requirement.¹³¹ Instead, “the harm from a breach of confidence occurs when the plaintiff’s trust in the breaching party is violated.”¹³² This theory is not commonly used but has been endorsed by the Eleventh and D.C. Circuits.¹³³ Muransky v. Godiva Chocolatier, Inc. analogized the defendant-business’s practice of printing ten digits of a plaintiff’s credit card number on customer receipts, in violation of FACTA,¹³⁴ to a breach of confidence because the information was “not kept confidential.”¹³⁵

B. Personal and Property Torts

Courts have also identified theories of standing premised on historical torts to persons and property, including harm to reputation via defamation and slander, emotional harm, and traditional property torts of trespass to chattels and implied bailment.

1. Defamation and Slander

The first tortious harms are defamation and slander. The Ninth Circuit’s reconsideration of Spokeo on remand typifies these injuries.¹³⁶ First, the court stated that the FCRA’s prohibition on inaccurate credit reports was intended to protect individuals’ concrete interests.¹³⁷ Second, it analogized Robins’s inaccurate report to “reputational and privacy interests that have

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¹³¹ Id. at 620, 629 (“The privacy torts also face a conceptual hurdle because their emphasis on public exposure of private information is misplaced in the data breach context.” (footnote omitted)).
¹³² Muransky v. Godiva Chocolatier, Inc., 922 F.3d 1175, 1190 (11th Cir. 2019).
¹³⁵ Muransky, 922 F.3d at 1191 (11th Cir. 2019) (“A consumer provides a merchant with his credit card number with the expectation that it will remain secret . . . . FACTA gives legal protection to that confidentiality interest by permitting merchants to print only the last five digits of a credit card number.”); see also Solow-Niederman, supra note 130, at 625 (“[G]iven their relationship to consumers, the holders of consumer data in commercial transactions should be labeled with a distinct term: data confidants.”).
¹³⁷ Id. at 1113–14 (citing 15 U.S.C. § 1681e(b) (“[G]iven the ubiquity and importance of consumer reports in modern life . . . the real-world implications of material inaccuracies in those reports seem patent on their face. . . . [T]he legislative record includes pages of discussion of how such inaccuracies may harm consumers . . . .”).
long been protected in the law,” particularly when defamatory statements
relate to a person’s business.\footnote{138} Importantly, these historical actions required
no evidence of actual harm suffered by the plaintiff.\footnote{139} Finally, Robins’s inac-
curacies were not trivial but risked “real harm” because of the importance of
credit reports to employers.\footnote{140}

Courts have made two additional observations about slander as an inju-
ry. First, as with privacy harms, historical torts of libel or slander per se “re-
quire evidence of publication” or dissemination to third parties.\footnote{141} Second,
any slanderous information must be harmful; trivial inaccuracies are not suf-
ficient.\footnote{142} As the Ninth Circuit stated, not “every inaccuracy in these catego-
ries . . . will necessarily establish concrete injury.”\footnote{143}

2. Infliction of Emotional Distress

The second tortious theory confers standing to plaintiffs that suffered
emotional distress as a result of a statutory violation.\footnote{144} In Ben-Davies v.
Blibaum & Associates, the Fourth Circuit held that an erroneous statement
of the amount that plaintiff owed\footnote{145} was a sufficiently concrete injury to con-
fer standing because the plaintiff “‘suffered’ . . . actually existing intangible
harms that affect her personally: ‘emotional distress, anger, and frustra-
tion.’”\footnote{146} Unlike other cases in which courts only mentioned emotional dis-

\footnotesize

\footnote{138} Id. at 1114 (citing RESTATEMENT (FIRST) OF TORTS § 570 (AM. LAW INST. 1938)).

\footnote{139} Id. at 1114–15 (“Courts have long entertained causes of action to vindicate intangi-
ble harms caused by certain untruthful disclosures about individuals, and we respect Con-
gress’s judgment that a similar harm would result from inaccurate credit reporting.”).

\footnote{140} Id. at 1116–17 (listing “age, marital status, educational background, and employ-
ment history”). This resembles Justice Ginsburg’s dissent. Spokeo, Inc. v. Robins, 136 S. Ct.
1540, 1556 (2016) (Ginsburg, J., dissenting).

\footnote{141} Owner-Operator Indep. Drivers Ass’n v. U.S. Dep’t of Transp., 879 F.3d 339, 344–45
(D.C. Cir. 2018).

\footnote{142} Robins, 867 F.3d at 1117.

\footnote{143} Id. at 1117 n.4.

\footnote{144} Ben-Davies v. Blibaum & Assoc., P.A., 695 F. App’x 674 (4th Cir. 2017).

\footnote{145} The plaintiff sued under the FDCPA, which prohibits, in part, “[t]he false represen-
Here, the defendant allegedly “demand[ed] payment of an incorrect sum based on the calcula-
tion of an interest rate not authorized by law.” Ben-Davies, 695 F. App’x at 676.

\footnote{146} Ben-Davies, 695 F. App’x at 676.
tress as one of several viable theories for standing,\textsuperscript{147} the Fourth Circuit identified emotional distress as the plaintiff’s sole basis for standing.\textsuperscript{148}

3. Trespass to Chattels

A third tort-based theory of intangible harm relates to the plaintiff’s property interests and has arisen in the context of the TCPA.\textsuperscript{149} Mey v. Got Warranty, Inc., a district court case, applied the historical tort of trespass to chattels when it held that the defendant’s telemarketing robocalls had utilized the plaintiff’s phone without permission.\textsuperscript{150} Invoking this historical tradition as well as Congress’s view of the matter, the court observed:

\begin{quote}
[T]he TCPA can be viewed as merely applying this common law tort to a 21st-century form of personal property and a 21st-century method of intrusion. Applying this ancient tort to these calls . . . is particularly appropriate since electronic intrusion is so much easier, and so much more readily repeated, than physical misuse of a chattel.\textsuperscript{151}
\end{quote}

From a plaintiff’s perspective, this theory carries the additional benefit of conferring standing “[e]ven if the consumer does not answer the call or hear the ring.”\textsuperscript{152} Though Mey provides the most explicit application of this tort to modern statutory violations, the court noted that it is not the first to consider the analogy to modern technology.\textsuperscript{153}

\textsuperscript{147} See, e.g., Vanamann v. Nationstar Mortg., LLC, 735 F. App’x 260, 261 (9th Cir. 2018); Church v. Accretive Health, Inc., 654 F. App’x 990, 991 (11th Cir. 2016) (acknowledging that the plaintiff “was very angry” and “cried a lot” but ultimately recognizing standing on other theories); Cabiness v. Educ. Fin. Sols., LLC, No. 16-cv-01109-JST, 2016 WL 5791411, at *6 (N.D. Cal. Sept. 1, 2016) (“The additional harms alleged by Ms. Cabiness in her complaint—i.e. suffering ‘a large amount of stress and anxiety’ and being ‘concerned and upset by the constant calls’ . . . —are intangible.”).

\textsuperscript{148} See Ben-Davies, 695 F. App’x at 676 (identifying emotional distress “as a ‘direct consequence’ of” the FDCPA violation).

\textsuperscript{149} As previously noted, the TCPA prohibits various forms of phone calls and faxes without the recipient’s consent. 47 U.S.C. § 227(b)(1)(A)(iii) (2012 & Supp. 2018).

\textsuperscript{150} 193 F. Supp. 3d 641, 646 (N.D. W. Va. 2016) (“The harm recognized by the ancient common law claim of trespass to chattels—the intentional dispossession of chattel, or the use of or interference with a chattel that is in the possession of another, is a close analog for a TCPA violation.”).

\textsuperscript{151} Mey, 193 F. Supp. 3d at 647.

\textsuperscript{152} Id.

\textsuperscript{153} Id. ("Courts have applied this tort theory to the very actions alleged here—unwanted telephone calls."). Other district courts have followed Mey. See, e.g., Abante Rooter & Plumbing, Inc. v. Pivotal Payments, Inc., No. 16-cv-05486-JCS, 2017 WL 733123, at *7 (N.D. Cal. Feb. 24, 2017) (“The Mey court reasoned that '[t]he harm recognized by the ancient common law claim of trespass to chattels—the intentional dispossession of chattel, or the use of or interference with a chattel that is in the possession of another, is a close analog for a TCPA violation."

4. Implied Bailment

Plaintiffs can also allege standing based on the common law claim for breach of an implied bailment agreement. For example, in Muransky, the Eleventh Circuit compared the defendant-business’s FACTA violation to older cases in which a merchant is entrusted with a customer’s property and is held liable if the property is not returned in the required manner. A business that accepts credit cards, then, is a bailee who must return sensitive card information without exceeding the limitations set by statute. The court admitted that this theory is usually applied in the context of tangible property but nevertheless held that the analogy was close enough for Congress to use its power to create a cause of action.

C. Pecuniary Costs

Plaintiffs consistently establish standing when they allege the following batch of tangible harms—even when they border on the trivial. But ambiguity lingers as to where the precise divide between tangible and intangible harms lies.

The first group of cases arises under the TCPA, which prohibits various unsolicited phone calls and faxes. Courts have granted standing for an array of pecuniary harms resulting from receiving unsolicited faxes, including the cost of keeping the fax machine turned on and the cost of paper and ink consumed. Though unquestionably tangible, these harms amount to questionable costs. For example, Florence Endocrine Clinic v. Arriva Medical concerned a single medical form sent on four occasions. Similarly, an


155. Id.

156. Id. at 1210.


159. See, e.g., Florence Endocrine Clinic, PLLC v. Arriva Med., LLC, 858 F.3d 1362, 1366 (11th Cir. 2017); Sandusky Wellness Ctr., LLC v. MedTox Sci., Inc., 250 F. Supp. 3d 354, 359 (D. Minn. 2017) (“Sandusky’s allegation that MedTox’s violation of the TCPA disrupted Sandusky’s business by tying up its fax line, wasted Sandusky’s paper and ink, and wasted the time of Sandusky’s employees is sufficient to establish standing.”).

160. Florence Endocrine Clinic, 858 F.3d at 1364–65.
influential pre-"Spokeo" decision in the Eleventh Circuit concluded that occupying a fax machine for even "one minute" was sufficient for standing.\textsuperscript{161}

TCPA claims from unsolicited phone calls produce similar results. Plaintiffs have received standing because unsolicited calls drain a phone's electricity, increase wear on a phone, and incur call or text charges.\textsuperscript{162} Here, again, the actual magnitude of harm is dubious; even a generous estimate of the cost of electricity involved amounts to spare change.\textsuperscript{163} Further, courts have held that even a single unsolicited call is sufficient for standing purposes when plaintiffs invoke one of the above theories of harm.\textsuperscript{164} Despite the relatively trivial nature of these harms, courts have repeatedly cited these arguments to grant standing under the TCPA.\textsuperscript{165}

Courts have identified two other financial harms: mitigation costs and reduced credit scores. First, in \textit{Galaria v. Nationwide Mutual Insurance Co.}, the Sixth Circuit granted standing because the plaintiffs expended "reasonably incurred mitigation costs" in responding to defendant's data breach that exposed the plaintiff to the risk of fraud.\textsuperscript{166} Second, a lower credit score conferred standing in two cases. In \textit{Evans v. Portfolio Recovery Associates}, the Seventh Circuit held that the plaintiff's inaccurate credit rating, caused by an FDCPA violation, constituted an "appreciable risk of harm."\textsuperscript{167} The court reasoned that an inaccurate rating "produces a variety of negative effects"
because of its ubiquitous use.\(^\text{168}\) Similarly, the Eleventh Circuit cited the fact that the "[plaintiff’s] credit score dropped 100 points" as evidence of harm caused by violation of the FCRA.\(^\text{169}\)

The final set of cases concerns wasted time caused by a defendant’s statutory violation. In TCPA phone cases, courts have granted standing because plaintiffs wasted time responding to unsolicited calls and texts.\(^\text{170}\) Likewise, the Eleventh Circuit identified the time used resolving credit inaccuracies in an FCRA case\(^\text{171}\) and time spent destroying a receipt containing credit card number in a FACTA case as harms.\(^\text{172}\) These cases either labeled wasted time as "intangible"\(^\text{173}\) or made no specific finding regarding tangibility.\(^\text{174}\) In contrast, TCPA fax cases have explicitly classified "wast[ing] the time of [plaintiff’s] employees" as a "tangible injury."\(^\text{175}\)

As this survey of lower court decisions demonstrates, the Supreme Court’s attempt to clarify concreteness by dividing tangible and intangible harms was insufficient; the distinction remains blurry. Wasted time seems to be intangible when not acting as an employee but tangible once a frivolous fax is answered at work. Additionally, a court can characterize occupation of a physical object in intangible, tortious terms\(^\text{176}\) or in terms of tangible maintenance costs.\(^\text{177}\) Plaintiffs’ attorneys have cited multiple tangible hooks to avoid the morass of intangible harms, even by asserting a client’s printer ink bills or electricity costs. Courts’ comfort with monetary harms produces some uncomfortable results: a minuscule quantum of electricity consumed

\(^{168}\) Evans, 889 F.3d at 345 (emphasizing the use of credit reports by landlords and employers).

\(^{169}\) Pedro v. Equifax, Inc., 868 F.3d 1275, 1280 (11th Cir. 2017).

\(^{170}\) Mey v. Got Warranty, Inc., 193 F. Supp. 3d 641, 648 (N.D. W. Va. 2016); see also Abante Rooter & Plumbing, Inc. v. Pivotal Payments, Inc., No. 16-cv-05486-JCS, 2017 WL 733123, at *7 (N.D. Cal. Feb. 24, 2017) ("Courts have also recognized that the time that is wasted as a result of TCPA violations constitutes concrete injury."); Etzel v. Hooters of Am., LLC, 223 F. Supp. 3d 1306, 1312 (N.D. Ga. 2016) ("[S]urely Plaintiff’s battery was depleted and time was wasted while reading and responding to the text.").

\(^{171}\) Pedro, 868 F.3d at 1280.

\(^{172}\) Muransky v. Godiva Chocolatier, Inc., 922 F.3d 1175, 1192 (11th Cir. 2019) ("The effort [the plaintiff] put into doing away with the risky receipt would suffice for standing." (citing Pedro, 868 F.3d at 1280)).

\(^{173}\) See, e.g., Mey, 193 F. Supp. 3d at 648 ("A final intangible harm that the illegal calls caused here is that they required the plaintiff to tend to them and wasted the plaintiff’s time.").

\(^{174}\) Muransky, 922 F.3d at 1192; Pedro, 868 F.3d at 1280.


\(^{176}\) See supra Section III.B.3 (discussing trespass to chattels in the context of TCPA and intangible harms).

\(^{177}\) See, e.g., Florence Endocrine Clinic, PLLC v. Arriva Med., LLC, 858 F.3d 1362, 1366 (11th Cir. 2017).
receives universal endorsement as a harm while issues of privacy, consumer
deception, and accurate information receive more exacting judicial scrutiny.

D. Risks of Harm

The next category of injuries consists of various risks of harm to plain-
tiffs resulting from statutory violations. Spokeo acknowledged that a “risk of
real harm” can be sufficiently concrete.\textsuperscript{178} Left unspecified, however, was the
“degree of risk sufficient to meet” that requirement.\textsuperscript{179} The role of risk in
standing doctrine has been subject to extensive academic examination, par-
ticularly following the Court’s \textit{Clapper v. Amnesty International} decision.\textsuperscript{180}
This Section will focus on two groups of cases: violations of FACTA that
raise identity theft risks and violations of the FDCPA and TCPA that raise
other miscellaneous risks.

Discussions of risk have played a prominent role in cases arising under
FACTA, which regulates the display of customer credit card information on
receipts.\textsuperscript{181} Specifically, no “business shall print more than the last 5 digits of
the card number or the expiration date upon any receipt provided to the
cardholder.”\textsuperscript{182}

District courts in the Eleventh Circuit have staked out a strict textual po-
sition. In \textit{Guarisma v. Microsoft Corp.}, the defendant-business printed ten
digits of the plaintiff’s credit card number.\textsuperscript{183} The court first identified the
purpose of FACTA’s procedural requirements as revealed in the legislative
history, “finding [that] Congress desired to create a substantive legal right
for consumers to utilize in protecting against identity theft.”\textsuperscript{184} The court
then held that the injury was concrete because “FACTA created a substantive
legal right for . . . consumers to receive printed receipts truncating their per-
sonal credit card numbers, and thus protecting their financial infor-
mation.”\textsuperscript{185} The court in \textit{Wood v. J Choo USA} went a step further by granting
standing when the defendant merely printed the card’s expiration date but

\textsuperscript{178. Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1549 (2016).}
\textsuperscript{179. Id. at 1550. In 2013, the Court alternately defined the requisite risk as “certainly im-
pending” and “substantial.” Clapper v. Amnesty Int’l USA, 568 U.S. 398, 414 n.5 (2013).}
\textsuperscript{181. 15 U.S.C. § 1681c(g) (2012).}
\textsuperscript{182. Id. § 1681c(g)(1).}
\textsuperscript{183. 209 F. Supp. 3d 1261, 1262 (S.D. Fla. 2016).}
\textsuperscript{184. Guarisma, 209 F. Supp. at 1266.}
\textsuperscript{185. Id. at 1267; see also Altman v. White House Black Mkt., Inc., No. 1:15-cv-2451-SCJ, 2016 WL 3946780, at *6 (N.D. Ga. July 13, 2016) (citing “the Congressional creation of a right and injury, as well as the language of the Senate Report which indicates that Congress did not find the risk of identity theft to be speculative”).}
otherwise complied with FACTA’s last-five-digit requirement.\textsuperscript{186} Finally, in its 2019 Muransky opinion, the Eleventh Circuit held that printing six additional card digits resulted in a concrete injury.\textsuperscript{187}

Several circuit courts have reached the opposite conclusion.\textsuperscript{188} In each case, the FACTA violation at issue was, like in Wood, the printing of a customer’s expiration date. In Bassett v. ABM Parking Services, the Ninth Circuit held that “it is difficult to see how issuing a receipt to only the card owner and with only the expiration date” constitutes a concrete injury, because the risk of identity theft is simply “too speculative.”\textsuperscript{189} It rejected the analogy of an expiration date to historical harms of privacy or defamation.\textsuperscript{190} More importantly, the court concluded that the judgment of Congress, despite an explicit statutory prohibition, “weigh[ed] against Bassett” because a later amendment to FACTA clarified that “a disclosed expiration date by itself poses minimal risk.”\textsuperscript{191} The Second and Seventh Circuits reached identical conclusions, both stressing that (1) an expiration date alone is insufficient for identity theft and (2) the receipts in question were not disclosed to third parties.\textsuperscript{192}

This factual distinction—that card digits may facilitate identity theft but that expiration dates certainly cannot—has produced a slippery slope, in which other lower courts claim to rely on this distinction to deny standing in cases arising out of fact patterns increasingly attenuated from Bassett. First, the Ninth Circuit denied standing to a plaintiff when the defendant in the case had printed an extra first digit of the plaintiff’s credit card number, not an expiration date.\textsuperscript{193} The court claimed to defer to Congress’s expertise but concluded that, like Bassett, the receipt had not been distributed and that a card’s first digit is irrelevant information because it “merely identifies the brand of the card.”\textsuperscript{194} The next case down the slope, Katz v. Donna Karan

\begin{footnotes}
\footnotetext[186]{Wood v. J Choo USA, Inc., 201 F. Supp. 3d 1332 (S.D. Fla. 2016).}
\footnotetext[187]{Muransky v. Godiva Chocolatier, Inc., 922 F.3d 1175, 1192 (11th Cir. 2019). The court did not determine whether printing an expiration date alone would constitute a concrete injury. \textit{Id.} at 1189 n.5.}
\footnotetext[188]{Bassett v. ABM Parking Servs., Inc., 883 F.3d 776 (9th Cir. 2018); Crupar-Weinmann v. Paris Baguette Am., Inc., 861 F.3d 76 (2d Cir. 2017); Meyers v. Nicolet Rest. of De Pere, LLC, 843 F.3d 724 (7th Cir. 2016).}
\footnotetext[189]{\textit{Bassett}, 883 F.3d at 783 (quoting Missouri \textit{ex rel.} Koster v. Harris, 847 F.3d 646, 654 (9th Cir. 2017)).}
\footnotetext[190]{\textit{Id.} at 780–81 (observing that the receipt was never disclosed to a third party and that the interests in play do not resemble traditional privacy claims).}
\footnotetext[191]{\textit{Id.} at 781–82 (“Congress stressed that ‘proper truncation of the card number . . . regardless of the inclusion of the expiration date, prevents a potential fraudster from perpetrat-
\footnotetext[192]{Crupar-Weinmann, 861 F.3d at 81–82; Meyers, 843 F.3d at 727–28 (“Congress has specifically declared that failure to truncate a card’s expiration date, without more, does not heighten the risk of identity theft.”).}
\footnotetext[193]{Noble v. Nev. Checker Cab Corp., 726 F. App’x 582, 584 (9th Cir. 2018).}
\footnotetext[194]{\textit{Id.}}
\end{footnotes}
Co., denied standing when the defendant printed ten digits of a consumer’s credit card number.\textsuperscript{195} Katz relied on the claim, not drawn from Congress, that ten digits of a credit card are also insufficient to steal the card’s information and so cannot cause injury.\textsuperscript{196} 

Citing these cases, a district court case that denied standing for a receipt with the plaintiff’s full credit card number and expiration date marks the bottom of the slope.\textsuperscript{197} The court in Jeffries v. Volume Services America concluded that the risk of identity theft was too speculative because no one else saw the receipt and the plaintiff’s name was not on it.\textsuperscript{198} To prevent credit fraud, the court recommended that the plaintiff “simply discard her receipt in a public trash can.”\textsuperscript{199} Left out of this analysis is (1) any reference to the statutory text or congressional findings and (2) any explanation for how Jeffries could file a claim after throwing away the only evidence relevant to the case.

Jeffries epitomizes the tendency of courts in FACTA cases to depart from explicit statutory language and congressional statements of purpose to constrict any plaintiff’s ability to enforce the statute. Taken seriously, Jeffries renders the cornerstone of a piece of congressional legislation unenforceable by imposing constitutionally derived “dissemination,” “name,” and “trash can” requirements. Other court opinions told plaintiffs to “shred” their receipts.\textsuperscript{200} In minimizing plaintiffs’ “speculative” identity theft harms, these courts simultaneously ignore the additional harms of anxiety about identity theft, time wasted responding to the risk, and costs of shredding.\textsuperscript{201} In doing so, these cases create a notable discrepancy with cases arising under the FDCPA,\textsuperscript{202} TCPA,\textsuperscript{203} and FCRA.\textsuperscript{204}

\textsuperscript{195} 872 F.3d 114 (2d Cir. 2017); see also Taylor v. Fred’s, Inc., 285 F. Supp. 3d 1247 (N.D. Ala. 2018).
\textsuperscript{196} Katz, 872 F.3d at 118, 120.
\textsuperscript{198} Id. at 531 (“[T]he receipt given to Plaintiff ended up with Plaintiff herself. She could have lost the receipt, or it could have been stolen . . . . Nor is there any allegation that the receipt also contained Plaintiff’s name, which presumably would be necessary to make any use of a credit card number.”).
\textsuperscript{199} Id. at 532.
\textsuperscript{200} See, e.g., Bassett v. ABM Parking Servs., Inc., 883 F.3d 776, 783 (9th Cir. 2018) (“[Plaintiff] could shred the offending receipt along with any remaining risk of disclosure.”).
\textsuperscript{201} The Jeffries plaintiff highlighted each of these theories to no avail. Jeffries, 319 F. Supp. 3d at 530. Notably, the Eleventh Circuit in Muransky emphasized the time and cost burdens from receiving an untruncated receipt. Muransky v. Godiva Chocolatier, Inc., 922 F.3d 1175, 1192 (11th Cir. 2019).
\textsuperscript{202} See Ben-Davies v. Blibaum & Assoc.s., P.A., 695 F. App’x 674 (4th Cir. 2017) (emotional distress).
\textsuperscript{204} Galaria v. Nationwide Mut. Ins. Co., 663 F. App’x 384, 388 (6th Cir. 2016) (identifying “reasonably incurred mitigation costs” in responding to increased risk of fraud).
Ironically, Jeffries and similar opinions also highlight limitations on judicial factfinding. While these courts claim to closely scrutinize the facts of each case, they simultaneously appear to rely on outdated or incorrect facts. As the Eleventh Circuit observed, the claim that the first six digits of a credit card pose no risk of harm originates in a single expert report filed in a 2007 district court case. Subsequent court opinions recycled the finding, despite the very real possibility that technological developments in the intervening decade have invalidated the claim. Courts, then, have “transformed the fact-findings of a single district court into a bright-line, no-standing rule.”

Courts have identified two other risks beyond incremental risk of identity theft. First, the Sixth Circuit in Macy v. GC Services held that failure to properly disclose the plaintiff’s rights under the FDCPA caused the harm of “greater risk of falling victim to ‘abusive debt collection practices.’” If a consumer followed the defendant’s faulty instructions, the court reasoned, they would waive the FDCPA’s protections. Second, the district court in Mey held that unsolicited calls prohibited by the TCPA “cause a risk of injury due to interruption and distraction.” The resulting risk of automobile accidents, the court held, was a concrete injury.

This category demonstrates that judges have significant discretion to frame a harm either as a risk of harm or as a tortious form of harm. For example, on remand of Spokeo, the Ninth Circuit analogized Robins’s injury to defamation, a tort that requires no specific harm. But its discussion of Robins’s reduced employment prospects also appeared to be premised on probabilities. Given these two possible theories, the Ninth Circuit explicitly resisted a risk-based characterization of Robins’s harm. The Third Circuit offers another example of choosing between a tort-based theory and a risk-based theory of harm. In Horizon Healthcare it chose to base the plain-

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206. Id. at 1214.

207. Id. at 1213 (citing Tarr v. Burger King Corp., No. 17-23776-CIV-MORENO, 2018 WL 318477 (S.D. Fla. Jan. 5, 2018)).

208. Macy v. GC Servs. Ltd. P’ship, 897 F.3d 747, 758 (6th Cir. 2018) (quoting 15 U.S.C. § 1692(e) (2012)). The court also framed this as “a risk of harm to the FDCPA’s goal of ensuring that consumers are free from deceptive debt-collection practices.” Id. at 757.

209. Id. at 758. Notably, the court did not connect such “abusive practices” to any financial harm. Id.


211. Id. (“[A] cell phone call is a common cause of automobile accidents . . . .”).


213. Id. at 1117.

214. Id. at 1118 (“[T]his alleged intangible injury is itself sufficiently concrete. It is of no consequence how likely Robins is to suffer additional concrete harm as well (such as the loss of a specific job opportunity).”).
tiff’s standing on a privacy harm rather than the harm of a risk of identity theft.\textsuperscript{215}

E. Informational Injuries

These last cases concern “informational injuries” that plaintiffs suffer from statutory violations.\textsuperscript{216} According to the D.C. Circuit:

A plaintiff suffers sufficiently concrete and particularized informational injury where the plaintiff alleges that: (1) it has been deprived of information that . . . a statute requires the government or a third party to disclose to it, and (2) it suffers, by being denied access to that information, the type of harm Congress sought to prevent by requiring disclosure.\textsuperscript{217}

Informational injuries have been alleged in post-\textit{Spokeo} consumer protection cases with varying levels of success. Primarily, informational injuries confer standing when defendants fail to disclose a plaintiff’s rights under the FCRA or FDCPA.\textsuperscript{218} For example, in \textit{Syed v. M-I, LLC}, the Ninth Circuit granted standing because the defendant-employer provided the plaintiff with a disclosure document that did not “consist ‘solely’ of the disclosure,” a violation of the FCRA.\textsuperscript{219} The FCRA disclosure provision furthered Congress’s “overarching purposes of ensuring accurate credit reporting, promoting efficient error correction, and protecting privacy.”\textsuperscript{220} But excess information in the disclosure caused confusion, depriving the plaintiff of the ability to properly consider the waiver of his rights.\textsuperscript{221} Similarly, the Sixth Circuit in \textit{Macy} considered a provision of the FDCPA that requires debt collectors to...

\textsuperscript{215} In re Horizon Healthcare Servs. Inc. Data Breach Litig., 846 F.3d 625, 634–35 (3d Cir. 2017). The court observed later in the opinion that “[p]laintiffs make a legitimate argument that they face an increased risk of future injury, which at least weighs in favor of standing.” \textit{Id.} at 639 n.19.

\textsuperscript{216} Plaintiffs have long enjoyed standing for informational injuries. See, e.g., Havens Realty Corp. v. Coleman, 455 U.S. 363, 373–74 (1982).

\textsuperscript{217} Friends of Animals v. Jewell, 828 F.3d 989, 992 (D.C. Cir. 2016) (concerning an unsuccessful suit for disclosure of information under the ESA).

\textsuperscript{218} Under the FCRA, “a person may not procure a consumer report . . . for employment purposes . . . unless . . . a clear and conspicuous disclosure has been made in writing to the consumer . . . before the report is procured . . . in a document that consists solely of the disclosure, that a consumer report may be obtained for employment purposes.” 15 U.S.C. § 1681b(b)(2)(A) (2012) (emphasis added). Under the FDCPA:

\textsuperscript{219} 853 F.3d 492, 498–500 (9th Cir. 2017).

\textsuperscript{220} \textit{Syed}, 853 F.3d at 496–97.

\textsuperscript{221} \textit{Id.} at 499.
inform consumers of their right to dispute the validity of the debt “in writing.” Though the defendant–debt collector disclosed the plaintiff’s right to dispute the amount owed, it failed to specify that such complaints must be written. The court granted standing, citing an analogous injury of consumer confusion because a consumer that contested a debt by telephone instead of writing would forfeit the FDCPA’s protections. The Second Circuit drew a dividing line for granting standing under a disclosure provision of the Truth in Lending Act: a failure to disclose the plaintiff’s obligations is a concrete injury but a failure to disclose the defendant-lender’s obligations is not.

But several circuits have denied standing under similar fact patterns. First, the Third Circuit in Long denied standing to a plaintiff on the claim that the defendant-employer failed to disclose, in writing, the plaintiff’s rights under the FCRA. Departing from the Sixth Circuit’s Macy opinion, the Third Circuit concluded that this failure to disclose caused no injury because “[p]laintiffs became aware of their FCRA rights and were able to file this lawsuit.” This circular reasoning defeats Congress’s purpose. By this logic, savvy employers should never disclose an employee’s rights because employees will either (a) fail to file suit because of their ignorance or (b) become aware of their rights another way and sue, only to be denied standing.

Second, the Seventh Circuit encountered facts very similar to the Ninth Circuit in Syed. In Groshek v. Time Warner Cable, the plaintiff received a disclosure document that, in violation of the FCRA, did not “consist[ ] solely of the disclosure.” Here, however, the Seventh Circuit denied standing because, unlike in Syed, the plaintiff “present[ed] no factual allegations plausibly suggesting that he was confused by the disclosure form.”

Another informational injury arises when an employer fails to provide prospective employees with a copy of their credit report before taking adverse employment actions against them. Denying information guaranteed

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223. Id. at 751.
224. Id. at 758. The Eleventh Circuit reached a similar conclusion under a disclosure provision and, unlike the Sixth Circuit, explicitly invoked the language of a “right to information pursuant to the FDCPA.” Church v. Accretive Health, Inc., 654 F. App’x 990, 994 (11th Cir. 2016).
225. Strubel v. Comenity Bank, 842 F.3d 181, 190, 194 (2d Cir. 2016).
227. Long, 903 F.3d at 325 ("[A]lthough they did not receive FCRA rights disclosures, they understood their rights sufficiently to be able to bring this lawsuit.").
228. Groshek v. Time Warner Cable, Inc., 865 F.3d 884 (7th Cir. 2017).
229. Id. at 886 (emphasis added).
230. Id. at 889.
by the FCRA causes plaintiffs to suffer the type of harm Congress intended to prevent—wrongful denial of employment.\textsuperscript{232} This particular injury is the subject of the active split between the Third and Ninth Circuits.\textsuperscript{233} These circuits disagree over whether a concrete injury has occurred even if providing a copy of the report could not have changed the plaintiff’s employment outcome.\textsuperscript{234}

Two final cases arising under different statutes further flesh out standing for informational injuries. In \textit{Hagy v. Demers & Adams}, the Sixth Circuit considered another FDCPA disclosure violation where a letter forgave the plaintiff’s debt but “‘fail[ed] to disclose’ that it was a ‘communication . . . from a debt collector.’”\textsuperscript{235} Though the letter violated the explicit statute, it did no harm. In fact, the letter gave the plaintiff “peace of mind,” leading the court to conclude that the plaintiff had failed to establish standing.\textsuperscript{236} Finally, the Eleventh Circuit held that a failure to punctually disclose satisfaction of a mortgage did not injure the plaintiff because it did not deny him any information—he “already kn[ew] that he ha[d] discharged his contractual obligation.”\textsuperscript{237} These last two cases underline the importance of the D.C. Circuit’s second element of an informational injury: the plaintiff must specifically identify an injury that resulted from the denial of information that they were statutorily due. That injury is best demonstrated with a counterfactual: if the plaintiff had known, they would have acted differently.

This taxonomy demonstrates that the \textit{Spokeo} Court’s attempt to clarify standing doctrine instead produced confusion and divergence in the lower courts. While some intangible harms consistently confer standing, others produce results that vary between courts and between similarly structured consumer protection statutes.

\section*{IV. Proposing Deference to Congress}

This Note contends that courts should aim for uniformity by showing greater deference to Congress’s articulation of injuries that are sufficient to confer standing.

The courts and Congress have several sweeping options that would allow plaintiffs to establish injury more consistently. Apart from other actions,\textsuperscript{238} judicial deference to congressional factfinding should be part of the

\begin{thebibliography}{99}
\bibitem{232} Id. at 699.
\bibitem{233} See supra Part II.
\bibitem{236} \textit{Hagy}, 882 F.3d at 621, 623.
\bibitem{237} \textit{Nicklaw v. CitiMortgage, Inc.}, 855 F.3d 1265, 1268 (11th Cir. 2017).
\bibitem{238} Courts could eliminate the injury-in-fact requirement entirely. See \textit{Fletcher}, supra note 3, at 223; \textit{Sunstein}, supra note 3, at 235–36. Alternatively, courts could return to the pre-\textit{Spokeo} ante in which concreteness held little significance and injury in fact was simply a question of particularity. See Rachel Bayefsky, \textit{Constitutional Injury and Tangibility}, 59 WM. &
solution. Congress’s “power to define injuries and articulate chains of causation” has two major advantages when compared to judicial power.239 First, Congress has superior factfinding abilities in complex environments. Second, it is better equipped to adapt to social, political, and technological change.240

Identifying challenges in society and developing policy responses is the traditional realm of Congress. As an institution, it is well equipped to consider available evidence, solicit expert advice, and develop prospective responses to developing challenges.241 The courts, by comparison, have relatively weak factfinding abilities, as demonstrated in Part III. For one, courts have treated risk-based harms inconsistently to the point of dismissing them.242 In the series of post-Spokeo FACTA cases, judges’ intuitions about likelihood of harm diverged from the judgment of Congress.243 The Dutta–Long split also cautions against making cut-and-dry risk determinations that depart from Congress’s conclusions.244 Courts should be particularly hesitant about making decisive determinations on the likelihood of any particular harm occurring in complex environments, like in employer–employee relationships.245 Though courts should not treat Congress’s identification of harms as decisive for purposes of standing, they similarly should not brashly dismiss the benefits of prophylactic procedural requirements.246

Independent of calculating risk, courts may also simply misunderstand the harms that result from particular statutory violations. Fact-gathering on standing issues is structurally limited by the fact that it is a jurisdictional in-


243. See supra Section III.D.

244. See supra text accompanying notes 97–101.

245. Cf. In re Horizon Healthcare Servs. Inc. Data Breach Litig., 846 F.3d 625, 640 n.23 (3d Cir. 2017) (“Our conclusion that it was within Congress’s discretion to elevate the disclosure of private information into a concrete injury is strengthened by the difficulty that would follow from requiring proof of identity theft or some other tangible injury.”).

quiry and precedes any extensive discovery efforts.\textsuperscript{247} Notably, the Court itself fails to appreciate its narrow factfinding capabilities. One of the most-cited lines from \textit{Spokeo} is the Court’s dicta stating that an incorrect zip code is clearly “a bare procedural violation” resulting in no attendant concrete injury.\textsuperscript{248} Yet it is not difficult to identify harms that could result from an erroneous zip code. For example, research shows that employers discriminate against job applicants based on the zip codes that appear on their resumes.\textsuperscript{249} Reporting an incorrect zip code can lead to misdirected mail or even affect the credit options or prices for services available to consumers.\textsuperscript{250} After \textit{Spokeo}, at least one district court held that reporting an inaccurate address does cause a concrete injury.\textsuperscript{251} The \textit{Spokeo} Court’s judgment reveals a deeper failure to appreciate the extent to which “society runs on information, often through algorithmic calculations,” such that nearly “\textit{any} inaccuracy creates a material risk of tangible harm to consumers.”\textsuperscript{252}

Congress is also better positioned to align conceptions of injuries with cultural, political, and technological change. In FACTA cases, courts have repeatedly relied on prior case law discounting the risks of identity theft from the first six digits of a credit card number.\textsuperscript{253} Yet, as the Eleventh Circuit observed, the original basis for these claims was a single expert’s opinion in 2007.\textsuperscript{254} Since then, hacking and identity theft technology has progressed significantly.\textsuperscript{255} Courts have a tendency to convert a contingent factual situation (like the relative security of a credit card number) into a hard-and-fast precedent.\textsuperscript{256} While the very nature of precedent binds subsequent courts,

\begin{itemize}
\item \textsuperscript{247} See Townsend, \textit{supra} note 240, at 82.
\item \textsuperscript{248} \textit{Spokeo}, 136 S. Ct. at 1550; see, e.g., Braitberg v. Charter Commc’ns, Inc., 836 F.3d 925, 930 (8th Cir. 2016); Hancock v. Urban Outfitters, Inc., 830 F.3d 511, 514 (D.C. Cir. 2016).
\item \textsuperscript{249} Marianne Bertrand & Sendhil Mullainathan, \textit{Are Emily and Greg More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination}, 94 AM. ECON. REV. 991, 1003 (2004).
\item \textsuperscript{250} See Konnoth & Kreimer, \textit{supra} note 52, at 60 n.102; Willis, \textit{supra} note 41, at 241–42; \textit{see also} Wu, \textit{supra} note 50, at 459 (“\textit{[C]ollecting zip codes can lead to consumer privacy harms, such as receiving unwanted marketing or the sale of personal information to third parties.”)."
\item \textsuperscript{251} See Gambles v. Sterling Infosystems, Inc., 234 F. Supp. 3d 510, 524 (S.D.N.Y. 2017) (“\textit{[T]he statements in Sterling’s Report about Gambles’s address history together cast him as itinerant, shiftless, and risky, thereby undermining his prospects for employment.”)."
\item \textsuperscript{252} Willis, \textit{supra} note 41, at 242, 250.
\item \textsuperscript{253} See, e.g., Katz v. Donna Karan Co., 872 F.3d 114 (2d Cir. 2017).
\end{itemize}
Congress can act on the basis of future risks and determine that they are sufficient to justify creation of a private cause of action.\textsuperscript{257}

Statutory causes of action can also adapt to changing values. Because a single provision can further several interests simultaneously, courts should be wary of dismissing a plaintiff’s alleged injury by narrowly construing the values at stake. The Dutta–Long split epitomizes the issue. In Dutta, the Ninth Circuit focused on the narrow interest of correcting inaccurate credit reports.\textsuperscript{258} By comparison, in Long, the Third Circuit emphasized other intangible interests of fairness, transparency, and an opportunity to tell one’s story independent of any particular pecuniary outcome.\textsuperscript{259} The Third Circuit’s approach assigns intrinsic value to procedure and is reminiscent of the work of Jeremy Waldron. Waldron argues that procedure is valuable not just for its results but also for its “dignitarian aspect: it conceives of the people who live under it as bearers of reason and intelligence.”\textsuperscript{260} The Third Circuit also likened plaintiffs’ injury to historical conceptions of privacy torts premised on “interference with an individual’s ability to control his personal information.”\textsuperscript{261} This difference in approach not only better fulfills Congress’s interests as communicated in statutory text but also better subscribes to Spokeo’s historical considerations.

The Third Circuit’s Long opinion, however, also exhibits a perplexing vision of informational injuries. Though the court granted plaintiffs standing under the prior disclosure provision, it denied standing for SEPTA’s failure to disclose plaintiffs’ rights under the FCRA.\textsuperscript{262} The court claimed that the plaintiffs were unharmed by SEPTA’s oversight because they were informed of their rights by other means—evidenced only by the fact that they successfully filed suit against SEPTA.\textsuperscript{263} This conclusion seems to suggest, however, that a harm, or lack thereof, caused by a procedural interest can be inferred purely from the outcome. Such an inference conflicts with the court’s prior claim that a disclosure requirement is not conditioned “on whether having the report would allow an individual to stave off an adverse” outcome.\textsuperscript{264} Like the Ninth Circuit in Dutta, the Third Circuit mistakenly overlooked other interests that Congress could have been protecting—like the assurance

\begin{itemize}
  \item \textsuperscript{257} But see David P. Fidler, The Supreme Court Adapts Constitutional Law to Address Technological Change, COUNCIL ON FOREIGN REL. (July 11, 2018), https://www.cfr.org/blog/supreme-court-adapts-constitutional-law-address-technological-change [https://perma.cc/NR69-EKTC] (“[E]xpecting Congress to keep law in pace with technology is wishful thinking.”).
  \item \textsuperscript{258} Dutta v. State Farm Mut. Auto. Ins. Co., 895 F.3d 1166, 1174–75 (9th Cir. 2018).
  \item \textsuperscript{260} Jeremy Waldron, The Rule of Law and the Importance of Procedure, in GETTING TO THE RULE OF LAW 3, 19 (James E. Fleming ed., 2011).
  \item \textsuperscript{261} Long, 903 F.3d at 324.
  \item \textsuperscript{262} Id. at 325.
  \item \textsuperscript{263} Id.
  \item \textsuperscript{264} Id. at 319.
\end{itemize}
that unsophisticated consumers would not fall victim to deceptive practices or accidentally forgo their rights.\textsuperscript{265}

There is also reason to believe that a deferential stance would simply produce more coherent doctrine. Deferring to congressional factfinding would help resolve three troubling doctrinal trends. First, deference would reduce the incentive for plaintiffs to launder intangible harms as tangible harms by seizing on trivial monetary losses.\textsuperscript{266} For example, consider what options are left to plaintiffs in Dutta’s position. By narrowing the path for alleging a pure informational injury, the Ninth Circuit incentivizes standing arguments that pander to courts’ apparent comfort with pecuniary harms. As the string of TCPA cases demonstrates, intangible harms are amenable to being reframed as, often trivial, tangible harms.\textsuperscript{267} Dutta’s harms, for example, could be reframed as (1) the monetary cost of obtaining and printing one’s own reports, (2) the time and inconvenience of disputing inaccuracies, not to mention (3) the cost of phone charges and electricity consumed in the process. Following cases like \textit{Mey} or \textit{Florence Endocrine}, these claims should have traction with lower courts, and would certainly fulfill an apparent desire to tie procedural violations to a tangible injury to the plaintiff. It is difficult to argue, however, that they would create a more satisfying basis for the underlying policy concerns that motivated Congress to write the FCRA in the first place.\textsuperscript{268}

Second, deferring to Congress’s articulation of intangible injuries would reduce the significance of the tangible–intangible divide altogether. As Rachel Bayefsky argues, “the line between tangible and intangible harm is not a deep-seated or clear-cut feature of empirical reality, but a contextually sensitive boundary.”\textsuperscript{269} When judges distinguish between the two, they inevitably invoke their own normative assumptions as seemingly “obvious” tangible harms are separated from the more complex intangible ones.\textsuperscript{270} For example, courts have disagreed on whether lost time is tangible or intangible in nature.\textsuperscript{271} Similarly, informational injuries skirt the tangible–intangible divide, particularly when the information in question could determine a job applicant’s employment.\textsuperscript{272}

Finally, deferring to Congress would produce more consistent outcomes. Currently, a plaintiff’s fate may hang on a court’s readiness to engage

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  \item \textsuperscript{265} \textit{See Macy v. GC Servs. Ltd. P’ship}, 897 F.3d 747, 758 (6th Cir. 2018).
  \item \textsuperscript{266} \textit{Cf.} Bayefsky, \textit{supra} note 238, at 2310 (“Some courts have skirted debates about the cognizability of intangible harm by pointing to a tangible harm that a plaintiff had suffered.”).
  \item \textsuperscript{267} \textit{See supra} Section III.C.
  \item \textsuperscript{268} \textit{Cf.} 15 U.S.C. § 1681 (2012) (listing one of the statute’s purposes as ensuring fairness, confidentiality, and equity, not vindicating trivial harms that attend informational inaccuracies).
  \item \textsuperscript{269} Bayefsky, \textit{supra} note 238, at 2291.
  \item \textsuperscript{270} \textit{See id.} at 2325, 2359.
  \item \textsuperscript{271} \textit{See supra} Section III.C.
  \item \textsuperscript{272} \textit{See supra} Part II.
\end{itemize}
in historical analogy. The outcome in Muransky, for example, differs from other circuits in large part because the Eleventh Circuit searched for more apt historical analogies to printing a customer’s credit card information.\(^{273}\) FCRA cases, including the Ninth Circuit’s treatment of Spokeo on remand, also demonstrate the extent to which outcomes are determined by how a harm is characterized.\(^{274}\)

Ultimately, courts may simply be the wrong forum for determining which statutory causes of action are truly necessary to shelter individuals from concrete harms and which are merely superfluous procedural details. Deference to congressional identification of injuries in procedural rights cases could resemble rational basis review. Under rational basis review, a court upholds a law so long as there is a rational relationship between the chosen means and a legitimate interest.\(^{275}\) The law may be wrongheaded or trivial, but that judgment is for Congress to make, not the courts.\(^{276}\) A court should conclude that a statutory violation, enforceable by a private right of action, causes a concrete injury if a rational legislature could have concluded the procedural right was related to an actionable injury. Standing doctrine could remain unchanged in other contexts.\(^{277}\) The consumer protection laws highlighted in this Note may not be worth the trouble of enforcement, “[b]ut it is for the legislature, not the courts, to balance the advantages and disadvantages” of such policies.\(^{278}\) A deferential stance would produce fairer, more

\(^{273}\) Compare Muransky v. Godiva Chocolatier, Inc., 922 F.3d 1175, 1188–92 (11th Cir. 2019) (analogizing disclosure of the plaintiff’s credit card expiration date to the tort of breach of confidence), with Bassett v. ABM Parking Servs., Inc., 883 F.3d 776, 780–81 (9th Cir. 2018) (refusing to identify a cognizable privacy harm because the plaintiff’s receipt was not disclosed to a third party), and Crupar-Weinmann v. Paris Baguette Am., Inc., 861 F.3d 76, 81–82 (2d Cir. 2017) (examining the text of FACTA but not engaging in historical analogies to common-law privacy claims), and Meyers v. Nicolet Rest. of De Pere, LLC, 843 F.3d 724, 727–28 (7th Cir. 2016) (considering only the statutory language of FACTA as well as the fact that no third party viewed the plaintiff’s credit card expiration date). See also Jeffries v. Volume Servs. Am., Inc., 928 F.3d 1059, 1070 (D.C. Cir. 2019) (Rogers, J., concurring in part) (“The vagueness of the ‘close relationship’ test leaves ample room for a court to reach either conclusion and therefore does little to advance the standing analysis here.”).

\(^{274}\) See supra text accompanying notes 212–215.


\(^{277}\) See Lee & Ellis, supra note 34, at 225 (“The Court should acknowledge the primacy of congressional intent and recognize that it may require a different set of standing rules in the procedural rights context.”). Like equal protection cases, standing could have two tiers with a more permissive standard when Congress has spoken clearly. See id. at 228.

predictable outcomes for those that Congress saw fit to protect. A court’s faulty factual reasoning should not stand as a barrier to deserved relief.279

A deferential approach coheres with traditional justifications for standing doctrine. The most prominent justification for standing is respecting the separation of powers between branches.280 Yet consumer protection cases do not raise concerns of asserting general grievances—suits are filed against private companies and allege conduct as to particular plaintiffs.281 The executive branch is neither conscripted into action nor relieved of its Take Care Clause duties.282 Instead, capricious invalidation of congressional statutes raises far more pernicious separation-of-powers concerns.283 Courts also should not strictly construe Spokeo in order to manage caseloads and conserve judicial resources.284 First, as an empirical matter, predictions of flooding federal courtrooms with frivolous litigation are difficult to disprove.285 Second, conforming an explicitly constitutional doctrine to concern for judicial resources raises important issues of judicial legitimacy.286 Rather, Congress has authority in such areas of technocratic management and could allocate additional resources to the judiciary if necessary.287

Nor does greater deference to Congress necessitate abrogating Spokeo. In part, Spokeo’s holding is narrow in application. The opinion’s open-textured language, requiring support of history and Congress, does not de-

(2012) (amending FACTA to include a temporary safe harbor provision for printing expiration dates).

279. See Bayefsky, supra note 238, at 2315 (“[C]ourts deciding that a statutory violation poses no material risk of harm override congressional determinations that the likelihood of real harm was sufficiently grave to justify imposing a procedural requirement. It is unclear why courts are justified in taking this step.” (footnote omitted)).

280. See supra note 22 and accompanying text.


282. See U.S. CONST. art. II, § 3 (“[H]e shall take Care that the Laws be faithfully executed . . . .”); Sunstein, supra note 3, at 216–18 (arguing that granting standing to private parties to challenge executive nonenforcement of laws does not implicate separation-of-powers concerns).


284. Contra Morley, supra note 278, at 597.

285. See Toby J. Stern, Comment, Federal Judges and Fearing the “Floodgates of Litigation,” 6 U. PA. J. CONST. L. 377, 402 (2003) (“[T]he floodgates argument . . . is rarely . . . followed by a true analysis of the potential litigation of which it speaks.”). One should also weigh the benefits of additional actions that could, for example, deter bad actors and protect consumers. See Bayefsky, supra note 238, at 2357–58.


287. Marin K. Levy, Judging the Flood of Litigation, 80 U. CHI. L. REV. 1007, 1069–72 (2013) (noting the range of congressional options to manage judicial caseloads); Sohn, supra note 23, at 741 (“Congress, after all, is the ultimate guardian and trustee of judicial resources.”).
mand limiting standing to the extent that some lower courts have. On re-
mand, the Ninth Circuit was able to reach its original outcome despite the
Supreme Court’s tightening of concreteness. The Third and Eleventh Cir-
cuits, too, have engaged in Spokeo’s two-factor analysis and identified inju-
ries that reflect a pragmatic, dynamic understanding of intangible harms.
Ultimately, Spokeo’s bare terms may simply exclude standing for statutory
violations that have no rational connection to underlying harm—whether as
defined by history or by congressional judgment. Where there is room
for reasonable disagreement, a court should defer to Congress. Spokeo’s evi-
dent unmanageability also suggests that lower courts should, faithfully ap-
plying Court precedent, confine its reach. Courts should examine history
and congressional judgment, but should not let the opinion’s formalism ob-
struct the application of plain statutes. Finally, if courts cannot practically
defer to Congress’s superior judgment while faithfully following Spokeo, then
the Court should revisit its decision.

**CONCLUSION**

Application of Spokeo in the lower courts has produced a confused, in-
consistent standing doctrine. Outcomes for plaintiffs currently differ both
across jurisdictions and across similar statutes. Arbitrary doctrine is particu-
larly concerning for the federal system of consumer protection laws that re-
lies on consumers to vindicate their own statutory rights. This Note has
made two contributions. First, it sorted the various intangible harms that
courts have identified in the wake of Spokeo into categories. In doing so, it
highlighted areas of consistency, contradiction, and continued ambiguity.
Second, it called for greater judicial deference to congressional factfinding.
Deferring to Congress’s statutory language would result in both more re-
sponsive and effective enforcement of consumer protection laws as well as a
more coherent standing doctrine for the courts to apply.

288. See supra text accompanying notes 193–207.
291. See Hagy v. Demers & Adams, 882 F.3d 616, 621 (6th Cir. 2018) (finding no harm to plaintiff because a noncompliant letter gave plaintiff “peace of mind”); Nicklaw v. CitiMortage, Inc., 855 F.3d 1265, 1268 (11th Cir. 2017) (finding no harm because plaintiff was not deprived of any information as a result of defendant’s violation).
293. See, e.g., supra Parts II and III.