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## Spokeo, Where Shalt Thou Stand

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# Spokeo, Where Shalt Thou Stand?

Joan Steinman\*

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## I. INTRODUCTION

“Spokeo” has such a Shakespearean sound that I felt compelled to ask a question worthy of the name: thus, “Where shalt thou stand?” This essay analyzes three distinct issues raised by *Spokeo, Inc. v. Robins* and considers where the Court will stand on each of them. First, I consider whether the Court will decide the question on which it granted certiorari: “[w]hether Congress may confer Article III standing upon a plaintiff who suffers no concrete harm, and who therefore could not otherwise invoke the jurisdiction of a federal court, by authorizing a private right of action based on a bare violation of a federal statute?”<sup>1</sup> I explain why the Court might dismiss its writ of certiorari as improvidently granted. Second, I address whether Spokeo, Inc. or Robins has the better of the argument concerning Robins’ standing to sue. I opine that the Court’s decisions regarding standing in disputes concerning informational rights and wrongs indicate that it should find that the injury alleged by Robins is sufficiently concrete to confer Article III standing, and that Robins also satisfies prudential standing doctrines. Finally, I argue that the Court should not be dissuaded from so holding by the fact that the suit was brought as a class action.

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1. Question Presented, *Spokeo, Inc. v. Robins*, No. 92-212 (U.S. *petition for cert. filed* May 1, 2014), <http://www.supremecourt.gov/qp/13-01339qp.pdf>.

## II. AN IMPROVIDENT GRANT?

One possibility is that the Court will dismiss the writ of certiorari as improvidently granted. Respondent Tom Robins' position is that Spokeo has caused him concrete injuries (of economic, reputational, and emotional varieties) and that those injuries are redressable by the courts.<sup>2</sup> Robins argues that the Court must first decide whether he has adequately alleged such injuries, and that the question presented in Spokeo's petition for certiorari would be ripe for decision only if the Court were to decide that Robins has not alleged a sufficient "real-world" injury to demonstrate his standing.<sup>3</sup> If the Court were to conclude that Robins demonstrated his standing through his alleged economic, reputational and emotional injuries, it might dismiss the writ as improvidently granted.

However, the parties presented this issue to the Court in their briefs in support of and in opposition to certiorari, and the issue did not cause the Court to deny certiorari.<sup>4</sup> Moreover, no preliminary process in the Court has caused it to send the case away based on further development of these arguments in the briefs. Indeed, the Court has set the case for oral argument, so it seems likely that the Court will proceed to decide the case. Whether the Court actually will answer the question (or some version of the question) posed in the petition for certiorari remains to be seen. It would certainly not be the first time the Court decided a case that did not truly pose the question it purported to pose.<sup>5</sup>

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2. Respondent's Brief in Opposition at 3 – 4, *Spokeo, Inc. v. Robins*, No. 13-1339 (U.S. petition for cert. filed May 1, 2014); First Amended Complaint at ¶¶ 31–37, *Robins v. Spokeo, Inc.*, 2011 WL 11562151 (C.D. Cal. 2011) (No. CV10–05306 ODW(AGRx)).

3. See *id.* at 36–37 (arguing that Robins should prevail even under a "real-world injury test").

4. See *id.*

5. For an example of such a case, see *Ortiz v. Jordan*, 131 S. Ct. 884 (2011), in which the Court granted certiorari to decide the question, "[m]ay a party . . . appeal an order denying summary judgment after a full trial on the merits?" to resolve a circuit split in which some circuits recognized an exception to the general rule that denials of summary judgment may not be appealed after a full trial on the merits for situations in which the summary judgment motion presented a question of law and the trial court's resolution of that question was the basis of its denial of summary judgment, and other circuits rejected the exception. The Court concluded that the denial of summary judgment in *Ortiz* rested instead on genuine issues of material fact. In such a situation, all federal courts of appeals agreed that a post-trial appeal of the denial of summary judgment should be disallowed (at least when not presented in a cross-appeal). The Court nonetheless entered a decision on the merits in the case. See Joan Steinman, *The Puzzling Appeal of Summary Judgment Denials: When Are Such Denials Reviewable?*, 2014 MICH. ST. L. REV. 895, 927 (discussing *Ortiz* in greater depth).

## III. WHO IS RIGHT?

In order to have standing to sue in federal court, a plaintiff must satisfy both Article III and prudential limits on standing. I will briefly address both here. My colleagues on this Roundtable have thoroughly and thoughtfully examined standing jurisprudence and the fundamental policies that undergird it.<sup>6</sup> On that basis, they unanimously conclude that the Court should hold Robins to have standing to assert the claims he has alleged against Spokeo, Inc. My focus will be narrower than their admirably scholarly work. I look at Congress's purpose in enacting the Fair Credit Reporting Act ("FCRA") and pay particular attention to Supreme Court decisions that address standing to sue in cases involving allegedly wrongful dissemination of information. On those bases, I, too, conclude that the Court should find that Robins has standing to sue here.

In enacting the FCRA, Congress intended "to require that consumer reporting agencies adopt reasonable procedures for meeting the needs of commerce for consumer credit . . . information in a manner which is fair and equitable to the consumer, with regard to the . . . accuracy . . . of such information."<sup>7</sup> Among the adverse consequences that Congress was concerned might flow from breach of the duties that it imposed was "denial of employment . . . that adversely affects any . . . prospective employee."<sup>8</sup> Congress specifically provided that, "[w]henever 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,"<sup>9</sup> and further that, "[a]ny person who willfully fails to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer in an amount equal to the sum of . . . any actual damages sustained by the consumer as a result of the failure *or* damages of not less than \$100 and not more than \$1,000," plus such punitive damages as may be appropriate and attorneys' fees.<sup>10</sup>

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6. See generally Heather Elliott, *Balancing as Well as Separating Power: Congress's Authority to Recognize New Legal Rights*, 68 VAND. L. REV. EN BANC 181 (2015); F. Andrew Hessick, *Understanding Standing*, 68 VAND. L. REV. EN BANC 195 (2015); Jonathan R. Siegel, *Injury in Fact and the Structure of Legal Revolutions*, 68 VAND. L. REV. EN BANC 207 (2015); Maxwell L. Stearns, *Spokeo, Inc. v. Robins and the Constitutional Foundations of Statutory Standing*, 68 VAND. L. REV. EN BANC 221 (2015); Howard M. Wasserman, *Fletcherian Standing, Merits, and Spokeo, Inc. v. Robins*, 68 VAND. L. REV. EN BANC 257 (2015).

7. 15 U.S.C. § 1681 (2012).

8. *Id.* § 1681a.

9. *Id.* § 1681e.

10. *Id.* § 1681n (emphasis added).

Robins unquestionably satisfies the prudential limits on standing: it is evident that as a consumer, he is in the class of persons whom Congress sought to protect, his claim falls within the “zone of interests” protected by the statute, and he asserts claims of injury to his own interests rather than injuries to the interests of third-parties or to the public at large.<sup>11</sup> It is less clear that Robins has satisfied Article III’s standing requirements. As a matter of black letter constitutional law under Article III, a plaintiff must allege: (1) that he or she has suffered or imminently will suffer (2) a “concrete and particularized” injury that is (3) fairly traceable to the defendant’s conduct and (4) likely to be redressed by a court decision that is favorable to the plaintiff.<sup>12</sup> These are the “irreducible constitutional minima” of standing.<sup>13</sup>

Notably, Spokeo’s argument is *not* that Robins has failed to allege a *particularized* injury. In the operative complaint, Robins alleged that Spokeo maintained a consumer report about him on its website, and that the report was inaccurate in a variety of ways: the report allegedly misstated Robins’ age, his marital status, that he had children, his educational achievements, and his employment history in a professional or technical field. Spokeo’s report also included a photograph that was not of plaintiff Robins, as Spokeo represented it to be.<sup>14</sup> Robins further alleged that he was out of work and had actively been seeking employment throughout the time that Spokeo displayed inaccurate consumer reporting information about him, that he had yet to find employment, that Spokeo caused actual harm to his employment prospects, that his lack of employment had caused him to lose money, and that he suffered anxiety and worry about his diminished employment prospects.<sup>15</sup> All of this is quite particular to Robins. The alleged injuries are specific and personal; they clearly are not generalized grievances suffered by the public at large that the “particularized” injury requirement of Article III, as interpreted, is intended to screen out.<sup>16</sup>

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11. See *Bennett v. Spear*, 520 U.S. 154, 162 (1997) (discussing prudential principles that bear on the question of standing).

12. See, e.g., *id.* at 167.

13. *Id.*

14. First Amended Complaint, *supra* note 2, at ¶ 31.

15. *Id.* at ¶¶ 34–37.

16. See *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560, 573–74 (1992) (noting that for injury to be “particularized,” it must affect the plaintiff in a personal and individual way, and explaining that a plaintiff who claims only harm to every citizen’s interest in proper application of the Constitution and laws and seeks relief that no more directly and tangibly benefits him than it does the public at large does not state an Article III case or controversy).

The problem, instead, from Spokeo's vantage point, is that these alleged harms are both too speculative and insufficiently "concrete" to support a finding of Article III standing to sue.<sup>17</sup> Thus, Spokeo has argued that all Robins can rely on is the alleged violation of certain of his statutory rights under the FCRA—and that the latter alone is not enough.<sup>18</sup>

I will assume for the sake of argument that Robins' only injury lies in the violation of his statutory rights under the FCRA. Looking to the actual holdings and decisions of the Supreme Court, one finds that, when it comes to injuries involving information, the Court has *not* insisted on " 'direct,' 'tangible' and 'palpable' injuries to physical or economic interests."<sup>19</sup> Professor Seth Kreimer recently wrote a forthcoming article on this precise subject. He surveyed multiple categories of cases involving information, including cases involving illicit acquisition of information, wrongful denial of legitimate requests for information, allegedly wrongful dissemination and exposure of information, and the legal construction of injury in the context of intellectual property law. The third of these categories is most pertinent here, although the fourth has some bearing as well.<sup>20</sup> Professor Kreimer concludes that "today the constitutional test for a 'case' or 'controversy' cannot [and does not] require that plaintiffs demonstrate harm to person, goods or pocketbook."<sup>21</sup>

Consider the most pertinent cases:

*Doe v. Chao* was a class action in which plaintiffs sought injunctive relief and statutory damages for alleged violations of the Privacy Act.<sup>22</sup> Plaintiffs were persons who allegedly suffered an

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17. Brief for Petitioner at 36–52., *Spokeo, Inc. v. Robins*, No. 13-1339 (U.S. *petition for cert. filed* May 1, 2014).

18. Robins also alleged that Spokeo violated sections of the FCRA that impose duties to furnish notices, make disclosures, and post a toll-free telephone number on its website through which consumers could request free annual disclosures. First Amended Complaint, *supra* note 2 at ¶¶ 61–62, 70–71, 74–75. But the lower courts did not decide Robins' standing to assert those claims, and it is highly unlikely that the Supreme Court would focus on those counts of the complaint. It would be of dubious propriety for the Supreme Court to do so in light of the absence of lower court attention to these alleged harms.

19. Seth F. Kreimer, "Spooky Action at a Distance": *Intangible Injury in Fact in the Information Age*, 18 U. PA. J. CONST. L. (forthcoming 2015) (manuscript at 10) (available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2661018](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2661018)). Most of the discussion that follows through text at note 37 is based on Kreimer's article.

20. *Id.* (manuscript at 38–39) (noting that one of the classic privacy torts proposed by Warren and Brandeis "built on common law copyright, which [recognized] causes of action to prevent or remedy nonconsensual dissemination of information without any demonstration that the information was either false or economically harmful").

21. *Id.* (manuscript at 65).

22. *Doe v. Chao*, 540 U.S. 614, 618 (2004).

adverse effect from disclosures of their respective Social Security numbers beyond the limits set by the Privacy Act.<sup>23</sup> Plaintiff Doe alleged that he was “greatly concerned” that the wrongful disclosure of his Social Security number to a substantial number of people who had no right to see it could have “devastating” consequences.<sup>24</sup> The Court held that Doe’s claim stated a sufficient injury in fact for standing purposes.<sup>25</sup> This holding supports a conclusion that Robins has standing to sue Spokeo because Robins alleged similar concerns arising from Spokeo’s disclosure of inaccurate information about him.<sup>26</sup>

On the other hand, it could be of great concern to Robins that the Court in *Doe v. Chao* nonetheless held that the statutory minimum damages for which the Act provided were recoverable only by plaintiffs who proved “actual damages.”<sup>27</sup> However, the Court left open whether “actual damages” included mental anguish, though it assumed for the sake of argument that it did not.<sup>28</sup> Fortunately for Robins, the Privacy Act was drafted differently than the FCRA in important respects. While it is true that (like the Privacy Act) the FCRA authorizes the award of “actual damages” sustained by a consumer as a result of a willful failure to comply with the Act,<sup>29</sup> the FCRA—in the alternative—also authorizes damages of not less than \$100 and not more than \$1,000 for willful violations.<sup>30</sup> The Privacy Act is written differently. It makes the United States liable for actual damages sustained by an individual as a result of the federal government’s refusal or failure to abide by the Act, but states that “in no case shall *a person entitled to recovery* receive less than the sum of \$1,000.”<sup>31</sup> The Supreme Court understood the italicized language as a reference to the individuals to whom the United States was liable for

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23. *See id.* at 616.

24. *Id.* at 617–18.

25. *Id.* at 624–25 (“[A]n individual subjected to an adverse effect has injury enough to open the courthouse door . . .”).

26. *See supra* text at note 15.

27. *Doe*, 540 U.S. at 620.

28. *Id.* at 627 n.12 (noting that the petition for certiorari did not raise that issue for the Supreme Court’s review). *But see* *FAA v. Cooper*, 132 S. Ct. 1441, 1447 (2012) (holding 5-3 that a plaintiff seeking damages under the Privacy Act for disclosure of his HIV-positive status could not recover “actual damages” for nonpecuniary emotional harms, but doing so in a context in which the Court relied on the canon that sovereign immunity waivers must be strictly construed in the Government’s favor). Unlike *Cooper*, sovereign immunity plays no role in Robins’ suit against Spokeo. The *Cooper* Court further relied on Congress’s deliberate refusal to allow recovery for “general damages.” *Id.* at 1450–53.

29. *See supra* text at note 9.

30. *Id.*

31. 5 U.S.C. § 552a(g)(4) (2012) (emphasis added).

actual damages.<sup>32</sup> When the FCRA creates an alternative right to statutory damages ranging between \$100 and \$1,000, it does not limit the recovery of those damages to persons who have suffered “actual damages.” Instead, the FCRA’s sentence structure suggests that statutory damages under the FCRA are recoverable by those with standing to sue under the Act, *without regard* to whether those plaintiffs suffered actual consequential damages.<sup>33</sup>

In other cases involving allegedly improper dissemination of information about plaintiffs, the Court has resolved the merits—sometimes in favor of plaintiffs and sometimes in favor of defendants—without discussing standing. While these cases have limited utility as controlling precedent as to standing, they do appear to imply something significant about the Court’s view of standing requirements in cases involving information-based injuries because the Court would have had a duty to raise standing if it had thought that standing, a jurisdictional element, were dubious.<sup>34</sup> For instance, in *Maracich v. Spears*, the Court vacated a dismissal of claims for statutory damages by a class of individuals whose information had been disclosed in alleged violation of the Drivers Privacy Protection Act.<sup>35</sup> Justice Kennedy, for the Court, referred to disclosed information concerning plaintiffs’ names, addresses, phone numbers and cars as “personal and highly sensitive information.”<sup>36</sup> As Professor Kreimer writes, “Without any demonstration of tangible harm, plaintiffs sought \$2500 [in] statutory damages for each solicitation letter mailed. Neither [the] majority nor [the] dissent manifested any doubt that the plaintiffs claimed justiciable ‘injury in fact.’”<sup>37</sup> Similar cases are noted below.<sup>38</sup>

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32. *Doe*, 540 U.S. at 620.

33. S. REP. NO. 104-185, at 48–49 (1995) (“In cases of willful non-compliance, the consumer is entitled to recover either: (i) the actual damages sustained by the consumer as a result of the failure to comply with the FCRA; or (ii) damages in an amount ranging from \$100 to \$1,000.”).

34. See *Summers v. Earth Island Inst.*, 555 U.S. 488, 499 (2009) (invoking the Court’s duty to raise standing *sua sponte* in deciding the standing of environmental organizations who sued to enjoin the U.S. Forest Service from applying its regulations to exempt a sale of timber from a statutory notice, comment, and appeal process); *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541–42 (1986) (holding *sua sponte* that a school board member had no standing, in any capacity, to appeal the grant of summary judgment to plaintiffs in a case against a school district, where plaintiffs had challenged the constitutionality of the district’s refusal to permit a wholly student-initiated, non-denominational prayer club to meet during regularly scheduled activity periods, and the defendant school district had not appealed the decision).

35. 133 S. Ct. 2191 (2013).

36. *Id.* at 2209.

37. Kreimer, *supra* note 19 (manuscript at 44).

38. See *Los Angeles Cty. v. Humphries*, 562 U.S. 29 (2010) (adjudicating a challenge to the inclusion of plaintiffs’ names in a registry of alleged child abusers); *Doe v. Reed*, 561 U.S. 186

All of these cases bolster the arguments in support of Robins that the invasion of his legally protected interest in not having a credit reporting agency report inaccurate personal information constitutes an injury in fact sufficient to satisfy Article III's standing requirements. Indeed, as Robins and several amici (including the United States) have demonstrated, common law courts have long adjudicated claims alleging violations of a plaintiff's legal rights, even when the plaintiff suffered no consequential injury.<sup>39</sup>

It seems clear that Congress considered inaccurate disclosures by credit reporting agencies to constitute injuries in fact and recognized that injured consumers might have difficulty proving consequential economic losses, flowing from inaccurate disclosures. Congress therefore created a cause of action for statutory damages where the violation of the FCRA was willful.<sup>40</sup> The probability of

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(2010) (adjudicating claims by persons seeking to enjoin disclosure of their signatures on a ballot initiative by opponents of marriage equality, although plaintiffs' argument that the disclosures would subject them to threats, harassment, and reprisals were not relevant at this stage of the litigation where the question before the Court was whether disclosure of referendum petitions in general violates the First Amendment); *Conn. Dep't Pub. Safety v. Doe*, 538 U.S. 1 (2003) (adjudicating claims by convicted sex offenders who sought an injunction against a law requiring public disclosure on the internet, of their status and location); *Owasso Indep. Sch. Dist. v. Falvo*, 534 U.S. 426 (2002) (adjudicating claims by parents that the disclosure of grade information about their children as part of a student peer grading exercise violated the Family Educational Right and Privacy Act); *TRW, Inc. v. Andrews*, 534 U.S. 19 (2001) (on statute of limitations grounds, dismissing an FCRA action alleging improper furnishing of a credit report to third parties); see also *Zivotofsky v. Clinton*, 132 S. Ct. 1421 (2012) (deciding that plaintiff's challenge to a federal statute that purported to permit Americans born in Jerusalem to elect to have "Israel" listed as their place of birth was a justiciable question, without questioning Zivotofsky's standing to sue). In a later decision, *Zivotofsky v. Kerry*, 135 S. Ct. 2076 (2015), the Court struck down the statute because it unconstitutionally infringed upon the President's exclusive power to recognize foreign nations and governments). All of these cases are cited in Kreimer, *supra* note 19 (manuscript at 44–45).

39. See Brief of Respondent at 15–19; Brief of Amici Curiae Public Citizen, Inc., AARP, and MFY Legal Services, Inc. in Support of Respondent at 7–27; Brief for Public Law Professors as Amici Curiae in Support of Respondent at 18–22, 33; Brief for the United States as Amicus Curiae Supporting Respondent at 9–29. All of the briefs cited in this footnote were filed in *Spokeo, Inc. v. Robins*, No. 13-1339 (U.S. petition for cert. granted May 1, 2014).

40. In hearings, the ACLU urged an amendment that would give consumers a statutory damages award, noting that actual damages often are very difficult to prove. *Amendments to the Fair Credit Reporting Act: Hearing Before the Subcomm. on Consumer Affairs and Coinage of the H. Committee on Banking, Fin. and Urban Affairs*, 101st Cong. 133–34 (1990) (statement of Janlori Goldman, Legislative Counsel, American Civil Liberties Union); see Brief of Amici Curiae Information Privacy Law Scholars in Support of Respondent at 12–15, *Spokeo, Inc. v. Robins*, No. 13-1339 (U.S. petition for cert. filed May 1, 2014) (noting that, in response to testimony, Congress enacted the Consumer Credit Reporting Reform Act of 1996, authorizing statutory damages as an alternative to actual damages in instances of willful violation of the Act, and arguing that this represents Congressional recognition of the difficulty of documenting injury, which difficulty is due in part to the secretive ways in which the credit reporting industry works; citing the Truth in Lending Act and other examples of statutory damages that Congress has enacted because of the difficulties of demonstrating actual damages in particular contexts).

harm—even from dissemination of inaccuracies that might overstate (rather than understate) one’s characteristics—coupled with difficulties of proof made statutory damages an appropriate response from a Congress that was determined to require consumer reporting agencies to adopt reasonable procedures to ensure that consumers’ information would be reported accurately. Congress was sensitive in particular to hard-to-prove denials of employment—of the kind that Robins alleged in his complaint—that might flow from breach of the duties that Congress imposed.<sup>41</sup> Under these circumstances, the Court should recognize Robins’ standing to sue and to recover under the FCRA.<sup>42</sup>

#### IV. ARE PLAINTIFF’S CLASS ALLEGATIONS RELEVANT?

Robins brought his action on behalf of himself and a proposed class defined as “[a]ll individuals in the United States who have had information relating to their credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living compiled and displayed by Spokeo, Inc. on Spokeo.com between July 20, 2006 and the date of trial of this action,” excluding defendant (and related persons and entities) and the presiding judge and his or her immediate family.<sup>43</sup> Robins alleged that the class members were affected in substantially the same way as he was by Spokeo’s unlawful compilation of their personal information for distribution and/or sale.

Spokeo argued in support of its petition for certiorari that this case imposes a “threat of extraordinary settlement pressure regardless of the merits” because, “if a class were certified . . . , the potential exposure [would] reach[ ] into the billions of dollars.”<sup>44</sup> It noted that “class actions invoking the FCRA, and grounded in the injury-in-law theory . . . are being filed with great frequency,” and that “the interaction between a no-injury theory of standing and the class action device means that enormous potential liability may result even though no one has suffered *any* concrete injury.”<sup>45</sup> Moreover, the Ninth Circuit’s decision that Robins has standing to sue under the FCRA

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41. See *supra* text at note 15.

42. Accord Wasserman, *supra* note 6, at 268–70 (2015) (discussing the relevance of congressional intent to the Court’s assessment of the existence of an injury in fact in the present case).

43. First Amended Complaint, *supra* note 2, at ¶ 38.

44. Petition for a Writ of Certiorari at 15, *Spokeo, Inc. v. Robins* (U.S. *petition for cert. granted* May 1, 2014).

45. *Id.* at 12, 14.

“has the practical effect of relaxing Rule 23’s ‘stringent requirements for [class] certification,’ . . . because—once the presence of actual harm is out of the equation—issues of injury and causation will be . . . much more susceptible to common proof.”<sup>46</sup> Statutory damages could be awarded without proof of any injury beyond violations of plaintiffs’ rights under the FCRA.<sup>47</sup> Spokeo marshaled these arguments as reasons for the Court to grant certiorari. A majority of the amicus briefs filed in support of Spokeo similarly emphasize the great danger that class actions (allegedly) will pose to credit reporting agencies if the Court holds that the violation of plaintiffs’ rights under the FCRA, without more, confers standing to sue the credit reporting agencies.<sup>48</sup> Indeed, that is the *primary* concern of many amici supporting Spokeo.

It is true that if both named plaintiffs and plaintiff class members can recover in FCRA class actions without establishing consequential damages from defendants’ violations of the FCRA, then consumer reporting firms may face enormous liabilities, as the FCRA authorizes statutory damages ranging from \$100 to \$1,000 per plaintiff (and more for plaintiffs who can prove consequential damages). That fact, however, should not deter the Court from finding a “concrete” injury and standing in cases involving plaintiffs who are unable to prove consequential injuries and consequential damages.

First, even if the vastness of the liability that FCRA defendants might confront would be a proper consideration in the Court’s determination of standing, that consideration should play a role only when certification of FCRA class actions is a realistic threat.<sup>49</sup> In cases such as *Robins*’ it would be easy for plaintiffs to show that the membership of the class is so numerous that joinder of the individual

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46. *Id.* at 14.

47. *Id.* at 15.

48. See Brief of Alabama, et al. as Amici Curiae in Support of Petitioner at 15–20; Brief of Amicus Curiae Consumer Data Industry Association in Support of Petitioner at 15–18; Brief Amicus Curiae of Pacific Legal Foundation in Support of Petitioner at 13–19; Brief of DRI—The Voice of the Defense Bar as Amicus Curiae in Support of Petitioner at 16–19; Brief of National Association of Professional Background Screeners, et al. as Amici Curiae in Support of Petitioner at 13–18. All of the briefs cited in this footnote were filed in *Spokeo, Inc. v. Robins*, No. 13-1339 (U.S. petition for cert. filed May 1, 2014).

49. Certification of a class under Federal Rule of Civil Procedure 23 requires that: (1) the class be so numerous that joinder of all members is impracticable, (2) there be questions of law or fact common to the class, (3) the claims or defenses of the representative parties be typical of the claims or defenses of the class, and that (4) the representative parties will fairly and adequately protect the interests of the class. In order to certify a class action for money damages under Rule 23(b)(3), the court must further find that the questions of law or fact common to class members predominate over any questions affecting only individual members and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The Rule sets out factors that are pertinent to these findings.

class members would be impracticable, as Spokeo allegedly made information available concerning millions of individuals. Moreover, at least some questions of fact and/or law would be common to the class members. For example, there would likely be common questions as to the means and methods by which Spokeo (or other consumer reporting firms) compiled, distributed, and sold consumer reports;<sup>50</sup> there also might be common questions as to the extent and duration of Spokeo's (or other consumer reporting firms') compilation, distribution and sale of consumer reports.<sup>51</sup>

But plaintiffs also would have to prove—and it is *not* clear how easily they could prove—that “the extent to which Defendant transforms, converts and draws conclusions from data collected” from various sources would be a common question.<sup>52</sup> Robins' First Amended Complaint asserted that that is a common question, but the assertion may be subject to challenge. Spokeo's process of transforming, converting, and especially drawing conclusions from the data might vary from individual to individual. Similarly, while the named plaintiff in a proposed FCRA class action would allege (as Robins did) that his claims are typical of the claims of class members as plaintiff and each class member was “affected in substantially the same way by Defendant's unlawful compiling of their personal information for distribution and/or sale . . . in violation of the FCRA,”<sup>53</sup> plaintiffs would have to prove this. If “affected in substantially the same way” refers merely to their FCRA rights being violated, then commonalities in the means and methods by which a consumer reporting firm compiles, distributes, and sells consumer reports would likely lead to a finding that a named plaintiff's claim was typical of the claims of the class. But, if “affected in substantially the same way” refers instead to the particular economic, reputational, emotional, or other consequential injuries that class members may or may not have suffered, then the effects upon a named plaintiff might well *not* be substantially the same as the effects on class members. The typicality of a named plaintiff's claim, along with other factors (such as counsel's experience and resources), then would also bear upon whether the named plaintiff would adequately represent the proposed class. In addition, the question whether defendant's conduct violated the FCRA would be a common question only insofar as defendant's conduct vis-à-vis class members was identical. If defendant's conduct differed among

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50. First Amended Complaint, *supra* note 2, at ¶ 45.

51. *Id.*

52. *Id.*

53. *Id.* ¶ 40.

class members, the conduct might have violated the FCRA in some instances but not in others. Finally, to the extent that plaintiffs sue for varying amounts of money damages or even varying amounts of statutory damages under the FCRA, plaintiffs might have some difficulty in convincing a court that common questions predominate over questions affecting individual members and that a class action would be superior to alternative approaches to adjudicating the claims. As discussed above, individual questions might predominate in FCRA actions. The lack of predominating common questions, as well as other factors, could render a class action inferior (or at least not superior) to alternative approaches to adjudicating the claims.<sup>54</sup>

True, in addition to a monetary recovery, Robins sought both a declaration that Spokeo's alleged actions violated the Fair Credit Reporting Act, §§ 1681e, 1681b, 1681j, and California statutory law, and injunctive relief as necessary to require Spokeo to cease its violations and to protect Robins' interests and those of the plaintiff class that Robins sought to have certified. But even if a Rule 23(b)(2) certification, which is suitable for certain suits seeking injunction and corresponding declaratory relief, would be far easier for Robins to get in light of the absence from Rule 23(b)(2) of the requirement that common questions predominate, that certification would not pose the consternation and danger to Spokeo and other credit reporting agencies that suits for monetary recoveries would pose.<sup>55</sup> Rule 23(b)(3) class actions for money damages are the ones that Spokeo and other reporting entities are really worried about.

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54. See, e.g., *Farmer v. Phillips Agency, Inc.*, 285 F.R.D. 688, 700–03 (N.D. Ga. 2012) (denying class certification in a proposed class action against a consumer reporting agency that provided public records reports on prospective employees to employers, alleging willful violation of the FCRA provision requiring strict procedures to insure that any potentially adverse public record information reported was complete and up-to-date, because the claims did not meet the Rule 23(b) requirement that common issues predominate where—although the issue of whether the agency maintained strict procedures would involve factual overlap among all class members—the source of the adverse information in each report would require individualized proof and each class member would need to demonstrate by individual proof that the agency furnished a report containing potentially adverse information that was either incomplete or out-of-date). *But cf.* *Barel v. Bank of America*, 255 F.R.D. 393, 397–400 (E.D. Pa. 2009) (certifying a class action against a bank, alleging that the bank violated the FCRA by obtaining credit reports of non-customers, where all class members' credit reports were obtained via the same practices, the predominant issue was whether the bank willfully violated the FCRA, a class action would provide a forum for persons unlikely to bring separate actions on claims that were small, and management of the class action would be less onerous than managing many individual cases).

55. Robins and the class he proposes to represent would not be able to recover the monetary recoveries they seek through a Rule 23(b)(2) certification because the amount of those recoveries would be individualized. See *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2557 (2011) (holding that claims for individualized relief do not satisfy Rule 23(b)(2)).

In sum, even if the vastness of the liability that FCRA defendants might confront in a class action would be a proper consideration in the Court's determination of standing, that consideration would properly play a role only if certification of FCRA class actions were a realistic threat. But Spokeo exaggerates that threat. Even if Robins is held to have standing to sue for Spokeo's alleged violations of the FCRA, he will face significant challenges in convincing a federal district court to certify the class, as defined in the First Amended Complaint.

Still more fundamentally, the vastness of the liability that FCRA defendants might confront through class actions, predicated in part upon injury-in-law-based standing, would *not* be a proper consideration in the Court's determination of standing. In *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*, the Court responded to a similar argument. Allstate conten[ded] that the authorization of class actions is not substantively neutral: Allowing Shady Grove to sue on behalf of a class "transform[s] [the] dispute over a five *hundred* dollar penalty into a dispute over a five *million* dollar penalty."<sup>56</sup>

The Court responded that:

Allstate's aggregate liability, however, does not depend on whether the suit proceeds as a class action. Each of the 1,000-plus members of the putative class could . . . bring a freestanding suit asserting his individual claim. It is undoubtedly true that some plaintiffs who would not bring individual suits for the relatively small sums involved will choose to join a class action. *That has no bearing, however, on Allstate's or the plaintiffs' legal rights.* The likelihood that some (even many) plaintiffs will be induced to sue by the availability of a class action is just the sort of "incidental effec[t]" we have long held does not violate § 2072(b).<sup>57</sup>

The same is true here. Spokeo's potential aggregate liability does not depend on whether the suit proceeds as a class action. Each of the members of the putative class could bring a freestanding suit asserting his or her individual claim. While some would not do so in light of the small potential recovery and yet might not opt out of a class action (if offered that choice), that fact has no bearing on Spokeo's or the plaintiffs' legal rights. The Court should decide the circumstances under which plaintiffs have standing to sue under the FCRA without regard to the possibilities that plaintiffs might sue in a class action or that their claims might be consolidated under either

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56. *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.* 559 U.S. 393, 408 (2010) (quoting Brief of Respondent at 1, *id.*) (modifications in original).

57. *Id.* (quoting *Miss. Pub. Co. v. Murphee*, 326 U.S. 438, 445 (1946)) (modifications in original).

Rule 42 or the multi-district litigation statute, 28 U.S.C. § 1407, for pre-trial purposes.

If businesses believe that the potential FCRA liability is unduly great, they should appeal to Congress (not the Court) to revise the Act.<sup>58</sup>

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To sum up, then, the Court might dismiss the writ of certiorari as improvidently granted here on the ground that Mr. Robins alleged economic, reputational, and emotional harms that are sufficiently concrete to entitle him to sue. In that situation, the case would not pose the question that it purported to pose and the Court would not need to decide whether Congress, by authorizing a private right of action based on a bare violation of a federal statute, can confer standing that otherwise would not exist. As my Roundtable colleagues have made clear, that is a separation-of-powers issue that is fraught with peril. But if the Court confronts that question, its precedents, particularly those that decided standing issues raised in connection with alleged informational rights and wrongs, support a holding that Robins has standing to sue Spokeo. Finally, the Court should not be deterred from reaching that conclusion by the possible ramifications for FCRA class actions. Not only is the certification of FCRA class actions speculative, but the Court has only recently rejected a nearly identical argument that class action ramifications should influence the determination of plaintiffs' legal rights. And Congress obviously has the power to amend the FCRA if that statute threatens liabilities of a magnitude that Congress does not intend.

Where wilt *Spokeo* stand? We will soon find out.

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58. See *Murray v. GMAC Mortg. Corp.*, 434 F.3d 948, 953–54 (7th Cir. 2006) (concluding that the substantiality of a potential damages award, despite the “technical” nature of defendant’s violations, was not a proper ground on which to deny class certification in a consumer’s putative FCRA class action against a potential creditor that accessed her credit history without her consent since the substantiality of the potential award did not lie in any abuse of the class action rule, but in the legislative decisions to authorize awards as high as \$1,000.00 per person and to place no limit on the aggregate award payable to a class). On remand, the trial court certified the class and granted partial summary judgment to both plaintiff and defendant. *Murray v. GMAC Mortg. Corp.*, 483 F. Supp. 2d 636 (N.D. Ill. 2007).