

ORAL ARGUMENT NOT YET SCHEDULED

No. 16-7108

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

CHANTAL ATTIAS, INDIVIDUALLY AND ON BEHALF OF
ALL OTHERS SIMILARLY SITUATED, ET AL.

Appellants,

v.

CAREFIRST, INC., ET AL.

Appellees.

On appeal from the United States District Court
for the District of Columbia, Case No. 1:15-cv-882 (CRC)
The Honorable Christopher R. Cooper

**BRIEF OF *AMICUS CURIAE* ELECTRONIC PRIVACY INFORMATION
CENTER (EPIC) IN SUPPORT OF APPELLANTS**

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), *Amicus Curiae* Electronic Privacy Information Center (“EPIC”) certifies that:

A. Parties, Interveners, and Amici

Except for *Amicus Curiae* EPIC, all parties, interveners, and *amici* appearing before the district court and in this Court are set forth in the Corrected Brief of Appellants.

B. Ruling under Review

References to the ruling at issue appear in the Corrected Brief of Appellants.

C. Related Cases

The case on review has not previously been before this Court or any other court. EPIC is not aware of any related cases as defined by D.C. Circuit Rule 28(a)(1)(C).

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rules 27(a)(4) and 28(a)(1)(A), *Amicus Curiae* EPIC submits the following corporate disclosure statement:

EPIC does not have a parent, subsidiary, or affiliate. EPIC has never issued shares or debt securities to the public.

/s/ Marc Rotenberg
MARC ROTENBERG

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GLOSSARY

EPIC	Electronic Privacy Information Center
HIPAA	Health Insurance Portability and Accountability Act
PHI	Personal health information
PII	Personally identifiable information

STATUTES AND REGULATIONS

All applicable statutes, etc., are contained in the Brief for Appellants.

INTEREST OF AMICUS²

The Electronic Privacy Information Center (“EPIC”)³ is a public interest research center in Washington, D.C. EPIC was established in 1994 to focus public attention on emerging civil liberties issues and to protect privacy, the First Amendment, and other constitutional values.

EPIC frequently participates as *amicus curiae* in state and federal cases involving questions of consumer privacy and federal jurisdiction. *See* Mot. for Leave to File Amicus Br.

EPIC has a particular interest in this case because it is one of the first data breach cases to be considered at the appellate level following the Supreme Court’s decision in *Spokeo v. Robins*, 136 S. Ct. 1540 (2016). Given the growing risk to American consumers of data breach, identity theft, and financial fraud, EPIC has a strong interest in defending the ability of consumers to seek legal redress. If a company fails to comply with its obligation to safeguard personal data that it chooses to collect and store, consumers should be able to seek redress. Requiring consumers to demonstrate consequential harm to establish standing is not only a

² In accordance with Rule 29, the undersigned states that no monetary contributions were made for the preparation or submission of this brief, and counsel for a party did not author this brief, in whole or in part.

³ EPIC Appellate Advocacy Fellow John Davisson participated in the preparation of this brief.

fundamental misunderstanding of *Spokeo*, it runs contrary to decades of well-established precedent.

SUMMARY OF ARGUMENT

“Injury is the illegal invasion of a legal right; damage is the loss, hurt, or harm that results from the injury.” 22 Am. Jur. 2d *Damages* § 2 (2016). Despite this clear and important distinction, courts across the United States routinely conflate injury-in-fact and consequential harm in the analysis of standing. This occurs frequently in privacy cases, where many defendants have exploited this semantic trick to avoid consideration of the plaintiffs’ claims on the merits.⁴ Not only is the analysis wrong as a matter of law, the conflation has led to increasing confusion about the necessary requirements to bring a lawsuit in federal court. Paradoxically, plaintiffs’ standing claims in privacy cases are stronger than in many other cases precisely because the defendants have chosen to gather the plaintiffs’ personal data, establishing a clear nexus between the parties that was absent in *Lujan*.

⁴ In common English, the terms “injury” and “harm” are considered synonyms. Webster’s Pocket Thesaurus of the English Language 134 (2001). However, in the legal analysis of standing, the terms are clearly distinguishable. A legal injury is the “violation of another’s legal right, for which the law provides a remedy.” *Injury*, Black’s Law Dictionary (10th ed. 2014). Harm, by contrast, is “material or tangible detriment.” *Harm*, *id.*

Article III requires only that a plaintiff allege injury-in-fact—an actual or imminent *invasion* of her legally protected interest that is “concrete and particularized”—tied to defendant’s conduct, and redressable by the court. In data breach cases, customers seeking redress can satisfy the standing requirement by alleging violations of acts of Congress, state laws, and common law duties. These laws impose obligations on companies that choose to collect and store customer data. When a company violates its customers’ statutory or common law rights by failing to protect their data or failing to inform them of a data breach, the company invades their customers’ legally protected interests, causing injury-in-fact—*legal injury*. If the injury is tied to the company’s conduct and redressable by the court, then the plaintiffs have standing to proceed on their claims.

ARGUMENT

Article III grants the federal courts “judicial power” over “cases” and “controversies.” U.S. Const. art. III § 2. The Supreme Court has interpreted this to embody the “fundamental” principle that “federal-court jurisdiction” is limited “to actual cases or controversies.” *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). To effectuate this principle, the Court established the standing doctrine with its “injury-in-fact” requirement. *Id.* The standing doctrine helps ensure that in actions against the government, plaintiffs satisfy the Article III requirement. *See, e.g., Lujan v. Def’s of Wildlife*, 504 U.S. 555 (1992). But standing was never

understood to limit the ability of private plaintiffs to seek redress against private defendants for otherwise-valid claims arising under federal law or for state and common law claims under ancillary or diversity jurisdiction. *See Spokeo*, 136 S. Ct. at 1550–52 (Thomas, J., concurring) (“In a suit for the violation of a private right, courts historically presumed that the plaintiff suffered a *de facto* injury merely from having his personal, legal rights invaded.”).

Standing serves “to prevent the judicial process from being used to usurp the powers of the political branches,” *Clapper v. Amnesty Int’l USA*, 133 S. Ct. 1138, 1146 (2013), and “confines the federal courts to a properly judicial role,” *Spokeo*, 136 S. Ct. at 1547. Standing also ensures the plaintiff has “such a personal stake in the outcome of the controversy as to warrant his invocation of federal-court jurisdiction.” *Warth v. Seldin*, 422 U.S. 490, 498 (1975) (internal quotation marks omitted). In the case of a dispute between two private parties, the concern about judicial usurpation of legislative functions diminishes. Standing merely requires the plaintiff to successfully allege that the defendant’s conduct violated her right. This guarantees that both parties have a sufficient stake in the outcome of the case and ensures that there is a genuine controversy.

In order to show standing, a plaintiff must establish that she has (1) suffered an injury-in-fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) is likely to be redressed by a favorable judicial decision. *Lujan*,

504 U.S. at 560–61. The plaintiff bears the burden of establishing standing “with the manner and degree of evidence required at the successive stages of the litigation.” *Id.* at 561.

During the pleading stage, clearly alleged factual claims of a violation of the plaintiff’s legally protected interest suffice, since on a motion to dismiss “both the trial and reviewing courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party.” *Warth*, 422 U.S. at 501. “[S]tanding in no way depends on the merits of the plaintiff’s contention.” *Id.* at 500. Courts must find standing to hear each alleged claim. *Int’l Primate Prot. League v. Adm’rs of Tulane Educ. Fund*, 500 U.S. 72, 77 (1991) (“[T]he standing inquiry requires careful judicial examination of a complaint’s allegations to ascertain whether the particular plaintiff is entitled to an adjudication *of the particular claims asserted.*” (emphasis in original) (internal quotation marks omitted)), *superseded by statute on other grounds*, Federal Courts Improvement Act of 1996, Pub. L. No. 104-317, 110 Stat. 3847; *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2010) (declining to extend supplemental jurisdiction “over a claim that does not itself satisfy those elements of the Article III inquiry, such as constitutional standing”).

In this case, plaintiffs have alleged breach of express and implied contract, negligence, fraud, negligence *per se*, unjust enrichment, breach of the duty of

confidentiality, constructive fraud, and violation of four consumer and data breach statutes. Second Am. Compl. ¶¶ 64–154 (July 20, 2015). Here, the actual or imminent element is satisfied because plaintiffs allege that the defendants have already violated their legally protected interests; this is not an “imminent injury” case. Therefore plaintiffs need only establish that there has been a “concrete and particularized” invasion of these legally protected interests.

The lower court failed entirely to conduct the proper standing analysis, as explained in the Supreme Court’s recent decision in *Spokeo*, and the decision below must be vacated.⁵

⁵ The lower court is not alone in its mistake. In fact, many lower courts have recently made the mistake of conflating Article III legal injury with harm. *E.g.*, *Duqum v. Scottrade, Inc.*, No. 15-1537, 2016 WL 3683001, at *8 (E.D. Mo. July 12, 2016) (“Here, Plaintiffs do not allege any facts demonstrating that they *suffered any damages* or injury due to a loss of privacy or breach of confidentiality.” (emphasis added)); *Chambliss v. Carefirst, Inc.*, No. 15-2288, 2016 WL 3055299, at *3 (D. Md. May 27, 2016) (analyzing whether plaintiffs have injury-in-fact based on alleged consequential harms, i.e., damages); *Case v. Miami Beach Healthcare Grp., Ltd.*, No. 14-24583, 2016 WL 1622289, at *3 (S.D. Fla. Feb. 26, 2016) (dismissing a data breach claim for lack of standing because the plaintiff “d[id] not claim that this information was actually misused, or that the unauthorized disclosure of her sensitive information caused her any type of harm, economic or otherwise”); *Moyer v. Michaels Stores, Inc.*, No. 14-561, 2014 WL 3511500, at *4 (N.D. Ill. July 14, 2014) (finding the plaintiffs had suffered injury-in-fact based on alleged damages).

I. Under *Spokeo*, plaintiffs have standing if they allege an injury-in-fact fairly traceable to the defendant’s conduct and redressable by a favorable court ruling.

A. Injury-in-fact is the concrete, particularized, and actual or imminent *invasion* of the plaintiff’s legally protected interests—not a consequential harm caused by an invasion.

Injury-in-fact, *legal injury*, requires the plaintiff to suffer an “invasion of a legally protected interest” that is (1) “concrete and particularized” and (2) “actual or imminent, not conjectural or hypothetical.” *Lujan*, 504 U.S. at 560. When the law protects an interest, the law grants the owner of that interest a right. A right is a “legally enforceable claim that another will do or will not do a given act.” *Right*, Black’s Law Dictionary. “[C]reated or recognized by law,” *id.*, rights are granted through common law, statutory law, and constitutional law. *Tennessee Elec. Power Co. v. Tennessee Val. Auth.*, 306 U.S. 118, 137 (1939) (“[T]he right invaded is a legal right,—one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege.”).

The invasion of a right, i.e., a “legal injury,” is distinct from the “disadvantage that may flow from” the invasion. *Warth*, 422 U.S. at 503 n.13; *see, e.g., In re Google Cookie Placement Consumer Privacy Litig.*, 806 F.3d 125, 134 (3d Cir. 2014), *cert. denied sub nom. Gourley v. Google, Inc.*, 137 S. Ct. 36 (2016) (finding that injury-in-fact “does not demand that a plaintiff suffer any particular type of harm to have standing”). “[O]ur contemporary decisions have not required

a plaintiff to assert an actual injury beyond the violation of his personal legal rights to satisfy the ‘injury-in-fact’ requirement.” *Spokeo*, 136 S. Ct. at 1552 (Thomas, J., concurring).

i. The *invasion* of a right must be concrete.

As the Court explained in *Spokeo*, there are two ways to show that an intangible injury is concrete. First, an intangible legal injury can be concrete if it “has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts.” *Id.* at 1549 (using “harm” to refer to the invasion of the plaintiff’s legal right). Second, a statute can elevate “concrete, *de facto* injuries that were previously inadequate at law” to the “status of legally cognizable injuries.” *Id.* (internal quotation marks omitted).

As the Court recognized in *Spokeo*, legislatures have the power to create legal rights, the violation of which confers standing. “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.” *Id.* (internal quotation marks omitted). Justice Thomas stated the rule directly in concurrence: “Congress can create new private rights and authorize private plaintiffs to sue based simply on the violation of those private rights.” *Id.* at 1553 (Thomas, J., concurring). As the Court recognized more than four decades ago, “Congress may create a statutory right or entitlement the alleged deprivation of which can confer standing to sue even where

the plaintiff would have suffered no judicially cognizable injury in the absence of statute.” *Warth*, 422 U.S. at 514.

Rights established by legislatures are substantive, and are therefore concrete. Indeed, privacy laws protect substantive rights. For example, Congress enacted the Video Privacy Protection Act of 1988, which prevents video tape service providers from disclosing personally identifiable information about their customers, in order “to preserve personal privacy with respect to the rental, purchase, or delivery of video tapes or similar audio visual materials.” Pub. L. No. 100-618, 102 Stat. 3195 (codified at 18 U.S.C. § 2710). Congress enacted the Telephone Consumer Protection Act of 1991 because banning nonconsensual “automated or prerecorded telephone calls” was the “only effective means of protecting telephone consumers” from the resulting “nuisance and privacy invasion.” Pub. L. No. 102-243, § 2(12), 105 Stat. 2394, 2394–95 (codified at 47 U.S.C. § 227). Federal and state privacy statutes are based on an interconnecting framework of rights and responsibilities, known as “Fair Information Practices,” and provide substantive protections against the misuse of personal data. *See Allen & Rotenberg, Privacy Law and Society* 760–64 (2016).

Substantive law “creates, defines, and regulates the rights, duties, and powers of parties,” while procedural law is “rules that prescribe the steps for having a right or duty judicially enforced.” *Substantive Law*, Black’s Law

Dictionary; *Procedural Law*, Black's Law Dictionary. In other words, "substantive law defines the remedy and the right, while the law of procedure defines the modes and conditions of the application of the one to the other." John Salmond, *Jurisprudence* 476 (Glanville L. Williams ed., 10th ed. 1947); see *Shady Grove Orthopedic Associates, P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 407 (2010) (stating that procedural rights govern "only the manners and the means by which the litigants' rights are enforced").

But the Court in *Spokeo* made clear that a violation of procedural rights also creates legal standing. Writing for the Court, Justice Alito said:

Just as the common law permitted suit in such instances, the violation of a procedural right granted by statute can be sufficient in some circumstances to constitute injury in fact. In other words, a plaintiff in such a case need not allege any *additional* harm beyond the one Congress has identified. See *Federal Election Comm'n v. Akins*, 524 U.S. 11, 20–25 (1998) (confirming that a group of voters' "inability to obtain information" that Congress had decided to make public is a sufficient injury in fact to satisfy Article III); *Public Citizen v. Department of Justice*, 491 U. S. 440, 449 (1989) (holding that two advocacy organizations' failure to obtain information subject to disclosure under the Federal Advisory Committee Act "constitutes a sufficiently distinct injury to provide standing to sue").

Spokeo, 136 S. Ct. at 1549 (emphasis in original).

Only a "bare procedural violation, divorced from any concrete harm" fails to confer standing. *Spokeo*, 136 S. Ct. at 1549. Courts should not second-guess complex laws which establish a legally protected interest. Legislators have likely undertaken extensive fact finding prior to the enactment of a public law and

the provisions, when read together, may confer greater significance than when read in isolation. *See Lujan*, 504 U.S. at 580 (Kennedy, J., concurring in part and concurring in judgment) (“As Government programs and policies become more complex and far reaching, we must be sensitive to the articulation of new rights of action.”).

Even in *Spokeo* the Court was careful in its discussion of what may constitute a “bare procedural violation.” *Spokeo*, 136 S. Ct. at 1550; *cf. Hancock v. Urban Outfitters, Inc.*, 830 F.3d 511, 514–15 (D.C. Cir. 2016) (dismissing a complaint consisting of a “naked assertion” of a violation without any allegations concerning the concrete interests that the law was enacted to protect).

The Court was correct to add the qualifier “without more.” A zip code is routinely used to establish identity, confirm a credit card payment, withdraw money from an ATM machine, and create profiles with legal consequences. *See, e.g.,* Shaunacy Ferro, *What Your Zip Code Says About You*, Fast Company Co. Design (Oct. 24, 2014);⁶ Adam Tanner, *Never Give Stores Your ZIP Code. Here’s Why*, Forbes (June 19, 2013).⁷ The Court added in a footnote “We express no view about any other types of false information that may merit similar treatment. We leave that issue for the Ninth Circuit to consider on remand.” *Spokeo*, 136 S. Ct. at

⁶ <http://www.fastcodesign.com/3037550/infographic-of-the-day/what-your-zip-code-says-about-you>.

⁷ <http://www.forbes.com/sites/adamtanner/2013/06/19/theres-a-billion-reasons-not-to-give-stores-your-zip-code-ever/#3cfe08514e33>.

1550 n.8. The caution is well advised. In laws that seek to protect the collection and use of personal data, any false or aggregable information about the individual or may produce concrete harms.

ii. The *invasion* of a right must be particularized to the plaintiff.

The particularity requirement of the injury-in-fact test is easily met in privacy cases that involve the purposeful collection and use of the plaintiff's personal data by the defendant. Under the particularity requirement, the injury must "affect the plaintiff in a personal and individual way," where the plaintiff is "among the injured." *Lujan*, 504 U.S. at 560 n.1, 563 (internal quotation marks omitted); *see also Warth*, 422 U.S. at 501 ("[P]laintiff still must allege a distinct and palpable injury to himself, even if it is an injury shared by a large class of other possible litigants.").

If the violated right belongs to the plaintiff, the invasion is particularized, even if the invasion is also suffered by "a large number of people." *Spokeo*, 136 S. Ct. at 1548 n.7 (noting that even though "victims' injuries from a mass tort" are "widely shared," they still give rise to particularized injuries). If, however, the violated right is "possessed by every citizen," such as the "right . . . to require that the Government be administered according to law," then the injury is a general grievance that does not by itself give rise to standing. *Lujan*, 504 U.S. at 574

(internal quotation marks omitted); *see generally id.* at 573–77 (discussing generalized grievances).

iii. The *invasion* of the right must be actual or imminent.

In addition to being concrete and particularized, the violation of a right must finally be actual or imminent. That is, the defendant’s alleged conduct must have already violated or will imminently violate the plaintiff’s right. An “imminent” violation of a right has not yet occurred, but must be “*certainly* impending.” *Clapper*, 133 S. Ct. at 1147 (emphasis in original) (internal quotation marks omitted). In *Clapper*, the plaintiffs sought injunctive relief to prevent future government surveillance, but failed to establish that a violation of their legally protected interest had actually occurred or was certainly impending. The Court found that they had failed to allege that the *violation* of their Fourth Amendment *rights* was certainly impending: “[R]espondents lack Article III standing because they cannot demonstrate that the future *injury* they purportedly fear is certainly impending.” *Clapper*, 133 S. Ct. at 1155 (emphasis added).

Unlike in *Clapper*, most statutory and common law privacy cases, such as this data breach case, are brought *after* the alleged violation of plaintiff’s legally protected interest has occurred. Cases grounded in the violation of a federal law, a state law, or a common law right, involve *actual*, not *imminent*, injury claims. The Court’s analysis in *Clapper* is entirely irrelevant to actual injury claims.

Yet the lower court and several other courts have, incorrectly, analyzed whether the *consequential harms* caused by a data breach are “certainly impending” under *Clapper*. See, e.g., *Remijas v. Neiman Marcus Grp.*, 794 F.3d 688, 692 (7th Cir. 2015) (stating that standing turns on whether plaintiffs’ allegations of a risk of future identity theft and financial fraud “satisfy *Clapper*’s requirement that injury either already have occurred or be ‘certainly impending.’”); *Storm v. Paytime, Inc.*, 90 F. Supp. 3d 359, 365 (M.D. Pa. 2015) (concluding that it must “dismiss data breach cases for lack of standing unless plaintiffs allege actual misuse of the hacked data or specifically allege how such misuse is certainly impending”); *Whalen v. Michael Stores Inc.*, No. 14-7006, 2015 WL 9462108, at *5 (E.D.N.Y. Dec. 28, 2015) (finding that a risk of identity theft or fraud is not “certainly impending or based on a substantial risk that the harm will occur” (internal quotation marks omitted)).

This not only conflates injury with harm, it also simultaneously conflates the actual injury standard with the imminent injury standard. Decisions that apply a “certainly impending harm” standard have no basis in Article III or the Supreme Court’s jurisprudence.

B. The *invasion* of the right must be caused by the defendant and redressable by the court.

Once a plaintiff has established an injury-in-fact, she needs only to show that the defendant caused the invasion of her rights, and that the court is able to remedy

the invasion. These requirements are easily satisfied in privacy cases, in which defendants have typically collected or used personal data in violation of a legal right.

The causation requirement is satisfied if the invasion of the plaintiff's legally protected interest is "fairly traceable" to the defendant's conduct. *Lujan*, 504 U.S. at 560 (internal quotation marks omitted); *see also Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 149 (2010) ("Standing under Article III of the Constitution requires that an injury be concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling.").

The redressability requirement is satisfied if a favorable decision from the court would likely remedy the plaintiff's injury. *Lujan*, 504 U.S. at 561–62 ("[T]here is ordinarily little question that the action or inaction has caused [plaintiff's] injury, and that a judgment preventing or requiring the action will redress it.").

II. The plaintiffs in this case sufficiently alleged an injury-in-fact caused by the defendant that is redressable by a court.

In this case, the Court must establish standing for each of the "specific common-law, statutory, or constitutional claims that a party presents." *Int'l Primate Prot.*, 500 U.S. at 77. During pleadings, the Court must assume all material allegations of the complaint are true and construe the complaint in favor

of the complaining party. *Warth*, 422 U.S. at 501. “[S]tanding in no way depends on the merits of the plaintiff’s contention.” *Id.* at 500.

Unfortunately, the lower court did not do this. Instead, the court confused consequential harm with the legal injury required for standing, and incorrectly decided the motion based on whether the plaintiffs would suffer harms in the future. Mem. Op. 4–12 (Aug. 8, 2016). The court analyzed, for example, mitigation costs, “actual identity theft,” and diminishment in the value of plaintiffs’ personally identifiable information (“PII”). *Id.* In other words, the lower court mistakenly analyzed whether the plaintiffs had alleged *actual damages*—a question relevant only when evaluating a motion to dismiss for failure to state a claim, and then only if the claim requires a showing of actual damages.

A proper review of the plaintiffs’ claims shows that they alleged the necessary elements to confer standing under Article III in accordance with the Court’s recent decision in *Spokeo*. The claims are concrete, particularized, and actual violations of their legally protected interests, which they allege were caused by the defendants, and are redressable by a favorable Court ruling.

The plaintiffs allege eleven causes of action:

- (i) breach of express and implied contract;
- (ii) negligence;
- (iii) violation of the District of Columbia Consumer Protection Act;
- (iv) violation of the District of Columbia Consumer Personal Information Security Breach Notification Act;
- (v) violation of the Maryland Consumer Protection Act;

- (vi) violation of the Virginia Consumer Protection Act;
- (vii) fraud;
- (viii) negligence *per se*;
- (ix) unjust enrichment;
- (x) breach of the duty of confidentiality; and
- (xi) constructive fraud.

Second Am. Compl. ¶¶ 96–159.

A. Plaintiffs have properly alleged concrete, particularized, and actual violations of their rights protected at common law.

In the case at hand, plaintiffs have alleged seven violations of their common law rights: violations of their contract rights (breach of express and implied contract and unjust enrichment), and violations of their tort rights (negligence fraud, negligence *per se*, breach of the duty of confidentiality, and constructive fraud). Common law violations have “traditionally been regarded as providing a basis for a lawsuit in English or American courts.” *Spokeo*, 136 S. Ct. at 1549. This section will analyze two of these violations—breach of express and implied contract and negligence—to illustrate how the concreteness analysis under the standing doctrine would be analyzed based on the Court’s holding in *Spokeo*.

i. Plaintiffs have standing for their breach of express and implied contract claim.

Plaintiffs allege that defendants breached an express and implied contract between the parties. Second Am. Compl. ¶¶ 64–75 (“Defendants did not safeguard Plaintiffs’ health information and Sensitive Information and did not encrypt all personal information that Plaintiffs provided to Defendants, therefore, Defendants

breached the contract with Plaintiffs.”). Contract law protects contracting parties’ interest in the performance of the terms of the contract by endowing each party with a right to performance. *Contract*, Black’s Law Dictionary (“An agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law.”). Upon failing to perform as required under the contract, a party has breached, “which furnishes a basis for a cause of action.” *Breach of Contract*, Black’s Law Dictionary.

Plaintiffs allege that they “paid money to Defendants in exchange for health insurance, which included promises to protect Plaintiffs’ PII, PHI and Sensitive Information.” Second Am. Compl. ¶ 65. This created a contract. *Id.* ¶¶ 69–70. Each purchase of health insurance, and thus each contract, included promises by defendants that they would “only disclose health information when required to do so by federal or state law,” that they would “encrypt all personal information given to Defendants,” and that they would “comply with all HIPAA standards.” *Id.* ¶¶ 66–68. Further, “[t]o the extent that it was not expressed, an implied contract was created whereby Defendants’ promised to safeguard Plaintiffs’ health information and Sensitive Information from being accessed, copied, and transferred by third parties.” *Id.* ¶ 70.

Injury-in-fact turns on whether the alleged violation is concrete, particularized, and actual. Breach of contract has been “traditionally regarded as

providing a basis for a lawsuit in English or American courts.” *See Spokeo*, 136 S. Ct. at 1549. A breach of express and implied contract is thus concrete.

The plaintiffs allege that a contract existed between each class member and defendants. Thus, each class member had a personal contractual right, and defendants violated the personal right of each member by breaching each contract. These violations are particular.

The plaintiffs allege an actual breach of contract rather than an imminent breach. Second Am. Compl. ¶ 72 (“Defendants breached the contract with Plaintiffs.”). The plaintiffs have sufficiently alleged an injury-in-fact.

Plaintiffs allege that defendants’ conduct caused their injury. Specifically, plaintiffs allege their damages were “a proximate and direct result of the breach by Defendants.” *Id.* ¶ 74. Among other things, plaintiffs allege that defendants “fail[ed] to satisfy their confidentiality and privacy obligations” and “did not provide encryption for all of the personal information whether in transit or at rest.” *Id.* ¶¶ 31, 73. Further, plaintiffs allege that defendants “failed to recognize that a cyberattack occurred” for almost a year. *Id.* ¶ 35. Taking the facts as true, defendants have breached their contractual obligation to protect plaintiffs’ personal information. Therefore, plaintiffs’ alleged injury—the breach of implied contract—is directly traceable to defendants.

Finally, a favorable ruling would compel defendants to pay compensation to plaintiffs for these legal injuries and institute reasonable data security as injunctive relief. These remedies would redress the legal injuries caused by defendants.

Accordingly, plaintiffs have standing for their breach of express and implied contract claim.

ii. Plaintiffs have standing for their negligence claim.

Plaintiffs allege that defendants owed them “a duty of care in protecting the confidentiality of the personal and private information that the Plaintiffs provided to the Defendants as consumers of the Defendants’ health insurance policies,” including “a duty to exercise reasonable care in safeguarding and protecting such information from being compromised, lost, stolen, misused, and/or disclosed to unauthorized parties.” *Id.* ¶¶ 77, 78. Tort law provides a right protecting people’s interest in receiving a “standard of care that a reasonably prudent person would have exercised in a similar situation.” *Negligence*, Black’s Law Dictionary. A violation of that right creates a negligence cause of action. *Id.*

Negligence, like breach of contract, has long created a cause of action in English and American courts. *See Spokeo*, 136 S. Ct. at 1549. Thus the violation of the plaintiffs’ rights to a reasonable standard of care is concrete. The violation is particularized since defendants owed this duty to *each* plaintiff whose information it chose to collect. *See id.* at 1548 n.7 (“The victims’ injuries from a mass tort, for

example, are widely shared, to be sure, but each individual suffers a particularized harm.”). The violation is actual since the plaintiffs allege the breach of duty has already occurred. Second Am. Compl. ¶ 82 (“The Defendants were negligent in that [they] breached the duty of reasonable care[.]”).

Plaintiffs further allege that defendants failed to “have in place reasonable and appropriate protections from unauthorized data breaches,” to “provid[e] a reasonable and timely notice of the breach,” and to “perform reasonable and timely audits of the data protection system.” *Id.* Taking the facts as true, defendants failed to take reasonable care to ensure the safety of plaintiffs’ PII. As a result, plaintiffs’ alleged injury—a breach of the duty of reasonable care—is directly traceable to defendants’ conduct.

Finally, as above, a favorable verdict would result in defendants paying compensation to the plaintiffs for these legal injuries and instituting reasonable data security as injunctive relief. These remedies would redress the legal injuries caused by defendants.

Accordingly, plaintiffs have standing for a negligence claim.

B. Plaintiffs have properly alleged violations of state consumer protection statutes and data breach notifications.

The plaintiffs also allege that defendants violated three consumer protection statutes and a data breach notification statute. As explained above, legislatures create substantive rights in privacy statutes, the invasion of which is a concrete

injury. Only “bare procedural rights, divorced from any concrete harm,” are insufficiently concrete to confer standing. *See Spokeo*, 136 S. Ct. at 1549–50.

While plaintiffs allege violation of four distinct statutes, the standing analysis for each is similar. This section will analyze one of these statutes, the Consumer Personal Information Security Breach Notification Act of 2006, D.C. Code Ann. §§ 28-3851–53 (West 2016) [hereinafter Notification Act], to illustrate how the lower court should apply the concreteness analysis in light of *Spokeo*.

Section 28-3852 of the Notification Act provides a substantive right to D.C. consumers by explicitly setting forth what a company must do when a customer’s personal information is breached. Namely, a company that “owns or licenses computerized or other electronic data that includes personal information, and [which] discovers a breach of the security of the system, shall promptly notify any District of Columbia resident whose personal information was included in the breach. The notification shall be made in the most expedient time possible and without unreasonable delay[.]” § 28-3852. Any D.C. resident whose suffers a violation of this right “may institute a civil action to recover actual damages, the costs of the action, and reasonable attorney's fees.” § 28-3853.

This is not a procedural right, as the provision does not govern the “manner and means by which the rights are enforced.” *Shady Grove*, 559 U.S. at 407 (internal quotations omitted). Rather, it is a substantive right, encompassing both

“the remedy and the right.” Salmond, *supra*. The Notification Act defines a right that D.C. consumers have: the right to be informed when their personal information is subject to a data breach. Since the D.C. plaintiffs allege a violation of this substantive right, they have alleged a concrete injury.

The violation is particularized because defendants’ conduct, as alleged, violated each D.C. plaintiff’s personal right to be notified that their PII was subject to a data breach. The violation is actual since plaintiffs allege the violation already occurred. Second Am. Compl. ¶ 96 (“Defendants failed to provide notice of the data breach[.]”). Thus, plaintiffs alleged an injury-in-fact.

Further, the plaintiffs allege facts indicating defendants caused the violation of their statutory rights. Defendants were “required to notify Mr. Kotzur and Mrs. Attias and the DC Class in the ‘most expedient time possible’ and without unreasonable delay,” yet defendants violated this right by “fail[ing] to provide notice.” *Id.* ¶ 95–96. The courts can redress the violation through damages or injunctive relief, as detailed above. Therefore, the plaintiffs thus have standing to bring suit under the Notification Act and other consumer protection statutes.

III. The lower court erred in ignoring the deterrent role that civil litigation can play in mitigating the risks posed by dangerous security practices.

When a defendant challenges a plaintiff’s standing, Courts should take extra caution to avoid imputing questions of merit into questions of standing.

“[S]tanding in no way depends on the merits of the plaintiff’s contention.” *Warth*,

422 U.S. at 500. Article III standing is a threshold question without a rigorous burden. This Court has said it well. “In reviewing the standing question, the court must be careful not to decide the questions on the merits for or against the plaintiff, and must therefore assume that on the merits the plaintiffs would be successful in their claims.” *Muir v. Navy Fed. Credit Union*, 529 F.3d 1100, 1105 (D.C. Cir. 2008) (internal quotation marks omitted) (quoting *City of Waukesha v. EPA*, 320 F.3d 228, 235 (D.C. Cir. 2003)).

Until the courts have established what constitutes “reasonable” data security under statutory and common law, trials and detailed fact-finding by a judge may be the only way to determine whether the company implemented data security measures that met its legal obligations. Getting over the standing hurdle is not equivalent to granting a final judgment to the plaintiff, as many defendants insinuate. A trial on the merits could very well absolve a defendant if they can show that they met their legal obligations and provided adequate data security.

Companies that suffer data breaches necessarily bear potential liability. That is the risk of doing business, and the law places a duty of care so that the companies properly internalize the damages that could result from failing to reasonably secure the personal information that they collect and use.

“Database operators”—companies that collect and store consumer data—
“constitute the cheapest cost avoiders vis-à-vis individuals whose information sits

in a private entity's database.” Danielle K. Citron, *Reservoirs of Danger: the Evolution of Public and Private Law at the Dawn of the Information Age*, 80 Southern Cal. L. Rev. 241, 284 (2007) (arguing that data brokers should be strictly liable for unsecure databases and data breaches). Consumers do not have the ability to avoid these breaches because they “have no information about, and have no practical means to find out, where their personal data resides” or how it is protected. *Id.* at 285–86. Consequentially, the company collecting and storing consumer data “sits in the best position to make decisions about the costs and benefits of its information-gathering” and distribution. *Id.* at 285. As such, the company must bear the cost for failing to implement adequate data security.

But correct allocation of responsibilities does not by itself result in the efficient minimization of damages. Without determinations about whether particular data practices meet the standard of reasonable care, there will be little reason for a company to invest in prevention and mitigation. If these companies fail to invest in reasonable security measures, then consumers will continue to face harm from data breaches.

Litigation, therefore, is an important mechanism to ensure that personal data is adequately protected. *See* Richard A. Posner, *Economic Analysis of Law* 491 (3d ed. 1986) (stating that the legal system determines “what allocation of resources would maximize efficiency” when “the costs of a market determination would

exceed those of a legal determination”). Damages also force defendants to internalize the full measure of the damages that they cause and take sufficient care to prevent future harms. See *Laidlaw Env'tl. Serv. (TOC), Inc.*, 528 U.S. at 185 (finding that civil penalties have a deterrent effect and can therefore prevent future harm).

Data breaches, though prevalent, are not inevitable; reasonable data security measures can prevent many of the most common forms of criminal hacking. But until data breach victims can hold companies legally accountable for their lax security, data breaches will continue to occur at an alarming pace.

* * *

Post-*Spokeo*, courts should understand that injury-in-fact is a legal injury, distinct from consequential harm. If the claim is tied to the defendant’s conduct and the matter is redressable before the court, it is necessary only to allege that a legal injury has occurred.

CONCLUSION

For the reasons explained above, *Amicus* respectfully requests this Court to reverse the judgment of the district court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6). The brief is composed in a 14-point proportional typeface, Times New Roman, and complies with the word limit of Federal Rule of Appellate Procedure 32(a)(7)(B) and D.C. Circuit Rule 32(e) because it contains 6,139 words, excluding the parts of the brief exempted under Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and D.C. Circuit Rule 32(e)(1).

/s/ Marc Rotenberg
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CERTIFICATE OF SERVICE

The undersigned counsel certifies that on this 17th day of January 2017, he caused the foregoing “Brief of *Amicus Curiae* Electronic Privacy Information Center (EPIC) in Support of Appellants” to be electronically filed using the Court’s CM/ECF system, which served a copy of the document on all counsel of record in this case.

 /s/ Marc Rotenberg
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