CASE NO. 15-3690

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

DANIEL B. STORM, *et al.*,
Appellants,

v.

PAYTIME, INC., *et al.*,
Appellees.

Appeal from the Orders of the United States District Court for the Middle District of Pennsylvania in Civil Action Nos. 14-1138 and 14-3964 (Jones, J.)

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF CONSUMER ADVOCATES (NACA) IN SUPPORT OF APPELLANTS SEEKING REVERSAL AND/OR VACATUR OF THE DISTRICT COURT'S RULINGS

James J. Bilsborrow
WEITZ & LUXENBERG, PC
700 Broadway
New York, NY 10003
Telephone: (212) 558-5856
Facsimile: (646) 293-7937

Attorney for National Association of Consumer Advocates (Amicus Curiae)

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and 29(c), *amicus curiae* the National Association of Consumer Advocates (NACA) certifies that it is a non-profit corporation with no parent corporation. No publicly held company owns 10% or more of NACA's stock.

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INTEREST OF THE AMICUS

The National Association of Consumer Advocates (NACA) is a nationwide non-profit corporation whose over 1,700 members are private, public sector, legal services and non-profit lawyers, law professors, and law students.[1] NACA's primary practices or interests involve consumer rights and protection, and it is dedicated to furthering the effective and ethical representation of consumers. Toward this end, NACA has issued its *Standards and Guidelines for Litigating and Settling Consumer Class Actions*, the revised edition of which is published at 299 F.R.D. 160 (2014).

NACA is dedicated to promoting justice for all consumers by maintaining a forum for information sharing among consumer advocates across the country and serving as a voice for its members and for consumers in an ongoing effort to curb deceptive and exploitative business practices. NACA has furthered this interest in part by appearing as *amicus curiae* in support of consumer interests in federal and state courts throughout the United States. For example, NACA has appeared as *amicus curiae* before this Court in support of consumer parties in *Montgomery County v. MERSCORP Inc.*, 795 F.3d 372 (3d Cir. 2015).

[1] In accordance with Rule 29, the undersigned states that no monetary contributions were made for the preparation or submission of this brief. This brief was not authored, in whole or in part, by counsel for a party.

NACA was granted permission to file this brief by an Order of this Court dated July 5, 2016.

SUMMARY OF THE ARGUMENT

In its most recent term, the United States Supreme Court issued its decision in *Spokeo, Inc. v. Robins*, --- U.S. ---, 136 S. Ct. 1540 (2016), a case concerning the injury-in-fact requirement of Article III standing. *Spokeo* makes clear that constitutionally sufficient harms may be tangible or intangible; they may be difficult to measure or prove; and they may consist of the real risk of future harm. *Id.* at 1548-49. In the instant matter, a data breach in which hackers stole sensitive financial information and social security numbers (among other data), plaintiffs alleged tangible and intangible harms under *Spokeo*. This Court should apply the principles set forth in the *Spokeo* decision and reverse and/or vacate the lower court's rulings.

ARGUMENT

"To establish Article III standing, a plaintiff must demonstrate (1) an injury-in-fact, (2) a sufficient connection between the injury and the conduct complained of, and (3) a likelihood that the injury will be redressed by a favorable decision." *In re Nickelodeon Consumer Privacy Litig.*, --- F.3d ---, 2016 WL 3513782, at *6 (3d Cir. June 27, 2016) (quoting *Finkelman v. Nat'l Football League*, 810 F.3d 187, 193 (3d Cir. 2016)).

The court below wrongly held that the plaintiffs in this matter did not plead harms sufficient to constitute injury in fact. Since the district court's determination, the United States Supreme Court has revisited its injury-in-fact jurisprudence in *Spokeo, Inc. v. Robins*, --- U.S. ---, 136 S. Ct. 1540 (2016). *Spokeo* makes clear that injuries sufficient to satisfy Article III may be tangible or intangible, and may take the form of present injuries or future injuries for which there is a "risk of real harm." *Id.* at 1549.

The thrust of this brief is narrow; *amici* set forth the contours of the *Spokeo* decision and explain how that decision applies in a data breach case such as this one. *Spokeo* took pains to demonstrate that constitutionally sufficient harms may be difficult to measure or even prove. The harms that flow from a data breach—especially the substantial risk of future harm—are often difficult to measure, but no less real to the victims of the breach. *Amici* respectfully suggest that *Spokeo* favors reversal and/or vacatur of the district court's decisions, and remand to the district court to reassess the allegations of the complaint in light of the Supreme Court's standing jurisprudence.

I. The *Spokeo* Decision

On May 16, 2016, the United States Supreme Court issued its decision in *Spokeo, Inc. v. Robins*. *Spokeo* involved claims brought under the Fair Credit Reporting Act (FCRA) against a website, Spokeo.com, that allowed users to search

for information about others using their name, e-mail address, or telephone number. *Id.* at 1546. In response to such an inquiry, Spokeo searched its databases and returned information regarding the target individual's address, telephone number, marital status, age, occupation, hobbies, finances, shopping habits, and music preferences. *Id.*

The plaintiff, Thomas Robins, learned that the information Spokeo had compiled about him was factually inaccurate. Among other things, the website misreported Robins' income and educational background. *Id.* Robins alleged that this negatively impacted his employment prospects. *Robins v. Spokeo, Inc.*, 742 F.3d 409, 411 (9th Cir. 2014), *vacated and remanded by Spokeo*, 136 S. Ct. 1540. Further, because the Spokeo website amounted to a "consumer reporting agency," as defined by the FCRA, Robins argued that its generation of inaccurate reporting about him violated the law. *Spokeo*, 136 S. Ct. at 1546 & n.4 (explaining that publication of inaccurate information by a "consumer reporting agency" may be actionable under the FCRA).

Violation of the FCRA entitles a plaintiff to statutory damages. *See* 15 U.S.C. § 1681n(a) ("Any person who willfully fails to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer in an amount equal to . . . damages of not less than $100 and not more than $1,000 . . . ."). Spokeo claimed that the violation of Robins' statutory

rights—its misreporting of information about him—did not amount to injury in fact under Article III because Robins had suffered no actual harm. *Spokeo, Inc. v. Robins*, Petitioner's Br. at 8, 2015 WL 4148655 (July 2, 2015). According to Spokeo, injury in fact demanded something more than the violation of a federal statute.

The district court dismissed for lack of Article III standing, a determination the Ninth Circuit Court of Appeals reversed. *Robins*, 742 F.3d at 411-12. The court of appeals concluded that Robins had standing because "he allege[d] that Spokeo violated *his* statutory rights, not just the statutory rights of other people." *Id.* at 413 (emphasis in original). Moreover, "Robins's personal interests in the handling of his credit information are individualized rather than collective." *Id.* For the court of appeals, these factors spelled out an alleged injury that was sufficiently particularized and concrete to satisfy Article III injury in fact. *See id.* ("[T]he interests protected by the statutory rights at issue are sufficiently concrete and particularized. . . .").

The Supreme Court found this analysis incomplete; "[t]o establish injury in fact, a plaintiff must show that he or she suffered 'an invasion of a legally protected interest' that is 'concrete and particularized.'" *Spokeo*, 136 S. Ct. at 1548 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). These conditions—particularity *and* concreteness—are distinct, and each must be present

to establish injury in fact. *Id.* An injury is concrete when it is "*de facto*," or "'real, and not abstract.'"[2] *Id.* (quoting *Webster's Third New International Dictionary* 472 (1971)). A particularized injury affects the plaintiff "in a personal and individualized way." *Id.* (quoting *Lujan*, 504 U.S. at 560 n.1). Although the court of appeals determined that Robins' injuries were particularized, its analysis failed to determine whether they were sufficiently concrete to satisfy Article III.

The Court then elaborated on the concept of concreteness. Concrete injuries may be tangible (loss of money or property, physical or emotional suffering, lost time) or intangible (invasion of privacy). *Id.* at 1549. Although intangible injuries can be more difficult to identify, "the law has long permitted recovery by certain tort victims even if their harms may be difficult to prove or measure." *Id.* Where an alleged injury is intangible, courts may look to "both history and the judgment of Congress" to ascertain whether it is sufficiently concrete. *Id.*

If the alleged harm bears "a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts," it is likely to be one that is redressable in federal court. *Id.* The proper inquiry, in other words, asks whether the injury in question has a common-law analogue; if it does, it is concrete. When the harm derives from violation of a federal statute,

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[2] As this Court explained just two weeks ago, an injury "is 'concrete' if it is *de facto*; it must actually exist rather than being only abstract." *In re Nickelodeon*, --- F.3d ---, 2016 WL 3513782, at *6 (quoting *Spokeo*, 136 S. Ct. at 1548).

courts must also examine relevant congressional determinations in enacting the legislation. *Id.* ("[B]ecause Congress is well positioned to identify intangible harms that meet minimum Article III requirements, its judgment is also instructive and important.")

Spokeo took pains to make clear that risk of future injury may also be concrete. Citing to its decision in *Clapper v. Amnesty International USA*, 568 U.S. ---, 133 S. Ct. 1138 (2013), the Court explained that the "risk of real harm" could satisfy Article III. *Spokeo*, 136 S. Ct. at 1549. *Clapper*, of course, held that the risk of future harm constitutes injury in fact when the threatened harm is "certainly impending." 133 S. Ct. at 1147. The Court later characterized *Clapper* as holding that a constitutionally adequate future injury was one that is "certainly impending" or for which "there is a substantial risk that the harm will occur." *Susan B. Anthony List v. Driehaus*, --- U.S. ---, 134 S. Ct. 2334, 2341 (2014) (quoting *Clapper*, 133 S. Ct. at 1147, 1150 n.5). *Spokeo* further clarifies this standard, explaining that the "risk of real harm" satisfies injury in fact.[3] *Spokeo*, 136 S. Ct. at 1549 (citing *Clapper*, 133 S. Ct. 1138).

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[3] Although these decisions use different language to describe sufficiently concrete future injuries, they are not in discord. Indeed, as the Court explained in *Clapper*, "Our cases do not uniformly require plaintiffs to demonstrate that it is literally certain that the harms they identify will come about. In some instances, we have found standing based on a 'substantial risk' that the harm will occur, which may prompt plaintiffs to reasonably incur costs to mitigate or avoid that harm." *Clapper*, 133 S. Ct. at 1150 n.5. As one district court has observed, "*Clapper* did

In the end, the Court vacated the Ninth Circuit's decision because "its standing analysis was incomplete." *Id.* at 1550. Although it determined that Robins' alleged harms were particularized (the harm affected him), the court did not determine whether the alleged harm was sufficiently concrete. The case was remanded so the lower court could perform the appropriate analysis.

II. The *Spokeo* Ruling Supports a Finding of Standing in this Case

The complaints in this matter allege a wide-ranging data breach that compromised the names, social security numbers, bank account information, dates of birth, dates of hire, and wage information of employees whose paychecks are processed by the payroll service company Paytime, Inc. ("Paytime"). [JA0109 ¶ 1, JA0111 ¶ 9, JA0114 ¶ 22-23.] According to the plaintiffs, the compromised information was stolen by hackers during the breach. [JA0110 ¶ 5, JA0115-16 ¶¶ 25, 30, 33.]

One plaintiff, Appellant Redding, closed a savings account that was compromised during the breach. [JA0112-13 ¶ 16.] She then opened a new account and paid to have a fraud alert placed on her credit report. [*Id.*] Another plaintiff,

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not change the law governing Article III standing." *In re Adobe Sys., Inc. Privacy Litig.*, 66 F. Supp. 3d 1197, 1213 (N.D. Cal. 2014). *Clapper*'s seemingly more stringent description of the standing standard may have been attributable to context: "*Clapper*'s discussion of standing arose in the context of a claim that other branches of government were violating the Constitution, and the U.S. Supreme Court itself noted that its standing analysis was unusually rigorous as a result." *Id.* at 1213-14.

Appellant Wilkinson, reported the breach to his employer, who then suspended Wilkinson's security clearance pending an investigation. During this investigation, Wilkinson was required to work from another location. Wilkinson's daily commute increased by four hours and he incurred travel expenses as a result of this temporary displacement. [JA0123-24 ¶ 59]; *see also Storm v. Paytime, Inc.*, 90 F. Supp. 3d 359, 363 (M.D. Pa. 2015). All plaintiffs allege that they are at risk of identity theft and fraud as a result of the breach.

Appellants Redding and Wilkinson plead tangible, concrete harms under *Spokeo*.[4] Redding alleges, among other things, monetary loss caused by the breach: she was required to pay to place a fraud alert on her credit report. Wilkinson alleges loss of money and time in relation to the suspension of his security clearance and modified work commute. These injuries, unlike some intangible injuries expressly permitted by *Spokeo*, are real, quantifiable, and allegedly caused by the breach. Indeed, monetary impacts have always constituted concrete injuries in fact. *Carter v. HealthPort Techns., LLC*, --- F.3d ---, 2016 WL 2640989, at *5 (2d Cir. May 10, 2016) (injury in fact is established by "any monetary loss" (internal quotation omitted)).

[4] Because Appellants plead harms that affect them individually, the alleged harms are also pled with particularity. *See In re Nickelodeon*, --- F.3d ---, 2016 WL 3513782, at *7 (finding particularized injury where each plaintiff pled disclosure of his or her own online behavior).

Plaintiffs also allege concrete, intangible injuries—namely the substantial risk that identity theft and fraud is likely to occur because of the breach. [JA0117-18 ¶¶ 36-39; JA0120-21 ¶ 48.] The data breach was orchestrated by skilled hackers who targeted Paytime's system and intended to sell the stolen information on the black market. [JA0110 ¶ 4; JA0121 ¶ 49; JA0140.] *Spokeo* explicitly recognizes that "the risk of real harm"—such as the increased risk of identity theft—can be enough, on its own, to satisfy the concreteness requirement. *Spokeo*, 136 S. Ct. at 1549. Although these harms "may be difficult to prove or measure," such difficulties should not foreclose a showing of injury in fact.[5] *Id.* ("[T]he law has long permitted recovery by certain tort victims even if their harms may be difficult to prove or measure."). Indeed, as a sister court of appeals has explained, where

[5] Since *Spokeo*, a number of courts have applied the Court's analysis to find constitutionally sufficient injuries-in-fact. *See, e.g.*, *In re Nickelodeon*, --- F.3d ---, 2016 WL 3513782, at *7 (finding that disclosure of information about online activity constitutes injury in fact under the Video Privacy Protection Act); *Church v. Accretive Health, Inc.*, No. 15-15708, slip op. at 8-10 (11th Cir. July 6, 2016) (finding that failure to include statutorily-required information regarding a debt constitutes injury in fact under the Fair Debt Collection Practices Act); *Emilio v. Sprint Spectrum LP*, No. 1:11-cv-03041-JPO-KNF, Dkt. No. 222 at 3 (S.D.N.Y. July 7, 2016) (finding that "price deception" constitutes injury in fact); *Thomas v. FTS USA, LLC*, No. 3:13-cv-00825-REP, 2016 WL 3661960, at *4-8 (E.D. Va. June 30, 2016) (finding that informational injury constitutes injury in fact under the Fair Credit Reporting Act); *Mey v. Got Warranty, Inc.*, --- F. Supp. 3d ---, 2016 WL 3645195 (N.D. W.Va. June 30, 2016) (finding that unwanted telephone calls constitute injury in fact under the Telephone Consumer Protection Act). As these cases demonstrate, the *Spokeo* inquiry does not erect a high jurisdictional barrier to standing. To the contrary, *Spokeo* recognizes that harms that may be difficult to quantify or measure are nonetheless injuries sufficient to confer standing under the Constitution.

hackers "deliberately target[]" the valuable information stored by a defendant, "[p]resumably, the purpose of the hack is, sooner or later, to make fraudulent charges or assume those consumers' identities." *Remijas v. Neiman Marcus Grp., LLC*, 794 F.3d 688, 693 (7th Cir. 2015). *Spokeo* expressly holds that the risk of such likely future harms is sufficiently concrete for purposes of Article III.

CONCLUSION

For the reasons set forth herein, NACA respectfully requests that the Court reverse and/or vacate the decision of the district court and remand for further proceedings consistent with the Supreme Court's *Spokeo* decision.

RESPECTFULLY SUBMITTED this 12th day of July, 2016.

WEITZ & LUXENBERG, PC

By: s/ *James J. Bilsborrow*

James J. Bilsborrow
700 Broadway
New York, NY 10003
Telephone: (212) 558-5856
Facsimile: (646) 293-7937

Attorney for National Association of Consumer Advocates (Amicus Curiae)

CERTIFICATES OF COMPLIANCE

I certify, pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and Third Circuit Rule 31.1(c), that the attached *Brief of Amicus Curiae*:

(1) contains 2710 words;

(2) 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) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman font; and

(3) has been scanned for viruses using the most current version of Virus Total, and no virus was detected.

I further certify that the text of the electronic brief is identical to the text in the paper copies.

Dated: July 12, 2016

/s/ James J. Bilsborrow
James J. Bilsborrow

CERTIFICATE OF BAR MEMBERSHIP

I certify, pursuant to Third Circuit Rule 28.3(d), that I am a member of the Bar of this Court.

Dated: July 12, 2016

/s/ James J. Bilsborrow
James J. Bilsborrow

CERTIFICATE OF SERVICE

I hereby certify that on July 12, 2016, I electronically filed the foregoing *Brief of Amicus Curiae* with the Clerk of Court for the United States Court of Appeals for the Third Circuit via the Court's CM/ECF filing system. Participants in the case who were registered CM/ECF users were served by the CM/ECF system at that time.

Dated: July 12, 2016

/s/ James J. Bilsborrow
James J. Bilsborrow