

No. 14-7047

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

WHITNEY HANCOCK and JAMIE WHITE, on behalf of themselves and those
similarly situated,

Appellants,

v.

URBAN OUTFITTERS, INC. and
and ANTHROPOLOGIE, INC.

Appellees.

**APPELLANTS' MOTION IN FURTHER SUPPORT OF
ARTICLE III STANDING**

Appellants Whitney Hancock and Jamie White, on behalf of themselves and those similarly situated, through counsel and pursuant to the Court's June 6, 2016 Order directing the parties to further brief the issue of Article III standing in light of the United States Supreme Court's decision in *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016), 2016 U.S. LEXIS 3046, state as follows:

On pages 11-17 of Appellant's moving brief, they explained why they had Article III standing pursuant to existing law. As explained below, Appellants continue to have Article III standing in light of the *Spokeo* decision.

I. *Spokeo* Confirms That Article III Standing Exists When Statutory Violations Cause a Degree of Risk Sufficient to Meet the Concreteness Requirement.

Spokeo arose from a claim filed by Thomas Robins who sought to pursue a class action. Robins alleged that Spokeo, Inc. violated the Fair Credit Reporting Act (FCRA), 15 U.S.C. § 1681, et seq., by misreporting important personal information. *Id.* at **4-5. Robins alleged that by misreporting the personal information Spokeo violated his statutory rights created by the FCRA. *Id.* at **5. The Ninth Circuit Court of Appeals held that because Robins alleged personal violations, he had Article III standing based on prior Supreme Court precedent. *See id.*

The Supreme Court, finding the Ninth Circuit's analysis incomplete, remanded the case back to the Ninth Circuit without determining whether Robins had standing. *See id.* The Court found that while the Ninth Circuit analyzed one characteristic required for standing, particularity, it failed to analyze the other characteristic, concreteness. *See id.* As the dissent notes, while the Supreme Court long has coupled the words "concrete and particularized," it had not before indicated the words must individually analyzed. *Id.* at **31 (Ginsberg, J. dissenting). While the majority expressed no opinion whether Robins had adequately pled standing, it did (along with Justice Thomas' concurrence and

Justice Ginsburg's dissent) provide guideposts for courts to use to determine this issue.

The Court noted that “particularity” simply means that the injury affected the plaintiff in a “personal and individual way.” *Id.* at **13. A “concrete” injury is one that actually exists. *Id.* at **14. To be concrete, however, an injury need not be tangible. *See id.* (“[W]e have confirmed in many of our previous cases that intangible injuries can nevertheless be concrete.”). The Court then set forth the principles for determining concreteness in cases involving violation of statutory rights.

First, the Court held that Congress is well-positioned to identify intangible harms that meet Article III requirements by creating legally-enforceable statutory rights. *See id.* Congress can “elevat[e] to the status of legally cognizable injuries concrete, de facto injuries that were previously inadequate at law.” *Id.* (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 578 (1992)). Thus, courts should give deference to Congress’ attempt to create standing by enacting statutory rights.

Second, while not all statutory violations automatically confer standing, the identity of a risk of real harm can be sufficient. *See id.* at 16 (“The violation of a procedural right granted by statute can be sufficient in some circumstances to constitute injury in fact.”) The Court concluded by holding that the Ninth Circuit

failed to determine whether the statutory violations alleged “entail a degree of risk sufficient to meet the concreteness requirement.” *Id.* at 18.

II. When an Individual Seeks to Enforce a Private Right Against a Private Company Arising From a Statutory Violation, the Violation Alone Is Sufficient

Although the majority opinion does not provide further guidance as to how to apply the degree-of-risk-sufficient-to-meet-the-concreteness requirement, Justice Thomas does so in his concurrence. Simply put, “the concrete-harm requirement does not apply as rigorously when a private plaintiff seeks to vindicate his own private rights.” *Id.* at **24 (Thomas, J., concurring). In cases involving private parties and a private right, a violation of a legal right still is sufficient to establish injury in fact. *Id.* at **28. This is because the “separation of powers concerns underlying our public-rights decisions are not implicated when private individuals sue to redress violations of their own private rights.” *Id.* at **24.

Justice Thomas reiterated that because of this public right/private right dichotomy, Congress can create new private rights which a plaintiff can vindicate without alleging “actual harm beyond the invasion of that private right.” *Id.* at **26 (citations omitted). Thus, while *Robins* might not have standing to sue *Spokeo* for violations of duties that *Spokeo* owed to the public at large (absent a traditional concrete injury), he could establish standing if the right he sought to vindicate was a private right. *Id.* at **27. As Justice Thomas wrote, “[i]f Congress

has created a private duty owed personally to Robins to protect *his* information, then the violation of the legal duty suffices for Article III injury in fact.” *Id.* at **28 (Emphasis in original).

Thus, *Spokeo* does not change Supreme Court or this Court’s precedent, which recognizes that Article III standing can exist in lieu of traditional injury in cases arising from violations of statutory rights involving private parties and private rights.

III. Appellants Have Article III Standing Under *Spokeo*

A. The Statutes At Issue Satisfy Article III Standing Requirements Because The D.C. Council Created Private Duties Owed Personally to the Appellants

The District of Columbia Consumer Protection Act (DCCPA), D.C. Code § 28-3901, et seq., and the Consumer Identification Information law, D.C. Code § 47-3153, et seq., create “a private duty owed personally [by Urban Outfitters to Appellants] to protect [their] information.” *Spokeo* at **28. As to the DCCPA, it was passed expressly to “protect consumers from a broad spectrum of unscrupulous practices by merchants” *Ihebereme v. Capital One, N.A.*, 730 F. Supp. 2d 40, 50 (D. D.C. 2010). Thus, it creates private duties owed by merchants to individual consumers which, when violated, gives rise to a private right of action. This has been recognized both by this Court in *Shaw v. Marriott Int’l, Inc.*,

605 F.3d 1039 (D.C. Cir. 2010), and by the D.C. Court of Appeals in *Grayson v. AT&T Corp.*, 15 A.3d 219 (D.C. 2011) (*en banc*).

While no court has analyzed the purpose of the Consumer Identification Information law, it is a consumer protection law (like the DCCPA) enacted to place duties on private merchants to keep confidential private consumer's personal information.¹ Like the DCCPA, the statute is enforced by giving an aggrieved individual the right to sue. *See* D.C. Code § 47-3154. Both statutes provide for the recovery of liquidated damages, recognizing that such damages may be necessary given the inchoate nature of the harm. *See* D.C. § 47-3154 and D.C. Code § 28-3905(k)(1).

Spokeo did not overrule *Warth v. Seldin*, 422 U.S. 490 (1975), wherein the Court wrote that “[t]he actual or threatened injury required by Art. III may exist solely by virtue of ‘statutes creating legal rights, the invasion of which creates standing . . .’” *Id.* at 500. *Spokeo* also has no effect on this Court's decision in *Marriott Int'l, Inc.*, 605 F.3d at 1039 (finding standing under DCCPA without concrete injury because it creates statutory rights that, when violated, establish

¹ “The underlying premise of [consumer identification information] laws is the need to protect consumers from fraud and violated privacy rights that can occur under prevailing . . . credit card policies used by merchants.”¹ (JA 128). Testimony of Lacy C. Streeter, Before the Committee on Consumer and Regulatory Affairs Public Hearing on Bill 9-111, The Use of Consumer Identification Information Act of 1991. (JA 128).

standing). Nor does *Spokeo* have any effect on the D.C. Court of Appeals' holding in *Grayson*, 15 A.3d at 219, or *Floyd v. Bank of Am. Corp.*, 70 A.3d 246 (2013), wherein the Court held that violation of the DCCPA alone, creates Article III standing.² And as explained in Appellants' moving brief, these three decisions confirm that Appellants have Article III standing given the violations alleged.

This is the correct legal analysis for another reason. If this Court were to find that Appellants do not have standing in federal court, the perverse result would be that they have no ability to enforce their rights via a class action in any court. This is because Appellants unquestionably have standing to pursue their claims in D.C. Superior Court pursuant to *Floyd v. Bank of Am. Corp.*, 70 A.3d 246 (2013), which decided this very issue. But were they to file in Superior Court, Urban Outfitters has the right pursuant to the Class Action Fairness Act, 28 U.S.C. §§ 1332(d), 1453 and 1711-15, to remove the case to this federal Circuit where they would not have standing.

B. If Necessary, Appellants Request Leave To Plead Allegations Sufficient to Satisfy *Spokeo*

If this Court determines that *Spokeo* changes the standing analysis in cases involving violations of statutory rights, then Appellants request leave to allege

² While District of Columbia courts are not constitutionally required to apply Article III standing requirements, the D.C. Court of Appeals has always done so. *See Grayson*, 15 A.3d at 224.

facts sufficient to demonstrate concrete harm. If leave is granted, at least one of the Appellants will be able to allege that after providing Urban Outfitters with her Zip Code and full name via her credit card, Urban Outfitters used that information to obtain her e-mail address and sent her unwanted e-mail marketing materials. This is one the very harms that the statutes are designed to guard against. Most important as to standing, it will demonstrate a concrete injury as defined in *Spokeo*. That is, Appellant will be able to allege a *de facto* harm that actually occurred, the receipt of unwanted e-mail or spam. *See Spokeo*, 136 S. Ct. at **14; *see also Palm Beach Golf Center-Boca, Inc. v. Sarris*, 781 F.3d 1245 (11th Cir. 2015) (finding that Article III standing was satisfied where plaintiff alleged he received unwanted “spam” faxes).³

The Court will recall that one of the bases of this appeal is the trial court’s dismissal of the case with prejudice without providing Appellants any opportunity

³ In *Sarris*, the plaintiff brought a purported class action arising from his receipt of an unwanted and unsolicited fax advertisement in violation of the federal Telephone Consumer Protection Act, 47 U.S.C. § 227. The Eleventh Circuit reversed the trial court’s decision that the plaintiff lacked Article III standing, finding that receipt of the fax was sufficient to allege an Article III injury. *See Sarris*, 781 F.2d at 1253 (“Because [plaintiff] has suffered a cognizable, particularized, and personal injury, it has Article III standing.”). Given the similarities between *Sarris* and this case (both alleging violation of statutes designed to prevent deceptive consumer practices), Plaintiffs note that on remand the district court granted class certification. *See Palm Beach Golf Center-Boca, Inc. v. Sarris*, 311 F.R.D. 688 (2015).

to amend their Complaint. Had such opportunity be given, these concrete injury allegation could have been alleged.

WHEREFORE, Appellants respectfully request that the Court find that they have Article III standing to pursue their claims, and that this appeal be decided on the merits pursuant to the parties' briefs. Alternatively, if this Court finds that standing has not been adequately pled, Appellants request leave to amend their Complaint to allege concrete injuries.

Dated: June 24, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 24th day of June 2016, I caused a copy of this motion to be served via the Court's electronic filing system on:

H. Jonathan Redway, Esq.
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___/s/ Scott M. Perry___
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