Case Nos. 16-2378 and 16-2528

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Melissa Alleruzzo, et al.,

Plaintiffs-Appellants/Cross-Appellees,

v.

SuperValu, Inc., et al.,

Defendants-Appellees/Cross-Appellants.

On Appeal from the United States District Court
for the District of Minnesota

Brief of *Amicus Curiae* Electronic Privacy Information Center in Support of Plaintiffs-Appellants/Cross-Appellees

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1 and 29(c), *Amicus Curiae* Electronic Privacy Information Center ("EPIC") is a District of Columbia corporation with no parent corporation. No publicly held company owns 10 percent or more of EPIC stock.

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INTEREST OF AMICUS[1]

The Electronic Privacy Information Center ("EPIC")[2] 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 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 possess, consumers should be able to bring lawsuits to hold it accountable. Requiring consumers to also demonstrate consequential harm is not only a fundamental

[1] 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.
[2] EPIC IPIOP clerk Filippo Raso assisted with the preparation of this brief.

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

SUMMARY OF THE 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.[3] 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. And 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*.

[3] 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 conduct 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." US. 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. Defs. 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 the political branches 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 (1992). 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; *see also Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 185 (2000) ("[Appellee] is right to insist that a plaintiff must demonstrate standing separately for each form of relief sought."); *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 negligence, breach of implied contract, negligence *per se*, unjust enrichment, violations of state consumer protection laws, and violation of state data breach notification laws. Am. Compl. ¶¶ 96–159 (June 26, 2015). Here, the actual or imminent element is satisfied, because plaintiffs allege that the defendants already violated these legally protected interests. 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.[4]

[4] 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 "does 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 (continued…)

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.

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.").

Invading 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) (finding that injury-in-fact "does not demand that a plaintiff suffer any particular type of harm to have standing"). As Justice Thomas recently explained in *Spokeo*,

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3511500, at *4 (N.D. Ill. July 14, 2014) (finding the plaintiffs have suffered injury-in-fact based on alleged damages).

"our 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.

Concreteness requires plaintiffs allege a "*de facto*" violation of their rights. The violation must "actually exist," but may be "intangible." *Spokeo*, 136 S. Ct. at 1548–49. Courts should to look at both "history and the judgment of Congress" to determine whether an intangible violation is sufficiently concrete to establish standing. *Id.* at 1549.

The Court explained in *Spokeo* that 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, Congress 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*, Congress has 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 Congress 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 privacy laws 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 presume to second-guess Congress when complex laws establish a legally protected interest. Congress has 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:"

> In addition, not all inaccuracies cause harm or present any material risk of harm. An example that comes readily to mind is an incorrect zip code. It is difficult to imagine how the dissemination of an incorrect zip code, without more, could work any concrete harm.

Spokeo, 136 S. Ct. at 1550.

The Court is 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);[5] Adam Tanner, *Never Give Stores Your ZIP Code. Here's Why*, Forbes (June 19, 2013).[6] The Court adds 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 1550 n.8. The caution is well advised. In laws that seek to protect the collection and use of personal data, any false information about the individual 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.").

[5] http://www.fastcodesign.com/3037550/infographic-of-the-day/what-your-zip-code-says-about-you.
[6] http://www.forbes.com/sites/adamtanner/2013/06/19/theres-a-billion-reasons-not-to-give-stores-your-zip-code-ever/#3cfe08514e33.

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 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.

Unlike the outcome in *Clapper*, most privacy cases, such as this data breach case, are brought after the violation of the 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 several 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 to the standing analysis 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] 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 the 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. & Order 4–9 (Jan. 7, 2016). The court analyzed, for example, the increased risk of future harm, opportunity and mitigation costs, diminished value of plaintiffs' payment card personally identifiable information ("PII"), and lost benefit of bargain. *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 alleged six causes of action:

(i) violation of eight state consumer protection laws;
(ii) violation of six state data breach notification statutes;
(iii) negligence;
(iv) a breach of implied contract;
(v) negligence *per se*; and
(vi) unjust enrichment.

Am. Compl. ¶¶ 96–159.

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

In the case at hand, plaintiffs have alleged four violations of their common law rights: violations of their contract rights (breach of implied contract and unjust enrichment), and violations of their tort rights (negligence and negligence *per se*). 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 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 implied contract claim.

The plaintiffs allege that SuperValu breached an implied contract between the parties. Am. Compl. ¶¶136–42 ("Defendants breached the implied terms of the contracts they made with Consumer Plaintiffs and the other Class members by failing to reasonably protect their PII and by failing to provide adequate notice of the Data Breach and unauthorized access of such information."). 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.

The plaintiffs allege that SuperValu "offer[ed] Consumer Plaintiffs . . . the option of purchasing products at the Defendants' stores through use of credit and/or debit cards" and the plaintiffs "accepted Defendants' offers." Am. Compl. ¶ 137. Each purchase, and thus each contract, "was made pursuant to mutually agreed upon implied terms that Defendants would take reasonable measures to protect the PII of Consumer Plaintiffs . . . and that Defendants would timely and accurately notify Consumer Plaintiffs . . . if and when such information was compromised." *Id.* ¶ 138.

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 implied contract is thus concrete.

The plaintiffs allege that a contract existed between each class member and SuperValu. Thus, each class member had a personal contractual right and SuperValu 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. Am. Compl. ¶ 141 ("Defendants breached the implied terms of the contracts they made . . . by failing to reasonably protect [the Plaintiffs'] PII and by failing to provide adequate notice of the Data Breach and unauthorized access of such information."). The plaintiffs sufficiently alleged an injury-in-fact.

The plaintiffs allege that SuperValu's conduct caused their injury. Specifically, the plaintiffs allege their damages were the "direct and proximate result of" SuperValu's "fail[ure] to reasonably protect [plaintiffs'] PII and [failure] to provide adequate notice of the Data Breach and unauthorized access of such information." *Id.* ¶¶ 141–42. The plaintiffs allege that SuperValu, among other things, failed "to fix elementary deficiencies in their security systems" and failed to "abide by best practices." *Id.* ¶ 10. Plaintiffs further allege that SuperValu "utilized

weak passwords and usernames, failed to employ lockout security procedures, and failed to enable multifactor authentication at their remote access points." *Id.* ¶ 38. Furthermore, SuperValu "did not segregate access to their [point-of-sale ("POS")] terminals from the larger payment network," failed to implement a "firewall protecting the POS terminal," and "improperly stored [PII] on their network." *Id.* ¶¶ 40–41. Taking the facts as true, SuperValu has breached its contractual obligation to "reasonably protect" the plaintiffs' PII. Therefore, plaintiffs' alleged injury—the breach of implied contract—is directly traceable to SuperValu.

Finally, a favorable ruling would result in SuperValu 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 SuperValu.

Accordingly, the plaintiffs have standing for a breach of implied contract claim.

ii. Plaintiffs have standing for their negligence claim.

The plaintiffs allege that SuperValu owed them a "duty of reasonable care" in handling, using, securing, and protecting their PII because the plaintiffs "compose a well-defined, foreseeable and probable class of individuals whom Defendants should have been aware could be injured by Defendants' inadequate security protocols." *Id.* ¶¶ 120, 122. 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 SuperValu 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. Am. Compl. ¶ 125 ("Defendants breached their duties to Consumer Plaintiffs and the other Class members by failing to implement and maintain security systems and controls."). The plaintiffs have therefore alleged an injury-in-fact.

Plaintiffs further allege that SuperValu "fail[ed] to implement and maintain security systems and controls that were capable of adequately protecting the PII. *Id.* ¶ 125. Taking the facts as true, SuperValu 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 SuperValu's conduct.

Finally, as above, a favorable verdict would result in SuperValu 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 SuperValu.

Accordingly, the plaintiffs have standing for a negligence claim.

B. Plaintiffs allege violations of state consumer protection statutes and data breach notifications.

The plaintiffs also allege that SuperValu violated eight consumer protection statutes and six data breach notification statutes. As explained above, Congress creates 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 fourteen distinct statutes, the standing analysis for each is similar. This section will analyze one of these statutes, the California Consumer Legal Remedies Act, Cal. Civ. Code §§ 1750–85 (West 2016) [hereinafter CCLRA], to illustrate how the lower court would apply the concreteness analysis in light of *Spokeo*.

Section 1770 of the CCLRA provides substantive rights to consumers. The obligations protect consumers' interests by explicitly proscribing *what* a company can and cannot do. For example, companies are prohibited from "representing that goods or services have . . . characteristics . . . which they do not have." CCLRA

§ 1770(a)(5). These rights aren't procedural because the statute does not govern the "manner and means by which the rights are enforced." *Shady Grove*, 559 U.S. at 407 (internal quotations omitted). Instead, these rights are substantive because they define "the remedy and the right." Salmond, *supra*. The CCLRA defines the rights that California consumers have: the right to be free from companies making misrepresentations regarding their goods and services. Since the plaintiffs allege a violation of this substantive right, they have alleged a concrete injury.

The violation is particularized since SuperValu's conduct, as alleged, violated each plaintiff's personal right to be free from unfair or deceptive acts. CCLRA § 1770(a) ("[A]cts or practices undertaken by any person in a transaction intended to result or which results in the sale or lease of goods or services *to any consumer* are unlawful." (emphasis added)). The violation is actual since plaintiffs allege the violation already occurred. Am. Compl. ¶¶ 100–01 (listing SuperValu's past conduct as violating the state statutes). Thus plaintiffs alleged an injury-in-fact.

In addition to the facts outlined above, the plaintiffs also allege facts suggesting SuperValu caused the violation of their statutory rights. SuperValu engaged in "transactions intended to result, and which did result, in the sale of goods and services to consumers," and therefore their "actions and/or inactions regarding their failure to adequately protect the PII of [plaintiffs] constitute

deceptive acts and unfair practices." *Id.* ¶ 98–99. The courts can redress the violation through damages or injunctive relief, as detailed above. Therefore, the plaintiffs thus have standing to bring suit under CCLRA § 1750.

III. Barriers to standing ignore the many hurdles of civil litigation and the actual cost of failing to correct dangerous security practices.

For a privacy litigant, standing is merely the first step in a long journey. Plaintiffs must overcome many hurdles in order to move forward in civil cases—dismissal under Federal Rule of Civil Procedure ("FRCP") 12(b)(6), dismissal at the class certification stage pursuant to FRCP 23, or dismissal upon discovery and a motion for summary judgment pursuant to FRCP 56. Even where a case goes to trial, there is no guarantee of success. And success on the merits does not guarantee meaningful relief for those whose rights have been violated. *See, e.g.*, Michelle Singletary, *Class-Action Coupon Settlements Are a No-Win for Consumers*, Wash. Post (Apr. 27, 2011).[7]

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. The "burden is not rigorous: To have standing,

[7] https://www.washingtonpost.com/business/economy/class-action-coupon-settlements-are-a-no-win-for-consumers/2011/04/27/AFJITL1E_story.html.

the claimant need not prove the underlying merits of the claim." *United States v. One Lincoln Navigator 1998*, 328 F.3d 1011, 1013 (8th Cir. 2003) (internal quotation marks omitted).

If the complaint is without merit, the defendant will file a motion to dismiss. *See, e.g.*, *Young v. City of St. Charles, Mo.*, 244 F.3d 623, 627 (8th Cir. 2001) ("[D]ismissal under Rule 12(b)(6) serves to eliminate actions which are fatally flawed in their legal premises and deigned to fail, thereby sparing litigants the burden of unnecessary pretrial and trial activity."); *Mayer v. Mylod*, 988 F.2d 635, 638 (6th Cir. 1993) ("[T]he purpose of Rule 12(b)(6) is to allow a defendant to test whether, as a matter of law, the plaintiff is entitled to legal relief even if everything alleged in the complaint is true."). Deficiencies may include the complaint failing to allege all elements of a prima facie case, *Orlando v. Alamo*, 646 F.2d 1288, 1290 (8th Cir. 1981), or even the failure to demonstrate damages (i.e., harm) as required by the cause of action, *Miener v. State of Mo.*, 673 F.2d 969, 977 (8th Cir. 1982).

Surviving a motion to dismiss hardly guarantees that a plaintiff will ultimately succeed. Many data breach cases are brought as class actions, and thus require class certification, which the court may deny for failure to satisfy FRCP 23. Even when a judge finds standing and subsequently denies a defendant's 12(b)(6)

motion, class certification may fail. *E.g.*, *In re Google Inc. Gmail Litig.*, No. 13-02430, 2014 WL 1102660, at *9 (N.D. Cal. Mar. 18, 2014).

The plaintiffs may also fail to sufficiently develop a factual record supporting their claims during discovery. As litigation proceeds, the plaintiffs shoulder an increasing factual burden. *See Lujan*, 504 U.S. at 561 (comparing the burdens of proof placed on a plaintiff in a pleading, in a motion for summary judgment, and at trial). If they are unable to substantiate their allegations, they are unlikely to survive a motion for summary judgment pursuant to FRCP 56.

Finally, a factfinder may ultimately find against the plaintiffs. Until the courts have established what constitutes "reasonable" data security under statutory and common law, a trial on the merits is the only way to determine whether the company implemented data security measures that met its legal obligations. And a trial on the merits could absolve the defendant by proving that the company did meet its legal obligations and provided adequate data security.

Companies that suffer data breaches necessarily bear this potential liability, 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 Envtl. 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

EPIC respectfully requests this Court vacate the lower court's opinion.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of 7,000 words of Fed. R. App. P. 29(d) and Fed. R. App. P. 32(B)(i). This brief contains 6,479 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman style. This brief has been scanned for viruses and is virus free in compliance with 8th Cir. R. 28A(h).

/s/ Marc Rotenberg

Dated: July 19, 2016 Marc Rotenberg

CERTIFICATE OF SERVICE

I hereby certify that on July 19, 2016, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Marc Rotenberg

Dated: July 19, 2016 Marc Rotenberg