

Statutes and *Spokeo*: The Case of the FDCPA

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The Supreme Court’s decision in Spokeo, Inc v Robins clarified the “concreteness” element of the injury-in-fact requirement for standing. The Court explained that while some statutory violations are concrete injuries, others are merely procedural and insufficient for standing without additional allegations of concrete harms. Federal courts have divided on the decision’s application to many statutory causes of action, including the mandatory disclosure requirements of the Fair Debt Collection Practices Act (FDCPA). While some courts view FDCPA mandatory disclosure violations as concrete injuries if they threaten the plaintiff’s concrete interests, others view the violations as merely procedural and never sufficient for standing. This Comment argues for a third view, that an FDCPA mandatory disclosure violation is always a concrete injury regardless of whether it causes the plaintiff to suffer or risk subjective harm. That conclusion flows from a new view: applying Spokeo to statutory violations turns on whether the provision at issue has a deterrent or a compensatory function. Because the FDCPA’s text, remedies, statutory purpose, legislative history, and treatment in other contexts indicate that it is deterrent, violations of its mandatory disclosure provisions are concrete injuries.

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INTRODUCTION

A debt collector sent Paula Casillas a demand to pay a debt.¹ The letter disclosed her right to verify the debt under the Fair Debt Collection Practices Act² (FDCPA), but failed to specify that she had to request verification *in writing* to avoid waiving her right.³ That failure violated the statute,⁴ so Casillas proceeded to file a class action.⁵ Casillas and the debt collector resolved their dispute, jointly moving for class certification and preliminary approval of a settlement.⁶ But the court threw Casillas’s claim out soon after. Casillas’s complaint lacked what the court considered a crucial statement: that the nondisclosure caused her harm.⁷

The rationale in *Casillas v Madison Avenue Associates, Inc*⁸ was based on the standing doctrine. In order for a federal court to hear a case, the plaintiff must show that they have standing.⁹ The recent Supreme Court case *Spokeo, Inc v Robins*¹⁰ elaborated on “injury in fact,” a core component of standing. After *Spokeo*, an injury in fact requires an injury that is both concrete and particularized.¹¹ Concrete injuries “must actually exist”; they are “real, and not abstract.”¹² Congress has a role in deciding which injuries are concrete, but not every statutory cause of action successfully

¹ *Casillas v Madison Avenue Associates, Inc*, 926 F3d 329, 332 (7th Cir 2019).

² Pub L No 95-109, 91 Stat 874 (1977), codified as amended at 15 USC §§ 1692–92p.

³ *Casillas*, 926 F3d at 332.

⁴ See 15 USC § 1692g.

⁵ *Casillas*, 926 F3d at 332.

⁶ *Id.*

⁷ *Id.* at 331, 334.

⁸ 926 F3d 329 (7th Cir 2019).

⁹ See *Lujan v Defenders of Wildlife*, 504 US 555, 559–60 (1992).

¹⁰ 136 S Ct 1540 (2016).

¹¹ *Id.* at 1548.

¹² *Id.* (quotation marks omitted).

creates a concrete injury.¹³ On the other hand, “[f]or an injury to be ‘particularized,’ it ‘must affect the plaintiff in a personal and individual way.’”¹⁴ Thus, *Spokeo* distinguished concreteness from particularity—two requirements that the courts often previously applied as if they were one and the same.¹⁵

While the particularity prong has caused few problems, the application of the concreteness prong to consumer protection statutes remains unclear. In less than four years, *Spokeo* has caused a multitude of circuit splits on whether various violations of consumer protection statutes give rise to concrete injuries.¹⁶ As a result, defendants should challenge standing whenever plaintiffs sue for violations of consumer protection statutes.¹⁷ The Seventh Circuit created one of these circuit splits in *Casillas* by holding that violations of the mandatory disclosure provisions of the FDCPA are never concrete injuries if the plaintiff does not allege an additional harm.¹⁸ As a result, *Casillas*’s failure to allege some other injury doomed her claim. The Sixth Circuit, in contrast, treats violations of the FDCPA’s mandatory disclosure provisions as concrete injuries in certain cases.¹⁹

Resolving how *Spokeo* applies to the FDCPA is important. First, the FDCPA is one of America’s most critical consumer protection statutes. It regulates a vast, multibillion-dollar industry that is notorious for consumer abuse. As such, it generates thousands of lawsuits every year.²⁰ Settling FDCPA standing would clarify the applicable requirements for practitioners and courts. Second, and more “concretely,” standing matters to ordinary victims of abusive debt collectors. Tightening standing requirements

¹³ See *id.* at 1549.

¹⁴ *Spokeo*, 136 S Ct at 1548, quoting *Lujan*, 504 US at 560 n 1.

¹⁵ See William Baude, *Standing in the Shadow of Congress*, 2016 S Ct Rev 197, 215.

¹⁶ See Jennifer A. Jackson and Matthew M. Petersen, *Spokeo IV: Cert Denied and the Circuit Splits Left Behind* (Bryan Cave Leighton Paisner LLP, Feb 14, 2018), archived at <https://perma.cc/ZY7K-3PKV>; Jackson Erpenbach, Note, *A Post-Spokeo Taxonomy of Intangible Harms*, 118 Mich L Rev 471, 480 (2019) (noting that “[i]n *Spokeo*’s wake, lower courts have struggled to adopt a consistent methodology for identifying intangible concrete injuries across a range of alleged violations of comparable consumer protection laws” and providing a taxonomy of the failures).

¹⁷ See Loren Flath, Note, *No Harm, No Foul? How Companies Can Limit their Liability Under Federal Consumer Protection Statutes After Spokeo*, 46 Rutgers L Rec 125, 144 (2019) (arguing for the use of such a strategy).

¹⁸ See *Casillas*, 926 F3d at 336 & n 4.

¹⁹ See *Macy v GC Services Limited Partnership*, 897 F3d 747, 761 (6th Cir 2018) (holding that the defendant’s failure to indicate that disputes must be submitted in writing was sufficient to create standing for the plaintiffs).

²⁰ See Part I.B.4.

will cause more victims to lose on technicalities like Casillas did. Because failure to show standing prevents liability, heightening standing barriers may decrease debt collectors' incentives to avoid abuse ex ante. Finally, because this circuit split is one of a large family of similar splits, solutions to the concreteness question in the FDCPA context could apply analogically to other consumer protection statutes. This Comment proposes and examines a potential solution to this timely circuit split.

Courts should hold that all violations of the FDCPA's mandatory disclosure provisions are concrete injuries for purposes of injury in fact. In other words, plaintiffs need only allege a statutory violation with respect to these provisions, not that they suffered any subjective harm, to establish a concrete injury. For example, plaintiffs need not show that they suffered any financial loss or mental suffering from the FDCPA violation to have standing. Because of that feature, I refer to this as the "objective solution" to standing under the FDCPA's mandatory disclosure requirements.

The objective solution to FDCPA mandatory disclosure standing relies on and illustrates a novel interpretation of how *Spokeo* applies to standing when statutes are violated. Under my "functional" reading of *Spokeo*, violations of statutes that *regulate* industries through deterrence give rise to objective concrete injuries sufficient for standing without subjective harm. On the other hand, violations of statutes that *compensate* plaintiffs for subjective injuries are not concrete injuries without a resulting subjective, concrete injury that is also asserted in the complaint. I argue that this functional framework for evaluating whether statutory violations are concrete injuries is intuitive and consistent with both the spirit and text of *Spokeo*, including its descriptions of Congress's role, the purpose of standing, and listed examples.

The functional reading of *Spokeo*, when applied to the FDCPA's mandatory disclosure requirements, leads to the objective approach to standing under them. Because the provisions are designed to regulate and deter, not to compensate, plaintiffs' claims arising under them need only assert that the defendant violated the requirements with respect to the plaintiff to satisfy *Spokeo*. The text, structure, and purpose of the FDCPA all strongly suggest that its mandatory disclosure provisions are regulatory, not compensatory, so all violations of these requirements should be actionable regardless of whether a subjective injury results. *Spokeo* instructs the courts to defer to that congressional judgment. The objective solution also resolves an inconsistency

between how injury in fact applies to the FDCPA's mandatory disclosure and misrepresentation provisions. Finally, the objective approach sets proper incentives for defendants.

The functional reading of *Spokeo* has utility beyond the FDCPA. It could provide a way for courts to evaluate standing under the myriad other consumer protection statutes on which there are current circuit splits. It also provides Congress clear guidance on how to design consumer protection statutes to make violations of them concrete (and how not to do so).

In Part I, I explain standing doctrine and the structure of the FDCPA. Part II describes the federal courts' different views on whether violations of the FDCPA's mandatory disclosure provisions are ever concrete injuries. Part III proposes the objective approach as a solution to the circuit split and explains its merits. Part III also outlines how standing under other statutes could be addressed analogously by applying the functional reading of *Spokeo*.

I. BACKGROUND: STANDING, *SPOKEO*, AND THE FDCPA

A. Standing and *Spokeo*

The US Constitution limits the “judicial Power” to “Cases” and “Controversies.”²¹ The standing doctrine arises from that limitation.²² To be within the jurisdiction of the federal courts, a case must meet three requirements that form an “irreducible constitutional minimum.”²³ First, the plaintiff must show “an injury in fact,” which is “an invasion of a legally protected interest” that is both “concrete and particularized” as well as “actual or imminent, not conjectural or hypothetical.”²⁴ “Second, there must be a causal connection between the injury and the conduct complained of” so that the former can be “fairly” traced to the latter.²⁵ Third, it must be “likely,” not “merely speculative,” that the court could redress the plaintiff's injury.²⁶ The standing doctrine protects the separation of powers by ensuring that the courts stick to their proper domain of cases and controversies.²⁷

²¹ US Const Art III § 2, cl 1.

²² See *Lujan v Defenders of Wildlife*, 504 US 555, 559–60 (1992).

²³ *Id* at 560.

²⁴ *Id* (quotation marks omitted).

²⁵ *Id* (quotation marks omitted).

²⁶ *Lujan*, 504 US at 561 (quotation marks omitted).

²⁷ See *Spokeo*, 136 S Ct at 1547.

The injury-in-fact requirement raises a vexing problem: “To what extent is [the injury-in-fact requirement] shaped by ordinary law, and therefore by Congress, and to what extent is it instead hard-coded in Article III?”²⁸ In other words, what role does Congress have in determining which injuries are sufficient for standing, and is there a constitutional constraint on that role?

The Supreme Court’s jurisprudence on that question was in two minds before *Spokeo*. In some cases, statutes created standing for plaintiffs by creating causes of action. In *Lujan v Defenders of Wildlife*,²⁹ the Supreme Court said that standing “may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing.”³⁰ Congress can pass statutes to “elevat[e] to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law.”³¹ In doing so, it “broaden[s] the categories of injury that may be alleged in support of standing.”³²

However, *Lujan* is actually an example of the Supreme Court holding that a statutory violation that Congress explicitly made sufficient for suit was insufficient to create standing.³³ In that case, the Department of the Interior amended its regulations to no longer require federal agencies to consult it on impacts to endangered species when acting abroad.³⁴ Various environmentalists sued, seeking an injunction ordering the Department of the Interior return to the old rule.³⁵ They contended that they had standing under a provision of the Endangered Species Act allowing “any person” to sue “to enjoin any person, including the United States” from violating the statute.³⁶

The Court rejected the theory. Even when Congress creates a cause of action like the one in the Endangered Species Act, plaintiffs suing under it might not satisfy the injury-in-fact requirement. The statutory violation from the repealed regulation that the *Lujan* plaintiffs alleged was a “generally available grievance about government,” not an injury in fact, so the plaintiffs lacked

²⁸ Baude, 2016 S Ct Rev at 199 (cited in note 15).

²⁹ 504 US 555 (1992).

³⁰ Id at 578 (emphasis added) (quotation marks omitted), quoting *Warth v Sedlin*, 422 US 490, 500 (1975).

³¹ *Lujan*, 504 US at 578.

³² *Sierra Club v Morton*, 405 US 727, 738 (1972).

³³ Baude, 2016 S Ct Rev at 204 (cited in note 15).

³⁴ See *Lujan*, 504 US at 558–59.

³⁵ Id at 559.

³⁶ Id at 571–72, quoting 16 USC § 1540(g).

standing.³⁷ The Supreme Court criticized the court below for reasoning that “the injury-in-fact requirement had been satisfied by congressional conferral upon *all* persons of an abstract, self-contained, noninstrumental ‘right’ to have the Executive observe the procedures required by law.”³⁸ Even when federal courts act “at the invitation of Congress, in ignoring the concrete injury requirement,” they violate Article III.³⁹ *Lujan* therefore clarified that not all plaintiffs suing under statutory causes of action adequately allege an injury in fact.

Thus, a hard problem arose in standing doctrine. On the one hand, Congress could make some injuries concrete by enacting statutory causes of action. For example, *Lujan* explicitly did not apply to statutes that “create[] a concrete private interest in the outcome of a suit against a private party for the Government’s benefit, by providing a cash bounty for the victorious plaintiff.”⁴⁰ On the other hand, Congress could sometimes fail to create standing even when it attempted to do so, as it did in the Endangered Species Act. How to classify which statutes succeeded in their attempts to create injury in fact and which failed was a question with no clear answer.⁴¹

The Supreme Court faced this paradox squarely in *Spokeo*. In *Spokeo*, the defendant operated an online search engine for personal information that provided false information about the named plaintiff, Thomas Robins.⁴² Robins then sued under the Fair Credit Reporting Act⁴³ (FCRA), which includes a private right of action.⁴⁴ The district court dismissed his complaint for lack of standing but the Ninth Circuit reversed.⁴⁵ The Supreme Court reversed again, faulting the Ninth Circuit for “fail[ing] to

³⁷ *Lujan*, 504 US at 573.

³⁸ *Id.* (emphasis in original).

³⁹ *Id.* at 576. See also *Summers v Earth Island Institute*, 555 US 488, 497 (2009) (“[T]he requirement of injury in fact is a hard floor of Article III jurisdiction that cannot be removed by statute.”).

⁴⁰ *Lujan*, 504 US at 573.

⁴¹ See Baude, 2016 S Ct Rev at 209 (cited in note 15).

⁴² *Spokeo*, 136 S Ct at 1544.

⁴³ Pub L No 91-508, 84 Stat 1128, codified at 15 USC § 1681 et seq.

⁴⁴ See *Spokeo*, 136 S Ct at 1545–46. Note that the FCRA, like the FDCPA, is an important consumer protection statute that limits the activities of debt collectors. See Consumer Financial Protection Bureau, *Fair Debt Collection Practices Act: BCFP Annual Report 2019* *8 (Mar 2019), archived at <https://perma.cc/K9NP-BBY2>.

⁴⁵ See *Spokeo*, 136 S Ct at 1546.

fully appreciate the distinction between concreteness and particularization” in injury in fact.⁴⁶ The Court described concreteness in the following way: “A ‘concrete’ injury must be ‘*de facto*’; that is, it must actually exist. When we have used the adjective ‘concrete,’ we have meant to convey the usual meaning of the term—‘real,’ and not ‘abstract.’ Concreteness, therefore, is quite different from particularization.”⁴⁷ On the other hand, “[f]or an injury to be ‘particularized,’ it ‘must affect the plaintiff in a personal and individual way.’”⁴⁸ Showing a violation of the plaintiff’s personal interests is not enough to show concreteness, though.⁴⁹ Spokeo harmed Robins personally by providing false information about him in particular, so particularity was not an issue for Robins’s case.⁵⁰

While the Court claimed that it had repeatedly emphasized the distinction between concreteness and particularity,⁵¹ that claim is dubious.⁵² In prior decisions, the Court used both words but often did so interchangeably. The newly emphasized distinction once again raised the question of which statutory causes of action successfully create concrete injuries. Rather than resolving the tension that had built up over that question in earlier cases, though, the Court attempted to have its cake and eat it too.

On the one hand, it emphasized the role of Congress in identifying concrete intangible injuries, such as violations of free speech or free exercise.⁵³ The Court explained that “[i]n determining whether an intangible harm constitutes injury in fact, both history and the judgment of Congress play important roles.”⁵⁴ There are two ways to show that an intangible injury is concrete. The first is to show that the injury has a “close relationship” to a

⁴⁶ Id at 1550.

⁴⁷ Id at 1548 (citations omitted).

⁴⁸ Id, quoting *Lujan*, 504 US at 560 n 1.

⁴⁹ See *Spokeo*, 136 S Ct at 1548.

⁵⁰ Id at 1550.

⁵¹ See id at 1548.

⁵² Baude, 2016 S Ct Rev at 215 (cited in note 15) (“The word ‘concrete’ had appeared in the Court’s standing cases before . . . [b]ut . . . had not before been given any independent definition or meaning.”); *Justiciability—Class Action Standing—Spokeo, Inc. v. Robins*, 130 Harv L Rev 437, 444 (2016) (“[*Spokeo*] . . . is the first Supreme Court case to pull apart the concreteness and particularization prongs . . . in order to deny standing.”).

⁵³ See *Spokeo*, 136 S Ct at 1549.

⁵⁴ Id.

harm that was historically actionable at common law.⁵⁵ The second is to show that the plaintiff's injury has been identified by Congress as sufficiently concrete for standing:

[B]ecause Congress is well positioned to identify intangible harms that meet minimum Article III requirements, its judgment is [] instructive and important. Thus, we said in *Lujan* that Congress may “*elevat[e]* to the status of legally cognizable injuries concrete, *de facto* injuries that were *previously inadequate in law*.” . . . Similarly, Justice Kennedy's concurrence in that case explained that “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*.”⁵⁶

In cases where Congress has defined a new concrete injury, the plaintiff “need not allege any *additional* harm beyond the one Congress has identified” to have standing.⁵⁷ From the Court's language, a reasonable reader could infer that the courts should defer to Congress's creations of causes of action.

However, the Court also made clear that a statutory violation is not necessarily sufficient for a concrete injury. Plaintiffs do not “automatically” have concrete injuries “whenever a statute grants a person a statutory right” and purports to create a cause of action to remedy its violation.⁵⁸ “Article III standing requires a concrete injury even in the context of a statutory violation.”⁵⁹ In particular, “bare procedural violation[s]” of statutes that are “divorced from any concrete harm” are not concrete injuries even if a statute permits plaintiffs to sue in response to them.⁶⁰ The Court's example of a bare procedural injury in the context of the FCRA is that of a credit reporter reporting an incorrect zip code.⁶¹ That being said, the Court expressly did not decide whether any other violations of consumer protection statutes are insufficiently concrete without an additional showing of injury.⁶² It did clarify, though, that showing a risk of concrete harm, such as those posed by libel,

⁵⁵ *Id.* Because modern consumer protection statutes often create causes of action that are not especially similar to those at common law, such as violations of mandatory disclosure provisions, this is unlikely to be helpful to consumer protection plaintiffs.

⁵⁶ *Id.*, quoting *Lujan*, 504 US at 578 (majority), 580 (Kennedy concurring in part and concurring in the judgment) (emphasis added).

⁵⁷ *Spokeo*, 136 S Ct at 1549 (emphasis in original).

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Spokeo*, 136 S Ct at 1550.

⁶² *Id.* at 1550 n 8.

slander, and violations of freedom of information statutes, can be sufficient without showing an additional injury.⁶³

Thus, the two-sided nature of standing doctrine with regard to statutory violations continues. *Spokeo* continued to hold that Congress has a role in identifying concrete injuries, but also that not all such identifications succeed. By failing to resolve the tension in its prior cases, the Court added further confusion in a decision intended to resolve it. The key questions from before *Spokeo* remain: Which statutory causes of action identify concrete injuries and which do not? How should courts decide? Those problems are particularly vexing in the context of consumer protection law, the subject of *Spokeo* itself. Circuits have subsequently split on the questions of which violations of consumer protection statutes are sufficiently concrete to confer standing.⁶⁴

B. The Fair Debt Collection Practices Act

This Comment focuses on the circuit split over the mandatory disclosure provisions of the Fair Debt Collection Practices Act, a major federal consumer protection statute. The FDCPA aims to “eliminate abusive debt collection practices,” protect fair debt collectors from “competitive[] disadvantage[],” and “promote consistent State action to protect consumers against debt collection abuses.”⁶⁵ Its requirements can be grouped into two major categories: procedural protections for consumers and regulations on debt collector communications with the public.⁶⁶ The two categories work together to achieve the statute’s consumer protective goals: they give consumers rights under the statute and ensure that consumers know that they can exercise those rights. Neither the undisclosed ability to exercise rights nor formal disclosures without accompanying rights help consumers much. The FDCPA is enforced through both private lawsuits and administrative remedies. Its private right of action has enabled a great deal of

⁶³ Id at 1549–50, citing *Federal Election Commission v Akins*, 524 US 11, 20–25 (1998), and *Public Citizen v Department of Justice*, 491 US 440, 449 (1989).

⁶⁴ These include splits arising under the FDCPA, the FCRA, the Telephone Consumer Protection Act, the Fair and Accurate Credit Transactions Act, the Video Protection Privacy Act, and the Consumer Credit Protection Act. See generally Jackson and Petersen, *Spokeo IV: Cert Denied* (cited in note 16). The Supreme Court does not appear to feel a pressing need to resolve them.

⁶⁵ 15 USC § 1692(e).

⁶⁶ Note that debt collectors for purposes of the FDCPA include both natural and legal “person[s].” See 15 USC § 1692a(6).

litigation.⁶⁷ This Comment focuses, in particular, on how *Spokeo* applies to the FDCPA's mandatory disclosure requirements, but comprehending the Act as a whole helps to understand the disclosure requirements.

1. Procedural protections.

The FDCPA provides important procedural protections for consumers confronted by debt collectors. They include the rights to dispute a debt and to request the name and address of the original creditor within thirty days after receiving a notice from the debt collector.⁶⁸ The right to request information on the original creditor is important because debts are often transferred between many creditors, so the consumer might have difficulty verifying or disputing the debt without it.⁶⁹ Upon receiving notice that a consumer is exercising one of those rights, the debt collector must stop collecting the debt or the disputed portion of it until the collector receives the requested documentation and sends it to the consumer.⁷⁰ If the consumer does not make a request within the thirty-day period, the collector may continue all legal collection efforts.⁷¹

2. Regulations on communications.

The FDCPA also extensively regulates collector-consumer communications. These restrictions take five main forms: mandatory disclosures, bans on misrepresentations, bans on unfair practices, protections of debtor privacy, and restrictions on the scope of the debt collector's communications with the debtor.

This Comment focuses on standing under the FDCPA's two major mandatory disclosure provisions. First, 15 USC § 1692e(11) requires the debt collector to disclose that it is a debt collector in all communications with the consumer, with the exception of legal pleadings.⁷² In the first communication, the debt collector must also disclose "that the debt collector is attempting to collect a debt

⁶⁷ See Part I.B.4.

⁶⁸ 15 USC § 1692g(a).

⁶⁹ See Judith Fox, *Do We Have a Debt Collection Crisis? Some Cautionary Tales of Debt Collection in Indiana*, 24 Loyola Consumer L Rev 355, 359–60 (2012).

⁷⁰ 15 USC § 1692g(b).

⁷¹ 15 USC § 1692g(b).

⁷² 15 USC § 1692e(11).

and that any information obtained will be used for that purpose.”⁷³ Second, within five days of the initial communication with a consumer, the debt collector must send a “notice of debt” which includes more extensive disclosures of information and rights under § 1692g(a). These include the amount of the debt, the name of the creditor, that the debt will be presumed valid unless the consumer disputes it in writing within thirty days, and the rights to dispute the debt or request the name and address of the creditor in writing within thirty days.⁷⁴ If a consumer does not receive the notice and subsequently follow the prescribed procedures, they may accidentally waive the right to dispute the debt or receive creditor information.⁷⁵

Aside from mandatory disclosures, the FDCPA prohibits broadly defined categories of abusive debt collection practices. These include “any false, deceptive, or misleading representation or means” for debt collection, including more than a dozen specific, nonexhaustive examples.⁷⁶ The FDCPA also bans “conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt”⁷⁷ and “unfair or unconscionable means to collect or attempt to collect any debt,” again with a list of specific, nonexhaustive examples.⁷⁸

Other provisions of the FDCPA attempt to prevent debt collectors from humiliating consumers by communicating with third parties. For example, debt collectors may only communicate with the consumer, the creditor, and the attorneys of the parties involved except to find location information.⁷⁹

⁷³ 15 USC § 1692e(11).

⁷⁴ 15 USC § 1692g(a).

⁷⁵ See, for example, *Casillas*, 926 F3d at 341 (Wood dissenting from denial of rehearing en banc) (“[P]eople might not appreciate the need for a written record of their dealings with the debt collector and thus without a reminder that they must reduce their concerns to writing, they are likely to forfeit the important substantive rights the Act provides for them.”).

⁷⁶ 15 USC § 1692e.

⁷⁷ 15 USC § 1692d.

⁷⁸ 15 USC § 1692f.

⁷⁹ See 15 USC § 1692c(b), incorporating by reference 15 USC § 1692b. Location information means “a consumer’s place of abode and his telephone number at such place, or his place of employment.” 15 USC § 1692a(7). A debt collector contacting someone besides the consumer to discover the location information must “identify himself, state that he is confirming or correcting location information concerning the consumer, and, only if expressly requested, identify his employer.” 15 USC § 1692b(1). The collector may not reveal that the consumer owes any debt or send written materials indicating that it is a debt collector. See 15 USC § 1692b(2)–(5).

Finally, the Act prevents debt collectors from contacting consumers at all in certain circumstances unless they have permission to do so. For example, there is a presumption that collectors cannot contact consumers at inconvenient times or after the consumer requests that the collector stop, subject to enumerated exceptions.⁸⁰

3. Remedies.

Violations of the rights granted under the FDCPA can be remedied either through private action or administrative enforcement. First, the FDCPA creates a private right of action. Actual damages sustained by a plaintiff can be collected in all lawsuits.⁸¹ Other damages can be added to actual damages at the court's discretion.⁸² In individual actions, the plaintiff can collect discretionary statutory damages of up to \$1,000.⁸³ In class actions, named plaintiffs can recover statutory damages of up to \$1,000, and all other class members can collectively recover up to the lesser of \$500,000 or 1 percent of the debt collector's net worth.⁸⁴ When judging discretionary liability in class actions, courts consider "the frequency and persistence of noncompliance by the debt collector, the nature of such noncompliance, the resources of the debt collector, the number of persons adversely affected, and the extent to which the debt collector's noncompliance was intentional."⁸⁵ Moreover, successful plaintiffs in any FDCPA action have the right to costs and reasonable attorney's fees.⁸⁶ In all FDCPA actions, an affirmative defense exists if the debt collector shows that the violation was unintentional and happened notwithstanding reasonable error prevention procedures.⁸⁷

In addition to the private right of action, the FDCPA provides various administrative remedies. All violations of the FDCPA not committed to the jurisdiction of other agencies are deemed violations of the Federal Trade Commission Act⁸⁸ (FTC Act), so the Federal Trade Commission (FTC) enforces the FDCPA.⁸⁹ All of

⁸⁰ See 15 USC § 1692c(a)(1), (c).

⁸¹ See 15 USC § 1692k(a)(1).

⁸² See 15 USC § 1692k(a)(2).

⁸³ 15 USC § 1692k(a)(2)(A).

⁸⁴ 15 USC § 1692k(a)(2)(B).

⁸⁵ 15 USC § 1692k(b)(2).

⁸⁶ See 15 USC § 1692k(a)(3).

⁸⁷ See 15 USC § 1692k(c).

⁸⁸ Pub L No 63-203, 38 Stat 717 (1914), codified as amended at 15 USC § 41 et seq.

⁸⁹ See 15 USC § 1692l(a).

the FTC's powers under the FTC Act may be used in FDCPA enforcement.⁹⁰ Moreover, all violations of the FDCPA may be pursued by the Consumer Financial Protection Bureau (CFPB).⁹¹ In some specific contexts, the FDCPA is also enforced by federal banking agencies, the National Credit Union Administration, the Department of Transportation, and the Department of Agriculture.⁹²

4. FDCPA litigation.

The FDCPA's private right of action has led to a great deal of civil litigation. Debt collection is a multibillion-dollar industry in the United States.⁹³ Third-party debt collectors are attempting to collect from roughly 28 percent of American consumers with a credit file.⁹⁴ The average consumer contacted by at least one debt collector has more than three debts being pursued.⁹⁵ Debt collection typically begins with a creditor giving up on collecting a delinquent payment, at which point it hires a third-party debt collector who works on contingency.⁹⁶ If the debt collector is unsuccessful in collecting, the debt will be sold to a debt buyer at a heavy discount.⁹⁷ Debt buyers can then sell the debt on to other debt buyers, and so on and so forth.⁹⁸ Even the debt buying market is now very large; the FTC found that nine debt buyers spent nearly \$6.5 billion buying debt with a face value of almost \$143 billion in 2008.⁹⁹

Unsurprisingly, not all of those debt collectors treat consumers well. Debt collection is the most common source of consumer complaints to both the FTC and the CFPB.¹⁰⁰ There are serious

⁹⁰ See 15 USC § 1692l(a).

⁹¹ See 15 USC § 1692l(b)(6).

⁹² See 15 USC § 1692l(b).

⁹³ See Consumer Financial Protection Bureau, *Fair Debt Collection Practices Act: BCFP Annual Report 2019* at *8 (cited in note 44).

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ See Fox, 24 Loyola Consumer L Rev at 358–59 (cited in note 69).

⁹⁷ See *id.* at 359.

⁹⁸ *Id.* at 359–60.

⁹⁹ Federal Trade Commission, *The Structure and Practices of the Debt Buying Industry* *8 (Jan 2013), archived at <https://perma.cc/4PPM-7SAJ>.

¹⁰⁰ National Consumer Law Center, *Consumer Debt Collection Facts* *1 (Feb 2018), archived at <https://perma.cc/2YJ2-VPE8>.

questions over whether the FDCPA is currently capable of curbing widespread abuse by debt collectors.¹⁰¹

The FDCPA created a perfect storm for large-scale class action litigation. It has a private right of action with significant statutory damages and is aimed at a deep-pocketed industry that targets consumers by the thousands. As a result, FDCPA litigation has increased significantly over the last two decades, and around ten thousand lawsuits under the FDCPA are filed annually.¹⁰²

Because private FDCPA litigation is a major regulator of the debt collection industry, and because all plaintiffs must show standing, either relaxing or tightening standing requirements significantly would affect debt collectors' potential liability. As a result, changes in standing requirements would likely lead to changes in debt collectors' conduct. Resolving disagreements on standing under the FDCPA is thus important not only for justiciability doctrine but also for consumer protection efforts.

Moreover, while I focus on standing under the mandatory disclosure provisions of the FDCPA, a successful solution to that issue could be applied analogously to the circuit splits involving other consumer protection statutes. In this way, it would contribute to solving the current problems that arise from the intersection of consumer protection laws and *Spokeo*.

II. THE CIRCUIT SPLIT

The circuit courts are currently divided on how to apply *Spokeo* to the mandatory disclosure requirements of the FDCPA—specifically, whether nondisclosures can be concrete injuries without more. The Seventh Circuit recognized that its opinion in *Casillas* created a split with the Sixth Circuit by ruling in the opposite direction on materially identical facts.¹⁰³ In this Part, I explain the arguments on each side of this split. The Sixth Circuit holds that the FDCPA makes nondisclosure alone a concrete injury in some circumstances, while the Seventh Circuit holds that without more, it never is.¹⁰⁴

¹⁰¹ See Lauren Goldberg, Note, *Dealing in Debt: The High-Stakes World of Debt Collection After FDCPA*, 79 S Cal L Rev 711, 729 (2006) (alleging that the FDCPA simply forced collectors to find a new business model to continue harassing consumers).

¹⁰² Consumer Financial Protection Bureau, *Fair Debt Collection Practices Act: CFPB Annual Report 2016* *15 (Mar 2016), archived at <https://perma.cc/PQ4V-8VMC>.

¹⁰³ *Casillas*, 926 F3d at 336 & n 4. See also *id* at 340 (Wood dissenting from denial of rehearing en banc).

¹⁰⁴ The circuit split has a third side: the Eleventh Circuit's unpublished decision in *Church v Accretive Health, Inc*, 654 F Appx 990 (11th Cir 2016). *Church* analogizes the

A. The Sixth Circuit's View: Nondisclosure Is (Sometimes) a Concrete Injury

The Sixth Circuit faced the problem of how to reconcile *Spokeo* and the FDCPA in *Macy v GC Services Limited Partnership*.¹⁰⁵ The plaintiffs, Wilbur Macy and Pamela Stowe, alleged that a letter sent from the defendant debt collector failed to disclose that individuals must dispute debts in writing to assert their rights under the FDCPA, violating the FDCPA's disclosure requirements.¹⁰⁶ To determine whether the violation was a concrete injury, the court began by analyzing *Spokeo*. It pointed to the language in *Spokeo* indicating that plaintiffs need not allege additional harm when statutory violations are sufficient for injury in fact.¹⁰⁷ It recognized, though, that *Spokeo* also clarified that not all statutory violations are sufficient for injury in fact without additional allegations of harm.¹⁰⁸

The court's solution to this now-familiar dilemma was to focus on whether Congress created the procedural right to protect

FDCPA disclosure issue to *Havens Realty Corp v Coleman*, 455 US 363 (1982), in which the Supreme Court held that a plaintiff had standing to sue a landlord that falsely said it had no apartments available for her but told a prospective white renter that units were available, violating the Fair Housing Act (FHA). *Church*, 654 F Appx at 993–94, citing *Havens Realty*, 455 US at 368, 372–73. The FHA creates an enforceable right to truthful information, and violations of it are injuries in fact sufficient for standing without additional allegations. See *Church*, 654 F Appx at 994, citing *Havens Realty*, 455 US at 373–74. The Eleventh Circuit extended *Havens Realty* to the FDCPA, claiming that the FDCPA created an enforceable right to receive information through mandatory disclosures and that violations of it from nondisclosure are sufficient for standing. See *Church*, 654 F Appx at 994–95.

However, *Church* did not seriously grapple with *Spokeo*, which makes clear that not all violations of statutory rights are sufficient to create standing. The Eleventh Circuit itself seemingly rejected *Church*'s rationale in a different context. See *Nicklaw v CitiMortgage, Inc.*, 839 F3d 998, 1002–03 (11th Cir 2016). See also *Lyshe v Levy*, 854 F3d 855, 859–60 (6th Cir 2017) (explaining the tension between the Eleventh Circuit cases). Moreover, unlike the FDCPA, the FHA only creates private rights of action for failures to disclose on the basis of protected characteristics; the injury in an FHA case is discrimination related in a way that the injury in an FDCPA case is not. See *Casillas*, 926 F3d at 338. Both the Sixth and Seventh Circuits have explicitly rejected *Church*. See *Lyshe*, 854 F3d at 859–61; *Casillas*, 926 F3d at 338, 338–39 n 7. Because this does not appear to be a probable route taken by the courts in the future, I do not address it in detail. The idea that any statutory cause of action is sufficient for a concrete injury is an unpromising reading of both *Havens Realty* and *Spokeo*.

¹⁰⁵ 897 F3d 747 (6th Cir 2018).

¹⁰⁶ *Id* at 751.

¹⁰⁷ *Id* at 753, citing *Spokeo*, 136 S Ct at 1548–49.

¹⁰⁸ *Macy*, 897 F3d at 754.

a concrete interest and whether the violation threatened that concrete interest.¹⁰⁹ This approach borrows from widely cited decisions by the Second and Ninth Circuits.¹¹⁰ As the court summarized:

Spokeo categorized statutory violations as falling into two broad categories: (1) where the violation of a procedural right granted by statute is sufficient in and of itself to constitute concrete injury in fact because Congress conferred the procedural right to protect a plaintiff's concrete interests and the procedural violation presents a material risk of real harm to that concrete interest; and (2) where there is a "bare" procedural violation that does not meet this standard, in which case a plaintiff must allege "additional harm beyond the one Congress has identified."¹¹¹

The Second Circuit's rationale for adopting this test stemmed from a line in *Summers v Earth Island Institute*,¹¹² quoting *Lujan*, that the court determined was still good law.¹¹³ "Only a 'person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy.'"¹¹⁴ However, whether that line can support the Second Circuit's interpretation of *Spokeo* is at least questionable.¹¹⁵

¹⁰⁹ See *id.* at 754–55, citing *Strubel v Comenity Bank*, 842 F3d 181, 189 (2d Cir 2016), and *Robins v Spokeo, Inc.*, 867 F3d 1108, 1113 (9th Cir 2017) (*Spokeo II*).

¹¹⁰ See *Strubel*, 842 F3d at 189 (discussing the scope of "bare procedural violation[s]" as applied to the Truth in Lending Act); *Spokeo II*, 867 F3d at 1113–14 (assessing rights created by the FCRA). Note that neither *Strubel* nor *Spokeo II* involved the FDCPA, so they are not part of the split that is the main topic of this Comment.

¹¹¹ *Macy*, 897 F3d at 756, quoting *Spokeo*, 136 S Ct at 1549 (emphasis in original).

¹¹² 555 US 488 (2009).

¹¹³ See *Strubel*, 842 F3d at 189, quoting *Summers*, 555 US at 496.

¹¹⁴ *Summers*, 555 US at 496, quoting *Lujan*, 555 US at 572 n 7 (emphasis omitted).

¹¹⁵ There are several issues with the Second Circuit's extrapolation from this sentence. First, the language in *Summers* and *Lujan* preceded the development of the clear distinction between concreteness and particularity that created the issues this Comment is concerned with.

Second, in both *Summers* and *Lujan*, the language discusses the plaintiffs' supposed procedural right to force the government follow its own procedures, which bears little resemblance beyond the term "procedural" to rights granted in the causes of action of consumer protection statutes. See *Summers*, 555 US at 496–97; *Lujan*, 504 US at 572.

Third, and most importantly, Justice Anthony Kennedy wrote concurrences for the majority-makers in both *Lujan* and *Summers* that limit the exact text that the Second Circuit cites. For Justice Kennedy, each "case would present different considerations if Congress . . . provide[d] redress for a concrete injury 'giv[ing] rise to a case or controversy where none existed before,'" *Summers*, 555 US at 501 (Kennedy concurring), quoting *Lujan*, 504 US at 580 (Kennedy concurring in part and concurring in the judgment), exer-

The questions facing the Sixth Circuit thus became whether Congress created the right to disclosure in the FDCPA to protect a concrete interest of consumers and whether the defendant threatened that interest. The Sixth Circuit answered yes to both in *Macy*. Section 1692g(a)(4)'s requirement for debt collectors to disclose that debts must be disputed in writing aims to allow debtors to enforce and understand their rights.¹¹⁶ In particular, non-disclosure creates a risk of concrete harm from the "possibility of an unintentional waiver of FDCPA's debt-validation rights, including suspension of collection of disputed debts under Section 1692g(b)."¹¹⁷ The debt collector's failure to disclose in the particular case allegedly threatened Macy and Stowe's interest in avoiding waiver.¹¹⁸ It follows that Macy and Stowe had standing.¹¹⁹

Under the Sixth Circuit's approach, not all violations of statutory rights are sufficient for concrete injuries, so the approach complies with *Spokeo*. For example, the Sixth Circuit held that nondisclosure in violation of the FCRA was insufficient for standing without additional harm because violations of the disclosure requirements of the FCRA create far smaller risks of harm than analogous violations of the FDCPA.¹²⁰

cising "the power to define injuries and articulate chains of causation" that are newly sufficient for standing, *Lujan*, 504 US at 580 (Kennedy concurring in part and concurring in the judgment). See also Richard J. Pierce Jr., Comment, *Lujan v. Defenders of Wildlife: Standing as a Judicially Imposed Limit on Legislative Power*, 42 Duke L J 1170, 1173, 1181 (1993) (explaining the failure of much of *Lujan* to get majority support and the concurrence's approval of broad congressional power to create causes of action); Maria Banda, Case Comment, *Summers v. Earth Island Institute*, 34 Harv Envir L Rev 321, 328 (2010) ("Justice Kennedy broke the tie in *Summers* . . . by reaffirming his *Lujan* concurrence that Congress must retain enough flexibility to define new injuries."). The test adopted by the Second Circuit, though, plausibly violates this understanding for two reasons. The first is that it provides no space for Congress to identify new concrete interests. The second is that it requires courts to investigate whether the facts in particular cases threaten the concrete interest Congress identified. That eliminates Congress's power to identify statutory violations that are sufficient alone for standing, which is exactly what Justice Kennedy called to preserve.

¹¹⁶ See *Macy*, 897 F3d at 758.

¹¹⁷ Id. Chief Judge Diane Wood made a similar argument dissenting from denial of rehearing en banc in the Seventh Circuit's *Casillas* decision. She argued that nondisclosure creates a risk of accidental waiver of rights and the inability to stall collection until the debt is verified, which is a concrete injury sufficient for standing under *Spokeo*. See *Casillas*, 926 F3d at 341–42 (Wood dissenting from denial of rehearing en banc). Her argument shows that the FDCPA's disclosure interests were designed to protect the concrete interests of consumers, so plaintiffs need not allege any additional harm to have standing. See id.

¹¹⁸ *Macy*, 897 F3d at 758.

¹¹⁹ See id at 761.

¹²⁰ See *Huff v TeleCheck Services, Inc*, 923 F3d 458, 468 (6th Cir 2019).

Similarly, the Sixth Circuit held that a different violation of the FDCPA was a bare procedural violation insufficient for standing. In *Hagy v Demers & Adams*,¹²¹ the plaintiffs fell behind on payments on their mobile home and asked the creditor to waive any deficiency balance in return for a deed in lieu of foreclosure.¹²² The lender agreed and its attorney sent the plaintiffs a letter giving them “everything they wanted.”¹²³ Nevertheless, the plaintiffs sued because the letter did not disclose that it was from a debt collector, violating the FDCPA.¹²⁴ The court held that merely alleging a violation of the identification provision was insufficient for standing because otherwise Congress would be able to “enact an injury into existence, using its lawmaking power to transform something that is not remotely harmful into something that is.”¹²⁵ The *Macy* court distinguished the case from *Hagy* on the grounds that there was no risk of harm in the *Hagy* case, such as the risk of double payment, of the type that the mandatory disclosure prevents.¹²⁶ In other words, *Hagy* failed the second part of *Macy*’s test.

B. The Seventh Circuit: Nondisclosure Is Never a Concrete Injury

The Seventh Circuit case *Casillas* involved a factual setup nearly identical to that in *Macy*, but the court came to a different conclusion. As in *Macy*, the plaintiff received a letter from a debt collector that violated § 1692g(a)(4) by failing to note that consumers must dispute debts in writing, not orally.¹²⁷ The court emphasized that *Casillas* did not allege in her complaint that she attempted to dispute the debt or planned to attempt to dispute the debt.¹²⁸

Writing for the court, Judge Amy Coney Barrett read *Spokeo* differently from the Sixth Circuit. She emphasized the parts of *Spokeo* that explained that congressionally created causes of action are not necessarily sufficient for standing.¹²⁹ Yet, Judge Barrett did not cite the language in *Spokeo* on which the Sixth Circuit

¹²¹ 882 F3d 616 (6th Cir 2018).

¹²² *Id* at 618–19.

¹²³ *Id* at 622.

¹²⁴ *Id* at 620–21.

¹²⁵ *Hagy*, 882 F3d at 622.

¹²⁶ *Macy*, 897 F3d at 761, citing *Hagy*, 882 F3d at 621–22.

¹²⁷ *Casillas*, 926 F3d at 332.

¹²⁸ *Id*.

¹²⁹ See *id* at 333, citing *Spokeo*, 136 S Ct at 1549.

hung its hat: “[T]hat a ‘violation of a procedural right granted by statute can be sufficient in some circumstances to constitute injury in fact,’ and ‘in such a case a plaintiff need not allege any *additional* harm beyond the one Congress has identified.’”¹³⁰ The result was a one-sided reading of a two-sided decision. *Spokeo* emphasized both Congress’s role in identifying injuries in fact and the need for judicial limits on it, but the Seventh Circuit looked only to the latter. The court held that FDCPA disclosure plaintiffs must always allege an additional harm or risk of harm from the debt collector’s violation beyond the statutory violation itself to have standing.¹³¹ Indeed, in dicta, the Seventh Circuit suggested that this limitation on standing extends to the mandatory disclosure provisions of *all* consumer protection statutes.¹³²

The court applied this interpretation to the facts to deny Casillas standing. Because she did not allege that she planned to dispute the debt in her complaint, she could not have been impeded by the defendant’s failure to disclose. She “was not at any risk of losing her statutory rights because there was no prospect that she would have tried to exercise them.”¹³³ The court emphasized that she did not even plead that she read the deficient notice.¹³⁴ Because the Seventh Circuit requires mandatory disclosure plaintiffs to allege some other concrete harm beyond the statutory violation, Casillas’s case was dismissed.¹³⁵

The Seventh Circuit’s requirement does not doom *all* cases under the FDCPA. For example, when a debt collector failed to provide *any* of the required disclosures, the Seventh Circuit held that the plaintiff had standing to sue.¹³⁶ The debtor was concretely injured by the debt collector suing her without giving her the benefit of the mandatory disclosures, which would have informed her of rights to dispute and to verify the debt and thereby halt the

¹³⁰ *Macy*, 897 F3d at 753, quoting *Spokeo*, 136 S Ct at 1549 (alterations omitted) (emphasis in original).

¹³¹ See *Casillas*, 926 F3d at 333.

¹³² See *id* at 332 (“[A] plaintiff cannot satisfy the injury-in-fact element of standing simply by alleging that the defendant violated a disclosure provision of a consumer-protection statute.”), citing *Groshek v Time Warner Cable, Inc*, 865 F3d 884, 887 (7th Cir 2017).

¹³³ *Casillas*, 926 F3d at 334. At least one district court outside of the Seventh Circuit has ruled similarly on a parallel rationale. See *Jackson v Abendroth & Russell, PC*, 207 F Supp 3d 945, 953–57 (SD Iowa 2016).

¹³⁴ *Casillas*, 926 F3d at 335.

¹³⁵ *Id* at 332–33.

¹³⁶ See *Lavallee v Med-1 Solutions, LLC*, 932 F3d 1049, 1053 (7th Cir 2019).

lawsuit.¹³⁷ Similarly, the *Casillas* court distinguished the case before it from a FCRA case in which the plaintiff alleged a violation of a right to review a background report before a prospective employer took adverse action based on it.¹³⁸ Because the FCRA plaintiff's employer did not give her a copy of the background check before firing her, depriving her of the opportunity to respond to it, the Seventh Circuit held that she was concretely injured. The *Casillas* court argued that Casillas could not allege "any comparable lost opportunity."¹³⁹ That rationale suggests that a plaintiff alleging some other injury under the FDCPA involving a lost opportunity—such as a failure to disclose the possibility of disputing the debt at all—might fare better under the Seventh Circuit's approach to standing.¹⁴⁰

Thus, a circuit split now exists on whether a violation of the mandatory disclosure provisions of the FDCPA creates a harm such that a plaintiff "need not allege any *additional* harm beyond the one identified by Congress" in the statute.¹⁴¹ The split's root lies in an ambiguity in *Spokeo* itself: its decision to affirm both sides of the statutory standing debate created problems identifying which violations of statutorily created rights are sufficient for standing without allegations of additional harm and which are not.¹⁴² The objective approach to FDCPA standing that I propose follows from an answer to that deep question that focuses on statutes' functions.

III. RESOLVING THE SPLIT ON CONCRETENESS: THE OBJECTIVE PERSPECTIVE

In this Part, I advocate a distinct approach to the problem of standing under the FDCPA's disclosure requirements that helps

¹³⁷ See *id.*

¹³⁸ See *Casillas*, 926 F3d at 334, citing *Robertson v Allied Solutions*, 902 F3d 690, 693–97 (7th Cir 2018).

¹³⁹ *Casillas*, 926 F3d at 334.

¹⁴⁰ See *Lavallee*, 932 F3d at 1053 (holding that the plaintiff had standing when a debt collector failed to provide any of the required FDCPA disclosures). However, failing to disclose that disputes must be in writing also creates a risk that the plaintiff will be denied the opportunity to dispute the debt, but the Seventh Circuit held that that was insufficient for standing. See *Casillas*, 926 F3d at 341–42 (Wood dissenting from denial of rehearing *en banc*).

¹⁴¹ *Spokeo*, 136 S Ct at 1549 (emphasis in original).

¹⁴² See John L. Brown and Ron Edwards, *No One Left Standing: Hagy v. Demers & Adams, LLC and Post-Spokeo Standing Under the FDCPA* (American Bar Association Business Law Today, Nov 15, 2018), archived at <https://perma.cc/7TAN-FB2Q>; Baude, 2016 S Ct Rev at 214–16 (cited in note 15).

to resolve the ambiguities that the courts face in the aftermath of *Spokeo*. I propose that whenever debt collectors violate the mandatory disclosure provisions of the FDCPA, the affected consumers have standing, because Congress chose to make nondisclosure a concrete harm regardless of whether the nondisclosure causes a subjective harm to an individual plaintiff. In other words, the plaintiff need not show that they personally suffered due to nondisclosure—for example, by being misled, losing an opportunity, or being financially harmed—in order to have standing in a mandatory disclosure action. I call this the “objective approach” because it does not require the courts to determine whether a plaintiff suffered a subjective injury to determine whether she has a concrete injury.

Unlike the Sixth Circuit’s approach, whether a disclosure violation is a concrete injury under the objective framework does not depend on whether the risk posed by the failure to disclose was sufficiently grave. Thus, consumers should have standing even in hard mandatory disclosure cases like *Hagy*, in which the risk of subjective harm to the consumer is exceptionally slight. Unlike the Seventh Circuit’s approach, the objective approach provides that a violation of the FDCPA’s mandatory disclosure provisions is itself a concrete injury and that a consumer suing in response to it does not need to allege an additional harm.

This solution follows from a broader view of how *Spokeo* should be interpreted in cases involving statutory violations. Under this interpretation, when Congress creates a statutory cause of action to deter industry activity rather than to compensate individuals for their losses, a violation of the statute alone is an objective concrete injury under *Spokeo*. A plaintiff does not need to show any additional harm beyond the violation to have standing. When Congress creates causes of action to compensate individuals for harms they suffer, though, plaintiffs must show a subjective harm beyond the mere fact of the statutory violation to have standing and obtain compensation. I call this a “functional interpretation” of *Spokeo*’s application to statutes because it makes the question of whether a statutory violation is a concrete injury depend on the function of the statutory provision.

The objective approach to FDCPA mandatory disclosure standing in light of *Spokeo* has several advantages over alternatives. First, I argue that the functional reading of *Spokeo* is the best approach to the case. *Spokeo* held that Congress *can* identify concrete harms but that not all statutes creating causes of action

do so. The functional approach to *Spokeo* persuasively shows which are which.

Second, when the functional approach is applied to the FDCPA, it becomes clear that all violations of the mandatory disclosure provisions are concrete injuries. The text, structure, and legislative history of the FDCPA all support the theory that the mandatory disclosure provisions are deterrent, not compensatory. Moreover, the objective approach reconciles an inconsistency in how standing doctrine applies to the FDCPA's nondisclosure and misrepresentation provisions. The latter have long been governed by an objective standard that does not require showing subjective harm. Finally, the objective approach creates proper incentives for debt collectors, encouraging them to fulfill their FDCPA obligations and discouraging them from targeting unsophisticated consumers.

I conclude this Part by showing how courts—when confronted by similar problems under other consumer protections provisions—can use by analogy the approach to *Spokeo* exemplified by the objective view of FDCPA standing. The theory also preserves Congress's power by ensuring that it can successfully identify concrete injuries through legislation.

A. A Functional Reading of Statutory Violations and *Spokeo*

The objective theory of standing under the FDCPA is fully consistent with both sides of the Supreme Court's holding in *Spokeo*. Respecting Congress's decision to make nondisclosure an actionable injury aligns with *Spokeo*'s description of Congress's role in “elevat[ing] to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law.”¹⁴³ By creating the rights and remedies of the FDCPA, Congress made an injury which was not previously legally cognizable—nondisclosure—legally cognizable. As such, plaintiffs alleging illegal nondisclosure “need not allege any *additional* harm beyond the one Congress has identified.”¹⁴⁴

Remember, though, that *Spokeo* also clarified that merely alleging a “bare procedural violation, divorced from any concrete harm” is insufficient for standing even when a statute makes the procedural violation actionable.¹⁴⁵ Thus, there must be a principle

¹⁴³ *Spokeo*, 136 S Ct at 1549, quoting *Lujan*, 504 US at 578 (emphasis in original).

¹⁴⁴ *Spokeo*, 136 S Ct at 1549 (emphasis in original).

¹⁴⁵ *Id.*

that distinguishes nondisclosure under the FDCPA from *Spokeo*'s class of insufficiently concrete "bare procedural violations." My functional approach to *Spokeo* provides such a principle.

Under the functional approach, actions forbidden by regulatory causes of action that primarily deter industries rather than compensate individuals for suffering are concrete injuries. Actions forbidden by compensatory causes of action that make individuals whole for subjective suffering are not necessarily concrete. Plaintiffs suing under such provisions must show an additional concrete harm beyond the statutory violation to have standing. My approach thus clarifies which statutory violations are concrete injuries and which are not.

Some causes of action primarily regulate industries through deterrence rather than compensate individuals for harm. Congress enlists private individuals to sue to accomplish its end goal of ensuring that companies comply with federal statutes and regulations.¹⁴⁶ While the plaintiff is entitled to money damages, the role of damages is largely to give the plaintiff an incentive to bring suit and to deter the defendant, not to compensate the plaintiff for personal harms. Congress sees enhancements to damages beyond the level needed for compensation—such as treble, *qui tam*, and statutory damages mechanisms—as necessary to enlist private parties to enforce public regulations.¹⁴⁷ For deterrence, not only is compensation not the goal, but it theoretically does not matter who the damages go to as long as the defendant is made to pay.¹⁴⁸ The amount of litigation that results might seem wholly out of proportion to the meager harms caused by violations, but compensation is not the point.¹⁴⁹

Compensatory provisions, though, aim to make plaintiffs whole for the injuries they suffer due to the defendant's wrongful

¹⁴⁶ See Margaret H. Lemos, *Special Incentives to Sue*, 95 Minn L Rev 782, 783–95 (2011).

¹⁴⁷ See *id.* at 791–93.

¹⁴⁸ See Richard A. Posner, *Economic Analysis of Law* 78 (Little, Brown 1972) (“[T]hat the damages are paid *to the plaintiff* is, from an economic standpoint, a detail. It is payment *by the defendant* that creates incentives for more efficient resource use.”) (emphasis in original); Catherine M. Sharkey, *Punitive Damages as Societal Damages*, 113 Yale L J 347, 370 (2003) (“[C]onventional economic opinion has traditionally remained completely agnostic with respect to the distribution of punitive damages. It has long regarded the plaintiff's windfall as a necessary byproduct of adequately deterring the defendant.”) (citation omitted).

¹⁴⁹ See, for example, John O'Brien, *Phoney Lawsuits: A Federal Law is Giving Litigious People a New Income Stream* (Forbes, Mar 14, 2017), archived at <https://perma.cc/W7B6-C2KD> (criticizing the high number and high damages of lawsuits under the Telephone Consumer Protection Act).

conduct.¹⁵⁰ The classic example is, of course, compensatory damages in tort law,¹⁵¹ but examples can be found much further afield.¹⁵² While compensatory statutes deter by providing damages, since the purpose is to compensate the plaintiff, where the money goes is essential, not incidental.

The functional reading of *Spokeo* uses this distinction between compensation and deterrence to interpret whether statutory violations are concrete injuries. Violations of deterrent provisions are objective, concrete injuries, while violations of compensatory provisions are not. Plaintiffs suing under the latter thus must allege some concrete harm in addition to a bare statutory violation to have standing.

For several reasons, the functional reading is the best interpretation of *Spokeo*. First, it provides a clear rule on which statutory violations are injuries in fact and which are not, helping to solve the problems that the courts currently face. That clarity on how judges will treat statutes will also help legislatures predict the effect of statutes when enacting them.

Second, the functional reading reflects intuitions about cases. Generally, it seems that plaintiffs suing under statutes that provide compensation only as an incidental incentive to regulate industries should be able to sue regardless of whether they can show subjective harm. If the goal of a cause of action is to turn citizens into private attorneys general that punish all infractions, whether the particular plaintiff suing felt sad or confused or lost money as a result of the infraction seems irrelevant. What matters are just the objective facts that the law was violated and that the law makes that violation actionable.

The reasons why the courts should bar lawsuits for violations of compensatory statutes when the plaintiff can show no subjective harm are equally clear. For example, there is a federal cause

¹⁵⁰ See *Black's Law Dictionary* (West 11th ed 2019) ("Compensation" is defined as "[p]ayment of damages, or any other act that a court orders to be done by a person who has caused injury to another. In theory, compensation makes the injured person whole.").

¹⁵¹ See Restatement (Second) of Torts § 903 (1979) ("Compensatory damages" are the damages awarded to a person as compensation, indemnity or restitution for harm sustained by him.").

¹⁵² See generally, for example, Robert G. Schwemm, *Compensatory Damages in Federal Fair Housing Cases*, 16 Harv CR-CL L Rev 83 (1981) (describing and analyzing the compensation provided by federal fair housing law); Equal Employment Opportunity Commission, *Remedies for Employment Discrimination*, archived at <https://perma.cc/85QT-JYXV> ("Whenever [employment] discrimination is found, the goal of the law is to put the victim of discrimination in the same position (or nearly the same) that he or she would have been if the discrimination had never occurred.").

of action compensating for property damage, personal injury, or death caused by designated acts of terrorism.¹⁵³ That provision clearly does not make being targeted by, or even present at, an act of terrorism a concrete injury; the plaintiff must show some subjective harm requiring compensation. The functional theory draws the *Spokeo* line between statutory violations that are sufficient for standing and those that are not accordingly.

Third, the functional theory follows from *Spokeo*'s description of Congress's role in identifying new concrete injuries. The Court repeatedly emphasized that Congress's institutional competence in identifying concrete injuries gives it a role in determining which injuries are concrete:

[B]ecause Congress is well positioned to identify intangible harms that meet minimum Article III requirements, its judgment is [] instructive and important. . . . Congress may "elevat[e] to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law." . . . "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."¹⁵⁴

Under the functional approach, after Congress identifies conduct as actionable in a regulatory statute, being faced with that conduct is itself a concrete injury for purposes of Article III. This idea reflects that under *Spokeo*, Congress has not only the power to make previously recognized injuries actionable, but also the power to "define injuries . . . that will give rise to a case or controversy where none existed before."¹⁵⁵ When Congress creates a new regulatory cause of action, it does just that: it recognizes that people faced with the conduct it condemns have been wronged to such a degree that they are entitled to a remedy. Those wrongs are often new, though, in the sense they were not widely recognized before Congress enacted the standard of conduct or scheme of regulation that they violate. Congress makes these judgments using its unique positioning as the primary federal overseer of the economy and the law. Recognizing those judgments is exactly what *Spokeo* instructs the courts to do.

¹⁵³ See 31 CFR § 50.100.

¹⁵⁴ *Spokeo*, 136 S Ct at 1549, quoting *Lujan*, 504 US at 578 (majority), 580 (Kennedy concurring in part and concurring in the judgment) (emphasis in original).

¹⁵⁵ *Spokeo*, 136 S Ct at 1549, quoting *Lujan*, 504 US at 580 (Kennedy concurring in part and concurring in the judgment).

On the other hand, because compensatory statutes aim to make people whole for injuries they suffer, they will never justify liability for someone who cannot allege any subjective harm. Unlike regulatory causes of action, compensatory causes of action do not identify new injuries previously unrecognized at law, but provide additional remedies for old ones, as subjective harm (or even a risk of it) has long been recognized as an injury sufficient for standing.¹⁵⁶ In the context of a compensatory statute, if someone can allege only a “bare procedural violation” that is “divorced from any concrete harm,” they lack standing.¹⁵⁷ In the context of a regulatory cause of action, though, Congress “elevat[es]” the violation itself to the status of a concrete harm.¹⁵⁸

Fourth, the functional approach is consistent with, and indeed supported by, the goals of the case-or-controversy requirement articulated in *Spokeo*. The case-or-controversy requirement “prevent[s] the judiciary’s entanglement in disputes that are primarily political in nature”¹⁵⁹ and “prevent[s] the judicial process from being used to usurp the powers of the political branches.”¹⁶⁰ Preventing political entanglement is clearly important. For example, it is good that the Court stopped the plaintiff in *Lujan* from obtaining a remedy for the Department of the Interior’s allegedly poor regulation of third parties.¹⁶¹ Because the functional solution to concreteness keeps the particularization requirement in place, it will not allow such attempts to be successful. Indeed, it will minimize entanglement by minimizing judicial second-guessing of Congress’s decisions regarding which injuries are concrete. For that reason, my approach also prevents judicial usurpation of Congress’s Article I powers, the other goal of standing. Under my approach, the judge’s role is divining the intent and function of statutes, not making policy decisions.

An objection to the functional reading could be that it removes the role of the courts in ensuring compliance with the case-

¹⁵⁶ See *Spokeo*, 136 S Ct at 1549 (explaining the longstanding recognition of both tangible injuries and intangible ones such as slander).

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*, quoting *Lujan*, 504 US at 578.

¹⁵⁹ *Spokeo*, 136 S Ct at 1551 (Thomas concurring).

¹⁶⁰ *Id.* at 1547 (majority), quoting *Clapper v Amnesty International USA*, 568 US 398, 408 (2013).

¹⁶¹ See *Lujan*, 504 US at 562 (“When, [] as in this case, a plaintiff’s asserted injury arises from the government’s allegedly unlawful regulation (or lack of regulation) of *someone else*, . . . standing . . . is ordinarily ‘substantially more difficult’ to establish.”) (emphasis in original), quoting *Allen v Wright*, 468 US 737, 758 (1984).

or-controversy requirement, undermining the constitutional separation of powers.¹⁶² “Congress may not enact a law that eliminates Article III safeguards that permit federal courts only to use the ‘judicial Power’ to hear ‘Cases’ and ‘Controversies.’”¹⁶³ However, as the Sixth Circuit said, all that is required to avoid undermining separation-of-powers principles is that there “be some limits on Congress’s power to create injuries in fact suitable for judicial resolution.”¹⁶⁴

Because the functional approach has a limiting principle and does not cover all statutorily created causes of action, it complies with this requirement. When Congress enacts compensatory statutes that logically require a subjective injury for liability, the objective approach does not apply, so judicial checks on standing remain in full force. The judiciary must draw and preserve the line. For example, Congress cannot call a standard tort statute “regulatory” to avoid standing requirements. Furthermore, the functional approach does not eliminate other limits on standing, like particularization, actuality, and imminence, that enforce additional ceilings on Congress’s power to define injuries in fact. Thus, my theory does not eliminate “the line between what Congress may, and may not, do in creating an ‘injury in fact’”; rather, it explicates where that line lies, an exercise the Sixth Circuit did not attempt.¹⁶⁵ Under it, “Congress may not say that *anything* is an injury, and by saying so expect the federal courts to agree,” so “there [are] some limits on Congress’s power to create injuries in fact.”¹⁶⁶

Fifth, my approach is consistent with the Supreme Court’s examples of how to apply *Spokeo*. The FCRA requires consumer reporting agencies to give recipients of their reports a summary of the recipient’s obligations under the Act.¹⁶⁷ It also provides a cause of action for consumers whose FCRA rights are willfully violated.¹⁶⁸ The Supreme Court said in *Spokeo* that showing a violation of the mandatory disclosure provision is not sufficient to show a concrete harm.¹⁶⁹ That example makes perfect sense under

¹⁶² See *Hagy*, 882 F3d at 623.

¹⁶³ *Id.*, quoting US Const Art III, § 2.

¹⁶⁴ *Hagy*, 882 F3d at 623.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* (emphasis in original).

¹⁶⁷ See 15 USC § 1681e(d)(1)(B).

¹⁶⁸ See 15 USC § 1681n.

¹⁶⁹ See *Spokeo*, 136 S Ct at 1550.

my theory because the FCRA's private cause of action is compensatory. The FCRA protects the rights of specific individuals against inaccurate information by giving them a right to sue.¹⁷⁰ Its goal is to ensure that agencies are "fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of [] information" about the specific consumer.¹⁷¹ The FCRA's remedial provisions lack some of the features like enhanced damages for frequent noncompliance, consideration of the defendant's resources when setting damages, specific provisions for class actions, and automatic attorney's fees for successful plaintiffs that are included in the FDCPA.¹⁷² The FCRA also requires scienter for statutory and punitive damages, allowing only actual damages otherwise, which distinguishes it from the FDCPA's strict-liability, maximum-deterrence approach.¹⁷³ This suggests that the FCRA creates a regime for compensating individual consumers for individualized harms: when the defendant's information about the consumer is accurate, relevant, and properly used, the consumer suffered no harm and thus does not have standing to seek compensation.

The *Spokeo* Court next said that "[i]t is difficult to imagine" how a credit reporter disseminating a wrong zip code, a technical violation of the FCRA, "could work any concrete harm" without additional allegations.¹⁷⁴ That example perfectly aligns with the functional approach as applied to the FCRA. Under the functional approach, because the FCRA is compensatory, a technical violation of it is not a concrete injury.

Finally, one role of standing is to find the "best plaintiff" to bring the case. A good plaintiff can present the case well and will aggressively seek relief.¹⁷⁵ For the purposes of deterrent statutes, every plaintiff whose statutory rights are violated is as good as any other to achieve this policy priority. From an economic standpoint, any such consumer will theoretically be willing and able to pursue the case regardless of whether they are subjectively harmed, as the major damages in regulatory statutes are statutorily prescribed and do not depend on subjective harm. Thus, granting standing to any plaintiff subject to a statutory violation

¹⁷⁰ See *id.* at 1545.

¹⁷¹ 15 USC § 1681(b).

¹⁷² Compare 15 USC § 1681n, with 15 USC § 1692k. See also Part III.B.

¹⁷³ See 15 USC §§ 1681n, 1681o(a).

¹⁷⁴ *Spokeo*, 136 S Ct at 1550.

¹⁷⁵ See Erwin Chemerinsky, *Closing the Courthouse Door: How Your Constitutional Rights Became Unenforceable* 112–13 (Yale 2017).

would contribute to the standing doctrine's purposes of finding the best plaintiff. A plaintiff whose rights under a compensatory statute are violated but who suffers no subjective injury is most likely not a good plaintiff, though. Because they have no subjective injury, they will likely have minimal damages and thus little motivation to aggressively pursue the case.

All of these benefits to the functional theory of *Spokeo* would be irrelevant, though, if it could not be workably applied to particular causes of action. The power of a theory to persuasively explain examples also increases our confidence in the theory. The remainder of this Comment thus illustrates an application of the functional approach to the circuit split on standing under the mandatory disclosure provisions of the FDCPA. This application results in the objective approach to FDCPA standing.

B. The Objective Approach: Applying the Functional View of *Spokeo* to the FDCPA

This Section applies the functional interpretation of *Spokeo* to the FDCPA and argues that, in the FDCPA, Congress chose to make all violations of the disclosure provisions with respect to any consumer actionable regardless of whether the plaintiff was subjectively harmed. The statute's text, its function in regulating debt collectors through deterrence rather than providing compensation for subjective suffering, and its legislative history all lend support to this conclusion. As a result, any plaintiff whose FDCPA disclosure rights are violated has a concrete injury.

1. The cause of action.

In the operative language creating the FDCPA's private cause of action, the Act states that "any debt collector who fails to comply with any provision of this subchapter with respect to any person is liable to such person."¹⁷⁶ The plain meaning of this provision is that no additional subjective element is required, which is consistent with a noncompensatory function. The word "any" is repeated three times, after all. The Sixth and Seventh Circuits' approaches, which effectively read in a subjective element to standing under the FDCPA, thus implicitly amend the statute in contravention of its plain text.

¹⁷⁶ 15 USC § 1692k(a).

The Sixth Circuit's opinion in *Hagy* might offer a defense of such judicial amending: it observes that “[n]owhere in the Act (or for that matter the legislative record) does Congress explain why the absence of [a disclosure] *always* creates an Article III injury.”¹⁷⁷ In fact, it “did not even try to show” that nondisclosure always creates an injury.¹⁷⁸ But that argument does not work. First, statutes need not explain why Congress makes the judgments that it does on what should be actionable and what should not be. Second, the first section of the FDCPA does explain why nondisclosure is harmful. Congress viewed all violations of the FDCPA as harms because they are instances of “[a]busive debt collection practices [that] contribute to” problems such as “personal bankruptcies, [] marital instability, [] the loss of jobs, and [] invasions of individual privacy.”¹⁷⁹ Third, the legislative history also provides an explanation, as I discuss in Part III.B.4 below.

2. Damages.

The damages provision strongly suggests that the FDCPA's role is to regulate and deter an industry, not compensate for subjective harms. While the FDCPA allows plaintiffs to recover “any actual damage sustained by [a plaintiff] as a result of” violations of the FDCPA,¹⁸⁰ consumers are not limited to actual damages. Individual plaintiffs and every plaintiff who is a member of a class can also receive statutory damages.¹⁸¹ Unlike standard compensatory damages, the FDCPA's statutory damages do not depend on any showing of subjective harm. Indeed, they will exceed actual damages for all but the rarest plaintiffs.¹⁸² This suggests that like punitive damages, their primary function is to deter violators, not to compensate plaintiffs.¹⁸³ The deterrent purpose of the provision is also reinforced by how it sets maximum damages for

¹⁷⁷ *Hagy*, 882 F3d at 622 (emphasis in original).

¹⁷⁸ *Id.* at 623.

¹⁷⁹ 15 USC § 1692(a).

¹⁸⁰ 15 USC § 1692k(a)(1).

¹⁸¹ See 15 USC § 1692k(a)(2).

¹⁸² See *Beattie v D.M. Collections, Inc.*, 764 F Supp 925, 927–28 (D Del 1991) (“With the exception of cases involving egregious and multiple violations, consumers bringing suit for violation of the FDCPA will ordinarily be able to prove only minimal actual damages. . . . Congress apparently concluded that the statutory damages . . . would provide incentive for consumers who could prove only minimal damages to bring suit to enforce the Act.”).

¹⁸³ See Richard A. Posner, *Let Us Never Blame a Contract Breaker*, 107 Mich L Rev 1349, 1354 n 17 (2009) (“Consumer-protection statutes, such as the Fair Debt Collection Practices Act, frequently provide for the award of statutory damages, which are similar to punitive damages.”), citing 15 USC § 1692k.

absent class members in proportion to the size of the debt collector—namely, 1 percent of its total net worth.¹⁸⁴ It takes more damages to deter a larger defendant, so the FDCPA allows for customization based on the defendant's size. The instructions to judges setting statutory damages reinforce the point. In individual actions, judges must consider “the frequency and persistence of non-compliance” and “the extent to which such noncompliance was intentional.”¹⁸⁵ For class actions, the court must additionally consider “the resources of the debt collector,” and “the number of persons adversely affected.”¹⁸⁶ Moreover, defendants may escape liability altogether if their violations are unintentional and occur despite reasonable compliance procedures.¹⁸⁷ These instructions make no sense unless they are mechanisms to allow courts to scale damages for the sake of deterrence. The plaintiff's subjective injury is not affected by the defendant's conduct toward others, intent, compliance program, or resources, but courts consider them when setting damages.

3. Administrative enforcement.

In addition to private plaintiffs, various administrative agencies, most notably the FTC and the CFPB, are authorized to enforce the FDCPA.¹⁸⁸ The Act thus authorizes both private and governmental enforcement of the same regulations. If the major function of the FDCPA were to compensate for subjective harms, the administrative remedy would be out of place. Though administrative agencies can and do seek penalties that provide funds to consumers, such as refunds, their tools include shutting down debt collectors, obtaining injunctions, and collecting civil penalties—activities which do not directly compensate for past harms.¹⁸⁹ Moreover, the primary purposes of the agencies as a

¹⁸⁴ See 15 USC § 1692k(a)(2)(B).

¹⁸⁵ 15 USC § 1692k(b)(1).

¹⁸⁶ 15 USC § 1692k(b)(2).

¹⁸⁷ See 15 USC § 1692k(c).

¹⁸⁸ See 15 USC § 1692l.

¹⁸⁹ See, for example, Letter from Donald S. Clark, Secretary of the Federal Trade Commission, to Richard Cordray, Director of the Consumer Financial Protection Bureau *1–9 (Feb 13, 2017), archived at <https://perma.cc/VG7Z-D4T3> (describing the FTC's enforcement efforts under the FDCPA). Note, though, that both the CFPB and FTC have mechanisms for giving funds they collect to consumers. The CFPB's Civil Penalty Fund can disburse to consumers who cannot obtain other compensation for abusive practices, though it is used only a few times per year. See Consumer Financial Protection Bureau, *Civil Penalty Fund*, archived at <https://perma.cc/7QME-KYDD>. The FTC sends the vast majority of the funds it collects to customers of defendants via refunds. See Federal Trade

whole are regulatory, not compensatory.¹⁹⁰ The strong presence of administrative remedies suggests that the FDCPA's role is to regulate the debt collection industry whenever it violates the provisions with respect to any individual, not merely to provide compensation. That supports the argument that Congress chose not to require a subjective injury for standing under the FDCPA.

In sum, three of the major provisions of the FDCPA—the language authorizing private actions, the damages remedy, and the administrative remedy—all support the objective approach to FDCPA standing.

4. Statutory purpose and legislative history.

The statute's legislative history also supports the proposition that Congress decided to elevate FDCPA disclosure violations as objective harms due to the Act's emphasis on deterrence rather than compensation.

The FDCPA opens with a statement that its purpose is “to eliminate abusive debt collection practices by debt collectors” and “to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged.”¹⁹¹ It was motivated by “abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors.”¹⁹² The language is overwhelmingly regulatory and deterrent in nature, focused on the defendant's conduct rather than compensating for the plaintiff's subjective injury.¹⁹³

The Senate Committee Report on the FDCPA also focused on regulation of debt collectors. “The committee believe[d] that the serious and widespread abuses in this area” justified creating federal legislation.¹⁹⁴ While the bill included a consumer cause of action in addition to administrative remedies, its purpose was to make the regulations “primarily self-enforcing; consumers who

Commission Office of Claims and Refunds, *Annual Report 2017 *1* (2017), archived at <https://perma.cc/GR2Y-PSX9>.

¹⁹⁰ See 12 USC § 5491(a) (announcing the creation of the CFPB to “regulate the offering and provision of consumer financial products or services under the Federal consumer financial laws”); Federal Trade Commission, *About the FTC*, archived at <https://perma.cc/GEP3-BFMF> (announcing the FTC's mission as “[p]rotecting consumers and competition . . . through law enforcement, advocacy, and education”).

¹⁹¹ 15 USC § 1692(e).

¹⁹² 15 USC § 1692(a).

¹⁹³ See generally 15 USC § 1692.

¹⁹⁴ *Fair Debt Collection Practices Act*, S Rep No 95-382, 95th Cong, 2d Sess 3 (1977), reprinted in 1977 USCCAN 1965, 1967.

have been subjected to collection abuses will be enforcing compliance.”¹⁹⁵ Enforcing compliance is not the same role as obtaining compensation, though they may overlap. The Senate envisioned private plaintiffs not as analogues to tort victims, but as private enforcers of the law.¹⁹⁶ The committee also referred to the bill as “comprehensive legislation which fully addresses the problem of collection abuses.”¹⁹⁷ The focus was on solving industry abuse.

Similar ideas can be found in the relevant House Committee Report. The Report introduces the bill as a solution to the lack of “effective regulation of debt collectors” and the “lawless area” around debt collection.¹⁹⁸ While there is plenty of coverage of the abuses of debt collectors toward individuals, the statute is undeniably regulatory. For example, it originally included a minimum recovery of \$100 for successful individual FDCPA claims in addition to actual damages, costs, and attorney’s fees.¹⁹⁹ While this provision was later stripped from the bill, it speaks to the deterrent, as opposed to compensatory, intent of the House.

Therefore, the overall thrust of the statutory purpose and legislative history is toward regulation of the debt collection industry. The creation of a private right of action was merely a convenient way to do it; the contemplated suits had purposes beyond and independent of individual compensation.

Congress’s concerns about avoiding competitive disadvantages to ethical debt collectors competing with unethical ones also support omitting a subjective element from concreteness. All decisions to cut corners by not including disclosures save compliance costs for debt collectors regardless of whether the violations demonstrably caused a particular plaintiff subjective harm. Every violation of the statute thus hurts this purpose. Limiting standing to plaintiffs with subjective injuries would functionally cabin the scope of the Act and decrease the effectiveness with which it achieves this purpose.

¹⁹⁵ *Id.*

¹⁹⁶ See Zachary D. Clopton, *Redundant Public-Private Enforcement*, 69 Vand L Rev 285, 291 (2016) (“The private enforcement of public law has been a central regulatory strategy for decades, with historical antecedents tracing back centuries.”) (citations omitted); Stephen B. Burbank, Sean Farhang, and Herbert M. Kritzer, *Private Enforcement*, 17 Lewis & Clark L Rev 637, 662–84 (2013) (describing private enforcement regimes, their costs and benefits, and the legislative choices that must be made when crafting them).

¹⁹⁷ S Rep No 95-382 at 6 (cited in note 194).

¹⁹⁸ *Debt Collection Practices Act*, HR Rep No 95-131, 95th Cong, 1st Sess 3 (1977).

¹⁹⁹ *Id.* at 15.

One possible objection to this argument is that Congress could not have intended the absurd result commanded by the objective approach in a case like *Hagy*, in which the plaintiffs sued an attorney for not disclosing that he was a debt collector even though his letter was genuinely helpful to the plaintiffs. In that case, at least, it seems that there could not be a concrete injury. But to start with the obvious, a letter that appears on its face to be harmless might not actually be harmless. Congress wanted all consumers to be on guard when receiving letters from debt collectors, hence the requirement to disclose that the sender is a debt collector.²⁰⁰ More fundamentally, there is no justifiable reason to violate the disclosure requirements of the FDCPA. Every violation undercuts the FDCPA's regulations and its purposes of preventing unfair competition and establishing norms in the marketplace for debt. After all, the goal in bringing lawyers like the letter-writer in *Hagy* into the scope of the FDCPA was explicitly to keep a uniform floor of permissible debt collector activity, "requiring them to adhere to the standards of conduct that Congress enacted to govern consumer debt collection activities."²⁰¹

Another possible objection arising from the absurdity canon could be that under the objective approach, any technical violation would be sufficient for plaintiffs to have standing to sue. That would create practical problems, clogging the courts with suits over tiny harms. However, litigation will not increase because compliance costs will be low for ethical collectors. The required disclosures under the FDCPA are the same in every case. Most debt collectors simply copy and paste provisions of the statute.²⁰² Because of these low compliance costs, there is no good reason for a professional debt collector to fail to comply with the FDCPA. Further, my approach might actually decrease suits in the long run by making noncompliance more costly than compliance. Holding collectors liable for violations is therefore not absurd, but a reasonable response to activities that undermine ethical standards in the debt market.

²⁰⁰ For example, helpful-looking letters offering to settle old debt with consumers can actually be attempts to revive the debt, making it legally valid where it otherwise would not be. See *Pantoja v Portfolio Recovery Associates, LLC*, 852 F3d 679, 684–85 (7th Cir 2017).

²⁰¹ *Fair Debt Collection Practices Act Amendments*, HR Rep No 99-405, 99th Cong, 1st Sess 5 (1985), reprinted in 1986 USCCAN 1752, 1756.

²⁰² See Bureau of Consumer Financial Protection, Debt Collection Practices (Regulation F), 84 Fed Reg 23274, 23278 (2019) ("[T]o reduce legal risk, debt collectors typically use the language of the statute in making required disclosures, even though that language can be difficult for consumers to understand.").

5. Consistency with standing under other FDCPA provisions.

The objective approach resolves a current tension between standing under the FDCPA's mandatory disclosure and misrepresentation provisions. When assessing whether debt collectors' representations violate another FDCPA provision, § 1692e's ban on "false, deceptive, or misleading representation[s],"²⁰³ the federal courts use an objective standard: the least sophisticated consumer. The Second Circuit describes its approach, which is representative, in *Arias v Gutman, Mintz, Baker & Sonnenfeldt LLP*:²⁰⁴

We analyze the reasonableness of an interpretation from the perspective of the least sophisticated consumer, who . . . lacks the sophistication of the average consumer and may be naive about the law, but is rational and possesses a rudimentary amount of information about the world. The standard is objective, pays no attention to the circumstances of the particular debtor in question, and asks only whether the *hypothetical* least sophisticated consumer could reasonably interpret the representation in a way that is inaccurate. Employing the least sophisticated consumer standard ensures the protection of all consumers, even the naive and the trusting, against deceptive debt collection practices.²⁰⁵

The implication of this least-sophisticated-consumer approach is that a letter violates the FDCPA if it would confuse the hypothetical least sophisticated consumer regardless of whether the plaintiff was actually confused in the case.²⁰⁶ This objectivity

²⁰³ 15 USC § 1692e.

²⁰⁴ 875 F3d 128 (2d Cir 2017).

²⁰⁵ *Id.* at 135 (citations and quotation marks omitted) (emphasis in original), quoting *Easterling v Collecto, Inc.*, 629 F3d 229, 234 (2d Cir 2012), *Ellis v Solomon & Solomon PC*, 591 F3d 130, 135 (2d Cir 2010), and *Clomon v Jackson*, 988 F2d 1314, 1320 (2d Cir 1993). Note that while not all circuits use the same name for the test, the tests are functionally the same, including the Seventh Circuit's. See, for example, *Pantoja*, 852 F3d at 686 (explaining the "unsophisticated consumer" test which is used "[w]hen handling FDCPA cases"); *Daugherty v Convergent Outsourcing, Inc.*, 836 F3d 507, 511 n 2 (5th Cir 2016) (recognizing that the approaches of the circuits are uniform regardless of the different names given to the tests by the circuits), citing *Peter v G.C. Services LP*, 310 F3d 344, 348 n 1 (5th Cir 2002). Despite the terminological variation, I will use the term "least sophisticated consumer" universally for consistency's sake.

²⁰⁶ See, for example, *Arias*, 875 F3d at 137 (rejecting the defendant's argument that "its misrepresentations are not actionable because *Arias* was not *actually* misled" because the standard is objective) (emphasis in original); *Tsenes v Trans-Continental Credit and Collection Corp.*, 892 F Supp 461, 464 (EDNY 1995) (explaining that the plaintiff's burden

provides benefits for both sides, lowering the burden for plaintiffs while providing debt collectors a uniform target for what standard of clarity their disclosures must meet.²⁰⁷

In line with this interpretation of the FDCPA, various circuits have held that a plaintiff does not have to show that they were actually misled to have standing in a misrepresentation action. For example, in *Pollard v Law Office of Mandy L. Spaulding*,²⁰⁸ the defendant argued that a plaintiff alleging misrepresentation lacked standing because she was not actually subjectively misled.²⁰⁹ Interpreting the FDCPA and its purpose, the First Circuit held that “the FDCPA does not require that a plaintiff actually be confused” and that “the absence of confusion is irrelevant to the standing inquiry.”²¹⁰ The objective misrepresentation itself “comprised an injury attributable to the defendant’s actions.”²¹¹ Other courts have adopted similar rationales.²¹²

Analogously, there should be no subjective component to the injury of failure to disclose. Any other result would create a bizarre inconsistency because the provisions are so similar. First, the mandatory disclosure and misrepresentation sections of the

in a misrepresentation action only includes showing abuse by the defendant, not any subjective harm to the plaintiff).

²⁰⁷ See *Crawford v LVNV Funding, LLC*, 758 F3d 1254, 1259 (11th Cir 2014).

²⁰⁸ 766 F3d 98 (1st Cir 2014).

²⁰⁹ *Id.* at 102.

²¹⁰ *Id.* at 103.

²¹¹ *Id.*

²¹² See, for example, *Tourgeman v Collins Financial Services, Inc.*, 755 F3d 1109, 1116 (9th Cir 2014):

Although Tourgeman could not have suffered any pecuniary loss or mental distress as the result of a letter that he did not encounter until months after it was sent—when related litigation was already underway—the injury he claims to have suffered was the violation of his right not to be the target of misleading debt collection communications. The alleged violation of this statutory right—like those rights at issue in *Havens*, *Robins*, and the other cases that we have noted—constitutes a cognizable injury under Article III.

See also *Papetti v Does 1–25*, 691 F Appx 24, 26–27 (2d Cir 2017) (holding that misleading letters are sufficient for standing under *Spokeo*); *Miller v Wolpoff & Abramson, LLP*, 321 F3d 292, 307 (2d Cir 2003) (holding the same under Article III pre-*Spokeo*).

Several district courts have ruled similarly. See *Johnson v Enhanced Recovery Company, LLC*, 325 FRD 608, 611–14 (ND Ind 2018); *Patterson v Howe*, 307 F Supp 3d 927, 938–39 (SD Ind 2018) (holding that violations of least sophisticated debtor standard create standing regardless of whether the plaintiff was actually misled); *Ceban v Capital Management Services, LP*, 2018 WL 451637, *3–4 (EDNY); *Balon v Enhanced Recovery Company, Inc.*, 264 F Supp 3d 597, 608–10 (MD Pa 2017) (holding that misrepresentation was sufficient for standing under *Spokeo* even when plaintiff claimed they suffered no other injury whatsoever in an attempt to deprive the court of jurisdiction).

FDCPA are tightly bundled. For example, one of the major mandatory disclosure provisions of the FDCPA appears in the section titled “False or misleading representations.”²¹³ Second, both non-disclosure of rights and the misrepresentation of the amount or nature of a debt are prohibited to prevent debt collectors from duping consumers on the terms of repayment. Third, both the misrepresentation and nondisclosure provisions of the FDCPA primarily deter rather than compensate. The approaches of the Sixth and Seventh Circuits, which both require a subjective injury for standing in mandatory disclosure actions in at least some cases, treat the provisions differently despite their strong textual and operative similarities.

The Seventh Circuit faced this problem in *Casillas* and objected that the least-sophisticated-consumer standard is only used to check whether a letter is misleading; it cannot allow people without subjective injuries to sue.²¹⁴ However, this objection mischaracterizes the test. The point of the least-sophisticated-consumer standard is that it is objective, and violations of it are sufficient for standing, not just for liability on the merits. While it is typically used when judging misrepresentation, the arguments above demonstrate the value of consistency in standing across the FDCPA’s misrepresentation and nondisclosure provisions.

A critic could object that *Spokeo* should lead courts to reverse the precedents holding that violations of the least-sophisticated-consumer standard are sufficient for standing. As such, alignment with those precedents is a detriment, not a benefit, to my position. FDCPA standing should be uniform, but it should uniformly require an additional injury beyond a statutory violation. First, though, *Spokeo* has not in fact led the courts to abandon their prior positions on standing for violations of the least-sophisticated-consumer standard.²¹⁵ Second, such a radical

²¹³ 15 USC § 1692e.

²¹⁴ See *Casillas*, 926 F3d at 336 n 3.

²¹⁵ See, for example, *Tourgeman*, 755 F3d at 1114–18 (holding that a consumer had standing without additional allegations of harm when a dunning letter violated the least-sophisticated-consumer standard); *Balon*, 264 F Supp at 608–10 (holding plaintiff had standing from misrepresentations even when the plaintiff themselves argued they lacked it and had no actual damages, citing the “overwhelming majority” of district courts assessing such claims post-*Spokeo*); *Thomas v John A. Youderian Jr, LLC*, 232 F Supp 3d 656, 671–72 (D NJ 2017) (recognizing that even violations of the least-sophisticated-consumer standard that are very unlikely to result in a recovery for the plaintiff on the merits are sufficient for standing); *Bautz v ARS National Services, Inc*, 226 F Supp 3d

change would thus require a strong reason behind it. Because my functional reading of *Spokeo* demonstrates that *Spokeo* in fact requires the objective approach that the courts already follow in the misrepresentation context, the objective approach should be preserved.

C. The Objective Approach Sets Proper Incentives

In addition to its doctrinal advantages, the objective approach to standing has clear policy benefits: it sets proper incentives for defendants. Because showing standing is necessary to hold a defendant liable, different approaches to standing doctrine create different incentives for defendants to abide by statutory requirements.²¹⁶ Broadening standing creates more potential liability and thus deters defendants from engaging in potentially actionable activity. Consequently, more restrictive approaches limit potential defendants' incentives to abide by the statute.

First, requiring plaintiffs to show that they affirmatively planned to assert their FDCPA rights but were foiled by nondisclosure, as *Casillas* did, significantly lowers the probability that any given FDCPA disclosure violation will be actionable. That probability will be especially low for people without the income, education, and social connections which could lead them to understand their rights to dispute their debts. Debt collectors would thus have fewer incentives to comply with the FDCPA when collecting from vulnerable populations. Such a result is at odds with contemporary FDCPA doctrine, which attempts to protect unsophisticated consumers.²¹⁷

Second, any approach with a subjective element will fail to force defendants to internalize the full legal impact of their noncompliance, as a significant number of injuries will be unrecoverable in principle. Any noncompliance is too much noncompliance for the primary goal of the FDCPA: the creation of a universal

131, 143–44 (EDNY 2016) (reaching the same conclusion as the Ninth Circuit in *Tourge-man* post-*Spokeo*).

²¹⁶ See, for example, William M. Landes and Richard A. Posner, *Should Indirect Purchasers Have Standing to Sue Under the Antitrust Laws? An Economic Analysis of Illinois Brick*, 46 U Chi L Rev 602, 608–25 (1979) (analyzing the incentives created by different approaches to antitrust standing).

²¹⁷ See, for example, *Daugherty*, 836 F3d at 511 (explaining the use of the least-sophisticated-consumer standard to fulfill the remedial purpose of the FDCPA). See also *Pantoja*, 852 F3d at 684 (mentioning concerns with “opportunities for mischief and deception, particularly when sophisticated parties aim carefully crafted messages at unsophisticated consumers”).

standard throughout the debt collection industry.²¹⁸ Courts should interpret the FDCPA to encourage uniform compliance to fulfill the statute's purpose—and leaving violations unaddressed frustrates this purpose.²¹⁹

Third, subjective approaches can make liability depend on whether the plaintiff met finicky pleading standards. For example, Casillas's case itself was dismissed because the plaintiff failed to plead that she actually read the debt collector's letter. Casillas did not plead that she affirmatively *did not* read the letter; the complaint was merely silent on the matter, but her case was still dismissed with prejudice.²²⁰ While Judge Barrett later said that Casillas "already knew that she would not dispute her debt"²²¹ to distinguish the case from another, that assertion is not supported by the earlier description of the facts, the decision below, or the allegations in the complaint.²²² Standing is a technical doctrine, but it should not be interpreted to create arbitrary barriers to the plaintiff's day in court.

The objective approach to standing under the FDCPA addresses all of these policy issues. All violations of the FDCPA will be equally pursuable regardless of whether the plaintiff intended to pursue their rights, eliminating the incentive to target unsophisticated consumers.²²³ Moreover, the barriers that standing

²¹⁸ See Part III.B.4.

²¹⁹ One objection to this could be that Congress factored in the standing barrier when determining the ideal level of penalties for deterrence, so removing the standing barrier would actually lead to overdeterrence. Given the language of the FDCPA surveyed in Part III.B.1, though, it is unlikely that Congress envisioned standing being a major obstacle to FDCPA plaintiffs.

²²⁰ See *Casillas*, 926 F3d at 334.

²²¹ *Id.* at 337.

²²² See *id.* at 334; *Casillas v Madison Avenue Associates, Inc.*, 2017 WL 6517568, *2 (SD Ind); Complaint, *Casillas v Madison Avenue Associates, Inc.*, No 1:16-cv-1774, *2–5 (SD Ind filed July 1, 2016). This makes the decision to dismiss the case with prejudice mysterious. Chief Judge Wood's dissent from denial of rehearing en banc emphasized this mystery to argue that the decision may be more radical than it initially appears, as the problems with Casillas's complaint could apparently not be solved even with better pleading. See *Casillas*, 926 F3d at 342 (Wood dissenting from denial of rehearing en banc) ("[S]urely the panel means to do more than alert future plaintiffs in these cases that they should plead that they would stand on their rights and to highlight the imminent loss of numerous substantive protections afforded under the Act. A simple amendment to the complaint would solve that problem.").

²²³ There will probably still be some incentive to target unsophisticated consumers because they are less likely to sue to enforce their rights than more sophisticated consumers, but the objective approach should at least help at the margin.

poses to recovery will be lessened, preventing suboptimal deterrence. Cases will not rise or fall on unusually heightened pleading standards alone.

D. Applications of the Functional Reading of *Spokeo* to Non-FDCPA Contexts

My solution to the existing circuit split regarding the FDCPA's mandatory disclosure requirements flows from the functional reading of *Spokeo*, which emphasizes the differences between deterrent and compensatory statutes. Similar approaches can and should be applied to other consumer protection statutes in other contexts. If a law's text, function, and purpose support viewing it as a mechanism for deterrence, violations of it should be treated as concrete injuries. If they support viewing the law as compensatory, though, violations of it should not be treated as concrete injuries, so plaintiffs should have to show an additional concrete injury to have standing.

Focusing the *Spokeo* question on regulation versus compensation would help the courts to apply the confusing decision to other consumer protection statutes. For example, the courts are currently struggling with distinct disagreements on whether unsolicited cell phone calls and text messages in violation of consumer protection statutes count as "concrete."²²⁴ When resolving those questions, courts should focus not on the nature of the violation itself, but on the regulatory or compensatory role the statute plays in Congress's overall statutory scheme. That would lead to consistency with *Spokeo*, better outcomes, and fewer metaphysical headaches.

The current uncertainty over *Spokeo* also makes it difficult for Congress to determine the scope of standing under any consumer protection statute it passes. My approach would make this much easier; statutes concerned with regulating industries that emphasize deterrence and broad liability would create concrete injuries, while statutes concerned with compensation would not. The analysis of the FDCPA above provides an example of how Congress can choose appropriate texts, structures, and purposes for its statutes to predictably create its desired result and fulfill its role in determining the concreteness of injuries.

²²⁴ See generally, for example, *Salcedo v Hanna*, 936 F3d 1162 (11th Cir 2019); *Susinno v Work Out World, Inc.*, 862 F3d 346 (3d Cir 2017).

CONCLUSION

Courts are currently divided over how to apply the confusing *Spokeo* precedent to the FDCPA's mandatory disclosure requirements. This Comment has proposed a novel solution: removing any subjective harm requirement for standing in mandated disclosure cases. This position is consistent with a new, functional approach to interpreting *Spokeo*. It is also mandated by the FDCPA's structure and legislative history. The objective approach unifies the standing requirements under the FDCPA's disclosure and misrepresentation provisions, preventing an odd tension. Finally, limiting standing with a subjective element would have negative impacts on the incentives of debt collectors, which this solution avoids. Thus, the courts should adopt the objective approach.