CLOSING THE FINANCIAL PRIVACY LOOPHOLE: DEFINING "ACCESS" IN THE RIGHT TO FINANCIAL PRIVACY ACT

INTRODUCTION

There is a hole in Fourth Amendment protection that is teetering on the verge of rapid expansion. The omnipresence of technology in the 21st century has made the use of intermediaries necessary for fully participating in society. From sending messages through Facebook to driving past cellular phone towers, many everyday activities involve sharing information about ourselves with the third parties who give us access to new technology. The scope of privacy law, however, has not advanced at a similar pace. In the 1976 case *United States v. Miller*,[1] the Supreme Court punctured the Fourth Amendment privacy protections set forth in *Katz v. United States*.[2] In *Katz*, the Court had extended protection from unreasonable searches and seizures to areas in which a person has a "reasonable expectation of privacy."[3] Nine years later in *Miller*, the Court decided that there is no legitimate expectation of privacy in information handed over to third parties (in that case, a bank).[4] The Court asserted that "the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities."[5] *Smith v. Maryland* widened this gap in Fourth Amendment protection to include communication information.[6] The Court stated that there is no reasonable expectation of privacy in numbers dialed into phones, since the dialer is aware that the "phone company has facilities for recording this information" and that it does, in fact, record it.[7]

Miller and *Smith* have come to stand for the legal theory of the "third party doctrine." Professor Daniel Solove, a leading expert on privacy law, summarized the theory:

> This doctrine provides that if information is possessed or known by third parties, then, for purposes of the Fourth Amendment, an individual lacks a reasonable expectation of privacy in the

1. 425 U.S. 435 (1976), *superseded by statute*, 12 U.S.C. § 3401 (2012), *as recognized in* SEC v. Jerry T. O'Brien, Inc., 467 U.S. 735, 745 (1984).
2. 389 U.S. 347 (1967).
3. *Id.* at 360 (Harlan, J., concurring).
4. *Miller*, 425 U.S. at 442.
5. *Id.* at 443.
6. 442 U.S. 735 (1979).
7. *Id.* at 743.

> information. In the Information Age, much of what we do is recorded by third parties. The third-party doctrine therefore places an extensive amount of personal information outside the protection of the Fourth Amendment.[8]

Since this information lies outside the scope of Fourth Amendment protection, the showing that the government must make to access a citizen's personal information from a trusted third party is an open question.

Most of the academic commentary on third-party doctrine has focused only on communications privacy.[9] This is surprising because the Court originally formulated the third-party exception from Fourth Amendment protection in the context of an individual's financial records held by a bank.[10] In the age of the data breach, financial privacy and security are as important as communications privacy. One reason for the scholarly avoidance of the financial privacy issue could be that Congress, alarmed by the Court's finding in *Miller*, passed the Right to Financial Privacy Act[11] ("RFPA") to remedy the hole in Fourth Amendment protection left by *Miller*.[12]

Today, however, the privacy of financial records from unwarranted government intrusion is under siege. First, financial records are not protected by the Fourth Amendment.[13] Second, a case making its way through the federal judiciary is asserting a cramped interpretation of the RFPA, which, if adopted by the majority of circuits, would create a loophole allowing banks to release customer information into the public record.[14] Third, in deciding *Spokeo, Inc. v. Robins*, the Supreme Court left open the

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8. Daniel J. Solove, *A Taxonomy of Privacy*, 154 U. PA. L. REV. 477, 528–29 (2006) (footnotes omitted).

9. *See, e.g.*, Monu Bedi, *Facebook and Interpersonal Privacy: Why the Third Party Doctrine Should Not Apply*, 54 B.C. L. REV. 1 (2013); Tim Sheehan, *Taking the Third-Party Doctrine Too Far: Why Cell Phone Tracking Data Deserves Fourth Amendment Protection*, 13 GEO. J.L. & PUB. POL'Y 181 (2015); Glenn Greenwald, *NSA collecting phone records of millions of Verizon customers daily*, THE GUARDIAN (June 6, 2013, 6:05 EDT), http://www.theguardian.com/world/2013/jun/06/nsa-phone-records-verizon-court-order [https://perma.cc/S4MP-ZWSK].

10. *See* United States v. Miller, 425 U.S. 435 (1976), *superseded by statute*, 12 U.S.C. § 3401 (2012), *as recognized in* SEC v. Jerry T. O'Brien, Inc., 467 U.S. 735, 745 (1984).

11. 12 U.S.C. §§ 3401–3422.

12. Richard Cordero, Annotation, *Construction and Application of Right to Financial Privacy Act of 1978 (12 U.S.C.A. §§ 3401 et seq.)*, 112 A.L.R. Fed. 295, § 2[a] (1993) (stating that Congress passed the RFPA because of their concern that, post-*Miller*, the privacy rights of taxpayers were at risk).

13. *Miller*, 425 U.S. at 442.

14. *See* Brackfield & Assocs. P'ship v. Branch Banking & Tr. Co., No. 3:14-cv-524-PLR-HBG, 2015 WL 5177737, at *1 (E.D. Tenn. Sept. 4, 2015), *aff'd*, 645 F. App'x 428 (6th Cir. 2016). *See also* Brief for Appellants at 1–2, Brackfield & Assocs. P'ship v. Branch Banking & Tr. Co., 645 F. App'x 428 (6th Cir. Dec. 16, 2015) (No. 15-6092) [hereinafter Brackfield Brief for Appellants].

possibility of lower courts deciding that statutory violations are not injuries at all—an outcome that would strip a customer of his ability to sue under the RFPA if a bank releases his information.[15] Thus, despite Congress's attempt to safeguard financial records from unwarranted government intrusion, the financial privacy of Americans is being threatened in multiple levels of the judiciary.

The problem culminating from these attacks is the weakening of financial privacy protection for records in the hands of trusted third parties. The solution is this: the Supreme Court's reversal of *Miller*. The Supreme Court created a hole in Fourth Amendment protection in its *Miller* opinion and the remedy offered by Congress is now under siege because of the open-ended *Spokeo* decision and the judiciary's cramped interpretation of the RFPA.[16] Now, it is up to the Supreme Court to reverse *Miller* and stop the erosion of financial privacy.

Part I of this Note will discuss the *Miller* decision and the hole it left in the Fourth Amendment's protection of financial information left in the hands of trusted third parties. Part II will discuss Congress's response to *Miller* in the RFPA. Part III will discuss the cramped interpretation of the RFPA affirmed by the Sixth Circuit, its misapplication of the statute, and policy problems arising from the acceptance of the court's interpretation. Part IV will discuss statutory injuries and how the ambiguous outcome of the *Spokeo* case could threaten financial privacy protections generally and those specifically provided by the RFPA. Part V will discuss the proposed solution to the problem

I. FINANCIAL PRIVACY AND THE *MILLER* DECISION

A flurry of privacy laws, especially those related to safeguarding financial information, were enacted in the 1970s in response to the general distrust of government after the Vietnam War and the growing cache of customer records being stored on computers.[17] This sense of unease was exacerbated when the Supreme Court upheld the Bank Secrecy Act of 1970, which required banks to maintain financial records of customers so the federal government would be able to "enforce the myriad criminal, tax, and

15. Spokeo, Inc. v. Robins, 136 S. Ct. 1540 (2016).

16. For an example of a cramped interpretation of the RFPA, see *Brackfield*, 2015 WL 5177737, at *1.

17. MARK FURLETTI & STEPHEN SMITH, FED. RESERVE BANK OF PHILA., FINANCIAL PRIVACY: PERSPECTIVES FROM THE PAYMENT CARDS INDUSTRY 2 (2003) (noting that "the development of mainframe computers…made the accumulation and storage of detailed information regarding millions of individuals technically feasible").

regulatory provisions of laws"—a function that had been impaired by shoddy recordkeeping.[18] An important limitation on these required records, however, was that they would "not be made automatically available for law enforcement purposes [but could] only be obtained through existing legal process."[19] To address growing concerns about how new technologies could lead to widespread data collection, Congress enacted the Privacy Act of 1974.[20] The purpose of the Privacy Act was "to promote governmental respect for the privacy of citizens" by increasing accountability and legislative oversight with respect to the use of personal information collected by the government.[21] The Act's purpose of increasing customer privacy was thwarted by the 1976 decision in *United States v. Miller*.[22]

Two weeks after deputies in Houston County, Georgia found a "7,500-gallon-capacity distillery, 175 gallons of non-tax-paid whiskey, and related paraphernalia" on his property, Mitchell Miller was charged with conspiring to defraud the government of tax revenues.[23] Alcohol, Tobacco, and Firearms agents found evidence of Miller's untaxed income by issuing subpoenas to the presidents of Miller's bank, requesting his financial records.[24] Copies of Miller's checks obtained from his bank were used as evidence in his trial and he was ultimately convicted.[25] The Court of Appeals for the Fifth Circuit, however, found that the subpoenas were defective and reversed the admission of the checks, finding that their admittance would violate his Fourth Amendment rights.[26] The Supreme Court reversed, reasoning that the financial records of Miller were outside his "zone of privacy" as they were not his private papers but were instead business records owned by the bank.[27] With this reasoning, the third-party

18. Cal. Bankers Ass'n v. Shultz, 416 U.S. 21, 27 (1974). *See also* Sarah Elizabeth Jones & Sandra Tvarian, *A Review of Government Use & Customer Challenges Under the Right to Financial Privacy Act Since 1978*, 1996-AUG NAAG FIN. CRIMES REP. 1, 1 (1996).

19. *Cal. Bankers Ass'n*, 416 U.S. at 27 (quoting H.R. REP. NO. 91-975, at 10 (1970)).

20. 5 U.S.C. § 552a (2012).

21. S. REP. NO. 93-1183, at 1 (1974), *as reprinted in* 1974 U.S.C.C.A.N. 6916, 6916. Other stated purposes include preventing the secret gathering of information about people, preventing illegal surveillance of citizens, and to promote observance of the principle of individual privacy. *Id.*, *as reprinted in* 1974 U.S.C.C.A.N. at 6916–17.

22. *See infra* notes 23–32 and accompanying text.

23. *United States v. Miller*, 425 U.S. 435, 436–37 (1976), *superseded by statute*, 12 U.S.C. § 3401 (2012), *as recognized in* SEC v. Jerry T. O'Brien, Inc., 467 U.S. 735, 745 (1984).

24. *Miller*, 425 U.S. at 437.

25. *Id.* at 438.

26. *Id.* at 437 (The subpoenas were issued by a United States Attorney instead of a judge.).

27. *Id.* at 440. If the agents had tried to execute the warrant on Miller himself, the evidence from the search would not have stood up in court because the warrant was defective. *Id.* at 441. *See also* Joseph R. Mangan, Jr., Comment, *Reasonable Expectations of Privacy in Bank Records: A Reappraisal of* United States v. Miller *and Bank Depositor Privacy Rights*, 72 J. CRIM. L. & CRIMINOLOGY 243, 246

doctrine was created. Justice Powell, delivering the opinion of the Court, wrote:

> The depositor takes the risk, in revealing his affairs to another, that the information will be conveyed by that person to the Government. This Court has held repeatedly that the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities . . . .[28]

Concerned about the *Miller* decision's implication that the Internal Revenue Service could ask for any (or every) citizen's records without recourse, Congress began crafting the RFPA.[29] In a House Report on the Financial Institutions Regulatory Act of 1978,[30] Congress stated, "[W]hile the Supreme Court found no constitutional right of privacy in financial records, it is clear that Congress may provide protection of individual rights beyond that afforded in the Constitution."[31] Thus, Congress enacted the RFPA to "strike a balance between customers' right of privacy and the need for law enforcement agencies to obtain financial records pursuant to legitimate investigations."[32]

II. A RESPONSE TO *MILLER*: THE RIGHT TO FINANCIAL PRIVACY ACT

The RFPA provides two layers of protection for bank customers' privacy.[33] The first layer forbids the government from obtaining customer information without following a set protocol.[34] In order to provide citizens

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n.15 (1981).

28. *Miller*, 425 U.S. at 443 (citations omitted). In making this decision, the Court relied on the assertion in *Katz* that "[w]hat a person knowingly exposes to the public . . . is not a subject of Fourth Amendment protection." *Id.* at 442 (quoting *Katz v. United States*, 389 U.S. 347, 351 (1967)).

29. *See* Cordero, *supra* note 12.

30. The RFPA was introduced as Title XI of this Act. H.R. REP. NO. 95-1383, at 6 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 9273, 9278.

31. *Id.* at 34, *as reprinted in* 1978 U.S.C.C.A.N. at 9306.

32. *Id.* at 33, *as reprinted in* 1978 U.S.C.C.A.N. at 9305.

33. The RFPA defines a "person" as "an individual or a partnership of five or fewer individuals," 12 U.S.C. § 3401(4) (2012), and a "customer" as "any person or authorized representative of that person who utilized or is utilizing any service of a financial institution, or for whom a financial institution is acting or has acted as a fiduciary, in relation to an account maintained in the person's name." *Id.* § 3401(5). For simplicity's sake, I will refer to the plaintiff in an RFPA action as a customer, i.e., an individual with a bank account. Further, the RFPA defines a "financial institution" as "any office of a bank, savings bank, card issuer . . . , industrial loan company, trust company, savings association, building and loan, or homestead association (including cooperative banks), credit union, or consumer finance institution," located in the United States or its territories. *Id.* § 3401(1). I will use "financial institution" or "bank" to mean financial institution within the RFPA.

34. *Id.* § 3402.

with a blanket of privacy, the RFPA states that, limited exceptions aside,[35] "no Government authority may have access to or obtain copies of, or the information contained in the financial records of any customer from a financial institution" unless such records are "reasonably described" and either the customer has authorized the disclosure, or such records are disclosed pursuant to a legitimate legal process, as listed in the statute.[36] The RFPA further reinforces the protection of customer privacy within the government by limiting interagency transfers of the information.[37] In the House Report describing this section of the RFPA, the writers explain, "This section provides that information obtained under the title may not be used or retained for any purpose other than the specific statutory purpose for which the information was originally obtained, and that the information may not be transferred to another government agency without specific statutory authorization."[38] Thus, once a government agency obtains a customer's information, it is not only prohibited from sharing such information with other branches, but also limited to how the information is used even within that agency.

While § 3402 provides protection by preventing the customer's information from being *obtained* by government authorities, § 3403 provides protection by preventing the customer's information from being *released* by their financial institution.[39] § 3403, titled "Confidentiality of financial records," states, "No financial institution . . . may provide to any Government authority access to or copies of, or the information contained

35. *Id.* Under the statute, a financial institution may release customer information if that information "may be relevant to a possible violation of any statute or regulation." *Id.* § 3403(c). Even then, the only information allowed to be disclosed is the customer's name (or the account involved) and the nature of the suspected legal activity. *Id.* A bank can also release customer records "as an incident to perfecting a security interest, proving a claim in bankruptcy, or otherwise collecting on a debt." *Id.* § 3403(d)(1). Finally, a government authority can legally obtain customer information without adhering to the safeguards of the RFPA for certain intelligence and protective purposes or in emergency situations (i.e., if delay in access "would create imminent danger of— (A) physical injury to any person; (B) serious property damage; or (C) flight to avoid prosecution."). *Id.* § 3414(b)(1).

36. *Id.* § 3402. Financial records may be released without violating the statute when the records are reasonably described and disclosed in response to an administrative subpoena or summons, a search warrant, a judicial subpoena, or a formal written request—a last resort when all the other options, including attempts to notify the customer, have failed. *Id.* §§ 3402(2)–(5).

37. *Id.* § 3412(a) ("Financial records originally obtained pursuant to this chapter shall not be transferred to another agency or department unless the transferring agency or department certifies in writing that there is reason to believe that the records are relevant to a legitimate law enforcement inquiry . . . ."). § 3412(a) also allows for interagency transfers when "there is reason to believe that the records are relevant to . . . intelligence or counterintelligence activity, investigation or analysis related to international terrorism within the jurisdiction of the receiving agency or department." *Id.*

38. H.R. REP. NO. 95-1383, at 35 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 9273, 9307.

39. 12 U.S.C. § 3403 (2012).

in, the financial records of any customer except in accordance with the [RFPA]."[40] Further, the section prohibits a financial institution from releasing the information "until the Government authority seeking such records certifies in writing to the financial institution that it has complied with the applicable provisions of this chapter."[41] The latter component seems to be forbidding a financial institution from voluntarily releasing customer information, as discussed *infra* Part III–C(2).

Finally, the RFPA prescribes liability in § 3417, stating that any government agent or financial institution obtaining or disclosing financial records about a customer in violation of the RFPA is liable to the customer for $100 "without regard to the volume of records involved", actual and punitive damages (if applicable), and, if the customer is successful in her claim, attorney's fees.[42]

III. *BRACKFIELD*'S CRAMPING OF THE RIGHT TO FINANCIAL PRIVACY ACT

Though the RFPA appears relatively straightforward in its application, like much of the law, it contains some room for ambiguity. The RFPA prohibits financial institutions from granting the federal government "access to" customer information.[43] But, since its passage in 1978, there has been almost no case law interpreting one of the key phrases in the statute: "access to."[44] A decision on the scope of the words "access to" could mean the difference between the RFPA allowing banks to publish customer information freely, so long as there is no government authority waiting to accept it, and prohibiting a bank from releasing the information at all unless certain conditions are met.[45] On September 4, 2015, the District Court in the Eastern District of Tennessee ruled that the RFPA had not been violated

40. *Id.* § 3403(a).
41. *Id.* § 3403(b).
42. *Id.* § 3417(a).
43. *See supra* note 40 and accompanying text.
44. This author was unable to find an interpretation of the phrase "access to" in any case law or legislative history of the RFPA. In their appeal, the *Brackfield* plaintiffs note this fact with a level of incredulity in their statement to the Sixth Circuit Court of Appeals:

> The instant appeal presents this Court with a surprising apparent issue of first impression with respect to the interpretation of the RFPA. Notwithstanding that the RFPA has been law for several decades, it appears that there has been no judicial construction of one of the central provisions of this banking privacy law which affords a private right of action to those who can show a single violation . . . . Plaintiffs are unaware of any trial or appellate court in the United States, state or federal, addressing Plaintiffs' common-sense interpretations of the RFPA.

Brackfield Brief for Appellants, *supra* note 14, at 1–2.

45. For a list of exceptions to this outcome, as set out in the RFPA, see 12 U.S.C. § 3402, discussed *supra* note 36 and accompanying text.

when the financial institution Branch Banking & Trust (BB&T) released a customer's financial information into the public record.[46] The court's interpretation of the RFPA's reach was affirmed in an unpublished opinion by the Court of Appeals for the Sixth Circuit.[47] In deciding that a bank may publish customer information without violating the RFPA, *Brackfield & Associates P'ship v. BB&T Co.* exemplifies the gaps in the current body of privacy law created by the third party doctrine despite the increasingly prominent concern about keeping personal information private in a post-Snowden[48] world.[49]

Although the Sixth Circuit's decision in *Brackfield* is not binding authority, its narrow interpretation of the RFPA, if accepted by lower courts and other circuits, would significantly reduce the privacy protections Americans have over their financial records.[50] This is of even greater importance in a time when people are more concerned than ever about protecting the privacy of their personal information.[51] Additionally, although this decision is not binding on other circuits, its holding will likely have a disproportionate impact on the judiciary's treatment of the RFPA going forward since there are no cases interpreting the phrase "access to" in

46. Brackfield & Assocs. P'ship v. Branch Banking & Tr. Co., No. 3:14-cv-524-PLR-HBG, 2015 WL 5177737, at *1 (E.D. Tenn. Sept. 4, 2015), *aff'd*, 645 F. App'x 428 (6th Cir. 2016). While RFPA generally prohibits banks from releasing an individual's private information, there is an exception allowing public disclosure in order to perfect the financial institution's interest in that customer's property. *See* 12 U.S.C. § 3403(d). Here, there was no claim that the information was disclosed to perfect BB&T's interest, so this case is particularly illustrative of the problem of interpreting the RFPA narrowly, where it only prohibits the release of customer information to the public when there is a government agency waiting to receive it. *See* discussion *infra* Part III-C.

47. *Brackfield*, 645 F. App'x 428 (6th Cir. 2016).

48. Edward Snowden, "the individual responsible for one of the most significant leaks in US political history[,]" revealed the mass surveillance of American citizens being conducted by the National Security Agency in the summer of 2013. Glenn Greenwald et al., *Edward Snowden: the whistleblower behind the NSA surveillance revelations*, THE GUARDIAN (June 11, 2013, 9:00 EDT), http://www.theguardian.com/world/2013/jun/09/edward-snowden-nsa-whistleblower-surveillance [https://perma.cc/AKU3-EXAU].

49. *See* Neil M. Richards & Daniel J. Solove, *Prosser's Privacy Law: A Mixed Legacy*, 98 CAL. L. REV. 1887, 1889 (2010) ("Today, the chorus of opinion is that the tort law of privacy has been ineffective, particularly in remedying the burgeoning collection, use, and dissemination of personal information in the Information Age.").

50. America has "a patchwork of federal and state privacy laws that separately govern the use of personal details in spheres like patient billing, motor vehicle records, education and video rental records." Natasha Singer, *An American Quilt of Privacy Laws, Incomplete*, N.Y. TIMES (Mar. 30, 2013), http://www.nytimes.com/2013/03/31/technology/in-privacy-laws-an-incomplete-american-quilt.html. Alternatively, the European Union has blanket data protection that sets guidelines for how citizen information may be collected and used, no matter the industry. *Id.* Thus, when an American privacy statute is deemed ineffective by the courts, privacy protection for Americans is reduced significantly for that area or sector.

51. *See* Neil M. Richards, *Four Privacy Myths*, *in* A WORLD WITHOUT PRIVACY? 33 (Austin Sarat ed., 2015).

the RFPA.[52]

In a broader sense, the *Brackfield* decision is important because information privacy law is a relatively new area of jurisprudence and, because of that, "privacy doctrines in one area are being used to inform and structure legal responses in other areas."[53] Because of this potential for later courts to give more weight than is warranted to earlier decisions in emerging areas of law, it is important for today's courts to consider the ease with which information can be disseminated when interpreting privacy statutes—especially those courts which are the first to declare a statute's meaning. Even in the much-maligned *Miller* case, Justice Brennan's dissent recognized the need for the law to take account of changes in access to information, stating:

> Development of photocopying machines, electronic computers and other sophisticated instruments have accelerated the ability of government to intrude into areas which a person normally chooses to exclude from prying eyes and inquisitive minds. Consequently, judicial interpretations of the reach of the constitutional protection of individual privacy must keep pace with the perils created by these new devices.[54]

Since the mid-seventies, information collection and dissemination has become even more commonplace as the Internet has become a part of our daily lives. However, the *Brackfield* judgment reveals that even the ambiguities in old laws are still being interpreted as limiting privacy protections against the spread of personal information.

Part III will focus on analyzing "access to" in the phrase "[n]o financial institution . . . may provide to any Government authority access to or copies of, or the information contained in, the financial records of any customer" in § 3403.[55] This Part of the Note looks to answer the questions: Does releasing a customer's information into the public record constitute providing a government authority "access to" that information? Or is a more direct link required between the financial institution releasing the information and a government authority accessing it? To answer that question, this Note analyzes the meaning of the RFPA's phrase "access to"

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52. *See supra* note 44 and accompanying text.

53. DANIEL J. SOLOVE & PAUL M. SCHWARTZ, CONSUMER PRIVACY AND DATA PROTECTION 2 (2015).

54. United States v. Miller, 425 U.S. 435, 451–52 (1976) (Brennan, J., dissenting) (quoting Burrows v. Superior Court, 529 P.2d 590, 596 (Cal. 1974)).

55. 12 U.S.C. § 3403(a) (2012).

in light of the applicable canons of interpretation, existing case law interpreting the RFPA, and the legislative history preceding the act, concluding with a recommended interpretation considering the need for modern privacy laws. The author recommends interpreting the RFPA as prohibiting financial institutions from granting a government authority access to a customer's financial information by releasing such information into the public record when such an action falls outside the listed exceptions. The RFPA grants customers a cause of action against either, or both, of two entities in violation of the statute: a financial institution and a government authority.[56] This separation of entities against which claims can be brought protects customer information in two ways. It allows aggrieved customers whose financial information has been improperly disclosed a right of action against (1) the governmental authority that obtained the records,[57] and (2) the financial institution[58] that disclosed them.[59]

A. The Brackfield Facts

To analyze how the *Brackfield* court misapplied the RFPA, as well as how the phrase "access to" functions in the RFPA, it is first necessary to lay out the facts from *Brackfield*.[60] Brackfield & Associated Partnership and Eugene Brackfield (the general partner) were customers of BB&T.[61] In the course of their relationship, BB&T issued the plaintiffs (collectively "Brackfield") an open line of credit on the condition that Brackfield routinely provide BB&T with detailed financial information about the company, including a spreadsheet of its assets and liabilities.[62] BB&T and

56. *Compare id.* § 3402 (prohibiting access to financial records by government authorities), *with id.* § 3403 (prohibiting financial institutions from providing "access to or copies of, or the information contained in, the financial records of" customers).

57. *See id.* § 3402.

58. *See id.* § 3403.

59. Discussed further *infra* Part III-C(2). *See also* Tucker v. Waddell, 83 F.3d 688, 692 (4th Cir. 1996) ("Examination of the Right to Financial Privacy Act indicates that Congress there recognized a distinction between limiting *disclosure* of information and limiting *access* to information."); Lopez v. First Union Nat'l Bank of Florida, 129 F.3d 1186, 1190 (11th Cir. 1997) ("Among other things, the RFPA defines the conditions in which financial institutions may disclose an individual's financial records, defines the conditions in which government officials may access an individual's financial records, and provides a civil cause of action for anyone injured by a violation of the act's substantive provisions.") (citations omitted).

60. Brackfield & Assocs. P'ship v. Branch Banking & Tr. Co., No. 3:14-cv-524-PLR-HBG, 2015 WL 5177737 (E.D. Tenn. Sept. 4, 2015).

61. *Id.* at *1.

62. *Id.* The company is a partnership of five or fewer people so it qualifies as a "person" within the meaning of the RFPA. *See* 12 U.S.C. § 3401(4) (2012) (defining a person as "an individual or a partnership of five or fewer individuals").

Brackfield contractually agreed that no real property assets would serve as collateral on the loan.[63] Weeks after this agreement, BB&T filed a UCC financing statement with the Tennessee Secretary of State,[64] which need only contain the debtor's and creditor's name and address, and a general indication of the collateral property.[65] BB&T, however, included a complete listing of the assets and liabilities of the company and filed it (along with the UCC) with the Secretary of State, as well as the Register of Deeds[66]—neither of which constitute a "government authority" for the purposes of § 3401(3) since these are employees of the state and the RFPA only refers to federal agents.[67] After these filings, the UCC and its attached financial documents become part of the public record "to which the entire world, including any and all government agencies or authorities, had free and open access."[68] Since Brackfield's property was contractually excluded as collateral, the bank's recording of the UCC did not perfect a security interest in the property.[69] Additionally, even if it would have perfected such an interest, the inclusion of the company's un-redacted financial information offered no greater security than filing the UCC without that information would have offered.[70]

The injuries flowing from a bank publishing a customer's financial information are difficult to trace since such injuries deal more with a business's reputation than immediate losses. For example, a commercially reasonable title insurer would not insure property over which the lender appears to claim a security interest, a commercially reasonable buyer would not purchase property without title insurance, and a commercially

63. *Brackfield*, 2015 WL 5177737, at *1.

64. *Id.* Lenders file Uniform Commercial Code-1 (UCC) financing statements with the state to announce that the lender has or may have an interest in the debtor's personal property. *UCC Financing Statement*, LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/wex/ucc_financing_statement.

65. *Brackfield*, 2015 WL 5177737, at *1.

66. *Id.*

67. *See* 12 U.S.C. § 3401(3) (2012).

68. *Brackfield*, 2015 WL 5177737, at *1 (as asserted by Brackfield).

69. Such an act would be allowed under the RFPA. *See* 12 U.S.C. § 3403(c) (2012).

70. *See* U.C.C. § 9-502 (AM. LAW INST. & UNIF. LAW COMM'N 2010) (listing the requirements for a UCC filing). In addition to the first UCC filing, BB&T filed an amended version of the same information again in 2013. *Brackfield*, 2015 WL 5177737, at *2. The second filing occurred after Brackfield discovered that BB&T "purported to encumber assets beyond those to which the parties agreed," and Brackfield notified BB&T of the incorrect information. *Id.* at *2. The second UCC filing, although amended, still "contained unredacted financial records not incident to the perfection of a security interest in any of the real property described therein." *Id.* Brackfield claimed that each of these filings amounted to an RFPA violation and entitled them to the $100 statutory damages. Complaint at ¶¶ 49, 85–86, Brackfield & Associates P'ship v. Branch Banking & Tr. Co., No. 3:14-cv-524-PLR-HBG, 2015 WL 5177737 (E.D. Tenn. Sept. 4, 2015) [hereinafter Brackfield Complaint].

reasonable lender requiring a first priority lien against a property would not accept that property as collateral.[71] Thus, Brackfield would conceivably suffer the damages of receiving less favorable loan rates because of the apparent interest in the property, as well as the reputation losses associated with the release of sensitive financial information about himself and his company. These damages would accumulate even without consideration of the potential breach of Brackfield's financial privacy, which creates an even more nebulous injury.

Ultimately, the court granted BB&T's Motion to Dismiss for failure to state a claim under the RFPA.[72] It reasoned that since BB&T did not disclose Brackfield's information directly to a government authority (instead putting it into the public record, where a government authority can later obtain it), the customers had no claim.[73] The court later provided that for Brackfield to succeed in this claim, they "need only establish that their information was obtained by the Government."[74] The next sections of this Note will explain how the court misapplied the RFPA by overlooking the "access to" provision of the statute altogether, and by requiring government obtainment for a successful RFPA claim against a financial institution.

B. How Brackfield Misapplied the Right to Financial Privacy Act: Defining "Access to"

No appellate court has interpreted the meaning of the RFPA's statutory phrase "access to."[75] To understand the meaning and scope of the phrase, it is first necessary to look at the RFPA's plain text, and then analyze the phrase using established canons of statutory construction. Remedial legislation should be broadly construed, every word of a statute is to be given effect, the term "or" is to be interpreted as disjunctive, and the inclusion of one thing implies the exclusion of others (*expressio unius*).[76]

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71. These injuries were among those listed in the *Brackfield* complaint. Brackfield Complaint, *supra* note 70, at ¶¶ 96–99. Additionally, the Supreme Court has recognized that "the interests in privacy fade when the information involved already appears on the public record." Cox Broad. Corp. v. Cohn, 420 U.S. 469, 494–95 (1975). Thus, a customer's information, once on the public record, could be widely circulated—intensifying the injuries.

72. *Brackfield*, 2015 WL 5177737, at *3.

73. *Id.* at *2–3.

74. *Id.* at *3.

75. *See* Brackfield Brief for Appellants, *supra* note 14, at 1–2. *See also supra* note 44 and accompanying text.

76. Canons are helpful tools for judicial interpretations of ambiguous statutes. 2A NORMAN J. SINGER & J.D. SHAMBIE SINGER, SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 45:13 (7th ed. 2008). However, "[a] rule of construction [is] only an aid to fulfilling the legislature's intent; as such it [is] always rebuttable by more specific matter from the statutory text or from legislative history."

Black's Law Dictionary defines "access" as "[a] right, opportunity, or ability to enter."[77] Generally, courts assume that the words in a statute take on their ordinary meaning, or, in other words, how an ordinary or reasonable person would understand them.[78] In the RFPA, following the ordinary meaning of the word "access," the government *does* have access to customer financial information released into the public record. Specifically, when a bank releases a customer's information into the public record,[79] to which government agents have access (as members of the public), they have the opportunity to enter the public record and access the files therein. The question now becomes whether this generalized access is the type of access contemplated by the RFPA. When a statute is ambiguous, the interpreter is not restricted to the plain language of the text and may look beyond the language into that statute's legislative history to search for legislative intent.[80]

To uncover the phrase's intended meaning, it is helpful to analyze the context within which the RFPA was enacted. The Supreme Court's decision in *Miller*, which prompted lawmakers to pass the RFPA, resulted in giving law enforcement agencies unfettered access to financial records as long as they obtained the records from the bank and not the customer herself. [81] Because Congress passed the RFPA as remedial legislation (i.e., a statute designed to provide a remedy "for the enforcement of rights and the redress of injuries")[82] in response to *Miller*, it should be "construed broadly to effectuate its purposes."[83] The legislative history leading up to the RFPA's

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JAMES WILLARD HURST, DEALING WITH STATUTES 56–57 (1982).

77. *Access*, BLACK'S LAW DICTIONARY (10th ed. 2014). *See also* MERRIAM-WEBSTER DICTIONARY (11th ed. 2015) (defining "access" as "freedom or ability to obtain or make use of something").

78. *See* WILLIAM N. ESKRIDGE, JR. ET AL., CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 819–20 (3d. ed. 2001); 2A NORMAN J. SINGER & J.D. SHAMBIE SINGER, SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 46:1 (7th ed. 2008) (noting the plain meaning rule and Supreme Court's insight that "the meaning of the statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, … the sole function of the courts is to enforce it according to its terms.").

79. That is to say, the customer's information was put into the public record without perfecting any legitimate interest in the property (which is a listed exclusion to RFPA violations). *See* 12 U.S.C. § 3403(d) (2012).

80. 2A NORMAN J. SINGER & J.D. SHAMBIE SINGER, SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 46:1 (7th ed. 2008).

81. *See* United States v. Miller, 425 U.S. 435, 443 (1976) *superseded by statute*, 12 U.S.C. § 3401 (2012), *as recognized in* SEC v. Jerry T. O'Brien, Inc., 467 U.S. 735, 745 (1984).

82. 3 NORMAN J. SINGER & J.D. SHAMBIE SINGER, SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 60:2 (7th ed. 2008).

83. *See* Tcherepnin v. Knight, 389 U.S. 332, 336 (1967) ("[W]e are guided by the familiar canon of statutory construction that remedial legislation should be construed broadly to effectuate its purposes.").

enactment states its purpose as "strik[ing] a balance between customers' right of privacy and the need of law enforcement agencies to obtain financial records pursuant to legitimate investigations."[84] It follows that the RFPA's purpose was to give customers a legitimate expectation of privacy that the *Miller* Court found they do not constitutionally have. A broadly construed interpretation of the RFPA would err toward protecting a customer's privacy when ambiguities between the rights of the banks and the rights of its customers arise, as seen in *Brackfield*.

Another canon that serves to clarify the phrase "access to" is "the elementary principle that requires an interpreter 'to give effect, if possible, to every clause and word of a statute.'"[85] Through this lens, instead of reading § 3403(a) as prohibiting financial institutions from providing "any Government authority access to or copies of, or the information contained in, the financial records of any customer[,]"[86] it would be read to prohibit the bank from performing three discrete kinds of acts: providing access to the records, providing copies of the records, or providing the information contained within the records.[87] The latter reading logically follows from the principle of interpretation that "[d]ifferent words used in the same . . . statute are assigned different meanings whenever possible."[88]

The statute's use of the disjunctive term "or" further supports the interpretation that "access to" has an independent meaning and is not simply a repetitive reinforcement of "copies of." In referring to the word "or," the Supreme Court explained that the term's "ordinary use is almost always disjunctive, that is, the words it connects are to 'be given separate meanings.'"[89] By this understanding, any one of the three actions (providing access to, copies of, or information contained in the customer's records) is

84. H.R. REP. NO. 95-1383, at 33 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 9273, 9305.

85. King v. Burwell, 135 S. Ct. 2480, 2498 (2015) (quoting Montclair v. Ramsdell, 107 U.S. 147, 152 (1883)). The Supreme Court has pointed out, however, that "[l]awmakers sometimes repeat themselves" perhaps because of their "lawyerly penchant for doublets (aid and abet, cease and desist, null and void)." *Id.* But here, where reading the language as duplicative would render "access to" as completely meaningless, this canon is rightly employed. After all, "[l]awmakers do not . . . tend to use terms that 'have no operation at all.'" *Id.* (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 174 (1803)).

86. 12 U.S.C. § 3403(a) (2012).

87. Brief of Law in Opposition to Motion to Dismiss at 6, Brackfield & Assocs. P'ship v. Branch Banking & Tr. Co., No. 3:14-cv-00524-PLR-HBG, 2015 WL 5177737 (E.D. Tenn. Sept. 4, 2015) [hereinafter Brackfield Response to Motion to Dismiss].

88. 2A NORMAN J. SINGER & J.D. SHAMBIE SINGER, SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 46:6 (7th ed. 2008).

89. United States v. Woods, 134 S. Ct. 557, 567 (2013) (quoting Reiter v. Sonotone Corp., 442 U.S. 330, 339 (1979)). 1A NORMAN J. SINGER & J.D. SHAMBIE SINGER, SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 21:14 (7th ed. 2008) ("Generally, courts presume that "or" is used in a statute disjunctively unless there is clear legislative intent to the contrary.") (footnote omitted).

sufficient by itself to trigger a violation of the RFPA. This expansiveness shows Congress' attempt to broadly protect customer information from unwarranted government intrusion.[90]

Finally, even if one is not inclined to interpret the phrase "access to" as a distinct and separate violation, the *expressio unius* maxim, which is the understanding that the inclusion of some things implies the exclusion of others, would render BB&T's actions in *Brackfield* an RFPA violation.[91] The RFPA lists exceptions to liability when, among other things, there is a possible threat to national security, the bank has a good faith belief that a customer is engaging in illegal activity, or the bank is pursuing a legitimate lien or other claim on the customer's property.[92] Since there are exceptions specifically promulgated by the RFPA, a logical assumption is that if the bank's action is not on that list, then its actions are punishable under the RFPA.[93]

C. How Brackfield Misapplied the Right to Financial Privacy Act:

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90. *See* H.R. REP. NO. 95-1383, at 33 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 9273, 9305 ("[The RFPA] is intended to protect the customers of financial institutions from unwarranted intrusion into their records while at the same time permitting legitimate law enforcement activity.").

91. This interpretive tool is listed last intentionally because it does not enjoy the same legal footing as the previously listed canons. "The expressio unius maxim receives wide legal application, yet there is nothing peculiarly legal about it. Instead, the maxim is a product of 'logic and common sense,' and derives from the general understanding and experience that when people say one thing they do not mean something else." 2A NORMAN J. SINGER & J.D. SHAMBIE SINGER, SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 47:24 (7th ed. 2008) (internal footnotes omitted). Despite its informal roots, *expressio unius* is still widely used by judges when faced with ambiguity. *Id.*

92. *See* 12 U.S.C. §§ 3403(c)–(d) (2012). It is also worth noting that the exceptions to liability listed in the RFPA are relatively broad. For a list of specific exceptions, see *supra* note 35 and accompanying text. In addition to these specific exemptions, the RFPA also provides an exemption for liability when a financial institution discloses any financial records that are not identified or identifiable as being derived from the financial records of a particular customer. *See* 12 U.S.C. § 3413(a) (2012). Section 3417, which lists the circumstances under which a customer may sue for disclosure, further shields financial institutions by allowing a good-faith defense that states financial institutions cannot be held liable when they rely on faulty government certificates in good faith. *See id.* § 3417(c). The fact that there are so many exceptions to holding a bank liable suggests that Congress intended that similar behaviors *not* listed in an exception should be dealt with harshly. Thus, as a matter of policy, the lax standard of liability the RFPA places on banks should be balanced with a broader reading of "access" in order to be able to truly "strike a balance between customers' right of privacy" and the needs of law enforcement to investigate criminal behavior. *See* H.R. REP. NO. 95-1383, at 33 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 9273, 9305.

93. However, this canon is only used when the intent of the statute is not apparent on its face. United States v. Barnes, 222 U.S. 513, 519 (1912) ("The maxim invoked expresses a rule of construction, not of substantive law, and serves only as an aid in discovering the legislative intent when that is not otherwise manifest."). The argument presented in this Note is that the RFPA's intent is clear on its face. However, to the extent that it is not clear (as evidenced by the dismissal by the *Brackfield* court), this canon shows that in resolving a perceived ambiguity, the result should be the same: publishing a customer's record is not allowed by the statute.

Requiring Government Obtainment

Under the presumption that the government has access to a customer's published financial information because the public record is indiscriminate in who can access it, the remaining question is whether the RFPA anticipated such access, and thus whether a customer can pursue statutory damages under the RFPA.[94] As mentioned earlier, there are few cases interpreting the exact meaning of what aggrieved customers must show to establish standing to sue for an alleged RFPA violation.[95] The protection of a customer's information is twofold: the RFPA prevents the bank from releasing that information and it prevents the government from obtaining the information.[96] So, it follows that to sue under each of the sections, the court would require a different showing of proof: that either the bank released the information or the government obtained it.[97] According to *Brackfield*, however, for an individual to establish standing for an RFPA claim against a bank (via § 3403) for putting the individual's information in the public record, "[p]laintiffs need only establish that their information was obtained by the Government."[98] This sentence was central to the court's decision to dismiss *Brackfield*.[99] The court's assertion, however, misapplies the RFPA.

1. Amidax: A Case Involving Government Obtainment

To understand why this sentence is misguided in the context of the *Brackfield* case, it is helpful to consider a case in which it is aptly used. A nearly identical statement to the one in *Brackfield* appears in a 2009 decision by the Southern District of New York when it was faced with deciding what a customer must prove to sue for an RFPA violation in a slightly different context.[100] There, the court stated that to establish standing, a "plaintiff need

94. *See* discussion *infra* Part IV.

95. *See* Brackfield Brief for Appellants, *supra* note 14, at 1–2.

96. *Compare* 12 U.S.C. § 3402 (2012), *with id.* § 3403. *See also* discussion *infra* Part III-C(2).

97. The wording of the RFPA's § 3417, entitled "Civil penalties," supports the notion that there can be an action against either the financial institution or the government: "Any agency or department of the United States *or* financial institution *obtaining or disclosing* financial records . . . is liable to the customer . . . ." 12 U.S.C. § 3417(a) (2012) (emphasis added). For a discussion of the preferred interpretation of "or" as a disjunctive term, see discussion *supra* Part II.

98. Brackfield & Assocs. P'ship v. Branch Banking & Tr. Co., No. 3:14-cv-524-PLR-HBG, 2015 WL 5177737, at *3 (E.D. Tenn. Sept. 4, 2015).

99. *See id.* ("The problem for Plaintiffs is that taken in its totality, their Complaint does not allege that any of their financial information was disclosed to the Government. To establish [standing], Plaintiffs need only establish that their information was obtained by the Government.").

100. *See* Amidax Trading Grp. v. S.W.I.F.T. SCRL (*Amidax I*), 607 F. Supp. 2d 500 (S.D.N.Y.

only establish that *its* information was obtained by the government."[101] In that case, Amidax Trading Group (Amidax) sued SWIFT, their financial institution, and the government, for (among other things) violating the RFPA by unlawfully providing the U.S. Treasury Department with Amidax's financial information.[102] The Treasury Department "issued a 'narrowly targeted subpoena' to SWIFT, seeking only records of individuals 'tied to terrorism.'"[103] Amidax alleged that SWIFT did not comply with the constraints of the subpoena, and instead handed over their entire database of customer information.[104] Amidax's only proof of this claim, however, was one anonymous source from a *New York Times* article, which stated that the entire database had been handed over, and a statement by the Treasury Secretary that stated that SWIFT had offered "to give them all the data."[105] Contradictory evidence presented (including facts from the same *New York Times* article from which the quote was pulled) showed that "SWIFT made clear that it could provide data only in response to a valid subpoena and insisted that the data be used only for terrorism investigations."[106] Thus, Amidax's RFPA claim was dismissed for lack of standing when Amidax was unable to show that *their specific information* was among the records handed over to the government.[107]

In this case, the financial institution provided both access to and provision of *some* customer information to the government. The customers, therefore, could have established standing only by showing that their information was among the records obtained by the government.[108] In other words, the government's obtainment of the customer information implies that it had access, for it could not have obtained the information without first having access to it. Thus, the requirement that the customer "need only

2009), *aff'd*, 671 F.3d 140 (2d Cir. 2011).

101. *Id.* at 508.

102. *Id.* at 502–03.

103. *Id*. at 502 (quoting language from the complaint).

104. *Id.* at 503.

105. *Id.* at 506; *see also* Amidax Trading Grp. v. S.W.I.F.T. SCRL (*Amidax II*), 671 F.3d 140, 147–48 (2d Cir. 2011).

106. *Amidax II*, 671 F.3d at 147 (internal quotation marks omitted). Amidax proffered that SWIFT had given its entire database of customer information to the government but offered only a quote from an anonymous source published by the *New York Times* as evidence of its claim. *Id.* at 146. Because only one anonymous source of the nearly twenty sources interviewed stated that SWIFT had handed over the entire database, the court concluded that "Amidax's allegation that SWIFT's entire database was handed over to the government [was] speculative and conjectural and thus insufficient to establish a basis for Amidax's standing to sue." *Id*.

107. *Id.* at 147–48.

108. *Amidax I*, 607 F. Supp. 2d at 504 (stating that the injury-in-fact test "requires that the party seeking review be himself among the injured") (quoting Sierra Club v. Morton, 405 U.S. 727, 734–35 (1972)).

establish that their information was obtained by the Government"[109] to establish standing should only apply in this context, i.e., when obtainment is at issue.

Unlike the situation in *Amidax*, the customer in *Brackfield* was not suing under a claim of relief stemming from the government unlawfully obtaining their financial information. Instead, the customer claimed that the bank unlawfully provided the government with *access* to that information.[110] In *Amidax*, access to the information was immaterial because access to and obtainment of the information happened simultaneously. Thus, it was logically sound for the court to require the plaintiff to show that the government had obtained their information. However, in *Brackfield*, access was not immaterial to resolving the controversy—it was the central issue.[111] The government, as a member of the entire world that has free and open access to the information in public records, currently has access to the *Brackfield* customer's information. It has not, however, necessarily obtained that information. Thus, in stating that the customer needs to show that their information was obtained by the government in order to sue, the *Brackfield* court incorrectly conflated two distinct RFPA violations: (1) a financial institution granting access to that information,[112] and (2) the government obtaining the information.[113] The court should have addressed the plaintiff's standing in the context of the financial institution improperly providing the government with *access*, instead of addressing the collateral issue of whether the government had obtained such information.

Finally, it is worth noting that the reason the *Amidax* court dismissed the case was not because the government never reviewed the customer's files,[114] but only because Amidax "failed to affirmatively aver that there *was an actual provision of* access to, copies of, or information contained in financial records to a Government authority."[115] The same court that decided *Amidax* confirmed this interpretation of the decision after the *Brackfield* memoranda were filed: "[In *Amidax*], we viewed the collection

109. Brackfield & Assocs. P'ship v. Branch Banking & Tr. Co., No. 3:14-cv-524-PLR-HBG, 2015 WL 5177737, at *3 (E.D. Tenn. Sept. 4, 2015); *see also Amidax I*, 607 F. Supp. 2d at 504.

110. *See* Brackfield Complaint, *supra* note 70, at ¶ 37.

111. *See* Brackfield Response to Motion to Dismiss, *supra* note 87, at 5–8. *See also Brackfield*, 2015 WL 5177737, at *3.

112. *See* 12 U.S.C. § 3402 (2012).

113. *See id.* § 3403.

114. This was the interpretation set forth by the bank in its memorandum in support of its Motion to Dismiss in the *Brackfield* case. Memorandum of Law in Support of Motion to Dismiss at 5–6, Brackfield & Assocs. P'ship v. Branch Banking & Tr. Co., No. 3:14-cv-524-PLR-HBG, 2015 WL 5177737 (E.D. Tenn. Sept. 4, 2015).

115. Brackfield Response to Motion to Dismiss, *supra* note 87, at 9 (emphasis added).

of the data in question, if it had in fact occurred, as an injury sufficient to confer standing, without considering whether such data were likely to be reviewed."[116] Thus, even the case that the bank relied on as persuasive authority in the *Brackfield* controversy recognized that actual review of the information is less important to the inquiry into an RFPA violation than obtainment.

2. *The Structure of The Right to Financial Privacy Act: Protection from Disclosure and Obtainment*

The RFPA's statutory scheme lends credence to the interpretation that, by granting a government authority access to a customer's financial information (be it the primary intent or an unanticipated consequence), a bank violates the RFPA. The RFPA grants customers a cause of action against either, or both, of two entities that violate the statute: a financial institution and a government authority.[117] This separation of entities against which claims can be brought protects customer information in two ways: allowing aggrieved customers whose financial information has been improperly disclosed a right of action against (1) the governmental authority that obtained the records, and (2) the financial institution that disclosed them.[118] The Fourth Circuit Court of Appeals pointed out the different functions of these sections and concluded that, when it enacted the RFPA, "Congress limited *both* the disclosure of customer records by financial institutions and the acquisition of such information by governmental entities. It did so by enacting two 'companion' sections, one directed at the actions of governmental entities, and the other directed at the actions of financial institutions."[119] If, as the *Brackfield* court held, the RFPA only contemplated situations in which a financial institution directly and intentionally provides access to a government authority,[120] there would never be an instance in which an aggrieved customer would sue one entity and not the other, rendering the separation of the two actions inconsequential. In light of the statute's stated goal of providing customers

116. ACLU v. Clapper, 785 F.3d 787, 802 (2d Cir. 2015).

117. *Compare* 12 U.S.C. § 3402 (prohibiting access to financial records by government authorities), *with id.* § 3403 (prohibiting financial institutions from providing "access to or copies of, or the information contained in, the financial records of" customers).

118. *See supra* note 59.

119. Tucker v. Waddell, 83 F.3d 688, 692 (4th Cir. 1996) (emphasis added).

120. Brackfield & Assocs. P'ship v. Branch Banking & Tr. Co., No. 3:14-cv-524-PLR-HBG, 2015 WL 5177737, at *2 (E.D. Tenn. Sept. 4, 2015) ("[The bank] argues that since it did not disclose the Plaintiffs' information directly to a 'Government authority,' the Plaintiffs have no claim under the RFPA. The Court agrees.").

a right to privacy of their financial information, except when obtained pursuant to "legitimate investigations" by law enforcement,[121] perhaps a more reasonable interpretation would be to read the statute as keeping financial information from being both disclosed *and* obtained.[122] The separation of each entity's obligations under the statute supports the interpretation that financial institutions have duties to their customers that are broader than the duty not to directly hand over customer information to government authorities.[123]

Additionally, § 3403, titled "Confidentiality of financial records," states that "[a] financial institution *shall not release the financial records of a customer until* the Government authority seeking such records certifies in writing to the financial institution that it has complied with the applicable provisions of this chapter."[124] Of two possible interpretations, one is eventually contradicted in the RFPA, and should not be considered valid.[125] A more natural interpretation suggests that the bank has an independent duty to safeguard customer financial information until supplied with written notification of RFPA compliance. The Tenth Circuit interpreted the RFPA in the same manner, stating: "The RFPA prohibits the release of 'financial records' unless set procedures are followed."[126]

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121. H.R. REP. NO. 95-1383, at 33 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 9273, 9305 (stating the RFPA's goal as "strik[ing] a balance between customers' right of privacy and the need of law enforcement agencies to obtain financial records pursuant to legitimate investigations").

122. *See Tucker*, 83 F.3d at 692. This court used the existence of the RFPA's companion sections (liability of both the government and the financial institution) to show that, in the context of the Electronic Communications Privacy Act of 1986, a statute modeled after the RFPA, the absence of one of the "companion" sections (specifically, a § 3402 analog) "indicates that Congress did not intend to authorize civil suits against governmental entities for improperly obtaining customer records." *Id.*

123. Before the *Brackfield* decision, the Sixth Circuit framed the RFPA as "impos[ing] an affirmative duty on the government and banking officials to safeguard the financial records of individuals utilizing the services of banks." *In re* Knoxville News-Sentinel Co., 723 F.2d 470, 476 (6th Cir. 1983). This duty is violated in two instances: disclosure and obtainment of customer information (outside the confines of legal process). *Id.*

124. 12 U.S.C. § 3403(b) (2012) (emphasis added).

125. One could interpret the phrase "until the Government authority seeking such records" as implying that this section only applies when a government authority has already begun actively seeking a customer's records. However, the RFPA goes on to state:

> Nothing in this chapter shall preclude a financial institution, as an incident to perfecting a security interest . . . , from providing copies of any financial record to any court or Government authority. *Id.* § 3403(d)(1).

In the situation this exception describes, bank-to-government communication is not required and, even when such intervention is necessary (i.e., when the government guarantees part of the loan), it is listed as a separate exception. *See id.* § 3403(d)(2).

Thus, as discussed in Part III-B, the canon *expressio unius* would render the *Brackfield* scenario of a bank releasing a customer's information *not* in pursuance of "perfecting a security interest" as intentionally omitted and thus, prohibited from being released.

126. Anderson v. La Junta State Bank, 115 F.3d 756, 759 (10th Cir. 1997).

Finally, the RFPA's § 3412 provision regarding interagency transfers within the government sheds some light on the scope of privacy its writers had in mind.[127] "This section provides that information obtained under the title may not be used or retained for any purpose other than the specific statutory purpose for which the information was originally obtained, and that the information may not be transferred to another government agency without specific statutory authorization."[128] Thus, once the government does obtain the information, it is prohibited not only from sharing such information among other branches, but the information's use is limited even within the original agency. The customer protection provided by this provision shows the wide scope of protection that Congress intended to confer to customers of financial institutions. This protective measure would be entirely thwarted if the information were made public, granting any person or agency of the government access, without the need to abide by any legal process.

D. Policy Considerations in Reading The Right to Financial Privacy Act

The text of the RFPA, read plainly or through the use of canons; the judicial interpretation of similar statutes; and the general acceptance of statutory injuries as sufficient for standing, work together to support a finding that public disclosure of a customer's information is a violation of the RFPA. The intent of the representatives behind the act, as is visible in the RFPA's structure and its legislative history, further supports this notion. Finally, public policy considerations reinforce the idea that a bank should not be able to bypass the customer protections put in place by the RFPA simply by publishing the information at large.

Interpreting the RFPA as allowing a financial institution to publish customer information, so long as there is no direct contact between a bank and the government, would undermine the RFPA's purpose of providing individuals with privacy in their financial records.[129] The Eleventh Circuit case *Lopez v. First Union Nat'l Bank* considered whether a financial institution could disclose customer information to law enforcement officers if they suspected "any possible violation of the law," pursuant to the "safe harbor provisions" of the Annunzio-Wylie Anti-Money Laundering Act.[130]

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127. 12 U.S.C. § 3412(a). *See also supra* note 37 and accompanying text.

128. H.R. REP. NO. 95-1383, at 35 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 9273, 9307.

129. Lopez v. First Union Nat'l Bank, 129 F.3d 1186, 1190 (11th Cir. 1997) ("[*Miller*] prompted Congress to enact the [RFPA], which provides individuals with some privacy rights in financial records that are in the hands of third parties.") (citations omitted).

130. *Id.* at 1191 (examining 31 U.S.C. § 5318(g) (1992)).

The court decided that for the provision to apply, there must be a good-faith basis for the connection between suspected illegal activity and the accounts from which information is disclosed:

> If it were otherwise, a bank would have free license to disclose information from any and every account in the entire bank once it suspected illegal activity in any account at the bank. We do not think Congress intended such a drastic result which would needlessly strip away any right or expectation of privacy in financial records and effectively undo virtually all of what Congress did when it enacted the Right to Financial Privacy Act . . . .[131]

The court's concern that, by the defendant's proposed reading of the statute, a financial institution could disclose the financial information of customers who were not suspected of illegal activities mirrors the concerns arising from *Brackfield*. If a financial institution's disclosure of customer information to the public as a whole is outside the protection of the RFPA, so long as there was no direct communication with a government authority, then it would allow financial institutions to publicize every customer's information—in effect allowing *every* government authority unbridled access to *every* customer's information. This result would certainly "needlessly strip away any right or expectation of privacy,"[132] and undermine the RFPA's purpose entirely.

Another court explained, "[t]he basic thrust of the [RFPA] is that customers of financial institutions are entitled to notice of any government request for their financial records and an opportunity to challenge the request."[133] By this understanding, the statute would have no purpose in cases where the bank's actions were not deemed an RFPA violation. Once the information is released into the public record, financial institutions would not receive requests for the information by the government and would be thereby unable to provide its customers with notice. In the end, this result would undercut the purpose of the RFPA by stripping away the customer's ability to challenge the request before the government has obtained the information.

Had the bank in *Brackfield* been securing a legitimate interest in the customer's property, their actions would be protected by the RFPA.[134] In reality, the bank provided the government access to customer financial

131. *Id.* at 1195–96.
132. *Id.* at 1195.
133. Hunt v. SEC, 520 F. Supp. 580, 601 (N.D. Tex. 1981).
134. *See supra* text accompanying note 46

information without the protections of the above exception, nor any other exception (such as assisting in a legitimate investigation). Acceptance of the *Brackfield* decision would render the RFPA toothless and stunt its ability to accomplish its stated goal of balancing customer privacy with allowing legitimate government investigations into customers' records.[135]

IV. STATUTORY VIOLATIONS AS INJURIES-IN-FACT

Even if a court is persuaded by the proposal that a bank violates the RFPA by granting the government access to a customer's information, the customer faces another hurdle in protecting his financial privacy: the issue of standing. The answer to whether a customer can sue his bank for an RFPA violation after it publishes his information depends on whether the statutory damages are recognized as sufficient for Article III standing.[136] For a plaintiff to have standing, he must prove that he has suffered a concrete and particularized "injury in fact," which is actual or imminent (as opposed to conjectural or hypothetical); that his injury is fairly traceable to the defendant's actions; and, finally, that it is likely that a favorable decision by the court will redress his injury.[137] In addition to these requirements, "there must be a causal connection between the injury and the conduct complained of."[138]

A. The Right to Financial Privacy Act's Statutory Damages Provision

In *Brackfield*, the conduct "complained of" is that the bank violated the RFPA by improperly providing government authorities with access to the customer's financial information.[139] However, the injuries alleged (e.g., tarnished credit score and lost value to their property) flow from private parties having access to the customer's information, not from the

135. *See supra* note 121 and accompanying text.

136. *See* U.S. CONST. art. III, § 2, cl. 1 (limiting the power of the courts to deciding cases or controversies). This limitation has been interpreted as requiring that "the plaintiff himself has suffered some threatened or actual injury resulting from the putatively illegal action" before the case can properly come before a federal court. Warth v. Seldin, 422 U.S. 490, 498–99 (1975) (quotations and citations omitted). "In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." *Id.* at 498.

137. Brackfield & Assocs. P'ship v. Branch Banking & Tr. Co., No. 3:14-cv-524-PLR-HBG, 2015 WL 5177737, at *2 (E.D. Tenn. Sept. 4, 2015) (quoting Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc., 528 U.S. 167, 180–81 (2000)).

138. Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992).

139. *See Brackfield*, 2015 WL 5177737, at *3.

government having access to it.[140] Thus, the very basis of the RFPA claim did not result in these injuries, and the customer did not even allege that they did.[141] The *Brackfield* court agreed with the bank in concluding that the customer cannot claim an actual injury from the publication of his information, and dismissed the case with prejudice.[142] The court, however, failed to address that actual damages are but one of the four types of recovery available for an RFPA violation.[143]

The RFPA provides:

> [A]ny…financial institution obtaining or disclosing financial records . . . in violation of this chapter is liable to the customer . . . in an amount equal to the sum of—(1) $100 without regard to the volume of records involved; (2) any actual damages sustained by the customer as a result of the disclosure; (3) such punitive damages as the court may allow, where the violation is found to have been willful or intentional; and (4) in the case of any successful action to enforce liability under this section, the costs of the action together with reasonable attorney's fees as determined by the court.[144]

Thus, a customer lacking actual damages from the disclosure does not end the inquiry of whether he has standing, as § 3417(a)(1) awards damages for a statutory injury as well.[145]

There has been recent disagreement about whether a statutory injury, occurring when a person's statutory rights have been violated, will suffice as an injury-in-fact necessary for standing in order to sue for the corresponding statutory damages.[146] There are several federal statutes

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140. *See id.* The court acknowledged that "[t]hese damages may have a causal connection to the breach of contract claim, but they do not flow from a RFPA violation." *Id.* The court declined to exercise supplemental jurisdiction over the contract claim and dismissed it without prejudice, allowing the customer to pursue it in state court. *Id.* at *4.

141. *See* Brackfield Complaint, *supra* note 70, at ¶¶ 96–99 (listing the injuries resulting from private parties accessing the financial information).

142. *Brackfield*, 2015 WL 5177737, at *3.

143. *See* 12 U.S.C. § 3417(a) (2012). The *Brackfield* plaintiffs claimed all four types of damages in their complaint. Brackfield Complaint, *supra* note 70, at ¶¶ 85–88; 92–93.

144. 12 U.S.C. § 3417(a) (2012).

145. Although the $100 award may appear to be *de minimus*, this Note assumes such concerns are secondary in the effort to explore the actual rights, duties, and obligations of the parties to the litigation without giving the issues short shrift. Additionally, if BB&T has a habit of publishing customer information in this way, a successful class action suit (and the corresponding legal fees) could raise the damages to an amount much greater than the seemingly *de minimus* $100 sought here.

146. *See, e.g.*, Havens Realty Corp. v. Coleman, 455 U.S. 363, 377–74 (1982) (allowing statutory injury as sufficient for standing in the context of the Fair Housing Act); Pub. Citizen v. U.S. Dep't of Justice, 491 U.S. 440, 449–50 (1989) (allowing statutory injury as sufficient for standing in the context of the Federal Advisory Committee Act and the Freedom of Information Act). *But see* Spokeo, Inc. v.

granting plaintiffs damages in an amount, range, or floor set by the statute itself.[147] However, courts have disagreed on whether a statutory damages provision means that mere violation of the statute is sufficient to confer Article III standing,[148] or whether it is simply a tool for encouraging lawsuits in cases where the actual damages would otherwise be too small to justify a suit or require quantifying damages that are difficult to compute.[149] Some of this confusion comes from the apparent contradiction between circuits allowing claims for statutory injuries and the Article III requirement that plaintiffs have an actual injury.[150] For the *Brackfield* court, the issue of whether a plaintiff claiming a statutory damage award for an RFPA violation, without proving actual damages flowing from the violation, was one of first impression.[151] Ultimately, the court decided that since the customers could not claim an actual injury under the RFPA, their RFPA claim must be dismissed.[152] The two circuits that addressed the issue head-on, however, decided that the $100 statutory fine applies regardless of whether the customer incurred actual damages.[153] Although the *Brackfield*

Robins, 136 S. Ct. 1540, 1550 (2016) ("[The plaintiff] cannot satisfy the demands of Article III by alleging a bare procedural violation. A violation of one of the FCRA's procedural requirements may result in no harm.").

147. "For willful failures to comply [with the Act], plaintiffs may see statutory damages between $100 and $1,000." Geoffrey S. Stewart & Miriam S. Weiler, *Emerging Issues in Statutory Damages*, JONES DAY (July 2011), http://www.jonesday.com/emerging_issues_in_statutory_damages/#_ftnref2 [https://perma.cc/3DJM-2SD6] (explaining The Fair and Accurate Credit Transactions Act of 2003, 15 U.S.C. § 1681n(a)). "For violations of the Act[] . . . plaintiffs are entitled to as much as $1,000 per violation." *Id.* (explaining The Fair Debt Collection Practices Act of 1978, 15 U.S.C. §1692k(a)). "For a lender's failure to disclose credit terms, consumers are entitled to statutory damages of twice the lender's finance charges, between $100 and $5,000 . . . ." *Id.* (explaining The Truth in Lending Act of 1968, 15 U.S.C. § 1640(a)(2)(A)).

148. *See e.g.*, Edwards v. First Am. Corp., 610 F.3d 514, 518 (9th Cir. 2010) (finding that a plaintiff suing for a violation of the Real Estate Settlement Procedures Act had standing to sue even though there was no actual injury).

149. *See e.g.*, Douglas v. Cunningham, 294 U.S. 207, 209 (1935) (stating that statutory damages give the plaintiff "some recompense for injury due to him, in a case where the rules of law render difficult or impossible proof of damages . . ."); Forman v. Data Transfer, Inc., 164 F.R.D. 400, 404 (E.D. Pa. 1995) (noting that statutory damages under the TCPA provide adequate incentive for individuals to bring suit).

150. *See, e.g.*, *Edwards*, 610 F.3d at 517 (stating that the violation of a statutory right is usually a sufficient injury to confer standing). *But see* U.S. CONST. art. III, § 2, cl. 1 (limiting the power of the courts to deciding cases or controversies); *supra* text accompanying note 136.

151. *See* Brackfield Brief for Appellants, *supra* note 14, at 1–2.

152. Brackfield & Assocs. P'ship v. Branch Banking & Tr. Co., No. 3:14-cv-524-PLR-HBG, 2015 WL 5177737, at *3 (E.D. Tenn. Sept. 4, 2015), *aff'd*, 645 F. App'x 428 (6th Cir. 2016).

153. *See* Anderson v. La Junta State Bank, 115 F.3d 756, 759 (10th Cir. 1997) ("We need not consider whether plaintiffs suffered any damages as a result of the disclosure. If the government or a financial institution violates the RFPA, the customer whose financial records were disclosed is entitled to $100, regardless of the volume of records involved."); Duncan v. Belcher, 813 F.2d 1335, 1339 (4th Cir. 1987) ("If the government is found liable under the [RFPA], plaintiffs are entitled to $100 statutory

court was not bound by those interpretations, even its own circuit's court of appeals has held that statutory damages suffice as injuries for standing in the context of similar statutes.[154]

In analyzing Brackfield's claim, the court could have naturally employed the standard for analyzing statutory damages previously set forth in the Sixth Circuit in the context of Fair Credit Reporting Act ("FCRA") violations.[155] In *Beaudry v. TeleCheck Services*, the court explained: "Congress 'has the power to create new legal rights, [including] right[s] of action whose only injury-in-fact involves the violation of that statutory right.'"[156] This power is limited by two characteristics plaintiffs are required to have in order to sue. First, the plaintiff must be "among the injured" in that *his* statutory rights were violated.[157] Second, a violation of a right created by Congress "must cause individual, rather than collective, harm."[158] The first requirement is met in *Brackfield* because the government was given access to the records of the plaintiffs, which places them sufficiently "among the injured." And because the statute in question does

damages regardless of whether they prove actual damages.").

154. The *Brackfield* district court is within the Sixth Circuit, which had not interpreted the RFPA specifically, though it had interpreted similar statutes. Thus, the *Brackfield* court was free to interpret the RFPA as it saw fit. However, this Note goes on to argue that it should have given more precedential weight to how the higher court interpreted statutes with similar schemes. *See, e.g.*, Beaudry v. TeleCheck Servs., Inc., 579 F.3d 702, 703 (6th Cir. 2009) (finding that a claimant may seek statutory damages for a violation of the Fair Credit Reporting Act without proof of actual damages); Fed. Home Loan Mortg. Corp. v. Lamar, 503 F.3d 504, 513 (6th Cir. 2007) ("[A] consumer may recover statutory damages if the debt collector violates the [Fair Debt Collection Protection Act] even if the consumer suffered no actual damages."); Purtle v. Eldridge Auto Sales, Inc., 91 F.3d 797, 800 (6th Cir. 1996) (holding that a consumer need not show that she "suffered actual monetary damages" to prevail on a Truth in Lending Act claim for statutory damages and attorney's fees). In addition to these cases, the same court that decided *Brackfield*, in a case involving the FDCPA, held that "whether [a] plaintiff is entitled to statutory or actual damages are two separate inquiries." Hoffman v. GC Servs. Ltd. P'ship., No. 3:08-cv-255, 2010 U.S. Dist. LEXIS 139509, at *49 (E.D. Tenn. Mar. 3, 2010).

In affirming the *Brackfield* district court's decision, the Sixth Circuit stated that Brackfield had not "plausibly alleged an invasion of his statutory rights under the RFPA." *Brackfield*, 645 F. App'x 428, 431 (6th Cir. 2016). However, its analysis is flawed in much the same way as that of the district court. It does not distinguish between the distinct disclosure and obtainment prohibitions of the RFPA, discussed *supra* Part III.C. It additionally relies on the Supreme Court's statement in *S.E.C. v. Jerry O'Brien, Inc.*, 467 U.S. 735, 745 (1984) that "[t]he most salient feature of the [RFPA] is the narrow scope of the entitlement it creates." *Id.* However, the Sixth Circuit decontextualizes the statement's meaning in its reliance on it. At issue in *S.E.C.* was the RFPA's requirement that banks notify customers whose information has been subpoenaed, and the Court goes on to emphasize the RFPA's narrowness in the context of the SEC and citizens seeking to challenge its administrative subpoenas. *See S.E.C. v. Jerry O'Brien*, Inc., 467 U.S. 735, 745–47 (1984).

155. *See, e.g.*, *Beaudry*, 579 F.3d 702.

156. *Beaudry*, 579 F.3d at 707 (quoting *In re* Carter, 553 F.3d 979, 988 (6th Cir. 2009)).

157. *Id.* (citing Sierra Club v. Morton, 405 U.S. 727, 734–35 (1972)).

158. *Id.* (quoting *In re Carter*, 553 F.3d at 989).

not "'authorize suits by members of the public at large,'"[159] the second requirement is met, as in *Beaudry*. The statute instead authorizes only suits by "the customer to whom such records relate."[160] Thus, by the standard set forth in *Beaudry*, the customer in *Brackfield* meets the requirements for standing to sue by showing injury-in-fact through applicability of the statutory damages provision.

However, an important distinction between the FCRA, discussed in *Beaudry*, and the RFPA, at issue in *Brackfield*, is the wording of the statutes' provisions for statutory damages. Central to the court's reasoning in *Beaudry* was the difference in damages available for *willful* violations (actual, punitive, and statutory) as compared to *negligent* violations (actual only).[161] The Sixth Circuit used the differing treatment to quell fears of creating a "strict-liability regime" by reading the law to allow statutory damages without injury.[162] Unlike the FRCA, the RFPA does not prescribe statutory damages based on culpability; only punitive damages depend on the intent of the violator.[163] Because of this conflation of negligence and intentional violations, the court may have been wary of creating the "strict-liability regime" that the Sixth Circuit was careful to avoid in *Beaudry*. However, the two Circuits admitting the RFPA's statutory damages regardless of actual damages did not express concern about creating such a regime.[164] In any case, these concerns should be greatly diminished by the RFPA's "good-faith defense" provision, which states that any financial institution making disclosures in good-faith reliance on government certificates shall not be held liable.[165] Thus, liability under the RFPA is limited to only those financial institutions that voluntarily provide the government with access to customer information, as seen in *Brackfield*.

Given the RFPA's text, statutory scheme, treatment by other courts and policy goals, the *Brackfield* customer's suit should not have been dismissed for lack of standing. An unpublished opinion from the Northern District of Illinois analyzed an RFPA standing challenge this way: "It is well settled

159. *Id.*

160. 12 U.S.C. § 3417(a) (2012).

161. *Compare* 15 U.S.C. § 1681n(a) (2012) (prescribing a floor of $100 and ceiling of $1,000, or, when a consumer report is obtained using false pretenses, the greater of actual damages and $1,000, punitive damages, and attorney's fees for willful noncompliance with the statute), *with id.* § 1681o(a) (prescribing actual damages and attorney's fees for negligent noncompliance with the statute).

162. *Beaudry*, 579 F.3d at 708 ("The existence of a *willfulness* requirement proves that there is nothing 'strict' about the state of behavior required to violate the law.").

163. 12 U.S.C. § 3417(a) (2012).

164. *See* Anderson v. La Junta State Bank, 115 F.3d 756, 759 (10th Cir. 1997); Duncan v. Belcher, 813 F.2d 1335, 1339 (4th Cir. 1987).

165. 12 U.S.C. § 3417(c) (2012).

that a statute itself may create a legal right, the invasion of which causes an injury sufficient to create standing."[166] Specifically, the court reasoned that "[t]he RFPA creates for private citizens a right to sue and recover actual or statutory damages for violations; the statute thus by its own terms creates a legally-protected interest."[167] Had the *Brackfield* court followed a similar line of reasoning, the case would not have been dismissed for lack of standing. Given the precedential weight of *Beaudry* and the clarity with which it sets out a method to address the viability of statutory damages as injuries-in-fact, denying the dismissal would have been a legally sound result.

B. Spokeo: Complicating the Inquiry of Statutory Injuries

Despite the common-sense interpretation of the RFPA set forth up to this point, the privacy protections provided by the RFPA are under siege from another angle which threatens to render the RFPA (and other statutes aimed to protect against the third-party-doctrine-shaped hole created by *Miller*) all but useless. In May 2016, the Supreme Court decided *Spokeo, Inc. v. Robins*.[168] Although the decision was about the alleged violation of an FCRA provision, it provides guidance in cases such as *Brackfield* in which a different statute is used but the harm is of a general nature, such as the dissemination of information.

The plaintiff in the underlying case was a man claiming that the website Spokeo.com published inaccurate information about him online.[169] Publishing false information about a person can be a violation of the FRCA requirement that companies "follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom [it] relates."[170] Strangely, in this instance, the inaccuracies manifested in *Spokeo* listed him as more wealthy and educated than he actually was.[171] Robins claimed that the actual injuries resulting from the misinformation included harm to his employment prospects, prolonged unemployment, and anxiety about his diminished employment prospects.[172]

166. Beam v. Mukasey, No. 07 C 1227, 2008 WL 4614324, at *6 (N.D. Ill. Oct. 15, 2008) (citing Ramirez v. Midwest Airlines, Inc., 537 F. Supp. 2d 1161, 1166 (D. Kan. 2008)).

167. *Id.* (citing 12 U.S.C. § 3417(a)).

168. Spokeo, Inc. v. Robins, 136 S. Ct. 1540 (2016).

169. Robins v. Spokeo, Inc., 742 F.3d 409, 410 (9th Cir. 2014), *cert granted* , 135 S. Ct. 1892 (2015).

170. 15 U.S.C. § 1681e(b) (2012).

171. *Spokeo*, 742 F.3d at 411.

172. *Id.*

The Ninth Circuit noted that his allegations of injury were sparse,[173] but after employing the *Beaudry* factors, ultimately decided that the violation of Robins's statutory rights was sufficient to satisfy the injury-in-fact requirement for standing.[174]

On April 27, 2015, the Supreme Court granted certiorari to decide the issue of "[w]hether Congress may confer Article III standing upon a plaintiff who suffers no concrete harm . . . by authorizing a private right of action based on a bare violation of a federal statute."[175] Commentator Amy Howe listed three possible outcomes:[176] First, and most unlikely, the Court could have found that a plaintiff need only allege a statutory violation, without pointing to a concrete harm.[177] Second, the Court could have decided that there can only be standing when a plaintiff shows a violation of the statute *and* "real world" harm arising from that violation.[178] Third, the Court could have found that Spokeo's publication of incorrect information about Robins actually *was* an injury-in-fact.[179]

The third outcome would have allowed the Court to update the law by recognizing a new type of injury. In a critique of the legacy of Prosser's influential article on privacy law,[180] Professors Neil Richards and Daniel Solove have urged lawmakers to adapt the law to modern times by coming to a more sophisticated conception of harm—one that recognizes "harms of a more intangible nature," such as "harms to one's psyche and emotions."[181] Unfortunately, the eight-member Court rebuffed the opportunity to definitively decide the issue. The majority instead simply remanded the case back to the Ninth Circuit for a more complete analysis of the injury—expressly declining to take a position on whether the Ninth Circuit's

173. *Id.* at 410.

174. *Id.* at 413–14.

175. *See* Petition for Writ of Certiorari for Defendant-Appellant at i, Spokeo, Inc. v. Thomas Robins, 136 S. Ct. 1540 (2016) (No. 13-1339).

176. Amy Howe, *Argument analysis: Second time around no easier for Justices in standing case*, SCOTUSBLOG (Nov. 2, 2015, 4:23 PM), http://www.scotusblog.com/2015/11/argument-analysis-second-time-around-no-easier-for-justices-in-standing-case/ [https://perma.cc/Q3ZB-7Q22].

177. *Id.* ("Ginsburg . . . suggest[ed] that it would be 'very strange' to have a rule in which 'if we have some historic practice where damages are awarded to someone who has no out-of-pocket loss, if the common law says so, it's okay, but if Congress says so, it's not.'") Howe mentions that, based on their questions during oral arguments, only Justices Sonia Sotomayor and Ruth Bader Ginsberg seemed open to this outcome. *Id.*

178. *Id.* (stating that the conservative Justices seemed most sympathetic to this view). "Justice Antonin Scalia, for example, posited that, under Robins's interpretation, the failure of a credit reporting agency to provide a '1-800' number (required by the FCRA) would allow anyone to sue, even if it didn't affect them at all." *Id.*

179. *Id.*

180. William L. Prosser, *Privacy*, 48 CAL. L. REV. 383 (1960).

181. Richards & Solove, *supra* note 49, at 1922.

ultimate conclusion, that Robins was injured by the FCRA violation, was correct.[182] The decision did little work on clearing up the area of the law on whether a "real world" injury is required to bring an action based on a statutory violation and the case could wind up back in front of the Justices if they do not approve of the Ninth Circuit's position on remand.

CONCLUSION AND RECOMMENDED INTERPRETATION

Although it would be a step in the right direction, even the most favorable outcome for Robins in the *Spokeo* case would not fully address the RFPA loophole allowed in *Brackfield*. As discussed in Part III–C, the court interpreted the statute to require a showing of government obtainment before a plaintiff can sue. Thus, in light of the RFPA's organizational framework, legislative history, its interpretation by other district and circuit courts, and policy considerations in carrying out its intended purpose, illegitimately publishing a customer's financial information in the public record should be interpreted as providing government authorities access to that information in violation of the RFPA. Perhaps much of this discussion seems painstakingly nitpicky to the point of being overly critical of the court's decision in *Brackfield*. After all, BB&T's publication of the customer's information was most likely a clerical oversight, as opposed to an attempt to sneak past the RFPA's protections by taking advantage of its slippery wording. As the saying goes, "never attribute to malice that which is adequately explained by stupidity."[183] So, examining the minutiae of the RFPA may seem like an exercise in futility since the situation of a bank publishing a customer's information is such a rare occurrence. But that is precisely why it is important for the court to rule in favor of the customer under these facts. This result would be of little impact to banks and financial institutions because the act of publishing a customer's information is likely not a regularly conducted business activity, as it serves no purpose to the bank.[184] However, the urged result would have a meaningful impact for bank customers because they could rest assured that any sensitive

182. *See* Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1550 (2016) (finding the Ninth Circuit's standing analysis incomplete because, although it analyzed Robins's injury for its particularity to him, it failed to address whether the alleged FCRA violation "entail[ed] a degree of risk sufficient to meet the concreteness requirement").

y on you. Have another lawyer: w United States Court ofvernment involvementPAank'en informatino y on you. Have another lawyer: w183. This aphorism is often called "Hanlon's razor." OXFORD TREASURY OF SAYINGS AND QUOTATIONS 294 (Susan Ratcliffe ed., 2011).

184. Publishing information in pursuit of a lien or other property interest is explicitly permissible under the RFPA. 12 U.S.C. § 3402 (2012).

information they give their bank would remain confidential unless it was being sought by the government via legal measures—they would even be able to contest the government access to their files before it was given.[185] Such a result would be more in line with the intent and purpose of the statute and is a more suitable interpretation of the RFPA.[186]

Aside from achieving a legally sound result, upholding the customers' challenge in *Brackfield* would have been a judicially expedient move. Privacy concerns today mirror the concerns in the 1970s[187] that spurred lawmakers to pass privacy protections like the RFPA in the first place. Today, however, technology plays an even bigger role than was imaginable at the time of the RFPA's passage. According to a report by the U.S. Census Bureau, as of 2013, 83.8% of U.S. households owned a computer and 74.4% of U.S. households had Internet access.[188] Ideally, legislators would adapt older laws to better serve their purpose as technology advances. Unfortunately, however, lawmakers have been playing catch-up in regulating how individuals, corporations, and the government can use emerging technologies as a way to collect and store personal data.[189] Because of this disparity, rapidly changing technology, and slowly adapting laws, courts should err on the side of protecting individuals when faced with interpreting older laws in a new way. This is especially true for the *Brackfield* case where the law can be read to protect the individual's information by a plain reading of the statute.[190]

Even if the Sixth Circuit agrees with the interpretation that the RFPA prohibits banks from publishing customer information in the public record, and even if the *Spokeo* decision comes down in favor of the plaintiff, the protection of financial privacy remains insubstantial. The RFPA, though a

185. *Id.* § 3407 (detailing the letter the government must send to a customer whose records they are seeking and explaining the steps necessary for the customer to stop the records from being accessed via judicial subpoena).

186. *See* H.R. REP. NO. 95-1383, at 6 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 9273, 9278 ("Access to individual bank records would be governed by the procedures provided by the title and would guarantee that the customer knows who is looking at his records."); *id.* at 50, *as reprinted in* 1978 U.S.C.C.A.N. at 9322 ("Section [3403(b)] prohibits a financial institution from disclosing records unless the requirements of the title are met."); *id.* at 218, *as reprinted in* 1978 U.S.C.C.A.N. at 9348 ("[The RFPA] prohibits [financial] institutions, and their officers, employees and agents, from providing access to customer records, or to information contained in them, except as permitted by the act.").

187. *See* FURLETTI & SMITH, *supra* note 17, at 2.

188. THOM FILE & CAMILLE RYAN, U.S. CENSUS BUREAU, COMPUTER AND INTERNET USE IN THE UNITED STATES: 2013 2 (2014), http://www.census.gov/content/dam/Census/library/publications/2014/acs/acs-28.pdf.

189. *See* Richards & Solove, *supra* note 49, at 1889 ("Today, the chorus of opinion is that the tort law of privacy has been ineffective, particularly in remedying the burgeoning collection, use, and dissemination of personal information in the Information Age.") (footnote omitted).

190. *See* discussion *supra* Section III-B.

valiant attempt to patch the hole in Fourth Amendment protection left by *Miller*, is limited to protecting individuals or small partnerships from financial institutions and the federal government.[191] The RFPA by no means represents the pinnacle of privacy laws; it does not protect the release of financial information from other entities or access to it from state government agents. The Supreme Court created the third-party doctrine in 1967, and in order to comprehensively protect financial information in the hands of trusted third parties, the Court must reverse it.

W. Faith McElroy[*]

191. *See* 12 U.S.C. § 3401(4) (2012) (defining "person" as "an individual or a partnership of five or fewer individuals").

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