



PROGRAM MATERIALS

Program #2970

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Standing, Statutory Violations, and "Intangible Harm": The Illinois Biometric Information Privacy Act and Beyond

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**Standing, Statutory Violations, and
"Intangible Harm":
The Illinois Biometric Information
Privacy Act and Beyond**

What we're covering

1

The Foundation of
Standing in Federal Court

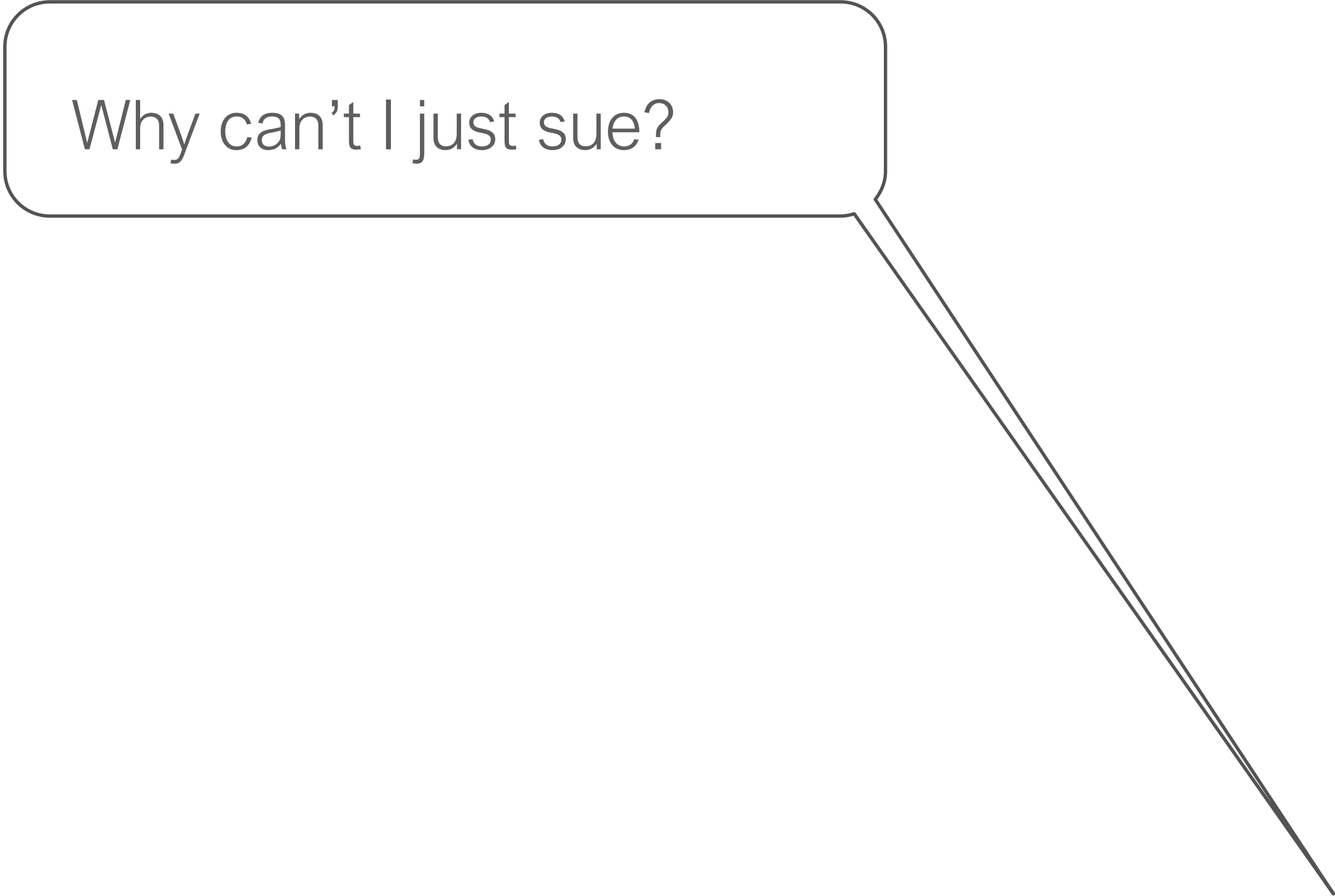
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Post-*Spokeo*: Areas of
Ongoing Debate

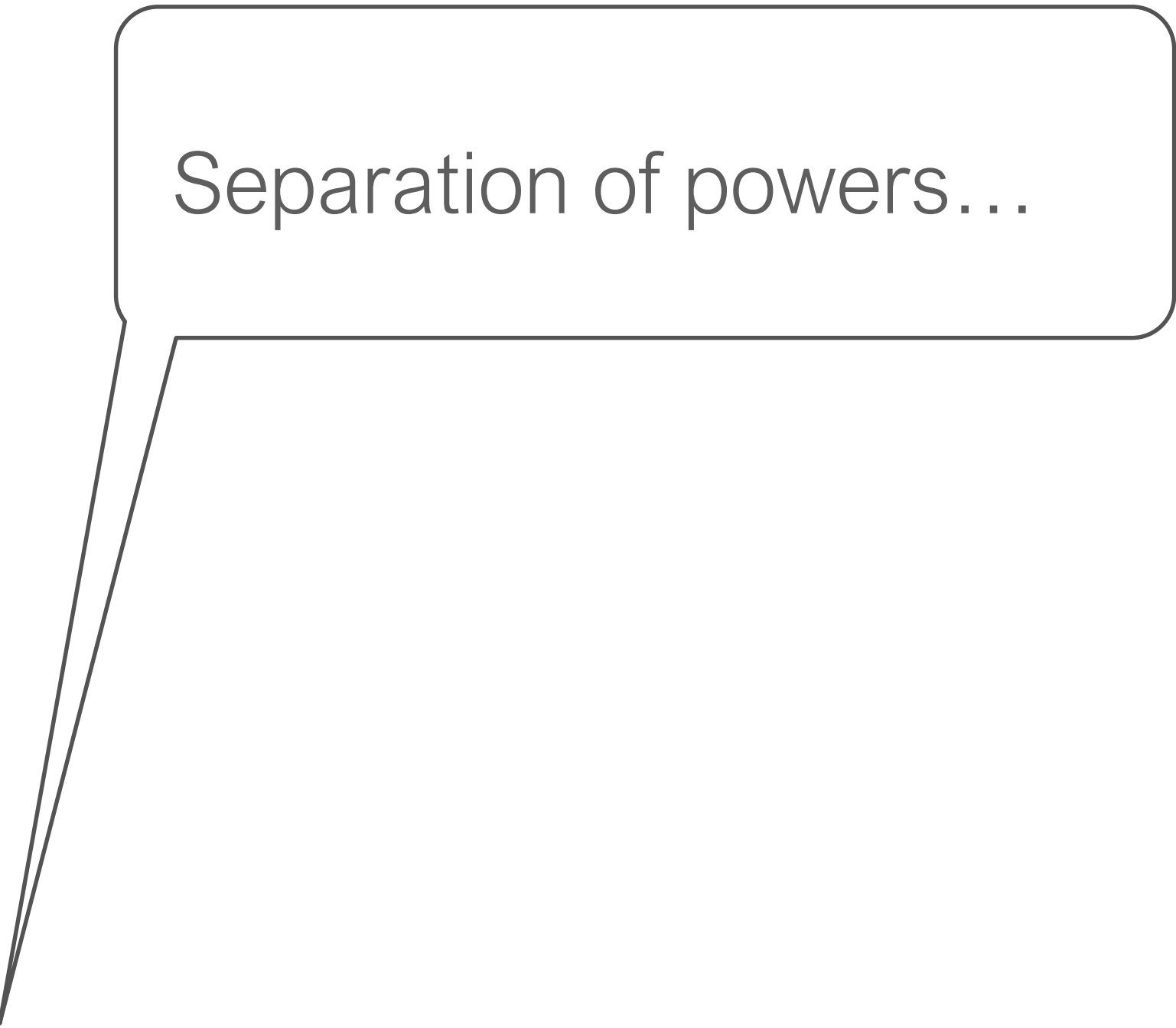
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Standing in State Courts
and the Biometric
Information Privacy Act

Why can't I just sue?

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Separation of powers...

A speech bubble with a rounded rectangular body and a thin black border. It has a small tail pointing towards the bottom left.

FOUNDATIONS OF THE LAW



If anyone could bring a lawsuit without having first suffered an injury, it would blur the line between the judiciary and the executive branch.

Generalized grievances.

“The question presented here is whether the public interest in proper administration of the laws (specifically, in agencies' observance of a particular, statutorily prescribed procedure) can be converted into an individual right by a statute that denominates it as such, and that permits all citizens (or, for that matter, a subclass of citizens who suffer no distinctive concrete harm) to sue.”

Lujan v. Defs. of Wildlife,
504 U.S. 555, 576–77 (1992).

Federal courts are courts of
limited jurisdiction.

“[T]he courts of the United States are all limited in their nature and constitution, and have not the powers inherent in courts existing by prescription or by the common law.”

Fink v. O'Neil, 106 U.S. 272, 280 (1882)
(quoting *Cary v. Curtis*, 44 U.S. 236, 245 (1845)).

Article III, Section 2 of the Constitution

extends the judicial “Power of the United States”
to only “Cases” and “Controversies.”

But it never defines what either "case" or “controversy” means.

According to SCOTUS

Article III standing consists of three elements:

The Plaintiff must have:

- (1) suffered an injury in fact,
- (2) that is fairly traceable to the Defendant's challenged conduct, and
- (3) that is likely to be redressed by a favorable judicial decision

Injury in Fact

In Sierra Club v. Morton, 405 U.S. 727 (1972), the Court held that an individual must have suffered an injury-in-fact, and that this injury must be concrete and particularized (i.e., affecting the person in a personal and individual way).

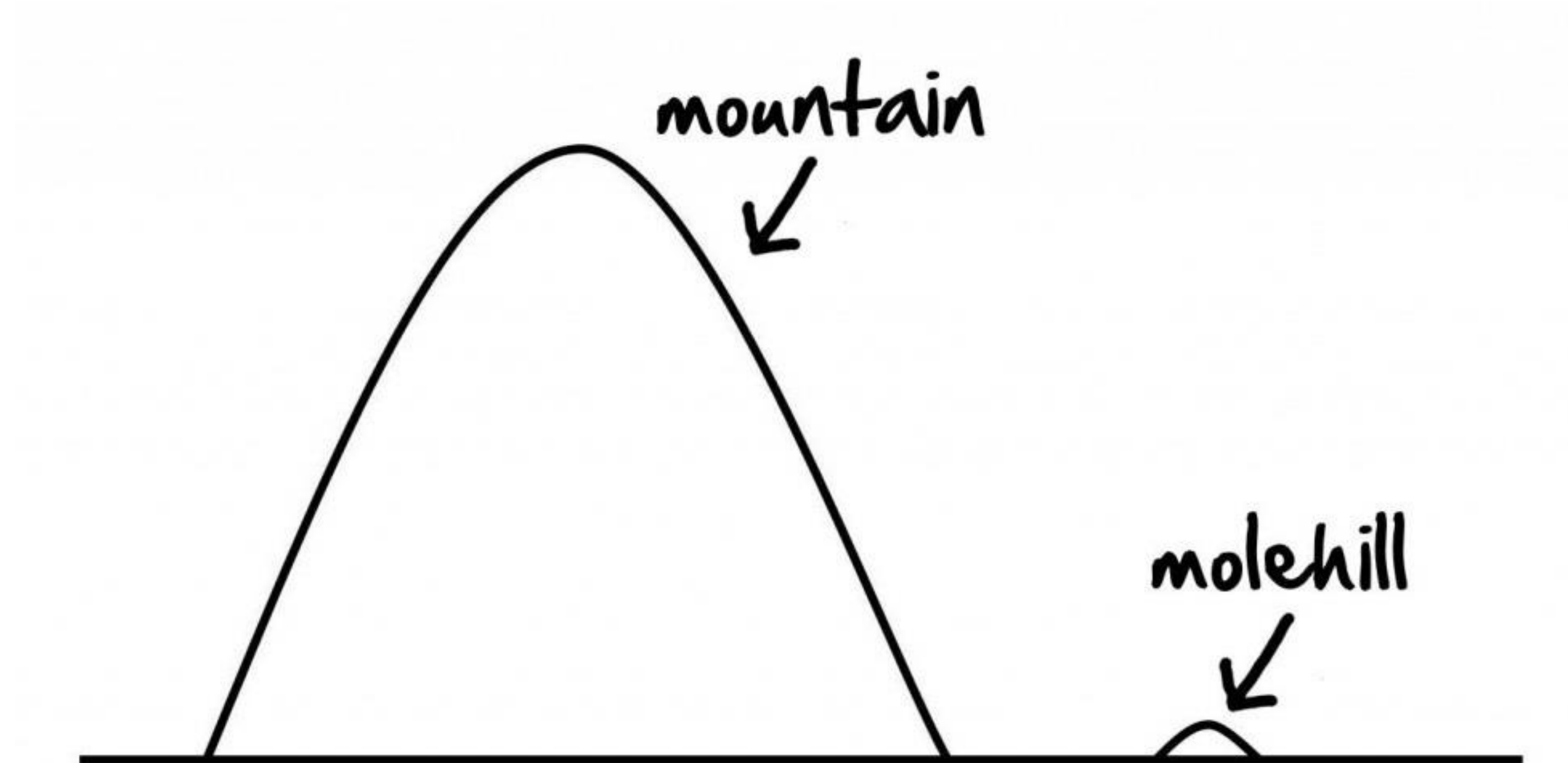
About a decade later, the Court further added that the injury must be “actual or imminent” and not conjectural. *Los Angeles v. Lyons, 461 U.S. 95 (1983)*

Future Harm May Be Sufficient

To be sure, the injury need not have yet occurred; rather, future harm is actionable if it is imminent; i.e., “concrete in both a qualitative and temporal sense. However, it need be more than an objectively reasonable likelihood; rather, it must be “certainly impending” and not just a “marginal increase in risk.” *Clapper v. Amnesty Int’l USA*, 568 U.S. 398 (2013)

But... a plaintiff has standing “even if their harms may be difficult to prove or measure . . . Just as the common law permitted suit in such instances, the violation of a procedural right granted by statute can be sufficient in some circumstances to constitute injury in fact.” *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016).

**Injury-in-fact
is not
Mount Everest**



A Causal Connection

In addition to requiring a showing of an injury in fact, the Court soon thereafter identified the second requirement— that the injury be “fairly traceable to the challenged conduct of the defendant”

Simon v. Eastern Ky Welfare Rights Organization, 426 U.S. 26 (1976)

In other words, a causal connection

Redressability

To satisfy this prong, the Court distinguishes a cause of action that might be resolved by the Court, from one that is likely to be resolved.

That is, the opportunity for a resolution must not be speculative.

But... where a statutory right is invaded, redressability might collapse into concreteness. *See Massachusetts v. E.P.A.*, 549 U.S. 497, 517–18 (2007) (“[A] litigant to whom Congress has accorded a procedural right to protect his concrete interests . . . can assert that right without meeting all the normal standards for redressability and immediacy.”)

AT THE PLEADING STAGE

The plaintiff must clearly allege facts demonstrating each element.

Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1547.

**Only 24 states
have explicitly
adopted the *Lujan*
standing analysis.**

The standing requirements are greatly varied. Some are adopted via the constitution (like Article III), some are statutorily created, and the majority are based on common law

The message: States vary widely, make sure to understand the standing parameters in the state of filing.

Defendants– Think Twice Before Removing

Because standing is a threshold question, efforts to remove certain cases, even under federal questions jurisdiction, may land you back in State Court

Removal may also result in the forfeiture of otherwise strong “no injury” arguments that may exist in state court

It’s the removing party’s burden to demonstrate Article III jurisdiction, including standing. Trying to have it both ways can result in fee awards.

Barnes v. Aryzta, 288 F. Supp. 3d 834 (N.D. Ill. 2017).

THE CIRCUIT SPLITS BEGIN

AGREEMENT ENDS

Spokeo v. Robins: **What's a “bare procedural violation”?**

Over the past decade, there was an explosion of what the defense bar has coined “no injury” class actions, typically arising under the “alphabet soup” statutes, such as EFTA, RESPA, TCPA and FACTA

Defense argued that you needed “blood or money”—or some kind of injury beyond the statutory violation.

Plaintiff won: Congress can pass enforceable procedural statutes.

Defendant won: bare procedural violations.

The 9th Circuit again finds standing; SCOTUS declines to review

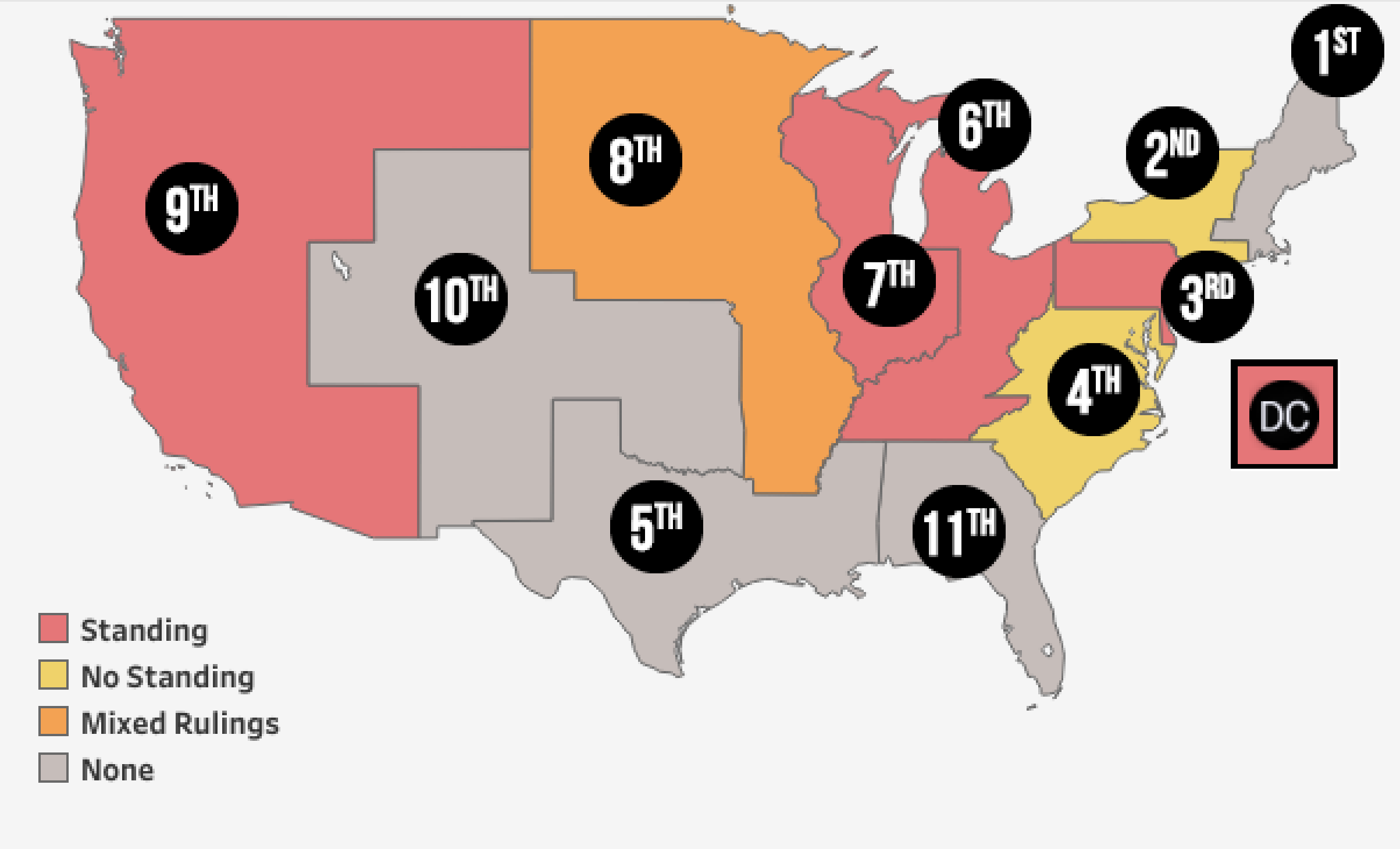
After *Spokeo*, and without guidance, decisions were all over the board on what rises above a “bare procedural violation”

Without further guidance, the decisions remain muddled.

But... Courts are starting to coalesce around certain principles.

Data Breach Standing Landscape

Appellate courts are far from uniform on whether data breach plaintiffs have standing to bring claims following the Supreme Court’s 2016 Spokeo ruling.



Plaintiffs' view: How real is the Circuit split?

PII versus non PII information.

Whalen v. Michaels Stores Inc. 689 Fed. Appx. 89, 90 (2d Cir. 2017) (no PII stolen; no standing);
Sackin v. TransPerfect Glob., Inc., 278 F. Supp. 3d 739, 744 (S.D.N.Y. 2017) (“*Whalen* strongly implies that the Second Circuit” would hold that “a risk of future identity theft is sufficient to plead an injury in fact.”).

Demonstrating risk of identity theft.

In re SuperValue, Inc. 870 F.3d 763 (8th Cir. 2017) (no standing, noting plaintiff could “plausibly plead” the requisite risk level required for injury-in-fact with “more detailed factual support”) (*citing Remijas v. Neiman Marcus Grp., LLC*, 794 F.3d 688, 692 (7th Cir. 2015)).

Is Invasion of a Congressionally Created Right Enough?

Church v. Accretive Health (11th Cir. 2016)

(FDCPA): Not receiving disclosures, even without concrete harm, satisfies standing

Hagy v. Demers & Adams, LLC (6th Cir. 2018)

(FDCPA): Congressional leeway cannot mean judicial abdication. Broad though Congress's power may be to define and create injuries, they cannot override constitutional limitations...

Congress... may not simply enact an injury into existence....”

Macy v. GC Servs. Ltd. P'ship (6th Cir. 2018)

(“Without the information about the in-writing requirement, Plaintiffs were placed at a materially greater risk of falling victim to ‘abusive debt collection practices.’”).

Dieffenbach v. Barnes & Noble, Inc. (April 2018)

District Court dismissed for lack of Article III standing; Reversed after 7th Circuit holds statutory violation sufficient; district court dismisses again, for lack of damage under 12(b)(6).

7th Circuit reverses again: Dismissing for lack of damage is a “new label for an old error.”

One view: applying ipso facto logic, if standing, then injury-in-fact; if injury-in-fact, then damage.

Another: Statutory violation is sufficient for standing, and you can collect statutory damages.

THE SPLITS

Data Breach: 3rd, 6th, 7th, 9th, 11th and DC (stolen data enough); 2nd, 4th and 8th (something more).

FCRA: 2nd, 4th, 7th, 8th and D.C. (statutory violation enough); 3rd and 9th (more)

FDCPA: 2nd, 8th and 11th (violation enough); 6th (more)

TCPA: Some district courts in Missouri, Louisiana require actual harm

FACTA: 11th (violation enough), 2nd 3rd, 7th and 9th (something more).

Supreme Court's Recent Activity

Zappos.com, Inc. v. Stevens, 18-225.

Standing for data breach teed up—
referencing Circuit split—petition denied.

Frank v. Gaos, 139 S. Ct. 1041 (2019).

Government submits amicus curiae in support
of neither party, remanded for *named plaintiff*
standing.

Other areas of ongoing debate

1

Unnamed Class Member
Standing

2

Reasonable Consumer

3

Illinois Biometric
Information Privacy Act

CIRCUIT SPLITS

Must the class representative establish that every unnamed class member has standing?

Mixed messages from Supreme Court

“[Unnamed plaintiffs] need not make any individual showing of standing [in order to obtain relief], because the standing issue focuses on whether the plaintiff is properly before the court, not whether represented parties or absent class members are properly before the court.” *Lewis v. Casey* (S. Ct.) (Souter, J., concurring) (quoting *Newberg on Class Actions*).

“Therefore, if there is no way to ensure that the jury's damages award goes only to injured class members, that award cannot stand.” *Tyson Foods, Inc. v. Bouaphakeo* (2016) (Roberts, C.J., concurring).

Is it an Article III issue?

“We do not require that each member of a class submit evidence of personal standing.” *Denney v. Deutsche Bank AG* (2d Cir. 2006).

“We now squarely hold that unnamed, putative class members need not establish Article III standing. Instead, the ‘cases or controversies’ requirement is satisfied so long as a class representative has standing, whether in the context of a settlement or litigation class ... We decline [the defendant's] invitation to impose a requirement that all class members possess standing.” *Neale v. Volvo Cars of N. Am.* (3d Cir. 2015).

“[A]s long as one member of a certified class has a plausible claim to have suffered damages, the requirement of standing is satisfied. This is true even if the named plaintiff (the class representative) lacks standing, provided that he can be replaced by a class member who has standing.” *Kohen v. Pacific Inv. Management Co. LLC* (7th Cir. 2009).

Is it a Rule 23 issue?

“In sum, pursuant to Rule 23, the court's task at certification is to ensure that the class is not defined so broadly as to include a great number of members who for some reason could not have been harmed by the defendant's allegedly unlawful conduct . . .

We conclude that such fortuitous non-injury to a subset of class members does not necessarily defeat certification of the entire class, particularly as the district court is well situated to winnow out those non-injured members at the damages phase of the litigation, or to refine the class definition. ” *Torres v. Mercer Canyons Inc.* (9th Cir. 2016).

A class “must therefore be defined in such a way that anyone within it would have standing.” *Avritt v. Reliastar Life Ins. Co.* (8th Cir. 2010) (quoting *Denney v. Deutsche Bank AG* (2d Cir.2006)).

CIRCUIT SPLITS

The Reasonable Consumer in False Advertising Claims

False Advertising Claims

Standing Properly Alleged

Consumers allege they they paid more money for than they otherwise might have been willing to pay if the product had been labeled accurately.

False Advertising Claims



No standing where a plaintiff “pleads economic injury from the purchase of a product, but fails to allege that the purchase provided her with an economic benefit worth less than the economic benefit for which she bargained.”

In re Johnson & Johnson Talcum Powder Prods. Mktg., Sales Practices & Liab. Litig., 903 F. 3d 278, 290 (3d Cir. 2018)

Reasonable Consumer in the Second Circuit?

Two decisions ostensibly at odds with each other:



In *Jessani v. Monini*, the Court of Appeals unanimously affirmed dismissal of a “truffle oil” case, holding that no reasonable consumer would believe that actual truffles were included in oil and noting the ingredient list did not include truffles.



In *Mantikas v. Kellogg*, a separate panel vacated the dismissal of a “whole grain” case, holding that even though the ingredient list identified enriched flour, it could not be used to “contradict” an explicit statement made on the front of a box.

THE NEW FRONTIER

The Illinois Biometric Information Privacy Act— Legislative Intent, Article III and State Standing

Illinois Biometric Information Privacy Act

740 ILCS 14/1 *et seq.*

Five different prongs, 740 ILCS 14/15

1. Public-facing retention policy
2. Subject-facing disclosures and consent
3. Disclosure to third parties
4. Sale or profit
5. Security

Private right of action

1. Negligent violations, \$1,000 per violation
2. Willful violations, \$5,000 per violation

Article III standing pre- *Rosenbach*

Knowing collection cases. *Santana v. Take-Two Interactive Software, Inc.* (2d Cir. 2017); *Howe v. Speedway LLC*, No. 17-CV-07303, 2018 WL 2445541, at *5 (N.D. Ill. May 31, 2018) (“The question here then is whether Defendants' alleged disclosure failures constitute a concrete harm to this interest in data protection.”).

Unknowing collection cases. *Patel v. Facebook Inc.*, 290 F. Supp. 3d 948 (N.D. Cal. 2018); *Monroy v. Shutterfly, Inc.*, No. 16 C 10984, 2017 WL 4099846 (N.D. Ill. Sept. 15, 2017); *but see Rivera v. Google, Inc.*, No. 16 C 02714, 2018 WL 6830332 (N.D. Ill. Dec. 29, 2018).

Disclosure cases. *Dixon v. Washington & Jane Smith Cmty.-Beverly*, No. 17 C 8033, 2018 WL 2445292, at *10 (N.D. Ill. May 31, 2018

***Rosenbach v. Six Flags*, 2019 IL 123186**

[T]he appellate court characterized violations of the law, standing alone, as merely “technical” in nature. . . . Such a characterization, however, misapprehends the nature of the harm our legislature is attempting to combat through this legislation. The Act vests in individuals and customers the right to control their biometric information by requiring notice before collection and giving them the power to say no by withholding consent. *Patel*, 290 F. Supp. 3d at 953.

***Rosenbach v. Six Flags*, 2019 IL 123186**

These procedural protections “are particularly crucial in our digital world because technology now permits the wholesale collection and storage of an individual's unique biometric identifiers—identifiers that cannot be changed if compromised or misused.” *Id.* at 954. When a private entity fails to adhere to the statutory procedures, as defendants are alleged to have done here, “the right of the individual to maintain [his or] her biometric privacy vanishes into thin air. The precise harm the Illinois legislature sought to prevent is then realized.” *Id.* This is no mere “technicality.” The injury is real and significant.

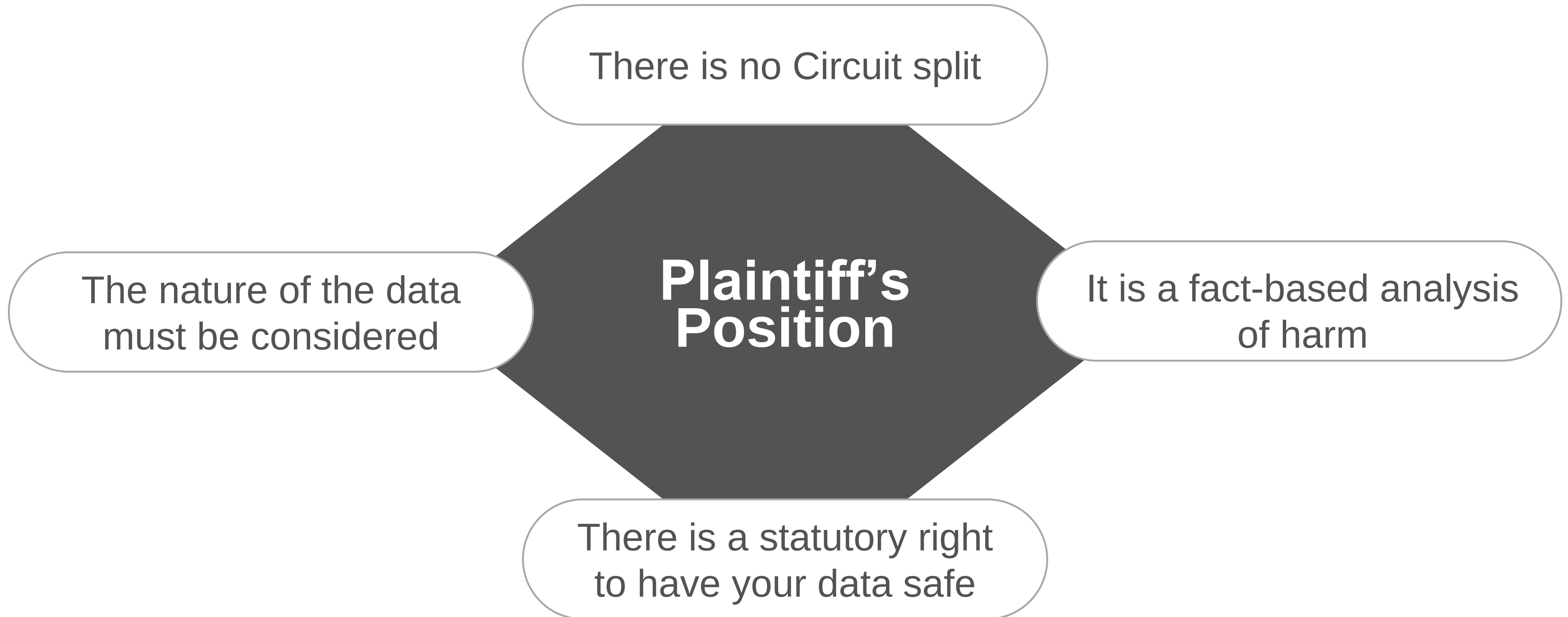
State standing

Must be “(1) distinct and palpable; (2) fairly traceable to the defendant's actions; and (3) substantially likely to be prevented or redressed by the grant of the requested relief.” *Duncan v. FedEx Office & Print Servs., Inc.*, 2019 IL App (1st) 180857, ¶ 22.

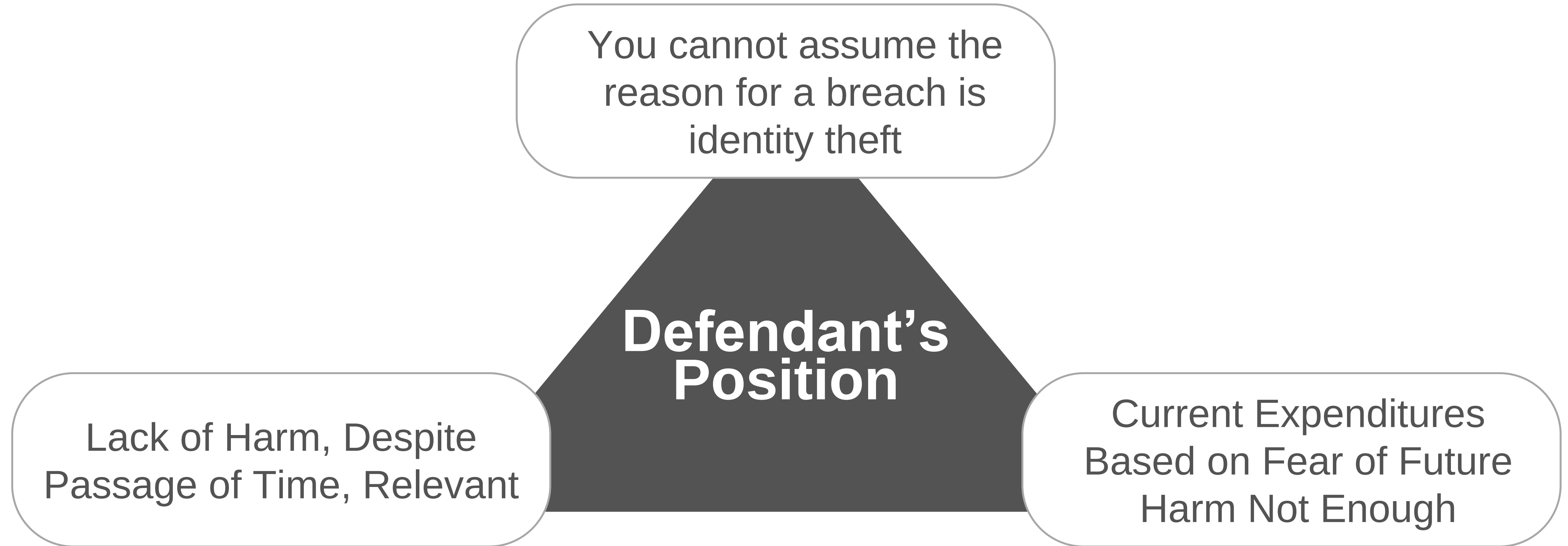
And yet... “In Illinois, ‘[t]he doctrine of standing is designed to preclude persons having no interest in a controversy from bringing suit, but it should not be an obstacle to the litigation of a valid claim.’” *Id.*

Thus, “[i]mportantly, under Illinois law, when a plaintiff alleges a statutory violation, no additional requirements are needed for standing.” *Id.* at ¶ 23.

Sekura v. Krishna Schaumburg Tan, Inc., 2018 IL App (1st) 180175.



THE STATE OF THINGS



FOOD FOR THOUGHT

As much as courts have historically struggled with standing, technology and data privacy will continue to demand updated thinking from courts and legislatures.

QUESTIONS?