TransUnion and Concrete Harm

One Year Later

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Contents

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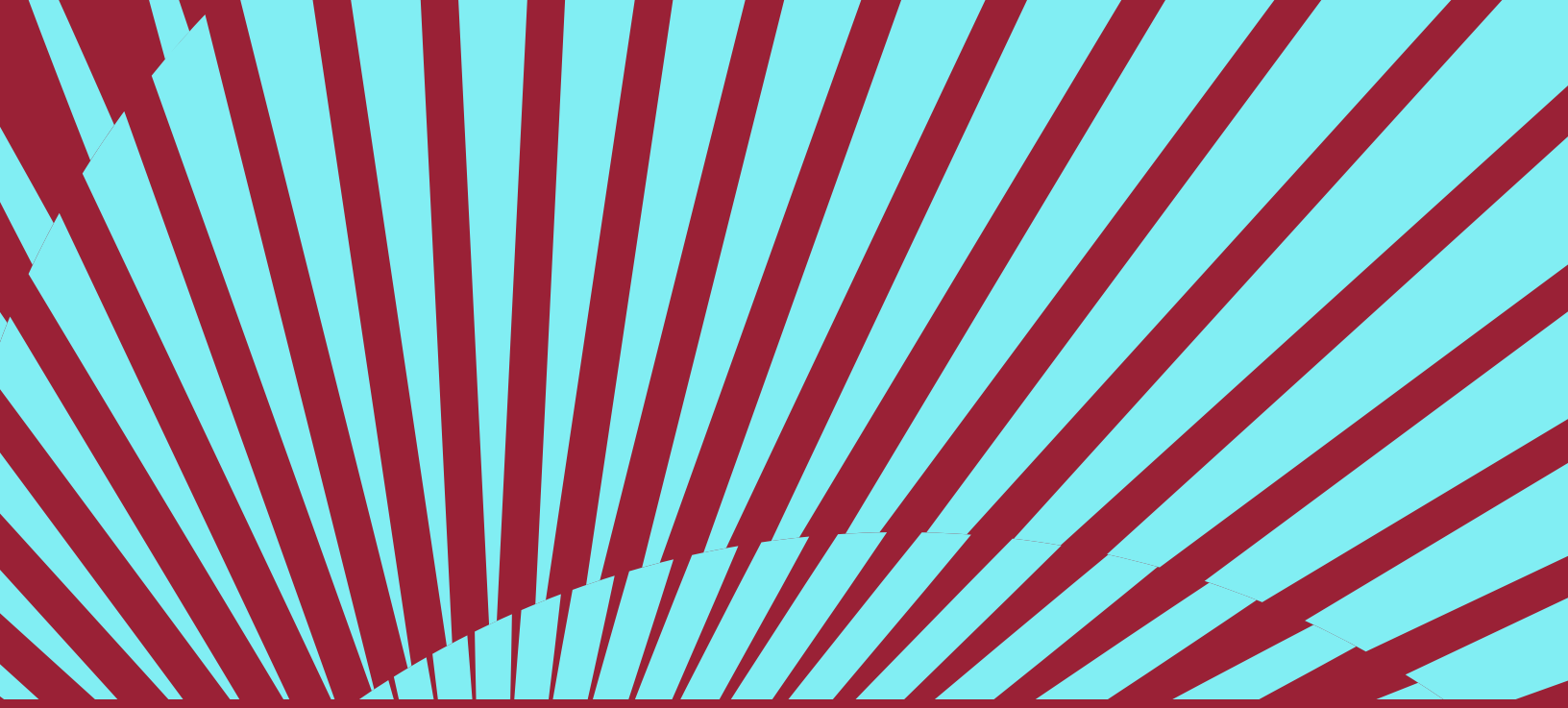

Chapter

01

Executive Summary

June 25, 2022 marks one year since the U.S. Supreme Court's decision in *TransUnion LLC v. Ramirez*.[2] *TransUnion* addressed an issue that can arise in any lawsuit in federal court—whether the plaintiff is entitled to invoke the court's jurisdiction; in other words, whether the plaintiff has "standing to sue." The Court clarified the standard for determining whether a plaintiff suffered "injury in fact," a critical element of the standing inquiry.

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TransUnion in particular provides much-needed guidance regarding the phenomenon of no-injury lawsuits. Congress in recent decades enacted a significant number of regulatory statutes with private causes of action that give plaintiffs the option of seeking either actual damages based on harm suffered, or a specified minimum amount per statutory violation (termed "statutory damages"). Plaintiffs' lawyers seized on those causes of action to bring a barrage of no-injury class actions, asserting that the entire class could recover damages simply by proving a statutory violation even if class members suffered no harm from that violation. The courts of appeals disagreed on whether such a bare statutory violation could qualify as an injury in fact sufficient to establish standing.

The Supreme Court granted review in *Spokeo, Inc. v. Robins* in 2015 to resolve that conflict.[3] The Court held that a plaintiff could not satisfy the injury-in-fact requirement by merely pleading that the defendant had committed a statutory violation. "[E]ven in the context of a statutory violation," the Court stated, a plaintiff must allege and ultimately prove a "concrete injury" that is "'real,' and not 'abstract.'"[4]

Unfortunately, *Spokeo* did not put an end to the disagreement among the lower courts. Some courts

applied *Spokeo* faithfully, but others circumvented the *Spokeo* Court's holding. They found injury in fact based on watered-down standards that did not actually require proof that the plaintiff suffered real-world harm. That confused interpretation of *Spokeo* led to the grant of Supreme Court review in *TransUnion*.

In *TransUnion*, the Supreme Court reaffirmed that the injury-in-fact requirement demands more than Congress's creation of a cause of action with a statutory-damages remedy; the plaintiff must suffer real, concrete harm resulting from the statutory violation in order to sue for damages in federal court. And the Court provided specific guidance for determining whether a harm is sufficiently concrete to support standing.

It is hard to overstate the impact of *TransUnion* and *Spokeo* on litigation in federal court. In just one year, *TransUnion* has been cited in over 575 federal-court decisions, including more than 80 decisions by federal courts of appeals.

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And *Spokeo* has been cited in over 6,000 federal-court decisions—including more than 740 decisions by federal courts of appeals.[5] These rulings involve claims asserted under dozens of different statutes.

This paper discusses the developments that led to *TransUnion*, describes the Court's decision, and demonstrates that the ruling is firmly rooted in the Constitution's original meaning and separation of powers. It then explains the significant new arguments available to defendants opposing no-injury class actions—and how the lower courts have been applying *TransUnion* in the year since it was decided.

To begin with, in reaffirming that concrete, real-world harm is required in all cases, the *TransUnion* Court slammed the door on various lower court "workarounds" that had neutered *Spokeo*'s real-world injury requirement. These included decisions limiting *Spokeo* to "procedural" statutory violations and decisions basing standing on harm to generalized statutory "interests" rather than real-world harm to the plaintiff. In practical effect, those workarounds had reinstated the pre-*Spokeo* rule that merely alleging a violation of a federal statute established standing, and *TransUnion* squarely rejected that result.

Next, the Court in *TransUnion* clarified the requirements for establishing concrete injury. To qualify as sufficiently concrete, a claimed injury must bear "a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts."[6] The ultimate reference point is the harms actionable at the Founding, but—as *TransUnion* demonstrates—injuries with a lengthy common-law pedigree may also satisfy the "close relationship" standard. That standard is easily met by physical and monetary harm, but claims grounded in intangible injury require more detailed analysis. Some post-*TransUnion* federal appellate decisions apply the standard faithfully, but others have permitted cases to proceed based on an impermissibly watered-down application of the "close relationship" test.

The Court underscored the limited importance of congressional enactments in this standing analysis. Congress may create causes of action to redress real-world concrete harms that were not previously actionable, but it may not displace the concrete harm requirement. A court must determine for itself whether the asserted harm satisfies

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the injury-in-fact standard. For a court to conclude that Congress has in fact sought to elevate a new category of existing real-world harm to actionable legal status, Congress must make clear its intent to do so; merely creating a cause of action and providing for statutory damages does not suffice.

TransUnion held insufficient to establish concrete harm two "injuries" that plaintiffs had invoked frequently following *Spokeo*. First, the Court rejected the notion that when a statute requires a party to provide information and the party fails to do so, the failure to provide information by itself constitutes a concrete injury sufficient to establish standing. *TransUnion* squarely held that real-world harm resulting from the failure to provide information is required to allow a claim to proceed in federal court.

Second, the Court held that a risk of future harm that has not materialized cannot support standing to recover statutory damages. Plaintiffs must allege and prove concrete harm resulting from a statutory violation and cannot point to a risk that was never realized.

TransUnion's clarification of the concrete harm standard will also have consequences for plaintiffs' lawyers seeking to obtain class certification of statutory damages claims, even if the named plaintiffs are able to satisfy the concrete harm requirement. Lower courts that had loosely interpreted *Spokeo* to permit standing based on statutory interests in general or unmaterialized risks of future harm effectively paved the way to class certification by making irrelevant the individual circumstances of absent class members. But now that *TransUnion* forecloses that approach and instead requires concrete, real-world harm to the plaintiff and every absent class member, standing is likely to be an individualized issue that weighs heavily against class certification in these damages actions.

Finally, *TransUnion* provides an important new argument to defendants faced with class actions asserting federal claims in state court. Many states already follow federal standing requirements in their own courts. Even in those states that do not, the *TransUnion* Court's grounding of the real-world harm requirement in the Constitution's allocation of executive authority to the President—because suits by uninjured parties seek to vindicate a general interest in enforcement of federal law and therefore intrude on the President's exclusive powers—gives defendants a significant new argument that the federal Constitution bars state court adjudication of injury-free lawsuits based on federal statutes.

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Chapter

02

Background: Statutory Damages Produced New Standing Questions

The text of Article III of the U.S. Constitution limits the federal courts' jurisdiction to "Cases" and "Controversies."[7] That limit on the scope of federal judicial power, the Supreme Court has explained, ensures that only real disputes, and not abstract disagreements, may go forward in federal court.

To satisfy the "irreducible constitutional minimum"[8] for standing, the plaintiff must have suffered an injury in fact that is:

1. "Concrete, particularized, and actual or imminent";

2. "Fairly traceable to the challenged action"; and

3. "Redressable by a favorable ruling."[9]

Spokeo and *TransUnion* focus on the "first and foremost" of these requirements: injury in fact.[10] Until recently, the Supreme Court's standing cases generally involved claims against the government.[11] Traditionally, private causes of action required plaintiffs to prove damages or ongoing harm warranting an injunction. "The situation has changed markedly," however, "especially over the last 50 years or so."[12] During that time, Congress created "federal 'citizen suit'-style causes of action [for] private plaintiffs who did not suffer concrete harms," making statutory damages available upon proof of a statutory violation without the need to show actual harm.[13] Those "many novel and expansive causes of action" led to far more "instances where litigants without concrete injuries had a cause of action to sue in federal court."[14]

Indeed, these new causes of action produced a new litigation phenomenon: the no-injury class action, in which private plaintiffs sought huge amounts of statutory damages for violations of statutory standards without asserting any accompanying real-world harm. That phenomenon was inevitable. Private causes of action coupled with the availability of statutory damages create a huge incentive for private plaintiffs—and their lawyers—to search for technical statutory violations and attempt to aggregate them into multi-million-dollar class cases.[15] With the need to provide actual damages eliminated, plaintiffs' lawyers could more easily obtain class certification under Federal Rule of Civil Procedure 23. That is because reliance on statutory damages eliminates an individualized issue (proof of actual damages) and therefore makes it easier to show that common issues predominate.[16] The number of those class actions skyrocketed.[17]

Facing this onslaught of class actions, the courts of appeals were required

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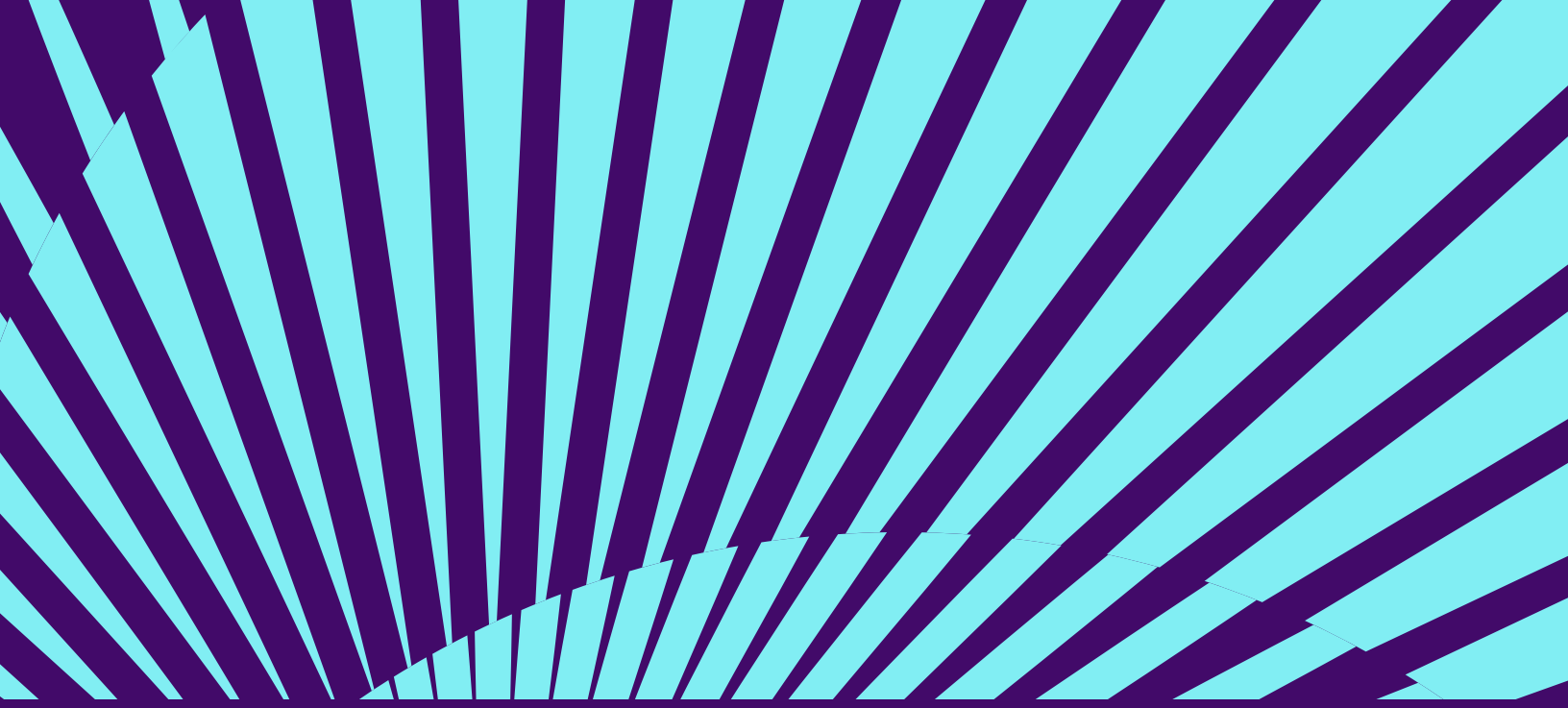
to determine whether, in a variety of contexts, a statutory violation unaccompanied by any concrete injury was sufficient to establish Article III standing. Some courts held that statutory damages were available without proof of injury, concluding that a defendant's failure to comply with a statutory obligation created by Congress qualified as an injury sufficient to establish standing.[18] Other courts reached the opposite conclusion, rejecting the contention that the mere "deprivation of [a] statutory right … is sufficient to constitute an injury-in-fact."[19]

As the number of class actions seeking statutory damages grew, the Supreme Court stepped in to clarify Article III's requirements by granting review in *Spokeo*.[20]



Chapter

03

The *Spokeo* and *TransUnion* Decisions

Spokeo made clear that no-injury lawsuits are incompatible with Article III, holding that the Constitution requires concrete harm in all cases. *TransUnion* clarified the standard for determining whether the "concrete harm test" has been satisfied. A full analysis of those decisions is essential to a proper understanding of the current state of the injury-in-fact requirement.

Spokeo Rejects "No-Injury" Lawsuits

The Journey to the Supreme Court

Spokeo operates an online search engine that aggregates data pulled from thousands of different sources.[21] Users of Spokeo's service can search for someone "by name, e-mail address, or phone number" and obtain information "such as the individual's address, phone number, marital status, approximate age, occupation, hobbies, finances, shopping habits, and musical preferences."[22] In 2010, Thomas Robins filed suit against Spokeo, alleging that if a user searched for him on its website, Spokeo would display inaccurate information.

Specifically, Robins alleged that his Spokeo-generated profile displayed a picture of a person that wasn't him;[23] said that "his economic health is 'Very Strong,' and that his wealth level is in the 'Top 10%,'" when neither statement was true;[24] and stated "that he is married, has children, is in his 50's, has a job, is relatively affluent, and holds a graduate degree"—all of which he alleged was inaccurate.[25]

Robins asserted that Spokeo was a "consumer reporting agency" within the meaning of the Fair Credit Reporting Act (FCRA), which regulates consumer reporting agencies that compile and disseminate personal information about consumers.[26] He argued that Spokeo had violated the FCRA by failing to:

1. "Follow reasonable procedures to assure maximum possible accuracy of" its reports;[27]
2. Furnish a "notice" to its users detailing their "responsibilities" under the FCRA as recipients of consumer reports;[28]
3. Ensure that employers who sought its consumer reports "for employment purposes" complied with the FCRA's disclosure requirements;[29] and
4. Post a toll-free telephone number for consumers to call to request a consumer report about themselves.[30]

Robins claimed that the inaccurate information in his Spokeo profile "ha[d] caused actual harm to [his] employment prospects," which in turn caused him

to lose money and to suffer "anxiety, stress, concern, and/or worry."[31]

Robins sought the maximum statutory damages of $1,000 per asserted violation on behalf of himself and a putative nationwide class.[32] If the class had been certified, the potential statutory damages award would have amounted to multiple billions of dollars.

The district court dismissed for lack of standing, holding that "the alleged harm to Plaintiff's employment prospects is speculative, attenuated and implausible."[33]

The Ninth Circuit reversed, stating that a "violation of a statutory right is usually a sufficient injury in fact to confer standing."[34] Because Robins alleged that Spokeo had violated the FCRA, the Ninth Circuit held that the claimed statutory violations themselves qualified as an injury sufficient to satisfy Article III, and it therefore did not need to "decide whether harm to his employment prospects or related anxiety could be sufficient injuries in fact."[35] Because Robins had "personal interests in the handling of his credit information," the court held

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that he had experienced a constitutionally cognizable injury in fact.[36]

The Supreme Court's Opinion

In a 6-2 decision, the Supreme Court held that Congress "cannot erase Article III's standing requirements" by "granting the right to sue to a plaintiff who would not otherwise have standing."[37] Thus, "even in the context of a statutory violation," "Article III standing requires a concrete injury."[38] The plaintiff must show that his or her alleged injury "actually exist[s]" and that it is "'real,' and not 'abstract.'"[39]

The Court recognized that "tangible" injuries (such as loss of money) are always concrete.[40] It explained that "intangible injuries" also can qualify as concrete, observing that it previously had held that alleged violations of the rights to free speech and religious exercise inflicted concrete injuries, despite the intangible nature of those rights.[41] And the Court further recognized, citing a case involving injunctive relief, that in some circumstances a "risk of real harm can[] satisfy the requirement of concreteness."[42]

Spokeo provided general guidance for determining whether an intangible harm constitutes an injury in fact, stating that "both history and the judgment of Congress play important roles."[43] First, the Court explained, "because the doctrine of standing derives from the case-or-controversy requirement, and because that requirement in turn is grounded in historical practice, it is instructive to consider whether an alleged intangible harm has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts."[44]

Second, "because Congress is well positioned to identify intangible harms that meet minimum Article III requirements, its judgment is also instructive and important."[45] The Court pointed to its prior statement that Congress may "elevat[e] to the status of legally cognizable injuries concrete, de facto injuries that were previously inadequate in law."[46]

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Turning to "the context of this particular case," the Court held that "Robins cannot satisfy the demands of Article III by alleging a bare procedural violation" of the FCRA because a violation of one of the statute's "procedural requirements may result in no harm."[47] For example, the Court explained, a consumer reporting agency could violate a FCRA procedural

requirement but the information reported may nevertheless "be entirely accurate."[48] Further, "not all inaccuracies cause harm or present any material risk of harm" even if the inaccurate information is disseminated; for example, the dissemination of "an incorrect zip code" would be harmless.[49] The Court therefore remanded the case to the Ninth Circuit to determine in the first instance whether the alleged violations were "sufficient to meet the concreteness requirement."[50]

Justice Thomas wrote a concurring opinion that distinguished between "private plaintiffs who allege[] a violation of their own rights, in contrast to private plaintiffs who assert[] claims vindicating public rights."[51] In his view: "common-law courts possessed broad power to adjudicate suits involving the alleged violation of private rights, even when plaintiffs alleged only the violation of those rights and nothing more," but "required a further showing of injury for violations of 'public rights'—rights that involve duties owed 'to the whole community, considered as a community, in its social aggregate capacity.'"[52] He concluded that most of the claims asserted by Robins fell within the "public rights" category.[53]

TransUnion Defines the "Concrete Harm" Standard

Spokeo's general statements regarding the standard for determining whether an alleged intangible harm qualifies as concrete did not provide sufficiently clear guidance to lower courts; plaintiffs' lawyers took advantage of that uncertainty to test the limits of *Spokeo* in the lower courts, with mixed outcomes. As a result, post-*Spokeo* lower court decisions applied dramatically different approaches.[54] The Supreme Court therefore granted review in *TransUnion* to again address Article III injury in fact in the context of a statutory damages class action.

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important guidance regarding the test for determining concrete harm.

The Journey to the Supreme Court

Federal law forbids U.S. companies from doing business with certain persons who are believed to threaten the security of the United States. The Treasury Department's Office of Foreign Assets Control (OFAC) maintains a list of these individuals, which includes suspected terrorists and narcotics traffickers.[55]

Plaintiff Sergio Ramirez sued TransUnion on behalf of a class of 8,185 individuals alleging two violations of the FCRA.[56] First, he claimed that TransUnion had failed to use reasonable procedures to ensure the accuracy of his and class members' credit files, which included a statement that the class members were a "potential match" to a name on the OFAC list.[57] Second, he asserted that TransUnion's mailings to inform him about the potential match violated the FCRA in two ways: an initial mailing that contained "his credit file and the statutorily required summary of rights … did not mention the OFAC alert in [his file]," and a second mailing that did disclose the potential match to the OFAC list "did not include an additional copy of the summary of rights."[58]

Ramirez, the sole named plaintiff, found out about his potential OFAC match while attempting to purchase a car, which caused him to suffer difficulty in obtaining an auto loan and embarrassment in front of his family, and led him to cancel a planned vacation out of concern about the alert.[59] But none of the other class members submitted any evidence of harms of this kind, and the record showed that only 1,853 of the 8,185 had their credit reports referencing the "potential" OFAC match disseminated to potential creditors.[60]

The district court certified the class and ruled that each member of the class had Article III standing for both categories of FCRA claims. After a trial, the jury returned a verdict in favor of the class and the district court entered a class-wide judgment.[61]

A divided Ninth Circuit panel affirmed in relevant part, holding that all members of the class had Article III standing to recover damages for both alleged FCRA violations.[62] For the reasonable procedures claims, the panel majority concluded that the mere existence of the alleged inaccuracy in class members' credit reports subjected them to risks of

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harm to their "privacy and reputational interests," regardless of whether the inaccuracy was ever disclosed to a third party.[63] And for the claims about the format of TransUnion's mailings, the panel majority concluded that the alleged violations "exposed all class members to a material risk of harm to their concrete informational interests" in "being able to monitor their credit reports and promptly correct inaccuracies."[64]

The Supreme Court's Opinion

The Supreme Court reversed by a 5-4 vote. The Court held that only plaintiffs and class members who are concretely harmed by a defendant's statutory violation have standing to seek damages. Applying that standard, it concluded that the class-wide judgment was improper in multiple respects.

The Court began by explaining the fundamental "separation of powers" concerns that underlie the injury-in-fact requirement.[65] It pointed out that "the text of the Constitution," specifically, Article III's limitation of federal-court jurisdiction to "Cases" and "Controversies," is the source of the requirement of a "personal stake in the case—in other words, standing."[66]

Building on its prior opinion in *Spokeo*, the Court reaffirmed that to satisfy Article III's requirement of injury in fact, a plaintiff must establish a concrete injury—an injury that (in *Spokeo*'s words) is "real, and not abstract."[67] And the Court reaffirmed that the concrete injury requirement is not relaxed in the context of claims resting on alleged statutory violations, stating that "an injury in law is not an injury in fact."[68] "Only those plaintiffs who have been *concretely harmed* by a defendant's statutory violation may sue that private defendant over that violation in federal court."[69]

The Court also confirmed that "Congress's creation

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of a statutory prohibition or obligation and a cause of action does not relieve courts of their responsibility to independently decide whether a plaintiff has suffered a concrete harm."[70] Quoting from an opinion by Sixth Circuit Judge Jeffrey Sutton, the Court explained that "even though 'Congress may elevate harms that exist in the real world before Congress recognized them to actionable legal status, it may not simply enact an injury into existence, using its lawmaking power to transform something that is not remotely harmful into something that is.'"[71]

To determine whether the concrete harm requirement is satisfied, the Court instructed (quoting *Spokeo*) that courts should "assess whether the alleged injury to the plaintiff has a 'close relationship' to a harm 'traditionally' recognized as providing a basis for a lawsuit in American courts."[72] The "inquiry asks whether plaintiffs have identified a close historical or common-law analogue for their asserted injury."[73] The Court cautioned that while "an exact duplicate in American history and tradition" is not required, "*Spokeo* is not an open-ended invitation for federal courts to loosen Article III based on contemporary, evolving beliefs about what kinds of suits should be heard in federal courts."[74]

Finally, the Court identified an additional reason for the concrete harm requirement: Article II's allocation of power to the Executive Branch. The Court explained that a "regime where Congress could freely authorize *unharmed* plaintiffs to sue defendants who violate federal law … would infringe on the Executive Branch's Article II authority."[75] That is because, unless "'an actual case'" exists—a claim in which the plaintiff alleges concrete harm—"the choice of how to prioritize and how aggressively to pursue legal actions against defendants who violate the law falls within the discretion of the Executive Branch, not within the purview of private plaintiffs (and their attorneys). Private plaintiffs are not accountable to the people and are not charged with pursuing the public interest in enforcing a defendant's general compliance with regulatory law."[76]

Applying those principles, the Court first made clear that, in a class action, every class member—not just the named plaintiff—must satisfy Article III's standing requirement in order to recover damages. Chief Justice Roberts had previously suggested as much in a prior concurring opinion, but the *TransUnion* Court squarely held for the first time that "[e]very class member must have Article III standing in order to recover individual damages."[77]

For the reasonable-procedures claim, the Court held that the 1,853 class members whose credit reports were disseminated to third parties did have standing, concluding that being labeled as a potential terrorist in a report disseminated to third parties sufficiently resembled the harm associated with the common-law tort of defamation.[78]

But the Court held that the remaining 6,332 class members whose

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credit reports were not disseminated to third parties lacked standing. In the absence of publication of their information, they could not point to any concrete harm akin to defamation resulting from the OFAC alert in their credit files, because the "mere presence of an inaccuracy in an internal credit file, if it is not disclosed to a third party, causes no concrete harm."[79]

The Court also rejected the argument that the 6,332 class members had standing based on a risk of future harm. It began by explaining that "in a suit for damages, the mere risk of future harm, standing alone, cannot qualify as a concrete harm—at least unless the exposure to the risk of future harm itself causes a *separate* concrete harm."[80] As an example, the Court, echoing a hypothetical posed by the Chief Justice at oral argument, imagined someone driving a quarter of a mile ahead of a reckless driver—where the risk posed by the reckless driver does not materialize and the first driver makes it home safely. Under those circumstances, the Court explained, the first driver has not suffered a concrete harm under Article III: the failure of the risk to materialize "would ordinarily be cause for celebration, not a lawsuit."[81]

Turning to the case before it, the Court explained that the "fundamental problem" with the class's future-risk-of-harm argument was that the risk never materialized; the 6,332 class members' credit reports were not disseminated to third parties and did not result in the denial of credit.[82] Nor did the class members demonstrate independent harm posed by the threat of future harm.[83]

The Court also stated that, in addition, the risk of future dissemination was too speculative to satisfy Article III. The 6,332 class members did not demonstrate a sufficient likelihood that their credit reports would be disclosed.[84] They also did not present any evidence that they even knew about the OFAC alerts in their credit files. As the Court noted, "[i]t is difficult to see how a risk of future harm could supply the basis for a plaintiff's standing when the plaintiff did not even know that there was a risk of future harm."[85]

For the second category of claims, relating to the format of TransUnion's mailings, the Court concluded that Ramirez had standing, but no other class member satisfied the concrete harm requirement. The Court explained that the class members did "not demonstrate that they suffered any harm *at all* from the formatting violations," much less a "harm with a close relationship to a harm traditionally recognized as providing a basis for a lawsuit."[86]

The Court also rejected the argument, advanced by the United States, that an alleged deprivation of information, without more, could constitute an injury in fact. "An 'asserted informational injury that causes no adverse effects

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cannot satisfy Article III.'"[87] The Court further explained that the class members here were not actually deprived of any information to which they were entitled; their complaint instead was "only that they received it *in the wrong format*."[88]

As the Court succinctly summarized, "[n]o concrete harm, no standing."[89]

The principal dissent, written by Justice Thomas, took a different view.[90] It stated that any "violation of an individual right gives rise to an actionable harm."[91] Justice Thomas reiterated the argument from his *Spokeo* concurrence that statutory rights should be divided into public and private rights, and that any violation of a "private" individual right suffices for Article III purposes.[92] He stated that this approach "was widespread at the founding" and "in early American history."[93]

The *TransUnion* majority squarely rejected Justice Thomas's proposed approach as inconsistent with modern standing doctrine and observed that

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it "would largely outsource Article III to Congress."[94] As the majority explained, the increased importance of the concrete harm requirement in recent standing jurisprudence reflects the fact that, "over the last 50 years or so," "Congress has created many novel and expansive causes of action that in turn have required greater judicial focus on the requirements of Article III."[95]

TransUnion confirms that the concrete harm requirement articulated in *Spokeo* is here to stay. Moreover, as discussed next, the *TransUnion* and *Spokeo* Courts also have the better of the historical and constitutional argument. Requiring private plaintiffs to demonstrate concrete harm is fully consistent with the Anglo-American legal tradition and with the bedrock separation-of-powers principles undergirding our constitutional structure.

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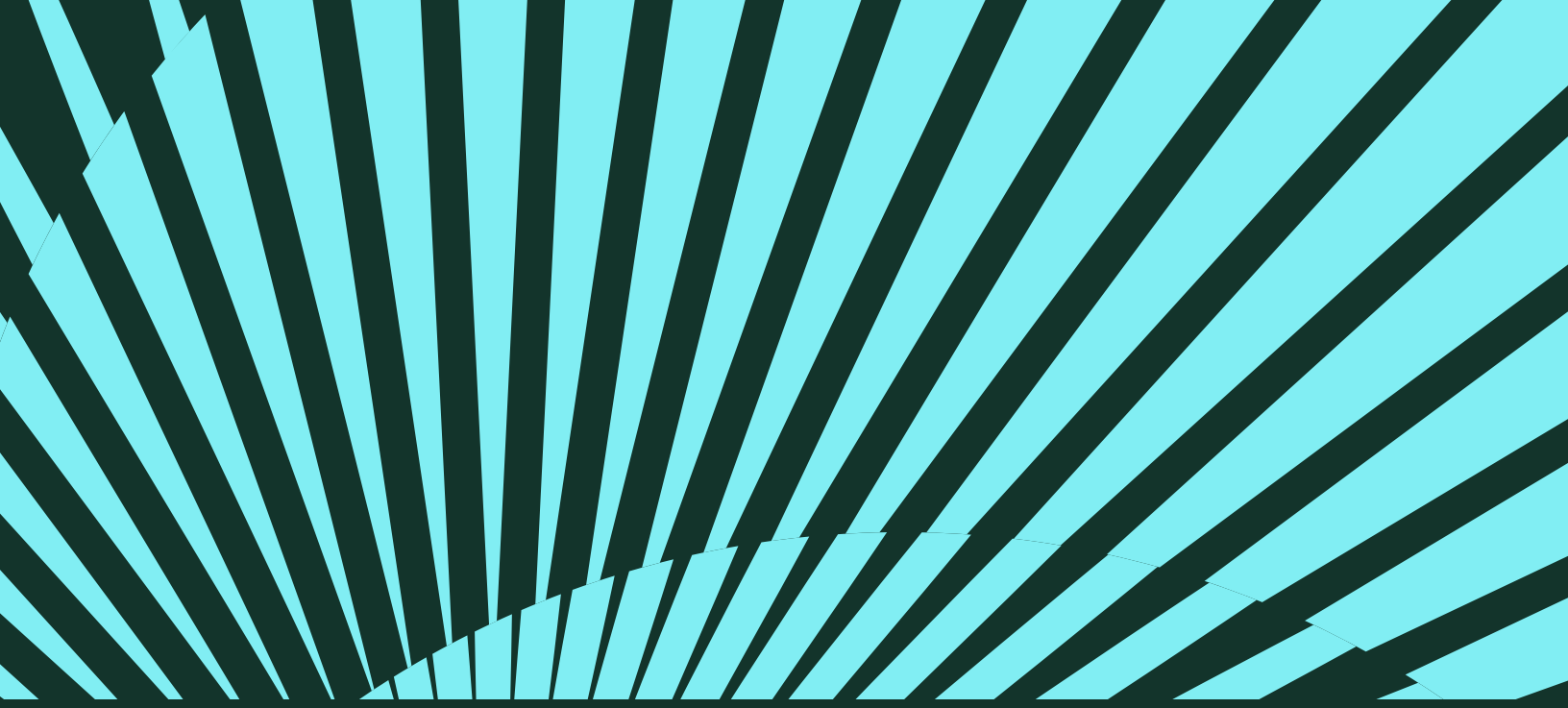

Chapter

04

Spokeo, *TransUnion*, and The Constitution's Original Meaning

The Framers included the "Cases" and "Controversies" requirement in Article III to limit the federal judicial power. Their understanding of those terms is grounded in a particular historical context: the Anglo-American legal tradition with which they were familiar. That tradition confined courts' authority to disputes involving concrete harm.

Although *Spokeo* and *TransUnion* did not explore the relevant history, their holdings are consistent with, and compelled by, the meaning of the terms the Framers used.[96] In addition, the Constitution's vesting of "[t]he executive Power" in the President provides further support for the concrete harm requirement. Granting a private party power to enforce federal laws in the absence of a concrete harm would effectively transfer government enforcement power to that private party, because that party would not be seeking to remedy a private harm but rather to vindicate a general interest in law enforcement—and therefore infringe on the President's exclusive power under Article II to determine how and in what circumstances to exercise law enforcement authority.

Article III Incorporates Founding-Era Limits on Judicial Authority

The drafting history of Article III demonstrates that the Framers purposefully adopted the then-recognized limits on court authority to restrict the scope of federal judicial power.

Early drafts of Article III would have granted federal courts the power to adjudicate an extremely broad range of disputes. For example, the Virginia Plan—authored by James Madison and proposed by Edmund Randolph, both proponents of a relatively strong national government—would have extended the jurisdiction of the federal inferior courts to "questions which may involve the national peace and harmony," phrasing that could have encompassed advisory opinions and federal lawsuits without any concrete harm.[97]

The Committee of Detail, which was tasked with assembling the first complete draft of the Constitution, then expanded the text, so that lower courts would have jurisdiction over "Cases arising under the Laws passed by the general Legislature, and to such other Questions as involve the national Peace and Harmony."[98] The fiercest advocates for a strong national government—such as Alexander Hamilton—would have gone even further. Hamilton would have created a federal judiciary that could "determin[e] … all matters of general concern."[99]

Champions of a more limited federal government, however, demanded changes.[100] The drafters eliminated the broad grant of authority to decide "other Questions as involve the national Peace and Harmony,"[101] substituted the term "judicial Power" for "jurisdiction,"[102] and eventually settled on the final text: that the "judicial Power shall extend" to enumerated types of "Cases" and "Controversies."[103]

Article III, Section 2 thus emerged as a compromise, confining the federal judiciary to adjudicating matters that were familiar to the Framers as disputes appropriate for resolution in court. Determining whether the Framers would have considered any particular dispute as one suited for judicial resolution thus requires turning to that Anglo-American common-law tradition.[104]

Concrete Harm Was Required at the Founding

In the English legal tradition familiar to the Framers, a concrete harm was a necessary element of any judicial dispute. The focus on the concrete harm requirement in *Spokeo* and *TransUnion* is therefore consistent with the original meaning of the terms the Framers used in drafting Article III.

The English legal system began with the King's resolution of disputes that threatened the peace.[105] The parties were "landowners, many of whom were warriors by trade"; the "claims" involved disputes over ownership of property and similarly grave matters that otherwise would have been resolved by force of arms.[106] Indeed, the principal purpose of the early royal civil justice system was to provide an alternative to "the resolution of disputes [by] private warfare."[107]

The writ of trespass at the root of much of early English law had similar origins as a mechanism for resolving violent disputes that inflicted serious harm. It emerged from the criminal context, providing a remedy when the "defendant is charged [by the plaintiff] with a breach of the king's peace, though with one that does not amount to felony."[108] The writ permitted lawsuits for damages if, "with force and arms the defendant has assaulted and beaten the plaintiff, broken the plaintiff's close, or carried off the plaintiff's goods."[109] The requirement that a plaintiff allege "trespass *vi et armis*" ("trespass with force and arms") became largely fictional, but the writ remained grounded in physical invasion of person or property sufficient to "breach … the king's peace."[110]

Ultimately, the early English legal system generated a limited set of writs, and plaintiffs of the time elected a writ based upon whether they had experienced one of a defined set of harms. While it became a truism

that every legal wrong had a remedy,[111] that was because legal wrongs—the category of wrongs justifying the exercise of judicial authority—in each case required a concrete harm.[112]

For instance, Sir William Blackstone—whose work was considered foundational by the Framers—painstakingly enumerated the "injuries cognizable by the courts of common law," along with the "respective remedies applicable to each particular injury."[113] Each legal wrong that Blackstone then identified involved the infliction of concrete harm to person or property, making clear that real-world harm was a prerequisite for asserting a claim in court. Wrongs described in Blackstone's *Commentaries on the Laws of England* included, for example:

- harms affecting the limbs or bodies of individuals;[114]
- threats and menaces of bodily hurt;[115]
- selling him bad provisions or wine;[116]
- exercise of a noisome trade, which infects the air in his neighborhood;[117]
- neglect or unskillful management of his physician, surgeon, or apothecary;[118]
- injuries affecting a man's reputation or good name (i.e., slander and defamation);[119]
- preferring malicious indictments or prosecutions against him;[120]
- false imprisonment;[121]
- injuries that may be offered to a person, considered as a husband,[122] parent,[123] or guardian[124] (i.e., injuries to one's spouse, child, or ward);
- interfering with performance of a servant's duties;[125]
- injuries to personal property;[126]
- contract-related wrongs, mainly, breaches of contract;[127] and
- real injuries ... or injuries affecting real rights (i.e., injuries to real property).[128]

English cases confirm that a showing of real-world harm was required. For example, Sir Edward Coke reported in *Robert Marys's Case* that injuria (legal injury) and damnum (damage) must be present in an action on the case regarding overgrazing of the common.[129] Justice Dodderidge stated that "injuria absque damno" ("injury without damage") was not actionable.[130] A 1611 decision of the Court of Common Pleas explained that a commoner could bring an action against a stranger who inflicted "a damage

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whereby [the commoner] los[t] [his] common," but "no action lieth" when no harm is suffered by a putative plaintiff—and therefore a master could not sue a third party for the third party's assault on his servant if the master did not "lose [the servant's] service."[131]

While English courts recognized lawsuits for certain intangible harms, those intangible harms invariably had concrete, real-world effects. In *Ashby v. White,* for example, the House of Lords reversed a decision of the Queen's Bench regarding an election-law dispute. Grounding its decision in the prohibition against suits alleging "injuria sine damno" ("injury without damage"), the Queen's Bench had concluded that an elector was not prejudiced by the inability to vote.[132] The House of Lords reversed because not permitting a remedy in this circumstance was "destructive of the Property" of the plaintiff.[133] The decision was thus grounded in the House of Lords' recognition of a cognizable concrete harm—the denial of the right to vote, which the House viewed as a property right. As Justice Frankfurter explained, "'*Private damage*' is the clue to the famous ruling in *Ashby v. White* ... and determines its scope as well as that of cases in this Court of which it is the justification."[134] The House of Lords has similarly confirmed that the legal analysis in *Ashby* turned on the infringement of a property right: treating the right to vote "as a matter of property" was "fundamental to Holt C.J.'s judgment and to his defence of the jurisdiction of the court."[135]

Courts applied that same rationale to real property rights. An unauthorized physical intrusion on another's property was actionable because it effected actual, real-world harm in form of the intruder's presence on the owner's land.[136]

This tradition—of finding private rights actionable when they were associated with concrete harms—answers Justice Thomas's dissent in *TransUnion.* There, Justice Thomas argued that under the Anglo-American legal tradition any individual who "sought to sue someone for a violation of his private rights ... needed only to allege the violation."[137] But what the dissent's historical account failed to recognize is that it is only in recent years that Congress has separated private causes of action from concrete harms.[138]

In sum, Anglo-American case law at the time of the Founding limited the exercise of judicial authority to situations where plaintiffs experienced concrete harm.

Separation-of-Powers Principles Also Require Concrete Harm

Spokeo's requirement that private plaintiffs show that they were concretely harmed also is compelled by bedrock separation-of-powers principles—as *TransUnion* makes explicit.[139]

To begin with, requiring a plaintiff to demonstrate concrete harm ensures that federal courts do not stray beyond their limited sphere of authority. Requiring every plaintiff to establish standing respects "separation-of-powers principles" and "prevent[s] the judicial process from being used to usurp the powers of the political branches."[140]

As the Supreme Court has explained, by "limiting the judicial power to 'Cases' and 'Controversies,' Article III of the Constitution restricts [the judiciary] to the traditional role of Anglo-American courts, which is to redress or prevent actual or imminently threatened injury to persons caused by private or official violation of law."[141] The injury-in-fact requirement thus furthers the "overriding and time-honored concern about keeping the Judiciary's power within its proper constitutional sphere."[142] "[T]he role of courts [and] that of the political branches" "would be obliterated if, to invoke intervention of the courts, no actual or imminent harm were needed."[143]

Second, and just as important, the concrete harm requirement helps to prevent Congress from impermissibly reassigning to private plaintiffs the Executive's exclusive authority to enforce federal law. A private plaintiff who files suit without suffering concrete harm is not seeking redress for her own injury—because she has not suffered any injury. She therefore could be suing only to vindicate a general interest in promoting compliance with federal law. But the Constitution in Article II vests "[t]he executive Power" in the President and also directs him to "take Care that the Laws be faithfully executed."

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Determining how and in what circumstances to enforce federal law lies at the core of that Presidential authority.[144] Permitting private actions without a concrete harm requirement would allow Congress to "transfer from the President to [private plaintiffs] the Chief Executive's most important constitutional duty, to 'take Care that the Laws be faithfully executed.'"[145]

It matters—on both a practical level and as a matter of good government—whether public

prosecutors, as opposed to self-interested private parties, enforce the law: The Executive's duties under the Take Care Clause include the attendant discretion to decide which cases warrant prosecution—determinations for which the President is politically accountable. By contrast, as the *TransUnion* Court explained, "[p]rivate plaintiffs are not accountable to the people and are not charged with pursuing the public interest in enforcing a defendant's general compliance with regulatory law."[146]

Third, and relatedly, delegating law enforcement authority to private parties would erode individual liberty. A government attorney "is the representative not of an ordinary party to a controversy," but of the people—and therefore has a higher calling: to do justice, not just to win.[147] By contrast, private plaintiffs hunting for a statutory-damages bounty—and their lawyers—lack the political and legal constraints that cabin the executive's discretion; they will naturally respond to their own incentives, not the public interest. The "'separation of powers protect[s]'" not only "'the dynamic between and among the branches,'" but "'the individual as well.'"[148] Thus, "[l]iberty is always at stake when one or more of the branches seek to transgress" the bounds of their authority.[149]

In sum, *Spokeo*'s robust concrete harm requirement maintains the Framers' vision of a judicial power with limited scope, devoted to deciding the types of disputes traditionally actionable under Anglo-American common law.

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Chapter

05

TransUnion Clarifies the Concrete Harm Standard

The concrete harm question is usually easy to answer in the context of tangible harm, such as physical injury, property damage, or monetary loss. It is much harder to resolve when the claimed harm is intangible, as is often the case in lawsuits based on federal regulatory laws.

The Supreme Court's decision in *Spokeo* did not stop plaintiffs' lawyers from filing no-injury actions based on those laws. Rather, plaintiffs' lawyers paid lip service to *Spokeo*'s requirement that concrete harm requires an injury that is "real, and not abstract," but advanced—and in some cases convinced lower courts to accept—arguments that effectively nullified that standard. *TransUnion* slammed the door on those arguments in five specific ways:

1. Holding that concrete, real-world harm is required in all cases, and rejecting various lower court "workarounds" that in practical effect reinstated the pre-*Spokeo* rule that alleging a violation of a federal statute automatically established standing;

2. Reiterating the requirement that, to qualify as sufficiently concrete, a claimed intangible injury must bear "a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts."[150] The ultimate reference point is the harms actionable at the Founding, but injuries with a lengthy common-law pedigree may also satisfy the "close relationship" standard;

3. Confirming that Congress may create causes of action to redress real-world concrete harms that were not previously actionable, but it may not displace the concrete harm requirement and courts ultimately must determine whether the asserted harm satisfies the constitutional standard;

4. Rejecting the notion, endorsed by some lower courts, that, when a statute requires a party to provide information and the party fails to do so, the failure to provide information by itself constituted a concrete injury satisfying Article III—real-world harm resulting from the failure to provide information is required in order to establish standing; and

5. Holding that a risk of future harm that has not materialized cannot support standing to recover statutory damages.

"The Supreme Court's decision in *Spokeo* did not stop plaintiffs' lawyers from filing no-injury actions based on those laws."

Concrete Injury Required in All Cases

Spokeo clearly stated that a plaintiff must allege and prove an injury that "actually exist[s]" and that is "'real,' and not 'abstract.'"[151] But a significant number of courts of appeals construed *Spokeo* in ways that effectively nullified the requirement of real-world harm to the plaintiff. All of those approaches are plainly improper after *TransUnion*.

For example, some lower courts determined that *Spokeo* applied only to "procedural" violations, concluding that any violation of a "substantive" statutory right was actionable without a showing of concrete harm.[152] Perhaps unsurprisingly, the courts that took that malleable approach were quick to find that statutory rights were "substantive."

TransUnion eliminates that purported distinction, holding that a plaintiff's obligation to demonstrate that she suffered real-world harm applies across the board to all claims.[153] The Second Circuit, for example, recently recognized that

... [A] significant number of courts of appeals construed *Spokeo* in ways that effectively nullified the requirement of real-world harm to the plaintiff. All of those approaches are plainly improper after *TransUnion*.

"*TransUnion* eliminated the significance" of whether a statutory prohibition is classified as "procedural" or "substantive."[154] Instead, "plaintiffs must show that the statutory violation caused them a concrete harm, *regardless* of whether the statutory rights violated were substantive or procedural."[155] In reaching that conclusion, the panel reversed course from its pre-*TransUnion* holding that the plaintiffs had standing because they had alleged violations of a substantive statutory right, holding instead that the plaintiffs lacked standing because they did not "suffer[] a concrete harm due to the" asserted statutory violations.[156]

Next, other lower courts relied on Justice Thomas's *Spokeo* concurrence stating that concrete harm is not required for claims asserting private rights, rather than public rights—placing many statutory claims in the "private rights" category and upholding standing without proof of real-world harm.[157]

The *TransUnion* majority clearly and explicitly rejected that approach.[158]

Still other decisions, including the Ninth Circuit's reversed opinion in *TransUnion* and its opinion on remand in *Spokeo*, erroneously based standing on harm to generalized statutory "interests" rather than real-world harm to the plaintiff. These courts construed *Spokeo* to require identification of the general interest protected by the federal statute creating the cause of action. If the courts found that interest sufficiently concrete, they upheld standing based on an alleged violation of that statutory interest—even if the particular plaintiff suffered no real-world harm.[159]

As a practical matter, this approach allowed courts to find standing based simply on the allegation of a statutory violation. Congress's definition of a regulatory requirement and creation of a cause of action to enforce it could easily be

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found to render the statutory interest "concrete." And concluding that a violation of the statute infringed that concrete interest was then virtually automatic.

The *TransUnion* Court squarely rejected that approach when it reversed the Ninth Circuit. The lower court had concluded that each class member demonstrated standing because inaccurate information in the credit reports "ran a real risk of causing the uncertainty and stress that Congress aimed to prevent in enacting the FCRA"—regardless of whether any individual class member's credit report was disseminated to a third party.[160] The Supreme

Court rejected this theory and instead assessed class members' standing based on whether their credit reports were actually disseminated to third parties.

The Sixth Circuit recognized as much in a recent case involving the Fair Debt Collection Practices Act. It stated that *TransUnion* "abrogated" the Circuit's prior view that a plaintiff may satisfy *Spokeo* by alleging that a statutory violation "created a material risk of harm to the interests recognized by Congress in enacting the" statute.[161] Instead, the Sixth Circuit explained, *TransUnion* requires a plaintiff to allege that he suffered "a concrete injury of the sort traditionally recognized" resulting from the statutory violation.[162]

In sum, the *TransUnion* opinion—including the majority's clear rejection of the contrary arguments set forth in the dissent—leaves no doubt that concrete, real-world injury is required in all cases.

Close Relationship to Historically Actionable Harm

For an alleged harm to be recognized as sufficiently concrete, *TransUnion* and *Spokeo* hold that the harm must bear a "close relationship" to a harm actionable at the time of the Founding—taking account of both the nature and the degree of harm. That does not mean that courts always must trace the claimed harm back to an injury recognized in 1787: harms with a lengthy common-law pedigree may also satisfy this standard. But a harm cannot be categorized as concrete by adopting only some of the common-law standards that made the particular injury actionable. Unfortunately, some courts have strayed from this test at the invitation of plaintiffs' lawyers, upholding standing based on loose or conclusory comparisons that are not faithful to the "close relationship" standard—and have done so even after *TransUnion*.

Guidance From *Spokeo* and *TransUnion*

Because "the doctrine of standing derives from the case-or-controversy requirement, and because that requirement in turn is grounded in historical practice," *Spokeo* instructed courts to "consider whether an alleged intangible harm has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts."[163] The *TransUnion* Court reiterated that requirement verbatim.[164] Applying the Court's instruction requires

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identifying an appropriate historical analogue for the asserted harm and then assessing whether there is a "close relationship" between the two.

In determining whether a plaintiff's asserted intangible harm has a historical analogue, the ultimate touchstone is the period of the Founding, because the injury-in-fact requirement ensures that the jurisdiction of federal courts does not expand beyond the "Cases" and "Controversies" permitted by Article III—as those terms were understood when the Constitution was adopted. The original meaning of those terms is therefore key in assessing whether a claimed intangible injury is actionable.

Spokeo confirms that conclusion. Its directive that courts must look to "a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts" was followed by a citation to *Vermont Agency of Natural Resources. v. United States ex rel. Stevens*.[165] The question in that case was whether the *qui tam* relator asserting a claim under the False Claims Act had suffered an injury in fact sufficient to satisfy Article III. The Court held that Congress had appropriately assigned the United States' interest in the lawsuit to individuals bringing *qui tam* actions, and that Article III allowed Congress to do so because of the "long tradition of *qui tam* actions in England and the American Colonies" at the time of the Founding.[166]

TransUnion followed the same approach in assessing whether the harm proven by the plaintiff was sufficiently analogous to the type of harm that would support a common-law defamation action.[167] The Court observed that defamation is a tort that has been part of the Anglo-American common-law tradition "[s]ince the latter half of the 16th century,"

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and thus would have been familiar to the Framers.[168]

Of course, the class of actionable injuries is not frozen as of 1787. *TransUnion* and *Spokeo* both stated that the claimed harm need not be identical to the historical analogue, requiring only a "close relationship."[169] The question, therefore, is whether the nature and severity of the harm alleged resemble an injury that was historically actionable.

Claimed harms with lengthy common-law pedigrees may satisfy that standard. But reliance on newer

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asserted harms that lack the necessary historical pedigree would run afoul of the *TransUnion* Court's warning that "*Spokeo* is not an open-ended invitation for federal courts to loosen Article III based on contemporary, evolving beliefs about what kinds of suits should be heard in federal courts."[170]

TransUnion provided an example of the necessary close relationship when it identified "reputational harms, disclosure of private information, and intrusion upon seclusion" as concrete harms.[171] Although the Court's opinion did not detail the link between these harms and historical analogues, the necessary close relationship is obvious.

Blackstone recognized that injuries "affecting a man's reputation or good name"—i.e., reputational harms—were actionable.[172] The tort of public disclosure of private facts similarly captures a harm very close to defamation—making public true, but previously private, facts about a person that causes harm to that person's reputation or good name.[173] Intrusion upon seclusion can be a more amorphous concept, but its core involves an intrusion into a person's private space or private information that causes the plaintiff anguish and suffering that "becomes a substantial burden to his existence"—in other words, that inflicts real-world harm.[174] These specific harms thus have a direct link to those recognized in English and early American common law—a link that was explicated in detail in the landmark 1890 law review article by then-Professors Warren and Brandeis.[175]

Thus, *TransUnion*'s reference to these harms did not endorse as historical analogues "relatively modern privacy torts" that did not "exist[] at the time of the Founding."[176] Rather, it focused on harms clearly satisfying the requirement of a "close relationship" to those recognized at the Founding.

Finally, the *TransUnion* Court's application of its test makes clear that courts cannot pick some, but not all, of the common-law requirements defining a concrete injury to produce a diluted concrete harm standard. For the class members whose reports were disseminated to third parties, the Court concluded that a misleading statement that someone is a "potential terrorist" was sufficiently akin to the harm from a defamatory statement; even if the "potential terrorist" label was not literally false (because name similarities led to a potential match), "[t]he harm from being labeled a 'potential terrorist' bears a close relationship to the harm from being labeled a 'terrorist.'"[177]

But for the remaining class members, the absence of dissemination to third parties meant that their asserted injuries lacked the requisite "close relationship" to common-law defamation, because "publication" is a "fundamental requirement of an ordinary defamation

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claim."[178] Those class members could not overcome that deficiency by pointing to TransUnion's internal dissemination of the reports or its dissemination of the reports to its vendors that printed and sent the mailings that the class members received, because "[m]any American courts did not traditionally recognize intra-company disclosures as actionable publications" and "generally require[d] evidence that the document was actually read and not merely processed."[179]

Lower Court Applications

Few courts of appeals since *TransUnion* have had occasion to compare in detail a plaintiff's asserted harm with a proposed historical analogue.

Shortly after *TransUnion*, the Sixth Circuit did consider whether an alleged violation of the Fair Debt Collection Practices Act (FDCPA) caused harm comparable to the harm redressed by "the tort of intrusion upon one's right to seclusion."[180] The court held that it did not. The violation that the defendant allegedly committed was "failing to identify the 'true name' of its business because it identified itself as 'NPAS' rather than 'NPAS, Inc.,'" when leaving voicemails about the debt.[181] That "failure to disclose its full identity in its voice messages" did not cause "a harm traditionally regarded as providing a basis for a lawsuit," because any confusion caused by the incorrect name did not resemble the harms associated with "an intentional intrusion into the private affairs of another."[182]

The Eighth Circuit reached a similar result in another post-*TransUnion* FDCPA case.[183] The court held that the plaintiff's alleged intangible harms of "nervousness" and "irritability" from the asserted violation—receiving a direct mailing from a creditor when the plaintiff was represented by an attorney—"fall short of cognizable injury as a matter of general tort law."[184] The court further observed that the close relationship standard is "fact specific," and that receiving a direct copy of a notice about a debt that the creditor is obligated to provide "is not an invasion of the [plaintiff's] privacy" sufficiently analogous to the common-law tort of intrusion upon seclusion.[185]

Even prior to *TransUnion*, several courts of appeals engaged in the appropriate, searching analysis to determine whether the plaintiffs' alleged harms resembled a harm traditionally actionable at common law.

For example, the *en banc* Eleventh Circuit determined that a violation of the Fair and Accurate Credit Transactions Act (FACTA)—which involved printing more digits of a credit card number on a receipt than allowed by statute—was not sufficiently analogous to the harm addressed by the common-law tort of breach of confidence.[186] The court began by questioning whether a "breach of confidence is sufficiently ancient" to qualify as a historical analogue.[187] The court declined to answer that question, however,

instead concluding that "even if we assume that a breach of confidence was traditionally redressable in English and American common-law courts, we are unpersuaded by its analogy to the facts of this case."[188]

The court explained that the common-law tort addresses harms from disseminating private material to third parties, while the receipts at issue were simply handed to the customer who owned the credit card.[189] The court further noted that the breach-of-confidence tort addresses the harms associated with abuse of "vulnerable, confidential relationships," yet purchasers of chocolate at a Godiva store do not have a "confidential relationship" with the cashier.[190]

Other courts have properly rejected similar loose comparisons between the plaintiffs' alleged harms and harms traditionally actionable at common law.[191] *TransUnion* confirms that those courts were correct to do so.

On the other hand, a number of pre-*TransUnion* decisions found that plaintiffs sufficiently alleged

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a concrete injury based on remote comparisons between the asserted harm from a modern statutory violation and a harm redressed by a traditional Anglo-American tort. *TransUnion* makes clear that those rulings are incorrect.

For example, in *Spokeo* itself, on remand from the Supreme Court, the Ninth Circuit determined that the plaintiff's alleged injury was sufficiently analogous to the common-law torts of defamation and libel *per se* to satisfy Article III's requirements, even though the court admitted that "those common-law claims required the disclosure of false information that would be harmful to one's reputation"—and the plaintiff had not alleged facts supporting a plausible inference that his reputation had been harmed.[192] The court justified its decision by stating that "[e]ven if there are differences between FCRA's cause of action and those recognized at common law, the relevant point is that Congress has chosen to protect against a harm that is at least closely similar *in kind* to others that have traditionally served as the basis for lawsuit."[193]

That conclusory assertion did not explain why the alleged FCRA violation was sufficiently similar to common-law defamation despite the total absence of the harm that is the focus of libel and defamation actions—and it cannot survive *TransUnion*. The same is true of other such conclusory assessments.[194]

Unfortunately, not all post-*TransUnion* decisions have properly applied the "close relationship" standard. A recent decision by a panel of the Eleventh Circuit—which subsequently reheard the case *en banc* but has not yet issued a decision at the time of writing[195]—provides a good illustration.

Prior to *TransUnion*, the panel in a case involving a claim under the FDCPA unanimously concluded that the plaintiff had standing. The panel granted rehearing following *TransUnion*, and then divided 2-1 in reaching the same outcome.

The majority concluded that the asserted FDCPA violation—sending the plaintiff's sensitive medical information to a third-party vendor as part of the information used by the vendor to create, print, and mail a letter seeking to collect a medical debt—involved an intangible harm that was sufficiently analogous to the harm supporting the common-law tort of public disclosure of private facts. It interpreted *TransUnion* and *Spokeo* to stand for the proposition that "a plaintiff need only show that his alleged injury

is similar in *kind* to the harm addressed by a common-law cause of action, not that it is similar in *degree*."[196]

Judge Tjoflat explained in dissent, however, that "with the benefit of the Supreme Court's reasoning in *TransUnion*, I have changed my mind because [the majority's] standing analysis sweeps much more broadly than *TransUnion* would allow."[197] Like the purported distinction between "procedural" and "substantive" statutory rights that the Supreme Court rejected in *TransUnion*, the proposed kind-versus-degree test is hopelessly malleable and unworkable.

The dissent explained that, because publicity—i.e., dissemination "to the public at large"—is a "key element" of the common-law tort, treating non-public disclosure to a vendor as sufficiently analogous turns "*TransUnion*'s close-relationship test" into "really a third-cousin-twice-removed test."[198]

Or to take another colorful example offered by the dissent, saying that any differences between non-public dissemination to a single vendor and common-law publicity are matters of degree rather than kind "is like saying that sugar cookie batter is the same thing as chocolate chip cookie batter because sugar cookie batter would be chocolate chip cookie batter if you added chocolate chips."[199]

The dissent's analysis makes clear that a close relationship in both "kind" and "degree" is essential to satisfy *TransUnion*'s test—and that it is improper to ignore limits of the historical analogue that help to define the contours of the actionable injury.[200]

In sum, proper application of *TransUnion*'s "close relationship" test requires that asserted harms strongly resemble harms linked to those recognized at the Founding and forbids courts from loosening Article III based on novel theories of harm untethered to the Anglo-American legal tradition.

Congress's Role Is Limited

TransUnion confirmed that "Congress's creation of a statutory prohibition or obligation and a cause of action does not relieve courts of their responsibility to independently decide whether a plaintiff has suffered a concrete harm under Article III."[201]

Indeed, even prior to *TransUnion*, multiple courts of appeals applying *Spokeo* had recognized that neither

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Congress's general purpose in enacting a statute nor the creation of a statutory prohibition coupled with a cause of action could by themselves suffice to establish concrete harm. [202] Rather, these courts held, a plaintiff must show a real harm to herself resulting from the particular violation that serves as the basis for the lawsuit.[203]

TransUnion confirmed that Congress's role in the Article III inquiry is circumscribed: "Congress may 'elevate' harms that 'exist' in the real world before Congress recognized them to actionable legal status," but "it may not simply enact an injury into existence."[204] Quoting an opinion by Judge Katsas, the *TransUnion* Court explained that courts may not "treat an injury as 'concrete' for Article III purposes based only on Congress's say-so."[205]

Thus, even if Congress has sought to "elevate" and make actionable in court an injury that previously could not support a lawsuit, courts must independently assess whether that injury qualifies under Article III.

How should courts determine whether Congress intended to "elevate" an injury—to expand the category of harms that open the courthouse door? They should look for a clear statement in the statutory text that Congress intended to do so.

Merely enacting a private cause of action cannot suffice; Congress is presumed to legislate against general background legal principles, including Article III's concrete harm requirement.[206] The creation of a cause of action standing alone therefore must be read to incorporate the generally-applicable rules regarding the litigation of claims in federal court—"an entitlement to nothing but procedure."[207] It cannot logically be interpreted to embody a determination by Congress that a violation of the statute inevitably, or even usually, involves concrete harm, but only a determination that those individuals who do suffer some form of already-recognized concrete harm are entitled to remedy that harm in court.[208]

Inclusion of a statutory damages provision does not alter that conclusion. The Supreme Court has explained that statutory damages "substitute for ordinary compensatory damages" that are difficult

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to quantify—"[w]hen a plaintiff seeks compensation for an injury that is likely to have occurred but difficult to establish."[209] "In those circumstances, presumed damages may roughly approximate the harm that the plaintiff suffered and thereby compensate for harms that may be impossible to measure."[210] They provide "only to those plaintiffs who can demonstrate actual damages" an award of "some guaranteed damages, as a form of presumed damages not requiring proof of amount."[211] Such provisions thus spare plaintiffs who have been concretely harmed from calculating damages that would otherwise be difficult to quantify; they do not expand the category of actionable harms.

In sum, *TransUnion* reaffirms *Spokeo*'s core holding that "an injury in law is not an injury in fact."[212] And it makes clear that if Congress seeks to expand the category of actionable harms, independent analysis by a court is required to ensure that the harm has the requisite "close relationship" to a harm recognized at the Founding.

Mere Failure to Disclose Is Not Concrete Harm

TransUnion addressed, and rejected, the argument that concrete harm results from the mere failure to disclose information that the law requires be disclosed. At the invitation of the plaintiffs' bar, some lower courts had previously concluded otherwise, pointing to the citation in *Spokeo* to *FEC v. Akins* and *Public Citizen v. Department of Justice*, two prior Supreme Court cases involving failures to disclose information that defendants were required by statute to disclose.[213]

The *TransUnion* Court squarely held that "[a]n 'asserted informational injury that causes no adverse effects cannot satisfy Article III.'"[214] Instead, the non-disclosure must have real-world, "downstream consequences" to the plaintiff.[215]

While some plaintiffs' lawyers had argued for an expansive approach to informational injuries based on the Supreme Court's prior decisions in *Akins* and *Public Citizen*, those decisions, properly understood, support *TransUnion*'s requirement of real-world adverse consequences to the plaintiff resulting from the alleged non-disclosure. As the Eleventh Circuit put it in the decision that the *TransUnion* Court quoted with approval, "the plaintiffs

"And it makes clear that if Congress seeks to expand the category of actionable harms, independent analysis by a court is required to ensure that the harm has the requisite 'close relationship' to a harm recognized at the Founding."

TransUnion addressed, and rejected, the argument that concrete harm results from the mere failure to disclose information that the law requires be disclosed.

in *Public Citizen* and *Akins* identified *consequential harms* from the failure to disclose the contested information."[216]

For instance, the *Akins* Court stated that "the information [not provided] would help [plaintiffs] (and others to whom they would communicate it) to evaluate candidates for public office, especially candidates who received assistance from AIPAC, and to evaluate the role that AIPAC's financial assistance might play in a specific election."[217] Because of these effects, the Court explained, the plaintiffs' "injury consequently seems concrete and particular."[218] And in *Public Citizen*, the deprivation was of information the interest groups needed to scrutinize the "workings" of government in order to "participate more effectively in the judicial selection process."[219] These types of informational injuries "directly related to voting, the most basic of political rights," are far more likely to be "sufficiently concrete and specific" than asserted informational injuries in statutory-damages class actions.[220]

Plaintiffs therefore can no longer rely on a bare "deprivation of information" theory to establish concrete harm—as many lower courts have recognized.[221] They must allege and prove real-world adverse consequences resulting from the failure to provide the statutorily-mandated information.

Risk-of-Future-Harm Cannot Support Standing for Damages Claims

TransUnion significantly limits plaintiffs' ability to use risk-of-harm theories to satisfy Article III. Following *Spokeo*, many plaintiffs argued that their standing should be upheld because they had been subjected to a risk of harm—as a way to circumvent *Spokeo*'s requirement that they allege and prove that the claimed statutory violation resulted in actual harm.

Maddox, for example, involved a claim that the defendant bank delayed recordation of the satisfaction of the plaintiffs' mortgage, violating the time limit established by New York law. But the plaintiffs could point to no actual harm suffered during the period of delay; in fact, they had already successfully conveyed the property to a third party "several weeks before the mortgage satisfaction occurred."[222] The plaintiffs therefore attempted to satisfy Article III by pointing to risks of harms that a delayed recording could cause, such as a "cloud on title" or adverse effects on credit until the mortgage satisfaction is recorded.[223]

TransUnion effectively precludes this tactic. In a suit for damages, the *TransUnion* Court explained, "the mere risk of future harm, standing alone, cannot qualify as a concrete harm—at least unless the exposure to the risk of future harm itself causes a *separate* concrete harm."[224]

In other words, "[i]f the risk of future harm does *not* materialize, then the individual cannot establish a concrete harm sufficient for standing" to recover damages—absent a separate concrete harm from the risk itself.[225]

Lower courts that had previously applied *Spokeo* to uphold standing to recover damages based on risks of future harm have now recognized that *TransUnion* forecloses that approach. As the Second Circuit explained in *Maddox*, *TransUnion* makes clear that a risk that is "not alleged to have materialized" is "incapable of giving rise to Article III standing."[226]

The Seventh Circuit also recognized that *TransUnion* "alters our understanding of *Spokeo*" and abrogates that court's pre-*TransUnion* cases "say[ing] that a mere risk of harm is a sufficiently concrete injury to support a suit for damages."[227] The Seventh Circuit subsequently applied that revised understanding in an FDCPA case, holding that a plaintiff lacked Article III standing when she alleged only that the receipt of a non-compliant letter "created a risk that she might make a payment on a time-barred debt," but she did not in fact "make a payment, promise to do so, or otherwise act to her detriment in response to anything in or omitted from the letter."[228]

Spokeo and *TransUnion* each involved claims for damages rather than for injunctive relief. But, *TransUnion* reiterated, "standing is not dispensed in gross; rather, plaintiffs must demonstrate standing for each claim that they press and for each form of relief that they seek (for example, injunctive relief and damages)."[229]

"In a suit for damages, the *TransUnion* Court explained, 'the mere risk of future harm, standing alone, cannot qualify as a concrete harm—at least unless the exposure to the risk of future harm itself causes a separate concrete harm.'"

In the context of injunctive relief, *TransUnion* reaffirms that a risk of harm must be serious in order to support standing. Quoting Judge McKeown's dissent, the Court made clear that courts "cannot simply presume a material risk of concrete harm."[230] Instead, as the Court has previously explained, the risk of future harm must be "substantial" and the harm "*certainly impending*" in order to be sufficiently concrete.[231] Further, plaintiffs seeking to demonstrate that they face a significant risk of harm may not rely on an "attenuated chain of inferences" or "speculation about 'the unfettered choices made by independent actors not before the court.'"[232]

One area in which *TransUnion*'s rejection of risk-of-harm theories may

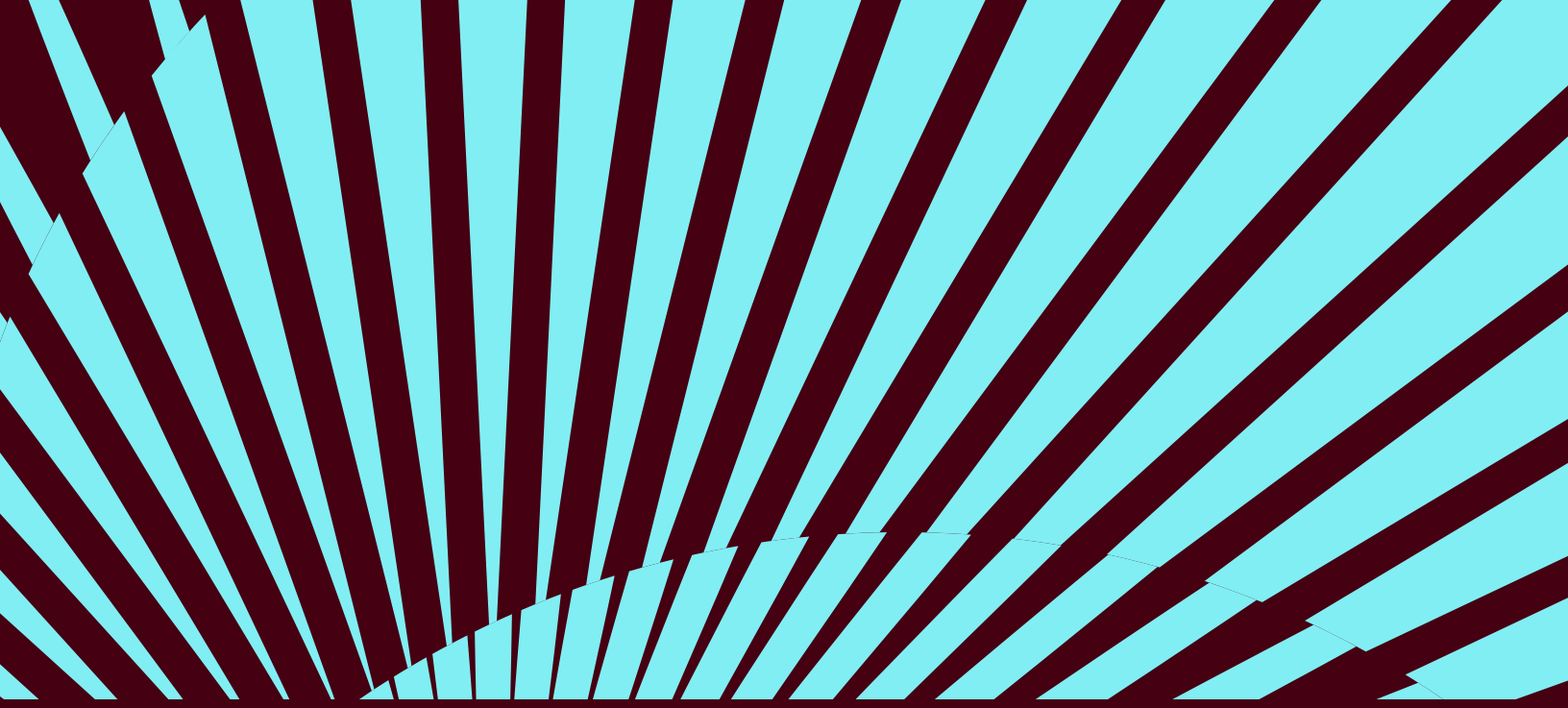
"In the context of injunctive relief, *TransUnion* reaffirms that a risk of harm must be serious in order to support standing."

have a significant impact is data breach litigation. Prior to *TransUnion*, several courts of appeals had held that plaintiffs could establish standing to recover damages "based on an increased risk of identity theft or fraud following the unauthorized disclosure of their data," so long as circumstances of the breach made that risk sufficiently substantial.[233] Under *TransUnion*, however, such a risk of future harm by itself cannot support standing to recover damages. At minimum, plaintiffs in data breach cases accordingly may need to show either (i) actual identity theft or fraud involving their information; or (ii) a sufficient risk of future identity theft or fraud coupled with a separate concrete harm resulting from the exposure to that risk.[234]

Another area in which *TransUnion* may have a similar impact is claims for medical monitoring. Lawsuits seeking medical monitoring without proof of present physical injury are controversial, and many jurisdictions have rejected them.[235] But even in those jurisdictions that permit medical monitoring, the theory for recovery of medical monitoring expenses is that they are designed to redress an "increase in risk of harm" that has not yet manifested.[236] Yet because medical monitoring "is predominantly monetary in nature, not declaratory or injunctive,"[237] *TransUnion* should preclude medical monitoring plaintiffs from recovering that form of damages based on speculative risks of future harm that have not materialized.[238]

TransUnion thus squarely rejects the attempts by some plaintiffs and lower courts to sidestep the concrete harm requirement by using hypothesized risks of potential, yet unmaterialized, harms posed by the asserted statutory violation. Each plaintiff instead will have to show actual harm—a requirement that makes demonstrating standing both more difficult and more individualized (and thus less suitable for class treatment).

"*TransUnion* thus squarely rejects the attempts by some plaintiffs and lower courts to sidestep the concrete harm requirement by using hypothesized risks of potential, yet unmaterialized, harms posed by the asserted statutory violation."



Chapter

06

TransUnion Makes Class Certification More Difficult

Even if a named plaintiff is able to satisfy the concrete harm requirement, plaintiffs and their lawyers in putative class actions will face significant challenges in obtaining class certification. Courts that had loosely interpreted *Spokeo* to allow standing based on statutory interests in general or unmaterialized risks of future harm paved the way to class certification by making irrelevant the individual circumstances of absent class members. But now that *TransUnion* forecloses that approach and instead requires concrete, real-world harm to the plaintiff and (as discussed below) every absent class member, standing is likely to be an individualized issue that weighs heavily against class certification.

"Certainly *TransUnion* signals … that the obligation to demonstrate that each class member suffered concrete harm will make it harder for plaintiffs to obtain class certification in statutory damages cases …"

Spokeo was decided on motions to dismiss, and therefore involved only the standing of the named plaintiff. And *TransUnion* reached the Supreme Court after a rare class-wide trial and final judgment, so the Court expressly reserved the question of whether putative class members must demonstrate standing at the class-certification stage.[239]

However, *TransUnion* goes a long way towards providing that answer. To be sure, parties will contest before the lower courts whether the holding in *TransUnion*—that every class member must have standing in order to obtain a judgment and recover damages—must be assessed at the class certification stage. But in reserving that question, the *TransUnion* Court cited an Eleventh Circuit decision, *Cordoba v. DIRECTV, LLC*, that reversed certification of a damages class because individualized issues surrounding class members' Article III standing "pose[d] a powerful problem under Rule 23(b)(3)'s predominance factor."[240]

That is a pretty big hint. Certainly *TransUnion* signals, at a bare minimum, that the obligation to demonstrate that each class member suffered concrete harm will make

it harder for plaintiffs to obtain class certification in statutory damages cases—because the need for individualized proof of harm will weigh heavily against a determination that common issues predominate, as Rule 23 requires for damages actions.

Indeed, as the Eleventh Circuit explained in *Cordoba*, deferring consideration of Article III standing until final judgment is too late, because if "many claims of the absent class members" are "not justiciable," then "whether absent class members can establish standing" should be "exceedingly relevant to the class certification analysis required by" Rule 23.[241]

How should this work in practice? At a minimum, courts should not certify a proposed class when it is clear from the nature of the claims, the proposed class definition, and evidence at the class certification stage that the proposed class includes more than a trivial number of individuals who would lack standing. After all, "[c]lass certification is the thing that gives an Article III court the power to 'render dispositive judgments' affecting unnamed class members."[242] Certification thus turns absent members of a potential class into parties who can invoke and are subject to the court's judicial power.

"At a minimum, courts should not certify a proposed class when it is clear from the nature of the claims, the proposed class definition, and evidence at the class certification stage that the proposed class includes more than a trivial number of individuals who would lack standing."

Before certifying a class, and thereby exercising jurisdiction over the merits of the claims of absent class members, the district court must therefore ensure that it has a firm basis for doing so. If, at the class certification stage, it is apparent that the proposed class may include more than a handful of members who could not demonstrate concrete harm, and therefore could not bring their claims in federal court on an individual basis, those same individuals should not be permitted to assert their claims through the expedient of the class device.

That approach makes practical sense as well. Enforcing Article III's requirements at the class certification stage ensures that parties and courts do not needlessly expend time and money—and defendants are not faced with unjustified settlement pressure—litigating a certified class action through trial only for a court to conclude at final judgment that significant portions of the certified class lack standing.

Of course, it sometimes will not be clear at the class certification stage whether the class as defined

contains uninjured members, because further factual development may be needed to determine whether absent class members suffered concrete injuries. Assuming that plaintiffs have nevertheless presented enough evidence to meet their Article III burden at the class certification stage, Rule 23(b)(3)'s predominance requirement should still require a plaintiff to show either: (a) that standing can be demonstrated on a class-wide basis; or (b) if the concrete harm question requires individualized determinations, that there is a manageable plan to identify and weed out uninjured class members prior to final judgment.

That plan must not only be consistent with the predominance requirement, but also protect the defendant's rights under the Due Process Clause and the Rules Enabling Act to challenge each class member's standing (and to have those challenges decided by an Article III judge rather than claims administrators or special masters after a class is certified).[243]

Thus, for example, the Eleventh Circuit in *Cordoba* vacated certification of a damages class for reconsideration of predominance when "each plaintiff will likely have to provide some individualized proof that they have standing," creating a key "individualized issue."[244] Or, as the First Circuit explained in a pre-*TransUnion* case where there were "apparently thousands" of putative class members "who in fact suffered no injury:" "The need to identify those individuals will predominate and render an adjudication unmanageable absent … [a] mechanism that can manageably remove uninjured persons from the class in a manner that protects the parties' rights."[245]

These cases demonstrate that, when injury in fact is an individualized issue—as will often be the case under the *Spokeo* and *TransUnion* standard—plaintiffs will rarely be able to satisfy Rule 23(b)(3) predominance. In the words of the D.C. Circuit, without a "reliable means of proving classwide injury in fact," "[c]ommon questions of fact cannot predominate."[246]

"These cases demonstrate that, when injury in fact is an individualized issue—as will often be the case under the *Spokeo* and *TransUnion* standard—plaintiffs will rarely be able to satisfy Rule 23(b)(3) predominance."

Chapter

07

Defending Federal No-Injury Lawsuits in State Courts

In the wake of *Spokeo*, some commentators speculated that if federal courts dismissed no-injury lawsuits for lack of standing, plaintiffs' lawyers would simply bring their federal-law actions in state court.[247] Justice Thomas made a similar point in his *TransUnion* dissent.[248]

Some plaintiffs' lawyers have followed this path, filing actions in state court and, if the defendant removed the case to federal court, pressing for remand to state court by cynically asserting that their clients had not suffered real harm and invoking *Spokeo* and *TransUnion* to argue that the federal court lacks jurisdiction.[249] But there is little evidence to suggest a widespread shift of cases from federal court to state court following *Spokeo* or (so far) *TransUnion*.[250] That is not surprising. Plaintiffs face serious obstacles in pursuing these lawsuits in state court.

To begin with, many state courts follow federal standing precedent, particularly when federal statutory claims are asserted.[251] In those state courts that have adopted standing rules mirroring Article III, *TransUnion*'s definition of concrete harm would preclude actions that cannot proceed in federal court.

Moreover, the *TransUnion* Court's grounding of the real-world harm requirement in Article II gives defendants a significant new argument against state court adjudication of injury-free lawsuits based on federal statutes.[252] Because *TransUnion* makes clear that an action asserting federal claims without accompanying concrete harm intrudes upon Article II's allocation of authority to the Executive Branch, separation-of-powers principles—combined with principles barring states from interfering with the Constitution's allocation of authority—separately preclude state courts from entertaining such claims.[253] *TransUnion*'s analysis therefore seriously undermines pre-*TransUnion* state court decisions permitting federal statutory claims to proceed in the absence of concrete harm solely because Article III does not apply in state court.[254]

Finally, defendants can argue that such claims are impermissible for the additional reason that Congress, in enacting the federal statute creating the cause of action, did not intend to authorize state courts to adjudicate claims that the Constitution bars from federal court.

Congress legislates against settled background legal principles—including constitutional limits on federal court jurisdiction, as discussed above.[255] In creating a cause of action, therefore, Congress would assume that the reach of the action would be limited

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by generally applicable standards governing private lawsuits, such as the standing requirement. At minimum, Congress would have to expressly state its intent to override those limits and authorize state court adjudication of claims that the Constitution bars from federal courts, because courts have required such express indications of intent before concluding in other circumstances that Congress intended to displace background legal principles.[256]

These three arguments will make it extremely difficult for plaintiffs to circumvent federal standing requirements by filing in state court.

Chapter

08

Conclusion

TransUnion and *Spokeo* clearly prohibit no-injury lawsuits, requiring plaintiffs to show a concrete real-world harm even in the context of alleged statutory violations. *TransUnion* provides important clarifications of the injury-in-fact standard that eliminate the ability of lower courts to circumvent that requirement. In addition, *TransUnion* gives defendants significant new arguments for defeating no-injury federal-law lawsuits in both federal and state courts.

Most lower courts have followed the Supreme Court's guidance and rejected interpretations of *Spokeo* inconsistent with *TransUnion*. Of course, the plaintiffs' bar is continuing to test the limits of these decisions, and it has convinced a few courts to adopt expansive views of the injury-in-fact test that cannot be reconciled with *TransUnion*. But the Supreme Court's willingness to correct improper interpretations of *Spokeo* by granting review in *TransUnion* shows that the Court stands ready to correct erroneous lower court applications of *TransUnion* as well.

Endnotes

[1] The authors represented the petitioner in *Spokeo, Inc. v. Robins*, 578 U.S. 330 (2016), and parties or *amici* in several of the other cases discussed in this paper.

[2] 141 S. Ct. 2190 (2021).

[3] 578 U.S. 330 (2016).

[4] *Id*. at 340, 341.

[5] These numbers are based on searches performed on June 16, 2022.

[6] *Spokeo*, 578 U.S. at 341; *accord TransUnion*, 141 S. Ct. at 2204.

[7] U.S. Const., Art. III, § 2.

[8] *Spokeo*, 578 U.S. at 338 (quotation marks omitted).

[9] *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 149 (2010).

[10] *Spokeo*, 578 U.S. at 338 (alteration and quotation marks omitted).

[11] *See, e.g.*, *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 339 (2006); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 557-58 (1992); *Allen v. Wright*, 468 U.S. 737, 750 (1984); *City of L.A. v. Lyons*, 461 U.S. 95, 101-02 (1983); *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 471 (1982); *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 37-38 (1976); *Sierra Club v. Morton*, 405 U.S. 727, 731-32 (1972).

[12] *TransUnion*, 141 S. Ct. at 2206 n.1.

[13] *Id.*; *see, e.g.*, Fair Credit Reporting Act, 15 U.S.C. §§ 1681 *et seq*. (imposing obligations on consumer reporting agencies and providing for statutory damages); Fair and Accurate Credit Transactions Act, 15 U.S.C. § 1681c(g)(1) (imposing restrictions on information included on credit-card receipts and providing for statutory damages); Electronic Funds Transfers Act, 15 U.S.C. §§ 1693, 1693m (imposing requirements for ATM transactions and providing for statutory damages); Truth in Lending Act, 15 U.S.C. §§ 1631-1632, 1640(a)(2)(B) (imposing requirements on financial institutions that extend credit to consumers and providing for awards of statutory damages); Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692f, 1692k(a)(2)(B) (prohibiting certain "means to collect or attempt to collect any debt" and providing for statutory damages); Telephone Consumer Protection Act, 47 U.S.C. § 227(b) (regulating certain telephone communications and providing for statutory damages); Real Estate Settlement Procedures Act, 12 U.S.C. § 2607 (prohibiting kickbacks in certain mortgage-loan transactions and providing a penalty of "three times the amount of any charge paid" for the relevant settlement service).

[14] *TransUnion*, 141 S. Ct. at 2206 n.1.

[15] *See, e.g.*, Sheila B. Scheuerman, *Due Process Forgotten: The Problem of Statutory Damages and Class Actions*, 74 Mo. L. Rev. 103, 114 (2009) ("What makes these statutory damages class actions so attractive to plaintiffs' lawyers is simple mathematics: these suits multiply a minimum $100 statutory award (and potentially a maximum $1,000 award) by the number of individuals in a nationwide or statewide class.").

[16] Fed. R. Civ. P. 23(b)(3).

[17] *See, e.g.*, Jonathan D. Jerison & Bradley A. Marcus, *A Brief History of the FCRA and the Potential for New Litigation After Dodd-Frank,* Consumer Fin. Servs. L. Rep., Apr. 13, 2011, at 3, 4, ("In the 40 years since FCRA was enacted, litigation has skyrocketed. The Mortgage Bankers Association called the potential for FCRA litigation a 'crisis' in 2006, with exposure … possibly in the trillions of dollars …. The U.S. Supreme Court's 2009 Year-End Report … noted that 'cases involving consumer credit, such as those filed under [FCRA] increased 53 percent.'"); Scheuerman, *supra* note 15, at 105-06, 112-13 (listing class actions brought under the Fair and Accurate Credit Transactions Act seeking millions of dollars in statutory damages for failing to redact the credit card expiration date and all but the last five digits of the credit card number on printed receipts); David L. Permut & Tamra T. Moore, *Recent Developments in Class Actions: The Fair Credit Reporting Act*, 61 Bus. Law. 931, 931 (2006) (noting the "proliferation of class action lawsuits brought under" FCRA that "combined with certain class action-friendly provisions of FCRA—such as the availability of fee shifting and statutory damages, and the lack of a class action damages cap—have … push[ed] the FCRA to the forefront of consumer financial services class litigation").

[18] *Charvat v. Mutual First Fed. Credit Union*, 725 F.3d 819, 822-25 (8th Cir. 2013) ("Our Court, as well, has held that plaintiffs need not show actual damages, beyond a statutory violation, in order to recover statutory damages."); *Edwards v. First Am. Corp.*, 610 F.3d 514, 516-17 (9th Cir. 2010) ("Plaintiff counters that the damages provision in RESPA gives rise to a statutory cause of action whether or not an overcharge occurred. We agree with Plaintiff."), *cert. dismissed as improvidently granted*, 567 U.S. 756 (2012); *Beaudry v. TeleCheck Servs., Inc.*, 579 F.3d 702, 705-07 (6th Cir. 2009) ("because the statute permits a recovery when there are no identifiable or measurable actual damages, this subsection implies that a claimant need not suffer (or allege) consequential damages to file a claim"); *Murray v. GMAC Mortg. Corp.*, 434 F.3d 948, 952-53 (7th Cir. 2006) ("That actual loss is small and hard to quantify is why statutes such as the Fair Credit Reporting Act provide for modest damages without proof of injury.").

[19] *David v. Alphin*, 704 F.3d 327, 338-39 (4th Cir. 2013); *see also Kendall v. Employees Ret. Plan of Avon Prods.*, 561 F.3d 112, 121 (2d Cir. 2009) (rejecting the argument that "either an alleged breach of fiduciary duty to comply with ERISA, or a deprivation of [the plaintiff's] entitlement to that fiduciary duty, in and of themselves constitutes an injury-in-fact sufficient for constitutional standing").

[20] 578 U.S. at 333.

[21] *See* Spokeo, *Start With Search*, https://www.spokeo.com/about. (last accessed June 21, 2022).

[22] *Spokeo*, 578 U.S. at 335-36.

[23] *Id*. at 351 (Ginsburg, J., dissenting).

[24] *Id*. at 350.

[25] *Id*. at 336.

[26] 15 U.S.C. § 1681 *et seq.*

[27] 15 U.S.C. § 1681e(b).

[28] 15 U.S.C. § 1681e(d).

[29] 15 U.S.C. § 1681b(b)(1).

[30] 15 U.S.C. § 1681j(a).

[31] First Amended Compl. ¶¶ 35-37, *Robins v. Spokeo, Inc.*, No. 10-5306 (C.D. Cal. Feb. 17, 2011), ECF No. 40.

[32] *Id.* at 16.

[33] *Robins v. Spokeo, Inc.*, 2011 WL 11562151, at *1 (C.D. Cal. Sept. 19, 2011).

[34] *Robins v. Spokeo, Inc.*, 742 F.3d 409, 412 (9th Cir. 2014).

[35] *Id*. at 414 n.3.

[36] *Id*. at 413.

[37] *Spokeo*, 578 U.S. at 339 (quoting *Raines v. Byrd,* 521 U.S. 811, 820 n.3 (1997)).

[38] *Id*. at 341.

[39] *Id*. at 340 (citation omitted).

[40] *Id*.

[41] *Id*. (citing *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009) (free speech), and *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520 (1993) (free exercise)).

[42] *Id*. at 341 (citing *Clapper v. Amnesty Int'l USA*, 568 U.S. 398 (2013)).

[43] *Id.* at 340.

[44] *Id.* at 340-41.

[45] *Id.* at 341.

[46] *Id.* (quoting *Lujan*, 504 U.S. at 578).

[47] *Id.* at 342.

[48] *Id*.

[49] *Id*.

[50] *Id*. at 343. On remand, the Ninth Circuit determined that Robins had alleged a sufficiently concrete injury. *See Robins v. Spokeo, Inc.*, 867 F.3d 1108, 1118 (9th Cir. 2017). To reach that conclusion, the Ninth Circuit, rather than focusing on whether Robins himself suffered a real-world harm resulting from the alleged statutory violations, developed a two-part test asking "(1) whether the statutory provisions at issue were established to protect [the plaintiff's] concrete interests (as opposed to purely procedural rights), and if so, (2) whether the specific procedural violations alleged in this case actually *harm*, or present a material risk of harm to, *such interests*." *Id*. at 1113 (emphasis added). As discussed below (at pages 34-35), that test does not survive the Supreme Court's reasoning in *TransUnion*.

[51] *Spokeo*, 578 U.S. at 343 (Thomas, J., concurring).

[52] *Id.* at 344-45.

[53] *Id.* at 348-49.

[54] *See* pages 33-35, *infra*.

[55] U.S. Dep't of the Treasury, OFAC – Sanctions Programs and Information, https://home.treasury.gov/policy-issues/office-of-foreign-assets-control-sanctions-programs-and-information (last accessed June 21, 2022).

[56] *TransUnion*, 141 S. Ct. at 2200.

[57] *Id.* at 2202.

[58] *Id.* at 2201-02.

[59] *Id.*

[60] *Id.* at 2202.

[61] *Id.*

[62] *Ramirez v. TransUnion LLC*, 951 F.3d 1008, 1024-30 (9th Cir. 2020).

[63] *Id.* at 1026-28.

[64] *Id.* at 1029-30.

[65] *TransUnion*, 141 S. Ct. at 2203 (quoting *Raines*, 521 U.S. at 820).

[66] *Id.* at 2203 (quotation marks omitted).

[67] *Id.* at 2204 (quoting *Spokeo*, 578 U.S. at 340).

[68] *Id.* at 2205.

[69] *Id.*

[70] *Id.*

[71] *Id.* (quoting *Hagy v. Demers & Adams*, 882 F.3d 616, 622 (6th Cir. 2018)).

[72] *Id.* at 2204 (quoting *Spokeo*, 578 U.S. at 341).

[73] *Id.*

[74] *Id.*

[75] *Id.* at 2207.

[76] *Id.*

[77] *Id.* at 2208; *see Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 466 (2016) (Roberts, C.J., concurring) ("Article III does not give federal courts the power to order relief to any uninjured plaintiff, class action or not.").

[78] *TransUnion*, 141 S. Ct. at 2208-09.

[79] *Id.* at 2210.

[80] *Id.* at 2210-11.

[81] *Id.* at 2211.

[82] *Id.*

[83] *Id.*

[84] *Id.* at 2212.

[85] *Id.*

[86] *Id.* at 2213.

[87] *Id.* at 2214 (quoting *Trichell v. Midland Credit Mgmt., Inc.*, 964 F.3d 990, 1004 (11th Cir. 2020)).

[88] *Id.*

[89] *Id.*

[90] *Id.* at 2214-25 (Thomas, J., dissenting). Justice Thomas raised similar arguments in his concurrences in *Spokeo* and *Thole*, and his dissent in *Gaos*. *See Thole v. U.S. Bank N.A.*, 140 S. Ct. 1615, 1622-23 (2020) (Thomas, J., concurring); *Frank v. Gaos*, 139 S. Ct. 1041, 1046-47 (2019) (Thomas, J., dissenting); *Spokeo*, 578 U.S. at 343-49 (Thomas, J., concurring).

[91] *TransUnion*, 141 S. Ct. at 2218 (Thomas, J., dissenting).

[92] *Id.* at 2220 ("A statute that creates a private right and a cause of action, however, *does* give[] plaintiffs an adequate interest in vindicating their private rights in federal court.").

[93] *Id.* at 2218.

[94] *Id.* at 2207 n.3.

[95] *Id.* at 2206 n.1.

[96] Briefs before the Court contained detailed discussions of the history. *See, e.g.*, Br. for Pet'r, *Spokeo, Inc. v. Robins*, No. 13-1339, 2015 WL 4148655 (U.S. July 2, 2015).

[97] 1 *The Records of The Federal Convention of 1787*, 22 (Max Farrand ed., 1911) (Farrand's *Records*) (reporting resolutions proposed by Edmund Randolph).

[98] 2 Farrand's *Records* at 132-33.

[99] 1 Farrand's *Records* at 292.

[100] *See id*. at 242-45 (describing William Paterson's "New Jersey Plan," which would have provided for federal appellate review of state-court adjudication of questions arising under federal law).

[101] *Compare* 2 Farrand's *Records* at 133 with *id*. at 186.

[102] *Id*. at 425.

[103] U.S. Const., Art. III, § 2.

[104] *See Spokeo*, 578 U.S. at 338 (standing doctrine "developed in our case law to ensure that federal courts do not exceed their authority as it has been *traditionally* understood") (emphasis added); *Sprint Commc'ns Co. v. APCC Servs., Inc.*, 554 U.S. 269, 274 (2008) ("We have often said that history and tradition offer a meaningful guide to the types of cases that Article III empowers federal courts to consider."); *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102 (1998) (Article III limits federal judicial power to "cases and controversies of the sort traditionally amenable to, and resolved by, the judicial process"); *Lujan*, 504 U.S. at 559-60 ("[T]he Constitution's central mechanism of separation of powers depends largely upon common understanding of what activities are appropriate to legislatures, to executives, and to courts."); *Coleman v. Miller*, 307 U.S. 433, 460 (1939) (opinion of Frankfurter, J.) (in crafting Article III, "the framers … gave merely the outlines of what were to them the familiar operations of the English judicial system and its manifestations on this side of the ocean before the Union.").

[105] *See* F.W. Maitland, *The Forms of Action at Common Law* 314 (1929) (describing the limited role of royal justice in the period from 1066-1154); 1 W.S. Holdsworth, *A History of English Law* 23-26 (1903) (describing emergence of royal courts).

[106] John Langbein et al., *History of the Common Law* 86 (2009).

[107] *Id.*

[108] Maitland, *supra* n. 105, at 343-44.

[109] *Id.* at 343.

[110] *Id.* at 344.

[111] 3 William Blackstone, *Commentaries on the Laws of England* 23 (1st ed. 1768).

[112] *See* Maitland, *supra*, at 298-99 (a plaintiff "may find that, plausible as his case may seem, it just will not fit any of the receptacles provided by the courts and he may take to himself the lesson that where there is no remedy there is no wrong").

[113] 3 William Blackstone, *Commentaries on the Laws of England* 115 (1st ed. 1768).

[114] *Id.* at 120.

[115] *Id*. Thus, assault was actionable because it inflicts real-world harm by causing the victim to suffer fear of imminent battery, even though no actual touching occurs.

[116] *Id.* at 122.

[117] *Id*.

[118] *Id*.

[119] *Id.* at 123.

[120] *Id.* at 126.

[121] *Id.* at 127.

[122] *Id.* at 139.

[123] *Id.* at 140.

[124] *Id.* at 141.

[125] *Id.* at 141.

[126] *Id.* at 145.

[127] *Id.* at 153-66.

[128] *Id.* at 167-253.

[129] *Robert Marys's Case*, 77 Eng. Rep. 895, 898 (K.B. 1612).

[130] *Cable v. Rogers*, 3 Bulst. 312, 312, 81 Eng. Rep. 259, 259 (K.B. 1625).

[131] *Crogate v. Morris*, 1 Brown. & Golds. 197, 197, 123 Eng. Rep. 751, 751 (C.P. 1611). *See also, e.g.*, *Atkinson v. Teasdale*, 3 Wils. K.B. 282, 288, 95 Eng. Rep. 1054, 1059 (C.P. 1772) (de Grey, C.J.) (explaining that a plaintiff "must be damaged to intitle him" to bring an action for trespass on the case); *Woolton v. Salter*, 3 Lev. 104, 104, 83 Eng. Rep. 599, 599 (C.P. 1683) (same); *Planck v. Anderson*, 5 T.R. 37, 40-41, 101 Eng. Rep. 21, 23 (K.B. 1792) (barring action where plaintiff was not prejudiced by sheriff's failure to maintain custody over a defendant because the defendant/prisoner was available at the time he was required); *Wylie v. Birch*, 4 Q.B. 565, 577, 114 Eng. Rep. 1011, 1015 (Q.B. 1843) (no action for breach of a sheriff's duty to levy goods unless the breach causes damage to the plaintiff).

[132] *Ashby v. White*, 6 Mod. 45, 46, 87 Eng. Rep. 808, 810 (Q.B. 1703).

[133] *Ashby v. White*, 17 J. House L. 526, 534 (1704). *See Ashby v. White*, 1 Brown 62, 64, 1 Eng. Rep. 417, 418 (H.L. 1704); *Ashby*, 87 Eng. Rep. at 815-16 (Holt, C.J., dissenting) (dissenting in the Queen's Bench, and explaining it is no "little thing" to obstruct the "privilege of giving a vote in the election of a person in whose power my life, estate, and liberty lie.").

[134] *Coleman*, 307 U.S. at 469 (opinion of Frankfurter, J.) (emphasis added); *see also Nixon v. Herndon*, 273 U.S. 536, 540 (1927) (Holmes, J.) ("That private damage may be caused by such political action and may be recovered for in suit at law hardly has been doubted for over two hundred years, since *Ashby v. White*.").

[135] *Watkins v. Home Dep't*, [2006] UKHL 17 ¶ 55, 2006 WL 755484 (H.L. 2006).

[136] For that reason, a lord did not need to demonstrate economic harm beyond the invasion of the common in which he held a property interest. *See, e.g., Robert Marys's Case*, *supra*.

[137] *TransUnion*, 141 S. Ct. at 2217 (Thomas, J., dissenting).

[138] *See id.* at 2206 n.1; pages 8-10, *supra*.

[139] *See id.* at 2207.

[140] *Clapper*, 568 U.S. at 408; *see also DaimlerChrysler Corp.*, 547 U.S. at 341 ("[T]he case-or-controversy limitation is crucial in maintaining the tripartite allocation of power set forth in the Constitution.") (quotation marks omitted).

[141] *Summers v. Earth Island Inst.*, 555 U.S. 488, 492 (2009).

[142] *Raines*, 521 U.S. at 820.

[143] *Lewis v. Casey*, 518 U.S. 343, 349-50 (1996).

[144] *See Heckler v. Chaney*, 470 U.S. 821, 832 (1985) (explaining that a decision by a prosecutor not to indict "has long been regarded as the special province of the Executive Branch, inasmuch as it is the Executive who is charged by the Constitution to 'take Care that the Laws be faithfully executed'").

[145] *Lujan*, 504 U.S. at 577 (quoting U.S. Const. art. II, § 3); *see also* Heather Elliott, *Congress's Inability to Solve Standing Problems*, 91 B.U. L. Rev. 159, 203 (2011) (noting the "significant" "Article II problem" raised by "suits against private individuals" brought by unharmed private plaintiffs); *see also generally* Tara Leigh Grove, *Standing As An Article II Nondelegation Doctrine*, 11 U. Pa. J. Const. L. 781 (2009).

The Supreme Court has not addressed whether *qui tam* actions under the False Claims Act, which assigns to private plaintiffs the ability to bring suit to remedy harm to the United States, violate Article II. *Vermont Agency of Natural Resources. v. United States ex rel. Stevens*, 529 U.S. 765, 778 n.8 (2000); *see Constitutionality of the Qui Tam Provisions of the False Claims Act*, 13 Op. O.L.C. 207, 229 (1989) (concluding that *qui tam* claims violate Article II). *Vermont Agency* held only that a *qui tam* relator's claim satisfies Article III. 529 U.S. at 774; *see also* page 36 and notes 165-166, *infra*.

[146] *TransUnion*, 141 S. Ct. at 2207.

[147] *Berger v. United States*, 295 U.S. 78, 88 (1935).

[148] *Stern v. Marshall*, 564 U.S. 462, 483 (2011) (quoting *Bond v. United States*, 564 U.S. 211, 222 (2011)); *see also Bowsher v. Synar*, 478 U.S. 714, 721 (1986).

[149] *Clinton v. City of New York*, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring).

[150] *Spokeo*, 578 U.S. at 341; *accord TransUnion*, 141 S. Ct. at 2204.

[151] *Spokeo*, 578 U.S. at 340.

[152] *See, e.g.*, *Eichenberger v. ESPN, Inc.*, 876 F.3d 979, 983-84 (9th Cir. 2017) ("[A]lthough the FCRA outlines *procedural* obligations that *sometimes* protect individual interests, the VPPA identifies a *substantive* right to privacy that suffers *any time* a video service provider discloses otherwise private information."); *Van Patten v. Vertical Fitness Grp., LLC*, 847 F.3d 1037, 1043 (9th Cir. 2017) ("The TCPA establishes the substantive right to be free from certain types of phone calls and texts absent consumer consent."); *In re Horizon Healthcare Servs. Inc. Data Breach Litig.*, 846 F.3d 625, 637-40 (3d Cir. 2017) ("[W]ith the passage of FCRA, Congress established that the unauthorized dissemination of personal information by a credit reporting agency causes an injury in and of itself—whether or not the disclosure of that information increased the risk of identity theft or some other future harm.").

[153] *TransUnion*, 141 S. Ct. at 2205.

[154] *Maddox v. Bank of N.Y. Mellon Tr. Co., N.A.*, 19 F.4th 58, 64 & n.2 (2d Cir. 2021).

[155] *Id.* at 64 n.2 (emphasis added).

[156] *Id.* at 64.

[157] *See, e.g.*, *Bryant v. Compass Grp. USA, Inc.*, 958 F.3d 617, 624 (7th Cir. 2020) ("Applying Justice Thomas's rubric" to conclude that plaintiff had standing by "asserting a violation of her own rights"); *Huff v. TeleCheck Servs., Inc.*, 923 F.3d 458, 469 (6th Cir. 2019) (asserting that Justice Thomas's distinction "between private and public rights ... deserves further consideration at some point").

[158] *See* pages 21-22, *supra*.

[159] *See, e.g.*, *Ramirez*, 951 F.3d at 1025-26; *DiNaples v. MRS BPO, LLC*, 934 F.3d 275 (3d Cir. 2019); *Macy v. GC Servs. Ltd. P'ship*, 897 F.3d 747, 759 (6th Cir. 2018) ("Plaintiffs may satisfy the concreteness prong of the injury-in-fact requirement of Article III standing by alleging that [Defendant's] purported FDCPA violations created a material risk of harm to a congressionally recognized interest."); *Van Patten*, 847 F.3d at 1043 ("[T]he telemarketing text messages at issue here, absent consent, present the precise harm and infringe the same privacy interests Congress sought to protect in enacting the [Telephone Consumer Protection Act]."); *Robins*, 867 F.3d at 1113-15 ("We have little difficulty concluding that these interests protected by FCRA's procedural requirements are 'real,' rather than purely legal creations."); *Strubel v. Comenity Bank*, 842 F.3d 181, 188-91 (2d Cir. 2016).

[160] *Ramirez*, 951 F.3d at 1026.

[161] *Ward v. Nat'l Patient Acct. Servs. Sols., Inc.*, 9 F.4th 357, 361 (6th Cir. 2021) (quotation marks omitted).

[162] *Id.*

[163] 578 U.S. at 340-41.

[164] 141 S. Ct. at 2204.

[165] 529 U.S. 765 (2000).

[166] *Id*. at 775-77.

[167] 141 S. Ct. at 2208-10.

[168] *Milkovich v. Lorain J. Co.*, 497 U.S. 1, 11 (1990) (citing L. Eldredge, *Law of Defamation* 5 (1978)).

[169] *TransUnion*, 141 S. Ct. at 2208; *Spokeo*, 578 U.S. at 341.

[170] *TransUnion*, 141 S. Ct. at 2204.

[171] *Id*.

[172] *See* page 26, *supra*.

[173] *See* Restatement (Second) of Torts § 652H cmt. a ("One to whose private life publicity is given, under § 652D, may recover for the harm *resulting to his reputation* from the publicity.") (emphasis added).

[174] Restatement (Second) of Torts § 652B & cmt. d.; *see also, e.g.*, *Salcedo v. Hanna*, 936 F.3d 1162, 1171 (11th Cir. 2019) (explaining that intrusion upon seclusion requires an "objectively intense interference" with the plaintiff's private space or private information).

[175] *See generally* Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193 (1890).

[176] *Laufer v. Arpan LLC*, 29 F.4th 1268, 1287-88 (11th Cir. 2022) (Newsom, J., concurring).

[177] *TransUnion*, 141 S. Ct. at 2209.

[178] *Id.* at 2210 & n.6.

[179] *Id.* at 2210 n.6.

[180] *Ward*, 9 F.4th at 362.

[181] *Id.* at 360.

[182] *Id.* at 362.

[183] *See Ojogwu v. Rodenberg Law Firm*, 26 F.4th 457 (8th Cir. 2022).

[184] *Id.* at 463 (quotation marks omitted).

185 *Id.* at 463 n.4.

186 *See Muransky v. Godiva Chocolatier, Inc.*, 979 F.3d 917 (11th Cir. 2020) *(en banc).*

187 *Id.* at 931.

188 *Id.* at 931-32.

189 *Id.*

190 *Id*. It is worth noting that the Court in *Muransky* was considering Article III standing in the context of a settlement.

191 *See, e.g.*, *Salcedo v. Hanna*, 936 F.3d 1162, 1170-72 (11th Cir. 2019) (alleged violation of the Telephone Consumer Protection Act (TCPA) by sending a single text message to the plaintiff's cell phone was insufficiently analogous to the harms associated with common-law torts of intrusion upon seclusion, trespass, nuisance, conversion, and trespass to chattel); *Kamal v. J. Crew Grp., Inc*., 918 F.3d 102, 114-15, 118 (3d Cir. 2019) ("[W]e do not believe a breach of confidence action is sufficiently analogous absent third-party disclosure."); *Owner-Operator Indep. Drivers Ass'n v. U.S. Dep't of Transp.*, 879 F.3d 339, 344-45 (D.C. Cir. 2018) ("To begin with, [plaintiffs] have identified no historical or common-law analog where the mere existence of inaccurate information, absent dissemination, amounts to concrete injury. They cite libel and slander *per se*, but as explained above, those torts require evidence of *publication*.") (citation omitted); *Dreher v. Experian Info. Sols., Inc.*, 856 F.3d 337, 345 (4th Cir. 2017) ("Dreher does not propose a common law analogue for his alleged FCRA injury [listing the incorrect servicer of information on a credit report], and we find no traditional right of action that is comparable."); *Nicklaw v. CitiMortgage, Inc.*, 839 F.3d 998, 1003 (11th Cir. 2016) (asserted violation of New York statutes requiring recordation of satisfaction of a mortgage within a specified time period—even though the satisfaction was ultimately recorded—did not involve harm sufficiently comparable to a common-law quiet title action, which is designed to address the harm of "wrongfully clouded" title to property).

192 *Robins*, 867 F.3d at 1114-15.

193 *Id*.

194 *See Jeffries v. Volume Servs. Am., Inc.*, 928 F.3d 1059, 1064-65 (D.C. Cir. 2019) (concluding that plaintiff had standing to pursue FACTA claim based on loose comparison to breach-of-confidence tort); *Eichenberger*, 876 F.3d at 983 (concluding that plaintiff has standing in Video Privacy Protection Act case because "[v]iolations of the right to privacy have long been actionable at common law" without additional historical analysis); *In re Horizon Healthcare Servs.*, 846 F.3d at 638-39 (concluding that plaintiffs had standing to pursue FCRA violations even though defendant's "actions would [not] give rise to a cause of action under common law" because "[n]o common law tort proscribes the release of truthful information that is not harmful to one's reputation or otherwise offensive," as defendant had allegedly done).

195 *Hunstein v. Preferred Collection & Mgmt. Servs., Inc.*, 17 F.4th 1103, 1104 (11th Cir. 2021) (vacating panel opinion and ordering rehearing *en banc*).

196 *Hunstein v. Preferred Collection & Mgmt. Servs., Inc.*, 17 F.4th 1016, 1024 (11th Cir. 2021), *vacated*, 17 F.4th 1103 (11th Cir. 2021); *see also, e.g.*, *Persinger v. Southwest Credit Sys., L.P.*, 20 F.4th 1184, 1192 (7th Cir. 2021) (concluding after *TransUnion* that an unauthorized credit score inquiry in asserted violation of the FCRA was sufficiently analogous "in kind," even if "not degree," to the common-law tort of intrusion upon seclusion, notwithstanding the common law requirement that the intrusion be so severe as to be "highly offensive to the reasonable person"); *Lupia v. Medicredit, Inc.*, 8 F.4th 1184, 1191-93 (10th Cir. 2021) (same for receipt of a single unanswered call and voicemail attempting to collect a medical debt in asserted violation of the FDCPA).

197 *Hunstein*, 17 F.4th at 1038 (Tjoflat, J., dissenting).

198 *Id.* at 1041, 1042, 1045.

199 *Id.* at 1042.

200 For similar reasons, a number of lower courts have erred (both before and after *TransUnion*) by ruling generally that acts that can be labeled as violating "privacy" inflict injury qualifying as a concrete harm—and ignoring the restrictions on the scope of those common law claims that limit actionable injuries. *See Seale v. Peacock*, 32 F.4th 1011, 1020-21 (10th Cir. 2022) (treating unauthorized access to a software account as analogous to "trespass to chattels" or "invasion of privacy" while ignoring the common-law requirements for those torts of actual damages or proof of harm, respectively); *Persinger*, 20 F.4th at 1192; *Patel v. Facebook, Inc.*, 932 F.3d 1264, 1273 (9th Cir. 2019) (treating the use of "facial-recognition technology" as analogous to an intrusion upon seclusion, because it assertedly "invades an individual's private affairs," but ignoring the common-law requirement of proof of harm). The three types of harm cited by the *TransUnion* Court all require proof of damage to reputation or mental suffering—real-world harms that a plaintiff is obligated to prove. The Court's statement accordingly provides no support for a generalized assertion that any intrusion on "privacy" unaccompanied by such harm is sufficient to support standing.

201 141 S. Ct. at 2205; *see also Thole*, 140 S. Ct. at 1620 (Congress's creation of a "cause of action does not affect the Article III standing analysis").

[202] *See, e.g*, *Muransky*, 979 F.3d at 926 ("[C]ongressional judgment only goes so far, and does not relieve the judiciary of our constitutional duty to independently determine whether the plaintiff has suffered a concrete injury.").

[203] *See, e.g*, *id.* at 933 ("[E]ven if Congress had explicitly stated in the text of the statute that every FACTA violation poses a material risk of harm, that alone would not carry the day .... [W]e cannot accept Muransky's argument that once Congress has spoken, the courts have no further role."); *Kamal*, 918 F.3d at 115 ("But the lesson of *Spokeo* is that we must confirm a concrete injury or material risk exists even when Congress confers a right of action."); *Casillas v. Madison Ave., Assocs., Inc.*, 926 F.3d 329, 333-34 (7th Cir. 2019) (Barrett, J.) ("Congress must operate within the confines of Article III."); *Groshek v. Time Warner Cable, Inc.*, 865 F.3d 884, 887-88 (7th Cir. 2017); *Lee v. Verizon Commc'ns, Inc.*, 837 F.3d 523, 529-30 (5th Cir. 2016).

[204] *TransUnion*, 141 S. Ct. at 2205 (quoting *Hagy*, 882 F.3d at 622).

[205] *Id.* (quoting *Trichell v. Midland Credit Mgmt., Inc.*, 964 F.3d 990, 999 n.2 (11th Cir. 2020)).

[206] *See, e.g., Astoria Fed. Sav. & Loan Ass'n v. Solimino,* 501 U.S. 104, 108 (1991) ("Congress is understood to legislate against a background of common-law adjudicatory principles.").

[207] *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 764 (2005).

[208] *See Astoria Fed. Sav. & Loan Ass'n*, 501 U.S. at 108-09 (collecting cases). In addition, in a variety of contexts, the Supreme Court has required Congress to speak clearly—in the statutory text—when it alters the usual balance among the branches of government. Because congressional "elevation" of a harm can open the federal courts to claims that otherwise would not be actionable, a similar clear statement should be required. *See, e.g., Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991)*; Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981) (requiring Congress to "unambiguously" state any "condition on the grant of federal moneys" in spending programs involving the States)*.* "[T]he requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." *Bond v. United States*, 572 U.S. 844, 858 (2014) (quotation marks omitted)*; Kucana v. Holder*, 558 U.S. 233, 237 (2010) ("Separation-of-powers concerns, moreover, caution us against reading legislation, absent clear statement, to place in executive hands authority to remove cases from the Judiciary's domain.")*; Boumediene v. Bush*, 553 U.S. 723, 738 (2008) ("Congress should 'not be presumed to have effected such denial [of habeas relief] absent an unmistakably clear statement to the contrary.'").

[209] *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 310-11 (1986) (emphasis omitted).

[210] *Id*. at 311.

[211] *Doe v. Chao*, 540 U.S. 614, 625 (2004) (construing the Privacy Act and pointing out that such a remedial scheme parallels the common law of defamation).

[212] *TransUnion*, 141 S. Ct. at 2205.

[213] *Spokeo*, 578 U.S. at 342 (citing *FEC v. Akins*, 524 U.S. 11, 20-25 (1998); *Public Citizen v. DOJ*, 491 U.S. 440, 449 (1989)).

[214] 141 S. Ct. at 2214 (quoting *Trichell*, 964 F.3d at 1004).

[215] *Id.* (quoting *Trichell*, 964 F.3d at 1004).

[216] *Trichell*, 964 F.3d at 1004 (emphasis added).

[217] 524 U.S. at 21.

[218] *Id.*; *see also id.* at 24-25 (the denial of information necessary to cast an informed vote is a deprivation "directly related to voting, the most basic of political rights," and therefore "sufficiently concrete and specific").

[219] 491 U.S. at 449.

[220] *Akins*, 524 U.S. at 24-25. The ruling in *Ashby v. White* (discussed at page 27, *supra*) was also grounded in the harm associated with the denial of voting rights. *Ashby*, 87 Eng. Rep. at 815-16 (Holt, C.,J., dissenting) (explaining that it is no "little thing" to obstruct the "privilege of giving a vote in the election of a person in whose power my life, estate, and liberty lie").

[221] *Harty v. West Point Realty, Inc.*, 28 F.4th 435, 444 (2d Cir. 2022) (applying *TransUnion* to reject theory of bare "informational injury" from asserted violations of the Americans with Disabilities Act); *Laufer v. Looper*, 22 F.4th 871, 880-81 (10th Cir. 2022) (same); *Beaudry v. TeleCheck Servs., Inc.*, 854 F. App'x 44, 46 (6th Cir. 2021) (same for asserted FCRA violations); *In re Coca-Cola Prods. Mktg. & Sales Practices Litig.*, 2021 WL 3878654, at *2 (9th Cir. Aug. 31, 2021) (same for claims challenging product labels); *Dreher*, 856 F.3d at 345 ("[A] constitutionally cognizable informational injury requires that a person lack access to information to which he is legally entitled *and* that the denial of that information creates a 'real' harm with an adverse effect.").

[222] 19 F.4th at 64.

[223] *Id.* at 64-65.

[224] 141 S. Ct. at 2210-11.

[225] *Id.* at 2211.

[226] *Maddox*, 19 F.4th at 65; *see also Beaudry*, 854 F. App'x at 46 (rejecting standing for FCRA claim and explaining that, under *TransUnion*, a plaintiff can recover statutory damages "only [for] a harm that actually happened, either when the risk materialized or when it caused a [separate] concrete injury").

[227] *Ewing v. MED-1 Sols., LLC*, 24 F.4th 1146, 1152, 1154 (7th Cir. 2022).

[228] *Pierre v. Midland Credit Mgmt., Inc.*, 29 F.4th 934, 939 (7th Cir. 2022), *rehearing en banc denied*, --- F.4th ---, 2022 WL 2062526 (7th Cir. June 8, 2022); *see also, e.g.*, *Wadsworth v. Kross, Lieberman & Stone, Inc.*, 12 F.4th 665, 668 (7th Cir. 2021) (plaintiff lacked standing in FDCPA case challenging letter and phone calls from a debt collector when the plaintiff "never paid Kross or PRA any money after Kross contacted her, nor did she rely on Kross's communication to her detriment in any other way").

The Supreme Court recently granted a petition for certiorari and vacated a Fourth Circuit decision that based standing for statutory damages claims on a risk of future harm for reconsideration in light of *TransUnion*. *Rocket Mortg., LLC v. Alig*, 142 S. Ct. 748 (2022), *vacating and remanding Alig v. Quicken Loans Inc.*, 990 F.3d 782 (4th Cir. 2021).

[229] 141 S. Ct. at 2208.

[230] *Id.* at 2212.

[231] *Clapper*, 568 U.S. at 409 (emphasis added; quotation marks omitted); *see also Thole*, 140 S. Ct. at 1622 ("substantially increased the risk"); *Dep't of Com. v. New York*, 139 S. Ct. 2551, 2565 (2019) ("'a substantial risk that the harm will occur'") (quoting *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014)); *Calcano v. Swarovski N. Am. Ltd.*, --- F.4th ---, 2022 WL 1788305, at *4-6 (2d Cir. June 2, 2022) (plaintiffs lacked standing to seek prospective relief under the Americans with Disabilities Act when they offered only "'naked assertions' of intent to return to Defendants' stores if they offer braille gift cards").

[232] *Clapper*, 568 U.S. at 414 n.5 (quoting *Lujan*, 504 U.S. at 562).

[233] *McMorris v. Carlos Lopez & Assocs., LLC*, 995 F.3d 295, 300-01 (2d Cir. 2021) (collecting cases); *see also, e.g.*, *Attias v. Carefirst, Inc.*, 865 F.3d 620, 626-29 (D.C. Cir. 2017).

[234] *See, e.g.*, *McMorris*, 995 F.3d at 303 (expenditures taken by plaintiffs to protect themselves qualify as injury in fact only "where plaintiffs have shown a substantial risk of future identity theft or fraud").

[235] *See, e.g.*, *Metro-North Commuter R.R. v. Buckley*, 521 U.S. 424, 438-44 (1997) (rejecting the argument that the Federal Employers' Liability Act permits a plaintiff "without symptoms or disease" to recover medical monitoring costs, and canvassing courts divided on the availability of medical monitoring under state law); Victor E. Schwartz et al., *Medical Monitoring—Should Tort Law Say Yes?*, 34 Wake Forest L. Rev. 1057, 1071 (1999) (arguing that "the regulation of medical monitoring ought to be left to legislatures" rather than courts given the complex policy decisions involved).

[236] *Donovan v. Philip Morris USA, Inc.*, 914 N.E.2d 891, 901 (Mass. 2009); *see also, e.g.*, *Potter v. Firestone Tire & Rubber Co.*, 863 P.2d 795, 824 (Cal. 1993) ("enhanced risk of disease").

[237] *In re Nat'l Hockey League Players' Concussion Injury Litig.*, 327 F.R.D. 245, 256-57 (D. Minn. 2018) (collecting cases reaching that conclusion).

[238] One federal district court post-*TransUnion* has held that allegations of mere exposure to an alleged toxic substance satisfy Article III in the context of medical monitoring (before then dismissing those claims on the merits). *Leslie v. Medline Indus., Inc.*, 2021 WL 4477923, at *4-7 (N.D. Ill. Sept. 30, 2021). But the court never attempted to reconcile its assertion, based on pre-*TransUnion* precedent, that "risk of contamination, on its own, constitute[s] an injury-in-fact for purposes of Article III standing" (*id.* at *6) with *TransUnion*'s rejection of damages for a risk of future harm standing alone or the Seventh Circuit's recognition that *TransUnion* abrogated its prior precedents to the contrary.

[239] 141 S. Ct. at 2208 n.4.

[240] 942 F.3d 1259, 1273 (11th Cir. 2019).

[241] *Id.*

[242] *Flecha v. Medicredit, Inc.*, 946 F.3d 762, 770 (5th Cir. 2020) (Oldham, J., concurring) (quoting *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 219 (1995)).

[243] The Supreme Court explained in *Dukes* that, in light of the Rules Enabling Act, "a class cannot be certified on the premise that [a defendant] will not be entitled to litigate its statutory defenses to individual claims." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 367 (2011) (citations omitted). Nothing in *Dukes* limits its logic to "*statutory* defenses"; the same rationale applies equally to constitutional defenses, including the defense that a claim must be dismissed because a class member lacks Article III standing.

[244] *Cordoba*, 942 F.3d at 1275, 1277.

[245] *In re Asacol Antitrust Litig.*, 907 F.3d 42, 53-54 (1st Cir. 2018).

[246] *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d 244, 252-53 (D.C. Cir. 2013).

[247] *See, e.g.*, Alison Frankel, Spokeo *Backlash: Dismissed in Federal Court, Class Actions Move to States*, Reuters (May 16, 2017), https://perma.cc/7CW4-2ELH (discussing a single example of a case dismissed in federal court for lack of standing and remanded to state court).

[248] 141 S. Ct. at 2224 n.9.

[249] *See, e.g.*, *Thornley v. Clearview AI, Inc.*, 984 F.3d 1241, 1242, 1248-49 (7th Cir. 2021).

[250] *See* Jacob L. Burnett, *A Bug or a Feature?: Exclusive State-Court Jurisdiction Over Federal Questions*, 170 U. Pa. L. Rev. Online 147, 150 (2022) (explaining that "data from state courts … demonstrate that there has not been a mass transfer of federal question cases from federal courts to state courts" following *Spokeo* or *TransUnion*).

[251] *See, e.g.*, *Toney v. Advantage Chrysler-Dodge-Jeep, Inc.*, No. 2021-CA-2428, at 3-4 (Fla. Cir. Ct. Feb. 24, 2022), https://bit.ly/3NZ6e00 (holding that the plaintiff lacked standing to pursue a TCPA claim based on "purely legal" injury of receipt of single ringless voicemail); *State ex rel. W. Va. Univ. Hosps. - E., Inc. v. Hammer*, 866 S.E.2d 187, 196-98 (W. Va. 2021) (citing *TransUnion* and holding that one of the named plaintiffs lacked standing to pursue her claims or to represent her proposed subclass because she failed to demonstrate injury in fact); *Sons of Confederate Veterans v. Newton Cnty. Bd. of Comm'rs*, 861 S.E.2d 653, 657-58 (Ga. Ct. App. 2021) (citing *Spokeo* and requiring concrete harm under Georgia law); *Courtright v. O'Reilly Auto.*, 604 S.W.3d 694, 700-05 (Mo. Ct. App. 2020) (applying *Spokeo* and requiring plaintiffs to demonstrate injury in fact to assert FCRA claims); *Smith v. Ohio State Univ.*, 2017 WL 6016627, at *3 (Ohio Ct. App. Dec. 5, 2017) (requiring a plaintiff to demonstrate injury in fact to assert FCRA claim in state court, even assuming the Ohio legislature could more broadly confer standing to sue under state statutes); *State ex rel. Healthport Techs., LLC v. Stucky*, 239 W. Va. 239, 242-44 (W. Va. 2017) (holding that the West Virginia constitution requires injury in fact and applying the *Spokeo* concrete-harm standard).

[252] *See* pages 18, 28-29, *supra*.

[253] *TransUnion*, 141 S. Ct. at 2207 (noting that without concrete harm sufficient to create an Article III case or controversy, "the choice of how to prioritize and how aggressively to pursue legal actions against defendants who violate the law falls within the discretion of the Executive Branch, not within the purview of private plaintiffs (and their attorneys)"); *see, e.g.*, Grove, *supra* n. 145, at 834 (explaining that Article II "would apply in both federal and state court").

[254] *See*, *e.g.*, *Soto v. Great Am. LLC*, 165 N.E.3d 935, 942-43 (Ill. Ct. App. 2020) (allowing FACTA claim to proceed even though plaintiff did not plead an actual injury because "plaintiffs are not required under Illinois law to plead an injury other than a willful violation of their statutory rights to pursue their claims of statutory damages under FACTA").

[255] *See, e.g., Astoria Fed. Sav. & Loan Ass'n*, 501 U.S. at 108; pages 24-39, *supra*.

[256] *See Astoria Fed. Sav. & Loan Ass'n*, 501 U.S. at 108-09 (collecting cases); pages 43-44, *supra*.

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