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Annefloor J. de Groot
University of Georgia School of Law

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Cover Page Footnote

J.D. Candidate, 2022, University of Georgia School of Law; B.A., 2019, University of Georgia. I would like to thank Dean Kent Barnett for his thoughtful comments on this Note.

NO [CONCRETE] HARM, NO FOUL? ARTICLE III STANDING IN THE CONTEXT OF CONSUMER FINANCIAL PROTECTION LAWS

Annefloor J. de Groot[*]

In the U.S. Supreme Court's 2016 decision in Spokeo, Inc. v. Robins*, the Court held that a bare procedural violation of a federal consumer protection statute is not enough to satisfy Article III's standing requirement because the alleged injury is not sufficiently concrete. This decision resulted in a sizeable circuit split regarding standing under the Fair Debt Collection Practices Act, with some circuit courts interpreting the holding as narrowing the scope of standing for consumer protection claims, and others maintaining a broader interpretation, allowing plaintiffs to obtain redress for violations of consumer financial protections laws.*

In its 2021 ruling in TransUnion LLC v. Ramirez*, the U.S. Supreme Court attempted to clarify* Spokeo*, holding that if a plaintiff does not suffer a real harm and a risk of future harm does not materialize, then there is no concrete harm to confer standing.* TransUnion *shifted the circuit split, still resulting in inconsistencies among the courts but making it even harder for plaintiffs to assert consumer financial protection claims in federal courts. This Note explores* TransUnion*'s impact on consumer financial protection claims, with a focus on the evolution of the circuit split regarding standing under the Fair Debt Collection Practices Act, and argues that the U.S. Supreme Court wrongly decided* TransUnion*. A broader approach giving deference to Congress would be more in line with Article III,* Spokeo*, and Congress's role as a factfinder, and it would ensure judicial consistency and provide for*

[*] J.D. Candidate, 2022, University of Georgia School of Law; B.A., 2019, University of Georgia. I would like to thank Dean Kent Barnett for his thoughtful comments on this Note.

better representation of modern issues posing harm, or a real risk of harm, to American consumers.

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I. INTRODUCTION

Imagine the following scenario. You receive a debt collection letter in the mail for credit-card debt that you defaulted on six years ago. The letter looks enticing, as it tells you that you have been pre-approved for a generous discount program designed to save you money and encourages you to act quickly to maximize your savings. Contrary to what you may be thinking, this letter is not so generous after all. Instead, the governing statute of limitations in your state provides that any claim to recover your six-year-old debt is time-barred.[1] The debt collection letter conveniently includes a small disclaimer at the bottom indicating this very fact. Given the misleading and deceptive nature of this debt collection letter, you may think that you have standing to sue for this clear violation of the Fair Debt Collection Practices Act (FDCPA).[2] The FDCPA prohibits "false, deceptive, or misleading representation[s]"[3] and "unfair or unconscionable means"[4] to collect debt and provides consumer victims with a private right of action against debt collectors.[5] Should courts allow this type of litigation to proceed?

This was precisely the situation that the plaintiffs faced in *Trichell v. Midland Credit Management, Inc.*, a recent Eleventh Circuit case.[6] In *Trichell*, the U.S. Court of Appeals for the Eleventh Circuit held that the consumer plaintiffs failed to allege a particularized, concrete injury required to demonstrate an injury in fact to satisfy Article III standing.[7] Because the plaintiffs lacked standing, the debt collectors faced absolutely no

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[1] *See, e.g.*, ALA. CODE § 6-2-34(5) (2020) (providing for a six-year statute of limitations period to commence an action for recovery of a debt).

[2] 15 U.S.C. §§ 1692–1692p.

[3] 15 U.S.C. § 1692e.

[4] 15 U.S.C. § 1692e.

[5] *Id.* § 1692f.

[6] 964 F.3d 990 (11th Cir. 2020).

[7] *Id.* at 1002. "Under settled precedent, the 'irreducible constitutional minimum' of standing consists of three elements: the plaintiff must have suffered an injury in fact, the defendant must have caused that injury, and a favorable decision must be likely to redress it." *Id.* at 996 (quoting Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992)).

repercussions for the statutory violations that they allegedly committed.[8]

The *Trichell* court relied heavily on the U.S. Supreme Court's 2016 landmark decision in *Spokeo, Inc. v. Robins*, in which the Court held that a "bare procedural violation" of a federal consumer protection statute is not enough to satisfy Article III's standing requirement because the alleged injury is not sufficiently concrete.[9] This decision left federal courts in a tangle with some, like the Eleventh Circuit in *Trichell*, interpreting this decision as narrowing the scope of standing for consumer protection causes of action and others maintaining a broader interpretation, leaving room for plaintiffs to obtain redress for statutory violations, including under the FDCPA.[10]

In 2021, the U.S. Supreme Court revisited the issue of Article III standing in *TransUnion LLC v. Ramirez*.[11] There, the Court

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[8] *Id.* at 1005 ("Because [the plaintiffs] lack Article III standing, we vacate the district courts' judgments and remand the cases with instructions to dismiss for lack of Article III standing.").

[9] Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1550 (2016).

[10] *Compare* Casillas v. Madison Ave. Assocs., 926 F.3d 329, 339 (7th Cir. 2019) (holding that a plaintiff debtor's class action against her creditor's alleged debt collector for procedural violations of the FDCPA failed to satisfy the concreteness requirement for an injury in fact necessary for Article III standing), *and* Frank v. Autovest, LLC, 961 F.3d 1185, 1186 (D.C. Cir. 2020) (holding that in bringing a putative class action against a debt purchaser and its collection agency for violations of the FDCPA, the plaintiff "did not suffer a concrete injury-in-fact traceable to the alleged statutory violations" and therefore lacked Article III standing), *and Trichell*, 964 F.3d at 1005 (holding that plaintiffs did not have Article III standing because neither plaintiff suffered an injury in fact by receiving misleading debt collection letters and because neither plaintiff was misled by the letters), *with* Cohen v. Rosicki, Rosicki & Assocs., 897 F.3d 75, 78–80, 82 (2d Cir. 2018) (holding that a mortgagor's putative class action against his mortgage-loan servicer and its law firm, alleging violations of FDCPA, sufficiently alleged an injury in fact to create Article III standing), *and* Macy v. GC Servs. Ltd. P'ship, 897 F.3d 747, 761 (6th Cir. 2018) (holding that the plaintiffs "satisfied the concreteness prong of the injury-in-fact requirement of Article III standing by alleging that [the defendant debt collection agency's] purported FDCPA violations created a material risk of harm to the interests recognized by Congress in enacting the FDCPA"), *abrogated by* Ward v. Nat'l Patient Acct. Servs. Sols., Inc., 9 F.4th 357 (6th Cir. 2021). *But see* Hunstein v. Preferred Collection & Mgmt. Servs., Inc., 994 F.3d 1341, 1344 (11th Cir.) (diverging from the Eleventh Circuit's holding in *Trichell* and concluding that the plaintiff had Article III standing in alleging that the defendant debt collector violated the FDCPA when it transmitted the plaintiff's personal information to a third-party vendor), *rev'd*, 17 F.4th 1016 (11th Cir. 2021), *reh'g en banc granted and opinion vacated*, 17 F.4th 1103 (11th Cir. 2021).

[11] 141 S. Ct. 2190 (2021).

held that if a plaintiff does not suffer a real harm and a risk of future harm does not materialize, then there is no concrete harm and therefore no standing to assert a claim for damages.[12] As will be discussed in this Note, *TransUnion* further shifted the circuit split, causing more inconsistencies among the courts and yet again making it harder for plaintiffs to assert consumer financial protection claims in federal courts.[13]

The absence of a consistent standing doctrine among the circuit courts' jurisprudence is an area of great concern in the consumer financial protection context because some doctrines deprive consumers of a forum to enforce their interests. The Federal Trade Commission (FTC) purports to enforce federal consumer protection laws in an effort to "prevent fraud, deception, and unfair business practices," and the FTC's ultimate mission is to "protect consumers and promote competition."[14] While agency enforcement of federal consumer financial protection laws is important for protecting consumers as a whole, it is imperative that courts recognize the shortcomings of government agencies, including their underfunding and underenforcement of these statutes.[15] Although the FTC plays a crucial role in the enforcement of many federal consumer financial protection statutes, agency enforcement is simply not sufficient, resulting in a need for private rights of action when consumers seek relief for

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[12] *See id.* at 2211 ("[T]here is a significant difference between (i) an actual harm that has occurred but is not readily quantifiable, as in cases of libel and slander *per se*, and (ii) a mere risk of future harm. By citing libel and slander *per se*, *Spokeo* did not hold that the mere risk of future harm, without more, suffices to demonstrate Article III standing in a suit for damages.").

[13] *See infra* Part V.

[14] *Enforcement*, FED. TRADE COMM'N, https://www.ftc.gov/enforcement (last visited Sept. 19, 2021).

[15] *See* Mark E. Budnitz, *The Federalization and Privatization of Public Consumer Protection Law in the United States: Their Effect on Litigation and Enforcement*, 24 GA. ST. U. L. REV. 663, 664 (2008) ("Recognizing the resource limitations of government agencies, many consumer laws provide a private right of action so individual consumers also can litigate violations of these laws."); *see also* Kathleen S. Morris, *Expanding Local Enforcement of State and Federal Consumer Protection Laws*, 40 FORDHAM URB. L.J. 1903, 1905 (2013) (opining that "due to insufficient funding and staffing, industry capture, or some combination of both, these potentially powerful bodies of consumer protection law are woefully under-enforced" (footnotes omitted)).

violations of these statutes.[16] Despite the existence of private rights of action for violations of consumer financial protection statutes, courts have failed to consistently permit plaintiffs to seek redress due to a fundamental disagreement among the circuit courts regarding the requirements for Article III standing.[17] This leaves consumers in jurisdictions that narrowly construe *Spokeo* and *TransUnion* without any means to hold companies accountable for harming, or attempting to harm, American consumers.[18] Therefore, courts' interpretations of *Spokeo*, *TransUnion,* and Article III standing doctrines have serious implications for consumer financial protection.

This Note argues that *TransUnion* was wrongly decided and that courts should instead apply the *Spokeo* standard on Article III standing to federal consumer financial protection causes of action for statutory violations less strictly and more consistently than courts did prior to *TransUnion*. Part II first discusses the background of the Article III standing doctrine, *Lujan v. Defenders of Wildlife*'s three-part structure as a constitutional minimum for standing,[19] and *Spokeo*'s concrete injury requirement. Part II then examines several key federal consumer financial protection statutes that are grossly diminished by narrow, inconsistent interpretations of *Spokeo*. Part III next explores the pre-*TransUnion* circuit split deepened by *Trichell v. Midland Credit Management, Inc.*, in which the Eleventh Circuit joined the Seventh and D.C. Circuits in holding that the general increased risk to consumers that may come from misleading debt collection letters is not enough to confer standing under the FDCPA for debtors who cannot show that they were personally injured.[20] Part IV discusses the U.S. Supreme Court's decision in

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[16] *See* Morris, *supra* note 15, at 1904–06 (discussing statutory causes of action available to consumers under various consumer protection statutes enforced by the FTC).

[17] *See supra* note 10 and accompanying text.

[18] *See* Morris, *supra* note 15, at 1906 (noting the "enormous gaps in consumer protection enforcement"); *see also* TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2224 (2021) (Thomas, J., dissenting) ("Although statutory damages are not necessarily a proxy for unjust enrichment, they have a similar flavor in this case. . . . [T]hanks to this Court, [TransUnion] may well be in a position to keep much of its ill-gotten gains.").

[19] Lujan v. Defs. of Wildlife, 504 U.S. 555 (1992).

[20] *See* Trichell v. Midland Credit Mgmt., 964 F.3d 990, 1002 (11th Cir. 2020) (finding "the approach of the Seventh and D.C. Circuits" to be "more faithful to Article III"). *But see* Hunstein v. Preferred Collection & Mgmt. Servs., Inc., 994 F.3d 1341, 1344, 1348 (11th

TransUnion, in which the Court made clear: "No concrete harm, no standing."[21] Part V next examines how the circuits reacted to *TransUnion* and how the circuit split has changed. Part VI then identifies the problem with some of the courts' "no harm, no foul" interpretations of the standing doctrine and criticizes the U.S. Supreme Court's decision in *TransUnion*. Finally, Part VI discusses the legislature's role in establishing a concrete harm in federal consumer financial protection statutes and offers a proposal for increasing deference to Congress.

II. BACKGROUND

A. ARTICLE III STANDING FOLLOWING *LUJAN* AND *SPOKEO*

Article III, Section 2 of the U.S. Constitution lays the groundwork for today's standing doctrine.[22] Namely, the "case and controversy requirement" limits judicial power to "Cases" and "Controversies."[23] Although this framework seems straightforward at first glance, the development of the modern standing doctrine has proven otherwise. The issues and requirements surrounding standing were not up for debate up until the end of the twentieth century, and it was not until 1970 that a larger number of cases addressing the issue emerged.[24] In 1992, Justice Antonin Scalia's landmark opinion in *Lujan v.*

Cir.) (deviating from *Trichell* because the Section 1692e claim asserted in *Trichell* lacked a close relationship to the common law tort of fraudulent or negligent misrepresentation and because conferring standing in this case on a Section 1692c(b) claim supported the congressional intent behind the FDCPA to prevent invasions of privacy), *rev'd*, 17 F.4th 1016 (11th Cir. 2021), *reh'g en banc granted and opinion vacated*, 17 F.4th 1103 (11th Cir. 2021).

[21] TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2200 (2021).

[22] U.S. CONST. art. III, § 2.

[23] *Id.* cl. 1.

[24] *See* Cass R. Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 169 (1992) ("In the history of the Supreme Court, standing has been discussed in terms of Article III on 117 occasions . . . . Of those 117, 109, or nearly all, of the discussions occurred since 1965 . . . . Not until the *Data Processing* case in 1970 did a large number of cases emerge on the issue of standing." (citing Ass'n of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150 (1970))).

Defenders of Wildlife[25] established a substantial portion of the foundation for the modern standing doctrine.

1. Lujan*'s Three-Part Structure.* Justice Scalia's opinion in *Lujan v. Defenders of Wildlife,* a 1992 U.S. Supreme Court case, "significantly shift[ed] the law of standing."[26] In that case, the plaintiffs, consisting of organizations dedicated to wildlife conservation and other environmental causes, challenged a rule interpreting the Endangered Species Act (ESA), a statute designed to protect animals from man-made threats.[27] The rule rendered the ESA applicable only to actions within a U.S. territory or on the high seas but not to actions taken in foreign nations.[28] The preliminary issue in that case—pertinent to the focus of this Note—was whether the plaintiffs had standing to seek judicial review of the rule.[29] In deciding this issue, the *Lujan* Court established a three-part framework for standing, requiring that a plaintiff first prove that he or she suffered an injury in fact, which the Court defined as "an invasion of a legally-protected interest which is (a) concrete and particularized and (b) 'actual or imminent, not "conjectural" or "hypothetical."'"[30] Second, a plaintiff must show "a causal connection between the injury and the conduct complained of—the injury has to be 'fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court.'"[31] Finally, "it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'"[32]

The plaintiffs alleged that they had standing under a provision of the ESA that allows "any person" to sue "to enjoin any person, including the United States," from violating the ESA.[33] Specifically, plaintiffs argued that their "claim to injury [was] that

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[25] 504 U.S. 555 (1992).

[26] Sunstein, *supra* note 24, at 164–65.

[27] *Lujan*, 504 U.S. at 557–59.

[28] *Id.* at 557–58.

[29] *Id.* at 558.

[30] *Id.* at 560 (citations omitted) (quoting Whitmore v. Arkansas, 495 U.S. 149, 155 (1990)).

[31] *Id.* (alterations in original) (quoting Simon v. E. Ky. Welfare Rts. Org., 426 U.S. 26, 41–42 (1976)).

[32] *Id.* at 561 (quoting *Simon*, 426 U.S. at 38, 43).

[33] *Id.* at 571–72 (quoting 16 U.S.C. § 1540(g)).

the lack of consultation with respect to certain funded activities abroad 'increas[ed] the rate of extinction of endangered and threatened species.'"[34] The Court reasoned that although this was a "cognizable interest for purpose of standing[,] . . . '[t]he "injury in fact" test requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured.'"[35] In holding that the plaintiffs failed to establish standing for purposes of Article III, the Court declared that

> a plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy.[36]

This holding sets the stage for today's modern standing doctrine and its seemingly confusing implications for plaintiffs seeking to invoke statutory provisions with private causes of action.

2. Spokeo*'s Concrete Injury Requirement. Lujan's* framework for alleging an "injury in fact" is central to today's standing doctrine. The case of *Spokeo, Inc. v. Robins* expanded upon this holding, creating further barriers for consumer plaintiffs seeking redress for statutory violations and laying the groundwork for major circuit splits in the consumer financial protection context.[37] In *Spokeo*, the central issue was whether respondent Robins had standing under the Fair Credit Reporting Act of 1970 (FCRA) to sue petitioner Spokeo, Inc. in federal court.[38] Spokeo operated a "people search engine," in which individuals could search people's names, phone numbers, or e-mail addresses, and Spokeo would

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[34] *Id.* at 562.

[35] *Id.* at 562–63 (quoting Sierra Club v. Morton, 405 U.S. 727, 734–35 (1972)).

[36] *Id.* at 573–74.

[37] *See* Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1550 (2016) (noting that because the Ninth Circuit in its decision below did not "fully appreciate the distinction between concreteness and particularization, its standing analysis was incomplete," thus demonstrating that the injury in fact inquiry requires more analysis than lower courts initially thought); *supra* note 10 and accompanying text.

[38] *Id.* at 1544 (citing 15 U.S.C. §§ 1681–1681h).

conduct a search to provide relevant information in response.[39] A search was performed on Robins, and some of the gathered and disseminated information was inaccurate, leading Robins to file a complaint on behalf of himself and a class of similarly situated individuals.[40] Robins's complaint alleged "that Spokeo willfully failed to comply with the FCRA requirements" by generating a profile on Robins with inaccurate information.[41] The FCRA requires that consumer reporting agencies, among other things,

> "follow reasonable procedures to assure maximum possible accuracy of" consumer reports, to notify providers and users of consumer information of their responsibilities under the [FCRA], to limit the circumstances in which such agencies provide consumer reports "for employment purposes," and to post toll-free numbers for consumers to request reports.[42]

Importantly, the statute further provides that "'[a]ny person who willfully fails to comply with any requirement [of the Act] with respect to any [individual] is liable to that [individual]' for, among other things, either 'actual damages' or statutory damages[,] . . . costs of the action and attorney's fees, and possibly punitive damages."[43]

Relying heavily on *Lujan* in its decision, the U.S. Supreme Court held that Robins did not satisfy the requirements of Article III to establish sufficient standing because he alleged "a bare procedural violation."[44] In reaching its holding, the Court first discussed the three essential elements of standing, as established in *Lujan*.[45] The Court placed special emphasis on the first

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[39] *Id.*

[40] *Id.*

[41] *Id.* at 1546.

[42] *Id.* at 1545 (citations omitted) (citing 15 U.S.C. §§ 1681e(b), 1681e(d), 1681b(b)(1), 1681j(a)).

[43] *Id.* (alterations in original) (quoting 15 U.S.C. § 1681n(a)).

[44] *Id.* at 1550.

[45] *Id.* at 1547.

element, which requires the plaintiff to assert an injury in fact.[46] The Court reiterated its language in *Lujan*, stating that "a plaintiff must show that he or she suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual and imminent, not conjectural or hypothetical.'"[47] Focusing on the concrete and particularization requirements, the Court stressed the need for an injury to be *both* concrete and particularized.[48] With regards to particularization, the Court clarified that an injury "must affect the plaintiff in a personal and individual way," and with regards to concreteness, the Court explained that the injury must be "'real,' and not 'abstract.'"[49]

Notably, however, the Court opined that to be concrete, an injury need not necessarily be tangible—intangible injuries can indeed be concrete.[50] In discussing whether an intangible injury is sufficiently concrete, the Court explained that "because Congress is well positioned to identify intangible harms that meet minimum Article III requirements, its judgment is also instructive and important. . . . Congress may 'elevat[e] to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law.'"[51] Nevertheless, the Court made clear that Congress's role here does not conclusively mean that a plaintiff satisfies the injury in fact requirement any time a statute authorizes a person to vindicate a right embedded in that statute; a concrete injury is still a prerequisite "even in the context of a statutory violation."[52] The Court also went on to note that the *risk* of real harm can satisfy the concreteness requirement in certain

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[46] *See Spokeo*, 136 S. Ct. at 1547 ("This case primarily concerns injury in fact, the '[f]irst and foremost' of standing's three elements." (alteration in original) (quoting Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 103 (1998))).

[47] *Id.* at 1548 (quoting Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992)).

[48] *See id.* ("Particularization is necessary to establish injury in fact, but it is not sufficient. An injury in fact must also be 'concrete.'").

[49] *Id.*

[50] *Id.* at 1549 (noting that both history and Congress's judgment play important roles in the determination of whether an intangible harm is sufficient to constitute an injury in fact).

[51] *Id.* (second alteration in original) (quoting *Lujan*, 504 U.S. at 578).

[52] *See id.* ("For that reason, Robins could not, for example, allege a bare procedural violation, divorced from any concrete harm, and satisfy the injury-in-fact requirement of Article III.").

situations.[53] Still, the Court concluded that Robins did not satisfy the requirements for Article III standing in his assertion of a "bare procedural violation" because the Court found no harm or material risk of harm in the procedural violations of the FCRA's requirements at issue.[54]

Although the Court in *Spokeo* cleared up some misunderstanding as to the requirements for Article III standing after *Lujan*, it left many questions unanswered and arguably created even more confusion for consumers alleging statutory violations. On the one hand, *Spokeo* clarified that an injury must be both concrete and particularized and that although an injury need not be tangible for it to be sufficiently concrete, a bare procedural violation is not enough for standing.[55] On the other hand, the Court expressed that Congress has a role in embedding concreteness in statutes.[56] Yet the Court did not explain when, or if, courts should defer to Congress's judgment as to whether a statutory provision makes an injury concrete. Finally, the Court left open the question of when a risk of a material harm would be adequate to satisfy the concreteness prong. This question is central to many violations of consumer financial protection statutes, and as will be discussed in more detail in Part IV, the Court in *TransUnion* answered "no" to this question, leaving plaintiffs without standing when they are unable to assert a concrete, materialized harm.[57]

B. FINANCIAL CONSUMER PROTECTION STATUTES: AN OVERVIEW

Class actions filed under so called "no-harm" statutory provisions make up a significant number of cases invoking consumer protection statutes. Indeed, empirical findings have shown that approximately half of all filings under federal consumer protection statutes consist of class actions filed under

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[53] *See id.* ("In other words, a plaintiff in such a case need not allege any *additional* harm beyond the one Congress has identified.").

[54] *Id.*

[55] *Id.*

[56] *See id.* (stating that Congress has the power to confer Article III standing on intangible injuries that otherwise would not be considered concrete).

[57] *See* TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2213 (2021) ("[T]he risk of future harm on its own does not support Article III standing for the plaintiffs' damages claim.").

no-harm provisions.[58] Still, given *Spokeo*'s categorization of some federal consumer protection causes of action as "bare procedural violations" with no harm or risk of harm present, some courts have been wary of allowing claims for these statutory violations to proceed.[59] This Section presents an overview of some key federal consumer financial protection statutes and the effects that *Spokeo* and *TransUnion* are likely to have on consumers alleging procedural violations under these statutes.

1. Fair Credit Reporting Act. Congress promulgated the FCRA in response to the "need to insure that consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer's right to privacy."[60] The statute applies to any entity that "regularly engages . . . in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties," in addition to employers using credit reports in their hiring efforts.[61] Under the FCRA, companies who willfully fail to comply are liable for damages "not less than $100 and not more than $1,000," whereas the only remedy for negligent noncompliance is actual damages.[62]

The FCRA was the statute at the center of controversy in *Spokeo, Inc. v. Robins*, which left many questions unanswered for plaintiffs seeking to assert claims under the FCRA without a showing of personal harm other than the presence of a statutory violation.[63] What exactly constitutes a concrete injury under the FCRA remains unclear, although the Court's decision in *TransUnion* certainly provides more clarification than its decision

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[58] *See* Jason Scott Johnston, *High Cost, Little Compensation, No Harm to Deter: New Evidence on Class Actions Under Federal Consumer Protection Statutes*, 2017 COLUM. BUS. L. REV. 1, 9 (discussing the results of a study of class actions filed under four federal consumer protection statutes and analyzing the implications of *Spokeo, Inc. v. Robins*).

[59] *See, e.g.*, Trichell v. Midland Credit Mgmt., Inc., 964 F.3d 990, 1002 (11th Cir. 2020) (holding that the plaintiffs did not allege an injury in fact with allegations based on a procedural violation that did not cause them harm or present a real risk of harm).

[60] 15 U.S.C. § 1681(a)(4).

[61] *Id.* §§ 1681a(f), 1681b(b).

[62] *Id.* §§ 1681n(a)(1)(A), 1681o(a)(1).

[63] *See* Loren Flath, Note, *No Harm, No Foul? How Companies Can Limit Their Liability Under Federal Consumer Protection Statutes After* Spokeo, 46 RUTGERS L. REC. 125, 131–32 (2018) (discussing the FCRA and effects on consumer causes of action for statutory violations in the wake of *Spokeo, Inc. v. Robins*).

in *Spokeo* did. For example, the *Spokeo* Court did not define the parameters for when a plaintiff's misreported information is merely a procedural violation versus when it constitutes an injury in fact. *Spokeo* itself presented one example of when a plaintiff's claim under the FCRA is not enough to confer Article III standing, but that determination still left other plaintiffs with little guidance for assessing their potential claims.[64]

TransUnion also involved claims under the FCRA, and the Court found that the 1,853 class members whose credit reports—which included misleading Office of Foreign Assets Control (OFAC) alerts and were disseminated to third-party businesses—had suffered a concrete injury, while those plaintiffs whose credit reports were not actually disseminated could not allege a sufficiently concrete injury.[65] The Court agreed with the plaintiffs that the injury suffered from dissemination of the credit reports "bears a 'close relationship' to a harm traditionally recognized as providing a basis for a lawsuit in American courts—namely, the reputational harm associated with the tort of defamation."[66]

After *Spokeo*, credit reporting agencies and employers using credit checks in their hiring efforts were still subject to considerable liability for violations of the FCRA, but it remains to be seen whether *TransUnion* will impact this trend.[67]

2. Truth in Lending Act. Another significant federal consumer financial protection statute is the Truth in Lending Act (TILA), which aims "to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit, and to protect the consumer against inaccurate and unfair credit billing and credit card practices."[68] This statute provides a private cause of action—allowing for statutory damages to affected consumers—and offers an opportunity for creditors to

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[64] *See id.* at 150 (stating that, as a result of *Spokeo*, "litigants are left to deal with the uncertainty of whether a violation of a consumer protection statute leads to a 'legally protected interest' on their own").

[65] TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2208–09 (2021).

[66] *Id.* at 2208 (quoting *Spokeo*, 136 S. Ct. at 1549).

[67] *See* Flath, *supra* note 63, at 132 ("[F]ailure to abide by these statutes has led to expansive liability for credit reporting agencies and employers who use credit checks as part of their hiring process." (footnotes omitted)).

[68] 15 U.S.C. § 1601(a).

remedy any errors within sixty days to avoid liability.[69] Cases brought under the TILA have had divergent outcomes, with some courts holding that a violation of the TILA is enough to confer standing, and others finding a mere procedural violation with no additional harm insufficient.[70] This inconsistency again demonstrates the serious implications for consumer financial protection causes of action in the wake of *Spokeo* and *TransUnion*, as courts remain divided in their interpretations of Article III standing requirements.

3. Fair Debt Collection Practices Act. The FDCPA is the key consumer financial protection statute that is invoked most frequently in no-harm causes of action.[71] This statute aims to "eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses."[72] The FDCPA largely applies to individuals or entities engaged in consumer debt collection or who "regularly collect[] or attempt[] to collect, directly or indirectly, debts owed or due or asserted to be owed or due to another."[73] If violated, statutory damages are available under the FDCPA, consisting of up to $1,000 or the actual damages sustained as a result of the failure to comply.[74] The statute also provides that in the case of a class action lawsuit, recovery shall be limited to $500,000, or one percent of the net worth of the debt collector.[75] The statute further notes that "[a] debt collector may not be held liable . . . if the debt collector shows by a preponderance of

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[69] *Id.* §§ 1640(a)–(b).

[70] *Compare* Strubel v. Comenity Bank, 842 F.3d 181, 200 (2d Cir. 2016) (holding that a credit card holder sufficiently alleged that she was at risk of a concrete and particularized harm, as required to satisfy the injury in fact requirement for standing, stemming from her bank's noncompliance with TILA requirements), *with* Kelen v. Nordstrom, Inc., 259 F. Supp. 3d 75, 79 (S.D.N.Y. 2016) (holding that the plaintiff's complaint was not sufficient to establish standing because although the plaintiff had a right to receive disclosures, she must demonstrate that the retailer's "actions (or inactions) injured her in a way distinct from the body politic").

[71] *See* Flath, *supra* note 63, at 133 (noting that the FDCPA is used most commonly in "no-harm" causes of action).

[72] 15 U.S.C. § 1692(e).

[73] *Id.* § 1692a(6).

[74] *Id.* § 1692k(a).

[75] *Id.*

evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error."[76]

Evidently, several significant provisions embedded into the FDCPA actively protect debt collectors and increase barriers to redress for victims of unlawful debt collection practices. Still, *Spokeo*, and subsequently *TransUnion*, raised that barrier even further. Due to the ambiguity created by the Court's decision in *Spokeo* regarding standing, some courts have found a lack of standing when plaintiffs assert procedural violations under the FDCPA.[77] Although the Court in *TransUnion* attempted to clarify the standing doctrine, the circuit courts still lack a consistent approach for determining whether an alleged injury is adequate for an FDCPA claim.[78] Further, the Court's narrow decision in *TransUnion*, along with the existing circuit split, generates substantial implications for consumers seeking to invoke federal consumer financial protections.

III. THE CIRCUIT SPLIT PRIOR TO *TRANSUNION*

This Part explores a major circuit split regarding standing under the FDCPA following *Spokeo*. Two circuit courts held that plaintiff consumers sufficiently established standing for their claims under the FDCPA, whereas three circuits found that plaintiffs' claims were not sufficient to establish an injury in fact, as is required for Article III standing.

A. CIRCUITS FINDING A CONCRETE INJURY IN FACT

1. The Sixth Circuit. In *Macy v. GC Services Ltd. Partnership*, consumer debtors brought a class action suit against a debt collection agency, alleging FDCPA violations for sending letters that did not accurately convey consumers' rights under the statute.[79] Specifically, the plaintiffs asserted that the debt collection letters were deficient because they did not inform the

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[76] *Id.* § 1692k(c).

[77] *See supra* note 10 and accompanying text.

[78] *See supra* note 10 and accompanying text; *see also infra* Part V.

[79] 897 F.3d 747, 751 (6th Cir. 2018), *abrogated by* Ward v. Nat'l Patient Acct. Servs. Sols., Inc., 9 F.4th 357 (6th Cir. 2021).

plaintiffs that the debt collection agency was obligated to provide additional debt and creditor information only if the plaintiffs disputed their debts *in writing*, thus creating a risk that the plaintiffs could waive protections afforded to them by the FDCPA.[80] The U.S. Court of Appeals for the Sixth Circuit ultimately held that the plaintiffs' complaint was sufficiently concrete to establish Article III standing.[81]

The Sixth Circuit reasoned that "*Spokeo* did not mean to disturb the Court's prior opinions recognizing that a direct violation of a specific statutory interest recognized by Congress, standing alone, may constitute a concrete injury without the need to allege any additional harm."[82] The court further explained that the debt collection agency's "letters present[ed] a risk of harm to the FDCPA's goal of ensuring that consumers are free from deceptive debt-collection practices because the letters provide[d] misleading information about the manner in which the consumer can exercise the consumer's statutory right[s]."[83] Therefore, the court concluded that this statutory violation was not merely a bare procedural one and that the "[p]laintiffs ha[d] satisfied the concreteness prong of the injury-in-fact requirement of Article III standing by alleging that [the debt collection agency's] purported FDCPA violations created a material risk of harm to the interests recognized by Congress in enacting the FDCPA."[84] As this Note later explains, *Macy* has since been abrogated by *Ward v. National Patient Accountant Services Solutions, Inc.*, in which the Sixth Circuit attributed its decision directly to the U.S. Supreme Court's holding in *TransUnion*.[85]

2. The Second Circuit. In *Cohen v. Rosicki, Rosicki & Associates, P.C.*, a mortgager brought a class action lawsuit against a mortgage-loan servicer and its law firm for violations of the FDCPA, including incorrect identification of the servicer as the creditor in a foreclosure complaint, certificate of merit, and request for judicial intervention.[86] In holding that the plaintiff

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[80] *Id.*

[81] *Id.* at 761.

[82] *Id.* at 754 (citing Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1549 (2016)).

[83] *Id.* at 757.

[84] *Id.* at 761.

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

[86] 897 F.3d 75, 78–80 (2d Cir. 2018).

sufficiently alleged an injury in fact to create standing under Article III, the U.S. Court of Appeals for the Second Circuit reasoned that, if "[t]aken as true, this misrepresentation might have deprived [the plaintiff mortgager] of information relevant to the debt prompting the foreclosure proceeding, posing a 'risk of real harm' insofar as it could hinder the exercise of his right to defend or otherwise litigate that action."[87] The court explained that the purpose of the FDCPA is "to protect against the abusive debt collection practices likely to disrupt a debtor's life"[88] and that provisions of the FDCPA further this purpose by protecting consumers from "false, deceptive, or misleading" debt collection practices[89] and requiring debt collectors to provide consumers with "a detailed validation notice" to allow consumers to confirm that they owe the debt and in what amount prior to making a payment.[90]

B. CIRCUITS FAILING TO FIND A CONCRETE INJURY IN FACT

1. The Seventh Circuit. In *Casillas v. Madison Avenue Associates, Inc.*, a plaintiff debtor brought a class action suit against her creditor's debt collector under the FDCPA, alleging that the debt collection letter that she received failed to specify that she was required to communicate with the agency in writing to trigger the statutory protections.[91] The FDCPA provision that the plaintiff invoked requires debt collectors to notify consumers about the process for verifying debt under the statute, and part of this process is requiring that the debtor communicate in writing, rather than through an oral communication.[92] In holding that the plaintiff did not have standing for purposes of Article III, the court

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[87] *Id.* at 81–82 (citing Strubel v. Comenity Bank, 842 F.3d 181, 190 (2d Cir. 2016)).

[88] *Id.* at 81 (quoting Simmons v. Roundup Funding, LLC, 622 F.3d 93, 96 (2d Cir. 2010)).

[89] *Id.* (quoting 15 U.S.C. § 1692e).

[90] *Id.* (quoting Russell v. Equifax A.R.S., 74 F.3d 30, 34 (2d Cir. 1996)).

[91] 926 F.3d 329, 331 (7th Cir. 2019).

[92] *See id.* at 332. The court noted that the FDCPA "requires a debt collector to give a written notice to a consumer within five days of its initial communication" and "[t]hat notice must include . . . a description of two mechanisms that a debtor can use to verify her debt. First, a consumer can notify the debt collector 'in writing' that she disputes all or part of the debt . . . ." *Id.* And "[s]econd, a consumer can make a 'written request' that the debt collector provide her with the name and address of the original creditor . . . ." *Id.* (citing 15 U.S.C. § 1692g(a)).

reasoned that she failed to allege that the debt collector's actions "harmed or posed any real risk of harm to her interests under the [FDCPA]."[93] The court found that the plaintiff neither "lost [nor] risked losing the" FDCPA's "statutory protections" because "she did not allege that she tried to dispute or verify her debt orally."[94] Therefore, the court held that this was merely a "bare procedural violation" insufficient to confer standing.[95]

2. The District of Columbia Circuit. In *Frank v. Autovest, LLC*, the plaintiff consumer brought a class action suit against her debt purchaser and its collection agency for violations of the FDCPA.[96] Specifically, the plaintiff alleged that the defendants had violated the statute by filing affidavits that contained "false, deceptive, or misleading representation[s]" in their attempts to collect contractually unauthorized contingency fees.[97] The U.S. Court of Appeals for the District of Columbia Circuit held that the plaintiff lacked Article III standing.[98] The court reasoned that the plaintiff failed to identify a concrete injury that could be traced back to the false representations within the affidavits or the request for contingency fees because the plaintiff did not take any action in reliance on those statements.[99] The court explained that "[a]fter *Spokeo*, a plaintiff must demonstrate a subjective—that is, an actual—personal injury for standing even when his merits argument turns on the perspective of an objective, unsophisticated consumer."[100]

3. The Eleventh Circuit, with a Caveat. Finally, in 2020 the U.S. Court of Appeals for the Eleventh Circuit decided *Trichell v. Midland Credit Management, Inc.*, in which consumer plaintiffs brought separate actions against a debt collector, all alleging that the debt collection letters they received were misleading and therefore in violation of the FDCPA.[101] In that case, the two plaintiffs received debt collection letters that they alleged were

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[93] *Id.* at 334.

[94] *Id.*

[95] *Id.* (quoting Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1549 (2016)).

[96] 961 F.3d 1185, 1186 (D.C. Cir. 2020).

[97] *Id.* at 1187 (alteration in original) (quoting 15 U.S.C. § 1692e).

[98] *Id.* at 1188.

[99] *Id.* (explaining that the plaintiff was not harmed or misled in any way during the collection action by the affidavits).

[100] *Id.* at 1190.

[101] 964 F.3d 990, 994 (11th Cir. 2020).

misleading because the letters presented seemingly generous repayment plans for debt that was actually time-barred under state law.[102] The plaintiffs contended that the letters "created a risk that unsophisticated consumers might be misled into making . . . payments on time-barred debt."[103] The court, however, rejected this argument and held that the plaintiffs lacked Article III standing.[104] In so holding, the court reasoned that the plaintiffs failed to "allege that the collection letters posed any risk of harm to themselves" and that any risk that may have been present had dissipated before they filed their suit.[105] The court emphasized that statutory violations must pose a risk of concrete harm to the individual plaintiff for a particularized injury to be recognized, a risk that was lacking in this case.[106] Finally, the Eleventh Circuit rejected the plaintiffs' contention that they suffered an informational injury because the misleading information did not cause the plaintiffs any adverse effects to satisfy Article III.[107]

Although the Eleventh Circuit's strict interpretation of Article III standing resulted in a denial of standing for the plaintiffs in *Trichell*, the court came to a different conclusion in its more recent decision in *Hunstein v. Preferred Collection & Management Services, Inc.*[108] In *Hunstein*, the plaintiff incurred debt to a hospital for his son's medical treatment, and the hospital assigned the debt to the defendant debt collector.[109] The defendant subsequently sent an electronic communication to a third-party vendor for the vendor to send a collection letter to the plaintiff on

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[102] *See id.* at 995. The court noted that the bottom of each debt collection letter included a disclaimer acknowledging that "[t]he law limits how long you can be sued on a debt and how long a debt can appear on your credit report. Due to the age of this debt, we will not sue you for it or report payment or non-payment of it to a credit bureau." *Id.*

[103] *Id.* at 1000.

[104] *Id.*

[105] *Id.*

[106] *See id.* at 1002 ("[A] statutory violation that poses a risk of concrete harm to consumers in general, but not to the individual plaintiff, cannot fairly be described as causing a particularized injury to the plaintiff. Here, neither Trichell nor Cooper has alleged such a particularized injury.").

[107] *Id.* at 1004 ("Absent any such concrete impact, [the plaintiffs] can complain only about receiving information that had no impact on them. . . . [A]n asserted informational injury that causes no adverse effects cannot satisfy Article III." (emphasis omitted)).

[108] 994 F.3d 1341 (11th Cir.), *rev'd*, 17 F.4th 1016 (11th Cir. 2021), *reh'g en banc granted and vacated*, 17 F.4th 1103 (11th Cir. 2021).

[109] *Id.* at 1345.

the defendant's behalf.[110] In doing so, the defendant, without the plaintiff's authorization, transmitted debt-related personal information about the plaintiff, and the plaintiff filed suit for a violation of Section 1692c(b) of the FDCPA.[111] Specifically, the plaintiff alleged that the defendant debt collector communicated a consumer's personal information to a third party in connection with a debt collection.[112] The Eleventh Circuit held that a violation of Section 1692c(b) of the FDCPA gives rise to an Article III concrete injury in fact and that the defendant debt collector sending the plaintiff's personal information to its letter vendor constituted a communication "in connection with the collection of any debt" under Section 1692c(b).[113] In so holding, the court found that, although the plaintiff alleged neither a tangible harm[114] nor a risk of real harm,[115] the statutory violation was sufficient to constitute a concrete injury in fact to confer Article III standing.[116] The court considered both "history and the judgment of Congress" in concluding that the plaintiff's claim bore a close relationship to the common law invasion of privacy tort and that "Congress identified the 'invasion[] of individual privacy' as one of the harms against which the statute is directed."[117] Thus, the Eleventh Circuit found that history and Congress's judgment were sufficient to confer standing on the plaintiff to sue in this case.[118]

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[110] *Id.*

[111] *See id.* (describing the information as "including, among other things: (1) his status as a debtor, (2) the exact balance of his debt, (3) the entity to which he owed the debt, (4) that the debt concerned his son's medical treatment, and (5) his son's name").

[112] *Id.* at 1344.

[113] *Id.* (quoting 15 U.S.C. § 1692c(b)).

[114] *Id.* at 1346 (finding that the plaintiff failed to allege a tangible harm because the complaint alleges no physical injury, financial loss, or emotional distress and instead contains conclusory and vague assertions of a negative impact).

[115] *Id.* (stating that plaintiff did not allege a "risk of real harm" because he only alleged that a debtor "may well be harmed by the spread" of such information and that vague assertion is not sufficient to confer standing).

[116] *Id.* at 1348–49 (finding that the plaintiff's claim sufficiently resembled a common-law tort and that "the FDCPA's statutory findings expressly address the very harm alleged—an 'invasion[ ] of individual privacy'" (alteration in original) (quoting 15 U.S.C. § 1692(a)).

[117] *Id.* at 1347–48 (alternation in original) (quoting 15 U.S.C. § 1692(a)).

[118] *Id.* at 1348–49 ("Because (1) § 1692c(b) bears a close relationship to a harm that American courts have long recognized as cognizable and (2) Congress's judgment indicates that violations of § 1692c(b) constitute a concrete injury, we conclude that Hunstein has the requisite standing to sue.").

Although the Eleventh Circuit's holding in *Hunstein* seems to diverge from its holding in *Trichell*, the court purported to reconcile this potential discrepancy in its opinion.[119] Specifically, the court reasoned that the Section 1692e claim asserted in *Trichell* lacked a sufficiently close relationship to the most comparable common law tort of fraudulent or negligent misrepresentation.[120] Further, the *Hunstein* court emphasized the congressional intent behind the FDCPA in preventing invasions of privacy.[121] By contrast, the court in *Trichell* opined that there is no evidence of Congress intending to address "misleading communication[s] that fail[] to mislead."[122] Thus, the Eleventh Circuit's holdings regarding concrete injuries and standing in *Trichell* and *Hunstein* stem from the court's focus on the claim's relationship to a historic common law tort, paired with the congressional intent behind the statute at issue.

As will be discussed in Part V, after the U.S. Supreme Court announced its decision in *TransUnion*, the U.S. Court of Appeals for the Eleventh Circuit vacated its original opinion in *Hunstein* and issued a new opinion,[123] which the court again vacated and thereafter ordered another rehearing en banc.[124]

IV. *TRANSUNION LLC V. RAMIREZ*

In 2021, the U.S. Supreme Court revisited the issue of Article III standing and narrowed its standing doctrine even further.[125] In *TransUnion LLC v. Ramirez*, the lead plaintiff, Sergio Ramirez, had visited a car dealership in 2011, hoping to buy a car.[126] After

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[119] *See id.* at 1348 (clarifying that the Eleventh Circuit's "decision in *Trichell* does not require a contrary conclusion").

[120] *Id.* at 1348.

[121] *Id.* (citing 15 U.S.C. § 1692(a)).

[122] Trichell v. Midland Credit Mgmt., Inc., 964 F.3d 990, 999 (11th Cir. 2020).

[123] Hunstein v. Preferred Collection & Mgmt. Servs., Inc., 17 F.4th 1016, 1020 (11th Cir.), *reh'g en banc granted and opinion vacated*, 17 F.4th 1103 (11th Cir. 2021).

[124] Hunstein v. Preferred Collection & Mgmt. Servs., Inc., 17 F.4th 1103, 1104 (11th Cir. 2021).

[125] TransUnion LLC v. Ramirez, 141 S. Ct. 2190 (2021); *see also Article III Standing—Separation of Powers—Class Actions*—TransUnion v. Ramirez, 135 HARV. L. REV. 333, 333 (2021) ("*TransUnion* will likely make it more difficult for class action plaintiffs to have their day in federal court.").

[126] *TransUnion*, 141 S. Ct. at 2201.

negotiating a price, the dealership ran a credit check on Ramirez and his wife that revealed his name as a match to names on the Department of the Treasury's OFAC list of "terrorists, drug traffickers, or other serious criminals."[127] Consequently, the car dealership refused to sell Ramirez a car, and his wife had to purchase the car in her name.[128] A day later, Ramirez requested a copy of his credit file from TransUnion.[129] TransUnion sent Ramirez his credit file along with a summary of his rights, but the mailing did not mention the OFAC alert.[130] The next day, Ramirez received a second mailing from TransUnion that alerted him that his name was a potential match to names on the OFAC list.[131] Due to his concern about the mailings, Ramirez consulted an attorney and cancelled an upcoming trip that he had planned.[132] TransUnion later removed the alert from Ramirez's credit file.[133]

In February 2012, Ramirez filed suit against TransUnion, alleging three violations of the FCRA.[134] Ramirez alleged that TransUnion: (1) "failed to follow reasonable procedures to ensure the accuracy of information in his credit file"[135]; (2) "failed to provide him with *all* the information in his credit file upon his request"[136]; and (3) "violated its obligation to provide him with a summary of his rights 'with each written disclosure,' because TransUnion's second mailing did not contain a summary of Ramirez's rights."[137]

Ramirez sought to certify a class of individuals who received mailings from TransUnion similar to the second mailing that Ramirez had received.[138] Over TransUnion's opposition, the district court certified the class of "8,185 members, including Ramirez."[139] The parties stipulated that "only 1,853 members of

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[127] *Id.*
[128] *Id.*
[129] *Id.*
[130] *Id.*
[131] *Id.* at 2201–02.
[132] *Id.* at 2202.
[133] *Id.*
[134] *Id.*
[135] *Id.* (citing 15 U.S.C. § 1681e(b)).
[136] *Id.* (citing 15 U.S.C. § 1681g(a)(1)).
[137] *Id.* (citing 15 U.S.C. § 1681g(c)(2)).
[138] *Id.*
[139] *Id.*

the class . . . had their credit reports disseminated" to third parties.[140] The district court held that all class members, including those whose reports were not sent to third parties, had Article III standing.[141] The Ninth Circuit Court of Appeals affirmed in relevant part, holding that all class members "had Article III standing to recover damages."[142]

The U.S. Supreme Court reversed and remanded the case.[143] Writing for the majority, Justice Kavanaugh[144] first summarized the requirements for Article III standing, with a focus on the requirement that plaintiffs show a "concrete harm."[145] The Court discussed standing's basis in the idea of separation of powers[146] and stated that "a federal court may resolve only 'a real controversy with real impact on real persons.'"[147] Next, the Court examined what makes a harm concrete for purposes of Article III standing.[148] The Court stated that generally history and tradition should be considered, and the Court cited to its decision in *Spokeo v. Robins*, in which it found 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."[149] The Court pointed to "the most obvious" harms being "traditional tangible harms, such as physical harms and monetary harms."[150] The Court stated that "[v]arious intangible harms can also be concrete," some of which include

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[140] *Id.*

[141] *Id.*

[142] *Id.*

[143] *Id.* at 2214.

[144] *Id.* at 2199.

[145] *Id.* at 2203.

[146] *See id.* ("Requiring a plaintiff to demonstrate a concrete and particularized injury caused by the defendant and redressable by the court ensures that federal courts decide only 'the rights of individuals,' and that federal courts exercise 'their proper function in a limited and separated government.'" (citations omitted) (first quoting Marbury v. Madison, 5 U.S. 137, 170 (1803); and then quoting John G. Roberts, Jr., Comment, *Article III Limits on Statutory Standing*, 42 DUKE L.J. 1219, 1224 (1993))).

[147] *Id.* (quoting Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2103 (2019)).

[148] See *id.* at 2204 ("The question in this case focuses on the Article III requirement that the plaintiff 's injury in fact be 'concrete'—that is, 'real, and not abstract.'") (internal quotation marks omitted) (quoting Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1548 (2016)).

[149] *Id.* (quoting *Spokeo*, 136 S. Ct. at 1549).

[150] *Id.*

"reputational harms, disclosure of private information, and intrusion upon seclusion."[151]

The Court next noted that "[c]ourts must afford due respect to Congress's decision to impose a statutory prohibition or obligation on a defendant, and to grant a plaintiff a cause of action to sue over the defendant's violation of that statutory prohibition or obligation."[152] Nevertheless, the Court stated that Congress "may not simply enact an injury into existence, using its lawmaking power to transform something that is not remotely harmful into something that is."[153] The Court clarified that, even in the context of a statutory violation, a plaintiff must still show a concrete injury to have standing.[154]

Next, the Court examined whether the class members in this action had standing to sue TransUnion under the FCRA.[155] Regarding the first claim alleging that TransUnion failed to "follow reasonable procedures to assure maximum possible accuracy" of the credit files, the Court held that the 1,853 class members whose credit reports were sent to third parties had standing because their injuries bore a close relationship to the reputational harm associated with the tort of defamation.[156] As for the remaining 6,332 class members, the Court held that those plaintiffs lacked standing because their credit information was not disseminated to any potential creditors, and therefore, they lacked the analogous element of publication required for a traditional defamation claim.[157]

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[151] *Id.*

[152] *Id.* (citing *Spokeo*, 136 S. Ct. 1549).

[153] *Id.* at 2205 (quoting Hagy v. Demers & Adams, 882 F.3d 616, 622 (6th Cir. 2018)).

[154] *See id.* ("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.").

[155] *Id.* at 2207.

[156] *See id.* at 2208–09 ("TransUnion provided third parties with credit reports containing OFAC alerts that labeled the class members as potential terrorists, drug traffickers, or serious criminals. The 1,853 class members therefore suffered a harm with a 'close relationship' to the harm associated with the tort of defamation.").

[157] *See id.* at 2209–10 ("In cases such as these where allegedly inaccurate or misleading information sits in a company database, the plaintiffs' harm is roughly the same, legally speaking, as if someone wrote a defamatory letter and then stored it in her desk drawer. A letter that is not sent does not harm anyone, no matter how insulting the letter is. So too here.").

The Court then assessed the plaintiffs' argument that a risk of future harm should give rise to standing.[158] The Court rejected this argument, finding that to have standing for their damages claim, plaintiffs would need to "demonstrate that the risk of future harm materialized"[159] or that "the class members were independently harmed by their exposure to the risk itself."[160] The Court found that the 6,332 plaintiffs were unable to demonstrate both possibilities.[161]

The Court then rejected the plaintiffs' two other claims under the FCRA—the disclosure claim and the summary-of-rights claim—because the plaintiffs failed to demonstrate a close relationship between TransUnion's formatting error underlying these claims[162] and a harm "traditionally recognized as providing a basis for a lawsuit in American courts."[163] The Court further dismissed an argument put forth by the United States as amicus curiae that the class members suffered a concrete "informational injury" because rather than arguing that they did not receive required information, the plaintiffs argued merely that they received the information in the wrong format.[164] Thus, the Court concluded, "[n]o concrete harm, no standing."[165]

Justice Thomas dissented.[166] He began by discussing the history of standing and focused on the distinction between a plaintiff suing for a violation of private rights and a plaintiff suing

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[158] *See id.* at 2210 ("[The Plaintiffs] say that the 6,332 class members suffered a concrete injury for Article III purposes because the existence of misleading OFAC alerts in their internal credit files exposed them to a material risk that the information would be disseminated in the future to third parties and thereby cause them harm.").

[159] *See id.* at 2211 (noting that to demonstrate that the risk of future harm materialized the plaintiffs would need to show "that the inaccurate OFAC alerts in their internal TransUnion credit files were ever provided to third parties or caused a denial of credit").

[160] *See id.* (stating that to show "that the class members were independently harmed by their exposure to the risk itself," they would have to show "that they suffered some other injury (such as an emotional injury) from the mere risk that their credit reports would be provided to third-party businesses").

[161] *Id.*

[162] *See id.* at 2213 ("In support of standing, the plaintiffs thus contend that the TransUnion mailings were formatted incorrectly and deprived them of their right to receive information in the format required by statute.").

[163] *Id.* (citing Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1549 (2016)).

[164] *Id.* at 2214.

[165] *Id.*

[166] *Id.* (Thomas, J., dissenting).

for a violation of a duty owed to the whole community.[167] While suits for violations of a plaintiff's private rights required only that the plaintiff allege a violation, suits based on violations of duties owed to the whole community required that the plaintiff show both a legal injury and damage.[168] Justice Thomas then pointed out that, "[w]hile the Court today discusses the supposed failure to show 'injury in fact,' courts for centuries held that injury in law to a private right was enough to create a case or controversy."[169] Here, Justice Thomas contended that the statutory provisions of the FCRA create certain duties owed to consumers, that those duties are particularized to individuals (the subject of the credit report or the consumer requesting the information), and that the jury found that TransUnion violated each class member's individual rights.[170] Justice Thomas argued that this combination leads to the conclusion that the plaintiffs have a concrete injury for standing to sue.[171]

Justice Thomas noted that "injury in fact served as an *additional* way to get into federal court," and "Article III injury still could 'exist solely by virtue of "statutes creating legal rights, the invasion of which creates standing."'"[172] He pointed to the Court's decision in *Spokeo*, which "made clear that 'Congress is well positioned to identify intangible harms that meet minimum Article III requirements' and explained that 'the violation of a procedural right granted by statute *can be* sufficient in some circumstances to constitute injury in fact.'"[173] Justice Thomas criticized the majority for taking Congress's role and usurping "its

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[167] *See id.* at 2217 ("At the time of the founding, whether a court possessed judicial power over an action with no showing of actual damages depended on whether the plaintiff sought to enforce a right held privately by an individual or a duty wed broadly to the community." (citing *Spokeo*, 136 S. Ct. at 1351–52 (Thomas, J., concurring)).

[168] *See id.* (noting that "[t]his distinction mattered not only for traditional common-law rights, but also for newly created statutory ones").

[169] *Id.* at 2218 ("And this understanding accords proper respect for the power of Congress and other legislatures to define legal rights.").

[170] *See id.* at 2218–19 ("Were there any doubt that consumer reporting agencies owe these duties to specific individuals—and not to the larger community—Congress created a cause of action providing that '[a]ny person who willfully fails to comply' with an FCRA requirement 'with respect to any *consumer* is liable to *that consumer*.'" (alteration in original) (quoting 15. U.S.C. § 1681n(a))).

[171] *Id.* at 2219.

[172] *Id.* (quoting Warth v. Seldin, 422 U.S. 490, 500 (1975)).

[173] *Id.* at 2220 (quoting Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1543–44 (2016)).

power to create and define rights," instead placing it in the hands of the courts contrary to the principle of separation of powers.[174] To Justice Thomas, "[w]eighing the harms caused by specific facts and choosing remedies seems . . . like a much better fit for legislatures and juries than for this Court."[175] Last, Justice Thomas noted that the majority's decision in this case will likely result in TransUnion financially profiting off the consumers whose rights it violated.[176]

Justice Kagan also dissented.[177] She took issue with the majority for evading the separation of powers doctrine in which the Article IIII case-or-controversy requirement is rooted, by holding "for the first time, that a specific class of plaintiffs whom Congress allowed to bring a lawsuit cannot do so under Article III."[178] Justice Kagan agreed with Justice Thomas that "Congress has broad 'power to create and define rights,'" and stated that Congress has the power to protect those rights by allowing plaintiffs to sue for both past harms and a material risk of future harms.[179]

Justice Kagan further argued that it was not "so speculative that a company in the business of selling credit reports to third parties [would] in fact sell a credit report to a third party."[180] She concluded that "Congress is better suited than courts" to assess risks and harms, and courts should only override Congress's authorization to sue "when Congress could not reasonably have thought that a suit will contribute to compensating or preventing the harm at issue."[181]

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[174] *See id.* at 2221 ("According to the majority, courts alone have the power to sift and weigh harms to decide whether they merit the Federal Judiciary's attention. In the name of protecting the separation of powers, this Court has relieved the legislature of its power to create and define rights." (citation omitted)).

[175] *Id.* at 2224.

[176] *See id.* ("Although statutory damages are not necessarily a proxy for unjust enrichment, they have a similar flavor in this case. . . . [T]hanks to this Court, [TransUnion] may well be in a position to keep much of its ill-gotten gains.").

[177] *Id.* at 2225 (Kagan, J., dissenting).

[178] *See id.* ("The Court here transforms standing law from a doctrine of judicial modesty into a tool of judicial aggrandizement.").

[179] *Id.*

[180] *Id.*

[181] *Id.* at 2226.

V. THE CIRCUITS' REACTIONS TO *TRANSUNION*

As a result of *TransUnion*'s attempt to clarify Article III standing doctrine, some circuit courts have altered their stances on the issue in the FDCPA context. While the Second Circuit,[182] the Seventh Circuit, and the D.C. Circuit maintain their pre-*TransUnion* stances on the Article III standing requirements for plaintiffs alleging FDCPA violations, the Sixth Circuit has shifted its approach significantly,[183] and the Eleventh Circuit reiterated its position after *TransUnion*.[184] This Part explores the ways in which some circuits have shifted or clarified their understandings of Article III standing in the FDCPA context after the U.S. Supreme Court's decision in *TransUnion*.

A. THE SIXTH CIRCUIT

The U.S. Court of Appeals for the Sixth Circuit shifted its position on Article III standing after the U.S. Supreme Court decided *TransUnion*. Shortly after *TransUnion*, the Sixth Circuit decided *Ward v. National Patient Account Services Solutions, Inc.*, in which the court concluded that *TransUnion* abrogated *Macy*, a case in which the court found standing.[185] In *Ward*, the plaintiff

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[182] Although *Cohen* has not been abrogated and the Second Circuit has not yet changed its position on standing in the context of the FDCPA, the court seems to have switched course outside of the FDCPA's scope after *TransUnion*. In *Maddox v. Bank of New York Mellon Trust Co.*, the Second Circuit vacated its prior decision in the case and held that the plaintiffs' allegations "fail to support Article III standing, and that they may not pursue their claims for the statutory penalties imposed by the New York Legislature in federal court." 19 F.4th 58, 60 (2d Cir. 2021). The court relied heavily on *TransUnion* in finding that the plaintiffs did not suffer a concrete harm as a result of the defendant bank's alleged violation of New York's mortgage-satisfaction-recording statutes. *Id.* at 62–63 ("'No concrete harm; no standing.' This equation, which opens the Supreme Court's *TransUnion* decision, leaves little room for interpretation and may be sufficient to resolve the issue before us." (citation omitted) (quoting TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2200 (2021))). The court made no mention of *Cohen* in its decision, and *Cohen* remains good law as of this writing. Cohen v. Rosicki, Rosicki & Assocs., 897 F.3d 75 (2d Cir. 2018).

[183] Ward v. Nat'l Patient Acct. Servs. Sols., Inc., 9 F.4th 357 (6th Cir. 2021).

[184] Hunstein v. Preferred Collection & Mgmt. Servs., Inc., 17 F.4th 1016 (11th Cir.), *reh'g en banc granted and opinion vacated*, 17 F.4th 1103 (11th Cir. 2021).

[185] *Ward*, 9 F.4th at 361; *see* Macy v. GC Servs. Ltd. P'ship, 897 F.3d 747 (6th Cir. 2018), *abrogated by Ward*, 9 F.4th 357 (holding that plaintiffs had standing in a class action against a debt collector who sent letters to debtor-plaintiffs that violated the FDCPA for containing "legally deficient warnigns and advisories").

received treatment at a medical center on two separate occasions, owing a balance after each visit.[186] The medical center hired the defendant debt servicer to collect debts from its patients, including the plaintiff.[187] The debt servicer sent several billing statements to the plaintiff, all of which included the necessary account number, dates of treatment, payment due date, and instructions for payment.[188] The statements further identified the defendant as a debt servicer.[189] In addition to the billing statements, the debt servicer also called the plaintiff and left voice messages on two occasions, one for each billing statement.[190] The voice messages did not explain that the defendant was a debt servicer, and they referred to the defendant as "NPAS" rather than "NPAS, Inc."[191] The debt servicer followed a similar process with regards to the plaintiff's second account for the second hospital visit.[192] After retaining counsel, the plaintiff sent a cease-and-desist letter to a different entity with a similar name as the defendant, allegedly resulting from confusion regarding the entity's name in the voice messages.[193] The debt servicer sent another statement and left a final voice message a few months later.[194]

Over two months after the plaintiff received the last phone call, he filed suit against the debt servicer, alleging three violations of the FDCPA, all of which were based on the debt servicer's voice messages.[195] The plaintiff alleged that the debt servicer violated the FDCPA by failing to: (1) "identify itself as a debt collector,"[196] (2) "identify the 'true name' of its business,"[197] and (3) "disclose its corporate designation."[198] The district court granted summary judgment for the defendant debt servicer because it did not qualify

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[186] *Ward*, 9 F.4th at 359.
[187] *Id.*
[188] *Id.*
[189] *Id.*
[190] *Id.* at 359–60.
[191] *Id.*
[192] *Id.* at 360.
[193] *Id.*
[194] *Id.*
[195] *Id.*
[196] *Id.* (citing 15 U.S.C. § 1692e(11)).
[197] *Id.* (citing 15 U.S.C. § 1692e(14)).
[198] *Id.* (citing 15 U.S.C. § 1692d(6)).

as a "debt collector" under the FDCPA.[199] The plaintiff appealed.[200]

The Sixth Circuit vacated the district court's summary judgment order and remanded the case with instructions to dismiss it for lack of subject matter jurisdiction.[201] The court focused primarily on whether the plaintiff suffered a concrete injury, as is required under Article III.[202] Before diving into its analysis, the court noted that *TransUnion* abrogated the court's holding in *Macy* that "plaintiffs satisfied the concreteness requirement where 'FDCPA violations created a material risk of harm to the interests recognized by Congress in enacting the FDCPA.'"[203] The court stated that, after *TransUnion*, "plaintiffs must demonstrate that 'the risk of future harm materialized,' or that the plaintiffs 'were independently harmed by their exposure to the risk itself.'"[204]

As to the plaintiff's argument that the procedural violations alone should give rise to standing, the court disagreed and found that "the procedural injuries [the plaintiff] asserts do not bear a close relationship to traditional harms."[205] The court found that the failure to provide information does not resemble an invasion of privacy, and the plaintiff's first argument therefore failed.[206] The court similarly rejected the plaintiff's second argument that a concrete injury flowed from the FDCPA violation.[207] The court found that "confusion alone is not a concrete injury for Article III

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[199] *Id.*

[200] *Id.*

[201] *Id.* at 363.

[202] *See id.* at 361 ("Here, the parties' arguments center on whether Ward has demonstrated injury in fact. . . . Instead, this appeal centers on whether Ward suffered a concrete injury.").

[203] *Id.* (quoting Macy v. GC Servs. Ltd. P'ship, 897 F.3d 747, 761 (6th Cir. 2018), *abrogated by Ward*, 9 F.4th 357).

[204] *Id.* at 361 (quoting TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2211 (2021)); *id.* (noting that the plaintiff "must show either that the procedural harm itself is a concrete injury of the sort traditionally recognized or that the procedural violations caused an independent concrete injury").

[205] *Id.* at 362.

[206] *See id.* ("[T]he mere failure to provide certain information does not mirror an intentional intrusion into the private affairs of another. Indeed, Ward alleged in his complaint that NPAS, Inc.'s violation, i.e., the use of an abbreviated name, confused him, not that it invaded his privacy.").

[207] *Id.* at 363.

purposes,"[208] the cost of hiring counsel cannot give rise to a concrete harm,[209] and finally, the plaintiff did not clearly allege a harm suffered from the last voice message he received after sending the cease-and-desist letter.[210] Ultimately, the court concluded that the plaintiff lacked standing because he "failed to show more than a bare procedural violation of the FDCPA."[211]

B. THE ELEVENTH CIRCUIT

Although the U.S. Court of Appeals for the Eleventh Circuit has not shifted its stance on the requirements for Article III standing, it did clarify its position on standing in the FDCPA context after *TransUnion*. As previously discussed, the Eleventh Circuit held in *Hunstein* that an alleged violation of a procedural right under the FDCPA constituted a concrete injury for purposes of Article III standing.[212] After *TransUnion* was decided, however, the court reheard *Hunstein* en banc, vacated its original opinion, and substituted it with a new one.[213]

On rehearing, the court again held that the alleged violation of § 1692c(b) of the FDCPA constituted a concrete injury in fact under Article III and that the defendant debt collector sending the plaintiff's personal information to its "vendor constituted a communication 'in connection with the collection of any debt' within the meaning of § 1692c(b)."[214] As in its original opinion, the court first noted that because the plaintiff's injury is not tangible and he is unable to demonstrate a "risk of real harm," the plaintiff would need to show standing "through an intangible injury

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[208] *Id.*

[209] *See id.* (noting that "applying Ward's logic to any plaintiff who hires counsel to affirmatively pursue a claim would nullify the limits created under Article III").

[210] *See id.* ("Because Ward did not clearly assert in his complaint that he received—let alone was harmed by—an additional phone call, we need not decide whether an unwanted call might qualify as a concrete injury.").

[211] *Id.*

[212] *See* discussion *supra* Section III.B.*3*.

[213] Hunstein v. Preferred Collection & Mgmt. Servs., Inc., 17 F.4th 1016, 1020 (11th Cir.), *reh'g en banc granted and opinion vacated*, 17 F.4th 1103 (11th Cir. 2021) (noting that the U.S. Supreme Court's *TransUnion* decision "bears on one of the issues presented in the case" (citing TransUnion LLC v. Ramirez, 141 S. Ct. 2190 (2021))).

[214] *Id.* at 1020 (quoting 15 U.S.C. § 1692c(b)).

resulting from a statutory violation."[215] In assessing whether the plaintiff demonstrated an intangible injury from the statutory violation, the court considered both the history and judgment of Congress, as *Spokeo* instructs courts to do.[216]

As to the history prong, the court stated that it "can discern a concrete injury where—in the words of *TransUnion*, echoing *Spokeo*—'the asserted harm has a "close relationship" to a harm traditionally recognized as providing a basis for a lawsuit in American courts.'"[217] Under this framework, the court concluded that the plaintiff "alleged a harm similar in kind to the common-law tort of public disclosure of private facts."[218] The court explained that the plaintiff claimed that the defendant debt collector "'disclosed' what he calls 'sensitive medical information'—including his minor son's name and prior medical treatment—to 'the employees of an unauthorized third-party mail house.'"[219] The court found that, based on the plaintiff's allegations, "*some* measure of disclosure in fact occurred."[220] The court further noted that although the disclosure in this case may be "less widespread . . . than the disclosures typical of actionable public-disclosure-of-private-facts claims," that is simply "a matter of 'degree,'" and all that is pertinent here is that the "dissemination of . . . personal information remain similar in 'kind.'"[221]

As to the congressional judgment prong, the court found that it also points to standing in this case.[222] The court noted that Congress's judgment is reflected both in the text of § 1692c(b) of

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[215] *Id.* at 1022–23 ("'[T]he violation of a procedural right granted by statute can be sufficient in some circumstances to constitute an injury in fact,' such that 'a plaintiff . . . need not allege any *additional* harm beyond the one Congress has identified.'" (alterations in original) (quoting Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1549 (2016))).

[216] *Id.* at 1023 ("*Spokeo* instructs that in determining whether an alleged statutory violation confers Article III standing, we should consider '[1] history and [2] the judgment of Congress.'" (quoting *Spokeo*, 136 S.Ct. at 1549)).

[217] *Id.* (quoting *TransUnion*, 141 S. Ct. at 2200).

[218] *Id.* at 1027.

[219] *Id.*

[220] *Id.*

[221] *Id.* at 1027–28 (noting that *TransUnion*'s approach to *Spokeo*'s close-relationship test requires "an intangible injury to be of the same kind as a harm actionable at common law but not necessarily the same degree").

[222] *Id.* at 1032 ("[W]e conclude that 'the judgment of Congress' also favors [the plaintiff].").

the FDCPA and in a section of the FDCPA titled "Congressional findings and declaration of purpose," where "Congress identified the 'invasion[] of individual privacy' as one of the harms against which the statute is directed."[223] Contrasting this case to *Trichell*, the court found that "here—and unlike *Trichell*—the alleged harm fits neatly within the 'invasions of individual privacy' that Congress expressly addressed."[224] Thus, the court found that both the history and judgment of Congress led to the conclusion that the plaintiff had standing under Article III.[225]

After concluding that the plaintiff had standing to sue, the court next turned to the merits of the plaintiff's claim under the FDCPA.[226] The court ultimately found that the debt collector's communication to the mail vendor "at least 'concerned,' was 'with reference to,' and bore a 'relationship [or] association' to its collection of [the plaintiff's] debt."[227] Accordingly, the Eleventh Circuit held that the plaintiff "alleged a communication 'in connection with the collection of any debt' as that phrase is commonly understood."[228]

On November 17, 2021, the Eleventh Circuit once again sua sponte vacated its opinion in *Hunstein* and ordered that the case be reheard en banc.[229]

VI. ADDRESSING BARRIERS TO CONSUMER FINANCIAL PROTECTION IN THE COURTS

A. ASSESSING THE CIRCUIT SPLIT

Prior to *TransUnion*, the circuit split on standing regarding violations of the FDCPA revealed significant discrepancies surrounding the meaning of *Spokeo,* which had a substantial

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[223] *Id.* (alteration in original) (quoting 15 U.S.C. § 1692(a)).

[224] *Id.* at 1033 (quoting 15 U.S.C. § 1692(a)).

[225] *Id.* ("Because (1) § 1692c(b) bears a close relationship to a harm that American courts have long recognized as cognizable and (2) Congress's judgment indicates that violations of § 1692c(b) constitute a concrete injury, we conclude that Hunstein has the requisite standing to sue.").

[226] *Id.*

[227] *Id.* at 1034–35 (first alteration in original).

[228] *Id.* at 1035.

[229] Hunstein v. Preferred Collection & Mgmt. Servs., Inc., 17 F.4th 1103, 1104 (11th Cir. 2021).

impact in the wider consumer financial protection context.[230] Some circuits interpreted *Spokeo* narrowly to limit standing for statutory violations, while others retained a broader interpretation, allowing plaintiffs to seek judicial redress.[231] Some circuit courts, like the Seventh Circuit, took a strict approach of "no harm, no foul."[232] Conversely, other courts, like the Second Circuit, found that a more general risk of harm from a statutory violation was sufficient to establish standing under Article III.[233]

The lack of clarity regarding standing after *Spokeo* left courts confused and resulted in inconsistent holdings. For example, the Seventh Circuit in *Casillas* deviated from the Sixth Circuit's holding in *Macy*, despite both cases presenting nearly identical facts.[234] More specifically, the Seventh Circuit concluded that an omission giving rise to a risk of harm to an individual is not sufficient to create standing; instead, it required a risk to the plaintiffs themselves.[235] The Eleventh Circuit in *Trichell* similarly rejected the Sixth Circuit's holding in *Macy*, as well as the Second Circuit's holding in *Cohen,* reasoning that "a statutory violation that poses a risk of concrete harm to consumers in general, but

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[230] *See* Joshua Scott Olin, Note, *Rethinking Article III Standing in Class Action Consumer Protection Cases Following* Spokeo v. Robins, 26 U. MIA. BUS. L. REV. 69, 88 (2017) (noting that there are seventy-three federal consumer protection statutes, which, prior to *TransUnion*, were all at risk "of becoming obsolete" and would provide a win for corporations that wanted to avoid consumer lawsuits).

[231] *See* discussion *supra* Part III.

[232] *See, e.g.*, Casillas v. Madison Ave. Assocs., 926 F.3d 329, 331 (7th Cir. 2019) ("The bottom line of our opinion can be succinctly stated: no harm, no foul.").

[233] *See, e.g.*, Cohen v. Rosicki, Rosicki & Assocs., 897 F.3d 75, 81–82 (2d Cir. 2018) (holding that a "risk of real harm" can be sufficient to create Article III standing (citing Strubel v. Comenity Bank, 842 F.3d 181, 190 (2d Cir. 2016))).

[234] *Compare* Casillas v. Madison Ave. Assocs., 926 F.3d 329, 332, 339 (7th Cir. 2019) (holding that a plaintiff debtor's class action against her creditor's alleged debt collector for procedural violations of the FDCPA failed to satisfy the concreteness requirement for an injury in fact necessary for Article III standing), *with* Macy v. GC Servs. Ltd. P'ship, 897 F.3d 747, 761 (6th Cir. 2018) (holding that the plaintiffs "satisfied the concreteness prong of the injury-in-fact requirement of Article III standing by alleging that [the defendant debt collection agency's] purported FDCPA violations created a material risk of harm to the interests recognized by Congress in enacting the FDCPA"), *abrogated by* Ward v. Nat'l Patient Acct. Servs. Sols., Inc., 9 F.4th 357 (6th Cir. 2021).

[235] *See Casillas*, 926 F.3d at 336 ("It is certainly true that the omission put those consumers who sought to dispute the debt at risk of waiving statutory rights. But it created no risk for the plaintiffs in that case, who did not try (and, for that matter, expressed no plans to try) to dispute the debt.").

not to the individual plaintiff, cannot fairly be described as causing a particularized injury to the plaintiff."[236] Nonetheless, the Eleventh Circuit in its original *Hunstein* opinion found a statutory violation sufficient to confer standing.[237] Although the court attempted to reconcile its holdings in *Trichell* and *Hunstein*,[238] there remained an apparent discrepancy. The court placed significant emphasis on congressional judgment in finding a concrete injury in *Hunstein*, citing an interest in preventing privacy invasions as part of the FDCPA's purposes.[239] By contrast, the Eleventh Circuit seemingly ignored the FDCPA's purpose of "eliminat[ing] abusive debt collection practices by debt collectors" when the court refused to find standing in *Trichell*.[240] Conferring standing on plaintiffs like those in *Trichell*, who were specifically targeted by debt collectors' abusive collection practices,[241] would directly support the statutory goal of eliminating such predatory behavior.

Notwithstanding the U.S. Supreme Court's ruling in *TransUnion*, the circuits still face ambiguity regarding the requirements for standing in the context of statutory violations, such as that of the FDCPA, resulting in continued inconsistencies across the courts' holdings. The Sixth Circuit completely shifted its position on standing in *Ward*, finding that *TransUnion* abrogated *Macy*'s holding that "plaintiffs satisfied the concreteness requirement where 'FDCPA violations created a

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[236] *See* Trichell v. Midland Credit Mgmt., Inc., 964 F.3d 990, 1002 (11th Cir. 2020) (opining that the Seventh and D.C. Circuit opinions were "more faithful to Article III").

[237] Hunstein v. Preferred Collection & Mgmt. Servs., Inc., 994 F.3d 1341, 1348–49 (11th Cir.), *rev'd*, 17 F.4th 1016 (11th Cir. 2021), *reh'g en banc granted and opinion vacated*, 17 F.4th 1103 (11th Cir. 2021).

[238] *See* s*upra* note 119 and accompanying text.

[239] *See supra* note 117 and accompanying text.

[240] *See* 15 U.S.C. § 1692(e) (setting forth purposes of the FDCPA, including its aim to "eliminate abusive debt collection practices by debt collectors"); *Trichell*, 964 F.3d at 1000 ("In sum, the FDCPA's narrow findings and cause of action affirmatively cut against [the plaintiffs] and, in any event, suggest no congressional judgment firm enough to break with centuries of tradition indicating that misrepresentations are not actionable absent reliance and ensuing damages.").

[241] *See supra* note 102 and accompanying text.

material risk of harm to the interests recognized by Congress in enacting the FDCPA.'"[242]

Meanwhile, as of this writing, the Second Circuit's holding in *Cohen* has not been abrogated, but in a Second Circuit decision outside of the FDCPA context, the court held that the plaintiffs' allegations "fail[ed] to support Article III standing, and that they may not pursue their claims for the statutory penalties imposed by the New York Legislature in federal court."[243] The court relied heavily on *TransUnion* in finding that the plaintiffs did not suffer a concrete harm because of the defendant bank's alleged violation of New York's mortgage-satisfaction-recording statutes.[244] Interestingly, the court made no mention of *Cohen* in this decision, and *Cohen* remains good law as of this writing.[245]

The Eleventh Circuit's divergent holdings in *Trichell* and *Hunstein* also remain current law, even after the court reassessed *Hunstein*. In its most recent *Hunstein* decision, the court again attempted to reconcile its holding with that of *Trichell*, stating that, "here—and unlike *Trichell*—the alleged harm fits neatly within the 'invasions of individual privacy' that Congress expressly addressed."[246] Still, the Eleventh Circuit again seemed to ignore the FDCPA's purpose of "eliminat[ing] abusive debt collection practices by debt collectors."[247] Contrary to the Eleventh Circuit's repeated conclusion about *Trichell*, the plaintiffs in that case, who were specifically targeted by debt collectors' abusive collection practices,[248] should have standing because this standing would directly support the statutory goal of eliminating such abusive behavior. Further supporting the argument that

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[242] Ward v. Nat'l Patient Acct. Servs. Sols., Inc., 9 F.4th 357, 361 (6th Cir. 2021) (quoting Macy v. GC Servs. Ltd. P'ship, 897 F.3d 747, 761 (6th Cir. 2018), *abrogated by Ward*, 9 F.4th 357).

[243] Maddox v. Bank of N.Y. Mellon Tr. Co., 19 F.4th 58, 60 (2d Cir. 2021).

[244] *Id.* at 62–63 ("'No concrete harm; no standing.' This equation, which opens the Supreme Court's *TransUnion* decision, leaves little room for interpretation and may be sufficient to resolve the issue before us." (citation omitted) (quoting TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2200 (2021))).

[245] Cohen v. Rosicki, Rosicki & Assocs., 897 F.3d 75 (2d Cir. 2018).

[246] Hunstein v. Preferred Collection & Mgmt. Servs., Inc., 17 F.4th 1016, 1033 (11th Cir.) (quoting 15 U.S.C. § 1692(a)), *reh'g en banc granted and opinion vacated*, 17 F.4th 1103 (11th Cir. 2021).

[247] 15 U.S.C. § 1692(e).

[248] *See supra* note 102 and accompanying text.

TransUnion left courts confused are the Eleventh Circuit's own words. The court noted in its most recent *Hunstein* opinion that "the question remains: If (as we now know for certain from *TransUnion*) Article III doesn't require a precise fit between an alleged intangible harm and a common-law tort, what *does* it require? The Supreme Court has never squarely answered that question."[249] In the absence of important answers like these, the U.S. Supreme Court is leaving it up to the circuits to come up with their own interpretations, as the Eleventh Circuit did in *Hunstein*.[250]

The inconsistent holdings among some of the circuits indicate a lack of clarity regarding Article III standing in the context of statutory violations, even after the U.S. Supreme Court's attempt to resolve this problem in *TransUnion*.

B. RETHINKING STANDING: A PROPOSAL TO GIVE DEFERENCE TO CONGRESS

Apart from the existing inconsistencies among the circuits regarding their interpretations of standing in the context of statutory violations, *TransUnion* was wrongly decided, and a broader approach giving deference to Congress would be more consistent with Article III and *Spokeo*.

In *Spokeo*, the U.S. Supreme Court clarified that statutory violations can follow either of two distinct paths to establish standing. Standing can be established where there is a "violation of a procedural right granted by statute," and the procedural violation presents a "risk of real harm" so as to "satisfy the requirement of concreteness."[251] Alternatively, where there is a bare procedural violation, plaintiffs must "allege . . . *additional* harm beyond the one identified by Congress" to establish standing.[252] The question that remained after *Spokeo*, which was at the heart of the FDCPA standing circuit split, was whether Congress embedded a procedural right in the various statutes at issue to protect plaintiffs' concrete interests so as to not require

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[249] *Hunstein*, 17 F.4th at 1024.

[250] *See id.* (stating that "lower-court decisions—both our sister circuits' and our own—offer useful guidance" in answering that question).

[251] Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1549 (2016).

[252] *Id.*

plaintiffs to prove additional harm to gain standing. The U.S. Supreme Court attempted to answer that question in *TransUnion*, holding that Congress "may not simply enact an injury into existence, using its lawmaking power to transform something that is not remotely harmful into something that is."[253] According to the Court, even in the context of a statutory violation, a plaintiff must still show a concrete injury to have standing.[254]

The Court's ultimate holding in *TransUnion* contradicts its holding in *Spokeo*, and Justice Thomas's dissent holds truer to the principle of separation of powers and the Court's precedent regarding Article III standing than the *TransUnion* majority's does. As Justice Thomas rightly argued in his dissent, the Court's decision in *Spokeo* "made clear that 'Congress is well positioned to identify intangible harms that meet minimum Article III requirements' and explained that 'the violation of a procedural right granted by statute can be sufficient in some circumstances to constitute injury in fact.'"[255] The majority directly contravened the principle of separation of powers by moving Congress's power to create and define statutory rights into the hands of the courts.[256] Unlike what the majority holds, Justice Thomas was correct in contending that "[w]eighing the harms caused by specific facts and choosing remedies seems . . . like a much better fit for legislatures and juries than for this Court."[257]

Contrary to what the U.S. Supreme Court did in *TransUnion*, the fundamental disagreements at play in the FDCPA circuit split, and other standing disagreements regarding procedural violations of different federal consumer financial protection statutes, should be resolved by giving greater deference to Congress. Congress generally enacts consumer protection statutes

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[253] TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2205 (2021) (quoting Hagy v. Demers & Adams, 882 F.3d 616, 622 (6th Cir. 2018)).

[254] *See id.* ("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.").

[255] *Id.* at 2220 (Thomas, J., dissenting) (quoting Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1543–44 (2016)).

[256] *See id.* at 2221 ("According to the majority, courts alone have the power to sift and weigh harms to decide whether they merit the Federal Judiciary's attention. In the name of protecting the separation of powers this Court has relieved the legislature of its power to create and define rights." (citation omitted)).

[257] *Id.* at 2224.

for the purpose of protecting consumer interests.[258] This goal remains true even in the procedural components of such statutes; for example, consumer plaintiffs may waive certain rights if they are deceived or not fully informed of a statute's procedural requirements.[259] This problem was demonstrated in the now abrogated *Macy* case from the Sixth Circuit: Congress enacted specific procedural requirements in the FDCPA for debt collectors "'to protect consumers' . . . and 'eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses.'"[260] With this purpose in mind, it should be clear that Congress granted consumers a private right of action to protect their concrete interests when it enacted the FDCPA. When a plaintiff alleges an injury of the precise type of harm that a statute aimed to prevent, that plaintiff should not be required to allege an additional harm beyond the one identified by Congress, as the Court alluded to in *Spokeo*.[261] This congressional deference should apply not only to procedural violations of the FDCPA but also in the broader context of consumer protection financial statutory violations.

Importantly, Congress is best positioned to identify concrete harms sufficient to confer standing under Article III.[262] As societal, cultural, political, and technological shifts take place

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[258] *See, e.g.*, 15 U.S.C. § 1601(a) (explaining that the TILA aims to "assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit, and to protect the consumer against inaccurate and unfair credit billing and credit card practices"); *id.* § 1692(e) (stating that the FDCPA aims to stop abusive debt collection practices and promote uniform State action to protect consumers against such practices).

[259] *See, e.g.*, Macy v. GC Servs. Ltd. P'ship, 897 F.3d 747, 751 (6th Cir. 2018) (regarding a statutory obligation for debt collection agencies to provide certain debt and creditor information only if plaintiffs dispute their debts *in writing*), *abrogated by* Ward v. Nat'l Patient Acct. Servs. Sols., Inc., 9 F.4th 357 (6th Cir. 2021).

[260] *Id.* at 756 (citing 15 U.S.C. § 1692(e)).

[261] *See* Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1549 (2016) ("[T]he violation of a procedural right granted by statute can be sufficient in some circumstances to constitute injury in fact. In other words, a plaintiff in such a case need not allege any additional harm beyond the one Congress has identified.").

[262] *See* TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2226 (Kagan, J., dissenting) (arguing that "Congress is better suited than courts to" assess harms and risks of harms).

across the country, it makes little sense for courts to rely on prior caselaw to determine the concreteness of an injury or a risk thereof.[263] Although courts should not exclusively rely on Congress's judgment in making such determinations, courts should consider the existence and purpose of procedural requirements embedded within consumer financial protection statutes.[264] Given that congressional deference is not merely a historical norm—indeed, Congress's role as a factfinder is embedded in the Constitution itself[265]—some courts' lack of deference to congressional factfinding is particularly troubling. Apart from Congress's constitutional role as a factfinder, Congress is also better positioned than courts to identify and understand the harms that arise from particular statutory violations.[266] Courts often fail to consider the intangible or non-obvious harms that may result from statutory violations, largely because "[f]act-gathering on standing issues is structurally limited by the fact that it is a jurisdictional inquiry and precedes any extensive discovery efforts."[267] Moreover, although every case presents a unique set of facts, courts' decisions create binding precedent that

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[263] For example, technological advances allow debt collectors to gain easier access to consumers, and in turn, consumers are more vulnerable to deception and false information.

[264] *Cf.* Jackson Erpenbach, Note, *A Post*-Spokeo *Taxonomy of Intangible Harms*, 118 MICH. L. REV. 471, 501–02 (2019) ("Courts have a tendency to convert a contingent factual situation . . . into a hard-and-fast precedent. While the very nature of precedent binds subsequent courts, Congress can act on the basis of future risks and determine that they are sufficient to justify creation of a private cause of action.").

[265] *See* Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180, 199 (1997) ("The Constitution gives to Congress the role of weighing conflicting evidence in the legislative process."); *see also* United States v. Lopez, 514 U.S. 549, 604 (1995) (Souter, J., dissenting) (opining that the role of factfinding is "expressly assigned to [Congress] by the Constitution").

[266] *See* Erpenbach*, supra* note 264, at 500–01 ("Independent of calculating risk, courts may also simply misunderstand the harms that result from particular statutory violations. . . . Notably, the Court itself fails to appreciate its narrow factfinding capabilities. One of the most-cited lines from *Spokeo* is the Court's dicta stating that an incorrect zip code is clearly 'a bare procedural violation' resulting in no attendant concrete injury. Yet it is not difficult to identify harms that could result from an erroneous zip code. For example, research shows that employers discriminate against job applicants based on the zip codes that appear on their resumes. Reporting an incorrect zip code can lead to misdirected mail or even affect the credit options or prices for services available to consumers." (footnotes omitted)).

[267] *See id.* (contending that courts often lack the necessary knowledge to make an informed decision about whether a plaintiff suffered an injury as a result of a statutory violation).

can limit future victims' abilities to recover on other consumer financial protection statutory violations when these precedents are read to foreclose entire groups of consumers from relief. Because courts are strictly bound by precedent and because Congress has a deeper understanding of the reasons behind the content of consumer financial protection statutes, Congress is better positioned than the courts to identify potential risks to consumers and to create a private cause of action for plaintiffs based on that risk.

Last, increasing deference to Congress will not only serve to protect consumers from abusive practices by predatory companies that pose a threat to consumers but also to increase consistency among the courts in determining whether an injury is concrete enough to satisfy Article III standing.[268] Today, even after *TransUnion*, Article III standing in actions arising out of consumer financial protection statutory violations is essentially determined by the jurisdiction in which a plaintiff litigates; this clash in standing doctrines is made evident by the ongoing FDCPA circuit split examined above.[269] Allowing courts to forego congressional deference inevitably will lead to inconsistent holdings in the context of consumer financial protection statutory violations, creating unfair outcomes for some plaintiffs trapped in forums with narrow standing doctrines. Instead, deferring to Congress when making injury determinations for purposes of standing will increase consistency among the courts, in turn enhancing reliability, predictability, and efficiency in actions involving these statutory violations.[270]

Notably, increasing congressional deference would be more consistent with the Court's holding in *Spokeo*. *Spokeo* laid out a two-part framework for assessing standing, which requires courts to look to both history and Congress's judgment.[271] This

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[268] *See id.* at 503–04 (arguing that deferring to Congress will produce more consistency among judicial holdings because, left to their own devices, courts will use different analytical tools that can produce inconsistent outcomes).

[269] *See* discussion *supra* Section VI.A.

[270] *See* Erpenbach, *supra* note 264, at 504–05 ("A deferential stance would produce fairer, more predictable outcomes for those that Congress saw fit to protect.").

[271] *See* Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1549 (2016) ("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

framework, however, does not require courts to assess alleged harms within the limited scope that *TransUnion* endorses and that some courts have applied.[272] By contrast, courts like the Second Circuit have more faithfully applied *Spokeo*'s two-part framework to find alleged injuries to be sufficiently concrete when there is a statutory violation and a risk of harm to interests specifically recognized by Congress.[273] In sum, courts should engage in congressional deference because deference would better align with *Spokeo*'s holding—which specifically calls for consideration of history and congressional judgment[274]—when compared to *TransUnion*, which instructs courts to ignore Congress's power to create and define rights by holding "for the first time, that a specific class of plaintiffs whom Congress allowed to bring a lawsuit cannot do so under Article III."[275]

VII. CONCLUSION

Although it is not yet clear what impacts *TransUnion* will have on consumer financial protection, the U.S. Supreme Court decision is already making it more difficult for victims to sue corporations for statutory violations of federal consumer financial protection laws. These additional barriers to redress for consumers were revealed by the circuit courts' reactions to *TransUnion* in the context of standing for violations of the FDCPA, in which all circuits, except for the Second Circuit, held

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providing a basis for a lawsuit in English or American courts. In addition, because Congress is well positioned to identify intangible harms that meet minimum Article III requirements, its judgment is also instructive and important." (citation omitted)).

[272] *See* TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2214 (2021) (Thomas, J., dissenting) ("Yet despite Congress' judgment that such misdeeds deserve redress, the majority decides that TransUnion's actions are so insignificant that the Constitution prohibits consumers from vindicating their rights in federal court. The Constitution does no such thing.").

[273] *See* Cohen v. Rosicki, Rosicki & Assocs., 897 F.3d 75, 81–82 (2d Cir. 2018) (holding that a "risk of real harm" can be sufficient to create Article III standing where a statutory violation is found (citing Strubel v. Comenity Bank, 842 F.3d 181, 190 (2d Cir. 2016))).

[274] *Spokeo*, 136 S. Ct. 1540 at 1549 ("In determining whether an intangible harm constitutes injury in fact, both history and the judgment of Congress play important roles.").

[275] *See TransUnion*, 141 S. Ct. at 2225 (Kagan, J., dissenting) ("The Court here transforms standing law from a doctrine of judicial modesty into a tool of judicial aggrandizement.").

that consumer plaintiffs did not allege a sufficiently concrete and particularized injury in fact, as Article III standing requires.[276]

As *Spokeo*, *TransUnion*, and the standing doctrine continue to cause confusion and disagreement among courts, reform is needed to increase courts' deference to Congress in identifying what constitutes a concrete injury for purposes of Article III standing. Consumer protection statutes exist for the primary purpose of protecting consumers.[277] Accordingly, when a consumer alleges an injury due to a procedural violation of a statute embedded with a private right of action and enacted for the purpose of preventing such an injury, that consumer should have standing under Article III. With the current lack of clarity and consistency in courts' interpretations of *Spokeo*, and now *TransUnion*, consumers alleging procedural violations under federal consumer financial protection statutes will likely continue to face significant challenges when proceeding through the courts. Further, shifting the role of defining an injury worthy of standing to Congress will allow for more judicial consistency and provide for a better representation of modern cultural, political, societal, and technological issues posing harm, or a real risk of harm, to American consumers.

[276] *See* discussion *supra* Part V (discussing shifts in some of the circuit courts' positions on standing after *TransUnion*).

[277] *See supra* note 258 and accompanying text.