Louisiana Law Review

Volume 83
Number 2 *Winter 2023*

Article 11

3-10-2023

Article III Standing but Add a Little Bit of 21st Century Spice: How Data Breaches Illuminate the Continuously Contradictory Rulings of the Supreme Court

Emily A. Martin

Article III Standing but Add a Little Bit of 21st Century Spice: How Data Breaches Illuminate the Continuously Contradictory Rulings of the Supreme Court

Emily A. Martin[*]

TABLE OF CONTENTS

---

* J.D. candidate 2023, Paul M. Hebert Law Center, Louisiana State University.

INTRODUCTION

The Internet continues to change the way the world works, socializes, creates new ideas, shares information, and organizes the flow of people.[1] Simply stated, technology dictates how the world operates. An estimated 127 new devices connect to the Internet every second.[2] In 2022, 5 billion people accessed the Internet, and the number of smart devices collecting, analyzing, and sharing data is projected to hit approximately 50 billion by 2030.[3] While the exponential growth of the Internet enhances and simplifies everyday life, it also negatively impacts a person's security and privacy.[4]

With the rise of the Internet comes the increased risk of data breaches. A data breach is any incident where confidential or sensitive information is accessed without permission.[5] Typically, data breaches include accessing a computer's network to steal local files and bypassing network

---

1. James Manyika & Charles Roxburgh, *The Great Transformer: The Impact of the Internet on Economic Growth and Prosperity*, MCKINSEY GLOBAL INST. (Oct. 2011), https://www.mckinsey.com/~/media/mckinsey/industries/technology%20media%20and%20telecommunications/high%20tech/our%20insights/the%20great%20transformer/mgi_impact_of_internet_on_economic_growth.pdf [https://perma.cc/U3HT-Y6W7].

2. Mark Patel et al., *What's New with the Internet of Things?*, MCKINSEY & CO. (May 10, 2017), https://www.mckinsey.com/industries/semiconductors/our-insights/whats-new-with-the-internet-of-things [https://perma.cc/4DLY-C3CG].

3. Jacquelyn Bulao, *How Fast is Technology Advancing in 2023?*, TECHJURY (Jan. 12, 2023), https://techjury.net/blog/how-fast-is-technology-growing/#gref [https://perma.cc/KD95-8CNQ].

4. *See* Haris Shahid, *What is internet privacy & why does it matter so much in 2023?*, PUREVPN (Jan. 2, 2023), https://www.purevpn.com/blog/what-is-internet-privacy-scty [https://perma.cc/T7QD-UZ6A]

5. Rob Sobers, *89 Must-Know Data Breach Statistics [2022]*, VARONIS (May 20, 2022), https://www.varonis.com/blog/data-breach-statistics/ [https://perma.cc/7ZCU-6RAW].

security.[6] Businesses, government entities, and individuals are all at risk of data breaches such as hacking, insider leaks, payment card fraud, and theft of a physical hard drive containing files.[7] For example, in 2017, Equifax[8] announced a data breach in their system that exposed 143 million customer names, social security numbers, birthdates, and addresses.[9] Additionally, the hackers stole 209,000 credit card numbers and 182,000 documents containing personal information.[10] Equifax estimated that the data breach affected half of the United States population and agreed to a $425 million global settlement with the Federal Trade Commission to redress those impacted.[11]

In 2020, there were 3,950 confirmed data breaches in the United States, and each data breach contained around 25,575 records.[12] Further, the average total cost for each data breach in 2020 was $3.86 million.[13]

---

6. A computer's local files are the central storage location on the server that maintains digital files. To protect those files, network security limits the accessibility to the computer network and data using different types of software. *Id.*; *Local file server: How enterprises connect multiple computers on a network*, CANTO, https://www.canto.com/local-file-server/ [https://perma.cc/CQK5-79E2] (last visited Jan. 14, 2023); *What is Network Security? Network security defined, explained, and explored*, FORCEPOINT, https://www.forcepoint.com/cyber-edu/network-security [https://perma.cc/L2SF-QLUX] (last visited Jan. 14, 2023).

7. Sobers, *supra* note 5.

8. Equifax is a credit bureau that tracks the credit history of borrowers to generate credit reports and credit scores. It sells this information to banks and other financial institutions to help them determine the credit risk of their customers. Nicole Dieker, *What do the 3 credit bureaus do?*, BANKRATE (May 23, 2022), https://www.bankrate.com/glossary/e/equifax/ [https://perma.cc/P4Y2-UV7Q].

9. Shelby Brown, *Robinhood data breach is bad, but we've seen much worse*; CNET (Nov. 12, 2021, 3:40 AM PT), https://www.cnet.com/news/privacy/robinhood-data-breach-is-bad-but-weve-seen-much-worse/ [https://perma.cc/3DX8-RBWN].

10. *Id.*

11. *Equifax Data Breach Settlement*, FTC (Feb. 2022), https://www.ftc.gov/enforcement/cases-proceedings/refunds/equifax-data-breach-settlement [https://perma.cc/SHN4-K2LX].

12. Records represent the number of accounts or individuals affected by the data breach. Sobers, *supra* note 5.

13. The average total cost of a data breach includes both direct and indirect expenses. Direct expenses include forensic experts, hotline support, free-credit monitoring subscriptions, and potential settlements. *Id.* Indirect costs include in-house investigations and communications, as well as customer turnover or diminished client acquisition rates due to companies' reputations after breaches. *Id.*

Data breaches harm many people and entities, but courts inadequately define these injuries.[14] Specifically, courts have failed to properly articulate what is required for Article III standing in cases involving a data breach.[15]

The Supreme Court of the United States's ruling in *Spokeo, Inc. v. Robins* stated that to establish Article III standing, a plaintiff's harm must be concrete, real, and not abstract.[16] Tangible injuries, or *real* injuries, are not the only possible causes of harm.[17] Tangible injuries, such as physical and economic harm, can typically be quantified. The monetary value of intangible injuries, such as pain, suffering, and emotional distress, may not be as evident.[18] Although tangible injuries are more obvious in their concreteness, intangible injuries can be concrete and have a close relationship to harms traditionally recognized as providing a basis for standing in United States courts.[19] Although the Supreme Court rejected the notion that a mere violation of a statute conferring a procedural right is a sufficient injury to award standing, the Court also confirmed Congress's power to "define injuries . . . that will give rise to a case or controversy where none existed before."[20] The Court's reasoning in *Spokeo* was not clear on what constitutes Article III standing and consequently sparked a circuit split on the interpretation of standing.[21]

Following *Spokeo*, several circuit courts applied varying approaches in deciding what constitutes an injury in fact that satisfies Article III

---

14. Shelly A. Kim et al., *Second Circuit Weighs In on Article III Standing in Data Breach Lawsuits, Denying Existence of a Circuit Split*, AKIN GUMP STRAUSS HAUER & FELD LLP (May 19, 2021), https://www.akingump.com/en/experience/practices/cybersecurity-privacy-and-data-protection/ag-data-dive/second-circuit-weighs-in-on-article-iii-standing-in-data-breach-lawsuits-denying-existence-of-a-circuit-split.html [https://perma.cc/T24N-S5QM].

15. *Id.*

16. Spokeo, Inc. v. Robins, 578 U.S. 330, 340 (2016).

17. *What are Intangible Damages in an Injury Case?*, MATTHEW L. SHARP: PERSONAL INJURY LAWS., https://mattsharplaw.com/news/intangible-damages/ [https://perma.cc/S9HA-MUNT] (last visited June 8, 2022).

18. *Id.*

19. To be concrete, intangible injuries must be real and reasonably compare to traditional common-law harms. Matthew Petersen et al., *TransUnion v. Ramirez: The Supreme Court Further Narrows Article III Standing and Rejects "No Injury" Class Actions*, JDSUPRA (June 30, 2021), https://www.jdsupra.com/legalnews/transunion-v-ramirez-the-supreme-court-1255306/ [https://perma.cc/J8AR-4MFX].

20. *Spokeo*, 578 U.S. at 341 (quoting Lujan v. Defs. of Wildlife, 504 U.S. 555, 580 (1992) (Kennedy, J., concurring)).

21. Petersen et al., *supra* note 19.

standing requirements for intangible harms.[22] However, despite an evident circuit split on Article III standing interpretations, the Supreme Court continued to deny petitions for writs of certiorari concerning the matter until the Court decided *TransUnion v. Ramirez*.[23] The case involved a credit reporting agency called TransUnion, which compiled personal and financial information about individual consumers to create consumer reports.[24] TransUnion then sold those reports to entities that requested information about the creditworthiness of individual consumers.[25] In 2002, TransUnion used the Office of Foreign Assets Control (OFAC) Name Screen Alert, which is a third-party software that compares a consumer's name against a list maintained by the U.S. Treasury Department's OFAC list of terrorists, drug traffickers, and other serious criminals.[26] If an individual's name matches the name of an individual on the OFAC list, TransUnion places an alert on the individual's credit report indicating this similarity.[27] A class of 8,185 individuals with OFAC alerts in their credit files sued TransUnion under the Fair Credit Reporting Act (FCRA) for failing to use reasonable procedures to ensure the accuracy of their credit files.[28]

The FCRA requires consumer reporting agencies to implement procedures to ensure the accuracy of consumer information, and the plaintiffs alleged that TransUnion violated this requirement.[29] The Court reasoned that although TransUnion violated the FCRA by reporting inaccurate information on credit reports of 8,185 members, over 75% of those class members did not suffer a concrete injury and, therefore, lacked Article III standing.[30] The Supreme Court's ruling undermines the

22. Alicia A. Baiardo & Anthony Le, *Federal Circuit Courts' Differing Interpretations of Scope and Application of Article III Standing after Spokeo Leaves Defendants with Uncertainty*, MCGUIREWOODS (Feb. 28, 2020), https://www.classactioncountermeasures.com/2020/02/articles/lawyers/federal-circuit-courts-differing-interpretations-spokeo/ [https://perma.cc/N2PM-FK2H].

23. Petersen et al., *supra* note 19.

24. TransUnion v. Ramirez, 141 S. Ct. 2190, 2197 (2021).

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. The Supreme Court ruled that 25% of the class action members suffered a concrete injury under Article III standing because TransUnion already disseminated their inaccurate reports to third-party businesses. The Court stated that the harm from a misleading statement of this kind bears a close relationship to the harm from a false and defamatory statement—a tort law violation. *Id.* at 2208–09; Petersen et al., *supra* note 19 (citing *TransUnion*, 141 S. Ct. at 2211

effectiveness of federal privacy laws, such as the FCRA, and fails to provide sufficient guidance on Article III standing issues.

The Supreme Court further held that violations of federal statutes will not automatically constitute a concrete harm for purposes of establishing Article III standing.[31] In *TransUnion*, TransUnion violated the FCRA, the purpose of which is to protect consumers and provide pathways to recover damages.[32] The Supreme Court's ruling is a significant blow to consumer plaintiffs attempting to plead their way into federal court with claims based on alleged statutory violations that did not cause any concrete or *real-world* injury. Plainly stated, because the plaintiffs have not suffered any real-world injury, they do not meet the standing requirements and, thus, have no way to redress their injury. The 5 to 4 decision ignored important jurisprudence and broadened the judiciary's power to determine which types of injuries are actionable in court, thus transforming standing law from a "doctrine of judicial modesty into a tool of judicial aggrandizement."[33] Finally, the Supreme Court failed to expressly address the ongoing circuit split that emerged following *Spokeo*.[34] Consequently, although the Court's instruction as to what is required to establish concrete injuries may eliminate some of the open circuit splits, it will ultimately be up to the individual circuits to interpret the ruling in *TransUnion*, potentially resulting in continuing differences.[35]

The Supreme Court's ruling in *TransUnion* is wrong as a matter of jurisprudence and policy. The Court raised the bar for establishing concrete injuries.[36] As a result, this will likely have a significant impact on class action practice, especially for "no injury" classes premised on statutory claims without an accompanying real-world injury—a common occurrence in consumer-related cases.[37] The Court overlooked years of jurisprudence in the Sixth, Seventh, and D.C. Circuits demonstrating the need to allow data breach victims the ability to recover damages for

("Here, the 6,332 plaintiffs did not demonstrate that the risk of future harm materialized . . . .")).

31. *TransUnion*, 141 S. Ct. at 2205.

32. Petersen et al., *supra* note 19.

33. *TransUnion*, 141 S. Ct. at 2225 (Thomas, J., dissenting).

34. Petersen et al., *supra* note 19.

35. *Id.*

36. *Id.*; Rachel Clattenburg & Scott L. Nelson, *The Fiction of the "No-Injury" Class Action*, CITIZEN.ORG (Oct. 2015), https://www.citizen.org/wp-content/uploads/the-fiction-of-no-injury-class-action.pdf [https://perma.cc/HZ6R-RSPH].

37. Petersen et al., *supra* note 19.

breaches in their privacy.[38] An even more shocking outcome of the case is the Court's disregard for what may be considered the forefather of federal privacy laws: the FCRA.[39] Although the FCRA was designed to encourage privacy protection through mechanisms allowing private actions seeking both statutory and punitive damages,[40] the Supreme Court held that the data breach victims in *TransUnion* did not have Article III standing and did not qualify for damages outlined in the FCRA.[41] The Court held that 6,332 members of the class action lacked standing, thus leaving those members with no way of redressing their injuries.[42]

Courts implement constitutional standing for the main purpose of protecting the separation of powers, while prudential standing is entirely statutory and makes clear that Congress can create judicially cognizable injuries through legislation.[43] The Supreme Court's disregard for the FCRA's identification of justiciable injuries demonstrates the Court's preference for the constitutional strand of standing over prudential standing.[44] Although the Supreme Court created the injury-in-fact requirement to represent prudential standing ideology within the Article III analysis, the Court continues to inconsistently interpret this rule.[45] Thus, the Supreme Court's ruling in *TransUnion* only concerned protecting the separation of powers and failed to redress consumers who deserved to be compensated for their injuries, which TransUnion's negligent actions directly caused.[46] To resolve the Court's flawed holding in *TransUnion*, the Supreme Court should apply the zone-of-danger theory, which originally provided that a plaintiff could only recover damages in a negligent infliction of emotional distress case if the plaintiff was: (1) placed in the immediate risk of physical harm by the defendant's

38. *See generally* Galaria v. Nationwide Mut. Ins. Co., 663 F. App'x 384 (6th Cir. 2016); Remijas v. Neiman Marcus Grp., LLC, 794 F.3d 688 (7th Cir. 2015); Attias v. Carefirst, Inc., 865 F.3d 620 (D.C. Cir. 2017).

39. *See* Fair Credit Reporting Act, 15 U.S.C. § 1681.

40. Philip R. Stein, *With Supreme Court Privacy Case Pending, Silicon Valley Weighs In*, BILZIN SUMBERG (Feb. 26, 2021), https://www.bilzin.com/we-think-big/insights/publications/2021/02/privacy-portal-12 [https://perma.cc/MEF7-4PKT].

41. TransUnion v. Ramirez, 141 S. Ct. 2190, 2197 (2021).

42. *Id.* at 2214.

43. *See* discussion *infra* Part I.B.

44. *Id.*

45. *See generally* discussion *infra* Parts II & III.

46. *Id.*

negligence; and (2) frightened by the risk of harm.[47] The Supreme Court should use the zone-of-danger theory by analogy to supplement the current Article III standing analysis in data breach cases to provide both the court system and litigants greater clarity as to what types of injuries constitute standing in federal court.[48]

Part I of this Comment evaluates the background and the jurisprudence of the federal circuit courts' various rulings pertaining to the issue of whether a data breach victim established Article III standing in federal court. The Sixth, Seventh, and D.C. Circuits ruled that data breach victims satisfied Article III standing, while the Third, Fourth, and Eighth Circuits denied Article III standing.[49] It was this circuit split that ultimately led to the Supreme Court granting a petition for writ of certiorari in *TransUnion*. Part II of this Comment addresses why the Supreme Court's ruling in *TransUnion* was incomplete and, therefore, incorrect. Additionally, this Part discusses the potential negative effects the Court's ruling will have in the future. Part III of this Comment offers a solution for the Supreme Court's ruling and the ongoing confusion as to whether data breach victims have Article III standing in court. Article III standing is rarely a straightforward policy to apply in any case, let alone in cases where courts disagree as to what constitutes an injury in fact in data breach cases. Therefore, the zone-of-danger theory should supplement the current Article III standing analysis to determine whether a plaintiff's injury meets standing.[50]

I. CHRONICLES OF ARTICLE III STANDING: A NOTORIOUSLY PERPLEXING JURISDICTIONAL STANDARD

Data breaches are on the rise, and criminals are attacking companies in hopes of retrieving personal information that they can use to turn a profit.[51] A 2017 study of the digital privacy environment showed that

47. *Zone of danger rule*, CORNELL L. SCH. LEGAL INFO. INST., https://www.law.cornell.edu/wex/zone_of_danger_rule [https://perma.cc/6XVZ-EN97] (last visited June 11, 2022).

48. *See* discussion *infra* Part III.

49. Tsao v. Captiva MVP Rest. Partners, LLC, 986 F.3d 1332, 1340 (11th Cir. 2021).

50. *See* discussion *infra* Part III.

51. Consumer Bob & Nicholas Kjeldgaard, *Data Breaches Could Reach All-Time High by End of 2021: ITRC*, NBC SAN DIEGO (July 15, 2021, 7:52 PM), https://www.nbcsandiego.com/news/investigations/nbc-7-responds/data-breaches-could-reach-all-time-high-by-end-of-2021/2655793/ [https://perma.cc/68CN-9TV2].

many Americans fear they have lost control of their personal information, and many worry whether government agencies and major corporations can protect the customer data they collect.[52] In an attempt to address these concerns, Congress enacted the FCRA to protect consumer information collected by credit reporting agencies.[53] Further, the FCRA awarded remedies to those consumers who are injured by a company's violation of the procedures set forth in the FCRA.[54] Although the FCRA awarded injured consumers remedies, not all courts adhere to this legislation. In some instances, the FCRA failed to provide redress to injured consumers because several courts rejected the notion that a mere statutory violation confers Article III standing to the injured individuals.[55] As a result, the consumer does not stand to bring suit in federal court.[56] Article III standing is a notoriously perplexing jurisdictional standard, and the judicial system's differing interpretations as to what constitutes standing is discernibly portrayed in cases involving data breach victims.[57]

A. The Fair Credit Reporting Act: Congress's Attempt at Protecting Consumers

Amid the rise of the digital era, personal data information digitally stored within credit reporting agencies fuels the twenty-first century's economy.[58] A credit reporting agency is an entity that assembles and sells credit-related personal and financial information about individuals to banks, employers, landlords, and others.[59] Credit reports are used for, but not limited to, evaluating an individual's eligibility for credit, insurance, employment, and tenancy.[60] The three national credit reporting agencies

52. Kenneth Olmstead & Aaron Smith, *Americans and Cybersecurity*, PEW RSCH. CTR. (Jan. 26, 2017), https://www.pewresearch.org/internet/2017/01/26/americans-and-cybersecurity/ [https://perma.cc/NFY2-FTUL].

53. Austin H. Krist, *Large-Scale Enforcement of the Fair Credit Reporting Act and the Role of the State Attorneys General*, 115 COLUM. L. REV. 2311 (2015).

54. *See* discussion *infra* Part I.A.

55. *See* discussion *infra* Part I.D.

56. *Id.*

57. *See* discussion *infra* Part I.

58. Nuala O'Connor, *Reforming the U.S. Approach to Data Protection and Privacy*, COUNCIL ON FOREIGN RELS. (Jan. 30, 2018), https://www.cfr.org/report/reforming-us-approach-data-protection [https://perma.cc/3Y5N-LRYX].

59. *The Fair Credit Reporting Act (FCRA) and the Privacy of Your Credit Report*, EPIC.ORG, https://epic.org/the-fair-credit-reporting-act-fcra-and-the-privacy-of-your-credit-report/ [https://perma.cc/5CF2-NGJV] (last visited June 8, 2022).

60. *Id.*

in the United States are Experian, TransUnion, and Equifax, and each of these three credit bureaus maintain a database with information about approximately 220 million United States consumers.[61] The reality that three credit reporting agencies readily disseminate sensitive, personal information about millions of consumers to third parties is unsettling, and as a result, Congress enacted the FCRA to safeguard and ensure the accuracy of consumers' information.[62]

The FCRA is a federal law that helps to regulate credit reporting agencies to ensure the accuracy, fairness, and privacy of information in consumer credit bureau files.[63] The FCRA regulates the way credit reporting agencies can collect, access, use, and share the data they gather in consumer reports.[64] In particular, consumer reporting agencies must correct or delete inaccurate, incomplete, or unverifiable information.[65] The major rights the FCRA provides to individuals include but are not limited to: (1) the right to know if information in their file negatively portrays their character to a third party; (2) the right to know what is listed in their file; (3) the right to ask for a credit score; (4) the right to dispute incomplete or inaccurate information; and (5) the right to seek damages from consumer reporting agencies for violating the FCRA.[66] Plainly stated, the FCRA requires consumer reporting agencies to follow reasonable procedures to ensure the accuracy of consumer reports and imposes liability, including statutory and punitive damages, on any entity that willfully fails to comply with any requirement of the Act regarding any individual.[67]

Although the FCRA expressly awards statutory and punitive damages to consumers who were harmed by FCRA violations, courts have been reluctant to allow consumers to file suit for FCRA violations in federal

---

61. Michelle Black & Dia Adams, *What You Need to Know About the Three Main Credit Bureaus*, FORBES ADVISOR (Jan. 15, 2021, 3:32 PM), https://www.forbes.com/advisor/credit-score/3-credit-bureaus/ [https://perma.cc/E445-8Y2J].

62. *The Fair Credit Reporting Act (FCRA) and the Privacy of Your Credit Report*, *supra* note 59.

63. *Understanding the Fair Credit Reporting Act*, EXPERIAN, https://www.experian.com/blogs/ask-experian/credit-education/report-basics/fair-credit-reporting-act-fcra/ [https://perma.cc/9QF4-3KL6] (last visited June 8, 2022).

64. *Id.*

65. *Id.*

66. *See* Fair Credit Reporting Act, 15 U.S.C. § 1681.

67. An FCRA violation is willful when a credit reporting agency either knowingly violates the statute or recklessly disregards its requirements. Ramirez v. TransUnion LLC, 951 F.3d 1008, 1031 (9th Cir. 2020); Spokeo, Inc. v. Robins, 578 U.S. 330, 335 (2016); *see* 15 U.S.C. § 1681n(a).

court.[68] Several courts, including the Supreme Court, held that an FCRA violation does not automatically confer Article III standing to consumers, and, therefore, the claims are not justiciable in federal court.[69] To file suit in federal court, plaintiffs' injuries must meet the Article III standing requirements, but courts notoriously differ in their interpretations of what constitutes Article III standing.[70]

B. Article III Standing: The Past and the Present

Courts continuously differed in their opinions on whether data breach victims seeking remedies under the FCRA met constitutional Article III standing requirements.[71] The Case or Controversy Clause in Article III of the Constitution provides that the judicial branch of the federal government can only preside over certain types of cases but does not explicitly mention standing.[72] However, the Supreme Court interpreted Article III as authorizing the Court to establish a system for determining when a plaintiff has standing.[73]

Standing limits participation in lawsuits and asks whether the plaintiff filing suit has enough cause to advocate before the court.[74] Federal courthouse doors are closed to those who lack standing because not every disagreement has the right to be heard in federal court.[75] The parties

---

68. *See Spokeo*, 578 U.S. 330; Reilly v. Ceridian Corp., 664 F.3d 38 (3d Cir. 2011).

69. *See Spokeo*, 578 U.S. 330; *Reilly*, 664 F.3d 38.

70. FindLaw Staff, *Article III Standing Requirements*, FINDLAW (June 27, 2022), https://constitution.findlaw.com/article3/annotation10.html [https://perma.cc/UNZ6-FY35].

71. *See Spokeo*, 578 U.S. 330; *Reilly*, 664 F.3d 38; Remijas v. Neiman Marcus Grp., LLC, 794 F.3d 688 (7th Cir. 2015).

72. The Supreme Court interpreted the Case or Controversy Clause of Article III of the Constitution as a limitation on the Court's exercise of judicial review. Thus, a party must have standing to bring suit in federal court. *See* U.S. CONST. art. III, § 2, cl. 1.

73. *Federal Constitutional Standing Requirements Under Article III*, BONALAW ANTITRUST & COMPETITION, https://www.bonalaw.com/insights/legal-resources/federal-constitutional-standing-requirements-under-article-iii [https://perma.cc/6Z6J-XN99] (last visited June 11, 2022). *See Spokeo*, 578 U.S. 330; TransUnion v. Ramirez, 141 S. Ct. 2190, 2203 (2021).

74. *Standing*, CORNELL L. SCH. LEGAL INFO. INST., https://www.law.cornell.edu/wex/standing [https://perma.cc/5KN2-6GU2] (last visited June 11, 2022); *TransUnion*, 141 S. Ct. at 2197.

75. GianCarlo Canaparo, *Why Standing Matters*, THE FEDERALIST SOC'Y (June 25, 2021), https://fedsoc.org/commentary/fedsoc-blog/why-standing-

seeking a legal remedy must show that they have a sufficient connection to and harm from the challenged action to support that party's standing in federal court.[76] For example, if *A* and *B* enter into a contract, and *B* breaches the contract, *A*'s injury is real and an injury in fact. Thus, *A* likely has standing in federal court. However, even though *B* did wrong, and *A* suffered an injury in fact, *C*—someone who is not a party to the contract nor directly affected by the contract—cannot sue *B* over *A*'s injury. *C* did not suffer an injury in fact and, thus, does not have standing to bring suit. This limitation intends to keep the judiciary in its constitutional lane by maintaining the separation of powers between the federal branches of government, particularly the judicial branch and the legislative branch.[77] Article III articulates that the judicial power only extends to "cases and controversies,"[78] and for a case or controversy to exist, a person must be harmed by someone else's unlawful conduct, which creates standing.[79] Further, this restriction attempts to protect parties on each side of the suit.[80] If the courts loosely interpret standing, courts will act without authority while hearing potentially frivolous claims, which disadvantages defendants.[81] Conversely, if courts strictly interpret standing, people who deserve justice might be turned away, which potentially disadvantages plaintiffs.[82]

The standing doctrine did not always include an injury-in-fact requirement.[83] Prior to its addition, courts strictly applied the constitutional strand of standing law.[84] Courts previously applied standing with the sole purpose of protecting and maintaining the separation of powers because the Constitution's general structure embodies the

---

matters [https://perma.cc/KH79-4G9S]; *STANDING: What It Is and Why It Matters To The Supreme Court and To Us*, AM.'S VOICE (Jan. 26, 2016), https://americasvoice.org/blog/standing-what-it-is-and-why-it-matters-to-the-supreme-court-and-to-us/ [https://perma.cc/FR44-P9TR].

76. *Standing Law and Legal Definition*, US LEGAL, https://definitions.uslegal.com/s/standing/ [https://perma.cc/P7NV-ABTV] (last visited June 11, 2022).

77. F. Andrew Hessick, *Understanding Standing*, 68 VAND. L. REV. EN BANC 195, 195 (2015); Canaparo, *supra* note 75.

78. *See* U.S. CONST. art. III, § 2, cl. 1.

79. Canaparo, *supra* note 75.

80. *Id.*

81. *Id.*

82. *Id.*

83. *See generally* Cassandra Barnum, *Injury in Fact, Then and Now (and Never Again):* Summers v. Earth Island Institute *and the Need for Change in Environmental Standing Law*, 17 MO. ENV'T L. & POL'Y REV. 1 (2009).

84. *See id.* at 8.

separation of powers principle.[85] Standing aims to ensure that federal courts decide only the right of individuals and exercise "their proper function in a limited and separated government."[86] In other words, any assumption of jurisdiction that infringed upon the other branches of government was not a judicial controversy within the meaning of Article III standing, regardless of the injury suffered.[87] It was not until the further development of the injury doctrine that standing became problematic.[88]

Although constitutional standing continued to develop, the idea of prudential standing emerged in the Supreme Court's 1970 decision of *Association of Data Processing Service Organizations, Inc. v. Camp*.[89] Prudential standing recycled the original legal-right test in which litigants had to show that a legal right, conferred upon them by statutory or common law, was infringed upon.[90] In other words, the prudential standing test was statutorily based and was not explicitly grounded on constitutional principles.[91] For example, in *Tennessee Electric Power Co. v. TVA*, the Supreme Court denied standing unless the plaintiff's injury was one founded on a statute, which conferred the plaintiff a right to a remedy.[92] The prudential test clarified Congress's ability to create judicially cognizable injuries through legislation.[93]

Uncertainty arose concerning the implementation of constitutional standing and prudential standing because both theories awarded litigants standing on different grounds.[94] As a result, the Supreme Court replaced prudential standing's legal-right test with the injury-in-fact requirement to accompany constitutional standing.[95] The Supreme Court articulated its current injury-in-fact requirement in *Lujan v. Defenders of Wildlife*.[96] In this case, an environmental organization challenged federal regulations issued under the Endangered Species Act.[97] In ruling that the plaintiff did

85. *See id.*

86. TransUnion v. Ramirez, 141 S. Ct. 2190, 2203 (2021) (citing John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 DUKE L.J. 1219, 1224 (1993) (internal quotations omitted)).

87. Barnum, *supra* note 83, at 8.

88. *Id.* at 7.

89. *Id.* at 12; *see generally* Ass'n of Data Processing Serv. Org., Inc. v. Camp, 397 U.S. 150 (1970).

90. Barnum, *supra* note 83, at 13.

91. *Id.* at 13–14.

92. *See* Tenn. Elec. Power Co. v. TVA, 306 U.S. 118, 137–38 (1939).

93. Barnum, *supra* note 83, at 14.

94. *Id.*

95. *Id.*

96. *See* Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–61 (1992).

97. *Id.* at 557–58.

not have standing, the Supreme Court identified a three-part test for establishing standing in federal court.[98] The plaintiff bears the burden of demonstrating: (1) an injury in fact; (2) the injury is fairly traceable to the challenged conduct of the defendant; and (3) the injury is likely to be redressed by a favorable judicial decision.[99]

To constitute an injury in fact, a plaintiff must suffer an invasion of a legally protected interest that meets several additional criteria including that the injury is concrete and particularized and actual or imminent.[100] Further, the plaintiff's injury must result from and be fairly traceable to the challenged action of the defendant.[101] The injury cannot result from actions by someone who is not a party to the lawsuit.[102] Finally, a judgment by the court in the plaintiff's favor must be likely to provide an adequate remedy for the plaintiff's injuries.[103]

Although the Court implemented the current standing test 51 years ago, the Supreme Court continues to inconsistently apply exceptions to the injury-in-fact requirement.[104] Moreover, the Court is often inconsistent in its definition of the injury-in-fact rule.[105] Inevitably, these contradictions trigger different judicial interpretations of standing law and result in confusion as to whether one's injury meets the injury-in-fact requirement.[106] Today, confusion exists as to whether a data breach victim seeking a remedy under the FCRA meets the standing requirement in federal court.[107]

Article III standing emphasizes the importance in maintaining the federal judiciary's proper role in the federal government and protecting parties of the suit.[108] However, the Supreme Court's inconsistent rulings on what a plaintiff must show to establish standing creates confusion

---

98. *Id.* at 560–61.
99. *Id.*
100. *Id.* at 560.
101. *Id.*
102. *Id.*
103. *Id.* at 561.
104. Canaparo, *supra* note 75.
105. *Id.*
106. *Eleventh Circuit Finds No Article III Standing in Data Breach Class Action - Further Solidifying Circuit Split*, BRYAN CAVE LEIGHTON PAISNER (Feb. 24, 2021), https://www.bclplaw.com/en-US/insights/eleventh-circuit-finds-no-article-iii-standing-in-data-breach-class-action-further-solidifying-circuit-split.html [https://perma.cc/NZ9E-852D].
107. *Id.*
108 Hessick, *supra* note 77.

within the lower court systems.[109] One of the most notable cases to highlight this inconsistency is *Spokeo, Inc. v. Robins*.[110]

C. Spokeo, Inc. v. Robins*: The Supreme Court's Unsuccessful Attempt at Clarifying Standing*

Spokeo, Inc. operated a website that provided personal information about individuals to a variety of users including employers recruiting prospective employees.[111] Regardless of whether an individual has a Spokeo account or subscription, Spokeo, Inc. collected consumers' information from a multitude of sources including public records, mailing lists, surveys, public media profiles, and many others.[112] The FCRA requires consumer reporting agencies, such as Spokeo, Inc., to follow reasonable procedures to ensure the accuracy of consumer reports and imposes liability on any entity that willfully fails to comply with any requirement of the Act with respect to any individual.[113] Thomas Robins, the plaintiff in *Spokeo*, discovered that his Spokeo-generated profile stated he was a relatively affluent man with children, had a job, and had a graduate degree—none of which were true.[114] Robins filed a class action complaint on his own behalf and on behalf of similarly situated individuals alleging that Spokeo, Inc. willfully failed to ensure the accuracy of his information within its systems by not implementing the FCRA's required procedures.[115]

The United States Court of Appeals for the Ninth Circuit held that Robins adequately alleged an injury in fact under Article III standing because Robins claimed Spokeo, Inc. violated his statutory rights under the FCRA.[116] The Ninth Circuit recognized that the handling of credit information is a personal interest and a particularly individualized

109. *Id.*
110. *See* Spokeo, Inc. v. Robins, 578 U.S. 330 (2016).
111. *Id.* at 332.
112. *Where does Spokeo get its data?*, SPOKEO, https://help.spokeo.com/hc/en-us/articles/115010352567-Where-does-Spokeo-get-its-data- [https://perma.cc/5SKC-WL73] (last visited June 11, 2022); *How do I remove my information from Spokeo?*, SPOKEO, https://help.spokeo.com/hc/en-us/articles/115010425928-How-do-I-remove-my-information-from-Spokeo- [https://perma.cc/R4LY-45FT] (last visited June 11, 2022).
113. *Spokeo*, 578 U.S. at 335; Fair Credit Reporting Act, 15 U.S.C. § 1681e. *See also* discussion *supra* Part I.A.
114. *Spokeo*, 578 U.S. at 336.
115. *Id.* at 332.
116. *Id.*

concept.[117] The Supreme Court, however, ruled that the Ninth Circuit's Article III standing analysis was incomplete because it did not include the requirement that a plaintiff's injury must also be actual or imminent and not conjectural or hypothetical.[118] The Supreme Court remanded the case back to the Ninth Circuit to analyze whether Robins's injury was concrete, and the Ninth Circuit ruled in the affirmative.[119] Thus, the Ninth Circuit once again held that Robins alleged a statutory cause of action and potential harm because Congress created the FCRA provisions to protect consumers' concrete yet intangible interests[120] in accurate credit reporting.[121] Further, the Ninth Circuit provided that Robins successfully alleged an injury in fact under Article III because Robins's credit report inaccurately listed him as an employed man, which created real harm to his employment prospects while he was unemployed.[122] Although Spokeo, Inc. filed a writ of certiorari, the writ was subsequently denied.[123]

The Supreme Court's guidance on what constitutes a concrete injury is not clear in *Spokeo.*[124] Although the Court rejected the notion that a mere violation of a statute conferring a procedural right is a sufficient injury to confer standing, it also affirmed Congress's power to "define injuries . . . that will give rise to a case or controversy where none existed before."[125] The Supreme Court essentially affirmed two contradicting ideas in one case. This ambiguity, thus, paved the way for numerous circuit splits on the Article III interpretation the Court utilized in *Spokeo*.[126]

---

117. *Id.*

118. *Id.*

119. *Id.*

120. *See* discussion *supra* Introduction.

121. *See* Fair Credit Reporting Act, 15 U.S.C. § 1681; Jennifer M. Keas, *Supreme Court Will Not Look at Spokeo Again, Leaving Lower Courts to Grapple with Article III Uncertainties*, FOLEY & LARDNER LLP (Feb. 8, 2018), https://www.foley.com/en/insights/publications/2018/02/supreme-court-will-not-look-at-spokeo-again-leavin [https://perma.cc/7LGX-VKWF].

122. Robins v. Spokeo, Inc.*: Ninth Circuit Allows Fair Credit Reporting Act Class Action to Proceed Past Standing Challenge*, 131 HARV. L. REV. 894 (2018), https://harvardlawreview.org/2018/01/robins-v-spokeo-inc/ [https://perma.cc/5KSX-DKDF].

123. Peterson et al., *supra* note 19.

124. Robins v. Spokeo, Inc.*: Ninth Circuit Allows Fair Credit Reporting Act Class Action to Proceed Past Standing Challenge*, *supra* note 122.

125. Spokeo, Inc. v. Robins, 578 U.S. 330, 341 (2016) (quoting Lujan v. Defs. of Wildlife, 504 U.S. 555, 580 (1992)).

126. Peterson et al., *supra* note 19.

D. Trouble in the Circuit Courts: Standing or No Standing?

Given the Supreme Court's limited guidance in *Spokeo*, several federal circuit courts applied varying approaches in deciding what constitutes an injury in fact that satisfies standing requirements.[127] Specifically, circuit courts differ in their interpretations of whether a bare statutory violation constitutes a concrete injury under Article III.[128] In *Spokeo*, the Ninth Circuit held that the plaintiff met the standing bar by virtue of the fact that he alleged a statutory cause of action and potential harm to him because Congress enacted the FCRA provision to protect consumers' *concrete* yet intangible interests in accurate credit reporting.[129] In doing so, the Ninth Circuit created a standing interpretation that focused on two questions: (1) whether the statutory provisions allegedly violated were established to protect the plaintiff's concrete interests; and if so, (2) whether the specific procedural violations alleged actually harmed, or presented a material risk of harm, to those interests.[130] The Sixth, Seventh, and D.C. Circuits joined the Ninth Circuit's interpretation of Article III standing pertaining to data breach victims.[131] These circuits all found an Article III injury in fact exists due to the increased risk of future harms which arise from data breaches.[132] However, the Third, Fourth, and Eighth Circuits declined to find injuries on this ground, resulting in a lack of Article III standing for data breach victims.[133] The Seventh Circuit's decision in *Remijas v. Neiman Marcus Group, LLC* and the Third Circuit's decision in *Reilly v. Ceridian Corp.* portray the conflicting interpretations on both sides of the circuit split.[134]

127. Baiardo & Le, *supra* note 22. *See also Spokeo*, 578 U.S. 330; Huff v. TeleCheck Servs., Inc., 923 F.3d 458 (6th Cir. 2019); Van Patten v. Vertical Fitness Grp., LLC, 847 F.3d 1037 (9th Cir. 2017).

128. *Id.*

129. Robins v. Spokeo, Inc., 742 F.3d 409, 413 (9th Cir. 2014).

130. *See id.*

131. *Eleventh Circuit Finds No Article III Standing in Data Breach Class Action – Further Solidifying Circuit Split*, *supra* note 106.

132. *Id.*

133. *Id.*

134. *See* Remijas v. Neiman Marcus Grp., LLC, 794 F.3d 688 (7th Cir. 2015); *see also* Reilly v. Ceridian Corp., 664 F.3d 38 (3d Cir. 2011).

1. The Seventh Circuit Confers Standing: Remijas v. Neiman Marcus Group, LLC

In 2013, hackers attacked Neiman Marcus—a luxury department store—and stole customer credit card numbers.[135] After the attack, Neiman Marcus learned that some of its customers found fraudulent charges on their cards, and the company investigated the matter.[136] During its investigation, the company discovered potential malware in its computer systems and announced to the public on January 10, 2014, that a cyberattack occurred.[137] The hackers' malware gathered approximately 350,000 credit card numbers,[138] 9,200 of which were known to have been used fraudulently.[139] These events prompted Neiman Marcus's customers to file several class-action complaints in the Seventh Circuit, which were then consolidated.[140] The complaint involved approximately 350,000 customers whose data was hacked and relied on six theories for relief including: (1) negligence; (2) breach of implied contract; (3) unjust enrichment; (4) unfair and deceptive business practices; (5) invasion of privacy; and (6) violation of multiple state data breach laws.[141] Neiman Marcus moved to dismiss the complaint for lack of standing.[142]

In accordance with the *Lujan* standard for standing, the *Remijas* plaintiffs needed to allege that: (1) the data breach inflicted a concrete, particularized injury on them; (2) Neiman Marcus caused that injury; and (3) a judicial decision could provide favorable redress for them.[143] The plaintiffs alleged that they met standing based on two imminent injuries—an increased risk of future fraudulent charges and greater susceptibility to identify theft.[144] The Seventh Circuit held that allegations of possible future injury were not sufficient to fulfill the injury-in-fact requirement but referred to the Supreme Court's ruling in *Clapper v. Amnesty International*

135. *Remijas*, 794 F.3d at 689–90.
136. *Id.* at 690.
137. *Id.*
138. Michael Kingston, the Senior Vice President and Chief Information Officer for Neiman Marcus, testified that there was no indication that social security numbers or other personal information were exposed to the hackers—only customers' credit card information. *Id.*
139. *Id.*
140. *Id.*
141. *Id.* at 690–91.
142. *Id.* at 691.
143. *See* discussion *supra* Part I.D.1.
144. *Remijas*, 794 F.3d at 692.

USA[145] to determine whether allegations of future harm can establish Article III standing if that harm is certainly impending.[146] In *Clapper*, the Supreme Court ruled that an injury must have already occurred or be *certainly impending* to satisfy Article III's injury-in-fact requirement.[147] The Court recognized in *Clapper* that plaintiffs are "not uniformly require[d] . . . to demonstrate that it is literally certain that the harms they identify will come about. . . . [The Court previously] found standing based on a 'substantial risk' that the harm will occur . . . ."[148] Applying this reasoning, the Seventh Circuit in *Remijas* reasoned there was no need to address the threshold question as to whether the hackers stole the Neiman Marcus customers' information and what type of information they stole.[149] Therefore, the injuries were certainly impending, and the Neiman Marcus customers should not have to wait until hackers commit identity theft or credit card fraud to give the class action standing.[150] Accordingly, the Seventh Circuit held that the Neiman Marcus customers' injuries constituted an injury in fact.[151]

However, establishing an injury in fact is only part of the standing inquiry. The plaintiffs needed to sufficiently allege the other two prerequisites: causation and redressability.[152] First, Neiman Marcus argued that the plaintiffs could not prove that their injuries traced back to the data breach at Neiman Marcus rather than to other large-scale breaches that took place around the same time.[153] However, the Seventh Circuit held that causation was met because Neiman Marcus announced to its customers that 350,000 credit card numbers might have been exposed to a third party; thus, the plaintiffs' injuries were traceable to the defendant's

145. Several groups of people brought a facial challenge to the Foreign Intelligence Surveillance Act, which created new procedures for authorizing government electronic surveillance of non-U.S. persons outside of the U.S. for foreign intelligence purposes. The groups argued that the new provisions would force them to take costly measures to ensure the confidentiality of their international communications. The Supreme Court ruled that the plaintiffs lacked Article III standing because they could not demonstrate that a future injury was certainly impending. The groups only had an abstract subjective fear of being monitored and provided no proof that they were subject to the new federal provision. *See* Clapper v. Amnesty Int'l USA, 568 U.S. 398 (2013).

146. *Remijas*, 794 F.3d at 692.

147. *Clapper*, 568 U.S. at 400.

148. *Id.* at 414 n.5.

149. *Remijas*, 794 F.3d at 693.

150. *Id.* at 692.

151. *Id.* at 694.

152. *Id.* at 696.

153. *Id.*

actions.[154] Finally, the court held that a favorable judicial decision could redress any imminent injuries a plaintiff would incur because of the data breach, and, therefore, the plaintiffs met all three standing requirements.[155]

In sum, although plaintiffs must satisfy three different elements to obtain Article III standing, the main concern in *Remijas* was whether the plaintiffs' risk of future injuries sufficiently met the injury-in-fact requirement.[156] Upon the Seventh Circuit's review of *Clapper*, the court determined that the plaintiffs' risk of future harm was certainly impending and fulfilled the injury-in-fact element.[157] In addition to the injury-in-fact requirement, the plaintiffs also satisfied the causation and redressability elements, and, therefore, the Seventh Circuit ruled that the plaintiffs' risk of future harm adequately met standing requirements under Article III.[158]

2. The Third Circuit Rejects Standing: Reilly v. Ceridian Corp.

In *Reilly v. Ceridian Corp.*, the Third Circuit faced the same question the Seventh Circuit addressed in *Remijas*.[159] Ceridian, the defendant, is a payroll processing firm and manages its commercial business customers' payrolls by collecting information about its customers' employees, typically including employees' names, addresses, social security numbers, dates of birth, and bank account information.[160] Ceridian executed a contract with Brach Eichler law firm to provide payroll processing services.[161]

On December 22, 2009, Ceridian suffered a data breach where an unknown hacker infiltrated Ceridian's Powerpay system potentially gaining access to approximately 27,000 employees at 1,900 companies' personal and financial information.[162] After an investigation, Ceridian sent letters to the potential identify theft victims and informed them of the breach.[163] Several months later, a few of the data breach victims filed a class action complaint against Ceridian on behalf of themselves and all others similarly affected.[164] The plaintiffs alleged that they experienced an

154. *Id.*
155. *Id.* at 697–98.
156. *Id.* at 692.
157. *Id.* at 694.
158. *Id.* at 697.
159. *See* discussion *supra* Part I.D.1.
160. Reilly v. Ceridian Corp., 664 F.3d 38, 40 (3d Cir. 2011).
161. *Id.*
162. *Id.*
163. *Id.*
164. *Id.*

increased risk of identity theft, incurred costs as a result of monitoring their credit activity, and suffered from emotional distress.[165] Ceridian filed a motion to dismiss for lack of standing.[166]

The Third Circuit ruled in previous cases that allegations of possible future injury were insufficient to satisfy Article III standing requirements.[167] However, in *Reilly*, the Third Circuit required the threatened injury be certainly impending.[168] Therefore, the court reasoned that plaintiffs lack standing if their injury stemmed from an indefinite risk of future harms inflicted by unknown third parties.[169] Applying this reasoning, the Third Circuit first addressed the plaintiffs' allegation of an increased risk of identity theft and concluded that the plaintiffs' claim for future injury was insufficient to establish standing.[170] The court explained that the plaintiffs' contentions depended entirely on speculative, future actions of an unknown third party.[171] The court believed these speculative actions might have included: (1) reading, copying, and understanding the personal information; (2) intending to commit future criminal acts by misusing the information; and (3) using such information to the detriment of the plaintiffs by making unauthorized transactions in the plaintiffs' names.[172] Therefore, the Third Circuit ruled that the alleged injury was not an injury in fact under Article III.[173]

Next, the Third Circuit addressed the plaintiffs' claims for the incurred cost of credit monitoring and insurance to protect their safety and emotional distress.[174] The court reasoned that the claim for money expenditures and emotional distress failed to meet Article III standing requirements because the costs the plaintiffs incurred and distress they experienced stemmed from a speculative chain of future events based on hypothetical acts.[175] In short, the expenses and emotional distress the plaintiffs incurred did not result from an actual injury.[176]

The Third Circuit did not award standing to the plaintiffs because the allegations of an increased risk of harm were hypothetical and, thus,

---

165. *Id.*
166. *Id.* at 41.
167. *Id.* (citing Clapper v. Amnesty Int'l USA, 568 U.S. 398 (2013)).
168. *Id.*
169. *Id.* at 42.
170. *Id.*
171. *Id.*
172. *Id.*
173. *Id.*
174. *See id.* at 44.
175. *Id.* at 46.
176. *Id.*

insufficient to satisfy the injury-in-fact requirement.[177] *Reilly* and *Remijas* considered similar fact patterns and issues, but the Seventh and Third Circuits decided their respective cases differently.[178] On one hand, the Seventh Circuit affirmed that an increased risk of future harm equated to an injury in fact and found the plaintiffs had standing to bring suit.[179] On the other hand, the Third Circuit declined to find that an increased risk of future harm constituted an injury in fact and failed to award standing on those grounds.[180] Although it was evident that the circuit courts were split on their Article III interpretations, the Supreme Court continued to deny petitions for writ of certiorari concerning the matter until June 25, 2021, when the Court decided *TransUnion v. Ramirez*.[181]

E. TransUnion v. Ramirez*: A Big Step in the Wrong Direction*

The Supreme Court revisited the issue of Article III standing for the first time since *Spokeo* in *TransUnion*.[182] Prior to the Supreme Court's ruling, the Ninth Circuit joined the Sixth, Seventh, and D.C. Circuits' interpretations of Article III standing pertaining to data breach victims in its ruling in *Ramirez v. TransUnion*.[183] These circuits all held that the increased risk of future harms due to data breaches met the Article III injury-in-fact requirement.[184] Conversely, the Third, Fourth, and Eighth Circuits declined to find injuries on these grounds, which resulted in a lack of standing for data breach victims.[185] In *TransUnion*, the Supreme Court adopted the Third, Fourth, and Eighth Circuits' interpretation.[186]

177. *Id.*

178. *See* Remijas v. Neiman Marcus Grp., LLC, 794 F.3d 688 (7th Cir. 2015); *Reilly*, 664 F.3d 38.

179. *Remijas*, 794 F.3d at 697.

180. *Reilly*, 664 F.3d at 46.

181. *See generally* TransUnion v. Ramirez, 141 S. Ct. 2190 (2021).

182. *See id.*; Peterson et al., *supra* note 19.

183. *Eleventh Circuit Finds No Article III Standing in Data Breach Class Action – Further Solidifying Circuit Split*, *supra* note 106; *see* Ramirez v. TransUnion LLC, 951 F.3d 1008 (9th Cir. 2020).

184. *Eleventh Circuit Finds No Article III Standing in Data Breach Class Action – Further Solidifying Circuit Split*, *supra* note 106.

185. *Id.*

186. *See TransUnion*, 141 S. Ct. at 2214.

1. Ramirez v. TransUnion*: The Ninth Circuit Continued to Confer Standing*

A class action suit before the Ninth Circuit against TransUnion, one of the nation's largest consumer reporting agencies, traced back to TransUnion's launch of OFAC Advisor.[187] OFAC Advisor added a consumer to the OFAC list, which indicated that the consumer was flagged as a possible terrorist, drug trafficker, or threat to national security.[188] TransUnion's OFAC Advisor collected this information from a third-party company, Accuity, which conducted a name-only search to compare a consumer's name with the existing OFAC list.[189] The search examined whether the name was either identical or similar to a name on the OFAC list and reported any matches to TransUnion.[190] The issue, however, stemmed from the fact that TransUnion believed the OFAC alerts placed on consumer credit reports were exempt from the FCRA's requirement that TransUnion "follow reasonable procedures to assure maximum possible accuracy of the information" provided on credit reports.[191] Accordingly, "TransUnion did not follow its normal procedures to ensure accuracy."[192] "TransUnion also adopted a policy of not disclosing OFAC matches to affected consumers when the consumers requested a copy of their reports."[193] TransUnion's disregard of the FCRA's reporting requirements harmed thousands of consumers.[194]

In 2011, Ramirez and his wife went to a car dealership to purchase a car, but the dealership refused to let Ramirez purchase a car due to the results of a credit check the dealership ran.[195] The results showed that Ramirez was on an OFAC terrorist list.[196] The salesman failed to provide Ramirez with a copy of this credit report but instead recommended he contact TransUnion, which was the credit reporting agency that created Ramirez's report.[197]

Ramirez spoke with a TransUnion representative, but the representative repeatedly told Ramirez that his credit report did not show

---

187. *See* discussion *supra* Introduction; *Ramirez*, 951 F.3d at 1019.
188. *Ramirez*, 951 F.3d at 1019.
189. *Id.*
190. *Id.*
191. *Id.* (citing Fair Credit Reporting Act, 15 U.S.C. § 1681e(b)).
192. *Id.* at 1020.
193. *Id.*
194. *See id.* at 1019.
195. *Id.* at 1017.
196. *Id.*
197. *Id.*

him on a terrorist list.[198] Ultimately, Ramirez requested a copy of his credit report to determine why the salesman refused to sell him a car.[199] TransUnion sent Ramirez two separate letters on different days.[200] The first letter contained only the credit report without alerts while the second letter alerted Ramirez to the fact that his name was on a potential terrorist list.[201] The two letters did not include instructions for initiating a dispute to address falsely labeled credit reports.[202] Concerned about the possible consequences of his name on a terrorist list, Ramirez canceled an international vacation he planned with his family and sued TransUnion.[203] Further investigation revealed that TransUnion placed inaccurate labels on 8,184 other consumer reports, and, as a result, Ramirez sued TransUnion on behalf of the other 8,184 falsely labeled consumers for violations of the FCRA.[204] In particular, the plaintiffs alleged that: (1) TransUnion willfully failed to follow reasonable procedures to assure accuracy of the OFAC alerts because TransUnion used basic name-only matching software;[205] (2) TransUnion willfully failed to disclose to the class members their entire credit report by excluding the OFAC alerts;[206] and (3) TransUnion willfully failed to provide a summary of rights as required by the FCRA when it sent the OFAC alert to Ramirez in the second letter.[207]

The question in this case focused on the Article III requirement that the plaintiff's injury in fact be concrete, not abstract.[208] Particularly, the issue concerned whether TransUnion's violation of the FCRA created a cause of action in which class action members satisfy standing requirements.[209] TransUnion alleged that some of the class members did not suffer an injury in fact because they did not show that TransUnion disclosed their credit report to a third party and, therefore, did not meet

198. *Id.* at 1018.
199. *Id.*
200. *Id.*
201. *Id.*
202. *Id.*
203. *Id.*
204. *Id.* at 1019; *see* discussion *supra* Part I.C.
205. *Ramirez*, 951 F.3d at 1022; *see* Fair Credit Reporting Act, 15 U.S.C. § 1681e(b).
206. *Ramirez*, 951 F.3d at 1022; *see* Fair Credit Reporting Act, 15 U.S.C. § 1681g(a)(1).
207. *Ramirez*, 951 F.3d at 1022; *see* Fair Credit Reporting Act, 15 U.S.C. § 1681g(c)(2).
208. TransUnion v. Ramirez, 141 S. Ct. 2190, 2204 (2021).
209. *Id.*; *see* discussion *supra* Part I.E.

Article III standing.[210] To determine whether the class members had standing, the Ninth Circuit applied the same test it previously used in *Spokeo*, which looked to whether: (1) the statutory provisions in the FCRA were established to protect the plaintiffs' concrete interests; and (2) the specific procedural violations alleged actually harmed, or presented a risk of harm, to the plaintiffs.[211]

The Ninth Circuit affirmed that Congress enacted the FCRA to protect consumers' concrete interests[212] and reasoned that courts historically entertained causes of action to vindicate harms caused by untruthful disclosures about individuals.[213] Additionally, the severity of the inaccurate information at issue risked causing the uncertainty and stress Congress aimed to prevent in enacting the FCRA.[214] Accordingly, both prongs of the Ninth Circuit's *Spokeo* test were met.[215] Finally, the Ninth Circuit addressed TransUnion's argument that 6,332 class members lacked standing because their credit reports were not disclosed to third parties.[216]

Of the 8,185 total class members, TransUnion only disseminated 1,853 members' credit reports to third parties.[217] Thus, TransUnion argued that the remaining 6,332 class members could not satisfy Article III's standing requirements because they could not demonstrate a concrete and particularized injury.[218] The Ninth Circuit rejected this argument.[219] TransUnion made all class members' reports, which contained defamatory OFAC alerts, available to third parties at a moment's notice and in some instances without the consumers' knowledge.[220] The Ninth Circuit stated that this problem was not merely a procedural FCRA violation but rather

---

210. The Ninth Circuit first recognized the Supreme Court's ruling that all parties seeking to recover monetary awards in their own name must show standing. Thus, Ramirez and the other 8,184 class members must establish individual injuries in fact to recover their own damages. *See* Town of Chester, NY v. Laroe Ests., Inc., 581 U.S. 433 (2017); *Ramirez*, 951 F.3d at 1024.

211. *Ramirez*, 951 F.3d at 1024; *see* discussion *supra* Part I.D.

212. *Ramirez*, 951 F.3d at 1025 (citing Robins v. Spokeo, Inc., 867 F.3d 1108, 1113 (9th Cir. 2017)).

213. *Id.* at 1026 (noting that *Spokeo* allowed a cause of action to vindicate harms caused by untruthful disclosures about individuals).

214. *Id.* (citing Drew v. Equifax Info. Servs., LLC, 690 F.3d 1100, 1109 (9th Cir. 2012)).

215. *See* discussion *supra* Part I.D.

216. *Ramirez*, 951 F.3d at 1027.

217. *Id.*

218. *Id.*

219. *See id.*

220. *Id.*

a real risk of harm, and all plaintiffs had standing to bring suit.[221] TransUnion directly caused the risk of harm by failing to follow reasonable procedures[222] to ensure the accuracy of consumers' credit reports, and an award of damages would redress the harm TransUnion caused.[223] Thus, the Ninth Circuit affirmed the lower court's finding that the class members had standing and awarded damages to Ramirez and the other 8,184 plaintiffs.[224]

2. TransUnion v. Ramirez*: An Unprecedented Supreme Court Ruling*

The Supreme Court subsequently granted certiorari to review the Ninth Circuit's ruling in *Ramirez*, and on July 25, 2021, the Court decided *TransUnion*.[225] Justice Brett Kavanaugh, writing for the majority, recognized that the Supreme Court must respect Congress's decision to impose statutory prohibitions or obligations on defendants.[226] Additionally, the majority opinion held that the Supreme Court must respect Congress's decision to grant plaintiffs with causes of action to sue over the defendants' violations of the statutory prohibitions or obligations.[227] Justice Kavanaugh reasoned, however, that Congress's creation of statutory prohibitions or obligations and a cause of action does not relieve courts of their responsibility to independently decide whether a plaintiff has standing to bring suit.[228] Further, Congress cannot simply enact an injury into existence by using its lawmaking power to transform something that is not harmful into something that is harmful.[229] Therefore, in a 5 to 4 decision, the Supreme Court held that because TransUnion disseminated the 1,853 class members' reports to third parties, those class members suffered a concrete injury.[230] However, the remaining 6,332 members did not suffer a concrete injury.[231]

---

221. *Id.* at 1028.

222. TransUnion willfully failed to follow reasonable procedures to assure the accuracy of the OFAC alerts because TransUnion used basic name-only matching software. *See* discussion *supra* Part I.E.

223. *Ramirez*, 951 F.3d at 1028–29.

224. *Id.* at 1037–38.

225. *See* TransUnion v. Ramirez, 141 S. Ct. 2190 (2021).

226. *Id.* at 2204.

227. *Id.*

228. *Id.* at 2205.

229. *Id.*

230. *Id.* at 2209.

231. *Id.*

The Court ruled in favor of the 1,853 class members because TransUnion published their credit reports with incorrect OFAC alerts to third parties.[232] Justice Kavanaugh explained that "a person is injured when a defamatory statement 'that would subject him to hatred, contempt, or ridicule' is published to a third party."[233] In this case, TransUnion labeled the class members as potential terrorists, drug traffickers, or threats to national security and sent that defamatory information to third parties.[234] Therefore, the 1,853 class members suffered an injury in fact recognized by Article III and were awarded standing.[235] Justice Kavanaugh then turned to the remaining 6,332 class members whose credit reports were not published to third parties to determine whether they had standing to bring suit.[236]

The Supreme Court examined whether there was a risk of future harm arising from the risk that the inaccurate information could be sent to third parties in the future.[237] The 6,332 class members alleged that the existence of damaging and misleading information in their credit reports exposed them to a risk that the information would be sent to third parties in the future, thereby causing harm.[238] The Court explained that the plaintiffs did not demonstrate a sufficient likelihood that a third party would request their individual credit information.[239] Further, the Supreme Court contended that time would reveal whether the risk materialized in the form of actual harm, and if it did, then the harm itself, and not the pre-existing risk, would constitute a basis for the consumer's Article III injury in fact.[240] The Court additionally stated that the plaintiffs did not present evidence that they suffered some other injury, such as an emotional injury, from the mere risk that their credit reports would be provided to a third party.[241]

The Supreme Court partially reversed the Ninth Circuit's judgment in *Ramirez*.[242] Although the Supreme Court conferred standing to the 1,853 class members whose credit reports TransUnion disseminated to third parties, the Court held that there was not a sufficient risk of future harm

232. *Id.* at 2208.
233. *Id.* (quoting Milkovich v. Lorain J. Co., 497 U.S. 1, 13 (1990)).
234. *Id.* at 2209.
235. *Id.* at 2200.
236. *Id.* at 2210.
237. *Id.*
238. *Id.*
239. *Id.* at 2211.
240. *Id.*
241. *Id.*
242. *See id.* at 2211–14; discussion *supra* Part I.E.

for the remaining 6,332 class members.[243] In sum, although TransUnion violated the FCRA, the Court reasoned that the 6,332 plaintiffs did not suffer a concrete injury and failed to provide evidence of a risk of future injury, thus failing to meet Article III standing.[244]

II. THE SUPREME COURT FUMBLED THE CASE

TransUnion erroneously reported law-abiding citizens as potential terrorists, drug traffickers, and threats to national security.[245] TransUnion's actions violated several FCRA provisions that entitle consumers to reasonable credit reporting procedures.[246] Despite Congress's intent that FCRA violations deserve redress, the Supreme Court in *TransUnion* decided that TransUnion's actions did not amount to a cognizable injury under Article III, and, consequently, the Constitution prohibited consumers from vindicating their rights in federal court.[247] The Court willfully ignored the world's current digital climate where concrete injuries are no longer so obviously *concrete* but, rather, are intangible.[248]

In terms of *TransUnion*, digital credit reports are readily available at any given moment, and an inaccurate credit report hinders a person's ability to buy certain products and results in that person incurring higher interest rates.[249] Although credit reports play a vital role in one's financial aspirations, the credit industry is historically slow to adopt new technology to conform to today's digital era.[250] In an effort to mitigate this issue and uphold the integrity of the credit industry, Congress passed the FCRA to protect the interests of consumers by ensuring that credit reporting agencies maintain sufficient levels of accuracy within credit reports.[251]

---

243. *TransUnion*, 141 S. Ct. at 2214.

244. *Id.*

245. *Id.* at 2197.

246. *Id.*

247. *Id.* at 2214 (Thomas, J., dissenting).

248. Jacalyn Crecelius, TransUnion v. Ramirez*: No Harm, No Foul*, EXPERT INST. (July 27, 2021), https://www.expertinstitute.com/resources/insights/transunion-v-ramirez-no-harm-no-foul/ [https://perma.cc/XP3D-HTR5]. *See also* discussion *supra* Introduction.

249. Alison Grace Johansen, *What is a Credit Report and Why is it Important?*, LIFELOCK BY NORTON (June 30, 2017), https://www.lifelock.com/learn/credit-finance/what-is-credit-report [https://perma.cc/CF5W-FJT6].

250. *How Digital Finance Is Changing The Credit Game In The Covid-19 Era*, FORBES (Mar. 31, 2021, 4:11 PM EDT), https://www.forbes.com/sites/moorinsights/2021/03/31/how-digital-finance-is-changing-the-credit-game-in-the-covid-19-era/?sh=761af86f6a1d [https://perma.cc/V4P7-L8FS].

251. Krist, *supra* note 53.

Individuals' digital footprints stretch farther and wider each year, and because the Supreme Court declined to hold TransUnion responsible for its FCRA violations, the Court failed to safeguard consumers against unfolding technological advancements.[252] The Supreme Court's judgment in *TransUnion* ignored Article III standing jurisprudence, broadened the power of the judiciary, and failed to address the years-long circuit split the Court's earlier *Spokeo* decision created.[253]

A. Overlooking Jurisprudence: The Supreme Court's Dubious Interpretation on Traditional Common-Law Harms

The Supreme Court's *TransUnion* decision relied on whether the injury before the court in *TransUnion* mirrored injuries traditionally recognized by courts in the past and thus resembled a sufficiently concrete injury.[254] However, in *Spokeo*, the Court asserted that this analysis should not be an open-ended invitation for federal courts to loosen Article III standing requirements based on evolving beliefs about what should be heard in federal court.[255] To determine the similarity between an intangible injury of today's technology-driven climate and an injury courts have traditionally recognized, it is important to consider the history of the Article III injury-in-fact requirement.

The Supreme Court did not introduce the injury-in-fact requirement until 1970, "180 years after the ratification of Article III."[256] Prior to the addition, Article III standing stemmed from whether a violation of legal rights caused the injury.[257] As such, injury in fact originally served as an

---

252. A digital footprint refers to the trail of data one leaves when using the Internet. For example, every website one visits, any email one sends, and any information one submits online adds to their digital footprint. Crecelius, *supra* note 248.

253. *See* Remijas v. Neiman Marcus Grp., LLC, 794 F.3d 688 (7th Cir. 2015); Reilly v. Ceridian Corp., 664 F.3d 38 (3d Cir. 2011); Spokeo, Inc. v. Robins, 578 U.S. 330 (2016); discussion *infra* Parts II.A, II.B, and II.C.

254. Daniel J. Solove & Danielle Keats Citron, *Standing and Privacy Harms: A Critique of TransUnion v. Ramirez*, 101 B.U. L. REV. ONLINE 62 (2021), https://www.bu.edu/bulawreview/2021/07/21/standing-and-privacy-harms-a-critique-of-transunion-v-ramirez/ [https://perma.cc/PLE3-L9DV] (last visited June 11, 2022).

255. *Id.*; *see Spokeo*, 578 U.S. at 336–37.

256. TransUnion v. Ramirez, 141 S. Ct. 2190, 2219 (2021) (Thomas, J. dissenting) (quoting Sierra v. Hollandale Beach, 996 F.3d 1110, 1117 (11th Cir. 2021)).

257. *Standing Requirement: Overview*, CORNELL L. SCH. LEGAL INFO. INST., https://www.law.cornell.edu/constitution-conan/article-3/section-2/clause-1/

additional way to get into federal court, and a plaintiff could then invoke standing by establishing an injury by successfully alleging a violation of a legal right or some other type of personal interest.[258] In *TransUnion*, the Supreme Court failed to consider the history of Article III statutory injuries as sufficient for standing and held that even if a defendant's conduct violated a statute, that violation alone did not rise to the level of a concrete injury.[259] The Court, for the first time, held that a specific class of plaintiffs whom Congress allowed to bring a lawsuit cannot do so under Article III—legal injury is now inherently insufficient to support standing.[260]

Although the common law is notoriously inconsistent, the Supreme Court's ruling is rather far reaching. The Court recently held in *Spokeo* that Article III injuries may be tangible and intangible, but when the injury is intangible, the harm must be real and have a close relationship to traditional common-law harms.[261] The primary issue concerns what the Supreme Court meant by *traditional*. The Supreme Court did not introduce the injury-in-fact requirement until 51 years ago, and until recently, the Court never explicitly ruled that statutory violations alone are inherently insufficient to establish standing.[262] It is difficult to think that the *TransUnion* ruling accurately portrays a traditional common-law harm when 72% of Article III's history did not include an injury-in-fact requirement.[263]

To the contrary, injuries traditionally recognized over the last 180 years are generally different from today's injuries due to the rapid growth of digital information and media.[264] According to this argument, it is

---

standing-requirement-overview [https://perma.cc/K59W-E5FG] (last visited June 27, 2022).

258. *TransUnion*, 141 S. Ct. at 2219 (Thomas, J., dissenting).

259. Peterson et al., *supra* note 19.

260. *Id.*

261. *Id.*; *see* discussion *supra* Part I.C.

262. The number of years since the introduction of the injury-in-fact requirement is subject to change. This number is based on 2021. *See* discussion *supra* Part II.B.

263. Founders of the Constitution enacted Article III 180 years ago, but the injury-in-fact requirement was not enacted until 51 years ago. These numbers were calculated based on the year 2021 and are subject to change. *About the Supreme Court*, U.S. COURTS, https://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/about [https://perma.cc/3G26-6F53] (last visited June 11, 2022).

264. The Supreme Court promulgated Article III standing requirements in 1970. The number of years since Article III's ratification is subject to change, as this calculation is based on 2021. *Substantial Interest: Standing*, JUSTIA, https://law.justia.com/constitution/us/article-3/20-substantial-interest-standing.html

reasonable to believe that the Supreme Court correctly overlooked historical precedents and that the ruling in *TransUnion* protects the Court from opening the floodgates to many lawsuits. However, even if this were true, the Supreme Court's judgment essentially relieved Congress of its enumerated power to create and define statutory rights that provide for damages in the absence of a concrete injury as outlined in Article I of the Constitution.[265]

B. Judicial Seizure of Congressional Power

In *Spokeo*, the Court recognized that Congress is well positioned to identify tangible and intangible harms meeting Article III standing requirements.[266] However, a plaintiff did not automatically satisfy the injury-in-fact requirement whenever a statute granted a right to vindicate it.[267] The Court presumably attempted to find a balance between its power to determine standing[268] and Congress's power to create and define rights.[269] While this view adhered to the checks and balances of the federal government branches,[270] the vague ruling did not provide enough guidance

---

[https://perma.cc/RL33-J62L] (last visited June 27, 2022). *See* James Manyika & Charles Roxburgh, *The great transformer: The impact of the Internet on economic growth and prosperity*, MCKINSEY GLOB. INST. (Oct. 2011), https://www.mckinsey.com/~/media/mckinsey/industries/technology%20media%20and%20telecommunications/high%20tech/our%20insights/the%20great%20transformer/mgi_impact_of_internet_on_economic_growth.pdf [https://perma.cc/SEC4-YSHX]; discussion *supra* Introduction.

265. Robert J. McGahan et al., *No Harm, No Foul—With* TransUnion v. Ramirez*, the Supreme Court Holds that Fed. Rule Civ. P. 23 Does not Permit a Damages Class Where Much of the Class Suffered No Injury*, THE NAT'L L. REV. (June 25, 2021), https://www.natlawreview.com/article/no-harm-no-foul-transunion-v-ramirez-supreme-court-holds-fed-rule-civ-p-23-does-not [https://perma.cc/FN9S-XPD2]; *see Congress's Power to Define the Privileges and Immunities of Citizenship*, 128 HARV. L. REV. 1206 (2015), https://harvardlawreview.org/2015/02/congresss-power-to-define-the-privileges-and-immunities-of-citizenship/#:~:text=The%20Congress%20shall%20have%20power,life%2C%20liberty%2C%20and%20property.&text=3. [https://perma.cc/23UV-FZ5T].

266. Spokeo, Inc. v. Robins, 578 U.S. 330, 341 (2016).

267. *Id.*

268. *See* U.S. CONST. art. III.

269. *See Spokeo*, 578 U.S. at 341; *see also* Lujan v. Defs. of Wildlife, 504 U.S. 555 (1992).

270. Article III standing is built on the basic idea of separation of powers. History.com Editors, *Checks and Balances*, HIST. (Sept. 9, 2021), https://www.history.com/topics/us-government/checks-and-balances [https://perma.cc/8JAU-WX2R].

and resulted in a circuit split.[271] Although necessary to offer additional direction, the Supreme Court's ruling in *TransUnion* placed an explicit limit on Congress's ability to create statutory rights that provide for damages to potential plaintiffs.[272] The Court reasoned that if Congress freely authorizes unharmed plaintiffs to sue defendants who violate federal law, this not only violates Article III but also infringes on the executive branch's Article II authority.[273] As such, the judiciary expanded its authority in the name of preserving the separation of powers.[274]

At first, prohibiting plaintiffs from suing others in federal court might seem reasonable, regardless of statutory rights, when they do not suffer from an injury and there is no risk of future injury, as these are underlying principles of standing. However, the Court's reasoning and final judgment in *TransUnion* are not indicative of the injuries suffered by those wrongly labeled by TransUnion.[275] The Supreme Court stated that Congress cannot simply enact an injury into existence by using its lawmaking power to transform something that is not remotely harmful into something that is.[276] The Court then applied this reasoning to broaden its Article III judiciary power to determine what may be deemed an injury.[277] However, TransUnion's actions specifically require legal redress.[278] If erroneously placed on the OFAC list, consumers may suffer devastating effects on their economic freedom and psychological well-being, and the process of removing their name from the OFAC list is a challenging and opaque legal

---

271. *See Spokeo*, 578 U.S. 330; Remijas v. Neiman Marcus Grp., LLC, 794 F.3d 688 (7th Cir. 2015); Reilly v. Ceridian Corp., 664 F.3d 38 (3d Cir. 2011); discussion *supra* Part I.D.

272. McGahan et al., *supra* note 265.

273. The *TransUnion* Court argued that allowing private plaintiffs to sue for statutory violations absent concrete, particularized injuries would undermine the Executive agencies' regulatory and prosecutorial discretion under Article II. *See* TransUnion v. Ramirez, 141 S. Ct. 2190, 2207 (2021); *Supreme Court Holds That the Violation of a Statutory Right Is Insufficient to Establish Article III Standing in a Damages Action*, WINSTON & STRAWN LLP (June 30, 2021), https://www.winston.com/en/thought-leadership/supreme-court-holds-that-the-violation-of-a-statutory-right-is-insufficient-to-establish-article-iii-standing-in-a-damages-action.html [https://perma.cc/TT4J-6V66].

274. Solove & Citron, *supra* note 254.

275. *TransUnion*, 141 S. Ct. at 2218–19 (Thomas, J., dissenting); *see* discussion *supra* Part I.E.

276. *Supreme Court Holds That the Violation of a Statutory Right Is Insufficient to Establish Article III Standing in a Damages Action*, *supra* note 273.

277. *TransUnion*, 141 S. Ct. at 2221 (Thomas, J., dissenting).

278. *Id.*

process.[279] One only needs common sense to understand how being identified as a drug trafficker or terrorist is harmful and, thus, a basis for a lawsuit.[280]

Prior to the Ninth Circuit's ruling in *Ramirez*, TransUnion already received warnings about its OFAC practices from officials at the Department of the Treasury's OFAC.[281] OFAC officials notified TransUnion that they continued to hear from individuals who were adversely affected by incorrect OFAC alerts on their TransUnion credit reports.[282] TransUnion disregarded these warnings and made few changes to its practices.[283] At the Ninth Circuit, TransUnion argued that the FCRA protections did not apply to its OFAC Advisor system, and, thus, it did not need to follow reasonable methods to assure accuracy of the OFAC alerts placed on the class members' credit reports.[284] TransUnion recklessly disregarded the FCRA, and as a result, TransUnion falsely labeled 8,185 consumers as terrorists, drug traffickers, and threats to national security.[285] In the end, TransUnion was only required to redress a handful of the consumers; the remaining were left with nothing but damaged reputations.[286]

While the Supreme Court correctly ruled that 1,853 class members had standing, it failed to recognize the true risk of imminent harm that the remaining class members faced. Employers and creditors typically request credit reports to determine whether someone can be trusted, and an alert on the report stating that the consumer is a terrorist, drug trafficker, or threat to national security is damaging. [287] Although not yet disseminated, the 6,332 class members' credit reports still contained inaccurate alerts, and TransUnion continued to keep these reports readily available to send

279. *OFAC and Credit Reports*, OFAC SANCTIONS ATT'Y PRICE BENOWITZ LLP, https://ofaclawyer.net/about/credit-reports/ [https://perma.cc/ 6565-EF7L] (last visited June 11, 2022).

280. Nina Totenberg, *The Supreme Court Limits Lawsuits By Those Wrongly Flagged As Terrorists*, NPR (June 25, 2021, 3:45 PM ET), https://www.npr.org/2021/06/25/1010303016/the-supreme-court-limits-lawsuits-by-those-wrongly-flagged-as-terrorists [https://perma.cc/NCK7-XFMP].

281. Ramirez v. TransUnion LLC, 951 F.3d 1008, 1021 (9th Cir. 2020).

282. *Id.*

283. *Id.*

284. *Id.* at 1020.

285. *Id.* at 1019.

286. *Id.*

287. *What is a credit report?*, CONSUMER FIN. PROT. BUREAU (Sept. 1, 2020), https://www.consumerfinance.gov/ask-cfpb/what-is-a-credit-report-en-309/? [https://perma.cc/6HXA-VUUN].

to third parties.[288] The facts clearly demonstrate an imminent risk of harm for the consumers, and the Supreme Court's ruling in *Norfolk & Western Railway Co. v. Ayers* supports this conclusion by analogy.[289]

In *Norfolk & Western Railway Co.*, former railroad employees sued Norfolk & Western Railway Company for negligent asbestos exposure.[290] The exposure caused the former employees to contract a disease related to asbestos exposure known as asbestosis.[291] The Federal Employers' Liability Act (FELA) holds railroad employers liable to any person who suffered an injury, such as asbestosis, while employed by the railroad company for interstate commerce purposes.[292] An asbestosis expert acknowledged that asbestosis increases workers' risk of contracting lung cancer, and approximately ten percent of asbestosis patients have died from mesothelioma.[293] As a result, the former employees sought recovery for the fear of developing cancer in the future from their asbestosis.[294] The defendant presented the question "[w]hether a plaintiff who has asbestosis but not cancer can recover damages for fear of cancer under [FELA] without proof of physical manifestations of the claimed emotional distress," to which Justice Ruth Bader Ginsburg responded.[295]

Delivering the majority opinion, Justice Ginsburg explained that knowledge of a greater risk of developing cancer because of documented asbestos exposure likely had a depressing effect on the former employees.[296] In a 5–4 decision, the Supreme Court ruled that the risk of developing asbestos-related cancer is enough for a group of railroad workers suffering from asbestosis to collect monetary damages *even if they are showing no signs of cancer and may never develop the disease*.[297] Upon showing that the fear and risk of developing cancer was genuine and serious, the Supreme Court awarded the former railroad employees $4.9 million.[298]

---

288. *Ramirez*, 951 F.3d at 1028.
289. Norfolk & W. Ry. Co. v. Ayers, 538 U.S. 135 (2003).
290. *Id.* at 140.
291. *Id.* at 135.
292. *Id.*
293. *Id.* at 137.
294. *Id.* at 135.
295. *Id.* at 157 (alteration in original).
296. *Id.* at 150; *see also* Sandy Smith, *Supreme Court: Fear of Cancer Is Enough to File Claim*, EHS TODAY (Mar. 10, 2003), https://www.ehstoday.com/archive/article/21913066/supreme-court-fear-of-cancer-is-enough-to-file-claim [https://perma.cc/8EBQ-PQQU].
297. *See Norfolk*, 538 U.S. at 149–51.
298. *Id.* at 144.

Although the *Norfolk & Western Railway Co.* decision concerned emotional distress damages as opposed to awarding standing, the former railroad employees' asbestosis diagnoses are analogous to the *TransUnion* consumers' incorrect credit reports. Both the railroad company and TransUnion acted negligently, and as a result, people suffered a greater risk of future harm. Additionally, the plaintiffs in both cases relied on congressional statutory guidance to argue in favor of awarding damages for the suffered injuries. Although similar, the Supreme Court awarded damages to the railroad employees for an increased risk of cancer but refused to award the consumers standing, stating there was not an increased risk of third parties receiving their slanderous credit reports.[299] Justice Ginsburg acknowledged in *Norfolk & Western Railway Co.* that an increased risk of future harm can constitute standing even if the harm never materializes, but the Court in *TransUnion* failed to implement this reasoning.[300] The Supreme Court erroneously ignored the glaring similarities between the two cases and incorrectly ruled that there was not an imminent threat of future harm in *TransUnion*.[301] In both cases, the risk of future harm was genuine, serious, and supported by congressional statutory acts.[302]

TransUnion's actions exemplified Congress's ability to identify the need to create and define legal rights that deserve redress. TransUnion explicitly refused to follow protective guidelines provided by Congress, and the consequences of not adhering to these procedures caused harm to 8,185 people.[303] Unlike the Supreme Court, Congress is better situated to determine when something realistically causes harm or a risk of harm in the real world.[304] As elected officials, members of Congress are best suited to legislate on behalf of the constituents with whom they keep in constant contact.[305] If constituents disagree with their decisions, constituents can vote officials out of office and, thus, further incentivize congressmen to keep their constituents' best interest in mind.[306] On the contrary, the

299. TransUnion v. Ramirez, 141 S. Ct. 2190, 2210 (2021); *see also* discussion *supra* Part I.E.

300. *TransUnion*, 141 S. Ct. at 2211; Smith, *supra* note 296.

301. *TransUnion*, 141 S. Ct. at 2212.

302. *See id.*; *Norfolk* 538 U.S. at 165–56.

303. *TransUnion*, 141 S. Ct. at 2209.

304. *Id.* at 2226 (Kagan, J., dissenting).

305. *6. Congress: The People's Branch?*, AM. GOV'T, https://www.ushistory.org/gov/6.asp [https://perma.cc/X4Z7-4TGB] (last visited June 11, 2022).

306. *Id.*

President of the United States appoints Supreme Court Justices.[307] Although the Senate must confirm the appointment, the House of Representatives has no say, and a Justice's appointment is for life.[308] Congress created the FCRA to establish rights for individuals and imposed obligations on companies that profit from the collection and use of this data, but the Supreme Court essentially reduced the effectivity of the FCRA against congressional intent.[309] TransUnion violated all 8,185 consumers' rights outlined in the FCRA to create and sell a product to its clients for a financial gain, and with the Supreme Court's ruling, it will continue to harm consumers.[310] There is no longer an incentive for companies to invest in digital technology that protects consumers' data that they are putting at risk.[311]

In sum, by a close 5 to 4 vote, the Supreme Court erroneously ruled that Congress does not have the constitutional power to establish statutory rights or the power to enforce those rights with private lawsuits.[312] Instead, the Supreme Court shifted that power to itself. As a result, the Court second guessed Congress's judgment regarding when an FCRA injury justifies a lawsuit in federal court.[313]

C. The Supreme Court Failed to Address the Circuit Split in TransUnion v. Ramirez

Even if one believes that the Supreme Court rightfully overlooked jurisprudence and had the authority to usurp Congress's legislative power, the *TransUnion v. Ramirez* majority failed to expressly address any of the

---

307. *The Judicial Branch*, THE WHITE HOUSE, https://www.whitehouse.gov/about-the-white-house/our-government/the-judicial-branch/ [https://perma.cc/MJ5S-KJV2] (last visited June 11, 2022).

308. *Id.*

309. *The Fair Credit Reporting Act (FCRA) and the Privacy of Your Credit Report*, ELEC. PRIV. INFO. CENT., https://epic.org/privacy/fcra/ [https://perma.cc/4MYL-37DY] (last visited June 11, 2022).

310. TransUnion v. Ramirez, 141 S. Ct. 2190, 2224 (2021) (Thomas, J., dissenting).

311. Luke Martin, *Resolving the Circuit Split on Article III Standing for Data Breach Suits*, COLUM. BUS. L. REV. (Aug. 13, 2019), https://journals.library.columbia.edu/index.php/CBLR/announcement/view/181 [https://perma.cc/H8ML-66CL].

312. Totenberg, *supra* note 280.

313. *TransUnion*, 141 S. Ct. at 2205; David N. Anthony et al., *Supreme Court Decision: TransUnion v. Ramirez*, TROUTMAN PEPPER (June 25, 2021), https://www.troutman.com/insights/supreme-court-decision-transunion-v-ramirez.html [https://perma.cc/ZXA8-5JCJ].

inconsistent rulings in the circuit split, particularly in the Third Circuit and Seventh Circuit.[314] As such, circuit courts must once again interpret the Court's ruling, and after *Spokeo*, each circuit decides differently from one another on the subject.[315] This may result in forum shopping—an attempt by the plaintiff to find a particular court to try the case where they believe the chances for a favorable decision are highest.[316] A plaintiff can forum shop when more than one court has jurisdiction over the dispute.[317] For example, if forum *A* and *B* are on different sides of the circuit split, consumer *A* and *B* will receive different judicial decisions on similar claims in their respective forums. However, consumer *B* may forum shop and choose to bring suit in forum *A* if forum *A* also has jurisdiction over the claim. On one hand, a lack of uniformity across circuits targets defendants, as forum shopping allows the plaintiff to file in a jurisdiction with the most favorable interpretation of the law to the detriment of the defendant.[318] On the other hand, if only one court has jurisdiction over the claim, the plaintiff must file suit in that specific jurisdiction even if the plaintiff would have been better redressed in another court, thus potentially harming the plaintiff.[319] Forum shopping raises the issues of unfairness and the lack of predictability and, thus, provokes the ongoing confusion as to whether a data breach concretely injures a plaintiff to meet Article III standing.[320]

Conversely, if the circuit courts interpret *TransUnion* to mean that federal statutes do not automatically constitute a harm for purposes of establishing Article III standing, state courts will likely see an influx of similar class action suits.[321] Many states' standing doctrines differ from, and are looser than, the federal standard; therefore, plaintiffs might attempt

---

314. Peterson et al., *supra* note 19.

315. *Id.*; *see* discussion *supra* Part I.D.

316. *U.S. Supreme Court Restricts Forum Shopping*, MILLER L. (June 12, 2017), https://millerlawpc.com/u-s-supreme-court-restricts-forum-shopping/ [https://perma.cc/J36F-DYAE].

317. *Forum Shopping*, US LEGAL, https://civilprocedure.uslegal.com/jurisdiction/forum-non-conveniens-and-forum-shopping/forum-shopping/ [https://perma.cc/MCF9-P5X9] (last visted June 11, 2022).

318. Markus Petsche, *What's Wrong with Forum Shopping? An Attempt to Identify and Assess the Real Issues of a Controversial Practice*, 45 INT'L LAW. 1005, 1018 (2011).

319. *See generally id.*

320. *See id.*

321. Eve Cann et al., *The Impact of the 'TransUnion' Decision on Future Class Actions*, LAW.COM (Aug. 2, 2021, 11:35 AM), https://www.law.com/dailybusinessreview/2021/08/02/the-impact-of-the-transunion-decision-on-future-class-actions/ [https://perma.cc/26F9-YFNK].

to bring suit in state court rather than risking the dismissal of their case for lack of Article III standing in federal court.[322] However, it is still unclear how the Court's statement about Congress's inability to enact an injury into existence for purposes of Article III will affect a state court's jurisdiction to hear cases arising under federal law.[323] The *TransUnion* dissent argued that the Court's decision affects only federal court jurisdiction under Article III and does not explicitly bind state courts as some states rejected various aspects of federal standing jurisprudence in the past.[324] If this is the case, there is now a risk that the uncertainty among federal courts with regard to standing will give rise to a similar ambiguity among state courts resulting in a never-ending uncertainty as to whether plaintiffs will be redressed for the harms others cause.

According to the narrow majority, a violation of a statutory legal right can never be an injury sufficient to establish standing, and "courts *alone* have the power to sift and weigh harms" to decide whether they merit standing in federal court.[325] In other words, Congress no longer possesses the power to identify and remedy violations of legal rights outlined in the FCRA—that power solely belongs to the judiciary.[326] This reasoning ignores jurisprudence and unnecessarily broadens the judiciary's power. Additionally, the Supreme Court failed to address the circuit split, thus potentially continuing the original issue of differing Article III standing requirements. *TransUnion* portrayed exactly why this ruling is so damaging to all congressional statutory provisions meant to protect future plaintiffs and exposed the Court's inability to identify harms that deserve redress. The decision cannot stand as-is.

III. THE SUPREME COURT'S CHANCE AT REDEMPTION

It is still unclear as to the extent to which the Supreme Court's opinion changes the way federal courts decide whether plaintiffs have standing under Article III to bring individual and class action claims based on alleged statutory violations.[327] However, the two potential outcomes—a

322. *Id.*

323. *Supreme Court Holds That the Violation of a Statutory Right Is Insufficient to Establish Article III Standing in a Damages Action*, *supra* note 273.

324. *Id.*; *see* TransUnion v. Ramirez, 141 S. Ct. 2190, 2224 n.9 (2021) (Thomas, J., dissenting).

325. *TransUnion*, 141 S. Ct. at 2219, 2221 (Thomas, J., dissenting) (emphasis added).

326. *Id.*

327. Spencer Persson & John D. Seiver, *TransUnion v. Ramirez: SCOTUS Limits Article III Redressable Injuries*, DAVIS WRIGHT TREMAINE LLP (July 1,

continued circuit split or state court misinterpretations of the law—are undesirable and harm plaintiffs injured by the reckless actions of others, like TransUnion. Courts still face the issue of protecting consumers' data, as the volume of that information continues to rapidly increase.[328] Congress implemented the FCRA to promote the efficiency of the nation's consumer credit system, improve the accuracy of the information included in credit reports, and prevent the misuse of consumers' sensitive information.[329] However, the Supreme Court's ruling in *TransUnion* essentially nullified Congress's enforcement mechanisms in the FCRA.[330]

The Court originally applied prudential standing to protect the progressive efforts of others in an attempt to widen the scope of cases heard by the federal court system.[331] Different types of injuries continued to develop and change over time, and the prudential standing doctrine recognized Congress's ability to address these issues and implement causes of action to redress damages.[332] The Court intended the current injury-in-fact requirement to act as a happy medium between constitutional standing and prudential standing, but the *TransUnion* majority primarily based its reasoning on maintaining the separation of powers and protecting the Court against an influx of statutory violation claims.[333] In doing so, the Court explicitly rejected the notion that Congress can freely authorize plaintiffs to sue defendants solely based on a violation of federal law.[334] As a result, the Supreme Court regressed the current Article III standing doctrine back towards the original constitutional strand of standing, leaving thousands of consumers without redress for TransUnion's negligent acts.[335]

To resolve the issue in *TransUnion* and similar future cases, the Supreme Court should refer to the zone-of-danger theory originally presented in *Bovsun v. Sanperi*.[336] In *Bovsun*, the defendant's car struck

---

2021), https://www.dwt.com/blogs/privacy--security-law-blog/2021/06/transunion-v-ramirez-article-iii-standing [https://perma.cc/JG6V-9XWC].

328. Martin, *supra* note 311.

329. *See* Fair Credit Reporting Act, 15 U.S.C. § 1681; Charlestien Harris, *How the 1970 Fair Credit Reporting Act Benefits the Consumer*, S. BANCORP (Nov. 6, 2020), https://banksouthern.com/blog/how-the-1970-fair-credit-reporting-act-benefits-the-consumer/ [https://perma.cc/7B3R-J7G2].

330. *TransUnion*, 141 S. Ct. at 2205; *see* discussion *supra* Part II.C.

331. Barnum, *supra* note 83, at 14.

332. *See generally id.*

333. *TransUnion*, 141 S. Ct. at 2206–07; *see* discussion *supra* Part I.B.

334. *TransUnion*, 141 S. Ct. at 2207.

335. *See generally id.*; *see also* discussion *supra* Part I.B

336. Bovsun v. Sanperi, 461 N.E.2d 843, 844 (N.Y. 1984).

Mr. Bovsun and his car while on the side of the road, pinning Mr. Bovsun between the two cars.[337] Ms. Bovsun and her daughter were inside Mr. Bovsun's car at the time of the accident, and Ms. Bovsun and her daughter later sued the defendant for negligent infliction of emotional distress (NIED).[338] Although Ms. Bovsun and her daughter did not suffer physical injuries, the plaintiffs alleged the defendant's negligence caused an unreasonable risk of harm, and. subsequently, they suffered emotional distress.[339] The New York Court of Appeals ruled in favor of Ms. Bovsun and her daughter and held that the zone-of-danger theory is premised on the tort-based principle that the defendant owed a basic duty to avoid harming others and breached this duty by threatening the plaintiffs' physical safety.[340]

Originally, the zone-of-danger rule limited the liability of people accused of NIED, and a plaintiff could only recover damages if they were: (1) placed in the immediate risk of physical harm by the defendant's negligence; and (2) frightened by the risk of harm.[341] Although the zone-of-danger theory is not related to standing, the Supreme Court could use the concept by analogy when analyzing the injury-in-fact element of the standing inquiry.[342] As a result, the Supreme Court would expand the zone-of-danger theory to incorporate injuries stemming from data breaches, as NIED cases and data breach cases both frequently consider future risks of harm that are not necessarily tangible.[343] In terms of *TransUnion*, the Supreme Court would need to determine whether TransUnion's violation of the FCRA placed the consumers in the immediate risk of harm and whether the consumers took this threat seriously. To determine if consumers considered the harm a serious threat, the Court should first look to Justice Ginsburg's reasoning in *Norfolk Western Railway Co.* to establish whether the risk of future harm was

337. *Id.*

338. *Id.*

339. *Id.* at 850.

340. Kevin G. Faley & Andrea M. Alonso, *Understanding New York's 'Zone of Danger' Rule in Non-Automobile Situations*, NY L.J. (Aug. 11, 2021, 11:45 AM), https://www.law.com/newyorklawjournal/2021/08/11/understanding-new-yorks-zone-of-danger-rule-in-non-automobile-situations/ [https://perma.cc/7Z6T-LVDX].

341. *Zone of danger rule*, CORNELL L. SCH. LEGAL INFO. INST., https://www.law.cornell.edu/wex/zone_of_danger_rule [https://perma.cc/FV5R-7HG8] (last visited June 11, 2022).

342. *See generally* Luke Meier, *Using Tort Law to Understand the Causation Prong of Standing*, 80 FORDHAM L. REV. 1241 (2011).

343. *See* discussion *supra* Introduction.

genuine and serious.[344] If the impending injury is genuine and serious, the Court should then determine whether the data breach victims took mitigative efforts to protect themselves from the impending harm. The Court in *Clapper* found that taking steps to mitigate future harm, like subscribing to credit monitoring services, suffices as a present harm and, thus, leans towards granting the victims standing.[345]

The zone-of-danger test would not replace *Lujan's* Article III standing test. Rather, the zone-of-danger test would supplement the current standing analysis when the FCRA grants a remedy to protect potential data breach victims from the Court's ebb and flow between favoring either constitutional standing ideology or prudential standing ideology. The Court's recent trend towards implementing stricter constitutional standing overlooked the real risk of future harm suffered by the 6,332 consumers whose credit reports had not yet been disseminated to third parties. The zone-of-danger rule, however, follows Justice Ginsburg's reasoning in *Norfolk & Western Railway Co.* that the risk of future harm must be genuine and serious to constitute standing.[346] The *TransUnion* consumers met this standard upon the consumers' realization that their credit reports falsely labeled them as terrorists, drug traffickers, and other serious criminals.[347]

The addition of the zone-of-danger rule would provide greater clarity regarding what types of injuries constitute standing and what a plaintiff must show to meet Article III requirements in cases involving FCRA violations. The Supreme Court initially added the injury-in-fact requirement for this purpose, but the Court continued to inconsistently interpret this rule, thus causing widespread confusion.[348] Although the zone-of-danger test would broaden the Supreme Court's constitutional standing analysis in *TransUnion*, the analysis does not unnecessarily open the federal courthouse doors to an influx of frivolous class-action claims. To the contrary, the additional test potentially limits the number of plaintiffs who stand to bring suit in federal court based on an increased risk of harm because the new analysis would be more objective rather than subjective. Thus, the separation of powers of the federal government remains protected, but the Court once again acknowledges injuries that Congress identified as deserving redress. In sum, the zone-of-danger theory provides a more precise analysis to determine whether plaintiffs

344. *See* discussion *supra* Part II.B.

345. Clapper v. Amnesty Int'l USA, 568 U.S. 398, 438 (2013) (Breyer, J., dissenting).

346. *See* discussion *supra* Part II.B.

347. TransUnion v. Ramirez, 141 S. Ct. 2190, 2197 (2021).

348. *See* discussion *supra* Parts I & II.

truly suffered an imminent risk of harm due to data breaches, and the Court should apply this analysis when it is unclear as to whether the plaintiff's injury meets the current *Lujan* Article III standing analysis in data breach cases.

CONCLUSION

With more personal information stored digitally, the risk of falling victim to a data breach is more prevalent than ever.[349] The rise in industries designed to help cyber criminals monetize stolen data further highlights the problem and fuels the risk of future cybercrime.[350] Congress recognized consumers' needs for protection against these data breaches and enacted the FCRA to provide guidelines for agencies to follow while also affording remedies to those harmed by cyber-attacks.[351] While the FCRA awarded statutory damages to those injured by agencies, the power to determine whether the plaintiffs meet Article III standing requirements to bring suit in federal court still lies within the judicial branch.

Although the Supreme Court attempted to resolve the confusion as to whether a plaintiff met standing while only alleging an FCRA statutory violation, the Court's judgment in *Spokeo* spurred a deep circuit split.[352] The circuit split continued for years, and the Supreme Court declined to grant certiorari until *TransUnion*.[353] The Court's ruling, however, overlooked years of jurisprudence, usurped congressional power to create and define legal rights, and failed to address the circuit split.[354] Congress is better suited to identify the protections needed to curtail data breaches, and the Supreme Court incorrectly ruled that the 6,332 class action members did not suffer a real risk of harm and, thus, did not stand to bring suit in federal court.[355]

The Supreme Court's reasoning in *TransUnion* reverts to the Court's original constitutional strand of standing and overlooks the need to recognize congressionally identified injuries that deserve redress.[356] To

---

349. Alex Scroxton, *Data breaches are a ticking timebomb for consumers*, COMPUTER WKLY. (Feb. 9, 2021, 2:18 PM), https://www.computerweekly.com/news/252496079/Data-breaches-are-a-ticking-timebomb-for-consumers [https://perma.cc/RFV4-KPR4].

350. *Id.*

351. *See* discussion *supra* Part I.E.

352. *See* discussion *supra* Part I.D.

353. *See* discussion *supra* Part I.E.2.

354. *See* discussion *supra* Part II.

355. *Id.*

356. *See* discussion *supra* Part I.B; *see also* discussion *supra* Part III.

resolve the Court's erroneous ruling in *TransUnion* and protect future plaintiffs, the Supreme Court should implement the zone-of-danger theory in data breach cases to supplement the *Lujan* Article III analysis. The zone-of-danger rule considers whether a person's negligence placed the plaintiff in an immediate risk of harm and whether the plaintiff took this threat seriously.[357] Plainly stated, the Supreme Court will look to whether the risk of future harm was genuine and serious to award standing in federal court.[358] The addition of the zone-of-danger theory will likely reduce the number of ambiguous court rulings and provide greater clarity as to what elements must be shown in data breach cases to constitute Article III standing, thus potentially solving this serious circuit split.

357. *See* discussion *supra* Part III.
358. *Id.*