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Did the Supreme Court in TransUnion v. Ramirez Transform the Article III Standing Injury in Fact Test?: The Circuit Split Over ADA Tester Standing and Broader Theoretical Considerations

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Did the Supreme Court in *TransUnion v. Ramirez* Transform the Article III Standing Injury in Fact Test?: The Circuit Split Over ADA Tester Standing and Broader Theoretical Considerations

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Some commentators have criticized the Supreme Court's 2016 decision in Spokeo, Inc. v. Robins *and especially the Court's 2021 decision in* TransUnion LLC v. Ramirez *for limiting Congress' authority to confer standing by statute. For example, in his article,* Injury in Fact Transformed, *Professor Cass Sunstein argues that* TransUnion *is a "radical ruling" that uses the injury in fact standing requirement to limit the authority of Congress to enact only statutes that address harms that have a close relationship to traditional or common law harms. By contrast, Professor Ernst Young argues*

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that the Supreme Court's injury in fact doctrine is justified in light of the history of equitable practice requiring a "grievance" rather than just a cause of action. The question of how much the TransUnion *decision has narrowed Article III standing has resulted in a circuit split regarding when civil rights testers filing suits under the Americans with Disabilities Act have standing. The Tenth Circuit's 2022 decision in* Laufer v. Looper *and similar decisions in the Second and Fifth Circuits have read the* TransUnion *decision to limit but not eliminate the broad tester standing in the Supreme Court's 1982 decision in* Havens Realty Corp. v. Coleman. *By contrast, the First Circuit, in its 2022 decision in* Laufer v. Acheson Hotels, LLC, *explicitly rejected these decisions in the Tenth, Second and Fifth Circuits to conclude that the* TransUnion *decision had not overruled the expansive tester standing in* Havens Realty. *The Eleventh Circuit had previously taken a similar position as the First Circuit but did not explicitly disagree with other circuits. On March 27, 2023, the Supreme Court granted certiorari in the First Circuit decision for the 2023-24 term. This is an important issue because a broad reading of the* TransUnion *decision could limit tester standing and affect many other federal statutes that go beyond traditional common law damages. This article will argue that one's view of standing issues depends heavily upon whether one favors expansive government regulation as a social good or is a libertarian skeptical of government regulation.*

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INTRODUCTION

The Supreme Court has interpreted Article III of the U.S. Constitution to require that any legitimate plaintiff in the federal courts have a personal and concrete "injury in fact" to sue.[1] In *TransUnion LLC v. Ramirez*,[2] the Supreme Court in 2021 built upon its 2016 decision in *Spokeo, Inc. v. Robins*[3] in determining that a mere statutory violation is inadequate for standing unless the plaintiff suffers a concrete injury.[4] According to Justice Kavanaugh's majority opinion in *TransUnion*, fundamental separation of powers principles in the U.S. Constitution prohibit Congress from granting standing to "*unharmed* plaintiffs."[5] Furthermore, both the *TransUnion* and the *Spokeo* decisions concluded that courts should assess whether a plaintiff's injuries have a close relationship to harms traditionally recognized in common law suits

[1] *See* Mank, *Standing in Spokeo*, introductory author footnote *supra*, at 1380-81; Mank, *Seven Members*, introductory author footnote *supra*, at 729; *infra* Part I.

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

[3] Spokeo, Inc. v. Robins, 578 U.S. 330 (2016).

[4] *TransUnion,* 141 S. Ct. at 2205-07; *Spokeo*, 578 U.S. at 341.

[5] *TransUnion*, 141 S. Ct. at 2207 (emphasis in original).

because there are limits to even Congress' authority to fashion new-fangled rights by statute.[6]

Some commentators have criticized *Spokeo* and especially *TransUnion* for limiting Congress' authority to confer standing by statute. For example, in his article, *Injury in Fact Transformed*, Professor Cass Sunstein argues that *TransUnion* is a "radical ruling" that uses the injury in fact standing requirement to limit the authority of Congress to enact only statutes that address harms that have a close relationship to traditional or common law harms, when in Professor Sunstein's view there is not an historical or constitutional basis for such limitations.[7] Similarly, Professors Solove and Citron criticize *TransUnion* for significantly limiting and imposing a "usurpation" on the authority of Congress to grant private rights of action by treating standing injury as a fundamental constitutional extension of the separation of powers when modern standing doctrine only developed in the 1970s and the *TransUnion* decision's reading of history was misleading.[8] Additionally, Justice Thomas' concurring opinion in *Spokeo* and his dissenting opinion in *TransUnion* contended that, historically, courts had allowed the legislature broad discretion to define harm in purely private suits that do not implicate separation of powers concerns.[9]

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[6] *See id.* at 2204-05; *Spokeo*, 578 U.S. at 340-41.

[7] Cass R. Sunstein, *Injury in Fact, Transformed*, 2021 SUP. CT. REV. 349, 365-74 (2022) [hereinafter *Injury in Fact*]; *see also* Erwin Chemerinsky, *What's Standing After* TransUnion v. Ramirez, 96 N.Y.U. L. REV. ONLINE 269, 269-72, 286-91 (2021) (arguing the *TransUnion* decision "has the potential to dramatically restrict standing to sue in federal courts to enforce federal statutes" and contends that "[i]f one starts with the premise that Congress has the constitutional power to create legally enforceable rights — which seems unassailable — then the Supreme Court's refusing to enforce them greatly undermines, not advances, separation of powers").

[8] Daniel J. Solove & Danielle Keats Citron, *Standing and Privacy Harms: A Critique of* TransUnion v. Ramirez, 101 B.U. L. REV. ONLINE 62, 64-66 (2021); *see also* Chemerinsky, *supra* note 7, at 287-88 ("The focus on the common law in defining the rights that can be enforced by statute is even more perplexing when one realizes that the idea of standing as a constitutional limit on the federal judicial power was not articulated until the twentieth century. And the injury requirement did not appear in Supreme Court decisions until the early 1970s.").

[9] *TransUnion*, 141 S. Ct. at 2214, 2218-21 (Thomas, J., dissenting); *infra* Parts II.B, II.D.

By contrast, Professor Ernst Young argues that the Court's injury in fact doctrine is justified in light of the history of equitable practice requiring a "grievance" rather than just a cause of action.[10] His standing article builds upon an article by Professors Sam Bray and Paul Miller that explains how equitable actions involve grievances rather than the cause of action at the center of legal actions, and why equitable actions cannot be properly assessed using conventional legal analysis.[11] Professor Young's standing article briefly discusses the *TransUnion* decision, but does not focus on that case.[12] Even if Professor Young's and Professor Bray and Miller's historical analysis of equity actions is correct, their historical analysis would need to address the concerns of Professors Sunstein, and Professors Solove and Citron, about to what extent standing doctrine can limit the authority of Congress to create private rights of action.[13]

The question of how much the *TransUnion* decision has narrowed Article III standing has resulted in a circuit split regarding when civil rights testers filing suits under the Americans with Disabilities Act ("ADA")[14] have standing.[15] The Tenth Circuit's 2022 decision in *Laufer v. Looper*[16] and similar decisions in the Second[17] and Fifth Circuits[18] have

[10] Ernest A. Young, *Standing, Equity, and Injury in Fact*, 97 NOTRE DAME L. REV. 1885, 1887-88, 1896, 1899-1904, 1908, 1910 (2022).

[11] Samuel L. Bray & Paul B. Miller, *Getting into Equity*, 97 NOTRE DAME L. REV. 1763, 1764, 1766, 1775-86, 1789, 1795, 1799 (2022) (discussing importance of establishing a "grievance" in equity actions).

[12] Young, *supra* note 10, at 1889 n.22, 1906.

[13] *See infra* Part III.A.

[14] 42 U.S.C. § 12101.

[15] Catherine Cole, Note, *A Standoff*: Havens Realty v. Coleman *Tester Standing and* TransUnion v. Ramirez *in the Circuit Courts*, 45 HARV. J.L. & PUB. POL'Y 1033 *passim* (2022) (discussing circuit split on tester stigmatic injury standing).

[16] 22 F.4th 871 (10th Cir. 2022); *infra* Part IV.A.

[17] Harty v. W. Point Realty, Inc., 28 F.4th 435, 444 (2d Cir. 2022) (determining an ADA tester plaintiff cannot show a concrete Article III standing injury from the denial of information without also showing downstream consequences required by the *TransUnion* decision). *But see* Cole, *supra* note 15, at 1038-40 (discussing Second Circuit's decision, and that the path to standing used by the Havens Realty tester plaintiff is now foreclosed).

[18] Laufer v. Mann Hosp., LLC, 996 F.3d 269, 273 (5th Cir. 2021) (concluding ADA tester plaintiff Laufer failed to demonstrate Article III standing because she could not

read the *TransUnion* decision to limit but not eliminate the broad tester standing in the Supreme Court's 1982 decision in *Havens Realty Corp. v. Coleman*.[19] By contrast, the First Circuit in its 2022 decision in *Laufer v. Acheson Hotels, LLC* explicitly rejected these decisions in the Tenth, Second, and Fifth Circuits to conclude that the *TransUnion* decision had not overruled the expansive tester standing in *Havens Realty*.[20] The Eleventh Circuit had previously taken a similar position as the First Circuit in concluding that the tester had standing for intangible emotional injuries even considering the *TransUnion* decision; however, the Eleventh Circuit has now vacated that decision because it was moot when it was decided.[21] On March 27, 2023, the Supreme Court granted

show the information she was denied had "some relevance" to her considering the *TransUnion* decision). *But see* Cole, *supra* note 15, at 1038-40 (discussing Fifth Circuit's decision, and that the path to standing used by the *Havens Realty* tester plaintiff is now foreclosed).

[19] 455 U.S. 363 (1982). *But see* Cole, *supra* note 15, at 1033-40 (discussing and criticizing Tenth, Second, and Fifth Circuits decisions on tester standing for giving insufficient weight to *Havens Realty* decision).

[20] Laufer v. Acheson Hotels, LLC (*Acheson Hotels I*), 50 F.4th 259, 272-74 (1st Cir. 2022), *cert. granted*, Acheson Hotels, LLC v. Laufer, 143 S. Ct. 1053 (2023). On March 27, 2023, the Supreme Court granted the petition for a writ of certiorari in Acheson Hotels, LLC v. Laufer (*Acheson Hotels II*), 143 S. Ct. 1053 (2023), https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/22-429.html [https://perma.cc/V5SS-27DW]; *see also* Amy Howe, *Court Takes up Civil Rights "Tester" Case*, SCOTUSBLOG (Mar. 27, 2023, 10:52 AM), https://www.scotusblog.com/2023/03/court-takes-up-civil-rights-tester-case/ [https://perma.cc/9YB9-NMZQ].

[21] Laufer v. Arpan LLC, 77 F.4th 1366, 1366 (11th Cir., 2023); Bernie Pazanowski, *Eleventh Circuit Vacates Opinion Tied to Supreme Court Argument*, BLOOMBERG L. (Aug. 15, 2023, 12:33 PM), https://news.bloomberglaw.com/product/blaw/bloomberglawnews/exp/eyJpZCI6IjAwMDAwMTg5LWZhNWEtZGE2Ni1hMTlmLWZmZmU3MzZhMDAwMSIsImNoeHQiOiJMV05XIiwidXVpZCI6ImdydWxIbStqSol3Ry9WdG45WXJHekE9PWhQQmdiMEpLZnlnWU5wMHNRTXRXenc9PSIsInRpbWUiOiIxNjkyMTg0MDAzMjA1Iiwic2lnIjoiSE54Y1FUcVhZTHBkMDQ2b3BHeXJaYTJxMHc4PSIsInYiOiIxIn0=?source=newsletter&item=read-text&region=digest [https://perma.cc/7WW3-LS2K]. In a concurring opinion in the now vacated decision, Judge Jordan had explicitly acknowledged that the Eleventh Circuit's approach to tester standing was contrary to the Second, Fifth and Tenth Circuits, but argued that the plaintiff's emotional distress was a sufficient basis for Article III standing. *See* Laufer v. Arpan LLC, 29 F.4th 1268, 1273-75 (11th Cir. 2022); *id.* at 1281-83 (Jordan, J., concurring); Cole, *supra* note 15, at 1040-41, 1047-48 (discussing Eleventh Circuit's decision and Judge Jordan's concurring opinion).

certiorari in the First Circuit decision for the 2023–24 term,[22] probably because according to Supreme Court Rule 10(a) and the actual practice of the Court, circuit splits are one of the most important reasons for the Court to grant a writ of certiorari, although the Court has discretion not to grant certiorari even if there is a circuit split.[23] This is an important issue because a broad reading of the *TransUnion* decision could limit tester standing, and could affect many other federal statutes that go beyond traditional common law damages.[24] In Part IV, this article will examine the contrasting views of the Tenth and First Circuits regarding whether the *TransUnion* decision implicitly limits the broad standing rights for civil rights testers in *Havens Realty*.[25] While standing doctrine and theory is complicated, ultimately one's approach to standing principles is likely influenced by one's view of the role of the federal government and regulation.[26]

Part I will discuss the general doctrine of Article III Standing.[27] Part II will examine to what extent the *Spokeo* decision and especially the *TransUnion* decision used the injury in fact requirement to limit Congress' ability to grant statutory standing.[28] Part III will discuss the legal "cause of action" critique of the Court's injury in fact requirement, and a possible equitable defense of injury requirements.[29] Part IV will discuss the circuit split in ADA tester standing between the Tenth

[22] On March 27, 2023, the Supreme Court granted the petition for a writ of certiorari in *Acheson Hotels II*, 143 S. Ct. 1053 (2023), https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/22-429.html [https://perma.cc/V5SS-27DW]; *see also* Howe, *supra* note 20.

[23] SUP. CT. R. 10(a) ("The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers: (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter."); Ryan Stephenson, *Federal Circuit Case Selection at the Supreme Court: An Empirical Analysis*, 102 GEO. L.J. 271, 272-75 (2013) (arguing Supreme Court practice indicates that circuit splits are among the most important reasons the Court grants certiorari in a particular case).

[24] *See infra* Part IV, CONCLUSION.

[25] *See infra* Part IV.

[26] *See infra* CONCLUSION.

[27] *See infra* Part I.

[28] *See infra* Part II.

[29] *See infra* Part III.

Circuit's 2022 decision in *Laufer v. Looper*[30] and the First Circuit's decision in *Laufer v. Acheson Hotels, LLC*.[31] The conclusion suggests that one's view of standing doctrine depends heavily upon whether one favors expansive government regulation as a social good, or is a libertarian skeptical of government regulation.[32]

I. ARTICLE III CONSTITUTIONAL STANDING[33]

The requirement of Article III standing in federal courts is based upon separation of powers principles to limit federal courts to judicial duties involving the rights of individuals and to avoid courts unnecessarily interfering with the other two branches of the federal government.[34] The U.S. Constitution provides limited powers in each of the three branches of the federal government.[35] The Constitution establishes that Congress has enumerated "legislative Powers,"[36] the President holds "[t]he executive Power,"[37] and that the federal courts are confined to "[t]he judicial Power of the United States."[38] The Article III standing doctrine places limits on the types of cases that federal courts may hear based upon these separation of powers principles, and serves to prevent the Judicial Branch from intruding upon the powers given to the other two branches, the Executive and Legislative, which are often referred to as the political branches.[39]

Although the Constitution does not explicitly mandate that plaintiffs have Article III standing to sue in federal courts, the Supreme Court has

[30] 22 F.4th 871 (10th Cir. 2022); *see infra* Part IV.A.

[31] 50 F.4th 259, 272-74 (1st Cir. 2022); *see infra* Part IV.B.

[32] *See infra* CONCLUSION.

[33] The discussion of standing in Part I relies in part upon my earlier standing article, Mank, *Seven Members*, introductory author footnote *supra*, at 728-29.

[34] TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2203 (2021); Spokeo, Inc. v. Robins, 578 U.S. 330, 337 (2016); Raines v. Byrd, 521 U.S. 811, 820 (1997).

[35] *See Spokeo*, 578 U.S. at 337.

[36] U.S. CONST. art. I, § 1.

[37] *Id.* art. II, § 1, cl. 1.

[38] *Id.* art. III, § 1; *TransUnion*, 141 S. Ct. at 2203 ("Article III confines the federal judicial power to the resolution of 'Cases' and 'Controversies.'").

[39] *See TransUnion*, 141 S. Ct. at 2203; *Spokeo*, 578 U.S. at 337; DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 341 (2006); Lujan v. Defs. of Wildlife, 504 U.S. 555, 559-60 (1992).

inferred limitations on the power of federal judges to hear suits, based on the Constitution's Article III restriction of judicial decisions to "[c]ases" and "[c]ontroversies," to guarantee that a plaintiff has a genuine interest and stake in a case and to prevent judicial intrusion on the authority of the political branches.[40] A plaintiff has the burden of establishing that their suit is an appropriate "[c]ase" or "[c]ontroversy" that a federal court may hear.[41]

The Supreme Court has established a three-part Article III standing test that requires a plaintiff to show: (1) a concrete and particularized injury; (2) that the injury is fairly traceable to the challenged action of the defendant; and (3) that it must be likely that the injury can be redressed by a favorable federal court decision.[42] A plaintiff has the burden of establishing all three parts of the standing test for each form of judicial remedy or relief sought,[43] which is a significant distinction for the discussion of the differences between legal and equitable actions in

[40] U.S. CONST. art. III, § 2 ("The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; — to all Cases affecting Ambassadors, other public Ministers and Consuls; — to all Cases of admiralty and maritime Jurisdiction; — to Controversies to which the United States shall be a Party; — to Controversies between two or more States; — between a State and Citizens of another State; — between Citizens of different States; — between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."); *TransUnion*, 141 S. Ct. at 2203; *Spokeo*, 578 U.S. at 337-38; Clapper v. Amnesty Int'l U.S.A., 568 U.S. 398, 408-09 (2013); *DaimlerChrysler*, 547 U.S. at 339-41 (explaining why the Supreme Court infers that case and controversy requirement under Article III necessitates standing limitations); Mank, *Seven Members,* introductory author footnote *supra*, at 728. *See generally* Michael E. Solimine, *Congress, Separation of Powers, and Standing*, 59 CASE W. RSRV. L. REV. 1023, 1036-38 (2009) (discussing debate over whether the Constitution implicitly requires standing to sue).

[41] *Spokeo*, 578 U.S. at 338; *Clapper*, 568 U.S. at 408; Raines v. Byrd, 521 U.S. 811, 818 (1997); *see also* Mank, *Seven Members,* introductory author footnote *supra*, at 728-29.

[42] *TransUnion*, 141 S. Ct. at 2203; Va. House of Delegates v. Bethune-Hill, 139 S. Ct. 1945, 1950 (2019); *Spokeo*, 578 U.S. at 338; *Lujan*, 504 U.S. at 560-61; *see also* Mank, *Seven Members,* introductory author footnote *supra*, at 729.

[43] *DaimlerChrysler*, 547 U.S. at 351-52; Friends of the Earth, Inc. v. Laidlaw Env't Servs., Inc., 528 U.S. 167, 185 (2000) ("[A] plaintiff must demonstrate standing separately for each form of relief sought."); *see also* Mank, *Seven Members*, introductory author footnote *supra*, at 729; Young, *supra* note 10, at 1908-09.

Part III of this Article.[44] A federal court must dismiss a case without deciding the merits of the case if the plaintiff fails to meet the constitutional Article III standing test.[45]

II. *SPOKEO* AND ESPECIALLY *TRANSUNION* LIMIT THE AUTHORITY OF CONGRESS TO CREATE STATUTORY INJURIES THAT ARE NOT CLOSE TO TRADITIONAL COMMON LAW INJURIES

The *Spokeo* decision and especially the *TransUnion* decision tightened Article III standing requirements by requiring that a plaintiff's injury sufficient for Article III standing must be both concrete and particularized in nature.[46] *Spokeo* was a seven-to-two decision with a concurring opinion by Justice Thomas.[47] To gain the votes of seven justices, the *Spokeo* majority opinion gingerly emphasized that a statutory injury alone was insufficient for standing unless a plaintiff suffered some type of "material risk of harm" constituting a personal concrete and particularized injury.[48] Building upon some language in the *Spokeo* decision, the *TransUnion* majority opinion emphasized that although Congress has some discretion in defining new types of statutory injuries, Congress may only properly authorize statutory actions based upon real injuries that have some basis or relationship to traditional injuries established in the common law.[49] That the *TransUnion* majority opinion went farther than the *Spokeo* decision in limiting congressional authority to create new causes of action or statutory injuries is supported by the fact that three justices who joined

[44] *See infra* Part III.B.

[45] *See TransUnion*, 141 S. Ct. at 2203, 2205-07 (stating federal courts may only resolve suits involving plaintiff with real and concrete injuries); *Spokeo*, 578 U.S. at 338-39; *DaimlerChrysler*, 547 U.S. at 340-43; *Friends of the Earth*, 528 U.S. at 180 ("[W]e have an obligation to assure ourselves that [petitioner] had Article III standing at the outset of the litigation."); *see also* Mank, *Seven Members*, introductory author footnote *supra*, at 729.

[46] *See infra* Parts II.A, II.C.

[47] *See infra* Parts II.A, II.B.

[48] *Spokeo*, 578 U.S. at 338-42.

[49] *See TransUnion*, 141 S. Ct. at 2204-07.

the *Spokeo* majority opinion dissented in *TransUnion*: Justices Thomas, Breyer, and Kagan.[50]

A. Spokeo *Requires Standing Injuries to be Concrete and Particularized*

In 2016, the Supreme Court in *Spokeo* examined when a plaintiff's federal statutory injury establishes sufficient injury for Article III standing.[51] The *Spokeo* Court held that a plaintiff asserting a federal statutory injury must demonstrate not only a concrete injury, but also a particularized one to satisfy the standing requirement of an injury in fact.[52] The *Spokeo* decision quoted with approval the definition of a particularized standing injury in the 1992 *Lujan v. Defenders* decision: "For an injury to be 'particularized,' it 'must affect the plaintiff in a personal and individual way.'"[53] In *Spokeo*, the plaintiff had clearly suffered a personal and therefore a particularized injury from inaccurate information published by Spokeo's website, but the question was whether the alleged injury was a concrete injury causing actual harm to the plaintiff or a mere abstract injury that caused no real harm to the plaintiff.[54] The Supreme Court in *Spokeo* approved the Ninth Circuit's decision that the plaintiff, Robins, had asserted a particularized standing injury to his personal interests in light of the defendant Spokeo, Inc. mishandling his personal credit information.[55] Nevertheless, the Supreme Court remanded the case back to the Ninth Circuit because the court of appeals had only concluded that Robins had suffered from an individualized or particularized injury, and had failed to address whether the plaintiff additionally had a concrete injury that caused him actual harm.[56]

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[50] *Id.* at 2199.

[51] *Spokeo*, 578 U.S. at 338-42.

[52] *Id.* at 334, 339-40, 342-43; *see also* Mank, *Seven Members*, introductory author footnote *supra*, at 732.

[53] *Spokeo*, 578 U.S. at 339 (affirmatively quoting Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 n.1 (1992)).

[54] *Id.* at 333-37, 339-40.

[55] *Id.* at 333-41; *see also* Mank, *Seven Members*, introductory author footnote *supra*, at 733.

[56] *Spokeo*, 578 U.S. at 334, 343; *see also* Mank, *Seven Members*, introductory author footnote *supra*, at 733. On remand, the Ninth Circuit held that Robins had suffered actual harm from Spokeo's mishandling his personal information and therefore a concrete

The *Spokeo* decision provided some explanation for when an injury is sufficiently concrete to meet Article III standing requirements. The Court declared that "[a] 'concrete' injury must be '*de facto*'; that is, it must actually exist."[57] The majority opinion further explicated, "When we have used the adjective 'concrete,' we have meant to convey the usual meaning of the term — 'real,' and not 'abstract.'"[58] Accordingly, the *Spokeo* decision stated that "[c]oncreteness, therefore, is quite different from particularization."[59]

Although a statutory violation may not automatically satisfy Article III's requirement of a personal and concrete injury, the *Spokeo* decision suggested that some types of procedural statutory injuries may be presumed to be concrete in some circumstances, especially if they are intangible or informational injuries that are hard to measure.[60] For example, the Court explained that the "risk of real harm" can satisfy the concreteness standing test, and, as an example, observed that tort victims may recover "even if their harms may be difficult to prove or measure."[61] Furthermore, the *Spokeo* Court clarified that the government's violation of a statute granting public access to government-held information may in some cases be considered a concrete injury permitting a plaintiff to establish Article III standing without proof of additional harm.[62] The *Spokeo* majority opinion stated,

injury that satisfied Article III standing. Robins v. Spokeo, 867 F.3d 1108, 1117-18 (9th Cir. 2017).

[57] *Spokeo*, 578 U.S. at 340; *see also* Mank, *Seven Members*, introductory author footnote *supra*, at 733.

[58] *Spokeo*, 578 U.S. at 340; *see also* Mank, *Seven Members*, introductory author footnote *supra*, at 733.

[59] *Spokeo*, 578 U.S. at 340; *see also* Mank, *Seven Members*, introductory author footnote *supra*, at 733.

[60] *Spokeo*, 578 U.S. at 341-42 (citing Pub. Citizen v. U.S. Dep't of Just., 491 U.S. 440, 449 (1989); FEC v. Akins, 524 U.S. 11, 20-25 (1998)); Robins v. Spokeo, Inc., 867 F.3d 1108, 1113 (9th Cir. 2017).

[61] *Spokeo*, 578 U.S. at 341; *see also* Mank, *Seven Members*, introductory author footnote *supra*, at 733-34.

[62] *Spokeo*, 578 U.S. at 341-42 (citing Pub. Citizen v. U.S. Dep't of Just., 491 U.S. 440, 449 (1989); FEC v. Akins, 524 U.S. 11, 20-25 (1998)); *see also* Mank, *Seven Members*, introductory author footnote *supra*, at 734.

> Just as the common law permitted suit in such instances, the violation of a procedural right granted by statute can be sufficient in some circumstances to constitute injury in fact. In other words, a plaintiff in such a case need not allege any *additional* harm beyond the one Congress has identified.[63]

However, Justice Alito's *Spokeo* majority opinion suggested that there are limits on how far Congress may establish statutory violations without a plaintiff proving that the plaintiff has suffered actual concrete and particularized harm from the statutory violation. The *Spokeo* Court implied it would give some but not unlimited deference to how Congress defined intangible injuries in a statute. The *Spokeo* majority opinion stated:

> In determining whether an intangible harm constitutes injury in fact, both history and the judgment of Congress play important roles. Because the doctrine of standing derives from the case-or-controversy requirement, and because that requirement in turn is grounded in historical practice, it is instructive to consider whether an alleged intangible harm has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts.[64]

In *TransUnion*, the Court would discuss in more detail when federal courts might refuse to recognize a statutory injury as sufficient for standing if it does not possess, as the *Spokeo* decision stated, a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts.[65] Additionally, the *Spokeo* decision placed limits on what constitutes a concrete and real injury by explaining that inconsequential harms such as a reporting inaccuracy like an "incorrect zip code" do not establish a "material risk

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[63] *Spokeo*, 578 U.S. at 342; *see also* Mank, *Seven Members*, introductory author footnote *supra*, at 734.

[64] *Spokeo*, 578 U.S. at 340-41.

[65] *See* TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2204-07 (2021) (discussing *Spokeo*, 578 U.S. at 340-41).

of harm" and, therefore, do not constitute a concrete injury worthy of standing.[66]

B. Justice Thomas's Concurring Opinion in Spokeo

In his concurring opinion in *Spokeo*, Justice Thomas made a sharp distinction between private litigants asserting private rights against a private defendant and private parties seeking the vindication of public rights by suing a government institution or acting as private attorneys general on behalf of the Executive Branch.[67] He argued that standing rights have been historically broad in purely private litigation but much narrower in public rights litigation involving government institutions or private attorneys general suits on behalf of the government because of separation of powers concerns.[68] This distinction between broad standing in cases involving purely private damages, and narrow standing in private suits against the government or private attorneys general on behalf of the Executive Branch in public rights litigation, helps to explain why Justice Thomas concurred in the *Spokeo* case and dissented in the *TransUnion* decision.[69] In his *Spokeo* concurrence, Justice Thomas wrote

> separately to explain how, in my view, the injury-in-fact requirement applies to different types of rights. The judicial power of common-law courts was historically limited depending on the nature of the plaintiff's suit. Common-law courts more readily entertained suits from private plaintiffs who alleged a

[66] *Spokeo*, 578 U.S. at 342; *see also* Mank, *Seven Members*, introductory author footnote *supra*, at 734.

[67] *Spokeo*, 578 U.S. at 343-49 (Thomas, J., concurring) (contrasting broad standing for suits between private parties for personal damages as opposed to narrow standing in suits by private parties against the government seeking enforcement of the law or environmental citizen suits where private attorneys general seeking to enforce a federal statute). *See generally* Friends of the Earth, Inc. v. Laidlaw Env't Servs., Inc., 528 U.S. 167, 185-89 (2000) (holding that private plaintiffs have Article III standing to seek civil penalties on behalf of the Executive Branch under the Clean Water Act because the plaintiffs benefit from the deterrent effect of the civil penalties even if the plaintiffs are not seeking personal damages).

[68] *Spokeo*, 578 U.S. at 344, 346-47 (Thomas, J., concurring) (same).

[69] *See infra* notes 70–86 & Part II.D.

> violation of their own rights, in contrast to private plaintiffs who asserted claims vindicating public rights. Those limitations persist in modern standing doctrine.[70]

"Historically," Justice Thomas argued, "common-law courts possessed broad power to adjudicate suits involving the alleged violation of private rights, even when plaintiffs alleged only the violation of those rights and nothing more."[71] He explained,

> In a suit for the violation of a private right, courts historically presumed that the plaintiff suffered a *de facto* injury merely from having his personal, legal rights invaded. Thus, when one man placed his foot on another's property, the property owner needed to show nothing more to establish a traditional case or controversy.[72]

Justice Thomas contended that private plaintiffs asserting private rights did not historically have to demonstrate actual or real damages beyond "the violation of his private legal right."[73]

By contrast, Justice Thomas maintained that common law courts traditionally "required a further showing of injury for violations of 'public rights' — rights that involve duties owed 'to the whole community, considered as a community, in its social aggregate capacity.'"[74] He explicated, "Such rights include 'free navigation of waterways, passage on public highways, and general compliance with regulatory law.'"[75] Justice Thomas asserted that "[t]hese differences between legal claims brought by private plaintiffs for the violation of

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

[71] *Id.* at 344.

[72] *Id.*

[73] Many traditional remedies for private-rights causes of action — such as for trespass, infringement of intellectual property, and unjust enrichment — are not contingent on a plaintiff's allegation of damages beyond the violation of his private legal right. *Id.* at 344-45.

[74] *Id.* at 345 (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *5 (1772)).

[75] *Id.* (quoting Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 MICH. L. REV. 689, 693 (2004)).

public and private rights underlie modern standing doctrine and explain the Court's description of the injury-in-fact requirement."[76]

Justice Thomas argued that the concrete injury standing requirement is appropriately applied to a private plaintiff's attempt to vindicate the infringement of *public* rights.[77] He explained,

> This requirement applies with special force when a plaintiff files suit to require an executive agency to 'follow the law'; at that point, the citizen must prove that he 'has sustained or is immediately in danger of sustaining a direct injury as the result of that [challenged] action and it is not sufficient that he has merely a general interest common to all members of the public.'[78]

Justice Thomas also cited environmental citizen suits where statutes authorize private parties to act as private attorneys general on behalf of the Executive Branch to sue for governmental penalties or injunctions against private parties that have allegedly violated a federal statute or regulation and there is no allegation that the defendant owes personal damages to the plaintiff.[79]

However, Justice Thomas maintained that "the concrete-harm requirement does not apply as rigorously when a private plaintiff seeks to vindicate his own private rights. Our contemporary decisions have not required a plaintiff to assert an actual injury beyond the violation of his personal legal rights to satisfy the 'injury-in-fact' requirement."[80] He explained that "separation-of-powers concerns underlying our public-rights decisions are not implicated when private individuals sue to redress violations of their own private rights. But, when they are

[76] *Id.* at 346.

[77] *Id.* (emphasis in original).

[78] *Id.* (quoting *Ex parte* Levitt, 302 U.S. 633, 634 (1937) (per curiam)).

[79] *Id.* (citing Lujan v. Defs. of Wildlife, 504 U.S. 555, 572-73 (1992) (evaluating standing where plaintiffs sought to enforce the Endangered Species Act); Friends of the Earth, Inc. v. Laidlaw Env't Servs., Inc., 528 U.S. 167, 183-84 (2000) (Clean Water Act)); *id.* at 185-89 (holding that private plaintiffs have Article III standing to seek civil penalties on behalf of the Executive Branch under the Clean Water Act because the plaintiffs benefit from the deterrent effect of the civil penalties even if the plaintiffs are not seeking personal damages).

[80] *Spokeo*, 578 U.S. at 347 (Thomas, J., concurring).

implicated, standing doctrine keeps courts out of political disputes by denying private litigants the right to test the abstract legality of government action."[81] He further explicated,

> [b]ut where one private party has alleged that another private party violated his private rights, there is generally no danger that the private party's suit is an impermissible attempt to police the activity of the political branches or, more broadly, that the legislative branch has impermissibly delegated law enforcement authority from the executive to a private individual.[82]

Based on these distinctions between suits involving private versus public rights, Justice Thomas argued in his *Spokeo* concurrence that Congress had broad authority to create private rights suits without proof of actual harm to the plaintiff, but that Congress could authorize private plaintiffs to enforce public rights only where "the plaintiff has suffered a concrete harm particular to him."[83] He explained that a plaintiff in a private suit authorized by a federal statute need only show that the plaintiff is asserting their own individualized rights, as opposed to the rights of other people.[84] In the *Spokeo* case, Justice Thomas asserted that the lower courts on remand should determine the following facts:

> [i]f Congress has created a private duty owed personally to Robins to protect his information, then the violation of the legal duty suffices for Article III injury in fact. If that provision, however, vests any and all consumers with the power to police the "reasonable procedures" of Spokeo, without more, then Robins has no standing to sue for its violation absent an allegation that he has suffered individualized harm.[85]

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[81] *Id.*

[82] *Id.* (citing F. Andrew Hessick, *Standing, Injury in Fact, and Private Rights*, 93 CORNELL L. REV. 275, 317-21 (2008)).

[83] *Id.* at 348.

[84] *Id.* at 349.

[85] *Id.*

A strength of Justice Thomas' concurring opinion in *Spokeo* is that he attempts to ground his distinction between private law and public law standing doctrine based upon historical cases and historical scholarship.[86] However, any historical analysis needs to be open to the possibility of new evidence. As will be discussed in Part III.B, Professor Young argues that our historical understanding of standing doctrine is better informed in light of Professors Bray and Miller's article discussing the history of equity jurisprudence and especially the idea that equity cases require a "grievance" that is analogous to standing's injury in fact requirement.[87] Perhaps Justice Thomas might rethink his approach to standing in light of the new historical evidence by Professors Bray and Miller, and Professor Young's application of equity principles to the history of standing doctrine.[88] On the other hand, Justice Thomas might stick to his argument that courts have historically applied a more lenient approach to standing in private suits than public rights cases.[89]

C. TransUnion *Limits the Authority of Congress to Establish New Causes of Action Without Statutory Injuries Comparable to Traditional Common Law Injuries*[90]

In 2021, five years after the *Spokeo* decision, the Supreme Court decided *TransUnion*[91] in a divided five to four decision.[92] The *TransUnion* case relied heavily upon the Court's prior *Spokeo* decision, but the *TransUnion* decision arguably went beyond the *Spokeo* decision by narrowing or limiting the Court's recognition of standing injury in

[86] *See id.* at 343-49; *see also supra* notes 70–85; *infra* Part III.B (discussing an article by Professors Ann Woolhandler and Caleb Nelson).

[87] *See infra* Part III.B. *See generally* Bray & Miller, *supra* note 11, at 1764, 1766, 1775-86, 1789, 1795, 1799 (discussing importance of establishing a "grievance" in equity actions).

[88] *See supra* INTRODUCTION; *infra* Part III.B.

[89] *See supra* notes 70–86; *infra* Part II.D.

[90] The factual discussion of the *TransUnion* decision in this article relies upon my prior article, Mank, *Seven Members*, introductory author footnote *supra*, at 735-38, but the analysis of that case is significantly different.

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

[92] *See id.* at 2190, 2197-99, 2214.

statutory rights cases in the view of the four dissenting justices: Justices Thomas, Breyer, Sotomayor and Kagan.[93] The first paragraph of Justice Kavanaugh's majority opinion in *TransUnion* emphasized that plaintiffs in federal courts must show they have "suffered a concrete harm."[94] He then quoted with approval the *Spokeo* decision for the principle that "[c]entral to assessing concreteness is whether the asserted harm has a 'close relationship' to a harm traditionally recognized as providing a basis for a lawsuit in American courts — such as physical harm, monetary harm, or various intangible harms including (as relevant here) reputational harm."[95]

One significant difference between the *Spokeo* and *TransUnion* decisions is that the *Spokeo* majority opinion quoted Justice Kennedy's concurring opinion in *Lujan v. Defenders of Wildlife* for the principle that "Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before."[96] Justice Kennedy joined the majority in *Spokeo* and, therefore, it is not surprising that Justice Alito's opinion included a citation to Justice Kennedy's expansive views on congressional authority to define standing injuries.[97] By the time of the *TransUnion* decision in 2021, Justice Kennedy had retired from the Court.[98] Justice Kavanaugh's majority opinion in *TransUnion* does not cite Justice Kennedy's concurring opinion in *Lujan*, and that is arguably because Justice Kavanaugh has a much narrower view of the extent to which Congress may expand standing injuries beyond the common law.[99]

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[93] *Id.* at 2214-25 (Thomas, J., dissenting) (joined by Breyer, Sotomayor & Kagan, JJ.); *infra* Part II.D; *see also TransUnion*, 141 S. Ct. at 2225-26 (Kagan, J., dissenting) (joined by Breyer & Sotomayor, JJ.).

[94] *TransUnion*, 141 S. Ct. at 2200 (majority opinion).

[95] *Id.*

[96] Spokeo, Inc. v. Robins, 578 U.S. 330, 341 (2016) (quoting Lujan v. Defs. of Wildlife, 504 U.S. 555, 580 (1992) (Kennedy, J., concurring in part and concurring in judgment)).

[97] *Id.*

[98] Justice Kennedy retired from the Supreme Court on July 31, 2018. *Anthony M. Kennedy*, OYEZ, https://www.oyez.org/justices/anthony_m_kennedy (last visited Aug. 17, 2023) [https://perma.cc/YB53-TU73].

[99] The *TransUnion* decision appeared to place restrictions on the authority of Congress to create new types of standing harms when the Court stated, "even though 'Congress may "elevate" harms that "exist" in the real world before Congress recognized

In *TransUnion*, the defendant TransUnion's credit reporting service had falsely branded 8,185 individuals as potentially being on the U.S. Treasury Department's Office of Foreign Assets Control ("OFAC") list of terrorists, drug traffickers, and other serious criminals.[100] The 8,185 individuals brought a class action suit[101] pursuant to The Fair Credit Reporting Act ("FCRA"),[102] which regulates the consumer reporting agencies that collect and publicize personal information about consumers, and authorizes lawsuits and damages for certain violations of the Act.[103] The parties agreed prior to trial that only 1,853 class members had their misleading credit reports containing OFAC alerts provided to third parties during the relevant time period in the suit, and that the credit files of the other 6,332 class members were not provided to third parties during the relevant time period.[104] The district court ruled that all class members had Article III standing for their statutory claims.[105] The jury returned a verdict for the plaintiffs and awarded each class member statutory damages and punitive damages.[106] A divided panel of the Ninth Circuit affirmed that all 8,185 class members had standing as to all three claims, but reduced the damages awarded by the jury and approved a class damages award of about $40 million.[107]

The Supreme Court reversed the Ninth Circuit Court of Appeals decision by holding that those 6,332 class members whose false information was not reported to third parties "have not demonstrated concrete [reputational] harm and thus lack Article III standing to sue on the reasonable-procedures claim."[108] The Court had "no trouble concluding that the 1,853 class members suffered a concrete harm that

them to actionable legal status, it may not simply enact an injury into existence, using its lawmaking power to transform something that is not remotely harmful into something that is.'" *TransUnion*, 141 S. Ct. at 2205 (quoting Hagy v. Demers & Adams, 882 F.3d 616, 622 (6th Cir. 2018) (citing *Spokeo*, 578 U.S. at 341)).

[100] *TransUnion*, 141 S. Ct. at 2200-02, 2207-09.

[101] *Id.* at 2200.

[102] 15 U.S.C. §§ 1681, 1681x.

[103] *Id.*

[104] *TransUnion*, 141 S. Ct. at 2202, 2208-09.

[105] *Id.* at 2213 n.8.

[106] *Id.* at 2202.

[107] *Id.*

[108] *Id.* at 2200.

qualifies as an injury in fact" because they suffered harm similar to the tort of defamation by being characterized as potential terrorists or criminals to third parties.[109] Justice Kavanaugh's majority opinion interpreted the *Spokeo* decision as demanding a plaintiff demonstrate that they have suffered a concrete injury in order to have Article III standing.[110] According to the *TransUnion* decision, the 6,332 class members whose false information was not reported to third parties did not suffer a concrete injury necessary for Article III standing even if TransUnion LLC's handling of their information was poor and exposed the 6,332 class members to potential risk since they did not sustain an actual harmful injury.[111] By contrast, Justice Thomas's dissenting opinion in *TransUnion* contended that these 6,332 class members had suffered from a concrete statutory injury because the *Spokeo* decision directed federal courts to defer to the definition of injury established by Congress in a relevant statute, the FCRA in this case, rather than the majority's common law evaluation of what is actionable defamation.[112]

In deciding whether a harm is "concrete," the *TransUnion* decision emphasized the importance of history and tradition in deciding which cases meet Article III standing requirements.[113] Justice Kavanaugh's majority opinion observed that "*Spokeo v. Robins* indicated that courts

[109] *Id.* at 2209.

[110] *Id.* at 2210-14. On remand after the Supreme Court's decision, the U.S. District Court for the Northern District of California granted preliminary approval of a proposed $9 million settlement by TransUnion that only paid compensation to the class members whose false designation as suspected terrorists or criminals had been transmitted to third parties. Holly Barker, *TransUnion Reaches $9 Million Deal in Terrorist Watch List Suit*, BLOOMBERG L. (July 20, 2022, 8:57 AM), https://www.bloomberglaw.com/bloomberglawnews/class-action/X1KAGHVO000000?bna_news_filter=class-action#jcite [https://perma.cc/L884-YD9H].

[111] *TransUnion*, 141 S. Ct. at 2210-14.

[112] *Id.* at 2214-25 (Thomas, J., dissenting); *see also* Noah Feldman, Opinion, *Supreme Court Blocks Congress on the Right to Sue*, BLOOMBERG (June 25, 2021, 9:43 AM PDT), https://www.bloomberg.com/opinion/articles/2021-06-25/supreme-court-liberal-justices-join-clarence-thomas-on-lawsuit-ruling-dissent [https://perma.cc/RZX7-RF9A] (arguing that *TransUnion* gave the Supreme Court, and not Congress, authority to decide what is a proper Article III standing injury, and thereby limited the authority of "Congress to confer rights on individuals by law and then give them the authority to sue in federal court to enforce those rights."); *infra* Part II.D.

[113] *TransUnion*, 141 S. Ct. at 2204 (majority opinion).

should assess whether the alleged injury to the plaintiff has a 'close relationship' to a harm 'traditionally' recognized as providing a basis for a lawsuit in American courts."[114] The *TransUnion* decision offered a much more detailed explanation than the *Spokeo* decision of which types of statutory actions might qualify as having "a close historical or common-law analogue for their asserted injury."[115] Justice Kavanaugh explained that "*Spokeo* does not require an exact duplicate in American history and tradition. But *Spokeo* is not an open-ended invitation for federal courts to loosen Article III based on contemporary, evolving beliefs about what kinds of suits should be heard in federal courts."[116] First, the *TransUnion* decision addressed tangible harms that "readily qualify as concrete injuries under Article III. The most obvious are traditional tangible harms, such as physical harms and monetary harms. If a defendant has caused physical or monetary injury to the plaintiff, the plaintiff has suffered a concrete injury in fact under Article III."[117]

Next, Justice Kavanaugh's majority opinion explained that some types of intangible harms may be concrete standing injuries. He stated, "Chief among them are injuries with a close relationship to harms traditionally recognized as providing a basis for lawsuits in American courts. Those include, for example, reputational harms, disclosure of private information, and intrusion upon seclusion. And those traditional harms may also include harms specified by the Constitution itself."[118]

The *TransUnion* decision suggested that it would give Congress some deference in defining statutory injuries, but not unlimited deference.[119] Justice Kavanaugh initially observed that, "In determining whether a harm is sufficiently concrete to qualify as an injury in fact, the Court in *Spokeo* said that Congress's views may be 'instructive.'"[120] Furthermore, the *TransUnion* decision stated, "Courts must afford due respect to Congress's decision to impose a statutory prohibition or obligation on a defendant, and to grant a plaintiff a cause of action to sue over the

[114] *Id.* (quoting Spokeo, Inc. v. Robins, 578 U.S. 330, 341 (2016)).

[115] *Id.*

[116] *Id.*

[117] *Id.*

[118] *Id.* (citations omitted).

[119] *See id.* at 2204-05.

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

defendant's violation of that statutory prohibition or obligation."[121] Additionally, Justice Kavanaugh quoted *Spokeo* for the principle that "[c]ongress may 'elevate to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law.'"[122] But the *TransUnion* decision cautioned that "even though 'Congress may "elevate" harms that "exist" in the real world before Congress recognized them to actionable legal status, it may not simply enact an injury into existence, using its lawmaking power to transform something that is not remotely harmful into something that is.'"[123] Justice Kavanaugh's interpretation of how much deference the *Spokeo* decision gives congressional statutory harms differs from Justice Thomas' dissenting opinion in *TransUnion*, which argued that the majority opinion unduly limited congressional authority to establish statutory standing rights in contradiction to both the U.S. Constitution's text and the Court's historical precedent.[124]

The *TransUnion* decision returned to the *Spokeo* decision for the principle that "this Court has rejected the proposition that 'a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right.'" [125] "As the Court emphasized in *Spokeo*, 'Article III standing requires a concrete injury even in the context of a statutory violation.'"[126] Furthermore, Justice Kavanaugh explained,

> Congress's creation of a statutory prohibition or obligation and a cause of action does not relieve courts of their responsibility to independently decide whether a plaintiff has suffered a concrete harm under Article III any more than, for example, Congress's enactment of a law regulating speech relieves courts

[121] *Id.* (citing *Spokeo*, 578 U.S. at 340-41).

[122] *Id.* at 2204-05 (quoting *Spokeo*, 578 U.S. at 341).

[123] *Id.* at 2205 (quoting Hagy v. Demers & Adams, 882 F.3d 616, 622 (6th Cir. 2018) (citing *Spokeo*, 578 U.S. at 341)).

[124] *See id.* at 2214, 2219-21 (Thomas, J., dissenting); *infra* Part II.D.

[125] *TransUnion*, 141 S. Ct. at 2205 (majority opinion) (quoting *Spokeo*, 578 U.S., at 341).

[126] *Id.*

> of their responsibility to independently decide whether the law violates the First Amendment.[127]

The *TransUnion* decision explicated,

> Congress may enact legal prohibitions and obligations. And Congress may create causes of action for plaintiffs to sue defendants who violate those legal prohibitions or obligations. But under Article III, an injury in law is not an injury in fact. Only those plaintiffs who have been concretely harmed by a defendant's statutory violation may sue that private defendant over that violation in federal court.[128]

Justice Kavanaugh then warns, "if the law of Article III did not require plaintiffs to demonstrate a 'concrete harm,' Congress could authorize virtually any citizen to bring a statutory damages suit against virtually any defendant who violated virtually any federal law. Such an expansive understanding of Article III would flout constitutional text, history, and precedent."[129] Justice Kavanaugh's majority opinion in *TransUnion* is not necessarily contrary to the *Spokeo* decision regarding the scope of Article III standing,[130] although Justice Thomas' dissenting opinion argued that the majority opinion was contrary to history and the Constitution.[131] The *TransUnion* opinion is much more detailed about when statutory violations do not qualify as concrete standing harms than the *Spokeo* decision.[132]

Justice Kavanaugh's majority opinion in *TransUnion* goes beyond the *Spokeo* decision by invoking the Executive Branch's Article II authority for limiting statutory standing rights, and the only citations he offers in support is a law review article written by Chief Justice Roberts before he became a member of the Court, and a *plurality* opinion by Justice Scalia in the Court's 1992 decision in *Lujan v. Defenders of Wildlife*.[133] Justice Kavanaugh argued:

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[127] *Id.*

[128] *Id.*

[129] *Id.* at 2206.

[130] *See supra* Part II.B.

[131] *See TransUnion*, 141 S. Ct. at 2214, 2219-21 (Thomas, J., dissenting); *infra* Part II.D.

[132] *See TransUnion*, 141 S. Ct. at 2204-06 (majority opinion).

[133] *See id.* at 2207.

> A regime where Congress could freely authorize unharmed plaintiffs to sue defendants who violate federal law not only would violate Article III but also would infringe on the Executive Branch's Article II authority. We accept the "displacement of the democratically elected branches when necessary to decide an actual case." But otherwise, the choice of how to prioritize and how aggressively to pursue legal actions against defendants who violate the law falls within the discretion of the Executive Branch, not within the purview of private plaintiffs (and their attorneys). Private plaintiffs are not accountable to the people and are not charged with pursuing the public interest in enforcing a defendant's general compliance with regulatory law.[134]

No prior Supreme Court *majority* decision had ever invoked Article II to limit Article III standing, so it is fair to say that the *TransUnion* decision is potentially a significant departure from prior cases and a limitation on standing in future cases.[135]

Professor Sunstein argues that it was totally inappropriate for the *TransUnion* majority opinion to raise Article II concerns about a suit potentially infringing executive authority in a case involving only two private parties and not involving the federal government.[136] In his view, "Article II concerns do not belong in standing cases" at all, although he

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[134] *Id.* at 2207 (emphasis omitted) (quoting John Roberts, *Article III Limits on Statutory Standing*, 42 DUKE L.J. 1219, 1230 (1993); Lujan v. Defs. of Wildlife, 504 U.S. 555, 577 (1992)).

[135] For discussion of how Justice Scalia's plurality opinion in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 577 (1992) sought to limit standing including through Article II limitations, see Solimine, *supra* note 40, at 1029, 1049-56; Cass R. Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 197-215 (1992) [hereinafter *What's Standing After* Lujan?].

[136] *See* Sunstein, *Injury in Fact*, *supra* note 7, at 367-68 n.99, 371 n.119; *see also* F. Andrew Hessick, *The Separation-of-Powers Theory of Standing*, 95 N.C. L. REV. 673, 675-76 (2017) [hereinafter *The Separation-of-Powers Theory*] (stating "a suit by a private individual seeking to vindicate a private right does not threaten the power of Congress or of the President"); Case Comment, *Article III — Standing — Separation of Powers — Class Actions* — TransUnion LLC v. Ramirez, 135 HARV. L. REV. 333, 339-40 (2021) [hereinafter *Article III Standing*] (arguing that *TransUnion* should have not raised Article II concerns in a standing case involving private individuals and private claims).

acknowledges that issue is complicated.[137] However, only time will tell how the Court in the future uses the *TransUnion* decision to limit statutory standing rights through either Article III or Article II, and that issue may be more appropriately addressed in a case in which the Executive Branch of the U.S. government is a legitimate party and not just two private individuals.[138]

As the author discussed in a prior article, the *TransUnion* decision is also potentially an important decision for informational standing rights.[139] In *TransUnion*, the United States acting as *amicus curiae* "separately assert[ed] that the plaintiffs suffered a concrete 'informational injury'"[140] under prior Court cases interpreting public information statutes such as *FEC v. Akins*[141] and *Public Citizen v. U.S. Dep't of Justice*.[142] The Court rejected the government's informational injury argument because the *TransUnion* plaintiffs had received the information they requested, as *Akins* and *Public Citizen* requires, but the *TransUnion* plaintiffs' complaint instead made a different allegation that the information provided by the defendant was false or in a different format than required by the statute, the FCRA.[143]

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[137] Sunstein, *Injury in Fact*, *supra* note 7, at 367-68 n.99, 371 n.119. Professor Sunstein does concede that in extreme cases, Article III or Article II might limit congressional authority to establish standing rights. He writes: "Note that nothing I say here is meant to rule out the possibility that in very extreme cases, a congressional grant of standing might violate Article III or Article II: Imagine, for example, that Congress granted every American a kind of property right in legality, and accompanied the grant of that right with a cause of action. Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992), is best understood as treating the citizens' suit, as such, as that kind of extreme case." Sunstein, *Injury in Fact*, *supra* note 7, at 352-53 n.18.

[138] Some scholars have argued that Article II concerns about executive authority do not implicate private suits involving private damages. *See* Hessick, *The Separation-of-Powers Theory*, *supra* note 136, at 675-76; Sunstein, *Injury in Fact*, *supra* note 7, at 367-68 n.99, 371 n.119; *Article III Standing*, *supra* note 136, at 339-40.

[139] *See* Mank, *Seven Members*, introductory author footnote *supra*, at 735-38 (discussing the potential impact of *TransUnion* on informational standing rights). This paragraph on the potential impact of *TransUnion* on informational standing rights relies upon my prior article. *See id.*

[140] TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2214 (2021).

[141] 524 U.S. 11 (1998).

[142] 491 U.S. 440 (1989).

[143] *TransUnion,* 141 S. Ct. at 2214.

The *TransUnion* decision suggested that plaintiffs seeking to establish informational standing in credit reporting cases must show some type of adverse harm from the allegedly false information to demonstrate Article III standing.[144] Justice Kavanaugh's majority opinion stated that the *Akins* and *Public Citizen* cases "involved denial of information subject to public-disclosure or sunshine laws that entitle all members of the public to certain information. This case does not involve such a public-disclosure law."[145] The *TransUnion* decision requires plaintiffs in credit reporting cases to identify "'downstream consequences' from failing to receive the required information" and to demonstrate "adverse effects" to satisfy Article III.[146] It appears that plaintiffs in future credit reporting cases would have informational standing only if they can prove they have suffered downstream consequences from the alleged actions of the credit reporting agency.[147] By restricting the authority of Congress to establish statutory rights, including informational rights, unless a plaintiff can prove they suffered an actual real world harm, the *TransUnion* decision arguably restricted Article III standing rights more so than the *Spokeo* decision.[148] As a result, several commentators have criticized the *TransUnion* decision, which they see as building upon unnecessarily restrictive standing policies dating to the 1970s.[149]

D. Justice Thomas Dissenting Opinion in TransUnion

In his dissenting opinion in *TransUnion*, Justice Thomas in part repeated his argument in his *Spokeo* concurrence that there should be broader standing rights for individuals asserting private rights and narrower standing when an individual asserts public rights.[150] Additionally, he argued that "[t]his distinction mattered not only for traditional common-law rights, but also for newly created statutory

[144] *See id.*

[145] *Id.*

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

[147] *See id.* at 2214.

[148] *See supra* Part II.C.

[149] *See* Solove & Citron, *supra* note 8, at 62-66, 69-71; Sunstein, *Injury in Fact*, *supra* note 7, at 365-74; *infra* Part III.A.

[150] *See TransUnion*, 141 S. Ct. at 2217-18 (Thomas, J., dissenting).

ones."[151] Furthermore, Justice Thomas asserted, "The principle that the violation of an individual right gives rise to an actionable harm was widespread at the founding, in early American history, and in many modern cases."[152] Because the *TransUnion* case involved private parties only, Justice Thomas rejected the majority's requirement that plaintiffs prove some actual harm to themselves beyond the violation of the class action plaintiffs' statutory right to accurate credit information.[153] Accordingly, in his dissenting opinion in *TransUnion*, Justice Thomas claimed that the statutory right at issue in the case allowed all of the plaintiffs to recover damages without any specific showing of an injury in fact.[154]

Justice Thomas explained that the *TransUnion* majority inappropriately relied upon standing cases beginning only in 1970 to require a concrete injury in fact in every single case, including cases involving only purely private parties, when that requirement only made sense in public rights cases.[155] By ignoring the history of broad private rights to sue for private damages, he complained, "The 1970s injury-in-fact theory has now displaced the traditional gateway into federal courts."[156] In the *TransUnion* decision, Justice Thomas contended that the majority had improperly denied Congress the authority to establish statutory rights of action for legal injuries unless a plaintiff suffers a concrete standing injury.[157] He wrote,

> Never before has this Court declared that legal injury is *inherently* insufficient to support standing. And never before has this Court declared that legislatures are constitutionally precluded from creating legal rights enforceable in federal court if those rights deviate too far from their common-law roots. According to the majority, courts alone have the power to sift and weigh harms to decide whether they merit the Federal

[151] *Id.* at 2217.

[152] *Id.* at 2218.

[153] *See supra* notes 150–52; *infra* notes 154–58.

[154] *See TransUnion*, 141 S. Ct. at 2218-19 (Thomas, J., dissenting).

[155] *See id.* at 2218-21.

[156] *Id.* at 2221.

[157] *See id.* at 2219-21.

> Judiciary's attention. In the name of protecting the separation of powers, this Court has relieved the legislature of its power to create and define rights.[158]

It is possible that Justice Thomas might at least partially re-think his historical critique of the injury in fact requirement as dating only to the 1970s[159] if he had the opportunity to examine the new historical evidence regarding equity jurisprudence by Professors Bray and Miller, and Professor Young's application of equity principles to standing injury requirements.[160]

III. CRITICS OF ARTICLE III STANDING AND ESPECIALLY THE *TRANSUNION* DECISION, AND AN EQUITY DEFENSE OF STANDING REQUIREMENTS

A. *Critics of Article III Standing and Especially the* TransUnion *Decision*

For many years, a number of scholars have criticized Article III standing requirements, including the injury in fact mandate.[161] For example, Professor Cass Sunstein in 1992 wrote an article criticizing Justice Scalia's restrictive approach to standing's injury in fact

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[158] *Id.* at 2221.

[159] *See id.* at 2218-21.

[160] *See supra* INTRODUCTION; *infra* Part III.B.

[161] *See, e.g.*, Rachel Bayefsky, *Constitutional Injury and Tangibility*, 59 WM. & MARY L. REV. 2285, 2296 (2018) ("The injury-in-fact requirement may have initially served to liberalize the law of standing . . . . But the injury-in-fact requirement began, in the 1970s, to be interpreted more restrictively."); Richard H. Fallon, Jr., *The Fragmentation of Standing*, 93 TEX. L. REV. 1061 (2015) (arguing the Supreme Court in the 1970s promised that the three-part test for standing, including injury in fact, would be simple to apply, but instead its subsequent standing decisions are complicated and inconsistent); William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221 (1988) (arguing that current standing doctrine is complicated and inconsistent, and that the injury in fact test should be abandoned in favor of looking at the merits of the case); F. Andrew Hessick, *Standing, Injury in Fact, and Private Rights*, 93 CORNELL L. REV. 275, 290-99 (2008) [hereinafter *Standing, Injury in Fact, and Private Rights*] (discussing the development of the modern standing doctrine); Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371 (1988) (arguing modern standing law, including the injury in fact requirement, is overly complicated and unnecessarily prevents legitimate suits, yet has no real historical basis in Article III).

requirement in Scalia's plurality opinion in *Lujan*.[162] More recently, Professor Sunstein, in a draft article, has criticized the *TransUnion* decision as "the key case, the culmination and radicalization of a series of cases that had spoken far more cautiously and equivocally," including prior cases such as *Lujan* and *Spokeo*.[163]

Professor Sunstein argues that the standing "injury in fact" requirement was invented by Justice Douglas in his 1970 opinion, *Association of Data Processing Service Organizations, Inc. v. Camp*,[164] and has no legitimate basis "in the text or history of the Constitution, or indeed in any of the Court's precedents."[165] Professor Sunstein explains how the injury in fact test developed as follows:

> What was the source of the injury in fact test? Did the Supreme Court just make it up? The answer is basically yes. The concept of injury in fact did not come from Alexander Hamilton, John Jay, or James Madison. It does not appear in the debates in the Founding era. It appears to have first arisen in a 1955 law review article by Kenneth Culp Davis, purporting to interpret the [Administrative Procedure Act of 1946 ("APA")]. Davis relied on the APA's "adversely affected or aggrieved" language in support of his conclusion. In his view, someone is "adversely affected" if he suffers an injury "in fact."[166]

Professor Sunstein argues that Professor Davis's contention that the APA[167] allows any person adversely affected "in fact" to have standing to sue was contradicted by textual language in the APA that limits the

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[162] Lujan v. Defs. of Wildlife, 504 U.S. 555, 560-78 (1992) (Scalia, J., plurality opinion); *see also* Sunstein, *What's Standing After* Lujan*?*, *supra* note 135, at 197-215.

[163] Sunstein, *Injury in Fact*, *supra* note 7, at 365 n.80.

[164] Ass'n of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 152 (1970); *see* Sunstein, *Injury in Fact*, *supra* note 7, at 349, 355-59; *see also* Bayefsky, s*upra* note 161, at 2595-96 (discussing how the *Ass'n of Data Processing* decision changed standing law).

[165] Sunstein, *Injury in Fact*, *supra* note 7, at 349; *see also id.* at 349, 358-59.

[166] Sunstein, *Injury in Fact*, *supra* note 7, at 358-59 (discussing Administrative Procedure Act, 5 U.S.C. § 702); *see also id.* at 353 ("A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.").

[167] 5 U.S.C. § 500.

words "adversely affected or aggrieved" with the following language "within the meaning of the relevant statute."[168]

Justice Douglas apparently adopted the "injury in fact" test as a means to expand those who could challenge government action and to simplify the then complicated legal interest test that looked to the merits to decide standing.[169] Justice Douglas was successful in convincing the Court to adopt the injury in fact standing test as demonstrated by the Court's 1998 decision in *Steel Company v. Citizens for Better Environment*, which described the injury in fact requirement as the "first and foremost" of the elements of standing.[170] Ironically, as Professor Sunstein observes,

> Over the course of the last half-century, the injury-in-fact test has been transformed from a bold effort to expand the category of persons entitled to bring suit into an equally bold effort to achieve the opposite goal, by understanding judicially cognizable injuries largely by reference to the common law (and the Constitution), and by severely restricting Congress' power to create new rights and to allow people to sue to protect those rights. The transformation is lawless. It is disconnected from standard sources of constitutional law.[171]

Professor Sunstein contends that the concept of injury in fact should not be understood merely in terms of factual issues, but upon the legal rights established by Congress in a statute.[172] For example, the Court in

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[168] Sunstein, *Injury in Fact*, *supra* note 7, at 349, 353-59 (discussing 5 U.S.C. § 702).

[169] *See Ass'n of Data Processing*, 397 U.S. at 154 ("Where statutes are concerned, the trend is toward enlargement of the class of people who may protest administrative action."); Sunstein, *Injury in Fact*, *supra* note 7, at 349, 355-59; *see also* Bayefsky, s*upra* note 161, at 2295-96 (discussing how *Ass'n of Data Processing* decision changed prior standing law from legal interest test); Fallon, s*upra* note 161, at 1065-66 (same); Hessick, *Standing, Injury in Fact, and Private Rights*, s*upra* note 161, at 290-95 (same).

[170] Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 103 (1998); Sunstein, *Injury in Fact*, *supra* note 7, at 359-60.

[171] Sunstein, *Injury in Fact*, *supra* note 7, at 349-50; *see also* Bayefsky, s*upra* note 161, at 2296-98 (arguing that the Supreme Court beginning in the 1970s began adopting a much more restrictive reading of injury in fact than it had in the *Association of Data Processing* decision); Fallon, s*upra* note 161, at 1066-67 (same); Hessick, *Standing, Injury in Fact, and Private Rights*, *supra* note 161, at 296-99 (same).

[172] Sunstein, *Injury in Fact*, *supra* note 7, at 361-62.

its 1998 decision *FEC v. Akins*[173] had concluded that Congress by statute could create a right to information about voting that did not exist in the common law.[174] Professor Sunstein argues that in the *Akins* decision, the Court clearly recognized Congress' authority "to create legal rights unfamiliar to tradition and the common law."[175] Unfortunately, in Professor Sunstein's view, the *Spokeo* decision provided "[a]n ambiguous signal" about whether Congress may create novel rights or is limited by traditional concepts of which types of rights may be adjudicated in federal courts in a "cautious" manner and "without breaking new ground."[176]

By contrast, Professor Sunstein interprets the *TransUnion* decision as a "radical ruling" that limits Article III standing to "concrete" injuries that are traditionally recognized in lawsuits in American courts.[177] Professor Sunstein interprets the *TransUnion* decision as refusing to recognize statutory harms as real injuries if they are outside traditional notions of injury.[178] He writes,

> One might think that whether a plaintiff is injured depends on what the law says. But in the [*TransUnion*] Court's view, injury seems like a kind of Platonic form. Whatever Congress says, people not subjected to traditional harms *simply are not injured*. The injuries they perceive or experience are not injuries that Article III courts are authorized to "see."[179]

In Professor Sunstein's view, there is no historical evidence in the "Founding-era debates" or the original understanding of the U.S. Constitution to support *TransUnion's* narrow approach to injury in

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[173] 524 U.S. 11 (1998).

[174] *See id.* at 22; Sunstein, *Injury in Fact*, *supra* note 7, at 364.

[175] Sunstein, *Injury in Fact*, *supra* note 7, at 364.

[176] *Id.* at 364-65.

[177] *Id.* at 365-74; *see also* Solove & Citron, *supra* note 8, at 65 ("*TransUnion* purports to be a mere application of current law when, in fact, it works a significant change in the law. Supreme Court opinions often wear this mask, pretending to be routine and concealing their radical departure from precedent. *Spokeo* made a significant turn, and *TransUnion* pushes even further into this new territory.").

[178] Sunstein, *Injury in Fact*, *supra* note 7, at 365-66.

[179] *Id.* at 366.

fact.[180] He contends that the *TransUnion* decision is analogous to the Court's discredited decision in *Lochner v. New York*[181] in "us[ing] common-law baselines in such a way as to strike down actions by the democratic branches of government, and thus to limit the reach of regulatory enactments."[182] Professors Solove and Citron agree with him, arguing:

> *TransUnion* is a usurpation of legislative power. *Spokeo* danced around the issue, noting that Congress can play a role in defining harm and noting that in certain cases, courts could override Congress's determination. *TransUnion* further encroaches on Congress's power. Normally, it has been the conservatives who have urged judicial restraint and deference to Congress. According to the traditional conservative critique, so-called "activist" judges are purportedly quick to override Congress's judgment and make law themselves. But that's just what this conservative majority of the Supreme Court does: It essentially rewrites the FCRA to be more to the Court's liking.[183]

Professor Sunstein argues that courts in future cases should read the *TransUnion* decision narrowly and limit the decision to its holding and not its extended discussion of what is a concrete injury.[184] He writes,

> The central holding is exceedingly narrow: Congress cannot authorize people to sue to collect damages against a credit company on the sole ground that it has produced, and is holding, a credit report that contains inaccurate information about them. Viewed most sympathetically, the Court's holding is that Congress cannot conjure an injury out of nothing — any more than it could say that someone who lives in Texas is injured by air pollution in Maine, or that someone who lives in Utah is injured by automobile accidents in New Jersey.[185]

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[180] *Id.* at 369-70.

[181] 198 U.S. 45 (1905).

[182] Sunstein, *Injury in Fact*, *supra* note 7, at 371.

[183] Solove & Citron, *supra* note 8, at 69-70.

[184] Sunstein, *Injury in Fact*, *supra* note 7, at 372-74.

[185] *Id.* at 372.

Furthermore, Professor Sunstein argues that courts in future cases should read *TransUnion's* traditional rights limitation on injuries as narrowly as possible. He states,

> The challenge, of course, is to narrow the *TransUnion* ruling while also paying heed to the Court's explicit emphasis on "whether the asserted harm has a 'close relationship' to a harm traditionally recognized as providing a basis for a lawsuit in American courts — such as physical harm, monetary harm, or various intangible harms." The simplest way to do that is to note that many harms that Congress has singled out, as legally cognizable, should be understood to have a sufficiently close relationship. Air pollution can, of course, produce a physical harm or a monetary harm; it might also be akin to a common-law nuisance. But more broadly, *TransUnion* should not be taken as a train that runs over well-established categories of legally cognizable harm, or to insist on a conception of the judicial role that does not respect Congress's authority to go beyond common-law understandings of private rights. Congress has considerable room to categorize, as legally cognizable, a wide range of physical harms, monetary harms, and intangible harms, involving (for example) "aesthetic, conservational, and recreational" interests, as well as the interests in avoiding discrimination, unfair or manipulative practices, and risks to personal safety and health.[186]

Professor Sunstein concludes that the *TransUnion* decision is simply wrong in its view that Congress is limited in creating statutory rights to those traditionally recognized in the American legal system, and that the Court in the future should reject that approach.[187]

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[186] *Id.* at 373; *see also* Chemerinsky, *supra* note 7, at 291 (arguing that "the [Supreme] Court, and lower courts, should see the holding of the [*TransUnion*] case as being narrow and denying standing only when the claim presented, in the words of Justice Kavanaugh's majority opinion, is not 'remotely harmful'").

[187] Sunstein, *Injury in Fact*, *supra* note 7, at 373-74; *see also* Chemerinsky, *supra* note 7, at 291 ("In light of reliance interests in the statutory rights which have originated entire lines of jurisprudence, and of the separation of powers concerns in having the judiciary limit the power of Congress to confer rights of action in the name of judicial restraint, the Court should abandon the path it began in *Spokeo* and embraced in

B. An Equity Defense of Standing Requirements

While many scholars have strongly criticized the Court's standing doctrine, including the injury in fact test,[188] a few commentators have attempted to at least partially defend that doctrine.[189] For example, Professors Woolhandler and Nelson have provided historical evidence for the idea that modern standing doctrine has some basis in the founding era. They write,

> We do not claim that history compels acceptance of the modern Supreme Court's vision of standing, or that the constitutional nature of standing doctrine was crystal clear from the moment of the Founding on. The subsistence of qui tam actions alone might be enough to refute any such suggestion. We do, however, argue that history does not defeat standing doctrine; the notion of standing is not an innovation, and its constitutionalization does not contradict a settled historical consensus about the Constitution's meaning.[190]

In particular, Professors Woolhandler and Nelson claim that "eighteenth- and nineteenth-century courts were well aware of the need for proper parties."[191] Their careful historical research suggests a potential basis for modern standing doctrine placing some limitations on who can sue, as even Professor Sunstein acknowledges.[192] However, Professors Woolhandler and Nelson concede, "Admittedly, these early decisions are only suggestive; they read Article III to incorporate a notion of proper parties (defined in terms of real-world interests), but they did not involve congressional attempts to confer standing."[193] Because Professors Woolhandler and Nelson's research mainly

TransUnion."); Solove & Citron, *supra* note 8, at 69-71 (criticizing *TransUnion* for usurping legislative authority to protect consumers and privacy).

[188] *See supra* Part III.A. (discussing critics of Article III standing, especially in relation to *TransUnion* decision).

[189] *See infra* Part III.B. (discussing equity defense of standing requirements).

[190] Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 MICH. L. REV. 689, 691 (2004) (emphasis omitted).

[191] *Id.*

[192] Sunstein, *Injury in Fact*, *supra* note 7, at 358 n.44.

[193] Woolhandler & Nelson, *supra* note 190, at 720.

addresses potential historical support for standing limitations in common law actions and does not necessarily support standing limitations in statutory cases, Professor Sunstein believes that their research is compatible with his view that "a legal right and a cause of action are necessary and sufficient conditions for a lawsuit."[194]

Professor Young disagrees with scholars such as Professor Sunstein who criticize the injury in fact requirement and who argue instead that any plaintiff who has a statutory "cause of action" should have standing.[195] Young argues instead that equity provides a strong basis for standing and injury in fact limitations in statutory rights cases.[196] He takes as his starting point Professors Bray and Miller's observation that equity did not traditionally require a "cause of action." Instead, Professors Bray and Miller say, equity focuses on a "grievance" that can motivate the court to intervene.[197] Young argues that equitable grievances "look a lot like injury in fact."[198] He contends that longstanding practices in equity provide a stronger argument than the traditional practice of law for the Court's standing injury in fact requirement.[199] He contends that critics of the injury in fact requirement have focused on the law side of legal history and failed to discuss the traditional practice of equity.[200]

Professor Young observes that standing doctrine not only requires an injury in fact, but also that a case be redressable by courts.[201] If it is inappropriate to issue equitable relief such as injunctive relief in a case, then it makes little sense to recognize standing in a case where a court

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[194] Sunstein, *Injury in Fact*, *supra* note 7, at 358 n.44.

[195] *See* Young, *supra* note 10, at 1887 (citing critics of the injury in fact requirement and advocates of the cause of action approach as including Fletcher, *supra* note 161, at 290-91 and Sunstein, *What's Standing After* Lujan*?*, *supra* note 135, at 177).

[196] *Id.*

[197] *Id.* (citing Bray & Miller, *supra* note 11, at 1764 ("[E]quity did not have causes of actions. Having a cause of action was how a plaintiff would get into a court of law. But to get into equity, a plaintiff needed something quite different.")). *See generally* Bray & Miller, *supra* note 11, at 1764, 1766, 1775-86, 1789, 1795, 1799 (discussing importance of establishing a "grievance" in equity actions).

[198] *See* Young, *supra* note 10, at 1888.

[199] *Id.*at 1887-88.

[200] *Id.* at 1887, 1907-10.

[201] *Id.* at 1897-98.

will not order relief even if there is a statutory cause of action.[202] Young interprets Bray and Miller's work to mean that a mere cause of action is not enough in equity, which instead demands a plaintiff have a grievance justifying equitable relief.[203] Young contends that standing's focus on injury in fact does make sense in equity because courts must assess whether a plaintiff's injuries justify extraordinary relief beyond legal remedies.[204]

Professor Young argues that federal courts should focus on equitable principles rather than legal principles in standing law because "equitable claims compose the overwhelming majority of [federal standing] cases, at least in the last half century," although a few cases like *Spokeo* or *TransUnion* involved damages relief.[205] Professor Young provides the following support for his view that modern standing law primarily involves equitable claims:

> A review of all Supreme Court decisions discussing standing between 1965 and 1995 — the key period for the development of the Court's injury-in-fact jurisprudence — reveals that in the *overwhelming* majority of cases, the remedies sought were equitable in nature. And the familiar landmarks of standing doctrine — *Data Processing*, *Warth v. Seldin*, *Allen v. Wright*, *Lujan v. Defenders of Wildlife* — all involved equitable relief.[206]

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[202] *Id.* at 1897-1910.

[203] *Id. See generally* Bray & Miller, *supra* note 11, at 1764, 1766, 1775-86, 1789, 1795, 1799 (discussing importance of establishing a "grievance" in equity actions).

[204] *See* Young, *supra* note 10, at 1897-1910.

[205] *Id.* at 1887, 1906-08; *supra* notes 54–55 (discussing personal injury in *Spokeo*); *supra* notes 100–104 (discussing personal injuries in *TransUnion*). The *TransUnion* and *Spokeo* decisions are exceptions because they involve private damages. Young, *supra* note 10, at 1906. However, Professor Young argues that standing doctrine should be defined by the majority of cases involving equitable claims or involving essentially public law statutory claims that should be defined by the injury in fact test. *Id.* at 1887, 1906-08; *supra* Part III.B.

[206] Young, *supra* note 10, at 1906. In a footnote, Professor Young explains his research methods:

> My research assistants reviewed every U.S. Supreme Court decision on standing between 1965 and 1995 to determine the sort of relief sought . . . . Many, if not most, cases seeking injunctive relief also sought a declaratory judgment. Interestingly, a significant proportion of those standing cases that

Professor Young does acknowledge that "[d]ecisions like *Spokeo* and *TransUnion* may herald a new category of cases in which Congress seeks to regulate certain kinds of *private* conduct through private-attorney-general suits for statutory damages. But most standing cases seem likely to remain focused on injunctive relief."[207] He also points out that the Court's 2021 decision in *Uzuegbunam v. Preczewski*[208] involved nominal damages but explains that the case involved "a (nominal) damages claim only because the original injunctive claim had become moot."[209] Professor Young predicts that equitable claims will continue to dominate the Court's standing docket into the foreseeable future:

> Standing typically has to be litigated where the plaintiff's interest is diffuse, or where they seek to challenge action happening in the future, and in these cases injunctive and declaratory relief are likely to be more plausible than damages awards. Moreover, most standing litigation takes place in suits challenging government action, where sovereign immunity doctrines are likely to press plaintiffs toward equitable rather than legal remedies.[210]

Professor Young also argues that public law litigation in general mainly involves equitable actions:

> Abram Chayes' seminal discussion of the public law model of adjudication, for example, stressed "the increasing importance of equitable relief." Doug Laycock points out that administrative litigation, designed to "provide centralized adjudication that bypasses the ordinary courts" (with their juries), "looks a lot like the chancellor's procedure." And again, so many of the great landmarks of public law litigation — *Brown*

did involve damages claims were shareholders derivative actions, which the Court has described as "historically an equitable matter."

Id. at 1906 n.136 (citing Ross v. Bernhard, 396 U.S. 531, 538 (1970)).

[207] Young, *supra* note 10, at 1906-07.

[208] 141 S. Ct. 792 (2021).

[209] Young, *supra* note 10, at 1906-07, 1907 n.142.

[210] *Id.* at 1907.

> *v. Board of Education*,[211] *Roe v. Wade*,[212] *United States v. Virginia*,[213] *District of Columbia v. Heller*,[214] *Obergefell v. Hodges*[215] — involved claims for injunctive relief. This is unsurprising, given that only equity can provide the far-reaching relief necessary to restructure many discriminatory practices or practices that impinge on basic civil rights.[216]

Critics of the injury in fact requirement have focused on the alleged lack of historical support in law, but these critics have failed to consider the extent to which equitable practices support injury in fact.[217]

Professor Young concludes his article as follows,

> Our law interprets Article III's bare-bones language in light of traditional practices about how lawsuits are structured and proceed. But our view of those practices has often overlooked the distinctive character of equity. In particular, the absence of causes of action in equity, and the centrality of grievances rather than legal rights, ought to inform our view of standing — especially since so many standing cases involve equitable relief. Happily, we have somehow arrived at a basic predicate for standing — injury in fact — that seems basically similar to the grievance necessary for getting into equity. If that is right, then equity may help us better ground our current doctrine and answer some of the questions that remain.[218]

Professor Young's equity defense of injury in fact challenges the majority of scholars who have adopted criticisms of the standing injury

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[211] 347 U.S. 483 (1954).

[212] 410 U.S. 113 (1973).

[213] 518 U.S. 515 (1996).

[214] 554 U.S. 570 (2008).

[215] 576 U.S. 644 (2015).

[216] Young, *supra* note 10, at 1906-07 (citing Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1292 (1976); Douglas Laycock, *The Triumph of Equity*, 56 L. & CONTEMP. PROBS. 53, 67 (1993)).

[217] *Id.* at 1907-10.

[218] *Id.* at 1910.

in fact doctrine similar to Professor Sunstein.[219] His equity approach arguably explains the result in the *TransUnion* decision even though the case involved damages. The 1,853 class action members whose wrongful and misleading information was published to third parties, similar to a common law defamation, suffered a "grievance" justifying action by federal courts and, therefore, an injury in fact under Article III.[220] By contrast, the remaining 6,332 class action members whose wrongful information was not published to third parties only were at potential risk and such a potential risk is arguably not enough to justify a "grievance" or an injury in fact under Article III.[221] Similarly, prior to the *TransUnion* decision, the Seventh Circuit in its 2015 decision *Remijas v. Neiman Marcus Group, LLC,* recognized an injury in fact for class action plaintiffs in a data breach suit who had suffered actual fraud or real other harms from third parties because of a data breach, but denied an injury in fact and Article III standing to those plaintiffs who had only an increased potential risk of data hacking by third parties.[222] Even cases where damages are at issue such as data breaches or misreporting of consumer information, as in *TransUnion* or *Remijas,* the equitable concept of a grievance can be used to distinguish between cases where there is actual harm to a plaintiff and hence an injury in fact for Article III standing, and cases where there is only a potential increased risk of future harm and no injury in fact.[223] However, Professor Young's historical analysis of equity does not fully answer Professors Sunstein's, and Professors Solove and Citron's arguments that standing doctrine, which only has fully developed as a limitation on courts since about 1970, should not limit the authority of Congress as the legislative branch

[219] *Compare supra* Part III.A (Professor Sunstein and other scholars arguing that the Supreme Court invented the injury in fact standing test during the 1970s, and the doctrine is not based upon historical Article III precedent), *with supra* Part III.B. (Professor Young arguing that the Article III standing test is legitimately based upon historical practice in equity courts).

[220] TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2200, 2209-14 (2021).

[221] *Id.*

[222] *See* Remijas v. Neiman Marcus Grp., LLC, 794 F.3d 688, 692-97 (7th Cir. 2015); Bradford C. Mank, *Data Breaches, Identity Theft, and Article III Standing: Will the Supreme Court Resolve the Split in the Circuits?*, 92 NOTRE DAME L. REV. 1323, 1346, 1352-53, 1355, 1366 (2017) (discussing the Seventh Circuit's decision in *Remijas*).

[223] *TransUnion*, 141 S. Ct. at 2200, 2209-14; *Remijas*, 794 F.3d at 692-97.

to create private rights of action that transcend common law notions of harm.[224]

IV. THE CIRCUIT SPLIT ON ADA TESTER STANDING

The Tenth Circuit's 2022 decision in *Laufer v. Looper*[225] and similar decisions in the Second[226] and Fifth Circuits[227] have interpreted the *TransUnion* decision to significantly restrict but not abolish the broad standing for civil rights testers recognized in the Supreme Court's 1982 decision in *Havens Realty*.[228] By contrast, the First Circuit has concluded that the *TransUnion* decision does not affect the broad standing rights for civil rights testers delineated in *Havens Realty*.[229] The Eleventh Circuit had taken a similar position as the First Circuit, but the Eleventh Circuit has subsequently vacated that decision because the case was moot when it was decided and therefore that decision is no longer valid as precedent. [230] This Part examines the contrasting views of the Tenth and First Circuits regarding whether the *TransUnion* decision implicitly limits the broad standing rights for civil rights testers in *Havens Realty*

[224] *See supra* Part III.A.

[225] 22 F.4th 871 (10th Cir. 2022); *see infra* Part IV.A.

[226] Harty v. W. Point Realty, Inc., 28 F.4th 435, 444 (2d Cir. 2022) (determining an ADA tester plaintiff cannot show a concrete Article III standing injury from the denial of information without also showing downstream consequences required by the *TransUnion* decision).

[227] Laufer v. Mann Hosp. LLC, 996 F.3d 269, 273 (5th Cir. 2021) (concluding ADA tester plaintiff Laufer failed to demonstrate Article III standing because she could not show the information she was denied had "some relevance" to her considering the *TransUnion* decision).

[228] *See infra* Part IV.A.

[229] *See infra* Part IV.B.

[230] Laufer v. Arpan LLC, 77 F.4th 1366, 1366 (11th Cir. 2023); Bernie Pazanowski *Eleventh Circuit Vacates Opinion Tied to Supreme Court Argument*, BLOOMBERG L. (Aug. 15, 2023, 12:33 PM PT), https://news.bloomberglaw.com/us-law-week/eleventh-circuit-vacates-opinion-tied-to-supreme-court-argument [https://perma.cc/7WW3-LS2K]. In a concurring opinion in the now vacated decision, Judge Jordan had explicitly acknowledged that the Eleventh Circuit's approach to tester standing was contrary to the Second, Fifth and Tenth Circuits, but argued that the plaintiff's emotional distress was a sufficient basis for Article III standing. Laufer v. Arpan LLC, 29 F.4th 1268, 1281-83 (11th Cir. 2022), *vacated*, 77 F.4th 1366 (11th Cir. 2023) (Jordan, J., concurring); Cole, *supra* note 15, at 1047-48 (discussing Judge Jordan's concurring opinion).

because they offer more in-depth analysis than the other circuit court decisions.[231]

A. Laufer v. Looper*: The Tenth Circuit Reads the* TransUnion *Decision to Narrow Tester Standing, but Not Eliminate It*

In its 2022 decision in *Laufer v. Looper*,[232] the Tenth Circuit followed the *TransUnion* decision in holding that the plaintiff, a self-described "tester" and a legally qualified disabled person, lacked Article III standing to file suit under the ADA[233] against the owners of a Colorado Inn for an alleged violation of a federal regulation because she had not suffered a personal concrete and particularized injury since she had no intent to actually rent a room from the defendant Inn.[234] The court of appeals also concluded that she did not have informational standing to sue because she lacked the downstream consequences from the denial or omission of information by the defendant as required by the *TransUnion* decision because she did not intend to use the requested information for her personal use or to rent a room from the defendant Inn.[235] The *Laufer* decision is a good example of how lower federal courts may apply the *TransUnion* decision in deciding standing injury in fact issues and informational standing questions.[236] The *Laufer* decision, like the *TransUnion* decision, implicitly adopts a grievance approach to what is an injury in fact and implicitly rejects finding that a mere statutory cause of action is sufficient for standing without a personal injury suffered by the plaintiff.[237]

Title III of the ADA prohibits public accommodations from discriminating against individuals on the basis of disability.[238] The

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[231] *See infra* notes 232–308.

[232] Laufer v. Looper, 22 F.4th 871 (10th Cir. 2022).

[233] 42 U.S.C. § 12101.

[234] *Looper*, 22 F.4th at 871, 874-75, 877-78, 883. The plaintiff alleged that the defendant had violated a federal regulation requiring places of lodging to "identify and describe accessible features in the hotels and guest rooms offered through its reservations service" *Id.* at 874-75 (citing 28 C.F.R. § 36.302(e)(1)(ii)).

[235] *Id.* at 880-81.

[236] *See id.* at 877-78, 880-81.

[237] *See supra* Part II.

[238] *Looper*, 22 F.4th at 874 (discussing 42 U.S.C. § 12182(a)).

Department of Justice ("DOJ") promulgated a regulation under Title III stating that a place of public accommodation operating a

> 'place of lodging' shall, 'with respect to reservations made by any means,' '[i]dentify and describe accessible features in the hotels and guest rooms offered through its reservations service in enough detail to reasonably permit individuals with disabilities to assess independently whether a given hotel or guest room meets his or her accessibility needs.'[239]

Ms. Laufer, who is a resident of Florida and who is a disabled person using a wheelchair, visited the online reservation system ("ORS") of the Elk Run Inn in Colorado and determined that in her opinion the Inn's ORS did not provide all of the information on room accessibility required by the DOJ regulation.[240] Ms. Laufer filed suit in federal court alleging that the Inn had violated Title III of the ADA, but the district court dismissed her complaint for lack of standing injury because she had not alleged that she planned to actually rent a room from the Inn.[241]

The Tenth Circuit relied upon both the *Spokeo* decision and the *TransUnion* decision in affirming the district court decision dismissing her complaint for lack of standing injury.[242] Even if she is correct that the Inn's ORS fails to provide all of the accessibility information required by DOJ's ADA Title III regulation, the court of appeals concluded that Ms. Laufer lacked a concrete standing injury because "she has no concrete plans to visit Craig, Colorado, or to book a room at the Elk Run Inn."[243] Quoting the *Spokeo* decision, the Tenth Circuit explained,

> Ms. Laufer counters that she suffered harm when she visited the Elk Run Inn's ORS and discovered it was non-compliant with the ORS Regulation. But a violation of a legal entitlement alone is insufficient under *Spokeo* and *TransUnion* to establish that Ms. Laufer suffered a concrete injury. "Article III standing requires

[239] *Id.* (quoting 28 C.F.R. § 36.302(e)(1)(ii)).

[240] *Id.* at 874-75.

[241] *Id.* at 875.

[242] *Id.* at 876-78.

[243] *Id.* at 877-78.

> a concrete injury even in the context of a statutory violation." And that concrete injury "must affect the plaintiff in a personal and individual way." Ms. Laufer did not suffer a concrete injury. The district court properly dismissed her action for lack of Article III jurisdiction.[244]

Ms. Laufer argued that "testers" have special standing rights in light of the Supreme Court's 1982 decision in *Havens Realty Corporation v. Coleman*.[245] In *Havens Realty*, the Court held that a "tester" posing as a prospective renter or purchaser of a home or apartment could sue under the Fair Housing Act.[246] The *Havens Realty* decision held that Ms. Coleman, the Black tester, had Article III standing to sue because the defendant gave her untruthful information about the availability of housing for discriminatory reasons in violation of her statutory right to truthful information.[247] However, the *Havens Realty* Court held that the White tester did not have standing as a tester because the agent gave him accurate information about the availability of housing, and, therefore, the White tester had not suffered an injury requisite for standing purposes.[248] The Tenth Circuit concluded that Ms. Laufer did not have standing injury comparable to Ms. Coleman in *Havens Realty* because the omission of certain information on the Inn's website was far different from the deliberate falsehoods told to Ms. Coleman on four different occasions to deliberately discourage her from renting an apartment because of racial animus in *Havens Realty*.[249] The *Laufer* decision explained:

> Ms. Laufer has not alleged that the Loopers gave her false information. Nor has she alleged they denied her information because of her disability. All individuals, whether or not disabled, had access to the same information on the Elk Run Inn's ORS. Ms. Laufer's alleged injury — her discovery that the

[244] *Id.* at 878 (quoting Spokeo, Inc. v. Robins, 578 U.S. 330, 339-41 (2016)).

[245] *Looper*, 22 F.4th at 879 (discussing the Court's decision in *Havens Realty*); *see* Havens Realty Corp. v. Coleman, 455 U.S. 363, 373-374 (1982).

[246] *Havens Realty*, 455 U.S. at 373-74; *Looper*, 22 F.4th at 878.

[247] *Havens Realty*, 455 U.S. at 373-74; *Looper*, 22 F.4th at 879.

[248] *Havens Realty*, 455 U.S. at 375; *Looper*, 22 F.4th at 879.

[249] *Looper*, 22 F.4th at 879.

> ORS lacked certain information — is thus distinct from the injury suffered in *Havens Realty*, which was grounded in misrepresentation and racial animus.[250]

Lastly, Ms. Laufer made a more general informational standing argument based upon prior Supreme Court cases interpreting public information statutes such as *FEC v. Akins*[251] and *Public Citizen v. U.S. Department of Justice*.[252] In light of the *TransUnion* decision's requirement that a plaintiff has informational standing only if there are "downstream consequences" from failing to receive required information,[253] the Tenth Circuit concluded that Ms. Laufer lacked such consequences and therefore did not have a standing injury.[254] The court of appeals explained:

> Unlike the plaintiffs in *Akins* and *Public Citizen*, Ms. Laufer has not alleged that she has any interest in using the information she obtained from the Elk Run Inn's ORS beyond bringing this lawsuit. She has no plans to visit Craig, Colorado. She did not attempt to book a room at the Elk Run Inn and has no intent to do so. She therefore has not suffered an injury of the type recognized in *Public Citizen* or Akins.
>
> Although Ms. Laufer may have had a regulatory right to the information she sought here, she has not demonstrated that the defendants' failure to provide that information caused her to suffer an injury in fact.[255]

The Tenth Circuit in *Laufer* concluded its standing analysis as follows:

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[250] *Id*. *But see* Cole, *supra* note 15, at 1036-37 (criticizing the Tenth Circuit's argument that the *Haven Realty* decision involved misrepresentation and racial animus that was different from the denial of information in the *Laufer* case because the denial of required statutory information has the same *legal* effect in both cases and the intent of the defendant is irrelevant).

[251] 524 U.S. 11 (1998).

[252] 491 U.S. 440 (1989).

[253] TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2214 (2021) (quoting Trichell v. Midland Credit Mgmt., Inc., 964 F.3d 990, 1004 (11th Cir. 2020)).

[254] *Looper*, 22 F.4th at 880-81.

[255] *Id*. at 881.

> Ms. Laufer has disclaimed any interest in booking a room at the Elk Run Inn. She therefore has no concrete interest in the information required by the ORS Regulation, and has not suffered an injury in fact. Although testers may have standing under the ADA regardless of their motivations for encountering a violation, they still must satisfy the constitutional requirements of Article III. Because she has failed to do so, Ms. Laufer lacks standing to pursue her claims against the Loopers.[256]

The Tenth Circuit's holding that a tester has standing only if they suffer an actual injury from a defendant's behavior is plausible.[257] A plaintiff tester can still sue if the defendant's omission of required data interferes with the plaintiff's ability to book public accommodations.[258] Or, following *Havens Realty*, a tester who is unharmed nonetheless has standing to sue if a defendant provides false information for discriminatory reasons, which is supported both by civil rights statutes and common law notions of fraud and misrepresentation.[259]

Nevertheless, the practical effect of the *Laufer* decision puts some limits on when testers can enforce the civil rights and anti-discriminatory provisions of Title III of the ADA. Professor Sunstein would probably decry *Laufer's* limitations on a statutory cause of action.[260] By contrast, Professor Young might agree with the Tenth Circuit because Ms. Laufer lacked a grievance with the defendant.[261] However, a plaintiff who is actually harmed or is lied to by a defendant for discriminatory reasons could sue.[262]

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[256] *Id.* at 883.

[257] *See supra* notes 242–256.

[258] *Id.*

[259] *Id.*

[260] *See supra* Part III.A.

[261] *See supra* Part III.B.

[262] *See supra* Part II.B. Justice Thomas would probably conclude that Ms. Laufer lacked standing to sue because she did not have a personal injury, but merely sought to enforce a public right that applies to all consumers. In his concurring opinion in *Spokeo*, Justice Thomas wrote:

> If Congress has created a private duty owed personally to Robins to protect his information, then the violation of the legal duty suffices for Article III

Based on the DOJ's record using testers, testers can be very useful in uncovering discriminatory housing practices. In 1991, the Civil Rights Division of the Department of Justice created the Fair Housing Testing Program within the Housing and Civil Enforcement Section, which commenced testing in 1992.[263] According to the Department of Justice, "Since 1992, the Department of Justice has resolved 111 pattern and practice testing cases with evidence directly generated from the Fair Housing Testing Program, leading to the recovery of more than $15.3 million, including over $2.3 million in civil penalties and over $13 million in other damages."[264] However, Ms. Laufer's allegations regarding the Inn's alleged failure to supply all required accessibility information that she had no actual intent to use are less serious than the types of discriminatory practices caught by DOJ testers or the racial animus and lies in *Havens Realty*.[265] According to the DOJ, "The vast majority of testing cases filed to date are based on testing evidence that involved allegations of agents misrepresenting the availability of rental units or offering different terms and conditions based on race, and/or national origin, and/or familial status."[266] By contrast, Ms. Laufer did not allege any misrepresentations based upon her disability or that she was denied the ability to rent from the defendant because of her disability, and, therefore, her allegations are less serious than those in *Havens Realty* or

> injury in fact. If that provision, however, vests any and all consumers with the power to police the "reasonable procedures" of Spokeo, without more, then Robins has no standing to sue for its violation absent an allegation that he has suffered individualized harm.

Spokeo, Inc. v. Robins, 578 U.S. 330, 349 (2016) (Thomas, J., concurring) (emphasis omitted).

Ms. Laufer fits the latter example in Justice Thomas' above quotation because she is seeking to enforce a public right to accessibility information for the public at large and lacked any claim of individualized harm. *See* Laufer v. Looper, 22 F.4th 871, 875, 877-78, 881 (10th Cir. 2022) (concluding Ms. Laufer lacked any concrete harm because she did not intend to rent a room from the defendant Elk Run Inn).

[263] *Fair Housing Testing Program*, C.R. DIV. U.S. DEP'T OF JUST. (last updated Feb. 7, 2023), https://www.justice.gov/crt/fair-housing-testing-program-1 [https://perma.cc/GN44-LC7N].

[264] *Id.*

[265] *See Looper*, 22 F.4th at 878-80. *But see* Cole, *supra* note 15, at 1036-37.

[266] *Fair Housing Testing Program*, *supra* note 263.

most DOJ cases.[267] Following *Havens Realty* and *Laufer*, a plaintiff with a personal injury could still enforce Title III of the ADA if a public accommodation facility harms them or a defendant lies to the plaintiff for discriminatory reasons prohibited by statute.[268]

B. The First Circuit in Laufer v. Acheson Hotels, LLC *Concludes the* TransUnion *Decision Did Not Overrule the Expansive Tester Standing in Havens Realty*

In its 2022 decision in *Laufer v. Acheson Hotels, LLC*,[269] the First Circuit addressed an ADA suit involving Deborah Laufer, the same tester whose similar suit against a Colorado innkeeper had been dismissed by the Tenth Circuit for lack of standing.[270] The plaintiff alleged that Defendant Acheson Hotels, LLC, which operates The Coast Village Inn and Cottages in a small town on Maine's southern coast, had failed to comply with Title III of the ADA because the hotel's reservation website didn't identify accessible rooms, didn't provide an option for booking an accessible room, and didn't give her sufficient information to determine whether the rooms and features of the Inn were accessible to her.[271] The District Court for the District of Maine dismissed her lawsuit for lack of standing for the same reason as the Tenth Circuit because she did not intend to actually rent a room at the Inn in Maine, but was just acting as a tester to determine if the defendant's website was compliant with Title III of the ADA.[272]

The First Circuit reversed the district court and concluded that Laufer had standing to sue.[273] According to the court of appeals, prior to the *TransUnion* decision, the law of standing would have clearly favored standing for *Laufer*.[274] The First Circuit explained:

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[267] *Looper*, 22 F.4th at 878-80.

[268] *See supra* Part IV.A.

[269] Laufer v. Acheson Hotels, LLC, 50 F.4th 259, 263 (1st Cir. 2022).

[270] *Compare infra* Part IV.B (discussing First Circuit's decision involving ADA tester standing), *with supra* Part IV.A (discussing Tenth Circuit's decision involving ADA tester standing).

[271] *Acheson Hotels*, 50 F.4th at 263-65.

[272] *Id.* at 265.

[273] *Id.* at 271-79.

[274] *Id.* at 269-70.

> *Havens Realty*, *Akins*, and *Public Citizen* make clear that a denial of information that a plaintiff is statutorily entitled to have can make for a concrete injury in fact. And *Havens Realty* and *Public Citizen* tell us that the denial of information to a member of a protected class alone can suffice to make an injury in fact — that person's intended use of the information is not relevant.[275]

The First Circuit rejected the defendant's argument that the Court's *TransUnion* decision had overruled *Havens Realty* and *Public Citizen* by requiring plaintiffs to show downstream consequences from a defendant's denial of information.[276] The First Circuit acknowledged that the Second, Fifth, and Tenth Circuits had accepted arguments similar to the defendant regarding the standing of ADA testers who have no intent to actually rent a hotel room.[277] But the First Circuit argued that a court of appeals may not overrule *Havens Realty* or *Public Citizen* merely because the Court's *TransUnion* decision cast some doubt on those two decisions or suggested that the Court might overrule those cases in the future.[278] Only the Supreme Court may overrule its own cases, not a lower court.[279] Thus, the First Circuit concluded that *Havens Realty* is still good law and that the Court's decision in that case clearly supported Laufer's standing in her case.[280] The First Circuit explained, "As we said before, we think *Havens Realty* shows the clear path here — it is so similar to Laufer's case as to render any distinction insufficiently material. We're thus bound by that decision unless the Supreme Court tells us that *TransUnion* overruled it."[281]

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[275] *Id.* at 270.

[276] *Id.* at 270-71 (discussing TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2214 (2021) and noting that the *TransUnion* court found that the plaintiffs did not have Article III standing because they "identified no 'downstream consequences' from failing to receive the required information and that '[a]n asserted informational injury that causes no adverse effects cannot satisfy Article III.'" (quoting Trichell v. Midland Credit Mgmt., Inc., 964 F.3d 990, 1004 (11th Cir. 2020)).

[277] *Id.* at 272-74.

[278] *Id.* at 271 n.4.

[279] *Id.*

[280] *Id.* at 271-75.

[281] *Id.* at 271 n.4.

The First Circuit then elucidated why it disagreed with the Second, Fifth and Tenth Circuits on ADA tester standing and why *Havens Realty* still controlled its case despite the views of these three circuits.[282] The defendant Acheson relied on the Second and Tenth Circuits for the proposition that an ADA tester is not injured and does not have standing if she does not actually want to rent a room.[283] But the First Circuit reasoned that "[d]enying Laufer the same 'efficiency, immediacy, and convenience' as those not requiring accommodations is exactly the discrimination the [DOJ's Title III ADA] regulations are trying to stamp out."[284] Furthermore, the First Circuit maintained that the circuits denying standing to ADA testers like Laufer who are not seeking to rent a room "did not explain why the ADA tester plaintiff didn't suffer an injury but the Black tester plaintiff in *Havens Realty* did, even though her only 'interest in using the information' was testing compliance and bringing her lawsuit — just as with an ADA-Reservation-Rule tester."[285] Additionally, the First Circuit disagreed with the Tenth Circuit that ADA testers are not entitled to standing because "the fact that *Havens Realty* involved a misrepresentation, but the ADA-Reservation-Rule cases involve a lack of any representation."[286] The First Circuit responded that the Tenth Circuit's misrepresentation interpretation of *Havens Realty* "seems a distinction without a difference. In either case, in order to shine a light on unlawful discrimination, the law conferred on the plaintiff 'a legal right to truthful information' about an accommodation."[287]

The First Circuit also disagreed with the Tenth Circuit about whether a plaintiff must prove that the information that it seeks has downstream consequences for the plaintiff such as helping the plaintiff to rent a room in order to prove a concrete and particularized injury in fact for the Article III standing test.[288] The First Circuit explained, "The Tenth Circuit also thought that *Akins* and *Public Citizen* made clear years ago

[282] *Id.* at 272-74.

[283] *Id.* at 272-73.

[284] *Id.* at 272.

[285] *Id.* at 273.

[286] *Id.*

[287] *Id.*

[288] *Id.*

that there needed to be a downstream consequence from the denial of information. True, the Court in both cases described what the plaintiffs wanted to do with the information they sought."[289] However, the First Circuit reasoned that *Havens Realty* had not required testers to prove that they would use the information they sought to rent a room. "But, for one thing, that doesn't show why *Havens Realty* wouldn't still apply and give standing, since the Black tester plaintiff there wanted the information only to test the defendant's compliance with the law."[290] Moreover, the First Circuit maintained that the Tenth Circuit's downstream consequences requirement in informational standing cases is "hard to square with the Court's clear statement in *Public Citizen* that the Court's 'decisions interpreting the Freedom of Information Act have never suggested that those requesting information under it need show more than that they sought and were denied specific agency records.'"[291] Furthermore, the First Circuit reasoned that the Court's *Spokeo* decision had not suggested that either the *Akins* or *Public Citizen* decisions required plaintiffs seeking information to demonstrate that the plaintiffs would suffer downstream consequences from being denied the requested information.[292]

The First Circuit concluded that the plaintiff had standing according to the *Havens Realty* decision. "We understand that our sibling circuits thought *Havens Realty* doesn't decide this case. But we respectfully disagree. None has convincingly explained why *Havens Realty* can't illuminate the path to decision."[293] Because the *TransUnion* decision did not explicitly overrule or limit the *Havens Realty* decision, the First Circuit did not feel bound by the arguments of other circuits that *TransUnion* had placed a downstream consequences limitation on *Havens Realty*.[294] In footnote four, the First Circuit acknowledged that it was bound by recent Supreme Court dictum, but explained that mere dictum could not implicitly overrule a prior Supreme Court decision.[295]

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289 *Id.*

290 *Id.*

291 *Id.*

292 *Id.*

293 *Id.* at 273-74.

294 *See id.* at 271 & n.4.

295 *Id.* at 271 n.4.

"But when later dictum might call into question a prior holding, we're still bound by the Court's earlier holding, not its dictum."[296] The First Circuit characterized the *TransUnion* decision's downstream consequences language as dictum.[297] "And *TransUnion's* downstream-consequences-needed-for-informational-injury proviso certainly looks like dictum given that the Court concluded the plaintiffs didn't allege they hadn't received any required information."[298] The First Circuit rejected the idea that dictum in the *TransUnion* decision had implicitly overruled or limited the tester standing in *Havens Realty*.[299] "[W]e think it suspect, too, that the [*TransUnion*] Court would overrule *Havens Realty* implicitly, in dictum, and with only three sentences of explanation."[300] Accordingly, the First Circuit concluded that the broad tester standing in *Havens Realty* remained good law.[301]

The First Circuit also concluded that the plaintiff, Ms. Laufer, had a concrete standing injury because "[d]ignitary harm or stigmatic injuries caused by discrimination have long been held a concrete injury in fact, even without informational injury."[302] The First Circuit explained:

> Laufer alleges she suffered "frustration and humiliation" when Acheson's reservation portals didn't give her adequate information about whether she could take advantage of the accommodations. Without that information, Laufer is put on unequal footing to experience the world in the same way as those who do not have disabilities. She alleges that the "discriminatory conditions" on Acheson's website contribute to her "sense of segregation and isolation" and deprive her of "full and equal enjoyment of the goods, services, facilities, and/or accommodations available to the general public." Avoiding that was part of the point of the ADA.[303]

[296] *Id.*

[297] *Id.*

[298] *Id.*

[299] *Id.*

[300] *Id.*

[301] *Id.* at 271-74, 271 n.4, 272 n.5, 272 n.6.

[302] *Id.* at 274.

[303] *Id.*

The First Circuit concluded that these stigmatic injuries constituted downstream consequences from the denial of information sufficient to meet standing requirements in the *TransUnion* decision. The Court stated:

> [W]e find that Laufer's feelings of frustration, humiliation, and second-class citizenry are indeed "downstream consequences" and "adverse effects" of the informational injury she experienced. So even if post-*TransUnion* a plaintiff in the same shoes as the Black tester plaintiff in *Havens Realty* must show some "additional harm" from the denial of information to demonstrate a concrete injury, Laufer still meets that newly set bar.[304]

It is notable that there is currently disagreement among the circuits about allowing emotional distress, confusion, or anxiety claims in cases pursuant to the Fair Debt Collection Practices Act ("FDCPA"),[305] with the en banc Seventh Circuit in 2022 rejecting standing for psychological injuries in a FDCPA case over the dissenting opinion of Judge Hamilton and three other judges.[306] Accordingly, some courts may reject the First Circuit's allowance of emotional-distress-type damages in similar testing cases, and, that might create an additional basis for arguing there is a significant circuit split.[307] Because the First Circuit interpreted the impact of the *TransUnion* decision on tester standing and *Havens Realty* far differently from the Tenth Circuit, there is a strong argument that the Supreme Court should grant certiorari to resolve the conflict over ADA tester standing between the Tenth, Second and Fifth Circuits on the one hand, and the First and Eleventh Circuits on the other hand.[308]

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[304] *Id.* at 275.

[305] 15 U.S.C. § 1692(e).

[306] *See* Pierre v. Midland Credit Mgmt., Inc., 36 F.4th 728, 729-37 (7th Cir. 2022) (Hamilton, J., dissenting); Pierre v. Midland Credit Mgmt., Inc., 29 F.4th 934, 939-40 (7th Cir. 2022), *reh'g and reh'g en banc denied*, 36 F.4th 728 (7th Cir. 2022); *but see id.* at 940, 943-48, 953-955 (Hamilton, J., dissenting) (arguing for standing for psychological damages in FDCPA case and discussing decisions in several circuits allowing intangible injuries in FDCPA cases).

[307] *See Pierre*, 29 F.4th at 939.

[308] *See supra* Part IV; *infra* CONCLUSION; *see also supra* note 19 and accompanying text.

CONCLUSION

The actual holding of *TransUnion* is defensible. In *TransUnion*, it was reasonable for the Court to limit standing to parties that had suffered actual injuries from the defendant's publication of false information to third parties.[309] The other plaintiffs were at some risk because the defendant held false information about them internally, but there was no actual harm to them as long as the information is not published to third parties.[310] The Court's distinction based upon publication of false information and actual harm is reasonable.[311] Indeed, *TransUnion's* general reliance upon "traditional" and common law distinctions to judge which types of injuries Congress may create is a plausible approach if it is appropriate for the Court to set any limitations at all on legislative definitions of injury or harm as a means to decide if there is standing for a particular plaintiff in a given case.[312]

Professor Sunstein acknowledges that *TransUnion's* "central holding is exceedingly narrow."[313] He is much more concerned that the decision's reliance upon common law principles for judging when an "injury in fact" is concrete enough for a standing injury could thwart congressional intent in a future case than the actual holding of *TransUnion*.[314] Professor Sunstein might be more concerned with the outcome in the Tenth Circuit's decision in *Laufer v. Looper* where the plaintiff tester could not enforce a civil rights and anti-discriminatory statute, Title III of the ADA, because she lacked a personal injury despite an alleged statutory omission of information.[315] The private and common law conceptions of what constitutes a standing injury in *TransUnion* or the Tenth Circuit's *Laufer* decision limits the ability of plaintiffs to enforce a statutory right to information about the accessibility of public accommodations.[316]

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309 *See supra* Part II.C.

310 *See supra* Part II.C.

311 *See supra* Part II.C.

312 *See supra* Part II.C.

313 Sunstein, *Injury in Fact*, *supra* note 7, at 372.

314 *Id.* at 372-74.

315 *See supra* Part IV.

316 *See supra* Part IV.

Going beyond the Woolhandler and Nelson article's focus on limitations on federal court jurisdiction based upon traditional common law doctrines,[317] Professor Young's article provides some plausible reasons for why modern standing law might have support based upon the history of federal courts and especially equity principles.[318] If equitable principles require a sufficient "grievance," then it is not unreasonable for federal courts to demand an injury in fact in public law actions that are primarily equitable in nature.[319] If equitable principles will not allow a remedy unless there is a sufficient injury or grievance, it is pointless to allow standing if a case will ultimately fail.[320] Young's article is unlikely to convince scholars such as Professor Sunstein who believe that federal courts should be extremely deferential to congressional causes of action and definitions of harms.[321]

Whether you agree with Professor Sunstein or Professor Young may depend upon your views about the scope of government and its regulations, where there are sharp partisan divisions between self-identified Republicans and Democrats in the United States.[322] Because Ms. Laufer did not allege any personal harm or that she was lied to by the defendants, a libertarian who prefers a reduced scope of government might argue that the standing injury requirement appropriately prevents a "busybody" like Ms. Laufer from suing a Colorado Inn that she has no real connection to.[323] By contrast, a supporter of government

[317] *See* Woolhandler & Nelson, *supra* note 190, at 691, 721.

[318] *See supra* Part III.B.

[319] *See supra* Part III.B.

[320] *See supra* Part III.B.

[321] *See supra* Part III.A.

[322] A 2022 Pew Research Center survey found significant partisan divisions between self-identified Republicans and Democrats in the United States over the appropriate role of government. "A 61% majority of Republicans say it's not the government's job to protect people from themselves; an even larger majority of Democrats (77%) say laws are sometime needed for that purpose." PEW RSCH. CTR., AMERICANS' VIEWS OF GOVERNMENT: DECADES OF DISTRUST, ENDURING SUPPORT FOR ITS ROLE 8 (2022), https://www.pewresearch.org/politics/2022/06/06/americans-views-of-government-decades-of-distrust-enduring-support-for-its-role/ [https://perma.cc/3CM2-HAWT]. Note that for this study, "[a] total of 5,074 panelists responded out of 5,897 who were sampled, for a response rate of 86%." *Id.* at 74.

[323] *See* Samuel Goldman, *The Rise and Fall and Rise Again of the Libertarian Moment*, WEEK (Feb. 2, 2022), https://theweek.com/feature/1009651/the-strange-return-of-the-

regulation might believe that government regulations implementing Title III of the ADA, such as the accessibility reporting requirements for lodging reservation websites in both *Laufer* decisions, promote equality for disabled persons.[324]

Justice Thomas' concurring opinion in *Spokeo* and his dissenting opinion in *TransUnion* offer an additional perspective on standing injury issues.[325] He makes a plausible distinction between standing in cases involving purely private individuals versus cases involving public rights and especially suits in which separation of powers concerns apply.[326] Justice Thomas' reliance on historical precedent to justify his conclusions is a reasonable approach to addressing standing issues.[327] However, Justice Thomas should reexamine his historical conclusions about standing in light of the equity history in both the Bray and Miller article and the separate Young article to see if the distinction between private rights and public rights cases is better explained by the distinction between cases involving legal rights and those involving equitable "grievances."[328] Nevertheless, in the end, Justice Thomas might conclude that courts have historically applied a more lenient approach to standing in private suits than public rights cases.[329]

The question of how much the *TransUnion* decision has narrowed Article III standing has resulted in a circuit split regarding when civil rights testers filing suits under the ADA have standing.[330] The Tenth Circuit's 2022 decision in *Laufer v. Looper* and similar decisions in the Second and Fifth Circuits have read the *TransUnion* decision to limit but not eliminate the broad tester standing in the Supreme Court's 1982 decision in *Havens Realty*.[331] By contrast, the First Circuit in its 2022

libertarian-moment [https://perma.cc/U4FD-CAPD] (arguing modern libertarians dislike busybodies telling them what to do, especially government regulators).

[324] *See* Cole, *supra* note 15, at 1043-45 (arguing circuit split on tester standing creates real world problems for disabled persons seeking to enforce their legal rights against discrimination); *supra* Part IV.

[325] *See supra* Parts II.B, II.D.

[326] *See supra* Parts II.B, II.D.

[327] *See supra* Parts II.B, II.D.

[328] *See supra* INTRODUCTION, Part III.B.

[329] *See supra* Parts II.B, II.D.

[330] *See supra* Part IV.

[331] *See supra* Part IV.A.

decision in *Laufer v. Acheson Hotels, LLC* explicitly rejected these decisions in the Tenth, Second, and Fifth Circuits to conclude that the *TransUnion* decision had not overruled the expansive tester standing in *Havens Realty*.[332] The existence of an explicit circuit split led the Supreme Court on March 27, 2023 to grant certiorari and resolve the issue of standing for ADA testers.[333]

Although the *TransUnion* decision limits congressional authority to define statutory harms to those supported by tradition or the common law, Congress can still redress many types of harms such as harmful credit reports sent to third parties or discriminatory refusals to rent to minority groups.[334] The limitations on suits in the *TransUnion* decision or in the *Laufer* decision do not overrule the ability of Congress to prevent discrimination as in *Havens Realty*.[335] Even if the *TransUnion* decision is theoretically a radical decision in limiting congressional authority as Professor Sunstein suggests,[336] the actual impacts of the *TransUnion* decision or the Tenth Circuit's *Laufer* decision are modest so far.[337] If the First Circuit's allowance of standing for testers is not overruled by the Supreme Court, plaintiffs may be able to raise emotional distress as a grounds for standing not just in ADA tester suits, but many other areas of law.[338] Thus, the First Circuit's *Laufer* decision could limit the impacts of the *TransUnion* decision if that *Laufer* decision remains good law.[339]

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[332] *See supra* Part IV.B.

[333] *See* Laufer v. Acheson Hotels, LLC, 50 F.4th 259, 272-74 (1st Cir. 2022), *cert. granted*, Acheson Hotels, LLC v. Laufer, 143 S. Ct. 1053 (2023). On March 27, 2023, the Supreme Court granted the petition for a writ of certiorari. Howe, *supra* note 20. The Rules of the U.S. Supreme Court state that circuit splits are an important reason for granting certiorari, but that the Court has discretion not to do so. SUP. CT. R. 10(a); *see also* Stephenson, *supra* note 23, at 274-75 (arguing Supreme Court practice indicates that circuit splits are among the most important reasons the Court grants certiorari in a particular case).

[334] *See supra* Parts II.C, III.B, IV.

[335] *See supra* Parts II.C, III.B, IV.

[336] *See supra* Part III.A.

[337] *See supra* Parts II.B, III.B, IV.

[338] *See supra* Part IV.B.

[339] *See supra* Part IV.B.

In light of Article I, should the Supreme Court simply defer to Congress when it enacts a statute establishing a novel cause of action as Professor Sunstein believes?[340] Or does the history of Article III actions and especially equitable doctrine suggest that some type of actual harm to a plaintiff is required as suggested in Part III.B of this Article?[341] Because standing principles are not explicitly contained in Article III, the debate regarding standing and injury in fact is likely to continue into the future.[342] But a Supreme Court decision on standing for ADA testers could provide significant insights into how the Court will address standing issues in the near future.

POSTSCRIPT

Just before this article was sent to the printer, the Supreme Court in a unanimous 9–0 decision in *Acheson Hotels LLC v. Laufer* vacated the case as moot.[343] After the Supreme Court had granted review in *Acheson Hotels*, the United States District Court for the District of Maryland suspended the lawyer for plaintiff Deborah Laufer, attorney Tristan Gillespie, from the practice of law "for defrauding hotels by lying in fee petitions and during settlement negotiations."[344] Following revelations of misconduct by her attorney, Laufer voluntarily dismissed her pending suits with prejudice, including her complaint against Acheson Hotels in the District of Maine, and then she filed a suggestion of mootness in the Supreme Court.[345] Because defendant Acheson had already filed its principal brief on the standing issue, the Supreme Court deferred a decision on mootness until after the oral argument.[346]

Laufer acknowledged that the Supreme Court did not have to dismiss her suit for mootness because the Court can address jurisdictional issues in any order it chooses.[347] But she argued that it would be prudent for the Court to avoid a difficult standing question in a case that was

340 *See supra* Part III.A.

341 *See supra* Part III.B.

342 *See supra* Part III.B.

343 Acheson Hotels, LLC v. Laufer, No. 22-429, 2023 WL 8378965 (2023).

344 *Id.* at *1.

345 *Id.* at *2.

346 *Id.*

347 *Id.*

now moot.[348] On the other hand, Acheson contended that the Court should decide the standing issue to resolve the circuit split now rather than waiting for a later case regarding the same standing question.[349] Acheson also suggested that dismissing this case could encourage future litigants to manipulate the Court's jurisdiction by abandoning a case a litigant believes that it might lose.[350]

Justice Barrett's opinion for the Court recognized Acheson's concern about litigants manipulating the jurisdiction of this Court.[351] Yet, Barrett's opinion concluded that the Court was "not convinced, however, that Laufer abandoned her case in an effort to evade our review. She voluntarily dismissed her pending ADA cases after a lower court sanctioned her lawyer. She represented to this Court that she will not file any others."[352] Accordingly, the Court held that Laufer's case against Acheson was moot and dismissed the case on that ground.[353] To discourage possible future attempts to manipulate the Court's jurisdiction, the Court "emphasize[d], however, that we might exercise our discretion differently in a future case."[354] Justice Barrett's opinion rejected Justice Jackson's objection to the Court's vacating the First Circuit's decision in *Acheson* because the Court has consistently vacated cases that become moot when the prevailing party below voluntarily dismisses the case since its 1950 decision in *United States v. Munsingwear, Inc.*[355]

Concurring in the judgment, Justice Thomas argued that the Court should not dismiss the case, but instead should decide the issue of standing because that question is likely to recur in future cases.[356] He observed that all justices agreed that the Court had the authority to hear the case and contended that they should hear the case because "the

348 *Id.*

349 *Id.*

350 *Id.*

351 *Id.*

352 *Id.*

353 *Id.*

354 *Id.*

355 *Id.* (citing United States v. Munsingwear, Inc., 340 U.S. 36 (1950)).

356 *Id.* at *2-6 (Thomas, J., concurring in the judgment).

circumstances strongly suggest strategic behavior on Laufer's part."[357] On the merits, Justice Thomas concluded that Laufer lacked Article III standing for reasons similar to the Tenth Circuit's opinion involving Laufer discussed in Part IV.A.[358]

Concurring in the judgment, Justice Jackson agreed the case was moot but argued that the Court should not vacate the First Circuit's decision in the case.[359] She disagreed with the *Munsingwear* decision's policy of vacating a decision whenever a prevailing party voluntarily dismisses a case because there should instead be a rebuttable presumption that federal court decisions remain as guides for future decisions unless there are good equitable reasons in a particular case for vacatur, such as a judge finding that a particular litigant manipulated the jurisdiction of a court.[360] She concluded that Acheson's disappointment that its case was not heard on the merits by the Court was an insufficient grounds for vacating the First Circuit's decision.[361] She concurred in the judgment rather than dissenting because she conceded that the *Munsingwear* decision was a longstanding precedent that the Court could follow even if she disagreed with that decision.[362]

[357] *Id.* at *4.

[358] *Id.* at *4-6; *see supra* Part IV.A (discussing a 10th Circuit decision concluding that Laufer lacked standing as a "tester" who had no actual intent to rent a room from the defendant hotel).

[359] *Acheson Hotels*, 2023 WL 8378965, at *7-10 (Jackson, J., concurring in the judgment).

[360] *Id.*

[361] *Id.*

[362] *Id.*