"No Concrete Harm, No Standing:" Aggrandizing Standing Doctrine in a Credit-Centered America

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I. INTRODUCTION

"No concrete harm, no standing."[1] This is how Justice Kavanaugh began the Supreme Court's most recent opinion

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clarifying (or to some, confusing) Article III's standing doctrine.[2] Article III of the Constitution establishes the judicial power and extends that power to "all Cases, in Law and Equity, arising under th[e] Constitution . . . ."[3] Standing is a doctrine of justiciability that refers to who can bring a lawsuit to federal court.[4] To have standing under Article III of the Constitution, a plaintiff must show: (1) an injury-in-fact that is concrete, actual, particularized, and imminent; (2) a causal link that is fairly traceable to the harm and the conduct at issue; and (3) redressability.[5] In *TransUnion LLC v. Ramirez*,[6] the Supreme Court made a controversial determination regarding the injury-in-fact constitutional requirement of Article III standing, which this Comment addresses.[7]

In *TransUnion*, Justice Kavanaugh, writing for the majority, held that plaintiffs must have a concrete injury, not just an increased risk of harm, in order to sue in federal court.[8] In a 5-4 decision, with dissenting opinions from Justices Thomas and Kagan, Justice Kavanaugh wrote that a concrete injury requires more than the mere existence of a risk of harm that never materializes.[9]

Until *TransUnion*, *Spokeo, Inc. v. Robins*[10] was the seminal case addressing what constitutes a concrete harm for the injury-in-fact requirement of Article III standing, pursuant to procedural rights and congressional intent.[11] *Spokeo*, itself, was a revolutionary opinion, limiting a plaintiff's cause of action and exploring procedural rights as they pertain to Article III standing.[12] Yet, the Court in *TransUnion* went beyond the holding of *Spokeo*, redefining the constitutional requirements of Article III standing, confusing

Lastly, for their support and unconditional love, I would like to thank my parents, Bonnie and Mark Cimring, and my brothers Jordan and Alex Cimring.

1 TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2200 (2021).

2 *Id.*

3 U.S. CONST. art. III, § 2, cl. 1.

4 *See* Flast v. Cohen, 392 U.S. 83, 98–100 (1968).

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

6 TransUnion LLC v. Ramirez, 141 S. Ct. 2190 (2021).

7 *TransUnion*, 141 S. Ct. at 2200.

8 *Id.* at 2200, 2212 (explaining that "[i]t is difficult to see how a risk of future harm could supply the basis for a plaintiff 's standing when the plaintiff did not even know that there was a risk of future harm").

9 *Id.* at 2198–99, 2214.

10 Spokeo, Inc. v. Robins, 578 U.S. 330 (2016); *see* discussion *infra*, Section II.A.4.

11 *Id.*

12 *See* Daniel J. Solove & Danielle Keats Citron, *Standing and Privacy Harms: A Critique of TransUnion v. Ramirez*, 101 B.U. L. REV. ONLINE 62, 71 [hereinafter Solove & Citron].

scholars and lawyers once again, and causing disagreements in the district courts.[13]

After a short introduction of standing, summarizing the cases of *Lujan v. Defenders of Wildlife* ("*Lujan*"), *Massachusetts v. Environmental Protection Agency* ("*Massachusetts v. EPA*"), *Clapper v. Amnesty International USA* ("*Clapper*"), *Spokeo Inc. v. Robins* ("*Spokeo*"), and *Thole v. U.S. Bank* ("*Thole*"), this Comment will give an overview of the Fair Credit Reporting Act ("FCRA"), the statute of significant importance in both *TransUnion* and *Spokeo*. Following a description of the FCRA, this Comment will discuss *TransUnion*, with analyses of Justice Kagan's and Justice Thomas's dissenting opinions.

Through this analysis, this Comment will draw attention to the conflicting and confusing views of standing jurisprudence, the shift in the Court's understanding of standing and privacy rights after *Spokeo,* and where *TransUnion* leaves American jurisprudence regarding standing to sue in federal court. This Comment will look to history, precedent, congressional intent, and policy reasons to fashion a more practical and useful standard for Article III standing, in particular, when a plaintiff suffers concrete harm. The goal of this Comment is to analyze the flaws of the *TransUnion* decision, which led to the Court's horrific narrowing of the standing doctrine, in order to provide a more feasible approach for courts in the future.

II. BACKGROUND/OVERVIEW

This section will discuss standing jurisprudence, starting with *Lujan* in 1992, and ending with *Thole* in 2020. It will also look to portions of the FCRA that are relevant to *TransUnion*. Finally, this section will summarize the facts, procedural history, and holdings of *TransUnion v. Ramirez*. As the case law develops, it is important to recognize how the Court overcomplicates the constitutional requirements of standing, making it more difficult for plaintiffs to file suit in federal court.

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[13] *See TransUnion*, 141 S. Ct at 2225 (Kagan, J., dissenting) (writing that "[a]fter today's decision, [standing in this Country needs to be re-written]. The [majority] transforms standing law from a doctrine of judicial modesty into a tool of judicial aggrandizement. It holds, for the first time, that a specific class of plaintiffs whom Congress allowed to bring a lawsuit cannot do so under Article III"); *see also* Solove & Citron, *supra* note 12, at 71 ("Let's call *TransUnion* for what it is: an activist decision that nullifies Congress's power to protect consumers and that enables courts to rewrite privacy laws to alter how they are enforced.").

A. Standing Jurisprudence

The jurisdiction of federal courts is defined in Article III of the Constitution.[14] Article III provides that the judicial power shall extend to "all Cases, in Law and Equity, arising under th[e] Constitution . . . ."[15] "[T]he case or controversy requirement of Article III . . . is 'built on a single basic idea––the idea of separation of powers.'"[16] The doctrine of justiciability, premised on the "case or controversy" requirement of Article III, is a doctrine of judicial restraint that determines when federal courts can entertain certain disputes.[17] To qualify as a case or controversy, a dispute must be concrete and non-hypothetical, present an actual injury, arise neither too late nor too early, and not present a political question.[18] Respectively, these are the doctrines of mootness, ripeness, standing, and political questions.[19] This Comment will purely discuss standing.

Standing refers to who may bring a lawsuit to federal court.[20] To bring a lawsuit to federal court, a plaintiff must have an actual interest––one that is serious and palpable––in the controversy.[21] In *Baker v. Carr*, the Court wrote that the question underlying the standing doctrine is whether plaintiffs have alleged "such a personal stake in the outcome of the controversy."[22] As discussed briefly above, to have standing under Article III, a plaintiff must show: (1) an injury-in-fact, (2) causation, and (3) redressability.[23]

Regarding the first constitutional requirement, injury-in-fact, the Court has required plaintiffs to suffer an injury that is concrete, actual, particularized, and imminent.[24] Second, the causation requirement refers to a causal link that is fairly traceable to the

14 *Flast*, 392 U.S at 94; U.S. CONST. art. III.

15 U.S. CONST. art. III, § 2, cl. 1.

16 TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2225 (2021) (Kagan, J., dissenting) (quoting Allen v. Wright, 468 U.S. 737, 752 (1984)).

17 Renne v. Geary, 501 U.S. 312, 316 (1991) ("Concerns of justiciability go to the power of the federal courts to entertain disputes, and to the wisdom of their doing so.").

18 NOAH R. FELDMAN & KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW 34 (Foundation Press eds., 20th ed. 2019).

19 *Id.* at 34–35.

20 *Flast*, 392 U.S.at 99.

21 *See* Baker v. Carr, 369 U.S. 186, 204 (1962).

22 *Id.* ("This [question] is the gist of the question of standing. It is, of course, a question of federal law.").

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

24 *Id.* at 560; Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc., 528 U.S. 167, 180 (2000).

harm and the conduct at issue.[25] In other words, the injury must be rationally connected to the harm suffered. Lastly, the third requirement, redressability, refers to whether a particular plaintiff can receive a judicial remedy, no matter how slight.[26] "If [a] plaintiff does not claim to have suffered an injury that the defendant caused and the court can remedy, there is no case or controversy for the federal court to resolve," and, thus, no standing.[27]

"Under Article III, federal courts do not adjudicate hypothetical or abstract disputes."[28] Rather, a federal court may resolve only a "real controversy with real impact on real persons."[29] Finally, regarding class actions, "every class member must have Article III standing in order to recover individual damages."[30]

In addition to these constitutional requirements for Article III standing, there are several prudential limitations.[31] While this Comment will purely discuss the constitutional requirements discussed above, to fully understand the subsequent analysis, it is important to have a full and comprehensive background of the prudential limits of standing.

First, there is no third-party standing.[32] A plaintiff must "assert his own legal rights and interests," not the interests of third parties.[33] For example, if a plaintiff is injured in an automobile accident, the plaintiff's brother cannot sue on behalf of the plaintiff, unless, of course, the plaintiff is unable to assert the right themselves. Some exceptions to this principle include if there is a close relationship between the plaintiff and the third party, if an organization is suing on behalf of its members, or, as discussed above, when the rights holder is unable to assert the right themselves.[34] Article III similarly disallows general grievances.[35] An individual cannot bring a case where the individual's grievances

25 *Lujan*, 504 U.S. at 560 (quoting Simon v. E. Ky. Welfare Rts. Org., 426 U.S. 26, 41–42 (1976).

26 *Id.* at 560 (quoting *Simon*, 426 U.S. at 38, 43).

27 Casillas v. Madison Ave. Assocs., 926 F.3d 329, 333 (7th Cir. 2019).

28 *TransUnion*, 141 S. Ct. at 2203.

29 Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2073 (2019).

30 *TransUnion*, 141 S. Ct. at 2208.

31 *See* FELDMAN & SULLIVAN, *supra* note 18.

32 *See* Kylie Chiseul Kim, *The Case Against Prudential Standing: Examining the Courts' Use of Prudential Standing Before and After Lexmark*, 85 TENN. L. REV. 303, 322 (2017).

33 *Id.*

34 FELDMAN & SULLIVAN, *supra* note 18.

35 *See* Kim, *supra* note 32, at 324.

are shared by the public as a whole.[36] For example, there is no taxpayer standing. Lastly, there can be no suits outside the law's zone of interest when an individual is trying to enforce a law.[37] The individual enforcing the law must be among the persons that Congress intended to benefit from a particular law when it was passed.[38] For example, environmental laws designed to protect urban areas cannot be enforced by rural residents. These are the prudential limits to Article III standing.

1. Lujan v. Defenders of Wildlife

In *Lujan v. Defenders of Wildlife*, the Court addressed the constitutional requirements of Article III standing.[39] Justice Scalia, writing for the majority, held that plaintiffs did not have standing to sue because the plaintiff-conservationists did not have a personal stake in the outcome of the case, as their injury was neither imminent nor concrete.[40] In *Lujan*, plaintiffs, a group of environmentalists and conservationists, alleged that the government's failure to enforce the Endangered Species Act of 1973 ("ESA") caused them injury as they would no longer be able to see certain animals in the wild.[41] The Court reaffirmed the three constitutional requirements of Article III standing and held that plaintiffs did not have standing because "the injury-in-fact test requires more than an injury to a cognizable interest[;] [i]t requires that the party seeking review be himself among the injured."[42] Because plaintiffs failed to show a concrete injury and a definitive plan to return to Africa to see the animals, their alleged injury was not imminent nor concrete.[43]

In his concurring opinion, Justice Kennedy wrote that while the ESA confers a right to "'any person . . . to enjoin . . . the United States and any other governmental instrumentality or agency . . . who is alleged to be in violation of any provision of this chapter,' it does not of its own force establish that there is an injury in 'any person' by virtue of any 'violation.'"[44] This is the principle that *Spokeo* expands and eventually rejects (see infra page 9). Justice Blackmun,

36 *See* Kim, *supra* note 32, at 324.
37 *See* Kim, *supra* note 32, at 331.
38 *See* Kim, *supra* note 32, at 326, 330–36.
39 Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–61 (1992).
40 *Id.* at 564, 578.
41 *Id.* at 560–61, 563.
42 *Id.* at 563 (quoting Sierra Club v. Morton, 405 U.S. 727, 734–35 (1972)).
43 *Id.* at 564.
44 *Id.* at 580 (Kennedy, J., concurring) (quoting 16 U.S.C. § 1540(g)(1)(A)).

joined by Justice O'Connor, dissented, finding that summary judgment was improper because there were genuine issues of material fact.[45] They also wrote that the majority misapplied standing to procedural injuries.[46]

2. Massachusetts v. EPA

Fifteen years later, the Court took a more liberal approach to the application of the standing doctrine in *Massachusetts v. Environmental Protection Agency*.[47] Writing for the majority, Justice Stevens held that "[w]hen a litigant is vested with a procedural right, that litigant has standing if there is some possibility that the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant."[48] In *Massachusetts v. EPA*, after an increase in global warming, greenhouse gases, and carbon dioxide trapped in the atmosphere, the Commonwealth of Massachusetts—along with a group of private organizations and local governments—claimed that the Environmental Protection Agency ("EPA") failed to act responsibly in curtailing greenhouse gases.[49] The Court held that plaintiffs satisfied the three standing requirements as global warming had already harmed—and continues to harm—Massachusetts.[50] The Court further noted that the harms associated with climate change were serious, that there was a clear causal connection between man-made greenhouse gasses and global warming, and that even a slight remedy would reduce or slow the greenhouse effect.[51]

Chief Justice Roberts, joined by Justices Scalia, Thomas, and Alito, dissented, arguing that the majority irresponsibly relaxed the standing requirements simply because the action was brought by a State.[52] The Justices also argued that any remedy for global warming was mere speculation and not sufficient to satisfy the redressability element of standing.[53]

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45 Lujan v. Defs. of Wildlife, 504 U.S. 555, 589–91 (1992) (Blackmun, J., dissenting); *see* FED. R. CIV. P. 56(a).

46 *Lujan,* 504 U.S. at 589–91 (Blackmun, J., dissenting).

47 Massachusetts v. Env't Prot. Agency, 549 U.S. 497 (2007).

48 *Id.* at 518.

49 *Id.* at 505.

50 *Id.* at 526.

51 *Id.* at 521–25.

52 *Id.* at 536 (Roberts, J., dissenting).

53 *Massachusetts*, 549 U.S. 497, 545 (2007) (Roberts, J., dissenting).

3. Clapper v. Amnesty International

More recently, in *Clapper v. Amnesty International*, the Court held that, although plaintiffs' alleged injury was concrete, it was too speculative for plaintiffs to have standing.[54] In *Clapper*, plaintiffs were a coalition of domestic advocacy groups who anticipated that their overseas contacts would be subject to Section 702 of the Foreign International Surveillance Act of 1978.[55] In holding that plaintiffs lacked Article III standing, Justice Alito, writing for the majority, held that the plaintiff's argument was too speculative, and their injury was not "certainly impending."[56] Further, the Court noted that fears of hypothetical harm are not "impending" and, therefore, not sufficient to satisfy the injury-in-fact requirement of Article III standing.[57]

4. Spokeo v. Robins

Three years later, in a perplexing opinion, the Court held that under Article III, an injury-in-law is not an injury-in-fact.[58] The *Spokeo* Court considered whether a violation of the Fair Credit Reporting Act ("FCRA" or "Act") was enough to satisfy the concrete harm element of Article III standing.[59] In *Spokeo*, a group of consumers, on behalf of Robins, claimed that Spokeo intentionally violated the FCRA by publishing false information about plaintiffs on their website.[60] The Court held that plaintiffs did not have standing because they did not have an injury that was "concrete" or "real."[61] The Court reasoned that in assessing Article III standing pursuant to procedural rights or alleged "injuries in law," courts should assess whether the injury to the plaintiff has a "close relationship" to a harm "traditionally" recognized "as providing a basis for a lawsuit in . . . American courts."[62]

54 Clapper v. Amnesty Int'l USA, 568 U.S. 398, 401–02 (2013).

55 *Id.*

56 *Id.* at 409–10 (finding that "[a]lthough imminence is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes—that the injury is *certainly* impending . . ." (emphasis in original)).

57 *Id.* at 416.

58 TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2200 (2021) (relying on Spokeo, Inc. v. Robins, 578 U.S. 330 (2016)).

59 *Spokeo*, 578 U.S. at 333.

60 *Id.* at 336.

61 *Id.* at 340–42.

62 *Id.* at 340–41.

Justice Alito, writing for the majority, explained that certain harms qualify as concrete injuries under Article III.[63] Such harms include tangible harms, such as physical and monetary harm, intangible harms, such as reputational harms, disclosure of private information, intrusion, and harms specified in the Constitution.[64] The Court, once and for all, affirmed the principle that "a plaintiff [does not] automatically satisf[y] the injury-in-fact requirement whenever a statute grants a person a statutory right . . . *Article III standing requires a concrete injury even in the context of a statutory violation*."[65]

To many constitutional scholars and law students, *Spokeo* is a "vague, confusing jumble of an opinion" that directly contradicts Congress's intent to grant plaintiffs a private right when a company violates a statute.[66] *Spokeo*, nonetheless, played a vital role in the Court's holding in *TransUnion*, another "jumble of an opinion" that shocks American constitutional law jurisprudence.

5. Thole v. U.S. Bank

Four years after *Spokeo*—but prior to *TransUnion*—Justice Kavanaugh wrote for the majority on Article III standing in *Thole v. U.S. Bank*.[67] In *Thole*, plaintiffs were a class of individuals who had retirement plans with U.S. Bank North America.[68] Acknowledging that they did not suffer any monetary injuries, plaintiffs sued, arguing that U.S. Bank mismanaged their respective retirement plans.[69] The plaintiffs sued under the Employee Retirement Income Security Act of 1974.[70] The Court held that when determining standing in a class action lawsuit, each litigant must have suffered a concrete injury-in-fact, giving them a sufficiently concrete interest in the case or controversy.[71] Relying on *Spokeo*, the Court found that plaintiffs did not make a proper showing of any concrete harm since

63 *Id.*

64 *Id*. at 34–42; *see, e.g.*, Meese v. Keene, 481 U.S. 465, 473–74 (1987) (reputational harms); David v. Fed. Election Comm'n, 554 U.S. 724, 733 (2008) (disclosures of private information); Gadelhak v. AT&T Servs., Inc., 950 F.3d 458, 462 (7th Cir. 2020) (intrusion).

65 *Spokeo*, 136 S. Ct. at 1549 (emphasis added).

66 *See* Solove & Citron, *supra* note 12, at 64.

67 Thole v. U.S. Bank N.A., 140 S. Ct. 1615, 1618 (2020).

68 *Id.* at 1618.

69 *Id.*

70 *Id.*

71 *Id.* at 1620; *see* Hollingsworth v. Perry, 570 U.S. 693, 708 (2013).

"Article III standing requires a concrete injury even in the context of a statutory violation."[72]

Justice Thomas and Justice Gorsuch concurred in the reasoning, articulating that the majority correctly applied the Court's precedents but overcomplicated their reasoning by applying trust law.[73] In a long opinion, Justices Sotomayor, Ginsburg, Breyer, and Kagan dissented.[74] In their powerful dissent, a dissent that echoes Justice Kagan's opinion in *TransUnion*, the Justices argued that the majority's conclusion conflicts with longstanding Article III precedent.[75] The dissenters believed that the plaintiffs had standing for three reasons: first, plaintiffs argued that they suffered $750 million in injuries from having an actual interest in their retirement plan, which is the center of their case or controversy;[76] second, breach of fiduciary duty is a recognized concrete injury under Article III standing jurisprudence and under historical common law doctrine;[77] and third, petitioners had standing to sue on their retirement plan's behalf.[78] In the end, the dissenters forcefully described the Court's complication and nonsensical application of Article III standing.[79] This same irresponsible and unsupported thinking that the dissenters attacked in *Thole* is at the forefront once again in *TransUnion*.

Throughout the development of American constitutional law and standing jurisprudence, the Court's complication of Article III standing has caused confusion among legal scholars, academics, lawyers, and judges as to how to apply the justiciability doctrine, especially as it pertains to procedural rights in the face of statutory violations. These contradictory views are central to the legal conversation, as the Court in *TransUnion* misapplied precedent and misconstrued critical principles of Article III standing. This misapplication of standing jurisprudence will cause disagreement in lower courts, waste judicial resources, and impact the legitimacy of the court.

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72 *Thole*, 140 S. Ct. at 1620–21 (quoting Spokeo, 578 U.S. at 341).

73 *Thole*, 140 S. Ct. at 1622 (2020) (Thomas, J., & Gorsuch, J., concurring).

74 *Id.* at 1623 (Sotomayor, J., dissenting).

75 *Id.*

76 *Id.* at 1625.

77 Thole, 140 S. Ct. at 1628–29 (2020).

78 *Id.* at 1632 (Sotomayor, J., dissenting).

79 *See id*.

B. TransUnion v. Ramirez

1. Facts

"To have Article III standing to sue in federal court, plaintiffs must demonstrate, among other things, that they suffered a concrete harm. No concrete harm, no standing."[80] In *TransUnion*, on writ of certiorari from the Ninth Circuit,[81] a class of 8,185 individuals sued TransUnion, a large credit reporting agency, for violations of the Fair Credit Reporting Act.[82] Similar to *Spokeo*, the class argued that *TransUnion* failed to take reasonable measures to "ensure the accuracy of [plaintiffs'] credit files."[83] More specifically, information about 1,853 of the class members was sent to third-party businesses.[84] Information from the remaining 6,332 members was not sent to any third party.[85]

As part of their daily operations, TransUnion, one of the major credit reporting agencies in the United States, acquires personal information about consumers and creates reports, which get sent to third-party businesses, including, but not limited to, banks, car dealerships, real estate agents, and landlords.[86] After the terrorist attacks on September 11, 2001, TransUnion, and other credit reporting agencies, with the help of the Office of Foreign Assets Control ("OFAC"), created OFAC lists to monitor terrorist and drug activity, and to protect American national security.[87] TransUnion created the OFAC list to help protect businesses and other third-party entities from contracting with terrorists or other criminals.[88] These OFAC lists consist of names of potential terrorists and drug traffickers within the United States.[89]

After TransUnion conducts its routine credit check, if the first and last name of a consumer matches or is similar to a name on the OFAC list, an automatic alert is then placed on their credit file.[90] TransUnion negligently compared nothing more than the first and last names of the consumers to the terrorists so, as one can imagine,

80 TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2200 (2021).
81 Ramirez v. TransUnion LLC, 951 F.3d 1008 (9th Cir. 2020).
82 *TransUnion*, 141 S. Ct. at 2200.
83 *Id.*
84 *Id.*
85 *Id.*
86 *Id.* at 2201.
87 *Id.*
88 *TransUnion*, 141 S. Ct. at 2201.
89 *Id.*
90 *Id.*

the list was extensive and named ordinary people who were not terrorists.[91] This litigation arose because OFAC alerts were placed on all 8,185 individuals, yet only 1,853 of those individuals' files were sent to third-party businesses.[92]

Sergio Ramirez ("Ramirez"), the representative of the class, attempted to buy a new car in California when, following a credit check produced by TransUnion, an alert popped up indicating that Ramirez was a potential terrorist.[93] Ramirez was therefore not permitted to purchase the car he wanted.[94] Ramirez then demanded a copy of his credit file from TransUnion, and when the agency complied, pursuant to § 1681(g)(c)(2) of the Fair Credit Reporting Act, they failed to mention the OFAC alert on Ramirez's file.[95] Eventually, after back-and-forth communications, TransUnion sent Ramirez a message stating that he was a potential match on the OFAC list, but that message did not include a summary of rights, as is required under the Fair Credit Reporting Act.[96] After learning that he was a potential terrorist, Ramirez was embarrassed, angered, and defamed, which led him to bring suit.[97]

2. Procedural History

In 2012, Ramirez sued TransUnion for violating the Fair Credit Reporting Act.[98] A class was certified in 2014 in the United States District Court for the Northern District of California pursuant to Fed. R. Civ. P. 23.[99] The district court held that all 8,125 members of the class had Article III standing because they suffered a concrete harm that was fairly traceable to the conduct and redressable by the court.[100] After six days of trial, the jury awarded a total of $60 million to the class.[101] The United States Court of Appeals for the Ninth Circuit affirmed, holding that the entire class had standing on

91 *Id.*

92 *Id.* at 2202.

93 *Id.* at 2201.

94 TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2201 (2021).

95 *Id.*

96 *Id.* at 2202.

97 *Id.* at 2209.

98 *Id.* at 2200.

99 *Id.* at 2202 (stating that Ramirez's claims were "typical of the class's claims for purposes of Rule 23").

100 *See* Ramirez v. TransUnion, 2016 U.S. Dist. LEXIS 143450, 2016 WL 6070490, at *5 (9th Cir. Oct. 17, 2016).

101 *TransUnion*, 141 S. Ct. at 2202.

all three claims.[102] The Ninth Circuit, however, reduced the amount of punitive damages to $40 million.[103] The Supreme Court granted certiorari on the issue of whether the entire class had Article III standing.[104] Central to the understanding of *TransUnion* is the Fair Credit Reporting Act, which must be reviewed carefully to truly comprehend the implications of the Court's opinion.

3. Background: The Fair Credit Reporting Act

The Fair Credit Reporting Act ("FCRA" or the "Act") was passed by Congress and signed into law by President Nixon in 1970.[105] The purpose of the Act was to "promote fair and accurate credit reporting," especially once information gets compiled and disseminated to third-party creditors.[106] The FCRA "imposes a host of requirements concerning the creation and use of consumer reports."[107] The Act requires credit reporting agencies to "follow reasonable procedures to assure maximum possible accuracy in credit reports."[108] The Act further provides that credit agencies, upon request, must disclose all information in the consumer's file at the time of the request.[109] Lastly, pursuant to the Act, a "summary of rights" prepared by the Consumer Financial Protection Bureau must be disclosed to each consumer.[110] The FCRA "creates a cause of action for consumers to sue and recover damages for certain violations."[111] This is an important provision because the Supreme Court in both *Spokeo* and *TransUnion* disregarded the express intent of the legislature and held that "an injury in law is not an injury in fact."[112] According to the Act, "any person [or entity] who willfully fails to comply with any requirement imposed under . . . subchapter [§ 1681] is liable to that consumer . . . [for] any actual damages sustained . . . or [statutory] damages of not less than $100 and not more than $1,000," as well as for punitive damages and attorney's fees.[113]

102 *Id.*
103 *Id.*
104 *Id.*.
105 *Id.* at 2200.
106 *Id.*
107 Spokeo, Inc. v. Robins, 578 U.S. 330, 335 (2016).
108 Fair Credit Reporting Act, 15 U.S.C. § 1681(e)(b).
109 15 U.S.C. § 1681(g)(a)(1).
110 15 U.S.C. § 1681(g)(c)(2).
111 TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2201 (2021).
112 *Id.* at 2205; see also *Spokeo*, 578 U.S. at 341–42.
113 15 U.S.C. § 1681n(a).

The legislative history of the FCRA provides that credit reporting practices must be accurate, relevant, confidential, and compiled in a responsible manner.[114] The FCRA protects consumers by protecting their reputations.[115] Furthermore, courts interpreting the Act find that the FCRA is to be liberally construed.[116] Under the FCRA, principals may be liable for violations under apparent authority agency principles.[117] Despite the clear legislative history, the Court in *TransUnion* protected credit reporting agencies and ignored consumers' rights.

4. Majority Holding

In a controversial 5-4 decision, Justice Kavanaugh, joined by Chief Justice Roberts, and Justices Alito, Gorsuch, and Barrett, wrote that only the 1,853 class members—those whose information was disseminated to third-party creditors—demonstrated that they suffered a concrete, reputational harm sufficient for Article III standing to sue.[118] The Court held that the remaining individuals (the 6,332 class members), whose files were not sent to third-party businesses, did not suffer a concrete harm, and thus lacked Article III standing.[119] Acknowledging that TransUnion failed to follow reasonable procedures to assure maximum possible accuracy of credit files, the Court found that this violation of the FCRA bore a "close relationship" to a harm traditionally recognized in American courts, but only for the 1,853 class members whose information was sent to third parties.[120]

The controversy arises in the Court's standing analysis for the remaining 6,332 class members.[121] The Court relied heavily on the fact that the remaining class members did not have their information disseminated to any third party.[122] Relying on the Restatement of Torts § 577, the majority held that publication is

114 *See* 15 U.S.C. § 1681(g)(a)(1); *see also* Guimond v. TransUnion Credit Info. Co., 45 F.3d 1329, 1333 (9th Cir. 1995).

115 *See Guimond*, 45 F.3d at 1333; *see also* Leet v. Cellco P'Ship, 480 F. Supp. 2d 422, 428 (D. Mass. 2007).

116 *Guimond*, 45 F.3d at 1333.

117 Jones v. Federated Fin. Reserve Corp., 144 F.3d 961, 965 (6th Cir. 1998).

118 *See TransUnion*, 141 S. Ct. at 2209.

119 *Id.* at 2214.

120 *Id.* at 2208 (Plaintiffs alleged that the common law tort of defamation is similar to the harm they suffered).

121 *Id.* at 2210.

122 *See* TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2209 (2021).

essential to liability in a suit for defamation.[123] The Court further reasoned that there is no common law analog where the mere existence of inaccurate information, absent dissemination, amounts to a concrete injury.[124] In summation, the Court held that the mere inaccuracy of information, without more, does not satisfy the concrete harm definition of Article III standing.[125] "No concrete harm, no standing."[126]

Alternatively, plaintiffs argued that they suffered harm based on a risk of future harm.[127] They maintained that the misleading OFAC alerts "exposed them to a material risk that the information would be disseminated in the future to third parties," causing them harm.[128] The majority distinguished *TransUnion* from *Clapper*, highlighting that *Clapper* involved injunctive relief, whereas this case involves damages.[129] As held in *Clapper*, a person exposed to a risk of harm may pursue forward-looking, injunctive relief, as long as the harm is sufficiently imminent and substantial.[130] Despite *Clapper*, the Court in *TransUnion* articulated that the 6,332 plaintiffs did not demonstrate that the risk of harm materialized and, therefore, the Court held that they did not have Article III standing.[131] In the end, the Court reversed the judgment of the Ninth Circuit and remanded the case for further proceedings.[132]

5. Justice Thomas's Dissent

Justice Thomas, joined by Justices Breyer, Sotomayor, and Kagan, dissented, reasoning that TransUnion's violation of the FCRA entitled the plaintiffs to a remedy.[133] Although this approach conflicts with the holding in *Spokeo,* it makes more sense from a practical and logical perspective. The dissent relied on a previous lawsuit between a consumer and TransUnion.[134] In 2005, after discovering

123 *Id.*

124 *Id.* at 2209 (citing Owner-Operator Indep. Drivers Ass'n v. U.S. Dep't of Transp., 879 F.3d 339, 344–45 (D.C. Cir. 2018)).

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

126 *Id.* at 2200.

127 *Id.* at 2210.

128 *Id.*

129 *Id.* ("*Clapper* involved a suit for injunctive relief.").

130 *Id.*

131 *TransUnion*, 141 S. Ct. at 2211–12.

132 *Id.* at 2214.

133 TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2214 (2021) (Thomas, J., dissenting).

134 *Id.* at 2215 (referencing Cortez v. TransUnion LLC, 617 F.3d 688, 696–706 (3d Cir. 2010)).

that she was on the OFAC list, Sandra Jean Cortez sued TransUnion, alleging that the company failed to take reasonable efforts to ensure maximum possible accuracy.[135] The jury awarded Cortez $50,000 in actual damages and $750,000 in punitive damages, and the court urged TransUnion to revamp its business practices.[136] The Third Circuit affirmed the decision but reduced the amount of punitive damages.[137] After this case, TransUnion made few changes to their business practices.[138]

"Where an individual sought to sue someone for a violation of his private rights . . . the plaintiff needed only to allege the violation."[139] At common law, courts typically did not require any showing of actual damages when an important right was violated.[140] Justice Thomas argued that statutory violations can give rise to Article III standing.[141] He held that the "actual or threatened injury required by Art. III may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing."[142] In the end, Justice Thomas believed that all the class members suffered a harm to their private rights because TransUnion violated three separate statutory duties, and never adjusted their flawed and irresponsible business practices.[143]

6. Justice Kagan's Dissent

Justice Kagan further dissented, claiming that the majority's decision rewrote Article III standing jurisprudence.[144] Justice Kagan noted that Article III precedent explains that Congress has "broad power to create and define rights."[145] Justice Kagan differed with Justice Thomas on one issue:

> In [Justice Thomas's view], any "violation of an individual right" created by Congress gives rise to Article III standing. But in *Spokeo*, this Court held that "Article III requires a concrete injury even in the context of a statutory violation."

135 *TransUnion*, 141 S. Ct. at 2215 (Thomas, J., dissenting).

136 *Id.*

137 *Id.*

138 *Id.*

139 *Id.* at 2217 (quoting Entick v. Carrington (1765) 95 Eng. Rep. 807, 817; 2 Wils. K.B. 275, 291).

140 Uzuegbunam v. Preczewski, 141 S. Ct. 792, 800 (2021).

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

142 *Id*. (quoting Havens Realty Corp. v. Coleman, 455 U.S. 363, 373 (1982)).

143 *TransUnion*, 141 S. Ct. at 2218 (2021) (Thomas, J., dissenting).

144 *Id.* at 2225 (Kagan, J., dissenting).

145 *Id*. (internal quotations omitted).

> [The Court should continue to adhere to that principle] but . . . it should lead to the same result [that the entire class has standing to sue].[146]

Justice Kagan suggested that, as recognized in *Spokeo*, Article III requires only a real harm or a risk of a real harm.[147] The Justice concluded her dissenting opinion by arguing that it is not the Court's role to determine a plaintiff's harm, and such a practice abuses basic principles of the separation of powers doctrine.[148]

III. WHERE THIS LEAVES THE JURISPRUDENCE

A. Redefining the Standing Doctrine

TransUnion redefines standing jurisprudence in this country.[149] The majority's holding gives the judiciary too much power to determine when a plaintiff suffers a concrete harm, something the founding fathers did not intend to give the judiciary.[150] As compelling as Justice Kavanaugh's arguments are, he misapplied Article III precedent and incorrectly held that the 6,332 class members did not have standing. Courts in the future should adhere to Justice Thomas's dissenting opinion, as it applies a more practical and reasonable approach to Article III standing.[151]

It is hard to imagine that the majority would take such a narrow approach to Article III standing, given the clear precedent, prior broadening of the doctrine, and the judicial modesty under Chief Justice Roberts.[152] But, as Justice Kagan wrote in her dissent, *TransUnion* rewrites American standing law and transforms the

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146 *Id*. at 2226.

147 *Id.*

148 *Id*.

149 *See* DAVID N. ANTHONY ET AL., *SUPREME COURT DECISION: TRANSUNION V. RAMIREZ* (JUNE 25, 2021), TROUTMAN PEPPER HAMILTON SANDERS, LLP, https://www.troutman.com/insights/supreme-court-decision-transunion-v-ramirez.html.

150 *See* FELDMAN & SULLIVAN, *supra* note 18, at 34.

151 *See TransUnion*, 141 S. Ct. at 2215 (Thomas, J., dissenting).

152 *See* Benjamin Pomerance, *The King in His Court: Chief Justice John Roberts at the Center*, 83.1 ALB. L. REV. 169, 172–73 (2020) (explaining how Roberts took "great pains to avoid any semblance of controversy in his public image. In many ways, Roberts is at once visible and invisible, a highly public ambassador for the Court and for the legal profession who still manages to remain intensely private, a man lauded for his intellectual eminence who does not succumb to the entreaties of politically conservative groups like the Federalist Society, which seeks Roberts's public endorsement . . . .").

doctrine of justiciability into a "tool of judicial aggrandizement."[153] The holding in *TransUnion* is, thus, wrong for several reasons.

First, the Court ignores the Latin maxim of "*ubi jus, ibi remedium*,"[154] which should be applied to standing cases and should have been applied to the plaintiffs in *TransUnion*.[155] That maxim translates to Justice Marshall's famous saying, "where there is a right, there is a remedy."[156] In *Marbury v. Madison*,[157] Justice Marshall wrote that, "it is a general and indisputable rule that where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded."[158] It is therefore inconceivable for the majority to hold that the 6,332 class members did not suffer a concrete harm since they were legally wronged and therefore must be entitled to a legal remedy. Although the *Spokeo* Court determined that the mere violation of a statutory right does not provide plaintiffs with a remedy, *Spokeo* fails to recognize that the plaintiffs nevertheless suffered reputational harm, a harm sufficient to satisfy the injury-in-fact requirement of standing.[159] Section B of this analysis explores why *Spokeo* is incorrect and should be overruled.

Second, the Court ignores the fact that the victims on TransUnion's OFAC list were defamed and suffered a reputational harm. Under longstanding common law principles, "a person is injured when a defamatory statement 'that would subject him to hatred, contempt, or ridicule' is published to a third party."[160] On the facts of *TransUnion*, although several of the class members did not have their information published to third-party creditors, their information became *known* to third parties.[161] Ramirez's family, for example, was aware of the OFAC report naming Ramirez as a potential terrorist.[162] Additionally, the OFAC reports were sent to

153 *TransUnion*, 141 S. Ct. at 2225 (Kagan, J., dissenting).

154 *See* Tracy A. Thomas, *Ubi Jus, Ibi Remedium: The Fundamental Right to a Remedy Under Due Process*, 41 SAN DIEGO L. REV. 1633, 1636 (2004); *see also* 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 23 (Dawsons of Pall Mall 1966) (1768).

155 *See* Thomas, *supra* note 154.

156 Thomas, *supra* note 154, at 1637.

157 Marbury v. Madison, 5 U.S. 137 (1803).

158 *Id.* at 163.

159 *See* Spokeo, Inc. v. Robins, 578 U.S. 330, 341–42 (2016).

160 *See TransUnion*, 141 S. Ct. at 2208; *see also* Milkovich v. Lorain J. Co., 497 U.S. 1, 13 (1990).

161 TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2208 (2021).

162 *Id.* at 2215–16 (Thomas, J., dissenting).

internal agencies and software that work with TransUnion.[163] They were disseminated to employees of TransUnion, which amounts to embarrassment and slander. Although this is not considered "publication," when thinking liberally, the information was sent to third parties, which is an action sufficient to justify a concrete harm. Instead of following this approach, the majority irresponsibly created a heightened standard for a concrete harm under Article III standing.

Third, the class members in TransUnion have shown more than a mere violation of the law. Before addressing this point, it is important to note that, following the principle set out in *Spokeo*—that a mere violation of a statute does not create a procedural right—in *TransUnion*, the Court did not overrule *Evans v. Portfolio Recovery Associations.*[164] *Evans*, a Seventh Circuit standing case, similarly held that "it is not enough that [a] statutory violation present[s] a risk of harm—[rather,] the plaintiff has to explicitly allege a risk of [a] concrete harm."[165] Similarly, the fact that the FCRA provides for a plaintiff to sue a credit agency for violations does not mean there is Article III standing.[166] District courts applying *Evans* and *Spokeo* have typically required plaintiffs to show some change in the plaintiff's status beyond the mere violation of the law.[167] Despite these principles, the class in *TransUnion* showed more than a mere FCRA violation. The class proved that the OFAC reports defamed, embarrassed, and limited them in the free market. Clearly, there is a difference between the 1,853 and the 6,322 members, but only in terms of the level of harm suffered. All members, nevertheless, suffered some kind of harm, a harm that was fairly traceable and redressable. Because the entire class suffered a legal wrong, they are all entitled to a remedy.

B. Stare Decisis and Spokeo

Even if we take the Court's *TransUnion* Opinion at face value, over time, *Spokeo* has proven to be unworkable and should not be followed as precedent. Prior to *Dobbs v. Jackson*,[168] *Planned*

163 *Id.* at 2210.

164 Evans v. Portfolio Recovery Assocs., LLC, 889 F.3d 337 (7th Cir. 2018).

165 *Id.* at 345; Tolliver v. Nat'l Credit Sys., Inc., No. 20-cv-728-jdp, 2021 U.S. Dist. LEXIS 180784, *1, *3 (W.D. Wis. Sep. 22, 2021) (quoting Markakos v. Medicredit, Inc., 997 F.3d 778, 786 (7th Cir. 2021) (Rovner, J., concurring)).

166 Casillas v. Madison Ave. Assocs., 926 F.3d 329, 333 (7th Cir. 2019).

167 *Tolliver*, 2021 U.S. Dist. LEXIS 180784, at *6.

168 Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

Parenthood v. Casey[169] set out the principle that "the decision to overrule a prior case is not . . . virtually foreordained, it is common wisdom that the rule of stare decisis is not 'inexorable command,' and certainly it is not such in every constitutional case."[170] While that principle has stood the test of time, the *Dobbs* court changed the *stare decisis* factors and created five similar, but new factors.[171] In *Dobbs*, Justice Alito, writing for the majority, noted that "five factors weigh strongly in favor of overruling *Roe* and *Casey*: the nature of their error, the quality of their reasoning, the 'workability' of the rules they imposed on the country, their disruptive effect on other areas of the law, and the absence of concrete reliance."[172] In other words, the Court, in a constitutional case, can decide not to follow a prior case if it has been shown to be intolerable or practically unworkable.[173]

Here, in addition to *Spokeo* incorrectly applying precedent and its poor reasoning, it has been proven unworkable. The holding in *Spokeo* contradicts traditional common law doctrine and results in plaintiffs suffering harms that can never be redressed. Because *Spokeo* is a recent case from 2016, it has not been relied on sufficiently for *stare decisis* to be the sole reasoning for Justice Kavanaugh and the majority in *TransUnion* to rely on. Thus, there is no concrete reliance. Additionally, while prior cases need to be discussed as a basic principle theory of legal research, it is a longstanding constitutional doctrine that the legislature creates rights, invasion of which justify standing.[174] Building on this idea, *Spokeo* is problematic on a micro and macro level, as it "cast[s] doubt on standing in several different cases where standing seemed to be widely presumed," and is inconsistent with various causes of actions.[175] In other words, the nature of *Spokeo*'s error is massive. For example, under *Spokeo*'s holding, the Court in *Zivotofsky v. Kerry*, a separation of power case about having Israel as the place of birth on a United States passport, should have never reached the case

169 Planned Parenthood v. Casey, 505 U.S. 833 (1992).

170 *Id.* at 854 (quoting Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 405–11 (1932) (Brandeis, J., dissenting)).

171 *Dobbs*, 142 S. Ct. at 2265.

172 *Id.*

173 *Id.*; *see Planned Parenthood*, 505 U.S. at 855; *see also* Swift & Co. v. Wickham, 382 U.S. 111, 116 (1965).

174 William Baude, *Standing in the Shadow of Congress*, 2016 SUP. CT. REV. 197, 199 (2017).

175 *Id.* at 216.

on the merits because the Court has previously recognized that "Congress may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute."[176]

As expressed earlier in this Comment, Justice Kavanaugh and the majority in *TransUnion* relied mainly on *Spokeo* because of its relationship to the FCRA.[177] In *Spokeo*, similarly to *Evans v. Portfolio Recovery Associations*, the Court held that "a plaintiff [does not] automatically satisf[y] the injury-in-fact requirement whenever a statute grants a person a statutory right . . . Article III standing requires a concrete injury even in the context of a statutory violation."[178] Despite this, however, plaintiffs in *TransUnion* have shown a concrete harm by demonstrating a reputational harm, which is often a redressable injury with damages or injunctive relief, as seen in *Clapper*.[179] The Court in *Spokeo* explained that such harms include tangible and intangible harms like reputational harms, disclosure of private information, and intrusion.[180] The entire class in *TransUnion* suffered harm to their reputation, had private and personal information illegally disclosed in violation of the FCRA, and had their personal rights intruded upon.[181] This seems sufficient to justify Article III standing.

In addition to the suggestion that the Court follow Justice Thomas's dissent in *TransUnion*, a better approach to standing is that of the Ninth Circuit in its *Spokeo* opinion, before the petitioner filed a writ of certiorari to the Supreme Court. In that case, the Ninth Circuit adopted a two-pronged approach for determining whether the violation of a statutory right constitutes a concrete injury: "(1) whether the statutory provisions at issue were established to protect concrete interests, and if so, (2) whether the specific procedural violations alleged . . . actually harm, or present a material risk of harm to, such interests."[182] This is the standard that the Court should have applied, and district courts should apply in the future when dealing with a statutory violation. However, the

176 *Id.* at 218; *see* Zivotofsky v. Kerry, 576 U.S. 1, 6 (2015); *see also* Zivotofsky v. Sec'y of State, 444 F.3d 614, 617 (D.C. Cir. 2006) (quoting Linda R. S. v. Richard D., 410 U.S. 614, 617 n.3 (1973) and Warth v. Seldin, 422 U.S. 490, 514 (1975)).

177 TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2204 (2021).

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

179 *TransUnion*, 141 S. Ct. at 2208.

180 *Spokeo*, 578 U.S. at 340–342.

181 *TransUnion*, 141 S. Ct. at 2218 (Thomas, J., dissenting).

182 Robins v. Spokeo, Inc., 867 F.3d 1108, 1113 (9th Cir. 2017).

Court incorrectly rejected this test when they reversed the Ninth Circuit's decision in *Spokeo.*

The Ninth Circuit's test creates a workable bright-line rule for standing and procedural rights. Using the Ninth Circuit's approach, the statutory provisions of the FCRA would protect consumers from large credit reporting agencies who misuse information and potentially cause tangible or intangible harm to consumers when that information gets disseminated. The first prong in the two-factor test is satisfied here because the FCRA was written to protect several concrete interests of consumers––the legislative history of the FCRA expressly says so. Next, the violations of the FCRA by TransUnion harmed the plaintiffs as they could no longer purchase houses or cars or freely interact with interstate or intrastate commerce. Consumers, for example, can no longer purchase anything that requires a credit check because they will be marked as terrorists and refused a sale. While some of the class members did not try to purchase anything, time will show that *Spokeo* is unworkable, given that the basis for this country is capitalist principles where consumers purchase goods freely. As a result, this clear procedural violation has harmed and presented a material risk of harm to consumers.

In all of this analysis, the *Spokeo* decision was simply bad law, leading to unjust, poor results, as seen in *TransUnion.* While *stare decisis* is a basic principle of American legal doctrine, *stare decisis* is not an "inexorable command," and prior cases can be reconsidered, especially in constitutional cases.[183] As a result, the Court should overrule *Spokeo*. The rule, as explained prior to *Spokeo*, was simple: an "actual or threatened injury required by Article III may exist solely by 'statutes creating legal rights, the invasion of which creates standing.'"[184] This principle was the intent of the legislature and should never have been overruled or disregarded. As Justice Thomas similarly argued in his dissent in *TransUnion*, this principle should continue to be precedent.

C. Common Law

In addition to the more practical tests described above, when determining whether a plaintiff suffers a concrete harm, the Court should consider whether common law traditionally recognized the harm. Using this standard—and not the narrow one utilized by the

183 Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 405–11 (1932) (Stone, J. & Brandeis, J., dissenting).

184 *See* Warth v. Seldin, 422 U.S. 490, 500 (1975) (quoting Sierra Club v. Morton, 405 U.S. 727, 732 (1972)).

majority––the entire class in TransUnion would have had the standing to sue.

The Federalist Papers express a similar view.[185] In Federalist Number 15, Alexander Hamilton wrote that:

> [i]t is essential to the idea of [] law, that [a legal wrong] be attended with a sanction; or, in other words, a penalty or punishment for disobedience. If there be no penalty annexed to disobedience, the resolutions or commands which pretend to be laws will, in fact, amount to nothing more than advice or recommendation.[186]

Pursuant to the FCRA, it is a violation for a credit reporting agency to fail to take reasonable measures to ensure the accuracy of credit files.[187] In congruence with Federalist Number 15 and principles of *ubi jus, ibi remedium*, Congress established that violations of the FCRA create a legal wrong and result in damages awarded to the party who suffered the harm.[188]

> To the same point, Justice Thomas noted in his dissent in *TransUnion* that the [k]ey to the scope of the judicial power, then, is whether an individual asserts his or her own rights. At the time of the founding, whether a court possessed judicial power over an action with no showing of actual damages depended on whether the plaintiff sought to enforce a right held privately by an individual or a duty owed broadly to the community. Where an individual sought to sue someone for a violation of his private rights, such as trespass on his land, the plaintiff needed only to allege the violation.[189]

In other words, Justice Thomas believes that, given the founding fathers' view, the precedent of standing, and the common law, all the members of the class should have standing to sue.[190] For the foregoing reasons, *Spokeo* has been proven unworkable and, as seen in *TransUnion*, leads to inequitable and unjust results. Given the common law view, Justice Thomas's position, and the

185 ALEXANDER HAMILTON, THE FEDERALIST NO. 15, at 159 (Alexander Hamilton) (Benjamin Fletcher Wright ed., 1961).

186 *Id.*

187 *See* 15 U.S.C. § 1681e(b) ("Whenever a consumer reporting agency prepares a consumer report it shall follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates.").

188 *See* § 1681.

189 TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2217 (2021) (Thomas, J., dissenting).

190 *Id.*

unworkability of *Spokeo*, *TransUnion* should not have come out the way it did.

D. Failure to Adhere to Precedent

Even if the Court decides against *stare decisis*, the Court in *TransUnion* failed to adhere to its Article III standing precedent.[191] *Stare decisis* is the legal principle that uses precedent and prior case law to determine outcomes and rules.

First, pursuant to *Baker v. Carr*, the entire class has alleged a personal stake in the outcome.[192] As the Court in *Lujan* held, "the injury-in-fact test requires more than an injury to a cognizable interest."[193] "It requires that the party seeking review be himself among the injured."[194] Whereas in *Lujan*, the Court correctly held that plaintiffs failed to show a concrete injury because they had no intention of returning to Africa, *TransUnion* plaintiffs did make such a showing.[195]

The class members in *TransUnion* entrusted TransUnion Credit Agency with private information that impacted their daily lives.[196] The United States is founded upon basic principles of capitalism, where consumers, at any time, are free to search the market for goods and services.[197] The fact that only 1,853 plaintiffs attempted to buy something prior to this lawsuit does not mean that the remaining plaintiffs did not suffer an actual harm. The remaining class members could have easily suffered a harm––for example, defamation, libel, or emotional harm.[198] The plaintiffs clearly showed a cognizable interest since, in addition to a statutory FCRA

191 For an analysis of precedent, stare decisis, and originalism, see Amy Coney Barrett, *Originalism and Stare Decisis*, 92 NOTRE DAME L. REV. 1921, 1921–23 (2017).

192 Baker v. Carr, 369 U.S. 186, 204 (1962) ("This [question] is the gist of the question of standing. It is, of course, a question of federal law.").

193 Lujan v. Defs. of Wildlife, 504 U.S. 555, 563 (1992).

194 *Id.*

195 *Id.* at 564.

196 TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2201–05 (2021).

197 *See* Thomas K. McGraw, *It Came in the First Ships: Capitalism in America*, HARV. BUS. SCH. (Oct. 12, 1999), https://hbswk.hbs.edu/item/it-came-in-the-first-ships-capitalism-in-america.

198 *See* Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 762–63 (1985) (noting that the "market provides a powerful incentive to a credit reporting agency to be accurate, since false credit reporting of no use to creditors. Thus, any incremental 'chilling' effect of libel suits would be of decreased significance," and "permitting recovery of presumed and punitive damages in defamation cases absent a showing of 'actual malice' does not violate the First Amendment when the defamatory statements do not involve matters of public concern").

violation, plaintiffs suffered reputational and emotional harm, a harm traditionally recognized at common law.

Just as each class member showed a cognizable interest, the entire class could also show that TransUnion's violation of the FCRA impacted their daily lives.[199] Approximately twenty-five percent of the class had their information sent to third-party businesses when they attempted to make purchases, such as a car or a house.[200] It is not speculative to assume that when other plaintiffs attempt similar purchases, their information will be sent out as well.[201] It is also not speculative to believe that many consumers in the United States will rely on their credit reports to purchase something in their lifetime.

Similarly, because consumers make purchases daily, third parties can be contacted with OFAC lists by TransUnion Credit Reporting Agency at any time, thus harming the plaintiffs. The risk imposed on plaintiffs is therefore not speculative. *TransUnion* is distinguishable from *Clapper* because, in *Clapper*, although the plaintiffs articulated a concrete injury, the Court held that the injury was too speculative.[202] In *TransUnion*, in 2021, with most transactions occurring with credit, it is not mere speculation to say that the remaining class members who were judicially denied a justiciable claim suffered a harm by being on an OFAC list, in violation of the FCRA.[203]

Unlike the ESA in *Lujan*, which "does not of its own force establish that there is an injury in 'any person' by virtue of any violation,"[204] the FCRA does provide that violations of the statute amounts to a redressable injury.[205] The FCRA provides that any person who willfully fails to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer for actual damages or for statutory damages, not less than $100 and not more than $1,000, as well as for punitive damages and attorney's fees.[206]

Additionally, Justice Kavanaugh fails to mention *Massachusetts v. EPA,* a binding case that the Court should have followed in their

199 *TransUnion*, 141 S. Ct. at 2201–02.

200 *Id.* at 2222 (Thomas, J., dissenting).

201 *Id.* at 2222, 2225 (Kagan, J., dissenting).

202 Clapper v. Amnesty Int'l USA, 568 U.S. 398, 401 (2013).

203 *See* Jenn Underwood & Caroline Lupini, *Cash vs. Credit: Which One Should I Use?*, FORBES (Sept. 15, 2021), https://www.forbes.com/advisor/credit-cards/cash-vs-credit-which-should-i-use/.

204 Lujan v. Defs. of Wildlife, 504 U.S. 555, 580 (1992) (Kennedy, J., concurring).

205 *See* DAVID N. ANTHONY, *supra* note 149.

206 15 U.S.C. § 1681n(a).

decision in *TransUnion*.[207] In *Massachusetts v. EPA*, the Court broadly held that when a litigant is vested with a procedural right, the litigant has standing "if there is some possibility that the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant."[208] In *TransUnion*, plaintiffs were seeking damages and injunctive relief which would have caused TransUnion to reconsider some of their privacy practices and procedural mechanisms for conducting OFAC lists.[209]

It is important to note that Justice Thomas, a dissenter in *TransUnion*, also dissented in *Massachusetts v. EPA* because of the relaxation of standing jurisprudence that took place in that case.[210] In *TransUnion*, Justice Thomas is on the opposite end of the spectrum arguing that the majority now is giving the judiciary too much power to decide when plaintiffs suffer a concrete harm.[211]

E. The Impact of TransUnion on Future Lawsuits

The meaning of the majority's opinion in *TransUnion*, and more specifically, the broader question of whether a statutory violation amounts to a concrete harm, will be heavily debated in lower courts until the Supreme Court makes clear the Article III standing requirements for concrete harm.[212] Not only does the majority opinion impact Article III litigation and constitutional law, but it also affects other industries and claims regarding data breaches, consumer law, finance, and privacy matters.[213] Privacy and data breaches are particularly fascinating given evolving technological innovations and the insurmountable data breaches and privacy violations that constantly occur.

In addition to affecting data breaches and privacy law, the majority opinion harms the legitimacy of the Court, something Chief Justice Roberts, during his time as Chief Justice, has attempted to improve.[214] A few years ago, in response to former President Trump's statement regarding a district court judge being an "Obama

207 *See generally* TransUnion LLC v. Ramirez, 141 S. Ct. 2190 (2021) (showing that Massachusetts v. Env't Prot. Agency, 549 U.S. 497 (2007), is not discussed in *TransUnion*).

208 *Massachusetts*, 549 U.S. at 518.

209 *See TransUnion*, 141 S. Ct. at 2202.

210 *Massachusetts*, 549 U.S. at 548 (Roberts, C.J., Scalia, J., Alito, J., & Thomas, J., dissenting).

211 *TransUnion*, 141 S. Ct. at 2219–21 (Thomas, J., dissenting).

212 *See* DAVID N. ANTHONY, *supra* note 149.

213 DAVID N. ANTHONY, *supra* note 149.

214 *See* FELDMAN & SULLIVAN, *supra* note 18.

judge," Chief Justice Roberts said that "[the courts] do not have Obama judges or Trump judges, Bush judges or Clinton judges . . . . [The] independent judiciary is something we should all be thankful for."[215] However, the majority's approach to Article III standing aggrandizes the power of the judiciary and impacts the way people view the Court.[216] Every day people suffer legal harm; if the Court is to determine the extent of such harms, as the majority suggests, then basic principles of constitutional law and separation of powers have been thrown out the window.[217]

In regards to this view, Federalist Number 78 provides that "[t]he courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body."[218] In other words, Alexander Hamilton is suggesting that the Court's role is to interpret the law, not to interpret when a party suffers a concrete harm and the extent of an injury.[219] This power was never given to the judiciary and must never be given in order to protect the individual freedoms of the people and the separation of powers doctrine.[220]

While standing to sue is a constitutionally created requirement pursuant to Article III, for the reasons stated above, the majority's opinion gives too much power to the judiciary in determining who suffers an injury and to what extent that injury is concrete.[221] Congress has written the FCRA clearly so that violations of it result in a harm sufficient to amount to standing in federal court.[222] Although the majority attempts to justify their conclusion utilizing the holding in *Spokeo*, plaintiffs in *TransUnion* have alleged a close relationship between their injuries and a historical analog for their

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215 Rachel Koning Beals, *Chief Justice Roberts Rebukes Trump: 'We Do Not Have Obama Judges or Trump Judges, Bush Judges or Clinton Judges',* MKT. WATCH (Nov. 21, 2018, 4:28PM), https://www.marketwatch.com/story/chief-justice-roberts-rebukes-trump-we-do-not-have-obama-judges-or-trump-judges-bush-judges-or-clinton-judges-2018-11-21.

216 *TransUnion*, 141 S. Ct. at 2225 (Kagan, J., dissenting).

217 *See* FELDMAN & SULLIVAN, *supra* note 18.

218 THE FEDERALIST NO. 78, AT 573 (Alexander Hamilton) (The Floating Press ed., 2011).

219 *See id.*

220 TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2214, 2221, 2225 (2021) (Kagan, J., dissenting).

221 *Id.* at 2225–26 (Kagan, J., dissenting).

222 *See* 15 U.S.C. § 1681.

invasion of privacy.[223] The implications of this case, therefore, are everlasting, especially since courts consistently reject the legislative recognition of harm in statutes.

TransUnion also creates issues and conflicts between the rights of businesses and the rights of individuals and consumers. *TransUnion* seems to protect big businesses from potentially frivolous lawsuits where parties do not suffer an actual harm. But as discussed, is it the judiciary's role to protect big businesses? Is it the judiciary's role to determine the extent of an injury? The majority seems to think so.

IV. CONCLUSION

Giving consumers and individuals a right to a legal remedy for violations of their privacy is essential to a workable and functional system of law. Congress created the FCRA to give individuals a statutory right when companies violate the Act. *TransUnion* invades Congress's power to draft legislation that is necessary and vital to the protection of individuals.[224] As Justice Thomas wrote in his dissenting opinion,

> one need only tap into common sense to know that receiving a letter identifying you as a potential drug trafficker or terrorist is harmful. All the more so when the information comes in the context of a credit report, the entire purpose of which is to demonstrate that a person can be trusted.[225]

Even if the Court rules, as it did, that the 1,853 members do not have standing, the Court in *Gill v. Whitford*[226] held that, typically in cases where a plaintiff fails to demonstrate Article III standing, the case is dismissed; however, under certain circumstances, the Court can "decline to direct dismissal."[227] In *Gill*, the Court did just that.[228] This should have been the alternative approach by the Court in *TransUnion*, as privacy rights are essential to liberty.

Given the precedent in this country, the majority's opinion in *TransUnion* rewrites standing jurisprudence and gives too much power to the judiciary regarding who can bring a suit to federal court. Coming full circle, Justice Kavanaugh's opening statement in

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223 *See* Spokeo, Inc. v. Robins, 578 U.S. 330, 334 (2016); *see also TransUnion*, 141 S. Ct. at 2204.

224 Solove & Citron, *supra* note 12.

225 *TransUnion*, 141 S. Ct. at 2223 (Thomas, J., dissenting).

226 Gill v. Whitford, 138 S. Ct. 1916 (2018).

227 *Id.* at 1933–34.

228 *Id.*

the case, "[n]o concrete harm, no standing," is a misapplication of standing jurisprudence and an incorrect and faulty understanding of Article III standing jurisprudence.[229]

229 *TransUnion*, 141 S. Ct. at 2200.