No. 20-297

IN THE

Supreme Court of the United States

TRANS UNION LLC,

Petitioner,

v.

SERGIO L. RAMIREZ, individually and on behalf of all other similarly situated individuals,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE*[1]

Constitutional Accountability Center (CAC) is a think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of our Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and preserve the rights and freedoms it guarantees. CAC has a strong interest in ensuring meaningful access to the courts, in accordance with constitutional text and history, and therefore has an interest in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

The doctrine of Article III standing "is built on a single basic idea—the idea of separation of powers." *Allen v. Wright*, 468 U.S. 737, 752 (1984). By limiting the courts "to decid[ing] on the rights of individuals," *Marbury v. Madison*, 5 U.S. 137, 170 (1803), standing is meant to keep political judgments where they belong: in the elected branches. But accepting TransUnion's position in this case would do just the opposite. Based on subjective and standardless notions of what makes a "concrete" injury—notions at odds with this Court's decision in *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016)—TransUnion would have the judiciary restrict Congress's power to create statutory rights and remedies protecting Americans from private conduct

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[1] The parties have consented to the filing of this brief, and their letters of consent have been filed with the Clerk. Under Rule 37.6 of the Rules of this Court, *amicus* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus* or its counsel made a monetary contribution to its preparation or submission.

that threatens their livelihoods and well-being. As history and precedent confirm, however, TransUnion's position is wrong: Congress has the authority to establish "legally cognizable injuries" that "were previously inadequate in law," *id.* at 1549 (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 578 (1992)), including injuries that consist of being put at "material risk" of harms that Congress seeks to prevent, *id.* at 1550. Every plaintiff in this case suffered such an injury.

A jury found that TransUnion willfully violated multiple safeguards of the Fair Credit Reporting Act (FCRA), 15 U.S.C. §§ 1681 *et seq.*, by employing shoddy procedures that labeled thousands of people as potential national security threats who were prohibited from conducting financial transactions in the United States—and by responding to those individuals' requests for information about their credit reports with "confusing and incomplete mailings." Pet. App. 3. Seeking to overturn the jury's damages award, TransUnion argued that, except for Respondent Ramirez, the plaintiff class members did not suffer a "concrete" injury sufficient to create a case or controversy under Article III.

Following this Court's guidance in *Spokeo*, the court of appeals rejected that argument. It first identified the interests that Congress sought to protect in the FCRA, among them preventing "harms that result from inaccurate credit reporting . . . such as the inability to obtain credit and employment," as well as consumers' interest in "understanding how to dispute inaccurate information before it reaches potential creditors." Pet. App. 22, 31. The court noted that those interests "resemble other reputational and privacy interests that have long been protected in the law." *Id.* at 22. And it concluded that TransUnion's violations of the plaintiffs' statutory rights created "a material risk

of harm" to those interests. *Id.*; *see Spokeo*, 136 S. Ct. at 1549-50.

TransUnion cannot credibly deny that its statutory violations "exposed every class member to a material risk of harm to the core interests the FCRA was designed to protect." Pet. App. 33. Instead, TransUnion argues that this injury is not "concrete" because "that risk never materialized" for many class members. Pet. Br. 38. That argument flatly contradicts *Spokeo*'s discussion of injury in the context of statutory rights. And it rests almost entirely on TransUnion's subjective assumptions—untethered from any source of law—about the narrow scope of "real-world" injury. Pet. Br. 28. TransUnion offers no definition of "concrete" injury, no separation-of-powers analysis, and no standard for this Court to use in determining when the violation of a statutory right satisfies Article III's requirements. The closest TransUnion comes is to emphasize that the harms to which it put the plaintiffs at risk here are not *identical* to the harms addressed by other statutes and common law torts. But as this Court has explained, Congress has the power to "define *new* legal rights, which in turn will confer standing to vindicate an injury caused to the claimant," *Vermont Agency of Nat. Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 773 (2000) (emphasis added), and that power has never been limited to replicating the protections of existing law. Moreover, Congress's power is at its apex where, as here, the new rights it creates are deeply rooted in traditional legal protections such as those against false and defamatory statements.

This Court would be expanding the power of the judiciary at the expense of the elected branches—precisely what standing doctrine is supposed to prevent—by employing unguided intuitions of the type offered by TransUnion as a basis for restricting Congress's

power to create private rights and remedies. That result would also directly contravene constitutional text and history. As discussed below, Article III was not originally understood to require any particular type of "real world" damage to invoke the power of the federal courts. Instead, by limiting the judiciary to resolving "Cases" and "Controversies," U.S. Const. art. III, § 2, cl. 1, the Framers required the alleged deprivation of a legal right. And even as this Court has developed modern standing doctrine to prevent, among other things, the attempted conversion of undifferentiated public rights into private causes of action, this Court has consistently reaffirmed that the injury required by Article III "may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing." *Warth v. Seldin*, 422 U.S. 490, 500 (1975) (quotation marks omitted); *see Spokeo*, 136 S. Ct. at 1549. The decision below should be affirmed.

ARGUMENT

I. By Limiting the Scope of "Concrete" Injury Based on Intuitive Notions Unmoored from Any Standard, TransUnion's Position Would Expand the Power of the Judiciary at the Expense of the Elected Branches.

According to TransUnion, most of the plaintiffs in this case "suffered no injury," Pet. Br. 2, from its labeling of them as potential national security threats, or from its failure to comply with the FCRA's requirements in communicating with them about this mislabeling on their credit reports. Although Congress gave these individuals a right to be free from the treatment TransUnion inflicted on them, and a cause of action to redress violations of that right, TransUnion insists that the deprivation of these statutory rights is not a "concrete" injury. *Id.* at 28.

TransUnion, however, provides no standard for this Court to use in determining when the violation of a statutory right qualifies as a "concrete" injury. In lieu of any definition of concreteness or any yardstick by which to measure it, TransUnion simply declares that there is "no plausible claim of concrete injury" here. Pet. Br. 36. And its discussion consists primarily of reflexive assertions, unmoored from any source of law, about what does and does not constitute an "actual" harm. *Id.* at 28. TransUnion's approach is essentially, "I know it when I don't see it." *See, e.g.*, *id.* at 2 (portraying its labeling of the plaintiffs as potential terrorists in records available to creditors and employers as "the bare existence of inaccurate information lying dormant in the file"); *id.* (downplaying its inadequate communications with the plaintiffs as simply providing information "in two envelopes rather than one").

Based on these unexamined, *a priori* assumptions about the nature of "real-world" injury, Pet. Br. 28, TransUnion would have this Court limit the rights and remedies that Congress established in the FCRA—restricting those remedies to situations in which victims suffer *additional* harm resulting from violations of their statutory rights. *See id.* at 22 (citing "no evidence" that the plaintiffs "experienced any confusion" from its mailings); *id.* at 23 (emphasizing that many plaintiffs did not have their flawed credit reports "disseminated to a third party"). But accepting that invitation would be at odds with this Court's recent reaffirmation that when statutory rights are violated, "the risk of real harm" alone can "satisfy the requirement of concreteness," and that in such situations "the violation of a procedural right granted by statute can be sufficient." *Spokeo*, 136 S. Ct. at 1549. "In other words, a plaintiff in such a case need not allege any

additional harm beyond the one Congress has identified." *Id.*

Although "a bare procedural violation, divorced from any concrete harm," will not suffice, even in the context of a statutory right, *id.* at 1549, the risks to which the plaintiffs were subjected as a result of TransUnion's violations are evident. As "one of the nation's largest consumer reporting agencies," TransUnion "made all class members' reports available to potential creditors or employers at a moment's notice, even without the consumers' knowledge in some instances," creating "a risk of harm to all class members by allowing third parties to readily access the reports." Pet. App. 25-26; *see id.* at 32 (explaining that TransUnion's disclosure violations also "put every class member at a risk of real harm," including "not knowing that they were falsely being labeled as terrorists, drug dealers, and threats to national security," and "be[ing] left completely in the dark about how they could get the label off their reports"). This Court has long recognized that Congress may establish actionable rights to be free of such threats to private interests. *See infra* Part II.

TransUnion goes wrong in part because it asks the wrong question. As *Spokeo* makes clear, the issue in cases like this is "whether the particular procedural violations alleged . . . entail *a degree of risk* sufficient to meet the concreteness requirement." 136 S. Ct. at 1550 (emphasis added). *But see* Pet. Br. 38 (discounting the risk that TransUnion's flawed credit reports would be disseminated to the plaintiffs' creditors or employers because "that risk never materialized" for many plaintiffs).

Instead of engaging with the proper question, TransUnion confuses the "risk" inquiry that helps identify concrete injury in statutory-violation cases

like this one with the wholly separate "imminence" inquiry addressed in *Clapper v. Amnesty International USA*, 568 U.S. 398, 409 (2013). But the reason the court of appeals "never mentioned" *Clapper*, Pet. Br. 38, is that *Clapper* addressed imminence, not concreteness—an entirely different part of the injury-in-fact requirement. And it did so in a case that did not involve the deprivation of statutory rights. *See Robins v. Spokeo, Inc.*, 867 F.3d 1108, 1118 (9th Cir. 2017) (explaining that *Clapper* does not shed light on FCRA cases like this one because the *Clapper* plaintiffs sought to establish standing "on the basis of harm they would supposedly suffer from *threatened conduct* that had not happened yet," not on the basis of completed statutory violations that put them at risk of harm); *accord Spokeo*, 136 S. Ct. at 1549 (specifically distinguishing *Clapper* in reaffirming that "the risk of real harm" can satisfy the concreteness requirement in statutory cases); *Lujan*, 504 U.S. at 572 n.7 ("The person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy.").

TransUnion also disregards the broader principle reaffirmed in *Spokeo*: "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." 136 S. Ct. at 1549 (quoting *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring in part and concurring in judgment)). Indeed, the only substantive reasoning that TransUnion offers for its position—the only part of its argument that goes beyond bare assertions that no injury occurred—is that the harms inflicted on the plaintiffs here differed from the harms that *other* statutes, or specific common law torts, are designed to guard against, such as the publication of

defamatory statements or the inability to obtain information that the law requires be disclosed. *See* Pet. Br. 30, 38. This argument shortchanges Congress's power to "define *new* legal rights, which in turn will confer standing to vindicate an injury caused to the claimant." *Stevens*, 529 U.S. at 773 (emphasis added).

For instance, as TransUnion acknowledges, it is an injury-in-fact to be denied a statutory right to information. *FEC v. Akins*, 524 U.S. 11 (1998); *Public Citizen v. Dep't of Justice*, 491 U.S. 440 (1989). But that is not because some preexisting, transcendent concept of injury has been satisfied when one is prevented from obtaining the records of a political action committee, *Akins*, 524 U.S. at 21, or the American Bar Association, *Public Citizen*, 491 U.S. at 447. Rather, it is because the denial of that statutory right places the victims at risk of the type of private harm that Congress sought to prevent in enacting the relevant statutes. Without the information sought in *Akins*, this Court explained, the plaintiffs would have been less able "to evaluate candidates for public office" and "the role that . . . financial assistance might play in a specific election." 524 U.S. at 21. Denying the plaintiffs' right to information thus put them at risk of being unable to adequately evaluate candidates and their contributors—exactly the harm that the law in question aimed to avert. *See id.* at 14-15 ("the [statute] seeks to remedy any actual or perceived corruption of the political process in several important ways," including "record-keeping and disclosure requirements" covering "contributions" and other expenditures); *accord Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982) (enforcing a statutory right to truthful information about housing availability that Congress established to combat the risk of housing discrimination).

In a similar vein, TransUnion emphasizes that the torts of defamation and false light required dissemination of inaccurate information to third parties. Pet. Br. 38. Its premise is that congressional power extends no further than addressing the precise types of injuries already recognized by the (largely judge-made) common law. But such a restrictive view of Congress's power has no basis in Article III, *see infra*, and this Court has never endorsed it.

This Court has noted that "history" is important in "determining whether an intangible harm constitutes injury in fact," but only in the sense that it can be "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." *Spokeo*, 136 S. Ct. at 1549. That is true here, as the decision below recognized, because "[c]ourts have long entertained causes of action to vindicate intangible harms caused by certain untruthful disclosures about individuals." Pet. App. 23 (quoting *Robins*, 867 F.3d at 1115). And Congress's power is surely at its apex where it establishes new safeguards for reputational and privacy interests that resemble traditional, deeply rooted legal protections for those interests.

TransUnion misinterprets *Spokeo*'s "close relationship" language as giving Congress virtually no flexibility to address new types of risks that emerge with new technologies and financial practices—such as the risks inherent in error-prone credit reports that are made "available to potential creditors or employers at a moment's notice." Pet. App. 25. That parsimonious view of Congress's power to solve new problems misconstrues what this Court said—that historical analogies can be "instructive," not dispositive, and that "both history *and the judgment of Congress* play important roles." *Spokeo*, 136 S. Ct. at 1549 (emphasis

added). "Everyone agrees, after all, that Congress has considerable leeway in recognizing legal interests and creating causes of action that were unknown at common law." Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 Mich. L. Rev. 689, 717-18 (2004).

Accepting TransUnion's argument "that the common law exhausts Congress' power, and that the Constitution forbids it from intruding on that catalogue or creating new legal rights," would scarcely embody the judicial restraint that standing doctrine is meant to promote—rather, that argument recalls a notorious period of judicial activism: "In the early twentieth century, the common law catalogue was similarly thought to be part of the state of nature, or of 'how things are,' and thus to operate as a barrier to legislative efforts to redefine property interests." Cass R. Sunstein, *What's Standing after* Lujan*? Of Citizen Suits, "Injuries," and Article III*, 91 Mich. L. Rev. 163, 192 (1992). And this Court has never imposed so tight a straightjacket on congressional authority.

After all, it is the job of the elected branches, not the courts, to decide which kinds of real-world interests merit legal protection, *see Davis v. Passman*, 442 U.S. 228, 241 (1979) ("Statutory rights and obligations are established by Congress, and it is entirely appropriate for Congress, in creating these rights and obligations, to determine in addition, who may enforce them and in what manner."), subject, of course, to certain outer limits that ensure Congress is not conscripting the judiciary into overstepping its constitutional role, *see, e.g.*, *Lujan*, 504 U.S. at 577 (Congress may not "convert the undifferentiated public interest in executive officers' compliance with the law into an 'individual right' vindicable in the courts"). It is one thing for this Court to observe—in illustrating a point—that

"[i]t is difficult to imagine how the dissemination of an incorrect zip code, without more, could work any concrete harm." *Spokeo*, 136 S. Ct. at 1550. It would be quite another thing for this Court to employ such intuitions as a basis for restricting the constitutional powers of the elected branches, as TransUnion urges.

Indeed, that elevation of the judicial role and diminishment of the elected branches is exactly what standing doctrine, "founded in concern about the proper—and properly limited—role of the courts in a democratic society," *Summers v. Earth Island Inst.*, 555 U.S. 488, 492-93 (2009) (quoting *Warth*, 422 U.S. at 498), is supposed to prevent. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102 (1998) (standing doctrine rests on a "common understanding of what activities are appropriate to legislatures, to executives, and to courts" (quoting *Lujan*, 504 U.S. at 559-60)). Flipping those values upside down, TransUnion implores this Court to limit congressionally established remedies under the FCRA based on wholly subjective notions about what should be considered a "real-world injury." Pet. Br. 27; *see id.* at 26 ("courts, not Congress, are the ultimate arbiters of whether such injury exists"). TransUnion's unguided approach would accomplish what academic critics of standing doctrine have long warned of, transforming "a doctrine of judicial restraint into a judicially enforced doctrine of congressional restraint." Richard J. Pierce, Jr., *Lujan v. Defenders of Wildlife: Standing as a Judicially Imposed Limit on Legislative Power*, 42 Duke L.J. 1170, 1199 (1993).

TransUnion blithely asserts, for instance, that its labeling of the plaintiffs as potential terrorists in records readily accessible to employers and creditors was "no different from a defamatory letter left in a desk drawer," Pet. Br. 36, and that its failure to obey the

FCRA's disclosure rules amounted to sending information to the plaintiffs "in two envelopes instead of one," *id.* at 23. But what makes judges better positioned than Congress to decide which "risk[s] of harm," *Spokeo*, 136 S. Ct. at 1550, the law should protect against?

Precisely because the identification of "real injuries," Pet. Br. 1, requires social and political judgments about what types of harms should be legally redressable, that task is primarily "within the control of Congress." Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 Suffolk U. L. Rev. 881, 885 (1983); *see id.* ("Standing requires . . . some particularized injury to the individual plaintiff. But legal injury is by definition no more than the violation of a legal right; and legal rights can be created by the legislature."). That authority is limited only where the Constitution requires such limits to ensure that the courts continue to perform an exclusively judicial function. As standing doctrine reflects, a legislature with *complete* discretion to designate redressable injuries could subvert the separation of powers by, among other things, facilitating advisory opinions, promoting citizens to the role of general law enforcers, intruding on the executive's unique constitutional duties, and shifting policy judgments from the elected branches to the courts. *See* Heather Elliott, *The Functions of Standing*, 61 Stan. L. Rev. 459, 461-63 (2008); *id.* at 479 ("if a plaintiff can sue when there is nothing distinctive about him in relation to the lawsuit, then there is literally no limit on the cases that the federal courts could be asked to hear" (citing *Flast v. Cohen*, 392 U.S. 83, 130 (1968) (Harlan, J., dissenting))).

While these concerns are acute in "public rights" actions, where plaintiffs seek to vindicate "interests generally shared" by the entire populace, Woolhandler

& Nelson, *supra*, at 693, they are "generally absent when a private plaintiff seeks to enforce only his personal rights against another private party," *Spokeo*, 136 S. Ct. at 1551 (Thomas, J., concurring). Indeed, standing doctrine "grew out of the distinction between public and private rights" and "enforced the rule that the judiciary had the power only to vindicate private rights in suits by private litigants." F. Andrew Hessick, *Standing, Injury in Fact, and Private Rights*, 93 Cornell L. Rev. 275, 289 (2008); *see Lujan*, 504 U.S. at 577-78 (the individual rights that may be vindicated in Article III courts do not include mere "public rights that have been legislatively pronounced to belong to each individual" (citing *Stark v. Wickard*, 321 U.S. 288, 309-10 (1944))). Because "[t]he purpose of the factual injury requirement is to ensure that plaintiffs are asserting their own private rights," that requirement is largely "superfluous in cases alleging the violation of a private right." Hessick, *supra*, at 277.

None of the separation-of-powers concerns that animate Article III standing doctrine are implicated in this case. TransUnion does not even attempt to show that they are. Although standing doctrine "is built on the single basic idea . . . of separation of powers," *Allen*, 468 U.S. at 752, and although that central focus is what "makes possible the gradual clarification of the law through judicial application," *id.*, TransUnion's brief is strikingly devoid of any separation-of-powers analysis.

That is because this case presents no risk to the separation of powers, much less to its ultimate goal of "safeguard[ing] individual liberty." *NLRB v. Noel Canning*, 573 U.S. 513, 525 (2014). To the contrary: "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." *Marbury*,

5 U.S. at 163. The plaintiffs here clearly "seek relief in order to protect or vindicate an interest of their own," *Baker v. Carr*, 369 U.S. 186, 207 (1962), not some shared abstract concern such as "the right, possessed by every citizen, to require that the government be administered according to law," *Fairchild v. Hughes*, 258 U.S. 126, 129 (1922).

This Court has acknowledged that "standing doctrine incorporates concepts concededly not susceptible of precise definition," *Allen*, 468 U.S. at 751, and one such concept is surely the idea of "concrete" injury. Given this "absence of precise definitions," it is the touchstone provided by the "fundamental notion of separation of powers" that prevents courts from being left "at sea." *Id.* TransUnion, however, eschews separation-of-powers reasoning while simultaneously failing to offer any workable definition of "concrete" injury—relying instead on unexamined assumptions about the nature of "real" harm.

The court of appeals, by contrast, followed this Court's guidance in *Spokeo*, identifying the interests that Congress sought to protect in the FCRA and explaining why TransUnion's violations of the plaintiffs' rights created "a material risk of harm" to those interests. Pet. App. 22. The plaintiffs were designated as potential national security threats in records accessible to their creditors and employers, and in response to their requests for information, they were sent communications that failed to meet federal standards aimed at promoting accuracy in credit reporting. Plainly, their stake in this case is not "too abstract, or otherwise not appropriate, to be considered judicially cognizable." *Allen*, 468 U.S. at 752.

II. Through Its Broad Power to Establish New Legal Rights and Remedies, Congress May Create Procedural Entitlements that Protect Private Interests from Being Put at Risk of Harm.

As discussed, TransUnion's violations caused a material risk of harm to private interests that a federal statute aims to protect. That injury more than satisfies Article III's case-or-controversy requirement, as constitutional text and history make clear.

Before the twentieth-century development of a generalized doctrine of standing, "what we now consider to be the question of standing was answered by deciding whether Congress or any other source of law had granted the plaintiff a right to sue." Sunstein, *supra*, at 170. The question, in other words, was whether the plaintiff had a legally enforceable right—at common law, in equity, or by virtue of a statute. That question had "constitutional status," because "[w]ithout a cause of action, there was no case or controversy." *Id.*

Apart from this requirement of an actionable legal injury, however, Article III was not understood to impose any freestanding requirement that a plaintiff have any particular type of "real world" injury. The question was simply whether an actual dispute over a legal entitlement was presented in the form required. *See Osborn v. Bank of U.S.*, 22 U.S. 738, 819 (1824) (Article III jurisdiction exists when a question about federal law "shall assume such a form that the judicial power is capable of acting on it," which occurs "when the subject is submitted to it by a party who asserts his rights in the form prescribed by law. It then becomes a case . . . ."); 3 Joseph Story, *Commentaries on the Constitution of the United States* § 1640, at 507 (1833) (an Article III question "arises, when some

subject, touching the constitution, laws, or treaties of the United States, is submitted to the courts by a party, who asserts his rights in the form prescribed by law"); *see also Weston v. City Council of Charleston*, 27 U.S. 449, 464 (1829) (the term "suit" is "a very comprehensive one, and is understood to apply to any proceeding in a court of justice, by which an individual pursues that remedy in a court of justice, which the law affords him"). As Justice Field explained in the late nineteenth century:

> By cases and controversies are intended the claims of litigants brought before the courts . . . for the protection or enforcement of rights, or the prevention, redress, or punishment of wrongs. Whenever the claim of a party under the constitution, laws, or treaties of the United States takes such form that the judicial power is capable of acting upon it, then it has become a case.

In re Pac. Ry. Comm'n, 32 F. 241, 255 (C.C.N.D. Cal. 1887). There was no overriding metaphysical concept of a "real" injury, much less any notion that the judiciary could limit Congress's power to establish new legal injuries.

These conceptions of the judicial power came from English law, under which "rights were synonymous with remedies, remedies were synonymous with the forms of action, and, by algebraic logic, the forms of action were synonymous with the concept of redressable (that is, cognizable) injuries." Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 Stan. L. Rev. 1371, 1396 (1988) (footnote omitted). Notably, therefore, "individuals were entitled to relief for violations of private rights, regardless of whether they suffered any additional injury," and "the violation alone entitled the plaintiff to relief."

Hessick, *supra*, at 278-79; *cf.* 1 Samuel Johnson, *A Dictionary of the English Language* (6th ed. 1785) (defining "Injurious" as "Unjust; *invasive of another's rights*" (emphasis added)). As Blackstone wrote, it was 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." 3 William Blackstone, *Commentaries on the Laws of England* 23 (1766).

For that reason, "the common law inferred damages whenever a legal right was violated." *Uzuegbunam v. Preczewski*, No. 19-968, 2021 WL 850106, at *4 (U.S. Mar. 8, 2021). Nominal damages were available based on the violation of one's private legal rights alone—without a showing of additional harm resulting from the violation. *See* Joseph Story, *Commentaries on the Law of Agency* § 217c, at 277 (8th ed. 1874) ("Where the breach of duty is clear, it will, in the absence of all evidence of other damage, be presumed that the party has sustained a nominal damage."). The courts "reasoned that *every* legal injury necessarily causes damage, so they awarded nominal damages absent evidence of other damages." *Uzuegbunam*, 2021 WL 850106, at *4; *see Ashby v. White*, 92 Eng. Rep. 126, 137 (1703) (Holt, C.J.) ("surely every injury imports damage, though it does not cost the party one farthing," for "an injury imports a damage, when a man is thereby hindered of his right," and thus "in an action for slanderous words, though a man does not lose a penny by reason of the speaking them, yet he shall have an action"); *Wells v. Watling*, 96 Eng. Rep. 726, 727 (1778) (where a plaintiff possessing the right to graze sheep on a common pasture sued a defendant for over-grazing, the plaintiff did not need to supply evidence of harm: "[i]t [was] sufficient if the right be injured").

In such cases, the deprivation of a legal right inherently put the victim at risk of harms that the law sought to prevent, and that was enough. "For example, a trespass to land or water rights *might raise a prospective threat* to a property right by creating the foundation for a future claim of adverse possession or prescriptive easement," and so "a property owner could 'vindicate his right by action' and *protect against those future threats*." *Uzuegbunam*, 2021 WL 850106, at *4 (emphasis added) (quoting *Blanchard v. Baker*, 8 Me. 253, 268 (1832)).

Consistent with that tradition, the Framers did not require in Article III any particular type of "real world" damage or harm to invoke the power of the federal courts. Instead, by limiting the judiciary to resolving "Cases" and "Controversies," U.S. Const. art. III, § 2, cl. 1, the Framers required the alleged deprivation of a legal right. As explained in *Marbury*, the "province of the court is, solely, to decide on the rights of individuals," and "'every right, when withheld, must have a remedy.'" 5 U.S. at 170, 163 (quoting Blackstone, *supra*, at 109). Thus, "where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, . . . the individual who considers himself injured, has a right to resort to the laws of his country for a remedy." *Id.* at 166; *see also Martin v. Hunter's Lessee*, 14 U.S. 304, 350 (1816) (rejecting a construction of Article III because the result "would, in many cases, be rights without corresponding remedies"); *Kendall v. United States ex rel. Stokes*, 37 U.S. 524, 624 (1838) (stating that it would be a "monstrous absurdity in a well organized government, that there should be no remedy, although a clear and undeniable right should be shown to exist").

Early American law thus adopted the traditional understanding that every violation of a legal right

warranted a remedy. Based on that premise, courts awarded damages for the deprivation of individuals' private rights regardless of whether additional harm ensued. *See Uzuegbunam*, 2021 WL 850106, at *5 (the "well established" common law rule was that "a party whose rights are invaded can always recover nominal damages without furnishing any evidence of actual damage" (quoting 1 Theodore Sedgwick, *A Treatise on the Measure of Damages* 71, n.a (7th ed. 1880))).

As Justice Story explained: "Actual, perceptible damage is not indispensable as the foundation of an action. The law tolerates no farther inquiry than whether there has been the violation of a right. If so, the party injured is entitled to maintain his action for nominal damages, in vindication of his right, if no other damages are fit and proper to remunerate him." *Webb v. Portland Mfg. Co.*, 29 F. Cas. 506, 508 (C.C.D. Me. 1838). Applying this principle, the *Webb* court held that a mill owner could sue an adjoining property owner for diverting water from a river, concluding that "it is not necessary in an action of this sort to show actual damage." *Id.* at 509; *see also Whipple v. Cumberland Mfg. Co.*, 29 F. Cas. 934, 936 (C.C.D. Me. 1843) ("wherever a wrong is done to a right, the law imports, that there is some damage to the right, and, in the absence of any other proof of substantial damage, nominal damages will be given in support of the right"); *Hendrick v. Cook*, 4 Ga. 241, 261 (1848) (rejecting the argument that "there must be some *perceptible damage* shown, to entitle the plaintiff to recover" and "that injury without damage, is not actionable," because "whenever there has been an illegal invasion of the *rights* of another, it is an *injury*, for which he is entitled to a remedy by an action"); *Parker v. Griswold*, 17 Conn. 288, 303 (1846) ("An injury is a wrong; and for the redress of every wrong there is a remedy

. . . . Where therefore there has been a violation of a right, the person injured is entitled to an action."); *Allaire v. Whitney*, 1 Hill 484, 487 (N.Y. Sup. Ct. 1841) ("[A]ctual damage is not necessary to an action. A violation of right with a possibility of damage, forms the ground of an action.").

To be sure, the substantive rules of common law and equity often demanded certain kinds of injuries to entitle victims to certain remedies: injunctions, for example, were available only to prevent specific types of "irreparable injuries." 1 Joseph Story, *Commentaries on Equity Jurisprudence, as Administered in England and America* § 29, at 29 (1836). In developing these largely judge-fashioned bodies of law, American courts increasingly embraced "the general principle against private enforcement of public rights" by requiring a showing of individual harm to enforce a "duty owed to the public." Woolhandler & Nelson, *supra*, at 703; *see Mayor, etc. of City of Georgetown v. Alexandria Canal Co.*, 37 U.S. 91, 99 (1838) ("in case of public nuisance, where a bill is filed by a private person, asking for relief by way of prevention, the plaintiff cannot maintain a stand in a court of equity; unless he avers and proves some special injury"). But in fleshing out these "issue-specific rules," Woolhandler & Nelson, *supra*, at 703, "the central inquiry was whether the litigant asserted the kind of interest or right for which equity [or the common law] would provide a remedy," Winter, *supra*, at 1422.[2]

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[2] Courts came to regard the common law "prerogative writs," such as the writ of *mandamus*, as being governed by the same limits that equity imposed on the availability of relief, *see Bd. of Liquidation v. McComb*, 92 U.S. 531, 541 (1875), leading to similar requirements of private harm when a plaintiff sought to enforce a public right. *See* Frank J. Goodnow, *The Principles of*

In contrast, when a private legal right conferred *by statute* was the basis of a suit, courts did not impose any requirement of additional harm beyond the deprivation of that right. In the statutory context, there was no legal basis for such a requirement. And from the beginning, Congress created individual rights and prescribed judicial remedies for their violation that did not require victims to demonstrate additional harm resulting from the violations. *See* Copyright Act of 1790, ch. 15, §§ 1-2, 1 Stat. 124, 124-125 (vesting authors with "the sole right and liberty" of publishing and selling their works, and authorizing damages against copyright violators of "fifty cents for every sheet which shall be found in his or their possession, either printed or printing, published, imported or exposed to sale"); Patent Act of 1793, ch. 11, § 5, 1 Stat. 318, 322 (providing for an award of treble damages for a violation of an individual's patent rights).

There is no evidence of any contemporary belief that Article III limited Congress's power to create such private rights and remedies. Quite the opposite. As Justice Story noted, "where the law gives an action for a particular act, the doing of that act imports of itself a damage to the party. Every violation of a right imports some damage, and if none other be proved, the law allows a nominal damage." *Whittemore v. Cutter*, 29 F. Cas. 1120, 1121 (C.C.D. Mass. 1813). Indeed, "since the foundation of our government," statutes aimed at enforcing public rights went even further, permitting actions "by a common informer, who himself had *no interest whatever* in the controversy other

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Administrative Law of the United States 431-32 (1905) (a prerogative writ is "issued mainly with the intention of protecting private rights," and "no one may apply for it unless he has some particular interest in its issue which is greater than that possessed by the ordinary citizen").

than that given by statute." *Marvin v. Trout*, 199 U.S. 212, 225 (1905) (emphasis added); *see Adams v. Woods*, 6 U.S. 336, 341 (1805) (Marshall, C.J.) ("Almost every fine or forfeiture under a penal statute, may be recovered by an action of debt as well as by information."). Notably, the defendants in these actions "usually were private parties rather than governmental officials." Woolhandler & Nelson, *supra*, at 726.

In the twentieth century, even as a general doctrine of standing began to coalesce, this Court continued to recognize that "Congress may create legally enforceable rights where none before existed," and that the "[v]iolation of such a statutory right normally creates a justiciable cause of action." *Oklahoma v. U.S. Civil Serv. Comm'n*, 330 U.S. 127, 136 (1947); *see Tutun v. United State*s, 270 U.S. 568, 577 (1926) ("Whenever the law provides a remedy enforceable in the courts according to the regular course of legal procedure, and that remedy is pursued, there arises a case within the meaning of the Constitution."). "The touchstone to justiciability," this Court continued to acknowledge, "is injury *to a legally protected right*." *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 140-41 (1951) (emphasis added); *see Ala. Power Co. v. Ickes*, 302 U.S. 464, 479 (1938) ("injury, legally speaking, consists of a wrong done to a person, or, in other words, *a violation of his right*" (emphasis added)); *Edward Hines Yellow Pine Trs. v. United States*, 263 U.S. 143, 148 (1923) (the ability to sue hinges on "*legal injury*, actual or threatened" (emphasis added)); *cf. Massachusetts v. Mellon*, 262 U.S. 447, 487-89 (1923) (finding no "case" or "controversy" because "no basis is afforded for an appeal to *the preventive powers of a court of equity*" (emphasis added)).

Today, this Court's standing doctrine continues to recognize that "[t]he actual or threatened injury

required by Art. III may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing,'" *Warth*, 422 U.S. at 500 (quoting *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 n.3 (1973)), "even though no injury would exist without the statute," *Linda R.S.*, 410 U.S. at 617 n.3. While Congress may not "convert the undifferentiated public interest in . . . compliance with the law into an 'individual right,'" *Lujan*, 504 U.S. at 577—because "[v]indicating the *public* interest . . . is the function of Congress and the Chief Executive," *id.* at 576—Congress may "elevat[e] to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law," *Spokeo*, 136 S. Ct. at 1549 (quoting *Lujan*, 504 U.S. at 578).

Accordingly, this Court in *Akins* distinguished *United States v. Richardson*, 418 U.S. 166 (1974), where standing was denied to a plaintiff who similarly "sought information," on the grounds that in *Akins* "there is a statute which . . . seek[s] to protect individuals such as respondents from the kind of harm they say they have suffered." *Akins*, 524 U.S. at 21-22. Likewise, this Court denied standing in *Warth* by distinguishing *Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205 (1972), where standing was recognized for a similar claim, based on "the critical distinction" that in *Trafficante* "Congress had given residents of housing facilities covered by the statute an actionable right to be free from the adverse consequences . . . of racially discriminatory practices." *Warth*, 422 U.S. at 513.

Crucially, a "risk of real harm" that results from the infringement of a statutory right can "satisfy the requirement of concreteness." *Spokeo*, 136 S. Ct. at 1549. Congress, in other words, can create actionable rights to be free from conduct that place victims *at risk*

of individual harm. And when a statute creates a private right in order to guard against particular harms, and a person is deprived of that right, standing exists regardless of whether the harm that Congress feared came to pass. In *Havens*, for instance, this Court recognized standing based on the violation of a plaintiff's "right to truthful information about available housing," even though that plaintiff—a fair-housing advocate serving as a tester—did not show any additional harm resulting from the violation, and indeed lacked any "intention of buying or renting a home." 455 U.S. at 373-74. That was because "[a] tester who has been the object of a misrepresentation made unlawful under [the relevant statute] has suffered injury in precisely the form the statute was intended to guard against." *Id.*

This makes sense. After all, putting someone in danger of harm—say, pushing a pedestrian into oncoming traffic—can sensibly be regarded as an injurious act in its own right, whether or not that harm comes to fruition. And the law has long protected against deprivations of rights that *could* lead to future harm. *See supra* at 17-18. That is why "one living adjacent to the site for proposed construction of a federally licensed dam has standing to challenge the licensing agency's failure to prepare an environmental impact statement, even though he cannot establish with any certainty that the statement will cause the license to be withheld." *Lujan*, 504 U.S. at 572 n.7. As this Court reaffirmed in *Spokeo*, therefore, standing exists when the deprivation of a statutory right places the victim at "material risk" of the harms that Congress sought to prevent in the relevant statute. 136 S. Ct. at 1549-50.

Notably, this focus on the governing statute, and the harms it seeks to avert, is consistent with this

Court's contemporary precedent on the identification and interpretation of statutory causes of action. Instead of licensing courts "to provide such remedies as are necessary to make effective a statute's purpose," *Comcast Corp. v. Nat'l Ass'n of African Am.-Owned Media*, 140 S. Ct. 1009, 1015 (2020), that precedent directs attention to "the statute Congress has passed" and "whether it displays an intent to create not just a private right but also a private remedy," *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001). Congress's policy judgments, as reflected in the statute, are also decisive concerning "who may invoke the cause of action." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 130 (2014); *see id.* at 129-30 (discussing the "zone of interests" requirement). This Court has likewise emphasized, with respect to constitutional violations, "that Congress is best positioned to evaluate whether, and the extent to which, monetary and other liabilities should be imposed upon individual officers and employees of the Federal Government." *Hernandez v. Mesa*, 140 S. Ct. 735, 742 (2020) (quotation marks omitted). It would be anomalous to restrict judicial discretion in all these areas, in deference to Congress, while simultaneously allowing courts to rely on their unguided conceptions of "real" injury as a basis for restricting Congress's power to establish private rights and remedies—as TransUnion advocates.

Where, as here, a defendant has created a "material risk of harm" by violating the plaintiffs' statutory rights, *Spokeo*, 136 S. Ct. at 1550, where the statute that was violated aims to prevent exactly those harms, and where the plaintiffs' suit poses no conceivable threat to our "system of separated powers," *Allen*, 468 U.S. at 752 (quoting *Flast*, 392 U.S. at 97), a justiciable case exists under Article III. This dispute—in which plaintiffs seek damages from a private party for the

violation of individual rights secured by a federal statute—is plainly of the type "traditionally thought to be capable of resolution through the judicial process." *Id.*

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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