No. _____

IN THE

Supreme Court of the United States

PAULETTE BARCLIFT,

Petitioner,

v.

KEYSTONE CREDIT SERVICES, LLC,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

JESSE S. JOHNSON
GREENWALD DAVIDSON
RADBIL PLLC
5550 Glades Road
Suite 500
Boca Raton, FL 33431

DANIEL M. SULLIVAN
Counsel of Record
JACK L. MILLMAN
BRIAN T. GOLDMAN
JESSICA MARDER-SPIRO
HOLWELL SHUSTER
& GOLDBERG LLP
425 LEXINGTON AVENUE
14th Floor
New York, NY 10017
(646) 837-5120
dsullivan@hsgllp.com

Counsel for Petitioner

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QUESTIONS PRESENTED

1. Whether under *TransUnion LLC* v. *Ramirez*, 594 U.S. 413 (2021), a plaintiff alleging an intangible harm need only allege one that is similar in kind, and not degree, "to a harm traditionally recognized as providing a basis for a lawsuit in American Courts" to satisfy Article III standing, *id.* at 433, or if a plaintiff must allege an intangible harm that satisfies all the material elements of a common law tort.

2. In the alternative, whether the Court should overrule *TransUnion*, at least to the extent that it requires a plaintiff allege an intangible harm that satisfies the material elements of a common-law tort in order to establish Article III standing.

PARTIES TO THE PROCEEDING

Petitioner Paulette Barclift was plaintiff in the district court and appellant below.

Respondent Keystone Credit Services, LLC was defendant in the district court and appellee below.

RELATED PROCEEDINGS

- *Barclift* v. *Keystone Credit Services, LLC*, No. 5:21-cv-04335, U.S. District Court for the Eastern District of Pennsylvania. Judgment entered April 13, 2022.

- *Barclift* v. *Keystone Credit Services, LLC*, No. 22-1925, U.S. Court of Appeals for the Third Circuit. Judgment entered February 16, 2024.

There are no other proceedings in state or federal courts, or in this Court, directly related to this case within the meaning of this Court's Rule 14(b)(1).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The decision of the Court of Appeals for the Third Circuit is reported at 93 F.4th 136 and reproduced at Appendix ("Pet. App.") 1a. The decision of the Eastern District of Pennsylvania is unreported but available at 2022 WL 1102122 and reproduced at Pet. App. 55a.

JURISDICTION

The Third Circuit filed its published decision on February 16, 2024. Pet. App. 1a. On April 24, 2024, on Petitioner's application, Justice Alito extended the time to file a petition for certiorari through and including June 17, 2024. This petition is timely, and the Court has jurisdiction under 28 U.S.C. § 1254(1).

PROVISIONS INVOLVED

Article III, § 2 of the U.S. Const. states in relevant part that:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and

> maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State,—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

The Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692c(b), provides:

> Except as provided in section 1692b of this title, without the prior consent of the consumer given directly to the debt collector, or the express permission of a court of competent jurisdiction, or as reasonably necessary to effectuate a postjudgment judicial remedy, a debt collector may not communicate, in connection with the collection of any debt, with any person other than the consumer, his attorney, a consumer reporting agency if otherwise permitted by law, the creditor, the attorney of the creditor, or the attorney of the debt collector.

STATEMENT OF THE CASE

This case presents a question that affects the ability of countless individuals to obtain relief in federal court from harms they suffer through violations of the FDCPA and similar statutes. By enacting these statutes, Congress has expressed its belief that such individuals have a right to obtain redress for their injuries. But many lower courts, including multiple Courts of Appeals, have

improperly interpreted this Court's decision in *TransUnion* as limiting Article III standing to situations in which the plaintiff would have been able to plead the elements of a tort at common law. *See TransUnion LLC* v. *Ramirez*, 594 U.S. 413 (2021).

Such decisions, including that of the Third Circuit below, call out for this Court's intervention. They conflict with decisions of other Courts of Appeals that have properly held plaintiffs have standing to vindicate rights created by Congress to fill gaps left by the common law in federal court, so long as the plaintiff has suffered a harm similar in kind, if not degree, to a type of harm cognizable at common law. Moreover, the element-matching approach of the court below and other courts vitiates Congress's ability to create new statutory causes of action to redress very real intrusions on individual privacy and similar harms, even if there would not have been a claim at common law. *TransUnion* does not require such an unnaturally strict approach.

Nor, more importantly, does Article III. Thus, to the extent *TransUnion* does require a plaintiff to be able to plead the elements of a common-law tort in order to establish standing, that decision goes beyond what Article III requires. It should be overruled before it engenders more confusion about what Article III demands and keeps more claims out of federal court that Congress sought to recognize.

Given the division among the lower courts and the importance of the questions presented, the Court

should grant this petition and reverse the decision of the Third Circuit.

I. Legal Background

Congress enacted the FDCPA in 1977 to "eliminate abusive debt collection practices by debt collectors" and avoid associated harms to consumers, including everything from "personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy." 15 U.S.C. § 1692(a), (e). In enacting the FDCPA, Congress recognized that "[e]xisting laws and procedures for redressing these injuries are inadequate to protect consumers." *Id.* § 1692(b). To empower consumers to protect themselves, Congress created a civil cause of action for any individual damages caused by a debt collector's violations of the Act. *Id.* § 1692k.

II. Factual Background

On October 8, 2020, Petitioner Paulette Barclift received a notice in the mail from Respondent Keystone Credit Services, LLC concerning an outstanding debt for medical services. The letter contained Petitioner's full name, home address, and the balance owed. It also disclosed that Petitioner's debt arose from medical services she received from Main Line Fertility Center, Inc.

Although the October 8 letter purported to come from Keystone, it was printed and mailed by RevSpring, Inc., a third-party mailing vendor with hundreds of employees. As alleged in the Complaint,

RevSpring maintains electronic copies of its letters as well as the associated consumer data in the usual course of its business, and its employees have access to this data.

Petitioner never consented to Keystone sharing her private financial and medical information with RevSpring, or anyone else. As a result of Keystone's disclosure, Petitioner suffered emotional distress and embarrassment.

III. Procedural History

A. District Court

On October 1, 2021, Petitioner brought suit in the Eastern District of Pennsylvania to seek recompense for these harms and vindicate her rights under the FDCPA. She alleged, among other things, that Keystone "violated her 'right not to have her private information shared with third parties'" and that she was "embarrassed and distressed by the disclosure of her sensitive financial details and personal medical services." *Barclift* v. *Keystone Credit Servs., LLC*, 2022 WL 1102122, at *2 (E.D. Pa. Apr. 13, 2022), *aff'd as modified*, 93 F.4th 136 (3d Cir. 2024).

On February 14, 2022, the district court dismissed without prejudice Petitioner's claim for lack of standing. See generally *Barclift* v. *Keystone Credit Servs., LLC*, 585 F. Supp. 3d 748 (E.D. Pa. 2022) (discussing *TransUnion*, 594 U.S. 413).

The court recognized that intangible harms may be "sufficiently concrete" for Article III purposes but

held that an "alleged intangible harm [must] ha[ve] a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit." *Id.* at 754 (quoting *Spokeo, Inc.* v. *Robins*, 578 U.S. 330, 340–41 (2016)). Although the court recognized that Petitioner's "alleged injury does not need to be a perfect match" to a tort at common law, in application the district court all but required such a match.

Specifically, the Court construed Petitioner's allegations as closest to the tort of public disclosure of private facts, a long-recognized common law tort. *Id.* at 758; see also *White* v. *Fraternal Ord. of Police*, 909 F.2d 512, 517 (D.C. Cir. 1990) (tort of "publication of private facts" renders liable one who "(1) published private facts (2) in which the public has no legitimate concern and (3) which publication would cause suffering, shame, or humiliation to a person of ordinary sensibilities."); Restatement (Second) of Torts § 652D (1977) (similar). The district court, however, found that, under the facts Petitioner alleged, "there was no publicity," which is one of the elements of the tort of public disclosure. *Barclift*, 585 F. Supp. 3d at 758. On that basis, the court reasoned that Petitioner lacked Article III standing because her "alleged injury does not bear a close enough relationship to the tort of disclosure of private facts." Ibid.

In reaching that decision, the district court acknowledged that other district courts had reached different outcomes about "whether the mailing vendor theory establishes a concrete harm." *Id.* at 757. The

so-called "mailing vendor theory" refers to the theory that "the use of a mailing vendor to print and send collection letters to consumers is a violation of the FDCPA." *Id.* at 756. Considering this split in authority, the district court sided with the view that rejected standing. *Id.* at 757–58 (citing three cases that found standing and ten cases that did not find standing).

Petitioner amended her complaint on February 28, 2022, adding allegations that, among other things, RevSpring's employees could access Petitioner's personal information. *Barclift*, 2022 WL 1102122, at *3. Respondent again moved to dismiss, and Petitioner opposed, pointing to various allegations that she said showed concrete harm. See Opp. at 7, Dkt. 26, No. 5:21-cv-04335 (E.D. Pa. Apr. 4, 2022) (discussing how "Plaintiff suffered injury here in her loss of control over her private information" and "RevSpring's hundreds of employees have, or had, access to Plaintiff's private information" and "Plaintiff feels embarrassment and stress over Defendant's disclosure of, and her resulting loss of control over, this sensitive information").

Nevertheless, the court again dismissed Petitioner's complaint for much the same reasons it dismissed her original complaint—namely that her allegations were not "close enough" to a traditional harm "to prove a concrete injury." *Barclift*, 2022 WL 1102122, at *5.

B. Third Circuit

Petitioner then appealed to the Third Circuit, arguing that the harms caused by Respondent's unauthorized disclosure of her personal information track two common-law torts: public disclosure of private facts and breach of confidence. See generally Brief of Appellant, *Barclift* v. *Keystone Credit Servs., LLC*, 2022 WL 2904560, *3–4 (July 18, 2022).

But a divided panel affirmed the district court's decision that Petitioner lacked standing. *Barclift* v. *Keystone Credit Servs., LLC*, 93 F.4th 136, 140 (3d Cir. 2024). The majority first noted the confusion around applying *TransUnion*'s methodology for assessing whether intangible injuries are sufficiently concrete for Article III purposes. *Id.* at 143–45. For instance, it discussed how the Eleventh Circuit had determined that courts must "focus[] on [the] elements" of traditional torts and "reasoned that an alleged intangible harm is not closely related to a traditional harm if it is 'missing an element essential to liability under the comparator tort.'" *Id.* at 143 (quoting *Hunstein* v. *Preferred Collection & Mgmt. Servs., Inc.*, 48 F.4th 1236, 1242 (11th Cir. 2022) ("*Hunstein III*") (en banc) (other quotation marks omitted)).

The Third Circuit majority also recognized that the dissent in *Hunstein III*—labeled the third because there were two earlier appellate decisions in *Hunstein*, addressed below—"took issue with the majority's 'element-for-element' approach." Ibid. Instead, the Third Circuit majority explained, the dissenting judges "embraced a 'kind of harm' test"

that would have found concrete harm under Article III because it was "similar in kind to the harm addressed by a common-law cause of action" even though not "identical in degree." *Id.* at 144 (quoting *Hunstein III*, 48 F.4th at 1264, 1268–69 (Newsom, J. dissenting)).

The majority also discussed Tenth and Seventh Circuit decisions that rejected FDCPA mailing vendor claims. It noted that the Tenth Circuit "implicitly adopted the kind-of-harm framework urged by the *Hunstein III* dissent, but held that the plaintiff lacked standing" in a similar "FDCPA mailing vendor case." Ibid. (quoting *Shields* v. *Professional Bureau of Collections of Maryland, Inc.*, 55 F.4th 823, 829 (10th Cir. 2022)). The majority also discussed a Seventh Circuit decision in which the court employed both the element-based approach of *Hunstein III* and something like the "kind of harm" test and held that there was no standing because it found the harm to stem from a "private communication." *Id.* at 144–46 (discussing *Nabozny* v. *Optio Sols. LLC*, 84 F.4th 731, 735–36 (7th Cir. 2023)).

After conducting this review of the case law, the Third Circuit purported to adopt the "kind of harm" approach because it is "more faithful to *TransUnion*," which "speaks only of harms, not elements." Ibid.

On the result, however, the Third Circuit sided with the *Hunstein III* majority despite supposedly adopting the test of the *Hunstein III* dissent. To do so, the Third Circuit relied on footnote six in *TransUnion*, in which this Court in dicta rejected an argument by certain of the plaintiffs in that case that they were

harmed because TransUnion published their private information "internally." *Id.* at 143 (quoting *TransUnion*, 594 U.S. at 434 n.6). This Court first found the argument "forfeited," but went on to remark that (among other things), under the facts of the case the argument would "circumvent[t] a fundamental requirement of an ordinary defamation claim—publication." *Barclift*, 93 F.4th at 147 (quoting *TransUnion*, 594 U.S. at 434 n.6). Based largely on footnote six, the Third Circuit held that Petitioner cannot establish standing because the harm of a public disclosure of private information requires a "disclosure to the public," and Petitioner's private information was only disclosed to a "'single ministerial intermediary.'" *Id.* at 146 (quoting *Nabozny*, 84 F.4th at 736).[1]

Judge Matey dissented. Critiquing the majority's "talismanic" treatment of footnote six, which "turn[ed] dictum into precedent," Judge Matey faulted the majority for adopting the "element" test that it "purport[ed] to reject." *Id.* at 149. Judge Matey emphasized that *TransUnion* did not require that plaintiffs identify a common-law tort that is an "exact duplicate" for their asserted injury. Instead, he explained, *TransUnion* merely requires a plaintiff to identify "harms (not causes of action) and look for comparisons [of those harms] in kind (not degree)" to

[1] The majority rejected the "breach of confidence" analogue in a footnote, citing a forty-year-old law review article in holding that it is "not a 'traditional theor[y] of liability[.]'" *Barclift*, 93 F.4th at 145 n.3 (quoting Alan B. Vickery, *Breach of Confidence: An Emerging Tort*, 82 Colum. L. Rev. 1426, 1426, 1451 (1982)).

harms recognized "as providing a basis for lawsuits in American courts." *Id.* at 158–59. In short, Judge Matey concluded that the majority improperly "requir[es] more fit between Barclift's asserted harm and the common-law analogues" than *TransUnion* requires, thus setting too high a bar. Ibid.

Applying his approach, Judge Matey concluded that Petitioner's asserted injury was sufficiently analogous to the injury remedied by the tort of public disclosure because both concern a third party "gain[ing] unauthorized access to . . . personal information." *Id.* at 157–58 (quotation marks omitted).

REASONS FOR GRANTING THE PETITION

I. Lower Courts Are Sharply Divided Over The Proper Application of *TransUnion*

Since this Court's decision in *TransUnion*, the lower courts have struggled to apply its "close-relationship" test to determine whether a plaintiff has sufficiently alleged or shown that he has suffered a concrete intangible harm. See 594 U.S. at 427–28 (discussing how a plaintiff must show a "physical, monetary, or cognizable intangible harm traditionally recognized as providing a basis for a lawsuit in American courts"). The courts of appeals have divided along three lines, and many of their decisions have provoked thoughtful dissents.

The Eleventh and Seventh Circuits require the presence of all "material elements" of a common law

tort. Meanwhile, the Tenth and Third Circuits purport to require that the "kind of harm" from the comparator tort closely resemble the kind of harm the plaintiff alleges, but as part of the analysis require an exact match with specific key components of the comparator tort. Finally, the Fifth and Sixth Circuits require only that the "kind of harm" from the comparator tort be close in kind to the harm alleged, even if plaintiff's allegations would not have sufficed to plead any key elements of the comparator tort.

A. The Eleventh and Seventh Circuits Require the Presence of all the Elements of the Comparator Tort

The confusion about how to apply *TransUnion* is illustrated by the saga of one FDCPA case in the Eleventh Circuit.

1. Before this Court decided *TransUnion*, the Eleventh Circuit heard an FDCPA case based on an unauthorized disclosure to a mailing vendor. It held the plaintiff had standing to bring the claim. See generally *Hunstein* v. *Preferred Collection & Mgmt. Servs., Inc.*, 994 F.3d 1341 (11th Cir. 2021) ("*Hunstein I*"). The *Hunstein I* panel analogized the FDCPA claim to the tort of public disclosure of private facts, and it found that the harm from the "invasion[] of individual privacy" stemming from a violation of § 1692c(b) bore a close relationship to the harm from that common law tort. *Id.* at 1347.

After *TransUnion* was decided, the *Hunstein I* panel vacated its prior opinion and reheard the case.

Again, the Eleventh Circuit held that the plaintiff had standing on the ground that the harm from the statutory violation bore a close relationship to the harm from the public disclosure of private facts. *Hunstein* v. *Preferred Collection & Mgmt. Servs., Inc.*, 17 F.4th 1016, 1024 (11th Cir. 2021) ("*Hunstein II*"). The *Hunstein II* panel emphasized that "Article III does *not* require an exact match between a statutory claim and a common-law cause of action," and concluded that "a plaintiff need only show that his alleged injury is similar in *kind* to the harm addressed by a common-law cause of action, not that it is similar in *degree*." *Id*. at 1024. It therefore determined that, while the disclosure of private information "might have been less widespread—less public—than the disclosures typical of actionable public-disclosure-of-private-facts claims," the harms were still similar in kind. *Id*. at 1027–28.

The *Hunstein II* panel also considered footnote six of *TransUnion* and reasoned that it did not control the result. Specifically, the panel reasoned that (1) footnote six was dictum, (2) the case in *TransUnion* went to trial whereas the case before the Eleventh Circuit was on a motion to dismiss, and (3) an overreading of the footnote would require a "perfect match" between the common law tort and the statutory injury in contravention of longstanding Article III doctrine and other parts of the *TransUnion* decision and holding. 17 F.4th at 1031–32.

In the final episode of the trilogy, the Eleventh Circuit reheard the case en banc and reversed, finding

the plaintiff *did not* have standing. The en banc majority stated that "an alleged intangible harm" must contain all "element[s] 'essential to liability' under the comparator tort." *Hunstein III*, 48 F.4th at 1242. The court reasoned that, "if an element from the common-law comparator tort is completely missing, it is hard to see how a statutory violation could cause a similar harm." *Id.* at 1245; see also *id.* at 1248 ("[T]he common law analogy collapses if we can rewrite a traditional tort to exclude an essential element."). It then found that the plaintiff's alleged violation "lacks the fundamental element of publicity[,] [a]nd without publicity, there is not invasion of privacy—which means no harm . . . similar to that suffered after a public disclosure." *Id.* at 1245.

The dissent in *Hunstein III* took issue with this approach, relying on *TransUnion*'s finding that the allegations of some of the plaintiffs in that case were sufficiently similar to the tort of defamation even though they did not provide "*any* proof of actual falsity." *Id.* at 1262 (Newsom, J., dissenting). The dissent thus considered the "element" test to be an imposition of the "exact duplicate" test *TransUnion* disavowed and was not persuaded by the majority's insistence that it required only the presence of elements "essential to liability." *Id.* at 1261. Instead, according to the dissent, the majority's opinion "amount[ed] to a similar-in-*both*-kind-*and*-degree standard," which cannot be reconciled with *TransUnion* or *Spokeo*. *Id.* at 1267. The dissent also argued the majority's test split from the Third, Fourth, Fifth, Seventh, Eighth, Ninth, and Tenth

Circuits, which it asserted had explicitly required the harms be similar in kind, but not degree. *Id*. at 1264–66 (collecting cases). Moreover, the dissent emphasized, by engaging in this analysis "the majority denies Congress *any* breathing space in which to recognize judicially enforceable rights that didn't exist at common law." *Id*. at 1262.

Under the dissent's approach, the plaintiff had standing. Specifically, plaintiff's allegations of disclosure to a mailing vendor and its employees alleged a harm of the dissemination of personal information to a third-party, and, therefore, stated a harm similar in kind to that resulting from a "more widespread dissemination of the same personal information." *Id*. at 1268.[2]

2. The Seventh Circuit next picked up the Eleventh Circuit's "elements test." It similarly held that the plaintiff in a mailing-vendor FDCPA case failed to analogize her claim to the tort of public disclosure of private facts because it lacks the "threshold element of publicity." *Nabozny*, 84 F.4th at 735. According to the Seventh Circuit, "[t]he transmission of information to a single ministerial intermediary does not remotely resemble the publicity element of the only possibly relevant variant of the privacy tort," because, for the purposes of the common-law tort of public disclosure of private facts,

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[2] Adding to the confusion its test creates, the Eleventh Circuit stated, in dictum, that "the degree-of-harm inquiry so thoroughly endorsed in the dissent may well be a helpful explanatory tool in other cases—just not the one we have here." *Id*. at 1249.

the private facts "'must reach[], or [be] sure to reach, the public.'" *Id*. at 736 (quoting Restatement (Second) of Torts § 652D cmt. a). And, although it also purported to compare the kind of harm caused by the alleged disclosure and the kind of harm caused by the comparator tort, the Seventh Circuit still required that the kind of harm be "actionable," *i.e.*, sufficient to satisfy the elements of the common law tort. *Id*. at 737.

B. The Tenth and Third Circuits Adopt a Kind-of-Harm Approach that Also Requires Key Elements of the Comparator Tort

In contrast to the Eleventh and Seventh Circuits, the Third and Tenth Circuits expressly reject the application of the "elements" test. Yet, their version of the "kind of harm" test, rather than analyzing whether the alleged harm is similar in kind to one cognizable at common law, still requires that a plaintiff plead (or show) at least some elements of the comparator tort.

1. In *Shields*, the Tenth Circuit clearly stated that the harms from the plaintiff's allegations and the harms from the comparator tort must be "similar in kind, not degree." 55 F.4th at 828 (quotation marks omitted). It went on to explain that, "[b]ecause an 'exact duplicate' is unnecessary a plaintiff may have standing for a statutory claim even if she could not succeed on the traditional tort." Ibid. (quoting *TransUnion*, 594 U.S. at 424) (citations omitted).

In application, however, the Tenth Circuit's position is close to that of the Eleventh and Seventh Circuits. The *Shields* court positively cited *Hunstein III* and agreed that publicity is required for there to be a harm similar to that remediable by the tort of public disclosure of private facts. *Id.* at 829. Because, the court held, disclosure to a mailing vendor did not amount to publicity as the common law supposedly understood it, the court rejected standing. Ibid.

2. In the decision below, the Third Circuit also purportedly distanced itself from the elements test, but, like the Tenth Circuit, nevertheless requires that a plaintiff plead certain key elements of a comparator tort to satisfy Article III. For instance, like the Tenth Circuit, the Third Circuit requires that a plaintiff allege "publicity," an element of the common law tort of public disclosure of private facts, to show harm under Article III. See *Barclift*, 93 F.4th at 146. The panel majority recognized the confusion this partial element test creates, as it noted that its requirement that a disclosure be "public" could be seen as a requirement that a plaintiff satisfy the elements of the traditional tort, which include "publicity." *Id.* at 146 n.4. Yet the Third Circuit insisted that it was focusing "solely on the harm" and was not engaging in "an exercise in element-matching." Ibid.

C. The Fifth and Sixth Circuits Require Only Harm Similar in Kind, Not Degree

In contrast, the Fifth and Sixth Circuits take the position advanced by the dissents below and in

Hunstein III. Those courts hold that a plaintiff has standing if he alleges a "kind of harm" similar to an intangible harm cognizable at common law, *even if such harm would not satisfy any elements of a comparator tort*.

1. The Fifth Circuit has taken this approach in two cases. In *Calogero* v. *Shows, Cali & Walsh, L.L.P.*, a law firm sent plaintiffs a "dunning letter" demanding a supposed old debt be paid. 95 F.4th 951, 956–57 (5th Cir. 2024).[3] The court found standing because the plaintiffs complained of "fear, anxiety, and emotional distress" after receiving the intimidating letters, which sufficiently paralleled "emotional distress," "a traditional harm that satisfies *TransUnion*'s concreteness requirement." *Id.* at 958. The court did not focus on the elements of a particular common law tort, noting that its "inquiry does not look to an exact analog at common law, but rather to harms that are close 'in kind, not degree' to those traditionally remedied in American courts." Ibid. (indirectly quoting *Gadelhak* v. *AT&T Servs., Inc.*, 950 F.3d 458, 462 (7th Cir. 2020) (Barrett, J.)).

And in *Perez* v. *McCreary, Veselka, Bragg & Allen, P.C.*, 45 F.4th 816, 822 (5th Cir. 2022), a case the *Calogero* court cited, the Fifth Circuit also used the kind of harm test. See *Calogero*, 95 F.4th at 958 (referring to *Perez*). Specifically, the court stressed it "focus[es] on types of harms protected at common law,

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[3] A 'dunning letter' is a demand for payment from a delinquent debtor." *Kourouma* v. *Credence Res. Mgmt.*, LLC, 2023 WL 3311106, at *1 n.1 (N.D. Tex. Mar. 30, 2023) (citation omitted).

not the precise point at which those harms become actionable." *Perez*, 45 F.4th at 822. (citation omitted). Thus, "a plaintiff doesn't need to demonstrate that the level of harm he has suffered would be actionable under a similar, common-law cause of action." Ibid.

2. The Sixth Circuit has also adopted the kind of harm test without requiring a plaintiff to show the alleged harm satisfies specific elements of a comparator tort. In *Dickson* v. *Direct Energy, LP*, 69 F.4th 338, 343–44 (6th Cir. 2023), a plaintiff complained that his receipt of ringless voicemails ("RVMs") violated the Telephone Consumer Protection Act ("TCPA"). The court began by determining whether the harm asserted was similar in kind to the "harm vindicated by the intrusion-upon-seclusion tort." *Id.* at 345. The court stated that this harm "concerned, at its core—the right to maintain a sense of solitude in one's life and private affairs" but admitted that "*the scope of liability* for the actual tort of intrusion upon seclusion is more circumscribed and confines liability to cases where a defendant's conduct is 'highly offensive to the ordinary reasonable man.'" Ibid. Although defendants' alleged conduct could not satisfy the "highly offensive" requirement, the court still found a concrete harm—and thus standing—because what mattered was the kind of harm, not the degree, regardless of whether the conduct alleged would be actionable at common law. *Id.* at 343–46.

D. The Split Is Outcome-Determinative

This split in approach among the circuits is outcome determinative. Had the Third Circuit applied the test the Fifth and Sixth Circuits use—a kind-of-harm test *without* any element-matching requirement—it would have found Petitioner had standing.

Indeed, the reasoning of the Third Circuit's dissent in part mirrors the Sixth Circuit's reasoning in *Dickson*. The dissent notes that the tort of public disclosure is concerned with the harm of "unauthorized *disclosures* of information," a harm that indisputably happened here. *Barclift*, 93 F.4th at 157 (Matey, J., dissenting in part); compare *Dickson*, 69 F.4th at 345–46 (single "unsolicited call to Dickson's phone" satisfies "concreteness" because "the inquiry centers on the *kind* of harm at issue rather than the *degree* of that harm" (emphasis in original)). The dissent also emphasized that "Barclift alleges that she suffered embarrassment, anxiety, and stress over the disclosure of her information to RevSpring—harms that are 'of the same character' as privacy harms traditionally associated with public disclosure." *Barclift*, 93 F.4th at 159. Those are the very harms that satisfied the Fifth Circuit in *Calogero*. See 95 F.4th at 958.

II. The Third Circuit's Decision Is Wrong

As laid out in Judge Matey's dissent, the decision below misreads *TransUnion*. *Barclift*, 93 F.4th at 149 (Matey, J., dissenting in part). If, however, the Court

believes the Third Circuit's decision properly applies *TransUnion*, then *TransUnion* has charted an ill-fated course. A quasi-categorical approach to standing—previously unheard of—would conflict with Article III, history, tradition, and this Court's pre-*TransUnion* decisions. Petitioner therefore adds a second question presented, asking in the alternative that the Court overrule *TransUnion* to the extent that decision requires a plaintiff's allegations to match elements to a comparator tort to satisfy Article III standing.

A. Requiring the Alleged Harm to Match the Elements of a Common-Law Tort Misreads *TransUnion*

In *TransUnion* this Court required plaintiffs to plead a harm similar *in kind* to a cognizable harm recognized under the common law in order to establish standing. It did *not* require that they plead some or all elements of some tort at common law. *Id.* at 159 (Matey, J., dissenting in part). Indeed, *TransUnion* cautioned that the inquiry it directed did not require identifying "an exact duplicate" at common law. 594 U.S. at 424. Even before *TransUnion* was decided, then-Judge Barrett recognized that *Spokeo*, on which *TransUnion* relied, instructed courts "to look for a 'close relationship' in kind, not degree." *Gadelhak*, 950 F.3d at 462 (quoting *Spokeo*, 578 U.S. at 341).

Here, the Third Circuit concluded that Petitioner did not allege publicity sufficiently to plead the tort of

public disclosure of private facts. The majority's insistence on that inquiry abandoned the kind-degree distinction and instead required the type of "exact duplicate" *TransUnion* specifically disclaimed. *Barclift*, 93 F.4th at 158–59 (Matey, J., dissenting in part). In doing so, it improperly "require[s] more fit between Barclift's asserted harm and the common-law analogues" than *TransUnion* envisioned. Ibid.

Moreover, the holding of *TransUnion* further demonstrates that the Third Circuit's test is flawed. As Judge Newsom explained in his dissent in *Hunstein III*, this Court found that the plaintiffs could bring their claims under the FCRA notwithstanding that their comparator tort, defamation, required a showing of falsity, and they did not allege falsity, "an element all accepted as essential to a successful defamation claim." *Hunstein III*, 48 F.4th at 1262 (Newsom, J. dissenting). The Third Circuit's application of the "close relationship" test, in other words, would not have allowed the very claim for which *TransUnion* held there was standing. See *Barclift*, 93 F.4th at 160 (Matey, J. dissenting in part) (noting that the court's "application veers into an unnecessary jot-for-jot exactness to some common-law cause of action").

There is more. *TransUnion* recognized that, while Congress cannot simply legislate a concrete harm into existence despite the stricture of Article III, nevertheless "Congress's views may be 'instructive'" in "determining whether a harm is sufficiently concrete to qualify as an injury in fact." 594 U.S. at

425; see also *Gadelhak*, 950 F.3d at 462 ("[B]ecause Congress is particularly suited 'to identify intangible harms that meet minimum Article III requirements, its judgment is also instructive and important.'") (quoting *Spokeo* v. *Robins*, 578 U.S. 339, 341 (2016)). Of particular note in this context, *TransUnion* reiterated that "Congress may 'elevate to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law.'" 594 U.S. at 425 (quoting *Spokeo*, 578 U.S. at 341).

At a minimum, then, it is enough for Congress to "identif[y] a modern relative of a harm with long common law roots." *Gadelhak*, 950 F.3d at 462; see *Robins* v. *Spokeo, Inc.*, 867 F.3d 1108, 1115 (9th Cir. 2017) (applying this Court's *Spokeo* decision on remand and concluding, "guided by both Congress's judgment and historical practice, . . . the FCRA procedures at issue in this case were crafted to protect consumers' . . . concrete interest in accurate credit reporting about themselves.") (O'Scannlain, J.) (quotation marks omitted).

Thus, even assuming Petitioner's FDCPA claim did not match a common-law tort, that would mean only that Congress had done exactly what this Court has said it can do—"elevate to the status of legally cognizable injuries concrete, de facto injuries that were previously inadequate in law." *TransUnion*, 594 U.S. at 425 (quoting *Spokeo*, 578 U.S. at 341). To hold, instead, that a plaintiff has standing to assert a *statutory* claim only if he can plead the elements of a *common-law* claim utterly ignores the principle

recognized in *Spokeo*, *TransUnion*, and other cases. It narrows to a vanishing point Congress's ability to recognize that very real harms occur in the world that do not fit within a particular common-law claim—even though filling those gaps, of course, is one of the purposes of legislation. *Lujan* v. *Defs. of Wildlife*, 504 U.S. 555, 578 (1992) (reaffirming "principle that 'the injury required by Article III may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing.'" (alterations omitted) (quoting *Warth* v. *Seldin*, 422 U.S. 490, 500 (1975))).

There is simply no basis in the Constitution or in this Court's decisions to strap a constitutional straitjacket on such legislative innovation.

Finally, the element-bound application of the "close relationship" test embraced by the Third Circuit runs afoul of the careful distinction this Court has drawn between jurisdictional matters and the merits. This Court has recognized that standing is a "threshold matter" that courts must resolve *before* reaching the underlying merits of the dispute. *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 94–95 (1998). And this Court has cautioned that "the question whether a plaintiff states a claim for relief goes to the merits in the typical case, not the justiciability of a dispute, and conflation of these two concepts can cause confusion." *Bond* v. *United States*, 564 U.S. 211, 219 (2011) (quotation marks and citation omitted); see also *Steel Co.*, 523 U.S. at 90 (refusing to "mak[e] all the elements of the cause of action . . . jurisdictional"). The Third Circuit's test

creates exactly this type of confusion *and more*. It forces courts, not only to assess the merits, but to assess the merits of a claim the plaintiff *is not even bringing*—and all that to determine whether the plaintiff has constitutional standing to bring a cause of action Congress has provided to him.

B. To the Extent that *TransUnion* Requires Element-Matching, It Should Be Overruled

As the foregoing discussion demonstrates, the Circuits are deeply split on the proper application of the *Transunion* "close relationship" test, and the decision below falls on the wrong side of that divide. However, if the Court believes that the fairest reading of *TransUnion* requires *affirming* the Third Circuit's decision, then *TransUnion* has got standing doctrine on the wrong foot and needs correction. This Court should therefore also grant certiorari on the second Question Presented and consider whether to overrule—or at least correct—*TransUnion* in whole or in part.

1. The Third Circuit read stray language in footnote six of *Transunion* to require a plaintiff pleading a statutory cause of action to match the elements of a comparator tort to maintain Article III standing, at least insofar as those elements related to the harm alleged—in this case, what counts as a public disclosure. See *supra* 9–10; *see also TransUnion*, 594 U.S. at 434 n.6 ("the plaintiffs' internal public theory . . . does not bear a sufficiently

'close relationship' to the traditional defamation tort to qualify for Article III standing"). If that is what *TransUnion* requires, the decision conflicts with Article III's text and history in a manner that renders it incoherent and wrong. See *Janus* v. *Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 585 U.S. 878, 917 (2018) ("An important factor in determining whether a precedent should be overruled is the quality of its reasoning.").

To begin, Article III requires only a "Case" or "Controversy." Much of modern standing doctrine arose in response to an expansion of public-rights cases—in which litigants argued that governmental conduct violated a regulation or Constitutional rule.[4] It is in that context that this Court required that, in order to ensure that courts were adjudicating matters of a properly "Judiciary Nature," *DaimlerChrysler Corp.* v. *Cuno*, 547 U.S. 332, 342 (2006) (quoting 2 Records of the Federal Convention of 1787, p. 430 (M. Farrand ed. 1966)), a plaintiff advance a concrete and particularized injury-in-fact, caused by the

[4] See, *e.g.*, *Warth*, 422 U.S. at 508 (holding "that a plaintiff who seeks to challenge exclusionary zoning practices must allege specific, concrete facts demonstrating that the challenged practices harm him"); *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 487 (1982) (requiring a particularized injury because a "claim that the Government has violated the Establishment Clause does not provide a special license to roam the country in search of governmental wrongdoing"); *Lujan*, 504 U.S. at 562 (emphasizing how standing doctrine applies when "a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of *someone else*"); see also *Summers* v. *Earth Island Inst.*, 555 U.S. 488, 492–497 (2009).

defendant's conduct, that is remediable in court. See *TransUnion*, 594 U.S. at 448–49 (Thomas, J. dissenting) (reviewing the development of the case law). The doctrine responded, then, to the onslaught of litigation starting in the middle of the last century in which private citizens asserted public rights to prevent or direct government action.

By contrast, "[h]istorically, common-law courts possessed broad power to adjudicate suits involving the alleged violation of private rights, even when plaintiffs alleged only the violation of those rights and nothing more." *Spokeo*, 578 U.S. at 344 (Thomas, J., concurring); see also *TransUnion*, 594 U.S. at 449 (Thomas, J. dissenting) ("While the Court today discusses the supposed failure to show 'injury in fact,' courts for centuries held that injury in law to a private right was enough to create a case or controversy."); *Whittemore* v. *Cutter*, 29 F. Cas. 1120, 1121 (No. 17,600) (CC Mass. 1813) (Story, J) ("[W]here the law gives an action for a particular act, the doing of that act imports of itself a damage to the party" because "[e]very violation of a right imports some damage.").

It is not hard to see why this was so. At least in the vast majority of cases, a private plaintiff asserting a private right against a private party is likely arguing that he himself, rather than the general public or some unrelated third party, was harmed. Most of the time, then, one can expect a private-rights suit would rest on a concrete harm particular to the plaintiff. *Cf. TransUnion*, 594 U.S. at 462–63 (Kagan, J., dissenting).

TransUnion's insistence on requiring a "close relationship" in a private rights case between a plaintiff's harm and a harm remedied by a traditional common law cause of action ignores this history of judicial intervention in private rights cases and the logic on which it rests. It also departs from the actual injury-in-fact requirement of Article III, using historical proxies that may have little to do with the relevant constitutional question. As Judge Matey put it, "the close-relationship test [] swap[s] the text and history of Article III for unspecified and undetermined markers in American 'history and tradition[.]'" *Barclift*, 93 F.4th at 154 (Matey, J., dissenting in part). In other words, just because an asserted harm is novel does not mean it is not concrete or particularized, particularly when Congress has found it deserving of judicial relief. If *TransUnion* means what the court below and others say it does, then Congress is "relegated to the role of scrivener, dutifully replicating and codifying preexisting common-law causes of action," which "deprives Congress of *any* authority to innovate." *Hunstein III*, 48 F.4th at 1267 (emphasis in original).

To be clear, reexamining *TransUnion* would not require accepting that *any* statutory private right of action satisfies Article III. A plaintiff would still have to suffer some kind of cognizable harm that is *both* concrete and particularized, and the cause of action could not the otherwise infringe on the separation-of-powers. *Spokeo*, 578 U.S., at 341 ("Article III requires a concrete injury even in the context of a statutory violation."); see also *FDA* v. *Alliance for Hippocratic*

Medicine, 2024 WL 2964140, at *5 (U.S. June 13, 2024) (discussing "[t]he requirement that the plaintiff possess a personal stake" and collecting cases). Thus, for example, even under Petitioner's similar-in-kind-harm test, a hypothetical statutory cause of action that allowed a person in Hawaii to sue for unlawful damage to another person's property in Maine would not satisfy Article III given the lack of a concrete and particularized injury. See, *e.g.*, *TransUnion*, 594 U.S. at 427 (discussing such a hypothetical cause of action). Indeed, even under an approach that would presume a person who has suffered the loss of a private right has standing, "highly unusual cases" can be dealt with by the courts. *TransUnion*, 594 U.S. at 462 (Kagan, J., dissenting).

2. If the Court does not correct course, arbitrary results not required by the Constitution are likely to result. In fact, they already have. See, *e.g.*, *Hunstein III*, 48 F.4th at 1268–69 (Newsom, J., dissenting) (discussing how plaintiff alleged a clear harm: the disclosure of sensitive information "*to the employees* of an unauthorized third-party mail house"). For instance, one court held a plaintiff who had received a letter falsely asserting an unpaid debt (on which the statute of limitations had run) had no standing to bring an FDCPA claim under *TransUnion*, even though "[t]he torts of defamation and invasion of privacy and remedies . . . bear close relationships"—but lack a precise overlay of elements—"to the FDCPA and its private right of action." *Pierre* v. *Midland Credit Mgmt., Inc.*, 29 F.4th 934, 947 (7th Cir. 2022) (Ripple, J., dissenting).

At bottom, "*TransUnion*'s approach, which looks vaguely to 'tradition[],' but not to original, Founding-era understanding, leaves too much to chance—and thus to individual judges' discretion." Remarks of Judge Kevin C. Newsom, Harv. J. L. Pub. Pol'y (2024) (forthcoming).[5]

3. Finally, other stare decisis considerations do not compel retaining *TransUnion*. For instance, *TransUnion* concerns the appropriate interpretation of Article III of the Constitution, and *stare decisis* is "at its weakest when we interpret the Constitution," *Ramos* v. *Louisiana*, 590 U.S. 83, 105 (2020), particularly in cases "decided by the narrowest of margins, over spirited dissents challenging the basic underpinnings of those decisions," *Gamble* v. *United States*, 587 U.S. 678, 757 (2019) (Gorsuch, J., dissenting), all of which apply here. Nor does *TransUnion*—a threshold obstacle to federal court—implicate anything approaching weighty reliance interests, such as those in "cases involving property and contract rights." *Payne* v. *Tennessee*, 501 U.S. 808, 828 (1991).

In addition, *TransUnion* has not proven to be a workable test, as illustrated by the split between the Circuits discussed above, which directly effects how numerous federal laws purporting to grant private rights to would-be plaintiffs operate. See *id*. at 827 ("[W]hen governing decisions are unworkable or are badly reasoned, 'this Court has never felt constrained to follow precedent.'" (quoting *Smith* v. *Allwright*, 321

[5] Available at https://tinyurl.com/5fn5b5cz.

U.S. 649, 665 (1944)). Indeed, the Court has gone down an element-matching road before—in applying the Armed Career Criminal Act. It is fair to say that path has been much regretted. *Mathis* v. *United States*, 579 U.S. 500, 538 (2016) (Alito, J., dissenting) ("Serenely chanting its mantra, 'Elements,' . . . the Court keeps its foot down and drives on."); see also *Wooden* v. *United States*, 595 U.S. 360, 384 (2022) (Gorsuch, J., concurring) ("Disputes over the statute's meaning have occupied so much of this Court's attention over so many years[.]")

To be sure, *TransUnion* is of recent vintage. But that should counsel in favor of reexamination sooner, not retaining the decision until after it has sown confusion for longer. This Court recognized as much in similar circumstances. See *Garcia* v. *San Antonio Metro. Transit Auth.*, 469 U.S. 528, 531, (1985) (overruling *National League of Cities* v. *Usery*, 426 U.S. 833 (1976)) ("[O]ur examination of this . . . standard applied in these and other cases over the last eight years now persuades us that the attempt" is "not only unworkable but is also inconsistent with established principles of federalism."). The Court has an opportunity now to turn back before it gets too far off course, and before too many litigants with claims Congress recognized as worthy of relief are shut out of federal court.

III. The Questions Presented Are Important

A. The question whether a party must plead or show specific elements of a comparator tort to have Article III standing to maintain a statutory cause of

action in federal court is also highly important. Congress has passed numerous statutes like the FDCPA that permit individuals to sue to remedy harms that are similar to, but not exact duplicates of, harms traditionally redressed by common law causes of action. Because of this, the question presented frequently arises—a quick search of Westlaw reveals more than 400 cases citing *TransUnion* that contain the term "FDCPA."[6]

In addition to frequently arising, the questions presented directly implicate important issues regardless of the correct answer. If the element-matching test is incorrect, thousands of individuals will be wrongly prevented from vindicating their statutory rights. On the other hand, if matching one

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[6] Indeed, the lower courts are currently struggling to apply *TransUnion* to rights provided under a host of other statutes. See, *e.g.*, *Acheson Hotels, LLC* v. *Laufer*, 601 U.S. 1, 3 (2023) (discussing three-to-three circuit split on standing under *TransUnion* for Americans with Disabilities Act claim); *Campaign Legal Ctr.* v. *Scott*, 49 F.4th 931, 937 (5th Cir. 2022) (no standing for plaintiff under *TransUnion* for violation of 52 U.S.C. § 20507, the National Voter Registration Act ("NVRA")); *Jud. Watch, Inc.* v. *Griswold*, 2022 WL 3681986, at *3 (D. Colo. Aug. 25, 2022) (finding standing for plaintiff under *TransUnion* for § 20507 violation); *Neor* v. *Acacia Network, Inc.*, 2023 WL 6930000, at *5 (S.D.N.Y. Oct. 19, 2023) (no standing under *TransUnion* for Fair Labor Standard Act violation of not providing proper wage statements); *Gunthorpes* v. *IM. Grp., LLC*, 2024 WL 2031191, at *7 (E.D.N.Y. Apr. 11, 2024) (collecting cases and discussing how courts in the Second Circuit are divided on whether a plaintiff has standing under *TransUnion* for an employer's failure to provide proper wage statements and then concluding plaintiff does have standing), *report and recommendation adopted*, 2024 WL 2022688 (E.D.N.Y. May 7, 2024).

or more elements is required, then courts that fail to impose this requirement risk "violat[ing] Article III" and "infring[ing] on the Executive Branch's Article II authority" by permitting "unharmed plaintiffs to sue defendants who violate federal law." *Id.* at 429 (discussing how "the choice of how to prioritize and how aggressively to pursue legal actions against defendants who violate the law falls within the discretion of the Executive Branch, not within the purview of private plaintiffs").

B. The questions presented in this Petition also require intervention because the split has sown confusion among the district courts regarding the exact cause of action present in this Petition.

As the dissents in *Barclift* and *Hunstein III* persuasively state, the panel opinions in both cases misapprehend *TransUnion*'s charge by—however much they might deny it—requiring plaintiffs who plead statutory violations to include allegations of harm that map onto a common law analogue. See generally *Barclift*, 93 F.4th at 144–49 (Matey, J. dissenting in part); *Hunstein III*, 48 F.4th at 1260–69 (Newsom, J., dissenting).

Certain district courts have engaged in the analysis these dissents promote and have found that plaintiffs bringing FDCPA disclosure claims have Article III standing so long as the information is disclosed to a third-party. See, *e.g.*, *Ross* v. *Fin. Recovery Servs., Inc.*, 2022 WL 4479968, at *2–5 (W.D.N.C. Sept. 26, 2022) (finding plaintiff has standing when defendant disclosed debt-related

information to a mailing vendor because the harm is closely related to the public disclosure of private facts); *Jennings* v. *IQ Data Int'l Inc.*, 2023 WL 3224482, at *3–8 (W.D. Wash. May 3, 2023) (same).

For example, in *Jennings*, the court recognized that the common law tort "requires publicity to the public or several people." *Jennings*, 2023 WL 3224482, at *3. But it found that the plaintiff had standing even though she did not allege "publicity" because "the harm that both the common law tort . . . and [the statute] seek to remedy is the same: it protects people's privacy." Ibid. The court cited *TransUnion* for the proposition that the plaintiff "need not show that each element of the common law tort is the same," so long as "[t]he harms are closely related." Ibid. (citing *TransUnion*, 594 U.S. at 429–30). In reaching this conclusion, the court expressly rejected *Hunstein III*. *Id.* at *3.

IV. This Case Presents an Ideal Vehicle to Decide the Questions Presented

This case also cleanly presents the questions presented. It is at the motion to dismiss stage, so the facts are assumed to be true, and the issues are purely ones of law. *Barclift*, 93 F.4th at 140. In addition, the Third Circuit decision rested specifically on its conclusion that, although "Barclift alleged that Keystone transmitted her information to RevSpring" and "that she was 'embarrassed and distressed' by the disclosure to RevSpring," she lacked standing because this kind of disclosure "is not the same kind of harm as *public* disclosure of private facts." Ibid. Thus, the

answer to either question presented would resolve the motion.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for certiorari.

Respectfully submitted,

JESSE S. JOHNSON
GREENWALD DAVIDSON
RADBIL PLLC
5550 Glades Road
Suite 500
Boca Raton, FL 33431

DANIEL M. SULLIVAN
Counsel of Record
JACK L. MILLMAN
BRIAN T. GOLDMAN
JESSICA MARDER-SPIRO
HOLWELL SHUSTER
& GOLDBERG LLP
425 LEXINGTON AVENUE
14th Floor
New York, NY 10017

Counsel for Petitioner

APPENDIX

TABLE OF APPENDICES

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, FILED FEBRUARY 16, 2024

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 22-1925

PAULETTE BARCLIFT, ON BEHALF OF HERSELF AND OTHERS SIMILARLY SITUATED,

Appellant,

v.

KEYSTONE CREDIT SERVICES, LLC.

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil No. 5-21-cv-04335)
District Judge: Honorable Joseph F. Leeson, Jr.

Argued on March 30, 2023

Before: MATEY, FREEMAN, and FUENTES,
Circuit Judges.

(Opinion filed: February 16, 2024)

OPINION OF THE COURT

FREEMAN, *Circuit Judge.*

Appendix A

To facilitate its efforts to collect a debt, Keystone Credit Services, LLC ("Keystone") sent Paulette Barclift's personal information to a mailing vendor, RevSpring, which then mailed Keystone's collection notice to Barclift. Barclift did not authorize Keystone's communications to RevSpring. So she sued Keystone for an unauthorized communication with a third party in violation of the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692 *et seq.,* and she sought to represent a class of similarly situated plaintiffs. The District Court found that Barclift did not allege an injury sufficient to establish standing for purposes of Article III of the United States Constitution and dismissed her suit with prejudice. We agree that Barclift lacks standing, but we will modify the District Court's order so that the dismissal will be without prejudice.

I

Keystone is a collection agency based in Lancaster, Pennsylvania.[1] It contracts with RevSpring to print and mail debt collection notices. RevSpring is a nationwide operation with multiple locations and hundreds of employees.

In October 2020, Barclift received a notice in the mail from Keystone regarding her outstanding debt for medical services. The notice was printed and mailed by RevSpring to Barclift's home in Pennsylvania. Keystone provided RevSpring with Barclift's name, address, debt

1. We recount the facts as alleged in Barclift's complaint.

balance, and other information about the debt to populate the mailing. Barclift did not give Keystone prior consent to share that information.

In October 2021, Barclift filed a class action complaint against Keystone on behalf of herself and other Pennsylvania residents who had received collection notices from Keystone through third-party mailing vendors. She claimed that Keystone violated the provision of the FDCPA that bars debt collectors from communicating with third parties in connection with a debt absent prior consent from the debtor (or absent exceptions that do not apply here). 15 U.S.C. § 1692c(b). She alleged that the disclosures had caused her embarrassment and stress, invaded her privacy, and inflicted reputational harm.

Keystone moved to dismiss the complaint for failure to state a claim. The District Court did not reach that argument because it concluded that it lacked jurisdiction, so it dismissed the action without prejudice on that basis and denied Keystone's motion as moot. In its opinion, the court assumed that Barclift had alleged a procedural violation of the FDCPA based on Keystone's communication with RevSpring, but it held that Barclift had not alleged a concrete injury sufficient to establish standing.

Barclift subsequently amended her complaint by adding allegations about RevSpring's operations and data collection processes. Specifically, she made several allegations "upon information and belief," including that RevSpring maintains electronic copies of the consumer

data it receives from debt collectors for multiple years, during which time its employees can access sensitive information. She also alleged that RevSpring had mistakenly disseminated the personal information of more than 1,000 patients in the University of Pennsylvania Health System in 2014.

Keystone again moved to dismiss the complaint for failure to state a claim, and the District Court again concluded that Barclift lacked standing. It held that the mere possibility of public disclosure of private facts was not enough to establish a concrete injury and that her fear of future disclosure was too speculative. This time, it dismissed the action with prejudice, reasoning that any additional amendments would be futile because Barclift had not cured her claim's deficiencies when given the opportunity to do so.

Barclift timely appealed.

II

We have jurisdiction over the District Court's order pursuant to 28 U.S.C. § 1291. We exercise *de novo* review of a dismissal for a lack of standing, "accepting the facts alleged in the complaint as true and construing the complaint in the light most favorable to the non-moving party." *Potter v. Cozen & O'Connor,* 46 F.4th 148, 153 (3d Cir. 2022).

III

Article III of the Constitution grants federal courts "judicial Power" to resolve "Cases" and "Controversies." U.S. Const. art. III, §§ 1-2. The doctrine of standing ensures that courts do not overstep their role by "limit[ing] the category of litigants empowered to maintain a lawsuit in federal court to seek redress for a legal wrong." *Spokeo, Inc. v. Robins,* 578 U.S. 330, 338 (2016). Plaintiffs seeking to vindicate their rights in federal court must therefore satisfy Article III's standing requirements. *See Lujan v. Defs. of Wildlife,* 504 U.S. 555, 561 (1992); *Finkelman v. Nat'l Football League,* 877 F.3d 504, 511 (3d Cir. 2017). Standing consists of three main components: (1) an injury in fact that is concrete and particularized, (2) a causal connection between the injury and the challenged conduct, and (3) a likelihood that the injury will be redressed by a favorable judicial decision. *In re Horizon Healthcare Servs. Inc. Data Breach Litig.,* 846 F.3d 625, 633 (3d Cir. 2017) (quoting *Lujan,* 504 U.S. at 560). Only the first component is at issue in this appeal: whether Keystone's alleged violation of the FDCPA resulted in a concrete and particularized injury to Barclift.

A

Congress enacted the FDCPA in 1977 to "eliminate abusive debt collection practices by debt collectors" that had contributed to "personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy." 15 U.S.C. §§ 1692(a), (e). To that end, section 1692c(b) prohibits debt collectors from "communicat[ing],

in connection with the collection of any debt, with any person other than the consumer, his attorney, a consumer reporting agency if otherwise permitted by law, the creditor, the attorney of the creditor, or the attorney of the debt collector" "without the prior consent of the consumer." 15 U.S.C. § 1692c(b). And it creates a civil cause of action for any individual who sustains damages due to a debt collector's violation of the Act. 15 U.S.C. § 1692k.

For decades following the enactment of the FDCPA, consumers rarely sued over the use of third-party mailing vendors for debt collection practices. But in 2021, the United States Court of Appeals for the Eleventh Circuit held that consumers have standing under the FDCPA to bring so-called "mailing vendor theory" lawsuits. *Hunstein v. Preferred Collection & Mgmt. Servs., Inc.*, 994 F.3d 1341, 1344 (11th Cir. 2021) ("*Hunstein I*"), *vacated,* 48 F.4th 1236 (11th Cir. 2022) (en banc). In *Hunstein I,* the plaintiff alleged that a collection agency had sent his personal information to a mailing vendor to facilitate debt collection efforts. *Id.* at 1345. On the issue of Article III standing, the Eleventh Circuit considered *Spokeo, Inc. v. Robins,* in which the Supreme Court held that "a plaintiff [does not] automatically satisf[y] the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize [a suit] to vindicate [it]" because "Article III standing requires a concrete injury even in the context of a statutory violation." 578 U.S. at 341. Applying *Spokeo*'s guidance, the Eleventh Circuit held that the injury Hunstein alleged was intangible but was nonetheless sufficiently concrete for Article III standing. *Hunstein I,* 994 F.3d at 1344,

1346. The court also concluded that Hunstein's allegations constituted a violation of section 1692c(b). *Id.* at 1344. That since-vacated decision led to a proliferation of similar suits across the country. *See, e.g., In re FDCPA Mailing Vendor Cases,* 551 F. Supp. 3d 57, 63 (E.D.N.Y. 2021) ("Each case addressed herein invokes a recently-developed 'mailing-vendor' theory. . . . These cases emanate from [*Hunstein I*]."); *Jackin v. Enhanced Recovery Co.,* 606 F. Supp. 3d 1031, 1034-35 (E.D. Wash. 2022).

Just two months after *Hunstein I,* the Supreme Court decided *TransUnion LLC v. Ramirez,* 594 U.S. 413 (2021), which built upon *Spokeo* and provided additional guidance to courts seeking to determine whether an intangible harm suffices as a concrete injury. Because *TransUnion* is key to our decision today, we examine it in some detail here.

TransUnion was a class action suit seeking relief for individuals allegedly harmed by a violation of the Fair Credit Reporting Act ("FCRA"). A credit reporting agency mistakenly added an alert to numerous consumers' files indicating that they were a "potential match" with individuals on a national security threat list. *Id.* at 420. For most of the affected consumers, the credit agency simply maintained alerts on internal records without disseminating them. *Id.* at 421. But for others, the agency distributed reports containing the erroneous security alert to creditors. *Id.*

Invoking *Spokeo,* the Court explained that intangible harms can give rise to concrete injuries when they bear

"a close relationship to harms traditionally recognized as providing a basis for lawsuits in American courts," such as "reputational harms, disclosure of private information, and intrusion upon seclusion." *Id.* at 425. But even though this inquiry requires the identification of "a close historical or common-law analogue for the[ ] asserted injury," the Court clarified that there need not be "an exact duplicate." *Id.* at 424. And while Congress may elevate certain harms to actionable legal status through legislation, the Court stressed that Congress's mere creation of a statutory cause of action does not "automatically satisf[y] the injury-in-fact requirement." *Id.* at 426 (quoting *Spokeo,* 578 U.S. at 341).

The *TransUnion* plaintiffs had sued, in relevant part, under a FCRA provision that requires agencies to "follow reasonable procedures to assure maximum possible accuracy of the [consumer's] information." 15 U.S.C. § 1681e(b). The plaintiffs contended that the erroneous security alerts bore a "close relationship" to the traditional harm associated with the tort of defamation. *TransUnion,* 594 U.S. at 432. The credit agency countered by arguing that defamation required literal falsity, whereas the alerts (which only denoted "*potential* match[es]" with the threats list) were at most misleading. *Id.* at 433.

The Supreme Court sided with the plaintiffs, explaining that—in the context of a national security threats list—"the harm from a misleading statement . . . b[ore] a *sufficiently close relationship* to the harm from a false and defamatory statement." *Id.* (emphasis added). But because publication is "essential to liability"

in a defamation claim, only the plaintiffs whose erroneous security alerts were actually disseminated to creditors suffered concrete injuries for standing purposes. *Id.* at 434 (quoting Restatement (Second) of Torts § 577 cmt. a (1938)). By contrast, the remaining plaintiffs, whose alerts were never sent to third parties, lacked standing to sue. *Id.* ("The mere presence of an inaccuracy in an internal credit file, if it is not disclosed to a third party, causes no concrete harm."), 437 ("[T]he [other] plaintiffs did not demonstrate that the risk of future harm materialized. . . . Nor did those plaintiffs present evidence that [they] were independently harmed by their exposure to the risk itself[.]").

In a footnote, the Court noted that the plaintiffs had forfeited an argument that the credit agency had "'published' the class members' information internally . . . to employees within TransUnion and to the vendors that printed and sent the mailings that the class members received." *Id.* at 434 n.6. In any event, the Court deemed the argument "unavailing" because "[m]any American courts did not traditionally recognize intra-company disclosures . . . for purposes of the tort of defamation" and did not "necessarily recognize[ ] disclosures to printing vendors as actionable publications." *Id.* And even the courts that traditionally did so required a showing that the defendant "actually 'brought an idea to the perception of another'" or that the information "was actually read and not merely processed." *Id.* (quoting Restatement (Second) of Torts § 559 cmt. a); *see id.* (explaining that a theory that "circumvents a fundamental requirement of an ordinary defamation claim . . . does not bear a sufficiently 'close relationship' to the traditional defamation tort to qualify for Article III standing").

Courts have interpreted *TransUnion*'s methodology in different ways, as exemplified by the subsequent developments in the *Hunstein* matter. The Eleventh Circuit reheard *Hunstein* twice (first before the original panel ("*Hunstein II*"), and then *en banc*) before concluding that Hunstein's alleged harm in his mailing vendor case was not a concrete injury. *Hunstein v. Preferred Collection & Mgmt. Servs., Inc.*, 48 F.4th 1236, 1240 (11th Cir. 2022) (en banc) ("*Hunstein III*"). The *en banc* court focused on elements. It reasoned that an alleged intangible harm is not closely related to a traditional harm if it is "missing an element 'essential to liability' under the comparator tort." *Id.* at 1242. It then compared Hunstein's alleged injury to the traditional tort of public disclosure of private facts. It recounted that Hunstein did not suggest in his complaint that the debt collector's communication "reached, or was sure to reach, the public. Quite the opposite—the complaint describe[d] a disclosure that reached a single intermediary, which then passed the information back to Hunstein without sharing it more broadly." *Id.* at 1248. So the court held that Hunstein's allegations lacked publicity—an element "essential to liability." *Id.* at 1244.

The *Hunstein III* dissent, however, took issue with the majority's "element-for-element" approach. *Id.* at 1261 (Newsom, J., dissenting). The four dissenting judges viewed that approach as a "dressed-up version of the very 'exact duplicate' standard that the Supreme Court . . . flatly disavowed." *Id.* They reasoned that, because *TransUnion* held that misleading information was "close enough" to false and defamatory information, Hunstein's "allegation of *near* publicity[,] . . . (*i.e.,* dissemination to an as-yet-

unknown number of employees)" was "close enough" to an allegation of publicity. *Id.* at 1262.

As an alternative to comparing elements, the *Hunstein III* dissent embraced a "*kind* of harm" test, which would require a plaintiff suing on a statutory cause of action to "show that his alleged injury is similar in *kind* to the harm addressed by a common-law cause of action, but not that it is identical in *degree*." *Id.* at 1264. On that basis, the dissenting judges would have concluded that Hunstein's allegations (taken as true and paired with all reasonable and favorable inferences) were sufficient to show an injury in fact because Hunstein's injury was "close enough" to the *kind* of harm posed by publicity under the common-law tort of public disclosure of private facts, even if Hunstein's harm did not rise to the same *degree* of publicity-related harm. *Id.* at 1268-69.

A few months after *Hunstein III,* the Tenth Circuit considered the FDCPA mailing vendor theory in *Shields v. Professional Bureau of Collections of Maryland, Inc.*, 55 F.4th 823 (10th Cir. 2022). The Tenth Circuit implicitly adopted the kind-of-harm framework urged by the *Hunstein III* dissent, but held that the plaintiff lacked standing. *Shields,* 55 F.4th at 829. It stated that under *TransUnion,* "Shields did not have to plead and prove the [common law] tort's elements to prevail. But to proceed, she had to at least allege a similar harm." *Id.* The court concluded that Shields's assertion "that one private entity (and, presumably, some of its employees) knew of her debt" was "not the same kind of harm as *public* disclosure of private facts." *Id.*

After we heard oral argument in Barclift's appeal, the Seventh Circuit took a turn at deciding a FDCPA mailing vendor case. *Nabozny v. Optio Sols. LLC,* 84 F.4th 731 (7th Cir. 2023). It first used the element-based approach from *Hunstein III* and held that the plaintiff 's "attempt to analogize her case to [the tort of public disclosure of private facts] [fell] apart on the threshold element of publicity." *Id.* at 735 (citing *Hunstein III,* 48 F.4th at 1245-49). Because the plaintiff did not allege publicity as that term is understood in traditional tort law, the court concluded that she had not suffered an injury "analogous to the harm at the core of the public-disclosure tort." *Id.* at 736; *id.* at 735 ("'Publicity' . . . means that the matter is made public, by communicating it to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge." (quoting Restatement (Second) of Torts § 652D cmt. a)). The Seventh Circuit then addressed the kind-or-degree question, stating that the difference between public and private communication "is not just a matter of numbers," but when a private communication is sent "with no expectation of further disclosure, it is not one that is 'sure to reach[ ] the public.'" *Id.* at 736 (alteration in original) (quoting Restatement (Second) of Torts § 652D cmt. a). Finally, it explained that "the harm at the core of the public-disclosure tort" is "the humiliation that accompanies the disclosure of sensitive or scandalizing private information to public scrutiny." *Id.* So "[w]ithout a public-exposure component," the plaintiff 's alleged harm was not analogous. *Id.*

In sum, judges on our sister circuits have interpreted *TransUnion* in two different ways. Some espouse an

element-based approach, wherein a plaintiff's alleged harm must not lack any element of the comparator tort that was essential to liability at common law. *E.g., Hunstein III,* 48 F.4th at 1244-45; *see* Element, *Black's Law Dictionary* (11th ed. 2019) (defining "element" as "[a] constituent part of a claim that must be proved for the claim to succeed"). Others compare the kind of harm a plaintiff alleges with the kind of harm caused by the comparator tort. *E.g., Shields,* 55 F.4th at 829. We view the second method as more faithful to *TransUnion.*

To determine the "concreteness" of intangible injuries, *TransUnion* instructs us to ask "whether the asserted harm has a 'close relationship' to a harm traditionally recognized as providing a basis for a lawsuit in American courts—such as physical harm, monetary harm, or various intangible harms including (as relevant here) reputational harm." 594 U.S. at 417. *TransUnion* speaks only of harms, not elements. Indeed, the word "element" does not appear once in the body of the *TransUnion* opinion. We believe that if the Court wanted us to compare elements, it would have simply said so.[2] So when asking whether a plaintiff's intangible injury is "concrete," we will examine the kind of harm at issue.

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2. It has done so in other contexts. *See, e.g., United States v. Dixon,* 509 U.S. 688, 696-97 (1993) (referring to the *Blockburger* test for double jeopardy as a "same-elements test" (citing *Blockburger v. United States,* 284 U.S. 299, 304 (1932))); *cf. Descamps v. United States,* 570 U.S. 254, 260-61 (2013) (describing the "categorical approach" to determining whether a state crime qualifies for a federal sentencing enhancement, which requires courts to ask whether the state crime "has the same elements as the 'generic' [federal] crime").

B

Applying our interpretation of *TransUnion* to Barclift's allegations, we conclude that she cannot establish standing for her claim. She cannot demonstrate that the injury resulting from Keystone's communication of her personal information to a third-party mailing vendor bears a close relationship to a harm traditionally recognized by American courts. *See TransUnion,* 594 U.S. at 417.

At common law, actionable invasions of privacy are typically categorized into four separate torts: intrusion upon seclusion, appropriation of name or likeness, unreasonable publicity given to another's private life, and false light. *See* Restatement (Second) of Torts § 652A; *see also Nabozny,* 84 F.4th at 735. The traditional harm that Barclift analogizes to lies at the heart of the unreasonable publicity given to another's private life, which is also known as the public disclosure of private information.[3]

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3. The dissent accepts Barclift's argument that "breach of confidence" is also a common-law analogue for her alleged harm. Dissenting Op. at 157-58 & n.13. But we hesitate to conclude that the harm associated with a breach of confidence bears a "close relationship to a harm traditionally recognized as providing a basis for a lawsuit in American courts." *TransUnion,* 594 U.S. at 440. As Vickery (cited by Barclift and the dissent) writes, breach of confidence law in the United States is not a "traditional theor[y] of liability"—rather, it was "emerging" and "still rudimentary" in the 1980s. Alan B. Vickery, *Breach of Confidence: An Emerging Tort,* 82 Colum. L. Rev. 1426, 1426, 1451 (1982). Although it was mentioned in some texts much earlier, it "died out in its infancy," likely due to the "birth and explosive growth" of traditional privacy torts such as the public disclosure of private facts. *Id.* at 1454-55;

A defendant is liable under this tort when he "gives publicity to a matter concerning the private life of another . . . if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public." Restatement (Second) of Torts § 652D. The harm caused by this tort is "the humiliation that accompanies the disclosure of sensitive or scandalizing private information to public scrutiny." *Nabozny,* 84 F.4th at 736; *see also Jenkins v. Dell Publ'g Co.*, 251 F.2d 447, 450 (3d Cir. 1958) (explaining that privacy torts provide legal relief for "the embarrassment, humiliation[,] or other injury which may result from public disclosure concerning his personality or experiences"). The harm stems from both the offensive character of the information and its disclosure to the public.

Here, Barclift alleged that Keystone transmitted her information to RevSpring for one purpose: "to fashion, print, and mail debt collection letters." Appx. 39. She also alleged that she was "embarrassed and distressed" by the disclosure to RevSpring. Appx. 46. But she did not allege that anyone outside of Keystone or RevSpring accessed her personal information. In short, she alleged that Keystone transmitted her personal information to "a single ministerial intermediary," *Nabozny,* 84 F.4th at 736, causing her embarrassment.

While Barclift does not need to "exact[ly] duplicate" a traditionally recognized harm, *TransUnion,* 594 U.S. at 433, she must still analogize to a harm "of the same

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see Young v. U.S. Dep't of Just., 882 F.2d 633, 640 (2d Cir. 1989) (describing breach of confidence as "a relative newcomer to the tort family").

character of previously existing 'legally cognizable injuries,'" *Kamal v. J. Crew Grp., Inc.*, 918 F.3d 102, 114 (3d Cir. 2019) (quoting *Susinno v. Work Out World Inc.*, 862 F.3d 346, 352 (3d Cir. 2017)). Like our sister circuits, we conclude that the harm from disclosures that remain functionally internal are not closely related to those stemming from public ones. *See Shields,* 55 F.4th at 829 ("Shields's alleged harm was that one private entity (and, presumably, some of its employees) knew of her debt. That is not the same kind of harm as *public* disclosure of private facts, which is concerned with highly offensive information being widely known."). When the communication of personal information only occurs between a debt collector and an intermediary tasked with contacting the consumer, the consumer has not suffered the kind of privacy harm traditionally associated with public disclosure.[4]

Our conclusion comports with the Supreme Court's observations (in dicta) from *TransUnion* about the internal publication of consumer data. While *TransUnion* compared FCRA violations to the traditional harms of defamation, the same logic applies here. The Court found unavailing plaintiffs' unpreserved argument that their information had been "published . . . internally . . .

4. We acknowledge that there is overlap between the nature of the traditional harm (humiliation stemming from the public disclosure of offensive information) and an element of the traditional tort (publicity). This is because a disclosure that remains nonpublic is unlikely to result in the type of humiliation associated with the traditional injury. Despite this overlap, and in accordance with the Supreme Court's directive in *TransUnion,* we focus our inquiry solely on the harm. And even though that inquiry necessarily considers whether a disclosure is "public" (for lack of a better term), our approach is not an exercise in element-matching.

to employees within [the credit reporting agency] and to the vendors that printed and sent the mailings that the class members received." *TransUnion,* 594 U.S. at 434 n.6 (quotation marks omitted). The Court stated that American courts generally have not recognized "disclosures to printing vendors as actionable publications," and that harms associated with "internal publication . . . do[ ] not bear a sufficiently 'close relationship'" to defamation harms for standing purposes. *Id.* While this rationale is not binding, we believe it would apply to the mailing vendor theory claims here.[5] If there are no grounds to believe that

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5. Indeed, numerous early twentieth century courts held that communications to an associate in the ordinary course of business did not support an action at common law. For example, in *Chalkley v. Atlantic Coast Line Railroad Co.,* 143 S.E. 631 (Va. 1928), the Supreme Court of Virginia observed that

> in many cases the modern and more liberal rule is applied, *i.e.,* that where the communication of the libelous matter to the plaintiff is in the customary and usual course of the business of the defendant, in the discharge of an ordinary business duty, and is merely dictated to a stenographer, or copyist, who is charged with the duty of transcribing it, this is not such a publication of the alleged libel as will support an action.

143 S.E. at 638. *See also Globe Furniture Co. v. Wright,* 265 F. 873, 874-76 (D.C. Cir. 1920) (collecting cases); *Beck v. Oden,* 13 S.E.2d 468, 471 (Ga. Ct. App. 1941) ("The more liberal rule, and the one which seemingly has the support of the weight of modern authority, is that, where the communication is made to a servant or business associate in the ordinary or natural course of business, there is no actionable libel."); *Rodgers v. Wise,* 7 S.E.2d 517, 519 (S.C. 1940) ("This case seems to me to set out the sounder and more logical view [that] where a letter is dictated by a business man to his

stenographer," the "cause of action . . . fail[s] as a matter of law to allege a publication of the slanderous and libelous statements[.]"); *Cartwright-Caps Co. v. Fischel & Kaufman*, 74 So. 278, 279-80 (Miss. 1917) ("It is inconceivable how the business of the country . . . can be carried on, if a business man or corporation must be subject to litigation for every letter containing some statement too strong, where it is only sent to the person to whom directed, and only heard by a stenographer to whom the letter is dictated."); *Owen v. Ogilvie Publ'g Co.*, 53 N.Y.S. 1033, 1034 (App. Div. 1898) ("The writing and the copying were but parts of one act; i.e. the production of the letter. Under such conditions we think the dictation, copying, and mailing are to be treated as only one act of the corporation; and . . . there was no publication of the letter[.]"); *Central of Ga. Ry. Co. v. Jones,* 89 S.E. 429, 429 (Ga. Ct. App. 1916) (following *Owen*); *Nichols v. Eaton,* 81 N.W. 792, 793 (Iowa 1900) ("One may make a publication to his servant or agent, without liability, which, if made to a stranger, would be actionable.").

The dissent posits that the *TransUnion* Court cited *Ostrowe v. Lee* in footnote 6 "to illustrate the meaning of publication." Dissenting Op. at 21. In *Ostrowe,* the New York Court of Appeals held that dictating a letter to a stenographer qualified as "publication" for defamation purposes because the contents of the letter had been read by someone other than the defamed person. 175 N.E. 505, 505 (N.Y. 1931). In the dissent's view, "RevSpring is the modern stenographer," Dissenting Op. at 162, and Barclift's allegations are enough to suggest that her information was "read and not merely processed." *TransUnion,* 594 U.S. at 434 n.6.

We agree that Barclift's allegations plausibly support an inference that Keystone caused someone at RevSpring to read (and not merely process) information about Barclift's alleged debt. But, in light of the authority mentioned above, we are not convinced that this inference or the Supreme Court's citation to *Ostrowe* means that Barclift's harm bears a close relationship to one that was actionable at common law.

the information will result in humiliation, then there is no comparable harm under *TransUnion.*[6]

Finally, Barclift cannot show that she has suffered a concrete injury due to anticipated harm. As a general matter, "[a]llegations of 'possible future injury' are not sufficient to satisfy Article III" in a suit for damages. *Reilly v. Ceridian Corp.,* 664 F.3d 38, 42 (3d Cir. 2011) (quoting *Whitmore v. Arkansas,* 495 U.S. 149, 158 (1990)); *see TransUnion,* 594 U.S. at 437 ("*Spokeo* did not hold that the mere risk of future harm, without more, suffices to demonstrate Article III standing in a suit for damages."). For a material risk of future harm to be concrete, a plaintiff must show that she was "independently harmed by [her] exposure to the risk itself." *TransUnion,* 594 U.S. at 437. In *TransUnion,* it was not enough that "[the credit report company] could have divulged [the plaintiffs'] misleading credit information to a third party at any moment." *Id.* at 438. Similarly, the mere assertion that RevSpring's employees *could* access and broadcast Barclift's personal information to the public is far too speculative to support

6. Our view also aligns with Congress's intent in enacting the FDCPA. As Congress explained, the Act's "purpose is to protect consumers from a host of unfair, harassing, and deceptive debt collection practices without imposing unnecessary restrictions on ethical debt collectors." S. Rep. No. 95-382, at 1 (1977). With limited exceptions, the Act prevents debt collectors from "contact[ing] third persons such as a consumer's friends, neighbors, relatives, or employer" because "[s]uch contacts are not *legitimate collection practices* and result in serious invasions of privacy." S. Rep. No. 95-382, at 4 (emphasis added). Using a mailing vendor to contact a consumer in a legitimate attempt to collect a debt is not a practice the statute was meant to prohibit.

standing. And even though RevSpring suffered a prior data breach in 2014, Barclift has not alleged facts supporting an inference of "a sufficient likelihood that [RevSpring] would . . . intentionally or accidentally release [her] information to third parties." *Id.* Without an actual, materialized injury, "we cannot simply presume a material risk of concrete harm" absent a "serious likelihood of disclosure." *Id.* (quoting *Ramirez v. TransUnion,* 951 F.3d 1008, 1040 (9th Cir. 2020) (McKeown, J., concurring in part and dissenting in part)).[7]

In sum, the type of injury Barclift alleged "is not remotely analogous to the harm caused by the tortious public dissemination of sensitive facts about another's private life." *Nabozny,* 84 F.4th at 737-38 (emphasis omitted). Information transmission that neither travels beyond a private intermediary nor creates a sufficient likelihood of external dissemination cannot compare to a traditionally recognized harm that depends on the humiliating effects of public disclosure. Therefore, we conclude that Barclift lacks a concrete injury and cannot establish Article III standing.

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7. Of course, if RevSpring were to mistakenly release someone's personal information in the future, that person could have a cause of action. *Cf. Clemens v. ExecuPharm Inc.,* 48 F.4th 146, 155 (3d Cir. 2022) (holding, in the data breach context, that an alleged harm was sufficiently concrete because, among other things, there was actual "exposure of personally identifying information" on the dark web).

C

Although the District Court correctly held that Barclift lacked a concrete injury, it erred in dismissing her complaint with prejudice. "Because the absence of standing leaves the court without subject matter jurisdiction to reach a decision on the merits, dismissals 'with prejudice' for lack of standing are generally improper." *Cottrell v. Alcon Lab'ys,* 874 F.3d 154, 164 n.7 (3d Cir. 2017). That general rule applies here, so we will modify the District Court's order to dismiss the complaint without prejudice and affirm that order as modified.

* * *

For the foregoing reasons, we will modify the District Court's order to dismiss the complaint without prejudice and affirm the order as modified.

MATEY, *Circuit Judge*, concurring in part, dissenting in part, and dissenting in the judgment.

"Standing" is a term found in every first-year law school outline, but absent from the text of the Constitution, Founding-era discussions, English and Roman history, and the reported decisions of our federal courts throughout most of the twentieth century. Ever shifting, the judicially created standard of modern standing confuses courts, commentators, and plaintiffs like Paulette Barclift who are told their claim is insufficiently "concrete" to decide. Barclift says Keystone Credit Services shared private information about her physical and financial health with "an untold number of individuals" at a mailing facility close to her home. App. 62. Can she file a lawsuit for her alleged harms? Congress said yes, inserting a private right of action in the Fair Debt Collection Practices Act (FDCPA). And the Supreme Court has explained that the "disclosure of private information" has been "traditionally recognized as providing a basis for lawsuits in American courts." *TransUnion LLC v. Ramirez,* 594 U.S. 413, 425 (2021). I conclude that Barclift's "intangible harms" are sufficiently "concrete" for standing because they bear "a close relationship to harms traditionally recognized as providing a basis for lawsuits in American courts." *Id.*

But Barclift loses because the majority treats *TransUnion*'s footnote six as talismanic, turning dictum into precedent and, along the way, adopting the jot-for-jot reading of caselaw that the majority's opinion purports to reject. Respectfully, I cannot pour that much meaning into a note, particularly where the result only adds to the

incoherence of modern standing. So I dissent in part and in the judgment because, while standing "needs a rewrite," as the requirement stands, Paulette Barclift is due her day in court. *Id.* at 461 (Kagan, J., dissenting).[1]

I.

The majority surveys circuit caselaw, catalogues the divergent approaches, and selects a test that compares the harm a plaintiff asserts to a harm that traditionally provided a basis to sue in American courts to determine whether an intangible injury is concrete. I agree that conclusion is the best reading of *TransUnion*, even if a natural reading of the FDCPA and Article III make that difficult detour unnecessary.[2] I write separately to explain how the wandering began.

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1. *See also, e.g., TransUnion,* 594 U.S. at 442 (Thomas, J., dissenting); *Sierra v. City of Hallandale Beach,* 996 F.3d 1110, 1115 (11th Cir. 2021) (Newsom, J., concurring); *Muransky v. Godiva Chocolatier, Inc.,* 979 F.3d 917, 971 (11th Cir. 2020) (en banc) (Jordan, J., dissenting); *Springer v. Cleveland Clinic Emp. Health Plan Total Care,* 900 F.3d 284, 290 (6th Cir. 2018) (Thapar, J., concurring); Erwin Chemerinsky, *What's Standing After* TransUnion LLC v. Ramirez, 96 N.Y.U. L. Rev. Online 269, 286-91 (2021); Daniel J. Solove & Danielle Keats Citron, *Standing and Privacy Harms: A Critique of* TransUnion v. Ramirez, 101 B.U. L. Rev. Online 62, 66-68 (2021); *cf.* Ernest A. Young, *Standing, Equity, and Injury in Fact,* 97 Notre Dame L. Rev. 1885 (2022).

2. *See Fogle v. Sokol,* 957 F.3d 148, 165 (3d Cir. 2020) (Even where a doctrine "exceeds both [its] historic scope and the statutory text, we cannot use the original meaning of a statute as a 'makeweight' against precedent, nor hand-pick binding decisions to follow." (citation omitted)).

Appendix A

A. Article III provides that "[t]he judicial Power shall extend to *all* Cases, in Law and Equity, arising under . . . the Laws of the United States, ..." U.S. Const. art. III, § 2 (emphasis added). Text that places no limits on either the judicial power to hear cases or on the legislative power to create causes of action under the laws of the United States. It seems to allow all suits arising under federal law.

Barclift's suit arises under the FDCPA, which prohibits a "debt collector" from "communicat[ing], in connection with the collection of any debt, with any person other than the consumer, his attorney, a consumer reporting agency if otherwise permitted by law, the creditor, the attorney of the creditor, or the attorney of the debt collector." 15 U.S.C. § 1692c(b). The FDCPA includes a private right of action against debt collectors. *See id.* § 1692k(d) ("An action to enforce any liability created by [the FDCPA] may be brought in any appropriate United States district court. . . ."). If the text of Article III is the gate, Barclift's complaint says enough to walk through the doors of the federal courts. History confirms this unfussy understanding that Barclift's suit under the FDCPA constitutes a "case" under Article III.[3] Given the many

3. As originally understood, a "controversy" was thought to include fewer matters within its realm than did a "case." *See Chisholm v. Georgia,* 2 U.S. (2 Dall.) 419, 431-32, 1 L.Ed. 440 (1793) (Iredell, J.) ("The [Judiciary Act of 1789] more particularly mentions *civil* controversies, a qualification of the general word in the Constitution, which I do not doubt every reasonable man will think well warranted, for it cannot be presumed that the general word 'controversies' was intended to include any proceedings that

thoughtful discussions on this subject, *see supra* note 1, a summary of standing will suffice.

1. Pre-Founding and early American jurists never used the term "standing" or required an injury in fact or special damage when a private party sued to enforce a private right.[4] "Historically, common-law courts possessed broad power to adjudicate suits involving the

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relate to criminal cases, which in all instances that respect the same Government, only, are uniformly considered of a local nature, and to be decided by its particular laws. The word 'controversy' indeed, would not naturally justify any such construction, but nevertheless it was perhaps a proper instance of caution in *Congress* to guard against the possibility of it."); *see also In re Pac. Ry. Comm'n,* 32 F. 241, 255 (C.C.N.D. Cal. 1887) (Field, J.) ("The judicial article of the constitution mentions cases and controversies. The term 'controversies,' if distinguishable at all from 'cases,' is so in that it is less comprehensive than the latter, and includes only suits of a civil nature." (quoting *Chisholm,* 2 U.S. (2 Dall.) at 431-32)).

4. To the contrary, "[t]he word *standing* is rather recent in the basic judicial vocabulary and does not appear to have been commonly used until the middle of [the twentieth] century." Joseph Vining, Legal Identity: The Coming of Age of Public Law 55 (1978). Earlier judicial systems, well known to lawyers of the Founding era, used the phrase *stare in iudicium* ("to stand in court") to describe a person's "membership or position in a community" able to sue and be sued "separate from and largely independent of issues related to the merits of the lawsuit." Neil H. Cogan, "*Standing" Before the Constitution: Membership in the Community,* 7 L. & Hist. Rev. 1, 1-2 (1989) (tracing the meaning of standing through Roman to European sources familiar to American lawyers of the late 1700s).

alleged violation of private rights, even when plaintiffs alleged only the violation of those rights and nothing more." *Spokeo, Inc. v. Robins,* 578 U.S. 330, 344 (2016) (Thomas, J., concurring); *see also Muransky v. Godiva Chocolatier, Inc.,* 979 F.3d 917, 971 (11th Cir. 2020) (en banc) (Jordan, J., dissenting) ("English courts at common law heard suits involving private rights, regardless of whether the plaintiff suffered actual damage, ..."). Instead, "the English practice was to allow strangers to have standing in the many cases involving the ancient prerogative writs. . . . There were other English precedents for the citizen suit. In the seventeenth and eighteenth centuries, mandamus was available in England, even at the behest of strangers." Cass R. Sunstein, *What's Standing After* Lujan? *Of Citizen Suits, "Injuries," and Article III,* 91 Mich. L. Rev. 163, 171-72 (1992). Factual injury on top of legal injury was not a component of a completely pled complaint. *See, e.g.,* 3 William Blackstone, Commentaries *120 (explaining suits for assault could be brought even when "no actual suffering is proved" and for battery whether "accompanied with pain . . . [or] attended with none").

The Framers wrote Article III against this backdrop. Federal question jurisdiction appeared at the Constitutional Convention in the Virginia Plan, broadly authorizing federal courts to hear "questions which may involve the national peace and harmony." James Madison, Resolutions Proposed by Mr. Randolph in Convention (May 29, 1787), *in* 1 The Records of the Federal Convention of 1787, at 22 (Max Farrand ed., 1911). The Committee of Detail removed the reference to "national peace and harmony" but preserved jurisdiction over "cases arising under laws

passed by the Legislature of the United States." James Madison, Mr. Randolph's Delivery of the Report of the Committee of Detail (Aug. 6, 1787), *in* 2 The Records of the Federal Convention of 1787, *supra,* at 186. Few additional changes followed. And when the Committee of Style reported to the Convention in September 1787, the proposed federal judicial power extended "to all cases, both in law and equity, arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority." Report of Committee of Style, *in* 2 The Records of the Federal Convention of 1787, *supra,* at 600.

That troubled George Mason, who voiced concern that there would be no "limitation whatsoever, with respect to the nature or jurisdiction of [the federal] Courts." George Mason, Speech to the Virginia Convention (June 19, 1788), *in* 10 The Documentary History of the Ratification of the Constitution: Ratification of the Constitution by the States: Virginia, No. 3, at 1401 (John P. Kaminski & Gaspare J. Saladino eds., 1993). Responding, James Madison agreed that "it is so necessary and expedient that the Judicial power [of the national government] should correspond with the Legislative" and saw no problems posed by a broad judicial power. James Madison, Speech to the Virginia Convention (June 20, 1788), *in* The Documentary History of the Ratification of the Constitution: Ratification of the Constitution by the States: Virginia, No. 3, *supra,* at 1413. Neither Madison's nor Mason's writings, nor other Founding-era records, mention standing, the now-canonical injury-in-fact requirement, or anything else that would restrict Congress's power to create judicially enforceable rights.

Appendix A

Giants of the early American judiciary agreed, understanding Article III to confer broad power.[5] "It was

5. *See, e.g.,* 3 Joseph Story, Commentaries on the Constitution of the United States § 1640, at 507 (1833) ("A case, then, in the sense of this clause of the constitution, 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. In other words, a case is a suit in law or equity, instituted according to the regular course of judicial proceedings; and, when it involves any question arising under the constitution, laws, or treaties of the United States, it is within the judicial power confided to the Union." (footnote omitted)); *Osborn v. Bank of U.S.,* 22 U.S. (9 Wheat.) 738, 819, 6 L.Ed. 204 (1824) (Marshall, J.) ("[Article III, Section 2] enables the judicial department to receive jurisdiction to the full extent of the constitution, laws, and treaties of the United States, when any question respecting them shall assume such a form that the judicial power is capable of acting on it. That power is capable of acting only 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, and the constitution declares, that the judicial power shall extend to all cases arising under the constitution, laws, and treaties of the United States.").

The text of Article III supports this view. "Cases" extends "to all the cases described, without making in its terms any exception whatever, and without any regard to the condition of the party. If there be any exception, it is to be implied against the express words of the article." *Cohens v. Virginia,* 19 U.S. (6 Wheat.) 264, 378, 5 L.Ed. 257 (1821) (Marshall, J.). "Controvers[y]," by contrast, "depends entirely on the character of the parties," and if the parties asserting the controversy match those listed in Article III—"to which the United States shall be a Party," "between two or more States," "between a State and Citizens of another State," "between Citizens of different States," "between Citizens of the

also understood that Congress could create private rights by statute and that a plaintiff could sue based on a violation of that statutory right without regard to actual damages." *Muransky,* 979 F.3d at 971 (Jordan, J., dissenting) (citing Thomas M. Cooley, A Treatise on the Law of Torts or the Wrongs Which Arise Independent of Contract 271 (2d ed. 1888)); *see also Webb v. Portland Mfg. Co.,* 29 F. Cas. 506, 509 (C.C.D. Me. 1838) (Story, J.) ("[E]very violation imports damage; and if no other be proved, the plaintiff is entitled to a verdict for nominal damages."). Take the 1790 Copyright Act, which allowed patent holders to sue for damages those infringing on the patent, even in the absence of monetary loss. *See* Act of May 31, 1790, ch. 15, § 2, 1 Stat. 124, 124-25.

The factual injury requirement appeared only when a private individual sued to enforce a public right.[6]

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same State claiming Lands under Grants of different States," and "between a State, or the Citizens thereof, and foreign States, Citizens or Subjects," U.S. Const. art. III, § 2—"it is entirely unimportant what may be the subject of the controversy. Be it what it may, these parties have a constitutional right to come into the Courts of the Union." *Cohens,* 19 U.S. (6 Wheat.) at 378.

6. *See TransUnion,* 594 U.S. at 447 (Thomas, J., dissenting) ("But where an individual sued based on the violation of a duty owed broadly to the whole community, such as overgrazing of public lands, courts required 'not only *injuria* [legal injury] but also *damnum* [damage].'" (alterations in original) (citation omitted)); *see also* Caleb Nelson, *Adjudication in the Political Branches,* 107 Colum. L. Rev. 559, 562 (2007) ("Throughout our history, standing doctrine has raised no bar to private litigants with individualized legal interests. At least in the absence of public

"Repeated attempts of private litigants to obtain a special stake in public rights have been consistently denied." *Scripps-Howard Radio v. F.C.C.*, 316 U.S. 4, 20, 86 L.Ed. 1229 (1942) (Douglas, J., dissenting) (collecting cases). If an individual sued over a public nuisance, for example, the person had to allege the violation caused them "some extraordinary damage, beyond the rest of the [community]." 3 Blackstone, Commentaries *220; *see also* Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 Mich. L. Rev. 689, 703 (2004) ("To be sure, when a public nuisance was threatening special injury to a private plaintiff and the plaintiff was able to win an injunction against the nuisance, the same remedy that protected the plaintiff against private harm also benefited the public as a whole. As a conceptual matter, however, this benefit to the public was 'incidental[ ]'; the private plaintiff was not thought of as representing the public, but rather as protecting his own private interest." (alteration in original) (quoting *Sparhawk v. Union Passenger Ry. Co.*, 54 Pa. 401, 422 (1867))).

That is the original understanding of Article III, and "courts for centuries held that injury in law to a private right was enough to create a case or controversy." *TransUnion*, 594 U.S. at 449 (Thomas, J., dissenting). For most of American history, if Barclift sued as a private individual to enforce a private right created by Congress,

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authorization, however, American courts have generally refused to entertain private lawsuits about matters in which the whole body politic was concerned and in which every individual had the same legal stake. From the early Republic on, such matters were controlled instead by the political branches.").

her case would be heard without any obligation to make a threshold showing of factual injury.[7]

2. So what happened? The emergence of new federal agencies started to shift the landscape, although the public-private rights distinction continued without interruption. The idea, born from the minds of jurists like Brandeis and Frankfurter,[8] was "to insulate the nascent regulatory state from legal challenge. A strict requirement of *legal* injury fit well with efforts to limit challenges by regulated entities, which would generally be able to show factual costs from government action but often lacked either protected legal interests or established rights to sue." Ernest A. Young, *Standing, Equity, and Injury in Fact,* 97 Notre Dame L. Rev. 1885, 1890-91 (2022).[9] The

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7. *See* Adrian Vermeule, Common Good Constitutionalism 177 (2022) ("Until roughly the 1970s, the 'injury in fact' test in its current signification was no part of our law.").

8. *See Coleman v. Miller,* 307 U.S. 433, 460 (1939) (Frankfurter, J., concurring) (advancing the claim that the "[j]udicial power could come into play only in matters that were the traditional concern of the courts at Westminster and only if they arose in ways that to the expert feel of lawyers constituted 'Cases' or 'Controversies'").

9. Like most scholarly explanations, this "insulation thesis" has its challengers. But there seems to be a consensus that expanded executive administration brought the discussion of standing to center stage. *See* Daniel E. Ho & Erica L. Ross, *Did Liberal Justices Invent the Standing Doctrine? An Empirical Study of the Evolution of Standing, 1921-2006,* 62 Stan. L. Rev. 591, 604-07 (2010). As Judge Fletcher reasoned, "private entities increasingly came to be controlled by statutory and regulatory

Court formally introduced the concept of "injury in fact" in *Association of Data Processing Organizations v. Camp,* when it held that, in the context of the Administrative Procedure Act (APA), the plaintiff needed only to allege an "injury in fact, economic or otherwise" to sue under the APA. 397 U.S. 150, 152 (1970).[10] The Court added that "[t]he question of standing is different" from a test that looks to the plaintiff 's legal interest, which "goes to the merits." *Id.* at 153. Rather, standing "concerns, apart from the 'case' or 'controversy' test, the question whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question. Thus the [APA] grants standing to a person 'aggrieved by agency action within the meaning of a relevant statute.'" *Id.* (quoting 5 U.S.C. § 702). "Instead of a careful examination of the governing law to see if Congress had created a legal interest, the standing inquiry would be a simple one barely related to the

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duties" while "government increasingly came to be controlled by statutory and constitutional commands." William A. Fletcher, *The Structure of Standing,* 98 Yale L.J. 221, 225 (1988). When "individuals sought to control the greatly augmented power of the government through the judicial process, many kinds of plaintiffs and would-be plaintiffs sought the articulation and enforcement of new and existing rights in the federal courts." *Id.*

10. On the same day, the Court applied its new injury-in-fact requirement to another APA challenge. *See Barlow v. Collins,* 397 U.S. 159, 163-64 (1970); *see also* Sunstein, *supra,* at 185-86 (tracing "injury in fact" to Kenneth Culp Davis's analysis of the APA (citing 3 Kenneth C. Davis, Administrative Law Treatise § 22.02, at 211-13 (1958))).

underlying law. Henceforth the issue would turn on facts, not on law." Sunstein, *supra,* at 185. "Under the New Deal view, the common law was a regulatory system that should be evaluated pragmatically, in terms of whether it served human liberty and welfare. When it failed to do so, the system had to be supplemented or replaced." *Id.* at 187.

Standing's political valence shifted to an indirect limit on congressional power (ignoring, among other options, a fresh examination on the meaning of Article I, Section 8, Clause 3 of the Constitution). In 1983, then-Judge Scalia published an article explaining his view that "[t]he requirement of standing has been made part of American constitutional law through (for want of a better vehicle) the provision of Art. III, Sec. 2." Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers,* 17 Suffolk U. L. Rev. 881, 882 (1983). He went on: "[t]here is no case or controversy, the reasoning has gone, when there are no adverse parties with personal interest in the matter. Surely not a linguistically inevitable conclusion, but nonetheless an accurate description of the sort of business courts had traditionally entertained, and hence of the distinctive business to which they were presumably to be limited under the Constitution." *Id.* (footnote omitted). He described the notion that Congress may create legal rights as "a peculiar characteristic of standing." *Id.* at 885. But he was bothered by Congress's control over the creation of legal rights given the increasing power of the regulatory state. With little discussion of constitutional text or history, Judge Scalia concluded that "the judicial doctrine of standing is a crucial and inseparable element of [the principle of separation of powers], whose disregard

will inevitably produce . . . an overjudicialization of the process of self-governance." *Id.* at 881.

In 1992, Justice Scalia penned the modern-day test for standing in *Lujan v. Defenders of Wildlife,* establishing the atextual tripart test for determining whether a party has standing to bring suit. *See* 504 U.S. 555, 560-61 (1992). The broad, sweeping language of *Lujan* did not apply only in the public rights category, though the result, by happenstance, remained consistent with the historical public-private rights distinction.[11] Ever since, the Court has continued to march down *Lujan*'s path, while neglecting to engage with the public-private rights distinction.

3. Bringing us to *TransUnion.* That decision marked the first time the Supreme Court required a private individual to make some threshold showing of concrete harm, even though he was seeking to vindicate a private right. *See* 594 U.S. at 453-54 (Thomas, J., dissenting)

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11. The standing issue was teed up for the Court by the parties' briefs and the district and appellate court decisions that preceded it. But even those arguments were colored with uncertainty about the meaning or scope of standing. Prior to the Supreme Court's review, the Eighth Circuit observed that "[t]he doctrines that stem from Article III, such as standing, mootness, ripeness, and political question, relate 'to an idea, which is more than an intuition but less than a rigorous and explicit theory, about the constitutional and prudential limits to the powers of an unelected, unrepresentative judiciary in our kind of government.'" *Defs. of Wildlife v. Hodel,* 851 F.2d 1035, 1038 (8th Cir. 1988) (quoting *Vander Jagt v. O'Neill,* 699 F.2d 1166, 1178-79 (D.C. Cir. 1982) (Bork, J., concurring)).

("Never before has this Court declared that legal injury is *inherently* insufficient to support standing."); *see also Muransky,* 979 F.3d at 978-79 (Jordan, J., dissenting) (finding no "contemporary Supreme Court case in which a plaintiff had a private statutory right but was denied standing"). And the yardstick chosen to measure concreteness—the close-relationship test—swapped the text and history of Article III for unspecified and undetermined markers in American "history and tradition." *TransUnion,* 594 U.S. at 424 (majority opinion). A plaintiff 's allegations need not "exact[ly] duplicate" the elements of a common law cause of action, only resemble the "harm[s] *associated with*" those causes of action. *Id.* at 432-33.

This illustrates a judicial test "displac[ing] . . . controlling, nonjudicial, primary texts." *OI Eur. Grp. B.V. v. Bolivarian Republic of Venez.,* 73 F.4th 157, 175 n.22 (3d Cir. 2023) (citation omitted); *see also* Peter Bozzo, Note, *The Jurisprudence of "As Though": Democratic Dialogue and the Signed Supreme Court Opinion,* 26 Yale J.L. & Human. 269, 289 (2014) (Judicial "tests often take on a life of their own, displacing the [source of law] from which they are drawn."). Leaving us to work with only a "metaphor for the law" instead of the law itself. Mitchel de S.-O.-l'E. Lasser, "*Lit. Theory" Put to the Test: A Comparative Literary Analysis of American Judicial Tests and French Judicial Discourse,* 111 Harv. L. Rev. 689, 768 (1998)).

But work with the shadow we must, for "unless we wish anarchy to prevail within the federal judicial system,"

precedent must be followed "by the lower federal courts no matter how misguided the judges of those courts may think it to be." *Hutto v. Davis,* 454 U.S. 370, 375 (1982) (per curiam). So I move to the best reading of *TransUnion*.

II.

TransUnion's close-relationship test starts from the premise that "Article III confines the federal judicial power to the resolution of 'Cases' and 'Controversies.'" *TransUnion,* 594 U.S. at 423. "For there to be a case or controversy under Article III, the plaintiff must have a 'personal stake' in the case—in other words, standing." *Id.* (quoting *Raines v. Byrd,* 521 U.S. 811, 819 (1997)). And to establish standing, "a plaintiff must show (i) that he suffered an injury in fact that is concrete, particularized, and actual or imminent; (ii) that the injury was likely caused by the defendant; and (iii) that the injury would likely be redressed by judicial relief." *Id.* (citing *Lujan,* 504 U.S. at 560-61). "If 'the 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.'" *Id.* (citation omitted)). Barclift's case homes in on the injury-in-fact requirement—that the plaintiff 's injury be "real, and not abstract." *Id.* at 424 (quoting *Spokeo,* 578 U.S. at 340). We can reduce that requirement to three questions.

First, when assessing whether a harm is sufficiently concrete for standing, "the Court has explained that 'history and tradition offer a meaningful guide to the types of cases that Article III empowers federal courts to

consider.'" *Id.* (quoting *Sprint Commc'ns Co., L.P. v. APCC Servs., Inc.,* 554 U.S. 269, 274 (2008)). "And with respect to the concrete-harm requirement in particular," *Spokeo* and *TransUnion* instruct courts to "assess whether the alleged injury to the plaintiff has a 'close relationship' to a harm 'traditionally' recognized as providing a basis for a lawsuit in American courts." *Id.*; *see also Spokeo,* 578 U.S. at 341 ("[I]t is instructive to consider whether an alleged intangible harm has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts." (citing *Vt. Agency of Nat. Res. v. U.S. ex rel. Stevens,* 529 U.S. 765, 775-77 (2000))). Under the close-relationship test, plaintiffs must identify "a close historical or common-law analogue for their asserted injury," but an "exact duplicate in American history and tradition" is not required. *TransUnion,* 594 U.S. at 424.[12]

12. Which history and tradition to consult is another challenge. *TransUnion* directs a search for "harms traditionally recognized as providing a basis for lawsuits in American courts," 594 U.S. at 425, but cites tort law as restated in the twentieth century as "longstanding American law," *id.* at 432 (citing Restatement (First) of Torts § 559 (1938)). But a twentieth-century translation does not necessarily nor accurately state current law, let alone tell us anything about law as traditionally understood. *Cf. Kansas v. Nebraska,* 574 U.S. 445, 476 (2015) (Scalia, J., concurring in part and dissenting in part) ("[I]t cannot safely be assumed, without further inquiry, that a Restatement provision describes rather than revises current law.").

TransUnion also cites *Spokeo,* which cites *Vermont Agency* as an example of looking to traditionally recognized harms. *See TransUnion,* 594 U.S. at 425 (citing *Spokeo,* 578 U.S. at 340-41). *Vermont Agency* looks to "the long tradition of *qui tam* actions

Second, while "traditional tangible harms, such as physical harms and monetary damages," "readily qualify as concrete injuries under Article III," certain "intangible harms can also be concrete." *Id.* at 425. "Chief among them are injuries with a close relationship to harms traditionally recognized as providing a basis for lawsuits in American courts." *Id.* Qualifying intangible harms "include, for example, reputational harms, disclosure of private information, and intrusion upon seclusion." *Id.*

Third, along with common-law analogues, courts must consider "Congress's decision to impose a statutory prohibition or obligation on a defendant, and to grant a plaintiff a cause of action to sue over the defendant's violation of that statutory prohibition or obligation." *Id.* Indeed, Congress may enact a statute that "elevate[s]" certain "concrete, *de facto* injuries" "to the status of legally cognizable injuries" even though they "were

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in England and the American Colonies," dating back to "around the end of the 13th century." 529 U.S. at 774-75. So if looking to tradition means looking to England and the colonies, individuals alleging violations of private rights would not need to show harm. *See TransUnion,* 594 U.S. at 448 (Thomas, J., dissenting) ("The principle that the violation of an individual right gives rise to an actionable harm was widespread at the founding, in early American history, and in many modern cases."); *Muransky,* 979 F.3d at 971 (Jordan, J., dissenting) ("English courts at common law heard suits involving private rights, regardless of whether the plaintiff suffered actual damage. . . . "). But notice that *TransUnion* narrowed *Spokeo*'s class of permissible analogues from claims heard in "English or American courts," *Spokeo,* 578 U.S. at 341, to claims heard only in "American courts," *TransUnion,* 594 U.S. at 424.

previously inadequate in law." *Id.* at 426 (quoting *Spokeo,* 578 U.S. at 341). But while "Congress may 'elevate' harms that 'exist' in the real world before Congress recognized them to actionable legal status, it may not simply enact an injury into existence, using its lawmaking power to transform something that is not remotely harmful into something that is." *Id.* (citation omitted).

Putting it all together, we must evaluate whether Barclift's asserted harm bears a close relationship to a harm traditionally recognized as providing a basis for suit in American courts; and, if Barclift has a sufficiently concrete harm, evaluate whether Congress has elevated that harm to a legally cognizable injury. To that task I turn.

A. History

Barclift's "asserted harm has a 'close relationship' to a harm traditionally recognized as providing a basis for a lawsuit in American courts." *Id.* at 433. That inquiry requires "a close historical or common-law analogue for [her] asserted injury," not "an exact duplicate." *Id.* at 424.

1. Start with Barclift's alleged harm: the "disclosure of private information of a personal, sensitive nature" to a third party without her consent. App. 62. It stems from a "Notice of Account Placement" Barclift received stating that her "account with Main Line Fertility Center, Inc. ha[d] been assigned to" Keystone. App. 67. The letter listed Barclift's Keystone account number, the date of her purported delinquency, and the balance due. A

bold notice advised "this communication is from a debt collection company. This is an attempt to collect a debt; any information obtained will be used for that purpose." App. 67.

Though the letter arrived on Keystone's letterhead, a third-party vendor, RevSpring, had prepared and mailed it. That must mean Keystone "provided information regarding [Barclift] and the Debt" to RevSpring and its hundreds of employees, including her "name and address, the amount of the Debt, the name of the current creditor, and other private details regarding the Debt." App. 56. Barclift says she "did not consent to [Keystone] communicating with RevSpring in connection with the collection of the Debt," nor did she authorize Keystone to engage in similar communications with other third-party vendors. App. 56. And she claims the unauthorized "disclosure of her personal financial details, as well as the sensitive details of her personal medical services, to an untold number of individuals affiliated with RevSpring" made her feel embarrassed, anxious, and stressed. App. 62. Take those allegations as true, and Barclift argues the unauthorized disclosure tracks two common-law privacy torts: public disclosure of private facts and breach of confidence. She is right.

The tort of public disclosure prohibits "unauthorized *disclosures* of information." *In re Horizon Healthcare Servs. Inc. Data Breach Litig.,* 846 F.3d 625, 638 (3d Cir. 2017), *quoted in Kamal v. J. Crew Grp., Inc.,* 918 F.3d 102, 114 (3d Cir. 2019). And "breach of confidence involves 'the unconsented, unprivileged disclosure to a third party

of nonpublic information that the defendant has learned within a confidential relationship.'" *Kamal,* 918 F.3d at 114 (quoting Alan B. Vickery, Note, *Breach of Confidence: An Emerging Tort,* 82 Colum. L. Rev. 1426, 1455 (1982)).[13]

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13. Keystone did not address Barclift's arguments about breach of confidence. And the majority "hesitate[s] to conclude" that the harm associated with breach of confidence bears a close relationship to a harm traditionally recognized as providing a basis for suit in American courts because "it 'died out in its infancy,' likely due to the 'birth and explosive growth' of traditional privacy torts such as the public disclosure of private facts." Majority Op. at 14 n.3 (quoting Vickery, *supra,* at 1454-55). But that only acknowledges breach of confidence existed in earlier American and English jurisprudence, even if it fell out of vogue for a time. And its reemergence in the 1980s demonstrates its continued distinction from other torts.

Barclift is correct that breach of confidence is a proper common-law analogue for her alleged harm. Considered by English courts as early as 1849 and American courts as early as 1894, breach of confidence has deep roots, at least as deep as those of public disclosure of private facts, a tort the majority and the Supreme Court accept as a traditionally recognized basis for suit in American courts. *See Prince Albert v. Strange* (1849) 41 Eng. Rep. 1171, 1178; 1 Mac. & G. 25, 44; *Corliss v. E.W. Walker Co.,* 64 F. 280, 281 (C.C.D. Mass. 1894); *see also* Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy,* 4 Harv. L. Rev. 193, 207 (1890) ("It should be stated that, in some instances where protection has been afforded against wrongful publication, the jurisdiction has been asserted, not on the ground of property, or at least not wholly on that ground, but upon the ground of an alleged breach of an implied contract or of a trust or *confidence.*" (emphasis added)); *Pavesich v. New Eng. Life Ins. Co.,* 50 S.E. 68, 75 (Ga. 1905) ("It must be conceded that the numerous cases decided before 1890 in which equity has interfered to restrain the

As this Court held five years ago, "the harm underlying both of these actions transpires when a third party gains unauthorized access to a plaintiff 's personal information." *Id.* Meaning the "unlawful disclosure of legally protected information" is itself a "*de facto* injury." *In re Nickelodeon Consumer Priv. Litig.,* 827 F.3d 262, 274 (3d Cir. 2016); *see also St. Pierre v. Retrieval-Masters Creditors Bureau, Inc.,* 898 F.3d 351, 357-58 (3d Cir. 2018) (same); *DiNaples v. MRS BPO, LLC,* 934 F.3d 275, 279-80 (3d Cir. 2019) (same).

The Supreme Court reached the same conclusion in *TransUnion.* It specifically listed the "disclosure of private information" as an example of a "harm[ ] traditionally recognized as providing a basis for lawsuits

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publication of letters, writings, papers, etc., have all been based either upon the recognition of a right of property, or upon the fact that the publication would be a breach of contract, *confidence,* or trust. It is well settled that, if any contract or property right or trust relation has been violated, damages are recoverable. There are many cases which sustain such a doctrine." (emphasis added)). Its failure to gain popularity over alternative privacy torts in the early twentieth century is not fatal to this conclusion. The mere fact that, for a time, plaintiffs chose to utilize alternative causes of action does not render the underutilized cause of action unable to sustain a suit at common law.

Barclift's alleged harm bears a close relationship to the harm arising from breach of confidence. The confidential relationship is legally significant to the tort only because it imposes a duty on the defendant to maintain the plaintiff 's private information. *See* Vickery, *supra,* at 1456-57. Here that duty is imposed by the FDCPA. *See* 15 U.S.C. § 1692c(b).

in American courts." 594 U.S. at 425.[14] Because Barclift claims Keystone concretely harmed her by unlawfully disclosing her private information, she has done enough.

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14. A proposition the Court supported by citing *Davis v. Federal Election Commission,* which held that a candidate had standing to challenge a campaign finance law requiring him to disclose personal contributions beyond a certain amount. *See* 554 U.S. 724, 733 (2008). At common law, the tort of public disclosure requires "the matter publicized" to be "of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public." Restatement (Second) of Torts § 652D (1977). But neither of these elements mattered to the Court in *Davis,* nor did the Court mention them in *TransUnion. See Clemens v. ExecuPharm Inc.,* 48 F.4th 146, 155 n.5 (3d Cir. 2022) ("[W]hether a plaintiff has successfully made out claims under a particular cause of action is a separate question."). The "disclosure of private information" alone constituted the classic example of a concrete intangible harm. *TransUnion,* 594 U.S. at 425.

A conclusion with support dating back to at least 1905. *See Pavesich,* 50 S.E. at 80-81 ("So thoroughly satisfied are we that the law recognizes, within proper limits, as a legal right, the right of privacy, and that the publication of one's picture without his consent by another as an advertisement, for the mere purpose of increasing the profits and gains of the advertiser, is an invasion of this right, that we venture to predict that the day will come that the American bar will marvel that a contrary view was ever entertained by judges of eminence and ability."); *see also Cox Broad. Corp. v. Cohn,* 420 U.S. 469, 488-89 (1975) (acknowledging that "the century has experienced a strong tide running in favor of the so-called right of privacy," explaining that "a 'right of privacy' has been recognized at common law" in much of the country, and discussing "[t]he version of the privacy tort . . . termed . . . 'the tort of public disclosure'" (quoting *Time, Inc. v. Hill,* 385 U.S. 374, 383 n.7 (1967))).

2. The majority sets a higher bar, requiring more fit between Barclift's asserted harm and the common-law analogues. In the majority's view, Barclift loses because her Amended Complaint lacks allegations of publicity, removing the kind of harm traditionally associated with public disclosure. But Barclift alleges that she suffered embarrassment, anxiety, and stress over the disclosure of her information to RevSpring—harms that are "of the same character" as privacy harms traditionally associated with public disclosure. *Susinno v. Work Out World Inc.*, 862 F.3d 346, 352 (3d Cir. 2017) (concluding that, although plaintiff 's allegations "traditionally would provide no cause of action," Congress "sought to protect the same interests implicated in the traditional common law cause of action" when it enacted the statute at issue and thus plaintiff had standing under the statute). Nothing in *TransUnion* endorses, let alone requires, the majority's contrary result.

a. *TransUnion*'s close-relationship test directs courts to focus on harms (not causes of action) and look for comparisons in kind (not degree). *See Hunstein v. Preferred Collection & Mgmt. Servs., Inc.*, 48 F.4th 1236, 1264 (11th Cir. 2022) (en banc) (Newsom, J., dissenting) (discussing the "'kind-degree' framework"). And when comparing harms, *TransUnion* expressly disavows an "exact duplicate" requirement.[15]

15. *See* 594 U.S. at 433 ("[W]e do not require an exact duplicate."); *id.* at 424 ("*Spokeo* does not require an exact duplicate in American history and tradition."); *see also id.* ("[C]ourts should assess whether the alleged injury to the plaintiff has a 'close relationship' to a harm 'traditionally' recognized as

TransUnion's reasoning follows this distinction to hold that the mere transmission of misleading information—with no further harms or consequences—constitutes a concrete injury. *See* 594 U.S. at 433. TransUnion flagged thousands of individuals with a "potential match" to names on the U.S. Department of the Treasury Office of Foreign Assets Control (OFAC) list of "'specially designated nationals' who threaten America's national security." *Id.* at 419-20. The OFAC list names "terrorists, drug traffickers, [and] other serious criminals." *Id.* at 419. TransUnion's misleading labels imposed different kinds of harm. For Sergio Ramirez (the class representative), the label had real world consequences: he tried to buy a car, but the dealership refused to do business with him "because his name was on a 'terrorist list.'" *Id.* at 420. For 1,853 class members (including Ramirez), "TransUnion provided third parties with credit reports containing" the misleading terrorist label. *Id.* at 432. We do not know if other class members suffered harms beyond their credit reports; all the opinion tells us is that these class members had misleading information sent to third parties.

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providing a basis for a lawsuit in American courts."); *id.* at 425 (requiring "injuries with a close relationship to harms traditionally recognized as providing a basis for lawsuits in American courts"); *id.* at 432 (assessing plaintiffs' contention that their "injury bears a 'close relationship' to a harm traditionally recognized as providing a basis for a lawsuit in American courts"); *id.* (finding certain class members "suffered a harm with a 'close relationship' to the harm associated with the tort of defamation"); *id.* at 433 (stating courts should "look[ ] to whether a plaintiff 's asserted harm has a 'close relationship' to a harm traditionally recognized as providing a basis for a lawsuit in American courts").

See id. And for the Court, the mere transmission of that misleading information (with nothing further) constituted "a harm with a 'close relationship' to the harm associated with the tort of defamation." *Id.*

The Court could have required a more stringent connection to defamation. For one thing, the label was true: the class members' names were "potential" matches with those of terrorists. *See id.* at 420. TransUnion argued that this undercut the defamation analogy. *See id.* at 433. But the Court rejected TransUnion's push for "an exact duplicate," finding instead that "the harm from a misleading statement . . . bears a sufficiently close relationship to the harm from a false and defamatory statement." *Id.*

The Court could have required more specificity. The hornbook definition of defamation requires some sort of "special harm." *See* Restatement (Second) of Torts § 558 (1977) (requiring either "the existence of special harm" or a statement actionable "irrespective of special harm" (i.e., defamation *per se*)). If the plaintiff lacks "special harm," he may only recover by showing that the statement constituted "defamation *per se*." *Franklin Prescriptions, Inc. v. N.Y. Times Co.*, 424 F.3d 336, 343 (3d Cir. 2005) (citation omitted). And defamation *per se* historically applies to "words imputing (1) criminal offense, (2) loathsome disease, (3) business misconduct, or (4) serious sexual misconduct." *Synygy, Inc. v. Scott-Levin, Inc.*, 51 F. Supp. 2d 570, 580 (E.D. Pa. 1999), *aff'd sub nom. Synygy, Inc. v. Scott-Levin*, 229 F.3d 1139 (3d Cir. 2000) (citation omitted). The misleading terrorist label seems

analogous to "words imputing . . . criminal offense," *id.*, but the Court did not wade into, let alone rest on, that level of granularity. It instead drew an analogy to the general "reputational harm *associated with* the tort of defamation," and found that the mere transmission of a misleading (though literally true) statement implicated this kind of harm. *TransUnion,* 594 U.S. at 432 (emphasis added).

Summed up, *TransUnion*'s text and reasoning support performing a general, kind-of-harm comparison that rejects exact duplication. I concur in the majority's adoption of this approach. But its application veers into an unnecessary jot-for-jot exactness to some common-law cause of action.[16]

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16. In an attempt to fit its analysis under the kind-of-harm approach, the majority distinguishes between the harms arising from public dissemination and private dissemination. But as the Supreme Court recognized, the degree of dissemination only affects the "*extent* of the protection accorded a privacy right." *Dep't of Just. v. Reps. Comm. for Freedom of Press,* 489 U.S. 749, 763 (1989) (emphasis added). Meaning Barclift might be unable to recover on a claim for public disclosure at common law. But she has still suffered *some* intrusion on her right to privacy through the unauthorized disclosure. While that harm may be a mere "trifle of injury," that is all we require for her to stand in court. *Danvers Motor Co., Inc. v. Ford Motor Co.,* 432 F.3d 286, 294 (3d Cir. 2005) (citation omitted). Recall that Barclift need not establish the elements of a common-law analogue to have standing to assert her FDCPA claim. *See TransUnion,* 594 U.S. at 433 ("[W]e do not require an exact duplicate."). She only needs to assert a harm with a "'close relationship' to a harm traditionally recognized as providing a basis for a lawsuit in American courts." *Id.* She has done so.

b. Footnote six in *TransUnion* does not require a different outcome. I start by unpacking what the Court wrote. Recall that TransUnion sent the OFAC list to third-party vendors who printed and mailed the information to the class members. The class argued that "TransUnion 'published' the class members' information internally—for example, to employees within TransUnion and to the vendors that printed and sent the mailings that the class members received." *Id.* at 434 n.6. The Court reasoned that communication requires "evidence that the defendant actually 'brought an idea to the perception of another,' and thus generally require[s] evidence that the document was actually read and not merely processed." *Id.* (quoting Restatement (First) of Torts § 559, cmt. a (1938)) (citing *Ostrowe v. Lee*, 256 N.Y. 36, 38-39, 175 N.E. 505 (1931) (Cardozo, J.)). The Court then concluded that "the plaintiffs' internal publication theory circumvents a fundamental requirement of an ordinary defamation claim—publication—and does not bear a sufficiently 'close relationship' to the traditional defamation tort to qualify for Article III standing." *Id.*

Barclift still has standing despite *TransUnion*'s footnote six. To begin, the Court explained these class members failed to produce evidence at trial "that the [misleading credit reports were] actually read and not merely processed." *Id.* That makes sense: it is possible in our automated world that nobody even saw the data flowing from TransUnion's servers to the computers in the vendors' back offices. But the inverse does not follow—that, even if the challenged disclosures *were* read by a processor, they could not be actionable. I cannot read the lack of evidence to also mean that no evidence could suffice

because *all* disclosures to intermediaries are beyond the ordinary meaning of publication. Not only would that defy logic, it would undermine *Ostrowe v. Lee,* the case cited by the Court to illustrate the meaning of publication. The plaintiff there sued a defendant for libel, alleging "that the defendant composed a letter accusing the plaintiff of the crime of larceny; that he dictated this letter to his stenographer; that the stenographer, in obedience to his orders, read the notes and transcribed them; and that the letter so transcribed was received by the plaintiff through the mails." 256 N.Y. at 38, 175 N.E. 505.

The defendant responded that no publication occurred because "[a] defamatory writing is not published if it is read by no one but the defamed." *Id.* But the New York Court of Appeals, per Chief Judge Cardozo, held that the "complaint [was] good upon its face" because someone else had read the defamatory writing: the stenographer. *Id.* at 38, 41, 175 N.E. 505. Indeed, publication occurs "as soon as read by any one else." *Id.* at 38, 175 N.E. 505. Cardozo takes care to show his homework, and the result is worth reprinting in full:

> The reader may be a telegraph operator (*Williamson v. Frere,* [(1874)] L. R. 9 C. P. 393), or the compositor in a printing house (*Baldwin v. Elphinston,* [(1775)] 2 W. Bl. 1037), or the copyist who reproduces a long hand draft (*Puterbaugh v. Gold Medal F. M. Co.,* [(1904)] 7 Ont. L. R. 582, 586). The legal consequence is not altered where the symbols reproduced or interpreted are the notes of a stenographer. Publication there still is as a result of the

> dictation, at least where the notes have been examined or transcribed (*Pullman v. Hill & Co.,* [1891] 1 Q. B. 524; *Boxsius v. Goblet Freres,* [1894] 1 Q. B. 842; *Gambrill v. Schooley,* 93 Md. 48, 48 A. 730 [(1901)]; *Ferdon v. Dickens,* 161 Ala. 181, 49 So. 888 [(1909)]; *Berry v. City of New York Ins. Co.,* 210 Ala. 369, 371, 98 So. 290 [(1923)]; *Nelson v. Whitten,* 272 F.[ ] 135 [(E.D.N.Y. 1921)]; *Puterbaugh v. Gold Medal F. M. Co., supra*; Gatley, Libel & Slander, p. 91; *cf. Kennedy v. Butler, Inc.,* 245 N. Y. 204, 156 N.E. 666 [(1927)]). Enough that a writing defamatory in content has been read and understood at the behest of the defamer (1 Street, Foundations of Legal Liability, p. 297).

Id. (fourth and fifth alterations in original). It is a strong line of cases traversing the continent, crossing the pond, and dating back dozens of decades directly undercutting the notion that no harm ever follows communication to intermediaries.[17] Under Barclift's Amended Complaint,

17. The majority "agree[s] that Barclift's allegations plausibly support an inference that Keystone caused someone at RevSpring to read (and not merely process) information about Barflict's alleged debt," but is "not convinced that this inference or the Supreme Court's citation to *Ostrowe* means that Barclift's harm bears a close relationship to one that was actionable at common law." Majority Op. at 17 n.5. A conclusion the majority supports with cites to cases showing that "communications to an associate in the ordinary course of business did not support an action at common law." Majority Op. at 17 n.5. But those cases deal with *privileged* communications. *See, e.g., Chalkley v. Atl. Coast Line R. Co.,* 150 Va. 301, 334 (Va. 1928) ("Here, however, the communication was

privileged and the typist had a duty to discharge in the ordinary course of business in connection with the transcription of the communication."); *Globe Furniture Co. v. Wright,* 265 F. 873, 876 (D.C. Cir. 1920) ("But we prefer to put our decision upon the ground that the occasion was conditionally privileged, that the letter was within the privilege, that there was no malice, and therefore that the letter is not actionable."); *Rodgers v. Wise,* 7 S.E.2d 517, 517-19 (S.C. 1940) (finding satisfactory the conclusions of the lower court, which held that the letter was "privileged and that the writing and mailing of it [was] not a publication"); *Cartwright-Caps Co. v. Fischel & Kaufman,* 74 So. 278, 279 (Miss. 1917) (concluding that "the letters were privileged, and that there was not, in a legal sense, a publication of the letters in question"); *Owen v. Ogilvie Publ'g Co.,* 32 A.D. 465, 466-67 (N.Y. App. Div. 1898) (explaining that "[i]t may be that the dictation to the stenographer and her reading of the letter would constitute a publication of the same by the person dictating it, if the relation existing between the manager and the copyist was that of master and servant, and the letter be held not to be privileged. Such, however, was not the relation of these persons. They were both employed by a common master, and were engaged in the performance of duties which their respective employments required. Under such circumstances we do not think that the stenographer is to be regarded as a third person in the sense that either the dictation or the subsequent reading can be regarded as a publication by the corporation"); *Cent. of Ga. Ry. Co. v. Jones,* 89 S.E. 429, 429 (Ga. Ct. App. 1916) (reversing judgment and following rule in *Owen*); *Nichols v. Eaton,* 81 N.W. 792, 793 (Iowa 1900) ("One may make a publication to his servant or agent, without liability, which, if made to a stranger, would be actionable," if "[t]he occasion was undoubtedly privileged").

The presence of a privilege separates the claims in *Ostrowe,* the cases it cites, and the decisions that reach the same conclusions as Cardozo. *See also, e.g., Rickbeil v. Grafton Deaconess Hosp.,* 74 N.D. 525, 542 (1946); *State v. McIntire,* 20 S.E. 721, 722 (N.C.

RevSpring is the modern stenographer. Whether RevSpring "read and understood" the information Keystone sent is a question for discovery and another day. For today, it is enough that Barclift alleges Keystone "communicated with RevSpring"—as well as "an untold number of individuals affiliated with RevSpring"—and "provided [them] information regarding [Barclift] and the Debt . . . —including [her] name and address, the

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1894). Conclusions that constitute no outlier or minority approach. *See, e.g.,* Martin L. Newell, The Law of Slander and Libel in Civil and Criminal Cases § 195, 242-43 (4th ed. 1924) (describing the rule later adopted by *Ostrowe* as the "leading" American approach); Restatement (First) of Torts § 577, cmt. h (1938) (adopting *Ostrowe*'s publication holding). Rather, *Ostrowe*'s rule that disclosing private information to intermediaries constitutes publication is the starting point, subject to attacks to the *prima facie* case such as privilege. *See Rickbeil,* 74 N.D. at 542 ("A defamatory writing, which on its face is libelous per se, is presumed to be unprivileged and therefore when the plaintiff proved the publication of this libel he made out a cause of action showing an unprivileged publication."); *Kennedy,* 245 N.Y. at 207 ("Whether such a publication were privileged—a privileged communication—is another matter. Privilege presupposes publicity. The plea of privilege is unnecessary if there has been no publication."). *Ostrowe* and the majority's cases both show that the disclosure of private information to an intermediary was actionable at common law. Whether a plaintiff may successfully recover is a different—and premature—question in our standing inquiry.

In any event, that courts allowed both approaches—in different jurisdictions at different times—does not mean that disclosures to intermediaries were not actionable at common law. *TransUnion* did not insist on harms traditionally recognized in *every* American court. Nor harms that would withstand every defense against them.

amount of the Debt, the name of the current creditor, and other private details regarding the Debt." App. 56, 62. Accepting those factual allegations as true and extending all reasonable inferences in her favor, Barclift has done enough to show that she has standing. *See St. Pierre,* 898 F.3d at 354 n.1.

B. Judgment of Congress

The judgment of Congress confirms the concreteness of Barclift's asserted injury. *See TransUnion,* 594 U.S. at 425-26. Courts consult "Congress's views" to determine whether Congress has "elevate[d] to the status of legally cognizable" a concrete injury that was "previously inadequate in law." *Id.* at 425 (quoting *Spokeo,* 578 U.S. at 341). Of course, "courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Conn. Nat'l Bank v. Germain,* 503 U.S. 249, 253-54 (1992).

Congress has expressed its judgment in two provisions. First, Congress made it unlawful for a debt collector to communicate about "the collection of any debt" with "any person," unless the collector first obtains "the prior consent of the consumer." 15 U.S.C. § 1692c(b). And second, in a provision titled "Congressional findings and declarations of purpose," Congress listed the "invasion[ ] of individual privacy" as one of the harms to which the FDCPA was directed. *Id.* § 1692(a). Understood against the backdrop of common law privacy protections, the "legislative aim," *OI Eur. Grp. B. V.,* 73 F.4th at 170 (citing 1 Blackstone, Commentaries *87), of these provisions

is clear: to elevate a real-world harm (the unauthorized disclosure of private information) to "actionable legal status," *TransUnion,* 594 U.S. at 426 (citation omitted).

Maybe "Congress could have created . . . a [more] cumbersome scheme" to protect debtor privacy. *Krakauer v. Dish Network, L.L.C.,* 925 F.3d 643, 654 (4th Cir. 2019). One that requires the debtor to prove that her private information became public in the common-law sense of the word. Or maybe one that excepts third-party vendors from the general bar on communications (like the exceptions for attorney communications). Instead, Congress "opted for a more straightforward and manageable way of protecting personal privacy, and the Constitution in no way bars it from doing so." *Id.* That congressional judgment deserves the respect of the courts.

* * *

TransUnion warned that "the concrete-harm requirement can be difficult to apply in some cases." 594 U.S. at 429. Few would argue otherwise. But under the path *TransUnion* paved, Barclift's asserted harm (the unauthorized disclosure of private information) bears a close relationship to the harm underlying claims for public disclosure of private facts and breach of confidence. The majority starts down the right road but loses footing on a footnote. I think *TransUnion* is made of sturdier stuff and would not wander further from the limited requirements of Article III. Barclift has shown standing sufficient for a federal court to hear her claim, and so I respectfully concur in part, dissent in part, and dissent in the judgment.

APPENDIX B — OPINION OF THE UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF PENNSYLVANIA, FILED APRIL 13, 2022

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

No. 5:21-cv-04335

PAULETTE BARCLIFT, ON BEHALF OF HERSELF AND OTHERS SIMILARLY SITUATED,

Plaintiff,

v.

KEYSTONE CREDIT SERVICES, LLC,

Defendant.

April 13, 2022

OPINION

DEFENDANT'S MOTION TO DISMISS, ECF NO. 24 – DISMISSED

Joseph F. Leeson, Jr., United States District Judge

I. INTRODUCTION

Paulette Barclift brought suit against Keystone Credit Services, LLC, under the Fair Debt Collection Practices Act (the FDCPA). She claimed that Keystone

violated the FDCPA when, in order to send her a collection letter regarding a personal debt, it shared her personal information with RevSpring Inc., a mailing vendor.

The Court determined that even though Barclift alleged that Keystone violated the FDCPA, she had not alleged that Keystone's violation caused her a concrete injury. As a result, Barclift lacked standing. The Court therefore dismissed her original complaint without prejudice because, without standing, the Court lacked subject-matter jurisdiction over her claim.

Barclift then filed an amended complaint, and Keystone filed a motion to dismiss the amended complaint. However, the Court determines that Barclift still has not alleged facts sufficient to establish a concrete injury. So, the Court dismisses her amended complaint with prejudice. Since Barclift lacks standing, and the Court therefore does not have subject-matter jurisdiction over the case, it dismisses Keystone's motion as moot.

II. BACKGROUND

a. Alleged Facts

One day, Barclift received a letter from a debt collector—Keystone. *See* Let., ECF No. 23-1 Ex. A. The letter informed her that Keystone had acquired a personal debt of hers from a prior creditor. *See id.* In the heading of the letter were various pieces of information that were personal to Barclift: her name; her address; the name of her original creditor; the date her debt became delinquent; and the balance of the debt. *See id.*

Keystone explained that it would "assume the debt is valid" unless Barclift notified it otherwise within 30 days. *See id.* At the bottom of the short letter was the following statement in bold: "Please be advised that this communication is from a debt collection company. This is an attempt to collect a debt; any information obtained will be used for that purpose." *Id.*

The letter was signed, "Very truly-yours, Keystone Credit Services, LLC." *Id.* Keystone, however, did not actually lick the stamp or drop the envelope in the mail. *See* Amend. Compl. 5-6, ECF No. 23. Instead, it hired a mailing vendor, RevSpring, to print and mail the letter. *See id.*

RevSpring provides personalized print, online, phone, email, and text communications for other companies. *See id.* 7. In order to use RevSpring's services, Keystone shared some of Barclift's information with the mailing vendor: her name; her address; the name of her original creditor; the date her debt became delinquent; and the balance of the debt. *See id* 5. Barclift never gave Keystone permission to share her information with the mailing vendor. *See id.* 7.

b. Procedural History

Nearly one year after receiving the letter, Barclift sued Keystone. *See id.* She filed her original complaint as a class action suit, seeking to include as plaintiffs all persons with a Pennsylvania address who received collection letters from Keystone via a mailing vendor. *See* Orig. Compl., ECF No. 1.

Barclift alleged in her Original Complaint that Keystone violated the FDCPA by sharing her information with the mailing vendor in connection with the collection of a debt. *See id.* 9. According to Barclift, sharing her information with a mailing vendor without her permission violated her "right not to have her private information shared with third parties." *Id.* 10. She claimed that she had been "embarrassed and distressed by the disclosure of her sensitive financial details and personal medical services."[1] *Id.* For relief, she sought statutory damages, actual damages, costs, attorneys' fees, and injunctive relief. *See id.*

Keystone filed a motion to dismiss the Original Complaint for failing to state a claim upon which relief could be granted. *See* ECF No. 9. However, the Court never adjudicated Keystone's motion to dismiss. Instead, the Court dismissed Barclift's Original Complaint because she lacked standing. *See Barclift v. Keystone Credit Servs., LLC,* No. 5:21-CV-04335, 2022 WL 444267 (E.D. Pa. Feb. 14, 2022).

The Court determined that Barclift lacked standing because she had not alleged that she suffered a concrete harm. *See id.* *1. In her Original Complaint, Barclift alleged that Keystone had committed a procedural violation of the FDCPA. *See id.* *8. The Court explained,

1. The Court notes that the letter sent to Barclift does not actually state that the debt is one for medical services. *See* Let. Regardless, whether the letter mentions that the debt is from medical services does not change the Court's analysis in this Opinion.

however, that a simple procedural violation of the FDCPA does not automatically establish an injury-in-fact. *See id.* *5 (citing *TransUnion LLC v. Ramirez,* 141 S. Ct. 2190, 2210 (2021)).

Article III of the Constitution, which limits this Court's subject-matter jurisdiction to only actual "cases" or "controversies", required that Barclift allege more than a simple procedural violation in her Original Complaint. In order to establish standing, she had to allege that Keystone's violation bore a "close relationship" to a harm that is traditionally recognized as providing a basis for a lawsuit in American courts. *See Barclift,* 5:21-CV-04335, 2022 WL 444267, at *8.

The Court determined next that Keystone's alleged procedural violation of the FDCPA—sharing Barclift's information with a mailing vendor—was most closely related to the traditionally recognized privacy cause of action for public disclosure of private facts. *See id.* The Court explained that a prima facie case of public disclosure of private facts requires that the private facts be publicized. *See id.*

Reasoning that Keystone had not publicized or even come close to publicizing Barclift's private facts by sharing them with a mailing vendor, it determined that Barclift had not alleged that she suffered an injury-in-fact. *See id.* The Court therefore lacked subject-matter jurisdiction over the Original Complaint because Barclift had not satisfied Article III's standing requirement. As a result, the Court dismissed the Original Complaint.

Barclift then filed an amended complaint. *See* Amend. Compl. The Amended Complaint is nearly identical to the Original Complaint. Only the following additional allegations are of any substance:

- "RevSpring operates a total of nine locations nationwide, boasting a presence in eight states." *Id.* ¶ 54

- "RevSpring employs hundreds of employees throughout the country." *Id.* ¶ 55

- "Upon information and belief, after printing and mailing collection letters for its debt collector clients like Defendant, RevSpring maintains electronic copies of those letters for an agreed upon period of time." *Id.* ¶ 56

- "Upon information and belief, while RevSpring maintains collection letter-related information for its clients, RevSpring's employees have access to this information." *Id.* ¶ 59

- "Upon information and belief, RevSpring employees can, or could, access Plaintiff's personal medical and Debt-related information upon Defendant sharing that information with RevSpring." *Id.* ¶ 61.

- "RevSpring has, in the past, allowed public dissemination of private consumer

> information without the consumer's consent." *Id.* ¶ 63

In the Amended Complaint, Barclift also adds cites to two cases where debt collectors used mailing vendors and courts determined that the plaintiffs had established standing: *Morales v. Healthcare Revenue Recovery Grp., LLC,* 859 F. App'x 625 (3d Cir. 2021) and *DiNaples v. MRS BPO, LLC,* 934 F.3d 275 (3d Cir. 2019).

Once again, Keystone filed a motion to dismiss the Amended Complaint for failure to state a claim upon which relief can be granted. *See* ECF No. 24.

III. LEGAL STANDARD

Before a court can address the merits of a dispute, it must first determine whether it has subject-matter jurisdiction over the case. *See Hollingsworth v. Perry,* 570 U.S. 693, 704-05 (2013) ("In light of this overriding and time-honored concern about keeping the Judiciary's power within its proper constitutional sphere, we must put aside the natural urge to proceed directly to the merits of an important dispute and to 'settle' it for the sake of convenience and efficiency." (Cleaned up)). Article III of the Constitution states that federal courts have subject-matter jurisdiction only over actual "cases" or "controversies." § 2. This limitation on the judiciary furthers the goal of separation of powers by ensuring that courts do not "usurp the powers of the political branches." *Clapper v. Amnesty Int'l USA,* 568 U.S. 398, 408 (2013).

Appendix B

In order for a case or controversy to exist, several requirements must be met. Chief among those requirements is that the plaintiff suffered an injury-in-fact. In other words, the plaintiff must "prove that he has suffered a concrete and particularized injury." *Hollingsworth,* 570 U.S. at 704-05 (citing *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-561 (1992)). A risk of "hypothetical harm that is not certainly impending" is not an injury-in-fact. *Clapper,* 568 U.S., at 402. An injury-in-fact, among other requirements, is known as standing.[2]

If a plaintiff lacks standing, then there is no case or controversy, and a court does not have subject-matter jurisdiction over the plaintiff's claims. "If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action." Fed. R. Civ. P. 12(h)(3). Indeed, courts have an independent obligation to assess whether standing exists and "can dismiss a suit sua sponte for lack of subject jurisdiction at any stage in the proceeding." *Zambelli Fireworks Mfg. Co., Inc. v. Wood,* 592 F.3d 412, 420 (3d Cir. 2010).

When determining whether a plaintiff has alleged facts sufficient to establish standing, courts accept the plaintiff's well pled allegations as true and construe the

2. The additional standing requirements are familiar: (1) there must be a causal connection between the injury and the defendant's conduct; and (2) it must be likely that a favorable decision for the plaintiff can redress the injury. *See United States v. Windsor,* 570 U.S. 744, 757 (2013). Since the Court determines that Barclift does not satisfy the injury-in-fact requirement, it does not address the other standing requirements.

pleadings in their favor. *See Thorne v. Pep Boys Manny Moe & Jack Inc.*, 980 F.3d 879, 885 (3d Cir. 2020).

IV. ANALYSIS

Barclift raises the same claim in her Amended Complaint that she did in the Original Complaint—that Keystone violated the FDCPA. Specifically, Barclift takes issue with the fact that Keystone shared her personal information with a mailing vendor without her permission. Barclift alleges that by sharing her information with a mailing vendor, Keystone violated section 1692c(b) of the FDCPA, which prohibits debt collectors from communicating "with any person other than the consumer" regarding the collection of a debt.

As the Court explained in its prior opinion, alleging that Keystone violated the FDCPA does not automatically establish that she suffered an injury-in-fact. In order to meet her burden of showing that she suffered an injury-in-fact, Barclift must allege that publicity, or something bearing a close relationship to publicity, was given to her private facts. *See Perloff v. Transamerica Life Ins. Co.*, 393 F. Supp. 3d 404, 409-10 (E.D. Pa. 2019). That means Barclift must allege that her private facts were "made public through communication to either the general public or enough people that the matter is substantially certain to become public knowledge." *Id.* (cleaned up). The Court dismissed the Original Complaint because Barclift did not allege that her private facts had been publicized. So, the focus of this Opinion is whether Barclift's additions to the Amended Complaint, which the Court accepts as true,

allege that her private facts were publicized, and whether the additions allege a concrete injury.

At first glance, it appears that Barclift simply copied and pasted the Original Complaint over to her Amended Complaint. After careful review, however, some minor additions can be found. In all, Barclift attempts to beef up the Amended Complaint in three ways.

First, she adds allegations that the mailing vendor that Keystone shared her information with has multiple locations and employs hundreds of people. *See* Amend. Compl. ¶ 54-55. She also alleges that the mailing vendor employees "could" have accessed her personal information. *Id.* ¶ 61. However, she does not allege that these employees did access her personal information. Thus, these additional allegations, even when viewed in a light most favorable to her, does not suggest that her private information was actually publicized. The fact that employees could have viewed her personal information is not the same as alleging that employees did view her personal information.

Even if the Court assumed that a large number of RevSpring's employees did view her personal information, this would not satisfy the publication requirement because the "invasion of privacy requires publicity in the broad, general sense of the word 'public.'" *Tureen v. Equifax, Inc.,* 571 F.2d 411, 418 (8th Cir. 1978). Indeed, other district courts have determined that the sharing of consumer information with the very same mailing vendor at issue in this case, RevSpring, is not a "publication." *See Nyanjom v. NPAS Sols., LLC,* No. 21-CV-1171-JAR-ADM, 2022 WL 168222, at *5 (D. Kan. Jan. 19, 2022).

Second, Barclift adds an allegation that "RevSpring has, in the past, allowed public dissemination of private consumer information without the consumer's consent." Amend. Compl. ¶ 63. However, this allegation falls short of establishing an injury-in-fact for similar reasons that the first one does. Barclift alleges that the personal information of *others* has been publicized in the past, but she does not allege that *her* information was ever publicized. The fact that RevSpring publicized the information of others is clearly not a personalized injury for Barclift.

The Court can only assume that Barclift alleges that RevSpring publicized others' information in the past to suggest that it might publish her information someday too. Presumably, Barclift implies that the mere risk that her information could be publicized in the future is enough to establish an injury-in-fact. However, she has not alleged that such a hypothetical is certain to happen. Thus, any fear she may have of a future injury is not sufficient to establish an injury-in-fact. *See Clapper,* 568 U.S. 398, at 402. Indeed, the fact that her information has not been publicized yet—more than one year since she received the letter—suggests that the information will likely never be publicized.

Third, Barclift adds citations to two cases where courts determined that plaintiffs established standing when debt collectors used a mailing vendor. However, both cases differ from the facts of this case.

In both of Barclift's cited cases, the mailing vendors placed personal information on the outside of the envelopes

sent to the plaintiffs. *See Morales,* 859 F. App'x, at 626 (mailing vendor placed a barcode on the outside of the envelope that revealed the plaintiff 's personal information); *DiNaples,* 934 F.3d, at 278 (mailing vendor placed a scannable QR code on the outside of the envelope that revealed the plaintiff 's personal information). As a result, the plaintiffs in those cases brought suit, alleging that the debt collectors had violated section 1692f(8) of the FDCPA, which prohibits debt collectors from placing "any language or symbol, other than the debt collector's address, on any envelope when communicating with a consumer by use of the mails or by telegram, except that a debt collector may use his business name if such name does not indicate that he is in the debt collection business." 15 U.S.C. § 1692f(8).

The case at hand deals with an entirely different section of the FDCPA. Barclift alleges that Keystone violated section 1692c(b), not section 1692f(8). More importantly, she does not allege that any of her personal information appeared on the outside of the envelope of her letter. In *Morales* and *DiNaples,* the plaintiffs' personal information was available to anyone who handled or viewed their envelopes. The same cannot be said in this case. In order to see Barclift's personal information, one would have to open the envelope and read her letter. Thus, the cited cases do not support her argument for standing in light of the alleged facts.[3]

3. In her response, *see* ECF No. 26, Barclift also cites to *St. Pierre v. Retrieval-Masters Creditors Bureau, Inc.,* 898 F.3d 351 (3d Cir. 2018) to support her argument that she alleged a concrete injury. However, in that case, the plaintiff 's personal information

For the sake of clarity, Barclift's alleged injury does not need to be "an exact duplicate" of a harm that is traditionally recognized as providing a basis for a lawsuit in American courts. *See TransUnion,* 141 S. Ct., at 2209. In other words, Barclift does not have to allege that her private facts were publicized to the same extent that the privacy tort of public disclosure of private facts would require. However, she still has to get close, *see id,* and the allegations in the Amended Complaint do not get her close enough to prove a concrete injury. Indeed, that some employees of the mailing vendor *could* view her information and that her information *might* be disseminated in the future does not bear a close relationship to any a harm that is traditionally recognized as providing a basis for a lawsuit in American courts.

In sum, the Amended Complaint does not establish standing for the same reasons that the Original Complaint did not. Barclift alleges Keystone committed a procedural violation of the FDCPA, but she does not allege a concrete injury. *See id.* at 2205 (explaining that Article III requires a concrete injury even in the context of a statutory violation). Moreover, Barclift cannot rely on the mere possibility of a future harm to establish an injury-in-fact because she has not alleged that such a hypothetical harm is certain to happen.

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was visible through a transparent window on the envelope. *See id.* 355. As the Court has explained above, the facts of this case are different because Barclift's personal information could only be viewed once her letter was opened.

V. CONCLUSION

Since Barclift did not plead sufficient facts to show that she suffered a concrete injury, she did not satisfy the standing requirement in Article III. Without standing, this Court does not have subject-matter jurisdiction over her claim. It therefore dismisses the Amended Complaint with prejudice.[4]

A separate Order follows.

4. The Court dismisses the Amended Complaint with prejudice because Barclift had an opportunity to cure her claim's deficiencies but did not. Any additional amendments would therefore be futile. *See Boyd v. New Jersey Dept. of Corrections,* 583 Fed. Appx. 30, 32 (3d Cir. 2014).