NOT WITH A BANG BUT A WHIMPER:[1] *BARCLIFT*, INTANGIBLE HARMS, AND THE STRUGGLE FOR STANDING AFTER *TRANSUNION*

Abstract: On March 30, 2024, in *Barclift v. Keystone Credit Services, LLC*, the U.S. Court of Appeals for the Third Circuit held that a plaintiff lacked Article III standing to bring a Fair Debt Collection Practices Act claim because her alleged intangible harms did not bear a sufficiently close relationship to harms traditionally recognized at common law. In reaching this conclusion, the Third Circuit attempted to align itself with other circuits that apply a broader kind-of-harm approach to standing, deepening a split with courts that use a narrower element-for-element analysis. This Comment argues that the Third Circuit misapplied Supreme Court precedent and that the element-for-element approach improperly constricts Article III standing, undermines the congressional intent underlying the Fair Debt Collection Practices Act, and threatens to erode access to justice for plaintiffs asserting intangible harms.

INTRODUCTION

Incessant phone calls at odd hours of the day, invasive inquiries to neighbors and coworkers, and even violent threats—this is how debt collectors in the late 1960s and early 1970s contacted consumers who owed an outstanding debt.[2] When Congress enacted the Fair Debt Collection Practices Act (FDCPA), they intended to protect American consumers from these unfair and abusive debt collection practices.[3] When the FDCPA is violated, however, the consumer does not automatically have a statutory right to sue.[4]

In 2021, in *TransUnion LLC v. Ramirez*, the Supreme Court determined that plaintiffs could have standing to sue if plaintiffs analogized the intangible

[1] After T.S. Eliot: "This is the way standing ends / This is the way standing ends / This is the way standing ends / Not with a tangible harm but an intangible one." *Cf. The Hollow Men* (1925), poets.org/poem/hollow-men [perma.cc/FEN7-SWYA].

[2] *See* Logan Kraus, Note, *A Forgotten Past Creates a Fractured Present: Why Courts Should Utilize Historical Context when Interpreting Ambiguous Provisions of the 1977 Fair Debt Collection Practices Act*, 102 IOWA L. REV. 1789, 1795–97 (2017) (describing the aggressive debt collection practices leading up to the passage of the Fair Debt Collection Practices Act (FDCPA)).

[3] Fair Debt Collection Practices Act of 1977, Pub. L. No. 95-109, 91 Stat. 874 (codified as amended at 15 U.S.C. § 1692(a), (e)); *see* S. REP. NO. 95–382, at 1–2 (1977), *as reprinted in* 1977 U.S.C.C.A.N. 1695, 1695–96 (stating that the FDCPA was enacted to prevent unethical and harassing debt collection practices while balancing debt collectors' need to effectively collect debts).

[4] *See* Spokeo, Inc. v. Robins, 578 U.S. 330, 341 (2016) (holding that a plaintiff does not automatically have an injury-in-fact when a statute grants a right to sue).

harm they suffered to a harm actionable at common law.[5] Justice Kavanaugh, writing for the majority, noted how this requirement curtails a separation of powers concern: by connecting statutory claims to common-law injuries, courts can ensure that Congress does not exceed its powers by creating avenues of redress for plaintiffs' intangible injuries.[6] In light of the Supreme Court's decision in *TransUnion*, several federal courts of appeals developed ways to measure whether plaintiffs established a close relationship between the analogous harms.[7] Courts either narrowly matched the exact elements of the common-law tort to the plaintiff's alleged harm or broadly evaluated whether the plaintiff's harm was similar to the kind of harm suffered in a common-law tort.[8] In 2024, in *Barclift v. Keystone Credit Services, LLC*, the Third Circuit weighed in on which approach best aligns with the Supreme Court's instruction.[9]

Part I of this Comment examines Article III standing, the FDCPA and its legislative history, and the factual and procedural history of *Barclift*.[10] Part II discusses circuit courts' different approaches to analyzing whether an intangi-

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[5] *See* 594 U.S. 413, 417 (2021) (explaining that plaintiffs must show that they suffered a concrete harm to have standing).

[6] *See id.* at 429–30 (citing John G. Roberts, *Article III Limits on Statutory Standing*, 42 DUKE L.J. 1219, 1223 (1993)) (describing how Congress's ability to create statutory harms infringes on the Executive Branch's authority). In his reasoning, Justice Kavanaugh addresses the concern that Justice Thomas voiced in his concurrence to *Spokeo, Inc. v. Robins*. *Id.*; *Spokeo*, 578 U.S. at 347 (Thomas, J., concurring). Allowing Congress to create harms would essentially galvanize citizens to bring suits against defendants who would otherwise be regulated by the Executive Branch and its administrative agencies, thereby undermining the Article II power of the Executive to "take Care that the Laws be faithfully executed." U.S. CONST. art. II, § 3; *TransUnion*, 594 U.S. at 429–30; *see Spokeo,* 578 U.S. at 347 (Thomas, J., concurring) (articulating fears of congressional overreach into the Executive's prosecutorial power). The Court does not address, however, how this "history and tradition" test overrides Congress's authority to create statutory rights of action, because if the Court ultimately decides what counts as a cognizable harm, then Congress's power to define and authorize those rights becomes largely illusory. *See infra* note 93 and accompanying text (arguing that congressional authority is diminished, if not extinguished, by judicial review).

[7] *See* Barclift v. Keystone Credit Servs., LLC, 93 F.4th 136, 144–45 (3d Cir.) (describing the two approaches to evaluating intangible harms in light of *TransUnion*), *cert. denied*, No. 23–1327 (U.S. Oct. 7, 2024); *see, e.g.*, Shields v. Pro. Bureau of Collections of Md., Inc., 55 F.4th 823, 829 (10th Cir. 2022) (using a kind-of-harm approach); Nabozny v. Optio Sols. LLC, 84 F.4th 731, 735–36 (7th Cir. 2023) (applying an element-for-element approach).

[8] *See* Ryan Karerat, Note, *Close Enough to Stand? Reconsidering The Fair Debt Collection Practices Act's Relationship with the Right to Privacy*, 91 FORDHAM L. REV. 2353, 2373–82 (2023) (illustrating various circuit courts' narrow and broad approaches to evaluating harms).

[9] *See* 93 F.4th at 144–45 (opting for the kind-of-harm approach to determine when a plaintiff's intangible injury is sufficiently concrete). Before *TransUnion*'s instruction, the Third Circuit adopted a broad kind-of-harm approach. *See* DiNaples v. MRS BPO, LLC, 934 F.3d 275, 280 (3d Cir. 2019) (finding standing because plaintiff's harms were analogous to a common-law tort); St. Pierre v. Retrieval-Masters Creditors Bureau, Inc., 898 F.3d 351, 357–58 (3d Cir. 2018) (same); *see also In re* Horizon Healthcare Servs. Inc. Data Breach Litig., 846 F.3d 625, 636 (3d Cir. 2017) (finding standing because plaintiff's privacy harms were de facto an injury-in-fact); *In re* Nickelodeon Consumer Priv. Litig., 827 F.3d 262, 274 (3d Cir. 2016) (same).

[10] *See infra* notes 13–50 and accompanying text.

ble harm meets the injury-in-fact requirement of Article III standing.[11] Part III argues that the U.S. Court of Appeals for the Third Circuit reached the wrong conclusion in finding that the plaintiff lacked standing and that its misinterpretation of Supreme Court precedent improperly undermines congressional intent.[12]

I. The Legal, Factual, and Procedural Background of *Barclift v. Keystone Credit Services, LLC*

In 2024, in *Barclift v. Keystone Credit Services, LLC*, the U.S. Court of Appeals for the Third Circuit applied a "kind-of-harm" approach to determine whether plaintiffs who have suffered an intangible harm that bore a close relationship to a legally cognizable, concrete harm had standing under Article III of the U.S. Constitution.[13] Section A of this Part provides an overview of Article III's standing requirements.[14] Section B discusses the key decisions shaping various circuit approaches to assessing intangible harms following *TransUnion LLC v. Ramirez*.[15] Section C discusses the factual and procedural history of *Barclift*.[16]

A. Article III Standing

Although the word "standing" never appears in the Constitution, it is often the first constitutional hurdle litigants face in their pursuit of justice.[17] Article III grants federal courts the power to resolve only "Cases" and "Controversies."[18] This requirement ensures that federal courts address cases involving harmed or imminently to-be-harmed individuals.[19]

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[11] *See infra* notes 51–78 and accompanying text.

[12] *See infra* notes 79–99 and accompanying text.

[13] *See infra* notes 44–50 and accompanying text.

[14] *See infra* notes 17–26 and accompanying text.

[15] *See infra* notes 27–43 and accompanying text.

[16] *See infra* notes 44–50 and accompanying text.

[17] *See* Barclift v. Keystone Credit Servs., LLC, 93 F.4th 136, 148 (Matey, J., dissenting) (noting that standing is a familiar concept within the judicial system, yet is absent from the Constitution, Founding-era texts, and Roman and English judicial history); Nancy C. Staudt, *Modeling Standing*, 79 N.Y.U. L. REV. 612, 612–13 (2004) (describing standing as a "threshold requirement" for a hearing on the merits). The concept of standing has a surprisingly short constitutional history, with the term "standing" first appearing in late nineteenth century legal writing. *See* Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1418–20, 1422, 1424–25 (1988) (tracing standing doctrine's ontological evolution throughout the late nineteenth century). *See generally* Coleman v. Miller, 307 U.S. 433, 437 (1939) (providing the first use of the word "standing" in a Supreme Court decision to describe justiciability of claims under Article III); Massachusetts v. Mellon, 262 U.S. 447, 488 (1923) (creating the foundation of modern standing doctrine by requiring a showing of direct personal injury but never using the word "standing").

[18] U.S. CONST. art. III § 2, cl. 1. A "case" is a "civil or criminal proceeding, action, suit, or controversy at law or in equity." *Case*, BLACK'S LAW DICTIONARY (12th ed. 2024). A "controversy" is a "justiciable dispute." *Controversy*, *id.* The "case-or-controversy requirement" set out in Article III, then, is "the constitutional requirement that, for a federal court to hear a case, the case must involve an actual dispute." *Case-or-Controversy Requirement*, *id.*; *see* Spokeo, Inc. v. Robins, 578 U.S. 330, 338

In 1992, in *Lujan v. Defenders of Wildlife*, the Supreme Court mandated that plaintiffs seeking redress for their harms must satisfy the three standing requirements of Article III to have their claims heard in federal court.[20] First, the plaintiff must have an "injury-in-fact," that is, an injury that is both concrete and particularized to them.[21] Second, the plaintiff must establish a causal connection between their injury and the alleged action of the adverse party.[22] Third, there must be a likelihood that the injury can be redressed by a favorable judicial decision.[23]

The issue of standing becomes complicated when it comes to "intangible harms," or those harms that do not result in physical or economic injury.[24] Although the Court has recognized that certain intangible harms may be suffi-

(2016) (stating that Article III standing "is a doctrine rooted in the traditional understanding of a case or controversy.").

[19] *See* Summers v. Earth Island Inst., 555 U.S. 488, 492 (2009) (noting that a federal court's power of review pertains only to cases or controversies involving harmed individuals or those who may be imminently harmed).

[20] *See* 504 U.S. 555, 560–61 (1992) (collating the three standing requirements that litigants must meet as an "irreducible constitutional minimum" for a federal court to hear the claim); *see also* EDWARD H. COOPER, 13A WRIGHT & MILLER'S FEDERAL PRACTICE & PROCEDURE § 3531.2, at 100 (3d ed. 2008) (explaining that citing *Lujan v. Defenders of Wildlife* is nearly obligatory in judicial decisions on standing).

[21] *See Lujan*, 504 U.S. at 560 (defining injury-in-fact as "an invasion of a legally protected interest" that is concrete and particularized). For an injury to be particularized, it must impact the plaintiff in an individual and personal way. *Spokeo*, 578 U.S. at 339. An injury is concrete when it is "'*de facto*'; that is, 'it must actually exist.'" *Id*. at 340 (quoting BLACK'S LAW DICTIONARY (10th ed. 2014)). Other words have been used to describe an injury-in-fact including "direct," "actual," or "distinct and palpable." COOPER, *supra* note 20, § 3531.4. In any case, an injury-in-fact must be one that courts will recognize and can redress through a favorable ruling. *See id.* § 3531.4 n.15 (noting that injuries-in-fact only pertain to legally protected interests, and not, for instance, an injury that inhibits criminal activity). Some scholars have argued that the injury-in-fact requirement has been manipulated as a political tool that judges can use to determine what cases appear on their docket. *See generally* Richard J. Pierce, Jr., *Is Standing Law or Politics?*, 77 N.C. L. REV. 1741, 1742–43 (1999) (arguing that standing doctrine lacks consistent legal principles and is often shaped by judges' ideological preferences rather than neutral applications of the law).

[22] *See Lujan*, 504 U.S. at 560 (defining causal connection as traceability between the injury and the defendant's alleged conduct).

[23] *See id.* at 561 (identifying the redressability requirement). Redress is a "means of seeking relief or remedy." *Redress*, BLACK'S LAW DICTIONARY, *supra* note 18. Therefore, in its essence, the standing doctrine asks the plaintiff to answer the question: "What's it to you?" TransUnion LLC v. Ramirez, 594 U.S. 413, 417 (2021) (quoting Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 882 (1983)).

[24] *See Spokeo*, 578 U.S. at 340 (providing no explicit definition of an intangible harm). Courts have recognized various kinds of intangible harms—including aesthetic harms to environments, violation of privacy rights, and pain and suffering arising from physical damage—but never provided a clear distinction between tangible and intangible harms. *See* Rachel Bayefsky, *Constitutional Injury and Tangibility*, 59 WM. & MARY L. REV. 2285, 2291–92, 2307 (2018) (providing a list of previously recognized intangible harms but noting that the Supreme Court has inconsistently identified cognizable intangible harms).

ciently concrete to satisfy the injury-in-fact requirement,[25] the standing doctrine still presents the problem of how to consistently measure an intangible harm's concreteness.[26]

B. Evolution of Intangible Harms in Mailing Vendor Theory Claims Under the Fair Debt Collection Practices Act

In 1997, Congress enacted the FDCPA to protect consumers from harassment or deception by debt collectors.[27] The statute prohibits debt collectors from discussing a consumer's debt with anyone other than the consumer, the consumer's attorney, or a credit reporting agency, unless the consumer consents.[28] When a debt collector fails to obtain the consumer's consent before sharing their information, the statute creates a civil cause of action for the consumer to seek redress for their harms.[29]

In 2021, in *Hunstein v. Preferred Collection & Management Services, Inc.*, the Eleventh Circuit held that a consumer has standing under the FDCPA when alleging that a debt collector unlawfully shared debtor information with a third-party mailing vendor.[30] In *Hunstein I*, in what became the first decision in

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[25] *See, e.g.*, Meese v. Keene, 481 U.S. 465, 473 (1987) (determining that a legislator's reputational harm from being forced to distribute films labeled "political propaganda" constituted sufficiently concrete injury). Many instances in which the Supreme Court has recognized intangible harms are a result of a statutory violation. *See, e.g.*, Havens Realty Corp. v. Coleman, 455 U.S. 363, 378–79 (1982) (recognizing dignitary and informational harms as sufficiently concrete in a violation of the Fair Housing Act). *But see Lujan*, 504 U.S. at 566–67 (finding that an alleged violation of the Endangered Species Act resulting in an inability to someday observe endangered species was too intangible).

[26] *See* Bayefsky, *supra* note 24, at 2292–93 (describing the difficulty in measuring an intangible harm's concreteness). *Spokeo* explicitly held that concreteness is required to have an injury-in-fact, even for intangible harms. *See id.* at 2298 (explaining that prior to the Court's decision in *Spokeo*, concreteness was not considered its own requirement, separate from a particularized injury). The Supreme Court uses the phrase "concrete and particularized," but often without explicitly identifying the role that concreteness and particularization individually play in the standing analysis. *Spokeo*, 578 U.S. at 340 (noting that intangible injuries can be concrete because concrete and tangible are not synonymous); Bayefsky, *supra* note 24, at 2298. The cases illustrated in the following Parts outline one aspect of the struggle to measure concreteness of intangible privacy harms, though other forms of intangible harms face the same struggle. *See supra* notes 27–99 and accompanying text (demonstrating the circuit split on intangible harms). *See generally* Lauren Pezzi, Comment, *Struggling to Stay Standing: Circuit Courts' Varying Approaches to Civil Rights Testers and Article III Standing Requirements*, 66 B.C. L. REV. 2019, 2029–34 (2025) (describing how various circuits have struggled to measure the concreteness of intangible harms that tester plaintiffs have suffered in ADA violation cases).

[27] 15 U.S.C. § 1692(e). Congress found that debt collection practices had contributed to financial insolvency, marital difficulties, job displacement, and breaches of personal privacy. Barclift v. Keystone Credit Servs., LLC, 93 F.4th 136, 141 (3d Cir. 2024) (quoting 15 U.S.C. § 1692(a), (e)); *see supra* note 3 and accompanying text (stating the purpose of the FDCPA).

[28] 15 U.S.C. § 1692c(b). This rule applies even if otherwise permitted by law, the creditor, the attorney of the creditor, or the attorney of the debt collector. *Id.*

[29] *Id.* § 1692k(d).

[30] 994 F.3d 1341, 1344 (11th Cir. 2021) (Hunstein I), *vacated*, 48 F.4th 1236 (11th Cir. 2022) (en banc).

a volatile trilogy of cases, Plaintiff Hunstein alleged that a debt collection agency shared his personal information with a third-party mailing vendor without his consent.[31] Applying the standard articulated by the Supreme Court in 2016 in *Spokeo, Inc. v. Robins*—which held that standing requires a concrete injury even when a statute creates a cause of action—the Eleventh Circuit concluded that although the injury was intangible, it was sufficiently concrete to create standing.[32]

Two months after *Hunstein I*, the Supreme Court decided *TransUnion*, which built upon *Spokeo* by clarifying what qualifies as a concrete injury when a plaintiff alleges to have suffered an intangible harm.[33] In *TransUnion*, the Court addressed a class action that sought relief for individuals who had allegedly suffered harms that resembled the harms caused by the tort of defamation.[34] A class of consumer plaintiffs sued after TransUnion, a credit reporting agency, erroneously added alerts to their credit report files that indicated that they were a "potential match" with individuals on a national security threat list.[35] Only a subset of those consumers, however, had their misleading credit reports disseminated to third-party creditors; the remainder were flagged internally within TransUnion's system.[36]

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[31] *See id.* (stating that a debt collection agency shared the plaintiff's "name, his outstanding balance, the fact that his debt resulted from his son's medical treatment, and his son's name" with a third-party mailing vendor). This is the typical allegation made in mailing vendor theory lawsuits. *See In re* FDCPA Mailing Vendor Cases (*Mailing Vendor Cases*), 551 F. Supp. 3d 57, 66 (E.D.N.Y. 2021) (dismissing six class action lawsuits all premised on collecting debt resulting from medical services). In *Mailing Vendor Cases*, the court highlighted the other district court judges' observations of the nature of class actions before they were consolidated into one action. *See id.* at 59–62 (citing various opinions from FDCPA litigation rejecting plaintiffs' claims). These observations included those of Judge Glasser in *Kraus v. Professional Bureau of Collections of Maryland, Inc.*, stating that the imprecise development of the law "has turned FDCPA litigation into a glorified game of 'gotcha,' with a cottage industry of plaintiffs' lawyers filing suits over fantasy harms the statute was never intended to prevent." *Id.* at 61 (quoting Kraus v. Pro. Bureau of Collections of Md. Inc., 281 F. Supp. 3d 312, 321–22 (E.D.N.Y. 2017)).

[32] *See Hunstein I*, 994 F.3d at 1346 (applying *Spokeo*'s rule that a plaintiff does not automatically have an injury-in-fact whenever a statute grants an individual a right to sue). *Hunstein I*, now vacated, led to the proliferation of mailing vendor theory lawsuits nationwide. *See Mailing Vendor Cases*, 551 F. Supp. 3d at 63 ("Each case addressed herein invokes a recently-developed 'mailing vendor' theory . . . .These cases emanate from [*Hunstein I*].").

[33] TransUnion LLC v. Ramirez, 594 U.S. 413, 417 (2021) (citing Spokeo, Inc. v. Robins, 578 U.S. 330, 340–41 (2016)).

[34] *See id.* at 431–33 (articulating the facts and procedural posture of the case). Although *TransUnion* is a class action, the Court does not address whether each class member must demonstrate standing before the class is certified. *Id.* at 431 n.4. *See generally* Brief of Complex Litigation Law Professors as Amici Curiae in Support of Respondent, TransUnion LLC v. Ramirez, 594 U.S. 413 (2021) (No. 20-297) (arguing that there is no class action issue presented in *TransUnion* and the court ought to purely address the Article III standing issues).

[35] *TransUnion*, 594 U.S. at 432.

[36] *Id.* Although plaintiffs in that group argued that this closely resembled defamation, the credit agency said that because these alerts only indicated potential matches, they were misleading but did not meet the "literal falsity" standard required for a defamation claim. *Id.* at 433.

To determine whether an intangible harm is sufficiently concrete to establish standing, *TransUnion* requires courts to ask whether the alleged injury shares a "close relationship" with a type of harm traditionally recognized as actionable at common law.[37] Applying that framework, the Court held that only the plaintiffs whose information was shared with third-party creditors suffered harms closely analogous to the tort of defamation, and therefore had standing.[38] The Court did not resolve whether this "close relationship" requires a rigid, element-for-element match with the comparator common-law tort, or a more flexible kind-of-harm analysis, where the asserted harm need only be analogous to the traditional actionable harm.[39]

Following *TransUnion*, the Eleventh Circuit reheard *Hunstein* twice more before ultimately deciding *Hunstein III*, which held that the plaintiff had not suffered a sufficiently concrete injury for standing purposes.[40] The court, sitting en banc, relied on the element-for-element approach, reasoning that an

[37] *Id.* at 417. The Court, however, never defined what qualifies as a "close relationship" between an intangible harm and a harm that is traditionally recognized by American courts, but endorsed the idea that "it is for the courts, not Congress, to decide if a statute confers a right sufficient for standing[.]" Erwin Chemerinsky, *What's Standing After* TransUnion LLC v. Ramirez, 96 N.Y.U. L. REV. ONLINE 269, 281 (2021), https://nyulawreview.org/online-features/whats-standing-after-transunion-llc-v-ramirez/ [perma.cc/5SVT-PMZ3] (identifying *TransUnion*'s lack of specificity as to what counts as a close relationship); *see Spokeo*, 578 U.S. at 341 (describing this history and judgment of Congress as "instructive" in determining what constitutes an injury-in-fact). *TransUnion*, however, cautions that *Spokeo* is not an "open-ended invitation for federal courts to loosen Article III" because of personal beliefs about what kinds of causes ought to be tried at the federal level. *TransUnion*, 594 U.S. at 425.

[38] *TransUnion*, 594 U.S. at 433. Publication is "essential to liability" in a defamation claim. *Id.* at 434 (quoting RESTATEMENT (SECOND) OF TORTS § 557 cmt. a (1977)). Therefore, only the plaintiffs whose security alerts were published with third-party creditors suffered concrete injury to establish standing. *Id.* at 437. Those whose alerts failed to reach creditors did not have standing to sue. *See id.* (reasoning that an alert on a credit file, when it remains internal, does not create a concrete harm). The Supreme Court also noted that an argument from plaintiffs that their alerts indeed had been published, just internally, would fail. *Id.* at 424 n.6. At common law, there is no cause of action for defamation for *privileged* communication to associates made in the ordinary course of business. *Compare* Chalkley v. Atl. Coastline R.R. Co., 143 S.E. 631, 638–39 (Va. 1928) (holding that allegedly privileged defamatory statement dictated to a stenographer was part of the defendant's course of business and does not constitute a "publication" sufficient to support defamation), *with* Ostrowe v. Lee, 175 N.E. 505, 505–06 (N.Y. 1931) (holding that an alleged non-privileged defamatory statement is published as soon as it is read by anyone else, including a stenographer).

[39] *TransUnion*, 594 U.S. at 424. Relying on *Spokeo*, the Court determined that there does not need to be "an exact duplicate" of the "common-law analog[] for the asserted injury," but never made explicit that *elements* of that harm do not have to match, just that the *kinds of harm* do not have to be exact. *Id.* at 424, 433. The Third Circuit noted that "the word 'element' does not appear once in the body of the *TransUnion* opinion." Barclift v. Keystone Credit Servs., LLC, 93 F.4th 136, 145 (3d Cir. 2024).

[40] *See* Hunstein v. Preferred Collection & Mgmt. Servs., Inc., 48 F.4th 1236, 1240 (11th Cir. 2022) (Hunstein III) (en banc) (finding that the alleged reputational injury was not made public and therefore lacked "a necessary element of the comparator tort"). First *Hunstein I* was heard before a circuit panel in *Hunstein II*, and then en banc. Hunstein v. Preferred Collection & Mgmt. Servs., Inc., 17 F.4th 1016, 1020 (11th Cir. 2021) (Hunstein II) (en banc), *rev'd*, *Hunstein III*, 48 F.4th 1236, 1240 (11th Cir. 2022) (en banc).

alleged intangible harm does not bear a close enough relationship to the traditional harm if it omits an element essential to liability under the analogous tort.[41] In *Hunstein III*, although the plaintiff had sufficiently alleged that his harm resembled the tort of public disclosure of private facts, the claim failed because it did not allege that his information had been made public—an essential element to the tort.[42]

With the Supreme Court in *TransUnion* leaving the question unanswered as to whether courts should follow a flexible kind-of-harm analysis or a stricter element-for-element comparison, the Third Circuit offered its interpretation in *Barclift*, where it considered these competing approaches to a mailing vendor claim under the FDCPA.[43]

C. The Factual and Procedural History of Barclift

Like nearly twenty million other Americans, Paulette Barclift had outstanding debt from prior medical services she had received.[44] To collect that debt, Keystone Credit Services, LLC ("Keystone") contracted with RevSpring,

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[41] *See Hunstein III*, 48 F.4th at 1242 (stating that intangible harms to not bear a sufficiently close relationship if they are "missing an element 'essential to liability' under the comparator tort").

[42] *Id.* At common law, unreasonable publicity given to another's private life is considered an actionable privacy tort. RESTATEMENT (SECOND) OF TORTS § 652D (1977). A defendant is liable for unreasonable publicity of a person's private life when the matter publicized "(a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public." *Id.* When unreasonable publicity is given to another's private life, the plaintiff can seek redress for embarrassment, humiliation, reputational harms, or other injury that results from these disclosures to the public. *Id.* § 652H cmts. a, b; *see id.* § 652D cmt. a (defining publicity as the communication of a matter to the public at large or a group of people, such that is it substantially certain that the matter will become public knowledge).

[43] *Barclift*, 93 F.4th at 145–48; *see TransUnion*, 594 U.S. at 424–25 (stating only that a common-law analog is required to determine concreteness); Chemerinsky, *supra* note 37, at 271 (stating that because the Court has decided only it can determine whether a statute confers a right to standing, "that then raises the question of how the Court will decide, apart from history and the common law, which rights created by federal law involve sufficient harms for standing").

[44] *Barclift*, 93 F.4th at 140. Ms. Barclift is not alone—about one in twelve adults in the United States owe medical debt. Shameek Rakshit et al., *The Burden of Medical Debt in the United States*, PETERSON-KFF HEALTH SYS. TRACKER (Feb. 12, 2024), https://www.healthsystemtracker.org/brief/the-burden-of-medical-debt-in-the-united-states/ [perma.cc/5GL6-WGYN]. Driven by uninsurance and underinsurance, high deductibles, and gaps in medical coverage, medical debt has been building over decades. *See* Stephen Nuñez, *The U.S. Medical Debt Crisis: Catastrophic Costs of Insufficient Health Coverage*, ROOSEVELT INST. (May 15, 2025), https://rooseveltinstitute.org/publications/medical-debt/#medical-debt [perma.cc/97PR-PM4N] (connecting the escalation of medical debt to policy failures). After the Supreme Court in *National Federation of Independent Business v. Sebelius* made Medicaid expansion optional for states, millions of low-income adults, many of whom were Black, Hispanic, and Southern, were left in a "coverage gap," being too poor for marketplace subsidies yet ineligible for Medicaid, causing medical debt to spike in non-expansion states. *See id.* (noting that these non-expansion states are in the U.S. Southeast, with large Black and Hispanic populations); Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 558 (2012) (holding that an individual mandate to impose a minimum health insurance coverage requirement exceeded Congress's power).

a nationwide third-party mailing vendor, to send a collection notice on its behalf.[45] Keystone gave RevSpring the plaintiff's name, address, debt balance, and other information about the debt to include in the notice.[46] The plaintiff did not authorize Keystone to give her personal information to RevSpring, and she subsequently brought an action against Keystone for violating the FDCPA.[47]

The District Court for the Eastern District of Pennsylvania dismissed the action with prejudice, holding that Barclift's alleged injuries—embarrassment and stress, invasion of privacy, and reputational harm caused by Keystone's disclosures—were not sufficiently concrete to establish standing.[48] The Third Circuit affirmed, agreeing that the plaintiff failed to allege an injury bearing a close enough relationship to a kind of harm recognized at common law.[49] In doing so, the Third Circuit furthered the existing circuit divide over the proper analytical approach to evaluating intangible harms for the purpose of Article III standing.[50]

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[45] *Barclift*, 93 F.4th at 140. It is common practice that a debt collection agency uses a third-party mailing vendor. *See* CONSUMER FIN. PROT. BUREAU, STUDY OF THIRD-PARTY DEBT COLLECTION OPERATIONS 22 (2016), https://files.consumerfinance.gov/f/documents/20160727_cfpb_Third_Party_Debt_Collection_Operations_Study.pdf [perma.cc/569X-F53X] (revealing that thirty out of fifty-eight interviewed data collection agencies in the qualitative survey specifically collect medical debt). Additionally, in a 2016 study by the Consumer Protection Bureau, most collectors interviewed said they share account information via a third-party mailing vendor. *Id.*

[46] *Barclift*, 93 F.4th at 140.

[47] *Id.* Parties to the action included Barclift herself and a class of similarly situated Pennsylvania residents. *Id.*

[48] *Id.* Barclift filed a second amended complaint after the district court determined that it did not have jurisdiction over the action because Barclift did not have standing. *Id.* In the amended complaint, she added allegations "upon information and belief" that RevSpring kept electronic copies of the consumer data that has been shared by debt collectors for years, and that at any point, RevSpring employees could access this data. *Id.*; Amended Complaint & Demand for Jury Trial at 8, Barclift v. Keystone Credit Servs., LLC, No. 5:21-cv-04335 (E.D. Pa., Feb. 28, 2022), Dkt. No. 23. Additionally, she alleged that RevSpring had inadvertently disclosed the personal information of more than one thousand patients in the University of Pennsylvania Health System in 2014. Amended Complaint & Demand for Jury Trial at 9; *Barclift*, 93 F.4th 136 (No. 5:21-cv-04335). Keystone moved to dismiss the complaint. *Barclift*, 93 F.4th at 140. After determining once again that Barclift lacked standing, the district court dismissed the action with prejudice, reasoning that further amendments would be futile after Barclift had been given the opportunity to cure deficiencies in her complaint but failed to do so. *Id.* at 140–41. Barclift appealed, and the Third Circuit's decision followed. *Id.* The Third Circuit, however, determined that the District Court erred in dismissing Barclift's complaint with prejudice because without standing, the court did not have subject matter jurisdiction to hear the claim, making a prejudicial dismissal for lack of standing improper. *Id.* at 148 (quoting Cottrell v. Alcon Lab'ys, 874 F.3d 154, 164 n.7 (3d Cir. 2017)). Therefore, when granting Keystone's motion to dismiss, the Third Circuit modified the order to be dismissed without prejudice. *Id.*

[49] *Barclift*, 93 F.4th at 148. The Third Circuit affirmed the district court's decision to grant Keystone's motion to dismiss. *Id.*

[50] *Id.* The Third Circuit held fast to the words of *TransUnion*, stating that "if the [Supreme] Court wanted us to compare elements, it would have simply said so." *Id.* at 145. Indeed, the Supreme Court has previously made explicit when they wanted lower courts to apply an element-for-element analysis. *See, e.g.*, Blockburger v. United States, 284 U.S. 299, 304 (1932) (announcing the strict "same-elements" test for double jeopardy challenges); *cf.* Taylor v. United States, 495 U.S. 575, 600 (1990) (describing a "categorical approach" when determining sentencing enhancements for recidivists).

II. Approaches to Intangible Harms and Their Discontents

Since *Spokeo v. Robins* declared that Congress cannot create Article III standing by statute alone,[51] and *TransUnion LLC v. Ramirez* instructed courts to find an analogous common-law harm for the intangible harm suffered, circuit courts have diverged in how they evaluate the concreteness of an intangible harm.[52] Some circuits focus on the kind of harm alleged, whereas others require a match between the elements of the alleged injury and those of an analogous common-law tort.[53]

Section A of this Part discusses how the Third Circuit has applied a kind-of-harm approach to plaintiffs' claims, stemming from the varying methodologies of its sister circuits—namely, the Seventh and Tenth Circuits.[54] Section B of this Part examines Judge Kevin Newsom's dissent in *Hunstein III* alongside Judge Paul Matey's dissent in *Barclift v. Keystone Credit Services, LLC* to illustrate how the majority's chosen analytical framework ultimately determines whether the plaintiff has standing.[55]

A. Evaluating Harms Across the Tenth, Seventh, and Third Circuits

Working within the framework developed in *Spokeo* and *TransUnion*, the Eleventh Circuit settled on the element-for-element approach in *Hunstein III*.[56] Since then, the Tenth Circuit and the Seventh Circuit have widened the circuit split, adopting the kind-of harm approach and element-for-element approach, respectively.[57]

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[51] *See* Spokeo, Inc. v. Robins, 578 U.S. 330, 341 (2016) (stating that an individual must have suffered a concrete injury, even if Congress has created a statute that grants an individual a right to standing).

[52] *See* TransUnion LLC v. Ramirez, 594 U.S. 413, 417 (2021) (requiring plaintiffs to find a common-law analog to their intangible harms).

[53] *See Barclift*, 93 F.4th at 148 (explaining that under the kind-of-harm approach, plaintiff did not have standing); Nabozny v. Optio Sols. LLC, 84 F.4th 731, 735–36 (7th Cir. 2023) (under the element-for-element approach, plaintiff did not have standing); *Hunstein III*, 48 F.4th 1236, 1242 (11th Cir. 2022) (explaining that under the element-for-element approach, plaintiff did not have standing); Shields v. Pro. Bureau of Collections of Md., Inc., 55 F.4th 823, 829 (10th Cir. 2022) (under the kind-of-harm approach, plaintiff did not have standing).

[54] *See infra* notes 56–66 and accompanying text.

[55] *See infra* notes 67–78 and accompanying text.

[56] *See Hunstein III*, 48 F.4th at 1249–50 (determining that disclosure to a company is not the same as disclosure to the public at large, therefore the plaintiff did not allege an element of the comparator tort).

[57] *See Nabozny*, 84 F.4th at 735–36 (using the element-for-element approach); *Shields*, 55 F.4th at 829 (using the kind-of-harm approach). *TransUnion* recognized that the intangible harms of "reputational harms, disclosure of private information, and intrusion upon seclusion" have been actionable in American courts. 594 U.S. at 425. Although the Tenth Circuit and Seventh Circuit cases liken their harms to those resulting from the public disclosure tort, various circuits have considered other comparator torts to determine standing. *See, e.g.*, AFT v. Bessent, 154 F.4th 162, 172 (4th Cir. 2025) (considering intrusion upon seclusion); Conservation L. Found., Inc. v. Acad. Express, LLC, 129 F.4th 78,

In 2022, in *Shields v. Professional Bureau of Collections of Maryland, Inc.*, the Tenth Circuit applied the kind-of-harm approach and found that the plaintiff lacked standing.[58] The Tenth Circuit interpreted *TransUnion* as requiring the plaintiff to allege the same *type* of harm as the comparator tort, but not the same degree of harm as traditionally recognized in that tort.[59] The court held that because the plaintiff failed to allege external publication of private information—the same type of harm associated with the common-law tort of public disclosure of private information—the plaintiff had not established standing.[60]

In 2023, in *Nabozny v. Optio Solutions LLC*, the Seventh Circuit employed the alternative framework and, like the Tenth Circuit in *Shields*, concluded that the plaintiff lacked standing.[61] Applying the element-for-element approach, the Seventh Circuit determined that the plaintiff had not alleged that her private information had been made public, a required element of the comparator tort.[62] Adopting *Hunstein III*'s rationale, the Seventh Circuit did not

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88 (1st Cir. 2025) (considering nuisance); McNaught v. Nolen, 76 F.4th 764, 771–72 (8th Cir. 2023) (considering reputational harms).

[58] *See* 55 F.4th at 829 (finding that although the plaintiff did not have to match each element of the comparator tort, "she had to at least allege a similar harm").

[59] *See id.* at 828 (deeming "exact duplicate[s]" of elements unnecessary, as per *TransUnion*); *see also* Lupia v. Medicredit, Inc., 8 F.4th 1184, 1191–93 (10th Cir. 2021) (finding a plaintiff had standing under a kind-of-harm approach). Before deciding *Shields*, the Tenth Circuit applied the kind-of-harm approach to *Lupia v. Medicredit, Inc*. *Shields*, 55 F.4th at 828–29; *Lupia*, 8 F.4th at 1191–93. In *Lupia*, the plaintiff had alleged a harm similar to the tort of intrusion upon seclusion when she received a phone call from a debt collection agency. 8 F.4th at 1191. The court found that the plaintiff's allegation was similar enough to the common-law harm to establish standing. *Id.* at 1193. The court, noticeably, did not compare the degrees of harm between the plaintiff's one-time phone call and traditional harms resulting from intrusions upon seclusion to determine the concreteness of the intangible harm. *Id.* at 1191–92. The court noted that a single phone call nevertheless poses the same type of harm as imagined at common law: "an unwanted intrusion into a plaintiff's peace and quiet." *Id.* at 1192.

[60] *See Shields*, 55 F.4th at 829 (finding that the disclosure of information to one private entity is not the same kind of harm as described in the public disclosure of private facts, which "is concerned with highly offensive information being widely known" to the public). Curiously, the court in *Shields* likened their facts to those in *Hunstein III*. *See id.* (noting how like the plaintiff in *Hunstein III*, the plaintiff in *Shields* failed to allege the publicity element). With *Shields* adopting the kind-of-harm approach and *Hunstein III* adopting the element-for-element approach, the courts reached the same conclusion: the plaintiff did not have standing. *Id.* at 828–29; *Hunstein III*, 48 F.4th at 1245. Whereas *Hunstein III* was concerned with measuring the same *degree* of harm resulting from the public disclosure of private facts, *Shields* considered what counted as publicity as employed in the common-law tort of public disclosure. *Hunstein III*, 48 F.4th at 1245; *Shields*, 55 F.4th at 828–29.

[61] *Nabozny*, 84 F.4th at 735–36; *Shields*, 55 F.4th at 828–29. The court in *Nabozny* suggests that "[t]he Tenth Circuit has since endorsed *Hunstein* [*III*]," reading *Shields* as applying an element-for-element approach. *See Nabozny*, 84 F.4th at 735. ("No other circuit has held to the contrary. It would take a strong reason for us to create a circuit split, and we decline to do so here."). *Shields*, however, explicitly rejects the notion that there needs to be "exact duplicates" and supports a kind-of-harm analysis. *See supra* note 58 and accompanying text.

[62] *See Nabozny*, 84 F.4th at 735–36 (finding that the plaintiff did not allege publicity as understood in the common law tort context, therefore missing an element essential to liability). Marie Nabozny and Paulette Barclift alleged similar harms and attempted to analogize to the public disclo-

find standing for the plaintiff whose alleged harm was altogether a different type than the harm addressed by the essential element of the comparator tort.[63]

Informed by these varying interpretations of *TransUnion*, the Third Circuit approached the issue of intangible harms in *Barclift*.[64] The court reasoned that the plaintiff had not suffered a cognizable injury because the disclosure of her personal information was not made public beyond the internal transmission of her data from the creditor to the third-party mailing vendor.[65] Accordingly, the court concluded that she had not suffered the kind of harm actionable at common law under the public disclosure tort and therefore lacked standing.[66]

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sure of private facts, brought about through the same third-party mailing vendor: RevSpring. *See* Barclift v. Keystone Credit Servs., LLC, 93 F.4th 136, 140 (3d. Cir. 2024) (describing how the plaintiff's information was shared with RevSpring); *Nabozny*, 84 F.4th at 733 (same).

[63] *See Nabozny*, 84 F.4th at 735 (concluding that the plaintiff's information was shared with the third-party mailer, but it was not made public to the same degree as the common-law tort, and thus they could not be analogized). The court disposed of the kind-of-harm approach, saying that although *TransUnion* requires the court to find a close relation between present harms and harms at common law, here the plaintiff's harm is an entirely different kind because her information had not been effectively publicized. *See id.* at 736–37 (reconciling its present holding with Seventh Circuit precedent). The court distinguished its holding from *Gadelhak v. AT&T Services, Inc. Nabozny*, 84 F.4th at 736–37; Gadelhak v. AT&T Servs., Inc., 950 F.3d 458, 462 (7th Cir. 2020). *Gadelhak* used a kind-of-harm approach to determine that the plaintiff's alleged harms could be analogous to the tort of intrusion upon seclusion because even though the plaintiff received five automated text messages from the defendant and was not "hounded" by phone calls as understood at common law, the plaintiff nevertheless suffered the same kind of harm. *See* 950 F.3d at 462–63 (departing from the Eleventh Circuit in seeing the harms posed by unwanted texts being analogous to the type of harm resulting from an intrusion upon seclusion). The Seventh Circuit reasoned that, "a few unwanted automated text messages may be too minor an annoyance to be actionable at common law," but harms resulting from the texts had recognizable parallels at common law. *Id*. at 463. In *Nabozny*, the court distinguished *Gadelhak* from both *Nabozny* and *Hunstein III*, explaining that, unlike in *Gadelhak*, the plaintiffs in *Nabozny* and *Hunstein III* failed to allege any element of publicity. *Nabozny*, 84 F.4th at 736–37. As a result, the court reasoned, the harms alleged in *Nabozny* and *Hunstein III* were of an entirely different kind. *Id*.

[64] *See Barclift*, 93 F.4th at 144 (citing both *Shields* and *Nabozny* as illustrations of the kind-of-harm approach, and the element-for-element approach, respectively).

[65] *Id*. at 146–47. Here, footnote six of the *TransUnion* opinion controls the court's reasoning. *See* 594 U.S. 413, 434 n.6 (2021) (saying that "internal publication . . . does not bear a sufficiently 'close relationship'" to defamation harms for standing purposes). The Third Circuit recognized that this rationale is not binding and does not mirror the requirements of the public disclosure tort at issue in *Barclift*; nevertheless, they believed such rationale "would apply to the mailing vendor theory claims here." 93 F.4th at 146–47.

[66] *Barclift*, 93 F.4th at 148. Two years prior to *TransUnion*, in 2019, in *DiNaples v. MRS BPO, LLC.*, the Third Circuit adopted a kind-of-harm approach and found that the plaintiff had standing. *DiNaples v. MRS BPO, LLC.*, 934 F.3d 275, 280 (3d Cir. 2019). There, the court held that the disclosure of the plaintiff's personal information was a kind of harm actionable at common law. *Id*. In *DiNaples*, the plaintiff had been mailed a debt collection letter with a QR code that, once scanned, displayed a reference number connecting the plaintiff's account number with the debt collector. *Id*. at 278. The court reasoned that the plaintiff's "protected information has been made accessible to the public." *Id*. at 280. They found that the plaintiff had standing because the "disclosure of an account number is itself the harm." *Id*. Considering *TransUnion*'s dicta about the insufficiency of internal publication of a consumer's information within an organization, the Third Circuit departed from prec-

B. Dissenters and Their Frameworks of Choice

In his dissent in *Barclift*, Judge Matey argued that the plaintiff's alleged intangible harms bore a close enough relationship to the comparator tort to find standing, but that although the majority claimed to apply a kind-of-harm analysis, its reasoning revealed another story.[67] Even though the majority purported to follow *TransUnion*—and Judge Matey agreed with its interpretation of that decision—he maintained that the majority's application mirrored an element-by-element approach.[68]

In *Barclift*, the plaintiff alleged that her embarrassment and anxiety constituted the same kind of harms associated with the tort of public disclosure, but the majority honed in on publicity as the missing element of the plaintiff's claim.[69] In Judge Matey's view, the kind-of-harm framework was the correct approach because *TransUnion* could have required plaintiffs to plead more specific harms, but instead treated general kinds of harm as adequate.[70] Judge Matey posited that the plaintiff's right to sue ought not to come undone based on *TransUnion*'s dictum—found in a footnote—suggesting that internal publication is insufficient to establish publicity.[71] Had the majority properly applied the kind-of-harm framework and recognized the plaintiff's harms as bearing a

edent. *See supra* note 65 (discussing *TransUnion*'s dismissal of internal publications for defamation and the Third Circuit's adoption of this rationale for public disclosures).

[67] *See Barclift*, 93 F.4th at 149 (Matey, J., dissenting) ("[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.").

[68] *See id.* (agreeing that the kind-of-harm approach is the best reading of *TransUnion*). Judge Matey has larger qualms with the *TransUnion* opinion, namely, that the close relationship test is flimsy and relies upon opaque notions of American "history and tradition." *Id*. at 154 (quoting *TransUnion*, 594 U.S. at 424).

[69] *Id*. at 158–59 (discussing the majority's "higher bar" that requires "more fit" between the plaintiff's alleged harms and their common-law analogs, particularly the publicity harm resulting from public disclosure). At oral argument, counsel for the plaintiff noted that Barclift's embarrassment, anxiety, and stress were founded, in part, because RevSpring has a print and mail facility eleven miles away from her home. *See* Oral Argument at 1:27, Barclift v. Keystone Credit Servs., LLC, 93 F.4th 136 (2023) (No. 22-1925), https://www.courtlistener.com/audio/85990/barclift-v-keystone/ [perma.cc/P5K6-52M7] (discussing RevSpring's proximity to the plaintiff's address).

[70] *See Barclift*, 93 F.4th at 160 (Matey, J., dissenting) ("The Court could have required more specificity . . . . It instead drew an analogy to the general 'reputational harm associated with the tort of defamation.'") (quoting *TransUnion*, 594 U.S. at 432).

[71] *See id.* at 161–62 n.17 (discussing the different case law dealing with privileged internal communications and regular internal communication in the course of business); *supra* note 38 (offering comparative case illustrations). Although the distinction between privileged communication and non-privileged communication has not been consistently applied in defamation claims, that does not mean that these kinds of disclosures were not actionable at common law. *Barclift*, 93 F.4th at 161–62 n.17 (Matey, J., dissenting) (viewing *Ostrowe v. Lee*'s rule about internal publication as a "starting point" from which privilege makes the disclosure insufficiently published).

close enough relationship to the harms of the comparator tort, Judge Matey concluded, the plaintiff would have had standing.[72]

Comparing Judge Matey's dissent with that of Judge Newsom in *Hunstein III*, the two reflect shared concerns.[73] Judge Matey criticized the actual analysis of the intangible harm by the Third Circuit majority, whereas Judge Newsom challenged both the Eleventh Circuit majority's interpretation of *TransUnion* and its analysis of the intangible harm at issue.[74] In his dissent, Judge Newsom posited that the Eleventh Circuit majority's element-for-element approach contravened *TransUnion*'s instruction that a plaintiff's allegations need not mirror the elements of a comparator tort, but instead must bear a sufficiently close relationship to them.[75] Judge Newsom further argued that the majority erroneously relied on *TransUnion*'s outcome without considering the different procedural postures in each case.[76] As a result, Judge Newsom concluded that the Eleventh Circuit failed to properly measure how close the intangible harm was to the comparator tort.[77] Had the court taken a more flexible kind-of-harm approach, he contended, it would have found that the plaintiff sufficiently alleged injury to satisfy Article III standing requirements.[78]

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[72] *See id.* at 163 (finding that the plaintiff has shown standing sufficiently, but "[t]he majority starts down the right road but loses footing on a footnote").

[73] *Compare id.* at 149, 163 (finding that the majority misapplied *TransUnion*'s holding and advocating for a kind-of-harm approach), *with Hunstein III*, 48 F.4th 1236, 1260 (11th Cir. 2022) (Newsom, J., dissenting) (stating that the majority misinterpreted *TransUnion* and ought to have applied a kind-of-harm approach).

[74] *See Hunstein III*, 48 F.4th at 1256, 1260 (Newsom, J., dissenting) (arguing that the majority overlooked the complexities of intangible harms in the standing doctrine).

[75] *See id.* at 1258 (noting that the majority focused on the one missing element of a comparator tort and incorrectly measured how close the alleged harm was to the common-law harm). Judge Newsom suggests that the majority's "element-for-element" requirement is a "dressed-up version of the very 'exact duplicate' standard that the Supreme Court flatly disavowed." *Id.* at 1261.

[76] *Compare id.* at 1260 (describing the evaluation of facts at the pleading stage), *with* TransUnion LLC v. Ramirez, 594 U.S. 413, 431 (2021) (evaluating facts during a jury trial).

[77] *Hunstein III*, 48 F.4th at 1260 (Newsom, J., dissenting). The majority misconstrued how close of a relationship the alleged harms and the comparator tort needed to be at this point in the litigation. *Id.* Hunstein's allegations of public disclosure may not have satisfied the publicity element when evaluated at trial, but they were certainly close enough to the common-law comparator to establish standing at the pleadings phase. *Id.*

[78] *See id.* at 1264, 1268 (advocating for a kind-degree framework and finding that the plaintiff has standing). In Judge Newsom's view, the kind-of-harm approach requires that at the pleadings stage, a plaintiff's allegation only needs to come "close enough" to an element to give him standing. *See id.* at 1268 (finding that the plaintiff exactly satisfied the first two elements of the public discourse tort and came "close enough" to meeting the publicity requirement). Part of the difficulty that both plaintiffs in *Hunstein III* and *Barclift* faced was that, at the pleadings stage, neither party knew how many third-party mailing vendor employees could have seen the information about their medical debts. *See id.* at 1271 (speculating about how many third-party mailing vendor employees could have seen the parties' personal information); Oral Argument, *supra* note 69, at 4:33–:39 (plaintiff's counsel stating that "[w]e were not able to get into the discovery phase to learn how many of the RevSpring employees would have seen Ms. Barcliff's information").

III. RESOLVING THE CIRCUIT SPLIT: WHY THE ELEMENT-FOR ELEMENT APPROACH INADEQUATELY MEASURES INTANGIBLE HARMS

By denying certiorari in *Barclift v. Keystone Credit Services, LLC*, the Supreme Court declined an opportunity to provide circuit courts with clarification on the best modality for determining whether a plaintiff has sufficiently pled an intangible harm.[79] In *TransUnion LLC v. Ramirez*, the Court articulated that intangible harms and common-law harms need not be exact duplicates of one another, but must instead bear a close relationship.[80] Applying that theory to various intangible harms necessarily requires courts to compare the kind of harm alleged with the harm underlying a comparator tort, while accepting that the harms may differ in degree.[81]

The Third Circuit adopted this framework in theory, but not in practice.[82] As Judge Matey noted, the Third Circuit majority fixated on a footnote in *TransUnion* suggesting that internal disclosures alone are not close enough to publicity in the defamation context.[83] Although the majority correctly focused on the kind of harm, it incorrectly held this dictum as a principle and misapplied it to the public disclosure tort, thereby using the element-for-element approach in everything but name.[84]

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[79] *See* Barclift v. Keystone Credit Servs., LLC, 145 S. Ct. 169 (2024) (mem.) (denying certiorari). *See generally* Stewart Baker, *A Practical Guide to Certiorari*, 33 CATH. U. L. REV. 611, 616–17 (1984) (noting denials of certiorari where lower courts are following governing law).

[80] *See TransUnion*, 594 U.S. at 433 ("In looking 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, we do not require an exact duplicate."). *See generally supra* note 37 and accompanying text (discussing the ambiguity of the "close relationship" standard of *TransUnion*).

[81] *See* Karerat, *supra* note 8, at 2377 (using the Tenth Circuit's holding in *Lupia v. Medicredit, Inc*. as illustrative of the kind-of-harm approach post-*TransUnion*). In *Lupia*, the court explicitly discussed how the plaintiff's harms were similar, but not identical, appearing to "explicitly endorse a kind-degree framework for evaluating FDCPA standing inquiries." *Id.*; *see Hunstein III*, 48 F.4th at 1261 (Newsom, J., dissenting) ("After all, if the majority is going to require a plaintiff . . . to satisfy every element of a common-law claim without any accommodation at all, how *isn't* it, in practice, requiring an 'exact duplicate?'").

[82] *See* Barclift v. Keystone Credit Servs., LLC, 93 F.4th 136, 160 n.16 (3d Cir. 2024) (Matey, J., dissenting) (stating that although the majority attempted a kind-of-harm approach, they erroneously required the plaintiff to establish the elements of the common law analog, rather than evaluating the kind of harm she suffered).

[83] *See supra* note 67 (discussing the majority's misstep after interpreting the footnote); *see also* DiNaples v. MRS BPO, LLC., 934 F.3d 275, 281 (3d Cir. 2019) (finding that disclosures via QR code bear a close enough relationship to the kind of harm suffered in public disclosures at common law pre-*TransUnion*); *cf. Barclift*, 93 F.4th at 146–48 (concluding that internal disclosures are not harms and therefore are not connected to the kind of harm suffered at common law post-*TransUnion*). *See generally* Abner J. Mikva, *Goodbye to Footnotes*, 56 U. COLO. L. REV. 647, 648 (1985) (arguing that footnotes are a dumping ground for a judge's incidental remarks that are otherwise superfluous to the decision itself).

[84] *See Barclift*, 93 F.4th at 149 (Matey, J., dissenting) (noting that *TransUnion*'s footnote is just dicta, and therefore not binding on the Third Circuit). The Third Circuit majority argued that an internal public disclosure cannot be analogized to publicity harms of the public disclosure tort because "a

The element-for-element approach constricts standing doctrine and precludes standing for plaintiffs who allege statutory violations and analogize their harms to a relevant comparator tort.[85] On a procedural level, the element-for-element approach ignores the stage of litigation at which courts evaluate standing.[86] At the pleading stage, plaintiffs bringing claims under a mailing vendor theory often lack information about the scope of dissemination to third-party mailers and their employees.[87] Without knowing how widely their information has circulated, plaintiffs cannot fully evaluate whether their alleged harm satisfies each element of the analogous public disclosure tort.[88]

Furthermore, the element-for-element approach contravenes Congress's intention in creating the FDCPA.[89] Congress enacted the FDCPA to protect consumers from abusive, deceptive, and unfair debt collection practices that existing common-law remedies failed to address.[90] When courts insist on an

disclosure that remains nonpublic is unlikely to result in the type of humiliation associated with the traditional injury." *Id.* at 146 n.4. Instead of focusing on humiliation as the type of harm, the majority turned to the publicity element. *See id.* at 148 (discussing the insufficiency of the internal disclosure). "Publicity" comprises both the resulting harm and an element of the public disclosure comparator tort, and although the plaintiff alleged the kind of harm, she did not have a satisfactory "public" element. *Id.* Therefore, the court reasoned that the kinds of humiliation resulting from internal disclosure are "not remotely analogous" to the "traditionally recognized harm that depends on the humiliating effects of *public* disclosure." *Id.* (emphasis added) (quoting Nabozny v. Optio Sols. LLC, 84 F.4th 731, 737–38 (7th Cir. 2023)).

[85] *See Hunstein III*, 48 F.4th 1236, 1245 (11th Cir. 2022) ("[I]f 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."); *see also* Adam Flaherty & Isaiah W. Ogren, *The New Standing Doctrine, Judicial Federalism, and the Problem of Forumless Claims*, 134 YALE L.J. 1008, 1023–26 (2025) (suggesting that violations of consumer protections statutes will become "forumless claims" wherein plaintiff have suffered a harm, but have no access to redress).

[86] *See* COOPER, *supra* note 20, § 3531 (noting that when an action is filed, standing must exist because standing is evaluated first, before the merits of the claim).

[87] *See, e.g.*, *Barclift*, 93 F.4th at 140 (alleging "upon information and belief" that third-party mailing employees could access her information); *Hunstein III*, 48 F.4th at 1247 (claiming a third-party mailer could access the information but failing to allege that anyone actually read the information).

[88] *See supra* notes 76–78 and accompanying text (outlining the difficulty in evaluating the close relationship between harms at various stages of litigation). *See generally supra* note 48 and accompanying text (detailing the procedural history of *Barclift*).

[89] *See* 15 U.S.C. § 1692(e) (highlighting that the FDCPA was enacted to "eliminate abusive debt collection practices"). Today, third-party debt collection is a $20.2 billion industry, "with an estimated 140,000 employees in more than 6,400 different collection agencies based in the United States." 2 FEDERAL FAIR LENDING AND CREDIT PRACTICES MANUAL § 14.01 (2025).

[90] *See* 15 U.S.C. § 1692(e) (describing congressional intent). Before the enactment of the FDCPA, it was challenging to regulate independent debt collectors' practices because of the nature of their relationship to debtors. *See* Kraus, *supra* note 3, at 1797–98 (detailing how, pre-FDCPA, debt collection agencies' practices were extremely difficult to regulate due to the lack of personal relationship). Independent debt collectors, unlike creditors who sought to maintain ongoing relationships with their debtors, did not have strong connections to the debtors and therefore had no interpersonal constraints against harassing and abusing them. *See id.* (discussing this social phenomenon). In fact, it often paid for debt collectors to be aggressive, which made them more likely to collect debts successfully, and in turn, made them more appealing to creditors who could use them for their business. *See id.* (finding

element-for-element comparison between statutory violations and traditional torts, they recognize standing only when claimants can successfully squeeze their intangible injuries into the narrow confines of common-law causes of action.[91] This directly undermines the FDCPA's core purpose by imposing a near-impossible burden on plaintiffs to align their claims with each element of a preexisting tort, rendering their claims presumptively defective.[92] As a result, abusive collection practices—precisely the harms Congress sought to deter—may persist largely unchecked, insulated by the judicial doctrine that controls standing for litigants with intangible harms.[93] In effect, courts, not Congress, determine which statutory violations result in harms that are "concrete" enough to reach federal court.[94]

If courts formally adopted the kind-of-harm approach for FDCPA claims, the analysis could proceed as follows: in their complaints, plaintiffs would analogize the harm they suffered to a harm traditionally recognized at common

that debt collectors who harassed a debtor were able to collect more quickly). *See generally* Arthur Allen Leff, *Injury Ignorance and Spite—The Dynamics of Coercive Collections*, 80 YALE L.J. 1, 35 (1970) (explaining how debt collection is a business rooted in extortion, where "the reputation for being a 'son-of-a-bitch'" is a "good reputation").

[91] *See* Karerat, *supra* note 8, at 2384 (determining that when consumers with FDCPA violations fail to have standing, it halts the curtailment of improper debt collection practices, which essentially amounts to repealing the statute).

[92] *See Hunstein III*, 48 F.4th at 1242 (holding that under the element-for-element approach, the plaintiff did not have standing because the elements of their harm did not match a common-law cause of action); Nabozny v. Optio Sols. LLC, 84 F.4th 731, 735–36 (7th Cir. 2023) (finding that under the element-for-element approach, plaintiff did not have standing because the elements of their harm did not match a common-law cause of action). Lower courts that have since relied on *Barclift* have continuously found that plaintiffs do not have standing. *See, e.g.*, Cook v. GameStop, Inc., 148 F.4th 153, 158–60 (3d Cir. 2025) (relying on *Barclift*'s public disclosure analysis and determining that plaintiff did not have standing); Dervitz v. ARS Nat'l Servs. Inc., No. 22-3090, 2024 WL 1173739, at *3–4 (3d Cir. Mar. 19, 2024) (same); Heaven v. Prime Hydration LLC, 761 F. Supp. 3d 812, 818–19, 821 (E.D. Pa. 2025) (same).

[93] *See* Kraus, *supra* note 3, at 1798 (detailing how independent debt collectors are motivated to be as aggressive as possible to promote their business interests).

[94] *See Hunstein III*, 48 F.4th at 1267–68 (Newsom, J., dissenting) (describing the limiting effect on congressional power). Although it is true that Congress "may not simply enact an injury into existence" and create harms from something that "is not remotely harmful," that should not mean that Congress's lawmaking power cannot address harms that are otherwise unrecognized at common law. *See* TransUnion LLC v. Ramirez, 594 U.S. 413, 426 (2021) (proscribing limits on Congress's power to "create" statutory harms); *see also* Chemerinsky, *supra* note 37, at 270, 283–84 (detailing the far-reaching consequences of *TransUnion*'s holding). Professor Chemerinsky described the unspooling effect of the *TransUnion* decision that, if taken at its word, would mean that any federal law creating a legal right could be enforced in federal courts only if that right was historically protected or protected at common law. Chemerinsky, *supra* note 37, at 270. Chemerinsky noted that many federal civil rights laws could be undermined because their harms were not protected in American history or at common law. *See id.* at 283–84 (citing Title II of the Civil Rights Act of 1964 as an example of a statute having no common-law prohibition on race discrimination).

law.[95] Courts would then apply a holistic approach, informed by *TransUnion*'s instruction and the FDCPA's redressive purpose, asking whether the type of injury bears a close relationship to a traditional harm and is one that Congress sought to protect against when enacting the FDCPA.[96] Under this approach, the degree of harm, as cautioned against in *Shields v. Professional Collections Bureau of Maryland, Inc* and as illustrated in *TransUnion*'s footnote six, would not control the inquiry.[97] Instead, courts would focus on whether the plaintiff's harm is of a kind that the common law has considered cognizable, even if the harm's precise origin or magnitude differs.[98] A case-by-case assessment of the relationship between the two would provide a workable and principled means of implementing the kind-of-harm framework into the standing analysis without stripping the FDCPA, and Congress, of its remedial power.[99]

Conclusion

In 2024, in *Barclift v. Keystone Credit Services, LLC*, the U.S. Court of Appeals for the Third Circuit held that a plaintiff who suffered an intangible harm from a violation of the FDCPA lacked Article III standing. The court concluded that the plaintiff did not demonstrate a close relationship between the kind of harm alleged and a harm traditionally recognized at common law. In doing so, the Third Circuit relied on *TransUnion LLC v. Ramirez*, where the Supreme Court held that a group of plaintiffs did not have standing because their alleged intangible harms did not have a close relationship to the harms underlying the comparator tort. The Third Circuit's decision contributed to the split among the U.S. Courts of Appeals as to whether courts should evaluate the close relationship more narrowly or broadly. Judge Matey and Judge Newsom dissented from the Third and Eleventh Circuit majorities, respectively, arguing that each majority was wrong to apply the narrow element-for-element

[95] *See TransUnion*, 594 U.S. at 417 (explaining that plaintiffs must show that their intangible harms are sufficiently concrete for standing purposes by analogizing them to the common-law harms). The complaint is the first place where this analogizing should begin, even if the analogy is not perfect. *See* Oral Argument, *supra* note 69, at 4:33–:39 (recognizing the limited amount of information plaintiffs have pre-discovery to perfectly analogize their intangible harms to traditional harms).

[96] *See TransUnion*, 594 U.S. at 417 (detailing the first part of the inquiry); Lupia v. Medicredit, Inc., 8 F.4th, 1184, 1191–93 (10th Cir. 2021) (employing the kind-of-harm approach and incorporating congressional intent). In *Lupia*, the Tenth Circuit evaluated not only the plaintiff's alleged harm, but also whether that harm is one that Congress sought to protect against by creating a private right to action. 8 F.4th at 1192–93.

[97] *See TransUnion*, 594 U.S. at 434 n.6 (noting, in dicta, the difference between internal and external publication of private information for purposes of a defamation claim); Shields v. Pro. Bureau of Collections of Md., Inc., 55 F.4th 823, 828–29 (10th Cir. 2022) (noting how harms must be of a similar kind, even if they are not of the same degree).

[98] *See Lupia*, 8 F.4th at 1192 (noting the difference in degree between the intangible harm and the common-law harm at issue).

[99] *See id.* at 1191–93 (modeling a fulsome application of the kind-of-harm approach).

approach. The element-for-element approach contravenes the Supreme Court's instruction in *TransUnion*, whereas the broader kind-of-harm approach properly captures the limits of Article III standing while preserving Congress's power to carve out avenues of redress and protecting the FDCPA's remedial aim.

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