NOTE

STANDING UP TO *TRANSUNION*: HOW FDCPA PLAINTIFFS CAN SATISFY *TRANSUNION*'S HEIGHTENED CONCRETE INJURY STANDARD

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INTRODUCTION

After noticing a pervasive, nationwide problem, Congress enacts legislation. The legislation creates new, individual rights and gives private citizens the ability to vindicate those rights in federal court. The idea is simple: to attack the problem, Congress empowers private citizens to hold violators accountable. But if a plaintiff sues a violator, are there any federal courts that can consider the merits of her case? The answer used to be clear—"where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded."[1] Today, the violation of a private right is not enough. Instead, according to the Supreme Court's recent decision in *TransUnion LLC v. Ramirez*,[2] every plaintiff who files suit in federal court must also show that the defendant's violation caused them a separate, concrete injury.[3] Moreover, an injury is concrete only when it has "a close historical or common-law analogue."[4] If a plaintiff cannot make that showing,

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1 Marbury v. Madison, 5 U.S. 137, 163 (1803).
2 141 S. Ct. 2190 (2021).
3 *Id.* at 2205.
4 *Id.* at 2204.

then she lacks Article III standing, and cannot sue in federal court.[5]

Read expansively, *TransUnion* closes the courthouse door to plaintiffs whose rights have been violated and undermines statutory schemes that define new rights.[6] At particular risk are those statutory schemes that depend on private plaintiffs to enforce the law.[7] This Note analyzes how the Court's decision in *TransUnion* affects the Fair Debt Collection Practices Act of 1977 (FDCPA),[8] a federal statute that grants debtors substantive rights they lacked at common law and is largely enforced by private plaintiffs.[9]

While *TransUnion* poses new hurdles for FDCPA plaintiffs, I argue that most plaintiffs can satisfy *TransUnion*'s heightened standard. Most FDCPA plaintiffs can satisfy *TransUnion* by arguing that they have suffered harms similar to those embedded in the torts of fraudulent misrepresentation, intentional infliction of emotional distress, and intrusion upon seclusion. *TransUnion* does not require plaintiffs to show that their injuries are identical to injuries actionable at common law.[10] Therefore, plaintiffs need only identify harms that are similar in kind, but not degree, to common law harms.[11] Accordingly, I maintain that FDCPA plaintiffs do not need to establish every element of a common-law cause of action to show they have suffered a concrete injury: via the FDCPA, Congress has reified harms that are unactionable at common law. If the courts disagree and find that most FDCPA plaintiffs cannot satisfy *TransUnion*'s new standard, I argue that Congress can amend the FDCPA to include language that gives plaintiffs the explicit right to recover for emotional harms. By doing so, Congress can use its Article I power to make emotional harms concrete and preserve the FDCPA.

In Part I, I outline the FDCPA's history and consumer debt collection practices. I argue that the FDCPA serves important interests by providing debtors with rights they lacked at common law. These rights are particularly important today, as

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5 *Id.* at 2200 ("No concrete harm, no standing.").

6 Erwin Chemerinsky, *What's Standing After* Transunion LLC. v. Ramirez, 96 N.Y.U. L. REV. ONLINE 269, 270 (2021).

7 *See TransUnion*, 141 S. Ct. at 2207 n.3 ("Congress may not authorize plaintiffs who have not suffered concrete harms to sue in federal court simply to enforce general compliance with regulatory law.").

8 Fair Debt Collection Practices Act, 15 U.S.C. § 1692.

9 *See infra* notes 37–44 and accompanying text.

10 *See infra* notes 154–161 and accompanying text.

11 *See id.*

consumer debt is at an all-time high and third-party debt collectors frequently rely on misrepresentations or harassing behavior to collect from debtors. Moreover, I demonstrate that the FDCPA depends on private enforcement actions, as the federal regulatory agencies tasked with enforcing the FDCPA have pursued relatively few enforcement actions.

In Part II, I demonstrate how federal courts have increasingly used the standing doctrine to dismiss FDCPA claims that they consider frivolous. I sketch the history of the Article III standing doctrine, arguing that its present formulation is not well supported by constitutional text or history. I highlight how the circuits split after the Supreme Court's decision in *Spokeo, Inc. v. Robins*[12] over whether a plaintiff articulated a concrete harm sufficient for standing by alleging only that a defendant violated their statutory rights. I argue that the Supreme Court's decision in *TransUnion* resolved this split by eliminating plaintiffs' ability to rely on procedural statutory violations to demonstrate standing.

In Part III, I propose how most plaintiffs seeking to act as private attorneys general can continue to enforce the FDCPA. Because *TransUnion* requires plaintiffs to show that they suffered an injury analogous to one that existed at common law, I contend that most FDCPA plaintiffs can demonstrate that they have suffered injuries analogous to the common law injuries embedded in the torts of fraudulent misrepresentation, intentional infliction of emotional distress, and intrusion upon seclusion.

In Part IV, I argue that if courts reject plaintiffs' attempts to analogize to these common law harms, Congress can step in and amend the FDCPA. By amending the FDCPA, Congress can render concrete the minor emotional harms that most FDCPA plaintiffs experience. In essence, I argue that Congress should use its Article I powers to make the most minimal harms permitted by Article III actionable. I contend that by defining the types of emotional injuries that the FDCPA protects against this broadly, Congress can essentially sidestep *TransUnion*.

I
THE FDCPA AND CONSUMER DEBT COLLECTION

Congress enacted the FDCPA in 1977 to "protect consumers from a host of unfair, harassing, and deceptive debt collec-

12 578 U.S. 330 (2016).

tion practices" such as threatening violence, disclosing a debtor's information to the public, and obtaining information through pretense.[13] In the FDCPA's declaration of purpose, Congress stated that debt collections abuses were "abundant" and "contribute to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy."[14] Indeed, Congress recognized that "the suffering and anguish which [third-party debt collectors] regularly inflict is substantial."[15]

With the FDCPA, Congress attempted to strike a delicate balance. On the one hand, Congress wanted to give American consumers strong protections that they lacked under state law.[16] On the other, Congress hoped to preserve creditors' rights to collect legitimate debts.[17] Thus, the FDCPA applies only to third-party debt collectors, not original creditors seeking repayment.[18] Against third-party debt collectors, the FDCPA provides debtors with myriad protections. The FDCPA governs how third-party debt collectors can communicate with debtors, preventing them from contacting debtors (1) during non-business hours, (2) directly (if they have an attorney), and (3) at their place of employment.[19] If a debtor demands that a debt collector cease contact, then the debt collector cannot further communicate with the debtor except to notify the debtor that it has ceased collection activities or it may invoke legal remedies.[20] Debt collectors generally cannot contact anyone about a debt other than the debtor, the debtor's attorney,

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13 S. REP. NO. 95-382, at 1–2 (1977).

14 15 U.S.C. § 1692(a).

15 S. REP. NO. 95-382, at 1–2 (1977).

16 *Bills to Amend the Consumer Credit Protection Act to Prohibit Abusive Practices by Debt Collectors: Hearing on S. 656, S. 918, S. 1130, and H.R. 5294 Before the Subcomm. on Consumer Affs. of the S. Comm. on Banking, Hous., and Urban Affs.*, 95th Congress 18 (1977) [hereinafter *FDCPA Senate Hearings*] (statement of Rep. Frank Annunzio, Chairman, H.R. Subcomm. on Consumer Affs.).

17 *See, e.g.*, *id.* at 31 (statement of Sen. Joe Biden) ("We don't want to make it—and I know the chairman doesn't want to make it—exceedingly difficult for someone to collect a legitimate bill").

18 15 U.S.C. § 1692a(6) (defining "debt collector" as "any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts" or "regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another"). Debt buyers are debt collectors within the meaning of the act if their principal purpose is to collect debts. *See* Barbato v. Greystone All., LLC, 916 F.3d 260, 261 (3d Cir. 2019); *see also* Henson v. Santander Consumer USA Inc., 137 S. Ct. 1718, 1721 (2017) ("All that matters is whether the target of the lawsuit regularly seeks to collect debts for its own account or does so for 'another.'").

19 15 U.S.C. § 1692c(a)(1)-(3).

20 15 U.S.C. § 1692c(c).

or the original creditor.[21] Moreover, third-party debt collectors cannot call debtors to "annoy, abuse, or harass" them,[22] and anything they mail to debtors cannot outwardly indicate that the mailing is from a debt collector.[23]

The FDCPA also dictates what third-party debt collectors must communicate to debtors. In their initial communication, a debt collector must indicate they are a debt collector and give the debtor a "mini-*Miranda*," informing the debtor that they will use any information they obtain from the debtor to further their collection efforts.[24] Within five days of contacting a debtor for the first time, a third-party debt collector must specify, in writing, the amount owed and the debt's owner.[25] The debt collector must also inform the debtor that she can dispute the debt within thirty days and request the name and address of the original creditor.[26] If the debtor exercises either option, the debt collector must cease its collection efforts until it mails the requested information to the debtor.[27] When communicating with debtors, debt collectors may not misrepresent the status or amount of a debt,[28] threaten debtors with violence, use obscene language, or fail to meaningfully disclose their identity.[29]

To enforce these provisions, the FDCPA authorizes the Federal Trade Commission (FTC) and CFPB to bring enforcement actions.[30] The FDCPA also gives debtors a private right of action, authorizing them to sue third-party debt collectors who violate their rights in federal or state court.[31] The FDCPA provides third-party debt collectors with a "bona fide error" affirmative defense, allowing them to escape liability if they show that they unintentionally violated the Act despite already having compliance monitoring procedures in place.[32] Moreover, a third-party debt collector can avoid liability by demonstrating good-faith adherence to CFPB rules.[33] For instance, the CFPB

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21 15 U.S.C. § 1692c(b).
22 15 U.S.C. § 1692d(5).
23 15 U.S.C. § 1692f(8).
24 15 U.S.C. § 1692e(11); *See*, *e.g.*, Chalik v. Westport Recovery Corp., 677 F. Supp. 2d 1322, 1326 (S.D. Fla. 2009) ("Although debt collectors are to refrain from mentioning the debt when communicating with third parties they must provide a warning that is sometimes referred to as the "mini-Miranda").
25 15 U.S.C. § 1692g(a).
26 *Id.*
27 15 U.S.C. § 1692g(b).
28 15 U.S.C. § 1692e.
29 15 U.S.C. § 1692d.
30 15 U.S.C. § 1692*l*.
31 15 U.S.C. § 1692k.
32 15 U.S.C. § 1692k(c).
33 15 U.S.C. § 1692k(e).

has created a model debt-collection letter[34] that, if adhered to, provides third-party debt collectors with a safe harbor from liability.[35] However, if a court finds that a third-party debt collector violated the FDCPA, the court may award the debtor compensatory damages, costs and attorney's fees, and additional damages up to $1,000.[36]

Though debt collection violations are among consumers' most frequent complaints to the FTC[37] and CFPB,[38] neither agency aggressively enforces the FDCPA. In 2020, the FTC filed only seven FDCPA enforcement actions,[39] while the CFPB filed just four.[40] By contrast, private plaintiffs filed over 6,800 FDCPA lawsuits in 2020.[41] Thus, the FDCPA is largely "self-enforcing" and relies on private plaintiffs to enforce its protections. Congress intended that the FDCPA would operate this way. The Senate Banking Committee's Report plainly stated that "this legislation [is] primarily self-enforcing; consumers who have been subjected to collection abuses will be enforcing compliance."[42] The courts have also recognized private suits' importance to the FDCPA. In *Jacobson v. Healthcare Financial Services., Inc.*, Judge Guido Calabresi recognized that the FDCPA "enlists the efforts of sophisticated consumers . . . as 'private attorneys general' to aid their less sophisticated counterparts, who are unlikely themselves to bring suit under the Act, but who are assumed by the Act to benefit from the deterrent effect of civil actions brought by others."[43] Accordingly, courts apply an objective, "least sophisticated consumer" stan-

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34 CONSUMER FIN. PROT. BUREAU, DEBT COLLECTION MODEL FORMS: MODEL VALIDATION NOTICE – ENGLISH (2021), https://files.consumerfinance.gov/f/documents/cfpb_debt-collection_model-validation-notice_english.pdf [https://perma.cc/GZ6W-CVD7].

35 12 C.F.R. § 1006.34(d)(2) (2020).

36 15 U.S.C. § 1692k(a).

37 FED. TRADE COMM'N, THE STRUCTURE AND PRACTICES OF THE DEBT BUYING INDUSTRY i (2013), https://www.ftc.gov/sites/default/files/documents/reports/structure-and-practices-debt-buying-industry/debtbuyingreport.pdf [https://perma.cc/Y3TX-947C] ("The FTC receives more consumer complaints about debt collectors, including debt buyers, than about any other single industry.").

38 CONSUMER FIN. PROT. BUREAU, FAIR DEBT COLLECTION PRACTICES ACT: CFPB ANNUAL REPORT 2021 3 (2021), https://files.consumerfinance.gov/f/documents/cfpb_fdcpa_annual-report-congress_03-2021.pdf [https://perma.cc/2QTN-L24C] ("[D]ebt collection [is] one of the most prevalent consumer complaint topics.").

39 *Id.* at 5.

40 *Id.* at 3.

41 *WebRecon Stats for Dec 2020 and Year in Review*, WEBRECON LLC, https://webrecon.com/webrecon-stats-for-dec-2020-and-year-in-review/ [https://perma.cc/M583-AWP4] (last visited Aug. 23, 2022).

42 S. REP. NO. 95-382, at 5 (1977).

43 516 F.3d 85, 91 (2d Cir. 2008).

dard to determine whether a third-party debt collector's statements or actions were unlawful under the FDCPA.[44]

Despite the FDCPA's substantive protections, abusive debt collection practices remain a pervasive problem. American consumers are over $14 trillion in debt.[45] Nearly one out of every three American adults—about seventy-seven million Americans—owes money to a third-party debt collector.[46] Today, more Americans are in debt than at the height of the Great Recession.[47] Unsurprisingly, debt collection is a booming business. There are nearly 7,000 debt collection agencies in the United States, employing over 140,000 people and earning approximately $12.7 billion per year.[48] These third-party debt collection agencies' practices differ—some contract with creditors to collect on contingency fees, while some buy consumer debt from creditors to collect themselves.[49] While a majority of third-party debt collectors contract with original creditors to collect debts for a contingency fee, debt buying is extremely lucrative.[50] The nine largest firms own consumer debt with "face values" exceeding $140 billion.[51] Despite owning portfolios with large face values, debt buyers typically purchase consumer debt for only pennies on the dollar.[52] On average, they pay only four cents for every dollar in face value.[53] However, because there is no single, regulated marketplace for consumer debt, instead of paying, some debt collectors simply steal portfolios of debt from other collectors.[54] Furthermore, to maximize profits, debt buyers try to collect the account's face value

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44 *Id.* at 90–91.

45 CONSUMER FIN. PROT. BUREAU, supra note 38, at 10.

46 AM. CIV. LIBERTIES UNION, A POUND OF FLESH: THE CRIMINALIZATION OF PRIVATE DEBT 9 (2018), https://www.aclu.org/sites/default/files/field_document/022118-debtreport.pdf [https://perma.cc/Z64N-VTZB].

47 CONSUMER FIN. PROT. BUREAU, *supra* note 38, at 10; *see also* CONG. RSCH. SERV., FAIR DEBT COLLECTION PRACTICES ACT (FDCPA) 1 (2013), https://sgp.fas.org/crs/misc/R43041.pdf [https://perma.cc/C5LB-FPF7].

48 CONSUMER FIN. PROT. BUREAU, *supra* note 38, at 13. *But see* Nathan Woodard, *The New Wild West: Exploring Western New York's Underground, Fraudulent Debt Collection Industry*, 66 BUFF. L. REV. 239, 241 n.7 (2018) (indicating that official figures may underestimate the debt collection industry's true size because debt collectors frequently fail to properly report their income or employment figures).

49 FED. TRADE COMM'N, *supra* note 37, at 11.

50 CONSUMER FIN. PROT. BUREAU, *supra* note 38, at 15.

51 Jake Halpern, *Paper Boys: Inside the Dark, Labyrinthine, and Extremely Lucrative World of Consumer Debt Collection*, N.Y. TIMES MAG., https://www.nytimes.com/interactive/2014/08/15/magazine/bad-paper-debt-collector.html [https://perma.cc/6LQS-2SCZ] (last updated Aug. 19, 2014).

52 *Id.*

53 FED. TRADE COMM'N, *supra* note 37, at 23.

54 Halpern, *supra* note 51.

from debtors, then sell the remaining accounts to other collectors, who will then try to collect anew.[55]

Theoretically, third-party debt collection activity benefits consumers. Third-party debt collectors help creditors recover or recoup the money owed to them by debtors, thereby allowing creditors to lend to consumers at lower interest rates.[56] However, third-party debt collectors frequently engage in coercive practices to extract payments from debtors, creating immense social costs.[57] Debt collection agencies relentlessly try to contact debtors, reaching out to consumers more than one billion times per year.[58] Nearly a quarter of debtors report feeling threatened by third-party debt collectors' communications,[59] and twenty-nine percent said that collectors would not stop calling despite their requests to cease contact.[60] Many debt-collection firms intentionally hire former violent felons to call consumers,[61] using their employees to harass debtors' families and friends.[62] Some third-party debt collectors impersonate law enforcement personnel and threaten debtors with prison time.[63] Third-party debt collectors adopt sophisticated tactics to escape liability, having callers stick to carefully worded scripts when leaving messages to debtors, but encouraging callers to dominate calls and threaten debtors when they answer the phone.[64] Because few people record phone calls, con-

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55 *Id.*

56 *Id.*; *see also FDCPA Senate Hearings*, *supra* note 16, at 6.

57 *See*, *e.g.*, Elena Botella, *Debt Collecting Promises High Pay. All it Costs is Your Soul.*, TALK POVERTY (Sept. 20, 2019), https://talkpoverty.org/2019/09/20/debt-collecting-promises-high-pay-costs-soul/ [https://perma.cc/V5UV-T554] (detailing how third-party debt collectors engage in "mental warfare" to collect from debtors).

58 *Consumer Debt Collection Facts*, NAT'L CONSUMER L. CTR. (Feb. 2018, https://www.nclc.org/issues/consumer-debt-collection-facts.html [https://perma.cc/SV29-SY6Z].

59 *CFPB Survey Finds Over One-In-Four Consumers Contacted by Debt Collectors Feel Threatened*, CONSUMER FIN. PROT. BUREAU (Jan. 12, 2017), https://www.consumerfinance.gov/about-us/newsroom/cfpb-survey-finds-over-one-four-consumers-contacted-debt-collectors-feel-threatened/ [https://perma.cc/U7P3-GV5J].

60 CONSUMER FIN. PROT. BUREAU, *supra* note 38, at 21.

61 Halpern, *supra* note 51 (chronicling how a former investment banker established a third-party debt collection firm by hiring "thugs" because "Boy Scouts . . . can't turn any money").

62 Woodard, *supra* note 48, at 255–58.

63 Complaint at 4, CFPB v. BounceBack, Inc., No. 5:20-cv-06179 (W.D. Mo. Dec. 9, 2020) (accusing the defendant third-party debt-collector of sending 19,000 debtors collection letters on a prosecutor's letterhead and threatening them with jail time if they did not pay up).

64 Woodard, *supra* note 48, at 257–58.

sumers have no record of the debt collector's aggressive, unlawful behavior.[65]

Despite their blustering, belligerent tack with debtors, third-party debt collectors often lack evidence that the people they are contacting owe anything at all.[66] When purchasing consumer accounts, debt buyers usually receive debtors' names and the amounts they purportedly owe. Debt buyers rarely receive documents that verify a debt's validity or that describe debtors' prior challenges to the debt's validity.[67] Frequently lacking sufficient information, debt collectors often target the wrong people for collections, even suing persons who owe nothing at all.[68] The CFPB reports that consumers most frequently complain about third-party debt collectors' attempts to collect debts consumers do not owe.[69] Moreover, debt-collection practices disproportionally affect the most vulnerable members of society. Low-income,[70] Black, and Latinx households are more likely to have consumer debt than wealthy, white households.[71] Therefore, these historically vulnerable populations are more frequent targets of third-party debt collections than the wealthy and whites.[72] Consequently, suits enforcing the FDCPA serve important social functions—protecting historically vulnerable communities from the debt-collection industry's abuses and engendering respect for all debtors.

II
ARTICLE III STANDING

However, recent changes to the Article III standing doctrine have undermined private plaintiffs' ability to enforce the FDCPA in federal court for the benefit of less-sophisticated consumers. At the pleading stage, defendant third-party debt collectors frequently use Rule 12(b)(1) motions to dismiss

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65 *Id.* at 258.

66 *Rubber Stamp Justice: US Courts, Debt Buying Corporations, and the Poor*, HUM. RTS. WATCH (Jan. 20, 2016), https://www.hrw.org/report/2016/01/20/rubber-stamp-justice/us-courts-debt-buying-corporations-and-poor [https://perma.cc/V8HL-3KLC].

67 FED. TRADE COMM'N, *supra* note 37, at 35–36.

68 *Rubber Stamp Justice*,, *supra* note 66.

69 CONSUMER FIN. PROT. BUREAU, *supra* note 38, at 19.

70 Kyoung Tae Kim, Melissa J. Wilmarth, and Robin Henager, *Poverty Levels and Debt Indicators Among Low-Income Households Before and After the Great Recession*, 28 J. FIN. COUNSELING & PLAN. 196, 208 (2017).

71 AM. CIV. LIBERTIES UNION, *supra* note 46, at 10–11.

72 *Id.*

plaintiffs' claims for lack of subject matter jurisdiction.[73] Feeling that some plaintiffs have abused the FDCPA, courts have embraced the standing doctrine to curtail "frivolous" FDCPA claims.[74] Instead of dismissing frivolous claims on the merits under Rule 12(b)(6),[75] the lower courts have increasingly relied on a constitutional doctrine to dismiss these claims, making it difficult for Congress to respond if it disagrees with the courts. Moreover, the standing doctrine itself is a relatively new judicial innovation that is not well-founded in either constitutional text or history.[76] Article III limits the jurisdiction of federal courts to "Cases" and "Controversies," but the Constitution does not define either term.[77] Until the early twentieth century, federal courts read Article III to limit their authority to "controvers[ies] between parties which had taken a shape for judicial decision."[78] In essence, so long as a plaintiff could comply with common law pleading and equity practice, a federal court could hear the dispute.[79]

However, by the time of the New Deal, relaxed pleading standards and the merger of law and equity allowed plaintiffs with little personal stake in their lawsuits to challenge popular social welfare programs.[80] In response, the Supreme Court crafted standing requirements that required plaintiffs to show that they had a personal stake in their lawsuits.[81] Initially, the

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73 *See* Lueck v. Bureaus, Inc., No. 20 C 2017, 2021 WL 4264368, at *1 (N.D. Ill. Sept. 20, 2021).

74 *See* Barclift v. Keystone Credit Servs., LLC, 5:21-cv-04335, 2022 WL 444267 (E.D. Pa. Feb. 14, 2022).

75 The CFPB's safe-harbor provisions and the FDCPA's bona fide error affirmative defense provide defendants with ample opportunity to dismiss frivolous claims on the merits. *See supra* notes 32–35 and accompanying text.

76 Cass R. Sunstein, *What's Standing After* Lujan*: Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 168 (1992).

77 *See* U.S. CONST. art. III, § 2, cl. 1.

78 10 ANNALS OF CONG. 606 (1800).

79 *See* Osborn v. Bank of the U.S., 22 U.S. 738, 819 (1824); *see also* Seth F. Kreimer, *"Spooky Action at a Distance": Intangible Injury in Fact in the Information Age*, 18 J. CONST. L. 745, 747 (2016) ("To identify which controversies 'had taken a shape for judicial decision' in the eighteenth century, courts referred to accepted elements of common law pleading and equity practice").

80 *See* Peter C. Ormerod, *Privacy Injuries and Article III Concreteness*, 48 FLA. ST. U. L. REV. 133, 139 (2022); *see also* Sunstein, *supra* note 76, at 179.

81 *See*, *e.g.*, Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 347–48 (1936) (expressing that the Supreme Court would not

> pass upon the validity of a statute upon complaint of one who fails to show that he is injured by its operation. Among the many applications of this rule, none is more striking than the denial of the right of challenge to one who lacks a personal or property right. Thus, the challenge by a public official interested only in the performance of his official duty will not be entertained.

standing doctrine focused a plaintiff's ability to show that they suffered a particularized injury.[82] A plaintiff had standing when he showed that the defendant's actions caused him an injury and did not demonstrate that he suffered a particularized injury by alleging that "he suffer[ed] in some indefinite way in common with people generally."[83] For instance, a plaintiff could show that he suffered a particularized injury by demonstrating that the defendant violated one of his statutorily conferred rights.[84]

By the 1970s, the standing doctrine had subsumed the particularization inquiry into the "injury-in-fact" requirement.[85] In turn, the injury-in-fact requirement also required plaintiffs to show that the injury they suffered was "concrete."[86] Indeed, by the 1980s, then-Judge Antonin Scalia argued that the "concrete injury" requirement was "the indispensable prerequisite of standing" because "[o]nly [a concrete injury] can separate the plaintiff from all the rest of us."[87] Scalia viewed the concrete injury requirement as a method of proving that an injury was particularized, not that concrete injury was an altogether separate element of standing. Scalia also argued that the standing doctrine embodied separation of powers principles.[88] Standing limited the judiciary's power in order to protect the political branches, and it prevented Congress from aggrandizing the courts' power by rendering imaginary harms actionable.[89]

Once appointed to the Supreme Court, Justice Scalia enshrined the modern standing doctrine in *Lujan v. Defenders of Wildlife*.[90] In *Lujan*, plaintiff environmental activists sued the Secretary of the Interior (Secretary) to reverse regulations limiting the scope of the Endangered Species Act (ESA).[91] The ESA

(internal citations omitted)) (Brandeis, J., concurring). Professor Sunstein has described Justice Brandeis' concurrence in *Ashwander* as the "modern source of justiciability doctrine." Sunstein, *supra* note 76, at 180 n.83.

82 Ormerod, *supra* note 80, at 103.

83 Massachusetts v. Mellon, 262 U.S. 447, 488 (1923).

84 *See* Tenn. Elec. Power Co. v. Tenn. Valley Auth., 306 U.S. 118, 137–38 (1939).

85 *See*, *e.g.*, Ass'n of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 152 (1970) ("The first question is whether the plaintiff alleges that the challenged action has caused *him* injury in fact, economic or otherwise.") (emphasis added).

86 Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U.L. REV. 881, 891 (1983).

87 *Id.* at 895.

88 *See id.* at 891.

89 *See id.*

90 504 U.S. 555 (1992).

91 *Id.* at 559.

required federal agencies to consult with the Secretary to ensure that their projects would not adversely affect endangered species, and in 1978, the Department of the Interior ("the Department") promulgated regulations requiring federal agencies to consult with the Director when taking actions abroad.[92] However, the Department revised its position in 1986, promulgating new regulations that limited the consultation requirement to only federal agencies' domestic actions.[93] The plaintiffs sued the Secretary under the ESA's "citizen-suit" provision, which permitted private citizens to sue any official who failed to follow proper procedures when promulgating new regulations under the ESA.[94] The plaintiffs alleged that the Department's new regulations harmed them by permitting federal agencies to fund foreign projects that had deleterious effects on endangered species that they had hoped to observe in the future.[95]

Justice Scalia, writing for a plurality of the Court, held that plaintiffs have standing under Article III when they show that they have suffered an injury that (1) is concrete, particularized, and either actual or imminent; (2) that was likely caused by the defendant; and (3) is likely redressable following a favorable judicial decision.[96] Justice Scalia rooted the standing doctrine in Article III's case or controversy requirement[97] and declared that the standing doctrine's concrete injury requirement protected the political branches' authority to redress public wrongs by requiring plaintiffs to demonstrate that they had suffered concrete, individual injuries.[98] A majority of the court held that the plaintiffs failed to demonstrate that the Department's revised regulations caused them concrete injuries because their desires to observe endangered species "some day" did not indicate that their injuries were actual or imminent.[99] Additionally, the plaintiffs did not show that the Department's alleged violation of the ESA's citizen-suit provision constituted a concrete harm because the provision allowed plaintiffs to assert claims for public, rather than individual wrongs.[100] Instead, the Court held that statutory violations constitute con-

92 *Id.* at 558.
93 *Id.* at 558–59.
94 *Id.* at 571–72.
95 *Id.* at 562–63.
96 *Id.* at 560–61.
97 *Id.* at 560.
98 *Id.* at 576–77.
99 *Id.* at 564.
100 *Id.* at 575–78.

crete injuries when Congress creates individual rights, such as when Congress provides "cash bount[ies]" to plaintiffs who successfully sue private defendants for the government's benefit.[101] Indeed, Justice Scalia recognized that Congress can transform injuries inadequate at common law into concrete, legally cognizable harms.[102]

However, since *Lujan*, the Supreme Court has limited plaintiffs' ability to argue that defendants who violate their statutorily conferred individual rights cause concrete injuries. In *Spokeo, Inc. v. Robins*,[103] the Court distinguished standing's particularization and concrete injury requirements for the first time.[104] There, the plaintiff consumer alleged that the defendant website owner concretely injured him by violating his rights under the Fair Credit Reporting Act (FCRA). The FCRA requires credit reporting agencies to use reasonable procedures to ensure that they disseminate accurate information about consumers.[105] When a credit reporting agency disseminates false statements about a consumer, the FCRA authorizes that consumer to sue the violator in federal court to recover up to $1,000 per violation, attorney's fees, and costs.[106] In particular, the consumer alleged that the website violated the FCRA by inaccurately stating his age, marital status, employment status, and education.[107] However, the consumer did not allege that defendant's misstatements caused him any harm aside from violating his FCRA rights.[108]

While the Ninth Circuit had held that the consumer had alleged concrete injuries by claiming that the website owner violated a personal statutory right,[109] the Supreme Court vacated the Ninth Circuit's opinion, holding that plaintiffs do not automatically suffer a concrete injury whenever a defendant violates a statutorily granted individual right.[110] For example, the Court reasoned that the website owner's alleged procedural violation did not necessarily concretely harm the consumer because credit reporting agencies could conceivably violate the FCRA's procedural requirements without harming consum-

101 *Id.* at 572–73.
102 *Id.* at 578.
103 578 U.S. 330 (2016).
104 Chemerinsky, *supra* note 6, at 279.
105 *Spokeo*, 578 U.S. at 334.
106 *Id.*
107 *Id.* at 335.
108 *See id.*
109 Robins v. Spokeo, Inc., 742 F.3d 409, 413 (9th Cir. 2014).
110 *Spokeo*, 578 U.S. at 340.

ers.[111] Therefore, the Court remanded the case to the Ninth Circuit to determine whether violating the FCRA's procedures created a risk of harm that was sufficiently concrete for Article III standing.[112]

Spokeo left Congress's role in defining concrete harms unclear.[113] The Court first noted that Congress cannot "statutorily grant[] the right to sue to a plaintiff who would not otherwise have standing,"[114] but then recognized that Congress can render new injuries legally concrete through legislation.[115] Moreover, the Court suggested that bare procedural violations cannot constitute concrete harms,[116] while simultaneously stating that some bare procedural violations are concrete injuries that do not require plaintiffs to "allege any *additional* harm beyond the one Congress has identified."[117]

Spokeo's ambiguity on this issue led to a circuit split. In particular, the circuits disagreed over whether a third-party debt collector who violates the FDCPA—without causing a debtor any additional harm—has concretely harmed the debtor. One approach, typified by the Second Circuit in *Cohen v. Rosicki, Rosicki & Associates, P.C.*,[118] concluded that third-party debt collectors concretely harm debtors when they violate a plaintiff's FDCPA rights, even if they cause no additional harm.[119] In *Cohen*, the Second Circuit reasoned that third-party debt collectors cause concrete harms when they procedurally violate the FDCPA because Congress designed the FDCPA's procedural rules to protect debtors from economic harms.[120] By violating the FDCPA's procedural protections, a

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111 *Id.* at 341.

112 *Id.* at 342. On remand, the Ninth Circuit held that the website owner's alleged FCRA violation concretely harmed the consumer because (1) Congress enacted the FCRA to protect consumers' concrete interest in accurate credit reporting and (2) the plaintiff consumer had alleged that the website owner contravened his right by publishing false information about him. Robins v. Spokeo, Inc., 867 F.3d 1108, 1113, 1118 (9th Cir. 2017).

113 Lauren E. Willis, Spokeo *Misspeaks*, 50 LOY. L.A. L. REV. 233, 238 (2017) ("The majority opinion in *Spokeo* reads like a bad law student exam . . . .").

114 *Spokeo*, 578 U.S. at 338.

115 *Id.* at 341.

116 *Id.* ("[The plaintiff consumer] could not, for example, allege a bare procedural violation, divorced from any concrete harm, and satisfy the injury-in-fact requirement of Article III").

117 *Id.* at 342.

118 897 F.3d 75 (2d Cir. 2018).

119 *Id.* at 81–82. The Third and Eighth Circuits articulated similar approaches to procedural violations in FDCPA cases. *See* DiNaples v. MRS BPO, LLC, 934 F.3d 275, 279–80 (3d Cir. 2019); Demarais v. Gurstel Chargo, P.A., 869 F.3d 685, 691–92 (8th Cir. 2017).

120 *Cohen*, 897 F.3d at 81.

third-party debt collector automatically puts a debtor at a "risk of real harm" that Congress sought to abate by enacting the FDCPA.[121] By contrast, then-Judge Barrett's opinion in *Casillas v. Madison Avenue Associates, Inc.*[122] typifies the opposing approach.[123] Rather than focusing on whether a procedural violation automatically subjects a debtor to a real risk of harm, the Seventh Circuit required debtors to allege that they suffered a concrete harm separate from the third-party debt collector's procedural violation.[124]

The Supreme Court has seemingly resolved this issue (and the circuit split) in *TransUnion v. Ramirez*.[125] In *TransUnion*, a class of several thousand consumer plaintiffs sued the defendant credit reporting agency for violating the FCRA by erroneously labeling them as potential terrorists on credit reports.[126] For one group of plaintiffs, the credit reporting agencies sent these erroneous reports to lenders, while for a second group of plaintiffs, the credit reporting agency did not disclose the internal reports to anyone.[127]

In a 5-4 decision authored by Justice Kavanaugh, the Court held that the first group of consumers had suffered concrete reputational harms, while the second group lacked standing to sue.[128] The Court eliminated the post-*Spokeo* possibility that certain procedural violations could themselves constitute concrete harms, holding that plaintiffs can never satisfy Article III standing's injury-in-fact requirement by alleging only that a defendant violated a personal, statutorily granted right.[129] In short, without pointing to a legal violation and some additional harm, a plaintiff has no federal case.[130] Instead, plaintiffs must show that a defendant's statutory violation caused them an injury that has a close common-law analog.[131] While the Court recognized that Congress can still identify and render new harms actionable, the Court limited Congress's ability to

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121 *See id.*

122 926 F.3d 329 (7th Cir. 2019).

123 In addition to the Seventh Circuit, the D.C. Circuit adopted a similar approach. *See* Frank v. Autovest, LLC, 961 F.3d 1185, 1188–89 (D.C. Cir. 2020).

124 *See Casillas*, 926 F.3d at 333–34; *see also Frank*, 961 F.3d at 1188 (holding that debtors must demonstrate how third-party debt collectors' conduct harms them apart from violating the FDCPA).

125 141 S. Ct. 2190 (2021).

126 *Id.* at 2201–02.

127 *Id.* at 2000.

128 *Id.*

129 *Id.* at 2205.

130 *Id.*

131 *Id.* at 2204–05.

create new causes of action to only those harms that resemble harms already actionable at common law.[132]

The Court also shrunk what counts as an injury, suggesting that only in suits for injunctive relief can plaintiffs satisfy the injury-in-fact requirement by articulating a risk of future harm.[133] The Court was also openly hostile to statutory and regulatory regimes that rely on private plaintiffs to enforce the law, writing that "Congress may not authorize plaintiffs who have not suffered concrete harms to sue in federal court simply to enforce general compliance with regulatory law."[134] The Court based this conclusion on separation of powers principles, reasoning that Article III's standing requirement preserves the Executive Branch's Article II authority to ensure general compliance with regulatory law.[135]

TransUnion potentially represents a sea-change in the Article III standing doctrine. As Justice Thomas noted in the lead dissent, the Court had never before held that a legal violation alone was "inherently insufficient" for standing.[136] Rather, Justice Thomas argued that American courts have traditionally recognized that a defendant who violates an *individual* right opens himself up to a lawsuit.[137] Indeed, Anglo-American law has long recognized that when a person has an individual right, they have a remedy when that right is violated.[138] Yet *TransUnion* disrupts this longstanding understanding of legal rights—now, a federal statutory right does not have a federal remedy unless the violation caused a harm that has a common-law analog.[139] Going forward, *TransUnion* may substantially limit Congress's ability to protect consumers by granting them new individual rights enforceable in federal court.[140] Indeed, some

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132 *See id.*

133 *See id.* at 2210–11 ("TransUnion advances a persuasive argument that in a suit for damages, the mere risk of future harm, standing alone, cannot qualify as a concrete harm—at least unless the exposure to the risk of future harm itself causes a *separate* concrete harm."); *see also* Ormerod, *supra* note 80, at 127 ("[O]nly in cases of injunctive relief . . . will a plaintiff satisfy Article III for a harm not yet materialized").

134 *TransUnion*, 141 S. Ct. at 2207 n.3.

135 *Id.* at 2207.

136 *Id.* at 2221 (Thomas, J., dissenting).

137 *Id.* at 2218 (Thomas, J., dissenting).

138 *See, e.g.*, Ashby v. White (1703) 92 Eng. Rep. 126, 136 (KB) ("[I]ndeed it is a vain thing to imagine a right without a remedy; for [ ] want of right and want of remedy are reciprocal."); Marbury v. Madison, 5 U.S. 137 (1803) ("Where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded").

139 *See supra* notes 124–132 and accompanying text.

140 Chemerinsky, *supra* note 6, at 270.

commentators argue that the Supreme Court's standing jurisprudence serves deregulatory goals under the guise of separation of powers principles,[141] kicking enforcement responsibilities from private plaintiffs to executive agencies unwilling or unable to enforce procedural violations.[142]

Consequently, an expansive reading of *TransUnion* can undermine Congress's goal of protecting consumers from abusive debt-collection practices. Plaintiffs bringing lawsuits to enforce the FDCPA for the benefit of less-sophisticated consumers may lack a federal forum and might be relegated to state courts.[143] However, state courts are poor forums to vindicate debtors' rights. Generally speaking, federal judges are more rights affirming than their state counterparts[144] and tend to more vigorously enforce federally secured rights.[145] In the FDCPA context, state courts are not debtors' allies. Third-party debt collectors frequently take advantage of state courts' coercive powers to collect debt.[146] In 2016 alone, state court judges in Maryland, Massachusetts, and Utah issued more than 8,500 arrest warrants in debt-collection proceedings.[147] In many of these cases, state judges' antipathy toward debtors is palpable. One Massachusetts state judge told a 50-year-old mother and nursing student who owed $438 to either hand over the jewelry she was wearing, or he would send her to jail.[148] In addition to substantial personal costs, relegating many plaintiff's FDCPA claims to state courts runs the risk that federal and state

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141 Felix T. Wu, *How Privacy Distorted Standing Law*, 66 DEPAUL L. REV. 439, 440 (2017) (arguing that the Supreme Court's inability to clearly articulate the rationale behind its recent standing cases suggests that "standing law . . . serv[es] no purpose other than to constitutionalize a deregulatory agenda"); Matthew Tokson, *The TransUnion Case and the Lochnerization of Standing Doctrine*, DORF ON L. (June 29, 2021), http://www.dorfonlaw.org/2021/06/the-transunion-case-and-lochnerization.html [https://perma.cc/MHB5-S2UQ] ("The larger tragedy of *TransUnion* is that it relies on an Article III standing doctrine that has been thoroughly Lochnerized—stretched far beyond any plausible formal foundation and employed to thwart legislatures and protect corporate interests.").

142 *See supra* notes 37–40 and accompanying text.

143 *See* TransUnion LLC v. Ramirez, 141 S.Ct. 2190, 2224 n.9 (2021) (Thomas, J., dissenting).

144 Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1105-06 (1977).

145 *See id.* at 1124.

146 AM. CIV. LIBERTIES UNION, *supra* note 46, at 12.

147 *Id.*

148 *Dignity Faces a Steamroller: Small-Claims Proceedings Ignore Rights, Tilt to Collectors*, BOSTON GLOBE (Aug. 22, 2013), https://www.bostonglobe.com/metro/2006/07/31/dignity-faces-steamroller/SoK0TBVHzOzjLEpNqNrVYN/story.html [https://perma.cc/7596-ZCW3].

courts will interpret the statute differently, creating disunities that the Supreme Court could not easily fix.[149]

III
ANALOGIZING TO COMMON LAW HARMS

However, most FDCPA plaintiffs will not have to resort to state courts. Though the lower courts have used *TransUnion* to dismiss FDCPA claims that were viable post-*Spokeo*,[150] most FDCPA plaintiffs can identify harms that satisfy *TransUnion*. Consumers most frequently complained to the CFPB about third-party debt collectors misrepresenting facts or communicating with them in a manner that is unlawful under the FDCPA.[151] For instance, a third-party debt collector might claim that a debtor owes a fictitious debt[152] or call a debtor after they requested that the debt collector cease and desist.[153] In the first case, the third-party debt collector causes injuries similar to those protected by the torts of fraudulent misrepresentation and intentional infliction of emotional distress, while in the second, they cause injuries similar to those protected by the tort of intrusion upon seclusion.

Indeed, after *TransUnion*, plaintiffs do not need to show that their injury exactly matches an injury actionable at common law.[154] Rather, *TransUnion* recognizes that Congress possesses the ability to make previously unactionable harms concrete, and consequently, plaintiffs need not show that their harm has "an exact duplicate in American history and tradition."[155] Therefore, as the Fifth, Seventh, and Tenth Circuits have recently recognized, a plaintiff's asserted harm need not resemble an injury actionable at common law in degree, only in kind.[156] The Fifth, Seventh, and Tenth Circuits' holdings com-

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149 *See* Thomas B. Bennett, *The Paradox of Exclusive State-Court Jurisdiction Over Federal Claims*, 105 MINN. L. REV. 1211, 1216 (2021).

150 *See*, *e.g.*, Kola v. Forster & Garbus LLP, 19-CV-10496 (CS), 2021 WL 4135153, at *7–8 (S.D.N.Y. Sept. 10, 2021).

151 CONSUMER FIN. PROT. BUREAU, *supra* note 38, at 19.

152 *See*, *e.g.*, Oh v. Collecto, Inc., No. 20-01937 (KM) (ESK), 2021 WL 3732881, at *1 (D.N.J. Aug. 23, 2021).

153 *See*, *e.g.*, Lupia v. Medicredit, Inc., 8 F.4th 1184, 1188 (10th Cir. 2021).

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

155 *Id.* at 2204–05.

156 Perez v. McCreary, Veselka, Bragg & Allen, P.C., 45 F.4th 816, 822 (5th Cir. 2022); Persinger v. Sw. Credit Sys., L.P., 20 F.4th 1184, 1192 (7th Cir. 2021); *Lupia*, 8 F.4th at 1192; *see also* Hunstein v. Preferred Collection & Mgmt. Servs., Inc., 17 F.4th 1016, 1024 (11th Cir.), *reh'g en banc granted, opinion vacated*, 17 F.4th 1103 (11th Cir. 2021), *and on reh'g en banc*, 48 F.4th 1236 (11th Cir. 2022); Ward v. Nat'l Patient Acct. Servs. Sols, Inc., 9 F.4th 357, 366 (6th Cir. 2021) (Moore, J. dissenting).

port with post-*Spokeo* holdings, which also recognized a kind, but not degree requirement.[157] If plaintiffs' injuries were concrete only when they exactly matched a common law harm, then Congress could never create new causes of action to protect rights that did not exist at common law.[158] Such an expansive reading of *TransUnion* would undermine not only the FDCPA, but over a half-century's worth of civil rights, environmental, labor, and transparency laws.[159] Indeed, such a reading transforms the standing doctrine from a longstanding constitutional minimum—derived from ambiguous text and without historical support—into a major limit on Congress's Article I powers.[160]

Thus, most FDCPA plaintiffs can likely argue that defendants' statutory violations have caused them a harm made actionable by Congress, though insufficient for a common law claim. This approach differs from the pre-*TransUnion* cases, like *Cohen*, which held that some statutory violations were *per se* concrete harms because the statute protected concrete interests. Instead, each plaintiff must establish that the defendant's violation resembles a common law harm herself. Most FDCPA plaintiffs can likely contend that they suffered harms made cognizable by the FDCPA and that those harms resemble—in kind—a common law harm. In short, while a plaintiff does not need to establish every element of a comparable tort to establish that her harm has a common-law analog, she must show that her injury is qualitatively similar to the injury she would have suffered if the defendant had committed the analogous common law tort she has identified.[161]

For example, at common law, defendants are liable for the tort of fraudulent misrepresentation when they (1) misrepresent a fact, (2) intending the plaintiff's reliance, and (3) the plaintiff relies on the misrepresentation to her detriment.[162] However, under the FDCPA, Congress rendered unlawful "*any* false, deceptive, or misleading representation or means in connection with the collection of any debt."[163] Accordingly, the FDCPA's text plainly indicates that Congress did not limit the

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157 *See*, *e.g.*, Gadelhak v. AT&T Servs., Inc., 950 F.3d 458, 462 (7th Cir. 2020) (Barrett, J.).

158 *Hunstein*, 17 F.4th at 1024 n. 3.

159 Chemerinsky, *supra* note 6, at 270.

160 *See supra* notes 76–79 and accompanying text.

161 Thome v. Sayer L. Grp., P.C., No. 20-CV-3058-CJW-KEM, 2021 WL 4690829, at *9 (N.D. Iowa Oct. 7, 2021).

162 RESTATEMENT (SECOND) OF TORTS § 525 (AM. L. INST. 1977).

163 15 U.S.C. § 1692e (emphasis added).

FDCPA to prohibit only those misrepresentations actionable at common law. Instead, Congress sought to elevate harms unactionable at common law.

Therefore, plaintiffs may argue that via the FDCPA, Congress abrogated fraud's reliance requirement. By abrogating the reliance requirement, plaintiffs may argue that they suffer harms when the least sophisticated consumer would have relied on the third-party debt collector's misrepresentations.[164] However, debt collectors may counter by arguing that reliance is the *sine qua non* of fraud.[165] Thus, FDCPA plaintiffs suffer an injury that is different in kind, not just degree, from common law fraud when do not rely on a defendant's misrepresentations to their detriment. Put simply, Congress likely cannot abrogate the detrimental reliance requirement. Similarly, a plaintiff who argues that she is harmed because a less-sophisticated consumer likely would have relied on the debt collector's misrepresentations violates *TransUnion* because she alleges either that a bare procedural violation constitutes concrete harm[166] or relies on the risk of future harm to an unidentified person. However, in other contexts, federal courts have held that plaintiffs have standing even when they do not rely on a defendant's misrepresentations.[167] Instead, so long as a plaintiff shows that the defendant's misrepresentation was material, the plaintiff sufficiently demonstrates an injury-in-fact.[168] Importing a materiality requirement into the FDCPA would similarly protect private plaintiffs' ability to act as private attorneys general for unsophisticated consumers while simultaneously limiting frivolous claims.

Additionally, courts should find that FDCPA plaintiffs have standing when a third-party debt collector violates the FDCPA

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164 *See* Jensen v. Pressler & Pressler, 791 F.3d 413, 419 (3d Cir. 2015) ("[T]he specific plaintiff need not prove that *she* was actually confused or misled, only that the objective least sophisticated debtor would be."); Afewerki v. Anaya L. Grp., 868 F.3d 771, 775 (9th Cir. 2017).

165 John C. P. Goldberg, Anthony J. Sebok, & Benjamin C. Zipursky, *The Place of Reliance in Fraud*, 48 ARIZ. L. REV. 1001, 1004–05 (2006).

166 *See Afewerki*, 868 F.3d at 775 (noting that defendants violate the FDCPA's procedural protections when the least-sophisticated consumer would have relied on the debt collector's misrepresentations).

167 *See* Cowin v. Bresler, 741 F.2d 410, 426 (D.C. Cir. 1984) (holding that shareholders suing defendant corporate directors under 14(a) of the Exchange Act of 1934 for misrepresenting facts in proxy materials do not need to show detrimental reliance because the Act's text does not mention detrimental reliance).

168 Adams v. Standard Knitting Mills, Inc., 623 F.2d 422, 428–29 (6th Cir. 1980).

and the plaintiff suffers a minute emotional harm.[169] Therefore, FDCPA plaintiffs can satisfy *TransUnion* by alleging that they suffered a harm analogous to those protected by common law intentional infliction of emotional distress because the defendant's misrepresentations caused emotional harms. The common law has long recognized that emotional harms are concrete, redressable injuries. In fact, it has since the twelfth century when English law first recognized assault as tortious conduct.[170] American courts have only expanded the scope of actionable emotional harms. In 1968, California created a common law cause of action permitting plaintiffs to recover for negligent infliction of emotional distress.[171] By the 1970s, many states had recognized that debt-collection activity could cause emotional injuries and permitted plaintiffs to sue debt collectors and recover damages through the tort of intentional infliction of emotional distress.[172] Even in *TransUnion*, the Supreme Court suggested that emotional harms may satisfy standing's concrete injury requirement.[173]

Under the common law tort, a defendant is liable for intentional infliction of emotional distress when, by extreme and outrageous conduct, she intentionally or recklessly causes severe emotional distress to another.[174] The extreme and outrageous conduct standard is "based upon the common sense of the community"[175] and typically requires that the defendant's conduct goes beyond "all possible bounds of decency."[176] Moreover, a plaintiff experiences "severe emotional distress" when the distress he experiences "is so severe that no reasonable [person] could be expected to endure it."[177]

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169 Requiring plaintiffs to show only the minimum harm required by Article III is consistent with separation of powers principles and ensures that the judiciary does not trammel Congress's Article I power to legislate. *See* Petition for Writ of Certiorari at 31–32 (No. 20-1673), Nettles v. Midland Funding LLC, 142 S. Ct. 313 (2021); Nettles v. Midland Funding LLC, 983 F.3d 896 (7th Cir. 2020), *cert. denied*, 142 S. Ct. 313 (2021).

170 *See* I de S et ux. v. W de S, Y.B. 22 Edw. III, f. 99, pl. 60 (1348); John J. Kircher, *The Four Faces of Tort Law: Liability for Emotional Harm*, 90 MARQ. L. REV. 789, 790 (2007).

171 *See* Dillon v. Legg, 441 P.2d 912, 925 (Cal. 1968).

172 Barnett v. Collection Serv. Co., 242 N.W. 25, 28 (Iowa 1932); Long v. Beneficial Fin. Co. of New York, 330 N.Y.S.2d 664, 667 (App. Div. 1972); Muhich v. Fam. Fin. Corp., 241 N.W.2d 619, 630 (Wis. 1976); Moorhead v. J. C. Penney Co., 555 S.W.2d 713, 717 (Tenn. 1977).

173 TransUnion LLC v. Ramirez, 141 S.Ct. 2190, 2211 n.7 (2021).

174 RESTATEMENT (SECOND) OF TORTS § 46 (AM. L. INST. 1965).

175 *Moorhead*, 555 S.W.2d at 718.

176 RESTATEMENT (SECOND) OF TORTS § 46, cmt. d (AM. L. INST. 1965).

177 *Id.*, cmt. j.

However, FDCPA plaintiffs suing a third-party debt collector for experiencing stress or anger after a debt collector misrepresents the status of a debt likely cannot show that they suffered "severe emotional distress." Yet, they likely do not have to.[178] First, instead of adopting the community-based, common law requirement that the defendant act with "extreme and outrageous conduct," the FDCPA defines harassing behavior.[179] Courts should respect Congress's decision to define extreme and outrageous conduct just as they do in actions for negligence per se, where legislative judgment overrides the jury's ability to decide what constitutes reasonable conduct.[180] Second, allowing plaintiffs to rely on emotional harms that are not considered "severe" under the common law tort simply alters the degree, not the kind, of harm a plaintiff needs to have suffered to have a viable claim. When Congress enacted the FDCPA, it sought to eliminate the emotional harms that third-party debt collectors regularly inflicted on debtors.[181] Congress recognized that the debt collection techniques protected by the FDCPA cause severe emotional harms.[182] Consequently, Congress likely elevated stress and anxiety that, while unactionable at common law, are sufficiently analogous to common law harms to satisfy *TransUnion*.[183]

Turning to the second scenario—when third-party debt collectors call debtors in violation of the FDCPA—plaintiffs can likely allege that they suffer concrete privacy harms as well. A defendant is liable for the common law tort of intrusion upon seclusion when she intentionally intrudes upon the solitude or seclusion of another and her intrusion would be highly offensive to a reasonable person.[184] Again, however, a number of FDCPA plaintiffs bringing suit to protect less-sophisticated consumers likely cannot satisfy the common law tort. For instance, a debtor who receives a single, unlawful phone call from a third-party debt collector likely cannot show that the call was objectively unreasonable under the common law

178 *See supra* notes 155–161 and accompanying text.

179 *See* 15 U.S.C. § 1692d.

180 Esra Ripley Thayer, *Public Wrong and Private Action*, 27 HARV. L. REV. 317, 322 (1914).

181 *Supra* notes 13–15 and accompanying text.

182 S. REP. NO. 95-382, at 1–2 (1977).

183 *See* Mayfield v. LTD Fin. Servs., L.P., No. 4:20-cv-01966, 2021 WL 4481089, *2 (S.D. Tex. Sept. 30, 2021) (concluding that the plaintiff debtor's allegation that the defendant third-party debt collector caused him "emotional" distress by misrepresenting the status of a debt constituted a concrete injury).

184 RESTATEMENT (SECOND) OF TORTS § 652B (AM. L. INST. 1977).

tort.[185] Yet, through the FDCPA, Congress has essentially used its judgment to decide what constitutes highly offensive conduct. Indeed, Congress has said that whenever a third-party debt collector calls a debtor at unusual hours, at her place of employment, or via a third-party, its actions are objectively unreasonable.[186]

IV
LEGISLATIVE REMEDIES

If the courts reject FDCPA plaintiffs' attempts to analogize to common law harms, Congress lacks effective options to preserve widespread private enforcement in federal courts. Because the standing doctrine emanates from Constitutional text, Congress cannot directly overrule *TransUnion* without amending the Constitution. However, Congress can amend the FDCPA to make it clear to the federal courts that it has used its Article I power to render new harms cognizable. While the Supreme Court has stated that Article III prevents Congress from "using its lawmaking power to transform something that is not remotely harmful into something that is,"[187] the Court has not precisely defined which injuries satisfy this constitutional minimum. Therefore, to ensure the continued viability of private enforcement actions under the FDCPA, Congress should attempt to elevate the least severe harms cognizable under the standing doctrine's concrete injury requirement.

First, Congress can amend the FDCPA to embrace intangible harms. In particular, Congress can include language that mirrors state debt-collection statutes that explicitly permit plaintiffs to recover damages for emotional injuries. Maryland and Wisconsin's debt collection statutes both permit plaintiffs to recover damages for emotional distress or mental anguish even in the absence of physical injury.[188] While courts have interpreted the FDCPA to permit plaintiffs to recover for emo-

185 *See id.*, cmt. d. ("[T]here is no liability for knocking at the plaintiff's door, or calling him to the telephone on one occasion or even two or three, to demand payment of a debt.").

186 *See* 15 U.S.C. § 1692c(a).

187 TransUnion LLC v. Ramirez, 141 S.Ct. 2190, 2205 (2021) (quoting Hagy v. Demers & Adams, 882 F.3d 616, 622 (6th Cir. 2018)).

188 MD. CODE ANN., COM. LAW § 14-203 ("A collector who violates any provision of this subtitle is liable for any damages proximately caused by the violation, including damages for emotional distress or mental anguish suffered with or without accompanying physical injury."); WIS. STAT. ANN. § 427.105 (West 2021) ("[D]amages shall include damages caused by emotional distress or mental anguish with or without accompanying physical injury proximately caused by a violation of this chapter.").

tional damages,[189] the statute does not explicitly address emotional injuries. Therefore, by amending the FDCPA to include language that explicitly permits plaintiffs to recover damages for emotional harms, Congress would clearly indicate that it has elevated emotional harms that are not cognizable under the common law tort of intentional infliction of emotional distress. With additional textual support, plaintiffs will have an easier time convincing courts that Congress intended to lower the threshold of harm that a plaintiff must have suffered to have a cognizable claim.

However, Congress can go further by defining emotional harms broadly. The common law tort of intentional infliction of emotional distress limits the scope of actionable claims by requiring plaintiffs to prove that the defendant caused them distress that would have been unbearable to a reasonable person.[190] While Congress has likely already abrogated this requirement for FDCPA plaintiffs,[191] Congress can elevate less severe emotional injuries by defining emotional harm as any unpleasant mental reaction to the defendant's unlawful conduct.[192] On its face, this definition would ensure that nearly all FDCPA plaintiffs can bring a claim when a defendant violates their statutory rights. Yet this definition likely comports with *TransUnion* because plaintiffs are not simply relying on a defendant's statutory violation for standing—rather, they would be pointing to emotional harms that are similar in kind to those actionable under the common law tort of intentional infliction of emotional distress. In effect, this definition will extend standing as far as Article III permits.

CONCLUSION

Without private enforcement actions to deter third-party debt collectors who engage in unlawful practices, millions of Americans will lose the FDCPA's protections. In particular, Americans need private plaintiffs to enforce the FDCPA. Without private plaintiffs, regulatory agencies that have been un-

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189 *See*, *e.g.*, Johnson v. Columbia Debt Recovery, LLC, C20-573RSM, 2021 WL 2472630, at * 2 (W.D. Wash. June 17, 2021).

190 RESTATEMENT (SECOND) OF TORTS § 46, cmt. j (AM. L. INST. 1965).

191 *See supra* notes 179–183.

192 Congress could also simply adopt the expansive list of adverse mental reactions listed in the Second Restatement while dropping the Second Restatement's objectivity requirement. *See* RESTATEMENT (SECOND) OF TORTS § 46, cmt. j (AM. L. INST. 1965) (defining "severe emotional distress," in part, as "all highly unpleasant mental reactions, such as fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, worry, and nausea.").

willing or unable to enforce the FDCPA would be left to fill the void. State courts are also not a panacea—there, private plaintiffs will face a system predicated on hostility towards debtors. Yet, while *TransUnion* imposes new hurdles—and severely curtails Congress's Article I powers by pointing to ambiguous text from Article III—most plaintiffs can stand up to and satisfy *TransUnion*'s new concrete injury standard. As this Note demonstrates, FDCPA plaintiffs who wish to act as private attorneys general can analogize to the common law torts of fraudulent misrepresentation, intentional infliction of emotional distress, and intrusion upon seclusion. Moreover, this approach curbs the de-regulatory and counter-majoritarian impulses of the Supreme Court's recent Article III standing cases. By recognizing that FDCPA plaintiffs have the right to bring claims even when they suffer minute harms, the courts will respect Congress's choice to give them a remedy.