What Now? *Barclift* and Intangible Injuries After *TransUnion*

CLAIRE WILSON*

In 2024, in Barclift v. Keystone Credit Services*, the U.S. Court of Appeals for the Third Circuit applied a "kind-of-harm" approach to evaluate whether a plaintiff's intangible injury satisfied the concrete injury requirement for Article III standing. This approach differs substantially from the "element-for-element" approach used by other circuits. This Comment argues that circuit courts' approaches to the intangible injury analysis fall along a spectrum rather than the strict binary suggested by the* Barclift *court. An approach like the Third Circuit's "kind-of-harm" is preferable because it respects Congress's authority to recognize contemporary and evolving harms and allows plaintiffs with modern, intangible harms to vindicate their rights. This Comment concludes that, to resolve this circuit split, the Supreme Court should adopt the following modified test for evaluating intangible harms: (i) courts should take the plaintiff's given comparator tort and identify the harm it seeks to protect from, then (ii) compare the facts pled by the plaintiff with the tort's harm to see if they are similar in kind. If the harm resembles that of the comparator tort, the cause of action that the plaintiff relies on supports standing. This test allows federal courts to keep pace with the modern world and redress injuries that may not cause tangible harm in the traditional sense, but that Congress has nonetheless recognized as harmful to the public by providing a right of action.*

CONTENTS

---

* J.D. Candidate, 2027, Boston College Law School. Claire would like to thank Professor Andrea Olson for her thoughtful advice. Many thanks to the *Columbia Journal of Law & Social Problems* staff for their feedback and editorial work.

INTRODUCTION

Amid growing public concern about protecting electronic data,[1] Congress created various statutory causes of action that allow private individuals to enforce their privacy rights in the digital age.[2] As technology advances, courts are an important forum for addressing data privacy breaches.[3] Plaintiffs nevertheless face a formidable barrier to protecting their privacy: getting a federal court to hear their claim.[4] Article III of the Constitution restricts federal courts' jurisdiction to "[c]ases" and "[c]ontroversies."[5] The standing doctrine effectuates this mandate and requires plaintiffs to demonstrate that they have suffered a sufficient injury to maintain a suit in court.[6] Thus, a plaintiff must show that (i) they suffered a concrete injury, (ii) the defendant's conduct caused that injury, and (iii) a court could redress the injury.[7] To satisfy the

1. *See* Colleen McClain et al., *How Americans View Data Privacy*, PEW RSCH. CTR. (Oct. 18, 2023), https://pewrsr.ch/3FoB5QI [https://perma.cc/38K4-UY8U].

2. *See* Christopher Muhawe & Masooda Bashir, *Privacy as Pretense: Empirically Mapping the Gap Between Legislative & Judicial Protections of Privacy*, 2023 U. ILL. J.L. TECH. & POL'Y 257, 263 n.28. These laws include the Fair Debt Collection Practices Act (15 U.S.C. § 1692k), the Cable Communications Policy Act (47 U.S.C. § 551(f)), the Fair Credit Reporting Act (15 U.S.C. § 1681n, o), and the Video Privacy Protection Act (18 U.S.C. § 2710(c)).

3. *See* Muhawe & Bashir, *supra* note 2, at 278 (describing the importance of characterizing the harm that results from a privacy breach in a way that allows courts to hear cases).

4. *See id.* at 280 (revealing that the majority of data privacy suits between 2000 and 2020 failed to achieve standing).

5. U.S. CONST. art. III, §§ 1–2; *see* Barclift v. Keystone Credit Servs., 93 F.4th 136, 149 (3d Cir. 2024) (Matey, J., dissenting), *cert. denied*, 145 S. Ct. 169 (2024).

6. *See* TransUnion v. Ramirez, 594 U.S. 413, 423 (2021) (citing *Raines v. Byrd*, 521 U.S. 811, 819–20 (1997)); *see, e.g.*, Muhawe & Bashir, *supra* note 2, at 260–61.

7. *See* Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–61 (1992) (laying out the three-part test requiring concreteness, causal connection, and possibility for redress). Standing

first prong, a plaintiff must show that their injury is similar to harms historically protected by courts, typically by analogizing to a common law tort.[8] This concreteness requirement poses a challenge for plaintiffs who suffer intangible harms, such as the anxiety and embarrassment associated with a privacy violation.[9] Consequently, this hurdle has prevented over half of all data privacy protection cases from being heard in recent decades.[10]

Consider the following hypothetical to illustrate how the current standing doctrine poses a particular challenge for plaintiffs seeking privacy protection. Imagine a medical provider shares a patient's personal information with a third-party mailing vendor or another ministerial agency without the patient's consent.[11] Then imagine that this third-party mailing vendor lacks strong safeguards for personal data.[12] A cybersecurity breach compromises the patient's data.[13] The patient then receives a call from someone posing as a Medicare representative who has the patient's date of birth and insurance information.[14] If the patient sought legal recourse in federal district court, precedent suggests the patient would lack standing due to insufficient concrete harm.[15] This is despite statutes like the Fair Debt Collection Practices Act ("FDCPA") establishing that Congress intended to

---

is defined as "[a] party's right to make a legal claim or seek judicial enforcement of a duty or right based on the party's having a sufficient interest in a justiciable controversy." *Standing*, BLACK'S LAW DICTIONARY (12th ed. 2024).

8. *See TransUnion*, 594 U.S. at 424–25.

9. *See* Muhawe & Bashir, *supra* note 2 at 267.

10. *See id.* at 280 (explaining how almost 60% of standing cases were dismissed when trying to establish a concrete injury from 2000 to 2020). Defendants raise a standing defense more often when the plaintiff's claims involve identity theft or fraud. *Id.* at 281.

11. *See* Barclift v. Keystone Credit Servs., 93 F.4th 136, 140, 148 (3d Cir. 2024) (holding that although sharing data with a third-party mailing vendor is a breach of the Fair Debt Collection Practices Act, the plaintiff could not show a concrete harm to support standing in federal court), *cert. denied*, 145 S. Ct. 169 (2024).

12. *See* Complaint at 22, Williams v. Bienville Orthopaedic Specialists, No. 1:23-cv-00232 (S.D. Miss. Sept. 12, 2023) (describing how a breach of cybersecurity can violate both the Federal Trade Commission Act and HIPPA regulations).

13. *See* Williams v. Bienville Orthopaedic Specialists, 737 F. Supp. 3d 411, 416 (S.D. Miss. 2024) (describing the facts of a case where plaintiffs' personal information was hacked from an orthopedic office), *appeal dismissed sub nom.*, 2024 WL 5330715 (5th Cir. Sept. 6, 2024).

14. *See Williams*, 737 F. Supp. 3d at 421 (recounting the experience of one of the plaintiffs). The plaintiff in *Williams* then took measures to protect his data, such as getting a new Medicare number. *Id.*

15. *See Barclift*, 93 F.4th at 148 (holding that a plaintiff whose personal information was shared with a third-party mailing vendor alone does not confer standing); *Williams*, 737 F. Supp. 3d at 421 (holding that a plaintiff whose personal information was obtained in a data breach by a caller pretending to be a Medicare representative did not have standing).

allow plaintiffs to sue for unauthorized disclosure of information to third parties.[16]

This Comment explores how courts' current application of the standing doctrine's concrete injury prong has unduly restricted plaintiffs' access to federal courts, and proposes a solution.[17] Part I provides background on the standing doctrine, explains how different courts of appeals analyze intangible injuries, and introduces the 2024 Third Circuit case, *Barclift v. Keystone Credit Services*, to illustrate one such method of analysis.[18] Part II discusses *Barclift*'s articulation of the circuit split regarding this issue, dividing the Seventh, Tenth, and Eleventh Circuits into two camps.[19] Those that take an element-for-element approach require a match between each element of a traditional tort and the harm suffered by the plaintiff.[20] Those that take a kind-of-harm approach compare the plaintiff's harm to the more general harm that the traditional tort sought to protect from.[21] Finally, Part III describes the courts' approaches as a spectrum, weighs the competing values these approaches promote in practice, and advocates for an operational test—resembling the kind-of-harm approach—that may better allow plaintiffs to access federal courts when they have been harmed.[22]

---

16. *See* 15 U.S.C. § 1692c(b) (providing a short exhaustive list of persons with whom the debt collector may communicate without first obtaining the debtor's consent). The FDCPA provides background on the legislative intent behind the act. 15 U.S.C. § 1692. The section on "Congressional findings and declaration of purpose" provides evidence that abusive and unfair debt collection practices have led to "personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy." *Id.* The FDCPA, enacted in 1977, responded to growing concerns about abusive practices by debt collectors. NAT'L CONSUMER L. CTR., FAIR DEBT COLLECTION ch. 1, (10th ed. 2022), https://library.nclc.org/book/fair-debt-collection [https://perma.cc/7G39-VWQL]. Before then, about forty percent of Americans lived in states that lacked adequate protections for consumers against predatory debt collection practices. *Id.* The government's enforcement actions were primarily through the Federal Trade Commission in the decades leading up to the FDCPA. *Id.* Thus, the FDCPA provided a new form of uniform protection for all states. *See id.*

17. *See infra* Parts I–III.

18. *See infra* Parts I.A–C.

19. *See infra* Part II.

20. *See* Hunstein v. Preferred Collection & Mgmt. Servs., 48 F.4th 1236, 1245 (11th Cir. 2022) (en banc) (discussing how the plaintiffs failed to plead sufficient facts to support standing because the publicity element from the tort of public disclosure was not met).

21. *See* Barclift v. Keystone Credit Servs., 93 F.4th 136, 144 (3d Cir. 2024) (explaining how under the kind-of-harm test, courts look to see if the plaintiff's harm is similar to the traditional tort, but not *how* similar), *cert. denied*, 145 S. Ct. 169 (2024).

22. *See infra* notes 124–151 and accompanying text.

I. THE LEGAL, FACTUAL, AND PROCEDURAL BACKGROUND OF *BARCLIFT*

In 2024, in *Barclift v. Keystone Credit Services*, the Third Circuit applied a kind-of-harm approach to determine whether an alleged intangible injury asserted under a statutory cause of action was concrete.[23] Section A of this Part discusses the history of Article III standing and its elements. Section B examines the historical application of the concrete injury standard. Section C then outlines the factual and procedural background of *Barclift*.

A. BACKGROUND OF ARTICLE III STANDING

Article III of the Constitution authorizes courts to resolve "[c]ases" and "[c]ontroversies" under federal law.[24] This language confers judicial authority to hear cases and sets requirements that plaintiffs must satisfy to access federal courts.[25] Historically, courts have understood Article III to permit Congress to create causes of action by statute without requiring plaintiffs to show any harm beyond a violation of the statutory right itself.[26]

---

23. *Barclift*, 93 F.4th at 144–45 (adopting the Tenth Circuit's approach in Shields v. Pro. Bureau of Collections of Md., 55 F.4th 823, 828 (10th Cir. 2022), where the plaintiff did not have to prove each element of the comparator tort of public disclosure of private facts).

24. *See* Barclift v. Keystone Credit Servs., 93 F.4th 136, 149 (3d Cir. 2024) (Matey, J., dissenting), *cert. denied*, 145 S. Ct. 169 (2024); *see also* TransUnion v. Ramirez, 594 U.S. 413, 423 (2021); Spokeo v. Robins, 578 U.S. 330, 337 (2016) (quoting Raines v. Byrd, 521 U.S. 811, 818 (1997)).

25. *See* Erwin Chemerinsky, *What's Standing After* TransUnion v. Ramirez, 96 N.Y.U. L. REV. ONLINE 269, 272–73 (2021).

26. *See Barclift*, 93 F.4th at 152 (Matey, J., dissenting); Chemerinsky, *supra* note 25, at 269–70. One limitation to this broad jurisdictional power arose when plaintiffs sought to enforce public rights in their own private capacity. *See Barclift*, 93 F.4th at 152 (Matey, J., dissenting) (explaining how the concrete injury requirement came from plaintiffs attempting to vindicate rights on behalf of the public); *see also* Lujan v. Defs. of Wildlife, 504 U.S. 555, 575–76 (1992) (emphasizing the need for the concrete injury rule to maintain a separation of powers). Fearing a dilution of the separation of powers, courts wanted to keep the role of protecting the public interest within the Executive branch. *See id.* at 576–77 (asserting that the right to vindicate a public right rests with the President). Courts reason that private plaintiffs are not accountable to the public, making them inappropriate enforcers of public rights. *See TransUnion*, 594 U.S. at 429 (pointing to the lack of accountability for private plaintiffs compared to the Executive). To address this concern, courts developed the standing doctrine. *See Barclift*, 93 F.4th at 152 (Matey, J., dissenting) (discussing how the doctrine of standing has indirectly limited Congressional power to create causes of action by rendering them unenforceable); *see also* Summers v. Earth Island Inst., 555 U.S. 488, 494–95 (2009) (denying plaintiffs standing to sue the U.S. Forest Service for their procedural process because they did not plead facts showing direct harm to them due to the actions of the Forest Service); *Lujan*, 504 U.S. at 559, 578 (denying environmental

Today, the standing doctrine enforces Article III's limits on federal jurisdiction and helps preserve the separation of powers by ensuring that suits seeking to vindicate generalized public harms are ordinarily brought by the Executive, not private parties.[27] The doctrine thus performs an important structural function: because the President is politically accountable, while private plaintiffs are not, standing requirements help channel broad policy enforcement into the politically accountable branches.[28] In 1992, in *Lujan v. Defenders of Wildlife*, the Supreme Court articulated the modern three-part test for standing: (i) the plaintiff must have suffered a concrete and particularized "injury in fact," (ii) there must be a causal connection between the plaintiff's injury and the defendant's conduct, and (iii) a court's decision in the plaintiff's favor must be likely to redress the injury.[29]

While Article III empowers courts to handle many disputes, the standing doctrine substantially limits plaintiffs' ability to pursue certain legal claims in federal court.[30] The facts in each complaint must reveal that the plaintiff has a direct, personal interest in the claims at issue.[31] It also prevents uninterested parties from using judicial resources to litigate cases in which they have no personal stake.[32] The Supreme Court asserts that the Executive is the appropriate actor to step in and vindicate rights when there is no clear plaintiff who has been concretely harmed.[33]

B. HISTORICAL APPLICATION OF THE CONCRETE INJURY STANDARD

Since *Lujan*, courts have continued to grapple with the first prong of the standing test: the amorphous "concrete injury"

---

organizations the ability to enforce a procedural regulation under the grant of a private civil cause of action).

27. *See TransUnion*, 594 U.S. at 423, 428–29; *see also Spokeo*, 578 U.S. at 337–38.

28. *See TransUnion*, 594 U.S. at 429.

29. 504 U.S. at 560–61 (laying out the three-part test for standing).

30. *See Access to Justice*, BLACK'S LAW DICTIONARY (12th ed. 2024); Chemerinsky, *supra* note 25 at 272–73.

31. *See* TransUnion v. Ramirez, 594 U.S. 413, 423 (2021) (citing Raines v. Byrd, 521 U.S. 811, 819–20 (1997)).

32. *See id.* at 429.

33. *See* Lujan v. Defs. of Wildlife, 504 U.S. 555, 575–76 (1992); Barclift v. Keystone Credit Servs., 93 F.4th 136, 152 (3d Cir. 2024) (Matey, J., dissenting), *cert. denied*, 145 S. Ct. 169 (2024).

standard.[34] For plaintiffs with tangible monetary damages or physical injuries, the "concrete" nature of their harm is clear, and their cases typically proceed.[35] But when plaintiffs assert intangible harms for a violation of a statutory right, courts have maintained that such harms must be proven to be "real" to be concrete.[36] In such cases, the Supreme Court directs trial courts to analogize a plaintiff's alleged harm to one traditionally recognized at common law to determine whether an intangible injury is nonetheless concrete.[37]

The Supreme Court eventually expanded on *Lujan*'s doctrine and provided further guidance for evaluating whether an intangible injury is concrete.[38] In 2021, in *TransUnion v. Ramirez*, the Supreme Court limited a plaintiff's ability to sue under a private cause of action for the first time because the alleged injury strayed too far from traditional harms.[39] There, a credit reporting agency labeled certain individuals' credit files in a way that suggested they posed a threat to national security.[40] This label was misleading for at least 8,185 individuals who shared names with people on a threat list, but were not actually listed or implicated.[41] When the claim was filed, the credit reporting agency

---

34. *See* 504 U.S. at 560; *TransUnion*, 594 U.S. at 429 (acknowledging that the concrete harm requirement can sometimes be difficult for courts to apply). The first prong of the standing test also requires that an injury be particularized. *See Lujan*, 504 U.S. at 560. A particularized injury is one that impacts the plaintiff as an individual. *See* Spokeo v. Robins, 578 U.S. 330, 339 (2016).

35. *See TransUnion*, 594 U.S. at 425; *Spokeo*, 578 U.S. at 340.

36. *See TransUnion*, 594 U.S. at 424–25.

37. *See Spokeo*, 578 U.S. at 340–41.

38. *See* TransUnion v. Ramirez, 594 U.S. 413, 433–34 (2021); *see also Lujan*, 504 U.S. at 560–61 (laying out the three-part test requiring concreteness, causal connection, and possibility for redress).

39. *See* 594 U.S. at 417, 426–27 (rejecting the notion that a Congressional cause of action conveys standing by itself, requiring concreteness, and finding no concrete harm for a subclass of plaintiffs); *id.* at 453–54 (Thomas, J., dissenting) (noting that the majority's holding was inaugural).

40. *Id.* at 417, 419–20 (majority opinion). The plaintiff argued that this label created a significant risk of concrete harm that the court should recognize in its standing analysis. Brief for Respondent at 16, TransUnion v. Ramirez, 594 U.S. 413 (2021) (No. 20-297).

41. *TransUnion*, 594 U.S. at 417, 419–20. A 2024 study found that over a quarter of volunteers found serious mistakes in their credit reports that could have impacted their creditworthiness. Lisa L. Gill, *More Than a Quarter of People Find Serious Mistakes in Their Credit Reports, Study Shows*, CONSUMER REPS. (Apr. 30, 2024) https://www.consumerreports.org/money/credit-scores-reports/serious-mistakes-found-in-credit-reports-a1061511185/ [https://perma.cc/4WYN-RKM5]. When there is an error, people must dispute it with the credit reporting agency to avoid future harm when applying for loans, apartments, jobs, or insurance. *See id.* (explaining the dispute process and highlighting the potential harms of false information on credit reports).

had distributed 1,853 of the 8,185 misleading reports to third-party businesses.[42] The Court found standing under the statutory procedural obligations of accuracy for credit reporting agencies for those individuals whose reports the agency distributed to third parties.[43] But it declined to find standing for the other 6,332 individuals whose reports were not distributed.[44] The Court reasoned that the analogous tort of defamation requires publication—distribution to at least one third party—to cause the type of harm the tort seeks to protect from.[45] Thus, the Court limited Congress's ability to create a private cause of action under the Fair Credit Reporting Act by preventing the intended plaintiffs from getting their day in court.[46] The Court rejected the assumption that a statutory violation alone automatically confers standing in the absence of a concrete harm.[47]

---

42. *TransUnion*, 594 U.S. at 417.

43. *Id.* Under the Fair Credit Reporting Act, credit reporting agencies have a duty to ensure the "maximum possible accuracy" of their reports and to take all reasonable measures to ensure this accuracy. 15 U.S.C. § 1681e(b).

44. TransUnion v. Ramirez, 594 U.S. 413, 417 (2021).

45. *See TransUnion*, 594 U.S. at 434 (explaining how publication has always been necessary to prove defamation at common law). The plaintiffs who did not plead distribution to a third party argued that the *risk* that their misleading credit reports could be disseminated and harm them was sufficient to support a concrete injury. *Id.* at 438–39. The Court, however, agreed with Judge McKeown's dissent from the lower court opinion that the plaintiffs failed to show a sufficient likelihood that dissemination of their reports would occur to support standing. *Id.* at 437–38 (citing Ramirez v. TransUnion, 951 F.3d 1008, 1040 (3d Cir. 2020) (McKeown, J., dissenting)).

46. 15 U.S.C. § 1681e(b); *TransUnion*, 594 U.S. at 419, 426–27 (quoting Hagy v. Demers & Adams, 882 F.3d 616, 622 (6th Cir. 2018) (internal citation omitted)); *see* Hunstein v. Preferred Collection & Mgmt. Servs., 48 F.4th 1236, 1250 (11th Cir. 2022) (en banc) (praising the concrete injury standard for ensuring that plaintiffs suffered an actual harm to access federal courts beyond pleading under a cause of action).

47. *See* Barclift v. Keystone Credit Servs., 93 F.4th 136, 154 (3d Cir. 2024) (Matey, J., dissenting) (noting that in TransUnion, the Supreme Court required that a plaintiff pleading under a cause of action nonetheless prove a concrete injury) (internal citations omitted), *cert. denied*, 145 S. Ct. 169 (2024). Five years before TransUnion in 2016, in *Spokeo v. Robins*, the Supreme Court vacated the appeals court's opinion because it failed to assess concrete injury correctly, asserting that a plaintiff does not automatically pass the concrete injury requirement when Congress has enacted a private cause of action. Spokeo v. Robins, 578 U.S. 330, 341–43 (2016). The Supreme Court remanded the case for the district court to properly assess the concrete injury requirement but did not rule as to whether the plaintiff had standing. *Id.* at 342–43. Thus, TransUnion was the first case to enforce this limit. 594 U.S. at 453–54 (Thomas, J., dissenting). This limiting of standing to harms that have been traditionally recognized has wide ranging implications. *See* Chemerinsky, *supra* note 25 at 270 (pointing to federal causes of action that have historically been enough to support standing on their own).

Since *TransUnion*, circuit courts have struggled to apply the Court's guidance on the intangible harms analysis.[48] *TransUnion* directs that the alleged intangible harm need not be an exact duplicate of a common law tort, but courts must find some measure of closeness or similarity to those traditionally recognized harms.[49] The goal is to avoid over-broadening the types of harms on which claims can be based.[50] Beginning with an analogous common law tort, some courts compare each element of the tort to the plaintiff's injury, while others compare the kind of harm that the tort was designed to protect from with the harm alleged by the plaintiff.[51] But scholars warn that many existing statutory causes of action may not have a common law analogue, including private rights of action established by the Freedom of Information Act, the Fair Labor Standards Act, the Family Medical Leave Act, the Fair Housing Act, and the Civil Rights Act of 1964.[52] Ignoring plaintiffs who suffer intangible harms due to breaches of these pivotal rights-creating statutes would significantly reduce their

---

48. *Compare* Barclift v. Keystone Credit Servs., 93 F.4th 136, 144–45 (3d Cir. 2024) (using a kind-of-harm approach), *cert. denied*, 145 S. Ct. 169 (2024), *and* Shields v. Pro. Bureau of Collections of Md., 55 F.4th 823, 829 (10th Cir. 2022) (using a kind-of-harm approach), *with* Nabozny v. Optio Sols., 84 F.4th 731, 735–36 (7th Cir. 2023) (using an element-for-element approach), *and Hunstein*, 48 F.4th at 1242, 1248 (using an element-for-element approach). *See also* Lauren Pezzi, *Struggling to Stay Standing: Circuit Courts' Varying Approaches to Civil Rights Testers and Article III Standing Requirements*, 66 B.C. L. REV. 2019, 2029 (2025) (explaining the circuit split for finding standing for plaintiffs who tested civil rights laws).

49. *See* TransUnion v. Ramirez, 594 U.S. 413, 424–25, 433 (2021) (reiterating *Spokeo*'s direction that exact duplicates are not required).

50. *See Spokeo*, 578 U.S. at 341 (emphasizing the importance of a historical grounding for intangible harms). In TransUnion, the Court decided that a misleading statement caused harm that was sufficiently close to the traditional harm of a false and defamatory statement. 594 U.S. at 433. There, the lead plaintiff had his credit report mislabeled, marking him as a potential terrorist. *Id.* at 420. The defendant tried to claim that this label was not literally false because of the word "potential," and was therefore not close enough to the common law tort but was unsuccessful. *Id.* at 433.

51. *See Barclift*, 93 F.4th at 143–44 (explaining how some courts use the element-based approach, and some use the "kind-of-harm" approach).

52. *See* Chemerinsky, *supra* note 25 at 270, 283 (pointing to federal causes of action that have historically been enough to support standing on their own). For example, the First Circuit determined that a plaintiff who tested a hotel's compliance with the Americans with Disabilities Act had a concrete injury when the plaintiff had a disability and suffered frustration and embarrassment as a result of the discrimination. *See* Laufer v. Acheson Hotels, 50 F.4th 259, 264–65, 274 (1st Cir. 2022), *vacated and remanded*, 601 U.S. 1 (2023). The Supreme Court granted certiorari to address a circuit split on the issue of whether a discrimination tester with no plans to stay at the hotel had a concrete injury under the standing doctrine. *See* Acheson Hotels v. Laufer, 601 U.S. 1, 3 (2023). The Court dismissed the suit as moot before deciding the standing issue because Laufer had voluntarily dismissed the suit. *Id.* at 4–5.

enforcement power and potentially lead to a reduction in compliance from private entities.[53]

C. FACTUAL AND PROCEDURAL HISTORY OF *BARCLIFT*

In October 2020, mailing vendor RevSpring sent Paulette Barclift notice that a debt collection agency, Keystone Credit Services ("Keystone"), acquired her delinquent debt.[54] But Barclift had never consented to Keystone sharing her personal information with RevSpring.[55] The FDCPA forbids this exact kind of unauthorized information sharing with third parties.[56] The FDCPA also provides a private cause of action for plaintiffs to sue for violations of this mandate.[57]

Barclift filed a complaint in federal district court to enforce the FDCPA on behalf of herself and other individuals whose information was similarly impermissibly shared by Keystone.[58] At the time, the third-party mailing vendor, RevSpring, was owned by a private equity firm.[59] Barclift alleged that RevSpring and its employees had access to the plaintiffs' names, addresses, and details of their debts.[60] For her, this included information about the nature of the medical care she received that led to the accrual of her debt.[61] The district court dismissed her complaint after concluding that she failed to allege facts sufficient to establish standing under Article III.[62] On appeal, the Third Circuit

53. *See* Chemerinsky, *supra* note 25 at 283–84 (explaining how statutes that create rights to interracial association and freedom from discrimination in public accommodations rely on private plaintiffs for enforcement, and how it is unclear that the private rights of action under these statutes could survive a concrete harm analysis under *TransUnion*).

54. Barclift v. Keystone Credit Servs., 93 F.4th 136, 140 (3d Cir. 2024), *cert. denied*, 145 S. Ct. 169 (2024); Barclift v. Keystone Credit Servs., 585 F. Supp. 3d 748, 751 (E.D. Pa. 2022), *aff'd*, 93 F.4th 136 (3d Cir. 2024), *cert. denied*, 145 S. Ct. 169 (2024).

55. *Barclift*, 93 F.4th at 140.

56. *See* 15 U.S.C. § 1692c(b) (providing a short exhaustive list of persons with whom the debt collector may communicate without first obtaining the debtor's consent).

57. *See* 15 U.S.C. § 1692k; *Barclift*, 93 F.4th at 141.

58. *Barclift*, 93 F.4th at 140.

59. *See* Complaint at 6, Barclift v. Keystone Credit Servs., 585 F. Supp. 3d 748, 751 (E.D. Pa. 2022) (5:21-cv-04335).

60. *Id.*

61. *Id.*

62. Barclift v. Keystone Credit Servs., 585 F. Supp. 3d 748, 760 (E.D. Pa. 2022), *aff'd*, 93 F.4th 136 (3d Cir. 2024), *cert. denied*, 145 S. Ct. 169 (2024). After the first dismissal without prejudice, Barclift filed an amended complaint including allegations about RevSpring's data practices and how the company stored the information it received from Keystone. It also alleged that RevSpring employees had access to individuals' debt and personal information. *Id.* The district court dismissed her amended complaint for lack of

affirmed, holding that Barclift's alleged injury was too speculative and not concrete under a kind-of-harm approach.[63]

II. The Approaches to Assessing Intangible Injuries

Following *TransUnion LLC v. Ramirez*, a circuit split arose as courts tried to apply its standards, leading to varying assessments of plaintiffs' intangible injuries for Article III standing purposes.[64] In 2024, in *Barclift v. Keystone Credit Services*, the Third Circuit aimed to address these discrepancies by examining factually similar cases involving third-party mailing vendors' disclosures and the circuit split on their resolution.[65] It ultimately aligned itself with the Tenth Circuit, signaling a preference for a "kind-of-harm" approach rather than the element-for-element framework.[66] Despite differences in reasoning, all courts ultimately denied the plaintiff standing.[67]

Despite the Third Circuit's deep analysis of the different approaches in *Barclift*, its conclusion does not completely resolve the underlying tension in the modern application of the doctrine. Indeed, in his *Barclift* dissent, Judge Matey argued that even the majority's application of the intangible injury analysis is too

---

standing once again, this time with prejudice. *Id.* This was the second time that the district court dismissed Barclift's complaint. Barclift v. Keystone Credit Servs., 2022 WL 1102122, at *1 (E.D. Pa. Apr. 13, 2022), *aff'd as modified*, 93 F.4th at 136 (3d Cir. 2024), *cert. denied*, 145 S. Ct. 169 (2024), *cert. denied*, No. 23-1327 (U.S. Oct. 7, 2024).

63. *Barclift*, 93 F.4th at 140, 144–45 (acknowledging the court's deviation from approaches used by sister circuits). The Third Circuit modified the district court ruling as to prejudice. *Id.* at 148. It asserted that it was improper to dismiss Barclift's complaint with prejudice because of a lack of standing. *Id.* (citing Cottrell v. Alcon Lab'ys, 874 F.3d 154, 164 n.7 (3d Cir. 2017)). It then affirmed the order as modified. *Id.*

64. 594 U.S. 413, 424 (2021); Barclift v. Keystone Credit Servs., 93 F.4th 136, 148 (3d Cir. 2024), *cert. denied*, 145 S. Ct. 169 (2024); Nabozny v. Optio Sols., 84 F.4th 731, 738 (7th Cir. 2023); Shields v. Pro. Bureau of Collections of Md., 55 F.4th 823, 828 (10th Cir. 2022); Hunstein v. Preferred Collection & Mgmt. Servs., 48 F.4th 1236, 1250 (11th Cir. 2022) (en banc).

65. *See TransUnion*, 594 U.S. at 424 (explaining the comparator tort analysis); *Barclift*, 93 F.4th at 144–45 (explaining how some courts use the element-for-element approach by comparing each element of a common law tort to the plaintiff's cause of action, and some use the kind-of-harm approach by comparing the sort of harm that the statute was designed to protect from, and electing the kind-of-harm approach as the approach more consistent with *TransUnion*). The *Barclift* court noted that some courts compare each element of a common law tort to the plaintiff's cause of action, and some compare the sort of harm that the statute was designed to protect from. *See id.*

66. *See Barclift*, 93 F.4th at 143–45.

67. *Barclift*, 93 F.4th at 148; *Nabozny*, 84 F.4th at 738; *Shields*, 55 F.4th at 828; *Hunstein*, 48 F.4th at 1250.

strict.[68] Section A of this Part examines the reasoning behind the element-for-element approach.[69] Section B discusses the logic of the Tenth and Third Circuits' kind-of-harm approach.[70] Section C then summarizes Judge Matey's argument for why the application of the kind-of-harm approach is still too strict.[71]

A. THE "ELEMENT-FOR-ELEMENT" APPROACH

The element-for-element approach asks the court to take a plaintiff's identified traditional tort and examine each element individually.[72] The court must find that every element of the tort is satisfied by the plaintiff's allegations in the pleadings.[73] In 2022, in *Hunstein v. Preferred Collection & Management Services*, the Eleventh Circuit used *TransUnion*'s guidance to create an approach to evaluating intangible injuries that compares the statutory cause of action with each element of a comparable common law tort.[74] In *Hunstein*, a debt collection agency shared the plaintiff's personal information with a contractor mailing vendor.[75] The plaintiff pointed to the harms caused by the traditional tort of disclosure to the public as a comparator for his harm.[76] The cited tort, sometimes called "public disclosure of private facts," contains four main elements: (i) publicity (ii) of "a matter concerning the private life" (iii) of another person, (iv) if the matter is "highly offensive to a reasonable person" and "is not of legitimate concern to the public."[77] The Restatement defines "publicity" as information being communicated "to the public at large."[78]

---

68. *See Barclift*, 93 F.4th at 158 (Matey, J., dissenting) (arguing that the majority applies a higher standard than is necessary).

69. *See infra* notes 102–91 and accompanying text.

70. *See infra* notes 92–101 and accompanying text.

71. *See infra* notes 102–118 and accompanying text.

72. *See* Barclift v. Keystone Credit Servs., 93 F.4th 136, 143 (3d Cir. 2024) (explaining how the *Hunstein* court looked to the plaintiff's complaint and could not find a match for the publicity element), *cert. denied*, 145 S. Ct. 169 (2024).

73. *See* Hunstein v. Preferred Collection & Mgmt. Servs., 48 F.4th 1236, 1245 (11th Cir. 2022) (en banc) (discussing how the plaintiffs failed to plead sufficient facts to support standing because the publicity element from the tort of public disclosure was not met).

74. *See Hunstein*, 48 F.4th at 1243–44.

75. *See id.* at 1240.

76. *See id.* at 1242.

77. *See* RESTATEMENT (SECOND) OF TORTS § 652D (A.L.I. 1977).

78. *See id.*

The Eleventh Circuit initially agreed that the plaintiff had shown concrete injury.[79] But upon rehearing, the court en banc reversed, finding that he failed to allege facts sufficient to support the publicity element because his information was disclosed only to a ministerial entity—the mailing vendor—and not to the broader public.[80] The Eleventh Circuit's strict application of the intangible injury test requires a plaintiff to plead facts sufficient to establish all essential elements for liability under the comparator tort.[81] In his dissent, Judge Newsom points out that the majority's approach is logically inconsistent because it requires plaintiffs to plead every element, precisely the same standard that *TransUnion* rejected.[82]

In 2023, a year after *Hunstein*, the Seventh Circuit addressed a similar mailing vendor case in *Nabozny v. Optio Solutions*.[83] Although the court did not explicitly adopt an element-for-element approach, it deferred to the Eleventh Circuit's analysis in *Hunstein*.[84] It relied on a comparison to the same public disclosure tort that requires *public* knowledge of the plaintiff's private

---

79. *See* Hunstein v. Preferred Collection & Mgmt. Servs., 48 F.4th 1236, 1241 (11th Cir. 2022) (en banc) (describing the procedural history). Soon after the first ruling, the Supreme Court released its opinion in TransUnion, and the Eleventh Circuit issued a new opinion, but with the same ruling. *Id.* The Eleventh Circuit then agreed to hear the case again en banc. *Id.*

80. *Hunstein*, 48 F.4th at 1242.

81. *See id.* at 1244 (pointing to *TransUnion* as instructing courts that when a plaintiff's injury cannot meet an "essential" element from an analogous tort, the plaintiff's injury is not close enough to that tort). An "element" is "[a] constituent part of a claim that must be proved for the claim to succeed." *Element*, BLACK'S LAW DICTIONARY (12th ed. 2024). As the court understood it, the difference in outcomes for the two subsets of plaintiffs in *TransUnion* turned on the presence or absence of the element of publication that was essential to the comparator tort of defamation. *See Hunstein*, 48 F.4th at 1248 (explaining that facts could have been present in this case to support standing if the element of publicity was met).

82. *See* TransUnion v. Ramirez, 594 U.S. 413, 424, 433 (2021); *Hunstein*, 48 F.4th at 1261 (Newsom, J., dissenting).

83. *See* Nabozny v. Optio Sols., 84 F.4th 731, 732 (7th Cir. 2023); *Hunstein*, 48 F.4th at 1240. In *Nabozny*, the defendant debt collector used the same mailing vendor as the defendant in *Barclift*, RevSpring; *see* Barclift v. Keystone Credit Servs., 93 F.4th 136, 140 (3d Cir. 2024), *cert. denied*, 145 S. Ct. 169 (2024); *Nabozny*, 84 F.4th at 732. The defendant sent the plaintiff a letter about her outstanding credit card debt including her name, address, balance amount, and account number. *Id.* at 733. The letter was prepared by a third-party mailing vendor. *Id.* at 732. The plaintiff included a putative class in her complaint: every borrower from the defendant that received a similar letter prepared by RevSpring. *Id.*

84. *See Nabozny*, 84 F.4th at 735; *Hunstein*, 48 F.4th at 1242 (discussing how the plaintiffs failed to plead sufficient facts to support standing because the publicity element from the tort of public disclosure was not met).

information to fulfill the publicity element.[85] The court declined to find a concrete injury because the plaintiff did not allege that any mailing vendor actually read the information disclosed by the defendant creditor.[86]

Both the Eleventh and Seventh Circuits acknowledged that the cause of action need not precisely duplicate the comparator tort, and instead compared the elements to identify similarities.[87] The *Hunstein* court pointed to *TransUnion*'s analysis to explain this flexibility.[88] In *TransUnion*, the Court explained that the tort of defamation required that the information disseminated be false.[89] The Court found that the statement that the plaintiffs *may* be on a national watchlist was misleading, but did not restrict the plaintiffs' standing based on this mismatch because the harm was similar enough.[90] Notably, neither the Eleventh Circuit nor the Seventh Circuit permits a similar mismatch between elements and harms in its analyses of intangible harm.[91]

B. THE "KIND-OF-HARM" APPROACH

The kind-of-harm approach asks the court to articulate the type of harm the plaintiff's identified tort seeks to protect from and to assess whether the harm the plaintiff suffered was similar in-

85. *See Nabozny*, 84 F.4th at 735 (suggesting the court will follow the Eleventh Circuit's analysis without repeating the reasoning). The Seventh Circuit also pointed to dicta in *TransUnion*, 594 U.S. at 424, about a forfeited claim concerning the internal disclosure of the misleading information to mailing vendors. *See Nabozny*, 84 F.4th at 738. The *TransUnion* Court said this kind of disclosure would not meet the publication requirement under the comparator tort. *See TransUnion*, 594 U.S. at 434 n.6 (stating that the forfeited claim about publication to mailing vendors would not have succeeded, because courts have not traditionally recognized disclosure intra-company or to printing vendors as actionable). Proving the element of publication in the tort of defamation is a lower threshold than the publicity element in the public disclosure tort to which the Seventh and Eleventh Circuits compared the allegations in *Nabozny* and *Hunstein*, respectively. *See Nabozny*, 84 F.4th at 738 (explaining that publication includes disclosure to just one person).

86. *See Nabozny*, 84 F.4th at 735–36, 738.

87. *See* Hunstein v. Preferred Collection & Mgmt. Servs., 48 F.4th 1236, 1242 (11th Cir. 2022) (en banc); *Nabozny*, 84 F.4th at 735 (quoting *TransUnion*, 594 U.S. at 424)).

88. *See Hunstein*, 48 F.4th at 1244.

89. *See* TransUnion v. Ramirez, 594 U.S. 413, 433 (2021) (holding that the false information element of defamation did not have to be met exactly if the kind of harm was the same from the misleading information in the credit reports).

90. *See id.*

91. *See Hunstein*, 48 F.4th at 1244; Nabozny v. Optio Sols., 84 F.4th 731, 735–36, 738 (7th Cir. 2023).

kind.[92] In 2022, in *Shields v. Professional Bureau of Collections of Maryland*, the Tenth Circuit concluded that the plaintiff did not have standing because her injury stemming from disclosure of her debt to a mailing vendor did not resemble the harm from the common law tort of public disclosure.[93] The Tenth Circuit did not articulate the steps of its analysis, but referenced *Hunstein*'s reasoning regarding the element of publicity.[94] The Tenth Circuit was clear that a plaintiff need not plead each element of the traditional tort.[95] Instead, the court looked to the underlying nature of the injury and concluded that the harm alleged by the plaintiff—that a private entity knew of her debt—was not similar enough to the embarrassment of the public knowing about private information required by the public disclosure tort.[96]

Similar to the Tenth Circuit, the Third Circuit in *Barclift* compared the injury recognized by the FDCPA to the tort of public disclosure and the harm it seeks to address: the embarrassment of having sensitive information disclosed publicly.[97] Despite the plaintiff's alleged feelings of embarrassment and distress when the mailing vendor accessed her personal information,[98] the court affirmed the dismissal of the complaint for lack of a concrete injury because the plaintiff's harm did not have a close enough relation to the traditionally recognized harm.[99] Thus, because only a mailing vendor accessed her information, her embarrassment was not from *public* knowledge of sensitive personal information.[100] The *Barclift* court stated that *TransUnion* endorsed a kind-of-harm approach by emphasizing the overarching importance of finding a sufficiently close relationship between the harm protected by a cause of action and the harm caused by a comparator tort to establish a concrete injury.[101]

---

92. *See* Barclift v. Keystone Credit Servs., 93 F.4th 136, 144–45 (3d Cir. 2024) (explaining how under the kind-of-harm test, courts look to see if the plaintiff's harm is similar to the traditional tort, but not *how* similar), *cert. denied*, 145 S. Ct. 169 (2024).

93. *See* 55 F.4th 823, 829 (10th Cir. 2022) (examining the kind of harm suffered by the plaintiff rather than the elements of the public disclosure tort).

94. *See id.* at 828–29.

95. *See id.* at 829.

96. *See id.*

97. *See Barclift*, 93 F.4th at 145–46; RESTATEMENT (SECOND) OF TORTS § 652D (A.L.I. 1977) (giving the elements for the comparator tort of public disclosure).

98. Barclift v. Keystone Credit Servs., 93 F.4th 136, 145–46 (3d Cir. 2024), *cert. denied*, 145 S. Ct. 169 (2024).

99. *Id.* at 146.

100. *Id.* at 145–46, 148.

101. *See id.* at 145 (quoting *TransUnion*, 594 U.S. at 417).

C. JUDGE MATEY'S DISSENT: *BARCLIFT* IS STILL TOO STRICT

Building on the discourse about intangible injuries, Judge Matey concurred in part and dissented in the judgment in *Barclift*.[102] Although he agreed with the kind-of-harm approach, he disagreed with the majority's application.[103] Judge Matey critiqued the majority for placing emphasis on *TransUnion* dicta that opined that the plaintiffs' forfeited mailing-vendor claim would not have standing if they had pursued it in that case.[104] Instead, he points to the clear mandate in *TransUnion*: courts must consider Congressional intent to recognize a real harm when it enacts a cause of action.[105] This approach permits a looser fit between the traditional tort and the cause of action.[106] For Judge Matey, the traditional harm stems from sensitive information being shared with a third party without consent, rather than the public dissemination of information.[107] Thus, the embarrassment that the plaintiff pled in her complaint bears a close relationship to the harms recognized by the tort of public disclosure.[108] He also points to the *TransUnion* Court's willingness to more broadly construe the harm in the tort of defamation to include misleading information, rather than restricting it to outright false information, as a strict reading of the tort of defamation would require.[109] Ultimately, the *TransUnion* plaintiffs established standing by merely suggesting that the plaintiffs were on the

---

102. *Barclift*, 93 F.4th at 148.

103. *See id.* at 149.

104. *See* TransUnion v. Ramirez, 594 U.S. 413, 434 n.6 (2021) (comparing disclosure to mailing vendors with printing vendors, which courts have not historically recognized as a third party disclosure); Barclift v. Keystone Credit Servs., 93 F.4th 136, 149 (3d Cir. 2024) (Matey, J., dissenting) (noting that the majority treated the footnote as "talismanic"), *cert. denied*, 145 S. Ct. 169 (2024); *supra* note 85 (detailing the Seventh Circuit's reliance on the same dicta). Matey differentiates Barclift from the plaintiffs in TransUnion who did not plead facts in their complaint or show evidence at trial to support the claim that their credit reports were actually read by third parties. *Barclift*, 93 F.4th at 161. He says the assertion of lacking a concrete injury based on the lack of evidence offered does not prevent other plaintiffs from prevailing who succeed in showing that a third party genuinely saw their personal information. *Id.*

105. *See Barclift*, 93 F.4th at 156 (citing *TransUnion*, 594 U.S. at 426); *see also* Spokeo v. Robins, 578 U.S. 330, 340–41 (2016) (placing the same level of importance on Congress's judgment and historical precedent when analyzing an intangible injury).

106. *See Barclift*, 93 F.4th at 156 (citing *TransUnion*, 594 U.S. at 426) (explaining that Congressional intent must fit into the analysis).

107. *See Barclift*, 93 F.4th at 157 (citing Kamal v. J. Crew Grp., 918 F.3d 102, 114 (3d Cir. 2019)).

108. *See Barclift*, 93 F.4th at 148.

109. *See Barclift*, 93 F.4th at 160.

threat list.[110] This, he argues, keeps the focus on the reputational harm underlying both the plaintiffs' claims and the traditional tort.[111]

Likewise, Judge Newsom, in his dissenting opinion in *Hunstein*, emphasizes the need to only find a similar kind of harm, not to measure *how* similar the harm is to the comparator tort.[112] To support their opinions, Judge Matey and Judge Newsom both point to language in *TransUnion* clarifying that the harms need not be identical.[113]

In sum, the varied approaches taken by circuits evidence confusion about how to apply the intangible injury analysis.[114] Even the *Hunstein* majority, which applied the element-for-element test, acknowledged the difficulties plaintiffs face in stretching harms from modern causes of action to fit traditional torts.[115] This difficulty extends beyond mailing-vendor cases.[116] In a 2025 case involving a violation of the Video Privacy Act, the D.C. Circuit advocated comparing the type of harm to the common law tort rather than finding an exact match in the degree of harm.[117] Although the mailing vendor cases all end with a finding of no concrete harm, these courts' varied application of the intangible injury analysis reveals that the guidance from *TransUnion* must be clarified.[118]

---

110. *See* Barclift v. Keystone Credit Servs., 93 F.4th 136, 160 (3d Cir. 2024); TransUnion, 594 U.S. at 433 (holding that the false information defamation element did not have to be met exactly if the kind of harm was the same from the misleading information in the credit reports). False information is an element of defamation. RESTATEMENT (SECOND) OF TORTS § 558 (A.L.I. 1977). The Restatement gives the elements for defamation: to create liability for defamation, there must be an unprivileged publication of false and defamatory matter of another which (i) is actionable irrespective of special harm, or (ii) if inactionable, is the legal cause of special harm to the other. *Id.*

111. *See Barclift*, 93 F.4th at 160 (Matey, J., dissenting).

112. *See* Hunstein v. Preferred Collection & Mgmt. Servs., 48 F.4th 1248, 1264 (11th Cir. 2022) (en banc) (Newsom, J., dissenting).

113. *See Barclift*, 93 F.4th at 159 (citing to language from TransUnion, 594 U.S. at 141, directing courts away from searching for an "exact duplicate"); *Hunstein*, 48 F.4th at 1261 (Newsom, J., dissenting).

114. *See Barclift*, 93 F.4th at 144–45.

115. *See Hunstein*, 48 F.4th at 1241 (quoting Muransky v. Godiva Chocolatier, 979 F.3d 917, 931 (11th Cir. 2020) (en banc)).

116. *See* Pileggi v. Wash. Newspaper Publ'g Co., 146 F.4th 1219, 1228 (D.C. Cir. 2025) (using a kind-of-harm analysis in a Video Privacy Act case).

117. *See id.* The court directly disagreed with *Hunstein*'s approach of matching each element. *Id.* at 1227 n.2.

118. *See* Barclift v. Keystone Credit Servs., 93 F.4th 136, 144–45 (3d Cir. 2024), *cert. denied*, 145 S. Ct. 169 (2024).

III. Resolving the Confusion: Identifying an Operational Test for Intangible Injuries

All circuit courts that have applied *TransUnion's* guidance have examined whether the plaintiff's harm was rooted in an analogous common law tort and have reached the same result: the plaintiff suffered no concrete harm and therefore lacked standing to sue.[119] The Third Circuit, in *Barclift*, articulated the circuit split as a binary between two approaches to intangible injury analysis, but a closer look at how the analysis is applied reveals that such a neat binary is an oversimplification.[120]

This section lays out three arguments.[121] First, circuit courts' applications of the intangible injury analysis created a spectrum of approaches that do not cleanly fit into the kind-of-harm and element-for-element camps.[122] Although the circuit courts all reach the same conclusion—no concrete harm—conceptualizing these varied approaches as a spectrum rather than a binary offers further guidance to courts seeking to analyze other intangible injuries for which Congress has provided a cause of action.[123] Second, a version of the kind-of-harm approach is preferable because it prioritizes Congress's ability to recognize contemporary, evolving harms.[124] Further, it expands access to the courts for

---

119. *See Barclift*, 93 F.4th at 148; *see also* Nabozny v. Optio Sols., 84 F.4th 731, 738 (7th Cir. 2023); Shields v. Pro. Bureau of Collections of Md., 55 F.4th 823, 828 (10th Cir. 2022); Hunstein v. Preferred Collection & Mgmt. Servs., 48 F.4th 1236, 1250 (11th Cir. 2022) (en banc).

120. *See Barclift*, 93 F.4th at 144–45 (articulating a circuit split, while acknowledging that the Tenth Circuit implicitly adopted the kind-of-harm approach); *Nabozny*, 84 F.4th at 735 (refusing to create a split, while citing *Hunstein* and *Shields*).

121. *See infra* notes 127–151 and accompanying text.

122. *See Barclift*, 93 F.4th at 145–46 (identifying the harm from the comparator tort and looking for harm of the same character); *id.* at 158–59 (Matey, J., dissenting) (pointing to the harm alleged in the complaint and finding similarity with the harms from public disclosure); *Nabozny*, 84 F.4th at 735–37 (using the element of publicity as a guide for understanding that the injuries are different in kind); *Shields*, 55 F.4th at 829 (referencing the element of publicity, but clarifying that it points to the kind of harm required in the public disclosure tort and that the plaintiff did not need to prove the elements of the comparator tort); *Hunstein*, 48 F.4th at 1244 (looking for a missing essential element from the comparator tort when evaluating a plaintiff's harm).

123. *See* Chemerinsky, *supra* note 25 at 283 (explaining how the Civil Rights Act of 1964 protects against racial discrimination in various areas, including public accommodations, where the harms of embarrassment and feelings of discrimination are intangible, but not recognized by any traditional torts).

124. *See Hunstein*, 48 F.4th at 1267 (Newsom, J., dissenting) (critiquing the majority's application of the element-for-element approach for completely restricting Congress's ability to recognize new and evolving harms).

plaintiffs who suffer these contemporary harms, in a manner consistent with the jurisdictional concerns that the standing doctrine seeks to address.[125] Third, the Supreme Court should clear up the confusion by operationalizing its intangible injury analysis.[126]

First, the circuit courts' applications of the intangible injury analysis resemble a spectrum.[127] At one end, the Eleventh Circuit's element-for-element approach is the strictest because it requires the plaintiff's harm to closely track each "essential" element of the comparator tort.[128] The Seventh Circuit applies a less rigid analysis, using only the "threshold" element of publicity as a guide to conclude that the plaintiff's injury was not analogous to the harm of the common law tort.[129] Further down the spectrum,

---

125. *Compare* Hunstein v. Preferred Collection & Mgmt. Servs., 48 F.4th 1236, 1243 (11th Cir. 2022) (en banc) (asserting that its application of the intangible harm test adequately balances the concerns of respecting Congress and upholding Article III jurisdictional limits), *with id.* at 1267 (Newsom, J., dissenting) (critiquing the majority for completely restricting Congress's ability to recognize new and evolving harms).

126. *See* TransUnion v. Ramirez, 594 U.S. 413, 429 (2021) (acknowledging that the concrete harm requirement can sometimes be difficult for courts to apply).

127. *See* Barclift v. Keystone Credit Servs., 93 F.4th 136, 144–45 (3d Cir. 2024) (majority opinion) (articulating a circuit split, while acknowledging that the Tenth Circuit's adoption of the kind-of-harm approach was implicit), *cert. denied*, 145 S. Ct. 169 (2024); Nabozny v. Optio Sols., 84 F.4th 731, 735 (7th Cir. 2023) (refusing to create a split, while citing *Hunstein* and *Sheilds* as precedent). The dissent from the Eleventh Circuit, which came at the beginning of the string of mailing vendor cases, posits that the majority creates a 7-1 circuit split. *Hunstein*, 48 F.4th at 1267 (Newsom, J., dissenting). To make matters more confusing, the Seventh Circuit purports to rely on the Tenth and Eleventh Circuits in equal weight, even though they applied two different approaches. *See Barclift*, 93 F.4th at 143–44 (asserting that Shields v. Pro. Bureau of Collections of Md., 55 F.4th 823, 828 (10th Cir. 2022) implicitly adopts a kind-of-harm approach, while *Hunstein* and *Nabozny* apply the element-for-element approach); *Nabozny*, 84 F.4th at 735 (citing to both *Hunstein* and *Shields* when comparing its analysis to persuasive precedent). *Barclift* also cites to circuits that supposedly apply an element-for-element approach in its application. *See Barclift*, 93 F.4th at 145–46 (citing *Nabozny* to articulate the kind of harm that the public disclosure tort sought to protect).

128. *See Hunstein*, 48 F.4th at 1245 (focusing on the elements of the comparator tort of public disclosure, such as publicity, when comparing the plaintiff's harm). The court does note that this is not an exact duplicate requirement. *See id.* at 1242 (acknowledging that *TransUnion* does not require an exact duplicate). The court does not go through every element of public disclosure. *See id.* at 1245 (limiting its analysis to only the "essential elements"). The tort of public disclosure has a few more elements beyond publicity, namely that the matter must be "highly offensive to a reasonable person" and "not of legitimate concern to the public." RESTATEMENT (SECOND) OF TORTS § 652D (A.L.I. 1977). Although the Eleventh Circuit lists these elements "for information's sake," it does not address whether they are "essential elements." *See Hunstein*, 48 F.4th at 1245, 1248.

129. *See Nabozny*, 84 F.4th at 735–36 (discussing how the plaintiff's harm was different from the public disclosure tort because it differed from the humiliation suffered when private information is subject to public scrutiny, and there was not enough exposure to the public in this case). The Seventh Circuit also cites to both the Eleventh Circuit—which

the Tenth Circuit explicitly states that plaintiffs need not show each element of the comparator tort, but still considers the tort's elements as a means of examining whether the plaintiff's harm was sufficiently close.[130] Lastly, the Third Circuit in *Barclift* rejects any discussion of elements, first extracting the harm from the comparator tort and then deciding that the plaintiff's claims did not bear a close relationship.[131] This spectrum of applications from circuit courts blurs the two approaches, providing even less clarity for plaintiffs and underscoring the need for clarification from the Supreme Court.

Second, the Supreme Court's operational test should resemble the kind-of-harm approach because that approach allows Congress to recognize contemporary, evolving harms by creating new causes of action.[132] The Article III jurisdictional allowance that prompted the standing doctrine stemmed from a fourteenth-century development in English courts that permitted plaintiffs to sue to protect their own interests.[133] When interpreting the Constitution, courts look to history and tradition to ensure that causes of action comply with the jurisdictional boundaries originally intended

applied the element-for-element approach—and the Tenth Circuit—which applied the kind-of-harm approach—throughout its opinion, making no distinction between the approaches. *See id.* at 735 (stating that the Tenth Circuit endorsed the Eleventh Circuit's decision and citing to both in the discussion).

130. *See Shields*, 55 F.4th at 829 (explaining that the plaintiff did not allege any facts resembling the "required" element of publicity for the tort of public disclosure).

131. *See Barclift*, 93 F.4th at 145–46 (citing the harm from the public disclosure tort as the humiliation that accompanies offensive information being disclosed to the public). To make the applications more confusing, *Barclift* cites the Seventh Circuit—which applied an element-for-element approach—when it describes the harm that comes from the public disclosure tort yet applies a kind-of-harm approach. *Id.* Judge Matey argues in his dissent for an approach even further along on the spectrum, saying that the majority should have found concrete harm for the plaintiff because she alleges humiliation in her complaint, which is similar enough to the harm from the tort of public disclosure. *See id.* at 159 (Matey, J., dissenting) (stating that the plaintiff's harms are "of the same character" as the traditional harms and that the plaintiff should therefore be awarded standing) (internal citations omitted).

132. *See* Hunstein v. Preferred Collection & Mgmt. Servs., 48 F.4th 1236, 1267 (11th Cir. 2022) (en banc) (Newsom, J., dissenting) (claiming that rigid adherence to an element-for-element approach denies Congress's ability to innovate); *see also* Chemerinsky, *supra* note 25 at 271 (raising concerns about the ability of plaintiffs to plead facts that support a concrete injury with the new intangible injury analysis under the Family and Medical Leave Act or the Freedom of Information Act).

133. *See* Vt. Agency of Nat. Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 775 (2000) (walking through the history of the Article III jurisdictional grant).

when Article III was drafted.[134] The Supreme Court relies on traditional common law torts recognized at the time of the framing to keep its analysis rooted in historical practice.[135] But the element-for-element approach goes too far and forfeits consideration of Congress's authority to create a cause of action.[136] Under the strictest interpretation, this analysis requires plaintiffs to plead every element of a common law tort in addition to the elements of the statute under which they are suing.[137] While this requirement attempts to preserve the separation of powers by protecting the Executive's power to vindicate the rights of the public as a whole through litigation, it imposes a limit on Congress's legislative authority that is not present in Article I.[138] The kind-of-harm approach more effectively strikes this balance because it still requires a plaintiff to show some connection to a traditional harm, preventing unaccountable private parties from taking the role of the Executive, while also allowing Congress to recognize when modern, intangible injuries implicate traditionally recognized harms.[139] In turn, this allows private plaintiffs to protect their rights through federal courts.[140] Congress's recognition of intangible harms through statutes counteracts the Supreme Court's concern that the Executive is more accountable to the public than individuals who have not proved they have a

134. *See* Spokeo v. Robins, 578 U.S. 330, 340–41 (2016) (emphasizing the importance of grounding the analysis of compliance with a Constitutional requirement in history and tradition).

135. *See id.* (same); TransUnion v. Ramirez, 594 U.S. 413, 424 (2021) (explaining that "history and tradition" must direct courts' analysis of the concrete injury prong of standing).

136. *See* Hunstein v. Preferred Collection & Mgmt. Servs., 48 F.4th 1236, 1267 (11th Cir. 2022) (en banc) (Newsom, J., dissenting) (critiquing the majority's application of the element-for-element approach for completely restricting Congress's ability to recognize new and evolving harms).

137. *See id.* at 1242 (explaining that the plaintiff did not achieve standing because he lacked the required element of publicity).

138. U.S. CONST. art. I, § 8; *see TransUnion*, 594 U.S. at 428–29 (warning that the idea of plaintiffs bringing suits without having suffered concrete harm flouts the Constitution because it impinges on the powers of the Executive).

139. *See Hunstein*, 48 F.4th at 1267 (Newsom, J., dissenting) (critiquing the majority's application of the element-for-element approach for completely restricting Congress's ability to recognize new and evolving harms).

140. *See id.*

personal stake in their suit.[141] Congress is also accountable to the public in creating these causes of action in the first place.[142]

Admittedly, the element-for-element approach provides less judicial discretion because it does not include identifying a specific harm that a traditional tort sought to protect.[143] While even the kind-of-harm approach did not confer standing in the mailing vendor privacy cases, the flexibility allowed by the kind-of-harm approach ensures that more injured plaintiffs have access to courts.[144] This approach is better suited to adapting traditional torts to recognize harms that stem from technology or other contemporary sources that do not have an explicit common law analogue.[145] The kind-of-harm approach is also more faithful to the language in *TransUnion* that forbids an exact duplicate requirement.[146]

---

141. *See* Lujan v. Defs. of Wildlife, 504 U.S. 555, 575–76 (1992) (emphasizing the need for the concrete injury rule in order to maintain a separation of powers); Barclift v. Keystone Credit Servs., 93 F.4th 136, 152 (3d Cir. 2024) (explaining how the concrete injury requirement came from plaintiffs attempting to vindicate rights on behalf of the public), *cert. denied*, 145 S. Ct. 169 (2024).

142. *See* U.S. CONST. art. I, § 2.

143. *See* Hunstein v. Preferred Collection & Mgmt. Servs., 48 F.4th 1236, 1244 (11th Cir. 2022) (en banc).

144. *See Barclift*, 93 F.4th at 158 (Matey. J., dissenting) (explaining how the kind-of-harm approach should be a low bar, relying on the plaintiff's articulation of their harm, and urging that TransUnion v. Ramirez, 594 U.S. 413 (2021), only requires an analogy to traditional harms, not an exact duplicate).

145. *See TransUnion*, 594 U.S. at 433 (interpreting the tort of defamation to include harm that comes from misleading information, thus extending the tort to include harm caused through an electronic credit report service); *Barclift*, 93 F.4th at 158 (Matey. J., dissenting) (urging that a data privacy breach should have standing under the kind-of-harm approach).

146. *See Barclift*, 93 F.4th at 145. In *TransUnion*, the court used publication—an element of the comparator tort—to understand the kind of harm that tort sought to protect from. *See* 594 U.S. at 434 (using publication to articulate that the harm from defamation comes from the disclosure of the sensitive information). Even when it is advocating for the element-for-element approach, the Eleventh Circuit recognizes that the *TransUnion* court was willing to find standing when the element of false information had similar harm to the misleading information that the plaintiffs alleged. *See Hunstein*, 48 F.4th at 1244. It is fair to say that courts do not want a friend of an individual who had their information shared by a creditor with a mailing vendor to have standing to litigate the matter themselves. *See TransUnion*, 594 U.S. at 427 (pointing to a plaintiff in Hawaii filing a suit about a procedural harm in Maine that they were not personally involved in as an example of the kind of plaintiff that should not have standing). Under the kind-of-harm test, these plaintiffs could get filtered out because the harm they articulate would be concern for another's privacy or apprehension about their own privacy in the future, harms which are not recognized by common law tort analogues. *See id.* at 437–38 (rejecting the plaintiff's theory of a "risk of future harm" because they could not establish a serious likelihood that the harm would come to fruition).

Third, the Supreme Court should articulate a test that operationalizes the kind-of-harm approach to increase uniformity among circuit courts.[147] The test should instruct courts on the order of the steps that they use to apply the intangible injury analysis to ensure they do not inadvertently turn to the elements of the common law tort.[148] Provided that the plaintiff pleads facts to plausibly support a cause of action created by Congress, courts should (i) take the plaintiff's given comparator tort and identify the harm it seeks to protect from,[149] and (ii) compare the facts pled by the plaintiff with the tort's harm to see if they are similar in kind.[150] If the plaintiff's allegations bear a resemblance to the harm of the comparator tort, then the plaintiff's cause of action is grounded in a traditional tort and supports standing.[151]

Conclusion

In *Barclift v. Keystone Credit Services*, the Third Circuit employed a kind-of-harm approach to evaluate whether a plaintiff pleading an intangible harm had standing under Article III. Although the *Barclift* court claims it was contributing to a binary circuit split, the nuances in how circuit courts apply this analysis more closely resemble a spectrum. On that spectrum, the kind-of-harm approach is preferable because it allows plaintiffs to

147. *See TransUnion*, 594 U.S. at 429 (acknowledging that the concrete harm requirement can sometimes be difficult for courts to apply).

148. *See* Shields v. Pro. Bureau of Collections of Md., 55 F.4th 823, 829 (10th Cir. 2022) (beginning the kind-of-harm approach with defining the publicity element and concluding that the plaintiff did not plead the publicity element, then turning away from the elements while discussing harms).

149. *See* Nabozny v. Optio Sols., 84 F.4th 731, 736 (7th Cir. 2023) (identifying that humiliation from sensitive information being exposed to the public is the harm that public disclosure protects against).

150. *See* Barclift v. Keystone Credit Servs., 93 F.4th 136, 159 (3d Cir. 2024) (Matey, J., dissenting) (referencing the plaintiff's alleged harms as embarrassment and anxiety from disclosure of her sensitive information), *cert. denied*, 145 S. Ct. 169 (2024).

151. See Hunstein v. Preferred Collection & Mgmt. Servs., 48 F.4th 1236, 1264 (11th Cir. 2022) (en banc) (Newsom, J., dissenting) (clarifying that the harm should be "similar in kind," without analysis of the degree of similarity). The guidance against an exact duplicate recognizes that Congress enacted the cause of action for a reason, and although it should not be given complete deference, this reasoning should be respected. *See* TransUnion v. Ramirez, 594 U.S. 413, 425 (2021) (recognizing that Congress has some role in creating rights). The amount of resemblance between the harm pled and the comparator tort considers the fact that Congress intended to create a cause of action through legislation, recognizing a real harm that should be individually actionable. *See* Spokeo v. Robins, 578 U.S. 330, 340–41 (2016) (explaining that Congress's judgement is still instructive in identifying harms through the creation of a cause of action).

vindicate rights recognized by Congress when they are harmed in contemporary ways that common law courts could not have anticipated or were not historically interested in protecting. As technology develops and Congress continues to identify corresponding contemporary harms, it is important that plaintiffs are able to vindicate their rights in federal courts. If only a few private citizens are harmed by a particular data breach, government agencies may not step in to protect them and enforce privacy statutes. These plaintiffs should still be able to use the avenues provided by Congress to enforce the protection of their data. The Supreme Court should resolve the circuit courts' confusion and inconsistent application of the concrete injury prong of the standing analysis by articulating an operational test for dealing with intangible injuries that resembles Barclift's application of the kind-of-harm approach. This approach allows for a broader range of intangible harms to confer standing, while still drawing a line for courts to hear cases only from plaintiffs who have suffered actual harms.