Article III Standing — Separation of Powers — Class Actions — TransUnion LLC v. Ramirez

To bring a lawsuit in federal court, a plaintiff must have Article III standing.[1] While commentators perceived federal courts as having generally made it easier for plaintiffs to satisfy standing requirements from the 1950s through the 1970s, the trend has reversed since then.[2] As the Court has increasingly emphasized separation of powers as the basis for standing, it has also increasingly emphasized that standing requirements constrain the instances in which federal courts can exercise judicial review.[3] Last Term, in *TransUnion LLC v. Ramirez*,[4] the Supreme Court held that some members of a class lacked standing to bring claims under the Fair Credit Reporting Act[5] (FCRA) because they lacked a concrete injury when TransUnion erroneously included an alert for creditors that class members were linked to a Treasury Department terrorist database, but had not yet disseminated those files.[6] By misconstruing the separation of powers rationale underlying standing doctrine, *TransUnion* will likely make it more difficult for class action plaintiffs to have their day in federal court. Such a result undermines congressional efforts to keep class actions in federal courts and out of state courts.

In February 2011, Sergio Ramirez went with his wife and father-in-law to buy a car.[7] When the dealership ran a credit check on Ramirez, the credit report returned an alert matching Ramirez's name to those of individuals on the Department of the Treasury's Office of Foreign Assets Control (OFAC) list of "terrorists, drug traffickers, [and] other serious criminals."[8] As a result, Ramirez's wife had to buy the car instead.[9] A day later, Ramirez asked TransUnion for a copy of his credit file.[10] TransUnion then sent him his credit file and a summary of rights, but neither file mentioned the OFAC alert.[11] The next day, Ramirez received a separate letter from TransUnion discussing Ramirez's potential

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[1] Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992).

[2] Michael E. Solimine, *Congress, Separation of Powers, and Standing*, 59 CASE W. RSRV. L. REV. 1023, 1027–28 (2009).

[3] *See, e.g.*, Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1547 (2016); Summers v. Earth Island Inst., 555 U.S. 488, 493–94 (2009).

[4] 141 S. Ct. 2190 (2021).

[5] 15 U.S.C. §§ 1681–1681x.

[6] *TransUnion*, 141 S. Ct. at 2209, 2211–13.

[7] *Id.* at 2201.

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] *Id.*

match to names on the OFAC list.[12] Concerned, Ramirez canceled an upcoming vacation and spoke with a lawyer.[13]

In February 2012, Ramirez filed a putative class action against TransUnion, alleging three violations of the Fair Credit Reporting Act: 1) that TransUnion failed to "follow reasonable procedures" to ensure credit files were accurate,[14] 2) that TransUnion did not include all information — specifically, OFAC matches — in consumers' credit reports,[15] and 3) that TransUnion failed to properly provide a summary of rights.[16] Over TransUnion's opposition, the district court certified a class of all people in the United States "to whom Trans Union sent a letter similar . . . to the March 1, 2011 letter Trans Union sent to [Ramirez] regarding [the OFAC database] from January 1, 2011–July 26, 2011."[17] The parties stipulated that only 1,853 members of this 8,185-person class had their credit reports sent to third parties.[18] And the district court held that all class members — even those whose reports were not sent to creditors — had standing.[19] Following a trial, the jury found in favor of Ramirez and the rest of the class, awarding statutory damages and significant punitive damages to each class member.[20]

The Ninth Circuit affirmed in part, vacated in part, and remanded.[21] Writing for the panel, Judge Murguia[22] held that at the final judgment stage of a class action, a showing of Article III standing was required, but found that each class member in the case had standing.[23] The court explained that TransUnion's violation of the FCRA constituted the type of "concrete injury" necessary for Article III standing for all three of the class's claims.[24] The court then determined that TransUnion's FCRA violations were "willful," given that TransUnion had previously been sued over its OFAC alerts in 2005 and, despite a jury verdict against TransUnion, had implemented few changes.[25] Next, the court found

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[12] *Id.* at 2201–02.

[13] *Id.* at 2202.

[14] *Id.* (citing 15 U.S.C. § 1681e(b)).

[15] *Id.* (citing 15 U.S.C. § 1681g(a)(1)).

[16] *Id.* (citing 15 U.S.C. § 1681g(c)(2)).

[17] Ramirez v. Trans Union, LLC, 301 F.R.D. 408, 426 (N.D. Cal. 2014); *see* Ramirez v. Trans Union, LLC, No. 12-cv-00632, 2016 WL 6070490, at *5 (N.D. Cal. Oct. 17, 2016).

[18] *TransUnion*, 141 S. Ct. at 2202.

[19] *Ramirez*, 2016 WL 6070490, at *5.

[20] *TransUnion*, 141 S. Ct. at 2202. The total damages awarded amounted to around $60 million — around $8 million in statutory damages and around $52 million in punitive damages. *Id.* at 2216.

[21] Ramirez v. TransUnion LLC, 951 F.3d 1008, 1038 (9th Cir. 2020).

[22] Judge Murguia was joined by Judge Fletcher.

[23] *Ramirez*, 951 F.3d at 1023, 1030. Writing separately, Judge McKeown concurred that a showing of Article III standing was required for absent class members but disagreed that each of the class members had standing here. *Id.* at 1038 (McKeown, J., concurring in part and dissenting in part). Judge McKeown also agreed that the jury's award of punitive damages was unconstitutionally excessive. *Id.*

[24] *Id.* at 1025, 1030 (majority opinion).

[25] *Id.* at 1032–33; *see id.* at 1020.

that Ramirez's claims were typical of the class's claims, despite TransUnion's arguments that Ramirez's injuries were more severe than those of the class.[26] The court then deemed the jury's punitive damages award unconstitutionally excessive and reduced it.[27]

The Supreme Court reversed and remanded.[28] Writing for the Court, Justice Kavanaugh[29] first summarized the elements of Article III standing.[30] He discussed standing's separation of powers basis, explaining that requiring plaintiffs to prove "concrete and particularized injury caused by the defendant that is redressable by the court ensures that federal courts decide only 'the rights of individuals'" rather than "opine on every legal question" or issue advisory opinions.[31] In short, the function of Article III standing is to ensure federal courts "resolve only 'a real controversy with real impact on real persons.'"[32] The Court then analyzed what a "concrete" injury meant under Article III.[33] Citing *Spokeo, Inc. v. Robins*,[34] the Court pointed to injuries similar to harms traditionally recognized in American courts as the basis for lawsuits.[35] The Court listed "physical harms and monetary harms" as "readily qualify[ing] as concrete injuries under Article III," as well as "[v]arious intangible harms," such as "reputational harms, disclosure of private information, and intrusion upon seclusion."[36]

The Court then noted that, although Congress's views on what constitutes a concrete injury could be instructive, Article III was not necessarily satisfied just because Congress created a statutory cause of action.[37] Absent judicial analysis, Congress could potentially authorize far too many lawsuits, infringing on the executive branch's Article II authority.[38] This is because "[p]rivate plaintiffs are not accountable to the

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[26] *Id.* at 1033. The court noted that "[e]ven if Ramirez's injuries were slightly more severe than some class members' injuries, Ramirez's injuries still arose 'from the same event or practice or course of conduct that [gave] rise to the claims of other class members and [his claims were] based on the same legal theory.'" *Id.* (quoting Lacy v. Cook Cnty., 897 F.3d 847, 866 (7th Cir. 2018)).

[27] *Id.* at 1034, 1037.

[28] *TransUnion*, 141 S. Ct. at 2214.

[29] Justice Kavanaugh was joined by Chief Justice Roberts and Justices Alito, Gorsuch, and Barrett.

[30] *TransUnion*, 141 S. Ct. at 2203. "[T]o establish standing, a plaintiff must show (i) that he suffered an injury in fact that is concrete, particularized, and actual or imminent; (ii) that the injury was likely caused by the defendant; and (iii) that the injury would likely be redressed by judicial relief." *Id.* (citing Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–61 (1992)).

[31] *Id.* (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 170 (1803)).

[32] *Id.* (quoting Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2103 (2019) (Gorsuch, J., concurring in the judgment)).

[33] *Id.* at 2204.

[34] 136 S. Ct. 1540 (2016).

[35] *TransUnion*, 141 S. Ct. at 2204.

[36] *Id.*

[37] *Id.* at 2204–05.

[38] *Id.* at 2206–07.

people and are not charged with pursuing the public interest in enforcing a defendant's general compliance with regulatory law."[39]

The Court then evaluated whether the class members had standing to sue under the FCRA.[40] For the reasonable-procedures claim, the Court held that the 1,853 class members whose reports were sent to third parties had standing since their injuries resembled defamation.[41] However, the other 6,332 class members lacked standing because their information was not disseminated, so they lacked the essential element of publication in a traditional defamation suit.[42] The Court rejected the argument that the inaccurate but internally maintained files created a risk of future harm.[43] It suggested that relief could have been appropriate if the plaintiffs had sought injunctive relief and if the harm had been "sufficiently imminent and substantial," but that, since the plaintiffs asked for damages, they needed to show that the harm actually materialized.[44] Because the 6,332 class members did not demonstrate the likelihood that their information would be disseminated, that the risk of harm materialized, that they were independently harmed by the risk of harm itself, or that they even knew about the issue, they therefore did not meet the concrete injury requirement.[45] The Court next dispensed with the disclosure and summary-of-rights claims for failing to show a relationship between the formatting violation and a harm traditionally recognized as providing a basis for lawsuits in American courts.[46] The Court also rejected the argument, made by the United States as amicus curiae, that the plaintiffs had suffered an "informational injury" because the plaintiffs received information in the wrong format, rather than failing to receive any required information.[47] In short, the Court concluded, "[n]o concrete harm, no standing."[48]

Justice Thomas dissented.[49] First, Justice Thomas discussed the history of Article III standing, distinguishing between lawsuits asserting a plaintiff's own private rights and lawsuits based on public rights — alleging violations of a duty owed to an entire community.[50] Whereas

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[39] *Id.* at 2207.

[40] *Id.* The Court concluded that every member of a class must have individual Article III standing, citing as its sole authority Chief Justice Roberts's concurrence in *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1053 (2016) (Roberts, C.J., concurring). *TransUnion*, 141 S. Ct. at 2207–08. However, the Court did not explain at what stage of litigation their standing must be assessed. *See id.* at 2208 n.4.

[41] *TransUnion*, 141 S. Ct. at 2208.

[42] *Id.* at 2209–11.

[43] *Id.* at 2210–11.

[44] *Id.*

[45] *Id.* at 2211–12.

[46] *Id.* at 2213.

[47] *Id.* at 2213–14.

[48] *Id.* at 2214.

[49] Justice Thomas was joined by Justices Breyer, Sotomayor, and Kagan.

[50] *TransUnion*, 141 S. Ct. at 2216–18 (Thomas, J., dissenting).

lawsuits based on public rights historically required plaintiffs to make an additional showing of individualized harm in order to sue, lawsuits based on plaintiffs' private rights did not.[51] In this case, Justice Thomas argued that since the statutory provisions at issue detailed duties owed to consumers, "each class member established a violation of [their] private rights" and therefore had standing.[52] Justice Thomas criticized the Court for taking the "power to create and define rights" away from Congress.[53] Finally, he argued that, by deciding what did or did not constitute a "real injury," the majority had delved into policy judgments better suited for Congress and juries.[54]

Justice Kagan also dissented.[55] She critiqued the majority's standing analysis as circumventing the separation of powers rationale underlying the case-or-controversy requirement of Article III, since the analysis second-guessed Congress's role in determining new rights.[56] Justice Kagan also argued that, contrary to what the majority noted, it was not speculative to say that a company in the business of selling information to third parties would in fact sell information to third parties.[57] Finally, Justice Kagan argued that "Congress is better suited than courts" to assess harms and risk of harms, even if, in "highly unusual" cases, courts could override those determinations "when but only when Congress could not reasonably have thought that a suit will contribute to compensating or preventing the harm at issue."[58]

TransUnion appears to be a straightforward application of Article III standing principles — after all, if "concrete injuries" are the outer limit of Congress's authority to create statutory rights, then plaintiffs should not be able to satisfy Article III standing simply by citing to laws that Congress itself created as proof of concrete injuries.[59] But by misinterpreting the separation of powers rationale underlying standing doctrine, *TransUnion* will likely make it more difficult for class action

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[51] *Id.*

[52] *Id.* at 2218–19.

[53] *Id.* at 2221.

[54] *Id.* at 2223–24 ("[I]f this sort of confusing and frustrating communication is insufficient to establish a real injury, one wonders what could rise to that level. . . . [H]ow do *we* go about picking and choosing which ones do and which do not? . . . Weighing the harms caused by specific facts and choosing remedies seems to me like a much better fit for legislatures and juries than for this Court."). Justice Thomas also argued that a risk of harm clearly exists when a defendant distributes false information about a quarter of consumers. *Id.* at 2222. As further evidence of harm, he also mentioned the jury verdict in favor of the class, the extra financial charges by TransUnion to prepare reports with OFAC alerts, and the standalone harm of the errors. *Id.*

[55] Justice Kagan was joined by Justices Breyer and Sotomayor.

[56] *Id.* at 2225 (Kagan, J., dissenting).

[57] *Id.* at 2225–26.

[58] *Id.* at 2226.

[59] *The Supreme Court, 2015 Term — Leading Cases*, 130 HARV. L. REV. 307, 442 (2016).

plaintiffs to have their day in federal court, undermining congressional efforts to keep class actions in federal courts and out of state courts.

As Justice Kavanaugh noted, "[t]he 'law of Art. III standing is built on a single basic idea — the idea of separation of powers.'"[60] Standing confines courts to their traditional role as antimajoritarian protectors of individuals and minorities, and prevents courts from telling the political branches how to serve majority interests.[61] One of the three elements of standing is "injury in fact."[62] This element requires plaintiffs to show "[they] suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'"[63] When someone directly affected by a law seeks to challenge it, they usually have standing because "there is ordinarily little question that the action or inaction has caused [them] injury."[64] The injury-in-fact requirement thus prevents courts from adjudicating "abstract questions of wide public significance" more appropriate for the political branches.[65] Courts thereby also avoid interfering with resource-allocation considerations inherent to the President's role in enforcing laws.[66]

Modern standing doctrine has thus developed in light of these separation of powers concerns. Before *Lujan v. Defenders of Wildlife*,[67] it was generally accepted that statutes create rights and the violation of those rights confers standing.[68] But in *Lujan*, the Court ruled that in a "citizen suit" or public rights case, a mere legal injury — a violation of the statute, absent some extralegal injury — is insufficient for purposes of standing.[69] Of particular concern to the Court was that citizen-suit

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60 *TransUnion*, 141 S. Ct. at 2203 (quoting Raines v. Byrd, 521 U.S. 811, 820 (1997)).

61 Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 894 (1983).

62 Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992). The other two elements are: (1) the injury must be fairly traceable to the defendant, and (2) it must be "likely" that the injury will be "redressed by a favorable decision." *Id.* at 560–61 (quoting Simon v. E. Ky. Welfare Rts. Org., 426 U.S. 26, 38 (1976)).

63 Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1548 (2016) (quoting *Lujan*, 504 U.S. at 560).

64 Const. Party of Pa. v. Aichele, 757 F.3d 347, 362 (3d Cir. 2014) (quoting *Lujan*, 504 U.S. at 561–62).

65 Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 475 (1982) (quoting Warth v. Seldin, 422 U.S. 490, 500 (1975)); *cf. TransUnion*, 141 S. Ct. at 2207 ("Private plaintiffs are not accountable to the people and are not charged with pursuing the public interest in enforcing a defendant's general compliance with regulatory law.").

66 *See* F. Andrew Hessick, *The Separation-of-Powers Theory of Standing*, 95 N.C. L. REV. 673, 691–92 (2017).

67 504 U.S. 555 (1992).

68 *Warth*, 422 U.S. at 500 (noting that "injury required by Art. III may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing'" (quoting Linda R.S. v. Richard D., 410 U.S. 614, 617 n.3 (1973))).

69 *Lujan*, 504 U.S. at 578. The citizen-suit provision of the Endangered Species Act of 1973 (ESA), 16 U.S.C. §§ 1531–1544, in *Lujan* stated: "[*A*]*ny* person may commence a civil suit . . . to enjoin any person, including the United States and any other governmental instrumentality or agency . . . who is

provisions could allow courts to review executive inaction when it is the Executive's duty to "take Care that the Laws be faithfully executed."[70] More recently, in 2016, the Court in *Spokeo, Inc. v. Robins* held that Article III standing is not automatically satisfied through a violation of a statutory right.[71] Instead, a plaintiff must show that they suffered an injury in fact that is both "concrete and particularized."[72] Moreover, "[i]n determining whether an intangible harm constitutes injury in fact, both history and the judgment of Congress play important roles," but "Article III standing [still] requires a concrete injury even in the context of a statutory violation."[73] The Court in *Spokeo* also explained that standing doctrine prevents courts from "usurp[ing] the powers of the political branches."[74] Justice Thomas expanded on this point, noting that limitations on judicial power "preserve separation of powers by preventing the judiciary's entanglement in disputes that are primarily political in nature" but that "[t]his concern is generally absent when a private plaintiff seeks to enforce only his personal rights against another private party."[75] In *TransUnion*, Justice Kavanaugh similarly drew on these separation of powers rationales. By requiring plaintiffs to establish a "concrete and particularized injury," federal courts are properly constrained under Article III to "their . . . function in a limited and separated government," thereby avoiding "publicly opin[ing] on every legal question."[76] This prevents federal courts from infringing on Article II powers.[77]

Yet the conclusions reached in *TransUnion* fail to serve these broader purposes of standing doctrine. The claims Ramirez brought on behalf of himself and the class under the FCRA were not "hypothetical or abstract disputes"[78] — they were specific, private, and concrete causes of action authorized by Congress.[79] Moreover, they do not threaten the

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alleged to be in violation of *any* provision of this chapter." *Id.* at 571–72 (emphasis added) (quoting 16 U.S.C. § 1540(g)).

[70] *Id.* at 577 (quoting U.S. CONST. art. II, § 3); *see also id.* at 573 ("[T]he court [below] held that the injury-in-fact requirement had been satisfied by congressional conferral upon *all* persons of an abstract, self-contained, noninstrumental 'right' to have the Executive observe the procedures required by law. We reject this view.").

[71] 136 S. Ct. 1540, 1549–50 (2016).

[72] *Id.* at 1548.

[73] *Id.* at 1549.

[74] *Id.* at 1547 (quoting Clapper v. Amnesty Int'l USA, 568 U.S. 398, 408 (2013)).

[75] *Id.* at 1551 (Thomas, J., concurring).

[76] *TransUnion*, 141 S. Ct. at 2203 (quoting John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 DUKE L.J. 1219, 1224 (1993)).

[77] *See id.* at 2207.

[78] *Id.* at 2203.

[79] Unlike the citizen-suit provision in *Lujan*, the provisions of the FCRA in *TransUnion* are much more closely tied to injuries to specific people and involve suits against private companies, not against the government. *Compare, e.g.*, 15 U.S.C. § 1681e(b) ("Whenever a *consumer reporting agency* prepares

President's Article II authority. After all, "Article II empowers the President to enforce public federal rights in [their] capacity as the representative of the public," not "to enforce private rights held by private individuals."[80] Unlike in *Lujan*, here Congress did not "convert the undifferentiated public interest in executive officers' compliance with the law into an 'individual right' vindicable in the courts" and thus "transfer from the President to the courts the Chief Executive's . . . duty[] to 'take Care that the Laws be faithfully executed.'"[81] Instead, Congress created a separate cause of action for individuals affected directly by credit reporting agencies.[82] Standing in cases involving private individuals bringing private claims is easily met to ensure proper separation of powers.

While framed as the responsible exercise of federal judicial power, the Court's cabined view of Article III will likely lead to the continued retrenchment of the federal judiciary in the class action context. *TransUnion* follows a line of modern cases undermining plaintiffs' ability to have their day in court.[83] The Roberts Court has upheld strict arbitration provisions,[84] made Rule 23's certification requirements more demanding,[85] and raised the requirements for class damages models.[86] By misconstruing the separation of powers rationale underlying the concrete injury requirement, *TransUnion* makes it harder for class action plaintiffs to vindicate their federal rights in federal courts.

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a consumer report it shall follow reasonable procedures to assure maximum possible accuracy . . . *concerning the individual about whom the report relates*.") (emphasis added) (FCRA), *with* 16 U.S.C. § 1540(g) ("[*A*]*ny* person may commence a civil suit . . . to *enjoin any person, including the United States and any other governmental instrumentality or agency* . . . who is alleged to be in *violation of any provision* of this chapter . . . .") (emphasis added) (ESA citizen-suit provision in *Lujan*).

[80] Hessick, *supra* note 66, at 704; *cf.* Alfred L. Snapp & Son, Inc. v. Puerto Rico *ex rel.* Barez, 458 U.S. 592, 607 (1982) (noting the States cannot represent individuals' rights); Pennsylvania v. Porter, 659 F.2d 306, 316 (3d Cir. 1981) (en banc) (per curiam) (recognizing government standing in vindicating an individual violation only to the extent that the violation constitutes "harm to interests shared by all members of the community").

[81] Lujan v. Defs. of Wildlife, 504 U.S. 555, 577 (1992) (quoting U.S. CONST. art. II, § 3); *accord* Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1552 (2016) (Thomas, J., concurring) ("The injury-in-fact requirement often stymies a private plaintiff's attempt to vindicate the infringement of *public* rights . . . . [W]hen a plaintiff seeks to vindicate a public right, [he] must allege that he has suffered a 'concrete' injury particular to himself.").

[82] *Compare* 15 U.S.C. §§ 1681n–1681o (private causes of action only for consumers who are affected), *with id.* § 1681s (general enforcement by FTC and other agencies).

[83] But see *Amgen Inc. v. Connecticut Retirement Plans & Trust Funds*, 568 U.S. 455 (2013); and *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258 (2014), for examples of cases facilitating class actions. *See also* Elizabeth J. Cabraser, *The Class Abides: Class Actions and the "Roberts Court,"* 48 AKRON L. REV. 757, 760 (2015) (noting that *Amgen* and *Halliburton* "upheld investors' rights and preserved presumptions that reflect realities of the securities markets and facilitate aggregate proof of liability").

[84] AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011).

[85] *See* Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338 (2011).

[86] *See* Comcast Corp. v. Behrend, 569 U.S. 27 (2013).

Moreover, *TransUnion* may push more class actions into state courts, contravening congressional efforts to the contrary. From the mid-1990s until the mid-2000s, there was a perception that plaintiffs abused class actions, harming both class members with legitimate claims and defendants acting responsibly.[87] Many critiques centered on state class actions: concerns that state judges would not strictly apply the procedural requirements governing class actions, thus failing to protect due process rights,[88] or that plaintiffs' attorneys would file nationwide class actions in small-town venues, believing that those courts would be more likely to certify their classes or award larger verdicts.[89] Still other criticisms revolved around alleged "false federalism" issues, wherein "state courts adjudicating multistate class actions [would] apply their own law," ignoring the interests and laws of other states.[90]

The aftereffects of state courts' perceived lax class certification drew criticism, as well: by too easily certifying a class, state courts handed plaintiffs a powerful tool to force settlement negotiations in frivolous lawsuits.[91] Other criticisms centered on state/federal jurisdictional tactics: for example, in state law suits, by choosing a class representative to destroy complete diversity,[92] plaintiffs could prevent defendants from removing the case to federal court,[93] or by bringing claims that were below $75,000,[94] plaintiffs could ensure their cases failed to meet the amount-in-controversy requirement for removal.[95]

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[87] *See, e.g.*, Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 2(a)(3)–(4), 119 Stat. 4, 4–5 (codified in scattered sections of 28 U.S.C.); *see also* Edward A. Purcell, Jr., *The Class Action Fairness Act in Perspective: The Old and the New in Federal Jurisdictional Reform*, 156 U. PA. L. REV. 1823, 1853 (2008) ("[There] were problems that arose because most class actions were settled out of court and . . . filed solely as comprehensive settlement devices[, which] . . . often provided little or no monetary relief to class members and functioned primarily to allow defendants to buy a cheap 'global peace' by paying large legal fees to class attorneys.").

[88] *See* S. REP. NO. 109-14, at 14 (2005).

[89] Nan S. Ellis, *The Class Action Fairness Act of 2005: The Story Behind the Statute*, 35 J. LEGIS. 76, 100 (2009) ("CAFA's jurisdictional provisions are based on a belief that class action attorneys purposely choose to file in certain state jurisdictions that are likely to certify the class and are famous for awarding large verdicts."); Michael S. Freeman & Amy R. Freestone, *The Class Action Fairness Act*, COLO. LAW., Sept. 2005, at 73, 73.

[90] Purcell, *supra* note 87, at 1854 n.111.

[91] S. REP. NO. 109-14, at 20. *See generally* William B. Rubenstein, *A Transactional Model of Adjudication*, 89 GEO. L.J. 371 (2001) (describing settlement-negotiation concerns in class actions).

[92] *Cf.* Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356, 366–67 (1921) (requiring, in diversity cases, that all class representatives be of diverse citizenship from all defendants).

[93] *See* 28 U.S.C. § 1332(a)(1).

[94] *See* Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 559 (2005) (permitting federal subject matter jurisdiction over claims below amount-in-controversy requirement so long as the value of one class member's claim meets the requirement); Snyder v. Harris, 394 U.S. 332, 338 (1969) (requiring each class member's claim to meet amount-in-controversy requirement, rather than permitting aggregation of claims).

[95] *See* 28 U.S.C. § 1332(a).

In response, Congress passed the Class Action Fairness Act[96] (CAFA). CAFA expanded federal jurisdiction for class actions. Under CAFA, if a class action has 100 or more class members,[97] federal courts have jurisdiction over the case if at least one class member is diverse from at least one defendant, and if more than $5 million in total is in controversy.[98] Thus, CAFA made it much more difficult for plaintiffs to keep cases in state court and out of federal court. In April 2007, a little over two years after CAFA went into effect, the Federal Judicial Center reported that CAFA "had its intended effect of bringing more state-law . . . class actions into federal district courts."[99]

Against this backdrop, *TransUnion* may move class actions from federal courts back into state courts.[100] After all, Article III standing is a jurisdictional limit on federal courts.[101] The Court's holding in *TransUnion* thus means that federal courts lack the ability to vindicate the rights of those 6,332 class members, not that those class members lack the ability to obtain relief in state courts.[102]

In *TransUnion*, the Supreme Court misconstrued the separation of powers rationale for Article III standing doctrine. In doing so, the Court has likely made it more difficult for class action plaintiffs to bring their claims in federal court, undermining congressional efforts to keep class actions in federal court. The result is a new rule, requiring a showing of standing at an undefined point in litigation for otherwise passive class members, threatening to undermine the economies of scale of class actions[103] or to push these kinds of class actions into state court.[104]

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96 Pub. L. No. 109-2, 119 Stat. 4 (2005) (codified in scattered sections of 28 U.S.C.).

97 28 U.S.C. § 1332(d)(5)(B).

98 *Id.* § 1332(d)(2).

99 THOMAS E. WILLGING & EMERY G. LEE III, FED. JUD. CTR., THE IMPACT OF THE CLASS ACTION FAIRNESS ACT OF 2005 ON THE FEDERAL COURTS: THIRD INTERIM REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES 21 (2007). The report noted that there was a significant jump in the number of class actions filed in federal court after CAFA was enacted. *Id.* at 2. State class actions declined in number at the same time, at least in some states. *See* FED. JUD. CTR., PROGRESS REPORT TO THE ADVISORY COMMITTEE ON CIVIL RULES ON THE IMPACT OF CAFA ON THE FEDERAL COURTS 4–5 (2007).

100 *TransUnion*, 141 S. Ct. at 2224 n.9 (Thomas, J., dissenting).

101 *See* United States *ex rel.* Chapman v. Fed. Power Comm'n, 345 U.S. 153, 156 (1953).

102 *See* ASARCO Inc. v. Kadish, 490 U.S. 605, 617 (1989) (noting state courts are not bound by Article III standing requirements). To be sure, there is still an open question about whether recent personal jurisdiction decisions from the Supreme Court (albeit not in the class action context) suggest that state courts may have trouble hearing claims by a nationwide class. *See* Bristol-Myers Squibb Co. v. Superior Ct., 137 S. Ct. 1773 (2017); Ford Motor Co. v. Mont. 8th Jud. Dist. Ct., 141 S. Ct. 1017, 1026 (2021). Nonetheless, it appears that, so far, most federal courts have rejected the application of *Bristol-Myers Squibb* and its limitations on personal jurisdiction to class actions. *See* Daniel Wilf-Townsend, *Did* Bristol-Myers Squibb *Kill the Nationwide Class Action?*, 129 YALE L.J.F. 205, 207 (2019).

103 *See* Phillips Petrol. Co. v. Shutts, 472 U.S. 797, 810 (1985) ("[A]n absent class-action plaintiff is not required to do anything. He may sit back and allow the litigation to run its course, content in knowing that there are safeguards provided for his protection.").

104 *TransUnion*, 141 S. Ct. at 2224 n.9 (Thomas, J., dissenting).