CLASS ACTIONS — ARTICLE III STANDING — ELEVENTH CIRCUIT HOLDS THAT ABSENT CLASS MEMBERS MUST SATISFY ARTICLE III STANDING AT THE CLASS CERTIFICATION PHASE FOR SETTLEMENT-ONLY CLASS ACTION. — *Drazen v. Pinto*, 41 F.4th 1354 (11th Cir. 2022).

Your phone buzzes and lights up. Glancing down, you see a text: "One time only sale, 20% off. Reply STOP to stop messages." You reply "STOP" and receive no more texts. Later, a class action is filed against the company that sent that text for violating a federal telecommunications law, and the parties agree to a settlement. You receive notice that you may be a class member entitled to a part of the settlement. But your ability to benefit may depend on the standing law of the circuit court where the case was filed. Recently, in *Drazen v. Pinto*,[1] the Eleventh Circuit held that it would certify a class for settlement only if *all* class members — named and unnamed — could establish Article III standing in the Eleventh Circuit.[2] In doing so, the court built on *Spokeo, Inc. v. Robins*[3] and *TransUnion LLC v. Ramirez*,[4] which together require absent class members to have standing before receiving post-trial damages.[5] Extending this trend, the Eleventh Circuit was the first circuit to hold that absent class members need standing to participate in *settlement*.[6] At best, this holding will produce piecemeal litigation, forum shopping, and uncertainty about how to define a class. At worst, this holding could threaten the future of nationwide class actions.

GoDaddy.com "is one of the world's largest domain registrars."[7] To market its services, GoDaddy collected cell phone numbers from customers and used third-party software to send marketing texts and phone calls to approximately 1.2 million customers between 2014 and 2016.[8] In August 2019, one of these customers — Susan Drazen — filed a class action against GoDaddy in the Southern District of Alabama, alleging the company had violated the Telephone Consumer Protection Act[9] (TCPA) by calling or texting class members using an automatic

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[1] 41 F.4th 1354 (11th Cir. 2022).

[2] *Id.* at 1362.

[3] 136 S. Ct. 1540 (2016).

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

[5] *See Spokeo*, 136 S. Ct. at 1549; *TransUnion*, 141 S. Ct. at 2204–05.

[6] *Drazen*, 41 F.4th at 1362–63.

[7] Opening Brief of Appellant Juan Enrique Pinto at 3, *Drazen* (No. 21-10199).

[8] Complaint at 2, Drazen v. GoDaddy.com, LLC, No. 19-00563 (S.D. Ala. Dec. 23, 2020), 2019 WL 8014756; Drazen v. GoDaddy.com, LLC, No. 19-00563, 2020 WL 2494624, at *3, *6 (S.D. Ala. May 14, 2020).

[9] 27 U.S.C. § 227.

telephone dialing system (ATDS).[10] Drazen's case was consolidated with two similar cases.[11]

The three named plaintiffs defined the class as: "All persons within the United States who received a call or text message to his or her cellular telephone from Defendant . . . ."[12] The plaintiffs negotiated with GoDaddy and agreed to a proposed $35 million class settlement with two compensation options for each class member: $35 in cash or a $150 GoDaddy voucher.[13] They submitted this settlement to district court Judge DuBose for approval.[14] Judge DuBose counseled the parties to narrow the class definition,[15] and the parties complied, specifying that class members must have received texts or calls from an ATDS.[16] Meanwhile, the Eleventh Circuit decided *Salcedo v. Hanna*,[17] which held that receiving a single text was not a concrete injury and did not establish standing.[18] Combining *Salcedo* with *Cordoba v. DIRECTV, LLC*,[19] which held that named plaintiffs must establish standing,[20] Judge DuBose ordered one of the named plaintiffs to be removed because he had received only one text.[21] Judge DuBose then approved the revised class definition.[22] She acknowledged that about seven percent of (or ninety-one thousand) of absent class members had received only a single text,[23] but reasoned that other circuits considered even one text message enough to establish standing.[24] Quoting from the Fifth Circuit decision *In re Deepwater Horizon*,[25] Judge DuBose concluded that GoDaddy was "entitled" to settle these related but (in the Eleventh Circuit) meritless claims because *Drazen* was a nationwide settlement.[26] Judge DuBose certified the class and preliminarily approved the settlement.[27] Class counsel moved for thirty percent of the settlement as

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[10] Complaint, *supra* note 8, at 1–3. The TCPA prohibits making "any call . . . using any automatic telephone dialing system or an artificial or prerecorded voice." 47 U.S.C. § 227(b)(1)(A).

[11] *See* Drazen v. GoDaddy.com, LLC, No. 19-00563, 2020 WL 8254868, at *1 (S.D. Ala. Dec. 23, 2020); Bennett v. GoDaddy.com LLC, No. CV-16-03908-PHX, 2019 WL 1552911 (D. Ariz. Apr. 8, 2019); Herrick v. GoDaddy.com LLC, 312 F. Supp. 3d 792 (D. Ariz. 2018).

[12] *Drazen*, 41 F.4th at 1356.

[13] *Id.*

[14] *Id.*; *see* FED. R. CIV. P. 23(e)(2) (requiring court approval of a binding class action settlement).

[15] *Drazen*, 2020 WL 8254868, at *2.

[16] *Id.*

[17] 936 F.3d 1162 (11th Cir. 2019).

[18] *Id.* at 1165.

[19] 942 F.3d 1259 (11th Cir. 2019).

[20] *Id.* at 1273.

[21] Drazen v. GoDaddy.com, LLC, No. 19-00563, 2020 WL 2494624, at *5 (S.D. Ala. May 14, 2020).

[22] *Id.* at *6.

[23] *Id.*

[24] *Id.* (citing Van Patten v. Vertical Fitness Grp., LLC, 847 F.3d 1037, 1043 (9th Cir. 2017); Melito v. Experian Mktg. Sols., Inc., 923 F.3d 85, 92–95 (2d Cir. 2019)).

[25] 739 F.3d 790 (5th Cir. 2014).

[26] *Drazen*, 2020 WL 2494624, at *6 (quoting *In re Deepwater Horizon*, 739 F.3d at 807).

[27] *Drazen*, 41 F.4th at 1357.

attorneys' fees,[28] and Judge DuBose granted twenty-five percent fees.[29] Class member Juan Pinto objected that the court awarded fees too early and that the settlement failed to calculate fees in accordance with coupon requirements in the Class Action Fairness Act of 2005[30] (CAFA).[31] Judge DuBose approved the settlement, reducing attorneys' fees to twenty percent of the common fund and concluding that CAFA coupon requirements did not apply.[32] Pinto timely appealed.[33]

The Eleventh Circuit vacated and remanded.[34] Writing for a unanimous panel, Judge Tjoflat[35] sua sponte held that the class did not have standing and remanded to allow revision of the class definition.[36] The panel began by quoting *Spokeo*, which held that a plaintiff does not have standing simply because "a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right."[37] Citing *Frank v. Gaos*,[38] Judge Tjoflat noted the distinction between nonclass litigation and class actions — because Rule 23(e) of the Federal Rules of Civil Procedure requires a court to approve a class action settlement, all named plaintiffs must have standing.[39]

The panel then reached another "lodestar principle that guide[d] [its] analysis," which consisted of two takeaways from *TransUnion*: (1) a plaintiff "must demonstrate that history and the judgment of Congress support a conclusion that there is Article III standing,"[40] and (2) "[e]very class member must have Article III standing in order to recover individual damages."[41] Judge Tjoflat concluded that the logic of *TransUnion* — a class action that went to trial — should also apply to *Drazen* — a settlement-only class action.[42] To support this conclusion, Judge Tjoflat highlighted that the district court had breezed over *Cordoba*'s holding that absent class members must have standing to receive relief.[43] Judge Tjoflat next discussed how this reasoning merged with *TransUnion*, driving the panel's conclusion that all class members

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[28] Drazen v. GoDaddy.com, LLC, No. 19-00563, 2020 WL 4606979, at *3 (S.D. Ala. Aug. 11, 2020).

[29] *Id.* (noting the "issues in this case were not complex").

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

[31] *Drazen*, 41 F.4th at 1357–58 (citing 28 U.S.C. § 1712(e)).

[32] Drazen v. GoDaddy.com, LLC, No. 19-00563, 2020 WL 8254868, at *1, *3–4, *13 (S.D. Ala. Dec. 23, 2020).

[33] *Drazen*, 41 F.4th at 1358.

[34] *Id.* at 1363.

[35] Judge Tjoflat was joined by Judges Wilson and Branch.

[36] *Drazen*, 41 F.4th at 1359, 1362–63.

[37] *Id.* at 1359 (quoting Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1549 (2016)).

[38] 139 S. Ct. 1041 (2019).

[39] *Drazen*, 41 F.4th at 1359–60.

[40] *Id.* at 1360 (citing TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2204–05 (2021)).

[41] *Id.* (quoting *TransUnion*, 141 S. Ct. at 2208).

[42] *Id.*

[43] *Id.* at 1361 (quoting Cordoba v. DIRECTV, LLC, 942 F.3d 1259, 1274 (11th Cir. 2019)).

in a settlement-only class action must have standing.[44] Judge Tjoflat rounded off this point by criticizing the District Court's contention that *In re Deepwater Horizon* would allow absent class members with no Eleventh Circuit standing to have standing in a settlement-only class action because they might have standing in another circuit as part of a "nationwide class."[45] Judge Tjoflat emphasized that *In re Deepwater Horizon* merely held that before settlement, absent class members did not need to prove the *merits* of their claims — a concept distinct from standing.[46]

Judge Tjoflat concluded that the absent class members who had received a single text had not established a concrete injury required for standing in the Eleventh Circuit.[47] The panel added that the "more difficult question" was whether a single cell phone call would confer standing.[48] The panel remanded for a new class definition and briefing on the "common-law analogue" for the injury of a cell phone call.[49]

While the Eleventh Circuit logically extended precedent in reaching this result, this holding presents yet another hurdle for nationwide class actions. *Drazen* is consistent with the Supreme Court's reasoning in *Spokeo* and *TransUnion*, continuing the trend of tightening standing constraints for class actions. However, *Drazen* will likely produce negative results for nationwide class actions, including piecemeal litigation, forum shopping, and uncertainty about how to define a class.

Spokeo and *TransUnion* raise the bar for standing in class actions, and *Drazen* follows as a logical extension of these cases.[50] In analyzing a violation of the Fair Credit Reporting Act[51] (FCRA), the *Spokeo* Court concluded that a statutory right to sue does not create automatic standing.[52] *TransUnion* added that plaintiffs should identify "a close historical or common-law analogue for their asserted injury"[53] and required every class member to have standing.[54] By adding these constraints, *TransUnion* has the potential to declaw federal statutory rights that do not match a close historical or common law analogue.[55]

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[44] *Id.*

[45] *Id.*

[46] *Id.* at 1361–62, 1361 n.12.

[47] *Id.* at 1362.

[48] *Id.*

[49] *Id.* at 1363.

[50] *See* Arthur R. Miller, Keynote Address, *The American Class Action: From Birth to Maturity*, 19 THEORETICAL INQUIRIES L. 1, 21–22 (2018) ("Without question, class certification is much more difficult to achieve today in various contexts . . . than it was fifteen or twenty years ago.").

[51] 15 U.S.C. §§ 1681–1681x.

[52] Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1549 (2016).

[53] TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2204 (2021).

[54] *Id.* at 2208.

[55] Erwin Chemerinsky, *What's Standing After* TransUnion LLC v. Ramirez*?*, 96 N.Y.U. L. REV. ONLINE 269, 270 (2021).

Drazen continues this trend as a logical extension of *Spokeo* and *TransUnion*.[56] Like the Court in *Spokeo*, the Eleventh Circuit in *Drazen* concluded that a violation of a statute (the TCPA) did not create an automatic injury.[57] And although *TransUnion* involved litigation (unlike *Drazen*'s settlement-only class action), both cases involved an Article III court reaching a binding determination. Just as the award of damages was a binding determination in *TransUnion*, the district court's approval of the settlement in *Drazen* was a binding determination because it barred absent class members from negotiating outside of the court-approved settlement.[58] Article III imposes standing limits whenever courts employ their judicial authority to resolve "Cases" and "Controversies,"[59] which logically includes these kinds of binding determinations. The panel also correctly rejected the district court's reasoning that *In re Deepwater Horizon* would allow absent class members standing by virtue of more lenient standing law in other circuits.[60]

Although consistent with precedent, the panel's holding will produce piecemeal litigation, forum shopping, and uncertainty about how to define a class. First, this ruling will incentivize piecemeal litigation. In *Drazen*, GoDaddy and the district court estimated that ninety-one thousand absent class members would not have standing in the Eleventh Circuit but might have standing in the Ninth or Second Circuits, which

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[56] Some criticize *Spokeo* and *TransUnion*, which are based on the idea of the class action as a joinder, by arguing that the class action is a trust that does not require absent class members to establish standing. *Compare* Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393, 408 (2010) (describing the class action as "a species" of joinder), *with* Sergio J. Campos, *The Class Action as Trust*, 91 WASH. L. REV. 1461, 1465–67 (2016) (arguing the class action is a trust).

[57] *See Drazen*, 41 F.4th at 1362.

[58] *See* Drazen v. GoDaddy.com, LLC, No. 19-00563, 2020 WL 2494624, at *2 (S.D. Ala. May 14, 2020) (discussing the need for "heightened attention" when "binding" absent class members (quoting Ortiz v. Fibreboard Corp., 527 U.S. 815, 849 (1999))); FED. R. CIV. P. 23(e)(2). Some circuits have suggested that absent class members need not prove standing at certification if they are a de minimis portion of the class. *See In re* Asacol Antitrust Litig., 907 F.3d 42, 53–54 (1st Cir. 2018); *In re* Rail Freight Fuel Surcharge Antitrust Litig., 934 F.3d 619, 624 (D.C. Cir. 2019) (assuming for the sake of argument the lower court's recognition of a de minimis exception); Olean Wholesale Grocery Coop. v. Bumble Bee Foods LLC, 31 F.4th 651, 669 (9th Cir. 2022) (en banc).

[59] *TransUnion*, 141 S. Ct. at 2203.

[60] *See Drazen*, 41 F.4th at 1361–62, 1361 n.12. By one measure, *In re Deepwater Horizon* could not have held what the district court claimed it did: absent class members in *In re Deepwater Horizon* had standing, *see In re* Deepwater Horizon, 739 F.3d 790, 803 (5th Cir. 2014), so any reference to borrowing standing from other circuits would have been nonbinding dicta. But as the Eleventh Circuit noted, the district court never even quoted any relevant dicta. *See Drazen*, 2020 WL 2494624, at *6 (quoting *In re Deepwater Horizon*, 739 F.3d at 807, which indicated that absent class members need not "prove their claims prior to settlement under Rule 23(e)"). Instead of referencing standing, which is a constitutional minimum, the district court quoted references to *merits*, which is a *statutory* minimum for each cause of action. *Id.* There is a thread of cases supporting *In re Deepwater Horizon*'s point, *see, e.g.*, *In re* Am. Int'l Grp., Inc. Sec. Litig., 689 F.3d 229, 232 (2d Cir. 2012); Sullivan v. DB Invs., Inc., 667 F.3d 273, 285–86 (3d Cir. 2011) (en banc), but these cases again involve a question of merits — not standing.

could result in at least one near-identical class action.[61] Further, the panel focused on the TCPA circuit split, but it is worth emphasizing that no other circuit has yet held that absent class members need standing to participate in *settlement*.[62] This means named plaintiffs could choose to file in other circuits either because of a lenient definition of injury *or* a lenient requirement for standing. Additionally, there could be multiple circuit splits affecting a single class action.[63] Piecemeal litigation hurts plaintiffs — particularly small claims plaintiffs — because it erases the central benefit of the class action: pooling resources to allow small claims plaintiffs to recover where recovery would not otherwise be feasible.[64] Piecemeal litigation also hurts defendants, as it prevents a party from achieving global resolution from a single settlement.[65]

Second, forum shopping will probably increase after this ruling. Class action plaintiffs' lawyers will file in favorable circuits whenever a circuit split impacts the standing of absent class members. These splits

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[61] *Drazen*, 2020 WL 2494624, at *6. The plaintiffs would also have standing in the Fifth and Seventh Circuits. *See* Cranor v. 5 Star Nutrition, L.L.C., 998 F.3d 686, 690 (5th Cir. 2021); Gadelhak v. AT&T Servs., Inc., 950 F.3d 458, 463 (7th Cir. 2020) (Barrett, J.); Melito v. Experian Mktg. Sols., Inc., 923 F.3d 85, 93 (2d Cir. 2019); Van Patten v. Vertical Fitness Grp., LLC, 847 F.3d 1037, 1043 (9th Cir. 2017).

[62] Before *Drazen*, judges and attorneys in other circuits assumed absent-class-member standing was not relevant to settlement-only class actions. *See, e.g.*, *In re Asacol Antitrust Litig.*, 907 F. 3d at 47, 58 (holding only that *named* plaintiffs must establish standing for any class action); Langan v. Johnson & Johnson Consumer Cos., 897 F.3d 88, 93 (2d Cir. 2018) (same); Neale v. Volvo Cars of N. Am., LLC, 794 F.3d 353, 359–60 (3d Cir. 2015) (same); DG *ex rel.* Stricklin v. Devaughn, 594 F.3d 1188, 1197–98 (10th Cir. 2010) (same); *cf.* Schumacher v. SC Data Ctr., Inc., 912 F.3d 1104, 1105 (8th Cir. 2019) (holding the district court erred by enforcing a class action settlement without deciding whether the *named* plaintiff had standing); Defendant Facebook, Inc.'s Answer to Plaintiffs' Consolidated Amended Complaint at 2, Campbell v. Facebook, Inc., 951 F.3d 1106 (9th Cir. 2020) (No. 13-05996) (arguing that merely "Plaintiffs" lack standing); Supplemental Jurisdictional Reply Brief of Plaintiffs-Appellees at 4, *Campbell* (No. 13-05996) (citing cases that discuss standing of only "named plaintiffs" in class action settlement).

[63] In the aftermath of *Drazen*, circuits could also split about whether one cell phone call is enough to establish an injury. *See* Susinno v. Work Out World Inc., 862 F.3d 346, 351–52 (3d Cir. 2017) (holding a single cell phone call established a concrete injury under the TCPA).

[64] Imagining *Drazen* as an action with one-hundred plaintiffs, seven would be left to file in another circuit. They would probably fail the numerosity requirement for certification, FED. R. CIV. P. 23(a)(1); *see In re* Modafinil Antitrust Litig., 837 F.3d 238, 250 (3d Cir. 2016) (noting review is "particularly rigorous" when the class consists of fewer than forty members), and would also face a smaller settlement, meaning few attorneys would agree to represent them, *see* BRIAN T. FITZPATRICK, THE CONSERVATIVE CASE FOR CLASS ACTIONS 7 (2019) ("It is hard to find a lawyer who will file a lawsuit for $100. It is not hard to find a lawyer willing to file one for $100,000.").

[65] *See* Georgene Vairo, *Is the Class Action Really Dead? Is that Good or Bad for Class Members?*, 64 EMORY L.J. 477, 479 (2014) ("[C]orporate defendants may try to achieve a global peace by negotiating a class settlement . . . .").

occur often,[66] and the Supreme Court rarely resolves them.[67] Cases that tighten requirements for class certification may increase forum shopping more than the mere existence of a circuit split.[68] *Drazen* (especially if extended to other circuits) could also lead to irregular class action filing patterns, with circuits like the Ninth managing a flood of TCPA litigation due to their more lax standing definitions.[69] Another possibility is that parties to these class actions will consent to file in state courts given pared-down standing requirements.[70] State courts, however, are ill-equipped to handle a nationwide class action, as Congress recognized in

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[66] For example, there is a split about whether one text message is enough to establish standing under the TCPA. *See* Salcedo v. Hanna, 936 F.3d 1162, 1165 (11th Cir. 2019) (no); *Cranor*, 998 F.3d at 690 (yes); *Gadelhak*, 950 F.3d at 463 (Barrett, J.) (yes); *Melito*, 923 F.3d at 93 (yes); *Van Patten*, 847 F.3d at 1043 (yes). Courts are also split on whether sharing debtor information with a letter vendor confers standing under the Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692–1692p. *See* Hunstein v. Preferred Collection & Mgmt. Servs., Inc., 17 F.4th 1016, 1020 (11th Cir. 2021) (yes); Khimmat v. Weltman, Weinberg & Reis Co., 585 F. Supp. 3d 707, 710 (E.D. Pa. 2022) (yes); Tukin v. Halsted Fin. Servs., LLC, No. 21-cv-00025, at 2–3 (N.D. Ill. July 12, 2022) (no); Quaglia v. NS193, LLC, No. 21C3252, 2021 WL 7179621, at *3 (N.D. Ill. Oct. 12, 2021) (no). Another split concerns whether violating the truncation rule under the Fair and Accurate Credit Transactions Act of 2003, Pub. L. No. 108-159, 117 Stat. 1952 (codified as amended in scattered sections of 15 U.S.C.), confers standing. *See* Jeffries v. Volume Servs. Am., Inc., 928 F.3d 1059, 1062, 1066 (D.C. Cir. 2019) (sometimes); Muransky v. Godiva Chocolatier, Inc., 979 F.3d 917, 928–29, 935 (11th Cir. 2020) (en banc) (no); Thomas v. Toms King (Ohio), LLC, 997 F.3d 629, 632 (6th Cir. 2021) (no); Kamal v. J. Crew Grp., Inc., 918 F.3d 102, 106 (3d Cir. 2019) (no); Crupar-Weinmann v. Paris Baguette Am., Inc., 861 F.3d 76, 78 (2d Cir. 2017) (no); Meyers v. Nicolet Rest. of De Pere, LLC, 843 F.3d 724, 727 (7th Cir. 2016) (no). Last, circuits are split on whether a technical violation of the FCRA establishes standing. *See* Schumacher v. SC Data Ctr., Inc., 33 F.4th 504, 507 (8th Cir. 2022) (no); Dutta v. State Farm Mut. Auto. Ins. Co., 895 F.3d 1166, 1176 (9th Cir. 2018) (no); Robertson v. Allied Sols., LLC, 902 F.3d 690, 692, 697 (7th Cir. 2018) (yes); Long v. Se. Pa. Transp. Auth., 903 F.3d 312, 324 (3d Cir. 2018) (yes).

[67] *See, e.g.*, DISH Network L.L.C. v. Krakauer, 140 S. Ct. 676, 676 (2019) (mem.) (appealed from 4th Circuit in *Krakauer v. DISH Network L.L.C.*, 925 F.3d 643 (4th Cir. 2019), denying petition to resolve split between the Eleventh and the Second, Third, Fourth, and Ninth Circuits, Petition for a Writ of Certiorari at 14–21, *DISH Network*, 140 S. Ct. 676 (No. 19-496)). *TransUnion* is a notable exception, resolving one of such circuit splits. *See* Recent Case, Ramirez v. TransUnion LLC, *951 F.3d 1008 (9th Cir.)*, cert. granted in part, *No. 20-297, 2020 WL 7366280 (U.S. Dec. 16, 2020) (mem.)*, 134 HARV. L. REV. 1286, 1290 & n.54 (2021).

[68] *See* GEORGENE M. VAIRO, THE COMPLETE CAFA: ANALYSIS AND DEVELOPMENTS UNDER THE CLASS ACTION FAIRNESS ACT OF 2005, at 2–5 (2011) (supplement to MOORE'S FEDERAL PRACTICE (3d ed. 1997)) (describing an "unprecedented degree of forum shopping" after *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997), which tightened class certification requirements, VAIRO, *supra*, at 3).

[69] The TCPA is only one of the statutes that would be affected; the Ninth Circuit also has relaxed standing requirements at class certification for injunctive or equitable relief. *See* Olean Wholesale Grocery Coop. v. Bumble Bee Foods LLC, 31 F.4th 651, 682 n.32 (9th Cir. 2022) (en banc).

[70] *See* Wyatt Sassman, *A Survey of Constitutional Standing in State Courts*, 8 KY. J. EQUINE, AGRIC. & NAT. RES. L. 349, 349 (2015–2016) (noting that a minority of states use the controlling federal test from *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992)). Indeed, this result already happened after *Amchem*. *See* Vairo, *supra* note 65, at 518 ("Plaintiffs' lawyers, knowing that it was becoming more difficult to get classes certified in federal courts, brought them in state courts.").

passing CAFA.[71]

Third, this ruling will exacerbate uncertainty about how to define a class. Standing is a notoriously unclear doctrine.[72] While class actions were created to *minimize* transaction costs,[73] *TransUnion increased* transaction costs by requiring plaintiffs to plead standing for the whole class before awarding damages.[74] *Drazen* went further, concluding that *even when two parties agree to a settlement*, they must decipher standing doctrine before they can seal the deal.[75] *Drazen* itself illustrates how its heightened standing requirements increase transaction costs by adding uncertainty. For example, the Eleventh Circuit never indicated how many text messages or calls to a cell phone were enough to establish standing, and only vaguely asserted that "a single unwanted text message is not sufficient."[76] The Eleventh Circuit's closing direction that plaintiffs "redefine the class with the benefit of *TransUnion* and its common-law analogue analysis" did little to offer further clarity.[77] On remand, parties must internalize this transaction cost of uncertainty as they rework the class definition to fit standing requirements.

In addition to these three probable consequences of *Drazen*, this holding could threaten nationwide class actions more generally if extended to other circuits.[78] *Drazen* is law only in the Eleventh Circuit, but it could portend a body of post-*TransUnion* standing law that further constricts the ability of class members to find relief and of defendants to settle global claims once and for all. In any event, *Drazen* reflects the reality that nationwide class actions face an uncertain future.

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[71] *See* Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 2, 119 Stat. 4, 4–5 (codified in scattered sections of 28 U.S.C.) (explaining that Congress passed CAFA in part to funnel large class actions into federal courts).

[72] *See* F. Andrew Hessick, *Standing, Injury in Fact, and Private Rights*, 93 CORNELL L. REV. 275, 276 (2008) (describing standing doctrine as "incoherent").

[73] *See* FED. R. CIV. P. 23(b)(3); Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393, 402 (2010); 1 WILLIAM B. RUBENSTEIN, NEWBERG AND RUBENSTEIN ON CLASS ACTIONS § 1:9 (6th ed. 2022) ("Class actions promote administrative efficiency . . . .").

[74] *See* TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2208 (2021).

[75] Some might counter that class actions *always* require court action before settlement, and thus standing is obviously required in a settlement-only class action. But practically, this is a new requirement for litigators. Further, one might respond that Rule 23(e) reflects policy concerns that are distinct from those underlying Article III; Rule 23(e) requires court approval of class action settlements to protect absent class members, *see* FED. R. CIV. P. 23 advisory committee's note to 2003 amendment ("[C]ourt review and approval are essential to assure adequate representation of class members who have not participated in shaping the settlement."), while Article III requires standing to protect the separation of powers, *see TransUnion*, 141 S. Ct. at 2203.

[76] *Drazen*, 41 F.4th at 1362.

[77] *See id.* at 1363. The Eleventh Circuit noted that it may need to reexamine conflicting case law about whether an unwanted call is enough. *Id.* at 1363 n.14.

[78] Of course, this is not the first time that court cases have seemed to threaten class actions. *See* FITZPATRICK, *supra* note 64, at 15–17 (2019) (noting that *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011), which held that arbitration clauses were waivers of the right to join a class action, might cause "class action lawsuits [to] be all but dead in a decade or less," FITZPATRICK, *supra* note 64, at 17).