2023-24 Data Privacy and Security Litigation Update

The Sedona Conference

Working Group 11 Annual Meeting

May 3, 2024

Minneapolis, Minnesota

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CLASS ACTION

and

ARTICLE III STANDING DECISIONS

Statutory Appendix: Text of Relevant VARA Provisions—Continued

ments or commentaries related to the distribution or display of such articles, or in connection with news reports.

(d)

(1) In a case in which—

(A) a work of visual art has been incorporated in or made part of a building in such a way that removing the work from the building will cause the destruction, distortion, mutilation, or other modification of the work as described in section 106A(a)(3), and

(B) the author consented to the installation of the work in the building either before the effective date set forth in section 610(a) of the Visual Artists Rights Act of 1990, or in a written instrument executed on or after such effective date that is signed by the owner of the building and the author and that specifies that installation of the work may subject the work to destruction, distortion, mutilation, or other modification, by reason of its removal,

then the rights conferred by paragraphs (2) and (3) of section 106A(a) shall not apply.

(2) If the owner of a building wishes to remove a work of visual art which is a part of such building and which can be removed from the building without the destruction, distortion, mutilation, or other modification of the work as described in section 106A(a)(3), the author's rights under paragraphs (2) and (3) of section 106A(a) shall apply unless—

(A) the owner has made a diligent, good faith attempt without success to notify the author of the owner's intended action affecting the work of visual art, or

(B) the owner did provide such notice in writing and the person so notified failed, within 90 days after receiving such notice, either to remove the work or to pay for its removal.

For purposes of subparagraph (A), an owner shall be presumed to have made a diligent, good faith attempt to send notice if the owner sent such notice by registered mail to the author at the most recent address of the author that was recorded with the Register of Copyrights pursuant to paragraph (3). If the work is removed at the expense of the author, title to that copy of the work shall be deemed to be in the author.

(3) The Register of Copyrights shall establish a system of records whereby any author of a work of visual art that has been incorporated in or made part of a building, may record his or her identity and address with the Copyright Office. The Register shall also establish procedures under which any such author may update the information so recorded, and procedures under which owners of buildings may record with the Copyright Office evidence of their efforts to comply with this subsection.

Statutory Appendix: Text of Relevant VARA Provisions—Continued

Nancy BOHNAK, on behalf of themselves and all others similarly situated, Plaintiff-Appellant,

Janet Lea Smith, on behalf of themselves and all others similarly situated, Plaintiff,

v.

MARSH & MCLENNAN COMPANIES, INC., a Delaware Corporation, Marsh & McLennan Agency, LLC, a Delaware Limited Liability Company, Defendants-Appellees.

Docket No. 22-319
August Term, 2022

United States Court of Appeals,
Second Circuit.

Submitted: October 24, 2022

Decided: August 24, 2023

Background: Former employee brought putative class action against employer and its parent after her personally identifying information (PII), including her name and Social Security number, which had been entrusted to defendants, were exposed to an unauthorized third party as a result of a targeted data hack, asserting state law claims of negligence, breach of implied contract, and breach of confidence. The United States District Court for the Southern District of New York, Hellerstein, J., 580 F.Supp.3d 21, granted defendants' motions to dismiss. Former employee appealed.

Holdings: The Court of Appeals, Robinson, Circuit Judge, held that:

(1) risk of future harm to former employee arising from disclosure of her PII was a cognizable concrete injury for Article III standing purposes;

(2) out-of-pocket expenses former employee incurred associated with prevention, detection, and recovery from identity theft was a concrete injury;

(3) former employee satisfied the actual or imminent harm component of the injury in fact element of Article III standing;

(4) former employee satisfied the particularity component of the injury in fact element of Article III standing; and

(5) former employee pled cognizable damages with reasonable certainty, as required to state her claims.

Reversed and remanded.

1. Federal Civil Procedure ⚿103.2, 103.3

To establish Article III standing under the United States Constitution, a plaintiff must show (1) an injury in fact (2) caused by the defendant, (3) that would likely be redressable by the court. U.S. Const. art. 3, § 2, cl. 1.

2. Federal Civil Procedure ⚿103.2

Injury in fact, for purposes of Article III standing, embodies three components: it must be concrete, particularized, and actual or imminent. U.S. Const. art. 3, § 2, cl. 1.

3. Federal Courts ⚿3301

District court's order dismissing, for failure to state a claim, former employee's claims for negligence, breach of implied contract, and breach of confidence against employer and its parent arising from data hack that exposed her personally identifying information (PII) was appealable because it was a final decision that disposed of the entire case, though the better practice would have been for employee to appeal the judgment the district court subsequently entered, so as to avoid any dispute as to whether the earlier entered order qualified as a final decision. 28 U.S.C.A. § 1291; Fed. R. Civ. P. 12(b)(6).

4. Federal Courts ⚿3666

Where Article III standing is challenged on the basis of the pleadings, the Court of Appeals accepts as true all mate-

rial allegations of the complaint, and must construe the complaint in favor of the complaining party. U.S. Const. art. 3, § 2, cl. 1.

5. Federal Courts ⚿3585(2)

On appeal from the denial of a motion to dismiss due to lack of standing, the Court of Appeals determines whether a plaintiff has constitutional standing to sue without deference to the district court. U.S. Const. art. 3, § 2, cl. 1.

6. Labor and Employment ⚿136

The risk of future harm to former employee arising from disclosure of her personally identifying information (PII), including her name and Social Security number, to unauthorized third parties as a result of targeted data hack against her former employer was a cognizable concrete injury, as required for former employee to have Article III standing to bring negligence, breach of implied contract, and breach of confidence claims against her former employer and its parent; core of former employee's alleged injury was that she had been harmed by exposure of her private information to an unauthorized malevolent actor, this fell squarely within scope of a concrete intangible harm, and it bore some relationship to a well-established common-law analog, namely public disclosure of private facts. U.S. Const. art. 3, § 2, cl. 1.

7. Telecommunications ⚿1944

For the purposes of the "concreteness" analysis of the injury in fact element of Article III standing arising from the disclosure of the plaintiff's personally identifying information (PII), what matters is that the intangible harm arising from disclosure of one's PII bears a relationship to an injury with a close historical or common-law analogue, and that analog need not be an exact duplicate. U.S. Const. art. 3, § 2, cl. 1.

8. Labor and Employment ⚿136

The out-of-pocket expenses former employee incurred associated with the prevention, detection, and recovery from identity theft and lost time and other opportunity costs from attempting to mitigate the consequences of the data breach that exposed her personally identifying information (PII), including her name and Social Security number, to unauthorized third parties as a result of targeted data hack against her former employer was a concrete injury, as required for former employee to have Article III standing to bring negligence, breach of implied contract, and breach of confidence claims against her former employer and its parent; these concrete harms foreseeably arose from the exposure of former employee's PII to a malign outside actor, giving rise to a material risk of future harm. U.S. Const. art. 3, § 2, cl. 1.

9. Labor and Employment ⚿136

Former employee's allegations that the personally identifying information (PII) she entrusted to her former employer was exposed as a result of a targeted attempt by a third party to access the data set, in which a hacker leveraged a vulnerability in a third party's software and gained access to her PII, and that the PII taken by the hackers included her name and Social Security number (SSN), the kind of information that gave rise to a high risk of identity theft, were sufficient to suggest a substantial likelihood of future harm, satisfying the actual or imminent harm component of the injury in fact element of Article III standing to sue former employer and its parent, even though employee did not allege any known misuse of information in the dataset accessed in the hack. U.S. Const. art. 3, § 2, cl. 1.

10. Labor and Employment ⚿136

Former employee's allegation that her specific personally identifying information

(PII) was compromised during a targeted data hack of her former employer sufficiently alleged an injury distinct from the body politic, and thus satisfied the particularity component of the injury in fact element of Article III standing to sue former employer and its parent. U.S. Const. art. 3, § 2, cl. 1.

11. Telecommunications ⚿1823(4)
Torts ⚿424

Former employee pled cognizable damages with reasonable certainty, as required to state claims against former employer and its parent for negligence, breach of implied contract, and breach of confidence arising from the exposure of the personally identifying information (PII), including her name and Social Security number, as a result of a targeted data hack of the information she had entrusted to employer; employee alleged the risk of future harm due to the exposure of her private information to an unauthorized malevolent actor, and that she had spent time and money trying to mitigate the consequences of the data breach through the prevention, detection, and recovery from identity theft.

12. Federal Courts ⚿3410

Former employee did not waive her challenge to district court's dismissal, for failure to state a claim, of her claims for damages against her former employer and its parent arising from the exposure of her personally identifying information (PII) as a result of a targeted data hack; district court's conclusion that former employee did not plausibly plead damages rested entirely on the court's conclusion that she lacked Article III standing to seek damages based upon a risk of future harm, and employee's challenge to that conclusion was a challenge to the court's analysis of her damages. U.S. Const. art. 3, § 2, cl. 1; Fed. R. Civ. P. 12(b)(6).

13. Damages ⚿15
Federal Civil Procedure ⚿103.2

To say that the plaintiffs have Article III standing is to say that they have alleged injury in fact, and if they have suffered an injury then damages are available. U.S. Const. art. 3, § 2, cl. 1.

Appeal from the United States District Court for the Southern District of New York (Hellerstein, *J.*)

John A. Yanchunis, Kenya Reddy, Morgan and Morgan, Tampa, FL, for Plaintiff-Appellant.

Travis LeBlanc, Cooley LLP, Washington, D.C., Tiana Demas, Cooley LLP, New York, NY, for Defendants-Appellees.

Before: Newman, Nardini, and Robinson, Circuit Judges.

Robinson, Circuit Judge:

This case requires us to consider the proper framework for evaluating whether an individual whose personally identifying information ("PII") is exposed to unauthorized actors, but has not (yet) been used for injurious purposes such as identity theft, has suffered an injury in fact for purposes of (1) Article III standing to sue for damages and (2) pleading a "claim upon which relief can be granted," Fed. R. Civ. P. 12(b)(6). In particular, we are called upon to determine how the Supreme Court's decision in *TransUnion, LLC v. Ramirez*, —— U.S. ——, 141 S. Ct. 2190, 210 L.Ed.2d 568 (2021), impacts this Court's previous holding in *McMorris v. Carlos Lopez & Associates*, 995 F.3d 295, 303 (2d Cir. 2021).

[1, 2] To establish Article III standing under the U.S. Constitution, a plaintiff must show (1) an injury in fact (2) caused by the defendant, (3) that would likely be

redressable by the court. *Thole v. U.S. Bank N.A.*, —— U.S. ——, 140 S. Ct. 1615, 1618, 207 L.Ed.2d 85 (2020). At issue here is the first element: injury in fact. "Injury in fact," in turn, embodies three components: it must be "concrete, particularized, and actual or imminent." *Id.* We conclude that with respect to the question whether an injury arising from risk of future harm is sufficiently "concrete" to constitute an injury in fact, *TransUnion* controls; with respect to the question whether the asserted injury is "actual or imminent," the *McMorris* framework continues to apply in data breach cases like this.

[3] Plaintiff-Appellant Nancy Bohnak appeals from an order [1] of the United States District Court for the Southern District of New York (Hellerstein, *J.*) dismissing her claims against Defendants-Appellees Marsh & McLennan Agency, LLC ("MMA") and Marsh & McLennan Companies ("MMC") (together, "Defendants") for failure to state a claim.[2] *Bohnak v. Marsh & McLennan Cos., Inc.*, 580 F. Supp. 3d 21 (S.D.N.Y. 2022). Applying the above framework, we conclude that Bohnak's allegation that an unauthorized third party accessed her name and Social Security number ("SSN") through a targeted data breach gives her Article III standing to bring this action against the defendants to whom she had entrusted her PII. We further conclude that the district court erred in dismissing Bohnak's claims for failure to plausibly allege cognizable damages because we hold that by pleading a sufficient Article III injury in fact, Bohnak also satisfies the damages element of a valid claim for relief.

For the reasons set forth below, we REVERSE the district court's order dismissing Bohnak's claims for damages and REMAND for further proceedings.

BACKGROUND [3]

MMC "is the world's leading professional services firm in the areas of risk, strategy and people," App'x 9, ¶ 3; MMA is a wholly owned subsidiary of MMC and serves "the risk prevention and insurance needs of middle market companies in the United States," *id.* ¶ 4. Defendants stored PII such as "Social Security or other federal tax identification number[s], driver's license or other government issued identification, and passport information" of at least 7,000 individuals. App'x 8-9, ¶ 2. The PII at issue relates to "(i) Defendants' current and former employees and spouses and dependents thereof; (ii) current and former employees of Defendants' clients, contractors, applicants and investors; and (iii) individuals whose information Defendants acquired through the purchase of or

1. The notice of appeal states that Bohnak appeals "from the Order and Opinion ... entered ... on January 17, 2022." (The order was in fact entered January 18, 2022, *see* Dist. Ct. Dkt. No. 32.) That order is appealable because it was a "final decision," 28 U.S.C. § 1291, that disposed of the entire case, *see Bankers Trust Co. v. Mallis*, 435 U.S. 381, 387, 98 S.Ct. 1117, 55 L.Ed.2d 357 (1978) ("[T]he District Court clearly evidenced its intent that the opinion and order from which an appeal was taken would represent the final decision in the case."). However, when a judgment is entered, as it was in this case on January 28, 2023 (Dist. Ct. Dkt. No. 33), the better practice is to appeal the judgment. That avoids any dispute as to whether an earlier entered order qualifies as a final decision.

2. Janet Lee Smith was a plaintiff in the underlying action but is not a party to this appeal.

3. This account is drawn from the allegations in Bohnak's complaint, which we must accept as true for purposes of evaluating Defendants' motion to dismiss. *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009).

merger with another business." App'x 8, ¶ 1.

Bohnak is MMA's former employee, and "[a]s a condition of [ ] Bohnak's employment, Defendants required that she entrust her PII, including but not limited to her Social Security or other federal tax id number."[4] App'x 21, ¶ 58.

In April 2021 an "unauthorized actor . . . leveraged a vulnerability in a third party's software" and accessed Bohnak's PII, including her "name and . . . Social Security or other federal tax id number." App'x 14, ¶ 30.

PII is of "high value to criminals, as evidenced by the prices they will pay through the dark web."[5] App'x 17, ¶ 44. "[SSNs], for example, are among the worst kind of personal information to have stolen because they may be put to a variety of fraudulent uses and are difficult for an individual to change." App'x 18, ¶ 45. Specifically, "[a]n individual cannot obtain a new [SSN] without significant paperwork and evidence of actual misuse." *Id.* ¶ 46.

Despite the sensitivity of the data in Defendants' possession, they did not secure the data from potential unauthorized actors through encryption, and the data continues to be unencrypted.

In contrast, Bohnak has been "very careful about sharing her PII. She has never knowingly transmitted her unencrypted sensitive PII over the internet or any other unsecured source." App'x 21, ¶ 61. She "stores any documents containing her PII in a safe and secure location or destroys the documents," and "she diligently chooses unique usernames and passwords for her various online accounts." App'x 21–22, ¶ 62.

After Defendants notified Bohnak of the data breach (two months after Defendants learned of the incident), Bohnak filed this nationwide class action on behalf of herself and others similarly situated. She alleges that Defendants failed to: "(i) adequately protect the PII of [Bohnak] and Class Members; (ii) warn [Bohnak] and Class Members of Defendants' inadequate information security practices; and (iii) effectively secure hardware containing protected PII using reasonable and effective security procedures free of vulnerabilities and incidents." App'x 11, ¶ 14.

Asserting state law claims of negligence, breach of implied contract, and breach of confidence, Bohnak alleges that she and Class Members suffered the following injuries:

> (i) lost or diminished value of PII; (ii) out-of-pocket expenses associated with the prevention, detection, and recovery from identity theft, tax fraud, and/or unauthorized use of their PII; (iii) lost opportunity costs associated with attempting to mitigate the actual consequences of the Data Breach, including but not limited to lost time, and (iv) the continued and certainly increased risk to their PII, which: (a) remains unencrypted and available for unauthorized third parties to access and abuse; and (b) may remain backed up in Defendants' posses-

4. The record is silent as to when Bohnak's employment with MMA began, but it ended "[i]n or around 2014." App'x 21 ¶ 58.

5. "The Dark Web is a general term that describes hidden Internet sites that users cannot access without using special software." *McMorris*, 995 F.3d at 302 n.4 (quoting Kristin Finklea, Cong. Rsch. Serv., 7-5700, *Dark Web* 2 (2017)). "Not surprisingly, criminals and other malicious actors . . . use the [D]ark [W]eb to carry out technology-driven crimes, such as computer hacking, identity theft, credit card fraud, and intellectual property theft." *Id.* (quoting Ahmed Ghappour, *Searching Places Unknown: Law Enforcement Jurisdiction on the Dark Web*, 69 Stan. L. Rev. 1075, 1090 (2017)).

> sion and is subject to further unauthorized disclosures so long as Defendants fail[ ] to undertake appropriate and adequate measures to protect the PII.

App'x 11, ¶ 15.

Defendants moved to dismiss Bohnak's complaint under Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction, arguing that Bohnak lacks Article III standing. In the alternative, Defendants moved to dismiss the complaint under Rule 12(b)(6) because Bohnak fails to allege any cognizable damages.

The district court rejected Defendants' argument that Bohnak lacked Article III standing, reasoning that, although the future, indefinite risk of identity theft involving her compromised PII by itself was insufficient to establish an injury in fact under *TransUnion*, Bohnak plausibly alleged a separate concrete injury, analogous to that associated with the common-law tort of public disclosure of private information, that could support Article III standing.

However, the district court accepted Defendants' argument that Bohnak had failed to state a claim for which relief can be granted, reasoning that she had not plausibly alleged cognizable damages arising from the disclosure of her PII. In particular, the district court concluded that Bohnak could only speculate about the extent of any future harm, and that the damages arising from any risk of future harm are not "capable of proof with reasonable certainty." *Bohnak*, 580 F. Supp. 3d at 31. The court concluded that Bohnak's alleged loss of time and money responding to the increased risk of harm is not "cognizable" because it was not proximately caused by the harm of disclosure which, the court emphasized, was "the only harm for which [the court] found Plaintiffs have Article III standing." *Id.*

Moreover, the court reasoned that Bohnak's prayer for injunctive relief is based on the same harms as her claims for monetary relief, indicating the harms are compensable through money damages. In the court's view, a permanent injunction is thus unavailable. Because the court concluded that Bohnak does not plausibly allege a claim for damages or injunctive relief, it dismissed Bohnak's claims pursuant to Rule 12(b)(6). Bohnak appealed.

DISCUSSION

Bohnak challenges the district court's conclusion that she cannot establish standing merely by virtue of the risk of future misuse of her PII (such as identity theft or fraud), and in so arguing implicitly challenges the reasoning underlying the court's dismissal of her claims for failure to state a cognizable claim for damages. Defendants, on the other hand, contend that because her claims are predicated on a risk of future harm, Bohnak lacks standing altogether.

We conclude that Bohnak has standing to pursue her claims for relief, and that she has adequately alleged a cognizable claim for damages.[6]

I. Standing

We first consider whether Bohnak has established Article III standing. *See Central States SE and SW Areas Health and*

6. Bohnak has not challenged the district court's determination that she failed to plausibly allege a claim that would entitle her to injunctive relief, and her challenge to the district court's standing analysis does not directly undercut the court's rationale for dismissing her claims for injunctive relief. Accordingly, we deem any challenge to the district court's dismissal of her claim for injunctive relief waived, and do not address her claims for injunctive relief on appeal.

Welfare Fund v. Merck–Medco Managed Care, LLC, 433 F.3d 181, 198 (2d Cir. 2005) ("If plaintiffs lack Article III standing, a court has no subject matter jurisdiction to hear their claim.").

[4, 5] "Because standing is challenged on the basis of the pleadings, we accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party." *W.R. Huff Asset Mgmt. Co., LLC v. Deloitte & Touche, LLP*, 549 F.3d 100, 106 (2d Cir. 2008) (internal quotation marks omitted). In this context, we determine whether a plaintiff has constitutional standing to sue without deference to the district court. *Id.*

As noted above, to establish Article III standing, a plaintiff must show (1) an injury in fact that is "concrete, particularized, and actual or imminent," (2) that the injury was caused by the defendant, and (3) that the injury would likely be redressable by the court. *Thole*, 140 S. Ct. at 1618. At issue here is the first element—an injury in fact that is "concrete, particularized, and actual or imminent."

Bohnak argues that the district court erred by concluding that the risk of future harm arising from the disclosure of her PII is not a cognizable injury for standing purposes. In particular, she argues that the district court erred in concluding that the Supreme Court's decision in *TransUnion* calls into question the continuing vitality of this Court's decision in *McMorris*. And she contends that under the framework established in *McMorris*, she has standing to pursue her claims.

Defendants contend that *TransUnion* forecloses any argument that Bohnak has standing based on a risk of future harm, that Bohnak cannot establish standing based on the factors set forth in *McMorris*, and that the district court erred in concluding that Bohnak did have standing to pursue her claims based on the injury from the exposure of her PII.

We conclude that *TransUnion* is the touchstone for determining whether Bohnak has alleged a concrete injury, and that under *TransUnion*, Bohnak's alleged injuries arising from the risk of future harm are concrete. We further conclude that *McMorris* is the touchstone for determining whether Bohnak has alleged an "actual or imminent" injury, and that under *McMorris*, Bohnak's alleged injuries are "actual or imminent." *McMorris*, 995 F.3d at 300. Given these conclusions, and because the other elements of Article III standing are undisputedly met, we conclude that Bohnak has Article III standing, and we have jurisdiction to review this appeal.

A. TransUnion: Concreteness

i. The Court's Holding

In *TransUnion*, in a distinct but somewhat analogous context, the Supreme Court considered whether a risk of future injury alone is sufficiently concrete to be an injury in fact for purposes of Article III standing. 141 S. Ct. at 2204 ("The question in this case focuses on the Article III requirement that the plaintiff's injury in fact be 'concrete,'—that is, 'real, and not abstract.' ").

The conflict in *TransUnion* arose from a product designed to help businesses avoid transacting with individuals on the United States Treasury Department's Office of Foreign Assets Control ("OFAC") list of "specially designated nationals who threaten America's national security." *Id.* at 2201-02 (internal quotation marks omitted). When TransUnion (a "Big Three" credit reporting agency) conducted a credit check for subscribers to their special service, it used third-party software to compare the consumer's name against the

OFAC list. *Id.* at 2201. As the Supreme Court explained,

> If the consumer's first and last name matched the first and last name of an individual on OFAC's list, then TransUnion would place an alert on the credit report indicating that the consumer's name was a "potential match" to a name on the OFAC list. TransUnion did not compare any data other than first and last names.

Id.

TransUnion's system produced many false positives, as many law-abiding Americans share names with individuals on OFAC's list of specially designated nationals. *Id.* Sergio Ramirez, the named plaintiff, was one such law-abiding American. *Id.* He tried to purchase a car from a dealership, but the dealership refused to sell it to him after receiving a report from TransUnion that he was on OFAC's list. *Id.* Ramirez filed a class action on behalf of himself and the rest of the proposed 8,185 class members seeking statutory damages for TransUnion's violations of the Fair Credit Reporting Act ("FCRA" or the "Act"). *Id.* at 2200. FCRA "imposes a host of requirements concerning the creation and use of consumer reports." *Id.* (internal quotation marks omitted). Ramirez alleged that in connection with its new product, TransUnion "failed to follow reasonable procedures to ensure the accuracy of information in his credit file." *Id.* at 2202. The proposed class of individuals all received notice from TransUnion that their names were considered a potential match to names on the OFAC list. *Id.* During the class period, TransUnion had distributed reports to potential creditors concerning only 1,853 of the 8,185 class members. *Id.*

In evaluating whether all of the class members' injuries arising from TransUnion's alleged statutory violations had suffered an injury in fact supporting Article III standing, the Supreme Court focused its analysis on the issue of whether the plaintiffs had shown a "concrete harm." *Id.* at 2208–09.

In considering whether the plaintiffs' alleged injuries were sufficiently concrete to constitute an injury in fact for purposes of their claim for damages, the Court considered whether their injuries bore a " 'close relationship' to a harm 'traditionally' recognized as providing a basis for a lawsuit in American courts." *Id.* at 2204 (quoting *Spokeo, Inc. v. Robins*, 578 U.S. 330, 341, 136 S.Ct. 1540, 194 L.Ed.2d 635 (2016)). The Court recognized that "traditional tangible harms," such as physical harms and monetary harms, "readily qualify as concrete injuries under Article III." *Id.* But it went on to recognize that harms beyond those traditional tangible harms can also support standing:

> Various intangible harms can also be concrete. Chief among them are injuries with a close relationship to harms traditionally recognized as providing a basis for lawsuits in American courts. Those include, for example, reputational harms, disclosure of private information, and intrusion upon seclusion.

Id. (citation omitted).

Applying this framework, the Court had "no trouble" concluding that the 1,853 class members whose false OFAC designations were sent to third parties had suffered a concrete injury. *Id.* at 2209. The Court reasoned that such an injury "bears a 'close relationship' to a harm traditionally recognized as providing a basis for a lawsuit in American courts—namely, the reputational harm associated with the tort of defamation." *Id.* (quoting *Spokeo*, 578 U.S. at 341, 136 S.Ct. 1540). Therefore, the Court concluded that the 1,853 class members whose reports were disseminated to third parties suffered a concrete injury in fact under Article III. *Id.* Significantly, the

Court concluded that the publication of false information about these class members to third parties was itself enough to establish a concrete injury; it did not take further steps to evaluate whether those third parties *used* the information in ways that harmed the class members. *Id.*

On the other hand, the Court concluded that the remaining 6,332 class members whose credit reports were not shared with third parties had not suffered a concrete injury, explaining that there is "no historical or common-law analog where the mere existence of inaccurate information, absent dissemination, amounts to concrete injury." *Id.* (internal quotation marks omitted). The Court distinguished between credit reports published to third parties and files that consumer reporting agencies maintain internally. *Id.* at 2210. It analogized misleading information merely sitting in a company database to a defamatory letter stored in a desk drawer and never sent; the Court explained that in both cases, legally speaking, nobody is harmed. *Id.*

The Court gave two answers of note in response to the arguments on behalf of the 6,332 class members that the existence of misleading OFAC alerts in their internal credit files exposed them to a material risk that the information would be disseminated to third parties *in the future* and thereby caused them present harm.

First, it explained that, although mere risk of future harm does not provide standing to seek retrospective damages where actual harm never materialized, "a person exposed to a risk of future harm may pursue forward-looking, injunctive relief to prevent the harm from occurring, at least so long as the risk of harm is sufficiently imminent and substantial." *Id.* (citing *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 414 n.5, 133 S.Ct. 1138, 185 L.Ed.2d 264 (2013)).

Second, the Court noted that a risk of future harm could "itself cause[ ] a *separate* concrete harm," in which case the plaintiff would have standing to pursue damages premised on that separate concrete harm. *Id.* at 2211 (emphasis in original). For example, the Court suggested that evidence that the class members suffered some other injury, such as emotional injury, from the risk that their reports would be provided to third-party businesses could give them standing to seek damages. *Id.*

These principles guide our assessment of whether Bohnak's alleged harm is sufficiently "concrete" to support Article III standing.

ii. Application to Bohnak's Claims

[6] Like the Supreme Court in *TransUnion*, we have no trouble concluding that Bohnak's alleged harm is sufficiently concrete to support her claims for damages. Similar to the publication of misleading information about some of the plaintiffs in *TransUnion*, the core injury here—exposure of Bohnak's private PII to unauthorized third parties—bears some relationship to a well-established common-law analog: public disclosure of private facts. *See Restatement (Second) Torts* § 652D ("One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of . . . privacy, if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public."). Bohnak's position is thus similar to that of the 1,853 class members who had standing in *TransUnion* based on the publication of misleading information to third parties without regard to whether the third parties used the information to cause additional harm.

We need not stretch to reach this conclusion. In *TransUnion* itself, the Supreme Court specifically recognized that "disclosure of private information" was an intangible harm "traditionally recognized as providing a basis for lawsuits in American courts." 141 S. Ct. at 2204 (citing *Davis v. Federal Election Comm'n*, 554 U.S. 724, 733, 128 S.Ct. 2759, 171 L.Ed.2d 737 (2008)). It thus described an injury arising from such disclosure as "concrete" for purposes of the Article III analysis. *Id.* The core of the injury Bohnak alleges here is that she has been harmed by the exposure of her private information—including her SSN and other PII—to an unauthorized malevolent actor. This falls squarely within the scope of an intangible harm the Supreme Court has recognized as "concrete." *Id.*

[7] We recognize that Bohnak does not in this case assert a common law claim for public disclosure of private facts, and it matters not whether New York common law recognizes a tort relating to publication of private facts. For the purposes of the "concreteness" analysis under *TransUnion*, what matters is that the intangible harm arising from disclosure of one's PII bears a relationship to an injury with a "close historical or common-law analogue." *Id.* And that analog need not be "an exact duplicate." *Id.* at 2209.

[8] In addition, Bohnak's allegations establish a concrete injury for purposes of her damages claim for a separate reason: she has suffered "separate concrete harm[s]" as a result of the risk of future harm occasioned by the exposure of her PII. *Id.* at 2211 (emphasis omitted). In particular, she has alleged among other things that she incurred "out-of-pocket expenses associated with the prevention, detection, and recovery from identity theft" and "lost time" and other "opportunity costs" associated with attempting to mitigate the consequences of the data breach. App'x 11, ¶ 15. These separate and concrete harms foreseeably arising from the exposure of Bohnak's PII to a malign outside actor, giving rise to a material risk of future harm, independently support standing.

Our conclusion on this point is consistent with our analysis in *McMorris*, in which we explained with reference to the injury-in-fact question more broadly that "where plaintiffs have shown a substantial risk of future identity theft or fraud, any expenses they have reasonably incurred to mitigate that risk likewise qualify as injury in fact." 995 F.3d at 303 (internal quotation marks omitted).

It also echoes the First Circuit's conclusion in *Webb v. Injured Workers Pharmacy, LLC*, 72 F.4th 365 (1st Cir. 2023). In that case, the First Circuit considered the standing of a plaintiff whose PII had been exposed in a data breach by a home-delivery pharmacy service. There was no allegation that the plaintiff's PII had actually been misused, although other PII in the same dataset had been. Applying the lessons of *TransUnion*, the court concluded that the plaintiff had plausibly alleged a "separate concrete, present harm" caused by exposure to the risk of future harm. *Webb*, 72 F.4th at 376. In particular, the plaintiff had alleged that she spent "considerable time and effort" monitoring her accounts to protect them. *Id.* (internal quotation marks omitted). The First Circuit joined other circuits in concluding that "time spent responding to a data breach can constitute a concrete injury sufficient to confer standing, at least when that time would otherwise have been put to profitable use." *Id.* at 377. The court noted, "Because this alleged injury was a response to a substantial and imminent risk of harm, this is not a case where the plaintiffs seek to 'manufacture standing by

incurring costs in anticipation of non-imminent harm.' " *Id.* (quoting *Clapper*, 568 U.S. at 422, 133 S.Ct. 1138).

The Third Circuit reached a similar conclusion in *Clemens v. ExecuPharm Inc.*, 48 F.4th 146 (3d Cir. 2022)—another post-*TransUnion* data breach case. In *Clemens*, the Third Circuit concluded:

> Following *TransUnion's* guidance, we hold that in the data breach context, where the asserted theory of injury is a substantial risk of identity theft or fraud, a plaintiff suing for damages can satisfy concreteness as long as [the plaintiff] alleges that the exposure to that substantial risk caused additional, currently felt concrete harms. For example, if the plaintiff's knowledge of the substantial risk of identity theft causes [the plaintiff] to presently experience emotional distress or spend money on mitigation measures like credit monitoring services, the plaintiff has alleged a concrete injury.

Id. at 155–56; *see also In re U.S. OPM Data Security Breach Litigation*, 928 F.3d 42, 59 (D.C. Cir. 2019) (noting that the Supreme Court has recognized standing to sue "on the basis of costs incurred to mitigate or avoid harm when a substantial risk of harm actually exists" (quoting discussion of *Clapper* in *Hutton v. Nat'l Bd. of Examiners in Optometry*, 892 F.3d 613, 622 (4th Cir. 2018))); *Dieffenbach v. Barnes & Noble, Inc.*, 887 F.3d 826, 829-30 (7th Cir. 2018) (monthly fees for credit monitoring secured in response to a data breach are "real and measurable" actual damages).

For these reasons, given the close relationship between Bohnak's data exposure injury and the common law analog of public disclosure of private facts, and, alternatively, based on her allegations that she suffered concrete present harms due to the increased risk that she will in the future fall victim to identity theft as a result of the data breach, we conclude that Bohnak has alleged an injury that is sufficiently concrete to constitute an injury in fact for purposes of her damages claim.

B. McMorris: Imminence

Our conclusion that Bohnak's injury is concrete does not fully resolve the standing question because it addresses only one component of injury in fact. The "particularity" requirement for an injury in fact is not in dispute here, but whether Bohnak's injury is "actual or imminent" is. Our pre-*TransUnion* decision in *McMorris* guides our analysis of this component.

i. The Court's Holding

In *McMorris*, the plaintiffs brought a putative class action against their employer asserting claims for negligence and violations of consumer protection laws resulting from inadvertent dissemination of a company-wide email containing their sensitive PII. 995 F.3d at 298. The plaintiffs alleged that because their PII had been disclosed to all of the defendant's then current employees, plaintiffs were "at imminent risk of suffering identity theft and becoming the victims of unknown but certainly impending future crimes." *Id.* (internal quotation marks omitted).

As in this case, the issue in *McMorris* was whether the plaintiffs had suffered an injury in fact. 995 F.3d at 300. But, in *McMorris* we considered the question holistically, without breaking the injury-in-fact analysis into its components. *See id.* ("This case concerns . . . the first element of Article III standing: the existence of an injury in fact."). Because many of our insights in *McMorris* relate most closely to the issue of whether the future harm is sufficiently "actual or imminent," *TransUnion*, which did not purport to address

matters beyond "concreteness," does not fully supplant our analysis in *McMorris*.

In *McMorris*, we explained that "a future injury constitutes an Article III injury in fact only 'if the threatened injury is certainly impending, or there is a substantial risk that the harm will occur.'" 995 F.3d at 300 (quoting *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158, 134 S.Ct. 2334, 189 L.Ed.2d 246 (2014)). We then identified and endorsed three non-exhaustive factors that courts have considered in determining whether plaintiffs whose PII has been compromised but not yet misused face a substantial risk of harm.

First, we said that the most important factor in determining whether a plaintiff whose PII has been exposed has alleged an injury in fact is whether the data was compromised as the result of a targeted attack intended to get PII. *McMorris*, 995 F.3d at 301. Where a malicious third party has intentionally targeted a defendant's system and has stolen a plaintiff's data stored on that system, courts are more willing to find a likelihood of future identity theft or fraud sufficient to confer standing. *Id.* We embraced the Seventh Circuit's reasoning in one such case: "Why else would hackers break into a store's database and steal consumers' private information? Presumably, the purpose of the hack is, sooner or later, to make fraudulent charges or assume those consumers' identities." *Id.* (quoting *Remijas v. Neiman Marcus Grp., LLC*, 794 F.3d 688, 693 (7th Cir. 2015)).

Second, we observed that, "while not a necessary component of establishing standing," courts have been more likely to conclude that a plaintiff has established a "substantial risk of future injury" where some part of the compromised dataset has been misused—even if a plaintiff's own data has not. *Id.* at 301. For example, fraudulent charges to the credit cards of *other* customers impacted by the same data breach, or evidence that a plaintiff's PII is available for sale on the Dark Web, can support a finding that a plaintiff is at a substantial risk of identity theft or fraud. *Id.* at 301–02.

Third, we explained that courts may consider whether the exposed PII is of the type "more or less likely to subject plaintiffs to a perpetual risk of identity theft or fraud once it has been exposed." *Id.* at 302. On one hand, we noted that "the dissemination of high-risk information such as [SSNs] ... especially when accompanied by victims' names—makes it more likely that those victims will be subject to future identity theft or fraud." *Id.* On the other hand, we reasoned that the exposure of data that is publicly available, or that can be rendered useless (like a credit card number unaccompanied by other PII), is less likely to subject plaintiffs to a perpetual risk of identity theft. *Id.*

Insofar as these factors shed light on whether the future harm of identity theft or fraud resulting from a data breach is sufficiently actual and imminent (as opposed to concrete), we see nothing in *TransUnion* that overrides our analysis, and *McMorris* remains a touchstone.

ii. Application to Bohnak's Claims

[9] Considering these three factors, we conclude that Bohnak has sufficiently alleged that she faces an imminent risk of injury—that is, a "substantial risk that the harm will occur." *Id.* at 300 (internal quotation marks omitted).

First and foremost, Bohnak has alleged that her PII was exposed as a result of a targeted attempt by a third party to access the data set. App'x 14, ¶ 30; *see McMorris*, 995 F.3d at 301 (considering "whether the data at issue has been compromised as the

result of a targeted attack intended to obtain the plaintiffs' data."). In particular, she alleges, based on Defendants' own report to her, that an "unauthorized actor [i.e., a hacker] . . . leveraged a vulnerability in a third party's software" and gained access to her PII. App'x 14, ¶ 30. This was not an inadvertent, intra-company disclosure; it was a targeted hack.

Second, Bohnak alleges that the PII taken by the hackers includes her name and SSN. *Id.* This is exactly the kind of information that gives rise to a high risk of identity theft. *McMorris*, 995 F.3d at 302. As Bohnak has alleged, SSNs "are among the worst kind of personal information to have stolen because they may be put to a variety of fraudulent uses and are difficult for an individual to change." App'x 18, ¶ 45. And one cannot get a new SSN without "evidence of actual misuse," making it difficult to take preventive action to guard against the misuse of the compromised number. *Id.* ¶ 46.

We recognize that Bohnak has not pulled off a hat trick with respect to the factors identified in *McMorris*; she has not alleged any known misuse of information in the dataset accessed in the hack. But we emphasized in *McMorris* that such an allegation is not necessary to establish that an injury is sufficiently imminent to constitute an injury in fact. 995 F.3d at 301. We conclude that the allegations of a targeted hack that exposed Bohnak's name and SSN to an unauthorized actor are sufficient to suggest a substantial likelihood of future harm, satisfying the "actual or imminent harm" component of an injury in fact.

[10] Because Bohnak has alleged a concrete and imminent injury, and because her injury is undisputedly particular, she has pled an injury in fact.[7] And because Bohnak has pled that Defendants caused her injury, and her injuries would be redressed through money damages, we conclude that Bohnak has Article III standing to pursue her damages claim.[8]

II. Bohnak's Damages Claim

[11, 12] Our discussion of standing all but disposes of the damages issue.[9] The district court dismissed Bohnak's claims on the basis that her damages are not "capable of proof with reasonable certainty," and her alleged loss of time and money responding to the increased risk of harm was not "cognizable." *Bohnak*, 580 F. Supp. 3d at 31.

[13] For the reasons set forth above, Bohnak's alleged injury arising from the increased risk of harm *is* cognizable for standing purposes, and thus could support

7. No party has suggested that the "particularity" requirement for an injury in fact is an obstacle to Bohnak's claims. *See Strubel v. Comenity Bank*, 842 F.3d 181, 188 (2d Cir. 2016) (explaining that "to satisfy the particularity requirement" an injury must be "distinct from the body politic"). Here, Bohnak has specifically alleged that *her* PII was compromised during a data breach that impacted a finite number of people, making her injury "distinct from the body politic."

8. Defendants challenge Bohnak's claims on the merits on the basis that she hasn't plausibly alleged cognizable damages. But in contesting her standing, Defendants have not argued that Bohnak has failed to establish the causation and redressability elements of standing.

9. We reject Defendants' contention that Bohnak waived her challenge to the district court's dismissal of her claim pursuant to Rule 12(b)(6). In this case, the district court's conclusion that Bohnak did not plausibly plead damages rested entirely on the court's conclusion that she lacked standing to seek damages based upon a risk of future harm. Bohnak's challenge to that conclusion *was* a challenge to the court's analysis of her damages.

a claim for damages. As the Seventh Circuit explained in a similar case: "To say that the plaintiffs have standing is to say that they have alleged injury in fact, and if they have suffered an injury then damages are available." *Dieffenbach*, 887 F.3d at 828.

Moreover, Bohnak has pled additional injuries—the time and money spent trying to mitigate the consequences of the data breach—with respect to which damages are unquestionably capable of reasonable proof. *See* App'x 11 ¶ 15; *see E.J. Brooks Co. v. Cambridge Sec. Seals*, 31 N.Y.3d 441, 448–49, 105 N.E.3d 301 (2018) (compensatory damages "cannot be remote, contingent or speculative," but the standard "is not one of 'mathematical certainty' but only 'reasonable certainty' " (quoting *Steitz v. Gifford*, 280 N.Y. 15, 20, 19 N.E.2d 661 (1939))); *Aqua Dredge, Inc. v. Stony Point Marina & Yacht Club, Inc.*, 183 A.D.2d 1055, 583 N.Y.S.2d 648, 650 (3d Dep't 1992) ("In computing damages for breach of contract, mathematical certainty is rarely attained or even expected.").

CONCLUSION

In sum, we conclude that the Supreme Court's decision in *TransUnion* governs the analysis of whether a risk of future injury is sufficiently concrete to constitute an injury in fact for purposes of a claim for damages and that our analysis in *McMorris* continues to guide our assessment of the "imminence" component of injury in fact for purposes of Article III standing. Applying these cases, we hold that Bohnak has Article III standing to bring her claims for damages and that the district court erred in dismissing her claims for failure to plead cognizable damages with reasonable certainty.

For these reasons, we REVERSE the district court's judgment dismissing Bohnak's claims for damages and REMAND for further proceedings consistent with this opinion.

Marc S. KIRSCHNER, solely in his capacity as Trustee of The Millennium Lender Claim Trust, Plaintiff-Appellant,

v.

JP MORGAN CHASE BANK, N.A., JP Morgan Securities LLC, Citibank, N.A., Bank of Montreal, BMO Capital Markets Corp., SunTrust Robinson Humphrey, Inc., SunTrust Bank, Citigroup Global Markets, Inc., Defendants-Appellees.*

No. 21-2726
August Term 2022

United States Court of Appeals,
Second Circuit.

Argued: March 9, 2023

Decided: August 24, 2023

Background: Bankruptcy trustee appointed to pursue claims of purchasers of notes to participate in syndicated term loan brought action in state court against financial institutions that facilitated transaction alleging violations of state securities laws. Following removal, the United States District Court for the Southern District of New York, Paul G. Gardephe, J., 2018 WL 4565148, denied trustee's motion to remand, 2020 WL 2614765, granted defendants' motion to dismiss for failure to state

* The Clerk of Court is directed to amend the caption as set forth above.

fluctuations and ever-increasing compliance burdens, then it is hard to see why the provision would distinguish between old and new refineries facing "the same current economic outlook" in a given year. Brief for Federal Respondent 43, n. 7.

In the end, the parties' dueling accounts of purpose underscore the wisdom of sticking to the statutory text and structure. Because, in my view, both clearly favor respondents' reading, I respectfully dissent.

TRANSUNION LLC, Petitioner

v.

Sergio L. RAMIREZ

No. 20-297

Supreme Court of the United States.

Argued March 30, 2021

Decided June 25, 2021

Background: Class of 8,185 consumers with alerts in their credit files maintained by credit reporting agency, indicating that the consumer's name was a "potential match" to a name on a list maintained by the United States Treasury Department's Office of Foreign Assets Control (OFAC) of terrorists, drug traffickers, and other serious criminals, brought action against agency under the Fair Credit Reporting Act (FCRA), alleging that agency failed to use reasonable procedures to ensure the accuracy of their credit files, that for 1,853 of the class members, agency provided misleading credit reports to third-party businesses, and that certain mailings sent to them by agency contained formatting defects. Following certification of class, 301 F.R.D. 408, and denial of agency's motions to decertify class, 2016 WL 6070490, for summary judgment, 2017 WL 1133161, and for leave to file motion for reconsideration, 2017 WL 2403812, trial was held, after which jury returned a verdict in consumers' favor, awarding statutory and punitive damages of more than $60 million for three willful violations of the statute. Agency moved for judgment as matter of law, or in the alternative, for a new trial, remittitur, or an amended judgment. The United States District Court for the Northern District of California, Jacqueline Scott Corley, United States Magistrate Judge, 2017 WL 5153280, denied agency's motions. Agency appealed. The United States Court of Appeals for the Ninth Circuit, Murguia, Circuit Judge, 951 F.3d 1008, affirmed in relevant part. Certiorari was granted.

Holdings: The Supreme Court, Justice Kavanaugh, held that:

(1) under Article III, only those plaintiffs who have been concretely harmed by a defendant's statutory violation may sue that private defendant over that violation in federal court;

(2) consumers whose credit reports containing alerts were disseminated to third-party businesses suffered a concrete injury in fact, as required for Article III standing;

(3) mere existence of misleading alerts in consumers' credit files that were not disseminated to third-party businesses did not constitute a concrete injury, for purposes of Article III standing;

(4) risk of future harm to consumers as a result of misleading alerts in their credit files, which had not been disseminated to third-party businesses, did not supply basis for Article III standing to seek retrospective damages; and

(5) consumers other than named plaintiff lacked Article III standing to pursue claims against agency for breach of obligation under the FCRA to provide them with complete credit files upon request.

Reversed and remanded.

Justice Thomas filed a dissenting opinion, in which Justices Breyer, Sotomayor, and Kagan joined.

Justice Kagan filed a dissenting opinion, in which Justices Breyer and Sotomayor joined.

1. Constitutional Law ⚿2330

The law of Article III standing is built on a single basic idea: the idea of separation of powers. U.S. Const. art. 3, § 2, cl. 1.

2. Federal Civil Procedure ⚿103.2
Federal Courts ⚿2101

Article III confines the federal judicial power to the resolution of "Cases" and "Controversies." U.S. Const. art. 3, § 2, cl. 1.

3. Federal Civil Procedure ⚿103.2
Federal Courts ⚿2101

For there to be a case or controversy under Article III, the plaintiff must have a personal stake in the case, in other words, standing. U.S. Const. art. 3, § 2, cl. 1.

4. Federal Civil Procedure ⚿103.2, 103.3

To establish Article III 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. U.S. Const. art. 3, § 2, cl. 1.

5. Federal Courts ⚿2105

If the plaintiff does not claim to have suffered an injury that the defendant caused and the court can remedy, there is no case or controversy for the federal court to resolve, under Article III. U.S. Const. art. 3, § 2, cl. 1.

6. Constitutional Law ⚿2330
Federal Civil Procedure ⚿103.2, 103.3

Requiring a plaintiff to demonstrate a concrete and particularized injury caused by the defendant and redressable by the court to have Article III standing ensures that federal courts decide only the rights of individuals, and that federal courts exercise their proper function in a limited and separated government. U.S. Const. art. 3, § 2, cl. 1.

7. Federal Courts ⚿2103

Under Article III, federal courts do not adjudicate hypothetical or abstract disputes. U.S. Const. art. 3, § 2, cl. 1.

8. Federal Courts ⚿2101

Federal courts do not possess a roving commission to publicly opine on every legal question.

9. Constitutional Law ⚿2470, 2540
Federal Courts ⚿2015

Federal courts do not exercise general legal oversight of the Legislative and Executive Branches, or of private entities.

10. Constitutional Law ⚿2600

Federal courts do not issue advisory opinions; they instead decide only matters of a judiciary nature.

11. Federal Courts ⚿2101

Under Article III, a federal court may resolve only a real controversy with real impact on real persons. U.S. Const. art. 3, § 2, cl. 1.

12. Federal Civil Procedure ⚿103.2

Article III requires that, to have standing, the plaintiff 's injury in fact must be concrete, that is, real, and not abstract. U.S. Const. art. 3, § 2, cl. 1.

13. Federal Civil Procedure ⚿103.2

Inquiry into whether the alleged injury to a plaintiff has a close relationship to a harm traditionally recognized as providing a basis for a lawsuit in American courts, to determine whether it is a concrete injury, as required for Article III standing, does not require an exact duplicate in American history and tradition, but it is not an open-ended invitation for federal courts to loosen Article III based on contemporary, evolving beliefs about what kinds of suits should be heard in federal courts. U.S. Const. art. 3, § 2, cl. 1.

14. Federal Civil Procedure ⚿103.2

Certain harms readily qualify as "concrete injuries" under Article III; the most obvious are traditional tangible harms, such as physical harms and monetary harms. U.S. Const. art. 3, § 2, cl. 1.

See publication Words and Phrases for other judicial constructions and definitions.

15. Federal Civil Procedure ⚿103.2

If a defendant has caused physical or monetary injury to the plaintiff, the plaintiff has suffered a concrete injury in fact under Article III. U.S. Const. art. 3, § 2, cl. 1.

16. Federal Civil Procedure ⚿103.2

Various intangible harms can be concrete, as required for Article III standing; chief among them are injuries with a close relationship to harms traditionally recognized as providing a basis for lawsuits in American courts, including, for example, reputational harms, disclosure of private information, and intrusion upon seclusion, and those traditional harms may also include harms specified by the Constitution itself. U.S. Const. art. 3, § 2, cl. 1.

17. Federal Civil Procedure ⚿103.2

Courts must afford due respect to Congress's decision to impose a statutory prohibition or obligation on a defendant, and to grant a plaintiff a cause of action to sue over the defendant's violation of that statutory prohibition or obligation; in that way, Congress may elevate to the status of legally cognizable injuries concrete, de facto injuries that were previously inadequate in law.

18. Federal Civil Procedure ⚿103.2

For purposes of Article III standing, even though Congress may elevate harms that existed in the real world before Congress recognized them to actionable legal status, it may not simply enact an injury into existence, using its lawmaking power to transform something that is not remotely harmful into something that is. U.S. Const. art. 3, § 2, cl. 1.

19. Federal Civil Procedure ⚿103.2

Article III standing requires a concrete injury even in the context of a statutory violation. U.S. Const. art. 3, § 2, cl. 1.

20. Federal Civil Procedure ⚿103.2

Congress's creation of a statutory prohibition or obligation and a cause of action does not relieve courts of their responsibility to independently decide whether a plaintiff has suffered a concrete harm under Article III any more than, for example, Congress's enactment of a law regulating speech relieves courts of their responsibility to independently decide whether the law violates the First Amendment. U.S. Const. art. 3, § 2, cl. 1; U.S. Const. Amend. 1.

21. Federal Civil Procedure ⚿103.2

Courts cannot treat an injury as "concrete" for Article III purposes based only

on Congress's say-so. U.S. Const. art. 3, § 2, cl. 1.

22. Federal Civil Procedure ⚿103.2

For Article III standing purposes, an important difference exists between (i) a plaintiff 's statutory cause of action to sue a defendant over the defendant's violation of federal law, and (ii) a plaintiff 's suffering concrete harm because of the defendant's violation of federal law; Congress may enact legal prohibitions and obligations, and Congress may create causes of action for plaintiffs to sue defendants who violate those legal prohibitions or obligations, but under Article III, an injury in law is not an injury in fact. U.S. Const. art. 3, § 2, cl. 1.

23. Federal Civil Procedure ⚿103.2

Under Article III, only those plaintiffs who have been concretely harmed by a defendant's statutory violation may sue that private defendant over that violation in federal court. U.S. Const. art. 3, § 2, cl. 1.

24. Federal Courts ⚿2105

Article III grants federal courts the power to redress harms that defendants cause plaintiffs, not a freewheeling power to hold defendants accountable for legal infractions. U.S. Const. art. 3, § 2, cl. 1.

25. Federal Civil Procedure ⚿103.2

The public interest that private entities comply with the law cannot be converted into an individual right by a statute that denominates it as such, and that permits all citizens, or, for that matter, a subclass of citizens who suffer no distinctive concrete harm, to sue.

26. Constitutional Law ⚿2390
Federal Civil Procedure ⚿103.2

A regime where Congress could freely authorize unharmed plaintiffs to sue defendants who violate federal law not only would violate Article III but also would infringe on the Executive Branch's Article II authority. U.S. Const. art. 3, § 2, cl. 1.

27. Constitutional Law ⚿2450, 2620

The court accepts the displacement of the democratically elected branches when necessary to decide an actual case, but otherwise, the choice of how to prioritize and how aggressively to pursue legal actions against defendants who violate the law falls within the discretion of the Executive Branch, not within the purview of private plaintiffs and their attorneys; 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.

28. Constitutional Law ⚿2330
Federal Civil Procedure ⚿103.2

The concrete-harm requirement to Article III standing is essential to the Constitution's separation of powers. U.S. Const. art. 3, § 2, cl. 1.

29. Constitutional Law ⚿655

The fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution.

30. Federal Civil Procedure ⚿103.2

The party invoking federal jurisdiction bears the burden of demonstrating that they have standing.

31. Federal Civil Procedure ⚿164

Every class member must have Article III standing in order to recover individual damages in a class action. U.S. Const. art. 3, § 2, cl. 1.

32. Federal Civil Procedure ⚿103.2, 164

Article III does not give federal courts the power to order relief to any

uninjured plaintiff, class action or not. U.S. Const. art. 3, § 2, cl. 1.

33. Federal Civil Procedure ⚿103.2

Plaintiffs must maintain their personal interest in the dispute at all stages of litigation to maintain standing.

34. Federal Civil Procedure ⚿103.2

A plaintiff must demonstrate standing with the manner and degree of evidence required at the successive stages of the litigation; therefore, in a case that proceeds to trial, the specific facts set forth by the plaintiff to support standing must be supported adequately by the evidence adduced at trial.

35. Federal Civil Procedure ⚿103.2

Standing is not dispensed in gross; rather, plaintiffs must demonstrate standing for each claim that they press and for each form of relief that they seek, for example, injunctive relief and damages.

36. Federal Civil Procedure ⚿182.5

Finance, Banking, and Credit ⚿1597

Consumers whose credit reports, which indicated that their name was a "potential match" to a name on a list maintained by United States Treasury Department's Office of Foreign Assets Control (OFAC) of terrorists, drug traffickers, and other serious criminals, were disseminated to third-party businesses, suffered a concrete injury in fact, as required to have Article III standing to bring class action seeking statutory and punitive damages from credit reporting agency, under Fair Credit Reporting Act (FCRA), for failure to use reasonable procedures to ensure accuracy of credit files; consumers suffered harm with a close relationship to that associated with defamation, even though reports merely identified a consumer as a "potential match," which was not technically false, as harm from being labeled a "potential terrorist" bore a close relationship to harm from being labeled a "terrorist." U.S. Const. art. 3, § 2, cl. 1; Consumer Credit Protection Act §§ 607, 616(a), 15 U.S.C.A. §§ 1681e(b), 1681n(a).

37. Libel and Slander ⚿32

Under longstanding American law, a person is injured when a defamatory statement that would subject him to hatred, contempt, or ridicule is published to a third party.

38. Federal Civil Procedure ⚿182.5

Finance, Banking, and Credit ⚿1597

Mere existence of misleading alerts in consumers' credit files maintained by credit reporting agency, indicating that the consumer's name was a "potential match" to a name on a list maintained by the United States Treasury Department's Office of Foreign Assets Control (OFAC) of terrorists, drug traffickers, and other serious criminals, did not constitute a "concrete injury," for purposes of Article III standing to bring class action seeking statutory and punitive damages from credit reporting agency, under Fair Credit Reporting Act (FCRA), for failure to use reasonable procedures to ensure accuracy of credit files, where allegedly inaccurate or misleading information sat in a company database, and was not disclosed to a third party; consumers' harm was roughly the same, legally speaking, as if someone wrote a defamatory letter and then stored it in her desk drawer, that is, such information did not harm anyone. U.S. Const. art. 3, § 2, cl. 1; Consumer Credit Protection Act §§ 607, 616(a), 15 U.S.C.A. §§ 1681e(b), 1681n(a).

See publication Words and Phrases for other judicial constructions and definitions.

39. Federal Courts ⚿3181

Consumers whose credit reports, which indicated that their name was a "potential match" to a name on a list maintained by United States Treasury Department's Office of Foreign Assets Control (OFAC) of terrorists, drug traffickers, and other serious criminals, were not disseminated to third-party businesses, forfeited for certiorari review on issue of Article III standing their argument that credit reporting agency "published" their information internally, for example, to employees within agency and to vendors that printed and sent mailings that consumers received, where consumers raised argument for first time to the Supreme Court. U.S. Const. art. 3, § 2, cl. 1.

40. Federal Civil Procedure ⚿182.5

Finance, Banking, and Credit ⚿1597

Credit reporting agency's internal publication of credit files for consumers, containing alerts indicating that the consumer's name was a "potential match" to a name on a list maintained by the United States Treasury Department's Office of Foreign Assets Control (OFAC) of terrorists, drug traffickers, and other serious criminals, did not bear a sufficiently close relationship to the traditional defamation tort to satisfy the concrete injury requirement for Article III standing to bring class action seeking statutory and punitive damages from credit reporting agency, under Fair Credit Reporting Act (FCRA), for failure to use reasonable procedures to ensure accuracy of credit files, absent evidence that the files were actually read and not merely processed. U.S. Const. art. 3, § 2, cl. 1; Consumer Credit Protection Act §§ 607, 616(a), 15 U.S.C.A. §§ 1681e(b), 1681n(a).

41. Federal Civil Procedure ⚿182.5

Finance, Banking, and Credit ⚿1597

Risk of future harm to consumers as a result of misleading alerts in their credit files maintained by credit reporting agency, which had not been disseminated to third-party businesses, indicating that the consumer's name was a "potential match" to a name on a list maintained by the United States Treasury Department's Office of Foreign Assets Control (OFAC) of terrorists, drug traffickers, and other serious criminals, did not satisfy the concrete injury requirement for Article III standing to bring class action seeking retrospective damages from credit reporting agency, under Fair Credit Reporting Act (FCRA), for failure to use reasonable procedures to ensure accuracy of credit files; consumers did not demonstrate that risk of future harm materialized, that there was sufficient likelihood that agency would disseminate the information, or that they suffered some other injury, such as emotional injury, from mere risk that credit reports would be provided to third parties. U.S. Const. art. 3, § 2, cl. 1; Consumer Credit Protection Act §§ 607, 616(a), 15 U.S.C.A. §§ 1681e(b), 1681n(a).

42. Injunction ⚿1042

A person exposed to a risk of future harm may pursue forward-looking, injunctive relief to prevent the harm from occurring, at least so long as the risk of harm is sufficiently imminent and substantial.

43. Federal Civil Procedure ⚿103.2

Injunction ⚿1505

A plaintiff must demonstrate standing separately for each form of relief sought; therefore, a plaintiff 's standing to seek injunctive relief does not necessarily mean that the plaintiff has standing to seek retrospective damages.

44. Federal Civil Procedure ⚿103.2

In a suit for damages, the mere risk of future harm, standing alone, cannot qualify as a concrete harm, for purposes of Article III standing, at least unless the exposure to the risk of future harm itself causes a separate concrete harm. U.S. Const. art. 3, § 2, cl. 1.

45. Libel and Slander ⚿33, 112(1)

Libel and slander per se require evidence of publication, and for those torts, publication is generally presumed to cause a harm, albeit not a readily quantifiable harm.

46. Federal Civil Procedure ⚿182.5

Finance, Banking, and Credit ⚿1597

Other than named plaintiff, there was no evidence of harm to class of consumers with alerts in their credit files maintained by credit reporting agency, indicating that their name was a "potential match" to a name on a list maintained by United States Treasury Department's Office of Foreign Assets Control (OFAC) of terrorists, drug traffickers, and other serious criminals, as result of incorrect format of mailings to consumers, and thus, consumers other than named plaintiff lacked Article III standing to pursue claims against agency for breach of obligation under Fair Credit Reporting Act (FCRA) to provide them with complete credit files upon request; there was no evidence that any other class member opened mailings, or that they were confused, distressed, or relied on mailings in any way. U.S. Const. art. 3, § 2, cl. 1; Consumer Credit Protection Act § 609, 15 U.S.C.A. § 1681g(a)(1), (c)(2).

47. Finance, Banking, and Credit ⚿1431

The Fair Credit Reporting Act's (FCRA) disclosure and summary-of-rights requirements are designed to protect consumers' interests in learning of any inaccuracies in their credit files so that they can promptly correct the files before they are disseminated to third parties. Consumer Credit Protection Act § 609, 15 U.S.C.A. § 1681g(a)(1), (c)(2).

48. Federal Civil Procedure ⚿182.5

Finance, Banking, and Credit ⚿1597

Risk of future harm to consumers with alerts in their credit files maintained by credit reporting agency, indicating that their name was a "potential match" to a name on a list maintained by United States Treasury Department's Office of Foreign Assets Control (OFAC) of terrorists, drug traffickers, and other serious criminals, as result of incorrect format of mailings to consumers, did not support Article III standing to pursue class action retrospective damages claims against agency for breach of obligation under Fair Credit Reporting Act (FCRA) to provide them with complete credit files upon request; consumers did not explain how the formatting error prevented them from contacting agency to correct any errors before misleading credit reports were disseminated to third-party businesses. U.S. Const. art. 3, § 2, cl. 1; Consumer Credit Protection Act § 609, 15 U.S.C.A. § 1681g(a)(1), (c)(2).

49. Federal Civil Procedure ⚿182.5

Finance, Banking, and Credit ⚿1597

Consumers with alerts in their credit files maintained by credit reporting agency, indicating that their name was a "potential match" to a name on list maintained by United States Treasury Department's Office of Foreign Assets Control (OFAC) of terrorists, drug traffickers, and other serious criminals, did not suffer a concrete informational injury as a result of incorrect format of mailings to consumers, as

would support Article III standing to pursue class action claims against agency for breach of obligation under Fair Credit Reporting Act (FCRA) to provide complete credit files upon request; consumers did not allege that they failed to receive required information, only that they received it in the wrong format, and they identified no downstream consequences from failing to receive the information. U.S. Const. art. 3, § 2, cl. 1; Consumer Credit Protection Act § 609, 15 U.S.C.A. § 1681g(a)(1), (c)(2).

50. Federal Civil Procedure ⚿103.2

An asserted informational injury that causes no adverse effects cannot satisfy Article III's concrete injury requirement to standing. U.S. Const. art. 3, § 2, cl. 1.

Syllabus *

The Fair Credit Reporting Act regulates the consumer reporting agencies that compile and disseminate personal information about consumers. 15 U.S.C. § 1681 *et seq.* The Act also creates a cause of action for consumers to sue and recover damages for certain violations. § 1681n(a). TransUnion is a credit reporting agency that compiles personal and financial information about individual consumers to create consumer reports and then sells those reports for use by entities that request information about the creditworthiness of individual consumers. Beginning in 2002, TransUnion introduced an add-on product called OFAC Name Screen Alert. When a business opted into the Name Screen service, TransUnion would conduct its ordinary credit check of the consumer, and it would also use third-party software to compare the consumer's name against a list maintained by the U. S. Treasury Department's Office of Foreign Assets Control (OFAC) of terrorists, drug traffickers, and other serious criminals. If the consumer's first and last name matched the first and last name of an individual on OFAC's list, then TransUnion would place an alert on the credit report indicating that the consumer's name was a "potential match" to a name on the OFAC list. At that time, TransUnion did not compare any data other than first and last names.

A class of 8,185 individuals with OFAC alerts in their credit files sued TransUnion under the Fair Credit Reporting Act for failing to use reasonable procedures to ensure the accuracy of their credit files. The plaintiffs also complained about formatting defects in certain mailings sent to them by TransUnion. The parties stipulated prior to trial that only 1,853 class members (including the named plaintiff Sergio Ramirez) had their misleading credit reports containing OFAC alerts provided to third parties during the 7-month period specified in the class definition. The internal credit files of the other 6,332 class members were not provided to third parties during the relevant time period. The District Court ruled that all class members had Article III standing on each of the three statutory claims. The jury returned a verdict for the plaintiffs and awarded each class member statutory damages and punitive damages. A divided panel of the Ninth Circuit affirmed in relevant part.

Held: Only plaintiffs concretely harmed by a defendant's statutory violation have Article III standing to seek damages against that private defendant in federal court. Pp. 2202 – 2214.

(a) Article III confines the federal judicial power to the resolution of "Cases"

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

and "Controversies" in which a plaintiff has a "personal stake." *Raines v. Byrd*, 521 U.S. 811, 819–820, 117 S.Ct. 2312, 138 L.Ed.2d 849. To have Article III standing to sue in federal court, a plaintiff must show, among other things, that the plaintiff suffered concrete injury in fact. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–561, 112 S.Ct. 2130, 119 L.Ed.2d 351. Central to assessing concreteness is whether the asserted harm has a "close relationship" to a harm "traditionally" recognized as providing a basis for a lawsuit in American courts. *Spokeo, Inc.* v. *Robins*, 578 U. S. 330, 340, 136 S.Ct. 1540, 194 L.Ed.2d 635. That inquiry asks whether plaintiffs have identified a close historical or common-law analogue for their asserted injury. Physical or monetary harms readily qualify as concrete injuries under Article III, and various intangible harms—like reputational harms—can also be concrete. *Ibid.*

"Article III standing requires a concrete injury even in the context of a statutory violation." *Ibid.* The Court has rejected the proposition that "a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right." *Id.*, at 341, 136 S.Ct. 1540. An injury in law is not an injury in fact. Pp. 2202 – 2207.

(b) The Court applies the fundamental standing requirement of concrete harm to this case. Pp. 2207 – 2214.

(1) In their reasonable-procedures claim, all 8,185 class members maintain that TransUnion did not do enough to ensure that misleading OFAC alerts labeling them as potential terrorists were not included in their credit files. See § 1681e(b). TransUnion provided third parties with credit reports containing OFAC alerts for 1,853 class members (including the named plaintiff Ramirez). Those 1,853 class members therefore suffered a harm with a "close relationship" to the harm associated with the tort of defamation. *Spokeo*, 578 U. S., at 341, 136 S.Ct. 1540. Under longstanding American law, a person is injured when a defamatory statement "that would subject him to hatred, contempt, or ridicule" is published to a third party. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 13, 110 S.Ct. 2695, 111 L.Ed.2d 1. The Court has no trouble concluding that the 1,853 class members suffered a concrete harm that qualifies as an injury in fact

The credit files of the remaining 6,332 class members also contained misleading OFAC alerts, but the parties stipulated that TransUnion did not provide those plaintiffs' credit information to any potential creditors during the designated class period. The mere existence of inaccurate information, absent dissemination, traditionally has not provided the basis for a lawsuit in American courts. The plaintiffs cannot demonstrate that the misleading information in the internal credit files itself constitutes a concrete harm.

The plaintiffs advance a separate argument based on their exposure to the risk that the misleading information would be disseminated in the future to third parties. The Court has recognized that material risk of future harm can satisfy the concrete-harm requirement in the context of a claim for injunctive relief to prevent the harm from occurring, at least so long as the risk of harm is sufficiently imminent and substantial. See *Spokeo*, 578 U. S., at 341–342, 136 S.Ct. 1540 (citing *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 133 S.Ct. 1138, 185 L.Ed.2d 264). But TransUnion advances a persuasive argument that the mere risk of future harm, without more, cannot qualify as a concrete harm in a suit for damages. The 6,332 plaintiffs did

not demonstrate that the risk of future harm materialized. Nor did those plaintiffs present evidence that the class members were independently harmed by their exposure to the risk itself. The risk of future harm cannot supply the basis for their standing. Pp. 2208 – 2213.

(2) In two other claims, all 8,185 class members complained about formatting defects in certain mailings sent to them by TransUnion. But the plaintiffs have not demonstrated that the format of TransUnion's mailings caused them a harm with a close relationship to a harm traditionally recognized as providing a basis for a lawsuit in American courts. See *Spokeo*, 578 U. S., at 341, 136 S.Ct. 1540.

The plaintiffs argue that TransUnion's formatting violations created a risk of future harm, because consumers who received the information in the dual-mailing format were at risk of not learning about the OFAC alert in their credit files and thus not asking for corrections. The risk of future harm on its own is not enough to support Article III standing for their damages claim. In any event, the plaintiffs here made no effort to explain how the formatting error prevented them asking for corrections to prevent future harm.

The United States as *amicus curiae* asserts that the plaintiffs suffered a concrete "informational injury" from TransUnion's formatting violations. See *Federal Election Comm'n v. Akins*, 524 U.S. 11, 118 S.Ct. 1777, 141 L.Ed.2d 10; *Public Citizen v. Department of Justice*, 491 U.S. 440, 109 S.Ct. 2558, 105 L.Ed.2d 377. But the plaintiffs here did not allege that they failed to receive any required information. They argued only that they received the information in the wrong format. Moreover, an asserted informational injury that causes no adverse effects does not satisfy Article III. Pp. 2212 – 2214.

951 F.3d 1008, reversed and remanded.

KAVANAUGH, J., delivered the opinion of the Court, in which ROBERTS, C. J., and ALITO, GORSUCH, and BARRETT, JJ., joined. THOMAS, J., filed a dissenting opinion, in which BREYER, SOTOMAYOR, and KAGAN, JJ., joined. KAGAN, J., filed a dissenting opinion, in which BREYER and SOTOMAYOR, JJ., joined.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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For U.S. Supreme Court briefs, see:

2021 WL 1123968 (Reply.Brief)

2021 WL 859701 (Resp.Brief)

2021 WL 409753 (Pet.Brief)

Justice KAVANAUGH delivered the opinion of the Court.

To have Article III standing to sue in federal court, plaintiffs must demonstrate, among other things, that they suffered a concrete harm. No concrete harm, no standing. Central to assessing concreteness is whether the asserted harm has a "close relationship" to a harm traditionally recognized as providing a basis for a lawsuit in American courts—such as physical harm, monetary harm, or various intangible harms including (as relevant here) reputational harm. *Spokeo, Inc.* v. *Robins*, 578 U. S. 330, 340–341, 136 S.Ct. 1540, 194 L.Ed.2d 635 (2016).

In this case, a class of 8,185 individuals sued TransUnion, a credit reporting agency, in federal court under the Fair Credit Reporting Act. The plaintiffs claimed that TransUnion failed to use reasonable procedures to ensure the accuracy of their credit files, as maintained internally by TransUnion. For 1,853 of the class members, TransUnion provided misleading credit reports to third-party businesses. We conclude that those 1,853 class members have demonstrated concrete reputational harm and thus have Article III standing to sue on the reasonable-procedures claim. The internal credit files of the other 6,332 class members were *not* provided to third-party businesses during the relevant time period. We conclude that those 6,332 class members have not demonstrated concrete harm and thus lack Article III standing to sue on the reasonable-procedures claim.

In two other claims, all 8,185 class members complained about formatting defects in certain mailings sent to them by TransUnion. But the class members other than the named plaintiff Sergio Ramirez have not demonstrated that the alleged formatting errors caused them any concrete harm. Therefore, except for Ramirez, the class members do not have standing as to those two claims.

Over Judge McKeown's dissent, the U. S. Court of Appeals for the Ninth Circuit ruled that all 8,185 class members have standing as to all three claims. The Court of Appeals approved a class damages award of about $40 million. In light of our conclusion that (i) only 1,853 class members have standing for the reasonable-procedures claim and (ii) only Ramirez himself has standing for the two formatting claims relating to the mailings, we reverse the judgment of the Ninth Circuit and remand the case for further proceedings consistent with this opinion.

I

In 1970, Congress passed and President Nixon signed the Fair Credit Reporting Act. 84 Stat. 1127, as amended, 15 U.S.C. § 1681 *et seq*. The Act seeks to promote "fair and accurate credit reporting" and to protect consumer privacy. § 1681(a). To achieve those goals, the Act regulates the consumer reporting agencies that compile and disseminate personal information about consumers.

The Act "imposes a host of requirements concerning the creation and use of consumer reports." *Spokeo, Inc.* v. *Robins*, 578 U. S. 330, 335, 136 S.Ct. 1540, 194 L.Ed.2d 635 (2016). Three of the Act's requirements are relevant to this case. *First*, the Act requires consumer reporting agencies to "follow reasonable procedures to assure maximum possible accuracy" in consumer reports. § 1681e(b). *Second*, the Act provides that consumer reporting agencies must, upon request, disclose to the consumer "[a]ll information in the consumer's file at the time of the request." § 1681g(a)(1). *Third*, the Act compels consumer reporting agencies to "provide to a

consumer, with each written disclosure by the agency to the consumer," a "summary of rights" prepared by the Consumer Financial Protection Bureau. § 1681g(c)(2).

The Act creates a cause of action for consumers to sue and recover damages for certain violations. The Act provides: "Any person who willfully fails to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer" for actual damages or for statutory damages not less than $100 and not more than $1,000, as well as for punitive damages and attorney's fees. § 1681n(a).

TransUnion is one of the "Big Three" credit reporting agencies, along with Equifax and Experian. As a credit reporting agency, TransUnion compiles personal and financial information about individual consumers to create consumer reports. TransUnion then sells those consumer reports for use by entities such as banks, landlords, and car dealerships that request information about the creditworthiness of individual consumers.

Beginning in 2002, TransUnion introduced an add-on product called OFAC Name Screen Alert. OFAC is the U. S. Treasury Department's Office of Foreign Assets Control. OFAC maintains a list of "specially designated nationals" who threaten America's national security. Individuals on the OFAC list are terrorists, drug traffickers, or other serious criminals. It is generally unlawful to transact business with any person on the list. 31 C.F.R. pt. 501, App. A (2020). TransUnion created the OFAC Name Screen Alert to help businesses avoid transacting with individuals on OFAC's list.

When this litigation arose, Name Screen worked in the following way: When a business opted into the Name Screen service, TransUnion would conduct its ordinary credit check of the consumer, and it would also use third-party software to compare the consumer's name against the OFAC list. If the consumer's first and last name matched the first and last name of an individual on OFAC's list, then TransUnion would place an alert on the credit report indicating that the consumer's name was a "potential match" to a name on the OFAC list. TransUnion did not compare any data other than first and last names. Unsurprisingly, TransUnion's Name Screen product generated many false positives. Thousands of law-abiding Americans happen to share a first and last name with one of the terrorists, drug traffickers, or serious criminals on OFAC's list of specially designated nationals.

Sergio Ramirez learned the hard way that he is one such individual. On February 27, 2011, Ramirez visited a Nissan dealership in Dublin, California, seeking to buy a Nissan Maxima. Ramirez was accompanied by his wife and his father-in-law. After Ramirez and his wife selected a color and negotiated a price, the dealership ran a credit check on both Ramirez and his wife. Ramirez's credit report, produced by TransUnion, contained the following alert: "***OFAC ADVISOR ALERT - INPUT NAME MATCHES NAME ON THE OFAC DATABASE." App. 84. A Nissan salesman told Ramirez that Nissan would not sell the car to him because his name was on a " 'terrorist list.' " *Id.*, at 333. Ramirez's wife had to purchase the car in her own name.

The next day, Ramirez called TransUnion and requested a copy of his credit file. TransUnion sent Ramirez a mailing that same day that included his credit file and the statutorily required summary of rights prepared by the CFPB. The mailing did not mention the OFAC alert in Ramirez's file. The following day, TransUnion sent Ramirez a second mailing—a letter alerting him that his name was considered a

potential match to names on the OFAC list. The second mailing did not include an additional copy of the summary of rights. Concerned about the mailings, Ramirez consulted a lawyer and ultimately canceled a planned trip to Mexico. TransUnion eventually removed the OFAC alert from Ramirez's file.

In February 2012, Ramirez sued TransUnion and alleged three violations of the Fair Credit Reporting Act. *First*, he alleged that TransUnion, by using the Name Screen product, failed to follow reasonable procedures to ensure the accuracy of information in his credit file. See § 1681e(b). *Second*, he claimed that TransUnion failed to provide him with *all* the information in his credit file upon his request. In particular, TransUnion's first mailing did not include the fact that Ramirez's name was a potential match for a name on the OFAC list. See § 1681g(a)(1). *Third*, Ramirez asserted that TransUnion violated its obligation to provide him with a summary of his rights "with each written disclosure," because TransUnion's second mailing did not contain a summary of Ramirez's rights. § 1681g(c)(2). Ramirez requested statutory and punitive damages.

Ramirez also sought to certify a class of all people in the United States to whom TransUnion sent a mailing during the period from January 1, 2011, to July 26, 2011, that was similar in form to the second mailing that Ramirez received. TransUnion opposed certification. The U. S. District Court for the Northern District of California rejected TransUnion's argument and certified the class. 301 F.R.D. 408 (2014).

Before trial, the parties stipulated that the class contained 8,185 members, including Ramirez. The parties also stipulated that only 1,853 members of the class (including Ramirez) had their credit reports disseminated by TransUnion to potential creditors during the period from January 1, 2011, to July 26, 2011. The District Court ruled that all 8,185 class members had Article III standing. 2016 WL 6070490, *5 (Oct. 17, 2016).

At trial, Ramirez testified about his experience at the Nissan dealership. But Ramirez did not present evidence about the experiences of other members of the class.

After six days of trial, the jury returned a verdict for the plaintiffs. The jury awarded each class member $984.22 in statutory damages and $6,353.08 in punitive damages for a total award of more than $60 million. The District Court rejected all of TransUnion's post-trial motions.

The U. S. Court of Appeals for the Ninth Circuit affirmed in relevant part. 951 F.3d 1008 (2020). The court held that all members of the class had Article III standing to recover damages for all three claims. The court also concluded that Ramirez's claims were typical of the class's claims for purposes of Rule 23 of the Federal Rules of Civil Procedure. Finally, the court reduced the punitive damages award to $3,936.88 per class member, thus reducing the total award to about $40 million.

Judge McKeown dissented in relevant part. As to the reasonable-procedures claim, she concluded that only the 1,853 class members whose reports were actually disseminated by TransUnion to third parties had Article III standing to recover damages. In her view, the remaining 6,332 class members did not suffer a concrete injury sufficient for standing. As to the two claims related to the mailings, Judge McKeown would have held that none of the 8,185 class members other than the named plaintiff Ramirez had standing as to those claims.

We granted certiorari. 592 U. S. ——, 141 S.Ct. 972, 208 L.Ed.2d 504 (2020).

II

The question in this case is whether the 8,185 class members have Article III standing as to their three claims. In Part II, we summarize the requirements of Article III standing—in particular, the requirement that plaintiffs demonstrate a "concrete harm." In Part III, we then apply the concrete-harm requirement to the plaintiffs' lawsuit against TransUnion.

A

[1] The "law of Art. III standing is built on a single basic idea—the idea of separation of powers." *Raines v. Byrd*, 521 U.S. 811, 820, 117 S.Ct. 2312, 138 L.Ed.2d 849 (1997) (internal quotation marks omitted). Separation of powers "was not simply an abstract generalization in the minds of the Framers: it was woven into the document that they drafted in Philadelphia in the summer of 1787." *INS v. Chadha*, 462 U.S. 919, 946, 103 S.Ct. 2764, 77 L.Ed.2d 317 (1983) (internal quotation marks omitted).

[2, 3] Therefore, we start with the text of the Constitution. Article III confines the federal judicial power to the resolution of "Cases" and "Controversies." For there to be a case or controversy under Article III, the plaintiff must have a " 'personal stake' " in the case—in other words, standing. *Raines*, 521 U.S., at 819, 117 S.Ct. 2312. To demonstrate their personal stake, plaintiffs must be able to sufficiently answer the question: " 'What's it to you?' " Scalia, The Doctrine of Standing as an Essential Element of the Separation of Powers, 17 Suffolk U. L. Rev. 881, 882 (1983).

[4, 5] To answer that question in a way sufficient to 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. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–561, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). If "the plaintiff does not claim to have suffered an injury that the defendant caused and the court can remedy, there is no case or controversy for the federal court to resolve." *Casillas v. Madison Avenue Assocs., Inc.*, 926 F.3d 329, 333 (CA7 2019) (Barrett, J.).

[6–10] Requiring a plaintiff to demonstrate a concrete and particularized injury caused by the defendant and redressable by the court ensures that federal courts decide only "the rights of individuals," *Marbury v. Madison*, 1 Cranch 137, 170, 5 U.S. 137, 2 L.Ed. 60 (1803), and that federal courts exercise "their proper function in a limited and separated government," Roberts, Article III Limits on Statutory Standing, 42 Duke L. J. 1219, 1224 (1993). Under Article III, federal courts do not adjudicate hypothetical or abstract disputes. Federal courts do not possess a roving commission to publicly opine on every legal question. Federal courts do not exercise general legal oversight of the Legislative and Executive Branches, or of private entities. And federal courts do not issue advisory opinions. As Madison explained in Philadelphia, federal courts instead decide only matters "of a Judiciary Nature." 2 Records of the Federal Convention of 1787, p. 430 (M. Farrand ed. 1966).

[11] In sum, under Article III, a federal court may resolve only "a real controversy with real impact on real persons." *American Legion* v. *American Humanist Assn.*, 588 U. S. ——, ——, 139 S.Ct. 2067, 2103, 204 L.Ed.2d 452 (2019).

B

[12] The question in this case focuses on the Article III requirement that the plaintiff 's injury in fact be "concrete"—that is, "real, and not abstract." *Spokeo, Inc.* v. *Robins*, 578 U. S. 330, 340, 136 S.Ct. 1540, 194 L.Ed.2d 635 (2016) (internal quotation marks omitted); see *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158, 134 S.Ct. 2334, 189 L.Ed.2d 246 (2014); *Summers v. Earth Island Institute*, 555 U.S. 488, 493, 129 S.Ct. 1142, 173 L.Ed.2d 1 (2009); *Lujan*, 504 U.S., at 560, 112 S.Ct. 2130; *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 220–221, 94 S.Ct. 2925, 41 L.Ed.2d 706 (1974).

[13] What makes a harm concrete for purposes of Article III? As a general matter, the Court has explained that "history and tradition offer a meaningful guide to the types of cases that Article III empowers federal courts to consider." *Sprint Communications Co. v. APCC Services, Inc.*, 554 U.S. 269, 274, 128 S.Ct. 2531, 171 L.Ed.2d 424 (2008); see also *Steel Co. v. Citizens for Better Environment*, 523 U.S. 83, 102, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998). And with respect to the concrete-harm requirement in particular, this Court's opinion in *Spokeo* v. *Robins* indicated that courts should assess whether the alleged injury to the plaintiff has a "close relationship" to a harm "traditionally" recognized as providing a basis for a lawsuit in American courts. 578 U. S., at 341, 136 S.Ct. 1540. That inquiry asks whether plaintiffs have identified a close historical or common-law analogue for their asserted injury. *Spokeo* does not require an exact duplicate in American history and tradition. But *Spokeo* is not an open-ended invitation for federal courts to loosen Article III based on contemporary, evolving beliefs about what kinds of suits should be heard in federal courts.

[14, 15] As *Spokeo* explained, certain harms readily qualify as concrete injuries under Article III. The most obvious are traditional tangible harms, such as physical harms and monetary harms. If a defendant has caused physical or monetary injury to the plaintiff, the plaintiff has suffered a concrete injury in fact under Article III.

[16] Various intangible harms can also be concrete. Chief among them are injuries with a close relationship to harms traditionally recognized as providing a basis for lawsuits in American courts. *Id.*, at 340–341, 136 S.Ct. 1540. Those include, for example, reputational harms, disclosure of private information, and intrusion upon seclusion. See, *e.g., Meese v. Keene*, 481 U.S. 465, 473, 107 S.Ct. 1862, 95 L.Ed.2d 415 (1987) (reputational harms); *Davis v. Federal Election Comm'n*, 554 U.S. 724, 733, 128 S.Ct. 2759, 171 L.Ed.2d 737 (2008) (disclosure of private information); see also *Gadelhak v. AT&T Services, Inc.*, 950 F.3d 458, 462 (CA7 2020) (Barrett, J.) (intrusion upon seclusion). And those traditional harms may also include harms specified by the Constitution itself. See, *e.g., Spokeo*, 578 U. S., at 340, 136 S.Ct. 1540 (citing *Pleasant Grove City v. Summum*, 555 U.S. 460, 129 S.Ct. 1125, 172 L.Ed.2d 853 (2009) (abridgment of free speech), and *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993) (infringement of free exercise)).

[17, 18] In determining whether a harm is sufficiently concrete to qualify as an injury in fact, the Court in *Spokeo* said that Congress's views may be "instructive." 578 U. S., at 341, 136 S.Ct. 1540. Courts must afford due respect to Congress's decision to impose a statutory prohibition or obligation on a defendant, and to grant a plaintiff a cause of action to sue over the defendant's violation of that statutory prohibition or obligation. See *id.*, at 340–341, 136 S.Ct. 1540. In that way, Con-

gress may "elevate to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law." *Id.,* at 341, 136 S.Ct. 1540 (alterations and internal quotation marks omitted); see *Lujan*, 504 U.S. at 562–563, 578, 112 S.Ct. 2130; cf., *e.g., Allen v. Wright*, 468 U.S. 737, 757, n. 22, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984) (discriminatory treatment). But even though "Congress may 'elevate' harms that 'exist' in the real world before Congress recognized them to actionable legal status, it may not simply enact an injury into existence, using its lawmaking power to transform something that is not remotely harmful into something that is." *Hagy v. Demers & Adams*, 882 F.3d 616, 622 (CA6 2018) (Sutton, J.) (citing *Spokeo*, 578 U. S., at 341, 136 S.Ct. 1540).

[19] Importantly, this Court has rejected the proposition that "a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right." *Spokeo*, 578 U. S., at 341, 136 S.Ct. 1540. As the Court emphasized in *Spokeo*, "Article III standing requires a concrete injury even in the context of a statutory violation." *Ibid.*

[20, 21] Congress's creation of a statutory prohibition or obligation and a cause of action does not relieve courts of their responsibility to independently decide whether a plaintiff has suffered a concrete harm under Article III any more than, for example, Congress's enactment of a law regulating speech relieves courts of their responsibility to independently decide whether the law violates the First Amendment. Cf. *United States v. Eichman*, 496 U.S. 310, 317–318, 110 S.Ct. 2404, 110 L.Ed.2d 287 (1990). As Judge Katsas has rightly stated, "we cannot treat an injury as 'concrete' for Article III purposes based only on Congress's say-so." *Trichell v. Midland Credit Mgmt., Inc.*, 964 F.3d 990, 999, n. 2 (CA11 2020) (sitting by designation); see *Marbury*, 1 Cranch, at 178; see also *Raines*, 521 U.S., at 820, n. 3, 117 S.Ct. 2312; *Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 26, 41, n. 22, 96 S.Ct. 1917, 48 L.Ed.2d 450 (1976); *Muskrat v. United States*, 219 U.S. 346, 361–362, 31 S.Ct. 250, 55 L.Ed. 246 (1911).

[22–24] For standing purposes, therefore, an important difference exists between (i) a plaintiff 's statutory cause of action to sue a defendant over the defendant's violation of federal law, and (ii) a plaintiff 's suffering concrete harm because of the defendant's violation of federal law. Congress may enact legal prohibitions and obligations. And Congress may create causes of action for plaintiffs to sue defendants who violate those legal prohibitions or obligations. But under Article III, an injury in law is not an injury in fact. Only those plaintiffs who have been *concretely harmed* by a defendant's statutory violation may sue that private defendant over that violation in federal court. As then-Judge Barrett succinctly summarized, "Article III grants federal courts the power to redress harms that defendants cause plaintiffs, not a freewheeling power to hold defendants accountable for legal infractions." *Casillas*, 926 F.3d at 332.

To appreciate how the Article III "concrete harm" principle operates in practice, consider two different hypothetical plaintiffs. Suppose first that a Maine citizen's land is polluted by a nearby factory. She sues the company, alleging that it violated a federal environmental law and damaged her property. Suppose also that a second plaintiff in Hawaii files a federal lawsuit alleging that the same company in Maine violated that same environmental law by polluting land in Maine. The violation did not personally harm the plaintiff in Hawaii.

Even if Congress affords both hypothetical plaintiffs a cause of action (with statutory damages available) to sue over the defendant's legal violation, Article III standing doctrine sharply distinguishes between those two scenarios. The first lawsuit may of course proceed in federal court because the plaintiff has suffered concrete harm to her property. But the second lawsuit may not proceed because that plaintiff has not suffered any physical, monetary, or cognizable intangible harm traditionally recognized as providing a basis for a lawsuit in American courts. An uninjured plaintiff who sues in those circumstances is, by definition, not seeking to remedy any harm to herself but instead is merely seeking to ensure a defendant's "compliance with regulatory law" (and, of course, to obtain some money via the statutory damages). *Spokeo*, 578 U. S., at 345, 136 S.Ct. 1540 (THOMAS, J., concurring) (internal quotation marks omitted); see *Steel Co.*, 523 U.S., at 106–107, 118 S.Ct. 1003. Those are not grounds for Article III standing.[1]

[25] As those examples illustrate, if the law of Article III did not require plaintiffs to demonstrate a "concrete harm," Congress could authorize virtually any citizen to bring a statutory damages suit against virtually any defendant who violated virtually any federal law. Such an expansive understanding of Article III would flout constitutional text, history, and precedent. In our view, the public interest that private entities comply with the law cannot "be converted into an individual right by a statute that denominates it as such, and that permits all citizens (or, for that matter, a subclass of citizens who suffer no distinctive concrete harm) to sue." *Lujan*, 504 U.S., at 576–577, 112 S.Ct. 2130.[2]

1. The lead dissent notes that the terminology of injury in fact became prevalent only in the latter half of the 20th century. That is unsurprising because until the 20th century, Congress did not often afford federal "citizen suit"-style causes of action to private plaintiffs who did not suffer concrete harms. For example, until the 20th century, Congress generally did not create "citizen suit" causes of action for private plaintiffs to sue the Government. See Magill, Standing for the Public, 95 Va. L. Rev. 1131, 1186–1187 (2009). Moreover, until *Abbott Laboratories v. Gardner*, 387 U.S. 136, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967), a plaintiff often could not bring a pre-enforcement suit against a Government agency or official under the Administrative Procedure Act arguing that an agency rule was unlawful; instead, a party could raise such an argument only in an enforcement action. Likewise, until the 20th century, Congress rarely created "citizen suit"-style causes of action for suits against private parties by private plaintiffs who had not suffered a concrete harm. All told, until the 20th century, this Court had little reason to emphasize the injury-in-fact requirement because, until the 20th century, there were relatively few instances where litigants without concrete injuries had a cause of action to sue in federal court. The situation has changed markedly, especially over the last 50 years or so. During that time, Congress has created many novel and expansive causes of action that in turn have required greater judicial focus on the requirements of Article III. See, *e.g.*, *Spokeo, Inc.* v. *Robins*, 578 U. S. 330, 136 S.Ct. 1540, 194 L.Ed.2d 635 (2016); *Summers v. Earth Island Institute*, 555 U.S. 488, 129 S.Ct. 1142, 173 L.Ed.2d 1 (2009); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992).

2. A plaintiff must show that the injury is not only concrete but also particularized. But if there were no concrete-harm requirement, the requirement of a particularized injury would do little or nothing to constrain Congress from freely creating causes of action for vast classes of *unharmed* plaintiffs to sue any defendants who violate any federal law. (Congress might, for example, provide that everyone has an individual right to clean air and can sue any defendant who violates any air-pollution law.) That is one reason why the Court has been careful to emphasize that concreteness and particularization are separate requirements. See *Spokeo*, 578 U. S., at 339-40, 136 S.Ct. 1540; see generally Bayefsky, Constitutional Injury and Tangibility, 59 Wm. & Mary L. Rev. 2285, 2298–2300, 2368 (2018).

[26, 27] A regime where Congress could freely authorize *unharmed* plaintiffs to sue defendants who violate federal law not only would violate Article III but also would infringe on the Executive Branch's Article II authority. We accept the "displacement of the democratically elected branches when necessary to decide an actual case." Roberts, 42 Duke L. J., at 1230. But otherwise, the choice of how to prioritize and how aggressively to pursue legal actions against defendants who violate the law falls within the discretion of the Executive Branch, not within the purview of private plaintiffs (and their attorneys). 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. See *Lujan*, 504 U.S., at 577, 112 S.Ct. 2130.

[28, 29] In sum, the concrete-harm requirement is essential to the Constitution's separation of powers. To be sure, the concrete-harm requirement can be difficult to apply in some cases. Some advocate that the concrete-harm requirement be ditched altogether, on the theory that it would be more efficient or convenient to simply say that a statutory violation and a cause of action suffice to afford a plaintiff standing. But as the Court has often stated, "the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution." *Chadha*, 462 U.S., at 944, 103 S.Ct. 2764. So it is here.[3]

III

We now apply those fundamental standing principles to this lawsuit. We must determine whether the 8,185 class members have standing to sue TransUnion for its alleged violations of the Fair Credit Reporting Act. The plaintiffs argue that TransUnion failed to comply with statutory obligations (i) to follow reasonable procedures to ensure the accuracy of credit files so that the files would not include OFAC alerts labeling the plaintiffs as potential terrorists; and (ii) to provide a consumer, upon request, with his or her complete credit file, including a summary of rights.

[30–35] Some preliminaries: As the party invoking federal jurisdiction, the plaintiffs bear the burden of demonstrating that they have standing. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561,

3. The lead dissent would reject the core standing principle that a plaintiff must always have suffered a concrete harm, and would cast aside decades of precedent articulating that requirement, such as *Spokeo*, *Summers*, and *Lujan*. *Post*, at 2219 – 2220 (opinion of THOMAS, J.). As we see it, the dissent's theory would largely outsource Article III to Congress. As we understand the dissent's theory, a suit seeking to enforce "general compliance with regulatory law" would not suffice for Article III standing because such a suit seeks to vindicate a duty owed to the whole community. *Spokeo*, 578 U. S., at 345, 136 S.Ct. 1540 (THOMAS, J., concurring) (internal quotation marks omitted). But under the dissent's theory, so long as Congress frames a defendant's obligation to comply with regulatory law as an obligation owed to *individuals*, any suit to vindicate that obligation suddenly suffices for Article III. Suppose, for example, that Congress passes a law purporting to give all American citizens an individual right to clean air and clean water, as well as a cause of action to sue and recover $100 in damages from any business that violates any pollution law anywhere in the United States. The dissent apparently would find standing in such a case. We respectfully disagree. In our view, unharmed plaintiffs who seek to sue under such a law are still doing no more than enforcing general compliance with regulatory law. And under Article III and this Court's precedents, Congress may not authorize plaintiffs who have not suffered concrete harms to sue in federal court simply to enforce general compliance with regulatory law.

112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). Every class member must have Article III standing in order to recover individual damages. "Article III does not give federal courts the power to order relief to any uninjured plaintiff, class action or not." *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 466, 136 S.Ct. 1036, 194 L.Ed.2d 124 (2016) (ROBERTS, C. J., concurring).[4] Plaintiffs must maintain their personal interest in the dispute at all stages of litigation. *Davis v. Federal Election Comm'n*, 554 U.S. 724, 733, 128 S.Ct. 2759, 171 L.Ed.2d 737 (2008). A plaintiff must demonstrate standing "with the manner and degree of evidence required at the successive stages of the litigation." *Lujan*, 504 U.S., at 561, 112 S.Ct. 2130. Therefore, in a case like this that proceeds to trial, the specific facts set forth by the plaintiff to support standing "must be supported adequately by the evidence adduced at trial." *Ibid.* (internal quotation marks omitted). And standing is not dispensed in gross; rather, plaintiffs must demonstrate standing for each claim that they press and for each form of relief that they seek (for example, injunctive relief and damages). *Davis*, 554 U.S., at 734, 128 S.Ct. 2759; *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 185, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000).

A

We first address the plaintiffs' claim that TransUnion failed to "follow reasonable procedures to assure maximum possible accuracy" of the plaintiffs' credit files maintained by TransUnion. 15 U.S.C. § 1681e(b). In particular, the plaintiffs argue that TransUnion did not do enough to ensure that OFAC alerts labeling them as potential terrorists were not included in their credit files.

Assuming that the plaintiffs are correct that TransUnion violated its obligations under the Fair Credit Reporting Act to use reasonable procedures in internally maintaining the credit files, we must determine whether the 8,185 class members suffered concrete harm from TransUnion's failure to employ reasonable procedures.[5]

1

[36] Start with the 1,853 class members (including the named plaintiff Ramirez) whose reports were disseminated to third-party businesses. The plaintiffs argue that the publication to a third party of a credit report bearing a misleading OFAC alert injures the subject of the report. The plaintiffs contend that this injury bears a "close relationship" to a harm traditionally recognized as providing a basis for a lawsuit in American courts—namely, the reputational harm associated with the tort of defamation. *Spokeo, Inc.* v. *Robins*, 578 U. S. 330, 341, 136 S.Ct. 1540, 194 L.Ed.2d 635 (2016).

[37] We agree with the plaintiffs. Under longstanding American law, a person is injured when a defamatory statement "that would subject him to hatred, contempt, or ridicule" is published to a third party. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 13, 110 S.Ct. 2695, 111 L.Ed.2d 1 (1990) (internal quotation marks omitted); *Gertz v. Robert Welch, Inc.*, 418 U.S.

4. We do not here address the distinct question whether every class member must demonstrate standing *before* a court certifies a class. See, *e.g., Cordoba v. DIRECTV, LLC,* 942 F.3d 1259, 1277 (CA11 2019).

5. For purposes of this case, the parties have assumed that TransUnion violated the statute even with respect to those plaintiffs whose OFAC alerts were never disseminated to third-party businesses. But see *Washington v. CSC Credit Servs. Inc.,* 199 F.3d 263, 267 (CA5 2000). We take no position on that issue.

323, 349, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974); see also Restatement of Torts § 559 (1938). TransUnion provided third parties with credit reports containing OFAC alerts that labeled the class members as potential terrorists, drug traffickers, or serious criminals. The 1,853 class members therefore suffered a harm with a "close relationship" to the harm associated with the tort of defamation. We have no trouble concluding that the 1,853 class members suffered a concrete harm that qualifies as an injury in fact.

TransUnion counters that those 1,853 class members did not suffer a harm with a "close relationship" to defamation because the OFAC alerts on the disseminated credit reports were only misleading and not literally false. See *id.*, § 558. TransUnion points out that the reports merely identified a consumer as a "*potential* match" to an individual on the OFAC list—a fact that TransUnion says is not technically false.

In looking to whether a plaintiff 's asserted harm has a "close relationship" to a harm traditionally recognized as providing a basis for a lawsuit in American courts, we do not require an exact duplicate. The harm from being labeled a "potential terrorist" bears a close relationship to the harm from being labeled a "terrorist." In other words, the harm from a misleading statement of this kind bears a sufficiently close relationship to the harm from a false and defamatory statement.

In short, the 1,853 class members whose reports were disseminated to third parties suffered a concrete injury in fact under Article III.

2

The remaining 6,332 class members are a different story. To be sure, their credit files, which were maintained by TransUnion, contained misleading OFAC alerts. But the parties stipulated that TransUnion did not provide those plaintiffs' credit information to any potential creditors during the class period from January 2011 to July 2011. Given the absence of dissemination, we must determine whether the 6,332 class members suffered some other concrete harm for purposes of Article III.

[38] The initial question is whether the mere existence of a misleading OFAC alert in a consumer's internal credit file at TransUnion constitutes a concrete injury. As Judge Tatel phrased it in a similar context, "if inaccurate information falls into" a consumer's credit file, "does it make a sound?" *Owner-Operator Independent Drivers Assn., Inc. v. United States Dept. of Transp.*, 879 F.3d 339, 344 (CADC 2018).

Writing the opinion for the D. C. Circuit in *Owner-Operator*, Judge Tatel answered no. Publication is "essential to liability" in a suit for defamation. Restatement of Torts § 577, Comment *a*, at 192. And there is "no historical or common-law analog where the mere existence of inaccurate information, absent dissemination, amounts to concrete injury." *Owner-Operator*, 879 F.3d at 344–345. "Since the basis of the action for words was the loss of credit or fame, and not the insult, it was always necessary to show a publication of the words." J. Baker, An Introduction to English Legal History 474 (5th ed. 2019). Other Courts of Appeals have similarly recognized that, as Judge Colloton summarized, the "retention of information lawfully obtained, without further disclosure, traditionally has not provided the basis for a lawsuit in American courts," meaning that the mere existence of inaccurate information in a database is insufficient to confer Article III standing. *Braitberg v. Charter Communications, Inc.*, 836 F.3d 925, 930 (CA8 2016); see *Gubala v. Time Warner Cable, Inc.*, 846 F.3d 909, 912 (CA7 2017).

[39, 40] The standing inquiry in this case thus distinguishes between (i) credit files that consumer reporting agencies maintain internally and (ii) the consumer credit reports that consumer reporting agencies disseminate to third-party creditors. The mere presence of an inaccuracy in an internal credit file, if it is not disclosed to a third party, causes no concrete harm. In cases such as these where allegedly inaccurate or misleading information sits in a company database, the plaintiffs' harm is roughly the same, legally speaking, as if someone wrote a defamatory letter and then stored it in her desk drawer. A letter that is not sent does not harm anyone, no matter how insulting the letter is. So too here.[6]

[41] Because the plaintiffs cannot demonstrate that the misleading information in the internal credit files itself constitutes a concrete harm, the plaintiffs advance a separate argument based on an asserted *risk of future harm*. They say that the 6,332 class members suffered a concrete injury for Article III purposes because the existence of misleading OFAC alerts in their internal credit files exposed them to a material risk that the information would be disseminated in the future to third parties and thereby cause them harm. The plaintiffs rely on language from *Spokeo* where the Court said that "the risk of real harm" (or as the Court otherwise stated, a "material risk of harm") can sometimes "satisfy the requirement of concreteness." 578 U. S., at 341–342, 136 S.Ct. 1540 (citing *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 133 S.Ct. 1138, 185 L.Ed.2d 264 (2013)).

[42] To support its statement that a material risk of future harm can satisfy the concrete-harm requirement, *Spokeo* cited this Court's decision in *Clapper*. But importantly, *Clapper* involved a suit for *injunctive relief*. As this Court has recognized, a person exposed to a risk of future harm may pursue forward-looking, injunctive relief to prevent the harm from occurring, at least so long as the risk of harm is sufficiently imminent and substantial. See *Clapper*, 568 U.S., at 414, n. 5, 133 S.Ct. 1138; *Los Angeles v. Lyons*, 461 U.S. 95, 102, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983); see also *Gubala*, 846 F.3d, at 912.

[43] But a plaintiff must "demonstrate standing separately for each form of relief sought." *Friends of the Earth*, 528 U.S., at 185, 120 S.Ct. 693. Therefore, a plaintiff 's standing to seek injunctive relief does not necessarily mean that the plaintiff has standing to seek retrospective damages.

[44] TransUnion advances a persuasive argument that in a suit for damages, the

6. For the first time in this Court, the plaintiffs also argue that TransUnion ''published'' the class members' information internally—for example, to employees within TransUnion and to the vendors that printed and sent the mailings that the class members received. That new argument is forfeited. In any event, it is unavailing. Many American courts did not traditionally recognize intra-company disclosures as actionable publications for purposes of the tort of defamation. See, *e.g., Chalkley v. Atlantic Coast Line R. Co.*, 150 Va. 301, 326–328, 143 S.E. 631, 638–639 (1928). Nor have they necessarily recognized disclosures to printing vendors as actionable publications. See, *e.g., Mack v. Delta Air Lines, Inc.*, 639 Fed.Appx. 582, 586 (CA11 2016). Moreover, even the plaintiffs' cited cases require evidence that the defendant actually ''brought an idea to the perception of another,'' Restatement of Torts § 559, Comment *a*, p. 140 (1938), and thus generally require evidence that the document was actually read and not merely processed, cf. *Ostrowe v. Lee*, 256 N.Y. 36, 38–39, 175 N.E. 505, 505–506 (1931) (Cardozo, C. J.). That evidence is lacking here. In short, the plaintiffs' internal publication theory circumvents a fundamental requirement of an ordinary defamation claim—publication—and does not bear a sufficiently ''close relationship'' to the traditional defamation tort to qualify for Article III standing.

mere risk of future harm, standing alone, cannot qualify as a concrete harm—at least unless the exposure to the risk of future harm itself causes a *separate* concrete harm. Brief for Petitioner 39, n. 4; Tr. of Oral Arg. 36.[7] TransUnion contends that if an individual is exposed to a risk of future harm, time will eventually reveal whether the risk materializes in the form of actual harm. If the risk of future harm materializes and the individual suffers a concrete harm, then the harm itself, and not the pre-existing risk, will constitute a basis for the person's injury and for damages. If the risk of future harm does *not* materialize, then the individual cannot establish a concrete harm sufficient for standing, according to TransUnion.

Consider an example. Suppose that a woman drives home from work a quarter mile ahead of a reckless driver who is dangerously swerving across lanes. The reckless driver has exposed the woman to a risk of future harm, but the risk does not materialize and the woman makes it home safely. As counsel for TransUnion stated, that would ordinarily be cause for celebration, not a lawsuit. *Id.*, at 8. But if the reckless driver crashes into the woman's car, the situation would be different, and (assuming a cause of action) the woman could sue the driver for damages.

[45] The plaintiffs note that *Spokeo* cited libel and slander *per se* as examples of cases where, as the plaintiffs see it, a mere risk of harm suffices for a damages claim. But as Judge Tatel explained for the D. C. Circuit, libel and slander *per se* "require evidence of *publication*." *Owner-Operator*, 879 F.3d, at 345. And for those torts, publication is generally presumed to cause a harm, albeit not a readily quantifiable harm. As *Spokeo* noted, "the law has long permitted recovery by certain tort victims *even if their harms may be difficult to prove or measure*." 578 U. S., at 341, 136 S.Ct. 1540 (emphasis added). But there is a significant difference between (i) an actual harm that has occurred but is not readily quantifiable, as in cases of libel and slander *per se*, and (ii) a mere risk of future harm. By citing libel and slander *per se*, *Spokeo* did not hold that the mere risk of future harm, without more, suffices to demonstrate Article III standing in a suit for damages.

Here, the 6,332 plaintiffs did not demonstrate that the risk of future harm materialized—that is, that the inaccurate OFAC alerts in their internal TransUnion credit files were ever provided to third parties or caused a denial of credit. Nor did those plaintiffs present evidence that the class members were independently harmed by their exposure to the risk itself—that is, that they suffered some other injury (such as an emotional injury) from the mere risk that their credit reports would be provided to third-party businesses. Therefore, the 6,332 plaintiffs' argument for standing for their damages claims based on an asserted risk of future harm is unavailing.

Even apart from that fundamental problem with their argument based on the risk

7. For example, a plaintiff 's knowledge that he or she is exposed to a risk of future physical, monetary, or reputational harm could cause its own current emotional or psychological harm. We take no position on whether or how such an emotional or psychological harm could suffice for Article III purposes—for example, by analogy to the tort of intentional infliction of emotional distress. See Reply Brief 14; Tr. of Oral Arg. 30. The plaintiffs here have not relied on such a theory of Article III harm. They have not claimed an emotional distress injury from the risk that a misleading credit report might be sent to a third-party business. Nor could they do so, given that the 6,332 plaintiffs have not established that they were even aware of the misleading information in the internal credit files maintained at TransUnion.

of future harm, the plaintiffs did not factually establish a sufficient risk of future harm to support Article III standing. As Judge McKeown explained in her dissent, the risk of future harm that the 6,332 plaintiffs identified—the risk of dissemination to third parties—was too speculative to support Article III standing. 951 F.3d 1008, 1040 (CA9 2020); see *Whitmore v. Arkansas*, 495 U.S. 149, 157, 110 S.Ct. 1717, 109 L.Ed.2d 135 (1990). The plaintiffs claimed that TransUnion could have divulged their misleading credit information to a third party at any moment. But the plaintiffs did not demonstrate a sufficient likelihood that their individual credit information would be requested by third-party businesses and provided by TransUnion during the relevant time period. Nor did the plaintiffs demonstrate that there was a sufficient likelihood that TransUnion would otherwise intentionally or accidentally release their information to third parties. "Because no evidence in the record establishes a serious likelihood of disclosure, we cannot simply presume a material risk of concrete harm." 951 F.3d, at 1040 (opinion of McKeown, J.).

Moreover, the plaintiffs did not present any evidence that the 6,332 class members even *knew* that there were OFAC alerts in their internal TransUnion credit files. If those plaintiffs prevailed in this case, many of them would first learn that they were "injured" when they received a check compensating them for their supposed "injury." It is difficult to see how a risk of future harm could supply the basis for a plaintiff 's standing when the plaintiff did not even know that there was a risk of future harm.

Finally, the plaintiffs advance one last argument for why the 6,332 class members are similarly situated to the other 1,853 class members and thus should have standing. The 6,332 plaintiffs note that they sought damages for the entire 46-month period permitted by the statute of limitations, whereas the stipulation regarding dissemination covered only 7 of those months. They argue that the credit reports of many of those 6,332 class members were likely also sent to third parties outside of the period covered by the stipulation because all of the class members requested copies of their reports, and consumers usually do not request copies unless they are contemplating a transaction that would trigger a credit check.

That is a serious argument, but in the end, we conclude that it fails to support standing for the 6,332 class members. The plaintiffs had the burden to prove at trial that their reports were actually sent to third-party businesses. The inferences on which the argument rests are too weak to demonstrate that the reports of any particular number of the 6,332 class members were sent to third-party businesses. The plaintiffs' attorneys could have attempted to show that some or all of the 6,332 class members were injured in that way. They presumably could have sought the names and addresses of those individuals, and they could have contacted them. In the face of the stipulation, which pointedly failed to demonstrate dissemination for those class members, the inferences on which the plaintiffs rely are insufficient to support standing. Cf. *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 226, 59 S.Ct. 467, 83 L.Ed. 610 (1939) ("The production of weak evidence when strong is available can lead only to the conclusion that the strong would have been adverse").

In sum, the 6,332 class members whose internal TransUnion credit files were not disseminated to third-party businesses did not suffer a concrete harm. By contrast, the 1,853 class members (including Ramirez) whose credit reports were dissemi-

nated to third-party businesses during the class period suffered a concrete harm.

B

We next address the plaintiffs' standing to recover damages for two other claims in the complaint: the disclosure claim and the summary-of-rights claim. Those two claims are intertwined.

[46, 47] In the disclosure claim, the plaintiffs alleged that TransUnion breached its obligation to provide them with their complete credit files upon request. According to the plaintiffs, TransUnion sent the plaintiffs copies of their credit files that omitted the OFAC information, and then in a second mailing sent the OFAC information. See § 1681g(a)(1). In the summary-of-rights claim, the plaintiffs further asserted that TransUnion should have included another summary of rights in that second mailing—the mailing that included the OFAC information. See § 1681g(c)(2). As the plaintiffs note, the disclosure and summary-of-rights requirements are designed to protect consumers' interests in learning of any inaccuracies in their credit files so that they can promptly correct the files before they are disseminated to third parties.

In support of standing, the plaintiffs thus contend that the TransUnion mailings were formatted incorrectly and deprived them of their right to receive information in the format required by statute. But the plaintiffs have not demonstrated that the format of TransUnion's mailings caused them a harm with a close relationship to a harm traditionally recognized as providing a basis for a lawsuit in American courts. See *Spokeo*, 578 U. S., at 341, 136 S.Ct. 1540. In fact, they do not demonstrate that they suffered any harm *at all* from the formatting violations. The plaintiffs presented no evidence that, other than Ramirez, "a single other class member so much as *opened* the dual mailings," "nor that they were confused, distressed, or relied on the information in any way." 951 F.3d, at 1039, 1041 (opinion of McKeown, J.) (emphasis added). The plaintiffs put forth no evidence, moreover, that the plaintiffs would have tried to correct their credit files—and thereby prevented dissemination of a misleading report—had they been sent the information in the proper format. *Ibid.* Without any evidence of harm caused by the format of the mailings, these are "bare procedural violation[s], divorced from any concrete harm." *Spokeo*, 578 U. S., at 341, 136 S.Ct. 1540. That does not suffice for Article III standing.[8]

[48] The plaintiffs separately argue that TransUnion's formatting violations created a risk of future harm. Specifically, the plaintiffs contend that consumers who received the information in this dual-mailing format were at risk of not learning about the OFAC alert in their credit files. They say that they were thus at risk of not being able to correct their credit files before TransUnion disseminated credit reports containing the misleading information to third-party businesses. As noted above, the risk of future harm on its own does not support Article III standing for the plaintiffs' damages claim. In any event, the plaintiffs made no effort here to explain how the formatting error prevented them from contacting TransUnion to correct any errors before misleading credit reports were disseminated to third-party

8. The District Court and the Court of Appeals concluded that Ramirez (in addition to the other 8,184 class members) had standing as to those two claims. In this Court, TransUnion has not meaningfully contested Ramirez's individual standing as to those two claims. We have no reason or basis to disturb the lower courts' conclusion on Ramirez's individual standing as to those two claims.

businesses. To reiterate, there is no evidence that "a single other class member so much as opened the dual mailings," "nor that they were confused, distressed, or relied on the information in any way." 951 F.3d, at 1039, 1041 (opinion of McKeown, J.).

[49, 50] For its part, the United States as *amicus curiae*, but not the plaintiffs, separately asserts that the plaintiffs suffered a concrete "informational injury" under several of this Court's precedents. See *Federal Election Comm'n v. Akins*, 524 U.S. 11, 118 S.Ct. 1777, 141 L.Ed.2d 10 (1998); *Public Citizen v. Department of Justice*, 491 U.S. 440, 109 S.Ct. 2558, 105 L.Ed.2d 377 (1989). We disagree. The plaintiffs did not allege that they failed to receive any required information. They argued only that they received it *in the wrong format*. Therefore, *Akins* and *Public Citizen* do not control here. In addition, those cases involved denial of information subject to public-disclosure or sunshine laws that entitle all members of the public to certain information. This case does not involve such a public-disclosure law. See *Casillas v. Madison Avenue Assocs., Inc.*, 926 F.3d 329, 338 (CA7 2019); *Trichell v. Midland Credit Mgmt., Inc.*, 964 F.3d 990, 1004 (CA11 2020). Moreover, the plaintiffs have identified no "downstream consequences" from failing to receive the required information. *Trichell*, 964 F.3d at 1004. They did not demonstrate, for example, that the alleged information deficit hindered their ability to correct erroneous information before it was later sent to third parties. An "asserted informational injury that causes no adverse effects cannot satisfy Article III." *Ibid.*

* * *

No concrete harm, no standing. The 1,853 class members whose credit reports were provided to third-party businesses suffered a concrete harm and thus have standing as to the reasonable-procedures claim. The 6,332 class members whose credit reports were not provided to third-party businesses did not suffer a concrete harm and thus do not have standing as to the reasonable-procedures claim. As for the claims pertaining to the format of TransUnion's mailings, none of the 8,185 class members other than the named plaintiff Ramirez suffered a concrete harm.

We reverse the judgment of the U. S. Court of Appeals for the Ninth Circuit and remand the case for further proceedings consistent with this opinion. In light of our conclusion about Article III standing, we need not decide whether Ramirez's claims were typical of the claims of the class under Rule 23. On remand, the Ninth Circuit may consider in the first instance whether class certification is appropriate in light of our conclusion about standing.

It is so ordered.

Justice THOMAS, with whom Justice BREYER, Justice SOTOMAYOR, and Justice KAGAN join, dissenting.

TransUnion generated credit reports that erroneously flagged many law-abiding people as potential terrorists and drug traffickers. In doing so, TransUnion violated several provisions of the Fair Credit Reporting Act (FCRA) that entitle consumers to accuracy in credit-reporting procedures; to receive information in their credit files; and to receive a summary of their rights. Yet despite Congress' judgment that such misdeeds deserve redress, the majority decides that TransUnion's actions are so insignificant that the Constitution prohibits consumers from vindicating their rights in federal court. The Constitution does no such thing.

I

For decades, the Treasury Department's Office of Foreign Assets Control (OFAC) has compiled a list of "Specially Designated Nationals." The list largely includes terrorists and drug traffickers, among other unseemly types. And, as a general matter, Americans are barred from doing business with those listed. In the wake of the September 11 attacks, TransUnion began to sell a new (and more expensive) type of credit report that flagged whether an individual's name matched a name found on that list.

The system TransUnion used to decide which individuals to flag was rather rudimentary. It compared only the consumer's first and last name with the names on the OFAC list. If the names were identical or similar, TransUnion included in the consumer's report an "OFAC ADVISOR ALERT," explaining that the consumer's name matches a name on the OFAC database. See, *e.g.,* 951 F.3d 1008, 1017, 1019 (CA9 2020) (" 'Cortez' would match with 'Cortes' "). TransUnion did not compare birth dates, middle initials, Social Security numbers, or any other available identifier routinely used to collect and verify credit-report data. *Id.*, at 1019, n. 2.

In 2005, a consumer sued. TransUnion had sold an OFAC credit report about this consumer to a car dealership. The report flagged her—Sandra Jean Cortez, born in May 1944—as a match for a person on the OFAC list: Sandra Cortes Quintero, born in June 1971. TransUnion withheld this OFAC alert from the credit report that Cortez had requested. And despite Cortez's efforts to have the alert removed, TransUnion kept the alert in place for years.

After a trial, the jury returned a verdict in the consumer's favor on four FCRA claims, two of which are similar to claims at issue here: (1) TransUnion failed to follow reasonable procedures that would ensure maximum possible accuracy, 15 U.S.C. § 1681e(b); and (2) TransUnion failed to provide Cortez all information in her file despite her requests, § 1681g(a). See *Cortez v. Trans Union, LLC*, 617 F.3d 688, 696–706 (CA3 2010). The jury awarded $50,000 in actual damages and $750,000 in punitive damages, and it also took the unusual step of including on the verdict form a handwritten note urging TransUnion to "completely revam[p]" its business practices. App. to Brief for Respondent 2a. The District Court reduced the punitive damages award to $100,000, which the Third Circuit affirmed on appeal, stressing that TransUnion's failure to, "at the very least, compar[e] birth dates when they are available," was "reprehensible." 617 F.3d, at 723.

But TransUnion "made surprisingly few changes" after this verdict. 951 F.3d, at 1021. It did not begin comparing birth dates. Or middle initials. Or citizenship. In fact, TransUnion did not compare *any* new piece of information. Instead, it hedged its language saying a consumer was a " 'potential match' " rather than saying the person was a " 'match.' " *Ibid.* And instead of listing matches for similar names, TransUnion required that the first and last names match exactly. Unsurprisingly, these reports kept flagging law-abiding Americans as potential terrorists and drug traffickers. And equally unsurprising, someone else sued.

That brings us to this case. Sergio Ramirez visited a car dealership, offered to buy a car, and negotiated the terms. The dealership then ran a joint credit check on Ramirez and his wife. The salesperson said that the check revealed that Ramirez was on " 'a terrorist list,' " so the salesperson refused to close the deal with him. *Id.,* at 1017.

Ramirez requested and received a copy of his credit report from TransUnion. The report purported to be "complete and reliable," but it made no mention of the OFAC alert. See App. 88–91. TransUnion later sent a separate " 'courtesy' " letter, which informed Ramirez that his "TransUnion credit report" had "been mailed to [him] separately." *Id.*, at 92. That letter informed Ramirez that he was a potential match to someone in the OFAC database, but it never revealed that any OFAC information was present on his credit report. See *id.*, at 92–94. TransUnion opted not to include with this letter a description of Ramirez's rights under the FCRA or any information on how to dispute the OFAC match. 951 F.3d, at 1018. The letter merely directed Ramirez to visit the Department of Treasury's website or to call or write TransUnion if Ramirez had any additional questions or concerns.

Ramirez sued, asserting three claims under the FCRA: TransUnion willfully failed to follow reasonable procedures to assure maximum possible accuracy of the information concerning him, § 1681e(b); TransUnion willfully failed to disclose to him all the information in his credit file by withholding the true version of his credit report, § 1681g(a)(1); and TransUnion willfully failed to provide a summary of rights when it sent him the courtesy letter, § 1681g(c)(2).

Ramirez also sought to represent a class of individuals who had received a similar OFAC letter from TransUnion. "[E]veryone in the class: (1) was falsely labeled . . . a potential OFAC match; (2) requested a copy of his or her credit report from TransUnion; and (3) in response, received a credit-report mailing with the OFAC alert redacted and a separate OFAC Letter mailing with no summary of rights." *Id.*, at 1022.

The jury found in favor of the class on all three claims. And because it also determined that TransUnion's misconduct was "willfu[l]," § 1681n(a), the jury awarded each class member $984.22 in statutory damages (about $8 million total) and $6,353.08 in punitive damages (about $52 million total).

TransUnion appealed, arguing that the class members lacked standing. The Ninth Circuit disagreed, explaining that "TransUnion's reckless handling of OFAC information exposed every class member to a real risk of harm to their concrete privacy, reputational, and informational interests protected by the FCRA." *Id.*, at 1037.[1]

II

A

Article III vests "[t]he judicial Power of the United States" in this Court "and in such inferior Courts as the Congress may from time to time ordain and establish." § 1. This power "shall extend to *all* Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority." § 2 (emphasis added). When a federal court has jurisdiction over a case or controversy, it has a "virtually unflagging obligation" to exercise it. *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976).

The mere filing of a complaint in federal court, however, does not a case (or controversy) make. Article III "does not extend the judicial power to every violation of the

1. TransUnion also contends that Ramirez's claims and defenses are not typical of those of the class. The Court declines to reach that question because its jurisdictional holding is dispositive. *Ante,* at 2214. In my view, the District Court did not abuse its discretion in certifying the class given the similarities among the claims and defenses at issue.

constitution" or federal law "which may possibly take place." *Cohens v. Virginia*, 6 Wheat. 264, 405, 5 L.Ed. 257 (1821). Rather, the power extends only "to 'a case in law or equity,' in which a *right*, under such law, is asserted." *Ibid.* (emphasis added).

Key to the scope of the judicial power, then, is whether an individual asserts his or her own rights. At the time of the founding, whether a court possessed judicial power over an action with no showing of actual damages depended on whether the plaintiff sought to enforce a right held privately by an individual or a duty owed broadly to the community. See *Spokeo, Inc.* v. *Robins*, 578 U. S. 330, 344–346, 136 S.Ct. 1540, 194 L.Ed.2d 635 (2016) (THOMAS, J., concurring); see also *Thole* v. *U. S. Bank N. A.*, 590 U. S. ——, ——–——, 140 S.Ct. 1615, 1618-19, 207 L.Ed.2d 85 (2020) (same); 3 W. Blackstone, Commentaries on the Laws of England 2 (J. Chitty ed. 1826); 4 *id.*, at 5. Where an individual sought to sue someone for a violation of his private rights, such as trespass on his land, the plaintiff needed only to allege the violation. See *Entick* v. *Carrington*, 2 Wils. K. B. 275, 291, 95 Eng. Rep. 807, 817 (K. B. 1765). Courts typically did not require any showing of actual damage. See *Uzuegbunam* v. *Preczewski*, 592 U. S. ——, ——–——, 141 S.Ct. 792, 798-99, 209 L.Ed.2d 94 (2021). But where an individual sued based on the violation of a duty owed broadly to the whole community, such as the overgrazing of public lands, courts required "not only *injuria* [legal injury] but also *damnum* [damage]." *Spokeo*, 578 U. S., at 346, 136 S.Ct. 1540 (THOMAS, J., concurring) (citing *Robert Marys's Case*, 9 Co. Rep. 111b, 112b, 77 Eng. Rep. 895, 898–899 (K. B. 1613); brackets in original).

This distinction mattered not only for traditional common-law rights, but also for newly created statutory ones. The First Congress enacted a law defining copyrights and gave copyright holders the right to sue infringing persons in order to recover statutory damages, even if the holder "could not show monetary loss." *Muransky v. Godiva Chocolatier, Inc.*, 979 F.3d 917, 972 (CA11 2020) (Jordan, J., dissenting) (citing Act of May 31, 1790, § 2, 1 Stat. 124–125). In the patent context, a defendant challenged an infringement suit brought under a similar law. Along the lines of what TransUnion argues here, the infringer contended that "the making of a machine cannot be an offence, because no action lies, except for actual damage, and there can be no actual damages, or even a rule for damages, for an infringement by making a machine." *Whittemore v. Cutter*, 29 F.Cas. 1120, 1121 (No. 17,600) (CC Mass. 1813). Riding circuit, Justice Story rejected that theory, noting that the plaintiff could sue in federal court merely by alleging a violation of a private right: "[W]here the law gives an action for a particular act, the doing of that act imports of itself a damage to the party" because "[e]very violation of a right imports some damage." *Ibid.*; cf. *Gayler v. Wilder*, 10 How. 477, 494, 13 L.Ed. 504 (1851) (patent rights "did not exist at common law").[2]

2. The "public rights" terminology has been used to refer to two different concepts. In one context, these rights are " 'take[n] from the public' "—like the right to make, use, or sell an invention—and " 'bestow[ed] ... upon the' " individual, like a "decision to grant a public franchise." *Oil States Energy Services, LLC* v. *Greene's Energy Group, LLC*, 584 U. S. ——, ——–——, 138 S.Ct. 1365 1372-74, 200 L.Ed.2d 671 (2018). Disputes with the Government over these rights generally can be resolved "outside of an Article III court." *Id.*, at ——–——, 138 S.Ct. at 1374. Here, in contrast, the term "public rights" refers to duties owed collectively to the community. For example, Congress owes a duty to all

The principle that the violation of an individual right gives rise to an actionable harm was widespread at the founding, in early American history, and in many modern cases. See *Uzuegbunam*, 592 U. S., at ——–——, 141 S.Ct. at 798-99 (collecting cases); *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373, 102 S.Ct. 1114, 71 L.Ed.2d 214 (1982) ("[T]he actual or threatened injury required by Art. III may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing" (citing cases; brackets and internal quotation marks omitted)). And this understanding accords proper respect for the power of Congress and other legislatures to define legal rights. No one could seriously dispute, for example, that a violation of property rights is actionable, but as a general matter, "[p]roperty rights are created by the State." *Palazzolo v. Rhode Island*, 533 U.S. 606, 626, 121 S.Ct. 2448, 150 L.Ed.2d 592 (2001). In light of this history, tradition, and common practice, our test should be clear: So long as a "statute fixes a minimum of recovery . . ., there would seem to be no doubt of the right of one who establishes a technical ground of action to recover this minimum sum without any specific showing of loss." T. Cooley, Law of Torts *271.[3] While the Court today discusses the supposed failure to show "injury in fact," courts for centuries held that injury in law to a private right was enough to create a case or controversy.

B

Here, each class member established a violation of his or her private rights. The jury found that TransUnion violated three separate duties created by statute. See App. 690. All three of those duties are owed to individuals, not to the community writ large. Take § 1681e(b), which requires a consumer reporting agency to "follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates." This statute creates a duty: to use reasonable procedures to assure maximum possible accuracy. And that duty is particularized to an individual: the subject of the report. Section 1681g does the same. It requires an agency to "clearly and accurately disclose" to a consumer, upon his request, "[a]ll information in the consumer's file at the time of the request" and to include a written "summary of rights" with that "written disclosure." §§ 1681g(a), (c)(2). Those directives likewise create duties: provide all information in the consumer's file and accompany the disclosure with a summary of rights. And these too are owed to a single person: the consumer who requests the information.

Were there any doubt that consumer reporting agencies owe these duties to specific individuals—and not to the larger community—Congress created a cause of action providing that "[a]ny person who

Americans to legislate within its constitutional confines. But not every single American can sue over Congress' failure to do so. Only individuals who, at a minimum, establish harm beyond the mere violation of that constitutional duty can sue. Cf. *Fairchild v. Hughes*, 258 U.S. 126, 129–130, 42 S.Ct. 274, 66 L.Ed. 499 (1922) (''Plaintiff has only the right, possessed by every citizen, to require that the Government be administered according to law and that the public moneys be not wasted. Obviously this general right does not entitle a private citizen to institute in the federal courts a suit to secure by indirection a determination whether a statute, if passed, or a constitutional amendment, about to be adopted, will be valid'').

3. Etymology is also a helpful guide. The word ''injury'' stems from the Latin ''*injuria*,'' which combines ''in'' (expressing negation) and ''jus'' (right, law, justice). See Barnhart Dictionary of Etymology 529 (1988).

willfully fails to comply" with an FCRA requirement "with respect to any *consumer* is liable to *that consumer*." § 1681n(a) (emphasis added). If a consumer reporting agency breaches any FCRA duty owed to a specific consumer, then that individual (not all consumers) may sue the agency. No one disputes that each class member possesses this cause of action. And no one disputes that the jury found that TransUnion violated each class member's individual rights. The plaintiffs thus have a sufficient injury to sue in federal court.

C

The Court chooses a different approach. Rejecting this history, the majority holds that the mere violation of a personal legal right is *not*—and never can be—an injury sufficient to establish standing. What matters for the Court is only that the "injury in fact be 'concrete.' " *Ante,* at 2203 – 2204. "No concrete harm, no standing." *Ante,* at 2200, 2214.

That may be a pithy catchphrase, but it is worth pausing to ask why "concrete" injury in fact should be the sole inquiry. After all, it was not until 1970—"180 years after the ratification of Article III"—that this Court even introduced the "injury in fact" (as opposed to injury in law) concept of standing. *Sierra v. Hallandale Beach*, 996 F.3d 1110, 1117 (CA11 2021) (Newsom, J., concurring). And the concept then was not even about constitutional standing; it concerned a *statutory* cause of action under the Administrative Procedure Act. See *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 153, 90 S.Ct. 827, 25 L.Ed.2d 184 (1970) (explaining that the injury-in-fact requirement "concerns, apart from the 'case' or 'controversy' test, the question whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question").

The Court later took this statutory requirement and began to graft it onto its constitutional standing analysis. See, *e.g., Warth v. Seldin*, 422 U.S. 490, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975). But even then, injury in fact served as an *additional* way to get into federal court. Article III injury still could "exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing.' " *Id.*, at 500, 95 S.Ct. 2197 (quoting *Linda R. S. v. Richard D.*, 410 U.S. 614, 617, n. 3, 93 S.Ct. 1146, 35 L.Ed.2d 536 (1973)). So the introduction of an injury-in-fact requirement, in effect, "represented a substantial broadening of access to the federal courts." *Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 26, 39, 96 S.Ct. 1917, 48 L.Ed.2d 450 (1976). A plaintiff could now invoke a federal court's judicial power by establishing injury by virtue of a violated legal right *or* by alleging some *other* type of "personal interest." *Ibid.*

In the context of public rights, the Court continued to require more than just a legal violation. In *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992), for example, the Court concluded that several environmental organizations lacked standing to challenge a regulation about interagency communications, even though the organizations invoked a citizen-suit provision allowing " 'any person [to] commence a civil suit . . . to enjoin any person . . . who is alleged to be in violation of ' " the law. See *id.,* at 558, 571–572, 112 S.Ct. 2130; 16 U.S.C. § 1540(g). Echoing the historical distinction between duties owed to individuals and those owed to the community, the Court explained that a plaintiff must do more than raise "a generally available grievance about government—claiming only harm to his and every citizen's inter-

est in proper application of the Constitution and laws." 504 U.S. at 573, 112 S.Ct. 2130. "Vindicating the *public* interest (including the public interest in Government observance of the Constitution and laws) is the function of Congress and the Chief Executive." *Id.,* at 576, 112 S.Ct. 2130. " 'The province of the court,' " in contrast, " 'is, solely, to decide on the rights of individuals.' " *Ibid.* (quoting *Marbury v. Madison*, 1 Cranch 137, 170, 2 L.Ed. 60 (1803)).

The same public-rights analysis prevailed in *Summers v. Earth Island Institute*, 555 U.S. 488, 129 S.Ct. 1142, 173 L.Ed.2d 1 (2009). There, a group of organizations sought to prevent the United States Forest Service from enforcing regulations that exempt certain projects from notice and comment. *Id.*, at 490, 129 S.Ct. 1142. The Court, again, found that the mere violation of the law "without some concrete interest that is affected by the deprivation—a procedural right *in vacuo*—is insufficient to create Article III standing." *Id.*, at 496, 129 S.Ct. 1142. But again, this was rooted in the context of public rights: " 'It would exceed Article III's limitations if, at the behest of Congress and in the absence of any showing of concrete injury, we were to entertain citizen suits to vindicate the *public's* nonconcrete interest in the proper administration of the laws.' " *Id.*, at 497, 129 S.Ct. 1142 (emphasis added; brackets omitted).

In *Spokeo*, the Court built on this approach. Based on a few sentences from *Lujan* and *Summers*, the Court concluded that a plaintiff does not automatically "satisf[y] the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right." *Spokeo*, 578 U. S., at 341, 136 S.Ct. 1540. But the Court made clear that "Congress is well positioned to identify intangible harms that meet minimum Article III requirements" and explained that "the violation of a procedural right granted by statute *can be* sufficient in some circumstances to constitute injury in fact." *Id.,* at 341, 342, 136 S.Ct. 1540 (emphasis added).

Reconciling these statements has proved to be a challenge. See *Sierra*, 996 F.3d at 1116–1117 (Newsom, J., concurring) (collecting examples of inconsistent decisions). But "[t]he historical restrictions on standing" offer considerable guidance. *Thole*, 590 U. S., at ——, 140 S.Ct., at 1622 (THOMAS, J., concurring). A statute that creates a public right plus a citizen-suit cause of action is insufficient by itself to establish standing. See *Lujan*, 504 U.S., at 576, 112 S.Ct. 2130.[4] A statute that creates a private right and a cause of action, however, *does* gives plaintiffs an adequate interest in vindicating their private rights in federal court. See *Thole*, 590 U. S., at ——, 140 S.Ct. at 1622 (THOMAS, J., concurring); *Spokeo*, 578 U. S., at ——–——, 136 S.Ct. 1540 (same); see also *Muransky*, 979 F.3d, at 970–972 (Jordan, J., dissenting); *Huff v. TeleCheck Servs., Inc.*, 923 F.3d 458, 469 (CA6 2019) ("Article III standing may draw a line between private and public rights"); *Bryant v. Compass Group USA, Inc.*, 958 F.3d 617, 624 (CA7 2020) (the *Spokeo* concurrence "drew a useful distinction between two types of injuries").

The majority today, however, takes the road less traveled: "[U]nder Article III, an

4. But see Caminker, Comment, The Constitutionality of *Qui Tam* Actions, 99 Yale L. J. 341, 342, n. 3 (1989) (''Six statutes [enacted by the First Congress] imposed penalties and/or forfeitures for conduct injurious to the general public and expressly authorized suits by private informers, with the recovery being shared between the informer and the United States''); *McCulloch v. Maryland,* 4 Wheat. 316, 317, 321–322, 4 L.Ed. 579 (1819) (reviewing ''an action of debt brought by the defendant in error ... who sued as well for himself as for the State of Maryland ... to recover certain penalties'').

injury in law is not an injury in fact." *Ante,* at 2205; but see *Webb v. Portland Mfg. Co.*, 29 F.Cas. 506, 508 (No. 17,322) (CC Me. 1838) ("The law tolerates no farther inquiry than whether there has been the violation of a right"). No matter if the right is personal or if the legislature deems the right worthy of legal protection, legislatures are constitutionally unable to offer the protection of the federal courts for anything other than money, bodily integrity, and anything else that this Court thinks looks close enough to rights existing at common law. See *ante*, at 2204. The 1970s injury-in-fact theory has now displaced the traditional gateway into federal courts.

This approach is remarkable in both its novelty and effects. Never before has this Court declared that legal injury is *inherently* insufficient to support standing.[5] And never before has this Court declared that legislatures are constitutionally precluded from creating legal rights enforceable in federal court if those rights deviate too far from their common-law roots. According to the majority, courts alone have the power to sift and weigh harms to decide whether they merit the Federal Judiciary's attention. In the name of protecting the separation of powers, *ante*, at 2203, 2207, this Court has relieved the legislature of its power to create and define rights.

III

Even assuming that this Court should be in the business of second-guessing private rights, this is a rather odd case to say that Congress went too far. TransUnion's misconduct here is exactly the sort of thing that has long merited legal redress.

As an initial matter, this Court has recognized that the unlawful withholding of requested information causes "a sufficiently distinct injury to provide standing to sue." *Public Citizen v. Department of Justice*, 491 U.S. 440, 449, 109 S.Ct. 2558, 105 L.Ed.2d 377 (1989); see also *Havens Realty Corp.*, 455 U.S., at 374, 102 S.Ct. 1114. Here, TransUnion unlawfully withheld from each class member the OFAC version of his or her credit report that the class member requested. And TransUnion unlawfully failed to send a summary of rights. The majority's response is to contend that the plaintiffs actually did not allege that they failed to receive any required information; they alleged only that they received it in the "*wrong format*." *Ante*, at 2213.

That reframing finds little support in the complaint, which alleged that TransUnion "fail[ed] to include the OFAC alerts . . . in the consumer's own files which consumers, as of right, may request and obtain," and that TransUnion did "not advise consumers that they may dispute inaccurate OFAC alerts." Class Action Complaint in No. 3:12–cv–00632, ECF Doc. 1 (ND Cal.), p. 5. It also finds no footing in the record. Neither the mailed credit report nor separate letter provide any indication that a person's report is marked with an OFAC alert. See, *e.g.,* App. 88–94.

5. See, *e.g., Lujan v. Defenders of Wildlife*, 504 U.S. 555, 578, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992) ("Nothing in this contradicts the principle that the injury required by Art. III may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing'" (internal quotation marks, brackets, and ellipsis omitted)); *Warth v. Seldin*, 422 U.S. 490, 514, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975) ("Congress may create a statutory right or entitlement the alleged deprivation of which can confer standing to sue even where the plaintiff would have suffered no judicially cognizable injury in the absence of statute"); *Linda R. S. v. Richard D.*, 410 U.S. 614, 617, n. 3, 93 S.Ct. 1146, 35 L.Ed.2d 536 (1973) ("Congress may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute").

Were there any doubt about the facts below, we have the helpful benefit of a jury verdict. The jury found that "Defendant TransUnion, LLC willfully fail[ed] to clearly and accurately disclose OFAC information in the written disclosures it sent to members of the class." *Id.*, at 690. And the jury found that "Defendant TransUnion, LLC willfully fail[ed] to provide class members a summary of their FCRA rights with each written disclosure made to them." *Ibid.* I would not be so quick as to recharacterize these jury findings as mere "formatting" errors. *Ante*, at 2200, 2213 – 2214; see also U. S. Const., Amdt. 7 ("no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law").

Moreover, to the extent this Court privileges concrete, *financial* injury for standing purposes, recall that TransUnion charged its clients extra to receive credit reports with the OFAC designation. According to TransUnion, these special OFAC credit reports are valuable. Even the majority must admit that withholding something of value from another person—that is, "monetary harm"—falls in the heartland of tangible injury in fact. *Ante*, at 2200, 2204. Recognizing as much, TransUnion admits that its clients would have standing to sue if they, like the class members, did not receive the OFAC credit reports they had requested. Tr. of Oral Arg. 9.

And then there is the standalone harm caused by the rather extreme errors in the credit reports. The majority (rightly) decides that having one's identity falsely and publically associated with terrorism and drug trafficking is itself a concrete harm. *Ante*, at 2208 – 2209. For good reason. This case is a particularly grave example of the harm this Court identified as central to the FCRA: "curb[ing] the dissemination of false information." *Spokeo*, 578 U. S., at 342, 136 S.Ct. 1540. And it aligns closely with a "harm that has traditionally been regarded as providing a basis for a lawsuit." *Id.*, at 341, 136 S.Ct. 1540. Historically, "[o]ne who falsely, and without a privilege to do so, publishes matter defamatory to another in such a manner as to make the publication a libel is liable to the other," even though "no special harm or loss of reputation results therefrom." Restatement of Torts § 569, p. 165 (1938).

The question this Court has identified as key, then, is whether a plaintiff established "a degree of risk" that is "sufficient to meet the concreteness requirement." *Spokeo,* 578 U. S., at 343, 136 S.Ct. 1540. Here, in a 7-month period, it is undisputed that nearly 25 percent of the class had false OFAC-flags sent to potential creditors. Twenty-five percent over just a 7-month period seems, to me, "a degree of risk sufficient to meet the concreteness requirement." *Ibid.* If 25 percent is insufficient, then, pray tell, what percentage is?

The majority deflects this line of analysis by all but eliminating the risk-of-harm analysis. According to the majority, an elevated risk of harm simply shows that a concrete harm is *imminent* and thus may support only a claim for injunctive relief. *Ante*, at 2210 – 2211, 2213 – 2214. But this reworking of *Spokeo* fails for two reasons. First, it ignores what *Spokeo* said: "[Our opinion] does not mean . . . that the risk of real harm cannot satisfy the requirement of concreteness." *Spokeo*, 578 U. S., at 341, 136 S.Ct. 1540. Second, it ignores what *Spokeo* did. The Court in *Spokeo* remanded the respondent's claims for statutory damages to the Ninth Circuit to consider "whether the . . . violations alleged in this case entail a degree of risk sufficient to meet the concreteness requirement." *Id.*, at 342–343, 136 S.Ct. 1540. The theory that risk of harm matters only for injunctive

relief is thus squarely foreclosed by *Spokeo* itself.

But even if risk of harm is out, the Ninth Circuit indicated that every class member may have had an OFAC alert disclosed. According to the court below, TransUnion not only published this information to creditors for a quarter of the class but also "communicated about the database information and OFAC matches" with a third party. 951 F.3d, at 1026; cf. *Cortez*, 617 F.3d, at 711 (TransUnion cannot avoid FCRA liability "by simply contracting with a third party to store and maintain information"). Respondent adds to this by pointing out that TransUnion published this information to vendors that printed and sent the mailings. See Brief for Respondent 16; see also App. 161 (deposition testimony explaining that "a printed credit report . . . would have been sent through our print vendor through the mail and delivered to the consumer requesting the file disclosure); *id.*, at 545 (trial testimony identifying three different print-vendor companies that worked with TransUnion during the relevant time period). In the historical context of libel, publication to even a single other party could be enough to give rise to suit. This was true, even where the third party was a telegraph company,[6] an attorney,[7] or a stenographer who merely writes the information down.[8] Surely with a harm so closely paralleling a common-law harm, this is an instance where a plaintiff "need not allege any additional harm beyond the one Congress has identified." *Spokeo*, 578 U. S., at 342, 136 S.Ct. 1540 (emphasis deleted).

But even setting aside everything already mentioned—the Constitution's text, history, precedent, financial harm, libel, the risk of publication, and actual disclosure to a third party—one need only tap into common sense to know that receiving a letter identifying you as a potential drug trafficker or terrorist is harmful. All the more so when the information comes in the context of a credit report, the entire purpose of which is to demonstrate that a person can be trusted.

And if this sort of confusing and frustrating communication is insufficient to establish a real injury, one wonders what could rise to that level. If, instead of falsely identifying Ramirez as a potential drug trafficker or terrorist, TransUnion had

6. *Munson v. Lathrop*, 96 Wis. 386, 389, 71 N.W. 596, 597 (1897) ("The writing of the message, and the delivery of it by him to the [telegraph] company for transmission, as mentioned, was a publication of the same").

7. *Hedgepeth v. Coleman*, 183 N.C. 309, 312–313, 111 S.E. 517, 519 (1922) ("[I]t has been held that the publication was sufficient where the defendant had communicated the defamatory matter to the plaintiff 's agent, or attorney; or had read it to a friend before posting it to the plaintiff; or had procured it to be copied, or sealed in the form of a letter addressed to the plaintiff and left in the house of a neighbor by whom it was read; or had caused it to be delivered to and read by a member of the plaintiff 's family").

8. *Rickbeil v. Grafton Deaconess Hospital*, 74 N.D. 525, 542, 23 N.W.2d 247 (1946) ("We hold that the dictating of this letter by the manager to the stenographer and her transcription of her notes into the written instrument constitutes publication within the purview of the law of libel: whether the relationship be that of master and servant or of coemployees of a corporation"); see also *Larimore v. Blaylock*, 259 Va. 568, 573, 528 S.E.2d 119, 122 (2000) (rejecting an argument of "absolute protection of the 'intracorporate immunity doctrine' " for defamatory statements); but see *Swindle v. State*, 10 Tenn. 581, 582 (1831) (" 'A personal libel is published when it arrives to the person *against whom it is written*, pursuant to the design of the author, or is made known to any other person, by any means to which the dissent of the author is not necessarily implied' " (emphasis added)).

flagged him as a "potential" child molester, would that alone still be insufficient to open the courthouse doors? What about falsely labeling a person a racist? Including a slur on the report? Or what about openly reducing a person's credit score by several points because of his race? If none of these constitutes an injury in fact, how can that possibly square with our past cases indicating that the inability to "observe an animal species, even for purely esthetic purposes, . . . undeniably" is? *Lujan*, 504 U.S., at 562, 112 S.Ct. 2130; see also *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 183, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000) ("plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons for whom the aesthetic and recreational values of the area will be lessened" (internal quotation marks omitted)); *Summers*, 555 U.S., at 494, 129 S.Ct. 1142 ("[I]f . . . harm in fact affects the recreational or even the mere esthetic interests of the plaintiff, that will suffice"). Had the class members claimed an aesthetic interest in viewing an accurate report, would this case have come out differently?

And if some of these examples do cause sufficiently "concrete" and "real"—though "intangible"—harms, how do *we* go about picking and choosing which ones do and which do not? I see no way to engage in this "inescapably value-laden" inquiry without it "devolv[ing] into [pure] policy judgment." *Sierra*, 996 F.3d, at 1129 (Newsom, J., concurring). 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.

Finally, it is not just the harm that is reminiscent of a constitutional case or controversy. So too is the remedy. Although statutory damages are not necessarily a proxy for unjust enrichment, they have a similar flavor in this case. TransUnion violated consumers' rights in order to create and sell a product to its clients. Reckless handling of consumer information and bungled responses to requests for information served a means to an end. And the end was financial gain. "TransUnion could not confirm that a single OFAC alert sold to its customers was accurate." 951 F.3d, at 1021, n. 4. Yet thanks to this Court, it may well be in a position to keep much of its ill-gotten gains. [9]

* * *

Ultimately, the majority seems to pose to the reader a single rhetorical question: Who could possibly think that a person is harmed when he requests and is sent an incomplete credit report, or is sent a suspicious notice informing him that he may be a designated drug trafficker or terrorist, or is *not* sent anything informing him of how to remove this inaccurate red flag? The answer is, of course, legion: Congress, the President, the jury, the District Court,

9. Today's decision might actually be a pyrrhic victory for TransUnion. The Court does not prohibit Congress from creating statutory rights for consumers; it simply holds that federal courts lack jurisdiction to hear some of these cases. That combination may leave state courts—which "are not bound by the limitations of a case or controversy or other federal rules of justiciability even when they address issues of federal law," *ASARCO Inc. v. Kadish*, 490 U.S. 605, 617, 109 S.Ct. 2037, 104 L.Ed.2d 696 (1989)—as the sole forum for such cases, with defendants unable to seek removal to federal court. See also Bennett, The Paradox of Exclusive State-Court Jurisdiction Over Federal Claims, 105 Minn. L. Rev. 1211 (2021). By declaring that federal courts lack jurisdiction, the Court has thus ensured that state courts will exercise exclusive jurisdiction over these sorts of class actions.

the Ninth Circuit, and four Members of this Court.

I respectfully dissent.

Justice KAGAN, with whom Justice BREYER and Justice SOTOMAYOR join, dissenting.

The familiar story of Article III standing depicts the doctrine as an integral aspect of judicial restraint. The case-or-controversy requirement of Article III, the account runs, is "built on a single basic idea—the idea of separation of powers." *Allen v. Wright*, 468 U.S. 737, 752, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984). Rigorous standing rules help safeguard that separation by keeping the courts away from issues "more appropriately addressed in the representative branches." *Id.*, at 751, 104 S.Ct. 3315. In so doing, those rules prevent courts from overstepping their "proper—and properly limited—role" in "a democratic society." *Warth v. Seldin*, 422 U.S. 490, 498, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975); see *ante*, at 2203 – 2204 (THOMAS, J., dissenting).

After today's decision, that story needs a rewrite. The Court here transforms standing law from a doctrine of judicial modesty into a tool of judicial aggrandizement. It holds, for the first time, that a specific class of plaintiffs whom Congress allowed to bring a lawsuit cannot do so under Article III. I join Justice THOMAS's dissent, which explains why the majority's decision is so mistaken. As he recounts, our Article III precedents teach that Congress has broad "power to create and define rights." *Ante*, at 2206 – 2207; see *Spokeo, Inc.* v. *Robins*, 578 U. S. 330, 341, 136 S.Ct. 1540, 194 L.Ed.2d 635 (2016); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 578, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992); *Warth*, 422 U.S., at 500, 95 S.Ct. 2197. And Congress may protect those rights by authorizing suits not only for past harms but also for the material risk of future ones. See *Spokeo*, 578 U. S., at 341–343, 136 S.Ct. 1540; *ante*, at 2207 – 2208 (THOMAS, J., dissenting). Under those precedents, this case should be easy. In the Fair Credit Reporting Act, Congress determined to protect consumers' reputations from inaccurate credit reporting. TransUnion willfully violated that statute's provisions by preparing credit files that falsely called the plaintiffs potential terrorists, and by obscuring that fact when the plaintiffs requested copies of their files. To say, as the majority does, that the resulting injuries did not " 'exist' in the real world" is to inhabit a world I don't know. *Ante*, at 2204 – 2205. And to make that claim in the face of Congress's contrary judgment is to exceed the judiciary's "proper—and properly limited—role." *Warth*, 422 U.S., at 498, 95 S.Ct. 2197; see *ante*, at 2205 – 2207 (THOMAS, J., dissenting).

I add a few words about the majority's view of the risks of harm to the plaintiffs. In addressing the claim that TransUnion failed to maintain accurate credit files, the majority argues that the "risk of dissemination" of the plaintiffs' credit information to third parties is "too speculative." *Ante*, at 2211 – 2212. But why is it so speculative that a company in the business of selling credit reports to third parties will in fact sell a credit report to a third party? See also *ante*, at 2207 – 2208 (THOMAS, J., dissenting) (noting that "nearly 25% of the class" already had false reports "sent to potential creditors"). And in addressing the claims of faulty disclosure to the plaintiffs, the majority makes a set of curious assumptions. According to the majority, people who specifically request a copy of their credit report may not even "*open[ ]* " the envelope. *Ante*, at 2215 (emphasis in original). And people who receive multiple opaque mailings are not likely to be "confused." *Ibid.*; but see *Niz-Chavez* v. *Garland*, 593 U. S. ——, ——, 141 S.Ct. 1474, 1485, 209 L.Ed.2d 433 (2021) (explaining that a "series of letters," "each containing

a new morsel of vital information," is likely to perplex recipients). And finally, people who learn that their credit files label them potential terrorists would not "have tried to correct" the error. *Ante*, at 2213. Rather than accept those suppositions, I sign up with Justice THOMAS: "[O]ne need only tap into common sense to know that receiving a letter identifying you as a potential drug trafficker or terrorist is harmful." *Ante*, at 2223.

I differ with Justice THOMAS on just one matter, unlikely to make much difference in practice. In his view, any "violation of an individual right" created by Congress gives rise to Article III standing. *Ante*, at 2203. But in *Spokeo*, this Court held that "Article III requires a concrete injury even in the context of a statutory violation." 578 U. S., at 341, 136 S.Ct. 1540. I continue to adhere to that view, but think it should lead to the same result as Justice THOMAS's approach in all but highly unusual cases. As *Spokeo* recognized, "Congress is well positioned to identify [both tangible and] intangible harms" meeting Article III standards. *Ibid.* Article III requires for concreteness only a "real harm" (that is, a harm that "actually exist[s]") or a "risk of real harm." *Ibid.* And as today's decision definitively proves, Congress is better suited than courts to determine when something causes a harm or risk of harm in the real world. For that reason, courts should give deference to those congressional judgments. Overriding an authorization to sue is appropriate when but only when Congress could not reasonably have thought that a suit will contribute to compensating or preventing the harm at issue. Subject to that qualification, I join Justice THOMAS's dissent in full.

Peyman PAKDEL, et ux.

v.

CITY AND COUNTY OF SAN FRANCISCO, CALIFORNIA, et al.

No. 20-1212

Supreme Court of the United States.

Decided June 28, 2021

Background: Partial owners of a multi-unit residential building organized as a tenancy-in-common brought § 1983 action against city, its board of supervisors, and its department of public works, alleging a city ordinance effected an unconstitutional regulatory taking by conditioning the conversion of the building to a condominium arrangement on the partial owners offering the tenant in their unit a lifetime lease. The United States District Court for the Northern District of California, Richard Seeborg, J., 2017 WL 6403074, granted defendants' motions to dismiss for lack of subject matter jurisdiction and for failure to state a claim. Owners appealed. The United States Court of Appeals for the Ninth Circuit, Friedland, Circuit Judge, 952 F.3d 1157, affirmed, and, 977 F.3d 928, denied rehearing en banc.

Holdings: Upon granting certiorari, the Supreme Court held that owners did not have to comply with administrative procedures for seeking relief, in order to satisfy finality requirement for bringing regulatory taking claim.

Certiorari granted; vacated and remanded.

1. Eminent Domain ⇨277

When a plaintiff alleges a regulatory taking in violation of the Fifth Amend-

directly supporting their thesis"); id. ("Arguments raised in the District Court in a perfunctory and underdeveloped ... manner are waived on appeal." (alteration in original) (quoting Kensington Rock Island Ltd. P'ship v. American Eagle Hist. Partners, 921 F.2d 122, 124–25 (7th Cir. 1990))).

[7] Additionally, in its Rule 59(e) motion, Appellant advanced an under-developed but also entirely different theory than it does here, namely, that promulgation of the regulations without the Oversight Board's approval constitutes a due process violation. This too is insufficient to preserve an argument based on Puerto Rico or federal administrative law. "Overburdened trial judges cannot be expected to be mind readers. If claims are merely insinuated rather than actually articulated in the trial court, we will ordinarily refuse to deem them preserved for appellate review." Id. at 22.

[8, 9] Further, Appellant "make[s] no effort to fit [its] situation within the 'narrowly configured and sparingly dispensed' exceptions to the raise-or-waive rule (as it is known)." Reyes-Colón v. United States, 974 F.3d 56, 62 (1st Cir. 2020) (quoting Daigle v. Me. Med. Ctr., Inc., 14 F.3d 684, 688 (1st Cir. 1994)). Although this Court may "in its discretion, ... consider theories not articulated below," "exceptions of this kind ... should be 'few and far between,' " and "[t]he typical case involves an issue that is one of paramount importance and holds the potential for a miscarriage of justice." B & T Masonry Constr. Co. v. Pub. Serv. Mut. Ins. Co., 382 F.3d 36, 41 (1st Cir. 2004) (quoting Nat'l Ass'n of Soc. Workers v. Harwood, 69 F.3d 622, 627 (1st Cir. 1995)); see also Correa v. Hosp. S.F., 69 F.3d 1184, 1196 (1st Cir. 1995) (explaining that such "appellate discretion should not be affirmatively exercised unless error is plain and the equities heavily preponderate in favor of correcting it"). Appellant has not shown, and we do not conclude, that these considerations are present here.

We therefore affirm the district court's dismissal of Appellant's complaint.

Affirmed.

Alexsis WEBB, on behalf of herself and all others similarly situated; Marsclette Charley, on behalf of herself and all others similarly situated, Plaintiffs, Appellants,

v.

INJURED WORKERS PHARMACY, LLC, Defendant, Appellee.

No. 22-1896

United States Court of Appeals, First Circuit.

June 30, 2023

Background: Former patient and current patient brought putative class action against pharmacy, asserting state-law claims for negligence, breach of implied contract, unjust enrichment, invasion of privacy, and breach of fiduciary duty, and alleging that pharmacy suffered data breach in which hackers stole personally identifiable information (PII), including names and Social Security numbers, of over 75,000 patients, including plaintiffs, that pharmacy did not immediately alert patients of breach, and that when pharmacy did circulate notice letter, it provided high-level description of breach but did not fully convey breach's size or scope. Pharmacy moved to dismiss for lack of Article III standing and failure to state a claim.

The United States District Court for the District of Massachusetts, Richard G. Stearns, J., 2023 WL 4280914, granted motion and dismissed for lack of standing. Patients appealed.

Holdings: The Court of Appeals, Lynch, Circuit Judge, held that:

(1) former patient's allegations that hackers stole her PII and used it to file fraudulent tax return alleged concrete injury in fact, as required to establish Article III standing;

(2) former patient and current patient plausibly alleged imminent and substantial risk of future misuse of their PII, as required to establish concrete-injury-in-fact element of Article III standing;

(3) former patient and current patient plausibly alleged separate concrete, present harm caused by their exposure to risk of future harm from misuse of their PII, as required to establish Article III standing; and

(4) former patient and current patient alleged traceability and redressability, as required to establish Article III standing; but

(5) patients lacked Article III standing to seek injunctive relief requiring pharmacy to improve its cybersecurity systems; and

(6) patients lacked Article III standing to seek injunctive relief prohibiting pharmacy from engaging in deceptive and unfair practices and making untrue statements about data breach.

Affirmed in part, reversed in part, and remanded.

1. Federal Civil Procedure ⚿103.2
Federal Courts ⚿3585(2)

The existence of Article III standing is a legal question, which an appellate court reviews de novo. U.S. Const. art. 3, § 2, cl. 1.

2. Federal Courts ⚿3665

When reviewing a pre-discovery grant of a motion to dismiss for lack of Article III standing, an appellate court accepts as true all well-pleaded facts and indulges all reasonable inferences in the plaintiff's favor. U.S. Const. art. 3, § 2, cl. 1.

3. Federal Civil Procedure ⚿103.2

Plaintiffs bear the burden of demonstrating that they have Article III standing, and must do so with the manner and degree of evidence required at the successive stages of the litigation. U.S. Const. art. 3, § 2, cl. 1.

4. Federal Civil Procedure ⚿103.2

Plaintiffs must demonstrate Article III standing for each claim that they press and for each form of relief that they seek. U.S. Const. art. 3, § 2, cl. 1.

5. Federal Civil Procedure ⚿103.2, 103.3

To establish Article III standing, a plaintiff must show an injury in fact caused by the defendant and redressable by a court order. U.S. Const. art. 3, § 2, cl. 1.

6. Federal Civil Procedure ⚿103.2

Traditional tangible harms, such as physical harms and monetary harms are obviously "concrete," for purposes of the injury-in-fact requirement for Article III standing. U.S. Const. art. 3, § 2, cl. 1.

See publication Words and Phrases for other judicial constructions and definitions.

7. Federal Civil Procedure ⚿103.2

Intangible harms can be "concrete," for purposes of the injury-in-fact requirement for Article III standing, including when they are injuries with a close relationship to harms traditionally recognized as providing a basis for lawsuits in American courts, such as reputational harms,

disclosure of private information, and intrusion upon seclusion. U.S. Const. art. 3, § 2, cl. 1.

See publication Words and Phrases for other judicial constructions and definitions.

8. Federal Civil Procedure ⚿103.2

The inquiry for determining whether an intangible harm is concrete, for purposes of the injury-in-fact requirement for Article III standing, asks whether plaintiffs have identified a close historical or common-law analogue for their asserted injury, but does not require an exact duplicate. U.S. Const. art. 3, § 2, cl. 1.

9. Federal Civil Procedure ⚿103.2
Injunction ⚿1505

A material risk of future harm can satisfy the concrete-harm requirement of the injury-in-fact element of Article III standing, but only as to injunctive relief, not damages. U.S. Const. art. 3, § 2, cl. 1.

10. Federal Civil Procedure ⚿103.2

To have Article III standing to pursue damages based on a risk of future harm, plaintiffs must demonstrate a separate concrete harm caused by their exposure to the risk itself. U.S. Const. art. 3, § 2, cl. 1.

11. Antitrust and Trade Regulation ⚿290
Federal Civil Procedure ⚿182.5

Former patient's allegations that hackers infiltrated pharmacy's patient records systems, stole patient's personally identifiable information (PII), including her name and Social Security number, and then used her PII to file fraudulent tax return alleged concrete injury in fact, as required to establish patient's Article III standing to bring putative class action against pharmacy asserting state-law claims of negligence, breach of implied contract, unjust enrichment, invasion of privacy, and breach of fiduciary duty. U.S. Const. art. 3, § 2, cl. 1.

12. Federal Civil Procedure ⚿1772, 1829

In applying the plausibility standard required at the motion-to-dismiss stage, courts must draw on their judicial experience and common sense and read the complaint as a whole.

13. Federal Civil Procedure ⚿1829

In applying the plausibility standard required at the motion-to-dismiss stage, courts must indulge all reasonable inferences in the plaintiff's favor.

14. Injunction ⚿1505

A material risk of future harm can satisfy the concrete-harm requirement for Article III standing, at least as to injunctive relief, when the risk of harm is sufficiently imminent and substantial. U.S. Const. art. 3, § 2, cl. 1.

15. Antitrust and Trade Regulation ⚿290
Federal Civil Procedure ⚿182.5

Former patient and current patient plausibly alleged imminent and substantial risk of future misuse of their personally identifiable information (PII), which was purportedly stolen by hackers who infiltrated pharmacy's patient records systems, as required to establish concrete-injury-in-fact element of Article III standing to bring putative class action against pharmacy asserting state-law claims of negligence, breach of implied contract, unjust enrichment, invasion of privacy, and breach of fiduciary duty, where patients alleged that stolen PII included patient names and Social Security numbers and that at least some stolen PII had already been misused to file fraudulent tax return in former patient's name. U.S. Const. art. 3, § 2, cl. 1.

16. Federal Civil Procedure ⚿182.5

Fraud ⚿29

Health ⚿812

Implied and Constructive Contracts ⚿71

Torts ⚿335

Former patient and current patient plausibly alleged separate concrete, present harm caused by their exposure to risk of future harm from misuse of their personally identifiable information (PII), which was purportedly stolen by hackers who infiltrated pharmacy's patient records systems, as required to establish Article III standing to bring putative class action against pharmacy seeking damages under state law for negligence, breach of implied contract, unjust enrichment, invasion of privacy, and breach of fiduciary duty, where patients alleged that they both spent considerable time and effort monitoring their accounts to protect themselves from identity theft and identified harms of lost time as lost opportunity costs and lost wages, which were equivalent to monetary injury. U.S. Const. art. 3, § 2, cl. 1.

17. Telecommunications ⚿1944

Time spent responding to a data breach can constitute a concrete injury sufficient to confer Article III standing, at least when that time would otherwise have been put to profitable use. U.S. Const. art. 3, § 2, cl. 1.

18. Federal Civil Procedure ⚿182.5

Fraud ⚿29

Health ⚿812

Implied and Constructive Contracts ⚿71

Torts ⚿335

Allegations by former patient and current patient that hackers infiltrated pharmacy's patient records systems and stole patients' personally identifiable information (PII), including names and Social Security numbers, alleged traceability and redressability, as required to establish Article III standing to bring putative class action against pharmacy asserting state-law claims of negligence, breach of implied contract, unjust enrichment, invasion of privacy, and breach of fiduciary duty, where patients alleged that pharmacy's actions led to exposure and actual or potential misuse of their PII, making their injuries fairly traceable to pharmacy's conduct, and that monetary relief would compensate them for their injuries, making injuries redressable. U.S. Const. art. 3, § 2, cl. 1.

19. Federal Courts ⚿2028

The absence of a valid cause of action does not implicate subject-matter jurisdiction, i.e., the courts' statutory or constitutional power to adjudicate the case.

20. Federal Civil Procedure ⚿182.5

Injunction ⚿1505

Patients' requested injunctions requiring pharmacy to improve its cybersecurity systems to protect patients' personally identifiable information (PII) were not likely to redress injuries patients allegedly sustained when hackers infiltrated pharmacy's patient records systems and stole patients' PII, including names and Social Security numbers, and thus patients lacked Article III standing to bring class action seeking injunctive relief, where injunctive relief would have safeguarded only against future breach and would not have protected patients from future misuse of their stolen PII. U.S. Const. art. 3, § 2, cl. 1.

21. Injunction ⚿1505

Article III standing for injunctive relief depends on whether the plaintiffs are likely to suffer future injury. U.S. Const. art. 3, § 2, cl. 1.

22. Antitrust and Trade Regulation ⚿290

Federal Civil Procedure ⚿182.5

Patients' requested injunctions prohibiting pharmacy from engaging in deceptive and unfair practices and making untrue statements about data breach in which hackers infiltrated pharmacy's patient records systems and stole patients' personally identifiable information (PII), including names and Social Security numbers, would not redress patients' injuries, and thus patients lacked Article III standing to bring class action seeking injunctive relief, where patients did not claim that pharmacy was likely to make deceptive statements about breach in the future or that any such statements would harm patients, who knew about breach. U.S. Const. art. 3, § 2, cl. 1.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS [Hon. Richard G. Stearns, U.S. District Judge]

David K. Lietz, with whom Milberg Coleman Bryson Phillips Grossman, PLLC, Raina C. Borrelli, and Turke & Strauss, LLP were on brief, for appellants.

Claudia D. McCarron, with whom Jordan S. O'Donnell and Mullen Coughlin LLC were on brief, for appellee.

Before Kayatta, Lynch, and Montecalvo, Circuit Judges.

LYNCH, Circuit Judge.

Named plaintiffs Alexsis Webb and Marsclette Charley brought this putative class action against defendant Injured Workers Pharmacy, LLC ("IWP"), asserting various state law claims in relation to a January 2021 data breach that allegedly exposed their personally identifiable information ("PII") and that of over 75,000 other IWP patients. The district court concluded that the plaintiffs' complaint did not plausibly allege an injury in fact and dismissed the case for lack of Article III standing. See Webb v. Injured Workers Pharmacy, LLC, No. 22-cv-10797, 2022 WL 10483751, at *2 (D. Mass. Oct. 17, 2022).

We hold that the complaint plausibly demonstrates the plaintiffs' standing to seek damages. The plaintiffs press five causes of action seeking damages, each of which encompasses at least one of the harms that we hold satisfy the requirements of Article III standing. The complaint plausibly alleges an injury in fact as to Webb based on the allegations of actual misuse of her PII to file a fraudulent tax return. Further, the complaint plausibly alleges an injury in fact as to both plaintiffs based on an imminent and substantial risk of future harm as well as a present and concrete harm resulting from the exposure to this risk. We also hold that the plaintiffs lack standing to pursue injunctive relief because their desired injunctions would not likely redress their alleged injuries. We affirm in part, reverse in part, and remand for further proceedings.

I.

A.

We recount the facts as they appear in the plaintiffs' complaint and in documents attached to the complaint or incorporated therein. Hochendoner v. Genzyme Corp., 823 F.3d 724, 728 (1st Cir. 2016).

IWP is a home-delivery pharmacy service registered and headquartered in Massachusetts. It maintains records of its patients' full names, Social Security numbers, and dates of birth, as well as information concerning their financial accounts, credit cards, health insurance, prescriptions, diagnoses, treatments, healthcare providers,

and Medicare/Medicaid IDs. Much of this information constitutes PII. See, e.g., United States v. Cruz-Mercedes, 945 F.3d 569, 572 (1st Cir. 2019). Patients provided their PII in order to receive IWP's services, and IWP kept that PII. IWP represented to patients that it would keep their PII secure.

In January 2021, IWP suffered a data breach. Hackers infiltrated IWP's patient records systems, gaining access to the PII of over 75,000 IWP patients, and stole PII including patient names and Social Security numbers.[1] IWP did not discover this breach until May 2021, almost four months later. In the interim, the hackers were able to continue accessing PII. On learning of the breach, IWP did not immediately alert its patients. Instead, it initiated a seven-month investigation and worked to implement new data security safeguards.

IWP did not begin notifying impacted patients until February 2022, when it circulated a notice letter. This notice provided a high-level description of the breach but, in the plaintiffs' view, did not fully convey its size or scope. The notice stated that IWP "currently ha[d] no evidence that any information ha[d] been misused." It also "encourage[d] [patients] to ... review[ ] [their] account statements and monitor[ ] [their] credit reports for suspicious activity" and referred patients to a guidance document on protecting their personal information. IWP has not offered to provide, at its own expense, credit monitoring and identity protection services to all impacted patients.

Alexsis Webb is a former IWP patient who received services from IWP between 2017 and 2020. She is a resident of Ohio. In February 2022, IWP notified her that her PII had been compromised in the data breach. As a result, Webb allegedly "fears for her personal financial security and [for] what information was revealed in the [d]ata [b]reach," "has spent considerable time and effort monitoring her accounts to protect herself from ... identity theft," and "is experiencing feelings of anxiety, sleep disruption, stress, and fear" because of the breach. Webb's PII was used to file a fraudulent 2021 tax return, and she has "expended considerable time" communicating with the Internal Revenue Service ("IRS") to resolve issues associated with this false return.

Marsclette Charley is a current IWP patient who has received services from IWP since 2016. She is a resident of Georgia. Like Webb, she became aware in February 2022 that her PII had been compromised in the breach. She called IWP to confirm that her information was stolen, but IWP's representatives would not provide her with specific details as to what types of information were accessed. As a result of the breach, Charley allegedly "fears for her personal financial security," "expends considerable time and effort monitoring her accounts to protect herself from ... identity theft," and "is experiencing feelings of rage and anger, anxiety, sleep disruption, stress, fear, and physical pain."

B.

On May 24, 2022, Webb and Charley filed a class action complaint against IWP in the U.S. District Court for the District of Massachusetts, invoking the court's jurisdiction under the Class Action Fairness

1. IWP stated in a notice letter to potentially impacted patients that "an unknown actor accessed a total of seven ... IWP e-mail accounts" over a four-month period. The complaint alleges that hackers "infiltrated IWP's patient records systems." The plaintiffs appear to agree that the "initial attack vector" was into IWP employee email accounts but contend that this allowed the hackers to access additional system information.

Act of 2005 ("CAFA"), 28 U.S.C. § 1332(d). The complaint asserts state law claims for negligence, breach of implied contract, unjust enrichment, invasion of privacy, and breach of fiduciary duty.[2] The complaint seeks damages, an injunction "[e]njoining [IWP] from further deceptive and unfair practices and making untrue statements about the [d]ata [b]reach and the stolen PII," other injunctive and declaratory relief "as is necessary to protect the interests of [the] [p]laintiffs and the [c]lass," and attorneys' fees. It seeks to certify a class of U.S. residents whose PII was compromised in the data breach.

On August 9, 2022, IWP moved to dismiss the complaint on two bases: under Federal Rule of Civil Procedure ("Rule") 12(b)(1), for lack of Article III standing, and under Rule 12(b)(6), for failure to state a claim as to each of the complaint's asserted claims. The plaintiffs opposed the motion.

On October 17, 2022, the district court granted IWP's motion and dismissed the case under Rule 12(b)(1). Webb, 2022 WL 10483751, at *2. The court concluded that the plaintiffs lacked Article III standing because their complaint did not plausibly allege an injury in fact. Id. As to the complaint's allegation that a fraudulent tax return was filed in Webb's name, the court reasoned that the complaint did not sufficiently allege a connection between the data breach and this false return. See id. at *2 n.4. As to the complaint's other allegations, the court reasoned that the potential future misuse of the plaintiffs' PII was not sufficiently imminent to establish an injury in fact and that actions to safeguard against this risk could not confer standing either. See id. at *2. Because it dismissed the case under Rule 12(b)(1), the court did not reach IWP's Rule 12(b)(6) arguments. Id. at *1 n.2.

This timely appeal followed.

II.

[1, 2] The plaintiffs' complaint must meet standing requirements based on Article III of the Constitution, which limits "[t]he judicial Power" to "Cases" and "Controversies." U.S. Const. art. III, § 2, cl. 1; see In re: Evenflo Co., Inc., Mktg., Sales Pracs. & Prods. Liab. Litig., 54 F.4th 28, 34 (1st Cir. 2022). "The existence of standing is a legal question, which we review de novo." Evenflo, 54 F.4th at 34 (quoting Kerin v. Titeflex Corp., 770 F.3d 978, 981 (1st Cir. 2014)). "When reviewing a pre-discovery grant of a motion to dismiss for lack of standing, we accept as true all well-pleaded fact[s] . . . and indulge all reasonable inferences in the plaintiff[s'] favor." Id. (alterations and omission in original) (internal quotation marks omitted) (quoting Kerin, 770 F.3d at 981). "[W]e apply the same plausibility standard used to evaluate a motion under Rule 12(b)(6)." Gustavsen v. Alcon Lab'ys, Inc., 903 F.3d 1, 7 (1st Cir. 2018). At this stage in the proceedings, our analysis focuses on whether the two named plaintiffs have standing. See id.; Hochendoner, 823 F.3d at 730, 733-34; 1 W. Rubenstein, Newberg and Rubenstein on Class Actions §§ 2:1, 2:3 (6th ed. June 2023 update).

[3–5] "[P]laintiffs bear the burden of demonstrating that they have standing," TransUnion LLC v. Ramirez, —— U.S. ——, 141 S. Ct. 2190, 2207, 210 L.Ed.2d 568 (2021), and must do so "with the manner and degree of evidence required at the successive stages of the litigation," id. at 2208 (quoting Lujan v. Defs. of Wildlife, 504 U.S. 555, 561, 112 S.Ct. 2130, 119

2. The complaint also asserts a state law claim for negligence per se. The plaintiffs agreed to voluntarily dismiss this claim in their district court briefing.

L.Ed.2d 351 (1992)). Plaintiffs "must demonstrate standing for each claim that they press and for each form of relief that they seek." Id. "To establish standing, a plaintiff must show an injury in fact caused by the defendant and redressable by a court order." United States v. Texas, No. 22-58, 599 U.S. ——, 143 S.Ct. 1964, 1966, 216 L.Ed.2d 624 (U.S. June 23, 2023); see Evenflo, 54 F.4th at 34.

[6–8] At issue in this appeal is the "injury in fact" requirement -- and, in particular, the requirement that this injury be "concrete." "[T]raditional tangible harms, such as physical harms and monetary harms" are "obvious[ly]" concrete. TransUnion, 141 S. Ct. at 2204. Intangible harms can also be concrete, including when they "are injuries with a close relationship to harms traditionally recognized as providing a basis for lawsuits in American courts," such as "reputational harms, disclosure of private information, and intrusion upon seclusion." Id.; see also Spokeo, Inc. v. Robins, 578 U.S. 330, 340-41, 136 S.Ct. 1540, 194 L.Ed.2d 635 (2016). This "inquiry asks whether plaintiffs have identified a close historical or common-law analogue for their asserted injury," but "does not require an exact duplicate." TransUnion, 141 S. Ct. at 2204.

[9, 10] "[A] material risk of future harm can [also] satisfy the concrete-harm requirement," but only as to injunctive relief, not damages. Id. at 2210; see id. at 2210-11. To have standing to pursue damages based on a risk of future harm, plaintiffs must demonstrate a separate concrete harm caused "by their exposure to the risk itself." Id. at 2211.

Applying these principles in TransUnion, the Supreme Court concluded that only a portion of the certified class in that case had standing to pursue the claim that TransUnion, a credit reporting agency, had failed to use reasonable procedures in maintaining its credit files. See id. at 2200, 2208. The class comprised individuals whose TransUnion credit reports bore alerts erroneously suggesting that they might be terrorists or other serious criminals. Id. at 2201-02. The Court held that the 1,853 class members whose credit reports TransUnion disseminated to third parties had standing, because this injury bore a sufficiently close relationship to "the reputational harm associated with the tort of defamation." Id. at 2208. That the credit reports "were only misleading and not literally false" did not defeat standing, because "an exact duplicate" of a traditionally recognized harm is not required. Id. at 2209.

However, the remaining 6,332 class members whose credit reports were not disseminated to third parties lacked standing. Id. at 2212. The Court first considered whether the mere existence of misleading alerts in these plaintiffs' internal TransUnion credit files (absent dissemination) was a concrete injury and concluded that it was not. See id. at 2209-10. The Court then rejected the plaintiffs' effort to establish standing for damages on a risk of future harm theory, reasoning that they had not demonstrated that they "were independently harmed by their exposure to the risk itself -- that is, that they suffered some other injury ... from the mere risk that their credit reports would be provided to third-party businesses." Id. at 2211; see id. at 2210-11. The Court noted that emotional harm might supply the requisite concrete, present injury but did not reach this question because the plaintiffs had not claimed any such injury. See id. at 2211 & n.7.

III.

A.

[11] We begin with Webb's standing to pursue damages. We conclude that the

complaint plausibly alleges a concrete injury in fact as to Webb based on the plausible pleading that the data breach resulted in the misuse of her PII by an unauthorized third party (or third parties) to file a fraudulent tax return.[3]

Our data security precedents support the conclusion that actual misuse of PII may constitute an injury in fact. In Katz v. Pershing, LLC, 672 F.3d 64 (1st Cir. 2012), we concluded that the named plaintiff lacked standing to sue as to her state law consumer protection claims that the defendant had employed inadequate data security practices. See id. at 69-70. We stated that "[c]ritically, the complaint [did] not contain an allegation that [her] nonpublic personal information ha[d] actually been accessed by any unauthorized user" -- let alone subsequently misused -- but rather "rest[ed] entirely on the hypothesis that at some point an unauthorized, as-yet unidentified, third party might access her data and then attempt to purloin her identity." Id. at 79. The alleged harm in that case was not "impending" because it was "unanchored to any actual incident of data breach." Id. at 80. And the plaintiff could not manufacture standing by incurring mitigation costs in the absence of an impending harm. See id. at 79. We distinguished the case from those "in which confidential data actually has been accessed through a security breach and persons involved in that breach have acted on the ill-gotten information." Id. at 80 (emphasis added).[4]

We hold that the complaint's plausible allegations of actual misuse of Webb's stolen PII to file a fraudulent tax return suffice to state a concrete injury under Article III. This conclusion accords with the law of other circuits. See, e.g., In re Equifax Inc. Customer Data Sec. Breach Litig., 999 F.3d 1247, 1262 (11th Cir. 2021) (identifying both "identity theft and damages resulting from such theft" as concrete injuries); Attias v. CareFirst, Inc., 865 F.3d 620, 627 (D.C. Cir. 2017) ("Nobody doubts that identity theft, should it befall one of these plaintiffs, would constitute a concrete and particularized injury.").

[12, 13] The district court concluded that the complaint did not plausibly allege a connection between the data breach and the filing of the false tax return. See Webb, 2022 WL 10483751, at *2 n.4. We disagree. In our view, the complaint plausibly alleges a connection between the actual misuse of Webb's PII and the data breach. In applying the plausibility standard re-

3. The claims asserted in the plaintiffs' complaint all arise from the IWP data breach, and neither party argues that the standing inquiry differs with respect to any claim. Accordingly, we treat the claims together throughout our analysis. See TransUnion, 141 S. Ct. at 2213-14 (assessing standing for "intertwined" claims together); Evenflo, 54 F.4th at 35 (similar); Clemens v. ExecuPharm Inc., 48 F.4th 146, 156-59 (3d Cir. 2022) (employing same underlying standing analysis for contract, tort, and "secondary contract" claims in data breach case).

4. Our decision in Anderson v. Hannaford Brothers Co., 659 F.3d 151 (1st Cir. 2011), is also instructive. To be clear, Anderson did not concern Article III standing. It did, however, discuss the types of harms that can arise out of data misuse following a data breach. Id. at 162-67. In that case, we reversed the district court's dismissal of certain state law claims because the plaintiffs' alleged mitigation costs were incurred in response to a serious data breach and actual misuse of PII and were thus "reasonable" and "constitute[d] a cognizable harm under Maine law." Id. at 154, 164; see id. at 162-67. The data breach involved "the deliberate taking of credit and debit card information by sophisticated thieves" and the "actual misuse" of this information to "run up thousands of improper charges across the globe." Id. at 164; see id. at 154. We concluded that "[t]he [plaintiffs] were not merely exposed to a hypothetical risk, but to a real risk of misuse." Id. at 164.

quired at the motion to dismiss stage, we "[must] draw on [our] judicial experience and common sense ... [and] read [the complaint] as a whole." Evenflo, 54 F.4th at 39 (alterations and omission in original) (internal quotation marks omitted) (quoting García-Catalán v. United States, 734 F.3d 100, 103 (1st Cir. 2013)). We must also "indulge all reasonable inferences in the plaintiff[s'] favor." Id. at 34 (alteration in original) (internal quotation marks omitted) (quoting Kerin, 770 F.3d at 981).

There is an obvious temporal connection between the filing of the false tax return and the timing of the data breach. Further, the complaint's allegation that Webb's PII was "used by an unauthorized individual" to file a false tax return is made in the context of allegations relating to harms Webb has suffered because of the data breach. The complaint also alleges that Webb is "very careful about sharing her PII," "has never knowingly transmitted unencrypted PII over the internet or any other unsecured source," and stores documents containing her PII in a secure location. The obvious inference to be drawn from these allegations is that the criminal or criminals who filed the false tax return obtained Webb's PII from the IWP data breach, not from some other source. And the complaint alleges that, as a result of the data breach and IWP's conduct, the plaintiffs "have suffered or are at an increased risk of suffering ... [d]elay in receipt of tax refund monies ... [and the] [u]nauthorized use of stolen PII." These general allegations provide further support for a plausible connection. See In re: SuperValu, Inc., Customer Data Sec. Breach Litig., 870 F.3d 763, 772 (8th Cir. 2017) (holding that, at the motion to dismiss stage, a complaint's " 'general allegations embrace[d] those specific facts ... necessary to support' a link between [a plaintiff's] fraudulent charge and the data breaches" (quoting Bennett v. Spear, 520 U.S. 154, 168, 117 S.Ct. 1154, 137 L.Ed.2d 281 (1997))).

We reject IWP's argument that the alleged actual misuse is not itself a concrete injury absent even more resulting harm to Webb. As described above, we agree with those courts that consider actual misuse of a plaintiff's PII resulting from a data breach to itself be a concrete injury. See, e.g., Equifax, 999 F.3d at 1262; Attias, 865 F.3d at 627. And beyond that, applying a TransUnion analysis, this alleged actual misuse is closely related to the tort of invasion of privacy based on appropriation of another's name or likeness, which "protect[s] ... the interest of the individual in the exclusive use of his own identity, in so far as it is represented by his name or likeness, and in so far as the use may be of benefit to him or to others." Restatement (Second) of Torts § 652C cmt. a (Am. L. Inst. 1977); see id. § 652C cmt. b (noting that while some states have "limited ... liability [by statute] to commercial uses of the name or likeness," the general rule is "not limited to commercial appropriation"); see also 141 S. Ct. at 2204.

B.

Charley's standing to pursue damages is more difficult. The complaint does not allege actual misuse of Charley's PII. Nonetheless, we conclude that, in light of the plausible allegations of some actual misuse, the complaint plausibly alleges a concrete injury in fact based on the material risk of future misuse of Charley's PII and a concrete harm caused by exposure to this risk.[5] This analysis is equally applicable to

5. The plaintiffs do not argue that the exposure of their PII in the breach was itself an intangible harm sufficient to confer standing -- for example, by analogy to the torts of breach of confidence or invasion of privacy based on public disclosure of private information. Cf.

Webb and provides an independent basis for our conclusion that the complaint plausibly demonstrates standing as to Webb.

1.

[14] "[A] material risk of future harm can satisfy the concrete-harm requirement," at least as to injunctive relief, when "the risk of harm is sufficiently imminent and substantial." TransUnion, 141 S. Ct. at 2210; see also Susan B. Anthony List v. Driehaus, 573 U.S. 149, 158, 134 S.Ct. 2334, 189 L.Ed.2d 246 (2014); Clapper v. Amnesty Int'l USA, 568 U.S. 398, 414 n.5, 133 S.Ct. 1138, 185 L.Ed.2d 264 (2013).

[15] Many of the same factors we have considered in other data breach cases inform our conclusion as to standing in this case. Plaintiffs face a real risk of misuse of their information following a data breach when their information is deliberately taken by thieves intending to use the information to their financial advantage -- i.e., exposed in a targeted attack rather than inadvertently. And the actual misuse of a portion of the stolen information increases the risk that other information will be misused in the future.

We stress that these considerations are neither exclusive nor necessarily determinative, but they do provide guidance. See, e.g., McMorris v. Carlos Lopez & Assocs., LLC, 995 F.3d 295, 302 (2d Cir. 2021) ("[D]etermining standing is an inherently fact-specific inquiry . . . ."). These considerations accord with other circuits' approach to determining when the risk of future misuse of PII following a data breach is imminent and substantial. The Second Circuit considers:

> (1) whether the plaintiffs' data has been exposed as the result of a targeted attempt to obtain that data; (2) whether any portion of the dataset has already been misused, even if the plaintiffs themselves have not yet experienced identity theft or fraud; and (3) whether the type of data that has been exposed is sensitive such that there is a high risk of identity theft or fraud.

Id. at 303; see also id. at 300-03 (explaining the relevance of these factors).[6] The Third Circuit also considers these factors. See Clemens v. ExecuPharm Inc., 48 F.4th 146, 153-54, 157 (3d Cir. 2022). Both circuits emphasize that these factors are "non-exhaustive." McMorris, 995 F.3d at 303; Clemens, 48 F.4th at 153. Other circuits look to similar considerations. See McMorris, 995 F.3d at 300-03 (collecting cases and synthesizing principles).

It stands to reason that data compromised in a targeted attack is more likely to be misused. See Anderson, 659 F.3d at 164; see also, e.g., McMorris, 995 F.3d at 301; Clemens, 48 F.4th at 153; Galaria v. Nationwide Mut. Ins. Co., 663 F. App'x 384, 388 (6th Cir. 2016); Remijas v. Neiman Marcus Grp., LLC, 794 F.3d 688, 693 (7th Cir. 2015); In re Zappos.com, Inc., Customer Data Sec. Breach Litig., 888 F.3d 1020, 1029 n.13 (9th Cir. 2018); In re: U.S. Off. of Pers. Mgmt. Data Sec. Breach

TransUnion, 141 S. Ct. at 2209 (analyzing similar "initial question" before turning to the plaintiffs' risk of future harm theory). Accordingly, we do not consider this question. And to the extent the plaintiffs seek to establish standing based on an alleged "diminution [in] value" of their PII, they have waived this argument by raising it for the first time in their reply brief. See, e.g., United States v. Abdelaziz, 68 F.4th 1, 60 n.36 (1st Cir. 2023).

6. McMorris and many of the other circuit cases discussed below were decided before TransUnion. Nevertheless, we think the factors the Second Circuit listed remain relevant to assessing the risk of future PII misuse. See Clemens v. ExecuPharm Inc., 48 F.4th 146, 153-54, 157 (3d Cir. 2022) (citing McMorris and applying similar factors post-TransUnion).

Litig., 928 F.3d 42, 58-59 (D.C. Cir. 2019) ("OPM").

That at least some information stolen in a data breach has already been misused also makes it likely that other portions of the stolen data will be similarly misused. See Anderson, 659 F.3d at 164; see also, e.g., McMorris, 995 F.3d at 301-02; Remijas, 794 F.3d at 693-94; Zappos.com, 888 F.3d at 1027 n.7; OPM, 928 F.3d at 58-59.

And the risk of future misuse may be heightened where the compromised data is particularly sensitive. "Naturally, the dissemination of high-risk information such as Social Security numbers and dates of birth -- especially when accompanied by victims' names -- makes it more likely that those victims will be subject to future identity theft or fraud." McMorris, 995 F.3d at 302; see also Clemens, 48 F.4th at 154; OPM, 928 F.3d at 49, 59; Attias, 865 F.3d at 628. In contrast, the risk of future misuse may be lower where the stolen data is "less sensitive, ... such as basic publicly available information, or data that can be rendered useless to cybercriminals." McMorris, 995 F.3d at 302; see also Tsao v. Captiva MVP Rest. Partners, LLC, 986 F.3d 1332, 1343 (11th Cir. 2021) (emphasizing fact that plaintiff did not allege that his Social Security number or date of birth were compromised in data breach); SuperValu, 870 F.3d at 770-71 (similar).

We hold that the totality of the complaint plausibly alleges an imminent and substantial risk of future misuse of the plaintiffs' PII. The complaint alleges that the data breach was the result of an attack by "cybercriminals" who "infiltrated IWP's patient records systems" and "stole[ ] PII." These hackers were, by IWP's own admission, able to compromise multiple employee email accounts and to remain undetected for almost four months. The complaint further alleges that at least some of the stolen PII has already been misused to file a fraudulent tax return in Webb's name. And the complaint alleges that the stolen PII "include[s] ... patients' names and [S]ocial [S]ecurity numbers." We do not hold that individuals face an imminent and substantial future risk in every case in which their information is compromised in a data breach. But on the facts alleged here, the complaint has plausibly demonstrated such a risk.

2.

[16] To establish standing to pursue damages, the complaint must also plausibly allege a separate concrete, present harm caused "by [the plaintiffs'] exposure to [this] risk [of future harm]." TransUnion, 141 S. Ct. at 2211. We conclude that the complaint has done so based on the allegations of the plaintiffs' lost time spent taking protective measures that would otherwise have been put to some productive use.[7] See Compl. ¶¶ 13, 56 (alleging "opportunity costs" and "lost wages" associated with "the time and effort expended addressing ... future consequences of the [d]ata [b]reach").

[17] The complaint alleges that both plaintiffs spent "considerable time and effort monitoring [their] accounts to protect [themselves] from ... identity theft." The complaint elsewhere identifies the harms of lost time as "[l]ost opportunity costs and lost wages." The loss of this time is equivalent to a monetary injury, which is indisputably a concrete injury. See id. at 2204; see also Dieffenbach v. Barnes & Noble,

7. The complaint does not allege that Webb or Charley purchased identity theft insurance or credit monitoring services or incurred similar mitigation costs. See TransUnion, 141 S. Ct. at 2204; see also, e.g., Clemens, 48 F.4th at 156; Hutton v. Nat'l Bd. of Exam'rs in Optometry, Inc., 892 F.3d 613, 622 (4th Cir. 2018).

Inc., 887 F.3d 826, 828 (7th Cir. 2018) (Easterbrook, J.) (recognizing that the opportunity cost of "one's own time needed to set things straight" following a data breach "can justify money damages, just as [it] support[s] standing"); In re: Gen. Motors LLC Ignition Switch Litig., 339 F. Supp. 3d 262, 307 (S.D.N.Y. 2018) ("[T]he overwhelming majority of states adhere to the view that lost-time damages are the equivalent of lost earnings or income.").[8] We join other circuits in concluding that time spent responding to a data breach can constitute a concrete injury sufficient to confer standing, at least when that time would otherwise have been put to profitable use. See, e.g., Clemens, 48 F.4th at 158; Hutton v. Nat'l Bd. of Exam'rs in Optometry, Inc., 892 F.3d 613, 622 (4th Cir. 2018); Galaria, 663 F. App'x at 388-89; Lewert v. P.F. Chang's China Bistro, Inc., 819 F.3d 963, 967 (7th Cir. 2016); Equifax, 999 F.3d at 1262.

Because this alleged injury was a response to a substantial and imminent risk of harm, this is not a case where the plaintiffs seek to "manufacture standing by incurring costs in anticipation of non-imminent harm." Clapper, 568 U.S. at 422, 133 S.Ct. 1138; see also, e.g., McMorris, 995 F.3d at 303; Hutton, 892 F.3d at 622.

C.

[18] The complaint's allegations also satisfy the traceability and redressability standing requirements. The complaint alleges that IWP's actions led to the exposure and actual or potential misuse of the plaintiffs' PII, making their injuries fairly traceable to IWP's conduct. See Evenflo, 54 F.4th at 41; Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118, 134 n.6, 134 S.Ct. 1377, 188 L.Ed.2d 392 (2014) ("Proximate causation is not a requirement of Article III standing, which requires only that the plaintiff's injury be fairly traceable to the defendant's conduct."). "And monetary relief would compensate [the plaintiffs] for their injur[ies], rendering the injur[ies] redressable." Evenflo, 54 F.4th at 41.

D.

[19] Defendants do not contend that the plaintiffs' ability to pursue emotional distress as a specific category of damages presents an independent Article III standing issue even after plaintiffs have shown an actual injury supporting their claim for damages generally under each cause of action, and for good reason. "It is firmly established in our cases that the absence of a valid ... cause of action does not implicate subject-matter jurisdiction, i.e., the courts' statutory or constitutional power to adjudicate the case." Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 89, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998). On the appeal before us we consider only whether the plaintiffs have "demonstrate[d] standing for each claim that they press and for each form of relief that they seek." TransUnion, 141 S.Ct. at 2208. Having concluded that plaintiffs have supported each of their five causes of action for damages with at least one injury in fact caused by the defendant and redressable by a court order, we venture no further. Cf. Attias, 865 F.3d at 626 n.2 (declining to address standing based on past identity theft because the risk of future identity theft, along with associated miti-

8. Because we conclude that the complaint plausibly alleges the loss of time that would otherwise have been put to profitable use, we do not consider whether the loss of personal time is either a tangible injury or an intangible injury with a "close historical or common-law analogue." TransUnion, 141 S. Ct. at 2204; cf. Gen. Motors LLC, 339 F. Supp. 3d at 307 ("[M]ost states do not treat lost personal time as a compensable form of injury.").

gation expenses, sufficed to confer standing); Linman v. Marten Transp., Ltd., No. 22-CV-204-JDP, 2023 WL 2562712, at *3 (W.D. Wis. Mar. 17, 2023) (finding time spent mitigating the risk of identity theft sufficient for standing and declining to decide whether other alleged injuries such as emotional distress are sufficient); TransUnion, 141 S. Ct. at 2211 & n.7. Whether the plaintiffs have stated a claim for damages specifically arising out of their emotional distress is a question for IWP's 12(b)(6) motion which, as discussed below, we do not reach.

IV.

[20] We next consider the plaintiffs' standing to seek injunctive relief. We conclude that the plaintiffs lack standing to pursue such relief because their requested injunctions are not likely to redress their alleged injuries. See Lujan, 504 U.S. at 568-71, 112 S.Ct. 2130.

The only allegation in the complaint that injunctive relief is necessary is that plaintiffs' "PII [is] still maintained by [IWP] with [its] inadequate cybersecurity system and policies." Naturally, an injunction requiring IWP to improve its cybersecurity systems cannot protect the plaintiffs from future misuse of their PII by the individuals they allege now possess it. Any such relief would safeguard only against a future breach.

[21] But the plaintiffs do not allege that any such future breach will occur. "Standing for injunctive relief depends on 'whether [the plaintiffs are] likely to suffer future injury.' " Laufer v. Acheson Hotels, LLC, 50 F.4th 259, 276 (1st Cir. 2022) (quoting City of Los Angeles v. Lyons, 461 U.S. 95, 105, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983)). Here, any available inference that IWP's prior data breach might make a future data breach more likely is undercut by the plaintiffs' own allegation that "[f]ollowing the [d]ata [b]reach, IWP implemented new security safeguards to prevent and mitigate data breaches -- measures that should have been in place before the data breach." Instead, IWP faces much the same risk of future cyberhacking as virtually every holder of private data. If that risk were deemed sufficiently imminent to justify injunctive relief, virtually every company and government agency might be exposed to requests for injunctive relief like the one the plaintiffs seek here. We decline to hold as much. Because the plaintiffs have not shown that their requested injunction would likely redress their alleged injuries, they lack standing to pursue that form of relief. Cf. Lujan, 504 U.S. at 568-71, 112 S.Ct. 2130.

[22] The plaintiffs also request that the district court "[e]njoin[ ] [IWP] from further deceptive and unfair practices and making untrue statements about the [d]ata [b]reach and the stolen PII." But nowhere do the plaintiffs allege that IWP is likely to make deceptive statements about that past breach in the future or that any such statements would harm the plaintiffs, particularly now that they know about the breach. Here, too, the plaintiffs' requested injunction would have no chance of redressing any alleged injury, and they lack standing to pursue it.

V.

We do not reach IWP's Rule 12(b)(6) arguments. The district court did not rule on these arguments, see Webb, 2022 WL 10483751, at *1 n.2, and will have the opportunity to do so in the first instance on remand, see, e.g., Evenflo, 54 F.4th at 41.

VI.

For the foregoing reasons, we affirm in part, reverse in part, and remand for fur-

ther proceedings consistent with this opinion. No costs are awarded.

UNITED STATES SECURITIES AND EXCHANGE COMMISSION, Plaintiff-Appellee,

v.

Iftikar A. AHMED, Shalini Ahmed, I.I. 1, a minor child, by and through his next friends Iftikar and Shalini Ahmed, his parents, I.I. 2, a minor child, by and through his next friends Iftikar and Shalini Ahmed, his parents, I.I. 3, a minor child, by and through his next friends Iftikar and Shalini Ahmed, his parents, I-Cubed Domains, LLC, Shalini Ahmed 2014 Grantor Retained Annuity Trust, DIYA Holdings, LLC, DIYA Real Holdings, LLC, Defendants-Appellants,

v.

Jed Horwitt, Receiver-Appellee.*

Nos. 21-1686, 21-1712
August Term 2022

United States Court of Appeals, Second Circuit.

Argued: January 18, 2023

Decided: June 28, 2023

Background: Securities and Exchange Commission (SEC) brought enforcement action against investment manager and relief defendants, which were his wife, his minor sons, and companies allegedly held in defendants' names or for their benefit, for violations of Securities Exchange Act of 1934, Securities Act of 1933, and Investment Advisers Act of 1940. The United States District Court for the District of Connecticut, Janet Bond Arterton, J., granted SEC's motion for preliminary injunction freezing total of $118.3 million. After denying manager's requests for discovery and funds to hire counsel, the District Court, 308 F.Supp.3d 628, entered summary judgment in favor of SEC, awarding relief including disgorgement, then appointed receiver and authorized receiver to liquidate frozen assets, but stayed distribution pending appeal. Defendants appealed, and the Court of Appeals granted SEC's motion for remand. On remand, the District Court, 2021 WL 2471526, increased disgorgement amount to $64,171,646.14, approved receiver's liquidation plan, and denied relief defendants' motion for stay pending appeal. Defendants appealed.

Holdings: The Court of Appeals, Park, Circuit Judge, held that:

(1) order denying discovery was reasonable exercise of trial court's inherent power to enforce protective order;

(2) trial court appropriately estimated net profits of manager's misconduct;

(3) manager was not entitled to offset from disgorgement based on his forfeiture to his employer of his carried interest bonus;

(4) amendments to disgorgement statutes applied retroactively on remand;

(5) retroactive application of amended limitations period for disgorgement did not violate Ex Post Facto Clause;

(6) trial court failed to support disgorgement of consequential gains with adequate findings on whether conse-

* The Clerk of Court is respectfully directed to amend the caption accordingly.

a conclusion that it was "so obvious" that Mitchell created a substantial risk of serious bodily injury when he struck Officer Jones.[5] *See Bolden*, 964 F.3d at 288.

For these reasons, I would vacate the district court's application of the official victim enhancement and remand the case for resentencing to have the district court explain fully its application of both disputed enhancements.

IN RE: MARRIOTT INTERNATIONAL, INC., Customer Data Security Breach Litigation,

Peter Maldini; Paula O'Brien; Robert Guzikowski; Denitrice Marks; Maria Maisto; Irma Lawrence; Michaela Bittner; Kathleen Frakes Hevener; Brent Long; David Viggiano; Eric Fishon; Annemarie Amarena; Roger Cullen, all proceeding individually and on behalf of all others similarly situated, Plaintiffs - Appellees,

court found [the defendant] raised his weapon or repositioned it to hold it by the grip.'').

5. The majority also cites *Alexander* to support its statement that ''[a]s little as one punch to the head by an unarmed person may cause a substantial risk of serious bodily injury.'' Op., at 670. I do not disagree that, in some circumstances, that might be the case. But the majority fails to acknowledge the succeeding sentences in *Alexander*:

> We are not holding or even suggesting that every swing of a fist qualifies for the upward adjustment under [the official victim enhancement]. Applying the Guideline standard to the specific circumstances of a case is the responsibility of the district judge.

712 F.3d at 979. Under the posture of this case, in which the district court failed to provide a sufficient explanation for its reasoning or to identify what particular circumstances created a ''substantial risk of serious bodily injury,'' it is not ''so obvious'' that the two strikes would have supported the application of the enhancement. *Bolden*, 964 F.3d at 288.

v.

Accenture LLP, Defendant - Appellant.

The Chamber of Commerce of the United States of America; The National Retail Federation, Amici Supporting Appellants.

The National Association of Consumer Advocates; Public Justice; Electronic Frontier Foundation; Electronic Privacy Information Center, Amici Supporting Appellees.

In re: Marriott International, Inc., Customer Data Security Breach Litigation.

Peter Maldini; Roger Cullen; Paula O'Brien; Robert Guzikowski; Denitrice Marks; Maria Maisto; Irma Lawrence; Michaela Bittner; Kathleen Frakes Hevener; Annemarie Amarena; Brent Long; David Viggiano; Eric Fishon, All Proceeding Individually and on Behalf of All Others Similarly Situated, Plaintiffs - Appellees,

v.

Marriott International, Incorporated, Defendant - Appellant.

The Chamber of Commerce of the United States of America; The National Retail Federation, Amici Supporting Appellants.

National Association of Consumer Advocates; Public Justice; Electronic Frontier Foundation; Electronic Privacy Information Center, Amici Supporting Appellees.

No. 22-1744, No. 22-1745

United States Court of Appeals, Fourth Circuit.

Argued: May 3, 2023

Decided: August 18, 2023

Background: Consumers brought consolidated class action claims against hotel chain and data security company for negligence, breach of contract, and consumer protection, arising from data breach in which hackers had access to consumers' personally identifiable information via guest information database. Consumers moved to certify classes and subclasses for monetary damages, liability issues, and injunctive or declaratory relief. The United States District Court for the District of Maryland, Paul W. Grimm, J., 341 F.R.D. 128, partially granted motion to certify classes and subclasses. Defendants' petitions for permission to appeal were granted.

Holdings: The Court of Appeals, Harris, Circuit Judge, held that:

(1) certifying classes was improper without first addressing defense of waiver of right to bring class action against chain, and

(2) class action on issues whether company owed duty to customers and breached it was no longer superior.

Vacated and remanded.

1. Federal Courts ⚿3585(3)

Court of Appeals reviews a district court's class certification decision for abuse of discretion, cognizant of both the considerable advantages that district court colleagues possess in managing complex litigation and the need to afford them some latitude in bringing that expertise to bear.

2. Federal Courts ⚿3565

District court per se abuses its discretion when it makes an error of law or clearly errs in its factual findings.

3. Federal Civil Procedure ⚿175

Certifying classes was improper without first addressing defense that class members, hotel guests, had waived right to bring class action against hotel chain to recover for damages caused by hacker's breach of guest reservation database; class-waiver defense was not merits issue as it was a defense to being required to litigate a class action at all, and even if waiver raised a merits question, there was nothing unusual or counter-intuitive about requiring court to consider aspects of merits in connection with class certification. Fed. R. Civ. P. 23.

4. Federal Civil Procedure ⚿171

Certification is key moment in class action litigation; it is sharp line of demarcation between individual action seeking to become class action and actual class action. Fed. R. Civ. P. 23.

5. Federal Civil Procedure ⚿182.5

Superiority requirement for class action by hotel guests on issues whether data security company owed duty to guests and breached it was not satisfied after Court of Appeals vacated certification order in suit against hotel chain for damages caused by hacker's breach of guest reservation database; district court reasoned that it would already be analyzing intertwined factual circumstances relevant to duty and breach issues since it had certified damages class against chain, but without classes against chain, nothing remained to support district court's superiority finding as to issue classes against company. Fed. R. Civ. P. 23(b)(3), 23(c)(4).

6. Federal Civil Procedure ⚿161.2

The superiority of class proceedings simply cannot be taken for granted, even when common questions predominate as to the certified issues; instead, courts must evaluate superiority question of efficiency carefully. Fed. R. Civ. P. 23(b)(3).

Appeal from the United States District Court for the District of Maryland, at Greenbelt. Paul W. Grimm, Senior District Judge. (8:19-md-02879-PWG)

ARGUED: Matthew S. Hellman, JENNER & BLOCK LLP, Washington, D.C.; Devin S. Anderson, KIRKLAND & ELLIS, LLP, Washington, D.C., for Appellants. Amy Elisabeth Keller, DICELLO LEVITT GUTZLER LLC, Chicago, Illinois, for Appellees. ON BRIEF: Craig S. Primis, Emily M. Long, Katherine E. Canning, KIRKLAND & ELLIS LLP, Washington, D.C., for Appellant Accenture LLP. Daniel R. Warren, Lisa M. Ghannoum, Dante A. Marinucci, Kyle T. Cutts, Cleveland, Ohio, Gilbert S. Keteltas, BAKER & HOSTETLER LLP, Washington, D.C.; Lindsay C. Harrison, Zachary C. Schauf, Kevin J. Kennedy, Mary E. Marshall, Raymond B. Simmons, JENNER & BLOCK LLP, Washington, D.C., for Appellant Marriott International, Inc. James J. Pizzirusso, Washington, D.C., Megan Jones, HAUSFELD LLP, San Francisco, California; Andrew N. Friedman, COHEN MILSTEIN SELLERS & TOLL PLLC, Washington, D.C.; Norman E. Siegel, Kasey Youngentob, STUEVE SIEGEL HANSON LLP, Kansas City, Missouri; Jason L. Lichtman, Sean A. Petterson, LIEFF CABRASER HEIMANN & BERNSTEIN, LLP, New York, New York; MaryBeth V. Gibson, THE FINLEY FIRM, P.C., Atlanta, Georgia; Megan Jones, HAUSFELD LLP, San Francisco, California; Timothy Maloney, Veronica Nannis, JOSEPH GREENWALD & LAAKE, P.A., Greenbelt, Maryland; Gary F. Lynch, LYNCH CARPENTER, LLP, Pittsburgh, Pennsylvania; James Ulwick, KRAMON & GRAHAM PA, Baltimore, Maryland; Daniel Robinson, ROBINSON CALCAGNIE, INC., Newport Beach, California; Ariana J. Tadler, TADLER LAW LLP, New York, New York, for Appellees. Jennifer B. Dickey, Jordan L. Von Bokern, UNITED STATES CHAMBER LITIGATION CENTER, Washington, D.C., for Amicus Chamber of Commerce of the United States of America. Stephanie A. Martz, NATIONAL RETAIL FEDERATION, Washington, D.C., for Amicus National Retail Federation. Ashley C. Parrish, Julianne L. Duran, KING & SPALDING LLP, Washington, D.C., for Amici Chamber of Commerce of the United State of America and National Retail Federation. Ira Rheingold, NATIONAL ASSOCIATION OF CONSUMER ADVOCATES, Washington, D.C., for Amicus National Association of Consumer Advocates. Shelby Leighton, PUBLIC JUSTICE, Washington, D.C., for Amicus Public Justice. Hassan A. Zavareei, Glenn E. Chappell, Spencer S. Hughes, Cameron Partovi, Schuyler Standley, TYCKO & ZAVAREEI LLP, Washington, D.C., for Amici National Association of Consumer Advocates and Public Justice. Cindy A. Cohn, Adam Schwartz, ELECTRONIC FRONTIER FOUNDATION, San Francisco, California, for Amicus Electronic Frontier Foundation. Chris Frascella, Megan Iorio, Tom McBrien, ELECTRONIC PRIVACY INFORMATION CENTER (EPIC), Washington, D.C., for Amicus Electronic Privacy Information Center. Jean Sutton Martin, John A. Yanchunis, Kenya J. Reddy, MORGAN & MORGAN COMPLEX LITIGATION GROUP, Tampa, Florida, for Amici Electronic Frontier Foundation and Electronic Privacy Information Center.

Before NIEMEYER, KING, and HARRIS, Circuit Judges.

Vacated and remanded by published opinion. Judge Harris wrote the opinion, in which Judge Niemeyer and Judge King joined.

PAMELA HARRIS, Circuit Judge:

In November 2018, Marriott International, Inc., announced that hackers had breached one of its guest reservation databases, giving them access to millions of guest records. Customers across the country began filing lawsuits, which were consolidated into multidistrict litigation in Maryland. The plaintiffs then moved to certify multiple class actions against Marriott and Accenture LLP, an IT service provider that managed the database at issue.

The district court obliged in part. After extensive proceedings, it certified classes for monetary damages on breach of contract and statutory consumer-protection claims against Marriott under Rule 23(b)(3) of the Federal Rules of Civil Procedure. It also certified "issue" classes on negligence claims against Marriott and Accenture under Rule 23(c)(4), limited to a subset of issues bearing on liability.

We granted the defendants' petitions to appeal the district court's certification order and now conclude that the order must be vacated. The district court erred, we find, in certifying damages classes against Marriott without first considering the effect of a class-action waiver signed by all putative class members. And because the existence of damages classes against Marriott was a critical predicate for the district court's decision to certify the negligence issue classes, that error affects the whole of the certification order. Accordingly, we vacate the district court's certification order and remand for further proceedings consistent with this opinion.

I.

A.

In November 2018, Marriott International, Inc., disclosed that it had been subject to a massive data breach: From July 2014 to September 2018, hackers had access to the guest reservation database of a hotel chain, Starwood Hotels & Resorts Worldwide, that Marriott had purchased mid-breach in September 2016. Through the Starwood database, the hackers were able to view customers' personal information, including names, mailing addresses, birth dates, email addresses, phone numbers, and, in some cases, passport and payment card information. The compromised information was associated with both regular guests and those who were members of the Starwood Preferred Guest Program. In total, the breach affected roughly 133.7 million guest records within the United States.

Consumer plaintiffs across the country began filing lawsuits against Marriott. The suits claimed, in collective effect, that Marriott failed to take reasonable steps to protect its customers' personal information against the foreseeable risk of a cyberattack, giving rise to tort liability. They also alleged that Marriott had breached contractual and statutory duties the company owed to its customers. Those actions were ultimately consolidated in multi-district litigation in the District of Maryland, where Marriott is headquartered. The plaintiffs added as a defendant Accenture LLP, a third-party provider of IT services to Starwood and then Marriott during the relevant period.

In their operative complaint, the plaintiffs asserted various state-law contract and statutory consumer-protection claims against Marriott, along with state-law tort claims for negligence against both Marriott and Accenture.[1] Marriott and the

1. The plaintiffs brought claims for both negligence and negligence per se. For the sake of

plaintiffs then identified ten "bellwether" claims to test the sufficiency of the pleadings; each was keyed to the law of a particular state, with the named plaintiffs from the selected state serving as the bellwether plaintiffs. The plaintiffs and Accenture followed a similar process to identify test jurisdictions and named plaintiffs for the state-law negligence claims against that defendant. Marriott and Accenture then moved to dismiss the representative plaintiffs' claims.

The district court denied the defendants' motions in relevant part, allowing the plaintiffs' claims to proceed. *See In re Marriott Int'l, Inc., Customer Data Sec. Breach Litig.* (*Marriott I*), 440 F. Supp. 3d 447 (D. Md. 2020); *In re Marriott Int'l, Inc., Customer Data Sec. Breach Litig.* (*Marriott II*), No. 19-md-2879, 2020 WL 6290670 (D. Md. Oct. 27, 2020). Most important here, the district court held that the named plaintiffs had adequately alleged "injury in fact" for purposes of Article III standing, and in so doing, it identified the theories of harm that would go on to guide the class certification litigation. *Marriott I*, 440 F. Supp. 3d at 456–66; *Marriott II*, 2020 WL 620670, at *4–5 (incorporating reasoning of *Marriott I*). Everyone agreed that plaintiffs who had experienced actual "fraudulent misuse of their personal information" had suffered a cognizable injury. *Marriott I*, 440 F. Supp. 3d at 456 n.4, 460 n.6. But the district court also found, as relevant here, that the remaining plaintiffs had advanced three other forms of injury sufficient to establish standing: (1) that they had spent time and money mitigating a non-speculative threat of identity theft (the "mitigation" theory); (2) that the cyberattack had deprived them of the inherent market value of their personal identifying information (the "loss of market value" theory); and (3) that they had paid more for their hotel rooms than they would have had they known of Marriott's allegedly lax data-security practices (the "overpayment" theory). *Id.* at 460–66.

B.

The plaintiffs moved to certify various classes, and in the decision now before us, the district court granted that motion in part. *See In re Marriott Int'l, Inc., Customer Data Sec. Breach Litig.* (*Marriott III*), 341 F.R.D. 128 (D. Md. 2022). On the plaintiffs' contract and consumer-protection claims against Marriott, the court certified three state-specific damages classes under Rule 23(b)(3) of the Federal Rules of Civil Procedure. *Id.* at 172–73. And on the plaintiffs' negligence claims against Marriott and Accenture, the court certified four state-specific "issue" classes under Rule 23(c)(4), limited to the elements of duty and breach, with individualized proceedings on injury, causation, and the amount of damages to follow. *Id.* at 173. Our ruling today turns primarily on the import of a class-action waiver signed by members of the damages classes against Marriott. But that issue is intertwined with others in this complex proceeding, and the defendants' objections are wide-ranging, so we lay out much of the district court's comprehensive opinion below.

1.

The district court began by returning to the question of the class representatives' standing. *Id.* at 140–43. The court relied mostly on its prior analysis from the motion to dismiss stage, reasoning that the same evidentiary burden applied through class certification and until summary judgment, at which point the defendants could raise further standing challenges. *Id.* at 141. The district court did, however, make one adjustment to the scope of the dam-

convenience, we refer to them together here as negligence claims.

ages classes against Marriott in response to standing concerns. Those classes, the court explained, relied in critical part on an alleged "overpayment" injury: The class members paid more for their hotel rooms than they were worth, given Marriott's data-security deficiencies. But as defined by the plaintiffs, Marriott argued, the classes also included customers, like those traveling for work, who were reimbursed for their stays and thus did not themselves incur the hypothesized economic injury. *Id.* at 142. The district court agreed, and thus limited the classes proceeding on the overpayment theory of injury – the contract and consumer-protection classes against Marriott – to "persons who bore the economic burden for hotel room[s]" and were not reimbursed for their stays. *Id.* at 142–43.

That raised a second concern for Marriott: that the classes, so defined, were insufficiently "ascertainable" because there was no administratively feasible way of determining who was and was not a class member. *See EQT Prod. Co. v. Adair*, 764 F.3d 347, 358 (4th Cir. 2014) (discussing Rule 23's "implicit threshold requirement" that members of a proposed class be "readily identifiable" (internal quotation marks omitted)). Here, the district court disagreed, finding no reason to think – at least at present – that identifying class members who had paid their own way would call for any "exceptionally complicated administrative review." *Marriott III*, 341 F.R.D. at 144. But the court cautioned that it would continue to monitor this process, redefining the classes or even decertifying them altogether if identifying members proved too unwieldy. *Id.* at 146.

2.

The court turned then to the issue implicating the class-action waivers at the heart of this appeal: Rule 23(a)'s "typicality" requirement, under which a class representative's claims and defenses must be typical of those of the class. *See* Fed. R. Civ. P. 23(a)(3); *Marriott III*, 341 F.R.D. at 149. The problem here, as Marriott saw it, was that the class representatives, all members of the Starwood Preferred Guest Program ("SPG"), had a contractual relationship with Marriott that differed critically from that of other class members. As SPG members, every class representative had signed a "Terms & Conditions" contract with a provision purporting to waive his or her right to pursue class litigation. *See* J.A. 727 ("Any disputes arising out of or related to the SPG Program or the[ ] SPG Program Terms will be handled individually without any class action . . . ."). But as the plaintiffs had defined them, the consumer-protection and negligence classes against Marriott included *non*-SPG members, who had *not* signed such waivers.[2] And that, the district court concluded, did indeed "raise[ ] serious typicality concerns," because Marriott had indicated that it would rely on the waiver to argue that SPG members – like the class representatives, but unlike many class members – could not pursue class litigation at all. *Marriott III*, 341 F.R.D. at 149.

To address that concern, the district court redefined all classes against Marriott to include only SPG members, bringing the class representatives into alignment with class membership. *Id.* The result, of course, was that now *every* proposed class member litigating against Marriott would be someone who had purportedly given up the right to engage in just such class liti-

2. The plaintiffs' proposed contract classes, by contrast, already included only SPG members. *Marriott III*, 341 F.R.D. at 149 & n.24.

gation. But the district court did not further consider the import of the class waiver on its certification decision. Instead, in a footnote, it first observed that the plaintiffs had raised a "strong argument" that Marriott had waived its right to enforce the class-action waiver; though it was included as a "one-line, boilerplate affirmative defense" in Marriott's answer, Marriott had not otherwise pressed the issue as "part of the bellwether negotiation process" or in any separate motion. *Id.* at 149 n.26. And in any event, the court concluded, it could address the class-action waiver, along with other affirmative defenses, after discovery and at the merits stage of the litigation. *Id.*

3.

After addressing other threshold Rule 23(a) requirements not at issue on appeal, the court proceeded to certify several state-specific Rule 23(b)(3) damages classes against Marriott on the plaintiffs' contract and consumer-protection claims. Here, the focus was on Rule 23(b)(3)'s predominance requirement, *see* Fed. R. Civ. P. 23(b)(3), which in this context meant that damages must be "capable of measurement on a classwide basis." *Marriott III*, 341 F.R.D. at 161 (quoting *Comcast Corp. v. Behrend*, 569 U.S. 27, 34, 133 S.Ct. 1426, 185 L.Ed.2d 515 (2013)). Though damages need not be *calculated* on a classwide basis, that is, the plaintiffs had to demonstrate that there was a "common, classwide *method* for determining individual damages." *Id.* (internal quotation marks omitted). And as the court explained, it had approved just such a common method for calculating the plaintiffs' alleged overpayment injuries in a companion *Daubert* opinion [3] issued the same day. *Id.* at 161–62 & n.48 (citing *In re Marriott Int'l, Inc., Customer Data Sec. Breach Litig.* (*Marriott IV*), 602 F. Supp. 3d 767 (D. Md. 2022)).

The plaintiffs' expert, the court concluded, had developed an admittedly "complex" model that nevertheless allowed each class member to use the same statistical formula to calculate his or her overpayment damages, relying on the same set of variables for each hotel stay. *Id.* at 161–62. Though some individual data would be required as an input, that information would be "objective and administrative in nature," raising no "individualized issues of a substantive nature." *Id.* at 162. And the expert model satisfied the *Comcast* requirement that it measure only those damages attributable to the identified theory of harm, isolating the overpayment theory of harm and attendant damages from the plaintiffs' other theories of injury. *Id.* at 163 (applying the "*Comcast* requirement that a plaintiff's damages case be consistent with its liability case" (cleaned up)). But here again, the court cautioned that its decision was not final: As of yet, the plaintiffs' model had been tested only against the bellwether plaintiffs. *Id.* at 163. If it turned out that individual inquiries threatened to overwhelm the analysis when applied more broadly, the court would adjust or decertify the classes. *Id.*

4.

That left the proposed negligence classes against both Marriott and Accenture. The court first denied the plaintiffs' motion for certification of full damages classes under Rule 23(b)(3), concluding that there was no common, classwide basis

3. In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), and its progeny, the Supreme Court set forth the standard for admitting expert testimony in federal trials. *See also* Fed. R. Evid. 702; *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999); *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 118 S.Ct. 512, 139 L.Ed.2d 508 (1997).

for calculating damages caused by the defendants' alleged negligence. *Id.* at 153. Here, the plaintiffs rested on the "loss of market value" theory of injury, arguing that all class members lost the value of their personal information when it was exposed to hackers and presenting an expert model for measuring that market value across all class members. But in its accompanying *Daubert* order, the district court rejected that model, leaving the plaintiffs with no classwide theory of injury or measure of damages. *Id.* at 153–54 & n.32. The court recognized, however, that the plaintiffs were pursuing a different methodology for measuring market value, anchored to Marriott's own valuation of its reward customers' personal data, and denied the plaintiffs' motion without prejudice, allowing for further proceedings on that matter. *Id.* at 154.

The court did, however, certify "issue" negligence classes against Marriott and Accenture under Rule 23(c)(4). *Id.* at 167–71; *see* Fed. R. Civ. P. 23(c)(4) ("When appropriate, an action may be brought or maintained as a class action with respect to particular issues."). These classes proceeded under theories of injury – actual fraud losses and the mitigation costs of guarding against such losses – that were concededly individualized. *See id.* at 168; *see also id.* at 169 n.62 (observing that the plaintiffs did not dispute that individualized issues predominated as to whether they had suffered actual injury, "a fourth consistent element . . . required to establish liability"). Moreover, the court concluded, individualized issues predominated on the question of causation, requiring "substantial individualized inquiry" as to whether class members' data may have been exposed through something other than the Starwood breach or whether it was indeed the defendants' alleged negligence that proximately caused their injuries. *Id.* at 169. By contrast, the court found, it was clear (and Marriott did not seriously dispute) that common issues predominated as to the other elements of the plaintiffs' negligence claims – the existence of a duty owed by the defendants to the plaintiffs and a breach of that duty. *Id.* Accordingly, the court certified issue classes on the duty and breach elements of the plaintiffs' negligence claims alone, to be followed (if the plaintiffs succeeded) by individualized proceedings on the injury and causation elements as well as damages.

The court recognized that certification of issue classes under Rule 23(c)(4) calls for special attention to Rule 23(b)(3)'s superiority requirement, under which a class action must be "superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). The efficiency gains of certification, that is, must be evaluated in light of the need for individualized proceedings at the back end. *See Marriott III*, 341 F.R.D. at 170. And here, the court acknowledged, the issue-class litigation it had authorized would leave important elements and issues unresolved, requiring extensive subsequent litigation. Nevertheless, the court concluded, "efficiency gains stemming from certification of the duty and breach issues outweigh this fact," given that the court already had certified damages classes against Marriott. *Id.* Because it would "already be analyzing the intertwined factual circumstances relevant to the duty and breach issues" in connection with the Marriott contract and consumer-protection classes, the court reasoned, "[n]ot certifying the duty and breach issue classes" would "result in totally unnecessary duplication." *Id.*

5.

After the district court entered its certification order, Marriott and Accenture timely petitioned this court for permission

to appeal under Rule 23(f) of the Federal Rules of Civil Procedure. We granted the petitions and this appeal followed.

II.

[1, 2] We review a district court's class certification decision for abuse of discretion, *Gregory v. Finova Cap. Corp.*, 442 F.3d 188, 190 (4th Cir. 2006), "cognizant of both the considerable advantages that our district court colleagues possess in managing complex litigation and the need to afford them some latitude in bringing that expertise to bear," *Krakauer v. Dish Network, L.L.C.*, 925 F.3d 643, 654 (4th Cir. 2019). Nevertheless, "[a] district court per se abuses its discretion when it makes an error of law or clearly errs in its factual findings." *Thorn v. Jefferson-Pilot Life Ins. Co.*, 445 F.3d 311, 317 (4th Cir. 2006).

In their petitions and on appeal, the defendants challenge multiple aspects of the district court's certification ruling, objecting, *inter alia*, to its finding that membership in the damages classes against Marriott was sufficiently "ascertainable"; to its approval of the plaintiffs' model for classwide calculation of overpayment damages; and, on several different grounds, to its certification of negligence "issue" classes limited to the elements of duty and breach. But we need not resolve all these issues – some of which, as noted above, involve district court rulings expressly left open to further consideration – in this interlocutory posture.[4]

That is because we agree with Marriott on one threshold and critical point: The district court erred when it declined to consider, *before* certifying class actions against Marriott, the import of a purported class-action waiver signed by every putative class member. And that error, in turn, affected the certification of the negligence issue classes against Accenture, because the certification of the Marriott damages classes was the linchpin of the district court's Rule 23(b)(3) superiority analysis. Accordingly, we vacate the certification order in its entirety and remand for proceedings consistent with this opinion.

A.

We begin with Marriott's class-action waiver defense. Marriott maintains that every SPG member agreed to resolve disputes against it only "individually [and] without any class action" when they signed the SPG Terms & Conditions contract. *See* J.A. 727. And because of the district court's Rule 23(a) typicality ruling, the certified classes against Marriott now consist *entirely* of SPG members. *See Marriott III*, 341 F.R.D. at 149. Those putative class members are bound, Marriott contends, by a contractual waiver that applies to all the certified claims, barring the entirety of the class action against it.

[3] The threshold question on appeal is whether the district court erred by certifying classes against Marriott without first addressing this class-action waiver defense. *See Marriott III*, 341 F.R.D. at 149 n.26 (explaining that the court will address the class-waiver defense, along with other affirmative defenses, after certification and at the merits stage of the litigation). Mar-

4. The certification order in this complex case incorporates a number of critical and contested rulings, some but not all of which are before us in this Rule 23(f) posture. As outlined above, much of the district court's certification order is premised on its early adoption, at the motion to dismiss stage, of the plaintiffs' various theories of injury and Article III standing, which included the overpayment and loss of market value theories. The order also incorporates two *Daubert* rulings – one in favor of the plaintiffs, one in favor of the defendants – regarding the susceptibility of those theories to classwide proof. We do not reach those issues today, and our narrow decision should not be understood to express any view on aspects of the certification order beyond those directly addressed.

riott argues vigorously that class waivers must be addressed and (if appropriate) enforced at the *certification* stage, not after a class action already has been litigated through to the merits. And, notably, the plaintiffs seem not to disagree – at least, not by much. Apart from a half-sentence referring to a district court's general discretion to manage its docket, the plaintiffs' brief does not join issue on this timing question at all; instead, it jumps straight to the merits of Marriott's defense, arguing that Marriott repudiated or otherwise waived the defense and that the class waiver is in any event unenforceable and largely inapplicable. If there is an argument in favor of deferring consideration of a class waiver until after certification, the plaintiffs have not made it, and it may well be forfeited. *See Grayson O Co. v. Agadir Int'l LLC*, 856 F.3d 307, 316 (4th Cir. 2017) ("A party waives an argument . . . by failing to develop it – even if its brief takes a passing shot at the issue." (cleaned up)).

Regardless, we agree with Marriott that the time to address a contractual class waiver is before, not after, a class is certified. Although it seems no court has had occasion to expressly hold as much, that is the consensus practice. Courts consistently resolve the import of class waivers at the certification stage – before they certify a class, and usually as the first order of business. *See, e.g., Kaspers v. Comcast Corp.*, 631 F. App'x 779, 784 (11th Cir. 2015) (per curiam) ("[B]ecause we have concluded that the class-action waiver was valid, the district court did not need to consider the requirements for class certification under Rule 23."); *Archer v. Carnival Corp. & PLC*, No. 2:20-CV-04203, 2020 WL 6260003, at *4, *8 (C.D. Cal. Oct. 20, 2020) (finding that because the plaintiffs' motion for certification was barred by class waiver there was no need to address whether the plaintiffs' claims satisfied the requirements for certification set forth in Rule 23(a) and 23(b)(3)); *Ranzy v. Extra Cash of Tex., Inc.*, No. Civ. A. H-09-3334, 2011 WL 13257274, at *8 (S.D. Tex. Oct. 14, 2011) (concluding that class-action waivers precluded plaintiff from asserting claims on behalf of a class, obviating need to reach the Rule 23 requirements); *Lindsay v. Carnival Corp.*, No. C20-982, 2021 WL 2682566, at *4 (W.D. Wash. June 30, 2021) (denying the plaintiffs' motion for class certification as barred by class waiver without addressing the requirements of Rule 23); *cf. Palacios v. Boehringer Ingelheim Pharms., Inc.*, No. 10-22398-CIV, 2011 WL 6794438, at *2–4 (S.D. Fla. Apr. 19, 2011) (finding that class-action waiver prevented plaintiff from participating in any class action, including collective actions brought pursuant to 29 U.S.C. § 216(b)).[5]

[4] We think this is the only approach consistent with the nature of class actions and the logic of class waivers. Under Rule 23, certification is the key moment in class-action litigation: It is the "sharp line of demarcation" between "an individual action seeking to become a class action and an actual class action." *Shelton v. Pargo, Inc.*, 582 F.2d 1298, 1304 (4th Cir. 1978). But by signing a valid and enforceable class waiver, as alleged here, a plaintiff promises not to cross that line – to give up, in exchange for some contractual benefit, the right to proceed by way of an "actual class action." *See Laver v. Credit Suisse Sec. (USA), LLC*, 976 F.3d 841, 846 (9th Cir. 2020) ("A class action waiver is a promise to forgo a procedural right to

5. The only contrary authority located by the parties is a district court decision declining to resolve a class waiver issue at certification that was subsequently reversed on other grounds on appeal. *See Earl v. Boeing Co.*, 339 F.R.D. 391 (E.D. Tex. 2021), *rev'd on other grounds*, 53 F.4th 897 (5th Cir. 2022).

pursue class claims."). If that "sharp line" is to be maintained, then a district court simply cannot certify a class at the behest of plaintiffs who have promised to stay on the "individual action" side of it.

Although the district court addressed this issue only parenthetically, it did suggest that it would be appropriate to group Marriott's class-waiver defense with its other affirmative defenses, all to be resolved at the "merits stage" of the class action litigation it was certifying. *Marriott III*, 341 F.R.D. at 149 n.26. We disagree. First, a class-waiver defense is not a "merits" issue in the usual sense. Whether a plaintiff may proceed via a class action does not speak to the underlying merits of his claim; it speaks to the process available in pursuit of that claim. Put differently, a class-waiver defense is not a defense to liability but to being required to litigate a class action at all. If that defense is addressed only after a class action already has been litigated to the merits, then it is effectively lost, *cf. Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985) (discussing qualified immunity as "immunity from suit"), and the defendant is denied the benefit of its contractual bargain.

And in any event, even if a class-waiver defense is treated as a merits question, that does not mean it should not be resolved at the certification stage. The Supreme Court has emphasized the "rigorous analysis" that must be performed *before* a class is certified under Rule 23 – even where that analysis will "entail some overlap with the merits." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 351, 131 S.Ct. 2541, 180 L.Ed.2d 374 (2011). There is nothing unusual or counter-intuitive, in other words, about requiring courts to consider aspects of the merits in connection with class certification. *See id.* ("The class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action." (cleaned up)).

The district court provided no other reason for declining to rule on Marriott's waiver defense before certifying a class against it, and none is apparent to us. We thus conclude, for the reasons given above, that the district court erred by certifying multiple classes against Marriott consisting entirely of plaintiffs who had signed a putative class waiver without first addressing the import of that waiver. Accordingly, we vacate the certification of all classes against Marriott and remand to the district court so that it may undertake this inquiry in the first instance.

In so doing, we decline the plaintiffs' invitation to resolve on appeal an issue never ruled on by the district court: whether, as the plaintiffs argue, Marriott repudiated or waived its class-waiver defense. It is true, as the plaintiffs emphasize, that the district court characterized their "waiver of the waiver" argument as a "strong" one. *Marriott III*, 341 F.R.D. at 149 n.26. But contrary to the plaintiffs' suggestions, the district court did not purport to resolve the issue, instead limiting itself to an aside. *See id.* ("Nevertheless, the Court need not rule on this issue at this time."). Moreover, we have some questions about the court's commentary. As Marriott argues, it raised its class-waiver defense in its answer to the plaintiffs' complaint and then again at class certification, and at least as a general rule, it is not obvious that more would be required. But to the extent the court was concerned with the particulars of Marriott's litigation strategy, *see id.* (discussing "bellwether negotiation process" and motions practice), that is a matter squarely within the purview of the district court, which has by far the better vantage point. *Cf. Stuart v. Huff*, 706 F.3d 345, 349–50 (4th Cir. 2013) (explaining that litigation "dynamics" are best evaluated by district courts based on

their "on the scene" presence (internal quotation marks omitted)). Accordingly, we leave it to the district court on remand to consider all "arguments related to waiver of the waiver provision," *Marriott III*, 341 F.R.D. at 149 n.26, in connection with a new certification determination.

Similarly, we will not take up for the first time on appeal questions related to the validity and scope of the Terms & Conditions class waiver. The plaintiffs raise objections to enforcement of that waiver under both state and federal law, and contend in the alternative that the waiver's scope does not reach their consumer-protection and negligence claims. Marriott, of course, argues to the contrary. But the district court declined to pass on these questions, too. *See id.* (deferring ruling on "the arguments both parties have made as to the applicability" of the contractual waiver provision until after discovery and a ruling on the merits). That leaves us without any development of those issues, and so we follow our ordinary course and leave to the district court "the first opportunity to perform the applicable analysis." *Fusaro v. Cogan*, 930 F.3d 241, 263 (4th Cir. 2019); *id.* at 264 ("[T]his Court is a court of review, not of first view . . . ." (internal quotation marks omitted)).

B.

[5] Having vacated the district court's certification order as to the classes against Marriott, we turn now to the negligence issue classes against Accenture.[6] As described above, the district court certified Rule 23(c)(4) issue classes on two and only two elements of the plaintiffs' negligence claims against Accenture – whether Accenture owed a duty of care to the plaintiffs and whether it had breached any such duty. The remaining elements – injury and causation, or whether a breach of duty established classwide caused injury to a given plaintiff – would be litigated in follow-on individual proceedings, along with damages. *Marriott III*, 341 F.R.D. at 167–71. Accenture objects to these issue classes on multiple grounds, arguing, *inter alia*, that Rule 23(c)(4) does not permit the certification of some but not all elements of a cause of action, and that even if it does, these classes do not satisfy Rule 23(b)(3)'s superiority requirement. As explained below, we agree that the district court's superiority analysis cannot stand, and on that ground, we vacate the certification of the classes against Accenture.

Rule 23(c)(4) provides that "[w]hen appropriate, an action may be brought or maintained as a class action with respect to particular issues." Fed. R. Civ. P. 23(c)(4). In *Gunnells v. Healthplan Services, Inc.*, 348 F.3d 417 (4th Cir. 2003), we held that this rule allows for certification of a class as to a particular cause of action, even where a lawsuit as a whole would not satisfy Rule 23(b)'s predominance requirement. *See* 348 F.3d at 439–45. *But see id.* at 446–48 (Niemeyer, J., concurring in part and dissenting in part). The question here is related but distinct: whether a court may certify certain *elements* of a cause of action as to which common issues predominate (in this case, duty and breach) when individual issues predominate as to other elements (here, injury and causation). It may be, as the district court concluded, that the case law is "coalesc[ing]" around a "broad view of Rule 23(c)(4) in which common questions need predominate over individual ones only for the specific issues that are certified, not for the entire cause of action." *Marriott III*, 341 F.R.D. at 168 (internal quotation marks omitted); *see also Naparala v. Pella Corp.*, No. 2:14-cv-

6. Those classes remain before us because Accenture, unlike Marriott, has not argued that it may enforce the class waiver provisions in the putative class members' SPG Terms & Conditions contract.

03465, 2016 WL 3125473, at *13–14 (D.S.C. June 3, 2016) (identifying similar "emerging majority" of decisions in favor of "permissive approach" to issue certification); *Martin v. Behr Dayton Thermal Prods., LLC*, 896 F.3d 405, 411–12 (6th Cir. 2018) (collecting cases). But as the district court explained, our court has yet to rule directly on this issue, and the question is not entirely free from doubt. *See Marriott III*, 341 F.R.D. at 168 n.60; *see also Parker v. Asbestos Processing, LLC*, No. 0:11-cv-01800, 2015 WL 127930, at *11 (D.S.C. Jan. 8, 2015) ("[T]he Fourth Circuit has not directly addressed this dispute and the relationship between Rule 23(b)(3) and Rule 23(c)(4) . . . .").[7]

What is clear, however, is that if courts certify classes on individual elements of a cause of action, Rule 23(b)(3)'s superiority requirement takes on special importance. As several district courts in our circuit have cogently explained, this kind of issue class will "almost automatically" meet Rule 23(b)(3)'s predominance requirement; once the issues to be certified are "narrowed down to make them sufficiently 'common,' " it is virtually axiomatic that common issues will predominate. *Naparala*, 2016 WL 3125473, at *14 (internal quotation marks omitted); *see also Parker*, 2015 WL 127930, at *15. That puts the "focus [on] Rule 23(b)(3)'s second requirement, superiority," because the same narrowing process will have cleaved off individualized questions of liability, as well as damages, for separate individual trials, diminishing the efficiency gains of the class proceedings. *Naparala*, 2016 WL 3125473, at *14; *see also Tillman v. Highland Industries, Inc.*, No. 4:19-cv-02563, 2021 WL 4483035, at *19 (D.S.C. Sept. 30, 2021) (explaining that certification of specific elements of liability, "leaving the remaining pieces of liability and damages to be determined at individual trials," would "render the significance of the class action easily overwhelmed" by the subsequent individual proceedings (cleaned up)). And although class litigation may address the "incentive problem" that arises when individual plaintiffs do not have enough at stake to justify individual litigation, that benefit, too, is diminished by issue certifications "where the remaining individualized issues will also require significant resources." *Romig v. Pella Corp.*, No. 14-cv-00433, 2016 WL 3125472, at *17 (D.S.C. June 3, 2016); *see also Naparala*, 2016 WL 3125473, at *16. For all these reasons, "the superiority component of Rule 23(b)(3) frequently comes into play to defeat issue certification." *Parker*, 2015 WL 127930, at *15.

The district court here recognized as much. *Marriott III*, 341 F.R.D. at 170 (explaining need to "additionally consider whether the efficiency gains of certification outweigh the fact that individualized issues requiring significant time and attention remain for later" (cleaned up)). And it acknowledged that the efficiency of class proceedings would be affected by the fact that "important issues related to causation, affirmative defenses, and damages related to Accenture's conduct [would] not be resolved during issue-class adjudication." *Id.* But that loss of efficiency, the court concluded, would be outweighed by one thing: the efficiency benefits of certifying the issue classes *together* with the damages classes against Marriott. Because it had "certified damages classes against Marriott," the court explained, it would "already be analyzing the intertwined factual

7. Nor has this court had occasion to address Accenture's additional concern regarding bifurcation of liability elements in this context, in which injury and causation elements have been carved out of class proceedings: that the result is inconsistent with Article III standing requirements, because there is no assurance at the certification stage that all class members have suffered the necessary injury in fact at the hands of the defendant.

circumstances relevant to the duty and breach issues." *Id.* And given the damages classes against Marriot, *not* certifying issue classes against Accenture "would result in totally unnecessary duplication as Plaintiffs and Defendants litigated the Marriott class action and the presumably numerous individual Accenture-related cases." *Id.*

[6] As explained above, however, we have now vacated certification of the Rule 23(b)(3) damages classes against Marriott. And without those classes, nothing remains to support the district court's superiority finding as to the issue classes against Accenture. In the Rule 23(c)(4) issue-class context, as the district court understood and all agree, the superiority of class proceedings simply cannot be taken for granted, even when common questions predominate as to the certified issues. Instead, courts must "evaluate this question of efficiency carefully." *Id.* Because the underpinning of the district court's careful evaluation has been removed, we must vacate the court's certification of the Rule 23(c)(4) issue classes, as well. On remand, the district court may reconsider that determination, taking into account its ultimate disposition of the plaintiffs' motion to certify Rule 23(b)(3) damages classes against Marriott.

III.

For the foregoing reasons, we vacate the district court's certification order and remand for further proceedings consistent with this opinion.[8]

VACATED AND REMANDED

8. After briefing was completed, the plaintiffs moved to supplement the record to include two letter orders issued by the district court concerning discovery related to Marriott's valuation of its customers' personal information. The materials in question have no bearing on our grounds of decision, and so we deny the motion as moot.

IN RE: Weldon W. STEWART, Jr., Movant.

No. 21-278

United States Court of Appeals, Fourth Circuit.

Argued: January 26, 2023

Decided: August 21, 2023

Background: Following state conviction for voluntary manslaughter, the United States District Court for the District of South Carolina, Sol Blatt, Jr., Senior District Judge, 701 F.Supp.2d 785, denied petition for habeas relief. Petitioner appealed. The United States Court of Appeals for the Fourth Circuit, 412 Fed.Appx. 633, dismissed the appeal. Petitioner filed motion for authorization to file successive habeas petition.

Holdings: The Court of Appeals, Quattlebaum, Circuit Judge, held that petitioner's claim that he had dissociative amnesia and now remembered that victim died by suicide did not demonstrate that no reasonable factfinder would find him guilty of voluntary manslaughter.

Motion denied.

Gregory, Circuit Judge, filed opinion concurring in part and concurring in judgment.

1. Habeas Corpus ⚿894.1

Generally, a state prisoner is entitled to only one federal habeas challenge. 28 U.S.C.A. § 2254.

2. Habeas Corpus ⚿894.1, 899

For any successive federal habeas application, the Antiterrorism and Effective

[PUBLISH]

In the United States Court of Appeals

For the Eleventh Circuit

No. 21-13146

MARLENE GREEN-COOPER,
individually and on behalf of all others similarly situated, et al.,

Plaintiffs,

ERIC STEINMETZ,
individually and on behalf of all others similarly situated,
MICHAEL FRANKLIN,
individually and on behalf of all others similarly situated,
SHENIKA THEUS,
individually and on behalf of all others similarly situated,

Plaintiffs-Appellees,

versus

BRINKER INTERNATIONAL, INC.,

Defendant-Appellant.

Appeal from the United States District Court
for the Middle District of Florida
D.C. Docket No. 3:18-cv-00686-TJC-MCR

Before WILSON, BRANCH, and TJOFLAT, Circuit Judges.

TJOFLAT, Circuit Judge:

Brinker International, Inc. ("Brinker"), the owner of Chili's restaurants, faced a cyber-attack in which customers' credit and debit cards were compromised. Chili's customers have brought a class action because their information was accessed (and in some cases used) and disseminated by cybercriminals. Below, the District Court certified the class, and Brinker appeals that decision. We vacate in part and remand for further proceedings.

I.

Between March and April 2018, hackers targeted the Chili's restaurant systems and stole both customer card data and personally identifiable information.[1] Plaintiffs explain that hackers then took that data and posted it on Joker Stash, an online marketplace

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[1] Different locations were affected at different periods within this timeframe.

for stolen payment data. The plaintiffs explain that, based on Brinker's internal reporting, the information for all 4.5 million cards the hackers accessed in the Brinker system were found on Joker Stash.

There are three named plaintiffs in this case: Shenika Theus, Michael Franklin, and Eric Steinmetz.[2] Theus is a Texas resident who used her card at Chili's in Texas on or about March 31, 2018. She experienced five unauthorized charges on the card she had used at Chili's and canceled the card as a result, disputing the charges that were not hers. She now spends time monitoring her account to make sure there is no further misuse.

Franklin is a California resident who made two Chili's purchases in the relevant timeframe, one on or about March 17, 2018, and one on or about April 22, 2018. Franklin experienced two unauthorized charges on his account, so he canceled that credit card, spoke for hours on the phone with bank representatives, and went to the Chili's locations he had visited to collect receipts for his transactions.[3] His bank canceled the affected card.

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[2] These plaintiffs, originally filing individual actions, moved to consolidate their cases. The District Court granted that motion.

[3] The locations Franklin visited were affected by the data breach between March 30, 2018–April 22, 2018, and March 22, 2018–April 21, 2018, respectively. Franklin visited the first Chili's on or about March 17, 2018, 13 days before the affected period, and he visited the second Chili's on or about April

Steinmetz is a Nevada resident who used his credit card at a Nevada Chili's on or about April 2, 2018. Steinmetz called the Chili's national office, the local Chili's chain, credit reporting agencies, and his bank as a result of the data breach. He canceled the card he used at Chili's but never experienced fraudulent charges.

Pertinent to this appeal,[4] these three plaintiffs moved to certify two classes under Federal Rules of Civil Procedure 23(a) and 23(b)(3),[5] seeking both injunctive and monetary relief: 1) a nationwide class (or alternatively a statewide class) for negligence and 2) a California statewide class for California consumer protection claims based on its unfair business practices state laws. They were defined as follows:

> 1. All persons residing in the United States who made a credit or debit card purchase at any affected Chili's location during the period of the Data Breach (the "Nationwide Class").
> 2. All persons residing in California who made a credit or debit card purchase at any affected Chili's

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22, 2018, one day after the affected period for the second Chili's. His card had also previously been compromised in a Whole Foods data breach in 2017.

[4] Plaintiffs originally brought a variety of other claims that are not before us. We do not address them here.

[5] Plaintiffs proffered a declaration from a damages expert to establish that a common methodology for calculating damages for individual class members existed.

> location during the period of the Data Breach (the "California Statewide Class").

The District Court then certified the nationwide class for the negligence claim as follows:

> All persons residing in the United States who made a credit or debit card purchase at any affected Chili's location during the period of the Data Breach (March and April 2018) who: (1) had their data accessed by cybercriminals and, (2) incurred reasonable expenses or time spent in mitigation of the consequences of the Data Breach (the "Nationwide Class").

The District Court also certified a separate California class under the state unfair competition laws:

> All persons residing in California who made a credit or debit card purchase at any affected Chili's location during the period of the Data Breach (March and April 2018) who: (1) had their data accessed by cybercriminals and, (2) incurred reasonable expenses or time spent in mitigation of the consequences of the Data Breach (the "California Statewide Class").

We then permitted Brinker to appeal these class certifications pursuant to Federal Rule of Civil Procedure 23(f).

II.

We review a district court's certification of a class under Federal Rule of Civil Procedure 23 for abuse of discretion. *Hines v. Widnall*, 334 F.3d 1253, 1255 (11th Cir. 2003). A district court

abuses its discretion when it certifies a class that does not meet the requirements of Rule 23. *See id.* ("In order to certify a class under the FRCP, all of the requirements of Rule 23(a) must be met, as well as one requirement of Rule 23(b).").

Class certification under Rule 23(b)(3), like in this case, is only appropriate if "the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied" and that "the questions of law or fact common to class members predominate over any questions affecting only individual members" through "evidentiary proof." *Comcast Corp. v. Behrend*, 569 U.S. 27, 33, 133 S. Ct. 1426, 1432 (2013) (internal quotation marks and citations omitted). Rule 23 is more than "a mere pleading standard. A party seeking class certification must affirmatively demonstrate his compliance with the Rule—that is, he must be prepared to prove [the existence of the elements of Rule 23]." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350, 131 S. Ct. 2541, 2551 (2011).

At the same time, "[m]erits questions may be considered to the extent—but only to the extent—that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied," so a district court does not have a free-ranging "authority to conduct a preliminary inquiry into the merits of a suit" at the class certification stage "unless it is necessary to determine the propriety of certification." *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 466, 133 S. Ct. 1184, 1195 (2013) (internal quotation marks and citations omitted).

III.

On appeal, Brinker mounts three arguments: 1) the District Court's class certification order violates our precedent on Article III standing for class actions; 2) the District Court improvidently granted certification because the class will eventually require individualized mini-trials on class members' injuries; and 3) the District Court erred by finding that a common damages methodology existed for the class. We will address each in turn.

IV.

A.

We start from the basic principle that at the class certification stage only the named plaintiffs need have standing.[6] *Cordoba v. DIRECTV, LLC*, 942 F.3d 1259, 1264 (11th Cir. 2019). Article III standing requires that 1) the plaintiff has experienced an injury that is concrete and particularized and actual or imminent, 2) the defendant's conduct is the cause of the plaintiff's injury, and 3) a

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[6] We may review both the allegations in the complaint and evidence in the record so far to determine whether the named plaintiffs in this case have established Article III standing for class certification purposes. *Cordoba v. DIRECTV, LLC*, 942 F.3d 1259, 1264, 1271 (11th Cir. 2019) (looking at the allegations of named plaintiff to determine whether he had standing); *Prado-Steiman ex rel. Prado v. Bush*, 221 F.3d 1266, 1280–81 (11th Cir. 2000) (evaluating both named plaintiffs' allegations and the lack of evidence of injury in the record for some claims while analyzing Article III standing); *Griffin v. Dugger*, 823 F.2d 1476, 1482 (11th Cir. 1987) ("Under elementary principles of standing, a plaintiff must allege and show that he personally suffered injury.").

decision by the court would likely redress the plaintiff's injury. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61, 112 S. Ct. 2130, 2136 (1992). As we'll explain, only Theus satisfies *Lujan*'s standing analysis.

We begin with the concrete injury analysis. For purposes of the concrete injury analysis under Article III, we have recognized three kinds of harm: 1) tangible harms, like "physical or monetary harms"; 2) intangible harms, like "injuries with a close relationship to harms traditionally recognized as providing a basis for lawsuits in American courts";[7] and, finally, 3) a "material risk of future harm" when a plaintiff is seeking injunctive relief. *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2204, 2210 (2021). And the Supreme Court most recently clarified in *TransUnion* that a mere risk of future harm, without more, does not give rise to Article III standing for recovery of damages, even if it might give rise to Article III standing for purposes of injunctive relief. *Id.* at 2210. We will take each of the named plaintiff's standing analysis in turn.

While each plaintiff puts forth a variety of allegations of harm in an effort to establish Article III standing, we need only

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[7] Constitutional harms, like violations of the First Amendment, and reputational harms, neither of which is at issue here, are examples of traditional harms for purposes of Article III standing. *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2204 (2021). Stigmatic harm is another example of intangible injury giving rise to Article III standing. *Laufer v. Arpan LLC*, 29 F.4th 1268, 1273 (11th Cir. 2022). Informational injuries can also give rise to Article III standing as intangible harms. *TransUnion*, 141 S. Ct. at 2214.

address one: hackers took these individuals' data and posted it on Joker Stash.

We said in *Tsao* that a plaintiff whose personal information is subject to a data breach can establish a concrete injury for purposes of Article III standing if, as a result of the breach, he experiences "misuse" of his data in some way. *See Tsao v. Captiva MVP Rest. Partners, LLC*, 986 F.3d 1332, 1343 (11th Cir. 2021). We typically require misuse of the data cybercriminals acquire from a data breach because such misuse constitutes both a "present" injury and a "substantial risk" of harm in the future. *Id.* at 1343, 1344 ("[W]ithout specific evidence of *some* misuse of class members' data, a named plaintiff's burden to plausibly plead factual allegations sufficient to show that the threatened harm of future identity theft was 'certainly impending'—or that there was a 'substantial risk' of such harm—will be difficult to meet." (emphasis in original and citation omitted)).

All three plaintiffs maintain that their credit card and personal information was "exposed for theft and sale on the dark web." That allegation is critical. The fact that hackers took credit card data and corresponding personal information from the Chili's restaurant systems and affirmatively posted that information for sale on Joker Stash is the misuse for standing purposes that we said was missing in *Tsao*.[8] And it establishes both a present injury—

[8] In *Tsao*, we said that a plaintiff had not established standing based on a state common-law negligence claim after a data breach where he alleged only that

credit card data and personal information floating around on the dark web—and a substantial risk of future injury—future misuse of personal information associated with the hacked credit card. We hold that this is a concrete injury that is sufficient to establish Article III standing.[9]

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he had canceled his credit card and faced an increased risk of identity theft because the credit card system at a restaurant he visited had been hacked. *Tsao*, 986 F.3d at 1344. We said that because Tsao had not accompanied his allegations of increased risk of identity theft with allegations of misuse of any credit card data taken by the hackers in the restaurant breach, he could not meet Article III standing requirements. *Id.*

[9] We decided *Tsao* before *TransUnion* was published, but we see the two as consistent. *TransUnion* established that a common-law analogue analysis is required when plaintiffs allege a statutory violation. We did not conduct that analysis in *Tsao* in the context of a state common-law negligence claim. *See TransUnion*, 141 S. Ct. at 2208. But we think that the common-law analogue analysis is *sui generis* to legislature-made statutory violations because the Supreme Court has not applied it to any other kind of intangible harm. For instance, constitutional harms, reputational harms, informational harms, and stigmatic harms are all intangible injuries that give rise to Article III standing, and the Supreme Court has never conducted the common-law analogue analysis in determining whether these kinds of harms establish Article III standing. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531, 113 S. Ct. 2217, 2225 (1993) (infringement of free exercise); *Meese v. Keene*, 481 U.S. 465, 473, 107 S. Ct. 1862, 1867 (1987) (reputational harms); *TransUnion*, 141 S. Ct. at 2214 (identifying informational injuries as intangible harms)*; Laufer*, 29 F.4th at 1272–73 (recognizing that under Supreme Court precedent both stigmatic and emotional harms have sufficed to establish Article III standing). So, we adhere to the reasoning of *Tsao* today. *See United States v. Gillis*, 938 F.3d 1181, 1198 (11th Cir. 2019) (explaining the prior panel precedent rule).

B.

Although all three plaintiffs adequately allege a concrete injury sufficient for Article III standing, Franklin and Steinmetz's allegations face a fatal causation issue, even at this stage of litigation.[10]

The Third Amended Complaint alleged that Franklin visited two Chili's restaurants during March and April of 2018; one in Carson, California, and one in Lakewood, California. The at-risk timeframe for the Chili's in Carson was subsequently determined to be March 30, 2018, to April 22, 2018. Franklin visited the Carson Chili's on March 17, 2018—well outside the affected period. The District Court correctly concluded that "Franklin's first transaction would not qualify him for the class without additional evidence, as he dined several days outside the affected time range."

The at-risk timeframe for the Chili's in Lakewood was March 22, 2018, to April 21, 2018. Franklin visited the Lakewood Chili's on April 22, 2018—a day shy of the affected period. Falling outside the affected period poses a traceability problem for Franklin's allegations. Without any allegation that he dined at a Chili's during the time that *that* Chili's was compromised in the data breach, Franklin fails to allege that his injury was "fairly . . . trace[able] to the challenged action of the defendant." *Lujan*, 504

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[10] Theus visited a Chili's location during the breach period for that location. As such, her alleged injuries are fairly traceable to the Chili's data breach.

U.S. at 560, 112 S. Ct. at 2136 (alterations in original) (internal quotation marks and citation omitted).[11]

The Third Amended Complaint also alleged that Steinmetz dined at the North Las Vegas Chili's on April 4, 2018. The at-risk time frame for the North Las Vegas Chili's was subsequently determined to be April 4, 2018, to April 21, 2018. Therefore, if Steinmetz's alleged dining date is true, he falls within the affected period. The record, however, shows that the allegation was slightly—but importantly—off the mark. Steinmetz stated in response to an interrogatory and in his deposition that he dined at the North Las Vegas Chili's on April 2, 2018.[12]

Much like with Franklin, therefore, Steinmetz does not have standing because the date he dined at Chili's is right outside of the affected date range for that Chili's. The proof required for a plaintiff to establish standing varies depending on the stage of litigation.

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[11] The District Court found that "while [Franklin's Lakewood Chili's transaction was] one day outside the [affected] range," Brinker's chart indicating the affected time periods for various Chili's locations indicated that the end date of the affected period "could not [be] validate[d]." Therefore, the District Court included Franklin as part of the class due to that wiggle room in the affected date range. But this was error. Although the Brinker chart included a "[c]ould not validate date" disclaimer for its April 22, 2018, end date for the Carson Chili's, the chart did not include such a disclaimer for the Lakewood Chili's.

[12] Steinmetz initially stated in his deposition that he dined at the Chili's on April 3, 2018, but later corrected himself when faced with documentation to the contrary that he dined there on April 2.

Lujan, 504 U.S. at 561, 112 S. Ct. at 2136 ("Since [the standing elements] are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation."). At the class certification stage, "it may be necessary for the court to probe behind the pleadings" to assess standing. *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 160, 102 S. Ct. 2364, 2372 (1982).

Where, as here, the facts developed in discovery firmly contradict the allegation in the complaint, the District Court cannot rely on the complaint's factual allegation. Plaintiffs make no argument and provide no additional facts to cast doubt on Steinmetz's discovery admissions that he dined at Chili's *outside* of the at-risk time period. He therefore cannot fairly trace any alleged injury to Brinker's challenged action. *See Lujan*, 504 U.S. at 560, 112 S. Ct. at 2136.

C.

Having determined that one named plaintiff has standing, we turn to the class definitions because Rule 23(b)(3)'s predominance analysis implicates Article III standing. *Cordoba*, 942 F.3d at 1272–73 ("In some cases, whether absent class members can establish standing may be exceedingly relevant to the class certification analysis required by Federal Rule of Civil Procedure 23."). The predominance inquiry is especially important in light of *TransUnion*'s (and *Cordoba*'s) reminder that "every class member must

have Article III standing in order to recover individual damages" because a district court must ultimately weed out plaintiffs who do not have Article III standing before damages are awarded to a class. *TransUnion*, 141 S. Ct. at 2208; *Cordoba*, 942 F.3d at 1264 ("At some point before it may order any form of relief to the putative class members, the court will have to sort out those plaintiffs who were actually injured from those who were not.").

Turning to the class definitions the District Court certified, we have the following:

> All persons residing in the United States who made a credit or debit card purchase at any affected Chili's location during the period of the Data Breach (March and April 2018) who: (1) had their data accessed by cybercriminals and, (2) incurred reasonable expenses or time spent in mitigation of the consequences of the Data Breach (the "Nationwide Class").
>
> . . .
>
> All persons residing in California who made a credit or debit card purchase at any affected Chili's location during the period of the Data Breach (March and April 2018) who: (1) had their data accessed by cybercriminals and, (2) incurred reasonable expenses or time spent in mitigation of the consequences of the Data Breach (the "California Statewide Class").

The District Court explained that its class definitions "avoid later predominance issues regarding standing and the inclusion of

uninjured individuals because now individuals are not in the class unless they have had their data 'misused' per the Eleventh Circuit's *Tsao* decision, either through experiencing fraudulent charges or it being posted on the dark web." So, under the class definitions, the District Court thought that the phrase "data accessed by cybercriminals" meant either that an individual had experienced fraudulent charges or that the hacked credit card information had been posted on the dark web. And, to make sure to clear any standing bar imposed by *Tsao*, the District Court added an additional requirement that the individuals in the class must have tried to mitigate the consequences of the data breach.

While the District Court's interpretation of the class definitions surely meets the standing analysis we have outlined above for named plaintiff Theus, we note that the phrase in the class definitions "accessed by cybercriminals" is broader than the two delineated categories the District Court gave, which were limited to cases of fraudulent charges or posting of credit card information on the dark web. Therefore, we think it wise to remand this case to give the District Court the opportunity to clarify its predominance finding. It may either refine the class definitions to only include those two categories and then conduct a more thorough predominance analysis,[13] or the District Court may instead conduct a

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[13] The District Court centered its predominance analysis around the fact that it thought it had created class definitions in which all members of the class had standing. And, while that calculus is part of the predominance inquiry, *Cordoba*, 942 F.3d at 1276, refining the class definitions is not necessary or

predominance analysis anew under Rule 23 with the existing class definitions based on the understanding that the class definitions as they now stand may include uninjured individuals under *Tsao*, who have simply had their data accessed by cybercriminals and canceled their cards as a result. *See Cordoba*, 942 F.3d at 1274 ("The essential point, however, is that at some time in the course of the litigation the district court will have to determine whether each of the absent class members has standing before they could be granted any relief.").

On remand, the District Court should also determine the viability of the California class afresh. As discussed *supra* part IV.B, Franklin does not have standing to bring the alleged causes of action against Brinker, including the causes of action based in California state law. Without a named plaintiff with standing to bring the California claims, the California class cannot survive.

V.

With standing sorted out, we are left with Brinker's final claim that individualized damages claims will predominate over

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sufficient to satisfy the predominance inquiry as to standing under *Cordoba*. In the predominance analysis, a district court must determine whether "each plaintiff will likely have to provide some individualized proof that they have standing." *Id.* at 1275. The District Court here did not determine whether its class definitions would require individualized proof of standing, especially as to time or effort expended to mitigate the consequences of the data breach. So, remand is appropriate to afford the District Court the opportunity to perform that analysis.

the issues common to the class under Rule 23(b)(3). As a starting point, "the presence of individualized damages issues does not prevent a finding that the common issues in the case predominate." *Allapattah Servs., Inc. v. Exxon Corp.*, 333 F.3d 1248, 1261 (11th Cir. 2003). Individualized damages issues predominate if "computing them will be so complex, fact-specific, and difficult that the burden on the court system would be simply intolerable" or if "significant individualized questions go[] to liability." *Brown v. Electrolux Home Prods., Inc.*, 817 F.3d 1225, 1240 (11th Cir. 2016) (internal quotation marks omitted) (citing *Klay v. Humana, Inc.*, 382 F.3d 1241, 1260 (11th Cir. 2004), *abrogated in part on other grounds by Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639, 128 S. Ct. 2131 (2008)). And "[i]ndividualized damages issues are of course least likely to defeat predominance where damages can be computed according to some formula, statistical analysis, or other easy or essentially mechanical methods." *Sacred Heart Health Sys., Inc. v. Humana Mil. Healthcare Servs., Inc.*, 601 F.3d 1159, 1179 (11th Cir. 2010) (internal quotation marks and citation omitted).

At the class certification stage, all that the named plaintiffs had to prove was that a reliable damages methodology existed, not the actual damages plaintiffs sustained. Plaintiffs must demonstrate that a "model purporting to serve as evidence of damages in this class action . . . measure[s] only those damages attributable to that theory." *Comcast*, 569 U.S. at 35, 133 S. Ct. at 1433. And "[t]he first step in a damages study is the translation of the *legal theory of*

the harmful event into an analysis of the economic impact *of that event*." *Id.* at 38, 133 S. Ct. at 1435 (emphasis in original and citation omitted). Here, plaintiffs' expert provided the District Court with a common methodology for calculating damages based on "a standard dollar amount for lost opportunities to accrue rewards points (whether or not they used a rewards card), the value of cardholder time (whether or not they spent any time addressing the breach), and out-of-pocket damages (whether or not they incurred any out-of-pocket damages)."[14] The plaintiffs' expert used a damages methodology based on averages because the expert believed the "delta between class members' damages is minimal irrespective of the type of card used or time spent."

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[14] Plaintiffs' expert does not purport to provide a damages methodology based on averages to determine actual damages for each plaintiff sustained as a result of the misuse of their personal information. Such inquiry into actual damages would surely be an individual inquiry. Rather, according to the expert, the out-of-pocket damages category includes:

> such items as penalties paid by cardholders in connection with not being able to use their cards to pay bills on time, gasoline to go back to the retail establishment where the breach occurred or to the cardholder's bank or local police station, postage and stationary, overnight replacement card shipping fees, bank charges to replace cards (while unusual this cost does occur on occasion), ATM fees to get access to cash, and hiring a third party to assist cardholder recovery and security efforts.

The expert stated that data breaches typically yield damages attributable to this category somewhere in the ballpark of $38 per plaintiff.

In our analysis of a damages methodology based on averages, the focus is on "whether the sample at issue could have been used to establish liability in an individual action." *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 458, 136 S. Ct. 1036, 1048 (2016). In this case, each Chili's customer fitting within the class definitions experienced a similar injury of a compromised card combined with some effort to mitigate the harm caused by the compromise. So, the damages methodology is not "enlarg[ing] the class members' substantive rights" by giving class members an award for an injury they could not otherwise prove in an individual action. *Id.* (internal alterations, quotation marks, and citation omitted). Through the District Court's rigorous analysis, it found that at the class certification stage the damages model was sufficient, and it would be a "matter for the jury" to decide actual damages at trial. *Id.* at 459, 136 S. Ct. at 1049. Any individual inquiry into particularized damages resulting from the data breach, such as damages recoverable due to uncompensated loss caused by compromised personal information, does not predominate over the three categories of common damages inquiries analyzed by the plaintiffs' expert. We do not think, therefore, that the District Court's determination on this point was an abuse of discretion, so we do not disturb it here.

VACATED IN PART AND REMANDED.

BRANCH, J., Specially Concurring in Part and Dissenting in Part:

I write separately to address two issues discussed in the Majority Opinion: standing and damages. First, while I agree with the Majority that Shenika Theus is the only named Plaintiff with standing, I disagree with the Majority's concrete injury analysis. Second, I dissent from the Majority's approval of Plaintiffs' damages methodology. I address each of these issues in turn.

I. STANDING

Beginning with standing, the Majority and I agree on several points. First, I agree that two of the three named Plaintiffs do not have standing. *See Cordoba v. DIRECTV, LLC*, 942 F.3d 1259, 1264 (11th Cir. 2019) (explaining that only named plaintiffs need to demonstrate standing at the class certification stage). Specifically, I agree that Michael Franklin and Eric Steinmetz lack standing because they failed to establish that their alleged injuries were "fairly . . . trace[able] to the challenged action of the defendant." *Lujan v. Defs. Of Wildlife*, 504 U.S. 555, 560 (1992) (quotation omitted). Second, with respect to Shenika Theus, the remaining named Plaintiff, I agree that Theus can establish standing—but I arrive at that conclusion for different reasons than the Majority articulates. Accordingly, my standing discussion proceeds in two parts. I first explain why I part ways with the Majority's approach and then address why Theus nonetheless establishes a concrete injury.

A.

To begin, I turn to my disagreement with the Majority's concrete injury analysis, which rests on two erroneous conclusions about what Plaintiffs have alleged in their third amended consolidated class action complaint ("TAC") (the operative complaint in this case). The Majority's first conclusion rests on an allegation that is simply not contained in the TAC, and the Majority's second conclusion rests on an allegation that, when viewed in light of all the TAC's allegations, does not establish a concrete injury.

The Majority first concludes that Plaintiffs have alleged that the "hackers took [their] data and posted it on Joker Stash" (an online marketplace for stolen payment data).[1] Plaintiffs' TAC, however, contains no such allegation. Instead, Plaintiffs' allegations concern only the risk of "potential fraud and identity theft" based on "expos[ure]" of Plaintiffs' data due to the data breach—*i.e.*, the risk of future harm. Accordingly, I respectfully disagree with the Majority's conclusion that the named Plaintiffs have alleged that their credit card information was posted on the dark web.

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[1] The Majority concludes that the posting of one's credit card information on the dark web is sufficient to establish a concrete injury for all three named Plaintiffs. To be clear, my dissent does not address whether an allegation that hackers stole Plaintiffs' data and posted it for sale on the dark web sufficiently establishes a concrete injury. I write separately because, even assuming such an allegation was sufficient for concreteness, Plaintiffs have simply not made that allegation in this case.

As to its second conclusion, the Majority points to Plaintiffs' TAC allegation that their personal information was "exposed for theft and sale on the dark web" as "critical" to establishing a concrete injury. Because Plaintiffs' allegations about mere "exposure" to the theft and sale of their information simply point to an increased risk of identity theft and risk of future harm, however, I disagree that this concern establishes a concrete injury. I address the TAC,[2] the motion for class certification, and the class certification hearing in turn.[3]

Starting with the TAC, Plaintiffs' allegations concern only the risk of future harm. Plaintiffs describe their injury as "imminent and certainly impending" (*i.e.*, futuristic) and fraud and identity theft as "potential" (*i.e.*, a mere risk). And allegations relating to the risk of future harm are insufficient to establish a concrete injury under Article III. *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2210–11 (2021) (explaining that mere risk of future harm without more does not give rise to Article III standing for recovery of damages); *Tsao v. Captiva MVP Rest. Partners, LLC*, 986 F.3d 1332, 1339 (11th Cir. 2021) ("[A] plaintiff alleging a threat of harm does not have Article III standing . . . ."); *Muransky v. Godiva Chocolatier, Inc.*, 979 F.3d 917, 927–28 (11th Cir. 2020). Indeed, we have

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[2] The Majority confines its concrete injury analysis to the TAC.

[3] The district court and the parties on appeal rely on post-pleading litigation developments—like the motion for class certification and the class certification hearing—for their standing arguments.

held that "[e]vidence of a mere data breach does not, standing alone, satisfy the requirements of Article III standing" and that allegations of an "increased risk" of identity theft based on a data breach are likewise insufficient. *Tsao*, 986 F.3d at 1344; *Muransky*, 979 F.3d at 933 (explaining that the allegation that the plaintiff "and members of the class continue to be exposed to an elevated risk of identity theft" is the "kind of conclusory allegation [that] is simply not enough" for an Article III injury). Thus, because the Majority rests its concrete injury analysis on an allegation that amounts to the mere risk of future harm, I cannot join the Majority's concrete injury analysis.

The motion for class certification and the class certification hearing do not help Plaintiffs in establishing a concrete injury either. Plaintiffs' motion for class certification largely echoes the TAC's allegations, stating that "Plaintiffs . . . experienced the . . . harm of having their Customer Data exposed to fraudulent use" and that the "evidence will establish that [Brinker's] conduct exposed [their customer data] to unauthorized third parties." The motion makes no reference to Joker Stash—or any other site on the dark web—and states only once in passing that Plaintiffs' customer data "ha[d] been exposed and found for sale on the dark web," without any allegation of which of the Plaintiffs' data was exposed or where such data was "found." But, as I explain below, this passing statement does not pass muster in light of Plaintiffs' admissions at the class certification hearing.

During the hearing on class certification, Plaintiffs stated that they had "uncontroverted evidence that the data that was taken from Brinker's system was posted for sale and sold on the dark web." According to Plaintiffs, at least 4.5 million cards were affected by the data breach and, according to documents they obtained from Fiserv (Brinker's processor), those 4.5 million cards—*i.e.*, one hundred percent of the cards used at Brinker's locations during the affected time period—were posted on Joker Stash. Despite these assertions at the hearing, however, when the district court asked Plaintiffs' counsel whether she knew if any of the three named Plaintiffs' cards were actually on the dark web, Plaintiffs' counsel responded: "[*W*]*e do not know* that at this point." Accordingly, by counsel's own admission, the record fails to support the conclusion that the named Plaintiffs' credit card information was either posted or sold on the dark web as a result of the data breach. To the contrary, Plaintiffs admitted that they did not know if their credit card information was on the dark web.

In sum, considering Plaintiffs' admission that they do not know whether their data was posted or sold on the dark web, I cannot join the Majority's concrete injury analysis—which rests on conclusions that are simply unsupported by the record. *See Lujan*, 504 U.S. at 561 (explaining that the proof required for standing varies "with the manner and degree of evidence required at the successive stages of the litigation"); *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 160 (1982) (explaining that "it may be necessary for the

court to probe behind the pleadings" to assess standing at the class certification stage).

B.

Although I disagree with the Majority's concrete injury analysis, I nonetheless agree that Theus has suffered a concrete injury (and therefore has standing) for a different reason: she has established financial harm. In her deposition, Theus explained that her transactions at Chili's, which occurred during the restaurant's at-risk time frame,[4] caused her to incur unauthorized charges on her account that led to an overdraft fee and a bank-imposed card replacement fee. These unreimbursed, out-of-pocket expenses that Theus incurred are the type of "pocketbook injur[ies] [that are] . . . prototypical form[s] of injury in fact." *Collins v. Yellen*, 141 S. Ct. 1761, 1779 (2021); *TransUnion*, 141 S. Ct. at 2204 (explaining that "traditional tangible harms, such as . . . monetary harms" are "obvious" harms that "readily qualify as concrete injuries under Article III"). Accordingly, I conclude—for different reasons than the Majority—that Theus has alleged a concrete harm sufficient for standing.

II. Damages Methodology

I now turn to the damages issue and conclude that the district court erred by accepting the damages methodology offered by

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[4] As the Majority points out, Theus does not suffer the same traceability problem that Franklin and Steinmetz do.

Plaintiffs' expert for two reasons. First, the methodology fails to tie a damages amount to an injury actually suffered by a plaintiff. And second, the district court improperly relied on *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 459–61 (2016).

In support of their motion for class certification, Plaintiffs offered an expert declaration to explain their damages methodology. Plaintiffs' expert set forth a "damages methodology applicable on a class-wide basis" by calculating four "damages elements": (1) the value of any lost opportunity to accrue rewards points; (2) the value of stolen payment card data; (3) the value of cardholder time; and (4) out-of-pocket damages.

The district court rejected Brinker's argument that the expert's methodology was overinclusive and not accurately tailored to the facts. It explained that "[u]nder [the expert's] damages methodology, all class members would receive a standard dollar amount for lost opportunities to accrue rewards points (whether or not they used a rewards card), the value of cardholder time (whether or not they spent time addressing the breach), and out-of-pocket damages (whether or not they incurred any out-of-pocket damages)." The court continued: "[Plaintiffs' expert] employs an averages method to compute damages, reasoning that the delta between class members' damages is minimal[,] irrespective of the type of card used or time spent." It explained that "[a]s with any averages calculation, over or under inclusivity is going to be a risk," and noted that "the Supreme Court" in *Tyson Foods* "has approved the use of averages methods to calculate damages." The district

court concluded that "at this point [the expert's] testimony [was] offered to show that a reliable damages calculation methodology exists, not to calculate class members' damages."

Applying Rule 23(a)'s predominance requirement, the district court determined that Plaintiffs' damages expert offered a common method of calculating damages that, despite including "payment cards that may have been breached prior to the Data Breach," "shows for class certification purposes that a common method of addressing causation and damages exists." The court opined:

> Most data breaches are very similar to one another, such that a jury may find that a relative average reduction in damages for every class member that has been subjected to other data breaches is appropriate. As discussed above, the Supreme Court has approved the use of averages methods to calculate damages, *see Tyson Foods,* 577 U.S. [at] 459–61, and the same rationale could apply here.

Nevertheless, the district court caveated that "if it becomes obvious at any time that the calculation of damages (including accounting for multiple data breaches) will be overly burdensome or individualized, the [c]ourt has the option to decertify the class."

Brinker argues that the district court erred by concluding that Plaintiffs' "proposed damages methodology permissibly eliminated individualized issues." Brinker contends that because it is "entitled to scrutinize each individual claim at trial by referring to

each individual class member's individual circumstances," Plaintiffs have not met Rule 23's requirement that common issues predominate over individual ones. Plaintiffs argue that the "district court did not abuse its discretion in finding [that they] met this standard."

To certify a class under Rule 23(b)(3), a district court must determine that "questions of law or fact common to class members predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3). This predominance determination includes questions relating to damages. *See Tyson Foods*, 577 U.S. at 453–54; *Agmen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 460 (2013). As the Majority points out, individual damages issues predominate "if computing them will be so complex, fact-specific, and difficult that the burden on the court system would be simply intolerable" or if "significant individualized questions go[] to liability." *Brown v. Electrolux Home Prods., Inc.*, 817 F.3d 1225, 1240 (11th Cir. 2016) (quotations omitted). Accordingly, in our analysis of a damages methodology based on averages, the focus is on "whether the sample at issue could have been used to establish liability in an individual action." *Tyson Foods*, 577 U.S. at 458.

At the class-certification stage, "a model purporting to serve as evidence of damages . . . must measure only those damages attributable to" plaintiffs' theory of liability in the case. *Comcast Corp. v. Behrend*, 569 U.S. 27, 35 (2013). "And for purposes of Rule 23, courts must conduct a rigorous analysis to determine whether that is so." *Id.* (quotation omitted). As such, a court must not only

evaluate whether a damages calculation "provide[s] a method to measure and quantify damages on a classwide basis," but also whether such a methodology constitutes "a just and reasonable inference" or whether it is "speculative." *Id.* Without this evaluation, "*any* method of measurement [could be] acceptable [at the class-certification stage] so long as it can be applied classwide, no matter how arbitrary the measurements may be." *Id.* at 35–36. And "[s]uch a proposition would reduce Rule 23(b)(3)'s predominance requirement to a nullity." *Id.* at 36.

Here, the district court approved a damages methodology that awards to all class members a standard dollar amount "for lost opportunities to accrue rewards points (*whether or not they used a rewards card*), the value of cardholder time (*whether or not they spent any time addressing the breach*), and out-of-pocket damages (*whether or not they incurred any out-of-pocket damages*)." In short, this methodology impermissibly permits plaintiffs to receive an award based on damages that they did not suffer—*i.e.*, an award that a plaintiff could not establish in an individual action. *Tyson Foods*, 577 U.S. at 458.

The Majority defends the use of representative evidence by asserting that each "customer fitting within the class definitions experienced a similar injury," but this assertion cannot be true. As the district court acknowledged, Plaintiffs' damages methodology could allow a plaintiff to be compensated for opportunities to accrue rewards points, the value of their time spent addressing the breach, and out-of-pocket damages, even though the plaintiff

suffered *none* of those harms. Each of these damages elements relate to separate and distinct injuries that may not be common to all class members, meaning that certain plaintiffs may impermissibly recover damages that they otherwise would not be entitled to in an individual action. *See Comcast Corp.*, 569 U.S. at 35.

The district court acknowledged that "[a]s with any averages calculation, over or under inclusivity is going to be a risk," but cited *Tyson Foods* to say that "the Supreme Court has approved the use of averages methods to calculate damages." But *Tyson Foods* is inapposite to the facts of this case.

In *Tyson Foods*, the Supreme Court approved the use of "representative evidence" to prove that the amount of time employees spent "donning and doffing" their gear at a chicken plant, when added to their regular work hours, "amounted to more than 40 hours in a given week" in order to be entitled to recovery under the Fair Labor Standards Act. *Tyson Foods*, 577 U.S. at 454. Far from categorically "approv[ing] the use of averages methods to calculate damages," as the district court asserted, the Supreme Court was careful to reject any request to "establish general rules governing the use of statistical evidence, or so-called representative evidence, in all class-action cases." *Id.* at 455. Instead, the Court explained that "[w]hether a representative sample may be used to establish classwide liability will depend on the purpose for which the sample is being introduced and on the underlying cause of action." *Id.* at 460. The Court noted that plaintiffs in that case "sought to introduce a representative sample to fill an evidentiary gap created

by the employer's failure to keep adequate records." *Id.* at 456. And the Court concluded that reliance on this representative evidence "did not deprive [the employer] of its ability to litigate individual defenses," reasoning that "[s]ince there were no alternative means for the employees to establish their hours worked," the employer was left to attack the representative evidence itself. *Id.* at 457. The defense was thus "itself common to the claims made by all class members." *Id.*

The justifications for using representative evidence that were present in *Tyson Foods* are simply not present here. In this case, the questions relevant to the damages inquiry include whether a given class member possessed a rewards card, spent time addressing a data breach, and suffered out-of-pocket losses. Unlike *Tyson Foods*, the evidence for the answers to those questions is not inaccessible or controlled by Brinker. To the contrary, that evidence would be known and controlled by the plaintiffs or is at least readily available through individualized examination. And unlike *Tyson Foods*, here, the use of damages averages would deprive Brinker of its ability to litigate individual defenses where a class members' individual damages are discoverable.

Considering that, under Plaintiffs' averages methodology, a plaintiff could be compensated for a harm he did not suffer and that *Tyson Foods* does not justify the use of averages under the facts of this case, I am left to conclude that the district court erred by accepting Plaintiffs' damages methodology when certifying Plaintiffs'

proposed classes. Accordingly, I dissent from the Majority's conclusion to the contrary.

* * *

In sum, while I agree with the Majority's bottom line that Theus is the only named Plaintiff with standing, I disagree with the Majority's concrete injury analysis, and I conclude that Theus suffered an injury by establishing financial harm. Additionally, I dissent from the Majority's approval of Plaintiffs' damages methodology.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
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Clerk of Court

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July 11, 2023

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 21-13146-DD
Case Style: Eric Steinmetz, et al v. Brinker International, Inc.
District Court Docket No: 3:18-cv-00686-TJC-MCR

All counsel must file documents electronically using the Electronic Case Files ("ECF") system, unless exempted for good cause. Although not required, non-incarcerated pro se parties are permitted to use the ECF system by registering for an account at www.pacer.gov. Information and training materials related to electronic filing are available on the Court's website. Enclosed is a copy of the court's decision filed today in this appeal. Judgment has this day been entered pursuant to FRAP 36. The court's mandate will issue at a later date in accordance with FRAP 41(b).

The time for filing a petition for rehearing is governed by 11th Cir. R. 40-3, and the time for filing a petition for rehearing en banc is governed by 11th Cir. R. 35-2. Except as otherwise provided by FRAP 25(a) for inmate filings, a petition for rehearing or for rehearing en banc is timely only if received in the clerk's office within the time specified in the rules. Costs are governed by FRAP 39 and 11th Cir.R. 39-1. The timing, format, and content of a motion for attorney's fees and an objection thereto is governed by 11th Cir. R. 39-2 and 39-3.

Please note that a petition for rehearing en banc must include in the Certificate of Interested Persons a complete list of all persons and entities listed on all certificates previously filed by any party in the appeal. See 11th Cir. R. 26.1-1. In addition, a copy of the opinion sought to be reheard must be included in any petition for rehearing or petition for rehearing en banc. See 11th Cir. R. 35-5(k) and 40-1 .

Counsel appointed under the Criminal Justice Act (CJA) must submit a voucher claiming compensation for time spent on the appeal no later than 60 days after either issuance of mandate or filing with the U.S. Supreme Court of a petition for writ of certiorari (whichever is later) via the eVoucher system. Please contact the CJA Team at (404) 335-6167 or cja_evoucher@ca11.uscourts.gov for questions regarding CJA vouchers or the eVoucher system.

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OPIN-1A Issuance of Opinion With Costs

The Sedona Conference

Working Group 11 Annual Meeting

May 3, 2024

Minneapolis, Minnesota

PRIVACY AND DATA SECURITY LITIGATION UPDATE

ILLINOIS BIOMETRIC INFORMATION PRIVACY ACT DECISIONS

dant's right to be present during all stages of jury selection, but it should also clarify the proper analysis a court should follow in the future when confronted with ineffective assistance claims related to this issue. I fear the lead opinion's analysis further muddies these waters.

¶ 102 It is for these reasons that I find counsel was deficient in agreeing to a process whereby defendant was not present for a critical part of his trial. More specifically, counsel's agreement to such a procedure was improper and lacked any possible strategic advantage. This does not end the inquiry, however, as reversal is only warranted if counsel's deficient performance resulted in prejudice to defendant.

¶ 103 Defendant concedes that there is no evidence in this record that he was tried by a biased jury, *i.e.*, prejudice. Furthermore, it must be noted that this record is silent as to whether defendant talked with counsel about individual venire members prior to the sidebars or what conversations were had by counsel and the judge during the sidebars. Because a defendant's lack of presence does not automatically entitle him to relief (*Bean*, 137 Ill. 2d at 88, 147 Ill.Dec. 891, 560 N.E.2d 258; *Spears*, 169 Ill. App. 3d at 483, 121 Ill.Dec. 570, 525 N.E.2d 877; *Beacham*, 189 Ill. App. 3d at 491-92, 136 Ill.Dec. 868, 545 N.E.2d 392; *Gentry*, 351 Ill. App. 3d at 884, 286 Ill.Dec. 817, 815 N.E.2d 27; *Oliver*, 2012 IL App (1st) 102531, ¶ 5, 361 Ill.Dec. 714, 972 N.E.2d 199), it would be inappropriate to simply presume prejudice, as defendant requests. Instead, the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2010)) provides a defendant the opportunity to raise " 'constitutional questions which, by their nature, depend[ ] upon facts not found in the record.' " *People v. Cherry*, 2016 IL 118728, ¶ 33, 407 Ill.Dec. 439, 63 N.E.3d 871 (quoting *People v. Thomas*, 38 Ill. 2d 321, 324, 231 N.E.2d 436 (1967)). In *Cherry*, this court commented that claims of ineffective assistance of counsel are commonly raised in postconviction proceedings because they often require the presentation of evidence not contained in the record. *Id.* Defendant's ineffective assistance claim is more appropriate for postconviction review, where he can develop the record and present the trial court with evidence that *may* support a claim that he was not tried by an impartial jury.

¶ 104 JUSTICE HOLDER WHITE joins in this special concurrence.

¶ 105 JUSTICES CUNNINGHAM and ROCHFORD took no part in the consideration or decision of this case.

2023 IL 128004
466 Ill.Dec. 85

Latrina COTHRON, Appellee,

v.

WHITE CASTLE SYSTEM, INC., Appellant.

(Docket No. 128004)

Supreme Court of Illinois.

Filed February 17, 2023

Rehearing Denied July 18, 2023

Background: Employee brought putative class action against employer, alleging that its fingerprint-scanning and verification system violated the Biometric Information Privacy Act (BIPA). After removal, the United States District Court for the Northern District of Illinois, John J. Tharp, J., 477 F.Supp.3d 723, denied employer's motion for judgment on the pleadings based on the statute of limitations.

Employer appealed. The Court Appeals, 20 F.4th 1156, certified question.

Holdings: As matter of first impression, the Supreme Court, Rochford, J., held that a BIPA claim accrues each time that biometric identifiers or information are collected or disseminated, and not only on first scan and first transmission.

Question answered.

Overstreet, J., filed dissenting opinion in which Theis, C.J., and Holder White, J., joined.

Overstreet, J., filed dissenting opinion upon denial of rehearing in which Theis, C.J., and Holder White, J., joined.

1. Statutes ⚿1072

Cardinal principle and primary objective in construing a statute is to ascertain and give effect to the intention of the legislature.

2. Statutes ⚿1080, 1091

In construing a statute, the best indicator of legislative intent is the statutory language itself, given its plain and ordinary meaning.

3. Statutes ⚿1108

Where statutory language is clear and unambiguous, a court must apply the statute without resort to further aids of statutory construction.

4. Statutes ⚿1105

Only if statutory language is ambiguous may a court look to other sources to ascertain the legislature's intent.

5. Records ⚿325

A private entity violates the Biometric Information Privacy Act (BIPA) when it collects, captures, or otherwise obtains a person's biometric information without prior informed consent; this is true the first time the entity scans a fingerprint or otherwise collects biometric information, and is no less true with each subsequent scan or collection. 740 Ill. Comp. Stat. Ann. 14/15(b).

6. Limitation of Actions ⚿58(17)

A claim for violation of the Biometric Information Privacy Act (BIPA) accrues, for limitations purposes, with each scan or transmission of biometric identifiers or biometric information by a private entity without prior informed consent, and not only upon the first scan and first transmission. 740 Ill. Comp. Stat. Ann. 14/15(b), 14/15(d).

7. Constitutional Law ⚿2474

A court cannot rewrite a statute to create new elements or limitations not included by the legislature.

Certified question from the United States Court of Appeals for the Seventh Circuit; heard in that court on appeal from the United States District Court for the Northern District of Illinois, the Hon. John J. Tharp, Judge, presiding.

Melissa A. Siebert and Erin Bolan Hines, of Cozen O'Connor, of Chicago, for appellant.

Ryan F. Stephan, James B. Zouras, Andrew C. Ficzko, and Teresa M. Becvar, of Stephan Zouras, LLP, of Chicago, for appellee.

Nadine C. Abrahams, Jody Kahn Mason, Jason A. Selvey, and Jeffrey L. Rudd, of Jackson Lewis P.C., of Chicago, for amici curiae Illinois Manufacturers' Association et al.

Gretchen M. Wolf, Amy Van Gelder, William Ridgway, and Gail E. Lee, of Skadden, Arps, Slate, Meagher & Flom LLP, of Chicago, Meredith C. Slawe and Michael W. McTigue Jr., of Skadden, Arps, Slate, Meagher & Flom LLP, of

New York, New York, and Angelo I. Amador, Deborah R. White, and Stephanie A. Martz, all of Washington, D.C., for amici curiae Restaurant Law Center et al.

Michael A. Scodro, Matthew D. Provance, and Jed W. Glickstein, of Mayer Brown LLP, of Chicago, for amici curiae Illinois Chamber of Commerce et al.

Randall D. Schmidt, of Edwin F. Mandel Legal Aid Clinic of the University of Chicago Law School, of Chicago, and Jeffrey R. White, of the American Association for Justice, of Washington, D.C., amici curiae.

Catherine Simmons-Gill, of Offices of Catherine Simmons-Gill, LLC, and Chiquita L. Hall-Jackson, of Hall-Jackson & Associates, PC, both of Chicago, for amici curiae NELA/Illinois et al.

Megan Iorio (pro hac vice) and Sara Geoghegan, of Electronic Privacy Information Center, of Washington, D.C., amicus curiae.

OPINION

JUSTICE ROCHFORD delivered the judgment of the court, with opinion.

¶ 1 This case requires us to construe section 15(b) and 15(d) of the Biometric Information Privacy Act (Act) (740 ILCS 14/15(b), (d) (West 2018)) in an action alleging that an employer violated the Act when it repeatedly collected fingerprints from an employee and disclosed that biometric information to a third party without consent. Specifically, the United States Court of Appeals for the Seventh Circuit certified the following question of law to this court: "Do section 15(b) and 15(d) claims accrue each time a private entity scans a person's biometric identifier and each time a private entity transmits such a scan to a third party, respectively, or only upon the first scan and first transmission?" *Cothron v. White Castle System, Inc.*, 20 F.4th 1156, 1167 (7th Cir. 2021). We hold that a separate claim accrues under the Act each time a private entity scans or transmits an individual's biometric identifier or information in violation of section 15(b) or 15(d).

¶ 2 I. BACKGROUND

¶ 3 We recite the facts as provided by the Seventh Circuit in its certification ruling. See, *e.g.*, *In re Hernandez*, 2020 IL 124661, ¶ 5, 443 Ill.Dec. 11, 161 N.E.3d 135. The controversy arises from a proposed class action filed by plaintiff, Latrina Cothron, on behalf of all Illinois employees of defendant, White Castle System, Inc. (White Castle). Plaintiff originally filed her action in the circuit court of Cook County against White Castle and its third-party vendor, Cross Match Technologies. Cross Match Technologies removed the case to federal court under the Class Action Fairness Act of 2005 (28 U.S.C. §§ 1332(d), 1453 (2018)). Plaintiff later voluntarily dismissed Cross Match Technologies from her action and proceeded solely against White Castle in the United States District Court for the Northern District of Illinois.

¶ 4 According to her complaint, plaintiff is a manager of a White Castle restaurant in Illinois, where she has been employed since 2004. Shortly after her employment began, White Castle introduced a system that required its employees to scan their fingerprints to access their pay stubs and computers. A third-party vendor then verified each scan and authorized the employee's access.

¶ 5 Generally, plaintiff's complaint alleged that White Castle implemented this biometric-collection system without obtaining her consent in violation of the Act (740 ILCS 14/1 *et seq.* (West 2018)), which became effective in 2008 (see Pub. Act 95-994, § 1 (eff. Oct. 3, 2008)). Section 15(b) of the Act provides that a private entity may

not "collect, capture, purchase, receive through trade, or otherwise obtain" a person's biometric data without first providing notice to and receiving consent from the person. 740 ILCS 14/15(b) (West 2018). Section 15(d) provides that a private entity may not "disclose, redisclose, or otherwise disseminate" biometric data without consent. *Id.* § 15(d).

¶ 6 Plaintiff asserted that White Castle did not seek her consent to acquire her fingerprint biometric data until 2018, more than a decade after the Act took effect. Accordingly, plaintiff claimed that White Castle unlawfully collected her biometric data and unlawfully disclosed her data to its third-party vendor in violation of section 15(b) and 15(d), respectively, for several years.

¶ 7 In relevant part, White Castle moved for judgment on the pleadings, arguing that plaintiff's action was untimely because her claim accrued in 2008, when White Castle first obtained her biometric data after the Act's effective date. Plaintiff responded that a new claim accrued each time she scanned her fingerprints and White Castle sent her biometric data to its third-party authenticator, rendering her action timely with respect to the unlawful scans and transmissions that occurred within the applicable limitations period.

¶ 8 The district court agreed with plaintiff and denied White Castle's motion. *Cothron v. White Castle System, Inc.*, 477 F. Supp. 3d 723, 734 (N.D. Ill. 2020). The court later certified its order for immediate interlocutory appeal, finding that its decision involved a controlling question of law on which there is substantial ground for disagreement.

¶ 9 The United States Court of Appeals for the Seventh Circuit accepted the certification. After determining that plaintiff had standing to bring her action in federal court under article III of the United States Constitution (U.S. Const., art. III), the Seventh Circuit addressed the parties' respective arguments on the accrual of a claim under the Act. *Cothron*, 20 F.4th at 1162-65. Ultimately, the Seventh Circuit found the parties' competing interpretations of claim accrual reasonable under Illinois law, and it agreed with plaintiff that "the novelty and uncertainty of the claim-accrual question" warranted certification of the question to this court. *Id.* at 1165-66. The Seventh Circuit observed that the answer to the claim-accrual question would determine the outcome of the parties' dispute, this court could potentially side with either party on the question, the question was likely to recur, and it involved a unique Illinois statute regularly applied by federal courts. *Id.* at 1166. Thus, finding the relevant criteria favored certification of the question, the Seventh Circuit certified the question to this court.[1] *Id.* at 1166-67.

¶ 10 We chose to answer that question. See Ill. S. Ct. R. 20(a) (eff. Aug. 1, 1992). The Illinois Chamber of Commerce, Chamber of Commerce of the United States, Retail Litigation Center,

1. Several federal district courts have stayed proceedings pending a final decision from the Seventh Circuit in *Cothron* in connection with the accrual question. See, *e.g.*, *Callendar v. Quality Packaging Specialists International, Inc.*, No. 21-cv-505-SMY, 2021 WL 4169967 (S.D. Ill. Aug. 27, 2021); *Hall v. Meridian Senior Living, LLC*, No. 21-cv-55-SMY, 2021 WL 2661521 (S.D. Ill. June 29, 2021); *Roberson v. Maestro Consulting Services, LLC*, No. 20-CV-00895-NJR, 2021 WL 1017127 (S.D. Ill. Mar. 17, 2021); *Roberts v. Graphic Packaging International, LLC*, No. 21-CV-750-DWD, 2021 WL 3634172 (S.D. Ill. Aug. 17, 2021); *Starts v. Little Caesar Enterprises, Inc.*, No. 19-cv-1575, 2021 WL 4988317 (N.D. Ill. Oct. 19, 2021); *Treadwell v. Power Solutions International, Inc.*, No. 18-cv-8212, 2021 WL 5712186 (N.D. Ill. Dec. 2, 2021).

Inc., Restaurant Law Center, National Retail Federation, Illinois Manufacturers' Association, National Association of Manufacturers, Illinois Health and Hospital Association, Illinois Retail Merchants Association, Chemical Industry Council of Illinois, Illinois Trucking Association, Mid-West Truckers Association, and Chicagoland Chamber of Commerce were granted leave to file *amicus curiae* briefs in support of White Castle's position. Ill. S. Ct. R. 345 (eff. Sept. 20, 2010). The American Association for Justice, Employment Law Clinic of the University of Chicago Law School's Edwin F. Mandell Legal Aid Clinic, NELA/Illinois National Employment Law Project, Raise the Floor Alliance, and Electronic Privacy Information Center (EPIC) were granted leave to file *amicus curiae* briefs in support of plaintiff's position. *Id.*

¶ 11 II. ANALYSIS

¶ 12 The certified question asks: "Do section 15(b) and 15(d) claims accrue each time a private entity scans a person's biometric identifier and each time a private entity transmits such a scan to a third party, respectively, or only upon the first scan and first transmission?" When answering this question, we assume, without deciding, that White Castle's alleged collection of plaintiff's fingerprints and transmission to a third party was done in violation of the Act.

¶ 13 Section 15(b) of the Act provides:

> "No private entity may collect, capture, purchase, receive through trade, or otherwise obtain a person's or a customer's biometric identifier or biometric information, unless it first:
>
> (1) informs the subject or the subject's legally authorized representative in writing that a biometric identifier or biometric information is being collected or stored;
>
> (2) informs the subject or the subject's legally authorized representative in writing of the specific purpose and length of term for which a biometric identifier or biometric information is being collected, stored, and used; and
>
> (3) receives a written release executed by the subject of the biometric identifier or biometric information or the subject's legally authorized representative." 740 ILCS 14/15(b) (West 2018).

¶ 14 Section 15(d) of the Act provides, in relevant part, that

> "[n]o private entity in possession of a biometric identifier or biometric information may disclose, redisclose, or otherwise disseminate a person's or a customer's biometric identifier or biometric information unless:
>
> *** the subject of the biometric identifier or biometric information or the subject's legally authorized representative consents to the disclosure or redisclosure[.]" *Id.* § 15(d)(1).

¶ 15 Relevant to this case, the Act further defines the term "biometric identifier" to include a fingerprint and the term "biometric information" to include any information based on an individual's biometric identifier used to identify that person. *Id.* § 10. The Act provides a private right of action for any person aggrieved by a violation of the Act. *Id.* § 20.

¶ 16 White Castle argues that section 15(b) and 15(d) claims can accrue only once—when the biometric data is initially collected or disclosed. Section 15(b) provides that no private entity "may collect, capture, purchase, receive through trade, or otherwise obtain a person's or a customer's biometric identifier or biometric infor-

mation, *unless it first*" provides notice and receives consent as outlined in the rest of section 15(b). (Emphasis added.) *Id.* § 15(b). According to White Castle, the "unless it first" phrase refers to a singular point in time; notice and consent must precede, or occur before, collection. The active verbs used in section 15(b)—collect, capture, purchase, receive, and obtain—all mean to gain control, an action that White Castle argues can only happen once under the plain meaning of those terms.

¶ 17 White Castle advances a similar argument for section 15(d), noting that it provides that no private entity "in possession of a biometric identifier or biometric information may disclose, redisclose, or otherwise disseminate a person's or a customer's biometric identifier or biometric information unless" the private entity has obtained consent or certain exceptions apply. *Id.* § 15(d). Thus, section 15(d) requires consent in order for a private entity to "disclose, redisclose, or otherwise disseminate" an individual's biometrics. According to White Castle, the plain meaning of each verb used in section 15(d) "implicates the disclosure of biometrics by one party to a new, third party—said differently, a party that has not previously possessed the relevant biometric identifier or biometric information." As it argues for section 15(b) claims, White Castle contends that occurs only on the first instance of disclosure or dissemination.

¶ 18 Plaintiff responds that the plain meaning of the statutory language demonstrates that claims under section 15(b) and 15(d) accrue every time a private entity collects or disseminates biometrics without prior informed consent. According to plaintiff, this construction is consistent with the plain meaning of the statutory language, gives effect to every word in the provision, and directly reflects legislative intent to provide an individual with a meaningful and informed opportunity to decline the collection or dissemination of their biometrics. It also provides an incentive for private entities that collect biometric information to take action to mitigate their conduct if they neglected to comply at first.

¶ 19 Plaintiff maintains that section 15(b) applies to every instance when a private entity collects biometric information without prior consent. According to plaintiff, the word "first" in section 15(b) modifies the words "informs" and "receives." Thus, according to plaintiff, an entity violates section 15(b) when it collects, captures, or otherwise obtains a person's biometrics without prior informed consent. Plaintiff observes that our appellate court reached the same conclusion in *Watson v. Legacy Healthcare Financial Services, LLC*, 2021 IL App (1st) 210279, ¶ 53, 458 Ill.Dec. 267, 196 N.E.3d 571. Similarly, section 15(d) prohibits the disclosure, redisclosure, or dissemination of biometrics by a private entity "unless" that entity receives prior consent. Thus plaintiff argues that, under the plain language of both section 15(b) and 15(d), a claim accrues each time that biometric identifiers or information are collected or disseminated by a private entity without prior informed consent.

[1–4] ¶ 20 To resolve the parties' dispute and answer the certified question, we focus on the language of the Act itself. The cardinal principle and primary objective in construing a statute is to ascertain and give effect to the intention of the legislature. *Roberts v. Alexandria Transportation, Inc.*, 2021 IL 126249, ¶ 29, 451 Ill. Dec. 244, 183 N.E.3d 701. The best indicator of legislative intent is the statutory language itself, given its plain and ordinary meaning. *In re Hernandez*, 2020 IL 124661, ¶ 18, 443 Ill.Dec. 11, 161 N.E.3d 135. Where the language is clear and un-

ambiguous, we must apply the statute without resort to further aids of statutory construction. *Krohe v. City of Bloomington*, 204 Ill. 2d 392, 395, 273 Ill.Dec. 779, 789 N.E.2d 1211 (2003). Only if the statutory language is ambiguous may we look to other sources to ascertain the legislature's intent. *Id.*

¶ 21 Section 15(b)

¶ 22 Section 15(b) mandates informed consent from an individual before a private entity collects biometric identifiers or information. Specifically, section 15(b) provides that "[n]o private entity may collect, capture, purchase, receive through trade, or otherwise obtain a person's or a customer's biometric identifier or biometric information unless it first" obtains informed consent from the individual or the individual's legally authorized representative. 740 ILCS 14/15(b) (West 2018).

¶ 23 We agree with plaintiff that the plain language of the statute supports her interpretation. "Collect" means to "to receive, gather, or exact from a number of persons or other sources." Webster's Third New International Dictionary 444 (1993). "Capture" means "to take, seize, or catch." *Id.* at 334. We disagree with defendant that these are things that can happen only once. As plaintiff explains in her complaint, White Castle obtains an employee's fingerprint and stores it in its database. The employee must then use his or her fingerprint to access paystubs or White Castle computers. With the subsequent scans, the fingerprint is compared to the stored copy of the fingerprint. Defendant fails to explain how such a system could work without collecting or capturing the fingerprint every time the employee needs to access his or her computer or pay stub. As the district court explained, "[e]ach time an employee scans her fingerprint to access the system, the system must capture her biometric information and compare that newly captured information to the original scan (stored in an off-site database by one of the third-parties with which White Castle contracted)." *Cothron*, 477 F. Supp. 3d at 732. To the extent White Castle is suggesting that "collection" or "capture" occurs only when an entity first obtains a print to store in its database—and subsequent authentication scans therefore cannot be collections or captures—this argument is belied by the position White Castle took below. White Castle acknowledges that it argued in its motion for judgment on the pleadings that plaintiff's claim accrued, if ever, in 2008 with her first scan after the Act's enactment. And White Castle argues in its brief that "there was no 'loss of control' under [the Act] until 2008, the first time she used the finger-scan technology in 2008 following [the Act's] effective date." Because White Castle first obtained a copy of plaintiff's fingerprint years before this, the first scan after the Act went into effect would have been a routine authentication scan. A claim could have accrued upon the taking of this authentication scan only if it were a collection or a capture under section 15(b). Moreover, section 15(b)(2) of the Act distinguishes between collection and storage. This section provides that the private entity must notify the subject of the "length of term for which a biometric identifier or biometric information is being collected, stored, and used." 740 ILCS 14/15(b)(2) (West 2008). That the subject must be notified how long his or her biometric data will be collected shows that the legislature contemplated collection as being something that would happen more than once.

[5] ¶ 24 We agree with the federal district court that "[a] party violates Section 15(b) when it collects, captures, or otherwise obtains a person's biometric information without prior informed consent.

This is true the first time an entity scans a fingerprint or otherwise collects biometric information, but it is no less true with each subsequent scan or collection." *Cothron*, 477 F. Supp. 3d at 732. Our appellate court has reached the same conclusion, determining that "the plain language of [section 15(b)] establishes that it applies to each and every capture and use of plaintiff's fingerprint or hand scan. Almost every substantive section of the Act supports this finding." *Watson*, 2021 IL App (1st) 210279, ¶ 46, 458 Ill.Dec. 267, 196 N.E.3d 571.

¶ 25 White Castle's suggestion that the "unless it first" phrase in section 15(b) refers only to the first collection of biometric information is inaccurate. Contrary to White Castle's position, the "unless it first" phrase refers to the private entity's statutory obligation to obtain consent or a release. See 740 ILCS 14/15(b) (West 2018) (prohibiting a private entity from collecting, capturing, purchasing, receiving, or otherwise obtaining biometric information "unless it first" obtains consent or a release as described by the statute). As our appellate court correctly determined, the "unless it first" phrase "modifies the entity's obligations, not the triggering actions." *Watson*, 2021 IL App (1st) 210279, ¶ 53, 458 Ill.Dec. 267, 196 N.E.3d 571.

¶ 26 Section 15(d)

¶ 27 Similar to section 15(b), section 15(d) mandates consent or legal authorization before a specific action is taken. It provides that "[n]o private entity in possession of a biometric identifier or biometric information may disclose, redisclose, or otherwise disseminate a person's or a customer's biometric identifier or biometric information unless" it obtains informed consent from the individual or their legal representative or has other legal authorization to disclose that information. 740 ILCS 14/15(d) (West 2018).

¶ 28 As with section 15(b), we conclude that the plain language of section 15(d) applies to every transmission to a third party. White Castle argues that a disclosure is something that can happen only once. The Seventh Circuit asserted that the plain meaning of "disclose" connotes a new revelation. See *Cothron*, 20 F.4th at 1163; see also Webster's Third New International Dictionary 645 (1993) (defining "disclose" as "to make known" or "to reveal *** something that is secret or not generally known"). In determining that an entity violates section 15(d) every time it discloses or otherwise disseminates biometric data, the district court focused on this section's use of the term "redisclose." *Cothron*, 477 F. Supp. 3d at 733. The district court agreed with plaintiff that repeated transmissions to the same third party are "redisclosures." *Id.* As the Seventh Circuit court pointed out, however, the issue is not quite so simple:

> "[Cothron] reads the term 'redisclose' as used in section 15(d) to include repeated disclosures of the same biometric data to the same third party. For its part, White Castle offers a different interpretation of the term: a downstream disclosure carried out by a third party to whom information was originally disclosed. That reading is consistent with the term 'redisclose' as used in other Illinois statutes.[2] Countering again, Cothron ar-

2. See, *e.g.*, section 35.3(b) of the Children and Family Services Act (20 ILCS 505/35.3(b) (West 2020) ("[a] person to whom disclosure of a foster parent's name, address, or telephone number is made under this Section shall not redisclose that information except as provided in this Act or the Juvenile Court Act of 1987")) and section 5 of the Mental Health and Developmental Disabilities Confidentiality Act (740 ILCS 110/5(d) (West 2020) ("[n]o person or agency to whom any information is disclosed under this Section may redisclose

gues that this usage would make 'redisclose' meaningless surplusage. Section 15(d) applies to any 'private entity in possession of a biometric identifier or biometric information.' As such, a violation by a down-stream entity can just be called a 'disclosure,' making 'redisclose' redundant under White Castle's reading. Maybe so; or maybe 'redisclose' serves to make certain that down-stream entities are subject to section 15(d). See *Reid Hosp. & Health Care Servs., Inc. v. Conifer Revenue Cycle Sols., LLC*, 8 F.4th 642, 652 (7th Cir. 2021) (noting the tension between the anti-surplusage canon and the belt-and-suspenders drafting approach)." *Cothron*, 20 F.4th at 1164.

¶ 29 We note that, even in the dictionary relied upon by White Castle, the principal meaning of "redisclose" is "[t]o disclose again." See WordSense Dictionary, https://www.wordsense.eu/redisclose/ (last visited Jan. 7, 2023) [https://perma.cc/63VU-RRTK]. Nevertheless, we do not believe that we have to specifically determine the meaning of "redisclose" in section 15(d) because the other terms in that section are broad enough to include repeated transmissions to the same party. "Disclose" also means to "expose to view" (Webster's Third New International Dictionary 645 (1993)), and Webster's gives as an example something happening more than once: "the curtain rises to [disclose] *once again* the lobby" (emphasis added) (*id.*). A fingerprint scan system requires a person to expose his or her fingerprint to the system so that the print may be compared with the stored copy, and this happens each time a person uses the system. Moreover, section 15(d) has a catchall provision that broadly applies to any way that an entity may "otherwise disseminate" a person's biometric data. "Disseminate" means "to spread or send out freely or widely." *Id.* at 656. White Castle asserts that this is something that can happen only once but provides no definitional support for that assertion. Thus, we find that the plain language of section 15(d) supports the conclusion that a claim accrues upon each transmission of a person's biometric identifier or information without prior informed consent.

[6] ¶ 30 We agree with the district court's explanation of how section 15(b) and (d) are violated:

> "Section 15(b) provides that no private entity 'may collect, capture, purchase, receive through trade, or otherwise obtain' a person's biometric information unless it first receives that person's informed consent. 740 ILCS 14/15(b). This requirement is violated—fully and immediately—when a party collects biometric information without the necessary disclosure and consent. Similarly, Section 15(d) states that entities in possession of biometric data may only disclose or 'otherwise disseminate' a person's data upon obtaining the person's consent or in limited other circumstances inapplicable here. 740 ILCS 14/15(d). Like Section 15(b), an entity violates this obligation the moment that, absent consent, it discloses or otherwise disseminates a person's biometric information to a third party." *Cothron*, 477 F. Supp. 3d at 730-31.

We believe that the plain language of section 15(b) and 15(d) demonstrates that such violations occur with every scan or transmission.

such information unless the person who consented to the disclosure specifically consents to such redisclosure''). In its reply brief,

White Castle lists several other Illinois statutes that use the term ''redisclose'' in the same manner.

¶ 31 White Castle's Other Arguments

¶ 32 We are not persuaded by White Castle's nontextual arguments in support of its single-accrual interpretation. Citing *Feltmeier v. Feltmeier*, 207 Ill. 2d 263, 278 Ill.Dec. 228, 798 N.E.2d 75 (2003), White Castle maintains that under Illinois law a claim accrues when a legal right is invaded and an injury inflicted. White Castle maintains that this court's decisions interpreting the Act define a right to secrecy in and control over biometric data and define the "injury" as loss of control or secrecy.

¶ 33 Citing *Rosenbach v. Six Flags Entertainment Corp.*, 2019 IL 123186, ¶¶ 33-34, 432 Ill.Dec. 654, 129 N.E.3d 1197, White Castle contends that the Act allows a claim for an individual's loss of the "right to control" biometric information and that, once an individual loses control over the secrecy in his or her biometric information, it cannot be recreated, resulting in the loss of any confidentiality. See also *West Bend Mutual Insurance Co. v. Krishna Schaumburg Tan, Inc.*, 2021 IL 125978, ¶ 46, 451 Ill.Dec. 1, 183 N.E.3d 47 (explaining that the Act protects a "secrecy interest"); *McDonald v. Symphony Bronzeville Park, LLC*, 2022 IL 126511, ¶ 24, 456 Ill.Dec. 845, 193 N.E.3d 1253 (reiterating that the Act protect an individual's " 'right to privacy in and control over their biometric identifiers and biometric information' " (quoting *Rosenbach*, 2019 IL 123186, ¶ 33, 432 Ill.Dec. 654, 129 N.E.3d 1197)).

¶ 34 Relying on this precedent, White Castle contends that, when a party collects or discloses biometric information without complying with the Act's notice and consent requirements, an individual's rights have been invaded, an injury has occurred, and the plaintiff may immediately sue. In other words, "the invasion and injury are one and the same and occurred upon [p]laintiff's initial loss of control of her biometrics." For purposes of claim accrual under section 15(b) and 15(d), White Castle argues that the claim accrues only on the initial scan or transmission of biometric information. Because a person cannot keep information secret from another entity that already has it, White Castle contends that the loss of an individual's right to control his or her biometrics is a "single overt act" that encompasses both the invasion of the interest and the infliction of the injury. See *Feltmeier*, 207 Ill. 2d at 279, 278 Ill.Dec. 228, 798 N.E.2d 75. Thus, a claim under section 15(b) or 15(d) can accrue only the first time the information is collected or disclosed. We disagree.

¶ 35 White Castle misreads our decisions in *Rosenbach*, *West Bend Mutual Insurance Co.*, and *McDonald*. As a preliminary observation, we note that none of those decisions involved, let alone analyzed, the question of claim accrual under the Act.

¶ 36 In fact, we find that *Rosenbach* supports our construction of section 15(b) and 15(d). This court recognized in *Rosenbach* that the Act operates to codify an individual's right to privacy in and control over his or her biometric identifiers and information. *Rosenbach*, 2019 IL 123186, ¶ 33, 432 Ill.Dec. 654, 129 N.E.3d 1197. Importantly, we determined in *Rosenbach* that a person is "aggrieved" or injured under the Act "when a private entity fails to comply with one of section 15's requirements." *Id.*

¶ 37 Focusing on the section 15 violation in *Rosenbach*, the same provision at issue in this case, we determined that, "[w]hen a private entity fails to comply with one of section 15's requirements, that violation constitutes an invasion, impairment, or denial of the statutory rights of any person or customer whose biometric identifier or biometric information is subject to the breach." *Id.* Critically, *Rosenbach* explains that an individual raising a section 15 claim

is not required to plead or prove actual damages because the statutory violation, "in itself, is sufficient to support the individual's or customer's statutory cause of action." *Id.*

¶ 38 Thus, contrary to White Castle's position, *Rosenbach* does not stand for the proposition that the "injury" for a section 15 claim is predicated on, or otherwise limited to, an initial loss of control or privacy. Instead, *Rosenbach* clearly recognizes the statutory violation itself is the "injury" for purposes of a claim under the Act, which is entirely consistent with our decision here. Our subsequent decisions in *West Bend Mutual Insurance Co.* and *McDonald* adhered to *Rosenbach*'s construction of the Act and similarly recognized that a claim under the Act is a private cause of action based exclusively on a statutory violation. *West Bend Mutual Insurance Co.*, 2021 IL 125978, ¶ 46, 451 Ill.Dec. 1, 183 N.E.3d 47 (citing *Rosenbach*); *McDonald*, 2022 IL 126511, ¶ 23, 456 Ill.Dec. 845, 193 N.E.3d 1253 (citing *Rosenbach*).

[7] ¶ 39 Put simply, our caselaw holds that, for purposes of an injury under section 15 of the Act, the court must determine whether a statutory provision was violated. Consequently, we reject White Castle's argument that we should limit a claim under section 15 to the first time that a private entity scans or transmits a party's biometric identifier or biometric information. No such limitation appears in the statute. We cannot rewrite a statute to create new elements or limitations not included by the legislature. *Zahn v. North American Power & Gas, LLC*, 2016 IL 120526, ¶ 15, 410 Ill.Dec. 947, 72 N.E.3d 333.

¶ 40 White Castle and *amici* supporting White Castle's position caution this court against construing section 15(b) and section 15(d) to mean that a claim accrues for each scan or transmission of biometric information made in violation of those provisions. They assert that, because section 20 of the Act sets forth liquidated damages that a party may recover for "each violation," allowing multiple or repeated accruals of claims by one individual could potentially result in punitive and "astronomical" damage awards that would constitute "annihilative liability" not contemplated by the legislature and possibly be unconstitutional. For example, White Castle estimates that if plaintiff is successful and allowed to bring her claims on behalf of as many as 9500 current and former White Castle employees, class-wide damages in her action may exceed $17 billion. We have found, however, that the statutory language clearly supports plaintiff's position. As the district court observed, this court has repeatedly held that, where statutory language is clear, it must be given effect, " 'even though the consequences may be harsh, unjust, absurd or unwise.' " (Emphasis omitted.) *Cothron*, 477 F. Supp. 3d at 734 (quoting *Petersen v. Wallach*, 198 Ill. 2d 439, 447, 261 Ill.Dec. 728, 764 N.E.2d 19 (2002)).

¶ 41 This court has repeatedly recognized the potential for significant damages awards under the Act. *Rosenbach*, 2019 IL 123186, ¶¶ 36-37, 432 Ill.Dec. 654, 129 N.E.3d 1197; *McDonald*, 2022 IL 126511, ¶ 48, 456 Ill.Dec. 845, 193 N.E.3d 1253. This court explained that the legislature intended to subject private entities who fail to follow the statute's requirements to substantial potential liability. *Rosenbach*, 2019 IL 123186, ¶ 36, 432 Ill.Dec. 654, 129 N.E.3d 1197. The purpose in doing so was to give private entities "the strongest possible incentive to conform to the law and prevent problems before they occur." *Id.* ¶ 37. As the Seventh Circuit noted, private entities would have "little incentive to course correct and comply if subsequent

violations carry no legal consequences." *Cothron*, 20 F.4th at 1165.

¶ 42 All of that said, we generally agree with our appellate court's recognition that "[a] trial court presiding over a class action—a creature of equity—would certainly possess the discretion to fashion a damage award that (1) fairly compensated claiming class members and (2) included an amount designed to deter future violations, without destroying defendant's business." *Central Mutual Insurance Co. v. Tracy's Treasures, Inc.*, 2014 IL App (1st) 123339, ¶ 72, 385 Ill.Dec. 904, 19 N.E.3d 1100. It also appears that the General Assembly chose to make damages discretionary rather than mandatory under the Act. See 740 ILCS 14/20 (West 2018) (detailing the amounts and types of damages that a "prevailing party *may* recover" (emphasis added)); see also *Watson*, 2021 IL App (1st) 210279, ¶ 66 n.4, 458 Ill.Dec. 267, 196 N.E.3d 571 (concluding that damages under the Act are discretionary rather than mandatory). While we explained in *Rosenbach* that "subjecting private entities who fail to follow the statute's requirements to substantial potential liability, including liquidated damages, injunctions, attorney fees, and litigation expenses 'for each violation' of the law" is one of the principal means that the Illinois legislature adopted to achieve the Act's objectives of protecting biometric information (*Rosenbach*, 2019 IL 123186, ¶ 36, 432 Ill.Dec. 654, 129 N.E.3d 1197 (quoting 740 ILCS 14/20 (West 2016))), there is no language in the Act suggesting legislative intent to authorize a damages award that would result in the financial destruction of a business.

¶ 43 Ultimately, however, we continue to believe that policy-based concerns about potentially excessive damage awards under the Act are best addressed by the legislature. See *McDonald*, 2022 IL 126511, ¶¶ 48-49, 456 Ill.Dec. 845, 193 N.E.3d 1253 (observing that violations of the Act have the potential for "substantial consequences" and large damage awards but concluding that "whether a different balance should be struck *** is a question more appropriately addressed to the legislature"). We respectfully suggest that the legislature review these policy concerns and make clear its intent regarding the assessment of damages under the Act.

¶ 44 III. CONCLUSION

¶ 45 In sum, we conclude that the plain language of section 15(b) and 15(d) shows that a claim accrues under the Act with every scan or transmission of biometric identifiers or biometric information without prior informed consent.

¶ 46 Certified question answered.

Justices Neville, Cunningham, and O'Brien concurred in the judgment and opinion.

Justice Overstreet dissented, with opinion, joined by Chief Justice Theis and Justice Holder White.

Justice Overstreet dissented upon denial of rehearing, with opinion, joined by Chief Justice Theis and Justice Holder White.

¶ 47 JUSTICE OVERSTREET, dissenting:

¶ 48 I respectfully disagree with my colleagues' answer to the certified question. The majority's interpretation cannot be reconciled with the plain language of the statute, the purposes behind the Biometric Information Privacy Act (Act) (740 ILCS 14/1 *et seq.* (West 2018)), or this court's case law, and it will lead to consequences that the legislature could not have intended. Moreover, the majority's interpretation renders compliance with the Act especially burdensome for employers. This court should answer the certified question

by saying that a claim accrues under section 15(b) or 15(d) of the Act (*id.* § 15(b), (d)) only upon the first scan or transmission.

¶ 49 The principles guiding our analysis are set forth in *Feltmeier v. Feltmeier*, 207 Ill. 2d 263, 278-79, 278 Ill.Dec. 228, 798 N.E.2d 75 (2003). This court held that, generally, "a limitations period begins to run when facts exist that authorize one party to maintain an action against another." *Id.* at 278, 278 Ill.Dec. 228, 798 N.E.2d 75. Moreover, "where there is a single overt act from which subsequent damages may flow, the statute begins to run on the date the defendant invaded the plaintiff's interest and inflicted injury." *Id.* at 279, 278 Ill.Dec. 228, 798 N.E.2d 75. Thus, to resolve the question of when claims accrue under section 15(b) and (d), we must consider whether plaintiff has alleged a single overt act from which subsequent damages may flow.

¶ 50 Two considerations inform this inquiry: (1) what interests does the Act seek to protect and (2) what constitutes a violation of section 15(b) or (d) under the plain language of those provisions? This court has addressed the first question several times. In *Rosenbach*, this court explained that "[t]he Act vests in individuals and customers the right to control their biometric information by requiring notice before collection and giving them the power to say no by withholding consent." *Rosenbach v. Six Flags Entertainment Corp.*, 2019 IL 123186, ¶ 34, 432 Ill.Dec. 654, 129 N.E.3d 1197. This court further explained that the "precise harm" the legislature sought to prevent was an individual's loss of the right to maintain biometric privacy. *Id.* In *West Bend Mutual Insurance Co. v. Krishna Schaumburg Tan, Inc.*, 2021 IL 125978, ¶ 46, 451 Ill.Dec. 1, 183 N.E.3d 47, this court stated that the Act "protects a secrecy interest," such as an individual's right to "keep his or her personal identifying information like fingerprints secret." Finally, in *McDonald v. Symphony Bronzeville Park, LLC*, 2022 IL 126511, ¶ 24, 456 Ill.Dec. 845, 193 N.E.3d 1253 (quoting *Rosenbach*, 2019 IL 123186, ¶ 33, 432 Ill.Dec. 654, 129 N.E.3d 1197), this court reiterated that the Act protects an individual's " 'right to privacy in and control over their biometric identifiers and biometric information.' "

¶ 51 Turning to the language of the statute, section 15(b) requires certain disclosures to be made, and a written release obtained, before that entity may "collect, capture, purchase, receive through trade, or otherwise obtain a person's or a customer's biometric identifier or biometric information." 740 ILCS 14/15(b) (West 2018). The statute thus broadly applies to any way that a private entity obtains a person's or customer's biometric information without consent. It is axiomatic, however, that a private entity may obtain any one type of a person's biometric information only once, at least until that biometric identifier or information is destroyed. With subsequent authentication scans, the private entity is not obtaining anything it does not already have. The majority commits the same analytical error as the appellate court in *Watson v. Legacy Healthcare Financial Services, LLC*, 2021 IL App (1st) 210279, 458 Ill.Dec. 267, 196 N.E.3d 571.

¶ 52 The *Watson* court held that section 15(b) means that "an entity must inform a subject and receive a release 'before' it collects or captures. *** [T]here is no temporal limitation on 'collects' or 'captures,' thereby applying to the first, as well as the last, collection or capture." *Id.* ¶ 57. *Watson*'s error is in assuming that the private entity is collecting or capturing a person's biometric information with every scan. The majority makes the same error, equating

every scan with a "collection." *Supra* ¶ 24. But this is not correct. Again, section 15(b) broadly applies to any way that a private entity obtains a person's biometric identifier or information. But this can happen only once. Here, White Castle obtains an employee's biometric identifier the first time that a fingerprint is scanned. White Castle is obviously not obtaining it with subsequent scans—White Castle already has it. As plaintiff acknowledges in her complaint, White Castle obtains an employee's fingerprint and stores it in its database. The employee is then required to use his or her fingerprint to access paystubs or White Castle computers. With the subsequent scans, the fingerprint is not being obtained, it is being compared to the fingerprint that White Castle already has. This fact is made plain in plaintiff's complaint. Plaintiff states, "Plaintiff was required to scan and register her fingerprint(s) so *White Castle could use them as an authentication method* for Plaintiff to access the computer as a manager and to access her paystubs as an hourly employee as a condition of her employment with White Castle." (Emphasis added.) The subsequent scans did not collect any new information from plaintiff, and she suffered no additional loss of control over her biometric information.

¶ 53 The above reading of the statute is the only one consistent with the purposes of the Act. As this court explained in *Rosenbach*, the "precise harm" the legislature was addressing was an individual's loss of the right to maintain biometric privacy. *Rosenbach*, 2019 IL 123186, ¶¶ 33-34, 432 Ill.Dec. 654, 129 N.E.3d 1197; *McDonald*, 2022 IL 126511, ¶ 24, 456 Ill.Dec. 845, 193 N.E.3d 1253. And in *West Bend Mutual Insurance Co.*, 2021 IL 125978, ¶ 46, 451 Ill.Dec. 1, 183 N.E.3d 47, this court stated that the Act "protects a secrecy interest," such as an individual's right to "keep his or her personal identifying information like fingerprints secret."[3] An individual loses his or her privacy in and control over biometric information upon the first scan. At this point his or her secrecy interest is lost—he or she may no longer keep his or her personally identifying information a secret from the private entity. Once that entity has the fingerprint, there is no additional loss of control, loss of privacy, or loss of secrecy from subsequent scans of the same finger. This is true whether the same finger is scanned a few times or one million times. The individual loses control over it only once. Accordingly, under *Feltmeier*, a section 15(b) claim accrues the first time a scan is taken without the required disclosures and consent. There was a single overt act from which damages flow, because the employer did not obtain anything with subsequent scans that it did not already have, and the employee did not lose control over and privacy in her biometric information with subsequent scans.

¶ 54 Thus, I agree with White Castle's argument on appeal: "Plaintiff's injury under [section] 15(b) occurred, if at all, the first time that her biometrics were collected by White Castle without her consent, not each subsequent time that her finger

3. The majority denies that our prior cases support White Castle's argument. The majority states that

> "*Rosenbach* does not stand for the proposition that the 'injury' for a section 15 claim is predicated on, or otherwise limited to, an initial loss of control or privacy. Instead, *Rosenbach* clearly recognizes the statutory violation itself is the 'injury' for purposes of a claim under the Act, which is entirely consistent with our decision here." *Supra* ¶ 38.

The majority assumes what it seeks to prove. The majority never explains how there is more than one loss of control or privacy with subsequent scans or how subsequent scans are a "statutory violation."

was rescanned." There is only *one* loss of control or privacy, and this happens when the information is first obtained. Indeed, the legislative findings in the Act confirm this. See 740 ILCS 14/5(c) (West 2018) ("[S]ocial security numbers, when compromised, can be changed. Biometrics, however, are biologically unique to the individual; therefore, *once compromised, the individual has no recourse* ***." (Emphasis added.)). The majority tellingly never explains how there is any additional loss of control or privacy with subsequent scans that are used to compare the employee's fingerprint with the fingerprint that White Castle already possesses. The majority simply asserts that every scan is a collection and therefore a violation of the Act. *Supra* ¶ 24. And this is the key flaw in the majority's analysis: it begs—rather than answers—the most important question before the court.

¶ 55 The analysis is the same for section 15(d) claims. Under section 15(d), a private entity in possession of a person's biometric identifier or information must obtain that person's consent before it may "disclose, redisclose, or otherwise disseminate a person's or a customer's biometric identifier or biometric information." 740 ILCS 14/15(d) (West 2018). With respect to any one party to whom the biometric information is disclosed, the person loses control of her biometric identifier or information only once. There is no further loss of control, privacy, or secrecy with subsequent provision of the identical biometric information to the same party.

¶ 56 The majority reaches the conclusion that section 15(d) includes repeated transmission to the same party (*supra* ¶ 28) only when willing to ignore (1) the plain meaning of the word "disclose" and (2) the way in which the Illinois legislature consistently uses the word "redisclose." The word "disclose" means "to make known" or "to reveal *** something that is secret or not generally known" (Webster's Third New International Dictionary 645 (1993)) or "[t]o make (something) known or public," "to reveal" (Black's Law Dictionary 583 (11th ed. 2019)); see also *Cothron v. White Castle System, Inc.*, 20 F.4th 1156, 1163 (7th Cir. 2021) (explaining that "the ordinary meaning of 'disclose' connotes a new revelation" (citing Black's Law Dictionary (11th ed. 2019))). With respect to a disclosure to any one party, this is obviously something that can happen only once. You can tell someone your middle name an unlimited number of times, but you can disclose it to them only once. Therefore, when something is "redisclosed" or "disclosed again," it must be to *a different party.* As the Seventh Circuit explained, "[r]epeated transmissions of the same biometric identifier to the same third party are not new revelations." *Cothron*, 20 F.4th at 1163.

¶ 57 Although the majority holds that it need not determine the meaning of "redisclose" in section 15(d) (*supra* ¶ 28), the definition of "redisclose" found in the WordSense Dictionary, https://www.wordsense.eu/redisclose/ (last visited Jan. 7, 2023) [https://perma.cc/63VU-RRTK] ("[t]o disclose again; *to disclose what has been disclosed to the discloser*" (emphasis added)) is consistent with how the term is used by the Illinois legislature. See *Cothron*, 20 F.4th at 1164. As noted by the majority, the Seventh Circuit gave two examples: section 35.3(b) of the Children and Family Services Act (20 ILCS 505/35.3(b) (West 2020) ("[a] person to whom disclosure of a foster parent's name, address, or telephone number is made under this Section shall not redisclose that information except as provided in this Act or the Juvenile Court Act of 1987")) and section 5 of the Mental Health and Developmental Disabilities Confidentiality Act (740 ILCS 110/5(d) (West 2020) ("[n]o per-

son or agency to whom any information is disclosed under this Section may redisclose such information unless the person who consented to the disclosure specifically consents to such redisclosure")). *Supra* ¶ 28 n.2; *Cothron*, 20 F.4th at 1164. In its reply brief, defendant lists several other Illinois statutes that use the term "redisclose" in the same manner.

¶ 58 Thus, if we consider the plain meaning of the word "disclose" and the manner in which the legislature consistently uses the term "redisclose," it is clear that section 15(d)'s use of the word "redisclose" does *not* mean repeated disclosures to the same party (a logical impossibility) but rather refers to downstream disclosures to third parties. In other words, if the party in possession of biometric information discloses it to a third party, consent is required before that third party rediscloses the information to anyone else. Plaintiff's only response to this argument is to claim that this interpretation renders the word "redisclose" in section 15(d) superfluous or redundant, as any disclosure to a new party would be covered by the word "disclose." But all that plaintiff can demonstrate with this argument is that the word "redisclose" is probably unnecessary in the English language (perhaps why Webster's does not define it). In the other statutes quoted above, the legislature could have used "disclose" instead of "redisclose," and the meaning of the provisions would not change. But the reality that plaintiff cannot avoid is that (1) the legislature consistently uses the term "redisclose" to mean "to disclose what has been disclosed to the discloser" and (2) a "redisclosure" to the same party is a logical impossibility.

¶ 59 The majority acknowledges that, in construing the Act as it has, the consequences may be harsh, unjust, absurd, or otherwise unwise. *Supra* ¶ 40. In doing so, the majority ignores that the construction of a statute that leads to an absurd result must be avoided. *Mulligan v. Joliet Regional Port District*, 123 Ill. 2d 303, 312-13, 123 Ill.Dec. 489, 527 N.E.2d 1264 (1988). Instead, a court construing the language of a statute should

> " 'assume that the legislature did not intend to produce an absurd or unjust result' (*State Farm Fire & Casualty Co. v. Yapejian*, 152 Ill. 2d 533, 541 [178 Ill.Dec. 745, 605 N.E.2d 539] (1992)), and [should] avoid a construction leading to an absurd result, if possible (*City of East St. Louis v. Union Electric Co.*, 37 Ill. 2d 537, 542 [229 N.E.2d 522] (1967))." *Hubble v. Bi-State Development Agency of the Illinois-Missouri Metropolitan District*, 238 Ill. 2d 262, 283, 345 Ill.Dec. 44, 938 N.E.2d 483 (2010).

¶ 60 In considering the consequences of construing the Act one way or another and giving each word of the statute a reasonable meaning (*Haage v. Zavala*, 2021 IL 125918, ¶ 44, 451 Ill.Dec. 373, 183 N.E.3d 830), two significant consequences militate against the majority's construction. First, under the majority's rule, plaintiffs would be incentivized to delay bringing their claims as long as possible. If every scan is a separate, actionable violation, qualifying for an award of liquidated damages, then it is in a plaintiff's interest to delay bringing suit as long as possible to keep racking up damages. Because there is no additional loss of privacy, secrecy, or control once a private entity has obtained a person's biometric information, the plaintiff loses nothing by waiting to bring suit until as many scans as possible are accumulated. This point, all by itself, should convince the majority that its interpretation is wrong. If, indeed, a party *was* losing control over his or her biometric information with every scan, this incentive would simply not exist.

¶ 61 Next, the majority's construction of the Act could easily lead to annihilative liability for businesses. As the Seventh Circuit explained:

> "White Castle reminds us that the Act provides for statutory damages of $1,000 or $5,000 for 'each violation' of the statute. § 14/20. Because White Castle's employees scan their fingerprints frequently, perhaps even multiple times per shift, Cothron's interpretation could yield staggering damages awards in this case and others like it. If a new claim accrues with each scan, as Cothron argues, violators face potentially crippling financial liability." *Cothron*, 20 F.4th at 1165.

The majority acknowledges White Castle's estimate that, if plaintiff is successful in her claims on behalf of as many as 9500 current and former White Castle employees, damages in this action may exceed *$17 billion. Supra* ¶ 40. Nevertheless, the majority brushes this concern aside by stating that "policy-based concerns about potentially excessive damage awards under the Act are best addressed by the legislature." *Supra* ¶ 43.

¶ 62 However, we are not being asked to render a decision on the damages in this case or to make a policy-based decision about excessive damages. Rather, we are being asked to determine legislative intent by considering the consequences of construing the statute one way or another. Surely the potential imposition of crippling liability on businesses is a proper consequence to consider. When the plaintiff argued in the Seventh Circuit that the calculation of damages is separate from claim accrual, that court pointed out that plaintiff "does not explain how alternative theories of calculating damages might be reconciled with the text of section 20." *Cothron*, 20 F.4th at 1165. Given that plaintiff argues that every scan is a violation and the statute sets forth what an aggrieved person may recover for "every violation," it is certainly proper to consider the consequences of plaintiff's interpretation of the statute.

¶ 63 Imposing punitive, crippling liability on businesses could not have been a goal of the Act, nor did the legislature intend to impose damages wildly exceeding any remotely reasonable estimate of harm. Rather, the legislature recognizes that the use of biometrics is an emerging area whose ramifications are not completely known and that it is in the public interest to regulate the "collection, use, safeguarding, handling, storage, retention, and destruction of biometric identifiers and information." 740 ILCS 14/5 (West 2018). Indeed, the statute's provision of liquidated damages of between $1000 and $5000 is itself evidence that the legislature did not intend to impose ruinous liability on businesses. Moreover, the majority's interpretation would lead to the absurd result that an entity that commits what most people would probably consider the worst type of violation of the Act—intentionally selling their biometric information to a third party with no knowledge of what the third party intended to do with it—would be subject to liquidated damages of $5000, while an employer with no ill intent that used that same person's fingerprint as an authentication method to allow access to his or her computer could be subject to damages hundreds or thousands of times that amount. This could not have been the legislature's intent.

¶ 64 The majority fails to set forth any similar dire consequences with White Castle's interpretation. With respect to control, the individual does not lose all control over his or her biometric data. Consent is still required before the private entity may disclose it to anyone else (*id.* § 15(d)), and that is the real concern once an individual has consented to a private entity collecting

a biometric identifier or information. With respect to postcollection, White Castle correctly explains:

> "[T]he Privacy Act itself contains numerous provisions that serve its prophylactic goals even after the first collection or disclosure. Specifically, White Castle has a duty to safeguard information it has collected. 740 ILCS 14/15(a), (e). White Castle has an ongoing duty to destroy any biometric data that current employees have already scanned, once the data's purpose is fulfilled. *Id.* at 15(a). Section 15(c) prohibits the sale of biometrics, so any sale of biometrics would give rise to a new claim. *Id.* at 15(c). Section 15(d) prohibits the disclosure of biometrics to a third party without consent. *Id.* at 15(d). So disclosure of biometrics to *a new third party* would give rise to a new claim—a straightforward reading of the statute that has *always* been White Castle's position ***." (Emphases in original.)

Thus, the Act very tightly regulates what private entities may do with the biometric information they collect, and individuals maintain a measure of control over their biometric data.

¶ 65 While discussing the strengths and weaknesses of each side's argument, the Seventh Circuit suggested two potential problems with a single accrual rule. First, that court speculated that the premise that "two violations aren't worse than one" may "simply be wrong." *Cothron*, 20 F.4th at 1165. The court speculated that "[r]epeated collections or disclosures of biometric data, even if by or to the same entity, might increase the risk of misuse or mishandling of biometric data." *Id.* This assumes, however, that repeated *scans* of the same biometric identifier by the same entity are repeated "*collections*" or "*disclosures*," which is a dubious proposition. Indeed, the Seventh Circuit itself had earlier explained that a disclosure is a "new revelation" and that "[r]epeated transmissions of the same biometric identifier to the same third party are not new revelations." *Id.* at 1163. Moreover, there is no reason to believe that subsequent scans of the same biometric identifier used *for authentication purposes* against a stored copy would increase the risk of misuse or mishandling of biometric data. Second, the Seventh Circuit speculated that, under a single accrual rule, "[o]nce a private entity has violated the Act, it would have little incentive to course correct and comply if subsequent violations carry no legal consequences." *Id.* at 1165. The Act, however, provides for injunctive relief. See 740 ILCS 14/20(4) (West 2018); see also *McDonald*, 2022 IL 126511, ¶ 6, 456 Ill.Dec. 845, 193 N.E.3d 1253 ("McDonald and the putative class sought (1) injunctive and equitable relief to protect their interests by requiring Bronzeville to comply with the Privacy Act's requirements."). Moreover, there is no reason to believe that an employer would rather be on the hook for liquidated damages to every new employee it hires rather than simply providing the notice and obtaining the consent that the Act requires. Finally, as White Castle points out:

> "Plaintiff purports to allege two violations of the Act, for up to 9,500 current and former White Castle employees. Even under a single accrual method, damages could equate to between $19 million and $95 million if Plaintiff's claims had been timely made, assuming that Plaintiff could recover separately under Section 15(b) and 15(d). Even under a 'one violation per employee' calculation of $1,000 per employee, damages could equal $9.5 million. These numbers, in and of themselves, are sufficient to incentivize [Act] compliance."

The consequences of construing the statute to provide multiple accruals are severe,

and neither plaintiff nor the majority has identified similar severe consequences to White Castle's interpretation.

¶ 66 In sum, the Act's legislative findings and intent show that the legislature recognized the utility of biometric technology and wanted to facilitate its safe use by private entities by regulating how it is used. See 740 ILCS 14/5(a) (West 2018) ("The use of biometrics is growing in the business and security screening sectors and appears to promise streamlined financial transactions and security screenings."). The Act thus requires notice and consent before biometric information is collected or disclosed. To encourage compliance and to prevent and deter violations, the Act provides for injunctive relief and liquidated damages. I see nothing in the Act indicating that the legislature intended to impose cumbersome requirements or punitive, crippling liability on corporations for multiple authentication scans of the same biometric identifier. The legislature's intent was to ensure the safe use of biometric information, not to discourage its use altogether.

¶ 67 CHIEF JUSTICE THEIS and JUSTICE HOLDER WHITE join in this dissent.

¶ 68 SEPARATE OPINION UPON DENIAL OF REHEARING

¶ 69 JUSTICE OVERSTREET, dissenting:

¶ 70 I respectfully dissent upon my colleagues' denial of White Castle's petition for rehearing. Pursuant to Illinois Supreme Court Rule 367(b) (eff. Nov. 1, 2017), White Castle has successfully asserted claims overlooked or misapprehended by the majority's opinion. Filing *amicus curiae* briefs in support of White Castle's petition, the Illinois Chamber of Commerce; Chamber of Commerce of the United States; Retail Litigation Center, Inc.; Restaurant Law Center; National Retail Federation; Illinois Restaurant Association; Illinois Manufacturers' Association; National Association of Manufacturers; Illinois Health and Hospital Association; Illinois Retail Merchants Association; Chemical Industry Council of Illinois; Illinois Trucking Association; Mid-West Truckers Association; Chicagoland Chamber of Commerce; American Trucking Associations, Inc.; and American Property Casualty Insurance Association have provided support for those claims. I would allow rehearing to address White Castle's argument that this court's opinion cemented an erroneous interpretation of the Biometric Information Privacy Act (Act) (740 ILCS 14/1 *et seq.* (West 2018)) that subverted the intent of the Illinois General Assembly, threatens the survival of businesses in Illinois, and consequently raises significant constitutional due process concerns. The legislature never intended the Act to be a mechanism to impose extraordinary damages on businesses or a vehicle for litigants to leverage the exposure of exorbitant statutory damages to extract massive settlements. Yet, this court construed the Act to allow these unintended consequences, and as a result, this construction raises serious issues as to the Act's validity.

¶ 71 As argued in White Castle's initial briefing before this court, the legislature intended the Act to be a remedial statute that implemented prophylactic measures to prevent the compromise of biometrics by allowing individuals to choose to provide (or not to provide) their data after being advised that it is being collected, stored, and potentially disclosed. See *McDonald v. Symphony Bronzeville Park, LLC*, 2022 IL 126511, ¶ 48, 456 Ill.Dec. 845, 193 N.E.3d 1253; *Rosenbach v. Six Flags Entertainment Corp.*, 2019 IL 123186, ¶ 36, 432 Ill.Dec. 654, 129 N.E.3d

1197 (discussing General Assembly's goal, through the Act, of preventing problems "before they occur" by imposing safeguards to protect an individual's privacy rights in their biometric identifiers and information). Remedial statutes "are designed to grant remedies for the protection of rights, introduce regulation conducive to the public good, or cure public evils." *Standard Mutual Insurance Co. v. Lay*, 2013 IL 114617, ¶ 31, 371 Ill.Dec. 1, 989 N.E.2d 591. Remedial statutes are distinct from penal statutes, which operate as "punishment for the nonperformance of an act or for the performance of an unlawful act" and "require[ ] the transgressor to pay a penalty without regard to proof of any actual monetary injury sustained." (Internal quotation marks omitted.) *Goldfine v. Barack, Ferrazzano, Kirschbaum & Perlman*, 2014 IL 116362, ¶ 28, 385 Ill.Dec. 339, 18 N.E.3d 884.

¶ 72 Damages under the Act are the greater of actual damages or liquidated damages. 740 ILCS 14/20 (West 2018). Arguably, this consideration is indicative of the fact that liquidated damages were intended to be awarded where actual damages were too small and difficult to prove, not as a multiplier by thousands for each time technology is used. Yet, pursuant to this court's per-scan construction of the Act, where claims and damages accrue under the Act with each scan of a finger and each transmission to the same technology vendors, the results will vastly exceed reasonable ratios between the damages awarded and the offense at issue.

¶ 73 The goal of construing a statute is to give effect to the intent of the legislature. *Roberts v. Alexandria Transportation, Inc.*, 2021 IL 126249, ¶ 29, 451 Ill. Dec. 244, 183 N.E.3d 701. For the majority's flawed construction of the Act to prevail, it must be presumed that our legislature resolutely passed the Act for the purpose of establishing a statutory landmine, destroying commerce in its wake when negligently triggered. This flawed presumption of the legislature's intent is required under the majority's construction because, under the majority's view, the legislature intended for Illinois businesses to be subject to cataclysmic, jobs-killing damages, potentially up to billions of dollars, for violations of the Act. No reported case has ever made a similar assumption about our legislature's intent in passing legislation, likely because it does not withstand reason to believe the legislature intended this absurd result. The majority's construction of the Act does not give effect to the legislature's true intent but instead eviscerates the legislature's remedial purpose of the Act and impermissibly recasts the Act as one that is penal in nature rather than remedial. This construction not only violates basic and fundamental principles of statutory construction but also raises serious due process concerns that, I believe, must be addressed by this court on rehearing.

¶ 74 Plaintiff alleges that she scanned her finger each time she accessed a work computer and each time she accessed her weekly pay stub. Assuming plaintiff worked 5 days per week for 50 weeks per year and accessed the computer each day and her pay stub weekly, her total scans would exceed 1500 over a five-year limitations period, which may result in damages exceeding $7 million for this single employee despite the fact that plaintiff has not alleged a data breach or any costs or other damages associated with identity theft or compromised data. The excessive nature of plaintiff's potential damages is exacerbated in the class-action context. Thus, as a result of this court's construction of the Act in this case, this court has undermined any connection between potential damages and actual monetary injury sustained and has thus arguably mutated the Act's provisions

into ones that are penal in nature. In doing so, this court failed to interpret the Act to avoid a construction that would raise doubts as to its validity. *People v. Nastasio*, 19 Ill. 2d 524, 529, 168 N.E.2d 728 (1960) (it is our duty to interpret a statute so as to promote its essential purposes and to avoid, if possible, a construction that would raise doubts as to its validity).

¶ 75 The legislature's authority to set a statutory penalty is limited by the requirements of due process. *In re Marriage of Miller*, 227 Ill. 2d 185, 197, 316 Ill.Dec. 225, 879 N.E.2d 292 (2007); *St. Louis, Iron Mountain & Southern Ry. Co. v. Williams*, 251 U.S. 63, 66, 40 S.Ct. 71, 64 L.Ed. 139 (1919). When a statute authorizes an award that is so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable, it does not further a legitimate government purpose, runs afoul of the due process clause, and is unconstitutional. See *St. Louis, Iron Mountain & Southern Ry. Co.*, 251 U.S. at 67, 40 S.Ct. 71; see also *People v. Bradley*, 79 Ill. 2d 410, 417, 38 Ill.Dec. 575, 403 N.E.2d 1029 (1980) (pursuant to due process clause of the Illinois Constitution, the legislature properly exercises its police power when its statute is " 'reasonably designed to remedy the evils which the legislature has determined to be a threat to the public health, safety[,] and general welfare' ") (quoting *Heimgaertner v. Benjamin Electric Manufacturing Co.*, 6 Ill. 2d 152, 159, 128 N.E.2d 691 (1955))).

¶ 76 The implications of the majority's opinion are severe and arguably oppressive, wholly disproportioned to the violations addressed in the Act, and unreasonable. As noted in the majority's opinion, White Castle estimates that, if plaintiff is successful and allowed to bring her claims on behalf of as many as 9500 current and former White Castle employees, class-wide damages in her action may exceed $17 billion. *Supra* ¶ 40. White Castle and *amici* note hundreds of pending cases involve similarly gigantic damages claims that could toll the death knell for even large, financially successful businesses.

¶ 77 This court's opinion has only exacerbated the confusion regarding the potential for exorbitant damages. In Rogers v. BNSF Ry. Co., No. 1:19-cv-03083, 2019 WL 13231781 (May 7, 2019), for example, the jury found in favor of a class of 45,600 truck drivers alleging that the defendant violated the Act on 45,600 occasions, despite no evidence that class members' alleged biometric data was compromised or improperly used. Notification of Docket Entry, ECF No. 223, Rogers v. BNSF Ry. Co., No. 1:19-cv-03083, 2022 WL 16721966 (N.D. Ill. Oct. 12, 2022). The federal district court entered judgment on the verdict and assessed damages of $228 million against the defendant based on the Act's provision for statutory damages of $5000 for each intentional or reckless violation of the Act identified by the jury. *Id.* After this court's decision in this case, the plaintiff argued that the amount should be multiplied. See Response at 2, ECF No. 256, Rogers v. BNSF Ry. Co., No. 1:19-cv-03083 (N.D. Ill. Mar. 3, 2023) (stating that the language in this court's opinion regarding the "discretionary" nature of damages "is *dictum* stacked upon *dictum* and is not precedential"); Plaintiff's Rule 59 Motion to Amend Judgment at 1, ECF No. 236, Rogers v. BNSF Ry. Co., No. 1:19-cv-03083 (N.D. Ill. Nov. 9, 2022) ("The sole purpose of this [m]otion is to ask the [c]ourt to adjust the statutory damages to conform to the undisputed evidence that there were actually 136,800 violations ***."). Likewise, cases alleging violations of the Act reportedly jumped 65% in Illinois circuit courts in the two months since this court's ruling. See, *e.g.*, Stephen Joyce & Skye Witley, *Illinois Biometric Privacy Cases Jump 65% After Seminal Ruling*,

Bloomberg L. (May 2, 2023), https://news.bloomberglaw.com/privacy-and-data-security/illinois-biometric-privacy-cases-jump-65-after-seminal-ruling [https://perma.cc/BQT8-7QKR] (noting that many smaller companies implemented the biometric technology to gain efficiencies with fewer resources, now those resources are being spent defending litigation, and growing liability risks may push more businesses into settlement agreements).

¶ 78 The parties' pleadings highlight that the potential ramifications for businesses operating in Illinois may be catastrophic. If an employee scans his finger (or hand, face, retina, etc.) on a timeclock four times per day—once at the beginning and end of each day and again to clock in and clock out for one meal break—over the course of a year, a single employee would have scanned alleged biometric identifiers or information more than 1000 times. Where a new claim accrues each time the employee scans on the system and the employee can recover a separate award of statutory liquidated damages for each scan, the potential damages for a single employee over the course of a year against a business negligently violating the Act would approximate $1 million. The potential damages against a defendant acting intentionally or recklessly would approximate $5 million. A small business with 50 such employees would face staggering statutory liquidated damages.

¶ 79 Moreover, an employer who employs 100 employees in a given year and who secures consent forms from 95% of its employees before using a biometric time clock could face statutory liquidated damages of $100,000 if the remaining five employees use the timeclock for a single week before the employer secures consent forms from them. Multiplied over a five-year period, the potential exposure would be $500,000 for an employer who is working diligently to ensure compliance with the Act while also juggling staffing issues and high turnover during a volatile labor market.

¶ 80 *Amici* note that the risk of harm the Act was enacted to prevent has not materialized in the 15 years since it was passed into law: in the more than 1700 cases filed since 2019, no case involved a plaintiff alleging that his or her biometric data has been subject to a data breach or led to identity theft. Thus, the potential astronomical damages awards under the majority's construction of the Act would be grossly disproportionate to the alleged harm the Act seeks to redress.

¶ 81 In egregiously expanding a business's potential liability, this court suggested that the legislature review these policy concerns and clarify its intent regarding the assessment of damages under the Act. See *supra* ¶ 43. As I noted in my initial dissent, the legislature's intent regarding the assessment of damages involved a one-time scan interpretation and was clear. *Supra* ¶ 65. Notwithstanding the majority's inconsistent conclusions that the Act's language was clear and simultaneously in need of clarification by the legislature (*supra* ¶ 43), it was the majority's interpretation that caused the ambiguity for which it needed clarification by the legislature. It was the majority's interpretation that raised constitutional issues contemplated by White Castle during initial briefing before this court but not addressed in this court's opinion.

¶ 82 In this court's opinion, the majority acknowledged that the consequences of its holding were "harsh, unjust, absurd[,] or unwise" (internal quotation marks omitted) (*supra* ¶ 40) and that no language in the Act suggested a legislative intent to authorize a damages award that would result in the financial destruction of a business (*supra* ¶ 42). In nevertheless holding as

appropriate a per-scan interpretation of the Act, which thereby authorized exorbitant damages awards threatening financial ruin for some businesses, this court has raised constitutional due process concerns threatening the Act's validity. Considering that the damage awards will now be arbitrary, unclear, and potentially exorbitant, is the statute reasonably designed to remedy the evils that the legislature determined to be a threat to the public health, safety, and general welfare? See *Heimgaertner*, 6 Ill. 2d at 159, 128 N.E.2d 691.

¶ 83 Accordingly, I would vote to grant rehearing to determine if the resulting penalty to Illinois businesses passes constitutional scrutiny. See *Bradley*, 79 Ill. 2d at 418, 38 Ill.Dec. 575, 403 N.E.2d 1029 (holding statute violated due process where penalty was "not reasonably designed to remedy the evil" the legislature identified); *People v. Morris*, 136 Ill. 2d 157, 162, 143 Ill.Dec. 300, 554 N.E.2d 235 (1990) (holding statutory penalty unconstitutional where it did not advance legislature's stated purpose in enacting statute).

¶ 84 At a minimum, I would grant White Castle's request for rehearing to allow this court to clarify paragraphs 40 through 43 of the opinion and provide guidance to the lower courts regarding the imposition of damages under the Act. These paragraphs highlight the conflicts that result from the opinion's accrual construction: Section 20 permits recovery for "each violation," damages "appear[ ]" to be discretionary, class members should be compensated and future violations deterred "without destroying defendant's business," and policy concerns exist over "excessive damage awards." *Supra* ¶¶ 40-43. As noted by White Castle in its petition for rehearing, no guidance or criteria remain for who pays nothing and who suffers annihilative liability. See *supra* ¶ 40.

¶ 85 Although the majority recognized that it "appear[ed]" that these awards would be discretionary, such that lower courts may award damages lower than the astronomical amounts permitted by its construction of the Act (*supra* ¶ 42), the court did not provide lower courts with any standards to apply in making this determination. This court should clarify, under both Illinois and federal constitutional principles, that statutory damages awards must be no larger than necessary to serve the Act's remedial purposes and should explain how lower courts should make that determination. Without any guidance regarding the standard for setting damages, defendants, in class actions especially, remain unable to assess their realistic potential exposure.

¶ 86 Despite legislative language suggesting otherwise, this court's opinion authorized the Act's imposition of damages wildly exceeding any remotely reasonable estimate of harm. As noted by *amici*, for businesses facing this draconian exposure, it is cold comfort that this job-destroying liability only "may" be imposed—if the actual amount depends on the decisions of individual trial judges applying their own standards, formulated without any guidance from this court or the legislature.

¶ 87 This court's opinion leaves a staggering degree of uncertainty for courts and defendants. "Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 574, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996). This court has been willing to reconsider its earlier decision in circumstances where the result of the prior decision would amount to "legalized extortion and a crippling of *** commerce as we

know it." *American Telephone & Telegraph Co. v. Village of Arlington Heights*, 156 Ill. 2d 399, 409, 189 Ill.Dec. 723, 620 N.E.2d 1040 (1993). Accordingly, I implore my colleagues to reconsider the court's earlier decision and allow White Castle's petition for rehearing.

¶ 88 CHIEF JUSTICE THEIS and JUSTICE HOLDER WHITE join in this dissent upon denial of rehearing.

2021 IL App (1st) 190484
466 Ill.Dec. 108

The PEOPLE of the State of Illinois, Plaintiff-Appellee,

v.

Donnte KINDLE, Defendant-Appellant.

No. 1-19-0484

Appellate Court of Illinois,
First District,
SIXTH DIVISION.

Filed September 17, 2021

Background: Defendant was convicted in the Circuit Court, Cook County, Kenneth J. Wadas, J., of first degree murder, and was sentenced to 28 years' imprisonment. Defendant appealed.

Holdings: The Appellate Court, Sheldon A. Harris, J., held that:

(1) identification testimony of witness was sufficient to support conviction;

(2) prosecutor's repeated statements implying that witnesses were afraid to testify or changed their testimony out of fear did not deprive defendant of his right to a fair trial;

(3) collateral proceeding under Post-Conviction Hearing Act was appropriate mechanism for addressing defendant's ineffective assistance of counsel claim;

(4) trial court violated rule governing voir dire examination;

(5) trial court's error in violating rule governing voir dire examination was not reversible error; and

(6) trial court acted within its discretion in sentencing defendant to 28 years' imprisonment.

Affirmed.

1. Criminal Law ⚿327

The State's burden of proof in a criminal prosecution includes the identity of the offender.

2. Criminal Law ⚿566

Positive testimony from a single witness can support a conviction if the witness viewed the accused under circumstances permitting a positive identification.

3. Criminal Law ⚿566

Identification testimony which is vague or doubtful is insufficient to support a conviction.

4. Criminal Law ⚿1159.2(7)

Appellate Court will not reverse a criminal conviction unless the evidence is so improbable or unsatisfactory that it creates a reasonable doubt of the defendant's guilt.

5. Criminal Law ⚿339.6

Courts consider the following factors when evaluating identification testimony: (1) the opportunity to view the offender at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the criminal; (4) how certain the witness is of the identification; and (5) the length of time between the crime and the identification.

der oath that he had no difficulty understanding, reading, or writing in English. The consulting psychologist confirmed that he did not have difficulty communicating in English. The district court had reasonable grounds for rejecting defendant's request for an interpreter.

To sum up, the district court did not err by relying on defendant's original sworn assertions about his competency, guilt, and satisfaction with counsel, coupled with the psychological evaluation that confirmed his competence to plead guilty. The district court did not abuse its discretion in denying defendant's motion to withdraw his guilty plea. The judgment of the district court is AFFIRMED.

Latrina COTHRON, individually and on behalf of all others similarly situated, Plaintiff-Appellee,

v.

WHITE CASTLE SYSTEM, INC., Defendant-Appellant.

No. 20-3202

United States Court of Appeals, Seventh Circuit.

Submitted August 14, 2023

Decided August 23, 2023

Background: Employee filed putative class action in state court against employer, claiming violation of Illinois Biometric Information Privacy Act (BIPA), by failing to obtain her written consent before implementing fingerprint-scanning system that required her to scan her fingerprints to access her work computer and payment records. Following removal, the United States District Court for the Northern District of Illinois, John J. Tharp, Jr., J., 477 F.Supp.3d 723, denied employer judgment on pleadings. Employer appealed. The Court of Appeals, 20 F.4th 1156, certified question. The Supreme Court of Illinois, 2023 WL 4567389, answered certified question.

Holdings: The Court of Appeals, Sykes, Chief Judge, held that putative class action was not time barred.

Affirmed.

Limitation of Actions ⚿58(17)

Employee's putative class action claims that employer violated Illinois Biometric Information Privacy Act (BIPA), by failing to obtain her written consent before implementing fingerprint-scanning system that required her to scan her fingerprints to access her work computer and payment records, accrued, under any statute of limitations, each time that biometric identifiers or information were collected or disseminated, and not only on first scan and first transmission. 740 Ill. Comp. Stat. Ann. 14/1 et seq.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 19 CV 00382 — **John J. Tharp, Jr.**, *Judge.*

Teresa M. Becvar, Andrew C. Ficzko, Ryan F. Stephan, James B. Zouras, Attorneys, Stephan Zouras, LLP, Chicago, IL, for Plaintiff-Appellee.

Melissa A. Siebert, Erin Bolan Hines, Attorneys, Cozen O'Connor, Chicago, IL, Max E. Kaplan, Attorney, Cozen O'Connor, Philadelphia, PA, Tamar S. Wise, Michael B. de Leeuw, Attorneys, Cozen O'Connor, New York, NY, for Defendant-Appellant.

Meredith C. Slawe, Attorney, Skadden, Arps, Slate, Meagher & Flom LLP, New York, NY, for Amici Curiae Retail Litigation Center, Inc., and Restaurant Law Center.

Debra Rae Bernard, Attorney, Perkins Coie LLP, Chicago, IL, Sopen B. Shah, Attorney, Perkins Coie LLP, Madison, WI, for Amicus Curiae Leadingage Illinois.

Jed Wolf Glickstein, Attorney, Kaplan & Grady, Chicago, IL, for Amicus Curiae Internet Association.

Randall D. Schmidt, Attorney, Mandel Legal Aid Clinic, Chicago, IL, for Amicus Curiae American Association for Justice.

Catherine Simmons-Gill, Attorney, Office of Catherine Simmons-Gill, LLC, Chicago, IL, for Amicus Curiae NELA/Illinois.

Alan Butler, Attorney, Alan Butler, Washington, DC, for Amicus Curiae Electronic Privacy Information Center.

Before Sykes, Chief Judge, and Easterbrook and Brennan, Circuit Judges.

Sykes, Chief Judge.

In December 2018 Latrina Cothron filed a proposed class-action lawsuit in Illinois state court against White Castle System, Inc., her employer. For many years Cothron has worked as a manager at one of White Castle's hamburger restaurants in Illinois; her suit accuses the company of violating the Illinois Biometric Information Privacy Act, 740 ILL. COMP. STAT. 14/1 *et seq.*, by failing to obtain her written consent before implementing a fingerprint-scanning system that requires her to scan her fingerprints to access her work computer and payment records.

White Castle removed the case to federal court and later sought judgment on the pleadings, arguing that Cothron's suit was untimely because her claim accrued in 2008 with her first fingerprint scan after the Act's effective date. Cothron countered that a new claim accrued with each fingerprint scan—not just the first one—so her suit was timely with respect to any scans without her consent that occurred within the limitations period.

The district judge agreed with Cothron's claim-accrual theory and denied the motion, but he certified his order for immediate appeal under 28 U.S.C. § 1292(b). Because the order involved a controlling question of law on which there was substantial ground for disagreement, we accepted the interlocutory appeal. *Cothron v. White Castle Sys., Inc.*, 20 F.4th 1156, 1160 (7th Cir. 2021).

Following oral argument, we certified the novel timeliness question—namely, whether a claim accrues under the Act with each unlawful biometric scan or only the first one—to the Illinois Supreme Court. *Id.* at 1166–67. The state supreme court accepted the certification and has now answered the question, holding that "a separate claim accrues under the Act each time a private entity scans or transmits an individual's biometric identifier or information in violation of section 15(b) or 15(d)" of the Act. *Cothron v. White Castle Sys., Inc.*, 466 Ill.Dec. 85, 216 N.E.3d 918, 920 (Ill. Feb. 17, 2023) *as modified on denial of reh'g* (July 18, 2023).

After denying White Castle's motion for rehearing, the Illinois Supreme Court issued its mandate on August 22. In the meantime we had directed the parties to file position statements under Circuit Rule 52(b). They have done so. Cothron asks us to lift the stay in this case and enter an order consistent with the state supreme court's answer to the certified question. White Castle asks us to expand the interlocutory appeal to include new questions concerning the scope of a possible damages award and constitutional arguments under the Due Process and Excessive Fines Clauses.

The order before us concerned only the timeliness of Cothron's suit. The Illinois Supreme Court's answer to the certified question makes it clear that the suit is

timely with respect to some of the allegedly unlawful fingerprint scans. That resolves this appeal. Accordingly, we lift the stay and affirm the district court's order denying White Castle's motion for judgment on the pleadings.

AFFIRMED

UNITED STATES of America, Plaintiff - Appellee

v.

Nora Gilda Guevara TRIANA, Defendant - Appellant

United States of America, Plaintiff - Appellee

v.

Tanner J. Leichleiter, Defendant - Appellant

No. 22-1455, No. 22-2386

United States Court of Appeals, Eighth Circuit.

Submitted: June 14, 2023

Filed: August 15, 2023

Background: Defendants were jointly tried in the United States District Court for the District of Nebraska, Brian C. Buescher, J., with female defendant being convicted of kidnapping and aiding and abetting, and male defendant pleading guilty to being a prohibited person in possession of a firearm. Defendants appealed.

Holdings: The Court of Appeals, Erickson, Circuit Judge, held that:

(1) denial of defendant's motion to withdraw his plea was not an abuse of discretion;

(2) evidence supported the district court's increase of defendant's base offense for being a prohibited person in possession of a firearm by four levels based on his possession of firearms in connection with another felony offense;

(3) evidence was insufficient to support a reduction in defendant's offense level based on acceptance of responsibility; and

(4) evidence was sufficient to support conviction for kidnapping.

Affirmed.

See also 2021 WL 4332257 and 2022 WL 2078091.

1. Criminal Law ⚿274(4)

A misunderstanding of how the Sentencing Guidelines apply in a defendant's case is not a permissible reason to withdraw a guilty plea. Fed. R. Crim. P. 11(d)(2)(B).

2. Criminal Law ⚿1149

Court of Appeals reviews a district court's denial of a motion to withdraw a guilty plea for abuse of discretion. Fed. R. Crim. P. 11(d).

3. Criminal Law ⚿274(4)

District court's denial of defendant's motion to withdraw his plea, which was based on court's alleged failure to advise defendant at the time of his plea that court was not bound by his pre-plea petition statement that he possessed the firearms for sporting purposes, was not an abuse of discretion; defendant failed to establish a fair and just reason for withdrawing his plea as he was found with ten firearms in his vehicle, one of the firearms met the definition of a semiautomatic firearm capable of accepting a large capacity magazine, the sporting purposes exception of sentencing guidelines was inapplicable when firearm qualified as a semiautomatic firearm, and the court informed defendant at his plea hearing that the sentence imposed could be different from the sentence he

The Sedona Conference

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May 3, 2024

Minneapolis, Minnesota

PRIVACY AND DATA SECURITY LITIGATION UPDATE

CALIFORNIA PRIVATE ATTORNEY GENERAL ACT DECISIONS

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CIVIL MINUTES—GENERAL

Case No.	**EDCV 22-1652 JGB (KKx)**	Date	February 14, 2023
Title	***Arisha Byars v. Hot Topic, Inc. et al.***		

Present: The Honorable	JESUS G. BERNAL, UNITED STATES DISTRICT JUDGE

MAYNOR GALVEZ	Not Reported
Deputy Clerk	Court Reporter

Attorney(s) Present for Plaintiff(s):	Attorney(s) Present for Defendant(s):
None Present	None Present

Proceedings: Order (1) GRANTING Defendant's Motion to Dismiss (Dkt. No. 18); and (2) VACATING the February 27, 2023 Hearing

Before the Court is a motion to dismiss filed by Defendant Hot Topic Inc. ("Defendant" or "Hot Topic"). ("Motion," Dkt. No. 18.) The Court determines the matter is appropriate for resolution without a hearing. See Fed. R. Civ. P. 78; L.R. 7-15. After considering all papers filed in support of and in opposition to the Motion, the Court GRANTS the Motion. The February 27, 2023 hearing is VACATED.

I. BACKGROUND

On September 20, 2022, Plaintiff Arisha Byars ("Plaintiff" or "Ms. Byars") filed a putative class action complaint against Defendant Hot Topic and Does 1-25. ("Complaint," Dkt. No. 1.) On September 29, 2022, the parties filed a joint stipulation extending the time for Defendant to answer the Complaint. (Dkt. No. 10.) On November 11, 2022, Defendant filed a motion to dismiss the Complaint. (Dkt. No. 11.)

On November 18, 2022, Plaintiff filed a first amended complaint. ("FAC," Dkt. No. 16.) The FAC asserts subject matter jurisdiction under the Class Action Fairness Act ("CAFA"). (See id.) The FAC alleges two causes of action: (1) violations of the California Invasion of Privacy Act ("CIPA") pursuant to Cal. Penal Code § 631; and (2) violations of CIPA pursuant to Cal. Penal Code § 632.7. (See id.)

On November 21, 2022, the Court denied Defendant's motion to dismiss the Complaint as moot. (Dkt. No. 17.)

On December 2, 2022, Defendant filed the Motion. (Motion.) In support of the Motion, Defendant filed a request for judicial notice. ("RJN," Dkt. No. 19.)[1]

On December 7, 2022, the National Retail Federation (NRF) filed a motion for leave to file an *amicus curiae* brief. ("Motion for Leave," Dkt. No. 21.) In support of the Motion for Leave, the National Retail Federation filed a Brief of *Amicus Curiae* the National Retail Federation in Support of Defendant's Motion to Dismiss. ("Brief Amicus Curiae of NRF," Dkt. No. 21-2.)

On December 30, 2022, Plaintiff filed an opposition to the Motion. ("Opposition to Motion," Dkt. No. 25.) The same day, Plaintiff filed an opposition to the Motion for Leave. ("Opposition to NRF," Dkt. No. 26.) On January 9, 2023, Plaintiff filed a reply in support of the Motion. ("Reply," Dkt. No. 28.) The same day, Plaintiff filed a reply in support of the RJN. (Dkt. No. 29.)

On January 19, 2023, the Court continued the hearing on the Motion from January 23, 2023 to February 27, 2023. (Dkt. No. 31.) On February 9, 2023, the Court granted the Motion for Leave. (Dkt. No. 32.)

II. FACTS

Hot Topic is a retailer that specializes in clothing, accessories and music. (Motion at 2.)[2] Plaintiff is a resident and citizen of California. (FAC ¶ 4.) Defendant is a Delaware corporation that owns, operates and controls a website, www.hottopic.com (the "Website"). (Id. ¶ 5.) Plaintiff alleges jurisdiction under CAFA because "there are believed to be at least 5,000 class members, each entitled to $5,000 in statutory damages, thus making the amount in controversy at least $25,000,0000 exclusive of interests and costs." (Id. ¶ 1.) "Defendant is subject to personal jurisdiction because it has sufficient minimum contacts with California and it does business with California residents." (Id. ¶ 3.)[3]

Defendant "ignores" CIPA because it "wiretaps the conversations of all website visitors and allows a third party to eavesdrop on the conversations in real time during transmission." (Id.

[1] The Court finds the RJN unnecessary to the resolution of the Motion. Accordingly, it is DENIED AS MOOT.

[2] This fact is taken from Defendant's Motion because the FAC does not bother to make a single allegation about the nature of Hot Topic's business, or even use the name "Hot Topic" once after the caption page. (See FAC.)

[3] The Court observes that the FAC may be subject to dismissal for lack of personal jurisdiction based on this sole, barebones jurisdictional allegation, but Defendant does not raise that argument.

¶ 10.) Defendant uses a chat feature on its website that automatically records and creates transcripts of conversations with visitors to the Website. (Id. ¶ 12.) It allows at least one third-party vendor ("on information and belief, SalesForce") to "intercept," eavesdrop upon and store transcripts of Defendant's chat communications with website visitors. (Id.) Defendant allows a third-party to access these communications, purportedly "under the guise of 'data analytics.'" (Id. ¶¶ 11, 14.)

Plaintiff is a "tester" with "dual motivations for initiating a conversation with Defendant." (Id. ¶ 16.) First, she was "genuinely interested" in learning about the (unspecified) "goods and services offered by Defendant." (Id.) Second, as a "tester," she works to ensure that companies abide by privacy laws, and believes she should be "praised rather than vilified" for her efforts. (Id.)[4]

Plaintiff brings the action on behalf of a proposed class defined as, "[a]ll persons within the United States who: (1) visited Defendant's website, and (2) whose electronic communications were recorded, stored, and/or shared by Defendant without prior express consent within the statute of limitations period." (Id. ¶ 22.) Plaintiff "does not know the number of Class Members but believes the number to be in the tens of thousands, if not more." (Id.)[5]

III. LEGAL STANDARD

A. Subject Matter Jurisdiction under CAFA

Federal courts have limited jurisdiction, "possessing only that power authorized by Constitution and statute." Gunn v. Minton, 568 U.S. 251, 256 (2013). The Court's jurisdiction is either that of federal question or complete diversity of citizenship. See 28 U.S.C. §§ 1331, 1332. "It is to be presumed that a cause lies outside [of a federal court's] limited jurisdiction, and the burden of establishing the contrary rests upon the party asserting jurisdiction." Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377 (1994) (citations omitted). Federal courts must ordinarily address jurisdictional questions before proceeding to the merits of the case. Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 101 (1998); Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574, 577 (1999); Snell v. Cleveland, 316 F.3d 822, 826 (9th Cir. 2002). "Without

[4] Plaintiff goes as far as to compare herself to Rosa Parks, who she claims was acting as a "tester" when she initiated the Montgomery Bus Boycott in 1955. (See FAC at 5 n.3.) Plaintiff's self-aggrandizing comparison trivializes Rosa Parks, a key accelerant of the civil rights movement. It was not well-received by the Court.

[5] The Court construes this putative class along the lines of those in Plaintiff's Counsel's other virtually identical lawsuits, for this class, as written, makes no sense. For one, Plaintiff never explains how users beyond California's borders could bring a CIPA claim; they cannot. Second, Plaintiff elsewhere explains that her use of a smartphone is essential to her theories of recovery under CIPA, so any putative class needs to be limited to users who used the Website's chat feature via their mobile phones. (See FAC ¶ 18.)

jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." Ex parte McCardle, 7 Wall. 506, 514 (1868). "The objection that a federal court lacks subject-matter jurisdiction . . . may be raised by a party, or by a court on its own initiative, at any stage in the litigation[.]" Arbaugh v. Y&H Corp., 546 U.S. 500, 506 (2006). "Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action." Id. (citations and internal quotations omitted); see also Fed. R. Civ. P. 12(h)(3).

"CAFA gives federal district courts original jurisdiction over class actions in which the class members number at least 100, at least one plaintiff is diverse in citizenship from any defendant, and the aggregate amount in controversy exceeds $5 million, exclusive of interests and costs." Ibarra v. Manheim Investments, Inc., 775 F.3d 1193, 1195 (9th Cir. 2015). Even with the "special liberalization" of jurisdictional requirements under CAFA, "there still must be a requisite amount in controversy that exceeds $5 million." Id. at 1195.

Under certain circumstances, attorney's fees may also be included in the amount in controversy. "[I]f the law entitles the plaintiff to future attorneys' fees if the action succeeds, then there is no question that future attorneys' fees are at stake in the litigation, and the defendant may attempt to prove that future attorneys' fees should be included in the amount in controversy." Fritsch v. Swift Transp. Co. of Ariz., 899 F.3d 785, 794 (9th Cir. 2018) (internal quotations, brackets, and citation omitted). However, "a court's calculation of future attorneys' fees is limited by the applicable contractual or statutory requirements that allow fee-shifting in the first place." Id. at 796.

B. Rule 12(b)(6)

Under Rule 12(b)(6), a party may bring a motion to dismiss for failure to state a claim upon which relief can be granted. Rule 12(b)(6) must be read in conjunction with Federal Rule of Civil Procedure 8(a), which requires a "short and plain statement of the claim showing that a pleader is entitled to relief," in order to give the defendant "fair notice of what the claim is and the grounds upon which it rests." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007); see Ileto v. Glock Inc., 349 F.3d 1191, 1199-1200 (9th Cir. 2003). When evaluating a Rule 12(b)(6) motion, a court must accept all material allegations in the complaint—as well as any reasonable inferences to be drawn from them—as true and construe them in the light most favorable to the non-moving party. See Doe v. United States, 419 F.3d 1058, 1062 (9th Cir. 2005); ARC Ecology v. U.S. Dep't of Air Force, 411 F.3d 1092, 1096 (9th Cir. 2005); Moyo v. Gomez, 32 F.3d 1382, 1384 (9th Cir. 1994). Courts are not required, however, "to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." In re Gilead Scis. Sec. Litig., 536 F.2d 1049, 1055 (9th Cir. 2008) (internal citation and quotation omitted). Courts also need not accept as true allegations that contradict facts which may be judicially noticed. See Mullis v. U.S. Bankr. Court, 828 F.2d 1385, 1388 (9th Cir. 1987).

"While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Twombly, 550 U.S. at 555 (citations omitted). Rather, the allegations in the complaint "must be enough to raise a right to relief above the speculative level." Id.

To survive a motion to dismiss, a plaintiff must allege "enough facts to state a claim to relief that is plausible on its face." Id. at 570; Ashcroft v. Iqbal, 556 U.S. 662 (2009). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it stops short of the line between possibility and plausibility of 'entitlement to relief.'" Iqbal, 556 U.S. at 678 (quoting Twombly, 550 U.S. at 556). The Ninth Circuit has clarified that (1) a complaint must "contain sufficient allegations of underlying facts to give fair notice and to enable the opposing party to defend itself effectively," and (2) "the factual allegations that are taken as true must plausibly suggest an entitlement to relief, such that it is not unfair to require the opposing party to be subjected to the expense of discovery and continued litigation." Starr v. Baca, 652 F.3d 1202, 1216 (9th Cir. 2011).

C. Rule 15

Federal Rule of Civil Procedure 15 ("Rule 15") provides that leave to amend "shall be freely given when justice so requires." Fed. R. Civ. P. 15(a). The Ninth Circuit has held that "'[t]his policy is to be applied with extreme liberality.'" Eminence Capital, L.L.C. v. Aspeon, Inc., 316 F.3d 1048, 1051 (9th Cir. 2003) (quoting Owens v. Kaiser Found. Health Plan, Inc., 244 F.3d 708, 712 (9th Cir. 2001)). Generally, a "district court should grant leave to amend even if no request to amend the pleading was made, unless it determines that the pleading could not possibly be cured by allegation of other facts." Lopez v. Smith, 203 F.3d 1122, 1127 (9th Cir. 2000) (en banc) (internal quotation marks and citation omitted).

IV. DISCUSSION

The Court raises the issue of subject matter jurisdiction *sua sponte* and finds that Plaintiff has failed to meet her burden to establish it. The Court then turns to the merits of the Motion and finds that Plaintiff fails to state a claim for relief under either cause of action.

Before turning to these issues, the Court acknowledges the central dynamic in this litigation, underscoring all of the deficiencies in the FAC: Plaintiff, and her counsel, Scott Ferrell, are serial litigants bringing numerous "cookie cutter" lawsuits under CIPA against various businesses that operate websites.[6] As of December 9, 2022, Mr. Ferrell appears to have filed at least 58 of these virtually identical lawsuits. See Miguel Licea v. Caraway Home Inc., et al.,

[6] The Ninth Circuit's unpublished decision in Javier v. Assurance IQ, 2022 WL 1744107 (9th Cir. May 31, 2022) appears to have opened the floodgates for these cases, an unfortunate unintended consequence of a brief, narrow ruling limited to the issue of prior consent.

EDCV 22-1791, Order on Motion to Dismiss, Dkt. No. 20, at 6 (taking judicial notice of table of cases filed by Plaintiff's Counsel.)[7] This Court alone has six virtually identical lawsuits filed by Plaintiff's Counsel on its docket: Miguel A. Licea v. Gamestop, Inc. et al., EDCV-22-1562; Miguel Licea v. Luxottica of America Inc, et. al., EDCV 22-1826; Miguel Licea v. Caraway Home Inc., et al., EDCV 22-1791; Miguel Licea v. Ulta Salon, Cosmetics & Fragrance Inc., et al., EDCV 23-201; Jasmine Gamez v. Zero Day Nutrition Company, et al., EDCV 22-1655; and Arisha Byars v. Hot Topic Inc., et al., EDCV 22-1652 (the instant action). Mr. Ferrell appears to work with multiple "tester" plaintiffs to drum up these lawsuits, with Mr. Licea and Ms. Byars serving as his primary vehicles for litigation. The cases bear strong echoes of serial Americans with Disabilities Act (ADA) litigation, in which Mr. Ferrell has also engaged.

Initiating legitimate litigation generally requires a considerable expenditure of time: in order to establish jurisdiction and state a claim for relief, a plaintiff must plead specific facts arising out of a specific encounter with a specific defendant. As the saying goes, time is also money. So when the goal is to file as many lawsuits as possible in the least amount of time, it is far easier and cheaper to copy and paste a complaint over and over again, and to write the original template in such a way that hardly anything needs to be swapped out. Sometimes a plaintiff can get away with this, particularly if a defendant is willing to offer a quick cash settlement. But other defendants may not roll over so easily, and raise some fundamental questions, not least: Why is the entire complaint written at such a high level of generality that it could apply word-for-word to the dozens of other businesses this law firm is suing? And surely, whatever one's views on the propriety of copying and pasting from boilerplate pleadings, there is a point at which all reasonable people should agree the practice has gone too far. This Court observed in Miguel Licea v. Caraway Home Inc, et al., EDCV 22-1791, Order on Defendant's Motion to Dismiss, Dkt. No. 20, that Plaintiff's Counsel had not even bothered to change the title of the pleading document (simply titling it "Pleading Template"), or write the case number on the caption page. At least here it appears that Plaintiff's Counsel has written the case number, though the PDF file of the FAC is still titled "Pleading Template." The FAC is replete with evidence of cut-and-paste work, perhaps the most obvious of which is that it *never* mentions the name of the company Plaintiff is suing after the caption page, because doing so might take more than a few seconds to alter when filing a new lawsuit.

[7] The Court again finds Plaintiff's Counsel's filings subject to judicial notice and relevant to the instant dispute. See United States ex. Rel. Robinson Rancheria Citizens Council v. Borneo, Inc., 917 F.2d 244, 248 (9th Cir. 1992); Reyn's Pasta Bella, LLC v. Visa USA, Inc., 442 F.3d 741, 746 n.6 (9th Cir. 2006); Neilson v. Union Bank of California, N.A., 290 F. Supp. 2d 1101, 1113 (C.D. Cal. 2003) (approving judicial notice of filings in federal and state courts). The Court has independently reviewed the docket of the Central District of California for filings by Plaintiff's Counsel and Plaintiff. The Court (1) confirmed the veracity of the table of such complaints filed in the Central District of California cited here and (2) observed yet more virtually identical filings by Plaintiff's Counsel since December 9, 2022. As of present, Plaintiff's Counsel appears to have filed at least 88 of these cases.

At the end of the day, Twombly-Iqbal pleading standards might be distilled to a single proposition: if a litigant pleads at such a high level of generality that it is possible to copy and paste a complaint word-for-word against a new defendant (at least after the unnumbered "introduction" section, where Plaintiff's Counsel has written the URL of the defendant of the day and referred to it as "the Website" so that he need not make a single other alteration to the rest of the complaint), then almost by definition he is pleading without the factual specificity necessary to state a claim for relief.

For the reasons below, the Court GRANTS the Motion.

A. Subject Matter Jurisdiction

The Court finds itself obligated to raise the matter of subject matter jurisdiction *sua sponte*. See Arbaugh, 546 U.S. at 506; Ex Parte McCardle, 7 Wall. at 514. The FAC does not plausibly allege in good faith that $5 million is in controversy under CAFA.

CIPA provides for a private right of action in which a plaintiff can seek $5,000 per violation. Cal. Pen. Code. § 637.2. Therefore, there would need to be at least a thousand class members to meet CAFA's $5 million amount in controversy requirement. The entirety of the FAC's allegations with regard to the number of putative class members, and thus the amount in controversy, is that "Plaintiff does not know the number of Class Members but believes the number to be in the thousands, if not more." (FAC ¶ 23.) In the Court's view, this vague and conclusory allegation, without a single factual contention in support, is insufficient to plausibly allege the jurisdictional threshold.

In Miguel Licea v. Caraway Home Inc, et al., EDCV 22-1791, when presented with this identical issue, Plaintiff argued, "Given that California is the largest state by population, the proposition that there are 1,000 putative class members in California who used Defendant's chat feature during the class period is plausible." Id., Order on Defendant's Motion to Dismiss, Dkt. No. 20. Assuming Plaintiff is applying the same logic here, the Court once again finds it wanting.

As the Court has already noted, the FAC does not allege a single fact about Hot Topic's business, other than aspects of its alleged "wiretapping" on its website, which are boilerplate allegations that Plaintiff's Counsel asserts against virtually every business he sues under CIPA. What does Hot Topic do? What does it sell? What kind of "goods and services" that Plaintiff was "genuinely interested in" does it offer? (FAC ¶ 16.) Is it a big company? Small company? Does it do lots of business in California? A little business? Any business? How much business does it do through its website? For those individuals who use the website, how many of them used the chat feature from a mobile phone? (Id. ¶ 18.) Is it not far more common to buy products from Hot Topic (and use the chat feature) on a computer, not a mobile phone? In other words, what about Hot Topic's *website specifically* and the *chat feature specifically* make it "plausible" that 1,000 or more people are in this putative class? There is no way of knowing from the FAC.

As at least one federal district court appears to have observed, there is a dearth of authority "evaluating the existence of CAFA jurisdiction in class actions originally filed in federal court," as the "overwhelming majority of decisions concerning CAFA jurisdiction involve cases removed to federal court by defendants." Petkevicius v. NBTY, Inc., 2017 WL 1113295, at *3 (S.D. Cal. Mar. 24, 2017). The Petkevicius court held that a plaintiff who files a case in federal court bears the same burden of establishing CAFA jurisdiction as a removing defendant. Id. at *4. The Court need not follow Petkevicius that far to hold that Plaintiff fails to meet her burden to establish subject matter jurisdiction. "When a plaintiff invokes federal-court jurisdiction, the plaintiff's amount-in-controversy allegation is accepted if made in good faith." Dart Cherokee Basin Operating Co., LLC v. Owens, 574 U.S. 81, 87 (2014). Plaintiff's Counsel's conduct, filing scores of identical lawsuits seemingly with little or no regard for the nature or size of the business he is suing, undercuts any presumption of good faith that might ordinarily apply. Moreover, background principles of law indicate that "good faith" allegations must be consistent with plausibility pleading standards. Courts do not "accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." In re Gilead Scis. Sec. Litig., 536 F.2d at 1055. "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it stops short of the line between possibility and plausibility of 'entitlement to relief.'" Iqbal, 556 U.S. at 678 (quoting Twombly, 550 U.S. at 556). Put another away, "[t]o render their explanation plausible, plaintiffs must do more than allege facts that are merely consistent with both their explanation and defendants' competing explanation." In re Century Aluminum Co. Sec. Litig., 729 F.3d 1104, 1105 (9th Cir. 2013). "A plaintiff . . . must show in his pleading, affirmatively and distinctly, the existence of whatever is essential to federal jurisdiction." Carolina Cas. Ins. Co. v. Team Equip., Inc., 741 F.3d 1082, 1088 (9th Cir. 2014) (citation omitted). Applying these principles, it should be obvious that a plaintiff who makes virtually no attempt to adhere to plausibility pleading standards, like Ms. Byars, fails to meet her burden to allege subject matter jurisdiction in good faith:

> [A] threadbare recitation of the amount in controversy element for subject matter jurisdiction under CAFA is insufficient, without more, to establish the Court's subject matter jurisdiction. . . . In other words, simply stating that the amount in controversy exceeds $5,000,000, without any specific factual allegations as to the actual amount sought by the plaintiffs does not constitute a good faith allegation of the amount in controversy any more than an allegation that 'the parties are diverse' would be sufficient to establish the requisite diversity absent specific allegations of the citizenship of the parties. The [complaint] therefore does not contain any good faith factual allegations as to the amount in controversy. Indeed, based on the lack of sufficient plausible factual allegations in the [complaint] as to the amount in controversy, Plaintiff did not meet her burden to establish federal CAFA jurisdiction at the outset. To hold otherwise, would essentially give any class action plaintiff

> license to file a claim in federal court simply by stating the legal conclusion that CAFA jurisdiction exists.

Petkevicius, 2017 WL 1113295, at *4 (internal citation omitted). Plaintiff's Counsel has provided no authority in support of the proposition that one can simply assume that, because California has a large population, at least 1,000 Californians must qualify as class members. Moreover, if any plaintiff could simply make a broad, conclusory allegation that, upon information and belief there were over 1,000 class members because California is a large state, then virtually any proposed class of Californians would always meet the amount in controversy requirement. This cannot be true, for even if California has a large population, it does not follow that every business that operates in California has a large number of customers, let alone ones who engage in a specific behavior, such as accessing a given chat feature from a mobile phone. None of this is to say that a plaintiff bears a particularly heavy burden to establish an amount in controversy under CAFA, or any aspect of subject matter jurisdiction, or that operating to some extent on information and belief is inappropriate. The standard is not high: plausibly pleading subject matter jurisdiction in good faith. But it is a burden nonetheless, and there must be *something*, perhaps even *anything*, of a fact-specific nature to surpass it.

As the Court previously noted in its Order on Defendant's Motion to Dismiss in Miguel Licea v. Caraway Home Inc, et al., EDCV 22-1791, Fritsch, 899 F.3d 785 does not allow for Plaintiff to augment the amount in controversy through attorney's fees here. Fritsch is clear that attorney's fees must count toward the amount in controversy requirement only when a plaintiff is *entitled* to prevailing party fees: "[I]f the law entitles the plaintiff to future attorneys' fees if the action succeeds, then there is no question that future attorneys' fees are at stake in the litigation, and the defendant may attempt to prove that future attorneys' fees should be included in the amount in controversy." 899 F.3d at 794. However, "a court's calculation of future attorneys' fees is limited by the applicable contractual or statutory requirements that allow fee-shifting in the first place." Id. at 796. Fritsch itself considered a statute with a mandatory fee-shifting provision, California Labor Code § 218.5. Id. at 789 n.3. Because CIPA has no attorney's fees provision, let alone a mandatory one, the only way for Plaintiff to recover attorney's fees is under California's private attorney general statute, California Code of Civil Procedure § 1021.5. That statute affords a court the discretion to award a plaintiff attorney's fees as a prevailing party if it finds, among other things, that the action "has resulted in the enforcement of an important right affecting the public interest[.]" See Cal. Civ. Proc. Code § 1021.5. Fritsch's principle does not apply "where there is neither a contractual provision nor a mandatory statutory imperative regarding an award of attorneys' fees." Wood v. Charter Commc'ns LLC, 2020 WL 1330640, at *2 (C.D. Cal. Mar. 21, 2020). As such, attorney's fees do not count toward the amount in controversy requirement in this matter.

The Court finds that Plaintiff has failed to meet her burden to establish subject matter jurisdiction. As such, the FAC is subject to dismissal on that basis alone.

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B. First Cause of Action: California Penal Code § 631(a)

Defendant and *amicus curiae* NRF raise various arguments for dismissal of Plaintiff's first cause of action, a violation of California Penal Code Section 631(a). The Court finds that Plaintiff fails to allege that Defendant is, or aids and abets, a third-party eavesdropper within the meaning of that section and accordingly GRANTS the Motion as to the first cause of action on that basis. The Court declines to reach additional grounds for dismissal, which may also be meritorious.

Section 631(a) states:

> (a) Any person [1] who, by means of any machine, instrument, or contrivance, or in any other manner, intentionally taps, or makes any unauthorized connection, whether physically, electrically, acoustically, inductively, or otherwise, with any telegraph or telephone wire, line, cable, or instrument, including the wire, line, cable, or instrument of any internal telephonic communication system, or [2] who willfully and without the consent of all parties to the communication, or in any unauthorized manner, reads, or attempts to read, or to learn the contents or meaning of any message, report, or communication while the same is in transit or passing over any wire, line, or cable, or is being sent from, or received at any place within this state; or [3] who uses, or attempts to use, in any manner, or for any purpose, or to communicate in any way, any information so obtained, or [4] who aids, agrees with, employs, or conspires with any person or persons to unlawfully do, or permit, or cause to be done any of the acts or things mentioned above in this section. . . . [is liable].

Cal. Penal Code § 631. The California Supreme Court has construed the statute as "three distinct and mutually independent patterns of conduct: intentional wiretapping, wilfully attempting to learn the contents or meaning of a communication in transit over a wire, and attempting to use or communicate information obtained as a result of engaging in either of the previous two activities." Tavernetti v. Superior Ct., 22 Cal. 3d 187, 192 (1978). In a remarkable illustration of conclusory pleading, Plaintiff restates these three theories of liability, and simply alleges, "[h]ere, Defendant does all three." (FAC ¶ 28.)

A recent case from the Northern District of California, Williams v. What If Holdings, LLC, 2022 WL 17869275 (N.D. Cal. Dec. 22, 2022), illustrates Plaintiff's failure to allege a viable theory of recovery under Section 631(a). In Williams, the plaintiff visited a website owned by What If Holdings, LLC ("What If"), which she alleged took a four second video of her interactions on a webpage displaying her name and contact information without her consent. Id. at *1. The plaintiff also sued ActiveProspect, Inc. ("ActiveProspect"), a third-party software vendor that offered a product called "TrustedForm," which allegedly had the ability to document a website visitor's keystrokes and mouse movements and then create a video replay of

the website visitor's interactions with the website. Id. The plaintiff alleged that What If used the TrustedForm software product to "record her keystrokes and clicks on the website, while also recording data regarding the date and time of her visit, her browser and operating system, and her geographic location." Id.

Judge Alsup explained why Plaintiff failed to allege a theory of Section 631(a) liability against either defendant. For present purposes, his analysis of any purported liability for What If is the relevant inquiry, since Defendant is a website owner akin to What If and Plaintiff has not sued the (unnamed and seemingly unknown) third-party software vendor in the instant action. Williams explains that the only viable theory of liability for a website owner like Defendant is under the fourth clause of Section 631(a), which encompasses one "who aids, agrees with, employs, or conspires with any person or persons to unlawfully do, permit, or cause to be done" any of the first three "patterns of conduct." Cal. Penal Code § 631; Tavernetti, 22 Cal. 3d at 192. That is because, "[a]s the website owner, What if," or here Defendant, "was the intended recipient of plaintiff's communication. Parties to a conversation cannot eavesdrop on their own conversation, so no other part of Section 631(a) is applicable[.]" Williams, 2022 WL 17869275 at *2. As the Williams court observed, the California state courts have long made clear this fundamental aspect of Section 631(a). See Warden v. Kahn, 99 Cal. App. 3d 805, 811 (1979) (finding that Section 631 "has been held to apply only to eavesdropping by a third party and not to recording by a participant to a conversation"); Rogers v. Ulrich, 52 Cal. App. 3d 894, 899 (1975) (holding that Section 631 does not apply to a party to a conversation because "it is never a secret to one party to a conversation that the other party is listening to the conversation; only a third party can listen secretly to a private conversation."). The California Supreme Court has also explained the underlying purpose of Section 631(a). "Section 631 was aimed at one aspect of the privacy problem—eavesdropping, or the secret monitoring of conversations by third parties." Ribas v. Clark, 38 Cal. 3d 355, 359 (1985) (citation omitted).

Relying in large part on the state court authorities, federal district courts have applied the direct party exemption to Section 631(a). See, e.g., Graham v. Noom, Inc., 533 F. Supp. 3d 823, 831 (N.D. Cal. 2021). Graham reasoned that (1) under Section 631(a), "if a person secretly listens to another's conversation, the party is liable"; (2) "only a third party can listen to a conversation secretly"; and (3) "[b]y contrast, a party to a communication can record it (and it is not eavesdropping when it does)." Id. at 831 (citations omitted); accord Yale v. Clicktale, Inc., 2021 WL 1428400, at *3 (N.D. Cal. Apr. 15, 2021). "Published cases are in accord that section 631 applies only to third parties and not participants." Powell v. Union Pac. R. Co., 864 F. Supp. 2d 949, 955 (E.D. Cal. 2012); see also, e.g., Membrila v. Receivables Performance Mgmt, LLC, 2010 WL 1407274, at *2 (S.D. Cal. April 6, 2010) ("Plaintiff's claim for violation of Section 631 fails, because this section applies only to eavesdropping by a third party and not to recording by a participant to a conversation."). The Ninth Circuit has followed the authorities finding a direct party exemption under Section 631(a):

> The Wiretap Act prohibits the unauthorized "interception" of an "electronic communication." 18 U.S.C. § 2511(1)(a)–(e). Similarly, CIPA prohibits any person from using electronic means to "learn the contents or meaning" of any "communication"

> "without consent" or in an "unauthorized manner." Cal. Pen. Code § 631(a). Both statutes contain an exemption from liability for a person who is a "party" to the communication, whether acting under the color of law or not. 18 U.S.C. § 2511(2)(c), (d); see Warden v. Kahn, 99 Cal. App. 3d 805 (1979) ("[S]ection 631 ... has been held to apply only to eavesdropping by a third party and not to recording by a participant to a conversation."). Courts perform the same analysis for both the Wiretap Act and CIPA regarding the party exemption. See, e.g., [In re Google Cookie, 806 F.3d 125, 152 (3d Cir. 2015)] (holding that CIPA claims could be dismissed because the parties were exempted from liability under the Wiretap Act's party exception).

In re Facebook, Inc. Internet Tracking Litig., 956 F.3d 589, 606–07 (9th Cir. 2020), cert. denied sub nom. Facebook, Inc. v. Davis, 141 S. Ct. 1684 (2021). Cf. Thomasson v. GC Servs. Ltd. P'ship, 321 F. App'x 557, 559 (9th Cir. 2008) ("California courts interpret 'eavesdrop,' . . . to refer to a third party secretly listening to a conversation between two other parties.").[8] So has the Third Circuit. See In re Google Inc. Cookie, 806 F.3d at 152 ("The pleadings demonstrate that Google was itself a party to all the electronic transmissions that are the bases of the plaintiffs' wiretapping claims. Because § 631 is aimed only at 'eavesdropping, or the secret monitoring of conversations by third parties,' we will affirm the dismissal of the California Invasion of Privacy Act claim[.]") (citations omitted).

Plaintiff offers only the meekest of arguments that "[t]here is no party exemption under the first clause of section 631(a)." (Opposition at 5.) Although acknowledging the analysis in Rogers, 52 Cal. App. 3d 894 (Opposition at 5), she offers no convincing explanation, or even any explanation, why this Court should be free to disregard the holdings of the California courts of appeal. See Hayes v. Cnty. of San Diego, 658 F.3d 867, 870 (9th Cir. 2011), certified question answered, 57 Cal. 4th 622 (2013) ("In deciding an issue of state law, when 'there is relevant precedent from the state's intermediate appellate court, the federal court must follow the state intermediate appellate court decision unless the federal court finds convincing evidence that the

[8] There is another reason that at least the first clause of Section 631(a) does not provide a theory of Defendant's liability: Plaintiff's factual allegations, to the extent they can be construed as such, solely involve Defendant's internet-based activities on the Website. (See FAC.) "[T]he first clause of Section 631(a) concerns telephonic wiretapping specifically, which does not apply to the context of the internet." Williams, 2022 WL 17869275, at *2; see also In re Google Assistant Privacy Litig., 457 F. Supp. 3d 797, 825 (N.D. Cal. 2020) (explaining that "the plain text of the statute . . . expressly requires that the unauthorized 'connection' be made with 'any telegraph or telephone wire, line, cable, or instrument' " (quoting Cal. Penal Code § 631(a))); In re Google Inc. Gmail Litig., 2013 WL 5423918, at *20 (N.D. Cal. Sept. 26, 2013) (Koh, J.) (describing the "limitation of 'telegraphic or telephone' on 'wire, line, cable, or instrument' in the first clause of [Section 631(a)]").

state's supreme court likely would not follow it.") (citation omitted). To the extent the California Supreme Court also affirmed the party exemption in Ribas, 38 Cal. 3d at 359, it is inarguable that this Court is bound by that decision. Lewis v. Tel. Emps. Credit Union, 87 F.3d 1537, 1545 (9th Cir. 1996) ("When interpreting state law, federal courts are bound by decisions of the state's highest court.") (citation omitted). Plaintiff also asks the Court to ignore the many federal cases finding a direct party exemption under Section 631(a). The Court declines to do so. The only case Plaintiff cites in support of her view that there is no direct party exemption is People v. Conklin, 12 Cal. 3d 259, 270 (1974). (Opposition at 5.) In doing so, she conflates two issues and exceptions: the direct party exception and consent exception. Conklin observed that Section 631(a) requires that all parties consent, while the federal Wiretap Act includes a one-party consent exception. See Conklin, 12 Cal. 3d at 270. But that is not the issue here, and the Court does not reach the issue of consent. See Williams, 2022 WL 17869275, at *4 (declining to reaching consent issue and observing that "Plaintiff's reliance on [Javier, 2022 WL 1744107] is therefore inapposite, as Javier was expressly cabined to the question of consent.")[9]

As such, like in Williams, the only possible basis for Defendant to be liable under Section 631(a) must be an aiding and abetting theory. See Williams, 2022 WL 17869275 at *2. Under that theory, Defendant's liability must be "based entirely" on whether the unnamed, likely unknown third-party software vendor "violated Section 631(a) in some way." Id. "Because a party to the communication is exempt from liability under CIPA, our dispositive question is whether [the third-party vendor] constitutes a third-party eavesdropper." Id. at *3 (citation omitted). "Put differently, the question boils down to whether [the third-party vendor] was an independent third party hired to eavesdrop on [Defendant's] communications, or whether [the third-party vendor's] software was merely a tool that [Defendant] used to record its own communications with plaintiff." Id.

In Williams, the facts "suggest the latter." Id. There, the complaint alleged that "What If deployed ActiveProspect's TrustedForm recording software only on What If's websites and that the recordings were stored and accessed on ActiveProspect's servers[.]" Id. Williams held that "[t]hese limited allegations are not enough to show that ActiveProspect was a third-party eavesdropper as contemplated by Section 631(a)." Id. The court rejected the argument that "if ActiveProspect is not considered a third party, then website owners can always circumvent Section 631(a) by hiring a vendor to record communications." Id. It reasoned that the "relevant inquiry here is whether a website owner's usage of third-party recordation software can be considered equivalent to having hired a third party to record." Id. "A key distinction is whether or not the alleged third-party software vendor aggregates or otherwise processes the recorded information, which might suggest that the software vendor independently 'uses' the gathered data in some way." Id. (citations omitted); see also In re Facebook Inc. Internet Tracking Litig., 956 F.3d at 608 ("Permitting an entity to engage in the *unauthorized duplication and forwarding* of

[9] The Court also declines to consider the other issues raised by the parties' briefing, such as "whether communications were intercepted in transit, and whether the recorded data constitute protected content under CIPA." Id.

unknowing users' information would render permissible the most common methods of intrusion, allowing the exception to swallow the rule") (emphasis added). Williams found that the plaintiff did not allege facts to suggest that ActiveProspect "intercepted and used the data itself." Id. at *3 (quoting Graham, 553 F. Supp. 3d at 832). The facts, as alleged, suggested that the TrustedForm software may have been deployed on a single page, rather than the "entire website,"; the recordation was routine, which is "qualitatively different from data mining"; and the plaintiff failed to plead facts that ActiveProspect "affirmatively engages with that data in any way other than to store it." Id. "In sum, the facts as pled show that TrustedForm functioned as a recorder, and not as an eavesdropper. ActiveProspect is not liable for wiretapping under Section 631(a) for providing a software tool, and that What If used software rather than a physical recording device for the same function does not mean that it aided and abetted wiretapping." Id.

In other cases, Plaintiff's counsel has attempted to distinguish Williams by noting that the unnumbered introductory paragraph (the sole paragraph that Plaintiff's Counsel appears to modify when filing cookie-cutter lawsuits), alleges that Defendant allows "at least one third party to eavesdrop on such communications in real time and during transmission to harvest data for financial gain." (FAC at 2: 4-5.) The Court remains unpersuaded. To begin, Plaintiff has pled with nowhere near the specificity of the (deficient) showing in Williams, or seemingly that of every analogous case cited here or that the Court has read. Unlike in Williams, Graham or other opinions, Plaintiff appears to know nothing about the role that the third-party vendor plays, because she does not even know what it is, let alone how it works. The FAC refers to an unnamed third-party (or multiple third-parties) except in one location, where Plaintiff alleges that "Defendant allows at least one independent third-party vendor (on information and belief, Salesforce)" to access its chat communications. (FAC ¶ 12.) Without alleging a single specific fact in support of the contention that the third party "harvest[s] data for financial gain," the allegation is a mere conclusion disregarded under Twombly and Iqbal. Here, as in Williams and Graham, Plaintiff does not allege a single fact that suggests the third-party "intercepted and used the data itself." Williams, 2022 WL 17869275, at *3 (quoting Graham, 553 F. Supp. 3d at 832). There is not a single fact that suggests the third-party vendor was deployed on the "entire website," not just a page or two. See id. There are no specific factual allegations that any such recordation was more than a routine effort, rather than "data mining." Id. There are no facts that the third party vendor "affirmatively engages with that data in any way other than to store it." Id. In fact, even construing the pleadings in the light most favorable to Plaintiff, the clear inference is that the third-party vendor is engaging in precisely the sort of "routine" data recordation in Williams: the primary function of the vendor appears to be "stor[ing] transcripts of Defendant's chat communications with 'unsuspecting' website visitors." (FAC ¶ 12.)

Graham also explains why Plaintiff's aiding and abetting theory must fail:

> By contrast, FullStory is a vendor that provides a software service that captures its clients' data, hosts it on FullStory's servers, and allows the clients to analyze their data. Unlike NaviStone's and Facebook's aggregation of data for resale, there are no allegations here that FullStory intercepted and used the data itself. Instead, as a service provider, FullStory is an extension of Noom. It provides a

> tool — like the tape recorder in Rogers — that allows Noom to record and analyze its own data in aid of Noom's business. It is not a third-party eavesdropper.

533 F. Supp. 3d at 832-33 (internal citations omitted). As in Graham, the facts alleged in the FAC and inferences that can be drawn from them demonstrate that Defendant uses a third-party vendor to "record and analyze its own data in aid of [Defendant]'s business," not the "aggregation of data for resale," which makes the third-party an "extension" of Defendant's website, not a "third-party eavesdropper." Id.

To the extent Plaintiff thinks it is unfair to hold that she fails to state a claim before discovery would allow her to learn exactly how the third-party software vendor operates, that is a policy argument that the Supreme Court, for better or for worse, has rejected by requiring plausibility pleading. Moreover, pre-discovery information deficits do not appear to have stopped numerous other plaintiffs who have brought CIPA challenges from learning how a third-party software vendor works. Those plaintiffs likely were represented by lawyers who were interested in conducting the necessary investigation into a party they intended to sue in order to plead facts with specificity. In contrast, Plaintiff's Counsel has evinced an unmistakable intent to sue as many as companies as possible in the shortest amount of time possible, seemingly without doing the most basic homework on the entities he names as defendants.

Accordingly, the Courts GRANTS the Motion as to Plaintiff's first cause of action. It discusses whether to dismiss the claim with or without leave to amend below.

C. Second Cause of Action: California Penal Code § 632.7

Plaintiff's second cause of action is foreclosed by the plain language of the statute. It states:

> (a) Every person who, without the consent of all of the parties to a communication, intercepts or receives and intentionally records, or assists in the interception or reception and intentional recordation of, a communication transmitted between two cellular radio telephones, a cellular radio telephone and a landline telephone, two cordless telephones, a cordless telephone and a landline telephone, or a cordless telephone and a cellular radio telephone [is liable].

Cal. Penal Code § 632.7. The unambiguous meaning of the statute is thus that it only applies to communications involving two telephones. Plaintiff's allegations all relate to text-based web communications regarding a chat feature on a website, which virtually by definition cannot involve two telephones. (See FAC ¶¶ 18-19.) Regardless of whether Plaintiff has successfully made an end-run around half the statute by purporting to use a smartphone, rather than the far more obvious tool of a computer, to initiate the conversation on the Website and thus inflict upon herself an injury to bring this lawsuit, she does not, and cannot, allege that Defendant is using a

telephone on the other end.[10] That is because it is not: whoever or whatever is on the other end of the text-based communication, a computer, not a telephone, is being used to receive and send messages to Plaintiff and other users of the Website.

The California Supreme Court has found that, in enacting Section 632.7, the California Legislature was "[r]esponding to the problem of protecting the privacy of parties to calls involving cellular or cordless telephones[.]" Flanagan v. Flanagan, 27 Cal. 4th 766, 776 (2002). "It protects against intentional, nonconsensual recording of telephone conversations regardless of the content of the conversation or the type of telephone involved." Id. at 581-82. Determining "what type of telephone was used to receive the subject call" is an element of a Section 632.7 claim. Hataishi v. First Am. Home Buyers Prot. Corp., 223 Cal. App. 4th 1454, 1469 (2014). To this Court's knowledge, at least until Arisha Byars v. The Goodyear Tire and Rubber Co., et al., 2023 WL 1788553 (C.D. Cal. Feb. 3, 2023) ("Goodyear"), courts universally agreed that the statutory language of Section 632.7 would not apply in the context of text-based communications on a website. See, e.g., Montantes v. Inventure Foods, 2014 WL 3305578, at *4 (C.D. Cal. July 2, 2014) ("The plain text of § 632.7 suggests that an exclusive list of five types of calls are included: a communication transmitted between (1) two cellular radio telephones, (2) a cellular radio telephone and a landline telephone, (3) two cordless telephones, (4) a cordless telephone and a landline telephone, or (5) a cordless telephone and a cellular radio telephone. According to this list of included types of telephones, the communication must have a cellular radio or cordless telephone on one side, and a cellular radio, cordless, or landline telephone on the other side."); Moledina v. Marriott Int'l, Inc., 2022 WL 16630276, at *7 (C.D. Cal. Oct. 17, 2022) (quoting the language of Section 632.7 and finding that it applies to communications between "a cellular telephone and another telephone").

However, Judge Sykes decided very recently in Goodyear, 2023 WL 1788553, at *5 (C.D. Cal. Feb. 3, 2023) that Section 632.7 applies to a claim made by Ms. Byars herself. There is no intellectually honest way to distinguish Goodyear, for it involves virtually identical allegations as those here (indeed, the allegations in Goodyear and here are copied and pasted from the same template). But persuasive authority like Goodyear is only relevant to the extent of its ability to *persuade*, and the Court respectfully disagrees with Goodyear's Section 632.7 holding.[11] Circumventing the plain language of Section 632.7, Goodyear cites McCabe v. Six Continents Hotels, Inc., 2014 WL 465750, at *3 (N.D. Cal. Feb. 3, 2014) for the proposition that Section

[10] It may even be true that Plaintiff's use of a smartphone to engage in web-based chatting fails to meet the telephone requirement, either, though the Court need not decide that question. See Mastel v. Miniclip SA, 549 F. Supp. 3d 1129, 1135-36 (E.D. Cal. 2021) (reasoning that a tool allowing a user to copy and paste text is a "feature of the portion of the iPhone that functions as a computer, not the phone" and therefore is not a "telephone instrument" within the meaning of Section 631(a).)

[11] Goodyear did not consider the direct party exception in its Section 631(a) analysis. "It is axiomatic that cases are not authority for propositions not considered." Evanston Ins. Co. v. Atain Specialty Ins. Co., 254 F. Supp. 3d 1150, 1165 (N.D. Cal. 2017) (citation omitted). Thus, the Court has no occasion to consider Goodyear's analysis as to Section 631(a).

632.7 may apply where only "one of the parties is using a cellular or cordless telephone." 2023 WL 1788553, at *5. It then rejected the argument that Ms. Byars failed to allege that the text-based communications occurred between two telephone devices, holding that "there is no requirement that Byars allege the type of telephonic device used by Goodyear." Id. at *5. As explained below, that may be true within a narrow context, but Goodyear's reasoning rests on the false premise that Goodyear was using a telephone at all: the allegations there, as here, make it abundantly clear that it was *not* using a telephone, for Goodyear, like Hot Topic, was accused of "embed[ing] code into its chat feature that allows Goodyear to record and transcribe" text-based communications. Id. at *1. Plaintiff admits as much: she asks the Court to construe "Defendant's computer equipment" as the "functional" equivalent of a "landline telephone." (Opposition at 17.) McCabe also does not support the broad proposition that Goodyear cited it for. McCabe rejected a predictable but unpersuasive argument by a defendant essentially asking the court to hold that the plaintiff needed to have ruled out a remote possibility in order to plausibly allege an element: the defendant argued that it could have been using Voice Over Internet Protocol (VoIP) technology to record phone calls, as opposed to an ordinary telephone. See 2014 WL 465750, at *3. McCabe's rejection of the argument made perfect sense, because VoIP telephone calls are similar to traditional telephony in almost every meaningful respect as it relates to an individual's right to privacy, and there was no doubt whatsoever that the facts in McCabe involved *telephone calls* between two users using some kind of *telephonic device*: the plaintiffs alleged that they called the defendant's "call centers from a cellular phone in California" and the call centers recorded their calls without their consent. Id. at *1.

Here, there is no possible basis to conclude that one of the five "exclusive . . . types of calls" are at issue: "a communication transmitted between (1) two cellular radio telephones, (2) a cellular radio telephone and a landline telephone, (3) two cordless telephones, (4) a cordless telephone and a landline telephone, or (5) a cordless telephone and a cellular radio telephone." Montantes, 2014 WL 3305578, at *4. Plaintiff's argument to the contrary is an enormous stretch, asking the Court to "broadly construe the term, 'landline telephone,' in section 632.7(a) of the Penal Code, which is undefined, functionally as encompassing Defendant's computer equipment, which connected with Plaintiff's smart phone to transmit and receive Plaintiff's chat communications." (Opposition at 17.) Plaintiff provides no valid authority or explanation why the Court should adopt a construction of the statute so fundamentally at war with its text other than it would allow her to possibly state a claim for relief. To the extent unpublished district court opinions have suggested, whether in their holdings or in dicta, that a plaintiff may state a claim under Section 632.7 without alleging the use of two or more telephones, the narrow reasoning of those cases is either distinguishable or, in the case of Goodyear, unpersuasive. "When the express terms of a statute give us one answer and extratextual considerations suggest another, it's no contest. Only the written word is the law, and all persons are entitled to its benefit." Bostock v. Clayton Cnty., Georgia, 140 S. Ct. 1731, 1737 (2020).

Section 632.7 applies only to communications involving two telephones. Plaintiff admits that Defendant was not using a telephone, and thus her second cause of action fails as a matter of law. Because it would be futile to amend the pleadings as to the second cause of action, the Court

GRANTS the Motion as to Plaintiff's Section 632.7 claim and DISMISSES it WITHOUT LEAVE TO AMEND. See Lopez, 203 F.3d at 1127.

D. Leave to Amend to Allege Subject Matter Jurisdiction and the First Cause of Action

The Court dismissed Plaintiff's complaint for lack of subject matter jurisdiction in Miguel Licea v. Caraway Home Inc, et al., EDCV 22-1791, with leave to amend the jurisdictional allegations. Id., Order on Defendant's Motion to Dismiss, Dkt. No. 20. In doing so, the Court denied a request for jurisdictional discovery. Assuming Plaintiff would request the same had the issue been raised by the Motion rather than *sua sponte*, the Court once again finds that leave to amend to properly allege subject matter jurisdiction is the appropriate court of action, rather than jurisdictional discovery. The Ninth Circuit has made it clear that a district court's discretion on the question of whether to grant jurisdictional discovery is exceptionally broad: "In granting discovery, the trial court is vested with broad discretion and will not be reversed except upon the clearest showing that denial of discovery results in actual and substantial prejudice to the complaining litigant. Discovery may appropriately be granted where pertinent facts bearing on the question of jurisdiction are controverted or where a more satisfactory showing of the facts is necessary." Data Disc, Inc. v. Sys. Tech. Assocs., Inc., 557 F.2d 1280, 1285 n.1 (9th Cir. 1977) (internal citation omitted). District courts routinely deny such requests. See, e.g., Boschetto v. Hansing, 2006 WL 1980383, at *5 (N.D. Cal. July 13, 2006), aff'd, 539 F.3d 1011 (9th Cir. 2008) ("plaintiff merely speculates without any support that discovery might allow him to demonstrate that jurisdiction in California is proper"); W. Air Charter, Inc. v. Sojitz Corp., 2019 WL 4509304, at *10 n.3 (C.D. Cal. May 2, 2019) (Bernal, J.). One district court's reasoning in denying limited jurisdictional discovery is particularly apt here: "Plaintiff's jurisdictional theories . . . rest only on bare allegations . . . These bare assertions are unsupported by evidence and too speculative to support a grant of jurisdictional discovery. Because plaintiff has not demonstrated that resolution of the jurisdictional issue should be delayed and [the defendant] forced to incur discovery costs, his request for discovery is denied." Barantsevich v. VTB Bank, 954 F. Supp. 2d 972, 998 (C.D. Cal. 2013). Jurisdictional discovery is not a substitute for a plaintiff's lawyer doing even the most basic research about the company he is suing (before suing it), or making even a minimal effort to comply with pleading standards as to jurisdictional facts (or any facts, for that matter). At least when plaintiffs have not already been afforded an opportunity to amend the complaint, dismissal without leave to amend is generally only appropriate when the "pleading could not possibly be cured by allegation of other facts." Lopez, 203 F.3d at 1127. These principles apply in the context of a failure to plead jurisdictional allegations. See Carolina Cas. Ins. Co., 741 F.3d at 1086. There is some possibility that Plaintiff may allege sufficient facts to plausibly plead, in good faith, that $5 million is in controversy under CAFA. As such, the Court grants leave to amend to allege subject matter jurisdiction.

The Court has serious doubts whether Plaintiff can or will cure the deficiencies with her pleading of the first cause of action outlined here, as well as others revealed by the Motion and the Brief Amicus Curiae of NRF. For one, the Complaint has already been amended once, and Plaintiff did not make a single meaningful change to the pleadings. (See Complaint; FAC.) When a plaintiff fails to cure the deficiencies in her pleadings once, it is a "a "strong indication

that [Plaintiff] has no additional facts to plead" and it may be "clear that [Plaintiff] has made [her] best case and [has] been found wanting." Zucco Partners, LLC v. Digimarc Corp., 552 F.3d 981, 1007 (9th Cir. 2009) (quoting In re Vantive Corp. Sec. Litig., 283 F.3d 1079, 1098 (9th Cir. 2002)). Plaintiff's Counsel's determination to file deficient cookie-cutter pleadings at massive scale, rather than fewer cases that adhere to plausibility pleading standards, is a strong indication that an Iqbal-compliant pleading is not forthcoming. Nonetheless, because Plaintiff and Plaintiff's Counsel have not had an opportunity to see how this Court would rule on a Rule 12(b)(6) motion on the allegations here, and because there is some possibility, however remote, that Plaintiff can plead specific facts to state a claim for relief under Section 631(a), the Court DISMISSES the first cause of action WITH LEAVE TO AMEND.

Lest there be any doubt about the Court's intentions, this will almost certainly be Plaintiff's final opportunity to amend the pleadings, and she is forewarned not to abuse it. To state a claim for relief under the first cause of action, Plaintiff must plead specific facts that will render Defendant liable for aiding and abetting the conduct of its third-party software vendor under Section 631(a). In order to do that, Plaintiff almost certainly must allege (1) the name of that third-party software vendor; (2) precisely how that software operates on Defendant's Website; (3) the ways in which data is shared and used by Defendant and the third-party such that the latter "intercepts" any communications; (4) how specifically the third-party vendor "intercepts" communications in transit, not just through accessing stored files after a communication has concluded; and (5) the nature of the financial relationship between Defendant and the third-party vendor, i.e. whether the latter is using data for its own purposes and financial gain, such that any usage would violate a user of Defendant's website's reasonable expectations of privacy.[12] The Court encourages Plaintiff to conduct additional research and make a concerted effort to substantively rewrite the allegations under her first cause of action, rather than make cosmetic changes to it. If Plaintiff is unable to allege these elements without resorting to the vague and conclusory allegations in the FAC, she should consider it futile to amend the FAC.

V. CONCLUSION

For the reasons above, the Court finds *sua sponte* that Plaintiff fails to plausibly allege subject matter jurisdiction and **GRANTS** the Motion. Plaintiff is granted leave to amend to allege, plausibly and in good faith, subject matter jurisdiction under CAFA. Plaintiff's first cause of action is **DISMISSED WITH LEAVE TO AMEND.** The second cause of action is **DISMISSED WITHOUT LEAVE TO AMEND.** The February 27, 2023 hearing is **VACATED**. An amended complaint, if any, shall be filed by February 24, 2023.

IT IS SO ORDERED.

[12] This is not to suggest that Plaintiff would state a claim if she properly alleged these elements. Plaintiff should take the opportunity to amend the FAC to address the other deficiencies raised by the Motion and the Brief Amicus Curiae of NRF.

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PRIVACY AND DATA SECURITY LITIGATION UPDATE

VIDEO PRIVACY PROTECTION ACT DECISIONS

JS-6

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

Jesse Cantu,

Plaintiff,

v.

Tractor Supply Company,

Defendant.

Case No. 2:23-cv-3027-HDV-JC

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT [DKT. NO. 27]

I. INTRODUCTION

Plaintiff Jesse Cantu brings this lawsuit against Defendant Tractor Supply Company,[1] alleging violations of the Video Privacy Protection Act ("VPPA" or "Act"). Before the Court is Defendant's Motion to Dismiss ("Motion"), which seeks dismissal of Plaintiff's First Amended Complaint ("FAC") on the grounds that Plaintiff cannot allege that he suffered a cognizable injury sufficient to confer standing. Defendant also avers that Plaintiff cannot allege three necessary elements of a VPPA claim: (1) that Defendant is a "video tape service provider," (2) that Defendant disclosed personally identifiable information ("PII"), and (3) that Plaintiff is a "consumer," or "subscriber" under the Act.

The Court first finds that Plaintiff has alleged a concrete injury under the VPPA sufficient to establish standing under Article III. But what drives Plaintiff's FAC requires a different analysis. Although Defendant Tractor Supply Company certainly supplies *something*—exactly what it sells the FAC is careful to omit, but careful readers may hazard a guess—it does not, on the facts alleged, sell or otherwise monetize videos. Because Plaintiff does not plausibly allege that Defendant is a "video tape service provider," he cannot state a viable VPPA claim. The Motion is ***granted in part*** and the FAC is ***dismissed*** with prejudice.

II. BACKGROUND

Defendant owns and/or controls a website and sells products. FAC ¶¶ 7, 16 [Dkt. No. 23]. Plaintiff is a consumer privacy advocate and "tester" who works to ensure companies abide by the obligations imposed by federal law. *Id.* ¶ 27.

Plaintiff claims that he watched a video on Defendant's website because, in addition to his motivations as a tester, he was genuinely interested in Defendant's unspecified goods and services. *Id.* Plaintiff also downloaded Defendant's mobile application onto his smart phone. *Id.* ¶ 28. As alleged, Defendant has embedded "Google Analytics" tracking tags into its website, which collect "data" from visitors of the website and sends the data to Google. *Id.* ¶ 15. This data includes information about the visitor's video-watching behavior and information linked to the visitor's

[1] DBA www.tractorsupply.com

Google account. *Id.* ¶ 23–24.

On April 21, 2023, Plaintiff initiated this putative nationwide class action asserting a violation of the Video Privacy Protection Act, 18 U.S.C. §§ 2710, *et seq.* [Dkt. No. 1].[2] Defendant filed the present Motion on October 12, 2023. [Dkt. No. 27]. On December 7, 2023, the Court heard oral argument and took the Motion under submission. [Dkt. No. 36].

III. LEGAL STANDARD

"If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action." Federal Rule Civil Procedure 12(h)(3). A defendant may raise the defense of lack of subject-matter jurisdiction by motion pursuant to Federal Rule of Civil Procedure 12(b)(1). Under Rule 12(b)(1), a party may seek dismissal "either on the face of the pleadings or by presenting extrinsic evidence." *Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136, 1139 (9th Cir. 2003) (citation omitted). In resolving a facial attack on jurisdiction, the Court only considers the allegations set forth in the complaint. *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). In contrast, when a party asserts a factual challenge, "the district court may review evidence beyond the complaint without converting the motion to dismiss into a motion for summary judgment." *Id.* The party asserting jurisdiction bears the burden of establishing subject-matter jurisdiction. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994).

Under Rule 12(b)(6), a party may move to dismiss a complaint for failure to state a claim upon which relief may be granted. "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. Only where a plaintiff fails to "nudge[] [his or her] claims … across the line from

[2] Plaintiff filed his FAC on September 22, 2023, [Dkt. No. 23], approximately ten hours after the deadline set by prior stipulation, [Dkt. No. 21]. The Court considers this neglect "excusable," if regrettable, and will decide Defendant's Motion on its merits. *See Pioneer Investment Services Co. v. Brunswick Associates, Ltd.*, 507 U.S. 380, 395 (1992).

conceivable to plausible," is the complaint properly dismissed. *Id.* at 680. While the plausibility requirement is not akin to a probability requirement, it demands more than "a sheer possibility that a defendant has acted unlawfully." *Id.* at 678. Determining whether a complaint satisfies the plausibility standard is a "context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.* at 679.

IV. DISCUSSION

A. Article III Standing

Article III standing is "a jurisdictional prerequisite to a federal court's consideration of any claim." *DaVita, Inc. v. Amy's Kitchen, Inc.*, 379 F. Supp. 3d 960, 967 (N.D. Cal. 2019), *aff'd*, 981 F.3d 664 (9th Cir. 2020). To demonstrate standing, a plaintiff must have suffered an injury in fact that is fairly traceable to the challenged conduct and likely to be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992). Injury in fact is the foremost element of standing. *Matter of E. Coast Foods, Inc.*, 80 F.4th 901, 907 (9th Cir. 2023). A plaintiff establishes injury in fact when he has suffered an invasion of a legally protected interest that is "concrete and particularized," meaning the injury must "actually exist" and "must affect the plaintiff in a personal and individual way." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 339–40 (2016). "Only those plaintiffs who have been *concretely harmed* by a defendant's statutory violation may sue that private defendant over that violation in federal court." *TransUnion LLC v. Ramirez*, 594 U.S. 413, 427 (2021) (emphasis in original). Thus, "under Article III, an injury in law is not an injury in fact." *Id.* Further, "[v]arious intangible harms" that "are injuries with a close relationship to harms traditionally recognized as providing a basis for lawsuits in American courts"—such as "reputational harms, disclosure of private information, and intrusion upon seclusion"—can be considered concrete. *Id.* at 425.

As a preliminary matter, no party seriously disputes that, "prior to *TransUnion*, courts … consistently found that plaintiffs satisfy the concreteness requirement of Article III standing where they allege a deprivation of their privacy rights under the VPPA." *See Salazar v. Nat'l Basketball Ass'n*, No. 1:22-CV-07935 (JLR), 2023 WL 5016968, at *5 (S.D.N.Y. Aug. 7, 2023); *see also Austin-Spearman v. AMC Network Entm't LLC*, 98 F. Supp. 3d 662, 666–67 (S.D.N.Y. 2015)

("[E]very court to have addressed this question has reached the same conclusion, affirming that the VPPA establishes a privacy right sufficient to confer standing through its deprivation[.]") (collecting cases). The thrust of Defendant's argument, however, is that the Supreme Court's reaffirmation of core standing principles in *TransUnion* abrogates any prior case law that supports Plaintiff's standing in this case. Motion at 17; Reply at 4–7 [Dkt. No. 31].

The Court disagrees. In the wake of *TransUnion*, many courts have found "that the alleged unlawful 'disclosure of [a plaintiff's] information to a third party' … bears 'a close relationship to harms traditionally recognized as providing a basis for lawsuits in American courts,' … including the common-law tort of intrusion upon seclusion that the Supreme Court in *TransUnion* expressly identified as among the 'intangible harms' 'qualify[ing] as concrete injuries under Article III.'" *Pileggi v. Washington Newspaper Publ'g Co.*, LLC, No. CV 23-345 (BAH), 2024 WL 324121 at * 5 (D.D.C. Jan. 29, 2024); *see Salazar*, 2023 WL 5016968 at *5 (allegations that a website "shared private information about … [a plaintiff's] video viewership to a third party without his consent or knowledge" were "sufficient to establish concrete injury (and standing) post-*TransUnion* because the 'disclosure of private information is a harm that courts have traditionally considered to be redressable'") (citation omitted); *Feldman v. Star Trib. Media Co. LLC*, 659 F. Supp. 3d 1006, 1015 (D. Minn. 2023) (allegations that a website intruded on a plaintiff's privacy by sharing "video viewing history" with a third-party was sufficient to establish a concrete injury); *Pratt v. KSE Sportsman Media, Inc.*, 586 F. Supp. 3d 666, 678 (E.D. Mich. 2022) (plaintiffs identified a concrete harm under a state law analog to the VPPA by alleging that defendants "violated Plaintiffs' statutorily conferred right to privacy in their reading habits—an intangible harm presenting ample constitutional mooring for Article III purpose"). The Court finds these decisions persuasive. Here, Plaintiff alleges that Defendant disclosed, without Plaintiff's consent, "information that allowed Google (and any ordinary person) to readily identify Plaintiff's video-watching behavior … for the purpose of retargeting Plaintiff in connection with Google advertising campaigns." FAC ¶ 31. Defendant's alleged intrusion into Plaintiff's privacy is sufficient to establish a concrete injury under

TransUnion.[3]

B. Video Tape Services Provider

Although Plaintiff has Article III standing to pursue this action, whether he can state a claim for relief under the VPPA is a different issue. Defendant argues that he cannot, most directly because Defendant is not a "video tape services provider" under the law. Motion at 21–23. The Court agrees.

Congress enacted the VPPA in 1988 to "preserve personal privacy with respect to the rental, purchase or delivery of video tapes or similar audio visual materials." S. Rep. 100-599 at 1 (1988); *see also Mollett v. Netflix, Inc.*, 795 F.3d 1062, 1066 (9th Cir. 2015) ("The VPPA was enacted in 1988 in response to the *Washington City Paper*'s publication of then-Supreme Court nominee Robert Bork's video rental history."). The Act provides that "[a] video tape service provider who knowingly discloses, to any person, personally identifiable information concerning any consumer of such provider shall be liable to the aggrieved person …." 18 U.S.C. § 2710(b)(1). To plead a claim under the VPPA, a plaintiff must plausible allege that: (1) the defendant is a "video tape service provider," (2) the defendant disclosed "personally identifiable information concerning any [consumer]" to "any person," (3) the disclosure was made knowingly, and (4) the disclosure was not authorized by Section 2710(b)(2)." *Mollett*, 795 F.3d at 1066.

The VPPA defines a "video tape service provider" as "any person, engaged in the business, in or affecting interstate or foreign commerce, of rental, sale, or delivery of prerecorded video

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[3] Nor is the Court persuaded that Plaintiff's status as a "tester" defeats standing. *See* Motion at 18. As the current Wright & Miller treatise on federal practice notes, although

> [s]elf-inflicted injury may seem a suspicious basis for standing[,] [i]t is clear ... that no rigid lines are drawn on this basis. A good illustration is provided by Havens Realty Corporation v. Coleman [465 U.S. 363 (1982)]. Two plaintiffs were permitted standing to challenge racially discriminatory practices in apartment rentals. One was a "tester," who sought information solely for the purpose of proving that false information was provided to black applicants; the other was an organization that claimed the defendants' practices forced it to greater efforts in combatting discrimination. Neither plaintiff needed to become involved at all. The voluntary choice to suffer the injury that conferred standing was sufficient.

Wright & Miller, 13A Fed. Prac. & Proc. & Proc. Juris. § 3531.5 (3d ed.).

cassette tapes or similar audio visual materials ….” 18 U.S.C. § 2710(a)(4). “[F]or the defendant to be ‘engaged in the business’ of delivering video content, the defendant’s product must not only be substantially involved in the conveyance of video content to consumers but also significantly tailored to serve that purpose.” *In re Vizio, Inc.*, 238 F. Supp. 3d 1204, 1221 (C.D. Cal. 2017); *see id.* (“When used in this context, ‘business’ connotes ‘a particular field of endeavor,’ i.e., a focus of the defendant’s work.”). Courts in the Ninth Circuit consistently recognize that delivering video content must be central to the defendant’s business or product for the VPPA to apply. *See, e.g., Carroll v. Gen. Mills, Inc.*, No. 23-cv-1746-DSF-MRW, 2023 WL 4361093, at *4 (C.D. Cal. June 26, 2023) (“The videos on the website are part of Defendant’s brand awareness, but they are not Defendant’s particular field of endeavor. Nothing suggests that Defendant’s business is centered, tailored, or focused around providing and delivering audiovisual content.”); *Cantu v. Tapestry, Inc.*, No. 22-cv-1974-BAS-DDL, 2023 WL 6451109, at *4 (S.D. Cal. Oct. 3, 2023) (“That the videos are used for marketing purposes, as admitted in the SAC, demonstrates that they themselves are not Defendant’s product and therefore are only peripheral to Defendant’s business.”).

Applying this standard, the Court finds that the FAC does not plausibly allege that Defendant is a video tape service provider under the VPPA. Plaintiff alleges that

> Defendants’ business model involves using pre-recorded videos and audio-visual materials to promote and monetize their products. Consistent with its business model, the Website hosts and delivers content including videos … [A] focus of Defendant’s business is the creation and/or commission and delivery of audio-visual materials….

Id. ¶¶ 16–17, 19–20. Plaintiff does not allege that Defendant’s business model consists of selling or monetizing the videos on its website or any “content hosted across other online platforms,” *Id.* ¶ 19; instead, the basis of Plaintiff’s argument that Defendant is a “video tape services provider” is, “specifically,” that its “business model involves using pre-recorded videos and audio-visual materials to promote and *monetize their products*.” *Id.* ¶ 16 (emphasis added). But the fact “[t]hat the videos are used for marketing purposes, as admitted in the [FAC], demonstrates that they themselves are not Defendant’s product and therefore are only peripheral to Defendant’s business.” *Tapestry*, 2023 WL 6451109, at *4.

The specific video that Plaintiff watched, which is hosted on the website corporate.tractorsupply.com, features an "inspirational" story of Defendant's employees who recovered from cancer. *Id.* ¶ 17–18 & Figure 1. Plaintiff does not plausibly claim that this video itself is a "good" or product that Defendant offers, only that the video "relate[s] to Defendant" and "includes footage of Defendant's employees in its stores as well as interviews with employees." *Id.* ¶ 18. It is not plausible to allege, as Plaintiff does here, that Defendant is "engaged in the business" of delivering video content by including such videos on its website. *Id.* ¶ 16. Using videos for "brand awareness" rather than as part of "a particular field of endeavor" shows that Defendant's business is not "centered, tailored, or focused around providing and delivering audiovisual content." *Tapestry*, 2023 WL 6451109, at *4 (citations omitted). The FAC candidly explains that "human-interest stories" created by Defendant are vehicles for the "*promotion* of [Defendant's] interests," *id.* at 18 (emphasis added); nowhere does it suggest that these videos are the actual goods on offer in Defendant's business model. The claim fails as a matter of law. [4]

V. CONCLUSION

Although Plaintiff has established standing, the Court finds that Plaintiff's allegation that Defendant is a "video tape service provider" within the meaning of the VPPA is inadequate. Because Plaintiff has already amended the complaint once as a matter of course, *see* [Dkt. Nos. 1, 23], and because the FAC's fatal deficiencies cannot plausibly be remedied by further pleading, the Court finds that amendment would be futile and ***dismisses*** the First Amended Complaint without leave to amend. *See Kroessler v. CVS Health Corp.*, 977 F.3d 803, 815 (9th Cir. 2020).

Dated: March 21, 2024

Hernán D. Vera
United States District Judge

[4] Defendant raises the independent question of whether Plaintiff is a "consumer" under the VPPA. Motion at 26–28. The Court need not reach this question because it concludes that Defendant is not a "video tape services provider" under the Act. For the same reason, the Court does not reach Defendant's argument that it did not disclose Plaintiff's "personally identifiable information" within the meaning of the VPPA. *See* Motion at 23–26.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

David Collins, *et al*.,

Plaintiffs,

v.

The Toledo Blade, *et al.*,

Defendants.

Case No. 23-cv-00302

ORDER

This is a Video Privacy Protection Act putative class action case under 18 U.S.C. § 2710 ("VPPA"). Defendants are the Toledo Blade Company, PG Publishing Co., and Block Communications, Inc. (Doc. 17. PgID. 88).

Defendants Toledo Blade and PG Publishing Co. own and publish local newspapers the *Toledo Blade* and the *Pittsburgh Post-Gazette*, respectively. (Doc. 18-1, PgID. 119). The *Toledo Blade* and the *Post-Gazette* are local newspapers serving Toledo, Ohio and Pittsburgh, Pennsylvania, respectively. (*Id.*) Toledo Blade is an operating division of Defendant Block Communications (*id*.) and PG Publishing is a wholly-owned subsidiary of Defendant Block Communications (*id*).

Plaintiffs are David Collins, Patricia Fuire, Elizabeth Mayforth, and Robert Annan. Plaintiffs are registered users of the *Toledo Blade's* website, www.toledoblade.com, or the *Post-Gazette's* website, www.post-gazette.com. (Doc. 17, PageID. 98–101). Plaintiffs allege that Defendants illegally shared a record containing their digital subscribers' identity plus titles of videos they accessed on Defendants' websites with non-party Meta Platforms, Inc. (*Id*. at PageID. 88).

On October 31, 2023, Defendants filed a motion to dismiss Plaintiffs' second amended complaint ("Complaint"). (Doc. 18). On November 20, 2023, Plaintiffs responded (Doc. 19), and on December 15, 2023, Defendants filed a reply (Doc. 20).

For the reasons that follow, I deny Defendants' motion.

Background

1. Factual Background

The *Toledo Blade* and the *Post-Gazette* offer print and online editions of their respective newspapers on their websites, www.toledoblade.com and www.post-gazette.com. (Doc. 17 at PgID. 89–90). Both websites contain pre-recorded and live-stream videos. (*Id*. at PgID. 92).

Defendants offer users of their websites the option to create an account or purchase a subscription. (*Id*. at PgID. 90). Plaintiffs allege that they were all digital subscribers to the *Toledo Blade* or the *Post-Gazette*. (*Id*.).

Plaintiffs registered for accounts on both newspapers' websites by providing, among other information, their names and email addresses. (*Id*. at PgID. 98–101). In exchange, the newspapers provided Plaintiffs with unique usernames and passwords for their websites. (*Id*.)

Plaintiffs allege that they all regularly requested or obtained video materials from Defendants' websites. (*Id*.).

Plaintiffs are also Facebook users. (*Id*. at PgID. 88, 98–101). They created Facebook accounts by providing Facebook with their name, email or phone number, and other information such as date of birth and gender. *See* www.facebook.com/help (Mar. 12, 2024) [https://perma.cc/C2RY-YA3J]. Facebook assigns each of its users a unique identification number, or Facebook ID ("FID"). (*Id*. at PgID. 93).

Facebook associates its users' FID with that individual's Facebook profile and URL.[1, 2] (*Id.*) Each of the four named Plaintiffs have a unique FID associated with their profiles. (*Id*. at PgID. 98–101).

In 2021, Facebook rebranded as Meta Platforms, Inc. *See* https://about.fb.com/news/2021/10/facebook-company-is-now-meta/ (Mar. 12, 2024) [https://perma.cc/2F24-7C88]. Among other products, Meta offers its customers a business tracking tool called the Meta Pixel. *Id*. Meta's website explains that "[t]he Meta Pixel is a piece of code that you put on your website that allows you to measure the effectiveness of your advertising by understanding the actions people take on your website." https://www.facebook.com/business/help (follow "About Meta Pixel" hyperlink) (Mar. 12, 2024).

Defendants voluntarily installed the Meta Pixel tracking tool on their websites. (Doc. 17, PgID. 92–93). Using Meta Pixel, the *Toledo Blade* and the *Post-Gazette* kept track of when Plaintiffs accessed a video on Defendants' websites. (*Id*.).

Defendants then sent Meta a "cookie"[3] containing the file names of the videos Plaintiffs accessed, along with their associated FIDs. (*Id*.).

Plaintiffs allege that each time Defendants sent this information to Meta, Defendants violated Plaintiffs' rights under the VPPA.

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[1] "URL" is short for "Uniform Resource Locator." It is, essentially, a web address that directs a browser to a website.

[2] Plaintiffs give an example of this in their Complaint where they state that Facebook founder Mark Zukerberg's FID is the number "4". (*Id*.). Thus, typing the URL www.facebook.com/4 into a web browser retrieves Zukerberg's unique Facebook profile page. (*Id*. at PgID. 93–94).

[3] Meta defines "cookies" as "small pieces of text used to store information on web browsers. Cookies are used to store and receive identifiers and other information on computers, phones and other devices. Other technologies, including data that we store on your web browser or device, identifiers associated with your device and other software, are used for similar purposes." https://www.facebook.com/privacy/policies/cookies/ (Mar. 12, 2024) [https://perma.cc/9Z3W-YLLH].

2. The VPPA

The VPPA provides that a "video tape service provider who knowingly discloses, to any person, personally identifiable information concerning any consumer of such provider shall be liable to the aggrieved person." 18 U.S.C. § 2710(b)(1).

The First Circuit has explained Congress' historical reasons for enacting the VPPA:

> Congress enacted the VPPA in response to a profile of then-Supreme Court nominee Judge Robert H. Bork that was published by a Washington, D.C., newspaper during his confirmation hearings. S. Rep. No. 100–599, at 5 (1988), *reprinted in* 1988 U.S.C.C.A.N. 4342–1. The profile contained a list of 146 films that Judge Bork and his family had rented from a video store. *Id*. Members of Congress denounced the disclosure as repugnant to the right of privacy. *Id*. at 5–8. Congress then passed the VPPA "[t]o preserve personal privacy with respect to the rental, purchase or delivery of video tapes or similar audio visual materials." *Id*. at 1.

Yershov v. Gannett Satellite Info. Network, Inc., 820 F.3d 482, 485 (1st Cir. 2016).

The VPPA defines a "video tape service provider" as "any person, engaged in the business … of rental, sale, or delivery of prerecorded video cassette tapes or similar audio visual materials." 18 U.S.C. § 2710(a)(4).

Personally identifiable information ("PII") is "includ[ing] information which identifies a person as having requested or obtained specific video materials or services from a video tape service provider." *Id*. at § 2710(a)(3).

Under the VPPA, "consumer" is "any renter, purchaser, or subscriber of goods or services from any video tape service provider." *Id*. at § 2710(a)(1).

The VPPA "is not well drafted" legislation. *Rodriguez v. Sony Comput. Ent. Am. LLC*, 801 F.3d 1045 (9th Cir. 2015); *and see Sterk v. Redbox Automated Retail, LLC*, 672 F.3d 535 (7th Cir. 2012). Simply put, the VPPA is an "attempt to place a square peg (modern electronic technology) into a round hole (a statute written in 1988 aimed principally at videotape rental services)." *Yershov*

v. Gannett Satellite Info. Network, Inc., 104 F. Supp. 3d 135, 140 (D. Mass. 2015), *rev'd on other grounds*.[4]

Legal Standard

1. Rule 12(b)(1)

"Rule 12(b)(1) motions to dismiss for lack of subject-matter jurisdiction generally come in two varieties: a facial attack or a factual attack." *Gentek Bldg. Prods., Inc. v. Sherwin-Williams Co.*, 491 F.3d 320, 330 (6th Cir. 2007).

A facial attack "questions [ ] the sufficiency of the pleading." *Rote v. Zel Custom Mfg. LLC*, 816 F.3d 383, 387 (6th Cir. 2016). "When reviewing a facial attack, a district court takes the allegations in the complaint as true." *Glob. Tech., Inc. v. Yubei (XinXiang) Power Steering Sys. Co.*, 807 F.3d 806, 810 (6th Cir. 2015) (quoting *Gentek*, *supra*, 491 F.3d at 330).

"If those allegations establish federal claims, jurisdiction exists." *O'Bryan v. Holy See*, 556 F.3d 361, 376 (6th Cir. 2009). But "[c]onclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss." *Rote*, *supra*, 816 F.3d at 387 (quoting *O'Bryan*, 556 F.3d at 376). "This approach is identical to the approach used by the district court when reviewing a motion invoking Federal Rule of Civil Procedure 12(b)(6)." *Glob. Tech., Inc.*, *supra*, 807 F.3d at 810.

A factual attack, by contrast, "raises a factual controversy requiring the district court to 'weigh the conflicting evidence to arrive at the factual predicate that subject-matter [jurisdiction] does or does not exist.'" *Wayside Church v. Van Buren Cnty.*, 847 F.3d 812, 817 (6th Cir. 2017)

[4] Congress revisited the statute in 2012–13. However, it did not change or update the key definitions set forth above. Rather, it modified only those provisions in the statute addressing how a customer can consent to disclosure of their own PII. *See, In re Nickelodeon Consumer Privacy Litigation*, 827 F.3d 262, 284–90 (3d Cir. 2016) (discussing legislative history of the VPPA).

(*overruled on other grounds by Freed v. Thomas*, 81 F.4th 655 (6th Cir. 2023)). In a factual attack on subject matter jurisdiction, "no presumptive truthfulness applies to the factual allegations," *Gentek*, *supra*, 491 F.3d at 330, and "the court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case." *United States v. Ritchie*, 15 F.3d 592, 598 (6th Cir. 1994).

"In considering a Rule 12(b)(1) motion to dismiss for lack of jurisdiction, a district court may consider factual matters outside the pleadings and resolve factual disputes." *Anestis v. United States*, 749 F.3d 520, 524 (6th Cir. 2014); *see also Ohio Nat'l Life Ins. Co. v. United States*, 922 F.2d 320, 325 (6th Cir. 1990) (stating that the court has "wide discretion to allow affidavits, documents and even a limited evidentiary hearing to resolve disputed jurisdictional facts").

When a court's subject-matter jurisdiction is challenged under Federal Rule of Civil Procedure 12(b)(1), the plaintiff has the burden to prove jurisdiction. *Glob. Tech., Inc.*, *supra*, 07 F.3d at 810 ("[T]he party invoking federal jurisdiction has the burden to prove that jurisdiction.").

2. Rule 12(b)(6)

Under Federal Rule of Civil Procedure 12(b)(6), I decide whether the complaint contains "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A complaint need only contain a "short and plain statement of the claim showing that the pleader is entitled to relief," *Ashcroft v. Iqbal*, 556 U.S. 662, 677–78 (2009) (quoting Fed. R. Civ. P. 8(a)(2)). This statement must contain "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id*. at 678.

Plausibility "is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id*. (quoting *Twombly*, *supra*, 550 U.S. at 556). "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of

misconduct, the complaint has alleged—but it has not 'show[n]'—'that the pleader is entitled to relief.'" *Id*. at 679 (quoting Fed. R. Civ. P. 8(a)(2)). Additionally, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id*. at 678.

Discussion

1. Subject Matter Jurisdiction

Defendants first argue that Plaintiffs lack a cognizable Article III injury under the VPPA. (Doc. 18-1, PgID. 124–127). Defendants identify that they are making a factual challenge to Plaintiffs' standing; specifically, that Plaintiffs have not suffered an injury in fact. (Doc. 18-1, PgID. 124).

To establish Article III standing, a plaintiff must allege three elements:

> First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized, … and (b) "actual or imminent, not 'conjectural or hypothetical.'" … Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be "fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court." … Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

Lujan v. Def. of Wildlife, 504 U.S. 555, 560–61 (1992) (internal citations omitted).

The Supreme Court clarified in *TransUnion LLC v. Ramirez*, that "an injury in law is not an injury in fact." 594 U.S. 413, 427 (2021). In other words, to establish a concrete injury, the plaintiff must identify an injury, that is, a "physical, monetary, or cognizable intangible harm traditionally recognized as providing a basis for a lawsuit in American courts." *Id*. Some examples of intangible injuries, recognized as a basis for lawsuits, are "reputational harm [and] disclosure of private information" *Id*. at 425.

The conclusion that plaintiffs have "suffered a concrete injury for purposes of Article III standing to assert a VPPA claim is supported by every federal circuit court that has considered the

issue." *Feldman v. Star Tribune Media Co. LLC*, 659 F. Supp. 3d 1006, 1015 (D. Minn. 2023) (collecting cases). The outcome here is no different.

Significantly, it is well-established that disclosure alone constitutes an injury under the VPPA:

> The VPPA plainly provides those, […], who allege wrongful disclosure even without additional injury a right to relief. By affording redress to "aggrieved" "consumers" and providing that "consumers" become "aggrieved" purely as a result of disclosures made in violation of the statute, the VPPA makes clear that such disclosures alone work an injury deserving of judicial relief.

Austin-Spearman v. AMC Network Ent. LLC, 98 F. Supp.3d 962, 966 (S.D.N.Y. 2015) (citations omitted).

In support of their argument, Defendants submit a declaration from Junsu Choi, a Principal at Keystone Strategy, which is a "consulting firm that specializes in the application of technological methodologies and principles to questions that arise in a variety of contexts, including, as here, in the context of litigation." [5] (Doc. 18-3, PgID. 141).

Mr. Choi's declaration explains that there are two types of videos on the *Toledo Blade* and *Post-Gazette's* websites: embedded videos and standalone videos. He states: "An embedded video refers to a webpage that contains a video that is embedded within an article. By contrast, a standalone video refers to a webpage that contains a video and a short description of that video (usually a single sentence or caption), and no other content." (Doc. 18-3, PgID. 143).

For his analysis, Mr. Choi used technology known as Man-In-The-Middle ("MITM") to intercept the cookies sent from the *Toledo Blade* and *Post-Gazette* to Meta. (*Id*. at PgID. 142). Mr. Choi attached screenshots of the MITM information to his affidavit. (*See id.* at PgID. 148–215).

[5] Plaintiffs expend many pages in their opposition arguing why I should disregard Mr. Choi's declaration and discredit it. (Doc. 19, PgID. 226–234). I reject Plaintiffs' arguments. As explained above, Defendants are making a factual attack and, accordingly, I can consider extrinsic evidence to resolve factual disputes. *See Nichols v. Muskingum Coll.*, 318 F.3d 674, 677 (6th Cir. 2003).

For embedded videos, Mr. Choi avers that the file name of the video is not included in the cookies Defendant sends Meta. (*Id*. at PgID. 144). He explains that, also, the cookies do not contain information such as whether a user "played, requested, or otherwise interacted" with the video. (*Id*.).

As to standalone videos, Mr. Choi avers that the name of the video file is included in only about half of the cookies sent to Meta. (*Id*. at PgID.146). And as with the embedded video cookies, none of the standalone video cookies disclose whether a user "played, requested, or otherwise interacted" with a video. (*Id*.).

In sum, Mr. Choi's declaration indicates that the only time that Defendants send Meta the file name of a video and the user's FID is when the video is the standalone type; not the embedded type. And even then, the file name is only in some of the cookies sent to Meta, not all of them.

Significantly, however, his affidavit confirms that even if a video *file name* is not included in all the cookies Defendants send to Meta, the *URL* for the webpage containing the video is disclosed, along with the user's FID. Accordingly, Mr. Choi's declaration does not contradict Plaintiffs' allegations that Defendants disclosed the fact that Plaintiffs visited a URL containing a video and Plaintiffs' FID to Meta.

Defendants argue that because the cookies transmitted to Meta do not indicate how or whether the user "interacted with a video on that webpage," such as if it was "in fact watched or requested," Plaintiffs have not sufficiently alleged that Defendants unlawfully shared VPPA-protected information with Meta. (Doc. 20, PgID. 325).

Again, I disagree. There is nothing in the statute that indicates that a plaintiff must show that they watched or "interacted with" a video. Rather, the VPPA states only that "a video tape service provider who knowingly discloses… personally identifiable information concerning any consumer

of such provider shall be liable." *See* 18 U.S.C. § 2710. Though not the basis of my decision, it seems reasonable to presume that a glimpse at a video, however brief, is sufficient.

Here, Plaintiffs have alleged that Defendants knowingly disclosed to Meta the fact that Plaintiffs accessed a webpage containing a video, along with the Plaintiffs' FID. Mr. Choi's declaration confirms this is so. Plaintiffs have therefore alleged that they suffered an injury in fact.[6]

2. Failure to State a Claim

Next, Defendants argue that Plaintiffs fail to state a claim under the VPPA. (Doc. 18-1, PgID. 127–135). Defendants argue: (1) that Plaintiffs are not "consumers" within the meaning of the VPPA; (2) that Defendants are not "video tape service providers" within the meaning of the VPPA; and (3) to the extent the information transmitted constitutes PII, it falls under the VPPA's ordinary course of business exception. (Doc. 18-1, PgID. 127–135).

Consumer

The VPPA defines "Consumer" as "any renter, purchaser, or subscriber of goods or services from a video tape service provider." 18 U.S.C. § 2710(a)(1).

Here, Plaintiffs allege that they provided their names and email addresses to Defendants and, in exchange, Defendants allowed access to more of Defendants' online newspaper content.[7] (*See* Doc. 17, PgID. 89–90).

[6] This is consistent with the plain language, and indeed, also the historical context, of the VPPA. As discussed, the VPPA was enacted well-before the regular use of current video-streaming technology. The titles of the 146 films that Robert Bork and his family rented from the video store, which prompted Congress to enact this law, were just that: the titles affiliated with his video store account. In Bork's case, there was no information about whether he actually watched all of the videos he and his family rented. Similarly here, Plaintiffs have established that the *Toledo Blade* and the *Post-Gazette* send Meta the URL for the webpage Plaintiffs visit plus their unique FID. In some cases, the *Toledo Blade* and *Post-Gazette* send the video's file name also. This suffices.

[7] Defendants provided an affidavit of their employee, Nathan Mason, which I mention here only for further context and not because I am converting this motion to dismiss into one for summary

The parties agree that Plaintiffs are not renters or purchasers, so I will analyze whether this adequately alleges that they are "subscribers."

The VPPA does not define "subscriber." The Sixth Circuit has not addressed this issue. Several other circuits have done so, and I look to them here for guidance.

The First Circuit stated, when confronted with this identical issue: "Because [the VPPA] contains no definition of the term 'subscriber,' nor any clear indication that Congress had a specific definition in mind, we assume that the 'plain and ordinary meaning' of the word applies." *Yershov*, *supra*, 820 F.3d at 487.

The *Yershov* Court explained:

> All dictionaries appear to be clear that a "subscriber" is one who subscribes. *See, e.g.*, Merriam–Webster's Collegiate Dictionary 1244 (11th ed. 2012). As for the meaning of the word "subscribe" itself, the dictionaries provide us with various choices. As the first relevant definition of "subscribe," Merriam–Webster provides "to enter one's name for a publication or service." *Id*. More on point technologically, another dictionary defines "subscribe" as "[t]o receive or be allowed to access electronic texts or services by subscription" with "subscription" defined, in turn, to include "[a]n agreement to receive or be given access to electronic texts or services." The American Heritage Dictionary 1726 (4th ed. 2000).

Id.

The Eleventh Circuit has set forth a multi-factor test for determining whether someone is a subscriber. The factors include: "payment, registration, commitment, delivery, expressed association, and/or access to restricted content." *Ellis v. Cartoon Network, Inc.*, 803 F.3d 1251,

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judgment. *See Commercial Money Ctr., Inc. v. Ill. Union Ins. Co.*, 508 F.3d 327, 335–36 (6th Cir. 2007). (Doc. 18-2).

Mr. Mason explains that, since at least 2013, Defendants' website users "have had unlimited free access to every standalone video on post-gazette.com and toledoblade.com." (Doc. 18-2, PgID. 139). However, as to embedded videos, he explains, "a user will eventually hit a paywall after viewing a certain number per month. That amount resets every month." (*Id*.). Thus, by creating an account or subscribing, Plaintiffs bypass the restrictions on embedded video content. (*See* Doc. 18-1, PgID. 122).

1256 (11th Cir. 2015). None of the factors on their own are dispositive. *Id*.; *and see Harris v. Public Broadcasting Service*, 662 F. Supp. 3d 1327, 1331 (N.D. Ga 2023).

Defendants cite to recent decisions where courts refused to find that plaintiffs who signed up for a defendant's online newsletter or email list were "subscribers" under the VPPA. (*Id*. at PgID. 128 (citing *Carter v. Scripps Networks, LLC*, No. 22-cv-2031, 2023 WL 3061858, at *6 (S.D.N.Y. Apr. 24, 2023); *Ellis, supra*, 803 F.3d at 1257–58; *and Jefferson v. Healthline Media, Inc*., No. 22-cv-05059, 2023 WL 3668522 (N.D. Cal. May 24, 2023)). In other words, "not everything that might be labeled a 'subscription' automatically triggers the statute's protections." (*Id*. (citing *Jefferson*, *supra*, 2023 WL 3668522 at *3)).

Those cases finding that a plaintiff is not a "subscriber" are distinguishable from the facts presented here. For example, in *Carter*, *supra*, 2023 WL 3061858, the plaintiffs contended they were "subscribers" because they signed up to receive a periodic emailed newsletter from hgtv.com. The plaintiffs never alleged that they signed up for an account directly with hgtv.com to fully access the website's content. Rather, their "subscription" to a newsletter was ancillary to hgtv.com's full website. Accordingly, they found that the plaintiffs were not "subscribers" to the hgtv.com website.

The Court in *Salazar v. Paramount Global*, No. 22-00756, 2023 WL 4611819 (M.D. Tenn. Julu 18, 2023), which is the only other district court case in the Sixth Circuit to analyze this issue, reached the same conclusion as *Carter* and presented similar facts. The plaintiff in *Salazar* signed up to receive the defendant's online newsletter—which was ancillary to the products and services offered by the defendant itself. *Id*. The plaintiff did not allege, for example, that he could "only" access video content on Defendant's website by signing up for the defendant's newsletter. *Id*.

Here, there is no "newsletter" ancillary to Defendants' main product. Plaintiffs gave Defendants their contact information in exchange for the very material that is, writ large, Defendants' main business: news and journalism. Defendants offer their users access to this information in the format of both written articles and audio-visual videos. Videos are not secondary or ancillary; they are just another format Defendants use to provide news and informational content to users.

I find that Plaintiffs are subscribers to Defendants for the same reasons that the district court in the Northern District of Georgia found that the plaintiffs there were subscribers to PBS in *Harris*, *supra*, 662 F. Supp. 3d 1327, 1331–32 (N.D. Ga. 2023). There, the plaintiff signed up for a free account with pbs.org, which required her to provide PBS with her name, email address, and other information. The plaintiff also was a Facebook user. She discovered that PBS configured its website to contain Meta Pixel, and was sending Meta data files that included a log of the video content that she accessed on pbs.org. In other words, the facts in *Harris* are nearly identical to the facts here.

The *Harris* court found that the plaintiff's relationship with PBS was "stronger" than those in other cases where the plaintiff merely signed up to receive a periodic newsletter or email. The *Harris* plaintiff had "established an account" directly with the defendant to access even "restricted" content that the defendant offered on its website. This is the same relationship that Plaintiff alleges here.

For these reasons, I find that Plaintiffs are "subscribers" within the plain meaning of that term.

Video Tape Service Provider

Defendants next argue that they are not "video tape service providers" within the meaning of the VPPA. As discussed, the VPPA defines a "video tape service provider" as "any person,

engaged in the business, in or affecting interstate or foreign commerce, of rental, sale, or delivery of prerecorded video cassette tapes or similar audio visual materials[.]" 28 U.S.C. § 2710(a)(4).

The parties do not dispute that this case does not involve video cassette tape rental or sale. (*See* Docs. 18-1, 19). Therefore, I must determine whether Plaintiffs have adequately alleged that Defendants are engaged in the business of delivery of audio visual materials. I find that they are.

Defendants revisit many of the same arguments made already namely, that delivery of digital videos is "ancillary" to their main business. (Doc. 18-1, PgID. 130–133). Defendants argue that the fact that they might be "peripherally or passively" involved in delivering video content to Plaintiffs does not mean they are video tape service providers under the VPPA. (*Id*. at PgID. 131). Again, the Sixth Circuit has not addressed this issue; though other circuit courts have.

Defendants are "local newspapers that publish print and online editions. … Their primary business function is to deliver written news articles." (*Id*. at PgID. 132). Defendants acknowledge that "[v]ideos are available" on their website. (*Id*.). Though, they emphasize, video content is only a "small minority of toledoblade.com and post-gazette.com's webpages," and any videos are "largely below-the-fold and embedded in news articles." (*Id*.)

Defendants argue that if I were to include them in the VPPA's definition of a video tape service provider, this "would sweep nearly all online and digital content providers that offer any video content whatsoever into the VPPA's scope." (*Id*.).

The problem for Defendants is that the plain language of the statute requires only that Defendants are engaged in the business of "delivery" of "audio visual materials." It does not distinguish "peripheral or passive" delivery. Instead, it requires only that Defendants engage in the delivery of audio visual materials, which Defendants concede they do.

Defendants cite to several cases where a district court refused to find that the defendant was a video tape service provider. For example, Defendants cite to *Carroll v. General Mills, Inc.*, No. 23-1746, 2023 WL 4361093 (C.D. Cal. June 26, 2023). In that case, the defendant General Mills maintained a website for its brands that offered videos that consumers could view. It maintained that the purpose of these videos was to "increase its brand presence." *Id*. at *1. The plaintiff, who was also a Facebook accountholder, viewed a video on the defendant's website. *Id*. The defendant then sent Meta a cookie indicating the plaintiff viewed or accessed the video on its website. *Id*. The plaintiff sued the defendant for violating the VPPA.

The district court granted the defendant's motion to dismiss on the basis that, for the defendant to be 'engaged in the business' of delivering video content, **the defendant's product** must not only be **substantially involved in the conveyance of video content** to consumers but also **significantly tailored to serve that purpose**." *Id*. at *3 (emphasis in original) (quoting *In re Vizio, Inc.*, 238 F. Supp. 3d 1204, 1221 (C.D. Cal. 2017)). The district court emphasized that there were "few allegations" in the complaint regarding the defendant's business, that such allegations were "conclusory and, at most, indicate that General Mills provides videos as a peripheral part of its marketing strategy." *Id*. The court concluded that the websites were not "the key components of the brands," nor were they the defendant's "particular field of endeavor." *Id*. at *4. The court concluded: "Nothing suggests that Defendant's business is centered, tailored, or focused around providing and delivering audiovisual content." *Id*.

The Sixth Circuit has not adopted this reading of the statute. Indeed, it has not addressed the issue at all. I am therefore not obligated to apply an analysis that narrows the definition of a video tape service provider beyond its plain meaning to one who is "substantially involved in the conveyance of video content to consumers." *Id*.

Even so, Plaintiffs have alleged, and Defendants have acknowledged, that Defendants are in the business of delivering news and journalism to the public, and that they format this content in both the written word and video. At least at the motion to dismiss stage, these allegations are sufficient.

Accordingly, I reject Defendants' argument that they are not video tape service providers under the VPPA.

Ordinary Course of Business Exception

Last, Defendants argue that the disclosure Plaintiffs complain of is "incident to the ordinary course of business" under the VPPA's safe harbor provision. (Doc. 18-1, PgID. 133; (citing 18 U.S.C. § 2710(b)(2)).

The VPPA permits a video tape service provider to disclose personally identifiable information to the following: (A) the customer him/herself; (B) to any person with the "informed written consent" of the customer; (C) to a law enforcement agency under a warrant; (D) if the disclosure is "for the exclusive use of marketing goods and services directly to the customer" and the customer had an opportunity to first prohibit the disclosure; (E) "to any person if the disclosure is incident to the ordinary course of business of the video tape service provider; or (F) pursuant to a court order. *See* 18 U.S.C. § 2710(b)(2) (A)–(F).

The only disclosure exception that Defendants argue applies here is the "ordinary course of business" exception. They urge me to find that the "ordinary course of business" encompasses advertising, which, they argue, is the "[m]odern day analogue of marketing activity long protected by the VPPA." (Doc. 18-1, PgID. 133–134). The Sixth Circuit has not weighed in on this issue.

I reject Defendants' argument for several reasons.

First, Congress already addressed marketing in a separate subsection—Subsection (D). If Congress intended to include "marketing" in Subsection (E) where it discussed the "ordinary course of business," then it would have done so, and perhaps would not have also addressed "marketing" in its own subsection.

Second, the few courts that have interpreted the "ordinary course of business" exception to include marketing are distinguishable from the facts alleged here. For example, in *Sterk v. Redbox Automated Retail, LLC*, 770 F.3d 618 (7th Cir. 2014), the Seventh Circuit found that the defendant, Redbox, provided another company, Stream Global Services, with personal information regarding its customers. *Id*. The reason it did so was because Redbox outsourced its customer service support to Stream Global. The court considered customer service a function of business operations normally performed by a company itself. *Id*. And, accordingly, this disclosure fell within the "ordinary course of business" exception. *Id*.

The facts of *Redbox* are not comparable to the facts here. Defendants do not offer any argument that Meta performed some function of Defendants' business, such as customer service or a similar function, that would normally be performed by Defendants themselves. I am not persuaded by Defendants' circular argument that they outsourced their advertising or marketing functions to Meta to perform on Defendants' behalf; rather, the facts alleged at the pleading stage do not show that Defendants shared Plaintiffs' PII with Meta for Meta to perform advertising and marketing, or any other function on Defendants' behalf.

Next, I reject Defendants' argument interpreting *Daniel v. Cantrell*, 375 F.3d 377 (6th Cir. 2004). (Doc. 20, PgID. 332). In *Daniel*, the plaintiff, in a separate criminal case, pleaded guilty to the sexually molesting three children. *Id*. at 379. Part of his criminal scheme was showing his

victims pornographic videos. *Id*. When law enforcement began investigating the plaintiff's crimes, it obtained a list of his video rental records. *Id*.

After pleading guilty, the plaintiff brought a *pro se* complaint against various video stores and its employees, along with several of the victims' parents, for violating the VPPA. *Id*. at 379–380. The victims' parents moved to dismiss the plaintiff's complaint on the basis that the parents were not video tape service providers under the VPPA. *Id*. The court granted the motion in the parents' favor and the plaintiff appealed. On appeal, the Sixth Circuit concluded that the parents were not proper parties. *Id*. at 381.

In *dicta*, the Court stated that "the defendants may only be [video tape service provider]s if personal information was disclosed to them under subparagraph (D) or (E) of subsection (b)(2)" of the VPPA. It found that neither would apply.

For a disclosure to fall under subparagraph (D), it must be "for the exclusive use of marketing goods and services directly to the consumer." *Id*. at 382. However, since the purpose of the disclosure in *Daniel* was a criminal investigation, the Court found subparagraph D "is inapplicable in this case." *Id*.

The Court next observed, "[the plaintiff] properly does not argue that the disclosure falls within subparagraph (E)." Yet, the Court noted, if the plaintiff had done so, it would apply "ordinary course of business" narrowly:

> Subparagraph (E) applies only to disclosures made "incident to the ordinary course of business" of the [video tape service provider]. *Id*. at § 2710(b)(2)(E). The term "ordinary course of business" is "narrowly defined" in the statute to mean "only debt collection activities, order fulfillment, request processing, and the transfer of ownership." *Id*. at § 2710(a)(2); *see also* S.Rep. No. 100–599 at 14 (1988), reprinted in 1988 U.S.C.C.A.N. 4342 (noting that the term is "narrowly defined" in the statute). "Order fulfillment" and "request processing" are defined in the legislative history as the use, by [video tape service provider]s, of "mailing houses, warehouses, computer services, and similar companies for marketing to their customers." S.Rep. No. 100–599 at 14 (1988), *reprinted in* 1988 U.S.C.C.A.N.

> 4342. Daniel presents no evidence suggesting that his information was disclosed as a result of any of these activities. The disclosure in this case seems to have been made in conjunction with a criminal investigation, which is not included on the list of disclosures made "in the ordinary course of business."

Daniel, *supra*, 375 F.3d at 382.

In other words, the Sixth Circuit would define "ordinary course of business exception" as "only debt collection activities, order fulfillment, request processing, and the transfer of ownership." *Id*. None of these terms include "marketing." This is the portion of *Daniel* that Defendants rely upon where they urge me to find that the "ordinary course exception" applies here. Clearly, it does not.

Accordingly, I reject Defendants' argument that the disclosures are protected by the "ordinary course of business" exception to the VPPA.

Conclusion

In sum, I conclude that Plaintiffs: (1) have standing; and (2) state a claim under the VPPA. I reject the Defendants' arguments that Plaintiffs are not consumers, that Defendants are not video tape service providers, and that the disclosures are protected under the "ordinary course of business" exception to the VPPA.

Accordingly, it is hereby,

ORDERED THAT:

1. Defendants' motion to dismiss under Rules 12(b)(1) and/or 12(b)(6) be, and hereby is, denied (Doc. 18); and
2. The Court will forthwith set a status/scheduling conference.

SO ORDERED.

/s/ James G. Carr
Sr. U.S. District Judge

The Sedona Conference

Working Group 11 Annual Meeting

May 3, 2024

Minneapolis, Minnesota

PRIVACY AND DATA SECURITY LITIGATION UPDATE

CLASS ACTION SETTLEMENTS

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

CHASOM BROWN, WILLIAM BYATT, JEREMY DAVIS, CHRISTOPHER CASTILLO, and MONIQUE TRUJILLO individually and on behalf of all other similarly situated,

Plaintiffs,

v.

GOOGLE LLC,

Defendant.

Case No.: 4:20-cv-03664-YGR-SVK

PLAINTIFFS' UNOPPOSED MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT

Judge: Hon. Yvonne Gonzalez Rogers
Date: July 30, 2024
Time: 2:00 p.m.
Location: Courtroom 1 – 4th Floor

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PLEASE TAKE NOTICE that on July 30, 2024, at 2:00 p.m., the undersigned will appear before the Honorable Yvonne Gonzalez Rogers of the United States District Court for the Northern District of California to move the Court for an order granting final approval of the parties' class action settlement (Ex. 1, the "Settlement").[1]

This Motion is brought under Paragraph 17 of the Court's Standing Order in Civil Cases and the Northern District of California's Procedural Guidance for Class Action Settlements, and it is based on this Notice of Motion and Motion, the accompanying Memorandum of Points and Authorities, the concurrently filed declarations and accompanying exhibits of Mark Mao and Chris Thompson, the consolidated declaration of David Boies, Bill Carmody, and John Yanchunis, the declarations on behalf of all of the class representatives, all matters of which the Court may take judicial notice, other pleadings and papers on file in this action, and other written or oral argument that Plaintiffs may present to the Court.

Google supports final approval of the settlement, but disagrees with the legal and factual characterizations contained in the Motion.

ISSUE TO BE DECIDED

Whether the Court should grant final approval of the parties' settlement.

RELIEF REQUESTED

Plaintiffs respectfully ask the Court to grant final approval of the parties' settlement.

Dated: April 1, 2024

By: */s/ Mark C. Mao*

[1] Unless otherwise noted, exhibit references are to the supporting declaration by Mark C. Mao, submitted on behalf of the three firms (Boies Schiller Flexner, Susman Godfrey, and Morgan & Morgan) who together litigated this action and obtained this settlement.

I. INTRODUCTION

This settlement is an historic step in requiring dominant technology companies to be honest in their representations to users about how the companies collect and employ user data, and to delete and remediate data collected. Plaintiffs secured a groundbreaking settlement that yields substantial benefits for every single class member, including:

Changes to Google's disclosures: Google with this Settlement agrees to rewrite its disclosures to inform users that "Google" collects private browsing data, including by explicitly disclosing that fact in its Privacy Policy and on the Incognito Splash Screen that automatically appears at the beginning of every Incognito session. Plaintiffs obtained a Settlement where Google has already begun implementing these changes, without waiting for final court approval.

Deletion and remediation of private browsing data: While disclosure changes ensure transparency going forward, Plaintiffs also demanded and secured accountability and relief for Google's past conduct. Upon approval of this Settlement, Google must delete and/or remediate *billions* of data records that reflect class members' private browsing activities. This includes data Google collected during the class period from private browsing sessions.

Limits on future data collection: For the next five years, Google must also maintain a change to Incognito mode that enables Incognito users to block third-party cookies by default. This change is important given Google has used third-party cookies to track users in Incognito mode on non-Google websites. This requirement ensures additional privacy for Incognito users going forward, while limiting the amount of data Google collects from them.

Removal of private-browsing detection bits: Google must delete the private browsing detection bits that Plaintiffs uncovered, which Google was (twice) sanctioned for concealing. As a result, Google will no longer track people's choice to browse privately.

No release of monetary claims: Consistent with the Court's certification order, Plaintiffs insisted on retaining class members' rights to sue Google individually for damages. That option is important given the significant statutory damages available under the federal and state wiretap statutes. These claims remain available for every single class member, and a very large number

of class members recently filed and are continuing to file complaints in California state court individually asserting those damages claims in their individual capacities.

Securing this relief through Settlement is especially valuable because Google argued these changes exceed the Court's inherent authority to order prescriptive injunctions. This Settlement also delivers relief to class members far sooner, without the delay and uncertainty inherent in trial and any appeal. Based on Plaintiffs' damages expert's valuation methods, the value of the relief obtained through this litigation and Settlement is over $5 billion.

This case required years of "herculean" efforts (the word used by Google's counsel), including 34 motions to compel, over 5.8 million pages of documents produced by Google, a year-long technical special master process, two sanctions proceedings with both finding discovery misconduct by Google, and many months of hard-fought mediation. Plaintiffs engaged in hard-fought litigation for nearly 4 years, only settling on the eve of trial. This Settlement ensures real accountability and transparency from the world's largest data collector and marks an important step toward improving and upholding our right to privacy on the Internet.[2]

II. BACKGROUND

A. Case History

***Pre-filing investigation*:** This case did not copy any government proceeding, nor was it born through any disclosure by Google. This case exists because Boies Schiller Flexner ("BSF") conducted an extensive many-months investigation (with expert assistance) prior to filing and decided to challenge these Google practices. Declaration of Mark C. Mao ("Mao Decl.") ¶ 3. That thorough investigation yielded a 37-page complaint filed in June 2020, with detailed allegations concerning Google's collection of private browsing data. Dkt. 1. When the case was filed, Google told reporters that it "disputes the claims and plans to defend itself vigorously against them." Ex. 2.

***Google's motions to dismiss*:** On August 20, 2020, Google moved to dismiss all claims. Dkt. 53. On September 21, 2020, after Plaintiffs filed an amended complaint (Dkt. 68), Google

[2] Google supports final approval of the settlement, but disagrees with the legal and factual characterizations contained in the Motion.

again moved to dismiss all claims (Dkt. 82). Google's filings included 514 pages of briefing and exhibits. Dkts. 82–84, 92, 93. On February 25, 2021, after Plaintiffs filed their opposition (Dkt. 87) and Google filed its reply (Dkt. 92), the Court heard oral argument. Dkt. 103. On March 12, 2021, the Court denied Google's motion in its entirety. Dkt. 113. On April 14, 2021, Plaintiffs sought and obtained leave to file a Second Amended Complaint, adding breach of contract and UCL claims. Dkts. 136, 138. On May 17, 2021, Google filed a second and even more voluminous motion to dismiss, this time submitting over 1,000 pages of briefing and exhibits. Dkts. 164, 208. On December 22, 2021, after Plaintiffs filed their opposition (Dkt. 192) and on June 29, 2021, Google filed its reply (Dkt. 208), Judge Koh once again denied Google's motion to dismiss in its entirety. Dkt. 363. Plaintiffs prevailed with respect to all seven claims.

Fact discovery*:** On September 30, 2020, after Judge Koh denied Google's motion to stay discovery (Dkt. 60), Plaintiffs served Google with their first set of document requests. Mao Decl. ¶ 4. During fact discovery from September 2020 through March 2022, Plaintiffs served Google with 235 document requests, 40 interrogatories, and 75 requests for admission. *Id.* Google opposed Plaintiffs' efforts to obtain discovery, and Plaintiffs filed ***34 motions to compel. *Id.*[3] The parties exchanged more than 150 letters, conducted dozens of meet and confers, and had 16 separate hearings before Judge van Keulen (totaling over 27 hours), where they submitted over 1,000 pages to her to address ***over 40 disputes***. *Id.*[4] Those disputes resulted in ***64 orders from Judge van Keulen***. *Id.* Obtaining discovery regarding Google's practices involved (in Google's

[3] For purposes of this count, each dispute chart that Judge van Keulen ordered the parties to file counts as just one motion to compel, notwithstanding that these charts each covered multiple disputes. Each letter-brief filed under Judge van Keulen's default rules also counts as one motion, even though such briefs sometimes covered more than one dispute. *See* Dkts. 90, 119, 127, 129, 140, 155, 177, 199, 202, 218, 230, 258, 281, 296, 355, 357, 383, 390, 399, 411, 424, 485, 456, 462, 517, 546, 561, 574, 635, 671.

[4] ***39 disputes*** were raised through the ongoing dispute charts that Judge van Keulen ordered the parties to submit. *See* Dkts. 129, 140, 155, 177, 230, 281, 424, 485. In addition to those dispute charts, but excluding sanctions-related filings, the parties filed over ***40 additional submissions*** with Judge van Keulen to raise disputes over issues including data productions, custodians, search terms, privilege, 30(b)(6) depositions topics, apex depositions, and preservation. Dkts. 90, 119, 127, 199, 202, 204, 212, 218, 231, 258, 296, 311, 312, 314, 355, 357, 383, 390, 399, 411, 456, 462, 517, 544, 546, 558, 561, 565, 574, 591, 635, 642, 654, 671, 678, 692, 730, 733, 780, 800, 810, 816, 818.

counsel's own words, and continuing with expert discovery) "two and a half years of ***scorched-earth*** discovery." Ex. 3 (Hearing Tr. at 85:19–20).

Plaintiffs compelled Google to produce over 900,000 documents from 43 custodians, totaling ***over 5.8 million pages***. Mao Decl. ¶ 4. This included documents Google initially included on its privilege logs, which Plaintiffs forced Google to re-review and produce. Dkt. 605. Google relied on over 300 contract attorneys, with what its counsel described as "herculean" discovery efforts. *See* Sept. 30, 2021 Hearing Tr. at 51:3-9. Google withheld most of those documents until October 2021, just three months before the scheduled close of fact discovery. Mao Decl. ¶ 4. In addition to relying on attorneys at their firms, Plaintiffs hired 11 document reviewers with engineering backgrounds to work through these technical documents and prepare for depositions. *Id.* Plaintiffs also retained 23 consulting and testifying experts to assist with fact discovery and prepare expert reports. *Id.*

Google's productions were incomplete, but Plaintiffs' efforts nonetheless yielded key admissions by Google employees, including documents describing Incognito as "effectively a lie" (Ex. 4), a "problem of professional ethics and basic honesty" (Ex. 5), and a "confusing mess" (Ex. 6). Some key admissions came from Google employees that Google initially refused to include as document custodians. Mao Decl. ¶ 5. These and other admissions were a focus throughout the litigation, and correcting disclosures that even Google admitted were misleading became a cornerstone of this Settlement. *Id*.

In 2021 and 2022, Plaintiffs obtained more than 117 hours of deposition testimony from 27 current and former Google employees, including 8 individuals designated as 30(b)(6) deponents. *Id.* ¶ 6. Those depositions included individuals involved with the core Google products and services at issue, including Chrome, Analytics, and Ads. *Id.* Google sought to prevent some of these depositions, and insisted that some depositions take place in Europe. *Id.* When those depositions did take place, the testimony of Google employees was found by Judge van Keulen to be "misleading." Dkt. 588 ¶ 82.

During this time, Plaintiffs also responded to discovery from Google, each responding to 17 interrogatories, 34 requests for production, and 55 requests for admission. Mao Decl. ¶ 4. The

class representatives each sat for deposition, with Google spending over 28 hours questioning them about their personal browsing private activities and other topics. *Id.* ¶ 6.

***Special Master process*:** In July 2021, the parties began a year-long process with technical Special Master Douglas Brush. Mao Decl. ¶ 7. In April 2021, Judge van Keulen ordered Google to "produce all of the named Plaintiffs' data." Dkt. 147-1. That order was meant to allow Plaintiffs to "test" Google's say-so about how it stores the data. Apr. 29, 2021 Hearing Tr. at 20:7–8. On July 12, 2021, Judge van Keulen appointed Special Master Brush to adjudicate Google's compliance with the order and other disputes. Dkt. 219. That process lasted a year, and it involved 21 hearings and conferences with the Special Master, dozens of written submissions and correspondence, and ongoing coordination among counsel for both sides, Plaintiffs' consulting experts, and Google engineers. Mao Decl. ¶ 7.

Through the Special Master process, Plaintiffs obtained 76GB of data across 13,483 data files, which Plaintiffs' technical expert used for his analysis. *Id.* This Court relied on that analysis in the summary judgment order. Dkt. 969 at 11 (citing technical expert's analysis and ruling "plaintiffs set forth evidence that Google does store their data with unique identifiers"). The data sources uncovered through the process and identified in the Special Master's preservation order (Dkts. 524, 587-1) also established the framework for the data deletion and remediation obligations that Google must now undertake—another cornerstone of this Settlement. *See* Settlement Ex. B (listing logs); Declaration of Chris Thompson ("Thompson Decl.") ¶¶ 6–7, 14.

***Sanctions*:** On October 14, 2021, Plaintiffs filed their first of two motions for sanctions involving Google's concealment of its private browsing "detection bits," fields that Google used within its logs to label browsing data as "Incognito" or "private" data. Dkts. 292, 656. Google not only resisted disclosure of key evidence but also engaged in discovery misconduct. The efforts to obtain this evidence and hold Google accountable was a trial unto itself**.**

On April 22, 2022, Judge van Keulen conducted an all-day evidentiary hearing that involved live testimony from five witnesses. Mao Decl. ¶ 7. In the lead-up to that hearing, the parties filed over 680 pages with the Court. Dkts. 292, 429, 494, 528, 535. On May 20, 2022, Judge van Keulen issued her first sanctions order, which included 48 pages of findings of fact

and conclusions of law along with a 7-page order, sanctioning Google for concealing three of the detection bits and their corresponding logs, in violation of "all three" of the court's April, September, and November 2021 orders, and other misconduct. Dkt. 588 ¶ 7, p. 35. The Court sanctioned Google by awarding Plaintiffs nearly $1 million in fees, precluding Google from presenting certain arguments and witnesses at trial, and proposing adverse jury instructions. *Id.* at 6–7.

On August 4, 2022, Plaintiffs filed their second motion for sanctions. Dkt. 656. That request for additional sanctions involved over 640 pages of briefing. Dkts. 655, 696, 708, 735, 798, 834, 858. On March 2, 2023, Judge van Keulen conducted another evidentiary hearing. Dkt. 883. On March 20, 2023, Judge van Keulen again sanctioned Google, finding that "Google's untimely disclosure" of certain "new logs shows that the discovery violations addressed in the May 2022 Sanctions Order were far more extensive and thus more prejudicial, than was then known." Dkt. 898 at 9. Judge van Keulen imposed "additional sanctions," including additional preclusion orders, a revised recommendation for an adverse-inference jury instruction, and additional monetary sanctions. *Id.* Importantly, the Settlement negotiated by Plaintiffs requires Google to delete each of the detection bits uncovered through the sanctions proceedings.

***Expert discovery*:** On April 15, 2022, Plaintiffs served five opening expert reports totaling 1,243 pages. Mao Decl. ¶ 8. Expert discovery in the end involved 11 testifying experts (6 for Plaintiffs and 5 for Google), all of whom provided at least one expert report and sat for deposition. *Id.* The parties exchanged 18 expert reports, totaling over 3,000 pages (excluding voluminous spreadsheets of data analysis), with 14 days of expert depositions. *Id.* This expert work involved analyzing Google's enormous document and data productions, including with the assistance of consulting experts. *Id.* Unlike Plaintiffs, Google's counsel could rely on Google engineers for assistance. Class Counsel invested significant time and resources into expert discovery, in total paying close to $5 million to testifying and consulting experts. *Id.*

***Certification*:** On June 20, 2022, Plaintiffs filed their motion for class certification. Dkt. 609. On August 5, 2022, Google opposed class certification in its entirety, contending that no class should be certified to seek any form of relief, and also filed *Daubert* motions. Dkts. 662–

68. In total, the parties filed over 4,100 pages in connection with these motions. Dkts. 609, 662–68, 713. On October 11, 2022, the Court conducted an extensive hearing. Dkt. 772. On December 12, 2022, the Court ordered nationwide Rule 23(b)(2) certification on all seven claims. Dkt. 803. Although no damages class was certified, the Court's ruling allowed Plaintiffs to seek (and now secure by Settlement) injunctive relief for the classes.

The Court's order noted that injunctive relief would bring "important changes to reflect transparency in the system." Dkt. 803 at 34. That same order denied Google's *Daubert* motion regarding Mr. Lasinski, whose report included relevant calculations regarding the number of class members, the amount of Google's enrichment from the challenged conduct, and ways in which actual damages could be calculated based on payments made by Google for user data (including for the named plaintiffs' damages). Dkt. 803 at 4–13. Mr. Lasinski's testimony supported key elements of Plaintiffs' claims. Dkt. 1029 at 15 (supporting model for statutory damages), 17, 61 (supporting actual damages through market analysis), 55 (supporting "damage or loss" under CDAFA), at 61 (supporting unjust enrichment theory).

***Summary judgment*:** On March 21, 2023, Google moved for summary judgment on all of Plaintiffs' claims. Dkt. 908. In total, Google filed over 4,500 pages of briefing and exhibits. Mao Decl. ¶ 9. On April 12, 2023, Plaintiffs filed their opposition along with a detailed separate statement of facts and 105 exhibits. Dkts. 923–26. On May 12, 2023, the Court held a lengthy hearing. Dkt. 955. On August 7, 2023, the Court denied Google's summary judgment motion in its entirety. Dkt. 969. In its ruling, this Court expressed concern over Google's arguments and conduct, explaining that "the assertion that federal courts are powerless to provide a remedy when an internet company surreptitiously collects private data is untenable." *Id.* at 8 (quoting *In re Facebook, Inc. Internet Tracking Litig.*, 956 F.3d 589, 599 (9th Cir. 2020)).

***Mediation*:** In September 2023, shortly after the Court's summary judgment ruling, the parties began a mediation process that lasted several months. Mao Decl. ¶ 10. The parties' prior discussions resulted in an agreement that any mediation should wait until after summary judgment. Ex. 1 at 2 ("discussions were premature"). The parties selected retired United States District Judge Layn R. Phillips as the mediator. Mao Decl. ¶ 10. After extensively briefing their

positions, the parties participated in an all-day, in-person mediation in New York on September 29, 2023. *Id.* The parties then continued to mediate for many months under Judge Phillips' supervision. *Id.*

***Trial preparation*:** In the leadup to the all-day pretrial conference on November 29, 2023, the parties prepared and filed, among other things, the Pretrial Conference Statement (Dkt. 1029), briefing on nine motions in limine (Dkts. 1020–25, 1027, 1030–31), a trial witness list (Dkt. 1049), discovery excerpts for trial (Dkt. 1050), a trial exhibit list (Dkt. 1062), and almost 300 pages of disputed jury instructions (Dkt. 1057). The Court then issued several important rulings. For example, the Court precluded Google from referencing the use of Google services by Class Counsel (Dkt. 1078 at 3), denied Google's motion to exclude evidence and argument regarding Google's joining of data (*id.* at 6), "largely denied" Google's motion to exclude evidence and argument related to classwide damages (Dkt. 1088 at 4), denied Google's motion to exclude over 100 exhibits as purportedly irrelevant (*id.* at 5), and adopted Judge van Keulen's proposed adverse jury instruction against Google (*id.* at 3). Class Counsel began preparing witness examination outlines and other necessary trial prep work, and the parties began working with retired Magistrate Judge Elizabeth Laporte to resolve objections to trial exhibits. Mao Decl. ¶ 11. This Court also ordered Google to produce documents from the files of former Google employee Blake Lemoine, noting that he was "a potential whistleblower who . . . in many ways, guts much of what [Google] say[s] if he's credible." Nov. 29, 2023 Tr. at 83. Mr. Lemoine's deposition took place on December 21, 2023. Mao Decl. ¶ 11.

Ultimately, the Court's rulings and Plaintiffs' efforts to obtain them paved the way for Google to agree to settlement terms that are both sweeping and unprecedented rather than face trial.

B. The Settlement

On December 22, 2023, on the eve of trial, Plaintiffs and Google finalized a Term Sheet, which has now been implemented with the Settlement. Plaintiffs below summarize the key parts of the Settlement, with estimates for the value of the relief obtained.

Settlement scope: The Settlement includes and provides benefits for the same individuals included within the scope of the Court's certification order. *See* Dkt. 803 & Ex. 1 § I.2.

Relief obtained for the benefit of class members:

(1) Changes to Google's disclosures: Google must rewrite its disclosures to tell users that it collects private browsing data. Google has agreed to begin making these changes immediately and complete them by March 31, 2024. Ex. 1 § III.1. Trial would have delayed these changes, and an appeal could have caused further delay. Now, class members benefit right away.

Securing disclosure changes by Google is no easy feat. Google employees for years wanted to fix these disclosures, but they were repeatedly shut down by Google management. In 2013, employees stressed the need to "simplify" the Incognito Splash Screen, lamenting the "incorrect conclusions" that users drew from it. Ex. 7. In 2019. Employees also proposed to redesign the Splash Screen to clarify that Incognito does not provide privacy from "Google." Ex. 8. Google's executives at the highest levels were aware of these concerns, but nothing changed. Rather than expressly disclose Incognito's limitations, Google continued using "really fuzzy, hedging language that is almost more damaging." Ex. 9 at -67 (email from CMO Lorraine Twohill to CEO Sundar Pichai).

Plaintiffs insisted that Google expressly disclose its collection of private browsing data, including on the Incognito Splash Screen and in its Privacy Policy. At summary judgment, this Court acknowledged Google's "failure to explicitly notify users it would be among the third parties recording their communications with other websites." Dkt. 969 at 31. This Settlement squarely addresses that failure. On the Incognito Splash Screen, Google now prominently discloses that Incognito Mode "won't change how data is collected by websites you visit and the services they use, *including Google*." Ex. 1 at 7 (emphasis added). Users receive this disclosure every time they launch Incognito Mode. In addition, the Google Privacy Policy must disclose that "activity on third-party sites and apps that use our [Google] services" "*is collected regardless of which browsing or browser mode you use*," and that when you use "Incognito," "third party sites and apps that integrate our services may *still share information with Google*." *Id.* (Exhibit A) at 20 (emphasis added). Google must also delete the Chrome Privacy Notice and Chrome

White Paper (Ex. 1 § III.1.d–e), two other misleading Google documents at issue in this lawsuit. The Settlement also ensures that Google cannot roll back any of these important changes.

(2) Google data deletion and remediation: The Settlement also provides relief for Google's *past* collection of private browsing data through data deletion and remediation. This portion of the Settlement relies on the framework developed by Special Master Douglas Brush. Thompson Decl. ¶¶ 6–7. For every data source identified in the Special Master's preservation order (Dkts. 524, 587-1) that could include private browsing data pre-dating the disclosure changes, Google must delete or remediate ***all*** entries that might contain users' at-issue private browsing data. *See* Settlement Ex. B (listing logs); Thompson Decl. ¶¶ 7–13.

The timing for this data deletion and remediation process dovetails with the disclosure changes. The data deletion and remediation obligations apply to "data older than nine months," and these obligations take effect upon approval of the settlement or within 275 days of Google making the required disclosure changes, whichever is later. Ex. 1 § III.2.a. Google will be required to remediate and delete data collected in December 2023 and earlier (prior to when the parties signed the Term Sheet). Any post-December data is subject to the new and revised disclosures, which Google began rolling out immediately after the Term Sheet was signed. The Settlement therefore appropriately accounts for both past and future data collection.

The deletion and remediation obligations apply not just to data tagged as "private" browsing using the Google detection bits but more broadly for all users (including all class members) across several databases, securing comprehensive relief.[5] The Settlement provides broad relief regardless of any challenges presented by Google's limited record keeping. Much of the private browsing data in these logs will be deleted in their entirety, including billions of event-level data records that reflect class members' private browsing activities. Ex. 1 § III.2.a–b.

[5] Google claimed in the litigation that it was impossible to identify (and therefore delete) private browsing data because of how it stored data, and emphasized how Incognito browsing traffic fluctuated around just three percent of the data collected and stored by Google. With this Settlement, Plaintiffs successfully obtained Google's agreement to remediate 100% of the data set at issue. Mao Decl. ¶ 12; Thompson Decl. ¶¶ 7–15.

For the data-remediation process, Google must delete information that makes private browsing data identifying. Google will mitigate this data by partially redacting IP addresses and generalizing user agent strings, which addresses one of Plaintiffs' re-identification theories supported by their technical expert. Ex. 1 § III.2.a. This change addresses Plaintiffs' allegations (and Google engineers' acknowledgement) that private browsing data is identifying due to the combination of IP address and user agent information. *E.g.*, Ex. 10 at -85 ("IP address + UA (user agent) can reveal individual user with high probability"). Google will also be required to delete the detailed URLs, which will prevent Google from knowing the specific pages on a website a user visited when in private browsing mode. Mao Decl. ¶ 12. This Court relied on these detailed URLs in rejecting Google's summary judgment argument on "contents." *See* Dkt. 969 at 26 ("'The URLs, by virtue of including the particular document within a website that a person views, reveal much more information . . . divulg[ing] a user's personal interests, queries, and habits.' So too here." (quoting *In re Facebook, Inc. Internet Tracking Litig.*, 956 F.3d at 605)). Google's agreement to remove detailed URLs from the at-issue logs and keep only the domain-level portion of the URL (i.e., only the name of the website) will vastly improve user privacy by preventing Google (or anyone who gets their hands on the data) from knowing precisely what users were browsing.

Google must also delete the X-Client Data Header field from these logs (Ex. 1 § III.2.a), which is the field Google used to build its Incognito detection bits. This deletion prevents Google from creating similar bits in the future to detect Incognito traffic. *See* Dkt. 588 (May 2022 sanctions order) p. 4 ¶¶ 17–19 ("Google created these [] Incognito-detection bits to look specifically at whether there is an X-Client Data header in the request").

Mr. Lasinski's expert report provides a useful reference point for the enormity of the private browsing records that Google had been storing, and which will now be subject to deletion and remediation. *See* Dkt. 608-9 ¶¶ 188–90. These hundreds of billions of private browsing data records and more are subject to the broad deletion and remediation secured through the Settlement.

(3) Limits on Google's collection going forward: Even though the Settlement already accounts for future data collection through disclosure changes, the Settlement also places further limits on Google's ability to collect data in the future. It does so by leveraging a change that Google rolled out in response to this lawsuit related to its use of third-party cookies. Google historically collected third-party cookies (i.e., Google's own "third-party" cookies deposited on users' browsers when they visited a non-Google websites) along with other private browsing data. Before this lawsuit, Google evaluated a potential change to Chrome Incognito mode that would block third-party cookies by default. Just after Plaintiffs filed this lawsuit, Google implemented this change for all Incognito users. As reflected in the Settlement, Google admits this lawsuit was the "substantial catalyst" for Google rolling this change out to all Incognito users. Ex. 1 § III.4.

Under the Settlement, Google must maintain this new default of blocking third-party cookies within Incognito mode for five years. Ex. 1 § III.5. This gives class members an option, presented on the Splash Screen, to block third-party cookies when using Incognito. The result is that Google will collect less data from users' private browsing sessions, and that Google will make less money from the data. The value of user data that will be protected is illustrated by the fact that blocking data tagged with Google's own "third-party cookies" in Incognito already results in Google losing nearly $500 million a year in global annual revenue. Dkt. 608-9 ¶ 35.

(4) Removal of private browsing detection bits: Google must delete all four of the identified private browsing detection bits (listed in Exhibit D to the Settlement). Ex. 1 § III.2.e. These were the detection bits that Google was sanctioned for concealing during discovery (twice). Unbeknownst to users, and without disclosure by Google, Google used these bits to track a user's decision to browse privately, and then label the data collected as private.

The Settlement puts a stop to this practice once and for all. Google will no longer infer private browsing using these detection bits. Google has further represented that there are no other detection bits for inferring Chrome's Incognito mode and has further agreed to no longer use any of the detections bits to identify or track any private browsing. Ex. 1 § III.2.e, Exhibit D.

(5) No class member damages release: The Settlement only releases class members' claims "for injunctive, declaratory, or any other equitable non-monetary relief." Ex. 1 §§ I.12, II.1. It excludes for all class members "claims for damages that they may pursue on an individual basis." *Id.* § I.12. The amount of damages to be awarded to the class representatives will be decided through arbitration. *Id.* §§ 8–9. Consistent with the absence of any release of damages claims, class members other than the class representatives have filed and will be filing actions in California state court seeking such damages. *E.g.*, Ex. 11 (complaint filed by 50 plaintiffs in their individual capacities seeking monetary relief for the claims at issue in this litigation).

Comprehensiveness of the injunctive relief: In the Pretrial Statement, Google argued that any injunctive relief "must be limited to further clarifying Google's relevant disclosures." Dkt. 1029 at 23. Plaintiffs demanded, and have obtained, even more expansive relief. Plaintiffs secured the most important facets of injunctive relief they would have sought at trial—including key disclosure changes, data deletion and remediation for all logs identified during the Special Master process, removal of the detection bits, and hard limits to third-party cookie tracking—while eliminating the risk of trial and inevitable delay that would follow from any appeals. While Plaintiffs are confident the Court would have rejected Google's argument to limit injunctive relief to disclosure changes, there was no guarantee it would have granted the extensive relief secured by the Settlement.

Value of this injunctive relief: The Procedural Guidance for Class Action Settlements requires parties to provide "details about and the value of injunctive relief" from the Settlement. Here, the benefits conveyed to class members both from changes made by Google during the litigation and as required under this Settlement are worth more than $5 billion.[6]

One way to quantify this value is to apply Mr. Lasinski's analysis to Google's data deletion and remediation. When this litigation began, Google was storing private browsing data in permanent logs. As this Court previously recognized, Plaintiffs presented "evidence that there

[6] While Google "disagrees with the legal and factual characterizations contained in the Motion," *see supra* at n. 2, Google did not mention, let alone expressly object to, the value of the relief that the Settlement will provide to class members. *See* Declaration of Mark C. Mao ¶ 26; Ex. 12.

is a market for their browsing history" and that "Google itself has piloted a program where it pays users" for their browsing history. Dkt. 969 at 33. Mr. Lasinski quantified the number of class members (approximately 136 million) and the value of the data Google obtained from their private browsing activities. Dkt. 608-9 ¶¶ 137–50, 165–84, 195. To assign a value to the data, he relied on the Ipsos Screenwise Panel through which Google paid users at least $3 per month per device for their browsing data that Google did not otherwise have access to without consent. *Id.* ¶¶ 137–150, 165–184. By requiring Google to delete or remediate the data it impermissibly collected, the Settlement is returning that value to class members. Assuming conservatively that each class member used just one device only twice per year (not per month) from June 2016 through December 2023, Google's data deletion and remediation yields a total value of $6.1 billion (136 million class members * 2 * $3 * 7.5 years = $6.12 billion). Assuming even more conservatively that they used just one device only once per year, that yields $3.06 billion. These are both conservative valuations of the benefits Plaintiffs have obtained.

The value of the limits imposed on Google's collection of private browsing data (via third-party cookie blocking) can also be measured. Mr. Lasinski's unjust enrichment damages models, which were based on Google's own internal projections, quantified the value of this privacy-enhancing change. Dkt. 608-9 ¶¶ 52–136. Google rolled out this change to all Incognito users in 2020, with this litigation as the substantial catalyst.[7] Mr. Lasinski's analysis reveals that blocking third-party cookies by default over the period June 2020 through December 2023 yields a value of about $697.4 million. Going forward, Google's agreement to maintain this change for five years yields an additional $993.5 million in additional value ($198.7 million * 5 years = $993.5 million), for a combined total value of about $1.69 billion.

[7] This calculation is based on discounting Google's claimed $249.9 million in revenue losses from ChromeGuard to reflect the percentage of Alphabet's worldwide revenue from U.S. users (46.6%), the share of Incognito users with a registered Google Account (91.6%), and the share of signed-out private browsing (95%), which yields about $101.3 million in value ($249.9 million X 46.6% U.S. X 91.6% account use X 95% signed out = $101.3 million). Lasinski Report, Schedules 12.4, 2.1, 5.1, and 8.1. For 2021, similar apportionments yield an additional $198.7 million in value ($499.7 million X 45.7% U.S. X 91.6% account use X 95% signed out = $198.7 million). *Id.* Schedules 12.4, 2.1, 5.1, and 8.1. Holding the 2021 result constant for two additional years yields another $397.4 million in value ($198.7 X 2 years = $397.4 million).

Without including any of the other injunctive relief detailed in the Settlement, these two changes alone conservatively total between $4.75 billion and $7.8 billion.

Comparable settlements: A comparison to other cases illustrates the value of the injunctive relief provided by this Settlement. For example, *In re Capital One Consumer Data Breach Litig.*, 2022 WL 17176495, at *1 (E.D. Va. Nov. 17, 2022), was a data breach case with injunctive-relief components that improved data security and provided three years of identify-theft protection. Case No. 19-md-02915-AJT-JFA, Dkt. 2251, at 3 (E.D. Va.). Similarly, *Adkins v. Facebook*, another data breach case, was certified for settlement under Rule 23(b)(2) based on Facebook's confirmation that security measures it implemented after litigation had commenced would remain in place. Case No. 3:18-cv-05982, Dkt. 323 at 1 (N.D. Cal.). The relief here goes much further by requiring fundamental changes to Google's data-collection practices, including with respect to how Google stores data (the remediation requirements) and Google's ability to track users' decisions to browse privately (the deletion of Google's private-browsing detection bits). These requirements apply not only to data Google has already collected but to data that Google collects in the future, providing for enhanced transparency and privacy for all people.

No impact on any other pending cases: While the Texas Attorney General subsequently filed a case against Google concerning private browsing, this Settlement is limited to the injunctive relief claims of individuals who used the specified browsing modes.

CAFA notice: Google confirmed that it will be providing CAFA notice.

No agreement on the amount of fees, costs, or service awards: These amounts are left solely to this Court's discretion. Google may contest the reasonableness of the amounts that Plaintiffs request, but Google has agreed to pay any amount awarded, and the parties waived any right to appeal this Court's decision. Class Counsel will separately petition the Court for fees, costs, and service awards, which will be paid by Google without in any way depleting or modifying the relief secured through this Settlement.

III. LEGAL STANDARD

In addressing whether to approve a class action settlement, this Court applies the overlapping *Hanlon* factors and criteria in Rule 23(e)(2).[8] According to *Hanlon*, courts balance the following factors to determine whether a class action settlement is fair, adequate, and reasonable: (1) the strength of the plaintiffs' case, (2) the risk, expense, complexity, and likely duration of further litigation, (3) the risk of maintaining class action status throughout the trial, (4) the amount offered in settlement, (5) the extent of discovery completed and the stage of the proceedings, (6) the experience and views of counsel, (7) the presence of a governmental Case participant, and (8) the reaction of the class members to the proposed settlement. *Emetoh v. FedEx Freight, Inc.*, 2020 WL 6216763, at *3 (N.D. Cal. Oct. 22, 2020) (Gonzalez Rogers, J.) (citing *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998)). Rule 23(e)(2) provides that a settlement may only be approved upon a finding that: "(A) the class representatives and class counsel have adequately represented the class; (B) the proposal was negotiated at arm's length; (C) the relief provided for the class is adequate . . . and (D) the proposal treats class members equitably relative to each other." Fed. R. Civ. P. 23(e)(2).

IV. ARGUMENT

A. Final approval is appropriate without preliminary approval or notice.

Consistent with prior rulings by the Court, the parties agreed that the appropriate next step following the Settlement was for Plaintiffs to file this final approval motion. Ex. 1 § II.5. This Settlement involves classes certified under Rule 23(b)(2) with no release of any class members' claims for monetary relief. Whether to provide notice is left to the Court's discretion. Fed. R. Civ. P. 23(c)(2). In seeking final approval, the parties were guided by this Court's

[8] *See Burnell v. Swift Transp. Co. of Arizona, LLC*, 2022 WL 1479506, at *8 n.5 (C.D. Cal. Apr. 28, 2022), *appeal dismissed sub nom. Saucillo v. Peck*, 2022 WL 16754141 (9th Cir. Oct. 4, 2022), and *aff'd sub nom. Saucillo v. Mares*, 2023 WL 3407092 (9th Cir. May 12, 2023) ("Fed. R. Civ. P. 23 was amended in 2018 to list four factors a district court should consider when evaluating a class action settlement. Fed. R. Civ. P. 23(e)(2). The Ninth Circuit in this case declined to decide 'how district courts should incorporate the [new] Rule 23(e)(2) factors into their analyses.' However, the Rule 23(e)(2) factors are similar to and substantially overlap with the *Hanlon* factors identified above.") (brackets in original).

decision in *Stathakos v. Columbia Sportswear Co.*, 2018 WL 582564 (N.D. Cal. Jan. 25, 2018) (Gonzalez Rogers, J.). In that case, the Court ruled that preliminary approval and notice were not required because Rule 23(b)(2) settlements are purely injunctive and do not impact class members' monetary claims. *Id*. at *3. The Court proceeded directly to final approval, without requiring any preliminary approval or notice. *Id.* ("In injunctive relief only class actions certified under Rule 23(b)(2), federal courts across the country have uniformly held that notice is not required.") (citing, inter alia, *Lilly v. Jamba Juice Co.*, 2015 WL 1248027, at *8–9 (N.D. Cal. Mar. 18, 2015) (holding that class notice was unnecessary)). As a practical matter, Plaintiffs are also proceeding straight to final approval to expedite this relief for the benefit of class members and avoid any further delay for the injunctive relief Google has agreed to implement.

B. Final approval is warranted based on the *Hanlon* factors.

1. The strength of Plaintiffs' case.

Under the first *Hanlon* factor, courts assess "objectively the strengths and weaknesses inherent in the litigation and the impact of those considerations on the parties' decisions to reach [a settlement]." *Edwards v. Nat'l Milk Producers Fed'n*, 2017 WL 3623734, at *6 (N.D. Cal. June 26, 2017), *aff'd sub nom. Edwards v. Andrews*, 846 F. App'x 538 (9th Cir. 2021). Here, the Settlement reflects the strength in Plaintiffs' position. Plaintiffs obtained these broad and valuable changes by Google only after defeating two motions to dismiss, certifying the injunctive classes, and defeating a motion for summary judgment, with Plaintiffs ready to proceed to trial. Although Plaintiffs remain confident that they would have succeeded had this case proceeded to trial, Plaintiffs asserted these claims in an ever-evolving privacy landscape. *See, e.g.*, *Hashemi v. Bosley, Inc.*, 2022 WL 2155117, at *7 (C.D. Cal. Feb. 22, 2022) (privacy class actions "are a relatively new type of litigation"). There was no guarantee that any results achieved at trial would survive subsequent motions practice and appellate review, or that Plaintiffs would be able to secure and defend on appeal injunctive relief and affirmative changes to Google's conduct at issue in this litigation. The Settlement thus satisfies the first *Hanlon* factor.

2. Risk, expense, complexity, and duration of further litigation.

"In assessing the risk, expense, complexity, and likely duration of further litigation [under the second *Hanlon* factor], the court evaluates the time and cost required." *Adoma v. Univ. of Phoenix, Inc.*, 913 F. Supp. 2d 964, 976 (E.D. Cal. 2012). Although Plaintiffs were prepared for trial and confident that the jury would find in their favor, even a successful trial result has an inherent risk of limited remedies that are not as sweeping as the remedies Plaintiffs achieved through this Settlement. The duration of post-trial proceedings is an additional factor weighing in favor of approval. The additional costs of experts, attorney resources, and generally maintaining the lawsuit, balanced against the relief obtained, also weighs heavily in favor of approval. *See, e.g.*, *In re Charles Schwab Corp. Sec. Litig.*, 2011 WL 1481424, at *5 (N.D. Cal. Apr. 19, 2011) (granting motion for final approval of class action settlement reached "on the eve of trial" in part where "prosecuting these claims through trial and subsequent appeals would have involved significant risk, expense, and delay").

3. The risk of maintaining class action status.

As to the third *Hanlon* factor, while Plaintiffs were confident that they could maintain class certification through trial, the possibility of decertification is always present. Google would have had the ability to challenge the Court's certification order on appeal. This potential vulnerability also militates in favor of settlement under *Hanlon*'s third factor. *E.g.*, *Ruiz v. XPO Last Mile, Inc.*, 2017 WL 6513962, at *5–6 (S.D. Cal. Dec. 20, 2017) (granting motion for final approval of class action settlement, noting, defendant could "appeal the propriety of the Court's class certification order").

4. The relief obtained through settlement.

As detailed above, the Settlement provides the class with substantial value in the form of injunctive relief that protects all class members' privacy rights and provides lasting benefits. As in *Columbia Sportswear*, the "injunctive relief settlement stops the allegedly unlawful practices, bars Defendant from similar practices in the future, and does not prevent class members from seeking [monetary] legal recourse." 2018 WL 582564, at *4 (citation and quotation marks

omitted) (brackets in original). This makes the Settlement especially valuable to all class members, providing important accountability and transparency.[9]

The Ninth Circuit has noted that "assigning a precise dollar amount to the class benefit may prove difficult where" the "relief obtained for the class is 'primarily injunctive in nature and thus not easily monetized.'" *Lowery v. Rhapsody Int'l, Inc.*, 75 F.4th 985, 992 n.1 (9th Cir. 2023) (citing *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 941 (9th Cir. 2011)). It has also emphasized that "[w]hat matters most is the result for the class members" (*id.* at 988) and that "lawsuits can provide considerable benefit to society through nonmonetary relief" (*id.* at 994–95). Unlike in *Rhapsody*, where the court found that the benefit provided was "minimal" and only benefited a small portion of potential class members, this Settlement provides valuable injunctive relief for every class member. *See id.*

All class members will benefit from this injunctive relief without releasing any claims for monetary damages. Ex. 1 § I.14. Class members remain free to bring individual damages claims. *See Nat'l Fed'n of Blind of Cal. v. Uber Techs., Inc.*, 2016 WL 9000699, at *3, *9 (N.D. Cal. July 13, 2016) (granting preliminary approval of a settlement in which "the class will not waive their right to pursue damages claims").

5. The extent of discovery and stage of the proceedings.

The fifth *Hanlon* factor clearly supports final approval. There were over 5.8 million pages of documents produced by Google (plus many gigabytes of data), 49 depositions, 11 disclosed experts, over two dozen hearings (including 2 evidentiary hearings which led to discovery sanctions), 21 Special Master proceedings, over 1,000 docket entries, and extensive mediation efforts before the parties finalized this Settlement. This Settlement was reached after all pretrial filings and the Court's rulings on most of same. The extensive discovery and lengthy proceedings

[9] Courts routinely approve settlements for injunctive relief alone. *See, e.g.*, *Romero v. Securus Techs., Inc.*, 2020 WL 6799401 (S.D. Cal. Nov. 19, 2020); *Ang v. Bimbo Bakeries USA, Inc.*, 2020 WL 5798152, (N.D. Cal. Sept. 29, 2020) (same); *Lilly v. Jamba Juice Co.*, 2015 WL 2062858 (N.D. Cal. May 4, 2015) (same); *Kim v. Space Pencil, Inc.*, 2012 WL 5948951 (N.D. Cal. Nov. 28, 2012) (same); *Goldkorn v. Cty. of San Bernardino*, 2012 WL 476279 (C.D. Cal. Feb. 13, 2012) (same); *In re Lifelock, Inc. Mktg. & Sales Practices Litig.*, 2010 WL 3715138 (D. Ariz. Aug. 31, 2010) (same).

fully support approval. *Kumar v. Salov N. Am. Corp.*, 2017 WL 2902898, at *7 (N.D. Cal. July 7, 2017) (Gonzalez Rogers, J.), *aff'd,* 737 F. App'x 341 (9th Cir. 2018) (granting motion for final approval of class action settlement that "occurred only after extensive litigation" and discovery).

6. The experience and views of counsel.

The sixth *Hanlon* factor asks the Court to address the recommendation of counsel and the level of experience backing that recommendation. *Grannan v. Alliant L. Grp., P.C.*, 2012 WL 216522, at *7 (N.D. Cal. Jan. 24, 2012). "The recommendations of plaintiffs' counsel should be given a presumption of reasonableness." *In re Am. Apparel, Inc. v. S'holder. Litig.*, 2014 WL 10212865, at *14 (C.D. Cal. July 28, 2014); *In re Omnivision Techns., Inc.*, 559 F. Supp. 2d 1036, 1043 (N.D. Cal. 2008); *Hanlon*, 150 F.3d at 1027. In moving for class certification, Class Counsel outlined their extensive experience in complex litigation, including privacy litigation. Dkts. 609, 609-8, 609-9, 609-10. The Court considered that record and found that Class Counsel's extensive experience satisfied the Rule 23(a) adequacy requirement. Dkt. 803 at 27. David Boies, Bill Carmody, and John Yanchunis—the three lead Plaintiffs' Counsel—draw on over a century of combined litigation experience and attest that the Settlement is an excellent result for the certified classes which provides valuable injunctive relief to each class member. Consolidated Decl. ¶¶ 25–34. Class Counsel drew on that experience to negotiate and secure this Settlement, and they now respectfully recommend final approval.

7. The presence of a governmental case participant.

The government did not participate in this case, so this *Hanlon* factor is not a consideration for this motion. *Askar v. Health Providers Choice, Inc.*, 2021 WL 4846955, at *4 (N.D. Cal. Oct. 18, 2021) (noting a lack of government participation and not weighing this factor in granting final approval). Google will provide CAFA notice, and the parties will provide the Court with information regarding any responses to such notice.

8. The reaction of the class members to the proposed settlement.

This factor is not considered where there is no notice. *Lilly v. Jamba Juice Co.*, 2015 WL 2062858, at *4 (N.D. Cal. May 4, 2015) ("[B]ecause the Court previously decided in its preliminary approval that notice was not necessary, the reaction of the class is not considered in

weighing the fairness factors."). As one reference point, the class representatives fully support the Settlement. *See* Class Rep. Declarations.

C. Final approval is also warranted under Rule 23(e)(2).

1. Class representatives and Class Counsel adequately represented the class.

Final approval is warranted under Rule 23(e)(2)(A), which considers the adequacy of representation by the class representatives and their attorneys. This factor includes "the nature and amount of discovery" undertaken. Fed. R. Civ. P. 23(e)(2)(A) advisory committee's note to 2018 amendment. The class representatives and their attorneys have provided relentless, excellent representation for over three years, fully satisfying this requirement. *Morrison v. Ross Stores, Inc.*, 2022 WL 17592437, at *3 (N.D. Cal. Feb. 16, 2022) (Gonzalez Rogers, J.) (finding that "the representative parties and class counsel have fairly and adequately represented the interests of the Class" in granting approval of an injunctive-relief-only settlement).

The class representatives were integrated into and involved with this litigation, reviewing and approving key filings and strategy decisions. Mao Dec. ¶ 13. Plaintiffs each responded to 17 interrogatories, 34 requests for production, and 55 requests for admission. *Id*. The class representatives also each sat for deposition. *Id*. Productions involved imaging each of their personal devices, negotiating search terms, and reviewing those documents before production. *Id*. The class representatives also participated in the Special Master process, which involved data collection from their devices, retrieving account information and settings, and culling through data to enable the experts and consultants to complete their analyses. *Id*. Plaintiffs remained involved with the mediation process and agreed that the injunctive relief that was obtained is the relief they sought by initiating and joining this litigation. *See* Class Rep. Declarations.

As detailed in the Background, Class Counsel zealously represented the classes throughout this litigation and in obtaining this Settlement. Class Counsel brought this case to the cusp of trial, settling only after extensive discovery and the Court's pretrial conference where jury instructions, motions in limine, witness lists, and exhibit lists were subject to the Court's scrutiny and through extensive mediation efforts. Class Counsel advanced more than seven

million dollars in litigation expenses and over 75,000 attorney hours on behalf of the classes with no assurances that those expenses would be reimbursed. Mao Decl. ¶ 14. These efforts were entirely self-funded without any third-party financing agreements. *Id*.

2. The parties negotiated the settlement at arm's-length.

Final approval is also warranted under Rule 23(e)(2)(B), which considers whether the settlement was negotiated at arms-length. Fed. R. Civ. P. 23(e)(2)(B). The Ninth Circuit has "identified three . . . signs [of collusion]: (1) 'when counsel receive[s] a disproportionate distribution of the settlement'; (2) 'when the parties negotiate a 'clear sailing arrangement,'; and (3) 'when the agreement contains a 'kicker' or 'reverter' clause.'" *Briseño v. Henderson*, 998 F.3d 1014, 1023 (9th Cir. 2021) (citing *In re Bluetooth Headset Products Liability Litig.*, 654 F.3d 935, 947 (9th Cir. 2011)). All requirements are met in this case, even if inapplicable. *Campbell v. Facebook, Inc.*, 2017 WL 3581179, at *5 (N.D. Cal. Aug. 18, 2017) ("Arguably, [the] *Bluetooth* [collusion analysis] is not even applicable to this settlement because it does not involve a Rule 23(b)(2) damages class."); *see also Moreno v. S.F. Bay Area Rapid Transit Dist.*, 2019 WL 343472, at *3 n.2 (N.D. Cal. Jan. 28, 2019).

The extensive discovery and motions practice in this case reflect an arm's length process. *Wannemacher v. Carrington Mortg. Servs., LLC*, 2014 WL 12586117, at *8 (C.D. Cal. Dec. 22, 2014); *see also Moreno*, 2019 WL 343472, at *5. Any concerns of collusion are further assuaged where, as here, the Settlement was reached only after class certification. *Cf. In re Volkswagen "Clean Diesel" Mktg., Sales Prac., & Prod. Liab. Litig.*, 895 F.3d 597, 610–11 (9th Cir. 2018). Before any settlement negotiations commenced, the Court resolved multiple motions to dismiss, dozens of discovery disputes, two sanctions motions, class certification, and summary judgment. Mao Decl. ¶ 11. Only after the Court's denial of Google's motion for summary judgment did the parties begin discussing potential resolution of this litigation. Ex. 1 at 2.

Judge Phillips' participation in the parties' extensive mediation further demonstrates the arm's-length nature of this Settlement. The "involvement of a neutral or court-affiliated mediator or facilitator in [the parties'] negotiations may bear on whether they were conducted in a manner that would protect and further the class interests." Rule 23(e)(2)(B) advisory committee's note

to 2018 amendment; *accord Pederson v. Airport Terminal Servs.*, 2018 WL 2138457, at *7 (C.D. Cal. Apr. 5, 2018). Here, the parties finalized this Settlement after six months of extensive mediation supervised by (Ret.) Judge Phillips. Mao Decl. ¶ 10. With the assistance and supervision of Judge Phillips, the parties established a framework for the potential injunctive relief and, over the next few months, exchanged numerous proposals and counterproposals. *Id*.

None of the remaining warning signs of collusion are present. Plaintiffs will file a motion for an award of attorneys' fees, costs, and service awards, and Google is free to contest the reasonableness of the amounts requested. There is no "clear sailing" arrangement, nor is there a settlement fund from which unawarded money will revert to Google. The facts support final approval. *See, e.g.*, *Lim v. Transforce, Inc.*, 2022 WL 17253907, at *12 (C.D. Cal. Nov. 15, 2022); *Lusk v. Five Guys Enters. LLC*, 2022 WL 4791923, at *9 (E.D. Cal. Sep. 30, 2022).

3. The substantial relief obtained for the class.

Final approval is also warranted under Rule 23(e)(2)(C), which considers the relief provided to the class. As set forth above, Plaintiffs respectfully submit that the relief provided by the Settlement is exceptional. It far exceeds any requirements in terms of reasonableness and adequacy, particularly in light of expedited process for obtaining that relief, with Google already making changes to its disclosures. That Settlement provides immediate and valuable relief for all class members while avoiding the risks and delay of trial, post-trial motions, potential decertification, and appeals. Because there are no monetary benefits, there is no method of distribution to consider. The parties have agreed to abide by the Court's ruling on attorneys' fees, costs, and service awards, which will be paid by Google without in any way depleting or modifying the relief to be provided to class members or their right to separately seek monetary relief. Because the proposed relief is more than adequate, the proposed settlement passes muster under Rule 23(e)(2)(C). *See Morrison*, 2022 WL 17592437, at *4.

4. The settlement treats all class members equally.

Final approval is also warranted under Rule 23(e)(2)(D), which considers whether the proposed settlement "treats class members equitably relative to each other." Fed. R. Civ. P. 23(e)(2)(D). "Matters of concern could include whether the apportionment of relief among class

members takes appropriate account of differences among their claims, and whether the scope of the release may affect class members in different ways that bear on the apportionment of relief." Fed. R. Civ. P. 23(e)(2)(D) advisory committee's note to 2018 amendment. Here, the Settlement treats all class members the same, with valuable injunctive relief that applies equally to every class member. Pursuant to this Settlement, Google is undertaking concrete and significant efforts to delete and remediate data for all class members, to limit data collection going forward, to change its disclosures, and to prevent further use of the detection bits—changes designed to hold Google accountable and enhance transparency going forward for the benefit of all class members. This fully meets the requirements of Rule 23(e)(2)(D). *See Morrison*, 2022 WL 17592437 at *5; *see also In re Google LLC St. View Elec. Commc'ns Litig.*, 611 F. Supp. 3d 872, 895 (N.D. Cal. 2020), *aff'd sub nom. In re Google Inc. St. View Elec. Comm'ns Litig.*, 21 F.4th 1102 (9th Cir. 2021) (noting that each member benefited equally from the injunctive relief).

V. CONCLUSION

For these reasons, Plaintiffs respectfully request that the Court grant this motion for final approval of the Settlement.

Dated: April 1, 2024

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