NOTE

TransUnion LLC v. Ramirez and the Fight to Protect Climate Change Standing

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ABSTRACT

As the impacts of climate change come to fruition, plaintiffs battle strict standing requirements to litigate climate harms. Federal courts impose increasingly strict definitions of injury in fact while Congress continually fails to present a comprehensive climate plan, leaving plaintiffs without a remedy. The Supreme Court recently made standing even more difficult in its decision TransUnion LLC v. Ramirez*, where it narrowed the definition of concrete injury. This Note examines the impact of* TransUnion*'s holding on climate plaintiffs and proposes three ways the case should be read narrowly to protect climate change standing. It argues that* TransUnion*'s standing test should be applied only to Fair Credit Reporting Act cases, to cases for damages, or to suits against private entities. By applying a narrow reading, federal courts may protect the ability of climate plaintiffs to assert an injury in fact and help stop climate change in its tracks.*

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Introduction

Over a decade ago, the Supreme Court declared that "[t]he harms associated with climate change are serious and well recognized."[1] This statement indicated a pivotal change toward redressability for the seemingly inevitable harms of man-made climate change. Since then, Supreme Court jurisprudence has directly contradicted this claim by making standing increasingly difficult for plaintiffs asserting "serious and well recognized" harms.[2] As standing becomes a higher barrier

1 Massachusetts v. EPA, 549 U.S. 497, 521 (2007).

2 *Id.*; *see, e.g.*, Clapper v. Amnesty Int'l USA, 568 U.S. 398, 401–02 (2013) (finding that plaintiffs' alleged future injury was not fairly traceable to the defendant's action); Spokeo, Inc. v. Robins, 578 U.S. 330, 334 (2016) (holding that a concrete injury is not always the same as a tangible one).

for plaintiffs to overcome, climate change claims go unrecognized and leave injured plaintiffs without a remedy.[3] If the Supreme Court is not willing to act on its own assertions that climate change is serious, other actions must be taken to achieve climate standing within the Court's existing framework.

To bring a case in federal court, all plaintiffs must satisfy the requirements of Constitutional standing.[4] Article III, Section 2 of the Constitution states that "[t]he judicial [p]ower shall extend to all [c]ases" and "[c]ontroversies."[5] To assert Article III standing, plaintiffs must fulfill three basic requirements: injury in fact, causation fairly traceable to the defendant's conduct, and redressability.[6] A harm must be concrete and particularized to constitute an injury in fact.[7] The Supreme Court has held that a "'concrete' injury must be '*de facto*' . . . it must actually exist."[8]

In 2021, the Supreme Court strictly limited the definition of concrete injury for Article III standing in *TransUnion LLC v. Ramirez*.[9] The Court expanded its previous precedent to define concrete injury as only tangible harms, or those that have a "'close relationship' to a harm traditionally recognized as providing a basis for a lawsuit in American courts."[10] *TransUnion*, with its narrow interpretation of injury in fact, is hardly the first decision to make standing more difficult for citizen plaintiffs. In 2020, the Ninth Circuit found that since the court itself could not stop climate change from occurring, the plaintiffs' claims against the continued use of fossil fuels were not redressable in *Juliana v. United States*.[11] Like *TransUnion*, *Juliana* limited one of the three elements of constitutional standing.[12] By adding stricter redressability requirements,

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3 *See, e.g.*, Juliana v. United States, 947 F.3d 1159, 1175 (9th Cir. 2020) (rejecting standing for climate plaintiffs); Juliana v. United States, No. 6:15-cv-01517, 2023 WL 9023339, at *1 (D. Or. Dec. 29, 2023) (denying defendant's motion to dismiss on plaintiff's second amended complaint); *see also* Ctr. for Biological Diversity v. U.S. Dep't of the Interior, No. 22-cv-01716, 2023 WL 7182041, at *1 (D.D.C. Nov. 1, 2023) (granting defendant's motion to dismiss due to the plaintiff's failure to allege Article III standing).

4 State courts "are not required to follow federal law on 'issues of justiciability and standing.'" Soto v. Great Am. LLC, 165 N.E.3d 935, 941 (Ill. App. Ct. 2020) (quoting Greer v. Ill. Hous. Dev. Auth., 524 N.E.2d 561, 574 (Ill. 1988)), *vacated*, No. 125806, 2021 WL 12133429 (Ill. July 16, 2021). Thus, state court standing requirements are generally less strict than Article III standing. *See also* Wyatt Sassman, *A Survey of Constitutional Standing in State Courts*, 8 Ky. J. Equine, Agric., & Nat. Res. L. 349, 352 (2015). State court standing, however, is outside the scope of this Note.

5 U.S. Const. art III, § 2.

6 *See* Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–61 (1992).

7 *See Massachusetts*, 549 U.S. at 517; *see also Spokeo*, 578 U.S. at 340.

8 *Spokeo*, 578 U.S. at 340 (quoting *De Facto*, Black's Law Dictionary (10th ed. 2014)).

9 594 U.S. 413 (2021).

10 *Id.* at 2200 (quoting *Spokeo*, 578 U.S. at 340–41).

11 947 F.3d 1159, 1164–65 (9th Cir. 2020).

12 *See id.* (limiting redressability element).

the Ninth Circuit raised the bar for plaintiffs attempting to litigate climate harms in federal court. These cases reveal how recent changes in standing jurisprudence make it harder than ever for plaintiffs to litigate on the merits despite the real and recognized harms of climate change.

This Note argues that federal courts should apply a narrow reading of *TransUnion*, distinguishing its standing requirements to apply only to Fair Credit Reporting Act ("FCRA")[13] cases, cases for damages, or claims brought against private parties. By distinguishing *TransUnion*'s narrow concrete harm test to these groups, climate plaintiffs can better achieve standing. Part I begins with a history of constitutional and prudential standing requirements, then provides an overview of *TransUnion LLC v. Ramirez* and subsequent cases citing *TransUnion*. Part II analyzes the potential impact of *TransUnion* on climate change litigants and how federal courts have interpreted its holding thus far. Part III then provides three ways federal courts may limit the application of *TransUnion*'s injury in fact requirements: by applying *TransUnion* only to FCRA claims,[14] to suits for damages, or to suits against private entities. By limiting *TransUnion*'s strict concrete injury test to certain types of claims, federal courts may protect the interests of plaintiffs injured by climate change and, ultimately, our planet.

I. A History of Article III and Prudential Standing From the Mid-Twentieth Century to *TransUnion*

A. Article III Standing

Although Article III explicitly grants the judiciary the power to hear cases and controversies, standing is not explicit in the language of the Constitution.[15] The Supreme Court did not always apply the strict standing requirements that are widely accepted today.[16] Standing, as it is now understood, was first mentioned in 1944 in *Stark v. Wickard*.[17] There, the Court found that strict new regulations on milk sales interfered with a legally cognizable right of dairy farmers to produce and market milk.[18] The Court held that by asserting an injury to their business interests and livelihood, the farmers had standing to sue.[19] *Wickard* established a broad test for Article III standing, defining it merely as "an interference

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13 Pub. L. No 91-508, 84 Stat. 1127 (1970) (codified as amended at 15 U.S.C. § 1681).

14 *See id.*

15 U.S. Const. art III, § 2.

16 *See* Cass R. Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, "Injuries," and Article III*, 91 Mich. L. Rev. 163, 168–69 (1992).

17 321 U.S. 288 (1944); *see also* Sunstein, *supra* note 16, at 169.

18 *See Wickard*, 321 U.S. at 290–302.

19 *See id.* at 311.

with some legal right."[20] By the 1970s, the Court expanded this test to three elements of standing—injury in fact, causation fairly traceable to the defendant's conduct, and redressability by the court.[21]

The Court continued to restrict and refine standing, concretely announcing three requirements in its 1992 decision *Lujan v. Defenders of Wildlife*.[22] There, the Court expressly outlined the requirements of each element: (1) an injury in fact that is "(a) concrete and particularized," and "(b) 'actual or imminent'";[23] (2) causation that is "fairly . . . trace[able] to the challenged action of the defendant";[24] and (3) the likelihood, beyond a mere speculation, that a favorable decision will redress the plaintiff's injury.[25] *Lujan* is now well entrenched in standing jurisprudence and has since been cited in over 30,000 cases, including *TransUnion*.[26] By relying on *Lujan* and defining its key terms, courts have reworked and redefined standing from broad assertions of interferences with a legal right into the strict Article III standing requirements that are known today.

B. Prudential Standing

Beyond the Article III requirements imposed by courts, standing is limited by prudential concerns.[27] Prudential concerns, or prudential standing requirements, impose judicially determined restrictions on which cases may be heard.[28] Unlike Article III standing, these requirements are not derived from the Constitution but from common law.[29] The political question doctrine, prohibition on generalized grievances, zone of interest test, and administrative standing requirements are key forms of prudential standing.[30]

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20 *Id.* at 290.

21 *See, e.g.*, Ass'n of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 152 (1970) (injury in fact); Simon v. E. Ky. Welfare Rts. Org., 426 U.S. 26, 41–42 (1976) (causation); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 280 n.14, 320 (1978) (redressability); *see also* Sunstein, *supra* note 16, at 211.

22 504 U.S. 555 (1992).

23 *Id.* at 560 (citation omitted) (quoting Whitmore v. Arkansas, 495 U.S. 149, 155 (1990)).

24 *Id.* at 560 (alteration in original) (quoting *Simon*, 426 U.S. at 41–42).

25 *Id.* at 561 (citing *Simon*, 426 U.S. at 38, 43).

26 This statistic was gathered per Westlaw's "Citing References" tool. *See* WESTLAW, http://www.westlaw.com (search "504 U.S. 555" to select the case; then view the "Citing References" tab to view the number of cases that have cited *Lujan*); TransUnion LLC v. Ramirez, 594 U.S. 413, 423 (2021).

27 *See* Allen v. Wright, 468 U.S. 737, 751 (1984), *abrogated by* Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118 (2014).

28 *See id.*

29 *See id.*

30 *See* Baker v. Carr, 369 U.S. 186, 210 (1962) (political question); Flast v. Cohen, 392 U.S. 83, 106 (1968) (generalized grievances); Bennett v. Spear, 520 U.S. 154, 162 (1997) (zone of interest);

First, under the political question doctrine, courts often avoid deciding cases that are presumably better answered by the legislature.[31] A claim may be a political question if it includes

> [A] textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[32]

The political question factors include lack of a justiciable standard, contradicting doctrine across political branches, and impossibility of judicial independence.[33] Not all factors must be present for a court to reject a claim as a political question.[34] By fulfilling one or more of the political question factors, a claim may constitute a nonjusticiable political question and be dismissed by a federal court.[35] In the climate change context, the political question doctrine has been used repeatedly to dismiss tort-based climate change claims and delegate the resolution of such claims to Congress.[36]

Abbott Labs. v. Gardner, 387 U.S. 136, 148 (1967), *abrogated on other grounds by* Califano v. Sanders, 430 U.S. 99 (1977) (standing under Administrative Procedure Act § 704).

31 *See, e.g.*, *Baker*, 369 U.S. at 210 (establishing the political question doctrine); El-Shifa Pharm. Indus. Co. v. United States, 607 F.3d 836, 845 (D.C. Cir. 2010) (applying the political question doctrine); Zivotofsky v. Clinton, 566 U.S. 189, 195, 201 (2012) (same).

32 *Baker*, 369 U.S. at 217.

33 *Id.*

34 *See id.* ("Unless one of these formulations is inextricable from the case at bar, there should be no dismissal for non-justiciability on the ground of a political question's presence."); *El-Shifa Pharm.*, 607 F.3d at 841.

35 *See Baker*, 369 U.S. at 217.

36 *See* Amelia Thorpe, *Tort-Based Climate Change Litigation and the Political Question Doctrine*, 24 J. Land Use & Env't L. 79, 81–84 (2008) (explaining the dismissal of three climate change cases in relation to the political question doctrine: Connecticut v. American Electric Power Co., 406 F. Supp. 2d 265 (S.D.N.Y. 2005), Korsinsky v. EPA, No. 05 Civ. 859, 2005 WL 2414744 (S.D.N.Y. Sept. 29, 2005), and Comer v. Nationwide Mutual Insurance Co., No. 1:05 CV 436, 2006 WL 1066645 (S.D. Miss. Feb. 23, 2006)); California v. Gen. Motors Corp., No. C06-05755, 2007 WL 2726871, at *16 (N.D. Cal. Sept. 17, 2007) (finding that claims related to auto emissions were a political question due to the Congress's textually demonstrable power under the commerce clause). For a more in-depth analysis of *General Motors Corp.* and the use of the political question doctrine in climate change cases, see also James R. May, *Climate Change, Constitutional Consignment, and the Political Question Doctrine*, 85 Denv. U. L. Rev. 919, 936 (2008).

Further, courts generally dismiss complaints that amount to generalized grievances.[37] Generalized grievances are defined as injuries that constitute "abstract questions of wide public significance" and are shared broadly among many, if not all, Americans.[38] Like political questions, courts find generalized grievances are better addressed by the legislature or left to state governance.[39] A taxpayer challenging the use of federal funds for public schools, for example, asserts a generalized grievance.[40] In many instances, the generalized grievance doctrine may be overcome so long as a plaintiff or class of plaintiffs have concrete and particularized injuries.[41] The reasoning, as a result, is somewhat circular. If the injury is concrete and particularized, it is not a generalized grievance; if the injury affects many people, it is not an injury in fact.[42] In a class action, each plaintiff must assert their own injury without relying on the injuries of others in the class.[43] Thus, an injury that affects many people is a generalized grievance unless each member of the class can fulfill the Article III definition of injury in fact.[44]

For certain statutory claims, a plaintiff's injury must fall into the zone of interest protected by the statutory provision under which they sue.[45] This test has generally required plaintiff's claims to fall within the injuries Congress intended to protect when passing the statute.[46] The zone of interest test applies most often to complaints under the Administrative Procedure Act ("APA")[47] regarding agency actions and lack thereof.[48] The zone of interest test is derived from the language of APA section 702,[49] which states, "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action *within the meaning of a relevant statute*, is entitled to judicial review

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37 *See* Flast v. Cohen, 392 U.S. 83, 85, 106 (1968); *see also* Heather Elliott, *The Functions of Standing*, 61 Stan. L. Rev. 459, 462 (2008).

38 Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 475 (1982) (quoting Warth v. Seldin, 422 U.S. 490, 500 (1975)).

39 *See id.* at 475.

40 *See Flast*, 392 U.S. at 85 (citing Frothingham v. Mellon, 262 U.S. 447 (1923)).

41 *See* Massachusetts v. EPA, 549 U.S. 497, 517 (2007); *see also* Juliana v. United States, 947 F.3d 1159, 1168–69 (9th Cir. 2020) (providing case law on the generalized grievance doctrine and concluding that plaintiffs' climate change claim is not a generalized grievance).

42 *See supra* notes 39–41 and accompanying text.

43 *See Warth*, 422 U.S. at 499.

44 *See id.*; *see also* Matte v. Sunshine Mobile Homes, Inc., 270 F. Supp. 2d, 805, 819–20 (W.D. La. 2003) (rejecting plaintiffs' class action claims, inter alia, as a generalized grievance).

45 *See* Bennett v. Spear, 520 U.S. 154, 162–64 (1997).

46 *See* Ass'n of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 153 (1970).

47 Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified in scattered sections of 5 U.S.C.).

48 *See* 5 U.S.C. § 702; *see also* James T. O'Reilly, Administrative Rulemaking § 15:42 (2023 ed.).

49 5 U.S.C. § 702.

thereof."[50] When applying the zone of interest test, courts use tools of statutory interpretation to ascertain the purpose of the statute at issue.[51]

For example, the Court upheld standing using the zone of interest test for a tribal land dispute where the plaintiffs sued under the APA in *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*.[52] There, the plaintiffs' interest in land used to build a casino fell within the zone of interests of the Indian Reorganization Act,[53] which authorized the Department of Interior to acquire property and provide it to Indian tribes.[54] For climate plaintiffs, the zone of interest test often allows claims under environmental statutes, such as the Clean Air Act,[55] Clean Water Act,[56] and Endangered Species Act ("ESA"),[57] to proceed. As a result, the zone of interest test is crucial for climate plaintiffs to overcome when bringing claims under these statutes.

The zone of interest test is one of several standing requirements for suits against federal agencies that differentiate public and private suits. In addition to satisfying the zone of interest test under APA section 702, plaintiffs must also show the agency action is final, their claim is ripe, and they have exhausted their administrative remedies.[58] First, an agency action must be ripe for judicial review.[59] Ripeness addresses the questions of whether the case is fit for judicial review and what harm to the plaintiffs may occur if review is delayed.[60] Similarly, an agency action must be final to be subject to judicial review.[61] To be final, "the [agency] action must mark the 'consummation' of the agency's decisionmaking process" and the action must have legal consequences.[62] Even if a plaintiff demonstrates their claim is ripe and relates to a final agency action, they must prove that they have exhausted their mandatory

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50 *Id.* (emphasis added).

51 *See* Bennett v. Spear, 520 U.S. 154, 175–76 (1997); *see also* Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak, 567 U.S. 209, 224, 227 (2012).

52 567 U.S. 209, 227 (2012).

53 Pub. L. No. 73-383, 48 Stat. 984 (1934) (codified as amended at 25 U.S.C. §§ 461–479).

54 *See Match-E-Be-Nash-She-Wish Band of Pottawatomi*, 567 U.S. at 224, 227.

55 42 U.S.C. §§ 7401–7671(q); *see also infra* notes 106–15 and accompanying text.

56 33 U.S.C. §§ 1251–1387; *see also infra* notes 166–68 and accompanying text.

57 16 U.S.C. §§ 1531–1544; *see also* Bennett v. Spear, 520 U.S. 154, 155 (1997) (holding that a reduction in available water for fish species was within the zone of interest that the ESA intended to protect).

58 *See Bennett*, 520 U.S. at 178; 5 U.S.C. § 704.

59 *See* Abbott Labs. v. Gardner, 387 U.S. 136, 148 (1967), *abrogated on other grounds by* Califano v. Sanders, 430 U.S. 99 (1977).

60 *See id.* at 159.

61 *See* 5 U.S.C. § 704 ("Agency action made reviewable by statute and *final agency action* for which there is no other adequate remedy in a court are subject to judicial review." (emphasis added)).

62 *Bennett*, 520 U.S. at 177–78 (quoting Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 113 (1948)).

administrative remedies.[63] Administrative remedies may include adjudication by an Administrative Law Judge ("ALJ") and appeals of adjudication, but differ by agency.[64]

In many climate change and environmental cases, plaintiffs are suing federal agencies for the promulgation of rules and other regulations impacting climate change.[65] The additional administrative standing requirements applied to federal agencies in these cases often differ from the Article III standard. Administrative standing requirements do not trump Article III standing but rather supplement it.[66] Thus, depending on whether a plaintiff sues an agency or a private party, the elements the plaintiff must satisfy to achieve standing may differ greatly. Such variable standing requirements for private and public suits demonstrate the issue of fragmented standing, articulated by Professor Richard Fallon in his article *The Fragmentation of Standing*.[67] Fallon opines that over the past fifty years, Supreme Court activity has resulted in such fragmented ideas of standing that there is simply no set doctrine for litigants to rely upon.[68]

Considered as a whole, prudential standing requirements—including the political question doctrine, generalized grievances requirement, and administrative standing requirements—impose even higher hurdles for standing than Article III. Plaintiffs must not only assert an injury in fact that is concrete and particularized but further prove that it is not a political question or generalized grievance.[69] Additionally, if the court's jurisdiction to review a claim is derived from a statute like the APA, as was the case in *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, plaintiffs must overcome the zone of interest test.[70] Finally, if the plaintiff is suing a federal agency,

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63 *See* Darby v. Cisneros, 509 U.S. 137, 144–47 (1993) ("Section 10(c) [of the APA] explicitly requires exhaustion of all intra-agency appeals *mandated* either by statute or by agency rule; it would be inconsistent with the plain language of § 10(c) for courts to require litigants to exhaust *optional* appeals as well." (emphasis added)).

64 *See, e.g.*, *id.* at 141 (appealing from an ALJ conclusion). The National Labor Relations Board, U.S. Patent and Trademark Office, and U.S. Department of Veterans Affairs have an increasing number of non-ALJ adjudication processes. *See* Kent Barnett, Malia Reddick, Logan Cornett & Russell Wheeler, Admin. Conf. of the U.S., Non-ALJ Adjudicators in Federal Agencies: Status, Selection, Oversight, and Removal 2–3 (2018).

65 *See, e.g.*, Massachusetts v. EPA, 549 U.S. 497, 505 (2007); Sierra Club v. EPA, 762 F.3d 971, 977–78 (9th Cir. 2014); *Bennett*, 520 U.S. at 154.

66 *See Bennett*, 520 U.S. at 162.

67 *See* Richard H. Fallon, Jr., *The Fragmentation of Standing*, 93 Tex. L. Rev. 1061, 1062–64 (2015).

68 *See id.* at 1070–71.

69 *See* Lujan v. Defs. of Wildlife, 504 U.S. 555, 576–77 (1992).

70 *See* Match-E-Be-Nash-She-Wish Band of Pottawomi Indians v. Patchak, 567 U.S. 209, 224 (2012).

they must comply with administrative standing requirements.[71] Due to these numerous and variable restrictions, many plaintiffs are kept out of federal court and are unable to litigate their claims.

C. Standing for Climate Plaintiffs

Despite the harms of climate change—warming temperatures, increased flooding, and air pollution,[72] to name a few—coming to fruition, courts often reject standing for climate plaintiffs in federal court.[73] The impact of climate change is widespread and affects the entire planet.[74]

Instead of tackling this issue, courts continually reject climate standing as not redressable. Courts, like the Ninth Circuit in *Juliana v. United States*, seem to believe that because they cannot solve global climate change, their incremental action fails the redressability requirement.[75] In *Juliana*, a group of young people and climate activists filed a complaint alleging that United States officials continue to "'permit, authorize, and subsidize' fossil fuel use despite" knowledge of their impacts on global warming.[76] The plaintiffs alleged violations of due process and equal protection against the Departments of Energy, Transportation, and Agriculture for failure to act on climate change.[77] The activists' alleged harms included imminent human death, property damage, and ecosystem catastrophe.[78] The district court found that the plaintiffs had standing because their alleged harms were "imminent" and thus satisfactory as an injury in fact.[79] In 2020, however, the Ninth Circuit found that the plaintiffs failed to satisfy the redressability requirement, and thus lacked standing.[80]

Despite agreeing that the plaintiffs had an injury in fact, the Ninth Circuit dismissed their claim.[81] In the Ninth Circuit's view, Article III does not place the ability to solve the widespread harms of fossil fuel

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71 *See supra* notes 62–68 and accompanying text.

72 *See* Intergovernmental Panel on Climate Change, *Summary for Policymakers*, *in* Climate Change 2022: Impacts, Adaptation and Vulnerability 11 (Hans-O. Pörtner et al. eds., 2022).

73 Throughout this Note the plaintiffs bringing claims related to the numerous injuries and harms of climate change will be referred to as "climate plaintiffs."

74 *See infra* note 78 and accompanying text.

75 Juliana v. United States, 947 F.3d 1159, 1165 (9th Cir. 2020).

76 *Id.* at 1165 (quoting First Amended Complaint for Declaratory and Injunctive Relief at 1, Juliana v. United States, 217 F. Supp. 3d 1224 (D. Or. 2016) (No. 15-cv-01517)).

77 *See id.* at 1165.

78 *See id.*

79 Juliana v. United States, 217 F. Supp. 3d 1224, 1244 (D. Or. 2016), *rev'd and remanded*, 947 F.3d 1159 (9th Cir. 2020).

80 *See Juliana*, 947 F.3d at 1173–75.

81 *See id.* at 1168, 1175.

emissions in the hands of the judiciary.[82] Since the circuit court itself cannot solve the widespread harms of climate change, including the death and ecosystem destruction the plaintiffs alleged, the case was not justiciable.[83] The court focused on its inability to solve the issue in its entirety instead of viewing climate change as a sum of its parts.[84] Because of *Juliana*, satisfying the redressability requirement will be more difficult for climate plaintiffs who bring imminent harms. *Juliana* is just one example of how climate plaintiffs may fail to assert standing under the current doctrine despite the serious, imminent, and well-known consequences of climate change.

Beyond injuries based on systematic failures to address climate change, climate plaintiffs often bring citizen suits under environmental statutes.[85] Citizen suit provisions—created by Congress—are long entrenched in environmental law and serve as an essential basis for standing under federal statutes including the Clean Air Act,[86] ESA,[87] Clean Water Act,[88] and Resource Conservation and Recovery Act.[89] Such provisions allow any individual to bring a claim so long as they have been harmed within the meaning of a statute.[90]

Environmental cases focused on pollution and preservation therefore provide a helpful analogy to climate change claims. In *Sierra Club v. Morton*,[91] the Sierra Club, an environmental nonprofit organization, sued the United States Forest Service for its approval of a plan to build a ski resort in the Mineral King Valley in California.[92] There, the Court found the Sierra Club lacked Article III standing because it did not assert an injury in fact.[93] In its analysis, the Court acknowledged the broad authority of Congress to establish justiciable rights, including

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82 *See id.* at 1174–75 ("Not every problem posing a threat—even a clear and present danger—to the American Experiment can be solved by federal judges.").

83 *See id.*

84 *See id.* at 1171 ("There is much to recommend the adoption of a comprehensive scheme to decrease fossil fuel emissions and combat climate change, both as a policy matter in general and a matter of national survival in particular. But it is beyond the power of an Article III court to order, design, supervise, or implement the plaintiffs' requested remedial plan."). The court reasons that because they cannot create a comprehensive and "remedial" plan to solve climate change, the plaintiffs' claim is not redressable. *Cf.* Massachusetts v. EPA, 549 U.S. 497, 532 (2007) (finding that regulation of tailpipe emissions would be an important step to reduce the effects climate change).

85 *See supra* notes 55–57 and accompanying text.

86 *See* 42 U.S.C. § 7604.

87 *See* 16 U.S.C. § 1540.

88 *See* 33 U.S.C. § 1365.

89 42 U.S.C. §§ 6901–6992k; *see* 42 U.S.C. § 6972.

90 *See* Bennett v. Spear, 520 U.S. 154, 164–66 (1997) (defining and discussing the requirements of the ESA's citizen suit provision).

91 405 U.S. 727 (1972).

92 *See id.* at 728–30.

93 *See id.* at 740–41.

citizen suit provisions.[94] Applying the zone of interest test, the Court noted that Congress expanded the categories of injury sufficient to satisfy an injury in fact.[95] Congress did so by authorizing judicial review of final agency actions under the APA, which states "[a] person suffering legal wrong because of agency action . . . is entitled to judicial review thereof."[96] Despite this broad reviewability standard, the Sierra Club did not properly assert standing because it did not show that its members enjoyed and used the valley area that would be impacted by the proposed resort.[97] Thus, the organization did not have a particularized injury sufficient to sue under the APA.[98]

The Court implied, however, that if the Sierra Club had asserted such a particularized injury, it would have fulfilled the requisite standing requirements.[99] In 2000, environmentalist group Friends of the Earth did just that.[100] In *Friends of the Earth v. Laidlaw Environmental Services (TOC), Inc.*,[101] Friends of the Earth successfully asserted standing by showing its members utilized a polluted river near a wastewater treatment plant.[102] Members of the organization used the polluted river to fish, camp, and swim—recreational injuries that courts continue to recognize as concrete.[103] As a result, the Court found that these plaintiffs had particularized injuries sufficient to establish Article III standing for the organization's claims.[104]

In the first case to uphold climate change standing at the Supreme Court level, *Massachusetts v. EPA*[105] considered a challenge to the refusal of the Environmental Protection Agency ("EPA") to regulate greenhouse gas emissions as an air pollutant.[106] There, the state of Massachusetts uniquely met the Article III standing requirements

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94 *See id.* at 737–38 (noting that it is within Congress's power to confer "the right to seek judicial review of agency action").

95 *See id.* at 738.

96 5 U.S.C. § 702.

97 *See Morton*, 405 U.S. at 735.

98 *See id.* at 735.

99 *See id.* ("The Sierra Club failed to allege that it or its members would be affected in any of their activities or pastimes by the Disney development. Nowhere in the pleadings or affidavits did the Club state that its members use Mineral King for any purpose, much less that they use it in any way that would be significantly affected by the proposed actions of the respondents."); *cf.* Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc., 528 U.S. 167, 184 (2000) (where the plaintiffs did file affidavits showing that members used the river for recreational purposes).

100 *See Laidlaw*, 528 U.S. at 184.

101 528 U.S. 167 (2000).

102 *See id.* at 184.

103 *See id.* at 181–83; *see also* Env't Tex. Citizen Lobby, Inc. v. ExxonMobil Corp. (*ETCL II*), 47 F.4th 408 (5th Cir. 2022) (upholding standing for recreational injuries), *reh'g granted*, 61 F.4th 1012 (5th Cir. 2023).

104 *Laidlaw*, 528 U.S. at 181–83.

105 549 U.S. 497 (2007).

106 *Id.* at 498–99, 505.

because of its status as a sovereign state.[107] Massachusetts alleged the EPA failed to fulfill its obligations of regulating emissions of greenhouse gases under the Clean Air Act.[108] In its defense, the EPA argued, among other assertions, that the Clean Air Act did not authorize the EPA to set greenhouse gas emission standards.[109] The Court determined that Massachusetts had a recognizable interest in the property along its shorelines, which would be threatened by sea level rise due to global warming.[110] Therefore, the state successfully asserted an injury in fact.[111]

Massachusetts v. EPA was unique among environmental cases at the time because of the Court's application of standing to a sovereign state.[112] The Court reasoned that Massachusetts "surrender[ed] certain sovereign prerogatives" when it joined the Union.[113] As a result, Massachusetts could not protect itself from air pollution—it yielded that authority to the EPA.[114] Therefore, the Court found that Massachusetts was "entitled to special solicitude," a lower standard to injury in fact determination, for its climate change concerns.[115] This distinction is significant when considering the application of standing to a wide variety of climate plaintiffs. With cases like *TransUnion* redefining how Article III standing is applied, standing jurisprudence becomes ever more fragmented while redressability for climate plaintiffs hangs in the balance.[116]

D. TransUnion LLC v. Ramirez

In *TransUnion LLC v. Ramirez*, the Supreme Court reasserted the premise that only plaintiffs who have suffered a concrete injury have standing to sue under Article III of the Constitution.[117] Scholars have interpreted *TransUnion* as creating a disjointed test for concreteness: first, the injury is tangible, typically meaning physical or monetary, or second, the injury has a close relationship to a traditionally recognized common law harm.[118]

The Court concluded that a concrete injury must have a "'close relationship' to a harm 'traditionally' recognized as providing a basis

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107 *See id.* at 498–99.
108 *See id.* at 505.
109 *See id.* at 511.
110 *See id.* at 518–21.
111 *See id.* at 521.
112 *See id.* at 519–20.
113 *Id.* at 519.
114 *See id.*
115 *See id.* at 520.
116 *See infra* notes 119–26 and accompanying text.
117 TransUnion LLC v. Ramirez, 594 U.S. 413, 417 (2021)
118 *See* 35A C.J.S. *Federal Civil Procedure* § 74 (2023).

for a lawsuit in American courts."[119] In *TransUnion*, plaintiff Ramirez brought a claim under the FCRA after he tried to purchase a vehicle and found that his credit had been flagged by TransUnion.[120] Ramirez represented a class of 1,853 individuals whose information was falsely disseminated to third parties.[121] TransUnion, a credit reporting company, ran regular credit checks on customers' accounts, then cross-checked this information with a sanctions list provided by the Treasury Department's Office of Foreign Assets Control ("OFAC").[122] OFAC maintained a list of specially designated nationals "who threaten America's national security."[123] Ramirez, and 1,853 class members like him, were wrongfully flagged as threats to national security due to TransUnion's misuse of the OFAC list, and Ramirez asserted that TransUnion disseminated this misinformation to third parties without customer consent.[124] The Court held that Ramirez's injury was "concrete" for the purposes of Article III standing because it had a close analog to the traditionally recognized reputational injury at common law.[125]

Other members of the class action, however, did not successfully achieve standing under this test.[126] In addition to the 1,853 class members who faced the same injury as the named plaintiff Ramirez, 6,332 other members joined the suit against TransUnion for wrongfully flagging their names on the OFAC list.[127] The Court found that these 6,332 class members, who were incorrectly flagged by OFAC within TransUnion's records, but whose information was not disseminated to third parties, did not have standing.[128] The Court explained that these plaintiffs were merely at risk of future harm despite TransUnion's failure to inform customers of its use of their personal information to search the OFAC list in violation of the FCRA.[129] This risk of future harm was not imminent enough to be a concrete harm under the Court's test.[130] Therefore, the 6,332 members of this class were considered distinct from Ramirez and the class of 1,853 customers like him, who could assert a concrete harm due to dissemination of false information.[131] In so holding, the Court stated that allowing justiciability of procedural harms such as those

119 *TransUnion*, 594 U.S. at 424 (quoting Spokeo, Inc. v. Robins, 578 U.S. 330, 341 (2016)).
120 *See id.* at 419.
121 *See id.* at 413.
122 *See id.* at 419.
123 *Id.*
124 *See id.* at 417–20.
125 *See id.* at 431–33.
126 *See id.* at 436.
127 *See id.* at 413.
128 *See id.* at 417.
129 *See id.* at 436.
130 *See id.* at 442.
131 *See id.* at 440–42.

asserted by the class whose information was not disseminated would create "[a] regime where Congress could freely authorize *unharmed* plaintiffs to sue."[132]

The Court relied heavily on its 2016 decision *Spokeo, Inc. v. Robins*[133] in conducting its analysis.[134] In *Spokeo*, a group of customers filed a class-action FCRA complaint for inaccurate consumer databases maintained by Spokeo, a consumer reporting agency.[135] The Court held that the customers did not satisfy the injury in fact requirements of Article III by alleging a mere procedural violation under the FCRA.[136] The Court reasoned that a concrete injury is not always the same as a tangible one.[137] Therefore, despite the particularized nature of the customers' procedural claims, they were not sufficiently concrete to fulfill Article III standing.[138]

TransUnion's holding turned on the plaintiffs' claim that TransUnion violated the FCRA by failing to follow statutory procedures for maintaining accurate credit files.[139] In part I of the opinion, the Court outlined the facts with a focus on the purpose and requirements of the FCRA.[140] The FCRA requires consumer reporting agencies to (1) "'follow reasonable procedures to assure maximum possible accuracy' in consumer reports," (2) disclose all requested information to the consumer, and (3) provide consumers with written disclosures and a summary of their rights.[141] These particular requirements added a procedural element to the plaintiffs' claims that is unique to the FCRA.[142] In *Spokeo*, the Court held that procedural injuries under the FCRA are limited to only those claims that are clearly connected to a concrete injury.[143] Violation of disclosure requirements by TransUnion was a procedural harm, which the court found was *intangible*.[144] The alleged injury was a clear violation of the FCRA but did not result in physical or monetary harm.[145] Therefore,

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132 *Id.* at 429.

133 578 U.S. 330 (2016).

134 *See TransUnion*, 594 U.S. at 437 (citing *Spokeo*, 578 U.S. at 341 (2016)).

135 *Spokeo*, 578 U.S. at 333.

136 *See id.* at 342.

137 *See id.* at 340. The *Spokeo* Court explains that although tangible injuries are always concrete, intangible injuries have nevertheless been found to be concrete. *See id.* at 340. These examples include free speech and free exercise under the First Amendment. *See id.* at 340 (citing Pleasant Grove City v. Summum, 555 U.S. 460 (2009) (free speech); Church of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520 (1993) (free exercise)).

138 *See Spokeo*, 578 U.S. at 342.

139 *See TransUnion*, 594 U.S. at 417.

140 *See id.* at 417–22.

141 *Id.* at 417–20 (citing 15 U.S.C. §§ 1681e(b), 1681g(a)(1), 1681(c)(2)).

142 *See id.*

143 *See Spokeo*, 578 U.S. at 341.

144 *TransUnion*, 594 U.S. at 440–41.

145 *See id.*

despite evidentiary support for TransUnion's violation of the statute, the plaintiffs whose information was not disseminated to third parties did not have a concrete injury.[146] The Court's reasoning implied that violation of the FCRA alone is not an injury.[147] In addition to statutory violation, there must be a tangible harm.[148]

Procedural versus substantive claims play a role in *TransUnion*'s holding as well.[149] The Court further emphasized *Spokeo*'s holding that a procedural claim may still be concrete if it results in a traditionally recognized harm.[150] The *TransUnion* Court opined that such a conclusion does not justify loosening Article III standing requirements "based on contemporary, evolving beliefs about what kinds of suits should be heard in federal courts."[151] This particular language raises concerns that the Court believes Congress is limited in its capacity to create new rights of action that are based on such "contemporary, evolving beliefs," including society's evolving belief in the severity and imminence of climate change.[152] Although this concern about "evolving beliefs" may be dismissed as dicta, it raises questions about Congress's power to create rights of action for climate plaintiffs.[153] Climate change certainly was not a concern historically.[154] Thus, the Court's reliance on historical rights and rejection of contemporary issues may harm climate plaintiffs, even if Congress chooses to create statutory protections for climate change claims. By holding that an injury in fact must be tangible or closely related to a traditionally recognized harm, the *TransUnion* Court rejected assertion of a procedural injury and made standing more difficult to achieve.

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146 *See id.*

147 *See id.*

148 *See id.*

149 *See id.*

150 *See id.* at 440.

151 *Id.* at 425.

152 *See id.*

153 *See id. See generally* Robert B. June, Note, *The Structure of Standing Requirements for Citizen Suits and the Scope of Congressional Power*, 24 Env't L. 761 (1994) (analyzing the role of Congress in determining standing via citizen suit provisions). Some scholars argue that because of this language, *TransUnion* violates separation of powers. *See* Erwin Chemerinsky, *What's Standing After* TransUnion LLC v. Ramirez, 96 N.Y.U. L. Rev. Online 269, 272 (2021). Although that issue is outside the scope of this Note, the ability of the Supreme Court to limit congressionally created rights is of serious concern.

154 Climate change was not well-litigated and recognized as sound science until 1990. *See* City of Los Angeles v. Nat'l Highway Traffic Safety Admin., 912 F.2d 478, 483 (D.C. Cir. 1990) (per curiam) (plaintiff National Resource Defense Council alleging "catastrophic and permanent" climate change), *overruled on other grounds*, Fla. Audubon Soc'y v. Bentsen, 94 F.3d 658, 669 (D.C. Cir. 1996); *see also* Dan Farber, *1990: The Year the Courts Discovered Climate Change*, Legal Planet (Jan. 10, 2022), https://legal-planet.org/2022/01/10/the-year-the-courts-discovered-climate-change/ [https://perma.cc/9NZX-CZRT].

E. Cases Interpreting and Distinguishing TransUnion

Since the Court decided *TransUnion* in June 2021, lower courts have interpreted and distinguished its holding in several notable environmental law cases.[155] In *Environment Texas Citizen Lobby, Inc. v. ExxonMobil Corp.* ("*ETCL II*"),[156] the Fifth Circuit held that climate plaintiffs suing under the Clean Air Act had standing.[157] The plaintiffs alleged that ExxonMobil's refinery in Baytown, Texas was operating in violation of its Clean Air Act permit.[158]. The court declined to extend *TransUnion*'s concrete injury test and found the plaintiffs' injuries were sufficient for Article III standing.[159] The Fifth Circuit emphasized that both recreational and physical harms have "long been a basis for constitutional standing" and that courts should continue to consider them injuries in fact.[160] The plaintiffs' injuries included "recreation, breathing and smelling polluted air, and allergy-like or respiratory problems," which have a close relationship to common law harms.[161] The Fifth Circuit reasoned that these harms were clearly concrete and that *TransUnion* did not impact the Article III standing analysis for these claims.[162] Although the opinion is being reheard,[163] this analysis indicates how federal courts may uphold standing for recreational and aesthetic injuries as historical analogs despite *TransUnion*.

The Eleventh Circuit in *Glynn Environmental Coalition, Inc. v. Sea Island Acquisition, LLC*,[164] similarly upheld standing for environmental plaintiffs.[165] The plaintiffs alleged that defendant Sea Island Acquisition, a commercial resort company, violated its dredge-and-fill permit

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155 Several cases in other areas of law are important to note as well due to their interpretation of *TransUnion* and are further discussed in Part III of this Note. *See, e.g.*, Thome v. Sayer L. Grp., P.C., 567 F. Supp. 3d 1057, 1077 (N.D. Iowa 2021) (finding that detrimental reliance on material misrepresentations was sufficiently analogous to common law misrepresentation tort claims and therefore constituted a concrete injury); Kelly v. RealPage Inc., 47 F.4th 202, 202 (3d Cir. 2022) (finding that customers had an injury in fact under the FCRA for defendant's alleged failure to disclose vendors in rental reports and declining to extend *TransUnion*); Pena v. Experian Info. Sols., No. 8:22-cv-01222, 2022 WL 14049542, at *1 (C.D. Cal. Oct. 24, 2022) (applying the *TransUnion* analysis specifically as "a two-step framework to determine whether alleged FCRA violations are sufficiently concrete to confer standing"). *See infra* Part III for a more in-depth analysis of these holdings.

156 47 F.4th 408 (5th Cir. 2022), *reh'g granted*, 61 F.4th 1012 (5th Cir. 2023).

157 *See ETCL II*, 47 F.4th at 419; 42 U.S.C. § 7604(a)(1).

158 *See ETCL II*, 47 F.4th at 413–14.

159 *See id.* at 416.

160 *Id.* (citing the court's prior decision on this issue, Env't Tex. Citizen Lobby, Inc. v. ExxonMobil Corp. (*ETCL I*), 968 F.3d 357 (5th Cir. 2020), *reh'g granted*, 61 F.4th 1012 (5th Cir. 2023)).

161 *ETCL II*, 47 F.4th at 416.

162 *See id.* at 416.

163 *See* Env't Tex. Citizen Lobby, Inc. v. ExxonMobil Corp., 61 F.4th 1012 (5th Cir. 2023).

164 26 F.4th 1235 (11th Cir. 2022).

165 *See id.* at 1243.

under the Clean Water Act when it filled a wetland area for landscaping as opposed to commercial construction, for which the permit was intended.[166] The Eleventh Circuit found that the plaintiff's aesthetic interests in the affected wetlands constituted an injury in fact sufficient for Article III standing.[167] The court further stated that it may recognize aesthetic and recreational injuries as concrete harms even if the injured plaintiff never steps foot on the affected area.[168] In this instance, aesthetic harms were sufficiently analogous to the traditional nuisance tort claim under the *TransUnion* test, which required a close relationship with a traditional harm.[169]

In another Clean Water Act case, *Conservation Law Foundation, Inc. v. Shell Oil Co.*,[170] the United States District Court for the District of Connecticut found the plaintiff Conservation Law Foundation ("CLF") had standing when it alleged "certainly impending or near-term harms."[171] The plaintiffs claimed that, due to rising sea levels and temperatures, several petroleum storage tanks were at risk of failure.[172] CLF claimed that extreme weather events, including storms and flooding, could result in a "catastrophic release of pollutants" from Shell's facilities.[173] Shell argued that CLF lacked standing because its claims were based only on CLF's "fears of a future injury," and not an existing injury in fact.[174] In essence, Shell argued that the potential flood or petroleum leakage must actually occur for CLF to have standing.[175] The district court rejected Shell's argument, finding that CLF sufficiently established imminence as to their claims against Shell.[176] The district court also rejected reliance on *TransUnion* in its standing analysis, reasoning that *TransUnion* only applies to cases for damages.[177] Thus,

166 *See id.* at 1239; *see also* 33 U.S.C. § 1344 (explaining the dredge-and-fill permit program generally requires issuance of a permit before "discharge of dredged or fill material into the navigable waters"). *See generally Permit Program Under CWA Section 404*, EPA (Apr. 11, 2024), https://www.epa.gov/cwa-404/permit-program-under-cwa-section-404 [https://perma.cc/23C2-TY7N].

167 *See Glynn*, 26 F.4th at 1243.

168 *See id.* at 1242.

169 *See id.* at 1243.

170 628 F. Supp. 3d 416 (D. Conn. 2022).

171 *Id.* at 437.

172 *See id.* at 427.

173 *Id.* at 434.

174 *Id.* at 431.

175 *See id.* at 432–33.

176 *See id.* at 446–47.

177 *See id.* at 436 ("Given the similar purpose served by civil penalties and prospective injunctive relief, the Court is persuaded that post-*TransUnion*, the standing analysis for claims seeking civil penalties should align with that applicable to prospective injunctive relief, rather than that applicable to damages.").

because CLF was seeking civil penalties, not damages, for its claims, *TransUnion*'s standing test was inapplicable.[178]

In reaching this conclusion, the court in *Shell Oil* relied on *Maddox v. Bank of New York Mellon Trust Co.*[179] *Maddox* presented a unique summary of *TransUnion* as applying only to suits for damages.[180] In *Maddox*, the Second Circuit reheard a case that granted standing to plaintiffs before *TransUnion* was decided and applied the new *TransUnion* standing test.[181] The plaintiffs sued the Bank of New York claiming the bank failed to discharge a fully paid mortgage from their credit report in violation of state law.[182] Under traditional standing jurisprudence, this claim is procedural since the statute requires a set of formal procedures—discharging the loan from the credit report—to protect consumers.[183] In its analysis, the *Maddox* court considered how *TransUnion* eliminated the distinction between substantive and procedural injuries.[184] As a result, it stated that all claims must meet Article III standing requirements, regardless of whether they are procedural or substantive.[185] This imposes a higher bar for procedural injuries which could keep many injuries, like Maddox's claim, out of court. Absent a showing that Maddox's inaccurate credit report was disseminated to a third party, Maddox did not suffer a concrete harm due to the bank's mishandling of his information sufficient to constitute standing under Article III.[186]

Similarly, in *Yaw v. Delaware River Basin Commission*,[187] the Third Circuit rejected a claim because it alleged only a procedural harm.[188] The Third Circuit found that the plaintiffs, a group of state senators and their constituents, did not have standing to challenge the Delaware River Basin Commission's ban on fracking.[189] The court focused on standing under *TransUnion*.[190] It found that the plaintiff's complaint was "a bare

178 *See id.* at 435 ("There is no clear Supreme Court or Second Circuit guidance on how *TransUnion* impacts the question of standing for claims seeking civil penalties.").

179 19 F.4th 58 (2d Cir. 2021); *see also Shell Oil*, 628 F. Supp. 3d at 433 (citing *Maddox*, 19 F.4th at 64).

180 *See Maddox*, 19 F.4th at 64.

181 *See id.* at 62, 64.

182 *See id.* at 60.

183 *See id.* at 61–62.

184 *See id.* at 64 n.2.

185 *See id.*

186 *See id.* at 65.

187 49 F.4th 302 (3d Cir. 2022).

188 *See id.* at 321.

189 *See id.* at 307.

190 *See id.* at 321. Before reaching *TransUnion*, the court first determined the senators lacked standing because "the legislative injuries they allege affect the state legislature as a whole," relying on *Raines v. Byrd*, 521 U.S. 811 (1997). *See Yaw*, 49 F.4th at 307, 311–16. The *TransUnion* analysis was then applied to the municipal plaintiffs suing alongside the senators. *See id.* at 321.

procedural violation" under the state's Environmental Rights Act and, therefore, did not satisfy the concrete injury requirement imposed by *TransUnion*.[191]

These cases demonstrate how *TransUnion* has quashed procedural injuries and limited standing for plaintiffs seeking a remedy in federal court. *TransUnion* prohibits procedural injuries from immediately satisfying injury in fact by removing the distinction between procedural and substantive injuries for the purposes of standing.[192] In reaching this conclusion, *TransUnion* relied on *Spokeo*, which found that procedural violations under the FCRA, absent additional injury, do not constitute an injury in fact.[193] If this requirement is applied broadly, procedural violations brought by climate plaintiffs could be barred unless they assert a "material risk of harm" as a result of the violation.[194] Scholars have suggested that these strict new standing requirements in *TransUnion* could also quash claims under federal statutes, including those like the FCRA, which are essential to consumer protection.[195] By contrast, limiting *TransUnion* and *Spokeo* to FCRA claims could prevent *TransUnion*'s impact on environmental statutes. Standing for procedural injuries is key to climate change claims, showing that *TransUnion* must be read narrowly to allow any sort of imminent or procedural claim to be justiciable.

II. The Potential Impact of *TransUnion* on Climate Plaintiffs

A. Overcoming TransUnion*'s Rigorous Concrete Injury Requirements by Working Within its Framework*

The *TransUnion* test requires plaintiffs to assert an injury that is tangible or has a close relationship to a traditionally recognized harm.[196] In applying *TransUnion*, federal courts must determine if these strict Article III standing requirements apply in all cases brought in federal court, or if the case is distinguishable as applying only to certain classes of plaintiffs. By reading *TransUnion* narrowly, courts can avoid this uncertainty and apply *TransUnion* only to FCRA cases, cases for damages, or cases against private parties.[197]

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191 *Yaw*, 49 F.4th at 321.

192 *See* TransUnion LLC v. Ramirez, 594 U.S. 413, 439–40 (2021); *see also* Maddox v. Bank of N.Y. Mellon Tr. Co., N.A., 19 F.4th 58, 64 (2d Cir. 2021).

193 *See* Spokeo, Inc. v. Robins, 578 U.S. 330, 340–43 (2016).

194 *TransUnion*, 594 U.S. at 435 (quoting *Spokeo*, 578 U.S. at 342).

195 *See* Chemerinsky, *supra* note 153, at 271.

196 *See* 35A C.J.S. *Federal Civil Procedure* § 74.

197 *See, e.g.*, Conservation L. Found., Inc. v. Shell Oil Co., 628 F. Supp. 3d 416, 433–34 (D. Conn. 2022) (applying *TransUnion* only to cases for damages); *Maddox*, 19 F.4th at 64 (applying

If the standing requirements in *TransUnion* are applied to all plaintiffs in federal court, it could have a significant chilling effect on climate change claims. Applied broadly, *TransUnion* may require all plaintiffs to meet the definition of concrete injury adopted by the Court: one that is tangible, typically meaning physical or monetary, or one that has a close relationship to a traditionally recognized harm.[198] Climate change cases often involve widespread and projected effects of climate change on human health and well-being—claims that are unlikely to be concrete under the *TransUnion* standard.[199] This concrete injury test is particularly hostile for climate plaintiffs like those in *Juliana*, who attempt to establish a causal connection between the defendant's action and an imminent future injury.[200] The *TransUnion* standing test simply does not account for such "imminent" injuries.[201]

Climate plaintiffs must first consider how to achieve standing if the *TransUnion* standing test applies in all cases. One key method to assert standing under *TransUnion* may be to find traditionally recognized rights that are analogous to climate-change-related harms. The district court in *Glynn* applies this method.[202] There, the court found that aesthetic harms were analogous to traditional nuisance claims.[203] However, more nuanced claims, like the ongoing harms of fossil fuel emissions asserted in *Juliana,* may require creative arguments to establish a concrete harm to overcome Article III standing.[204]

1. Tangible Injuries

The *TransUnion* test requires plaintiffs to have a tangible injury, or one with a close relationship to a traditionally recognized right, to

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TransUnion only to cases for damages); Kelly v. RealPage Inc., 47 F.4th 202, 202 (3d Cir. 2022) (applying *TransUnion* in an FCRA case against a private party); Pena v. Experian Info. Sols., No. 8:22-cv-01222, 2022 WL 14049542, at *1 (C.D. Cal. Oct. 24, 2022) (applying *TransUnion* in an FCRA case against a private party).

198 *See* 35A C.J.S. *Federal Civil Procedure* § 74.

199 *See TransUnion*, 594 U.S. at 435 (accepting the argument that risk of future harm cannot alone be concrete); *see id.* at 453 (Thomas, J., dissenting) ("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 also* Glynn Env't Coal., Inc. v. Sea Island Acquisition, LLC, 26 F.4th 1235, 1242–43 (11th Cir. 2022) (finding there was an aesthetic interest close enough to common law tort nuisance claim to survive the *TransUnion* test).

200 *See* Juliana v. United States, 947 F.3d 1159, 1165 (9th Cir. 2020) for a summary of the plaintiffs' claims.

201 *See* Lujan v. Defs. of Wildlife, 504 U.S. 555, 564 (1992).

202 *See* Glynn Env't Coal., Inc. v. Sea Island Acquisition, LLC, 26 F.4th 1235, 1243 (11th Cir. 2022).

203 *See id.* at 1243.

204 *See Juliana*, 947 F.3d at 1165.

constitute an injury in fact.[205] The *TransUnion* Court itself demonstrates what may count as a tangible injury in climate change cases in a hypothetical example. The Court compares a Maine plaintiff who sues a nearby plant for polluting her land with a second Hawaii plaintiff who sues the same plant with the same pollution claim.[206] The Court concludes the hypothetical Maine plaintiff has clearly established standing for a tangible injury, while the Hawaii plaintiff has not.[207] The Maine plaintiff established a claim directly related to her property, whereas the Hawaii plaintiff was not personally and tangibly harmed.[208]

Tangible injuries in climate change cases, therefore, are most likely to be injuries to property, monetary harm, or harm to physical health. *TransUnion* demonstrates that tangible also requires the injury to be currently present—not merely likely to happen in the future.[209] Unlike in *Massachusetts v. EPA*, where the Court recognized standing for an imminent injury to the property along Massachusetts's shores, the *TransUnion* Court rejected the argument that dissemination of false information that is likely to happen in the future is tangible.[210] Under the *TransUnion* standard, tangible injuries that are likely to occur in the future are insufficient.[211]

2. Traditionally Recognized Harms

In its analysis, the *TransUnion* Court provides a list of examples of traditionally recognized harms.[212] These include physical, monetary, or "various intangible harms including . . . reputational harm."[213] Although physical and monetary harms overlap with tangible harms, the category of "various intangible harms" is not defined.[214] This broad language opens the door for a wide class of potential injuries. For climate plaintiffs, finding a sufficient common law analog for their claim under the "various intangible harms" category may be a path to standing even if courts apply *TransUnion*.[215] These might include nuisance, aesthetics

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205 *See* 35A C.J.S. *Federal Civil Procedure* § 74 (2023).

206 *See* TransUnion LLC v. Ramirez, 594 U.S. 413, 426–28 (2021).

207 *See id.* But this reasoning is hardly new. *See, e.g.*, Comm. to Save the Rio Hondo v. Lucero, 102 F.3d 445, 449 (10th Cir. 1996) (finding that, in order to assert standing, plaintiffs must demonstrate a "geographic nexus" to the site of an agency action under the National Environmental Policy Act (quoting Douglas Cnty. v. Babbitt, 48 F.3d 1495, 1500 n.5 (9th Cir. 1995))).

208 *See TransUnion*, 594 U.S. at 426–28.

209 *See id.* at 2210–11; *cf.* Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992) (the "actual or imminent" requirement).

210 *See TransUnion*, 594 U.S. at 434–36; Massachusetts v. EPA, 549 U.S. 497, 522–23, 526 (2007).

211 *See TransUnion*, 594 U.S. at 434–36.

212 *See id.* at 417.

213 *Id.*

214 *See id.*

215 *See id.*

and recreation, trespass, and takings.[216] More nuanced requirements, however, may be required to assert climate change standing if no potential analog exists. Furthermore, the "various intangible harms" language the Court applies is vague and uncertain, requiring climate plaintiffs to rely on pre-*TransUnion* precedent to guide litigation.[217] *TransUnion*'s progeny demonstrates three possible ways to distinguish its holding: by applying it only to FCRA cases, cases for damages, or cases against private parties.

Federal courts have accepted arguments for traditional analogs in a wide variety of cases since *TransUnion*.[218] Although not a climate change case, *Thome v. Sayer Law Group*[219] provides an example.[220] There, the District Court for the Northern District of Iowa found detrimental misrepresentation tort claims, which, therefore, constituted a concrete injury.[221] The Third Circuit in *Kelly v. RealPage Inc.*[222] also found that plaintiffs have an injury in fact under the *TransUnion* standard.[223] There, a class of customers sued defendant RealPage, a consumer reporting agency, for generating and disseminating inaccurate credit reports.[224] The inaccurate RealPage credit reports then affected the plaintiffs' ability to obtain a mortgage.[225] Applying *TransUnion*, the Third Circuit found that the plaintiffs asserted the requisite "adverse effects" of RealPage's action to constitute a concrete injury.[226] The court explained that, in its view, *TransUnion* does not require a historical analog for information injuries like the one in this case.[227] Although *Thome* finds a traditional

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216 Prior to the enactment of the major environmental statutes in the 1970s, nuisance was how most environmental claims were brought. *See, e.g.*, Georgia v. Tenn. Copper Co., 240 U.S. 650 (1916) (nuisance claim for discharge of noxious gas); Boomer v. Atl. Cement Co., 257 N.E.2d 870 (N.Y. 1970) (nuisance claim for emission of dust and other byproducts from cement plant). Use of nuisance for climate change claims is not unheard of today. *See* City of Oakland v. BP PLC, 969 F.3d 895 (9th Cir. 2020) (nuisance claim for global warming caused by oil companies).

217 *See TransUnion*, 594 U.S. at 417.

218 *See, e.g.*, Thome v. Sayer L. Grp., P.C., 567 F. Supp. 3d 1057, 1074 (N.D. Iowa 2021); Rendon v. Cherry Creek Mortg., LLC, No. 22-cv-01194, 2022 WL 17824003, at *3 (S.D. Cal. Dec. 20, 2022) (applying traditional analog of intrusion upon seclusion); Vaughan v. Fein, Such, Kahn & Shepard, P.C., No. 21-16013, 2022 WL 2289560, at *4–5 (D.N.J. June 24, 2022) (accepting plaintiff's argument that defendant's conduct resembles fraud and therefore has a traditional analog).

219 567 F. Supp. 3d 1057 (N.D. Iowa 2021).

220 *Id.* at 1074.

221 *See id.* at 1073–75, 1077.

222 47 F.4th 202 (3d Cir. 2022).

223 *See id.* at 214–15.

224 *See id.* at 205.

225 *See id.*

226 *Id.* at 214 (quoting TransUnion LLC v. Ramirez, 594 U.S. 413, 442 (2021)).

227 *See id.* at 212 n.8 ("[W]e do not understand *TransUnion*'s passing discussion of informational injury, nor any other informational injury case, to import a historical analogue requirement into the standing analysis for informational injury claims.").

analog is necessary,[228] *Kelly* does not.[229] This difference may amount to a split between circuits or between substantive areas of law.[230]

Either way, these cases reveal that even when applying *TransUnion*'s test for standing, certain classes of plaintiffs may not be required to meet all its stipulations. Whether this method would adequately protect climate plaintiffs is not clear based on the cases citing *TransUnion* thus far. Although some cases, like *Shell* and *Glynn*, show that climate change claims can achieve standing after *TransUnion* even when they are imminent injuries,[231] not all claims are likely to prevail.[232]

B. Distinguishing TransUnion *for Climate Change Claims*

Beyond providing insight on how *TransUnion* impacts standing, recent cases citing *TransUnion* reveal how federal courts may read its holding narrowly to benefit climate plaintiffs. The tangible or traditionally analogous requirements of *TransUnion* raise questions of whether recreational injuries like those in *Morton* and *Laidlaw* are entrenched enough in the American legal system to constitute an injury in fact.[233] The *TransUnion* Court did not address this question outright, instead leaving questions for lower courts to determine if climate plaintiffs may assert standing for recreational injuries.[234] The Eleventh Circuit stated that courts may continue to recognize aesthetic and recreational injuries as concrete harms using the *TransUnion* standard.[235] This reasoning supports the idea that recreational and aesthetic harms are so entrenched in American jurisprudence as to be "traditional" under the *TransUnion* test.[236] Such precedent further supports the possibility that

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228 *See* Thome v. Sayer L. Grp., P.C., 567 F. Supp. 3d 1057, 1073–76 (N.D. Iowa 2021).

229 *See Kelly*, 47 F.4th at 212 n.8.

230 There is a circuit split because *Thome* was decided in the Eighth Circuit in the Northern District of Iowa and *Kelly* in the Third Circuit.

231 *See* Conservation L. Found., Inc. v. Shell Oil Co., 628 F. Supp. 3d 416, 434, 437 (D. Conn. 2022); Glynn Env't Coal., Inc. v. Sea Island Acquisition, LLC, 26 F.4th 1235, 1243 (11th Cir. 2022).

232 Further, *Shell Oil* rejects several other claims by CLF, including Clean Water Act and Resource Conservation Recovery Act violations, for lack of standing—complicating the analysis even further. *See Shell Oil*, 628 F. Supp. 3d at 438, 440.

233 *See* Sierra Club v. Morton, 405 U.S. 727, 734 (1972) (no standing); Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc., 528 U.S. 167, 184 (2000) (standing for recreational harm).

234 *See* TransUnion LLC v. Ramirez, 594 U.S. 413, 459 (2021) (Thomas, J., dissenting) ("Had the class members claimed an aesthetic interest in viewing an accurate report, would this case have come out differently?").

235 *See Glynn*, 26 F.4th at 1243.

236 *See TransUnion*, 594 U.S. 417, 424 (stating a harm can be concrete if it is traditionally recognized in the American judicial system).

some environmental claims are "traditional"[237] and will be recognized in federal courts even if *TransUnion* is applied in all cases.[238]

This outcome also indicates an emerging circuit split on applying *TransUnion* to environmental and climate cases. Although both cases upheld standing for environmental claims, they had different methods of achieving the result. The Fifth Circuit concluded that *TransUnion* did not impact the court's existing standing analysis whatsoever.[239] *Environment Texas Citizen Lobby, Inc. v. ExxonMobil Corp.* ("*ETCL I*")[240] assessed standing under the Clean Air Act and ultimately required that citizens suing under environmental statutes "meet the standing requirement in their own right."[241] It then reiterated this requirement in *ETCL II*, when rejecting the applicability of *TransUnion* to these circumstances.[242] Although the case is set to be reheard en banc by the Fifth Circuit,[243] its reasoning supports a potential narrowing of *TransUnion* in climate cases.[244] The Eleventh Circuit, however, used *TransUnion*'s traditional analog requirement to find that aesthetic harms had a close relationship to traditional common law nuisance claims.[245] If climate plaintiffs can rely on this precedent to bring claims that are closely related to traditionally recognized harms, they may still be able to assert standing. However, going beyond this to distinguish *TransUnion* as only applying to certain classes of plaintiffs would provide greater certainty for climate plaintiffs suing in federal court.

Like Professor Fallon's fragmentation of standing argument, another set of cases distinguish *TransUnion* by type of remedy and apply its injury in fact test accordingly.[246] In *Maddox*, the Second Circuit held that *TransUnion* only applies to cases for damages.[247] Like the 6,332 plaintiffs in *TransUnion*, whose information was flagged internally but not disseminated to a third party,[248] the *Maddox* plaintiffs did not have standing.[249] There, the plaintiffs claimed the Bank of New York failed to discharge a mortgage from their credit report.[250] Applying *TransUnion*'s

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237 *See id.* at 424.

238 *See Glynn*, 26 F.4th at 1243; Env't Tex. Citizen Lobby v. ExxonMobil Corp. (*ETCL II*), 47 F.4th 408, 415–16 (5th Cir. 2022) *reh'g granted*, 61 F.4th 1012 (5th Cir. 2023).

239 *See ETCL II*, 47 F.4th at 416.

240 968 F.3d 357 (5th Cir. 2020).

241 *Id.* at 364.

242 *See ETCL II*, 47 F.4th at 416.

243 *See* Env't Tex. Citizen Lobby v. ExxonMobil Corp. (*ETCL III*), 61 F.4th 1012 (5th Cir. 2023).

244 *See id.*

245 *See Glynn*, 26 F.4th at 1243.

246 *See* Fallon, *supra* note 67 and accompanying text.

247 *See* Maddox v. Bank of N.Y. Mellon Tr. Co., N.A., 19 F.4th 58, 64 (2d Cir. 2021).

248 *See* TransUnion LLC v. Ramirez, 594 U.S. 413, 421 (2021).

249 *See id.* at 417; *Maddox*, 19 F.4th at 63–66.

250 *Maddox*, 19 F.4th at 60.

test for standing, the court found the injury was not concrete.[251] *Maddox* is significant amongst the *TransUnion* progeny because it provides a clear and narrow interpretation of *TransUnion*'s holding, which the District Court for the District of Connecticut then cited in *Shell Oil*.[252] There, the district court recognized that *TransUnion* did not impact the standing analysis for climate plaintiffs who sought injunctive relief instead of damages.[253]

CLF's asserted harms included the possibility of major oil leaks due to climate change against defendant Shell.[254] Like in *Massachusetts v. EPA*, where the impacts of imminent flooding constituted an injury in fact,[255] the district court found that CLF had standing.[256] This finding is significant because the district court applied *TransUnion* but still found the climate plaintiffs had standing to bring imminent harms.[257] Further, CLF sought declaratory and injunctive relief.[258] Citing *Maddox*, the court reiterated the idea that *TransUnion* may only apply to suits for damages.[259] In cases like this one, distinguishing *TransUnion* as a standing test only for legal and not equitable relief is likely to benefit climate plaintiffs asserting imminent injuries against private parties.

These cases support two main conclusions about standing after *TransUnion*. First, the *TransUnion* test only applies to suits for damages, and not equitable relief. Second, in suits for damages, *TransUnion* clearly bans injuries that amount to mere procedural violations or do not meet the new definition of concrete. By limiting *TransUnion* only to suits for damages, climate plaintiffs are more likely to successfully assert standing in cases for equitable relief and cases against federal, state, or local governments. Limiting procedural injuries, however, may harm climate plaintiffs as many cases are brought under procedural statutes like the National Environmental Policy Act[260] and APA.[261] Therefore, in order to protect the rights of climate plaintiffs, federal courts should further distinguish *TransUnion* by applying its standing requirements only to FCRA cases or cases against private parties.

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251 *See id.* at 64–66.

252 *See* Conservation L. Found., Inc. v. Shell Oil Co., 628 F. Supp. 3d 416, 435 (D. Conn. 2022).

253 *See id.*

254 *See id.* at 434.

255 *See* Massachusetts v. EPA, 549 U.S. 497, 489–99 (2007).

256 *See Shell Oil*, 628 F. Supp. 3d at 437.

257 *See id.* at 432–34.

258 *See id.* at 426.

259 *See id.* at 433 (citing Maddox v. Bank of N.Y. Mellon Tr. Co., N.A., 19 F.4th 58, 64 (2d Cir. 2021)).

260 Pub. L. No. 91-190, 83 Stat. 852 (1970) (codified in scattered sections of 42 U.S.C.).

261 *See, e.g.*, Sierra Club v. Morton, 405 U.S. 727 (1972); Ass'n of Data Processing Servs. Orgs., Inc. v. Camp, 397 U.S. 150 (1970).

III. How Federal Courts May Limit the Application of *TransUnion*'s Standing Requirements—By Applying *TransUnion* Only to FCRA Claims, to Suits for Damages, or to Suits Against Private Entities

There are three potential ways federal courts may apply *TransUnion*'s standing rule based on a narrow reading of its holding, any of which may help climate plaintiffs achieve standing. First, *TransUnion* should apply only to FCRA cases. *TransUnion* handles an FCRA claim and relies primarily on FCRA precedent, including *Spokeo*. A narrow reading of *TransUnion* shows that its standing analysis applies only to FCRA cases or to other informational injuries. The *TransUnion* Court focuses on the intangible risk of future harm as a result of incorrect credit information, holding that no injury exists unless such information was disseminated.[262] The strict distinction between dissemination of false information and false information held merely in internal files has no clear analog in other areas of law. Second, as the Second Circuit has concluded, *TransUnion* should apply only to cases seeking damages.[263] This requirement may stand alone or apply only to cases against private parties, where damages are a permissible remedy.[264] Finally, *TransUnion* should only apply to plaintiffs suing private individuals or corporations, not public entities. Plaintiffs bringing claims against public entities already face higher barriers to standing due to administrative adjudication and sovereign immunity requirements.[265] Administrative standing requirements adequately address the concern of impermissibly broad standing, which would "authorize virtually any citizen to bring a statutory damages suit against virtually any defendant who violated virtually any federal law."[266] Therefore, the *TransUnion* standard is not necessary to limit the number of claims reaching federal court.

Many environmental cases are brought against government agencies or sovereign states and may be exempt from *TransUnion*'s standing test if it applies only to private suits.[267] The strict requirements in *TransUnion* and strong FCRA-based reasoning indicates that the case may only apply to others like it. Instead of establishing a new, universal standing requirement, *TransUnion* establishes standing precedent for only certain types of cases—FCRA claims and claims for damages against private parties. Application of one or more of these

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262 *See* TransUnion LLC v. Ramirez, 594 U.S. 413, 438 (2021).

263 *See Maddox*, 19 F.4th at 64.

264 The Eleventh Amendment generally prohibits suits for damages against the United States. *See* U.S. Const. amend. XI; *Ex parte* Young, 209 U.S. 123, 150 (1908).

265 *See infra* notes 312–13 and accompanying text.

266 *See TransUnion*, 594 U.S. at 428.

267 *See, e.g.*, Juliana v. United States, 947 F.3d 1159, 1165 (9th Cir. 2020) (plaintiffs sued the United States, the President, and federal officials for continued use and support of fossil fuels).

distinguishing elements is essential if climate plaintiffs are to achieve standing in federal court.

A. Applying TransUnion *Only to FCRA Cases*

The *TransUnion* standing test should be applied narrowly to informational injuries brought under the FCRA. Although the *TransUnion* Court focuses on the case and controversy requirement of Article III,[268] the holding could only be applicable to FCRA cases, with the rest as dicta. Most notably, *TransUnion*'s holding should be limited to FCRA claims because it conflicts with the overall goals of the FCRA and would similarly limit claims under other federal statutes.

The *TransUnion* Court held that only plaintiffs whose credit reports were disseminated to third parties suffered a concrete injury under the FCRA.[269] The goal of the FCRA is to achieve "[a]ccuracy and fairness of credit reporting."[270] If the plaintiff's claim that he was wrongfully flagged on the OFAC list was true, the result in *TransUnion* did not provide accuracy and fairness in accordance with these goals. The FCRA explains that "[i]naccurate credit reports directly impair the efficiency of the banking system, and unfair credit reporting methods undermine the public confidence which is essential to the continued functioning of the banking system."[271] *TransUnion*, however, holds that these exact "unfair credit reporting methods" do not result in an injury in fact for the consumer unless combined with some other harm.[272] *TransUnion* cannot be a blanket authorization for courts to read injuries like this one out of other statutes. By limiting its reasoning to FCRA claims, the holding that violation of a federal statute that does not result in a concrete injury is not justiciable will not impact plaintiffs suing under other statutes.[273]

Dissenting Justices also criticized the Court's definition of concrete injury as contrary to the FCRA's language, stating that, "TransUnion willfully violated that statute's provisions . . . . 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."[274] The dissent further argued that the Court simply relied on the misguided premise that no one could possibly be harmed by an incomplete credit report.[275] These dissenting opinions have led district courts to limit *TransUnion*'s standing test to

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268 *See* U.S. CONST. art III, § 2.

269 *See TransUnion*, 594 U.S. at 438–40.

270 15 U.S.C. § 1681(a); *see also TransUnion*, 594 U.S. at 417.

271 15 U.S.C. § 1681(a)(1).

272 *See id.*; *TransUnion*, 594 U.S. at 424.

273 *TransUnion*, 594 U.S. at 430–42; *see also id.* at 460 (Kagan, J., dissenting).

274 *Id.* at 461 (Kagan, J., dissenting) (citing *TransUnion*, 594 U.S. at 496–98).

275 *See id.* at 459 (Thomas, J., dissenting).

FCRA cases.[276] In *Pena v. Experian Information Solutions*,[277] the court referred to *TransUnion*'s analysis specifically as "a two-step framework to determine whether alleged *FCRA violations* are sufficiently concrete to confer standing."[278] This language suggests that *TransUnion*'s concrete injury requirement, barring procedural harms, may be limited to FCRA claims. Thus, no procedural violations may be brought under the FCRA.

The *TransUnion* Court also relied heavily on FCRA precedent and the standing elements of FCRA claims in its analysis. This line of cases is unique because the FCRA includes a citizen suit provision on which standing is premised.[279] Most notable in this line of cases is *Spokeo v. Robins*, which held that the plaintiff's procedural injury did not alone constitute a concrete injury under the FCRA.[280] Procedural injuries are often subject to the zone of interest test, in contrast to *Spokeo*'s requirement for a concrete injury.[281] This test requires the plaintiff's claim to fall within the type of interests protected by the statute.[282] An inaccurate credit report would fall within the zone of interests protected by the FCRA, which aims to "curb[] the dissemination of false information."[283]

TransUnion's distinction, therefore, may lie in the language of the FCRA: "Any person who willfully fails to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer. . . ."[284] The statute does not specify the standing requirements under this provision, leaving this determination for the courts. Since the Court has interpreted this particular section of the FCRA to require a concrete injury beyond a mere procedural violation,[285] its interpretation may be strictly limited to the FCRA.[286] By limiting *TransUnion*'s holding to FCRA claims, federal courts may allow plaintiffs to bring procedural claims that satisfy the zone of interest test under other statutes, including the APA.

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276 *See infra* note 278 and accompanying text.

277 No. 8:22-cv-01222, 2022 WL 14049542 (C.D. Cal. Oct. 24, 2022).

278 *Id.* at *1 (emphasis added).

279 *See* 15 U.S.C. § 1681n(a).

280 *See* Spokeo, Inc. v. Robins, 578 U.S. 330, 342 (2016).

281 *See supra* notes 45–51 and accompanying text.

282 *See supra* notes 45–51 and accompanying text.

283 *See* TransUnion LLC v. Ramirez, 594 U.S. 413, 456 (2021) (Thomas, J., dissenting) (quoting *Spokeo*, 578 U.S. at 342 (2016)).

284 15 U.S.C. § 1681n(a).

285 *See Spokeo*, 578 U.S. at 342.

286 *See TransUnion*, 594 U.S. at 430–42; *see also id.* at 460 (Kagan, J., dissenting).

B. Applying TransUnion *Only to Suits for Damages*

Even if *TransUnion* applies more broadly than just FCRA claims, it is limited by its own language to suits for damages. In *TransUnion*, the Court stated that plaintiffs must demonstrate standing separately for each form of relief sought.[287] Ramirez sought punitive and statutory damages for dissemination of false information.[288] Consequently, the case did not address standing requirements for injunctive relief. *TransUnion*, therefore, should not be applied to plaintiffs seeking injunctive or declaratory relief. The *Shell Oil* and *Maddox* cases stand for this principle.[289] As the district court explained in *Shell Oil*, "*TransUnion* . . . does not seem to have materially altered standing jurisprudence for parties seeking *injunctive* relief."[290] In *Shell Oil*, this distinction significantly aided the climate plaintiffs, who ultimately achieved standing against Shell.[291]

In *Maddox*, *TransUnion*'s standing test prohibited relief for plaintiffs who were injured by the bank's failure to follow FCRA procedures regarding credit accuracy.[292] In its analysis, however, the Second Circuit emphasized the narrow applicability of *TransUnion*.[293] The Second Circuit stated, "*TransUnion* established that *in suits for damages* plaintiffs cannot establish Article III standing by relying entirely on a statutory violation or risk of future harm: 'No concrete harm; no standing.'"[294] Similarly, in *Shell Oil*, the district court stated that "the *TransUnion* decision itself, and the decisions of other courts to have analyzed it, suggest that *TransUnion* is limited to actions seeking *damages*."[295] As a result of this reasoning, the court accepted the plaintiff's arguments that *TransUnion* did not apply to their claims seeking civil penalties.[296] By following the Second Circuit's *Maddox* reasoning and applying *TransUnion* only to cases for damages, federal courts can help ensure climate claims for injunctive and declaratory relief reach litigation on the merits.

Furthermore, the *TransUnion* Court cited *Laidlaw* when expressing that plaintiffs must assert standing "separately for each form of relief

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287 *See id.* at 431.

288 *See id.* at 421.

289 *See* Conservation L. Found. v. Shell Oil Co., 628 F. Supp. 3d 416, 433 (D. Conn. 2022); Maddox v. Bank of N.Y. Mellon Tr. Co., 19 F.4th 58, 63 (2d Cir. 2021).

290 *Shell Oil*, 628 F. Supp. 3d at 433.

291 *See id.* at 434.

292 *See Maddox*, 19 F.4th at 63.

293 *See id.* at 64.

294 *Id.* (emphasis added) (quoting TransUnion LLC v. Ramirez, 594 U.S. 413, 442 (2021)).

295 *Shell Oil*, 628 F. Supp. 3d at 435.

296 *See id.*

sought."[297] The Court accepted the defendant's argument that in a suit for damages, a risk of future harm may not be enough to constitute a concrete injury.[298] This language implies the applicability of *TransUnion* only to cases for damages. Although the Second Circuit is the only Circuit to recognize this distinction thus far, the existing precedent in *Maddox* and *Shell Oil* reveals how sister circuits may consider similar claims. *Shell Oil* is a particularly important example because of its similarity to many other claims brought by climate plaintiffs, including those in *Juliana*.[299] Like in *Juliana*, CLF alleged imminent injuries due to climate change, including flooding due to sea level rise and severe precipitation.[300] These cases urge that it is simply unnecessary to apply *TransUnion* to parties seeking injunctive relief, as the circuits recognize the differences between these types of relief.

C. Applying TransUnion *Only to Cases Against Private Parties*

Although *TransUnion*'s standing test has been applied in several cases against the government, narrowing its application to cases against private parties is a viable option to protect climate plaintiffs due to existing restrictions on standing for plaintiffs suing the government.[301] In *TransUnion*, the Court focused on Article III's concrete injury requirement and balanced "the public interest that private entities comply with the law" with limits on which cases may reach federal court.[302] Further, the Court expressed concerns about "[a] regime where Congress could freely authorize *unharmed* plaintiffs to sue."[303] In suits against public entities, these concerns are abrogated by strict administrative standing requirements that go beyond Article III standing. The zone of interest test and APA requirements for ripeness, finality, and exhaustion of administrative remedies ensure that unharmed plaintiffs cannot bring frivolous claims against the government.[304] Because different standing analyses apply for claims against private and public parties, a narrow reading of *TransUnion* indicates it should be applied only to cases against private parties.

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297 *TransUnion*, 594 U.S. at 436 (quoting Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc., 528 U.S. 167, 185 (2000)).

298 *See id.* at 435–37.

299 *See* Juliana v. United States, 947 F.3d 1159, 1160 (9th Cir. 2020).

300 *See Shell Oil*, 628 F. Supp. 3d at 433.

301 *See, e.g.*, Campaign Legal Ctr. v. Scott, 49 F.4th 931, 936 (5th Cir. 2022); Jud. Watch, Inc. v. Griswold, No. 20-cv-02992, 2022 WL 3681986, at *3 (D. Colo. Aug. 25, 2022) (applying *TransUnion*'s standing test in cases against the federal government).

302 *TransUnion*, 594 U.S. at 427.

303 *Id.* at 429.

304 *See* 5 U.S.C. §§ 702, 704.

In *TransUnion*, the plaintiffs sued a private credit reporting agency.[305] This is a very different case than suits against government agencies or officials. Compare, for example, *TransUnion* with *Lujan*, which relied on the citizen suit provision of the ESA.[306] Plaintiffs sued TransUnion for violating the FCRA by disseminating false and harmful information.[307] Despite similar citizen suit provisions in both the ESA and FCRA, very different standards applied in these two cases. While *Lujan* required the injury to be concrete and particularized,[308] *TransUnion* took that definition a step further by narrowly defining the term "concrete."[309] Proponents of strict standing requirements often argue such requirements prevent an influx of frivolous claims to federal court, but a strict definition of concrete injury is not necessary to limit claims where plaintiffs are already required to meet the requirements of APA sections 702 and 704.[310] Administrative standing requirements serve as their own buffer from frivolous claims, eliminating the need for *TransUnion*'s concrete injury analysis. Such a "fragmentation of standing" justifies the application of different standards against private versus public parties.[311]

Even if administrative standing requirements are not significant enough to justify a distinction of *TransUnion*, sovereign immunity may preclude application of *TransUnion* to suits against the government. Sovereign immunity requires the United States only be sued with its consent.[312] Federal standing jurisprudence has permitted public standing for states against the federal government where the state's sovereign interests are at stake, or it has suffered harm to its economy.[313] For individual plaintiffs, however, sovereign immunity is often waived by statute via citizen suit or judicial review clauses.[314] Cases implicating sovereign immunity thus differ significantly from cases against private parties. Where private suits only require the three standard elements of Article III standing, public suits require a waiver of sovereign immunity

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305 *TransUnion*, 594 U.S. at 421.

306 Lujan v. Defs. of Wildlife, 504 U.S. 555, 571–72 (1992).

307 *TransUnion*, 594 U.S. at 421.

308 *See Lujan*, 504 U.S. at 564.

309 *TransUnion*, 594 U.S. at 424.

310 *See* McKart v. United States, 395 U.S. 185, 193 (1969) (providing that exhaustion of administrative remedies is necessary to avoid premature or excessive judicial review).

311 *See generally* Fallon, *supra* note 67.

312 *See* United States v. Mitchell, 463 U.S. 206, 212 (1983).

313 *See generally* Massachusetts v. EPA, 549 U.S. 497 (2007); Seth Davis, *The New Public Standing*, 71 STAN. L. REV. 1229, 1294–1300 (2019).

314 *See, e.g.*, *supra* notes 55–57 and accompanying text (noting congressional waiver of federal government sovereign immunity via citizen suit provisions in the Clean Air Act, Clean Water Act, and ESA); *see also* John Copeland Nagle, *Waiving Sovereign Immunity in an Age of Clear Statement Rules*, 1995 WIS. L. REV. 771, 781–82 (1995) (discussing waiver of sovereign immunity in the APA context).

in addition to any administrative standing requirements that may apply.[315]

Sovereign immunity also plays a role in the differing standing requirements for states versus individuals. Comparing *Massachusetts v. EPA* with *Lujan* reveals this distinction. In *Lujan*, individual plaintiffs lacked standing to assert ESA claims.[316] The plaintiffs alleged that the Fish and Wildlife Service's decision to rescind a rule extending ESA protection to foreign jurisdictions interfered with their ability to view endangered species abroad.[317] The Court found that, because the plaintiffs had no "concrete plans" to view these endangered species in the future, they did not have an injury in fact that was actual or imminent.[318] The Court itself distinguished *Massachusetts v. EPA* from *Lujan*.[319] Unlike in *Lujan*, Massachusetts was not an individual asserting what amounted to a generalized grievance.[320] Massachusetts had a particularized interest in its sovereign territory, which was imminently threatened by rising sea levels.[321] Individual plaintiffs in *Lujan*, however, could not overcome the generalized grievance hurdle.[322] Without the unique status of a sovereign state, individuals must meet the requirements of *Lujan* to assert standing for climate change claims.

As a result, climate plaintiffs often sue under citizen suit provisions where they cannot achieve the type of broad state standing in *Massachusetts v. EPA*. This results in a built-in limit on which claims can be brought against the government, eliminating the need for stricter injury in fact requirements. *TransUnion* uniquely threatens plaintiffs suing under citizen suit provisions because of its narrow definition of a concrete injury. Under *TransUnion*, a violation of a federal statute does not alone constitute a concrete injury.[323] Plaintiffs must instead show that the injury resulting from the statutory violation is either tangible or analogous to a common law claim.[324] Although environmental statutes like the Clean Air Act may be expanded to cover climate change, like in *Massachusetts v. EPA*, the standing analysis under *TransUnion* does not favor such claims.[325]

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315 *See supra* notes 312–14 and accompanying text.

316 *See* Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–62 (1992).

317 *See id.* at 562–63.

318 *Id.* at 564.

319 *See* Massachusetts v. EPA, 549 U.S. 497, 517–18 (2007).

320 *See id.*

321 *See id.* at 521–23.

322 *See Lujan,* 504 U.S. at 576.

323 *See* TransUnion LLC v. Ramirez, 594 U.S. 413, 426 (2021); *see also* Chemerinsky, *supra* note 153.

324 *See TransUnion*, 594 U.S. at 423–26.

325 *See Massachusetts*, 549 U.S. at 497.

By applying *TransUnion* only to claims against private defendants, courts may protect standing for citizen suits and continue to allow procedural standing for climate change claims against the government. The *TransUnion* Court advanced the principle that a plaintiff must assert standing for each of its claims.[326] In suits with the government as a defendant, a different standard applies due to APA requirements and sovereign immunity.[327] Asserting standing for these claims, therefore, requires an entirely different analysis than for claims like Ramirez's informational injury in *TransUnion*. If climate plaintiffs can assert standing against the government, they may prevail on a claim without meeting the additional concrete injury requirement applied against a private defendant.

This distinction coordinates well with applying *TransUnion* only to cases for damages or under the FCRA. In suits against the government, for example, plaintiffs cannot typically seek damages.[328] Similarly, the administrative standing requirements outlined in APA section 704 will never apply to a private defendant. Although each of these solutions could be applied individually, combining them may create a more cohesive scheme for standing analysis where climate plaintiffs not only know what to expect when filing a claim, but can address their serious injuries.

Conclusion

Although *TransUnion* has limited the types of injuries that litigants can assert in federal court, distinguishing *TransUnion* and asserting close analogs to traditional rights where *TransUnion* is applied may help climate activists achieve standing for the irreparable harms of climate change. By limiting *TransUnion*'s application to only FCRA cases, cases for damages, or cases against private parties, federal courts can apply *TransUnion* narrowly to improve the likelihood that climate plaintiffs will achieve standing for their injuries.

Without establishing a clear path forward for climate change plaintiffs, Article III courts have simply decided to let climate change occur unchecked. Plaintiffs are left without a cognizable remedy at the federal level and must suffer what may come. As a result, many plaintiffs have brought climate change cases in state courts for a better chance at reaching the merits, with mixed success.[329] Such a phenomenon provides

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326 *See TransUnion*, 594 U.S. at 434–37.

327 *See supra* notes 312–14 and accompanying text.

328 *See supra* note 264 and accompanying text.

329 *See, e.g.*, Held v. State, No. CDV-2020-307 (Mont. Dist. Ct. Aug. 14, 2023); Complaint, Layla H. v. Virginia, CL22000632-00 (Va. Cir. Ct. Feb. 9, 2022). The case did not reach the merits and was dismissed on the basis of sovereign immunity. *See Layla H. v. Virginia*, Climatecasechart, https://climatecasechart.com/case/layla-h-v-commonwealth/ [https://perma.cc/4F48-AVPM]. The

even more reason to lower the bar of standing for climate plaintiffs in order to properly assess their claims. Through these pathways, climate justice may finally be achieved.

continued dismissal of these climate change injuries in state court mirrors the lack of a remedy available in federal court and may doom cases like those brought by Our Children's Trust.