

TRANSUNION’S EFFECT ON STANDING IN DATA PRIVACY CASES: AN EMPIRICAL STUDY OF FEDERAL APPELLATE CASES, 2021-2024

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ABSTRACT

*The defense bar heralded *TransUnion v. Ramirez*, 594 U.S. 413 (2021), as a watershed moment for standing in data-privacy cases. The Supreme Court’s decision established that “[o]nly those plaintiffs who have been concretely harmed by a defendant’s statutory violation may sue that private defendant over that violation in federal court,” and the Court instructed judges to look to common-law analogues to determine whether intangible harms passed the Article III test.*

*Over four years have passed since *TransUnion*. To understand the case’s true effect, we surveyed 297 federal appellate court decisions that invoke the opinion between 2021-2024 to determine the its impact on data-privacy cases. Although some courts have interpreted *TransUnion* as a heightened version of the earlier standing test from *Spokeo, Inc. v. Robins*, 578 U.S. 330 (2016), others have viewed *TransUnion* as merely rearticulating the concreteness requirement. And a circuit split is brewing over how closely a data-privacy plaintiff’s harm must match a common-law claim. This Article reviews the 53 published federal appellate decisions that have invoked *TransUnion* from 2021-2024 in the data-privacy context, and reports the results of an empirical study categorizing how each court characterizes and applies the *TransUnion* test. It also identifies an emerging circuit split between two different approaches courts have applied to common-law analogues: the element-by-element approach and the kind of harm approach.*

This first-of-its-kind, hand-coded study will provide the academy and data-privacy advocates alike with a toolkit for arguing standing issues effectively across different circuits, while also previewing the future of standing as data-privacy cases continue to proliferate.

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INTRODUCTION

On November 17, 2021, the Second Circuit vacated and remanded a case called *Maddox v. Bank of New York Mellon*.¹ The withdrawn opinion had come out only a few months earlier—in May of that year.² But in June, the Supreme Court had issued *TransUnion v. Ramirez* and with it came a decree: “No concrete harm, no standing.”³ Before *TransUnion*, the Second Circuit decided the Maddoxes had standing to sue;⁴ after *TransUnion*, the Second Circuit changed its mind.⁵

The Maddoxes had come to federal court to remedy a wrong.⁶ They had paid off their mortgage in October 2014, but BNY Mellon (their lender) had not recorded the mortgage satisfaction until September 2015.⁷ The Maddoxes’ complaint alleged that BNY Mellon’s failure to record violated New York’s mortgage-satisfaction-recording statute, which required recording a satisfaction within thirty days.⁸ In state court, there would have been no question that this state statute could provide relief to the Maddoxes.⁹ But the Maddoxes had come to federal court and were asserting they were members of a putative class action.¹⁰ As such, they were required to prove that they met the requirements of Article III standing.¹¹

Before *TransUnion*, the Second Circuit relied on the division between what is procedural and what is substantive to assess the Maddoxes’ standing.¹² As the reissued opinion explained: “Our original opinion observed that a statutory right is considered ‘substantive’ if it protects against a harm that has a close relationship to a harm traditionally regarded as providing a basis for a lawsuit in American courts.”¹³ Such a violation was “sufficient to establish Article III standing without any additional showing.”¹⁴ But, as the Second Circuit continued: “*TransUnion* clarified [] that the type of harm that a statute protects against is of little (or no) import.”¹⁵

After *TransUnion*, everything changed—at least for the Maddoxes.¹⁶ The Maddoxes had no longer sufficiently pled “an actionable cloud on title” as their title had already been conveyed.¹⁷

¹ *Maddox v. Bank of N.Y. Mellon Tr. Co., N.A.*, 19 F.4th 58 (2d Cir. 2021) (*Maddox II*).

² *Maddox v. Bank of N.Y. Mellon Tr. Co.*, 997 F.3d 436 (2d Cir. 2021) (*Maddox I*).

³ *TransUnion*, 594 U.S. 413, 417 (2021).

⁴ See *Maddox I*, 997 F.3d at 453 (“Because the Maddoxes have satisfactorily alleged that they suffered an injury to a legally protected interest that is both concrete and particularized to them and actual, not speculative, they have established an injury in fact sufficient to support Article III standing.”).

⁵ *Maddox II*, 19 F.4th at 64 (“On this appeal, the determinative standing issue is whether the Maddoxes suffered a concrete harm due to the Bank’s violation. It is clear that they have not.”).

⁶ See *id.* at 60.

⁷ See *id.*

⁸ See *id.*

⁹ See *id.* at 66.

¹⁰ See *id.* at 60–61.

¹¹ See *id.* at 61–62.

¹² See *id.* at 64 n.2.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ See *id.* at 64.

¹⁷ *Id.*

There was no reputational harm because “so far as is known, [the record] was read by no one.”¹⁸ There was no harm to their credit because they did not allege they needed any financing during the delay.¹⁹ And finally, their “perfunctory allegation of emotional distress” was not persuasive since BNY Mellon recorded the satisfaction three months before the complaint was filed without the Maddoxes realizing it.²⁰ As *TransUnion* had instructed: “No concrete harm, no standing.”²¹

Article III of the Constitution limits “[t]he judicial Power of the United States” to “Cases” and “Controversies.”²² But the Constitution defines neither “case” nor “controversy,” so the Supreme Court has adopted a test to see if a plaintiff’s claim fits within the judiciary’s properly limited federal-court jurisdiction.²³ The standing test is “numbingly familiar” to any student of the law.²⁴ A plaintiff seeking to bring a case in federal court “must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision.”²⁵

Each of the three requirements bears its own definition. First, an injury in fact must be “concrete and particularized.”²⁶ Concrete means *de facto*, or real; particularized means the harm “affect[s] the plaintiff in a personal and individual way.”²⁷ For traceability, “there must be a causal connection between the injury and the conduct complained of.”²⁸ The harm, in other words, cannot be “the result of the independent action of some third party not before the court.”²⁹ And finally, the requested relief must remedy the alleged harm.³⁰ The party invoking federal jurisdiction bears the burden of establishing all three elements³¹—at any point the issue is raised in the case.³²

The injury-in-fact requirement has proven a stumbling block for many plaintiffs in recent years.³³ Like the Maddoxes, plaintiffs now face the hurdle of proving to courts that the injury they suffered was sufficiently concrete.³⁴ Because of this Article III requirement, the fact that Congress purported to create a right is not dispositive—even if the enacted statute contains a private right of action or statutory damages.³⁵

¹⁸ *Id.* at 65.

¹⁹ *See id.*

²⁰ *Id.* at 66.

²¹ *TransUnion LLC v. Ramirez*, 594 U.S. 413, 417 (2021).

²² U.S. CONST. art. III, § 2.

²³ *See Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016) (discussing the lack of relevant definitions in the Constitution); *Raines v. Byrd*, 521 U.S. 811, 818 (1997) (calling this limited role “fundamental” to our system of government).

²⁴ Michael E. Solimine, *Congress, Separation of Powers, and Standing*, 59 CASE W. RES. L. REV. 1023, 1024 (2009) (quoting William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 222 (1988)).

²⁵ *Spokeo*, 578 U.S. at 338; *see also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992).

²⁶ *Lujan*, 504 U.S. at 560.

²⁷ *Id.* at 560 n.1.

²⁸ *Id.* at 560.

²⁹ *Id.* at 560–61 (quoting *Simon v. E. Ky. Welfare Rts. Org.*, 462 U.S. 26, 41–42 (1976) (brackets omitted)).

³⁰ *See California v. Texas*, 593 U.S. 659, 669, 671–72 (2021) (addressing redressability).

³¹ *Spokeo*, 578 U.S. at 338.

³² *See Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 93 (1998) (explaining that federal courts must resolve questions of subject-matter jurisdiction whenever raised during litigation—and must raise perceived issues *sua sponte*).

³³ *See Jonathan H. Adler, Standing Without Injury*, 59 WAKE FOREST L. REV. 1 1, 5 (2024).

³⁴ *See Spokeo*, 578 U.S. at 341.

³⁵ *See id.*

That problem has hit plaintiffs bringing data-privacy claims particularly hard. The reason stems from two recent Supreme Court cases: *Spokeo, Inc. v. Robins*³⁶ and the aforementioned *TransUnion v. Ramirez*.³⁷ Both cases involved plaintiffs that brought data-related claims.³⁸ The plaintiff in *Spokeo* filed a class-action against a people-search company for compiling profiles that contained inaccurate information.³⁹ And in *TransUnion*, “a class of 8,185 individuals” with terror-watch-list alerts in their credit files sued the credit bureau “under the Fair Credit Reporting Act . . . [for] fail[ing] to use reasonable procedures to ensure the accuracy of their credit files.”⁴⁰

Many expected the cases to prove a setback to privacy advocates. After all, the Supreme Court rejected “bare procedural” violations as insufficient for an Article III injury-in-fact.⁴¹ In the case of “intangible” harms, *Spokeo* explained, plaintiffs would need to show that their alleged injury “has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts.”⁴² *TransUnion* reiterated the point.⁴³ Congress’s views were “instructive,” but not dispositive: only the analogy between a historical common-law harm and the plaintiff’s alleged injury mattered for Article III purposes.⁴⁴

These cases are particularly relevant for privacy plaintiffs. Some data-privacy harms involve violations of statutes, like the Fair Credit Reporting Act (FCRA).⁴⁵ But which of those violations are merely procedural, and which are substantive? Some data-privacy harms involve tort claims.⁴⁶ But how much do these modern-day privacy invasions resemble historical privacy torts? Some data-privacy harms involve data breaches, in which identity thieves and other cybercriminals gain access to personal information.⁴⁷ But what are the chances those identity thieves and cybercriminals perform harmful acts with that data? And is the breach of that data a harm in itself?

³⁶ *Spokeo*, 578 U.S. 330.

³⁷ *TransUnion*, 594 U.S. 413.

³⁸ See Amy Howe, *Justices Return to Standing After Spokeo*, SCOTUSBLOG (Mar. 29, 2021), www.scotusblog.com/2021/03/justices-return-to-standing-after-spokeo [https://perma.cc/7JP2-G5RH].

³⁹ See *Spokeo*, 578 U.S. at 335–36.

⁴⁰ See *TransUnion*, 594 U.S. at 417.

⁴¹ *Spokeo*, 578 U.S. at 342.

⁴² See *id.* at 340–41 (noting free speech and free exercise violations as examples of intangible injuries).

⁴³ *TransUnion*, 594 U.S. at 424–25.

⁴⁴ As Erwin Chemerinsky notes, “[a]lthough the Court in *TransUnion* invokes separation of powers as the basis for its decision, in reality, the decision undermines separation of powers by greatly constraining congressional power to create judicially enforceable rights.” Erwin Chemerinsky, *What’s Standing After TransUnion LLC v. Ramirez*, 96 N.Y.U. L. REV. ONLINE 269, 272 (2021). “Using a private right of action is an important enforcement mechanism for laws”—including the FCRA, at issue in *TransUnion*. Daniel J. Solove, *Standing and Privacy Harms: A Critique of TransUnion v. Ramirez*, 101 B.U. L. REV. ONLINE 62, 70 (2021). To “waltz[] in” fifty years later to “disapprove of the FCRA’s enforcement mechanism and allow courts to nullify them . . . is akin to rewriting the law.” *Id.* *TransUnion* allows standing to become “weaponized, a tool to achieve political ends” by “slic[ing] away parts of laws the judiciary dislikes.” *Id.* As Justice Thomas put it:

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

TransUnion, 594 U.S. at 460 (Thomas, J., dissenting).

⁴⁵ See Danielle Keats Citron & Daniel J. Solove, *Privacy Harms*, 102 B.U. L. REV. 793, 796 (2022).

⁴⁶ See *id.*

⁴⁷ See Daniel J. Solove & Danielle Keats Citron, *Risk and Anxiety: A Theory of Data Breach Harms*, 96 TEX. L. REV. 737, 747 (2017).

In the wake of *Spokeo* and *TransUnion*, federal appellate courts began answering those questions.⁴⁸ And for many circuit courts, the answers depended on how the court analyzed common-law analogues.⁴⁹ Consider the Maddoxes. The Bank's actions "created a false impression adverse to their credit status."⁵⁰ This kind of "reputational harm," the Second Circuit explained, "is well established as actionable at common law."⁵¹ However, the court decided to dismiss the case nonetheless.⁵² Even though the common law recognized torts like libel and slander, such torts involved harms that "flow[] from the publication of false information"—and the Maddoxes did not allege that anyone actually read the misleading records.⁵³ So, the analogue rang hollow. Other plaintiffs' claims have met similar results.⁵⁴ *TransUnion*, in other words, has brought traditional privacy torts to the forefront.

Theories have abounded as to *TransUnion*'s effect on the country's case law.⁵⁵ Empirical studies on its effect, however, have been lacking. This Article seeks to fill that gap. We reviewed 297 published federal appellate cases that cite *TransUnion* between the opinion's publication and December 31, 2024. After narrowing the dataset to include only the 53 opinions that involved data privacy, we hand-coded each case to track details specific to cases in the data-privacy field.

Two key takeaways emerge from the data. First, *TransUnion* was not the death knell to data-privacy cases that advocates feared. And second, a circuit split is beginning to form regarding how to judge common-law analogues.⁵⁶ Some circuits require plaintiffs to show that they meet each element of a proffered common-law claim.⁵⁷ Others look only to whether the *kind* of harm mirrors a traditionally actionable harm.⁵⁸ Respectively, we refer to these as the "element-by-element" and "kind-of-harm" approaches.

This Article proceeds in three parts. Part I provides an overview of the recent history of injury-in-fact requirements, from the standard pre-*Spokeo* to the aftermath of *TransUnion*. Part II lays out the methodology the authors used in conducting the hand-coded study. Part III reviews and discusses the study's findings, including the emerging circuit split, and details the surprises, the trends, and the areas for further study and discussion.

⁴⁸ See discussion *infra* Section I.D.

⁴⁹ See discussion *infra* Section I.C.

⁵⁰ *Maddox II*, 19 F.4th at 61.

⁵¹ *Id.* at 65.

⁵² *Id.* at 66.

⁵³ *Id.* at 65.

⁵⁴ See discussion *infra* Part III.A and Figure 7.

⁵⁵ See, e.g., Curtis A. Bradley & Ernest A. Young, *Standing and Probabilistic Injury*, 122 MICH. L. REV. 1557 (2024) (offering "a framework for resolving a wide range of these 'probabilistic standing' issues" for public-law plaintiffs); Owen B. Smitherman, *History, Public Rights, and Article III Standing*, 47 HARV. J.L. & PUB. POL'Y 167 (2024) (questioning the "effective retention of injury-in-fact for public-rights actions"); David W. Opderbeck, *Cybersecurity and Data Breach Harms: Theory and Reality*, 82 MD. L. REV. 1001 (2023) (challenging the view that "private law should routinely recognize dignitary, emotional distress, or potential future harms in commercial data breach cases").

⁵⁶ Compare *Hunstein v. Preferred Collection & Mgmt. Servs., Inc.*, 48 F.4th 1236, 1245 (11th Cir. 2022) (holding that a plaintiff lacked standing because the statutory violation missed the "publicity" element required for the common-law tort of public disclosure of private facts), with *Lupia v. Mediacredit, Inc.*, 8 F.4th 1184, 1192 (10th Cir. 2021) (finding standing by rejecting the requirement that a statutory violation must strictly match every element of a common-law analogue).

⁵⁷ See, e.g., *Hunstein*, 48 F.4th at 1245.

⁵⁸ See, e.g., *Lupia*, 8 F.4th at 1192.

I. TRACING THE INJURY-IN-FACT REQUIREMENT OVER TIME

The question of who can sue for what kinds of injuries is not a new one.⁵⁹ For our purposes, though, the past fifty years or so matter for understanding how the injury-in-fact requirement for standing has evolved. This Part starts by tracing the requirement through the latter half of the twentieth century.⁶⁰ It then provides an overview of *Spokeo* and *TransUnion*, explaining the key legal outcomes from each case. Finally, it taps into the conversation about the current state of standing law, particularly in the context of data-privacy cases.

A. *The Injury-in-Fact Requirement Pre-Spokeo*

In the late twentieth century, plaintiffs enjoyed broad access to federal court. The Supreme Court confirmed in 1975 that Congress could create statutory rights and entitlements out of whole cloth—and the deprivation of that right was enough to “confer standing to sue even where the plaintiff would have suffered no judicial cognizable injury in the absence of a statute.”⁶¹ This decision was “no outlier.”⁶² Rather, it marked a consistent viewpoint that lasted throughout the Warren Court.

This generous standing doctrine faced opposition.⁶³ In 1992, *Lujan v. Defenders of Wildlife*⁶⁴ heralded the first attempt to “circumscrib[e] the ranks of potential litigants.”⁶⁵ It articulated the well-known standing formula described earlier: an injury-in-fact is one that is concrete and particularized.⁶⁶ In particular, *Lujan*’s author—Justice Scalia—took care to limit “particularized” to mean an injury that “affect[s] the plaintiff in a personal and individual way.”⁶⁷ In other words, the injury must be “more than an injury to a cognizable interest.”⁶⁸ For Article III standing, “the party seeking review [must] be himself among the injured.”⁶⁹

This contraction continued in fits and spurts. In *Federal Election Commission v. Akins*,⁷⁰ the Supreme Court held that voters had standing to sue the Federal Election Commission for refusing to compel disclosure of the contributions made to a political group by its members, where those contributions allegedly violated campaign finance law.⁷¹ The plaintiffs had suffered an injury

⁵⁹ See 3 WILLIAM BLACKSTONE, COMMENTARIES *2 (discussing private rights belonging to individuals); 4 WILLIAM BLACKSTONE, COMMENTARIES *5 (describing public rights enjoyed by the entire community). Of course, whether standing as it is discussed today is of similar origin—or whether it is a creature of the twentieth century—is more fraught. See generally Elizabeth Earle Beske, *Charting a Course Past Spokeo and TransUnion*, 29 GEO. MASON L. REV. 729 (2022) (collecting articles discussing competing points of view).

⁶⁰ This historical review is abbreviated; for a full discussion. See generally Elizabeth Earle Beske, *The Court and the Private Plaintiff*, 58 WAKE FOREST L. REV. 1 (2023).

⁶¹ *Warth v. Seldin*, 422 U.S. 490, 514 (1975).

⁶² Note, *Standing In The Way: The Courts’ Escalating Interference In Federal Policymaking*, 136 HARV. L. REV. 1223, 1225 (2023).

⁶³ See Beske, *Charting a Course Past Spokeo and TransUnion*, *supra* note 59, at 10 (describing the backlash against the “pronounced . . . expansion of the litigant pool”).

⁶⁴ *Lujan*, 504 U.S. 555 (1992).

⁶⁵ Beske, *Charting a Course Past Spokeo and TransUnion*, *supra* note 59, at 10–11.

⁶⁶ *Lujan*, 504 U.S. at 560.

⁶⁷ *Id.* at 560 n.1.

⁶⁸ *Id.* at 563 (quoting *Sierra Club v. Morton*, 405 U.S. 727, 734–35 (1972)).

⁶⁹ *Id.*

⁷⁰ *FEC v. Akins*, 524 U.S. 11 (1998).

⁷¹ *Id.* at 13–14.

because they could not obtain information—information that the Federal Election Campaign Act specifically addressed.⁷² Such a harm, the Court determined, was “concrete and specific” enough for Article III purposes.⁷³ Indeed, it emphasized that it had “previously held that a plaintiff suffers an ‘injury in fact’ when the plaintiff fails to obtain information which must be publicly disclosed pursuant to a statute.”⁷⁴

Massachusetts v. EPA appeared similarly plaintiff-friendly.⁷⁵ That case, decided in 2007, allowed Massachusetts’s claim against the EPA for failing to regulate greenhouse gases to proceed in federal court.⁷⁶ Although the dissent argued that the alleged potential global-warming injuries were neither concrete nor particularized,⁷⁷ the majority disagreed. Congress had accorded the litigant “a procedural right to protect his concrete interests.”⁷⁸ That was enough to let Massachusetts bring suit regardless of whether it “me[t] all the normal standards for redressability and immediacy.”⁷⁹ Moreover, as Justice Stevens noted in relying on precedent in which states were found to have standing to address injury to their citizens: “It is of considerable relevance that the party seeking review here is a sovereign State and not, as it was in *Lujan*, a private individual.”⁸⁰

Two years later, *Summers v. Earth Island Institute*⁸¹ marked another Justice-Scalia-drawn line in the sand—it declared the injury-in-fact requirement a “hard floor” for standing purposes.⁸² No statute could remove it.⁸³ Instead, plaintiffs must show “such a personal stake in the outcome of the controversy” as to warrant *his* invocation of federal-court jurisdiction.⁸⁴ *Summers* thus continued the personalization of standing. But neither *Summers* nor *Lujan* issued limits on Congress’s creation of “legal rights, the invasion of which creates standing.”⁸⁵ For that, we turn to *Spokeo*.

B. *Spokeo v. Robins: Historical Harms, and “Bare Procedural Violations”*

Thomas Robins was a single, childless man—but anyone who looked him up on Spokeo, a people search engine, would think otherwise.⁸⁶ It listed him as “married,” with “children, . . . in

⁷² *Id.* at 20 (citing *Buckley v. Valeo*, 424 U.S. 1, 66–67 (1976) (per curiam), for the proposition that, under the Act, “‘political committees’ must disclose contributors and disbursements to help voters understand who provides which candidates with financial support”).

⁷³ *Id.* at 25.

⁷⁴ *Id.* at 21 (citing *Pub. Citizen v. Dep’t of Just.*, 491 U.S. 440, 449 (1989)).

⁷⁵ *Massachusetts v. EPA*, 549 U.S. 497 (2007).

⁷⁶ *See id.* at 526.

⁷⁷ *See id.* at 541–42 (Roberts, C.J., dissenting).

⁷⁸ *Id.* at 517 (quoting *Lujan*, 504 U.S. at 572 n.7).

⁷⁹ *Id.* at 517–18.

⁸⁰ *Id.* at 518. *See also* *Georgia v. Tenn. Copper Co.*, 206 U.S. 230, 237 (1907) (“This is a suit by a State for an injury to it in its capacity of quasi-sovereign. In that capacity the State has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain. It has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air.”); *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 607 (1982) (“One helpful indication in determining whether an alleged injury to the health and welfare of its citizens suffices to give the State standing to sue *parens patriae* is whether the injury is one that the State, if it could, would likely attempt to address through its sovereign lawmaking powers.”).

⁸¹ *Summers v. Earth Island Inst.*, 555 U.S. 488 (2009).

⁸² *Id.* at 497.

⁸³ *Id.*

⁸⁴ *Id.* at 493 (quoting *Warth*, 422 U.S. at 498–99).

⁸⁵ *Lujan*, 504 U.S. at 578 (quoting *Warth*, 422, U.S. at 500).

⁸⁶ *Spokeo*, 578 U.S. at 336.

his 50s,” with a job, a “graduate degree,” and a “relatively affluent” lifestyle.⁸⁷ None of it was true.⁸⁸ So Robins sued *Spokeo* under the Fair Credit Reporting Act for failing to “follow reasonable procedures to assure maximum possible accuracy of” consumer reports,” among other things.⁸⁹ The district court dismissed his complaint for lack of standing, but the Ninth Circuit reversed course.⁹⁰ As the circuit court put it, “Spokeo violated *his* statutory rights,” given that Robins’s “personal interests in the handling of his credit information are individualized rather than collective.”⁹¹

The Supreme Court disagreed. Its concern lay with the concreteness of Robins’s claim.⁹² “[I]ntangible injuries can nevertheless be concrete,” but only in specific circumstances.⁹³ For example, the “alleged intangible harm [must] ha[ve] a close relationship to a harm that has been traditionally regarded as providing a basis for a lawsuit in English or American courts.”⁹⁴ Additionally, *Spokeo* recognized Congress’s ability to “identify” and “elevate” de facto injuries to the status of legally cognizable harms.⁹⁵ But it warned that “Congress’ role in identifying and elevating intangible harms does not mean that a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right”—a “concrete injury” was still required.⁹⁶ “[B]are procedural violation[s],” in other words, were not enough to establish Article III standing.⁹⁷

Here, the Court feared the plaintiff’s injury amounted to just such a procedural violation. “A violation of one of the FCRA’s procedural requirements,” it opined, “may result in no harm.”⁹⁸ It summoned as an example an incorrect zip code—an error that it found “difficult to imagine . . . could work any concrete harm.”⁹⁹ It remanded to the Ninth Circuit to address “whether the particular procedural violations alleged in this case entail a degree of risk sufficient to meet the concreteness requirement.”¹⁰⁰

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.* at 335–36; *see also* 15 U.S.C. § 1681e(b).

⁹⁰ *Spokeo*, 578 U.S. at 336.

⁹¹ *Id.* at 337 (quoting *Robins v. Spokeo, Inc.*, 742 F.3d 409, 413 (2016)).

⁹² *See Spokeo*, 578 U.S. at 342–43.

⁹³ *Id.* at 340–41.

⁹⁴ *Id.* at 341.

⁹⁵ *Id.* (brackets omitted).

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.* at 342.

⁹⁹ *Id.* Notably, the Court’s example missed the mark: as Professors Danielle Keats Citron and Daniel Solove have explained, “a lot can be inferred about a person based on their zip code, including demographic generalizations about race, religion, ethnicity, and income.” Danielle Keats Citron & Daniel J. Solove, *Privacy Harms*, 102 B.U. L. REV. 793, 839 (2022).

¹⁰⁰ *Spokeo*, 578 U.S. at 342–43. On remand, the Ninth Circuit reached the same outcome: that Robins had alleged sufficiently concrete injuries for Article III purposes. *See Robins v. Spokeo, Inc.*, 867 F.3d 1108, 1118 (9th Cir. 2017). Its reasoning came in three parts. First, it “conclude[d] that the FCRA procedures at issue in this case were crafted to protect consumers’ (like Robins’s) concrete interest in accurate credit reporting about themselves.” *Id.* at 1115. Second, it determined that “the inaccuracies alleged in this case” were not “the sort of ‘mere technical violation[s]’ which are too insignificant to present a sincere risk of harm to the real-world interests that Congress chose to protect with FCRA.” *Id.* at 1117 (quoting *In re Horizon Healthcare Servs. Inc. Data Breach Litig.*, 846 F.3d 625, 638 (3d Cir. 2017)). Finally, it “reject[ed] Spokeo’s suggestion that Robins’s allegations of harm are too speculative.” *Id.* As it put it, the “challenged conduct and the attendant injury ha[d] already occurred”: Spokeo had “published a materially inaccurate consumer report about Robins.” *Id.* at 1118. That was concrete enough for Article III.

In *Spokeo*'s wake, lower courts “struggled mightily” with its concreteness test.¹⁰¹ Which common-law analogues mattered, and how closely did a newly coined right have to track the historical claim?¹⁰² Despite the “disarray,” however, the Court would double down on *Spokeo*'s reasoning in *TransUnion v. Ramirez*.¹⁰³

C. *TransUnion v. Ramirez*: Continuing *Spokeo*'s Work

Five years later, the Supreme Court expanded on what *Spokeo*'s mandate meant for Article III standing in *TransUnion v. Ramirez*.¹⁰⁴ In 2011, Sergio Ramirez tried to buy a Nissan and was told by the dealership after a credit check that they would not sell to him because he was on the “terrorist list.”¹⁰⁵ The “terrorist list” was a list maintained by the Office of Foreign Asset Control (OFAC) designating individuals who pose a national security risk.¹⁰⁶ TransUnion allegedly had introduced a feature called NameScreen that would label credit reports as a “Potential Match” when the first and last name matched a name on the OFAC list.¹⁰⁷ Ramirez shared a name with someone on that list.¹⁰⁸

Ramirez became the named plaintiff of a class of 8,185 individuals that sued TransUnion for FCRA violations.¹⁰⁹ The issue before the Supreme Court was whether these plaintiffs had standing to sue for the alleged FCRA violations: “that TransUnion, by using the Name Screen product, failed to follow reasonable procedures to ensure the accuracy of information in his credit file,” “that TransUnion failed to provide him with all the information in his credit file upon his request,” and “that TransUnion violated its obligation to provide him with a summary of his rights ‘with each written disclosure,’ because TransUnion’s second mailing did not contain a summary of Ramirez’s rights.”¹¹⁰

Building on *Spokeo*'s requirement that “the plaintiff’s injury in fact be ‘concrete’—that is, ‘real, and not abstract,’” the Court explained that history and tradition offer a meaningful guide to what makes a harm concrete for the purposes of Article III.¹¹¹ Tangible harms are obviously concrete, but intangible harms can be too—especially those “with a close relationship to harms traditionally recognized as providing a basis for lawsuits in American courts.”¹¹² And though courts owe respect when Congress elevates a harm to an actionable legal status, courts must still independently decide whether a plaintiff has Article III standing because Congress may not “enact

¹⁰¹ Beske, *Charting a Course Past Spokeo and TransUnion*, *supra* note 59, at 19.

¹⁰² See Beske, *The Court and the Private Plaintiff*, *supra* note 60, at 26–27.

¹⁰³ *Id.* at 26.

¹⁰⁴ *TransUnion*, 594 U.S. at 417.

¹⁰⁵ *Id.* at 420.

¹⁰⁶ *Id.* at 419–20.

¹⁰⁷ *Id.* at 420.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 421.

¹¹⁰ *Id.*

¹¹¹ *Id.* at 424.

¹¹² *Id.* at 425 (noting prime examples include “reputational harms, disclosure of private information, and intrusion upon seclusion”); *Spokeo*, 578 U.S. at 341 (first articulating the requirement that intangible harms bear a close relationship to harms recognized at common law).

an injury into existence.”¹¹³ Consequently, a statutory cause of action does not automatically mean there was a concrete harm.¹¹⁴

Based on this, the Supreme Court divided the class into two portions: those for whom the OFAC potential match label had been shared with a third party, and those for whom it had not.¹¹⁵ For the 1,853 class members whose credit reports had been shared with third parties, the common-law tort of defamation—of which publication was an essential element—provided the requisite “close relationship” and a harm sufficient to satisfy standing.¹¹⁶ For those members whose reports had not been shared, there was no concrete harm (and thus, no standing) because there was no publication, only the “mere existence of a misleading OFAC alert.”¹¹⁷

Lastly, the Court addressed what it called the “formatting violations.”¹¹⁸ Those alleged violations included TransUnion not informing class members they were labeled as potential matches to the OFAC list on their credit reports, and that TransUnion failed to include a summary of rights in all mailings.¹¹⁹ Because there is no traditional harm with a close relationship to the format of one’s mail and there was no evidence that anyone other than the named plaintiff, Ramirez, even opened the mailings, there was no concrete harm and no standing.¹²⁰

In its conclusion, the Court reiterated its decree: “No concrete harm, no standing.”¹²¹

D. *The Fallout Post-TransUnion*

When the Supreme Court issued the decision in *TransUnion*, some heralded the opinion as the end of privacy rights. The reaction primarily focused on how the decision narrowed both the class action against the credit reporting company and access to federal courts for plaintiffs alleging privacy harms.¹²² Top privacy scholars argued that it “significantly undermined the effectiveness of many privacy laws” and “enables courts to rewrite privacy laws to alter how they are enforced.”¹²³ In other spheres, the reaction was even more dramatic. One commentator derided the opinion, explaining that “a huge number of Americans harmed by a flagrant violation of the law

¹¹³ *TransUnion*, 594 U.S. at 425–46.

¹¹⁴ *Id.* at 426.

¹¹⁵ *Id.* at 432.

¹¹⁶ *Id.* at 432–33.

¹¹⁷ *Id.* at 433.

¹¹⁸ *Id.* at 440.

¹¹⁹ *TransUnion*, 594 U.S. at 440.

¹²⁰ *Id.*

¹²¹ *Id.* at 442.

¹²² See, e.g., Amy Howe, *Court Limits Standing in Credit-Reporting Lawsuit*, SCOTUSBLOG (June 25, 2021), www.scotusblog.com/2021/06/court-limits-standing-in-credit-reporting-lawsuit [<https://perma.cc/K28W-ZZZ4>] (“The Supreme Court on Friday substantially narrowed a class action against TransUnion, one of the nation’s three major credit-reporting companies.”); Lawrence Hurley, *U.S. Supreme Court Curbs TransUnion ‘Terrorist List’ Lawsuit*, REUTERS (June 25, 2021, at 18:03 ET), www.reuters.com/legal/government/us-supreme-court-limits-damages-transunion-terrorist-list-lawsuit-2021-06-25 [<https://perma.cc/4AMY-QMPU>] (“The U.S. Supreme Court on Friday narrowed the scope of a class action lawsuit against TransUnion.”); Theodore F. Claypoole, *Did the US Supreme Court Just Gut Privacy Law Enforcement?*, NAT’L L. REV. (July 1, 2021), <https://natlawreview.com/article/did-us-supreme-court-just-gut-privacy-law-enforcement> [<https://perma.cc/89ZT-AE3E>] (“Privacy litigation is particularly susceptible to attack under this decision.”).

¹²³ Daniel J. Solove & Danielle Keats Citron, *Standing and Privacy Harms: A Critique of TransUnion v. Ramirez*, 101 B.U. L. REV. ONLINE 62, 62, 71 (2021).

will be locked out of the federal judiciary altogether,” and noting that the decision could restrict court access in areas as wide-ranging as privacy harms, environmental harms, disability rights, civil rights, and class actions.¹²⁴

As foreseen, the ripples of *TransUnion* have been felt—and studied—across disparate areas of law, including public law, environmental law, and class actions, among others. In the realm of public law, scholars have offered “a framework for resolving a wide range of these ‘probabilistic standing’ issues” for public-law plaintiffs,¹²⁵ investigated the effective “retention of injury in fact for public rights” actions,¹²⁶ and challenged the view that “private law should routinely recognize dignitary, emotional distress, or potential future harms in commercial data breach cases.”¹²⁷ Elsewhere, standing has been dissected harm-by-harm¹²⁸ and fundamentally questioned.¹²⁹ Both the injury and the adversarial elements of standing are in question post-*TransUnion*.¹³⁰

Lacking from this discussion are the specifics of the debate as they are playing out in our own courts—we fill that gap. By looking at the details, we uncover the exact contours of the future of standing, based not only on what critics of *TransUnion* portended, but also on how federal appellate courts grapple with the repercussions of it each day. Standing has certainly changed post-*TransUnion*, but our data shows that the courthouse doors are not yet closed to data privacy plaintiffs. Courts and litigants are finding ways to successfully work within the new common-law analogue framework dictated by *TransUnion*.

II. METHODOLOGY

To measure the effects of *TransUnion*, we looked across the federal appellate courts to see how the case has been cited and applied since its publication in 2021 until December 31, 2024. This focus, while somewhat narrow, proved advantageous for a few reasons.

Article III standing is a constitutional requirement,¹³¹ and thus, primarily an obstacle to plaintiffs seeking redress in federal courts. Of course, both appellate and district courts must decide questions of standing. But to keep the scope of the paper manageable, we focused on published appellate court cases. Appellate cases form the law of each circuit until the Supreme Court next

¹²⁴ Mark Joseph Stern, *The Supreme Court's Conservatives Issued a Decision Too Extreme for Clarence Thomas*, SLATE (June 25, 2021, at 4:10 PM ET), <https://slate.com/news-and-politics/2021/06/transunion-kavanaugh-thomas.html> [<https://perma.cc/FR2U-6MSZ>].

¹²⁵ Bradley & Young, *supra* note 55.

¹²⁶ Smitherman, *supra* note 55.

¹²⁷ Opperbeck, *supra* note 55.

¹²⁸ Ignacio Cofone, *Privacy Standing*, UNIV. OF ILL. L. REV. 1367 (2022) (providing “a framework for distinguishing which actions involve harm to people’s privacy interests and which do to other interests”).

¹²⁹ Adler, *supra* note 33.

¹³⁰ See, e.g., Thomas P. Schmidt, *Standing Between Private Parties*, 2024 WIS. L. REV. 1 (2024) (arguing that “suits against private parties should be treated differently from suits against government officials for standing purposes.”); Beske, *The Court and the Private Plaintiff*, *supra* note 60 (exploring standing doctrine as it relates to separation of powers).

¹³¹ U.S. CONST. art. III, § 2.

takes up a standing question. So, although there are plenty of well-reasoned, impactful cases at the district court level deserving of similar treatment, we leave those as a research topic for another day. We further limited our review to published appellate cases because those are precedential, while unpublished cases are not.¹³²

We relied on WestLaw’s Citing References tool to find the list of cases that have cited *TransUnion*. We narrowed our initial list by jurisdiction and then by publication. We removed any duplicate listings and organized by circuit. We reviewed cases circuit-by-circuit and determined a set of characteristics by which to code the cases, based on our own experience and knowledge of standing, our focus on data privacy, and elements that arose frequently during our review.

Our focus on data privacy stems from *TransUnion* itself, as it involved data privacy, and because the case was expected to most significantly affect access to federal court for those seeking remedies for privacy harms.¹³³ As one law professor noted at the time: “Judicial skepticism of privacy rights—and judges using standing to keep those claims out—has been a problem for a long time, and *TransUnion* will make it worse.”¹³⁴ Fortunately for the privacy-minded among us, and as demonstrated by our findings below, this prediction has not yet won the day.

One key difficulty in a hand-coded study like this one is maintaining consistency. Disparate cases must be cajoled into generalized categories in order to allow for data analysis. To ensure we applied our data tags consistently across different cases, we created a data dictionary for each data column. Standing analysis varied from a short sentence or two to wide-ranging, multi-paged discussions. Nevertheless, we kept the number of options for each column limited. This choice allowed us to better obtain high-level insights into the trends at the circuit-court level. Understanding these data points is critical for our analysis, so the remainder of this section walks through each one—followed by an example of how we applied these columns to the *Maddox* case discussed in the introduction.

A. Defining Key Terms for Analysis

1. *Data Privacy Case*. This data point was our first point of analysis after compiling the full dataset of published appellate cases that cited *TransUnion*. To pinpoint the effect of *TransUnion*—if any—on appellate data-privacy decisions, we needed to remove decisions grappling with other subject matters. We defined data-privacy case to include those cases that explicitly invoked alleged harms related to the security, use, and sharing of personal data. We also included cases we deemed “related” to data privacy. These cases primarily involved Telephone Consumer Protection Act (TCPA) claims spurred by unwanted calls or text messages from telemarketers or debt collectors. These claims relate to data privacy because they involve the use

¹³² The weight and citability of unpublished cases varies by circuit, but they are never precedential. See Merritt E. McAlister, “Downright Indifference”: Examining Unpublished Decisions in the Federal Courts of Appeals, 118 MICH. L. REV. 533 (2020) (explaining that unpublished decisions are non-precedential and that “[b]ecause many ‘unpublished decisions’ are widely available, it is best to think of the terms ‘published’ and ‘unpublished’ as synonymous with ‘precedential’ and ‘nonprecedential’”).

¹³³ Stern, *supra* note 124.

¹³⁴ *Id.* (quoting Lindsey Barrett).

of personal data, namely phone numbers, and the alleged harms share a common-law analogue with many privacy claims, namely intrusion on seclusion. The analysis that follows thus includes both full-fledged data-privacy cases and cases related to data-privacy concerns.

2. *Status as Good Law.* The next filter we used was whether the case remained good law. Many circuits have vacated decisions after rehearing a case *en banc*; we removed these cases to provide the most accurate analysis on what the state of the law is as practiced. This decision was closely related to our choice to analyze only published cases, not unpublished ones.

3. *Authoring Judges: Majority, Concurrences, and Dissents.* We then moved into general data points not specific to data-privacy cases, but important, nonetheless. We recorded the authoring judge for each majority opinion, concurrence, and dissent. Additionally, we recorded the president who appointed each judge, and that president's political party.

4. *Cause of Action.* Next, we recorded the cause of action. Many of the cases involved federal statutory claims, including: the Drivers Privacy Protection Act (DPPA); the Fair Credit Reporting Act (FCRA); the Fair Debt Collection Practices Act (FDCPA); the Stored Communications Act (SCA); and the TCPA. Others involved well-known state statutory claims, like the Illinois Biometric Information Privacy Act (BIPA). Some involved constitutional claims. And several involved state common-law claims. In the latter cases, we simply flagged these as state-law cases rather than identifying the specific state-law claim involved.

5. *Procedural Posture.* We then moved to recording the procedural posture of the case. In an effort to simplify this data point, we kept the options streamlined: motion to dismiss, motion for summary judgment, judgment on the pleadings, class certification, and class settlement. A few outliers involved panel and *en banc* rehearings.

6. *Class Action.* Finally, we noted whether the plaintiff brought the case as an individual or on behalf of a putative class.

7. *Standing.* With general data points collated, we collected data specific to standing—and to data-privacy cases. As an initial matter, we recorded whether the court found standing or not. In some cases, the standing decision was individualized by plaintiff. For example, in some cases, a court would find one plaintiff had standing, and the others did not. We recorded these cases as finding “partial” standing. Surprisingly, some cases cited *TransUnion* without engaging in an Article III standing analysis—either because the court decided the case was moot, and therefore no standing analysis was needed, or because the court simply cited *TransUnion* for some sort of general proposition. We filtered these decisions out of our dataset. We also filtered out cases that mentioned standing only in directions to the district court when remanding.

8. *Data Type and Subtype.* We categorized the kinds of personal data involved in each case into six different groups. First, we deemed some information as personally identifiable information (PII). We took a broad brush for this category: For data subtypes, we included a variety of different kinds of PII, including data about car accidents, citizenship, contact information (e.g., phone number), credit, debt, driver's license number, Social Security number, passport number, taxpayer identification number, and OFAC status.

Second, we cataloged other data as personal health information (PHI).¹³⁵ Importantly, we did not rely on the definition of PHI found in the Health Insurance Portability and Accountability Act of 1996 (HIPAA). HIPAA’s definition of “protected health information” is relegated to “individually identifiable health information” held or transmitted by a covered entity or its business associate only.¹³⁶ In turn, HIPAA limits covered entities to a small set of traditional healthcare organizations: health plans, health care clearinghouses, and health care providers.¹³⁷ Business associates, too, have a specific, limited definition.¹³⁸ As a result, HIPAA’s definition of protected health information misses wide swaths of what a layperson would consider health information—like the health information collected by life-insurance companies, or the health data generated by an Apple watch.¹³⁹ Instead, we tagged data as PHI if it had a connection with medical information, including biometrics and medical records, regardless of whether the collecting organization would count as a covered entity under HIPAA.¹⁴⁰

Finally, we had a handful of other categories that qualified neither as PII nor as PHI. Locational data was one, video data another. We categorized incorrect information separately as well. Although this category largely arose with false credit or debt information, we chose to categorize it separately from PII because it did not originate with the individual.

9. *Kind of Harm.* With the type of data out of the way, we moved to the kind of harm alleged. *TransUnion*’s concrete injury-in-fact explanation outlines two kinds of harm: tangible and intangible.¹⁴¹ We assigned labels to alleged harms based on the characteristics the Supreme Court has used to describe tangible and intangible harms. For example, a traditional pocketbook injury counts as a tangible harm.¹⁴² But an injury to reputation or privacy—more ephemeral concepts—counts as intangible.¹⁴³ Additionally, we noted when both tangible and intangible harms were alleged.

One wrinkle arose in this circumstance. In one case, for example, the harm alleged was interruption of self-employment.¹⁴⁴ At face value, such a harm could involve both tangible harm (loss of income) and intangible harm (emotional distress). However, by the summary-judgment stage, the plaintiff had provided no evidence of any monetary loss due to the interruption of self-

¹³⁵ If a case involved both PII and PHI, we tagged it as such.

¹³⁶ See 45 C.F.R. § 160.103 (2026).

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ See Emma Ritter Gordon, *Your Voice Gave You Away: The Privacy Risks of Voice-Inferred Information*, 71 DUKE L.J. 735, 757 (2021) (citing W. Nicholson Price II & I. Glenn Cohen, *Privacy in the Age of Medical Big Data*, 25 NATURE MED. 37, 39 (2019) and Angela Chen, *Why It’s Time To Rethink the Laws That Keep Our Health Data Private*, VERGE (Jan. 29, 2019, at 8:30 ET), <https://www.theverge.com/2019/1/29/18197541/health-data-privacy-hipaa-policy-business-science> [<https://perma.cc/R74V-TR2P>]).

¹⁴⁰ Of course, in today’s big-data era, “even ‘innocuous data’ . . . can enable” inferences about an individual’s health. Gordon, *supra* note 139, at 752 & n.112 (discussing how a grocery list can yield “as many health insights as a patient record”). For our purposes, though, the traditional view of what counts as medical is enough.

¹⁴¹ *TransUnion*, 594 U.S. at 425.

¹⁴² See *id.* (listing “physical harms and monetary harms” as “traditional tangible harms”); see also *Czyzewski v. Jevic Holding Corp.*, 480 U.S. 451, 464 (2017) (“For standing purposes, a loss of even a small amount of money is ordinarily an ‘injury.’”).

¹⁴³ See *TransUnion*, 594 U.S. at 425.

¹⁴⁴ See *Brown v. CACH, LLC*, 94 F.4th 665, 666 (7th Cir. 2024).

employment—not even loss of income.¹⁴⁵ We thus categorized this case as intangible harm only. In contrast, if a plaintiff alleged both emotional and monetary harm at the motion-to-dismiss stage, we categorized the case as involving both tangible and intangible components.

10. *Common-Law Analogue*. In cases involving intangible harms, we tracked which common-law analogues, if any, the court addressed. After all, part of the sea-change ushered in by *Spokeo* and *TransUnion* involves addressing whether an alleged intangible harm “has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts.”¹⁴⁶ A few cases did not address any common-law analogues despite dealing with intangible harms. Other cases addressed multiple common-law analogues. The majority identified at least one.

11. *Element-by-Element Approach*. For those cases that addressed a common-law analogue, we tracked how each court dealt with it. Did the court reject an analogue because an element of a common-law analogue was missing? Did it outline each element in a traditional tort and see how the alleged harm lined up to those elements? If so, we labeled that case as applying an element-by-element approach. If the court mentioned a common-law analogue but never mentioned elements, or never compared those elements to the facts at hand, then we did not include it in this count. This data label quickly emerged as a key differentiator in how courts approached privacy cases post-*TransUnion*.

B. Case Example: Applying These Definitions to *Maddox*

To understand our approach in practice, consider the post-*TransUnion* *Maddox II* decision discussed in the Introduction.¹⁴⁷ *Maddox II* involved a bank’s failure to properly record the discharge of a mortgage, which left incorrect information languishing in the county clerk’s office.¹⁴⁸ We deemed this case related to data privacy because it involved the use—or rather, the lack thereof—of personal data.¹⁴⁹ It was also good law, given that it replaced *Maddox I*.¹⁵⁰ Judge Jacobs penned the majority; he was appointed by George H.W. Bush, a Republican president.¹⁵¹ There were no concurrences or dissents.¹⁵²

The Maddoxes brought suit against the bank for violating New York’s mortgage-satisfaction recording statutes on behalf of themselves and a putative class.¹⁵³ We recorded the cause of action for the case as state-law claims as a result; we also flagged it as a class action.¹⁵⁴ The procedural posture was a panel rehearing.¹⁵⁵ As discussed earlier, no standing was found by

¹⁴⁵ *Id.* at 667.

¹⁴⁶ *Spokeo*, 578 U.S. at 340–41; see *TransUnion*, 594 U.S. at 425.

¹⁴⁷ *Maddox II*, 19 F.4th at 58.

¹⁴⁸ *Id.* at 60.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ Judge Jacobs originally dissented from *Maddox I*. See 997 F.3d at 455–61 (Jacobs, J., dissenting); *Maddox II*, 19 F.4th at 58.

¹⁵² *Maddox II*, 19 F.4th at 58.

¹⁵³ *Id.* at 60 (citing R.P.L. § 275(1) and R.P.A.P.L. § 1921(1)).

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 62.

the panel on rehearing.¹⁵⁶ We classified the type of data involved as incorrect information, and the kind of harm as intangible. The court addressed common-law analogues involving reputational harms, namely libel/slander.¹⁵⁷ And we characterized the court as applying an element-by-element approach.

Those last two points bear further explanation. The Court acknowledged that “a lender’s delay in recording a mortgage satisfaction risks creating the false appearance that the borrower has not paid the underlying debt and is thus more indebted and less creditworthy.”¹⁵⁸ Such a situation could give rise to reputational harm.¹⁵⁹ But at common law, those kinds of harms “flow[] from the publication of false information.”¹⁶⁰ And the Maddoxes never “allege[d] that they suffered any reputational harm due to the Bank’s violation.”¹⁶¹ Critically, “so far as is known, [the misleading record] was read by no one.”¹⁶² So the Court’s decision hinged on the fact that the plaintiffs were missing the element of publication. As the Court put it, “it is self-evident that ‘unless the defamatory matter is communicated to a third person there has been no loss of reputation.’”¹⁶³ This strict requirement that a plaintiff must match a common-law analogue, element by element, exemplifies what we mean by this approach.¹⁶⁴

With that walkthrough in mind, we move to the findings themselves.

III. FINDINGS

We review findings in three parts: general findings, data-privacy findings, and circuit-by-circuit findings. Our general findings related to case characteristics and procedural trends. Our data-privacy findings detail the invoked statutory harms, the common-law analogues, and the emerging circuit split between what we call the “element-by-element” approach and the “type of harm” approach. Lastly, we provide an overview of circuit-specific trends to show how circuits are assessing data-privacy standing cases and to provide information for practitioners in their respective circuits.

A. General Findings

Beyond looking at each circuit and before turning to specific data-privacy analysis, we review the general findings. Our general findings relate to characteristics of the cases that are not

¹⁵⁶ See *id.* at 64–66.

¹⁵⁷ See *id.* at 65.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* (emphasis added) (citing to cases discussing the elements of slander and libel).

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.* (quoting Restatement of Torts § 577, cmt. b).

¹⁶⁴ Though a subsequent panel of the Second Circuit disclaimed the use of the element-by-element approach in *Maddox*, we believe that the *Maddox* Court’s holding that the plaintiffs could not satisfy Article III without showing an element of common-law defamation still exemplifies this approach. See *Salazar v. NBA*, 118 F.4th 533, 542 n.6 (2d Cir. 2024) (“This Court has applied *TransUnion* in at least four published opinions to determine whether an alleged harm satisfies Article III standing’s concreteness requirement. We did not, in any of those cases, hold that *TransUnion* demands that a plaintiff adequately plead every element of a common-law analog to satisfy the concreteness requirement.” (citing *Maddox II*, 19 F.4th at 62–66)).

specific to any data-privacy information. Here, we detail trends over time. We examine trends relating to authorship, such as whether the opinion was a majority, a concurrence, or a dissent, as well as the political party of the president who appointed the judge. We also examine case-specific data, such as the procedural posture and whether the case was a class action or was brought by an individual plaintiff. We discuss each in turn.

1. *Trend Over Time.* Our data showed that, over time, courts have been less likely to find standing in data-privacy cases. In 2021 and 2022, the proportion of cases finding standing to cases not finding standing was remarkably consistent: 62.5% of cases found standing in 2021, and 66.6% of cases found standing in 2022.¹⁶⁵ By 2023, however, the landscape seems to have changed. Only 53.3% of cases resulted in a decision finding standing across the board.¹⁶⁶ And in 2024, circuit courts found standing in a mere 25% of cases.¹⁶⁷

| Year | No Standing | Partial Standing | Standing | Total |
|--------------|-------------|------------------|-----------|-----------|
| 2021 | 3 | | 5 | 8 |
| 2022 | 5 | | 11 | 16 |
| 2023 | 6 | 1 | 8 | 15 |
| 2024 | 9 | | 3 | 12 |
| Total | 23 | 1 | 27 | 51 |

Figure 1: Cases Citing TransUnion by Year and Standing Result, 2021–2024

2. *Majority Authorship.* Judges appointed by Democratic presidents found standing existed in 16 cases, and found standing lacking in 6 cases. The one per curiam decision¹⁶⁸ reached the conclusion that the plaintiffs had standing. Judges appointed by Republican presidents proved more likely to pen decisions finding no standing existed (17 cases) than decisions in which standing was found (9 cases). A Republican-appointed judge also authored the one decision that found standing for one plaintiff, but not for others.

¹⁶⁵ See *infra* Figure 9.

¹⁶⁶ See *id.*

¹⁶⁷ See *id.*

¹⁶⁸ Here, we count only *Santos v. Healthcare Revenue Recovery Grp., LLC*, 90 F.4th 1144, (11th Cir. 2024), not the early per curiam opinion that the panel vacated, see *Santos v. Healthcare Revenue Recovery Grp., LLC*, 85 F.4th 1351 (11th Cir. 2023).

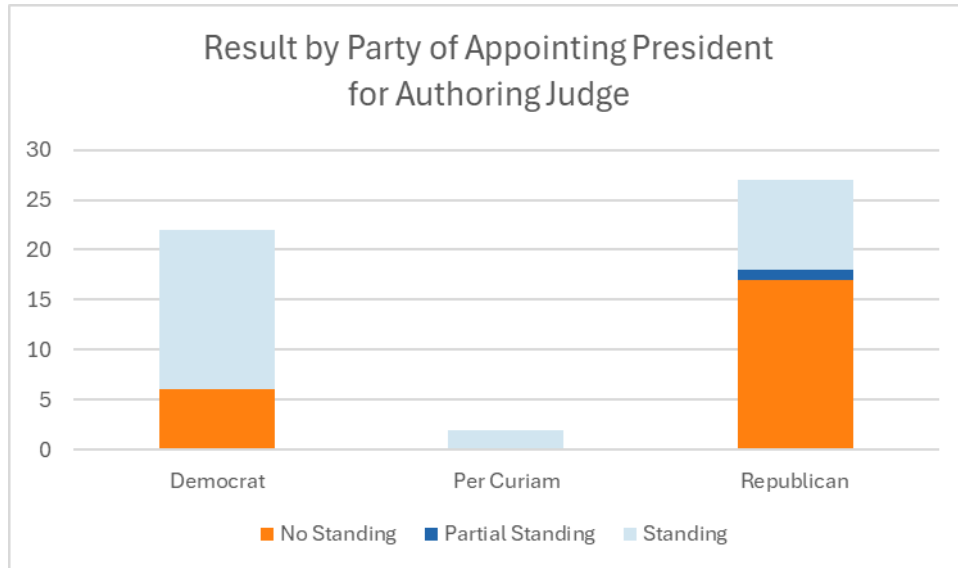


Figure 2: Authoring Judge by Party of Appointing President

But that reading of the data proved simplistic. Dig deeper, and the data revealed something more interesting. Some Republican appointees proved far more likely to pen decisions that found standing in data-privacy cases than others—and the split was significant. Trump appointees authored the most majority opinions finding standing (6 standing; 1 partial standing; 6 no standing). G.W. Bush appointees, on the other hand, proved far less likely to find standing in such a case (1 standing; 5 no standing). Those appointed by other Republican presidents had fewer decisions represented in the data: one Ford appointee authored a decision finding standing, three G.H.W. Bush appointees authored cases finding no standing, and Reagan appointees authored both (1 standing; 3 no standing).

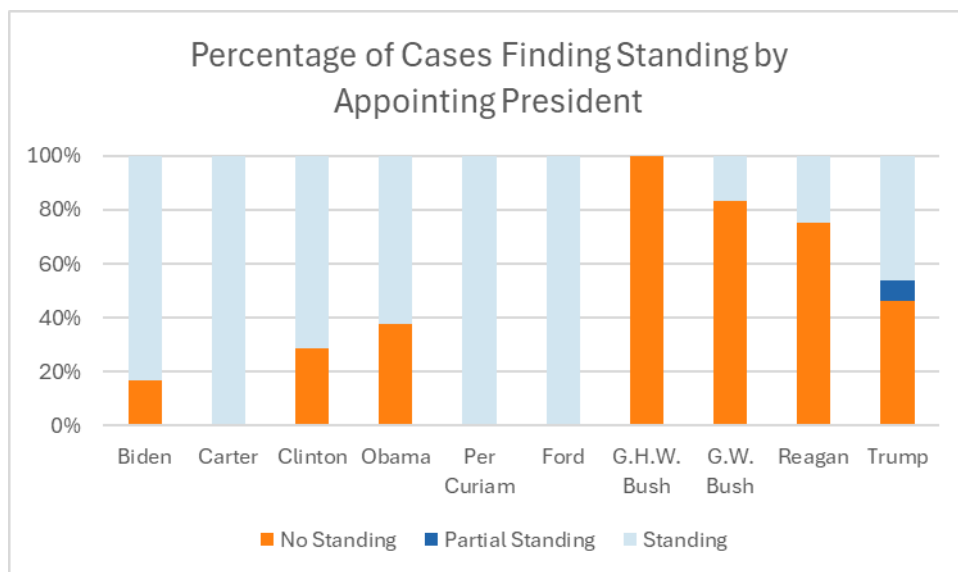


Figure 3: Percentage of Cases Finding Standing by Appointing President

3. *Concurrences and Dissents.* Given the breakdown of cases between Republican and

Democrat appointees, we decided to look next at the concurrences and dissents that accompanied data-privacy standing cases. An outlier quickly emerged: the Eleventh Circuit produced more concurrences and dissents than the rest of the circuits combined. It accounted for 8 concurrences and 5 dissents. It is worth noting, however, that the Eleventh Circuit has had two en banc cases grappling with standing issues.¹⁶⁹ No other circuit went en banc in a data-privacy case citing *TransUnion* between 2021 and 2024.

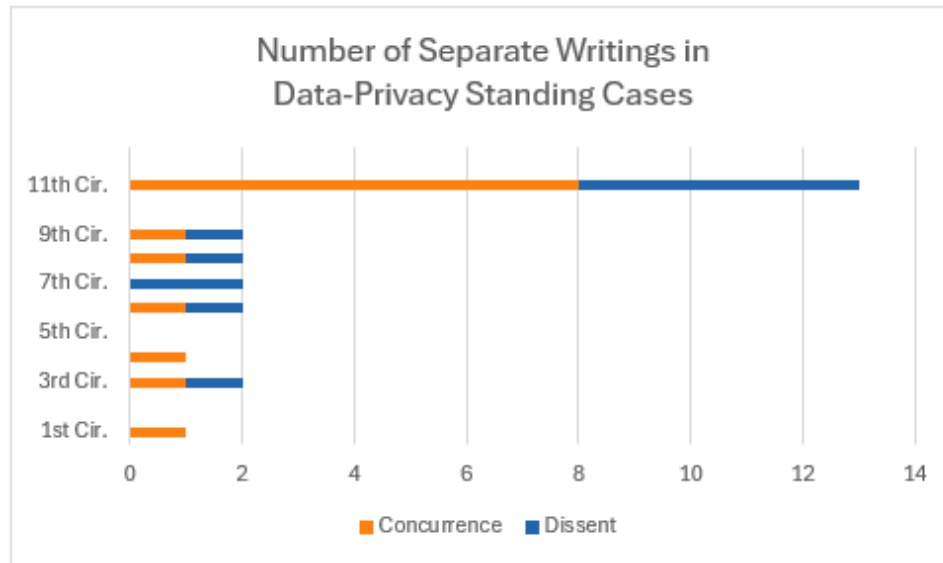


Figure 4: Number of Separate Writings in Data-Privacy Standing Cases

We also analyzed whether decisions finding standing (or not) garnered more concurrences and dissents. We broke this analysis down by appointing president as well. Surprisingly, the number of concurrences was the same for decisions finding standing (7 concurrences) and no standing (7 concurrences). Regardless of decision, Republican appointees were more likely to concur overall (10 concurrences, compared to 4 concurrences by Democrat appointees).

¹⁶⁹ See *Hunstein v. Preferred Collection and Mgmt. Servs., Inc.*, 48 F.4th 1236, 1241 (11th Cir. 2022); *Drazen v. Pinto*, 74 F.4th 1336, 1339 (11th Cir. 2023).

| Decision | Concurrences |
|--------------------|--------------|
| No Standing | 7 |
| Democrat | 2 |
| Carter | 1 |
| Obama | 1 |
| Republican | 5 |
| Ford | 1 |
| G.H.W. Bush | 1 |
| G.W. Bush | 3 |
| Standing | 7 |
| Democrat | 2 |
| Clinton | 1 |
| Obama | 1 |
| Republican | 5 |
| Trump | 5 |

Figure 5: Concurrences of Standing Decisions by Appointing President

Dissents yielded a bigger split. Cases finding standing existed faced only two dissents. Cases finding no standing existed yielded nine dissents—four penned by Democrat appointees, and five penned by Republican appointees.

| Decision | Dissent | Total |
|--------------------|----------|----------|
| No Standing | 9 | 9 |
| Democrat | 4 | 4 |
| Biden | 1 | 1 |
| Clinton | 1 | 1 |
| Obama | 2 | 2 |
| Republican | 5 | 5 |
| G.W. Bush | 1 | 1 |
| Reagan | 1 | 1 |
| Trump | 3 | 3 |
| Standing | 2 | 2 |
| Republican | 2 | 2 |
| Trump | 2 | 2 |

Figure 6: Dissents of Standing Decisions by Appointing President

5. *Procedural Posture*. Article III standing is a jurisdictional issue, so it makes sense that most of the cases reviewed would be at the motion-to-dismiss stage—and they are, by a wide margin. We categorized cases by the most significant part of the proceedings, though WestLaw often lists multiple characteristics of the proceedings. Twenty-one cases were decided on appeals from motions to dismiss, an early stage of proceedings, while seventeen were decided at summary judgment, a more intermediate or final stage.¹⁷⁰ Far fewer cases were decided at final stages in the

¹⁷⁰ *Infra* Figure 7.

proceedings that implicated more judicial resources were expended, such as the single appeal from final judgment case, the single class action settlement, the single panel rehearing, and the single en banc rehearing.¹⁷¹

| Procedural Posture | No Standing | Partial Standing | Standing | Total |
|------------------------------|-------------|------------------|----------|-------|
| Appeal from Final Judgment | 1 | | | 1 |
| Class Action Settlement | | | 1 | 1 |
| Class Certification | 2 | | 4 | 6 |
| Judgment on the Pleadings | | | 1 | 1 |
| Motion for Summary Judgment | 7 | 1 | 9 | 17 |
| Motion to Compel Arbitration | 1 | | | 1 |
| Motion to Dismiss | 9 | | 12 | 21 |
| Motion to Stay | 1 | | | 1 |
| Panel Rehearing | 1 | | | 1 |
| Rehearing En Banc | 1 | | | 1 |

Figure 7: Cases Citing TransUnion by Procedural Posture

Class certification presents an interesting issue because the question of class certification can be wound up with the question of standing, though whether a case is a class action “adds nothing to the question of standing.”¹⁷² As the Supreme Court explained in *TransUnion*: “Every class member must have Article III standing in order to recover individual damages.”¹⁷³ However, the Supreme Court declined to answer the question of “whether every class member must demonstrate standing before a court certifies a class.”¹⁷⁴ Though this question has not been answered, it is not clear that it affects many cases given that most standing issues we reviewed were resolved at the motion to dismiss stage, rather than at class certification.¹⁷⁵

6. *Class Actions*. We next looked at whether standing decisions varied based on whether a case sought relief on behalf of an individual or a class. For class actions, courts found standing existed in 53.3% of cases.¹⁷⁶ For individual actions, that number remained almost exactly the same—52.4%.¹⁷⁷

¹⁷¹ *Id.*

¹⁷² *Simon v. E. Ky. Welfare Rts. Org.*, 426 U.S. 26, 40 n.20 (1976).

¹⁷³ *TransUnion*, 594 U.S. at 431.

¹⁷⁴ *Id.* at 431 n.4.

¹⁷⁵ The Supreme Court granted certiorari in *Laboratory Corporation of America Holdings v. Davis* to address the limited question of “[w]hether a federal court may certify a damages class pursuant to Federal Rule of Civil Procedure 23 when the class includes both injured and uninjured class members,” but then dismissed the writ of certiorari as improvidently granted. *See Lab’y Corp. of Am. v. Davis*, 605 U.S. 327, 328 (2025) (Kavanaugh, J., dissenting).

¹⁷⁶ *Infra* Figure 8.

¹⁷⁷ *Id.*

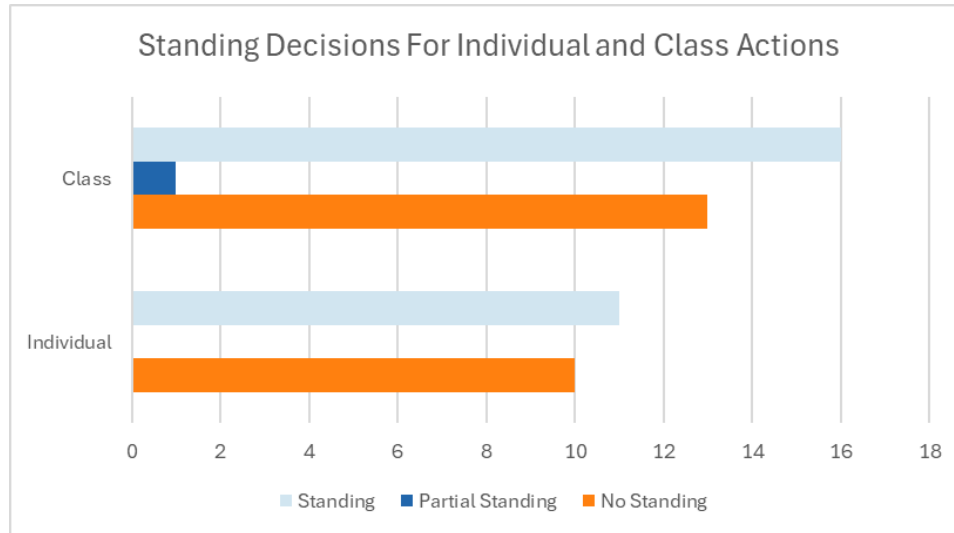


Figure 8: Standing Decisions for Individual and Class Actions

From there, we reviewed the breakdown of class-action standing decisions across the appellate circuits. The Seventh Circuit decided far and away the most data-privacy cases involving class actions—almost double the amount of the next closest circuits, the Third Circuit and the Eleventh Circuit.¹⁷⁸ The Seventh Circuit found a lack of standing in four of those seven class-action cases.¹⁷⁹ Similarly, the Third Circuit held there was no standing in two out of the four class-action data-privacy cases it heard.¹⁸⁰ The Eleventh Circuit, on the other hand, found standing in all four data-privacy class actions that came before it.¹⁸¹ As for the other circuits, they dealt with standing in only a handful of data-privacy class actions each.¹⁸² This data may seem to indicate some circuits are class-action friendly, and some are not, but the lack of volume makes it hard to draw such a conclusion from the data.

¹⁷⁸ *Infra* Figure 9.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.*

| | No Standing | Partial Standing | Standing | Total |
|--------------------------|-------------|------------------|-----------|-----------|
| Individual Action | 10 | | 11 | 21 |
| 1st Cir. | | | 1 | 1 |
| 6th Cir. | 1 | | 2 | 3 |
| 7th Cir. | 3 | | 2 | 5 |
| 8th Cir. | 2 | | 1 | 3 |
| 9th Cir. | 2 | | 2 | 4 |
| 10th Cir. | 1 | | 2 | 3 |
| 11th Cir. | 1 | | | 1 |
| D.C.Cir. | | | 1 | 1 |
| Class Action | 13 | 1 | 16 | 30 |
| 1st Cir. | | | 2 | 2 |
| 2d Cir. | 1 | | 2 | 3 |
| 3rd Cir. | 2 | | 2 | 4 |
| 4th Cir. | 2 | | 1 | 3 |
| 5th Cir. | 1 | | 1 | 2 |
| 6th Cir. | 1 | | 1 | 2 |
| 7th Cir. | 4 | 1 | 2 | 7 |
| 8th Cir. | 2 | | | 2 |
| 9th Cir. | | | 1 | 1 |
| 11th Cir. | | | 4 | 4 |

Figure 9: Individual and Class Actions by Circuit

B. Data-Privacy Specific Findings

With general data analysis out of the way, we turn next to analyze findings specific to data-privacy cases. The data-privacy specific analyses that we conducted were based on the characteristics we looked at across cases. As noted above, we chose which factors to focus on based on what we found in the cases, as well as our own experiences with data privacy litigation. We explored and categorized cases by: cause of action, data type, kind of harm, common-law analogue, and whether the court employed what we call the element-by-element approach in comparing the alleged harm to its common-law analogue. We discuss each in turn.

1. *Cause of Action.* Statutory claims were the primary bases for data-privacy causes of action in our dataset, though there were cases that hinged on constitutional claims (primarily the First Amendment) and state law claims (often a state statute, but also common-law claims).¹⁸³ We categorized cases by which statute formed the base of the claim to see whether the statute relied on impacted standing, and we found that it did.¹⁸⁴

¹⁸³ See *infra* Figure 10.

¹⁸⁴ See *id.*

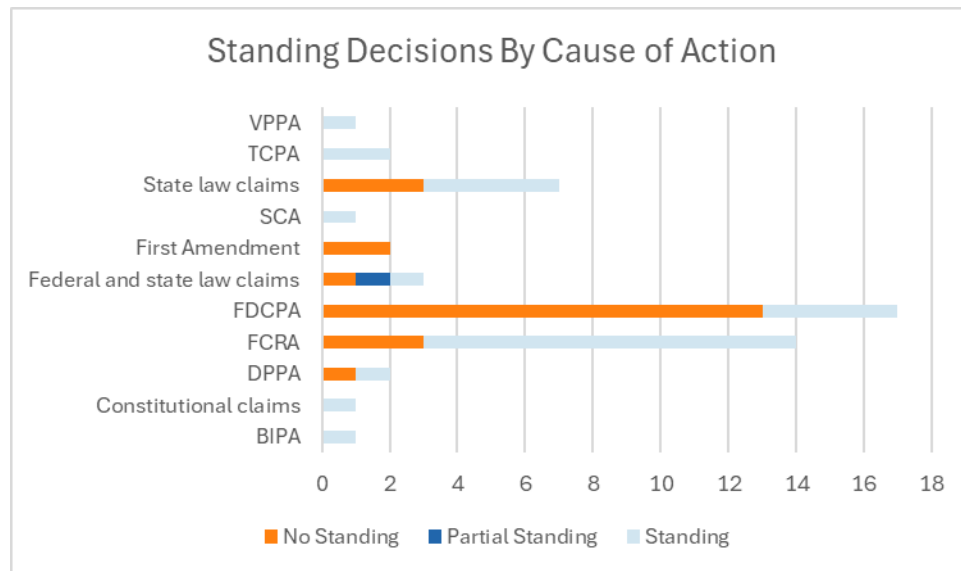


Figure 10: Standing Decisions by Cause of Action

Notably, courts were much less likely to find standing in cases in which plaintiffs relied on the FDCPA (13 did not; 4 did) than in those in which the plaintiffs relied on FCRA (3 did not; 11 did).¹⁸⁵ Though we cannot be sure why this trend exists, we posit that because *TransUnion* itself was based on a FCRA claim,¹⁸⁶ the Supreme Court’s explanation clarified when standing would be found, and alerted plaintiffs and lower-court judges how such an analysis should proceed.¹⁸⁷ In contrast, there is no Supreme Court guidance available on the contours of FDCPA harms,¹⁸⁸ which may make the analysis less clear. Thus, with FCRA cases that mirror *TransUnion*, there is likely a smaller chance of reversal in finding a plaintiff has standing than there is with other statutory claims.

We also found it interesting that plaintiffs relying on state law claims had close to a 50/50 chance of having standing (3 did not; 4 did). As explored below in our circuit-by-circuit findings, in reviewing a case example from the Fourth Circuit, *O’Leary v. TrustedID, Inc.*,¹⁸⁹ causes of action based on state law complaints can present procedural perils. We did not look at whether these cases were originally brought in state court, which has no Article III standing requirement and removed, or whether they originated in federal court—but it would be interesting to do so.

2. *Data Type.* We categorized data by primary type and by subtype to reflect the wide variety of data seen in the cases we reviewed. The bulk of cases (70.5%) involved PII, though within that broad category, many types of PII were at issue, ranging from financial data (debt, credit, etc.) to identification forms (SSN, driver’s license number, contact information,

¹⁸⁵ *Id.*

¹⁸⁶ See *TransUnion*, 594 U.S. at 417 (“In this case, a class of 8,185 individuals sued TransUnion, a credit reporting agency, in federal court under the Fair Credit Reporting Act.”).

¹⁸⁷ See *id.*

¹⁸⁸ See *supra* Figure 10.

¹⁸⁹ *O’Leary v. TrustedID, Inc.*, 60 F.4th 240 (4th Cir. 2023).

citizenship).¹⁹⁰

| Data Type | No Standing | Partial Standing | Standing | Total |
|---|-------------|------------------|-----------|-----------|
| Incorrect information | 4 | | 5 | 9 |
| Location data | | | 1 | 1 |
| PHI | 1 | | 2 | 3 |
| Biometrics | | | 1 | 1 |
| Medical records | 1 | | 1 | 2 |
| PII | 17 | | 17 | 34 |
| Car Accident Information | | | 1 | 1 |
| Citizenship | 1 | | | 1 |
| Contact information | | | 3 | 3 |
| Credit | | | 4 | 4 |
| Debt | 5 | | 3 | 8 |
| Driver's License | 1 | | | 1 |
| Financial | 8 | | 3 | 11 |
| Multiple (SSN, TIN, DLN, Passport Number) | | | 1 | 1 |
| OFAC List | | | 1 | 1 |
| SSN | 1 | | | 1 |
| Video viewing | | | 1 | 1 |
| Web Browsing | 1 | | | 1 |
| PII / PHI | | | 2 | 2 |
| Multiple (SSN, DOB, financial, credit, medical records) | | | 1 | 1 |
| Multiple (financial, medical records) | | | 1 | 1 |
| Video | 1 | 1 | | 2 |
| Prison surveillance | | 1 | | 1 |
| Sealed bench trial | 1 | | | 1 |
| Total | 23 | 1 | 27 | 51 |

Figure 11: Data by Type and Subtype

Within the PII category, most cases concerned some form of financial data (67.6%), which includes various financial, credit, and debt data.¹⁹¹ Standing was found in 100% of cases that involved credit data, 37.5% of cases involving debt data, and in only 27.3% of cases that involved broader financial data.¹⁹²

Beyond financial data, most data types appeared so infrequently that it is hard to draw any conclusions. However, there was a notable percentage of cases involving incorrect information (17.6%) of which 50% of the plaintiffs were found to have standing.¹⁹³ And the two cases in which plaintiffs cited multiple types of data were found to satisfy standing, perhaps indicating that the more types of data harms listed, the more likely one is to satisfy the harm requirement.¹⁹⁴ Lastly, we note that we were surprised that 100% of cases involving contact information satisfied standing requirements, given how readily available contact information may be through legal means (e.g., people search sites).

3. *Kind of Harm.* Unsurprisingly, the vast majority of data-privacy cases involved intangible harms. Data-privacy issues often involve informational injuries, whether that injury involves the withholding, acquisition, use, or dissemination of personal information.¹⁹⁵ Moreover,

¹⁹⁰ *Infra* Figure 11.

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ See Peter Ormerod, *Privacy Injuries and Article III Concreteness*, 48 FL. ST. UNIV. L. REV. 133, 141–49 (2021) (drawing upon scholarship from Daniel Solove and Seth Kreimer to “taxonomize[] these informational injuries” into the four categories described).

many data-privacy cases rest on statutory claims: “[m]any contemporary privacy laws . . . create new consumer rights in personal data.”¹⁹⁶ These kinds of cases may draw scrutiny from judges as involving “bare procedural” violations rather than a concrete, intangible harm.¹⁹⁷ Given these considerations, it made sense that 98% of cases involved intangible harms. Restrict that number to cases that included only intangible harms, and the number remains high, at 86.6%.¹⁹⁸

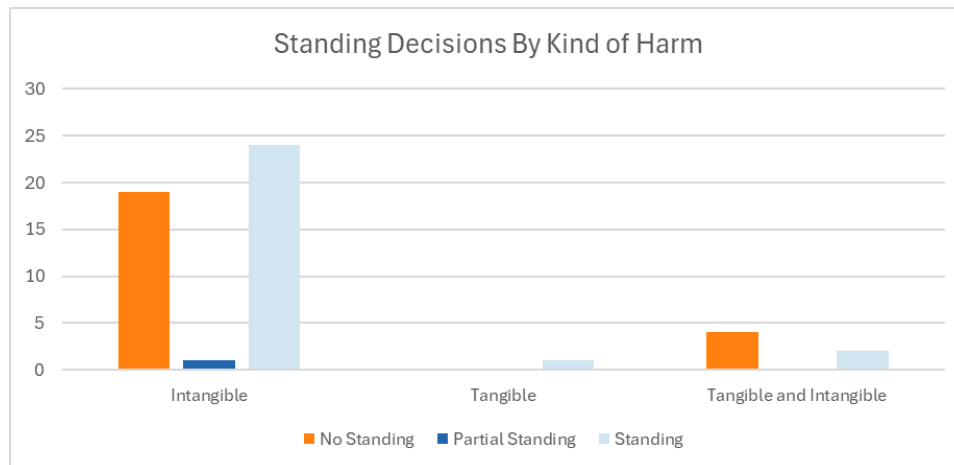


Figure 12: Standing Decisions by Kind of Harm

That being said, we expected to see a clear split between the standing success of cases alleging intangible and tangible harms. To be sure, the one case that involved only tangible harm resulted in a finding of Article III standing.¹⁹⁹ But among those that involved both tangible and intangible harms, the results were decidedly mixed: showing standing proved a one in three chance.²⁰⁰ Interestingly, cases involving intangible harms alone proved more successful than cases involving both tangible and intangible harm, with a 56.8% success rate—perhaps having a tangible harm to directly compare to was detrimental to the intangible harm.²⁰¹

4. *Common-Law Analogue.* Given *TransUnion*’s directive to look to history, we wanted to know what common-law analogues plaintiffs and courts relied on to satisfy the concrete harm requirement.²⁰² As might be predictable given *TransUnion*’s invocation of defamation and the clear explanation from the Supreme Court on how a statutory harm compares to that tort, 80% of cases involving that common-law analogue were found to have standing.²⁰³

¹⁹⁶ ERIC N. HOLMES, CONG. RSCH. SERV., LSB10629, PRIVACY LAW AND PRIVATE RIGHTS OF ACTION: STANDING AFTER *TransUnion v. Ramirez* (2021).

¹⁹⁷ *Spokeo*, 578 U.S. at 342.

¹⁹⁸ See *infra* Figure 12.

¹⁹⁹ See *Wiener v. MIB Grp., Inc.*, 86 F.4th 76 (1st Cir. 2023).

²⁰⁰ *Supra* Figure 12.

²⁰¹ *Id.*

²⁰² *TransUnion*, 594 U.S. at 424.

²⁰³ *Infra* Figure 13.

| Common-Law Analogue | No Standing | Standing | Grand Total |
|--|-------------|-----------|-------------|
| Appropriation of likeness | | 1 | 1 |
| Breach of Contract | 1 | | 1 |
| Defamation | 1 | 4 | 5 |
| Fraudulent Misrepresentation | 1 | | 1 |
| Intrusion on Seclusion | 3 | 5 | 8 |
| Invasion of Privacy | 1 | 1 | 2 |
| Libel / Slander | 1 | | 1 |
| Multiple | 7 | 3 | 10 |
| Intrusion on Seclusion, Fraudulent Misrepresentation | 1 | | 1 |
| Intrusion on Seclusion, Public Disclosure of Private Facts | 2 | 1 | 3 |
| Invasion of Privacy, Public Disclosure of Private Facts | 1 | | 1 |
| Invasion of Privacy, Reputational Harm | 1 | 1 | 2 |
| Invasion of Privacy, Trespass to Chattels | | 1 | 1 |
| Procedural Due Process, Nondisclosure and Fraudulent Misrepresentation, Invasion of Privacy, Contractual Misrepresentation | 1 | | 1 |
| Defamation, False Light, Intrusion on Seclusion, Invasion of Privacy, Abuse of Process | 1 | | 1 |
| Public Disclosure of Private Facts | 3 | 3 | 6 |
| Unjustifiable Litigation | 1 | | 1 |
| Emotional Distress | | 1 | 1 |
| Grand Total | 19 | 18 | 37 |

Figure 13: Cases Citing TransUnion by Common-Law Analogue

Invoking multiple common-law torts was most common; 27% of cases did so.²⁰⁴ The common-law tort most likely to be invoked on its own was intrusion on seclusion, which was cited in 29.7% of cases.²⁰⁵ Interestingly, citing multiple common-law harm comparisons did not seem to increase the chance that a court would find standing (30% had standing).²⁰⁶ Citing to intrusion on seclusion alone was more likely to result in a court finding standing (62.5%).²⁰⁷ Invoking a single common-law analogue may benefit plaintiffs by allowing them to spend more time (and pages) developing the argument that the analogue applies. Perhaps because of this, we saw the invocation of multiple common-law analogues drop over time: five cases cited multiple analogues in 2022; three in 2023, and only two in 2024.²⁰⁸

A surprising 26% of cases involving intangible harms cited no common-law analogue at all, despite *Spokeo* and *TransUnion*'s admonition to check for a close relationship with a traditional harm.²⁰⁹ Nevertheless, standing or partial standing was found in all of those cases.²¹⁰ It is not clear from these findings what the best approach is in terms of clearly citing a common-law analogue as a plaintiff. However, it generally appears that plaintiffs have more success when invoking a single well-understood harm, like intrusion on seclusion, rather than citing multiple common-law analogues.²¹¹

We were surprised to see invasion of privacy appear, especially alone.²¹² Generally, “‘invasion of privacy’ is a general term used to describe four different torts, each with distinct

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ See *Spokeo*, 578 U.S. at 341; *TransUnion*, 594 U.S. at 417.

²¹⁰ See *supra* Figure 13.

²¹¹ *Id.*

²¹² *Id.*

elements and a separate interest that can be invaded.”²¹³ These four torts consist of “intrusion upon seclusion, appropriation of another person’s name or likeness, publicity given to another person’s private life, and publicity that places one in a false light.”²¹⁴ Given the number of cases involving a strict element-by-element approach, discussed in Part III.B.5, the invocation of a general “umbrella” tort seemed less strategic than selecting a closer, more specific analogue.

Of course, it is worth noting that the articulation of these four torts came during the latter half of the twentieth century.²¹⁵ Samuel Warren and Louis Brandeis first pinpointed “[t]he idea of privacy as a legal right” in their landmark 1890 article.²¹⁶ The article “led to state courts adopting generalized privacy torts in the common law.”²¹⁷ Nearly a century later, William Prosser reviewed “all the common law cases that had stemmed from Warren and Brandeis’s article and distilled them down into” the “four types of torts” described above.²¹⁸ Prosser’s individual “doctrinal instincts” had such uptake that it “now permeates case law,” and “[i]ts classifications have taken on the status of doctrine.”²¹⁹ Litigants’ embrace of the four well-known privacy torts serves to further “ossif[y] the common law’s protection of privacy beyond the ossification already caused by Prosser.”²²⁰

These litigants also miss an opportunity. *Spokeo* and *TransUnion* require analogizing to harms that “English or American courts” would have “traditionally . . . regarded as providing a basis for a lawsuit.”²²¹ But few of the cases we surveyed performed the kind of intense historical analysis this requirement seems to encourage. Litigants who dig deeper may force courts to give their standing contentions more consideration. Consider the tort of intrusion on seclusion. Depending on the facts of the case, it may prove more beneficial to invoke eavesdropping instead.²²² Blackstone himself catalogued this ancient common-law crime, describing it as “listen[ing] under walls or windows, or the eaves of a house, to hearken after discourse, and thereupon to frame slanderous and mischievous tales.”²²³

Indeed, this seems to be Justice Thomas’s own approach. In his *Spokeo* concurrence, Justice Thomas discussed what common-law courts considered the violation of a private right at the Founding.²²⁴ The bar was not high. Indeed, “when one man placed his foot on another’s

²¹³ *Schumacher v. SC Data Ctr., Inc.*, 33 F.4th 504, 514 (8th Cir. 2022) (citation omitted).

²¹⁴ *Nabozny v. Optio Sols. LLC*, 84 F.4th 731, 735 (7th Cir. 2023) (citing Restatement (Second) of Torts, § 652A (Am. L. Inst. 1977)).

²¹⁵ See Summer Elliot, *There’s No Understanding Standing for Privacy: An Analysis of TransUnion v. Ramirez*, 37 BERK. TECH. L.J. 1379, 1385 (2022); Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

²¹⁶ Elliot, *supra* note 215, at 1385.

²¹⁷ *Id.* at 1386.

²¹⁸ *Id.*; see Prosser, *Handbook of the Law of Torts*, § 117 (4th ed. 1971).

²¹⁹ Danielle Keats Citron, *Mainstreaming Privacy Torts*, 98 CALIF. L. REV. 1805, 1823–24 (2010).

²²⁰ Citron & Solove, *supra* note 99, at 824.

²²¹ *Spokeo*, 578 U.S. at 341; see *TransUnion*, 594 U.S. at 425.

²²² For example, in *Lopez v. Apple, Inc.*, 558 F. Supp. 3d 821, 824 (N.D. Cal. 2021), plaintiffs alleged that “Apple’s voice-activated ‘Siri’ software . . . is routinely triggered by ‘accidental activations’ when the user neither intends nor expects it to be ‘listening’ and thereafter records voice conversations” and “discloses these accidentally-recorded conversations to third-party contractors.” *Id.* at 824. These allegations map on to common-law eavesdropping.

²²³ Daniel J. Solove, *A Taxonomy of Privacy*, 154 U. PA. L. REV. 477, 492 (2006) (discussing Blackstone’s definition and the evolution of eavesdropping over the years) (citing 4 WILLIAM BLACKSTONE, COMMENTARIES *169).

²²⁴ *Spokeo*, 578 U.S. at 344–46 (Thomas, J., concurring).

property, the property owner needed to show nothing more to establish a traditional case or controversy.”²²⁵ And in his *TransUnion* dissent, Justice Thomas pinpointed an early American case rejecting an argument similar to the one the credit bureau made: that “the making of a machine cannot be an offence, because . . . there can be no actual damages, or even a rule for damages, for an infringement by making a machine.”²²⁶

Uzuegbunam v. Preczewski reflects this approach.²²⁷ There, students sought nominal damages in a lawsuit against college officials in charge of enforcing campus speech policies alleged to violate the First Amendment. Writing for the majority, Justice Thomas emphasized that “[b]oth sides agree that nominal damages historically could provide prospective relief”; as he explained, “[t]he award of nominal damages was one way for plaintiffs at common law to ‘obtain a form of declaratory relief in a legal system with no general declaratory judgment act.’”²²⁸ That meant the plaintiffs satisfied the injury element of standing.²²⁹ He then traced the historical use of nominal damages in common-law courts. And “[b]ecause nominal damages were available at common law in analogous circumstances,” the Court held that a nominal-damages request “satisfies the redressability element of standing where a plaintiff’s claim is based on a completed violation of a legal right.”²³⁰

Leveraging this tactic may seem difficult or distasteful to some.²³¹ But given the state of the law post-*Spokeo* and *TransUnion*, looking to the past may prove the most effective means of pushing the law forward for the foreseeable future.

One last note on common-law analogues. In addition to tracking the prevalence of each common-law analogue itself, we looked to see whether cases involving specific causes of action favored particular analogues. We also found that whether a common-law analogue was likely to satisfy the concrete harm corollary required by *TransUnion* seemed to depend on what the underlying cause of action was. It may be that the common-law harm invoked matters less than the cause of action relied upon.

²²⁵ *Id.* (citing *Entick v. Carrington*, 2 Wils. K.B. 275, 291, 95 Eng. Rep. 807, 817 (1765)).

²²⁶ *TransUnion*, 594 U.S. at 447 (Thomas, J. dissenting) (quoting *Whittemore v. Cutter*, 29 F. Cas. 1120, 1121 (No. 17,600) (CC Mass. 1813)). As Justice Thomas noted, Justice Story heard the case while riding circuit and rejected the theory. *Id.* at 448.

²²⁷ See *Uzuegbunam v. Preczewski*, 592 U.S. 279 (2021).

²²⁸ *Id.* at 284–85.

²²⁹ *Id.*

²³⁰ *Id.* at 291–92.

²³¹ Of course, this is reflective of a broader debate about originalism. Compare Stephen E. Sachs, *Originalism: Standard and Procedure*, 135 HARV. L. REV. 778 (2022), with Joseph Blocher & Brandon L. Garrett, *Originalism and Historical Fact-Finding*, 112 GEO. L. REV. 699 (2024).

| Common-Law Analogues | | | |
|-------------------------------------|--------------------|-----------------|--------------------|
| By Cause of Action | No Standing | Standing | Grand Total |
| DPPA | 1 | 1 | 2 |
| Intrusion on Seclusion | 1 | | 1 |
| Invasion of Privacy | | 1 | 1 |
| FCRA | 3 | 5 | 8 |
| Defamation | 1 | 3 | 4 |
| Intrusion on Seclusion | | 1 | 1 |
| Multiple | 1 | 1 | 2 |
| FDCPA | 10 | 4 | 14 |
| Defamation | | 1 | 1 |
| Fraudulent Misrepresentation | 1 | | 1 |
| Intrusion on Seclusion | 1 | 2 | 3 |
| Invasion of Privacy | 1 | | 1 |
| Multiple | 3 | | 3 |
| Public Disclosure of Private Facts | 3 | | 3 |
| Unjustifiable Litigation | 1 | | 1 |
| Emotional Distress | | 1 | 1 |
| Federal and state law claims | 1 | 1 | 2 |
| Intrusion on Seclusion | 1 | | 1 |
| Multiple | | 1 | 1 |
| First Amendment | 2 | | 2 |
| Breach of Contract | 1 | | 1 |
| Multiple | 1 | | 1 |
| SCA | | 1 | 1 |
| Multiple | | 1 | 1 |
| State law claims | 3 | 3 | 6 |
| Appropriation of likeness | | 1 | 1 |
| Libel / Slander | 1 | | 1 |
| Multiple | 2 | | 2 |
| Public Disclosure of Private Facts | | 2 | 2 |
| TCPA | | 2 | 2 |
| Intrusion on Seclusion | | 2 | 2 |
| VPPA | | 1 | 1 |
| Public Disclosure of Private Facts | | 1 | 1 |

Figure 14: Common-Law Analogue by Cause of Action

A few points stood out. Generally, courts do not seem to think standing requirements are satisfied when the FDCPA forms the cause of action, regardless of the common-law analogue invoked. Conversely, FCRA and TCPA claims have more success (though we also note that in both TCPA claims, intrusion upon seclusion was the common-law analogue).²³²

Our conclusion from these results is that *TransUnion* is breathing new life into old torts. We see that these older, common-law torts are being invoked frequently—and with some success—to supply the concrete harm necessary to satisfy Article III standing for newer statutory

²³² See *supra* Part II (explaining dataset used).

harms.²³³ Yet this trend may have unforeseen consequences: As prominent data-privacy scholar Danielle Keats Citron has explained, although the four invasion-of-privacy torts “provided a pragmatic response to twentieth-century privacy intrusions, [they] leave[] many contemporary privacy injuries uncompensated.”²³⁴ Limiting concrete data-privacy injuries to those that track common-law torts may ossify privacy law²³⁵—but it may also encourage creative pleading that pushes the boundaries of how courts have historically conceptualized these torts. Time will tell whether these torts’ new life takes the form of analogues alone, or whether we will see an increase in cases filed explicitly pleading these kinds of common-law claims in data-privacy cases.

5. *Element-by-Element Approach*. Our final piece of analysis involved the element-by-element approach, described above.²³⁶ Although the approach is used in a minority of data-privacy standing cases, it resulted in a disproportionate number of decisions finding a lack of standing: 78.5% of courts that employed the approach found no standing existed, compared to only 34.7% of courts that did not.²³⁷

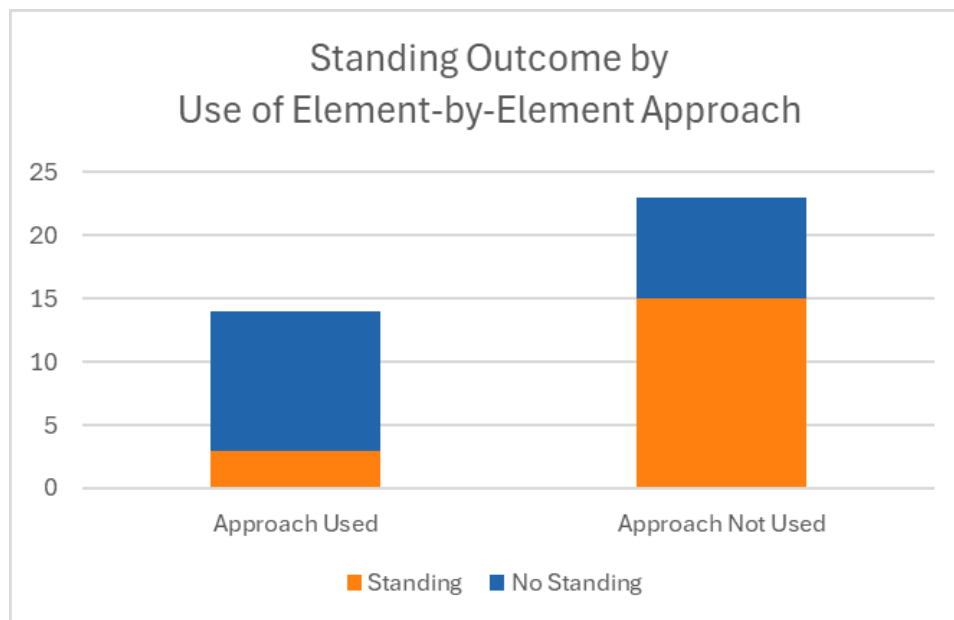


Figure 15: Standing Outcome by Use of Element-by-Element Approach

Given the outsized impact of this approach, we looked to see how frequently each circuit used element-by-element analysis. A handful of circuits used the approach once (namely, the Tenth, Ninth, Fifth, Fourth, and Second Circuits).²³⁸ Others employed it more often (the Eleventh, Seventh, and Sixth Circuits). And some never employed it at all (the Eighth, Third, and First

²³³ *Id.*

²³⁴ Citron, *supra* note 219 at 1824.

²³⁵ See generally Elliot, *supra* note 215.

²³⁶ See *supra* Part 11. *Element-by-Element Approach*.

²³⁷ See *supra* Part II. (explaining dataset used).

²³⁸ *Id.*

Circuits).²³⁹

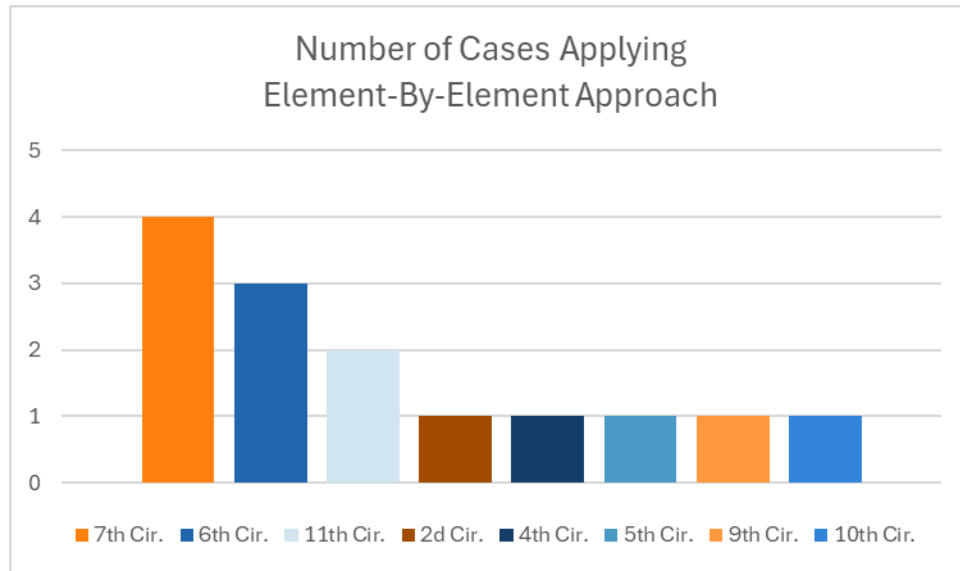


Figure 16: Circuit Use of Element-by-Element Approach

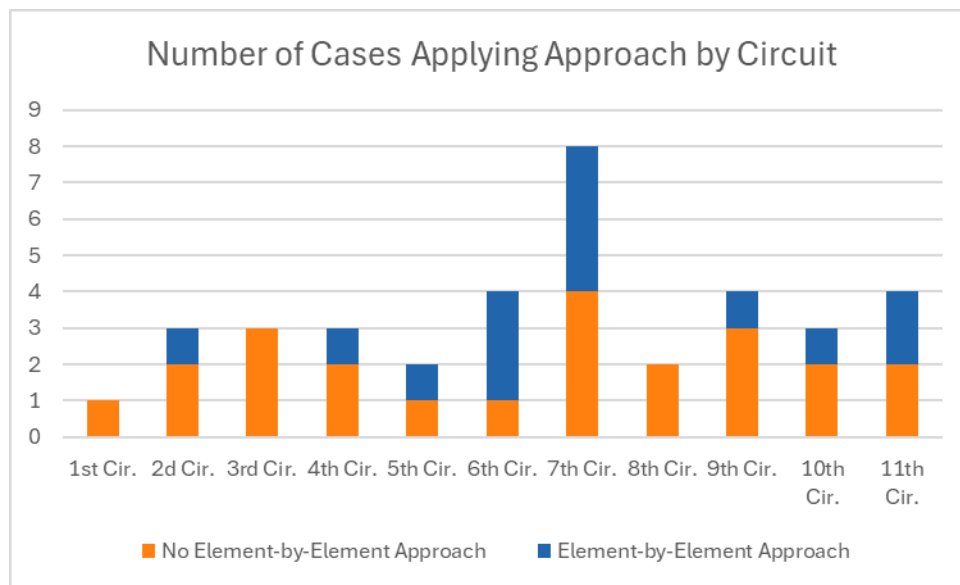


Figure 17: Number of Cases Applying Each Approach by Circuit

Interestingly, use of the approach broke down fairly cleanly by whether a Republican or Democrat president appointed the judge authoring the majority opinion. Only two opinions authored by Democrat appointees employed the approach; the one per curiam opinion did not use it either. In contrast, twelve opinions authored by Republican appointees used it.

²³⁹ *Id.*

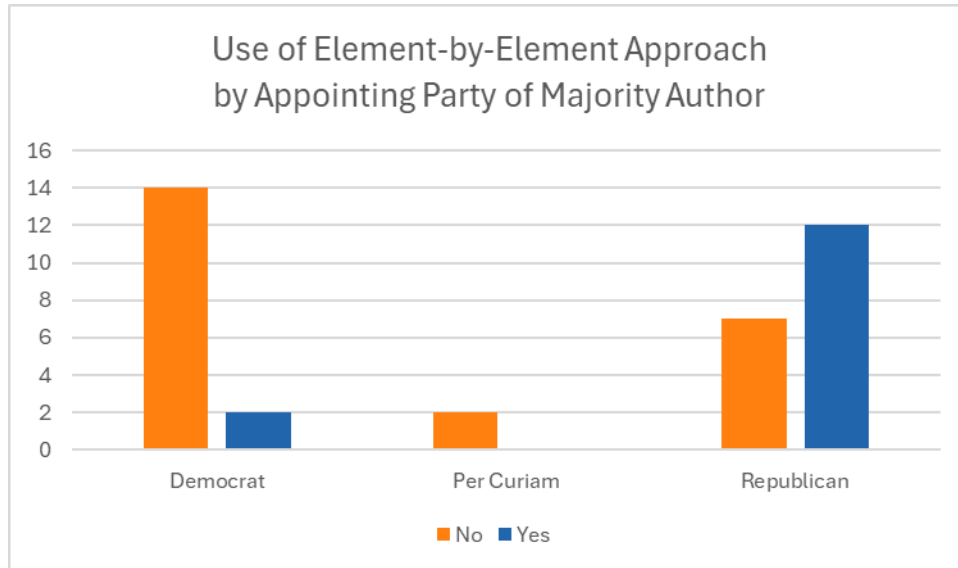


Figure 18: Use of Element-by-Element Approach by Appointing Party of Majority Author

The use of this approach, especially when applied strictly, lies uncomfortably beside the *TransUnion* decision. Although the Supreme Court requires a “close relationship” to a common-law harm, it “do[es] not require an exact duplicate”—the harm need only be “analog[ous].”²⁴⁰ Consider how *TransUnion* analyzed the portion of the class whose terrorist-watch-list alerts had been disseminated to third-party businesses.²⁴¹ The Supreme Court held that those class members suffered an injury closely related to “the reputational harm associated with the tort of defamation.”²⁴²

One problem is that defamation does not create liability for the dissemination of disparaging facts that are true.²⁴³ The credit-reporting agency mislabeled the class members as terrorists because they “shared a first and last name” with someone on the watch list.²⁴⁴ And as *TransUnion* argued in front of the Supreme Court, “[n]o one . . . ever disputed that each class member *in fact* ha[d] a first and last name of someone on the [terror watch] list.”²⁴⁵ The alert, in other words, had validity.

The Supreme Court rejected this argument against standing.²⁴⁶ Because an “exact duplicat[ion]” of a traditional harm was not required,²⁴⁷ it “concluded that truthfully labeling someone a ‘potential terrorist’—which would *not* have been actionable defamation at common law—was ‘sufficiently close’ to the harm of falsely labeling someone an actual terrorist to

²⁴⁰ *TransUnion*, 594 U.S. at 424, 433.

²⁴¹ *See id.* at 421.

²⁴² *Id.* at 432.

²⁴³ *See Curtis Publ’g Co. v. Butts*, 388 U.S. 130, 151 (1967).

²⁴⁴ *TransUnion*, 594 U.S. at 419–20.

²⁴⁵ *See Reply Br. of Pet’r at 8, TransUnion LLC v. Ramirez*, No. 20-297 (U.S. 2021).

²⁴⁶ *See TransUnion*, 594 U.S. at 433.

²⁴⁷ *Id.*

represent an actionable new harm.”²⁴⁸ Put simply, it declined to apply a strict element-by-element approach.

And some circuits are starting to note the incongruity of applying an element-by-element by analysis to post-TransUnion cases—and then rejecting the approach wholesale. A split is consequently starting to form between what we describe as the type or kind of harm approach and the element-by-element approach. In *Barclift v. Keystone Credit Services, LLC*,²⁴⁹ the Third Circuit details the emerging split.²⁵⁰ First, the court explains that its sister circuits have interpreted the common-law analogue in two ways with “[s]ome espous[ing] an element-based approach, wherein a plaintiff’s alleged harm must not lack any element of the comparator tort that was essential to liability at common law” while “[o]thers compare the kind of harm a plaintiff alleges with the kind of harm caused by the comparator tort.”²⁵¹

The court then explains that it views the kind-of-harm approach as “more faithful to TransUnion.”²⁵² It continues: “TransUnion speaks only of harms, not elements. Indeed, the word ‘element’ does not appear once in the body of the TransUnion opinion. We believe that if the Court wanted us to compare elements, it would have simply said so.”²⁵³ The Fifth Circuit reached a similar conclusion: “That inquiry does not look to an exact analog at common law, but rather to harms that are close ‘in kind, not degree’ to those traditionally remedied in American courts.”²⁵⁴

In contrast, as Figure 16 above shows, while several circuits have employed the element-by-element approach at least, the Seventh, Sixth, and Eleventh appear to be taking the lead in employing exact element comparators for common-law analogues.

We believe this will be an area of interest in the coming years, as a circuit split appears to be developing between these two approaches. Though the Supreme Court denied certiorari in *Barclift*²⁵⁵, it may be forced to articulate, yet again, the exact way courts should view these common-law analogues when verifying their jurisdiction over a case if the split continues to grow.

C. Circuit-by-Circuit Overview

Federal appellate courts across the country decide standing issues each day. For decisions involving standing in the data-privacy context, however, some circuits contribute to the conversation more than others. In the discussion that follows, we discuss each circuit in turn.

²⁴⁸ Beske, *The Court and the Private Plaintiff*, *supra* note 60, at 29–30; *see* Beske, *Charting a Course Past Spokeo and TransUnion*, *supra* note 59.

²⁴⁹ *See* *Barclift v. Keystone Credit Services, LLC*, 93 F.4th 136 (3d Cir. 2024), *cert. denied*, No. 23-1327, 2024 WL 4426674 (U.S. Oct. 7, 2024).

²⁵⁰ *Id.* at 145.

²⁵¹ *Id.* at 144.

²⁵² *Id.*

²⁵³ *Id.*

²⁵⁴ *Calogero v. Shows, Cali & Walsh, L.L.P.*, 95 F.4th 951, 958 (5th Cir. 2024).

²⁵⁵ *See supra* note 249.

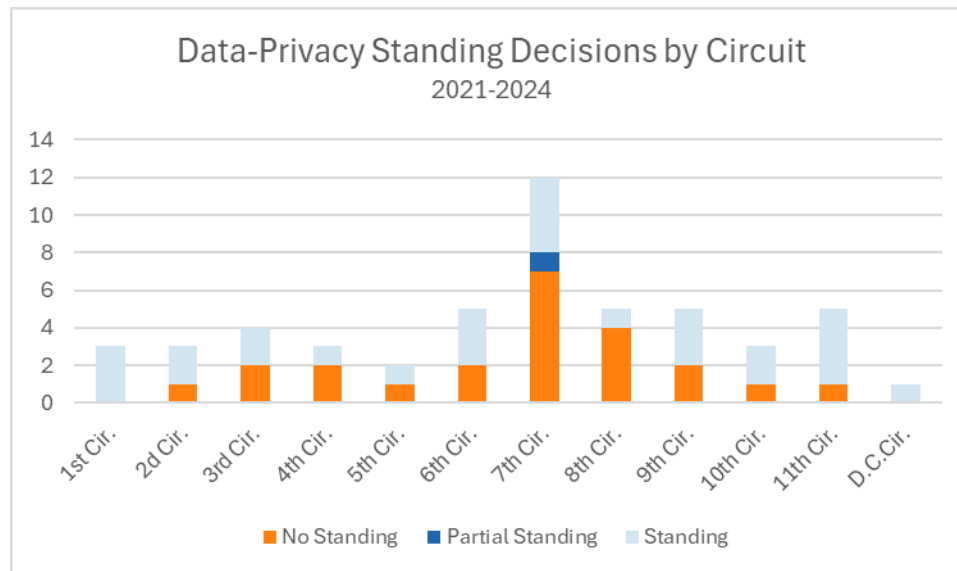


Figure 179: Data-Privacy Standing Decisions by Circuit, 2021-2024

1. *First Circuit.* We reviewed fifteen published cases from the First Circuit that cited *TransUnion* between its publication and the end of 2024. Of those fifteen, three were about data privacy and the Court determined the plaintiffs had standing in all three. In one of those cases, plaintiffs were found to have standing based on a tangible harm²⁵⁶—the only case in our dataset dealing with a tangible harm alone.²⁵⁷ In *Wiener v. MIB Group Inc.*, the Court declined to reach the issue of whether the plaintiff’s alleged emotional distress harm was sufficient for Article III standing because it found that the alleged out-of-pocket loss from attorney’s fees and costs sufficed.²⁵⁸

2. *Second Circuit.* Four of the twenty-two published cases from the Second Circuit that cited *TransUnion* between its publication and the end of 2024 related to data privacy. As detailed in the introduction, one of those cases, in which the plaintiffs did not have standing, resulted from a panel rehearing decided in the wake of *TransUnion*.²⁵⁹ The Second Circuit had another case based on state law claims, in which plaintiffs were found to have standing, in late 2023.²⁶⁰ However, unlike in *Maddox II*, which relied on a state statute,²⁶¹ the state law claims asserted in *Bohnak v. Marsh & McLennan Companies* were for negligence, breach of implied contract, and breach of confidence²⁶²—perhaps the most historical of common-law harms.

3. *Third Circuit.* We reviewed nineteen published cases from the Third Circuit that cited

²⁵⁶ *Wiener v. MIB Grp., Inc.*, 86 F.4th 76 (1st Cir. 2023).

²⁵⁷ *See id.* Four other cases involved both tangible and intangible harm. *See Kelly v. RealPage Inc.*, 47 F.4th 202 (3d Cir. 2022); *Perez v. McCreary, Veselka, Bragg, & Allen, P.C.*, 45 F.4th 816 (5th Cir. 2022); *Rydholm v. Equifax Info. Servs. LLC*, 44 F.4th 1105, 1108 (8th Cir. 2022); *Ojogwu v. Rodenburg L. Firm*, 26 F.4th 457 (8th Cir. 2022).

²⁵⁸ *Wiener*, 86 F.4th at 84–85.

²⁵⁹ *Maddox II*, 19 F.4th at 64.

²⁶⁰ *Bohnak v. Marsh & McLennan Companies, Inc.*, 79 F.4th 276, 283 (2d Cir. 2023).

²⁶¹ *Maddox II*, 19 F.4th at 60.

²⁶² *Bohnak*, 79 F.4th at 282.

TransUnion between its publication and the end of 2024; four of those were data-privacy related. In two of the four cases, the Court found that the plaintiffs had standing. One of the cases in which standing was found, *Clemens v. ExecuPharm Inc.*, provides an informative illustration as it analyzed a ransomware attack on a company that led to a former employee’s data being leaked on the dark web.²⁶³ In assessing whether the plaintiff had standing to pursue her contract and tort claims based on her employment contract, the Third Circuit compared the facts with a pre-*TransUnion* hacking case.²⁶⁴ The previous case involved an unknown hacker who potentially gained access to sensitive information, while *Clemens* involved a known hacker who definitely accessed sensitive information.²⁶⁵ In determining *Clemens* faced a substantial risk, the Court noted the “nefarious intent” of the hackers, as well as the fact that the hacker “*intentionally* gained access to and *misused* the data.”²⁶⁶ It is not entirely clear from the analysis why this hacker was so nefarious as to satisfy the imminence requirement, while the previous hacker was not—perhaps it was the eleven-year gap and subsequent prevalence of ransomware attacks that impacted the outcome.

4. *Fourth Circuit.* Of the thirteen published cases from the Fourth Circuit that cited *TransUnion* between its publication and the end of 2024, five concerned data privacy. One case provides an interesting look at the procedural perils Article III can cause related to state law claims and how those perils consume judicial resources.²⁶⁷ In *O’Leary v. TrustedID, Inc.*, the plaintiff filed in state court asserting violations of a state statute and the common-law right to privacy; the defendant removed to federal court under the Class Action Fairness Act.²⁶⁸ The plaintiff then filed a motion to determine subject-matter jurisdiction, or, in the alternative, remand.²⁶⁹ The defendant argued the plaintiff had sufficiently alleged standing, and the district court agreed.²⁷⁰ On appeal, however, the Fourth Circuit determined that the plaintiff did not have standing because he alleged only a “bare statutory violation,” and vacated and remanded with instructions to remand to state court.²⁷¹

5. *Fifth Circuit.* Only two of the thirty-five published cases from the Fifth Circuit that cited *TransUnion* between its publication and the end of 2024 had anything to do with data privacy. The remaining cases in the Fifth Circuit provide an interesting look at the many ways which *TransUnion* affects other areas of law,²⁷² but there did not appear to be much data-privacy

²⁶³ *Clemens v. ExecuPharm Inc.*, 48 F.4th 146, 150–51 (3d Cir. 2022).

²⁶⁴ *Id.* at 156–57 (comparing the facts in *Clemens* with *Reilly v. Ceridian Corp.*, 664 F.3d 38 (3d Cir. 2011)).

²⁶⁵ *Id.*

²⁶⁶ *Id.* at 157.

²⁶⁷ *O’Leary*, 60 F.4th 240.

²⁶⁸ *Id.* at 241.

²⁶⁹ *Id.* at 242.

²⁷⁰ *Id.*

²⁷¹ *Id.* at 242, 246.

²⁷² See, e.g., *All. for Hippocratic Med. v. U.S. Food & Drug Admin.*, 78 F.4th 210 (5th Cir.), *cert. granted sub nom.* *FDA v. All. for Hippocratic Med.*, 144 S. Ct. 537 (2023), and *cert. granted sub nom.* *Danco Lab’sys, L.L.C. v. All. for Hippocratic Med.*, 144 S. Ct. 537 (2023), and *cert. denied sub nom.* *All. for Hippocratic Med. v. FDA*, 144 S. Ct. 537 (2023); *Braidwood Mgmt., Inc. v. EEOC*, 70 F.4th 914 (5th Cir. 2023); *A & R Eng’g & Testing, Inc. v. Scott*, 72 F.4th 685 (5th Cir. 2023); *Campaign Legal Ctr. v. Scott*, 49 F.4th 931 (5th Cir. 2022).

litigation happening in the circuit. One of the two data-privacy cases alleged an FDCPA claim against a law firm that specializes in collecting debts owed to Texas local governments and sought to certify a class.²⁷³ On appeal, the defendants were not challenging standing—only class certification.²⁷⁴ But, the Fifth Circuit relied on “independent obligation to assure that standing exists, regardless of whether it is challenged by any of the parties,”²⁷⁵ and found that none of the five theories asserted sufficed.²⁷⁶

6. *Sixth Circuit*. Five of the forty published cases from the Sixth Circuit that cited *TransUnion* before 2025 involved data privacy, and all were alleged based on intangible harms. Plaintiffs were found to have standing in three of those five cases. And two of those cases in which standing was found were actually the same case at different moments of proceedings.²⁷⁷ After a Sixth Circuit panel found that plaintiff had not suffered a concrete injury sufficient for standing, the case was remanded.²⁷⁸ On remand, a different Sixth Circuit panel agreed with the district court that plaintiff’s amended complaint and added documentation sufficiently demonstrated a concrete harm.²⁷⁹ The plaintiff, Ward, asserted an FDCPA violation that alleged the defendant had not meaningfully disclosed its identity as a debt collector and that it continued to contact him after he sent a cease-and-desist letter.²⁸⁰ In *Ward I*, the Court explained that the single voice message did not satisfy standing because Ward “did not ‘clearly allege’ that harm in his complaint.”²⁸¹ In contrast, in *Ward II*, the Court found that Ward had adequately alleged a single unwanted phone call, explaining that “*Spokeo* tells us to look for a harm with a close relationship ‘in kind, not degree’ to common law harms.”²⁸² Ward was successful on his second attempt to satisfy Article III standing,²⁸³ perhaps relying on the *Ward I* dissent’s guidance that “the single voicemail he received after NPAS’s misidentification resembles a harm recognized under the common-law tort of intrusion upon seclusion.”²⁸⁴

7. *Seventh Circuit*. No circuit had more data-privacy cases than the Seventh Circuit did. Of the thirty-four published cases from the Seventh Circuit that cited *TransUnion* between its publication and the end of 2024, twelve concerned data privacy.²⁸⁵ While a notable portion of

²⁷³ *Perez v. McCreary, Veselka, Bragg & Allen, P.C.*, 45 F.4th 816, 820 (5th Cir. 2022).

²⁷⁴ *Id.*

²⁷⁵ *Id.* (quoting *Summers v. Earth Island Inst.*, 555 U.S. 488, 499 (2009)).

²⁷⁶ *Id.* at 823.

²⁷⁷ Compare *Ward v. NPAS, Inc.*, 9 F.4th 357 (6th Cir. 2021) (*Ward I*) with *Ward v. NPAS, Inc.*, 63 F.4th 576, 578 (6th Cir. 2023) (*Ward II*) (“A previous panel of this court found that Ward did not have Article III standing to bring his claims. On remand, Ward amended his complaint and added documents to the record to show he had suffered a concrete harm.”).

²⁷⁸ *Ward I*, 9 F.4th at 363.

²⁷⁹ *Ward II*, 63 F.4th at 578.

²⁸⁰ *Id.* at 579.

²⁸¹ *Ward I*, 9 F.4th at 363.

²⁸² *Ward II*, 63 F.4th at 581 (quoting *Gadelhak v. AT&T Servs., Inc.*, 950 F.3d 458, 462 (7th Cir. 2020) (citing *Spokeo, Inc. v. Robins*, 578 U.S. 330, 341 (2016)).

²⁸³ *Id.* at 581–82.

²⁸⁴ *Ward I*, 9 F.4th at 367 (Moore, J., dissenting).

²⁸⁵ One opinion was amended on petition for rehearing. *Freeman v. Ocwen Loan Servicing, LLC*, 113 F.4th 701 (7th Cir. 2024). However, because the amendment concerned only an issue of waiver, we only included the case once in our dataset as the Article III analysis and outcome remained the same. *Id.* at 707.

cases concerned debt (a trend among all circuits), the plethora of cases touched on a variety of data types, including: biometrics,²⁸⁶ driver's licenses,²⁸⁷ prison surveillance,²⁸⁸ and medical records.²⁸⁹ The variety of data types, however, did not seem to affect the likelihood of standing being found. Standing was found in four cases, partially found in one, and not found in the remainder.

8. *Eighth Circuit.* Six of the fourteen published cases from the Eighth Circuit that cited *TransUnion* between its publication and the end of 2024 were about data privacy. In two of those cases, plaintiffs pled both tangible and intangible harms,²⁹⁰ and in only one of those did the Court find that plaintiffs had standing.²⁹¹ Notably, one of these cases was also the only one in our dataset that came from an appeal from final judgment. Most cases, as shown in Part IV.B.5, occurred at the motion to dismiss phase. In *Ojogwu v. Rodenburg Law Firm*, the Eighth Circuit found that the plaintiff did not have standing after the appellant filed supplemental briefing asserting a lack of standing.²⁹²

9. *Ninth Circuit.* We reviewed thirty-eight published cases from the Ninth Circuit that cited *TransUnion* between its publication and the end of 2024. Of those, five were related to data privacy. Both First Amendment data-privacy cases in our dataset came from the Ninth Circuit, one relating to a court's unsealing of recordings from a bench trial²⁹³ and the other relating to government collection of surveillance records.²⁹⁴ Neither set of plaintiffs was found to have standing.²⁹⁵

10. *Tenth Circuit.* Three of the fifteen published cases from the Tenth Circuit that cited *TransUnion* between its publication and the end of 2024 concerned data privacy, specifically PII. The Court found plaintiffs had standing in two of the three cases.²⁹⁶ Interestingly, two of the cases were FDCPA cases and in one, the plaintiff had standing, but in the other, they did not. In *Lupia v. Mediacredit*, the plaintiff who received a single unwanted phone call adequately pledged a concrete harm sufficiently analogous to the common-law tort of intrusion upon seclusion.²⁹⁷ Conversely, in *Shields v. Professional Collections Bureau of Maryland*, a plaintiff whose debt was disclosed to one company and who received misleading letters was not found to have sufficiently pled concrete harms analogous to a common-law harm.²⁹⁸

²⁸⁶ *Cothron v. White Castle Sys., Inc.*, 20 F.4th 1156 (7th Cir. 2021), *certified question answered*, 216 N.E.3d 918, *as modified on denial of reh'g* (July 18, 2023).

²⁸⁷ *Baysal v. Midvale Indem. Co.*, 78 F.4th 976 (7th Cir. 2023), *reh'g denied*, No. 22-1892, 2023 WL 6144390 (7th Cir. Sept. 20, 2023).

²⁸⁸ *Alicea v. Cnty. of Cook*, 88 F.4th 1209 (7th Cir. 2023).

²⁸⁹ *Dinerstein v. Google, LLC*, 73 F.4th 502 (7th Cir. 2023).

²⁹⁰ *Ojogwu v. Rodenburg L. Firm*, 26 F.4th 457 (8th Cir. 2022); *Rydholm v. Equifax Info. Servs. LLC*, 44 F.4th 1105 (8th Cir. 2022).

²⁹¹ *Rydholm*, 44 F.4th at 1108.

²⁹² *Ojogwu*, 26 F.4th at 461, 464 (“Although the district court did not address the issue, “[w]e have an obligation to assure ourselves of litigants’ standing under Article III.”) (citations omitted).

²⁹³ *Perry v. Newsom*, 18 F.4th 622 (9th Cir. 2021).

²⁹⁴ *Phillips v. U.S. Customs & Border Prot.*, 74 F.4th 986 (9th Cir. 2023).

²⁹⁵ *Perry*, 18 F.4th at 635; *Phillips*, 74 F.4th at 996.

²⁹⁶ *Shields v. Pro. Bureau of Collections of Md., Inc.*, 55 F.4th 823 (10th Cir. 2022); *Lupia v. Mediacredit, Inc.*, 8 F.4th 1184 (10th Cir. 2021).

²⁹⁷ *Lupia*, 8 F.4th at 1191.

²⁹⁸ *Shields*, 55 F.4th at 828–31.

11. *Eleventh Circuit.* We reviewed twenty-four published cases from the Eleventh Circuit that cited *TransUnion* between its publication and the end of 2024. Of those twenty-four standing cases, only four were related to data privacy. In three of those cases, the Court found that plaintiffs had standing and each of those cases was also a class action: two were at the class certification stage,²⁹⁹ while one related to settlement.³⁰⁰ The only data privacy case in which the Court determined plaintiffs did not have standing was a FDCPA case that stemmed from a rehearing en banc.³⁰¹ In that case, the panel's opinion had come out shortly after *TransUnion*, in October 2021.³⁰² Notably, one of the cases in which plaintiffs had standing also stemmed from a rehearing en banc.³⁰³ Of the twenty-four total cases we reviewed, four were en banc opinions—the highest percentage or raw total we saw in any circuit.

Lastly, one of the cases in which plaintiffs had standing was vacated and superseded by a new panel opinion.³⁰⁴ The superseding opinion appeared to be identical except for the addition of one paragraph clarifying the role of standing as litigation proceeds.³⁰⁵

12. *D.C. Circuit.* Only one³⁰⁶ of the twenty published cases from the D.C. Circuit that cited *TransUnion* between its publication and the end of 2024 was related to data privacy as we defined it. Most of the cases in the D.C. Circuit concerned immigration of environmental law, as might be expected given the prevalence of agency related cases normally seen in the circuit.³⁰⁷ The one case that we coded as data-privacy related, *Jibril v. Mayorkas*, was also an agency case.³⁰⁸ It involved PII, in a manner similar to *TransUnion*, as it concerned the terrorist watchlist.³⁰⁹ But instead of focusing on credit related harms, it focused on the alleged constitutional harms stemming from extensive security screenings.³¹⁰ The Court found that the plaintiffs had standing.³¹¹

13. *Federal Circuit.* We reviewed three published cases from the Federal Circuit that cited *TransUnion* between its publication and the end of 2024 and none of them were data privacy cases. This, of course, makes sense because the Federal Circuit deals in patents and the crossover between

²⁹⁹ Santos v. Healthcare Revenue Recovery Grp., LLC, 85 F.4th 1351 (11th Cir. 2023), vacated and superseded on reh'g sub nom. Santos v. Healthcare Revenue Recovery Grp., LLC., 90 F.4th 1144, 1145 (11th Cir. 2024); Green-Cooper v. Brinker Int'l, Inc., 73 F.4th 883, 888 (11th Cir. 2023).

³⁰⁰ Drazen v. Pinto, 74 F.4th 1336 (11th Cir. 2023).

³⁰¹ Hunstein v. Preferred Collection & Mgmt. Servs., Inc., 48 F.4th 1236 (11th Cir. 2022).

³⁰² Hunstein v. Preferred Collection & Mgmt. Servs., Inc., 17 F.4th 1016 (11th Cir. 2021), reh'g en banc granted, opinion vacated, 17 F.4th 1103 (11th Cir. 2021), and on reh'g en banc, 48 F.4th 1236 (11th Cir. 2022).

³⁰³ Drazen, 74 F.4th at 1336.

³⁰⁴ Santos, 90 F.4th at 1145.

³⁰⁵ *Id.* at 1151 (“Of course, “[b]ecause the elements of standing ‘are not mere pleading requirements but rather an indispensable part of the plaintiff[s]’ case, each element must be supported . . . with the manner and degree of evidence required at the successive stages of the litigation.” (quoting *Jacobson v. Fla. Sec’y of State*, 974 F.3d 1236, 1245 (11th Cir. 2020)) (omission in original) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992))). For example, “if an action proceeds to trial, the facts necessary to establish standing ‘must be supported adequately by the evidence adduced at trial.’” *Id.* (quoting *Lujan*, 504 U.S. at 561).

³⁰⁶ *Jibril v. Mayorkas*, 20 F.4th 804 (D.C. Cir. 2021).

³⁰⁷ See generally Eric M. Fraser et. al., *The Jurisdiction of the D.C. Circuit*, 23 CORN. J. L. & PUB. POL’Y 131 (2013) (explaining that the D.C. circuit’s caseload is “disproportionally weighted towards administrative law” because many agency disputes must be brought there).

³⁰⁸ *Jibril*, 20 F.4th at 808.

³⁰⁹ See *TransUnion*, 594 U.S. at 417.

³¹⁰ *Jibril*, 20 F.4th at 804.

³¹¹ *Id.* at 817.

these two areas of law is likely to be limited.³¹² For this reason, none of the analysis below includes any conclusions based on Federal Circuit cases.

CONCLUSION

Federal appellate courts continue to deal with the fallout from *Spokeo* and *TransUnion*. Although *TransUnion* in particular has proven influential,³¹³ it did not necessarily close the courthouse doors to data-privacy plaintiffs.³¹⁴ Different circuits have begun to develop different approaches, particularly in analyzing common-law analogues.³¹⁵ Some circuits apply a strict element-by-element approach.³¹⁶ But others rely on a more flexible analysis that looks at the kind of harm suffered instead.³¹⁷ Either way, one thing is clear: The Supreme Court has breathed new life into old torts, at least in the data-privacy space.³¹⁸

The data analyzed here may help data-privacy practitioners make strategic choices about how—and potentially where—to bring data-privacy claims, knowing that standing looms over any such action. It may also assist federal lawmakers in crafting data-privacy legislation that allows for effective private rights of action.³¹⁹ Key similarities exist between, say, “a consumer’s right to view or obtain information held by a particular company” and “an individual’s right under the FCRA to request a complete credit file.”³²⁰ So reviewing the data to see when data-privacy plaintiffs demonstrate standing, and when they do not, may provide clues as to how to structure a private right of action in any future federal privacy law.³²¹

Regardless, our data shows that, for a case that was supposed to be the end of data-privacy litigation, *TransUnion* has in ways created more questions than it answered.³²² To be sure, the Supreme Court’s decree remains: “No concrete harm, no standing.”³²³ But how that decree plays out in privacy cases now relies on how well advocates can match the privacy harms of today to the privacy torts of the past. As the burgeoning circuit split on common-law analogues continues to develop,³²⁴ we will see how history ultimately judges the *TransUnion* case.

³¹² *Types of Cases the Federal Circuit Handles*, UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT, www.cafc.uscourts.gov/home/the-court/about-the-court/federal-circuit-case-types (highlighting the Federal Circuit’s role in handling patent and trademark cases).

³¹³ See e.g., *supra* Part I.D.

³¹⁴ See *supra* Part III.B.

³¹⁵ See *supra* Part III.B.5 and Part III.C.

³¹⁶ See *id.*

³¹⁷ See *id.*

³¹⁸ See *supra* Part III.B.3.

³¹⁹ Passage of a federal data-privacy law may seem far-fetched with Congress often at a standstill. But there are indications of movement: on April 5, 2024, two members of Congress introduced a bipartisan, bicameral federal data-privacy bill. See Jedidiah Bracy, *New Draft Bipartisan U.S. Federal Privacy Bill Unveiled*, IAPP (Apr. 7, 2024), <https://iapp.org/news/a/new-draft-bipartisan-us-federal-privacy-bill-unveiled> [<https://perma.cc/3V7N-TH86>] (describing the American Privacy Rights Act of 2024).

³²⁰ Holmes, *supra* note 196, at 2.

³²¹ See *id.* at 3 (discussing how “[p]rivacy laws may avoid creating standing obstacles for private plaintiffs,” and providing as an example the California Consumer Privacy Act’s requirement that “a consumer may only sue if that consumer’s information is accessed or disclosed without authorization”).

³²² See *supra* Part III.

³²³ *TransUnion*, 594 U.S. at 417.

³²⁴ See *supra* Part III.B.5 and Part III.C.