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Close Enough to Stand?: Reconsidering the Fair Debt Collection Practices Act's Relationship with the Right to Privacy

Ryan Karerat
Fordham University School of Law

CLOSE ENOUGH TO STAND?: RECONSIDERING THE FAIR DEBT COLLECTION PRACTICES ACT'S RELATIONSHIP WITH THE RIGHT TO PRIVACY

*Ryan Karerat**

With the passage of the Fair Debt Collection Practices Act (FDCPA) in 1977, Congress created a private right of action through which consumers could sue debt collectors for overzealous and improper conduct traceable to their debt collection efforts. FDCPA violations can abridge a consumer's rights under the statute without producing tangible economic or physical injury. As a result, many plaintiffs bringing claims under the FDCPA plead different theories of intangible harm to establish the required injury in fact conferring Article III standing to file suit in federal court. To establish that they have suffered an injury in fact, a plaintiff must demonstrate that their injuries were sufficiently concrete.

In the past six years, the U.S. Supreme Court has drastically altered its approach to determining whether an injury is sufficiently concrete, first in 2016 through Spokeo, Inc. v. Robins, *and more recently in 2021 through* TransUnion LLC v. Ramirez. *Through* Spokeo, *the Court created a basic two-pronged test analyzing a pleaded intangible harm within the context of (1) the legislative intent behind Congress's creation of a right of action and (2) the claim's relationship to traditional American or English common-law torts that have long formed the basis for private suits. Through* TransUnion, *the Court clarified that plaintiffs must demonstrate actual harm rather than demonstrating their exposure to a risk of future harm. In recent years, a narrow application of the* Spokeo *test has produced a slew of decisions denying standing for FDCPA plaintiffs based primarily on a determination that their claims were not "close enough" to traditional American or English common-law torts. These decisions have created uncertainty surrounding the capacity for FDCPA plaintiffs to satisfy Article III standing requirements.*

This Note explores the historic developments and rationale behind the passage of the FDCPA and the evolution of standing jurisprudence that has influenced the current FDCPA standing conflict. Ultimately, this Note

* J.D. Candidate, 2024, Fordham University School of Law; B.A., 2012, Hamilton College. Thank you to Professor Thomas Lee for his knowledge and insight throughout this process. I would also like to thank Michael Hamilton and the other members of the *Fordham Law Review* for their thoughtful guidance and thorough review. Finally, thank you to my wife, Sara, and our pup, Reggie, for their unconditional love, support, and encouragement.

advocates for adopting a kind-degree approach to the Spokeo *test that would more deliberately incorporate congressional intent into the concreteness analysis and that would afford courts more flexibility in analogizing FDCPA claims to traditional common-law torts. Under the kind-degree approach, courts should find FDCPA claims to be sufficiently concrete to grant standing—both because of the clear congressional intent behind the creation of a private right of action to help realize the FDCPA's remedial goals and because the FDCPA protects zones of privacy directly contemplated by common-law privacy torts.*

INTRODUCTION

Imagine the following scenario. You accumulate credit card debt and eventually default on that debt.[1] A debt collector called Midland Funding later sues you, seeking to recover on that debt, but voluntarily dismisses the suit.[2] Five years later, out of the blue, you receive a letter from an entity with a slightly different name—Midland Credit.[3] The statute of limitations under state law has already run, and you cannot be sued for the debt.[4] Nonetheless, Midland Credit tells you that you have been approved for a payment program

1. *See* Pierre v. Midland Credit Mgmt., Inc., 29 F.4th 934, 936 (7th Cir. 2022).
2. *See id.*
3. *See id.* at 936–37.
4. *See id.* at 936.

that could save you as much as 40 percent on your debt, but it indicates that the offer is only valid for thirty days.[5]

The letter surprises and confuses you.[6] It has been nine years since you accumulated and defaulted on the debt.[7] It has been five years since the holder of the debt sued you.[8] You believed that the case had been dropped.[9] Now, you are not so sure.[10] A debt that you believed was in your past thus continues to burden you.

Under the Fair Debt Collection Practices Act[11] (FDCPA), it is unlawful for Midland Credit to use deceptive means to attempt to collect a debt[12] or to send a letter falsely representing the character and legal status of a debt.[13] The FDCPA also explicitly prohibits debt collectors from falsely threatening legal action on time-barred debt.[14] So you sue on behalf of a class of all other residents in your state who received similarly misleading letters.[15] The district court certifies the class and enters summary judgment in your favor, and a jury awards $350,000 in damages.[16] But an appeals court reverses and dismisses your case, informing you that you never suffered a concrete injury to begin with.[17]

This was the exact scenario created when the U.S. Court of Appeals for the Seventh Circuit dismissed the complaint in *Pierre v. Midland Credit Management, Inc.*[18] for lack of standing. According to the Seventh Circuit, the plaintiff in *Pierre* did not suffer a concrete injury, and Congress's decision to create a statutory cause of action through the FDCPA could not overcome the plaintiff's concreteness defects.[19]

The *Pierre* court relied extensively on the U.S. Supreme Court's recent decisions in *Spokeo, Inc. v. Robins*[20] and *TransUnion LLC v. Ramirez*[21] to guide its analysis.[22] *Spokeo* created the current standing test governing intangible-harm claims, which broadly covers any harm not traceable to a "tangible" physical or economic injury.[23] Through *TransUnion*, the Court

5. *See id.* at 936–37.
6. *See id.* at 937.
7. *See id.*
8. *See id.*
9. *See id.*
10. *See id.*
11. 15 U.S.C. §§ 1601 note, 1692–1692p.
12. *See id.* § 1692e(10).
13. *See id.* § 1692e(2)(a).
14. *See Pierre*, 29 F.4th at 942 (Hamilton, J., dissenting) ("It is well established that a debt collector violates the [FDCPA] by either suing or threatening to sue to collect a debt after the statute of limitations has run.").
15. *See id.* at 937.
16. *See* Pierre v. Midland Credit Mgmt., No. 16C28295, 2018 WL 723278, at *1 (N.D. Ill. Feb. 5, 2018), *vacated*, 29 F.4th 934 (7th Cir. 2022).
17. *See Pierre*, 29 F.4th at 940.
18. 29 F.4th 934 (7th Cir. 2022).
19. *See id.* at 940.
20. 578 U.S. 330 (2016).
21. 141 S. Ct. 2190 (2021).
22. *See Pierre*, 29 F.4th at 937–40.
23. *See Spokeo*, 578 U.S. at 340–41.

clarified its intangible-harm standard by deeming any claims rooted in the notion that a statutory violation exposed a plaintiff to a risk of future harm to be insufficiently concrete.[24]

As this Note explores, those decisions reflect a doctrinal approach to Article III[25] standing founded on principles of judicial restraint.[26] To establish a legally cognizable injury satisfying Article III, a plaintiff "must demonstrate an injury that is concrete and particularized."[27] The consequences of failing to allege a concrete injury are straightforward: "No concrete harm, no standing."[28]

Because Article III sets a "hard floor"[29] requiring cognizable injuries, plaintiffs "cannot satisfy the demands of Article III by alleging a bare procedural violation."[30] To distinguish between such mere procedural violations and legitimately concrete injuries conferring standing, the *Spokeo* Court created a two-pronged test for evaluating statutory intangible-harm claims.[31] Under the first prong, courts evaluate the nature of Congress's intent in creating a private right of action.[32] Under the second prong, courts assess whether the "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."[33] In spite of this guidance, courts continue to grapple with measuring the proper balance between judicial and legislative interests in the standing context.[34]

The FDCPA extensively regulates the time, place, and manner in which debt collectors may communicate with consumers.[35] Plaintiffs bringing claims under the FDCPA often cannot plead harms derived from tangible physical or economic injuries that might allow them to bypass the *Spokeo*

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24. *See TransUnion LLC*, 141 S. Ct. at 2210–11.

25. U.S. CONST. art. III, § 2.

26. *See TransUnion LLC*, 141 S. Ct. at 2203 ("Federal courts do not possess a roving commission to publicly opine on every legal question. Federal courts do not exercise general legal oversight of the Legislative and Executive Branches, or of private entities."); *see also Justiciability—Class Action Standing*—Spokeo, Inc. v. Robins, 130 HARV. L. REV. 437, 442 (2016) ("Standing limitations primarily serve separation of powers ends by ensuring that the judiciary serves its traditional role of deciding cases and controversies, while avoiding political disputes more appropriately left for the legislative and executive branches.").

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

28. *TransUnion LLC*, 141 S. Ct. at 2200.

29. Summers v. Earth Island Inst., 555 U.S. 488, 497 (2009).

30. Spokeo, Inc. v. Robins, 578 U.S. 330, 342 (2016).

31. *Id.* at 341.

32. *See id.* ("Because Congress is well positioned to identify intangible harms that meet minimum Article III requirements, its judgment is . . . instructive and important.").

33. *Id.* (citing Vt. Agency of Nat. Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 775–77 (2000)).

34. *See* William Baude, *Standing in the Shadow of Congress*, 2016 SUP. CT. REV. 197, 203 (explaining that "[d]espite the Court's widespread use of statutory rights as a basis for Article III standing, the Court has also sometimes adverted to Article III limits on those rights").

35. *See infra* Part I.A.2.

test.[36] They instead allege procedural harms that produce intangible injuries.[37]

One possible path for resolving FDCPA standing inquiries lies in firmly grounding the statute in the common-law right to privacy. Thus, this Note analyzes how invasive debt collection practices might fit within the context of the right to privacy as understood by Samuel D. Warren and Justice Louis D. Brandeis in their foundational article on the right to privacy.[38] Furthermore, this Note examines the role that an invasive debt collection practice case, *Housh v. Peth*,[39] played in Professor William Prosser's construction of the tort of intrusion upon seclusion, and it considers whether *Housh* has implications for plaintiffs seeking to ground their FDCPA claims in common-law tradition.[40]

This Note also analyzes how FDCPA plaintiffs can satisfy Article III standing requirements in light of recent doctrinal developments. To answer that question, this Note addresses two interrelated issues: (1) the analytical framework under which courts should evaluate FDCPA standing inquiries and (2) how to analyze FDCPA standing claims under that framework.

Part I of this Note will provide a high-level overview of the history and structure of the FDCPA and its relationship to common-law torts, as well as the Supreme Court's evolution on standing doctrine.[41]

Part II will analyze how courts diverge in applying the *Spokeo* test to FDCPA claims. Some courts maintain a broader, more flexible approach to the issue that appears willing to deem FDCPA claims as sufficiently concrete to confer standing.[42] Other courts have adopted a narrower approach, one that is more likely to dismiss claims as insufficiently concrete based on a more exacting standard of what is "close enough" to traditional common-law torts under the *Spokeo* test.[43]

Part III.A advocates for resolving FDCPA standing inquiries by adopting a kind-degree framework, notably elevated by Judge Kevin C. Newsom in his dissent in *Hunstein v. Preferred Collection & Management Services, Inc*.[44] Under that approach, *Spokeo* inquiries would more deliberately take affirmative legislative intent under consideration and resolve the second prong of *Spokeo* by asking whether a claim is similar in *kind* to a historical American or English common-law tort rather than demanding that it is

36. *See* Rachel Bayefsky, *Constitutional Injury and Tangibility*, 59 WM. & MARY L. REV. 2285, 2321–22 (2018) ("In the standing context, courts and commentators have frequently—though not uniformly—cast two types of harm as tangible. One is economic harm . . . . The second type of harm considered tangible is physical harm.").

37. *See id.* at 2317 (explaining that "*Spokeo* can be read to describe at least three types of harm as intangible: certain constitutional violations, the results of procedural violations, and the risk of harm").

38. *See infra* Part I.C.1.

39. 133 N.E.2d 340 (Ohio 1956).

40. *See infra* Part I.C.2.

41. *See infra* Part I.

42. *See infra* Part II.A.

43. *See infra* Part II.B.

44. 48 F.4th 1236 (11th Cir. 2022); *see also infra* Part II.B.3.

exactly in *degree*.[45] Finally, in Part III.B, this Note applies the kind-degree framework to the FDCPA and argues that courts should determine virtually all FDCPA claims to be sufficiently "close enough" to the common-law tort of intrusion upon seclusion to confer standing.

I. THE FDCPA, STANDING, AND THE RIGHT TO PRIVACY

This part provides background information on the FDCPA and standing doctrine. Part I.A. discusses the history behind the passage of the FDCPA and the substance of the statute itself. Part I.B. provides an overview of the way in which standing jurisprudence has shifted in the past three decades. Part I.C then analyzes the FDCPA within the context of modern standing jurisprudence by investigating the FDCPA's relationship with American common-law privacy torts.

A. The Fair Debt Collection Practices Act

This section provides a high-level overview of the FDCPA. Part I.A.1 explores the legislative intent and history behind the passage of the statute to better contextualize the nature of the harm that Congress sought to remedy. Part I.A.2 examines the precise language of the FDCPA to delineate the exact nature of statutory breaches and unlawful debt collection practices. Part I.A.3 then contextualizes the private right of action created through the FDCPA within the statute's overarching remedial scheme.

1. Legislative History

Congress passed the FDCPA in 1977[46] as an amendment adding Title VIII to the Consumer Credit Protection Act,[47] a broader consumer protection statute. The FDCPA drafters sought to "eliminate abusive debt collection practices by debt collectors" and to "promote consistent [s]tate action to protect consumers against debt collection abuses."[48] When the FDCPA was originally passed, the consumer debt collection ecosystem constituted a five-billion-dollar industry.[49] More than tripling in size over the ensuing five decades, it maintains substantial economic significance today.[50]

Congress recognized abusive debt collection practices as a "widespread and serious national problem."[51] They sought to remedy practices that caused a wide variety of harmful economic consequences—including

45. *See Hunstein*, 48 F.4th at 1264 (Newsom, J., dissenting).

46. Pub. L. No. 95-109, 91 Stat. 874 (1977) (codified as amended at 15 U.S.C. §§ 1601 note, 1692–1692p).

47. Pub. L. No. 90-321, 82 Stat. 146 (1968) (codified as amended in scattered sections of 15 and 18 U.S.C.).

48. 15 U.S.C. § 1692(e).

49. *See* S. REP. NO. 95-382, at 1696 (1977).

50. *See Debt Collection Agencies in the US—Market Size 2005–2028*, IBISWORLD, https://www.ibisworld.com/industry-statistics/market-size/debt-collection-agencies-united-states [https://perma.cc/6VFG-3N7E] (Jan. 10, 2023) (estimating the current debt collection industry cap to be twenty billion dollars).

51. S. REP. NO. 95-382, at 1696.

personal bankruptcies and the loss of employment[52]—as well as more intangible harms derived from "serious invasions of privacy."[53]

The committee report accompanying the original bill reveals a depth of knowledge and concern over the myriad of ways that overzealous debt collectors can fundamentally disturb ordinary consumers and disrupt their lives.[54] Congress communicated a desire to eliminate a broad array of the industry's behaviors, "including obscene or profane language, threats of violence, telephone calls at unreasonable hours, misrepresentation of a consumer's legal rights, disclosing a consumer's personal affairs to friends, neighbors, or an employer, obtaining information about a consumer through false pretense, impersonating public officials and attorneys, and simulating legal process."[55]

The FDCPA authorizes the Federal Trade Commission (FTC) to pursue administrative enforcement of the law against debt collectors who fail to comply with FDCPA guidelines.[56] However, the FDCPA was also passed against the backdrop of increased attention and scrutiny in the 1960s and 1970s to the failure of the FTC to adequately protect consumer interests.[57] Accordingly, Congress designed the FDCPA such that the FTC's enforcement authority was supplemented by a private right of action for consumers for any actual damages sustained from the failure of debt collectors to comply with the statute's procedural safeguards.[58]

2. Statutory Violations Under the FDCPA

The FDCPA comprehensively regulates the manner in which debt collectors may interact with consumers.[59] It is "far-reaching."[60] Debt collectors cannot communicate with any third parties in pursuit of a consumer's location by "[stating] that such consumer owes any debt."[61] Nor can they communicate with a third party more than once without possessing

52. *See id.* at 1699.
53. *See id.*
54. *See generally id.*
55. *Id.* at 1696.
56. *See* 15 U.S.C. § 1692m.
57. *See* Sheila B. Scheurman, *The Consumer Fraud Class Action: Reining in Abuse by Requiring Plaintiffs to Allege Reliance as an Essential Element*, 43 HARV. J. ON LEGIS. 1, 12 (2006) ("Although the FTC was armed with the authority to proscribe false advertising that injured the public, the FTC did little to stop manufacturer misrepresentations. At the end of the 1960s, two scathing reports—one by a group of students led by Ralph Nader and the other by the American Bar Association—ruthlessly criticized the FTC's performance.").
58. *See* 15 U.S.C. § 1692k.
59. *See generally id.* §§ 1692–1692p.
60. Elwin Griffith, *The Fair Debt Collection Practices Act—Reconciling the Interests of Consumers and Debt Collectors*, 28 HOFSTRA L. REV. 1, 3 (1999). Not only does the FDCPA cover and protect the debtors themselves, but it also covers third parties affected by invasive debt collection practices. *See, e.g.*, Magdy v. I.C. Sys., Inc., 47 F.4th 884, 888 (8th Cir. 2022) ("We agree with [the plaintiff] that the FDCPA protects more than just consumers in its regulation of debt collectors. . . . The FDCPA provisions, such as 15 U.S.C. §§ 1692b(3) and 1692d, that offer third parties protection, do so without requiring the consumer's consent.").
61. 15 U.S.C. § 1692b(2).

the reasonable belief that the third party's previous responses were incomplete or erroneous.[62] They cannot communicate with a third party by postcard[63] or use any language or symbols that might allow a third party to infer that a given communication concerns the collection of a debt.[64] The drafters of the law were cognizant of the need for debt collectors to legitimately locate missing debtors, but they saw important privacy interests at play and thus decisively acted to rein in third party communications.[65]

Without consent, debt collectors cannot communicate with consumers regarding a debt collection "at any unusual time or place,"[66] which for the purposes of the statute is assumed to be before 8:00 AM or after 9:00 PM.[67] If a debt collector is aware or should be aware that a consumer's employer prohibits them from receiving communications at the workplace, then any communication through the workplace violates the FDCPA.[68] The statute bars communications altogether when an attorney represents the consumer, and the debt collector possesses actual knowledge of that fact or else could easily ascertain such knowledge.[69]

Should a consumer notify a debt collector either that they refuse to pay the debt or demand an immediate halt in further communications, the FDCPA prohibits debt collectors from communicating further, unless to advise the consumer on the ceasing of further communications and the expected remedy that the debt collector will instead pursue.[70]

To realize Congress's intent to influence and constrain the general tone and demeanor of the debt collection industry, the FDCPA makes it unlawful for debt collectors to engage in harassment or abusive conduct in service of collecting a debt.[71] Congress enumerated a wide variety of unlawful

62. *See id.* § 1692b(3).
63. *See id.* § 1692b(4).
64. *See id.* § 1692b(5).
65. *See* S. REP. NO. 95-382, at 1698 (1977) (characterizing the extensive provisions of 15 U.S.C. § 1692b as providing a means to "strongly protect[] the consumer's right to privacy by prohibiting a debt collector from communicating the consumer's personal affairs to third persons").
66. 15 U.S.C. § 1692c(a)(1).
67. *See id.* What constitutes "ordinary" times and places of communication is itself a contentious issue and beyond the scope of this Note. Consider, for example, the pushback that the Consumer Finance Protection Bureau was met with in 2021 over a proposed administrative rule change under the FDCPA that would allow debt collectors to communicate with consumers through social media platforms like Instagram and Facebook. *See, e.g.*, Michelle Singletary, *New Rule Will Allow Debt Collectors to Track You Down on Social Media*, WASH. POST (Nov. 30, 2021, 6:16 PM), https://www.washingtonpost.com/business/2021/11/30/cfpb-debt-collector-rules-facebook-instagram/ [https://perma.cc/2C7F-VJDQ].
68. *See* 15 U.S.C. § 1692c(a)(3).
69. *See id.* § 1692c(a)(2).
70. *See id.* § 1692c(c)(1)–(3).
71. *See id.* § 1692d. Congress specified that such behavior could include the following:
(1) The use or threat of use of violence or other criminal means to harm the physical person, reputation, or property of any person.
(2) The use of obscene or profane language or language the natural consequence of which is to abuse the hearer or reader.

practices by including provisions to protect intangible interests like the consumer's emotional well-being and reputation.[72]

Beyond the time, place, and tone of communications with a consumer, the FDCPA placed further guardrails around debt collection practices by barring "false, deceptive, or misleading" representations to recover a debt.[73] 15 U.S.C. § 1692e contains one of the longest sections of the act, laying out a nonexhaustive list of sixteen different ways that debt collectors may engage in unlawful misrepresentation.[74] Debt collectors can improperly mislead consumers by creating the false implication that the debt collector is affiliated with the government,[75] by misrepresenting the character or nature of the debt and consideration options available to the consumer,[76] by falsely creating the implication that the debt collector is reaching out through an attorney,[77] by implying that a failure to repay a debt could lead to arrest, imprisonment, or the seizure of wages or property,[78] or by threatening any other actions or consequences that the debt collector does not intend to or legally cannot follow through on.[79]

The FDCPA also prohibits debt collectors from implying that "a sale, referral, or other transfer of any interest in a debt shall cause the consumer to . . . lose any claim or defense to payment of debt."[80] Debt collectors shall not "disgrace the consumer" by implying that the consumer's failure to repay a debt represents a criminal act.[81]

> (3) The publication of a list of consumers who allegedly refuse to pay debts, except to a consumer reporting agency or to persons meeting with the requirements of [the statute].
> (4) The advertisement for sale of any debts to coerce payment of the debt.
> (5) Causing a telephone to ring or engaging any person in telephone conversation repeatedly or continuously with intent to annoy, abuse, or harass any person at the called number.

Id. § 1692d(1)–(5).

72. *See id.* § 1692d(1)–(3); *see also* Arroyo v. Solomon & Solomon, P.C., No. 99-cv-8302, 2001 WL 1590520, at *14 (E.D.N.Y. Nov. 16, 2001) (holding that the plaintiff had an actionable claim under § 1692d for abusive and harassing statements based on an interaction in which plaintiff asked "the defendant how she was expected to pay rent and take care of her children," and the "defendant responded, 'you should have thought about that ten years ago'").

73. 15 U.S.C. § 1692e.

74. *See id.* § 1692e(1)–(16); *see also* Cohen v. Rosicki, Rosicki & Associates, P.C., 897 F.3d 75 (2d Cir. 2018) (holding that a debt collector's improper identification of a creditor in a foreclosure complaint establishes a breach of 15 U.S.C. § 1692e).

75. *See* 15 U.S.C. § 1692e(1); *see also id.* § 1692e(9) (barring the use of documents that misrepresents a document as having been "authorized, issued, or approved by any court, official, or agency of the United States or any State").

76. *See id.* § 1692e(2) (making it unlawful to make a false representation of "the character, amount, or legal status of any debt" or "any services rendered or compensation which may be lawfully received by any debt collector for the collection of a debt").

77. *See id.* § 1692e(3).

78. *See id.* § 1692e(4).

79. *See id.* § 1692e(5).

80. *Id.* § 1692e(6).

81. *See id.* (barring the "false . . . implication that the consumer committed any crime").

Any communications from a debt collector to a consumer that fail to disclose the debt collector's ultimate intent to collect a payment per se misleads under the FDCPA.[82] The statute also prohibits debt collectors from obscuring the nature of a debt by implying that it was conveyed to a third party,[83] by communicating through documents that obscure whether or not the documents are a part of a legal process,[84] by hiding the debt collector's true identity in any way,[85] or by otherwise suggesting that the debt collector operates as a part of a consumer reporting agency.[86] Underscoring its broad reach, the FDCPA contains a catchall misrepresentation provision barring debt collectors from utilizing "any false representation or deceptive means to collect or attempt to collect any debt to obtain information concerning a consumer."[87]

The FDCPA safeguards consumers against any debt collection practice deemed to be substantively "unfair or unconscionable."[88] This includes overcollecting on debt owed,[89] accepting postdated checks without direct coordination with the consumer,[90] soliciting postdated debt collections as a means of wielding the threat of criminal prosecution as leverage,[91] concealing the purpose of communications in ways that lead to telephone or other communications charges for the consumer,[92] falsely threatening to seize or dispossess a consumer's property,[93] or "[c]ommunicating with a consumer regarding a debt by post card."[94] Debt collectors can use their names in communicating with a consumer by mail when the name does not

82. *See id.* § 1692e(11).

83. *See id.* § 1692e(12).

84. *See id.* § 1692e(13). Conversely, the FDCPA also prohibits false representations that "documents are *not* legal process forms or do not require action by the consumer." *Id.* § 1692e(15) (emphasis added).

85. *See id.* § 1692e(14) (stating that it is misleading to use "any business, company, or organization name other than the true name of the debt collector's business, company, or organization").

86. *See id.* § 1692e(16).

87. *Id.* § 1692e(10).

88. *Id.* § 1692f.

89. *See id.* § 1692f(1) (deeming it unfair to collect "any amount . . . unless such amount is expressly authorized by the agreement creating the debt or permitted by law"); *see also* Demarais v. Gurstel Chargo, P.A., 869 F.3d 685, 698 (8th Cir. 2017) (holding that a debt collector who sent a collection letter seeking payment that included accumulated interest that they were not legally entitled to was misleading within the meaning of § 1692f(1) because the statute does not require plaintiffs to be "misled, deceived, or duped").

90. *See* 15 U.S.C. § 1692f(2); *see also id.* § 1692f(4) (sanctioning debt collectors who deposit or "[threaten] to deposit any postdated check or other postdated payment instrument prior to the date on such check or instrument").

91. *See id.* § 1692f(3).

92. *See id.* § 1692f(5).

93. *See id.* § 1692f(6)(a)–(c) (prohibiting debt collectors from "[t]aking or threatening to take any nonjudicial action to effect dispossession or disablement of property if" such right does not exist or if the debt collector does not actually intend such action). Perhaps speaking to the way that "unfair" and "misleading" practices blend together, these practices could have arguably fallen under the 15 U.S.C. § 1692e "misrepresentations" section instead of its categorization as an "unfair practice" under 15 U.S.C. § 1692f.

94. *Id.* § 1692f(7).

indicate that they are in the debt collection business, but they otherwise cannot use any language or symbol, aside from the debt collector's address, when communicating with a consumer by mail.[95]

Within five days of their initial communication with a consumer, a debt collector must provide written notice to the consumer providing information on "the amount of debt; the name of the creditor to whom the debt is owed; [and] a statement that unless the consumer . . . disputes the validity of the debt . . . the debt will be assumed to be valid."[96] Should a consumer dispute their debt, the debt collector must cease collection efforts until the debt collector obtains independent verification or a judgment.[97] Further protecting the consumer, the FDCPA provides that any failure to dispute or validate a debt will not be interpreted by a court as a concession of liability.[98]

3. The Private Right of Action and Litigating an FDCPA Claim

Through the creation of a private right of action, the FDCPA provided consumers with an avenue for direct recourse against invasive debt collectors.[99] The plain language of the statute does not place restrictions on the right to sue so long as the debt collector subjects the plaintiff to unlawful conduct.[100] Under the FDCPA, individual plaintiffs are entitled to recover money damages reflecting any actual damage suffered from the defendant's unlawful actions.[101] The FDCPA also empowers courts to award up to $1,000 beyond actual damages to further compensate a vindicated plaintiff for a debt collector's statutory breach.[102]

To prevail on an FDCPA claim, the plaintiff must generally establish that they are a consumer, that the defendant is a debt collector, that the defendant's contested conduct involves an attempt to collect a debt, and that the defendant breached the FDCPA in attempting to collect the debt.[103]

Regarding the private right of action, the Supreme Court observed that the FDCPA's "calibrated scheme of statutory incentives . . . encourage[s]

95. *Id.* § 1692f(8); *see also* DiNaples v. MRS BPO, LLC, 934 F.3d 275, 282 (3d Cir. 2019) (concluding "that a debt collector violates § 1692f(8) when it sends to a debtor an envelope displaying an unencrypted QR code that, when scanned, reveals the debtor's account number").

96. 15 U.S.C. § 1692g(a)(1)–(3).

97. *See id.* § 1692g(b).

98. *See id.* § 1692g(c).

99. *See generally id.* § 1692k.

100. *Id.* § 1692k(a) ("[*A*]*ny* debt collector who fails to comply with *any* provision [of the FDCPA] with respect to *any* person is liable to such person . . . ." (emphasis added)).

101. *See id.* § 1692k(a)(1).

102. *See id.* § 1692k(a)(2)(A).

103. *See, e.g.*, Douglass v. Convergent Outsourcing, 765 F.3d 299, 303 (3d. Cir. 2014) (explaining that "[t]o prevail on an [FDCPA] claim, a plaintiff must prove that (1) [they are] a consumer, (2) the defendant is a debt collector, (3) the defendant's challenged practice involves an attempt to collect a 'debt' as the Act defines it, and (4) the defendant has violated a provision of the FDCPA in attempting to collect the debt"); Maynard v. Cannon, 401 F. App'x 389, 393 (10th Cir. 2010) ("To prevail on a claim under the FDCPA, a plaintiff must prove that a 'debt collector['s]' effort to collect a 'debt' from a 'consumer' violated some provision of the FDCPA." (alteration in original)).

self-enforcement."[104] When adjudicating FDCPA claims, courts employ a presumption in *favor* of the plaintiff when resolving interpretive questions concerning the statute.[105] Courts justify this plaintiff-friendly standard on the grounds that individual FDCPA suits advance the overall remedial purpose of the statute as a whole.[106]

B. The Evolution in Standing Doctrine

Standing is a threshold inquiry into an individual's capacity to bring an enforceable legal action in court.[107] Article III of the U.S. Constitution limits federal court jurisdiction to select "Cases" and "Controversies."[108] Standing implicates core separation-of-powers questions on the proper role of the judiciary in the American political system.[109] Paradoxically, standing presents an opportunity for some judges to express skepticism on the scope of their own judicial authority. "[Federal] courts," argues Justice Kavanaugh, "do not adjudicate hypothetical or abstract disputes."[110] Nor do they "possess a roving commission to publicly opine on every legal question."[111] Instead, as Chief Justice Roberts favorably notes, federal courts should "exercise power 'only in the last resort, and as a necessity.'"[112] As this Note explores, the Supreme Court has applied these principles in ways that have significant implications for plaintiffs bringing claims under the FDCPA.

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104. Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA, 559 U.S. 573, 603 (2010).

105. *See, e.g.*, Hamilton v. United Healthcare of La., Inc., 310 F.3d 385, 392 (5th Cir. 2002) ("Congress, through the FDCPA, has legislatively expressed a strong public policy disfavoring dishonest, abusive, and unfair consumer debt collection practices, and clearly intended the FDCPA to have a broad remedial scope."); *see also* Johnson v. Riddle, 305 F.3d 1107, 1117 (10th Cir. 2002) ("Because the FDCPA . . . is a remedial statute, it should be construed liberally in favor of the consumer.").

106. *See* Jensen v. Pressler & Pressler, 791 F.3d 413, 418 (3d. Cir. 2015) ("As the FDCPA is an explicitly remedial statute, passed by Congress 'to eliminate abusive debt collection practices by debt collectors . . . we construe its language broadly, so as to effect its purpose.'" (first quoting 15 U.S.C. § 1692(e); and then quoting Brown v. Card Serv. Ctr., 464 F.3d 450, 453 (3d. Cir. 2006))).

107. *See, e.g.*, Cass R. Sunstein, *What's Standing After* Lujan*?: Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 170 (1992) (explaining that "to have standing, a litigant need[s] a legal right to bring suit").

108. U.S. CONST. art. III, § 2, cl. 1.

109. *See* Spokeo, Inc. v. Robins, 578 U.S. 330, 337 (2016) ("In order to remain faithful to this tripartite structure, the power of the Federal Judiciary may not be permitted to intrude upon the powers given to the other branches."); *see also* Lujan v. Defs. of Wildlife, 504 U.S. 555, 559–60 (1992) ("Obviously, then, the Constitution's central mechanism of separation of powers depends largely upon common understanding of what activities are appropriate to legislatures, to executives, and to courts.").

110. TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2203 (2021).

111. *Id.*

112. John G. Roberts, *Article III Limits on Statutory Standing*, 42 DUKE L.J. 1219, 1223 (1993) (quoting Allen v. Wright, 468 U.S. 737, 752 (1984)). Chief Justice Roberts views "meaningful limitations on what constitutes injury for standing purposes" as an essential guardrail restricting courts "to their proper function in a limited and separated government." *Id.* at 1224.

1. *Lujan v. Defenders of Wildlife*

To many legal commentators, standing jurisprudence in the mid-to-late twentieth century was defined by a more permissive philosophy that created pathways for plaintiffs to satisfy Article III standing requirements.[113] Then came *Lujan v. Defenders of Wildlife*,[114] "which significantly shift[ed] the law of standing."[115] Writing for the majority, Justice Antonin Scalia held that the wildlife conservationists seeking to challenge environmental regulations—jointly issued by the U.S. Department of the Interior and the U.S. Department of Commerce—lacked Article III standing.[116] The Court held that the plaintiffs failed to plead more than generalized grievances targeting a government action and thus failed to demonstrate particularized injury and redressability.[117]

Through *Lujan*, the Court sought to simplify the standing inquiry by demanding that plaintiffs satisfy three basic elements to establish an injury in fact: (1) they must demonstrate an injury that is concrete and particularized, (2) they must establish a causal connection between the injury and the alleged conduct triggering liability, and (3) they must demonstrate that the injury would be redressed by judicial relief.[118]

Individualized FDCPA claims can be distinguished from *Lujan*-style "citizen suits," in which plaintiffs bring generalized challenges to governmental policies.[119] Thus, the Court's denial of standing there did not necessarily foreclose private FDCPA suits.[120] Even still, *Lujan* carried significant implications for the FDCPA, not least because the Court held for the first time that a congressional grant of a private right of action does not, on its own, confer Article III standing.[121]

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113. *See* Michael E. Solimine, *Congress, Separation of Powers, and Standing*, 59 CASE W. RES. L. REV. 1023, 1027–28 (2009) ("During the Warren Court and the early years of the Burger Court, the perception of most observers was that federal judges, for the most part, were making it easier to satisfy standing requirements. The perception has, for the most part, cut the other way in the last quarter-century.").

114. 504 U.S. 555 (1992).

115. Sunstein, *supra* note 107, at 164–65.

116. *See Lujan*, 504 U.S. at 578.

117. *See id.* at 573–74 ("We have consistently held that a plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that *no more directly and tangibly benefits him than it does the public at large*—does not state an Article III case or controversy." (emphasis added)).

118. *See id.* at 560–61.

119. *See id.* at 589–90 (Blackmun, J., dissenting) (opposing the majority's imposition of "fresh limitations on the constitutional authority of Congress to allow citizen suits in the federal courts").

120. *See id.* at 578 (majority opinion) ("Nothing in this [decision] contradicts the principle that '[t]he . . . injury required by Art. III may exist solely by virtue of "statutes creating legal rights, the invasion of which creates standing."'"(second alteration in original) (quoting Warth v. Seldin, 422 U.S. 490, 500 (1975))).

121. Sunstein, *supra* note 107, at 165 ("Through Justice Scalia's opinion, the Court held that Article III required invalidation of an explicit congressional grant of standing to 'citizens.' The Court had not answered this question before." (quoting Lujan v. Defs. of Wildlife, 504 U.S. 555, 561–68 (1992))).

2. *FEC v. Akins*

Through *FEC v. Akins*,[122] the Court clarified the reach of *Lujan* by demonstrating that congressional intent can still affirmatively influence a standing determination.[123] In *Akins*, the plaintiffs brought a claim under the Federal Election Campaign Act of 1971[124] (FECA) challenging the Federal Election Commission's determination that the American Israel Public Affairs Committee (AIPAC) was not a "political committee."[125] Under the FECA, designating AIPAC as a "political committee" would have triggered additional public reporting requirements for the organization regarding its membership and political contributions.[126]

Although the plaintiffs' challenge in *Akins* appeared on its face to be like the kind of "generalized grievance" citizen suit that the Court limited in *Lujan*, the *Akins* Court distinguished the two cases and found standing by placing considerable weight on the legislative intent behind the FECA.[127] The Court explained that "prudential standing is satisfied when the injury asserted by a plaintiff '"arguably [falls] within the zone of interests to be protected or regulated by the statute . . . in question."'"[128]

Because the FECA intended to protect individuals from the kind of harm alleged by the plaintiffs—being denied information about AIPAC's political activity—and because Congress intended to create a private right of action to enforce the FECA, the plaintiffs' claim was sufficiently particularized and concrete to constitute a cognizable injury in fact.[129] *Akins* and the principles surrounding prudential standing remain good law, although subsequent decisions did separately clarify and alter the extent to which legislative intent can influence FDCPA standing inquiries.[130]

3. *Spokeo, Inc. v. Robins*

Given that *Lujan* and *Akins* both concerned the issue of standing in the context of invoking "public" rights,[131] they did not necessarily provide

122. 524 U.S. 11 (1998).

123. *Id.* at 20–21.

124. Pub. L. No. 92-225, 86 Stat. 3 (codified as amended in scattered sections of 18, 47, and 52 U.S.C.).

125. *Akins*, 524 U.S. at 13; *see also* 52 U.S.C. § 30101(4).

126. *See Akins*, 524 U.S. at 13–14.

127. *See id.* at 20–21.

128. *Id.* at 20 (alterations in original) (quoting Nat'l Credit Union Admin. v. First Nat'l Bank & Tr. Co., 522 U.S. 479, 488 (1998)).

129. *See id.* at 22 (explaining that the plaintiffs have standing because the FECA "does seek to protect individuals such as respondents from the kind of harm they say they have suffered, *i.e.*, failing to receive particular information about campaign-related activities").

130. *See infra* Part I.B.3.

131. *See* Spokeo, Inc. v. Robins, 578 U.S. 330, 345 (2016) (Thomas, J., concurring) (distinguishing, for standing purposes, between "public" and "private" rights on the grounds that "common-law courts . . . have required a further showing of injury for violations of 'public rights'—rights that involve duties owed 'to the whole community, considered as a community, in its social aggregate capacity'" (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *5)). Justice Thomas attempted in his *Spokeo* concurrence to chart a different

clarity on how standing doctrine applies to individuals seeking to vindicate purely "private" rights.[132] In *Spokeo, Inc. v. Robins*, the Supreme Court issued necessary guidance on that question.[133]

In *Spokeo*, the plaintiff sought to bring a class action suit under the Fair Credit Reporting Act[134] (FCRA) against a consumer reporting agency that compiled and disseminated false information about him and other members of the purported class.[135] The question certified to the Court was whether a failure under the FCRA to take "reasonable procedures to assure maximum possible accuracy"[136] of consumer reports constituted a concrete injury in fact conferring Article III standing to bring the suit.[137]

To meet standing requirements, plaintiffs do not have to allege the existence of *tangible* injuries (i.e., physical or economic),[138] but when pleading *intangible* harms (e.g., psychological injury), they must establish that the harm suffered was concrete in nature.[139] To determine the injury's concreteness, the *Spokeo* Court introduced a two-pronged test balancing both judicial and legislative interests.[140]

The role of legislative intent in assessing the concreteness of injury is fraught.[141] On one hand, a "plaintiff does not automatically satisfy the injury in fact requirement whenever a statute grants a right and purports to authorize

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path for standing based on the public/private right dichotomy, arguing that the claims of plaintiffs seeking to vindicate private rights were presumptively concrete because common-law courts historically possessed the "broad power to adjudicate suits involving the alleged violation of private rights, even when plaintiffs alleged only the violation of those rights and nothing more." *Id.* at 344. This analytical framework would be especially promising for plaintiffs bringing claims under the FDCPA. However, the subsequent Supreme Court decision in *TransUnion LLC v. Ramirez* rejected this strand of standing doctrine. *See* 141 S. Ct. 2190, 2214–26 (Thomas, J., dissenting). For a richer exploration of the promise that Justice Thomas's public/private right dichotomy offers as a standing framework, see Elizabeth Earle Beske, *Charting a Course Past* Spokeo *and* TransUnion, 29 GEO. MASON L. REV. 729 (2022).

132. *See Spokeo*, 578 U.S. at 346 (Thomas, J., concurring) (explaining that the "differences between legal claims brought by private plaintiffs for the violation of public and private rights underlie modern standing doctrine and explain the Court's description of the injury-in-fact requirement").

133. *Id.* at 337–43 (majority opinion).

134. Pub. L. No. 91-508, 84 Stat. 1127 (1970) (codified as amended in scattered sections of 12, 15, and 31 U.S.C.).

135. *See Spokeo*, 578 U.S. at 333; 15 U.S.C. § 1681e(b).

136. 15 U.S.C. § 1681e(b).

137. *See Spokeo*, 578 U.S. at 333.

138. *See id.* at 340 ("Although tangible injuries are perhaps easier to recognize, we have confirmed in many of our previous cases that intangible injuries can nevertheless be concrete."); *see also* Bayefsky, *supra* note 36, at 2321–22 ("In the standing context, courts and commentators have frequently—though not uniformly—cast two types of harm as tangible. One is economic harm . . . . The second type of harm considered tangible is physical harm . . . .").

139. *See Spokeo*, 578 U.S. at 339 ("Particularization is necessary to establish injury in fact, but it is not sufficient. An injury in fact must also be 'concrete.'").

140. *See id.* at 340–41.

141. *See* Baude, *supra* note 34, at 209 ("[T]he tension [in standing case law] makes a simple question very hard to answer: *When* does a right created by Congress nonetheless fall below the 'hard floor' of Article III jurisdiction?").

a suit to vindicate it."[142] However, although congressional intent is not dispositive, *Spokeo* still elevated it as one half of the two-pronged analysis.[143] Against that legislative interest, courts consider a second prong evaluating "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."[144] Although *Spokeo* provided needed clarity for courts evaluating intangible harm claims, some observers have suggested that the second prong, which is often referred to as the "close-relationship test,"[145] simply invited plaintiffs to "hammer[] square causes of action into round torts."[146]

Professor Rachel Bayefsky has questioned the utility of trying to categorically sort between intangible and tangible harms, suggesting that such a duopoly would be grounded not in a "deep-seated or clear-cut feature of empirical reality, but a contextually sensitive boundary that reflects normative principles."[147] The real difference, Bayefsky argues, is that tangible harms capture "obvious" harms, while intangible harms are necessarily more complicated and difficult to comprehend.[148] As Professor Bayefsky observes, the danger with *Spokeo* is that, at first glance, it can appear to be an objective standing test but can potentially unspool into a largely subjective, discretionary exercise.[149]

4. *TransUnion LLC v. Ramirez*

In *TransUnion LLC v. Ramirez*, the Court expounded on its intangible harm analysis.[150] The plaintiff in *TransUnion* sought to certify a class of 8,185 consumers alleging that TransUnion violated the FCRA by improperly flagging their names as potential matches on a terrorist watch list and thus failed to maintain reasonable procedures in ensuring the accuracy of their credit files.[151] The district court certified the full proposed class,[152] and a

142. *Spokeo*, 578 U.S. at 341.

143. *Id.* ("Because Congress is well positioned to identify intangible harms that meet minimum Article III requirements, its judgment is . . . instructive and important.").

144. *Id.*

145. *See, e.g.*, Hunstein v. Preferred Collection & Mgmt. Servs., Inc., 48 F.4th 1236, 1264 (11th Cir. 2022) (Newsom, J., dissenting).

146. Muransky v. Godiva Chocolatier, Inc., 979 F.3d 917, 931 (11th Cir. 2020).

147. Bayefsky, *supra* note 36, at 2291.

148. *See id.* at 2325 ("The tangible/intangible distinction, thus understood, creates two tiers of harm: one category of 'obvious' harm and one category of harm, the reality of which requires a more complex inquiry.").

149. *See id.* at 2311 (noting that, for the purposes of conducting a *Spokeo* concreteness inquiry, the "relationship between an alleged harm and a common law injury depends on the feature of the claimed harm on which a court focuses, as well as the court's interpretation of the scope of the historical cause of action").

150. *See* 141 S. Ct. 2190, 2200–14 (2021).

151. *See id.* at 2200–01.

152. *See* Ramirez v. TransUnion LLC, No. 12-cv-00632, 2016 WL 6070490, at *5 (N.D. Cal. Oct. 17, 2016), *aff'd*, 951 F.3d 1008 (9th Cir. 2020), *rev'd*, 141 S. Ct. 2190 (2021).

jury eventually returned a verdict with a total reward of more than sixty million dollars.[153]

The Supreme Court reversed and remanded.[154] Writing for the majority, Justice Kavanaugh distinguished the 1,853 members of the class whose erroneous credit reports were distributed to potential creditors from the 6,332 proposed class members whose credit reports, although containing misleading information, were never distributed externally.[155] The Court held that only the former group had Article III standing to advance their claims.[156]

Applying the *Spokeo* test, the Court concluded that the former class of plaintiffs suffered a concrete injury sufficiently close to the common-law tort of defamation when their information was distributed by the defendant.[157] However, the Court determined the latter group lacked standing because "there is 'no historical or common-law analog [sic] where the mere existence of inaccurate information, absent dissemination, amounts to concrete injury.'"[158] Significantly, the Court also held that "in a suit for damages, the mere risk of future harm, standing alone, cannot qualify as concrete harm."[159]

In dissent, Justice Thomas expressed concern that the Court was effectively usurping the legislative "power to create and define rights."[160] Noting the paradoxical nature of the principles guiding the majority opinion, Justice Kagan accused the majority of transforming "standing law from a doctrine of judicial modesty into a tool of judicial aggrandizement."[161]

The criticism was not limited to the bench.[162] Professor Elizabeth Earle Beske characterized *TransUnion* as a judicial power grab that "provides scant guidance to lower courts, invites them to substitute their own policy preferences for legislative will in frustration of the separation of powers . . . and circumscribes Congress's ability to act proactively to prevent harms in the first place and react to novel challenges."[163]

Despite many critiques that *TransUnion* was broadly favorable to corporate defendants because it narrowed the viable paths to standing, one

153. *See TransUnion LLC*, 141 S. Ct. at 2202.

154. *See id.* at 2200–01.

155. *See id.* at 2209.

156. *See id.* ("In short, the 1,853 class members whose reports were disseminated to third parties suffered a concrete injury in fact under Article III. The remaining 6,332 class members are a different story.").

157. *See id.* at 2208–09.

158. *Id.* at 2209 (quoting Owner-Operator Indep. Drivers Ass'n, Inc. v. U.S. Dep't of Transp., 879 F.3d 339, 334–35 (D.C. Cir. 2018)).

159. *Id.* at 2210–11.

160. *Id.* at 2221 (Thomas, J., dissenting).

161. *Id.* at 2225 (Kagan, J., dissenting).

162. *See, e.g.*, Mark Joseph Stern, *The Supreme Court's Conservatives Issued a Decision Too Extreme for Clarence Thomas*, SLATE (June 25, 2021, 4:10 PM), https://slate.com/news-and-politics/2021/06/transunion-kavanaugh-thomas.html [https://perma.cc/BRA6-DL7F]; Cindy Cohn, *Supreme Court Says You Can't Sue the Corporation That Wrongly Marked You a Terrorist*, ELEC. FRONTIER FOUND. (June 28, 2021), https://www.eff.org/deeplinks/2021/06/supreme-court-says-you-cant-sue-corporation-wrongly-marked-you-terrorist [https://perma.cc/7BAK-QDD8].

163. Beske, *supra* note 131, at 735.

potential bright spot for plaintiffs emerged through the Court's analysis of the relative "youth" of privacy torts.[164] After all, in the context of the *Spokeo* test, "'traditional' injuries could mean injuries recognized at the time of the founding," whereas "'traditional' injuries could mean injuries recognized over the past century."[165] By finding standing for plaintiffs who alleged a particularized invasion of privacy, *TransUnion* signaled that the Court "recognizes intrusion upon seclusion as a harm."[166]

C. Navigating Spokeo*: FDCPA's Intangible Harm Quandary and the Right to Privacy*

Ambiguity over the proper interpretation and reach of *Spokeo* and *TransUnion* has produced uncertainty around the question of whether harms traceable to FDCPA violations are sufficiently concrete to establish standing.[167] The "close relationship" test fashioned by *Spokeo* encourages courts to ground their analysis in a shared conception of American and English tort law theory.[168] Tort law is, above all else, "a law of wrongs."[169] When someone is legally wronged, tort law exists to provide a civil recourse to rectify that wrong.[170]

Although actionable wrongs often result in allegations of tangible injury, tort law has also long recognized that certain legal wrongs demand recourse regardless of the tangible consequences of that wrong. For example, "[t]he trespasser who set foot onto Blackacre faced legal exposure for violating the owner's private right even if she did not trample the blackberries."[171]

But as the Supreme Court made clear in *Spokeo*, a generalized notion of wrong can only get a plaintiff so far in establishing the prerequisites for standing.[172] For this reason, plaintiffs bringing FDCPA claims have increasingly grounded their claims in the common-law privacy torts.[173]

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164. *See* Daniel J. Solove & Danielle Keats Citron, *Standing and Privacy Harms: A Critique of* TransUnion v. Ramirez, 101 B.U. L. REV. ONLINE 62, 67 (2021) (pointing out that "both public disclosure of private facts and intrusion on seclusion received recognition as privacy torts recently relative to other torts—only during the mid-twentieth century").

165. *Id.*

166. *Id.* at 68.

167. *See infra* Part II.

168. *See supra* notes 138–44 and accompanying text.

169. JOHN C.P. GOLDBERG & BENJAMIN C. ZIPURSKY, RECOGNIZING WRONGS 2 (2020).

170. *See id.* at 4 (explaining that "to commit a tort is to engage in conduct that violates an institutionally entrenched norm or directive—one recognized explicitly or implicitly in judicial decisions or legislation"). Civil recourse theory is not so freewheeling as to make any allegation of wrongdoing actionable. *See id.* at 28. Instead, it has traditionally demanded particularity that resembles modern Article III standing requirements. *See id.* Tort law "identifies conduct that is not merely wrongful in the sense of being antisocial, but wrongful *as to* a particular person or wrongful as to each member of a defined group of persons." *Id.*

171. Beske, *supra* note 131, at 776.

172. *See supra* notes 138–44 and accompanying text.

173. *See, e.g.*, Hunstein v. Preferred Collection & Mgmt. Servs., Inc., 48 F.4th 1236, 1245 (11th Cir. 2022); Lupia v. Medicredit, Inc. 8 F.4th 1184, 1189 (10th Cir. 2021); Ward v. Nat'l Patient Acct. Servs. Sols., Inc., 9 F.4th 357, 362 (6th Cir. 2021); Donovan v. Firstcredit, Inc., 983 F.3d 246, 252 (6th Cir. 2020).

1. The FDCPA's Relationship with the Right to Be Left Alone as Conceived by Justice Brandeis and Samuel Warren

Justice Brandeis and Samuel Warren's seminal 1890 article *The Right to Privacy*[174] helped define and shape the path of twentieth-century privacy jurisprudence.[175] In tracking the evolution of the common law, Justice Brandeis and Warren noted that the fundamental "right to life" evolved to include the right to *enjoy* that life and encompassed a right to be left alone.[176]

Justice Brandeis and Warren were particularly concerned with the growth of mass media and the invasive tactics employed by this new threat.[177] This naturally led to the article's emphasis on defamation and slander in discussing actionable privacy torts.[178] However, the principle that they sought to protect was not just the narrow right against defamation or slander, but rather the broader fundamental right to be left alone more generally.[179]

If a right to privacy exists, Justice Brandeis and Warren posit, then an invasion of that right produces concrete harm because "the value of mental suffering, caused by an act wrongful in itself, is recognized as a basis for compensation."[180] Accordingly, they recommend a private right of action for damages under tort law as the ideal remedy to an unlawful invasion of privacy.[181]

2. The FDCPA, *Housh v. Peth*, and Professor Prosser's Privacy Restatements

These Brandeisian principles formed the basis of Professor Prosser's highly influential 1960 article, *Privacy*.[182] Professor Prosser identified four

174. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

175. *See* Neil M. Richards, *The Puzzle of Brandeis, Privacy, and Speech*, 63 VAND. L. REV. 1295, 1295–96 (2010) (arguing that Justice Brandeis and Warren's *The Right to Privacy* is a "foundation of American privacy law . . . considered by scholars to have established not just the privacy torts but the field of privacy law itself").

176. *See* Warren & Brandeis, *supra* note 174, at 193.

177. *See id.* at 196 (arguing for the necessity of privacy protections because "the press is overstepping in every direction the obvious bounds of propriety and of decency"); *see also id.* at 211 (putting urgency on the need to articulate a right to privacy because "now that modern devices afford abundant opportunities for the perpetration of such wrongs without any participation by the injured party, the protection granted by the law must be placed upon a broader foundation"). This preoccupation with journalistic practices was likely informed by deeply personal motivations. *See* William L. Prosser, *Privacy*, 48 CALIF. L. REV. 383, 383 (1960) (explaining that *The Right to Privacy* was in part a reaction to Samuel Warren's "annoyance" at the press having a "field day" with "the wedding of [Warren's] daughter").

178. *See, e.g.*, Warren & Brandeis, *supra* note 174, at 196.

179. *See id.* at 195 (explaining that "recent inventions and business methods call attention to the next step which must be taken for the protection of the person, and for securing to the individual . . . *the right 'to be let alone'*" (emphasis added)).

180. *Id.* at 213.

181. *See id.* at 219 ("The remedies for an invasion of the right of privacy are also suggested," such as through "[a]n action of tort for damages in all cases.").

182. *See generally* Prosser, *supra* note 177.

distinct breaches of privacy giving rise to a cause of action, including the "intrusion upon the plaintiff's seclusion or solitude."[183]

In *Privacy*, Professor Prosser incorporates a favorable citation to *Housh v. Peth* into his overview of the tort of intrusion upon seclusion.[184] Professor Prosser characterized *Housh* as a privacy tort suit brought by a plaintiff-debtor after the defendant-creditor "hounded the debtor for a considerable length of time with telephone calls at his home and his place of employment."[185] Through *Housh*, the Supreme Court of Ohio held that the right to privacy, as first defined by Justice Brandeis and Warren, extended to grant the debtor a right of action when the creditor's practices were unreasonably invasive, even if their only harms suffered were mental distress.[186] The case, decided in 1956, predated the passage of the FDCPA by twenty years and was thus exclusively grounded in the common law.[187]

Professor Prosser eventually formalized his privacy framework through his authorship of the Restatement (Second) of Torts.[188] Included as an actionable claim under the Second Restatement was a privacy tort meant to remedy "unreasonable intrusion upon the seclusion of another."[189] Professors Neil M. Richards and Daniel J. Solove have noted Professor Prosser's lasting influence, observing that, "even today, most courts look to the Restatement's formulation of the privacy torts as the primary authority."[190]

II. AN UNCERTAIN STANDARD: NARROW AND BROAD APPROACHES TO FDCPA STANDING

Courts subject FDCPA standing inquiries to the standard *Spokeo* test that evaluates both congressional intent and the claim's proximity to traditional English or American common-law torts.[191] Even though all courts ostensibly apply the same test, they appear increasingly divided on how to properly interpret and weigh the two prongs of *Spokeo*, creating uncertainty and divergent outcomes in FDCPA standing inquiries.[192]

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183. *Id.* at 389.

184. *Id.* at 390 n.70 (citing Housh v. Peth, 133 N.E.2d 340 (Ohio 1956)).

185. *Id.* at 390 (citing Housh v. Peth, 133 N.E.2d 340 (Ohio 1956)).

186. *See* Housh v. Peth, 133 N.E.2d 340, 344 (Ohio 1956) (affirming judgment for the plaintiff because "the defendant deliberately initiated a systematic campaign of harassment of the plaintiff" and, "where the right of privacy is invaded, the person injured is entitled to recover substantial damages although the only damages suffered by her result from mental anguish").

187. *See id.*

188. *See* Neil M. Richards & Daniel J. Solove, *Prosser's Mixed Legacy*, 98 CALIF. L. REV. 1887, 1890 (2010).

189. RESTATEMENT (SECOND) OF TORTS § 652(2)(a) (AM. L. INST. 1977).

190. Richards & Solove, *supra* note 188, at 1890.

191. *See, e.g.*, Lupia v. Medicredit, Inc., 8 F.4th 1184, 1191 (10th Cir. 2021) ("In determining whether an intangible harm is sufficiently concrete to constitute an injury in fact, we look to both history and to the judgment of Congress.").

192. *Compare infra* notes 200–26 and accompanying text, *with infra* notes 226–69 and accompanying text.

The second prong of *Spokeo*, the close-relationship test, is particularly divisive.[193] That inquiry necessarily hinges on how courts characterize the alleged harm in the first place—whether a court believes that an FDCPA violation represents an *actual* invasion of privacy or simply created the risk of a *future* invasion of privacy can often dictate whether a plaintiff meets threshold standing requirements.[194]

Part II.A analyzes what this Note characterizes as the "broad," more permissive approach to the FDCPA standing question. It can best be exemplified by the U.S. Court of Appeals for the Third Circuit's decision in *DiNaples v. MRS BPO, LLC*.[195] There, the court explicitly rejected the notion that a concrete harm could only be demonstrated through an individual's actual act of accessing unlawfully disclosed information related to a plaintiff's debt.[196] Instead, under a privacy tort theory, the court conferred standing because the statutory breach "[was] *itself* the harm."[197] The broad approach to the FDCPA standing question typically gives more weight to the legislative intent behind the FDCPA and adopts a more flexible view as to what is "close enough" under *Spokeo*.[198]

Part II.B examines the other end of the spectrum—courts applying a "narrow" approach to FDCPA standing. The narrow approach typically produces more defendant-friendly outcomes because it demands a higher level of synthesis between the alleged harm and a traditional common-law tort to satisfy the close-relationship test and confer standing.[199]

A. Courts Taking a Broad, More Flexible Approach to FDCPA Standing

The "broad" approach to FDCPA standing explored in this part can best be understood as a more plaintiff-friendly application of both prongs of *Spokeo*.[200] First, these courts afford greater weight to the judgment of

193. *See, e.g.*, Hunstein v. Preferred Collection & Mgmt. Servs., Inc., 48 F.4th 1236 (11th Cir. 2022). See also *infra* Part II.B.3 for greater discussion of the disagreement between the *Hunstein* majority and dissent regarding the second prong of *Spokeo*.

194. *Compare* DiNaples v. MRS BPO, LLC, 934 F.3d 275, 280 (3d Cir. 2019) (finding standing based on a determination that the FDCPA violation represented an actual invasion of privacy), *with* Ward v. Nat'l Patient Acct. Servs. Sols. Inc., 9 F.4th 357, 362 (6th Cir. 2021) (finding no standing because the sharing of private information to a third party only created the risk of a future privacy harm).

195. 934 F.3d 275 (3d. Cir. 2019).

196. *See id.* at 280 ("[The defendant] is incorrect to suggest that 'to establish Article III standing, [the plaintiff] would have to show that someone actually intercepted her mail, scanned the barcode, read the unlabeled string of numbers and determined the contents related to debt collection—or it was imminent someone might do so.'" (quoting defendant's brief)).

197. *Id.*

198. *See, e.g.*, Pierre v. Midland Credit Mgmt., Inc., 29 F.4th 934, 946 (7th Cir. 2022) (Hamilton, J., dissenting) (arguing that *Spokeo* and *TransUnion* "emphasized the need to give considerable deference—'due respect'—to the judgment of Congress and to allow standing based on injuries similar, not identical, to those long recognized in the law").

199. *See, e.g.*, Hunstein v. Preferred Collection & Mgmt. Servs., Inc., 48 F.4th 1236, 1245 (11th Cir. 2022) ("[I]f an element from the common-law comparator tort is completely missing, it is hard to see how a statutory violation could cause a similar harm.").

200. *See supra* notes 138–44 and accompanying text.

Congress in passing the FDCPA.[201] Second, they operate with a greater presumption toward finding a claim sufficiently "close enough" under *Spokeo* to a traditional common-law tort to represent a sufficiently concrete claim.[202]

1. The Second Circuit: *Cohen v. Rosicki, Rosicki & Associates P.C.*

In *Cohen v. Rosicki, Rosicki & Associates P.C.*,[203] the U.S. Court of Appeals for the Second Circuit found standing for a plaintiff bringing a putative class action suit alleging FDCPA violations over the improper identification of a creditor in a foreclosure complaint.[204]

In a decision that predates *TransUnion*, the court reasoned that the alleged violations "might have deprived [the plaintiff] of information relevant to the debt prompting the foreclosure proceeding, posing a risk of real harm."[205] Although the Supreme Court's decision in *TransUnion* means that plaintiffs can no longer avail themselves of a risk-of-harm theory of standing,[206] the Second Circuit's decision remains significant because of how it gave probative effect to the congressional intent behind the FDCPA in distinguishing the harm alleged by the plaintiff from insufficiently bare statutory violations.[207] Thus, even though it relies on a now outdated theory of standing, the *Cohen* court also indicates support for a broader and more flexible interpretation of the *Spokeo* test that puts the judicial and legislative prongs on more equal footing.[208]

2. The Third Circuit: *DiNaples v. MRS BPO, LLC*

In *DiNaples v. MRS BPO, LLC*, the plaintiff received a collection letter that contained a QR code that, if scanned, would reveal an internal reference number associated with the plaintiff's account number with the debt

201. *See* Cohen v. Rosicki, Rosicki & Assocs. P.C., 897 F.3d 75, 80 (2d. Cir. 2018); *see also* Spokeo, Inc. v. Robins, 578 U.S. 330, 340 (2016).

202. *See, e.g.*, Lupia v. Medicredit, Inc., 8 F.4th 1184, 1192 (10th Cir. 2021) ("Though a single phone call may not intrude to the degree required at common law, that phone call poses the same *kind* of harm recognized at common law—an unwanted intrusion into a plaintiff's peace and quiet."). Some courts, like the *Lupia* court here, have executed their broad approach to FDCPA standing through a more explicit endorsement of the kind-degree framework that this Note advocates for, but it is by no means the exclusive approach to analyzing FDCPA claims from a broader and more flexible perspective.

203. 897 F.3d 75 (2d. Cir. 2018).

204. *See id.*; *see also* 15 U.S.C. §§ 1692e, 1692g.

205. *Cohen*, 897 F.3d at 81.

206. *See supra* note 159.

207. *See Cohen*, 897 F.3d at 81 ("Congress thus sought to protect consumers' concrete economic interest in enacting these [FDCPA] provisions.").

208. *See id.* ("*Spokeo* does not 'categorically . . . preclude[] violations of statutorily mandated procedures from qualifying as concrete injuries supporting standing.' It teaches, instead, that in order to 'determine whether a procedural violation manifests injury in fact, a court properly considers whether Congress conferred the procedural right in order to protect an individual's concrete interests." (alterations in original) (quoting Strubel v. Comenity Bank, 842 F.3d 181, 189 (2d Cir. 2016))).

collector.[209] The plaintiff subsequently filed an FDCPA claim alleging that the QR code violated the statute's prohibition on the use of language or symbols other than the debt collector's address when communicating with a consumer by mail.[210] Concluding that harms attributable to an invasion of privacy have long provided the basis for legal action in American and English common law, the Third Circuit found standing for the plaintiff.[211]

Although the case predated *TransUnion*, the court's rejection of the defendant's argument that the plaintiff could not establish standing absent a showing that a third party accessed the QR code anticipates a core question posed in the post-*TransUnion* world.[212] The court did not view the FDCPA breach as the creation of a *risk* of harm but instead reasoned that by implicating a core and cognizable privacy concern, "the disclosure of an account number *is itself* the harm."[213]

Analyzing the plaintiff's claim, the *DiNaples* court did not discuss or distinguish its analytical framework from those of courts taking a narrower approach to FDCPA standing.[214] However, by finding standing on the grounds that an FDCPA breach implicates "core privacy concerns,"[215] the *DiNaples* court implicitly bypassed the more exhaustive, element-by-element approach to the close-relationship test that exemplifies the narrow approach to FDCPA standing.[216]

3. The Tenth Circuit: *Lupia v. Medicredit, Inc.*

The U.S. Court of Appeals for the Tenth Circuit found standing in *Lupia v. Medicredit, Inc.*[217] In *Lupia*, the plaintiff sent a letter to the defendant debt collector demanding that they stop calling her regarding an unpaid medical debt.[218] The day after the defendant received the letter, but before it processed the letter, it called the plaintiff one more time.[219] The plaintiff subsequently filed suit alleging that the defendant violated the FDCPA by continuing to try and collect a debt after receiving a cease-and-desist letter.[220]

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209. *See* DiNaples v. MRS BPO, LLC, 934 F.3d 275, 278 (3d Cir. 2019).
210. *See id.*; *see also* 15 U.S.C. § 1692f(8).
211. *See DiNaples*, 934 F.3d at 280.
212. *See id.* ("[Defendant] is incorrect to suggest that 'to establish Article III standing, [the plaintiff] would have to show that someone actually intercepted her mail, scanned the barcode, read the unlabeled string of numbers and determined the contents related to debt collection—or it was imminent someone might do so.'" (quoting Brief and Appendix for Defendant-Appellant Volume I of III (Pages A1 to A18) at 16, DiNaples v. MRS BPO, LLC, 934 F.3d 275 (3d. Cir. 2019) (No. 18-2972), 2019 WL 969877)).
213. *Id.*
214. *See id.* at 278–80.
215. *Id.* at 280 (quoting Douglass v. Convergent Outsourcing, 765 F.3d 299, 304 (3d Cir. 2014)).
216. *See infra* Part II.B.
217. 8 F.4th 1184 (10th Cir. 2021).
218. *See id.* at 1187.
219. *See id.* at 1188.
220. *See id.* at 1188–89.

In contrast to the other broad approach decisions discussed in this section, the *Lupia* decision was released after *TransUnion* and could thus offer a valuable model for plaintiffs seeking to satisfy FDCPA standing requirements under existing doctrine. The *Lupia* court actively distinguished its plaintiff's circumstances from those of the parties denied standing in *TransUnion*.[221] In finding standing, the Tenth Circuit explained that the claim was grounded in the common-law tort of intrusion upon seclusion—an invasion of privacy—and that the solitary nature of the alleged breach mattered less than the fact that the "phone call pose[d] the same *kind* of harm recognized at common law."[222] By discussing how the plaintiff's claims are similar *in kind* to a common-law tort, the *Lupia* court appears to explicitly endorse a kind-degree framework for evaluating FDCPA standing inquiries.[223]

The court also appears to incorporate the legislative prong of the *Spokeo* analysis in a more intentional way. "In enacting the FDCPA, Congress recognized that abusive debt-collection practices may intrude on another's privacy interests."[224] To find standing for the plaintiff, the court not only favorably invoked legislative intent, but also engaged in a robust analysis under the second prong of *Spokeo* to demonstrate the way in which the plaintiff's claims sufficiently aligned with common-law privacy torts.[225]

B. The Narrow Approach to Standing in Ascendency

To the extent that courts have coalesced around a shared approach to FDCPA standing, it appears that a narrower and more defendant-friendly approach has gained steam.[226] This approach places more significance on *TransUnion* and tends to view FDCPA violations not as invasions of a plaintiff's privacy rights but instead as procedural violations creating the risk of a future privacy harm that may or may not be realized.[227]

The U.S. Court of Appeals for the Eleventh Circuit's volatile path in *Hunstein v. Preferred Collection & Management Services, Inc.* is illustrative. There, the court eventually coalesced around an element-by-element analysis of the claim in relation to the tort of public disclosure and denied standing when an element could not be met, thereby exemplifying both the uncertainty

221. *See id.* at 1192 ("But [*TransUnion*] differs markedly from ours. . . . That analysis doesn't control our case because [the plaintiff] has alleged the necessary components for a common-law intrusion-upon-seclusion-tort.").

222. *Id.* at 1191–92.

223. *See id.*

224. *See id.* at 1192.

225. *See id.* at 1193 ("We needn't rely on Congress's 'say-so' alone. As noted, [the plaintiff's] claims have roots in long-standing common-law tradition. We thus conclude that [the plaintiff] has sufficiently alleged that she suffered a concrete injury.").

226. *See e.g.*, Markakos v. Medicredit, Inc., 997 F.3d 778, 779 (7th Cir. 2021) ("In the last five months, we've held eight times that a breach of the Fair Debt Collection Practices Act ('FDCPA') does not, by itself, cause an injury in fact. We now repeat that refrain once more.").

227. *See, e.g.*, Ward v. Nat'l Patient Acct. Servs. Sols., Inc., 9 F.4th 357, 361–62 (6th Cir. 2021).

surrounding the FDCPA standing issue and the ascendancy of the narrow approach as a possible solution.[228]

1. The Tenth Circuit: *Shields v. Professional Bureau of Collections of Maryland, Inc.*

Although the Tenth Circuit in *Lupia v. Medicredit, Inc.* demonstrated the way in which courts can apply a broader interpretation of the *Spokeo* test to help FDCPA plaintiffs satisfy their concreteness burden,[229] the Tenth Circuit nevertheless also demonstrated the narrow application of *Spokeo* in ascendancy in *Shields v. Professional Bureau of Collections of Maryland, Inc.*[230] In that case, the plaintiff brought claims under the FDCPA alleging that the defendant debt collector improperly shared her debt with an outside mailing company and misrepresented the debt in their communications to her.[231]

Rather than rejecting *Lupia*, the court distinguished the two cases and focused its analysis on the plaintiff's ability to analogize her claims to the public disclosure tort.[232] Taking a narrow interpretative approach, the court dismissed the claims because the plaintiff did not demonstrate that her private information was shared publicly when it was shared with a third party, thus falling short of satisfying an essential element of the common-law tort of public disclosure.[233] In addition to denying standing on a privacy theory of harm, the court also rejected the notion that the FDCPA violation in question could cause a level of emotional distress sufficient to establish actual harm.[234]

2. The Sixth Circuit: *Ward v. National Patient Account Services Solutions, Inc.*

The U.S. Court of Appeals for the Sixth Circuit's dismissal of the complaint in *Ward v. National Patient Account Services Solutions, Inc.*[235] on standing grounds could represent a harbinger of things to come for FDCPA plaintiffs. The court recognized first that *TransUnion* abrogated prior decisions in the circuit upholding standing for FDCPA plaintiffs on a risk-of-harm theory.[236] From there, the court looked unfavorably on the

228. *See* Hunstein v. Preferred Collection & Mgmt. Servs., Inc., 48 F.4th 1236, 1245 (11th Cir. 2022) ("Because the harm [the plaintiff] now asserts lacks an element essential to its only plausible historical comparator, it lacks a close relationship with a traditional common-law tort.").

229. *See supra* notes 217–26 and accompanying text.

230. 55 F.4th 823 (10th Cir. 2022).

231. *See id.* at 827.

232. *See id.* at 828–29.

233. *See id.* at 829.

234. *See id.* at 830 ("Her confusion and misunderstanding are insufficient to confer standing.").

235. 9 F.4th 357 (6th Cir. 2021).

236. *See id.* at 361 ("In *Macy*, we held that the plaintiffs satisfied the concreteness requirement where 'FDCPA violations created a material risk of harm to the interests

notion that an FDCPA violation did more than produce just the risk of a future concrete harm.[237]

In *Ward*, the plaintiff brought FDCPA claims alleging that the defendant's representatives failed to identify themselves as debt collectors in voice messages,[238] failed to identify the true identity of the business when they associated themselves with "NPAS" in their voice mail instead of "NPAS, Inc.,"[239] and failed to meaningfully disclose their identities over the telephone.[240] The plaintiff claimed that the failure of the defendant's representatives to properly identify themselves confused him into sending a cease-and-desist letter to the wrong entity.[241]

The Sixth Circuit dismissed the action for lack of standing, holding that FDCPA plaintiffs can only establish a sufficient connection to common-law privacy torts when they establish that their private information was publicly disclosed in some manner.[242] The *Ward* court thus seemingly presupposes that FDCPA claims do not represent actual invasions of privacy but instead impact an individual only by raising the risk of a future invasion of privacy.[243]

3. The Eleventh Circuit: *Hunstein v. Preferred Collection & Management Services, Inc.*

The Eleventh Circuit's vigorous back-and-forth in *Hunstein v. Preferred Collection & Management Services, Inc.* serves as a vivid example of the competing interpretations in FDCPA standing jurisprudence.[244] In *Hunstein*, the defendant sought to collect a plaintiff's medical debt by sending its third-party mail vendor information that included the plaintiff's name, his son's name, the total amount of debt incurred, and the fact that the debt was incurred to pay for his son's medical treatment.[245]

After receiving the letter, the plaintiff brought an FDCPA claim alleging improper disclosure of information on his debt to a third party.[246] The district court granted the defendant's motion to dismiss, finding that the

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recognized by Congress in enacting the FDCPA.' Recently, the Supreme Court abrogated that holding." (quoting Macy v. GC Servs. Ltd. P'ship, 897 F.3d 747, 761 (6th Cir. 2018))).

237. *See id.*

238. *See id.* at 360; *see also* 15 U.S.C. § 1692e(11).

239. *See* 15 U.S.C. § 1692e(14).

240. *See Ward*, 9 F.4th at 359–62; *see also* 15 U.S.C. § 1692d(6).

241. *See Ward*, 9 F.4th at 360.

242. *See id.* at 362 ("Had [the plaintiff] claimed, for example, that NPAS, Inc. improperly shared personal information with a third party . . . publicized his debts . . . or used language on a publicly viewable envelope that would identify him as a debtor . . . then [the plaintiff's] alleged harm would more closely resemble an invasion of privacy. By contrast, the mere failure to provide certain information does not mirror an intentional intrusion into the private affairs of another.").

243. *See id.*

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

245. *See id.* at 1240.

246. *See id*.

communication to the mail vendor did not trigger a statutory violation under the FDCPA.[247]

The Eleventh Circuit initially reversed, holding that the plaintiff adequately alleged a concrete injury that was sufficiently close to common-law privacy torts.[248] After the Supreme Court decision in *TransUnion*, the Eleventh Circuit vacated their first opinion but, after reconsideration, issued a second opinion that came to the same conclusion.[249] This time, standing was found over a pointed dissent that argued that the "[court's] standing analysis [swept] much more broadly than *TransUnion* would allow."[250]

In a third decision, the Eleventh Circuit vacated again, ordering a rehearing en banc.[251] Finally, the court en banc reversed the panel decision, dismissing the case on standing grounds.[252] The majority adopted a narrow approach to the *Spokeo* test wherein, "if an element from the common-law comparator tort is completely missing," then a statutory violation could not be sufficiently close to a common-law tort to produce standing.[253] In doing so, the court engaged in a painstaking analysis of the plaintiff's claim in comparison to the common-law tort of public disclosure and determined that the plaintiff's allegations of *private* disclosure to third party vendors was fundamentally distinct from the required showing of a *public* disclosure.[254] Under this element-by-element approach, "without publicity, there is no invasion of privacy—which means no harm."[255]

The reversal sparked a vigorous dissent from Judge Kevin C. Newsom, who had written the two previous Eleventh Circuit opinions in *Hunstein* finding standing.[256] Judge Newsom did not dispute the utility of the *Spokeo* test but instead challenged the notion that a claim satisfying two prongs of a three-pronged tort was insufficiently "close enough" to that tort to confer

247. *See* Hunstein v. Preferred Collection & Mgmt. Servs., Inc., No. 19-cv-983, 2019 WL 5578878, at *3 (M.D. Fla. Oct. 29, 2019), *rev'd*, 994 F.3d 1341 (11th Cir. 2021), *aff'd on reh'g*, 17 F.4th 1016 (11th Cir. 2021), *vacated*, 48 F.4th 1236 (11th Cir. 2022) (en banc).

248. *See* Hunstein v. Preferred Collection & Mgmt. Servs., Inc., 994 F.3d 1341, 1347 (11th Cir.), *aff'd on reh'g*, 17 F.4th 1016 (11th Cir. 2021), *vacated*, 48 F.4th 1236 (11th Cir. 2022) (en banc).

249. *See* Hunstein v. Preferred Collection & Mgmt. Servs. Inc., 17 F.4th 1016, 1024 (11th Cir. 2021), *vacated*, 48 F.4th 1236 (11th Cir. 2022) (en banc) (holding that, even having considered *TransUnion*, the alleged statutory violation is "sufficiently analogous" to invasion-of-privacy torts to confer standing).

250. *Id.* at 1038 (Tjoflat, J., dissenting).

251. *See Hunstein*, 17 F.4th 1103.

252. *See* Hunstein v. Preferred Collection & Mgmt. Servs. Inc., 48 F.4th 1236, 1240 (11th Cir. 2022) (en banc).

253. *Id.* at 1245.

254. *See id.* ("Indeed, the harm at the core of the tort is based not on the fact that embarrassing information exists, but that the public knows about it. So without publicity, there can be no public disclosure.").

255. *Id.*

256. *See id.* at 1256–72 (Newsom, J., dissenting).

standing.[257] "That disagreement is narrow, but it is profound,"[258] wrote Judge Newsom.

He instead advocated for a "kind-degree" approach to the FDCPA standing question, under which a "plaintiff suing on a statutory cause of action must show that his alleged injury is similar in *kind* to the harm addressed by a common-law cause of action, but not that it is identical in *degree*."[259] This approach, he argues, comports with the Supreme Court's decisions in *TransUnion* and *Spokeo* to chart a "middle course" in standing jurisprudence that neither abdicates the judiciary's role in upholding Article III standing requirements nor improperly frustrates legislative authority.[260]

4. The Seventh Circuit: *Pierre v. Midland Credit Management, Inc.*

In *Pierre v. Midland Credit Management, Inc.*, the plaintiff received a letter from the defendant debt collector seeking payment for a debt for which the statute of limitations had already run.[261] The court found the claims to be insufficiently concrete because, at best, they gave rise to a claim that the plaintiff was exposed to a risk of future harm.[262] The Seventh Circuit did not analyze the claim through a privacy lens but instead considered and rejected the plaintiff's argument that the alleged harms were sufficiently close to emotional-distress torts based on how the communications confused the plaintiff.[263]

In dissent, Judge David F. Hamilton noted that *Pierre* embodied the Seventh Circuit's accumulated hostility toward plaintiffs in FDCPA standing inquiries.[264] The key insight of Judge Hamilton's dissent, like Judge Newsom's dissent in *Hunstein*,[265] lies in its insistence, not that *Spokeo* or

257. *See id.* at 1258 ("The dispute here, therefore, centers on one element of a three-element tort—and, in particular, on whether [the plaintiff's] allegations concerning that tort's 'publicity' element, though not an 'exact duplicate,' are 'close enough' for Article III purposes. The majority and I disagree about how close is 'close enough,' about how the 'close enough' question should be evaluated, and ultimately, about whether [the plaintiff's] publicity-related allegations satisfy the 'close enough' standard.").

258. *Id.*

259. *See id.* at 1264.

260. *See id.*

261. *See* 29 F.4th 934, 936–37 (7th Cir. 2022).

262. *See id.* at 936 (stating that "the letter might have created a risk that [the plaintiff] would suffer a harm, such as paying the time-barred debt. But a risk, at most, is all it was. That's not enough to establish an Article III injury in a suit for money damages, as the Supreme Court held last year" (citing TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2210–11 (2021))).

263. *See id.* at 939 ("[The plaintiff] testified that she experienced emotional distress arising from her concern about being sued for the debt. But worry, like confusion, is insufficient to confer standing in this context.").

264. *See id.* at 940 (Hamilton, J., dissenting) ("The majority follows several cases from the last two years in which this court has denied standing under the FDCPA on grounds that leave little or no room for intangible injuries.").

265. *See* Hunstein v. Preferred Collection & Mgmt. Servs., Inc., 48 F.4th 1236, 1264–65 (11th Cir. 2022) (en banc) (Newsom, J., dissenting).

other doctrinal standing cases were wrongly decided, but that courts are overreading and misapplying the holdings of those cases.[266]

Judge Hamilton pushed back on the majority's interpretation of both prongs of the *Spokeo* test.[267] He criticized the majority both for failing to give "due respect" to congressional judgment and for "overlooking close historical parallels" that afford FDCPA plaintiffs the necessary proximity to traditional common-law torts to satisfy the close-relationship test.[268]

III. THE KIND-DEGREE PATH FORWARD: FDCPA PLAINTIFFS HAVE STANDING BASED ON THEIR CLAIMS' CLOSE RELATIONSHIP TO COMMON-LAW PRIVACY TORTS

Part III of this Note seeks to resolve two interrelated questions: (1) the analytical framework under which FDCPA standing inquiries should be evaluated and (2) whether FDCPA claims are sufficiently concrete under the chosen analytical framework to confer standing.

Recent scholarship on the FDCPA standing question has largely sought to resolve the issue by seeking to relitigate and amend *Spokeo* to explicitly give greater weight to congressional intent.[269] This Note largely shares the critique that the narrow approach to FDCPA standing impermissibly discounts the legislative prong of the *Spokeo* test and incorporates this perspective into its proposed resolution. But these alternative approaches that advocate for a dispositive influence of legislative intent implicitly concede that FDCPA claims cannot otherwise be sustained under the incumbent standing regime.[270] Such solutions thus concede too much. As an alternative, this Note offers perspective on the viability of FDCPA claims under the existing *Spokeo* standard.[271]

Part III.A addresses the first question by advocating for a kind-degree approach to evaluating FDCPA intangible harm claims for concreteness. Part III.B then applies the kind-degree framework and argues that an analysis of both prongs of *Spokeo* militates in favor of finding that FDCPA violations

266. *See Pierre*, 29 F.4th at 940 (Hamilton, J., dissenting) ("These errors have led us to restrict standing under consumer protection laws much more tightly than the Supreme Court itself has.").

267. *See id.*

268. *See id.*

269. *See, e.g.*, Jason R. Smith, *Statutes and* Spokeo*: The Case of the FDCPA*, 87 U. CHI. L. REV. 1695, 1716 (2020) (recommending an approach premised on the notion that a "plaintiff does not need to show any additional harm beyond the violation to have standing" if the statutory violation the cause of action is brought under was drafted with the intent to "deter industry activity rather than to compensate individuals for their losses"). Under such an approach, the congressional intent to regulate and deter industry actors through the FDCPA would render all "violations of the FDCPA's mandatory disclosure provisions . . . concrete injuries for purposes of injury in fact." *Id.* at 1698.

270. *See* Annefloor J. de Groot, *No [Concrete] Harm, No Foul?: Article III Standing in the Context of Consumer Protection Financial Laws*, 56 GA. L. REV. 819, 859 (2022) (proposing that plaintiffs bringing FDCPA claims should categorically be granted standing because they have alleged "the precise type of harm that a statute aimed to prevent," and thus "should not be required to allege an additional harm beyond the one identified by Congress").

271. *See supra* notes 138–44 and accompanying text.

produce concrete injuries satisfying Article III standing requirements. Part III.C distinguishes this Note's FDCPA theory of privacy harm from the risk-of-harm construction foreclosed by the Supreme Court in *TransUnion*. Finally, Part III.D looks back at the Sixth Circuit's denial of standing in *Ward* and explains how the kind-degree framework would have allowed for a different outcome.

A. The Kind-Degree Framework Fairly Balances the Legislative and Judicial Interests Represented in the Spokeo *Test*

The primary flaw in the ascendant narrow reading of *Spokeo*'s two-pronged test is that, as applied to the FDCPA, it largely casts aside congressional intent as a relevant factor and thus amounts to an impermissible if inadvertent power grab by courts at the expense of a coequal branch of government.[272] The narrow approach transforms *Spokeo*'s two-pronged test into a largely singular inquiry—whether the harm caused by the alleged FDCPA violation is "close enough" to a tort traditionally recognized by American and English common law.[273]

And having already minimized congressional intent, the narrow approach further warps *Spokeo* through its exacting, element-by-element approach to the close-relationship test.[274] This approach conflicts with the Supreme Court's clarification in *TransUnion* that intangible harms can be sufficiently concrete even if they are not "an exact duplicate" of traditional common law tort claims.[275] Moreover, the precedential value of *Akins* and the prudential standing framework further support the utility of legislative intent as a probative standing factor.[276]

The kind-degree approach affords due respect to Congress in the exercise of recognizing and protecting new rights.[277] It does so without overcorrecting and abdicating the essential supervisory role that courts provide through a robust standing inquiry, thereby avoiding a lurch back to

272. *See, e.g.*, Hunstein v. Preferred Collection & Mgmt. Servs., Inc., 48 F.4th 1236, 1243 (11th Cir. 2022) (en banc) ("So congressional judgment, though instructive, is not enough.").

273. *See, e.g.*, Ward v. Nat'l Patient Acct. Servs. Sols., Inc., 9 F.4th 357, 362 (6th Cir. 2021) ("Because the procedural injuries [the plaintiff] asserts do not bear a close relationship to traditional harms, we conclude that he cannot demonstrate standing based upon the statutory violations alone.").

274. *See* Shields v. Pro. Bureau of Collections of Md., Inc., 55 F.4th 823, 829–30 (10th Cir. 2022); *see also Hunstein*, 48 F.4th at 1245 ("Because the harm [the plaintiff] now asserts lacks an element essential to its only plausible historical comparator, it lacks a close relationship with a traditional common-law tort.").

275. TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2209 (2021); *see also Hunstein*, 48 F.4th at 1261 (Newsom, J., dissenting) ("After all, if the majority is going to require a plaintiff . . . to satisfy every element of a common-law claim—without any accommodation at all—how *isn't* it, in practice, requiring an 'exact duplicate?'").

276. *See supra* notes 122–30 and accompanying text.

277. *See, e.g.*, *Hunstein*, 48 F.4th at 1263 (Newsom, J., dissenting) ("Congress has *some* role in recognizing new judicially enforceable rights; it is not limited to replicating and codifying preexisting common-law causes of action.").

the pre-*Lujan* regime under which the congressional prong controlled.[278] After all, the kind-degree framework still provides for a close-relationship test with teeth.[279] The inquiry into whether a claim is similar in *kind* to a traditional common-law tort represents a coherent limiting principle that will still empower courts to filter out weak, attenuated claims based on bare statutory violations.[280]

In its conscious appreciation and consideration of congressional action, the kind-degree approach also preempts the criticism articulated by Professor Bayefsky that *Spokeo* creates too large a window of discretion for judges to substitute their own normative judgments for legal analysis.[281] In fairness to courts adopting the narrow approach to *Spokeo*, there are no indications that these rulings have been motivated by policy disagreements with the statute itself. Nonetheless, a more intentional consideration of legislative intent enhances the integrity of standing jurisprudence by creating a structural shield against any such accusations.

Without question, the narrow approach to FDCPA standing, particularly the element-by-element approach endorsed in *Hunstein* and *Shields*, offers considerable benefits.[282] These decisions were grounded in a coherent framework with clear, bright lines.[283] If the primary consideration governing standing doctrine was ensuring efficiency in the courts, then there would be substantial utility to embracing this narrow, element-by-element approach to FDCPA standing.

But standing is more than an exercise in maximizing judicial economy—it implicates core separation-of-powers concerns.[284] Consider the legislative implications of the ascendant narrow approach to FDCPA standing inquiries. If Congress deliberately empowered consumers to curtail improper debt collection practices through private suits, then treatment of these claims as presumptively defective amounts to a partial repeal of the statute itself.[285] Would this outcome realize the doctrinal goal of *restraining* the judiciary through Article III?[286] On the contrary, this narrow approach to FDCPA standing essentially usurps legislative power and more closely resembles the "judicial aggrandizement" that Justice Kagan has warned of.[287]

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278. *See id.* at 1264 (lauding *Spokeo* and *TransUnion* for "[s]teering the required middle course between the two fixed points—again, (1) that Congress can't enact just any old injury into existence, and (2) that plaintiffs suing under congressional enactments needn't 'exact[ly] duplicate' an existing common-law claim").

279. *See supra* notes 256–61 and accompanying text.

280. *See Hunstein*, 48 F.4th at 1257 (Newsom, J., dissenting).

281. *See supra* notes 147–49 and accompanying text.

282. *See Hunstein*, 48 F.4th at 1245; Shields v. Pro. Bureau of Collections of Md., Inc., 55 F.4th 823, 829 (10th Cir. 2022).

283. *See Hunstein*, 48 F.4th at 1245 ("If an element from the common-law comparator tort is completely missing, it is hard to see how a statutory violation could cause a similar harm.").

284. *See supra* notes 107–12 and accompanying text.

285. *See* Pierre v. Midland Credit Mgmt., Inc., 29 F.4th 934, 940 (7th Cir. 2022) (Hamilton, J., dissenting) (explaining that the cumulative effect of the Seventh Circuit's narrow approach has rendered "the FDCPA largely neutered in the three states of the Seventh Circuit").

286. *See supra* notes 107–12 and accompanying text.

287. *See* TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2225 (2021) (Kagan, J., dissenting).

Under the narrow approach to FDCPA standing, the *Spokeo* inquiry largely begins and ends with a rigid analysis of whether the plaintiff's claim satisfies every element of a traditional common-law tort.[288] The kind-degree approach, by encouraging a more holistic standing inquiry, would do more than pay lip service to the legislative prong by ensuring that the standing analysis captures the congressional perspective.[289]

B. Under a Kind-Degree Framework, FDCPA Claims Are "Close Enough" to the Tort of Intrusion upon Seclusion and Thus Satisfy Standing Requirements Under Spokeo

Having advocated for the superiority of the kind-degree framework in evaluating FDCPA claims, this section offers its interpretation of what the FDCPA standing inquiry should look like in practice. Part III.B.1 analyzes the legislative prong of *Spokeo* and infers a strong congressional interest in maintaining the private right of action as a component of the statute's remedial scheme. Part III.B.2 evaluates whether the FDCPA possesses the appropriate proximity to traditional English or American common-law torts and argues that, under the kind-degree framework, the statute bears close enough resemblance to the tort of intrusion upon seclusion to confer standing.

1. Congress Demonstrated Clear Intent and Interest in Creating a Private Right of Action for FDCPA Claims

Considering the legislative history of the FDCPA,[290] the language of the statute itself,[291] and the way in which the statute has historically been interpreted by courts,[292] it appears clear that the private right of action was not an incidental or ancillary provision of the FDCPA. The architects of the FDCPA sought to remedy a pressing national problem,[293] and the private right of action was not an incidental component of the remedial scheme designed to address that problem.[294] Instead, it represented an effective tool in realizing Congress's twin aims of correcting the improper behavior of debt collectors and ensuring that consumers have a vehicle through which they can vindicate their rights.[295] Although this factor cannot form the entire basis for standing, under the kind-degree approach to resolving concreteness inquiries, the *Spokeo* test can be applied without disregarding or blunting

288. *See supra* notes 252–56 and accompanying text.

289. *See Pierre*, 29 F.4th at 956 (Hamilton, J., dissenting) ("The 'due respect' that courts owe Congress in this field needs to include more respect for those policy choices. This is a basic issue of the separation of powers in our federal government.").

290. *See supra* notes 46–57 and accompanying text; *see also* S. REP. NO. 95-382 (1977).

291. *See* 15 U.S.C. § 1692; *see also supra* Part I.A.2.

292. *See supra* Part I.A.3.

293. *See* S. REP. NO. 95-382, at 1696.

294. *See* Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich L.P.A., 559 U.S. 573, 603 (2010).

295. *See* S. REP. NO. 95-382, at 1696–700.

Congress's ability to draw up creative solutions to problems of national importance.[296]

2. FDCPA Claims Sufficiently Implicate the Common-Law Privacy Tort of Intrusion upon Seclusion

Under the kind-degree approach to the *Spokeo* test, FDCPA violations bear a sufficiently close relationship to the common-law tort of intrusion upon seclusion to satisfy Article III standing requirements.[297]

From the very beginning, the drafters of the FDCPA viewed the bill as a remedy against "invasions of privacy."[298] Consider the way in which the bill's drafters characterized these privacy harms. They sought to protect against "obscene or profane language, threats of violence, telephone calls at unreasonable hours, misrepresentation of a consumer's legal rights, disclosing a consumer's personal affairs to friends, neighbors, or an employer, [and] obtaining information about a consumer through false pretense."[299] Although Justice Brandeis fixated on the press, his fundamental worry—and thus the foundational concern underpinning American privacy torts—was that privacy violations trampled on the "propriety and decency" of an individual.[300] Thus, the FDCPA's preoccupation with the very tone and manner in which debt collectors can communicate with consumers[301] suggests that the drafters sought a categorical protection against the precise kind of injury that Justice Brandeis contemplated.[302] Accordingly, when debt collectors breach the FDCPA and engage in improper communications that disturb the propriety and decency of the consumer, these breaches produce actual, not theoretical, invasions on protected zones of privacy.

Greater support for the FDCPA's grounding in traditional privacy law can be found in Professor Prosser's privacy scholarship.[303] By affirmatively invoking *Housh v. Peth* to demonstrate what an actionable claim of intrusion upon seclusion looks like, Professor Prosser drew on what can now be understood as an archetypal FDCPA claim, one involving an overzealous debt collector's invasion of privacy through their telephone calls to a debtor's home and place of employment.[304]

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296. *See* Hunstein v. Preferred Collection & Mgmt. Servs., Inc., 48 F.4th 1236, 1264 (11th Cir. 2022) (en banc) (Newsom, J., dissenting) ("The kind-degree framework not only abides by the Supreme Court's dual directives, but also tethers modern plaintiffs to historical antecedents without hamstringing Congress's ability to innovate.").

297. *See supra* Part I.C.2.

298. *See* S. REP. NO. 95-382, at 1699.

299. *Id.* at 1696.

300. Warren & Brandeis, *supra* note 174, at 196.

301. *See supra* Part I.A.2.

302. *See* Warren & Brandeis, *supra* note 174, at 196.

303. *See supra* Part I.C.2.

304. *See* Prosser, *supra* note 182, at 390 (citing Housh v. Peth, 165 N.E.2d 340 (Ohio 1956)).

The kind-degree approach renders unnecessary the element-by-element analysis of FDCPA claims demonstrated by the Eleventh Circuit through *Hunstein* and the Tenth Circuit through *Shields*.[305] Courts need not subject FDCPA claims to such granular analysis because the FDCPA collectively represents comprehensive statutory protections similar in *kind* to the privacy rights explicitly contemplated by Professor Prosser through *Housh*, creating a family of actionable claims that together protect the same core interest.[306] However much an individualized FDCPA claim appears to diverge from the basic elements of the tort of intrusion upon seclusion set forth in *Housh*, those divergences represent variations in *degree* and remain "close enough" under *Spokeo*.[307]

Moreover, courts adopting the narrow approach to the *Spokeo* test and denying standing in FDCPA cases do so largely based on a flawed premise. The FDCPA did not create enforceable rights with only attenuated connections to common-law principles of harm.[308] The FDCPA was itself a legislative codification of privacy rights that *courts had already recognized* in the common law.[309]

Thus, by satisfying both prerequisites of *Spokeo*,[310] FDCPA claims operate from a concreteness zenith. Based on the close relationship between the FDCPA and the tort of intrusion upon seclusion, FDCPA violations produce concrete harms that satisfy Article III's standing requirements.

C. *TransUnion* Does Not Foreclose FDCPA Claims Because FDCPA Breaches Implicate Actual, Rather than Potential, Harm

Although the Supreme Court's decision in *TransUnion* seemingly narrowed the avenues through which plaintiffs can seek relief for intangible harms, courts can readily distinguish FDCPA violations from the now defective risk-of-future-harm claims.[311]

In *TransUnion*, there was no indication that the plaintiffs whose cases were dismissed for lack of standing were even aware of the contested privacy breaches in the first place.[312] FDCPA plaintiffs who demonstrate actual knowledge of the breaching conduct as an element of their claim can thus sidestep the complications posed by *TransUnion*.[313]

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305. *See supra* notes 252–56 and accompanying text; *see also supra* Part II.B.1.

306. *See supra* Part I.C.2.

307. *See supra* notes 257–61 and accompanying text.

308. *See* TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2205 (2021) ("[E]ven though 'Congress may "elevate" harms that "exist" in the real world before Congress recognized them to actionable legal status, it may not simply enact an injury into existence, using its lawmaking power to transform something that is not remotely harmful into something that is.'" (quoting Hagy v. Demers & Adams, 882 F.3d 616, 622 (6th Cir. 2018))).

309. *See* Housh v. Peth, 133 N.E.2d 340, 342–44 (Ohio 1956).

310. *See supra* notes 138–44 and accompanying text.

311. *See supra* note 159.

312. *See* TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2212 (2021).

313. *See* Hunstein v. Preferred Collection & Mgmt. Servs., Inc., 48 F.4th 1236, 1260 (11th Cir. 2022) (Newsom, J., dissenting) ("[T]he plaintiffs in *TransUnion* to whom the

Moreover, injuries derived from FDCPA breaches constitute sufficiently realized and concrete harms. A plaintiff either received an improper communication, or they did not.[314] They were either misled by a debt collector, or they were not.[315] Accordingly, harms under the FDCPA are not theoretical—they are actual invasions and intrusions on a consumer's privacy.[316]

D. Wielding the Kind-Degree Standard in Practice: Rethinking Ward

The Sixth Circuit's dismissal of the complaint in *Ward* on standing grounds[317] exemplifies how the kind-degree approach—as well as a greater appreciation for the FDCPA's grounding in the historic gloss of the right to privacy—could more effectively empower plaintiffs to vindicate their rights. *Ward* currently appears to portend a dour future for FDCPA plaintiffs by suggesting that lower courts can wield the Supreme Court's decision in *TransUnion* to deny standing to FDCPA plaintiffs.[318]

In *Ward*, the plaintiff alleged that the defendant encroached into the privacy of his home and confused him to such an extent that, in trying to resolve his debt, the plaintiff reached out to a completely separate entity, believing them to be his debt collector.[319] Although true that some circumstances may be distinct from *Housh*, the *Ward* plaintiff's claims essentially derive from *Housh*.[320] Both cases involve an intrusion into the sanctity of a plaintiff's home through invasive debt collection practices.[321]

In reality, the harm to the plaintiff in *Ward* was not contingent on his debts being publicly disclosed.[322] The debt collector already invaded his privacy.[323] The plaintiff thus suffered a harm that is similar in *kind* to the injury that the *Housh* court and Professor Prosser both recognized as archetypal invasions of privacy supporting a right of action.[324]

When a court can make such a connection, while also finding a clear statement of congressional intent,[325] the standing inquiry should end. The Sixth Circuit erred in dismissing *Ward*, and courts adopting the kind-degree framework should find standing for plaintiffs bringing FDCPA claims.

Supreme Court denied standing had utterly and completely failed—even following a full-blown trial—to produce *any* evidence of *any* disclosure of *any* sort. . . . That's not true here.").

314. *See, e.g.*, 15 U.S.C. §§ 1692c–1692d.

315. *See id.* § 1692e.

316. *See supra* Part III.B.2.

317. *See* 9 F.4th 357, 363 (6th Cir. 2021).

318. *See supra* Part II.B.2.

319. *See* Ward v. Nat'l Patient Acct. Servs. Sols. Inc., 9 F.4th 357, 359–60 (6th Cir. 2021).

320. *See supra* Part III.B.2.

321. *Compare Ward*, 9 F.4th at 359–60, *with* Housh v. Peth, 133 N.E.2d 340, 344 (Ohio 1956).

322. *See Ward*, 9 F.4th at 362–63.

323. *See supra* Part III.B.2.

324. *See supra* notes 182–90 and accompanying text.

325. *See supra* Part III.B.1.

CONCLUSION

The kind-degree approach functions as a faithful and balanced application of *Spokeo* that better ensures that both legislative intent and judicial history meaningfully factor into the concreteness analysis.[326] Based on Congress's clear intent to create a private right of action as a significant component of the statute's remedial and regulatory scheme[327] and based on the FDCPA's close relationship with the common-law protection against intrusion upon seclusion,[328] plaintiffs alleging harms derived from FDCPA violations categorically suffer concrete injuries that confer Article III standing.

The FDCPA represents just one example of many consumer protection statutes implicating the live issues discussed in this Note.[329] To the extent that the narrow reading of *Spokeo* and the resulting improper limitations on standing may well be repeating themselves across other statutes and contexts, the kind-degree framework for standing likely has broad-based value in better balancing the legislative and judicial interests contemplated through concreteness inquiries.

326. *See supra* Part III.A.

327. *See supra* Part III.B.1.

328. *See supra* Part III.B.2.

329. *See* Pierre v. Midland Credit Mgmt., Inc., 29 F.4th 934, 955 (7th Cir. 2022) (Hamilton, J., dissenting) ("Congress has exercised its legislative power to protect consumers in a host of statutes based on the finding that the common law has not provided sufficient protection for their interests. Those statutes typically do not limit their prohibitions to only unfair *results* for consumers, which might already be actionable under prior law. Instead, consumer protection statutes typically try to *prevent* the worst harms by imposing a range of procedural, informational, and substantive requirements to reduce the risk of harm.").