Dangerous Digital Standing: Applying Spokeo and TransUnion to Online Privacy Harms

ABSTRACT

In recent years, the California Invasion of Privacy Act (CIPA) has been used to sue website-holding companies for utilizing chat bots that record online conversations. Such claims have already generated high-profile class actions and multidistrict litigations, with many more expected. Because CIPA violations often occur writ large when websites retain data from their chat boxes, and the statute imposes relatively high damages, there exists an incentive for plaintiffs' attorneys to seek out aggregated claims, generating time-consuming litigation. Meanwhile, the harms suffered by those bringing suit fall under the category of intangible privacy harms. The US Court of Appeals for the Ninth Circuit's case law regarding standing shows a broader allowance for potentially nominal harms. This differs from the US Supreme Court's norm following TransUnion LLC v. Ramirez*'s emphasis on an injury's concreteness to confer standing. While recent decisions show that the effectiveness of CIPA in chatroom-type class actions is limited, at least one court has found a CIPA plaintiff to have standing absent any seemingly concrete harm.*

This Note describes the potentially illusory claims giving rise to mass litigation in California federal courts. It then analyzes the common injuries under a proposed reading of TransUnion *that denies standing to most intangible harms. It ultimately concludes that appellate review should compel the revival of limited standing applied to intangible, digital harms in the Ninth Circuit. However, the* TransUnion *decision may rest on shaky Constitutional ground. Justice Thomas has advanced a dissenting view, rooted in history, which emphasizes the nature of the rights at issue. This view might have gained traction with a more originalist judiciary and could eventually prevail. While Justice Thomas's view would allow seemingly frivolous suits for statutory damages, this Note argues it could also inform legislatures about the best ways to frame causes of action when they aim to protect digital privacy rights.*

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The expansion of a California wiretapping law now presents opportunities for online consumers to sue companies for alleged privacy invasions, even those bearing little resemblance to traditional government wiretapping.[1] In the 1990s, California enacted the California Invasion of Privacy Act (CIPA).[2] Courts over the last decade have broadened the statutory cause of action granted by CIPA, which originally targeted traditional wiretapping practices, to grant a private right to sue to individuals whose online conversations were recorded without their consent.[3] In particular, this statute has become the basis for mass litigation against website-holding companies for utilizing chat bots that record online conversations, resulting in several high-profile aggregated litigations.[4]

1. *See, e.g.*, Licea v. Am. Eagle Outfitters, Inc., 659 F. Supp. 3d 1072, 1085 (C.D. Cal. 2023) (regarding a class action filed against retail clothing company for saving and transmitting chat box conversations with consumers to a third party); Pena v. GameStop, Inc., 670 F. Supp. 3d 1112, 1115–16 (S.D. Cal. 2023) (challenging a website's monitoring of its own online chat box); Licea v. Vitacost.com, Inc., 683 F. Supp. 3d 1118, 1120 (S.D. Cal. 2023) (same); Licea v. Old Navy, LLC, 669 F. Supp. 3d 941, 944 (C.D. Cal. 2023) (same).

2. *See* CAL. PENAL CODE § 631 (West 2022).

3. *See id.*

4. *See, e.g.*, Williams v. What If Holdings, LLC, No. C 22-03780, 2022 WL 17869275, at *1 (N.D. Cal. Dec. 22, 2022) (dismissing a suit against a website company for using a third party to record a consumer's activity and keystrokes while on the website); Byars v. Hot Topic, Inc., 656 F. Supp. 3d 1051, 1073 (C.D. Cal. 2023) (dismissing for insufficiently-plead subject matter jurisdiction a suit against a clothing retailer for recording consumers' chat box messages on its website); Licea v. Cinmar, LLC, 659 F. Supp. 3d 1096, 1113 (C.D. Cal. 2023) (dismissing, with leave to amend, a suit against a website operator for recording chat box messages on the site, though recognizing plaintiffs had sufficiently alleged an injury in fact); *Licea*, 659 F. Supp. 3d at 1085 (granting defendant's motion to dismiss, with leave to amend, in a class action against a clothing retailer for recording chat box messages on its website and transmitting them to a third party); *see also* Craig Cardon, Jay Ramsey & Alyssa Sones, *The Tides Are Turning on a Wave of California Privacy Litigation*, JDSUPRA (Mar. 10, 2023), https://www.jdsupra.com/legalnews/the-

For example, one tester recently sued American Eagle Outfitters, a major company, on behalf of all those in "California who: (1) visited Defendant's Website and communicated through the chat feature on Defendant's Website, and (2) whose electronic communications were recorded, stored, and/or shared by Defendant without prior express consent within the statute of limitations period."[5] The class definition included every person in California who used the website's chat feature—a potentially massive class, including those who neither knew about the recording practices nor shared sensitive information on the website.[6] Many of these class members would have experienced no adverse reputational or monetary effects from the alleged violation, the mere recording and retransmission of their chat box messages on the American Eagle website.[7] The statutory penalty for a CIPA violation includes a sizable fine for individual infringements, which naturally incentivizes mass litigation.[8] This is because the claims which would otherwise have been negative-value (meaning litigation costs would easily exceed damages) become viable with high statutory damages on the table.[9] On top of that, the cost-efficiency of a class action or multidistrict litigation incentivizes aggregated suits because numerous plaintiffs share the financial burden of a single pre-trial litigation effort that almost always generates a settlement prior to remand or trial.[10] And because websites employing some kind of third-party monitoring of chat boxes will likely create similar interactions with a large number of individuals (especially on more popular websites, such as American Eagle in one notable case), it is

tides-are-turning-on-a-wave-of-5392238/ [https://perma.cc/A3CD-Q3EE] ("Although these decisions may cause the recent wave of litigation to recede, the plaintiffs' bar is regrouping and considering new tactics and strategies, so continued vigilance is definitely warranted."). Multidistrict litigations (MDLs), authorized by federal statute, are aggregated cases from different districts with "one or more common questions of fact" for "coordinated or consolidated pretrial proceedings." 28 U.S.C. § 1407(a).

5. *Licea*, 659 F. Supp. 3d at 1076. The term "tester" refers to a plaintiff who interacts with the defendant for the sole (or nearly sole) purpose of suing. *See* Catherine Cole, Note, *A Standoff:* Havens Realty v. Coleman *Tester Standing and* TransUnion v. Ramirez *in the Circuit Courts*, 45 HARV. J.L. & PUB. POL'Y 1033, 1038 (2022) ("The court listed Ms. Laufer's fatal flaw as having 'visited the [Online Reservation System website] to see if the motel complied with the law, and nothing more.' This, of course, is exactly what a tester does." (quoting Laufer v. Mann Hospitality, 996 F.3d 269, 272 (5th Cir. 2021))).

6. *See Licea*, 659 F. Supp. 3d at 1076.

7. *See id.*

8. *See* CAL. PENAL CODE § 631(a) (West 2022).

9. *See* ROBERT H. KLONOFF, FEDERAL MULTIDISTRICT LITIGATION IN A NUTSHELL 13 (2019) [hereinafter KLONOFF, MDL].

10. *See id.* at 5 ("[T]ransferred cases almost never return to their transferor courts. . . . MDL aggregation can empower plaintiffs and place pressure on defendants.").

easier to aggregate on account of frequently overlapping facts.[11] Meanwhile, the harms suffered by plaintiffs can be tenuous, especially in cases where the information provided by the consumer was not particularly sensitive, or where the information subsequently goes unused (at least in any adverse fashion) by the third party.[12] If the information lacks a special sensitivity, its retransmission would be unlikely to cause the plaintiff additional harm. And if the information is sensitive but goes unused by the receiving party, then the plaintiff would similarly go unharmed by the disclosure, at least in any financial or reputational fashion.[13]

This potential for mass litigation of negligible harms might warrant little concern were the US Court of Appeals for the Ninth Circuit's standing doctrine more limited, as one might expect following the *TransUnion LLC v. Ramirez* requirements.[14] In *TransUnion*, the US Supreme Court held standing requires a plaintiff to "show (i) that he suffered an injury in fact that is concrete, particularized, and actual or imminent; (ii) that the injury was likely caused by the defendant; and (iii) that the injury would likely be redressed by judicial relief."[15] However, even after *TransUnion*, California courts have sometimes found plaintiffs to have standing, despite suffering little or no monetary or reputational injury, so long as the statutory harm is at least nominally buoyed to some privacy interests.[16]

Though recent decisions contain only a few successful uses of CIPA in chatroom-type class actions, this is partially because courts have avoided fully litigating these claims, instead finding factual

11. *See, e.g.*, 28 U.S.C. § 1407(a) (requiring a common question of law or fact for MDL aggregation); *Licea*, 659 F. Supp. 3d at 1075.

12. *See, e.g.*, TransUnion LLC v. Ramirez, 594 U.S. 413, 433 (2021) (holding plaintiffs whose false credit reports were not transmitted to third parties had suffered no concrete injury).

13. *See id.*; *Licea*, 659 F. Supp. 3d at 1075.

14. 594 U.S. at 423.

15. *Id.* (citing Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–61 (1992)) (emphasizing the "concreteness" requirement of injury in fact).

16. *See* Osgood v. Main Streat Mktg., LLC, No. 16cv2415, 2017 WL 131829, at *7–8 (S.D. Cal. Jan. 13, 2017), *abrogated by* Huffman v. Lindgren, 81 F.4th 1016 (9th Cir. 2023); Matera v. Google Inc., No. 15-CV-04062, 2016 WL 5339806, at *14 (N.D. Cal. Sept. 23, 2016); PHILIP N. YANNELLA, CYBER LITIGATION: DATA BREACH, DATA PRIVACY & DIGITAL RIGHTS § 17:10 (2024 ed. 2024); *see also In re* Facebook, Inc. Internet Tracking Litig., 956 F.3d 589, 598 (9th Cir. 2020) (holding Facebook users had concrete injury for a CIPA claim—as well as claims for trespass to chattels, breach of contract, invasion of privacy, and others—when Facebook tracked their internet activity on other websites, compiled profiles with the information, and sold the profiles to third parties); Robins v. Spokeo, Inc., 867 F.3d 1108, 1118 (9th Cir. 2017) (holding, on remand from the US Supreme Court, that plaintiffs had alleged a concrete injury in fact because the privacy violation complained of fell within the scope of the harm CIPA sought to prevent, and some "risk of real harm" to a privacy interest existed (quoting Strubel v. Comenity Bank, 842 F.3d 181, 190 (2d Cir. 2016))); *Licea*, 659 F. Supp. 3d at 1085.

allegations insufficient, or otherwise sidestepping the application of CIPA as far as its text might compel, rather than deciding the standing issue.[17] But if future plaintiffs draft better complaints—containing more specific factual allegations better fitting the CIPA framework—courts will likely be unable to continue avoiding the elephant in the room by skirting a determinative standing analysis.[18] This Note argues that proper application of *Spokeo, Inc. v. Robins* and *TransUnion*, though increasingly difficult in the nebulous realm of cyberspace interactions, ought to defeat numerous such claims at an earlier jurisdictional stage, because many plaintiffs lack concrete harms resulting from the alleged CIPA statutory violations.[19] Then, it will consider the constitutional merit of Justice Thomas's suggestion from his minority opinions in both *Spokeo* and *TransUnion*—a view more in alignment with the Ninth Circuit treatment of standing, and which would allow the legislature to more easily create standing.[20] This Note then analyzes what effect Justice Thomas's approach would have on CIPA claims.

I. CONCERNS OF INCREASED AGGREGATE LITIGATION

Accepting, for the moment, that CIPA generates, or could generate, numerous mass litigations, one might still ask why that poses a problem. From a policy perspective, why is more aggregate litigation a bad thing? After all, a commonly cited benefit of aggregation is its efficiency, which lowers litigation costs for plaintiffs and defendants alike.[21] Multiple cases being litigated at once in a single forum should cut transaction costs, even though the aggregated litigation effort would become increasingly complex and, therefore, far more costly than any individual case.[22] If total costs decrease, how then does CIPA's promotion of more multidistrict litigations and class actions create an undesirable outcome (either for defendants or the justice system)? One

17. *See*, *e.g.*, *Licea*, 659 F. Supp. 3d at 1085 (dismissing a CIPA claim based on the statute's party exception, rather than a deficient injury in fact).

18. *See*, *e.g.*, *id.*

19. *See* Summer Elliot, Note, *There's No Understanding Standing for Privacy: An Analysis of* TransUnion v. Ramirez, 37 BERKELEY TECH. L.J. 1379, 1411 (2022) (characterizing the *TransUnion* decision as arbitrary and confusing for future application); Elizabeth C. Pritzker, *Making the Intangible Concrete: Litigating Intangible Privacy Harms in a Post-*Spokeo *World*, 26 COMPETITION J. 1, 6 (2017) (describing the Ninth Circuit's broadly permissible approach to standing for intangible privacy harms).

20. *See* Spokeo, Inc. v. Robins, 578 U.S. 330, 343 (2016) (Thomas, J., concurring); *TransUnion*, 594 U.S. at 447 (Thomas, J., dissenting).

21. *See* KLONOFF, MDL, *supra* note 9, at 5–6.

22. *See id.* at 4.

answer lies with the somewhat-controversial concerns about consumer blackmail.[23] The basic fear regarding consumer blackmail is that even frivolous cases might achieve a favorable settlement when aggregated, because the threat of aggregated litigation poses a higher risk to defendants.[24]

Objector blackmail is a form of consumer blackmail in class actions which has long been scrutinized.[25] After the judge approves a class settlement, class members, even those unnamed in the suit, may file an objection.[26] Though frivolous objections would eventually fail as their infirmities come to light before the judge, litigating the issues costs money, and class action lawyers' payment can often become delayed until objections resolve.[27] This creates inefficient incentives for class counsel to pay off even meritless objectors.[28] The same basic logic applies to aggregated lawsuits in general. Even prior to certification (for class actions) or consolidation (for multidistrict litigations), the threat of an aggregated action increases the risk of costly litigation, creating an incentive to settle potentially meritless claims that would not have been worth bringing on an individual basis (assuming the claims were negative value).[29] But, focusing on the objector blackmail for a moment, class members have an incentive to "defect" (in game theory parlance) by engaging in meritless objections.[30] When the defector objects, the

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23. Linda S. Mullenix, *Ending Class Actions as We Know Them: Rethinking the American Class Action*, 64 EMORY L.J. 399, 416 (2014) ("[C]orporate defendants have long contended that class action litigation—especially the action of a court in granting class certification—amounts to unfair settlement blackmail.").

24. *See* BRIAN T. FITZPATRICK, THE CONSERVATIVE CASE FOR CLASS ACTIONS 7 (2019) ("If a corporation steals $100 from one thousand people, the class action permits one person to sue the corporation for *all one thousand*. . . . A $100,000 lawsuit is a lot scarier to a defendant than a $100 lawsuit is.").

25. *See* Brian T. Fitzpatrick, *The End of Objector Blackmail?*, 62 VAND. L. REV. 1623, 1624 (2009).

26. *See* ROBERT H. KLONOFF, CLASS ACTIONS AND OTHER MULTI-PARTY LITIGATION IN A NUTSHELL 473–74 (6th ed. 2020) [hereinafter KLONOFF, CLASS ACTIONS].

27. *See id.*; *see also* Fitzpatrick, *supra* note 25, at 1666 (arguing that reforms have failed to eliminate concerns over objector blackmail and proposing an inalienability provision for objector suits).

28. *See* Fitzpatrick, *supra* note 25, at 1624.

29. *See* Mullenix, *supra* note 23; KLONOFF, CLASS ACTIONS, *supra* note 26, at 13 (stating class actions help "facilitate the prosecution of small claims that otherwise would not be brought").

30. *See* KLONOFF, CLASS ACTIONS, *supra* note 26, at 344–45; Brian T. Fitzpatrick, *Objector Blackmail Update: What Have the 2018 Amendments Done?*, 89 FORDHAM L. REV. 437, 448 (2020) (arguing the 2018 amendments aimed at deterring objector blackmail have not been entirely successful, according to an empirical study of post-amendment side-payment orders in federal courts). The game theory vocabulary is drawn from the classic Prisoner's Dilemma, a situation often modeled by imagining two criminals arrested for the same crime. *Prisoner's Dilemma*, STAN.

class attorney faces a decision. The lawyer may either litigate the objection or settle with the objector by granting a payoff.[31] One might consider this choice a decision to "cooperate" (with the system by litigating the meritless claim) or "defect" (by succumbing to the objector's pressure).[32] At this point, the class lawyers have an incentive to defect by paying off the objectors.[33] These outcomes are sketched below in Table 1.[34] The actual values selected are arbitrary and matter little for this exercise—the important thing is to assume that cooperation yields the highest total value, while paying off the frivolous objectors imposes some frictional transaction costs, slightly decreasing the total pot of wealth, whereas fully litigating the objection makes both parties worse off. It does not perfectly fit the classic prisoner's dilemma gamebox,[35] but imagine a game of four quadrants, one in which the parties cooperate by not objecting (a high total payoff because no unnecessary litigation commences, and no unmerited payments are wasted), two in which one party relinquishes to the other (with slightly lower total payoffs because money was transferred undeservedly, with some transaction cost), and one in which the parties battle out the objection in court (with the lowest total payoff because litigation incurs great expense). Once the objector defects, the class lawyers have an incentive to defect as well, resulting in a suboptimal outcome.[36] To the extent this situation resembles a prisoner's dilemma, traditional game theory has an answer: the "Grim Trigger" strategy.[37] But in order to ascertain the strategy's potential application to the objector blackmail problem, one must first understand the strategy's prerequisites, which reveal why the Grim Trigger inadequately addresses objector blackmail.

ENCYC. PSYCH. (Sept. 4, 1997), https://plato.stanford.edu/entries/prisoner-dilemma/ [https://perma.cc/4A8K-Z3H6]. While being interrogated by the police, the prisoners must decide between cooperating with the accomplice or defecting. Cooperation occurs when one prisoner refuses to "rat" on the other. *Id.* Defection occurs when one prisoner attempts to pass blame on the other. *Id.* The lowest total outcome occurs when both cooperate. *Id.* However, each one has an incentive to "rat" on the other in hopes of receiving a mitigated individual punishment. *Id.* In this way, self-interest causes both prisoners to defect, resulting in the highest total punishment.

31. *See* Fitzpatrick, *supra* note 25, at 1625.

32. *See Prisoner's Dilemma*, *supra* note 30.

33. *See id.*

34. *Infra* p. 8.

35. *See supra* text accompanying note 30.

36. *See supra* text accompanying note 30.

37. *See* Pedro Dal Bó & Guillaume R. Fréchette, *Strategy Choice in the Infinitely Repeated Prisoner's Dilemma*, 109 AM. ECON. REV. 3929, 3939 (2019); James W. Friedman, *A Non-Cooperative Equilibrium for Supergames*, 38 REV. ECON. STUD. 1, 5 (1971).

Table 1: An Imagined Objector Blackmail Outcome Chart

Values: (Gain to Class Lawyer, Gain to Objector)	Objector Consents	Objector Objects
Class Lawyer Settles	(100, 100)	(95, 104)
Class Lawyer Litigates	(95, 100)[38]	(90, 90)

The Grim Trigger strategy operates under an assumption that the game repeats between the same players frequently—usually it is modeled as an infinitely repeated game.[39] How often the game must repeat for the strategy to be effective depends on the exact values of the game, but the frequency must be such that the risk of future punishment outweighs the benefit from a single defection. Employing the Grim Trigger strategy, one party threatens that if the opposition defects, then the first player will also defect, not only once, but continuously and indefinitely over the course of the game's repetition.[40] The strategy becomes one of punishment, accepting a lower personal benefit in order to discipline the initial defector. If the players find the threat credible, the Grim Trigger strategy informs the opposing party that cooperation will best serve both players' interests, thereby allowing the optimal outcome to manifest.[41]

In the context of objector blackmail, utilizing the Grim Trigger would involve the lawyers fully litigating the meritless objection, at nontrivial expense to both the lawyers and the objector. But, over time, this would dissuade most frivolous objections, eventually recouping the cost of the initial litigations by saving money later. Much like the incentives in the objector blackmail scenario, all aggregate litigation poses risk to defendants, and therefore pressures settlement.[42] If it were viable, the Grim Trigger strategy would offer a way out of the blackmail which might accompany meritless aggregate litigation. However, the assumptions underlying the Grim Trigger's success, especially repetition and continuity of players, likely fail in real-world litigation.

Theory aside, actual aggregate litigation likely fails the necessary assumptions underlying the successful use of a Grim Trigger strategy because the game may not sufficiently repeat, and even if it does, new players will likely arise. In order for the Grim Trigger

38. This is a situation that would never arise in practice. If the objector consents, there is no need for litigation. Still, it is useful to model on the chart for symmetry. It also shows the loss to the lawyer based on additional litigation effort, all else held constant.

39. *See* Dal Bó, *supra* note 37.

40. *Id.*

41. *See id.*

42. *See* Mullenix, *supra* note 23.

strategy to operate effectively, the same parties must engage in repeated interactions.[43] But how likely is it that the same plaintiffs will sue the same defendant multiple times? And if they do, how likely is it that the game will repeat with enough regularity to justify the initial high cost of implementing the strategy? Common sense indicates the necessary repetition will not form. The strategy might yet prevail if the initial retaliatory response were publicized, because then it could serve as a credibility point for future threats against future plaintiffs, but only if the future litigants are well-informed of the past strategy. Even then, the Grim Trigger is less effective because non-repetitive plaintiffs have less to lose—they cannot be harmed by repeated deviation, so they have less risk in their one-off attempt at objector blackmail. In short, while the Grim Trigger is the intuitive market response to these sorts of repeated games where a Nash Equilibrium (a solution from which no party will singly depart) forms at a societally disfavored outcome, the strategy likely cannot effectively deter objector blackmail in typical class actions.[44] Therefore, the mass aggregation threatened by statutes like CIPA creates potential concern for both defendants and the civil justice system at large.

If meritless or frivolous claims would certainly fail at an early stage, it would assuage most of these concerns. In the context of digital privacy lawsuits, standing can serve a useful role in barring unharmed plaintiffs from withstanding a motion to dismiss.[45] Yet, when courts treat standing requirements with laxity, plaintiffs may have more leverage to force an early settlement in complex litigation. Statutory damages can exacerbate the issue.[46] To the extent aggregated litigation serves as a deterrent, placing large payouts on the table may over-deter defendants.[47] These large statutory damages allow for appropriate deterrence when a small number of plaintiffs sue. But when aggregation mechanisms allow the entire class of harmed individuals to sue, even a small violation could become catastrophic to a defendant.[48] The combination of statutory damages, aggregated

43. *See* Dal Bó, *supra* note 37.

44. *See* discussion *infra* Part II; Rajiv Sethi & Jörgen Weibull, *What Is… Nash Equilibrium?*, 63 NOTICES AM. MATHEMATICAL SOC'Y 526, 526 (2016).

45. *See* Sheila B. Scheuerman, *Due Process Forgotten: The Problem of Statutory Damages and Class Actions*, 74 MO. L. REV. 103, 115 (2009) ("Aggregating statutory damages claims warps the purpose of both statutory damages and class actions.").

46. *See id.* at 114–15.

47. *Id.*

48. Mark A. Olthoff, *When Enough Is Too Much: Constitutional Limitations on Extraordinary Statutory Damage Awards*, POLSINELLI (Oct. 28, 2022), https://www.polsinelli.com/publications/when-enough-is-too-much-constitutional-limitations-on-extraordinary-statutory-damage-awards [https://perma.cc/6WCR-BHGF].

litigation options, and a lower standing requirement poses a special risk for generating manifold high-value lawsuits for low-value injuries.[49] Unfortunately, it appears some California courts may be interpreting standing favorably to plaintiffs alleging digital privacy harms.[50]

II. CIPA: STATUTE AND CASES

CIPA is often referred to as the California Wiretapping Act because protecting against the wiretapping of telephone communications is the clearest textual purpose of its early provisions:

> Any person who . . . intentionally taps, or makes any unauthorized connection, . . . with any telegraph or telephone wire, line, cable, or instrument, . . . or in any unauthorized manner, reads, or attempts to read . . . any message, report, or communication while the same is in transit or passing over any wire, line, or cable, or is being sent from, or received at any place within this state; or who uses, or attempts to use . . . any information so obtained . . . is punishable by a fine . . . or by imprisonment . . . .[51]

The statute's reference to telephones and wires reveals the legislation's original purpose to provide a cause of action for those illegally wiretapped by private or public entities.[52] However, with an expanding universe of technology, plaintiffs can use CIPA to sue over forms of internet "eavesdropping," as well as the more traditional wiretapping injuries.[53] Notably, CIPA has significant potential for generating multidistrict litigations. This is because, intuitively, those able to engage in discoverable wiretapping or electronic eavesdropping can do so on a large scale.[54] A company operating a website chat box with policies that possibly violate CIPA, for example, will likely engage similarly with a relatively high number of individuals.[55] Additionally, California choice of law rules can raise a high bar against an alternative form of aggregate litigation for CIPA claims, the national class action.[56]

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49. *See id.*; Licea v. Am. Eagle Outfitters, Inc., 659 F. Supp. 3d 1072, 1081 (C.D. Cal. 2023) (holding plaintiff had standing when his messages in a clothing retail website's chat box were recorded and transmitted to a third-party company).

50. *See Licea*, 659 F. Supp. 3d at 1081 (stating the alleged retransmission of consumer chat box information could grant standing).

51. CAL. PENAL CODE § 631(a) (West 2022).

52. *Id.*

53. *See, e.g.*, *Licea*, 659 F. Supp. 3d at 1081.

54. *See, e.g.*, *id.*

55. *See, e.g.*, *id.*

56. *See In re* Yahoo Mail Litig., 308 F.R.D. 577, 605 (N.D. Cal. 2015) (denying nationwide class certification under CIPA and stating "the Court concludes that for non-California class members, other states' interests would be more impaired by applying California law than would California's interests by applying other states' laws"). However, plaintiffs do file class actions

The new internet claims under CIPA have met with differing levels of success, at times failing to satisfy the statute's more physical language, since internet conversations potentially occur absent "wires" or the audible speech most clearly imagined by the original drafters and readers of CIPA.[57] However, regardless of whether these internet claims succeed or fail, they ultimately raise the question of standing for plaintiffs suffering intangible, statutory harms, especially those linked to privacy.[58]

One recent and instructive case from the US District Court for the Northern District of California offers a lens through which to examine the standing problem.[59] In late 2022, Michael Licea, a consumer privacy advocate, filed a class action against American Eagle Outfitters, alleging the company violated CIPA when its website recorded and transmitted conversations that occurred in the site's chat box.[60] The store's website included a chat box feature into which consumers could type queries while browsing.[61] Licea alleged that whatever text a consumer submitted to the chat became saved and transmitted to some third party for analysis.[62] The named plaintiff contended the retention of a retail website's chat box conversations could include "private and deeply personal" information shared by the consumer.[63]

Setting aside skepticism over what kind of "deeply personal" conversations consumers were having in the store's online chat box, Licea still alleged no material, reputational, or otherwise tangible harm resulting from the saved conversations.[64] The only harm included an apparent statutory violation, occurring when the website retained and shared the chat box data, which was nominally buoyed to privacy.[65] No observable misfortune, embarrassment, or financial loss followed the chat box interactions as a causal matter.[66] Ultimately, Licea's claims failed because of a party exception, since the defendant, American

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under CIPA, but they are often limited to California residents—still a large number of prospective class members. *See, e.g.*, *Licea*, 659 F. Supp. 3d at 1076.

57. *See* CAL. PENAL CODE § 631(a) (West 2022).

58. *See, e.g.*, *Licea*, 659 F. Supp. 3d at 1077.

59. *Id.*

60. *Id.* at 1075–76.

61. *Id.*

62. *Id.*

63. *Id.* at 1076.

64. *See id.*

65. *See id.*

66. *See id.*

Eagle, was a conversant in the saved interaction.[67] That exception resembles the Fourth Amendment rule that details shared with a third party lose a reasonable expectation of privacy, and therefore the government's consensual acquisition of the information from the third party does not constitute a search.[68] Because the party exception defeated the suit, the standing issue became less determinative, but the court did briefly address plaintiff standing, shockingly finding that Licea had satisfied its requirements.[69]

Under current case law, standing requires, among other things, an injury in fact that must be concrete and particularized.[70] Yet the court in *Licea* held the plaintiff had standing on the mere basis that his messages in American Eagle's chat box were saved and utilized—even though there was no independent harm (for example, any monetary or reputational injury resulting from the alleged recording and disclosure).[71] Noting the lack of any clear harm, the court wrote, "[h]owever, 'violations of [p]laintiffs' statutory rights under CIPA, [even] without more, constitute injury in fact because instead of a bare technical violation of a statute, . . . a CIPA violation involves . . . a violation of privacy rights.'"[72] Post-*Spokeo*, a bare statutory violation would not itself grant standing without some "concrete" injury, yet the California federal court held CIPA's connection to privacy was enough to defeat that barrier.[73] The jarring disconnect between the lack of apparent harm suffered by plaintiffs and the relatively high statutory penalties—fines of several thousand dollars per violation—and a finding that the plaintiffs had standing to pursue their claims highlights a doctrinal uncertainty in the wake of digital privacy concerns: what constitutes sufficient concreteness?[74]

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67. *Id.* at 1085; CAL. PENAL CODE § 631(a) (West 2022) (exempting consensual recordings and requiring an "interception" to generate liability).

68. *See* Hoffa v. United States, 385 U.S. 293, 302 (1966) (holding a suspect's "misplaced belief that a person to whom he voluntarily confided his wrongdoing would not reveal it" is not an interest legitimately protected by the Fourth Amendment); *see also* United States v. Miller, 425 U.S. 435, 443 (1976) (holding defendant had no Fourth Amendment protected interest in financial statements pertaining to the defendant, but created and held by a cooperating bank).

69. *See Licea*, 659 F. Supp. 3d at 1078.

70. TransUnion LLC v. Ramirez, 594 U.S. 413, 423 (2021).

71. *Licea*, 659 F. Supp. 3d at 1078.

72. *Id.* (quoting Osgood v. Main Streat Mktg., LLC, No. 16cv2415, 2017 WL 131829, at *7 (S.D. Cal. Jan. 13, 2017)).

73. *Id.*; Spokeo, Inc. v. Robins, 578 U.S. 330, 341 (2016).

74. *Compare In re* Facebook, Inc. Internet Tracking Litig., 956 F.3d 589, 598 (9th Cir. 2020) (holding Facebook users had concrete injury for a CIPA claim when Facebook tracked their internet activity on other websites, compiled profiles with the information, and sold the profiles to third parties), *with TransUnion*, 594 U.S. at 423 (holding plaintiffs whose online profiles

III. CURRENT STANDING DOCTRINE AND CONCRETENESS: *SPOKEO* AND *TRANSUNION*

Any evaluation of how standing impacts the use of CIPA for litigation over digital privacy harms requires recounting of two recent Supreme Court decisions: *Spokeo, Inc. v. Robins* and *TransUnion LLC v. Ramirez*.[75] In 2016, the US Supreme Court considered whether intangible statutory harms, absent any resulting adverse effects, could satisfy standing requirements in *Spokeo, Inc. v. Robins*.[76] Spokeo, a company, operated a "people search engine," on which interested parties could input the name of an individual, or a phone number or email address, and the search engine would yield information pertaining to that person.[77] The search engine gathered this data by trawling other databases to create an individual profile.[78] The problem was that some of the profiles contained significant inaccuracies.[79]

Thomas Robins's profile, for example, incorrectly asserted that he was married, had children, had obtained a graduate degree, was employed, and was in his fifties.[80] Robins filed suit and became the class representative in the ensuing class action.[81] His suit came under the Fair Credit Reporting Act (FCRA), alleging the incorrectly published information violated the statute's requirement that consumer reporting agencies "follow reasonable procedures to assure maximum possible accuracy" regarding their generated consumer reports.[82] The US District Court for the Central District of California held Robins lacked standing, but the Ninth Circuit reversed the decision, stating any statutory violation constituted sufficient injury in fact for standing purposes, so long as the statute provided a right that was individualized, "rather than collective."[83] Spokeo appealed and the US Supreme Court disagreed with the Ninth Circuit's standing analysis.[84]

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incorrectly flagged them as being on a federal watchlist but were not published or viewed by third parties had not suffered concrete harm, and thus lacked the injury in fact requirement for standing), *and* Pena v. GameStop, Inc., 670 F. Supp. 3d 1112, 1118 (S.D. Cal. 2023) ("[B]ecause Defendant was the party that was meant to, and did, receive Plaintiff's communications, under the party exception, any alleged interception of the communications is not actionable.").

75. 578 U.S. 330 (2016); 594 U.S. 413 (2021).

76. 578 U.S. at 330.

77. *Id.* at 333.

78. *Id.*

79. *See id.* at 336.

80. *Id.* (quoting 15 U.S.C.A. § 1681e(b)).

81. *See id.* (quoting Robins v. Spokeo, Inc., 742 F.3d 409, 413 (9th Cir. 2014)).

82. *Id.* at 335.

83. *Id.* at 336–37.

84. *Id.* at 334.

In an opinion authored by Justice Alito, the Court held even statutory violations must independently meet the concreteness element of the injury in fact requirement for satisfying Article III standing.[85] The Court noted the Constitution's limitation of the federal judicial authority to cases or controversies has been understood to mean, among other things, that the alleged injury in fact must include harm both *concrete* and *particularized* to the individual, and that hearing cases absent this requirement results in the judiciary overstepping its constitutional mandate, violating separation of powers norms.[86] Because injury in fact is a constitutional requirement, "[i]t is settled that Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing."[87] The Court upheld the Ninth Circuit's particularization analysis, but found fault with the circuit court's failure to consider concreteness.[88]

While the Court held even statutory harms must include a concrete injury before constituting an injury in fact, the Court did not equate *concrete* with *tangible*.[89] The Court suggested intangible harms will more likely satisfy concreteness when they have a "close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts."[90] Congress also has some role to play, though seemingly more scrutiny applies to the concreteness of recently enumerated statutory injuries, because a "bare procedural violation" will not suffice.[91] There must be some interest of the individual which the statutory violation implicates.[92] Interestingly, on remand the Ninth Circuit found Robins's statutory injury was sufficiently concrete.[93] The Ninth Circuit considered whether (1) the statute sought to protect concrete interests, and (2) whether the violation harmed or presented a risk of material harm to those interests.[94] Robins was thus found to have standing because the FCRA protected his concrete interest in not having false information about him disseminated, and false information was in fact disseminated.[95]

85. *Id.* at 339.
86. *See id.*
87. *Id.* at 339 (quoting Raines v. Byrd, 521 U.S. 811, 818 (1997)).
88. *Id.* at 339.
89. *Id.* at 340.
90. *Id.* at 341.
91. *See id.*
92. *See id.*
93. Robins v. Spokeo, Inc., 867 F.3d 1108, 1117 (9th Cir. 2017).
94. *Id.* at 1113. (quoting Strubel v. Comenity Bank, 842 F.3d 181, 190 (2d Cir. 2016)).
95. See *id.* at 1117.

The court also paid attention to the similarity between this interest (in preventing the dissemination of false information about oneself) and privacy or reputational interests providing actionable harms at common law.[96]

In short, *Spokeo* effectively held statutory violations resulting in solely intangible harm can be concrete when the harm closely resembles a harm that would have justified a traditional cause of action, with some deference given to Congressional determinations.[97] Only a few years after the important decision in *Spokeo*, the US Supreme Court revisited the standing doctrine in its famous *TransUnion* opinion.[98]

The suit in *TransUnion* was also brought as a class action under the FCRA against a credit reporting agency.[99] Plaintiffs alleged the agency wrongfully listed consumers as potential matches to the Office of Foreign Assets Control's (OFAC) list of "terrorists, drug traffickers, and other serious criminals," allegedly violating the FCRA's mandate to ensure accuracy through use of reasonable procedures.[100] The mistakes occurred because the agency merely used first and last names when comparing consumers to the OFAC's list of serious criminals.[101] The full class included 8,185 members, only 1,853 of whom had such misleading credit reports delivered to other businesses.[102] Unlike in *Spokeo*, the US Supreme Court decided the plaintiffs' standing question, holding only those 1,853 plaintiffs whose erroneous information had been distributed had suffered reputational harm.[103] The injury to the remaining class members failed concreteness analysis, therefore the class members lacked standing.[104] In holding the majority of class members' harms were not concrete, the Court overruled the Ninth Circuit's decision.[105]

The Court in *TransUnion* reaffirmed its opinion in *Spokeo*, stating the appropriate test inquires "whether plaintiffs have identified a close historical or common-law analogue for their asserted injury."[106] The Court further remarked that the fit between the current injury and the historical analogue need not be exact, but, importantly, the test "is not

96. *See id.* at 1114.
97. *See Spokeo, Inc.*, 578 U.S. at 342.
98. *See* TransUnion LLC v. Ramirez, 594 U.S. 413, 417 (2021).
99. *Id.*
100. *See id.* at 420.
101. *See id.*
102. *Id.* at 421.
103. *Id.* at 442.
104. *Id.*
105. *Id.*
106. *Id.* at 424.

an open-ended invitation for federal courts to loosen Article III based on contemporary, evolving beliefs about what kinds of suits should be heard in federal courts."[107] Among the intangible harms which could qualify as concrete, the opinion listed harm to one's reputation, intrusion upon one's seclusion, and disclosure of one's private information.[108] Further, the Court reaffirmed that congressional statutes may not create federally actionable injuries where no concrete harm exists.[109]

Applying law to the facts, the Court remarked that the 1,853 class members whose incorrect information was disseminated bore a harm similar to traditional defamation.[110] The other 6,332 class members, however, bore no harm analogous to defamation, because common law defamation required the transmission of incorrect information to others.[111] The mere existence of the inaccurate reports, absent publication, could not support a concrete injury in fact.[112] Further, the risk of material future injury, should the remaining reports become disclosed, did not avail the plaintiffs because the risk of future harm supports standing for injunctive relief as the appropriate remedy, rather than monetary damages.[113]

One question begged by the *TransUnion* decision is whether the harms in *Spokeo* would have satisfied the Court's concreteness analysis. The Ninth Circuit held the statutory harms were concrete,[114] and the *TransUnion* opinion largely validated that holding by distinguishing between *disclosed* and *undisclosed* inaccurate consumer reports.[115] The disclosure in the case of the *TransUnion* plaintiffs involved the intuitively harmful claim that individuals might be terrorists, while false information published in *Spokeo* was more innocuous.[116] None of the examples of concrete harms given by the *TransUnion* Court stooped as low as the dissemination of unharmful falsities.[117] If the relevant

107. *Id.* at 424–25.

108. *Id.* at 425. Notably, none of these examples seem to extend as far as nonmaterial false statements, such as those the Ninth Circuit found concrete in the *Spokeo* remand. *See* Robins v. Spokeo, Inc., 867 F.3d 1108, 1117 (9th Cir. 2017).

109. *TransUnion*, 594 U.S. at 426.

110. *Id.* at 432.

111. *See id.*

112. *See id.* at 435.

113. *See id.*

114. *See* Robins v. Spokeo, Inc., 867 F.3d 1108, 1118 (9th Cir. 2017).

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

116. *Compare id.* at 432 (involving a profile inaccurately stating plaintiff was on a federal watch list), *with* Spokeo, Inc. v. Robins, 578 U.S. 330, 336 (2016) (involving a profile inaccurately stating plaintiff's marital status, etc.).

117. *See TransUnion*, 594 U.S. at 424.

common law analogue is defamation, would many of the *Spokeo* plaintiffs fall short because no reputational or material harm resulted from the false information?[118] Or would the Court's admonition that the injury need not perfectly fit the common law claim-of-reference allow some grace where plaintiffs' claims would fail to satisfy the essential elements of the relevant traditional claim?[119] Under the Court's approach, these answers remain elusive, as do the limits of litigating privacy harms under statutes like CIPA. Under Justice Thomas's approach, however, there would be clearer answers.[120]

IV. THE THOMAS VIEW

In both *Spokeo* and *TransUnion*, though the Court seemed to limit standing for intangible harms, Justice Thomas wrote disagreeing opinions (a concurrence and a dissent, respectively) containing a curious theory worthy of recitation and explication which could broaden standing in many cases.[121] Essentially, he argued that the key question for intangible statutory harms is whether the relevant statute conferred a *public right* or an *individual right*.[122] This perspective, if adopted, would expand standing and largely transform the injury in fact analysis.[123] In order to consider the ramifications of Justice Thomas's interpretation, this Part is devoted to recounting Justice Thomas's opinions in *Spokeo* and *TransUnion*.

A. The Spokeo *Concurrence*

Justice Thomas's concurrence in *Spokeo* began by rooting standing doctrine in the historical practices of common law courts.[124] When extrapolating from so few words as "case" and "controversy,"[125] it makes sense to assume the Framers, as well as the ordinary reader at the time

118. *See Spokeo*, 578 U.S. at 336.

119. *See Robins*, 867 F.3d at 1115–16.

120. *See Spokeo*, 578 U.S. at 343 (Thomas, J., concurring).

121. *See id.*; *TransUnion*, 594 U.S. at 442–43 (Thomas, J., dissenting).

122. *See Spokeo*, 578 U.S. at 343 (Thomas, J., concurring) ("Common-law courts more readily entertained suits from private plaintiffs who alleged a violation of their own rights, in contrast to private plaintiffs who asserted claims vindicating public rights.").

123. *Compare id.* (Thomas, J., concurring) (arguing the concreteness requirement should be less when suing to vindicate a personal right), *with id.* at 342 (majority opinion) (holding the circuit court's standing analysis was incomplete).

124. *Spokeo*, 578 U.S. at 343 (Thomas, J., concurring).

125. U.S. CONST. art. III, § 2.

of ratification,[126] must have imported their understanding of the powers exercised by courts at, and up to, that time. According to Justice Thomas, common law courts would hear cases dependent more on the "different types of rights" at issue, rather than a distinction between procedural and actual harm.[127] Instead of the nature of the harm suffered, the key to standing—at least regarding the sufficiency of the injury at issue—should be the vindication of a "personal right," as opposed to a "public right."[128]

Personal rights are best understood when distinguished from public rights.[129] At common law, a violation of one's personal rights incurred a "*de facto* injury" requiring no further harm to support a lawsuit.[130] Public rights, on the other hand, necessitated a further showing of particularized harm, otherwise the government became the appropriate enforcer of the right, as opposed to leaving enforcement in the hands of private plaintiffs.[131] Public rights included "free navigation of waterways, passage on public highways, and general compliance with regulatory law."[132] These are rights owed to the social collective, rather than to individuals, with public nuisance as another prime example.[133] According to Justice Thomas, the injury in fact requirement serves to bar private individuals from inappropriately vindicating collective rights.[134] When an individual pursues a claim based on a public right, the added injury in fact components of concreteness and particularity ensure that there is some special reason for *that* individual to enforce the right against a third party, instead of relying on the government to bring suit.[135]

But why apply the private versus public rights distinction to modern litigation? Since Justice Thomas follows the logic that Article III's standing requirement should import the traditional common law standard, and since, according to him, common law did not require a high degree of concreteness when the cause of action followed from a violation of an individual right, neither should today's courts impose

126. This is an originalist and textualist framing of the relevant inquiry, but justified because this Note seeks, in part, to understand the view offered by Justice Thomas, a notable originalist and textualist. *See* Gregory E. Maggs, *Which Original Meaning of the Constitution Matters to Justice Thomas?*, 4 N.Y.U. J.L. & LIBERTY 494, 495 (2009).

127. *See Spokeo*, 578 U.S. at 343 (Thomas, J., concurring).

128. *See id.* at 344.

129. *See id.* at 344–45.

130. *Id.* at 344.

131. *Id.* at 347.

132. *Id.* at 345.

133. *See id.*

134. *See id.* at 345.

135. *See id.*

such an obstacle when individual rights are at stake.[136] As he says, "the concrete-harm requirement does not apply as rigorously when a private plaintiff seeks to vindicate his own private rights."[137] This is because the separation of powers justification for the standing requirements of concreteness and particularity applies only weakly, if at all, in the context of private citizens vindicating their individual rights.[138]

In Justice Thomas's words, there exists "no danger that the private party's suit is an impermissible attempt to police the activity of the political branches or . . . that the legislative branch has impermissibly delegated law enforcement authority from the executive to a private individual."[139] Presumably this is because the public rights—especially those traditionally policed by the executive branch in the regulatory sphere—would, if they conferred standing, allow individuals to sue absent an especially particular and concrete harm. This, in turn, would outsource executive authority, effectively watering down the president's broad enforcement discretion which ought to reside in the president and simultaneously bringing the enforcement power within the sphere of the judiciary, where it does not belong—impacting the separation of powers on two fronts.

The *Spokeo* decision was a first attempt by Justice Thomas to redirect the course of standing doctrine after joining Justice Scalia's 1992 plurality opinion in *Lujan v. Defenders of Wildlife*.[140] That decision solidified the injury in fact sub-elements: concreteness, particularization, and actuality or imminence.[141] However, it occurred in the context of a citizen suit against an agency, regarding the alleged infringement of public rights, a classic example of a suit which would have troublingly invited the Court to supervise the executive branch.[142] Justice Thomas's opinion in *Spokeo* illustrated how the standing requirement, in his view, differed once the nature of the rights at issue changed.[143] Applied to CIPA litigation like that in *Licea*, the relevant question would then become whether the statute granted public or private rights, a potentially less thorny determination than strictly

136. *See id.* at 347.

137. *Id.*

138. *See id.*

139. *Id.*

140. 504 U.S. 555 (1992).

141. *See id.* at 560–61.

142. *Compare id.* (elucidating concreteness and particularization as necessary elements of the injury in fact standing requirement in a citizen suit against an administrative agency over one of its environmental policies), *with Spokeo*, 578 U.S. at 343 (Thomas, J., concurring) (arguing the necessary concreteness depends in part on the nature of the rights at issue).

143. *See Spokeo*, 578 U.S. at 344 (Thomas, J., concurring).

analogizing to harms recognized at common law.[144] Justice Thomas again advanced this view in *TransUnion*, gaining surprising traction with other Justices on the Court.[145]

B. The TransUnion *Dissent*

In *TransUnion*, Justice Thomas dissented from the majority decision, again espousing his view that the predominant question was whether the rights asserted were individual or public in nature.[146] Unlike in *Spokeo*, Justices Breyer, Kagan, and Sotomayor joined him, possibly implying that the Thomas view of standing for intangible harms had been gaining popularity since *Spokeo*.[147] Perhaps surprisingly, Justice Thomas was not joined by any of the Court's more well-known originalists, even though his opinion placed heavy emphasis on judicial practices contemporary to the founding.[148] The *TransUnion* dissent did little to depart from the view expounded in *Spokeo*, but rather emphasized history to show that common law and early US courts paid close attention to the nature of the rights at issue before considering the requisite level of concreteness.[149]

While the injury in fact requirement has "relatively recent vintage,"[150] the emphasis on the nature of the right asserted traces back to at least the early 1800s.[151] Though very early common law courts might have required actual damages, shortly after the United States' founding that had changed with the acceptance of nominal damages.[152] Describing the scope of judicial power, the Court in 1821 said "the power extends only 'to "a case in law or equity," in which a right, under such law, is asserted.'"[153] The Court's focus, then, was on the nature of the

144. *See id.*; Licea v. Am. Eagle Outfitters, Inc., 659 F. Supp. 3d 1072, 1076 (C.D. Cal. 2023).

145. *See* TransUnion LLC v. Ramirez, 594 U.S. 413, 443 (2021) (Thomas, J., dissenting).

146. *See TransUnion*, 594 U.S. at 446–47 (Thomas, J., dissenting) ("Key to the scope of the judicial power, then, is whether an individual asserts his or her own rights.").

147. *Id.* at 442; *see also* Uzuegbunam v. Preczewski, 592 U.S. 279, 285 (2021) ("Article III's restriction of the judicial power to 'Cases' and 'Controversies' is properly understood to mean 'cases and controversies of the sort traditionally amenable to, and resolved by, the judicial process.'" (quoting Vt. Agency of Nat. Res. v. U.S. ex rel. Stevens, 529 U.S. 765, 774 (2000))).

148. *See TransUnion*, 594 U.S. at 445–49 (Thomas, J., dissenting).

149. *Id.* at 448.

150. NOAH R. FELDMAN & KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW 48 (Foundation Press, 21st ed. 2022).

151. *See* Cohens v. Virginia, 19 U.S. 264, 405 (1821).

152. *See Uzuegbunam*, 592 U.S. at 286 ("[I]njuria & damnum . . . are the two grounds for the having [of] all actions, and without these, no action lieth." (quoting Cable v. Rogers (1625) 81 Eng. Rep. 259 (KB))); Barker *v.* Green (1824) 130 Eng. Rep. 327 (CP) (allowing nominal damages for a procedural deficiency because a breach of a duty necessarily caused damage).

153. *TransUnion*, 594 U.S. at 446 (Thomas, J., dissenting) (quoting *Cohens*, 19 U.S. at 405).

right asserted.[154] In making this point, Justice Thomas focused partially on the common law claim for trespass, which required no showing of damages for purposes of standing.[155] Instead, because the right to control access to an individual's own property was personal, rather than communal, the violation itself constituted sufficient harm.[156] But when a litigant asserted a communal right at common law, then a particular injury must have been alleged.[157] The distinction between individual rights and communal duties became the trigger for a necessary inquiry into the litigant's injury.[158] But so long as the violation infringed upon an individual right, the courts would not look to concreteness or particularity in the harm suffered.[159] This included rights merely conferred by statute.[160]

Briefly stated, while the Court has required a seemingly heightened concreteness where intangible privacy harms constitute the injury in fact,[161] the Thomas position would allow a low level of concreteness so long as the plaintiff seeks to vindicate a personal right, rather than public-oriented duty.[162] This is because the separation of powers concerns will seldom manifest when individual rights are at issue.[163] In short, the Thomas view would allow more flexibility for legislatures to create effective private remedies for digital privacy harms.[164] But where does all this doctrine come from, and how do the origins of standing inform either view's correctness?

V. ANALYSIS

Standing doctrine has developed out of relatively few words in the US Constitution:

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154. *See id.*

155. *See id.* at 447.

156. *See id.* ("Where an individual sought to sue someone for a violation of his private rights, such as trespass on his land, the plaintiff needed only to allege the violation." (citing Entick v. Carrington (1764) 95 Eng. Rep. 807, 817 (KB))). *But see* Blanchard v. Baker, 8 Me. 253, 268 (1832) (holding trespass constituted sufficient injury because adverse possession claims could arise in the future if the rights went unvindicated).

157. *See TransUnion*, 594 U.S. at 447 (Thomas, J., dissenting) (citing Robert Marys's Case (1613) 77 Eng. Rep. 895, 898–99 (KB)).

158. *See id.*

159. *Id.*

160. *Id.* at 448 (citing Havens Realty Corp. v. Coleman, 455 U.S. 363, 373 (1982) ("[T]he actual or threatened injury required by Art. III may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing.")).

161. *See id.* at 424–25 (majority opinion).

162. *See id.* at 447 (Thomas, J., dissenting).

163. *Id.*

164. *See id.*

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls . . . to Controversies between . . . Citizens of different States 165

The text states that judicial power extends to "[c]ases" and "[c]ontroversies," which has been interpreted to require (1) an injury in fact, (2) caused by the challenged conduct, (3) which is redressable by a judicial decision.[166] Injury in fact further requires both concreteness and particularization, and the harm must be "actual or imminent."[167] The primary value underlying the interpretation of the Constitution's "case or controversy" requirement is judicial restraint.[168] The Supreme Court has repeatedly opined on the value of limiting the scope of judicial authority, and congressional inability to create standing where an injury in fact otherwise would not exist.[169] But alongside the concern about an aggrandized judiciary, the standing requirement also serves to keep the executive enforcement authority from dilution.[170]

Despite the Court's insistence that Congress may not water down Article III standing,[171] the fact that the legislature has some power to expand and constrict the jurisdiction of federal courts cuts against that logic.[172] If Congress can confer or deny the authority for the Court to hear a subset of cases,[173] why should Congress not retain the authority to create "cases" and "controversies" by granting causes of action for violations of procedural rights?[174] After all, how is a dispute

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165. U.S. CONST. art. III, § 2.

166. Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–61 (1992) ("First, the plaintiff must have suffered an 'injury in fact'—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) 'actual or imminent, not "conjectural" or "hypothetical."' (quoting Whitmore v. Arkansas, 495 U.S. 149, 155 (1990)) Second, there must be a causal connection between the injury and the conduct complained of—the injury must be 'fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court.'" (quoting Simon v. E. Ky. Welfare Rts. Org., 426 U.S. 26, 41–42 (1976))).

167. *Id.* at 560.

168. *TransUnion*, 594 U.S. at 423; *id.* at 460 (Kagan, J., dissenting) ("The familiar story of Article III standing depicts the doctrine as an integral aspect of judicial restraint.").

169. *See, e.g.*, Gladstone Realtors v. Vill. of Bellwood, 441 U.S. 91, 100 (1979) ("In no event . . . may Congress abrogate the [Article] III minima."); Clapper v. Amnesty Int'l USA, 568 U.S. 398, 408 (2013) ("The law of Article III standing . . . serves to prevent the judicial process from being used to usurp the powers of the political branches.").

170. *See* Spokeo, Inc. v. Robins, 578 U.S. 330, 347 (2016) (Thomas, J., concurring).

171. *See TransUnion*, 594 U.S. at 427.

172. *See* Marbury v. Madison, 5 U.S. 137, 148 (1803).

173. *See id.*

174. Lujan v. Defs. of Wildlife, 504 U.S. 555, 580 (1992) (Kennedy, J., concurring) ("We must be sensitive to the articulation of new rights of action that do not have clear analogs in tour common-law tradition.").

over whether a duly enacted law grants an individual procedural protection not a controversy sufficient for litigation? Yet, the fact remains, it is not.[175] Even though Congress possesses the greater powers of jurisdiction stripping and federal court creation,[176] current standing doctrine does not allow it the arguably lesser power to define which harms should allow litigants to access federal courts.[177]

It would be a gross mischaracterization to say that *Spokeo* or *TransUnion* entirely barred Congress from creating individual rights vindicable by lawsuit.[178] As the Court has noted, Congress can "elevat[e] to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law."[179] In other words, so long as there first exists an injury in fact, Congress may create a legally cognizable right. However, Congress may not independently create and define an injury.[180] The legislature has some role—an actual injury not addressed by the legislature *might not* grant standing, while an actual injury addressed by Congress *will* grant standing.[181] On the other hand, a nonconcrete (or unparticularized) injury will not confer standing, regardless of the legislature's attention to it.[182] There is some irony that injury in fact analysis has become a hurdle for statutory claims, when the Court originally developed it as an additional avenue for judicial relief, meant to open the courts to plaintiffs absent a statutory cause of action.[183] Now, instead of expanding access to federal court, the injury in fact requirement constricts it.[184] Another, though inverse, irony exists in the political ramifications of the injury requirement. The injury in fact interpretation of Article III's case or controversy requirement was intended to restrain the *judiciary*,[185] but in effect it limits *legislatures* by neutralizing many attempts to grant a cause of action for procedural injuries.[186] Such a limitation begs the question whether this is the sort of "political" matter from which standing aims to bar the judiciary's meddling.[187] The quintessential concern

175. *See TransUnion*, 594 U.S. at 426.

176. *See* U.S. CONST. art. III.

177. *See TransUnion*, 594 U.S. at 426.

178. *Id.*

179. Spokeo, Inc. v. Robins, 578 U.S. 330, 341 (2016) (quoting *Lujan*, 504 U.S. at 578).

180. *See TransUnion*, 594 U.S. at 426.

181. *Id.*

182. *Id.*

183. *Id.* at 451 (Thomas, J., dissenting) ("[I]njury in fact served as an *additional* way to get into federal court.").

184. *See id.*

185. *Id.* at 460 (Kagan, J., dissenting).

186. *See* Spokeo, Inc. v. Robins, 578 U.S. 330, 341 (2016).

187. *See TransUnion*, 594 U.S. at 424.

emanating from the injury in fact requirement seems to be the potential for citizen suits against the federal government for any policies that might be unfavorable or procedurally deficient.[188] If citizen suits were not cabined, many lawsuits would invite judicial oversight for any number of executive and legislative actions.[189] However, the development of the injury in fact requirement has gone even farther, limiting not only the courts from overly supervising the other branches, but also the legislature from combatting harms that have no clear common law analogue, as *TransUnion* required.[190]

The standing elements are far more rooted in modern jurisprudence than a historical understanding of the case or controversy requirement.[191] As one legal scholar remarked, "why require litigants to have an injury that is personal to them? . . . The answer is not historical pedigree; most of the Court's standing cases are of relatively recent vintage, and the 'injury in fact' requirement was never mentioned until 1970."[192] Nor can the three standing requirements be traced to the English common law, since "[t]he English practice [did] not in fact demand injury to a personal interest, and [neither] the separation of powers nor advisory opinions doctrines as originally envisaged require insistence on a personal stake as the basic element of standing."[193] With the Court's modern textualist leanings, perhaps such a departure from the text and history signals a weakness in the doctrine, should it be challenged again.[194] Even though most of the current textualist Justices signed onto the *TransUnion* majority, originalist scholarship has continued to critique the current standing formulation.[195] Since the historical background of the standing

188. *Id.*

189. *See id.*

190. *Id.*

191. *See* FELDMAN & SULLIVAN, *supra* note 150, at 48.

192. *Id.*

193. *Id.* (quoting Raoul Berger, *Standing to Sue in Public Actions: Is It a Constitutional Requirement?*, 78 YALE L.J. 816, 827 (1969)).

194. *See* Harvard Law School, *The Antonin Scalia Lecture Series: A Dialogue with Justice Elena Kagan on the Reading of Statutes*, YOUTUBE (Nov. 25, 2015), https://www.youtube.com/watch?v=dpEtszFT0Tg [https://perma.cc/8C2H-QPPK] ("We're all textualists now."); Owen B. Smitherman, *History, Public Rights, and Article III Standing*, 47 HARV. J.L. & PUB. POL'Y 167, 170 (2024) ("Many (but not all) academics have cast doubt on the originalist justification for modern standing doctrine. . . . [T]hey have concluded that there is little support for the modern requirements of standing, especially the all-important injury in fact element.").

195. *See* Smitherman, *supra* note 194, at 173 ("[L]ower courts have struggled to apply *TransUnion*. . . . Respected judges with solid originalist credentials have divided over whether particular harms qualify . . . ."); Cole, *supra* note 5, at 1034 (describing how lower courts have had

elements remains murky at best, Justice Thomas's different conception of the relevant inquiry becomes more understandable, as he is probably the staunchest originalist on the Court.[196]

In his view, "at the time of the founding, whether a court possessed judicial power over an action with no showing of actual damages depended on whether the plaintiff sought to enforce a right held privately by an individual or a duty owed broadly to the community."[197] As shown in Justice Thomas's dissent, without sufficient rebuttal by the majority,[198] history paints a far more permissive picture of judicial authority, particularly regarding the requirements of standing.[199] Neither English common law nor early US courts required an injury in fact to be concrete when the right was individual to the litigant seeking relief.[200] In fact, it seems the injury requirement initially granted an additional *avenue* into court, rather than an additional *hurdle*—plaintiffs could allege *either* actual harm or violation of a statutory right.[201]

With the historical evidence seemingly pointing in the direction of a broader conception of standing, one which would allow Congress greater latitude to create statutory rights redressable by lawsuit, why has the Court opted for the more limited construction?[202] The analysis from this Note's Part II potentially sheds some light on this question.[203] With an expanding internet marketplace, individuals can conduct business and interact with one another to an extent unimagined at the founding.[204] This increased connectedness necessarily means more opportunities for disputes to arise. Not only do people have more opportunities to violate one another's rights, but the massive accumulation of state and federal laws generating causes of action must

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difficulty applying *TransUnion*); Robert J. Pushaw, Jr., *The Court Continues to Confuse Standing*: *The Pitfalls of Faux Article III "Originalism"*, 31 GEO. MASON L. REV. 893, 895 (2024) (arguing Article III cases required only that the plaintiff assert a legal right, the case be "fortuitous" (not manufactured purely for litigation), and the case involve a legal question in need of interpretation).

196. *See* Maggs, *supra* note 126, at 495–96.

197. *TransUnion*, 594 U.S. at 446–47 (Thomas, J., dissenting).

198. *See id.*; *see also* FELDMAN & SULLIVAN, *supra* note 150, at 52 ("Justice Thomas's dissent also contained an extensive discussion of the history of federal courts, to which the TransUnion majority did not respond.").

199. *See TransUnion*, 594 U.S. at 447.

200. *See id.*

201. *Id.* at 451 ("A plaintiff could now invoke a federal court's judicial power by establishing injury by virtue of a violated legal right or by alleging some other type of 'personal interest.'") (citing Simon v. E. Ky. Welfare Rts. Org., 426 U.S. 26, 39 (1976)).

202. *See id.* at 425–26.

203. *See supra* Part II.

204. *See supra* Part II; *see also Licea*, 659 F. Supp. 3d at 1078.

also allow for many of these slights to become actionable where they may not have been before.[205] A seemingly litigious US culture might be a product or a factor in all of this, but regardless, it appears safe to say that lawsuits are now more popular than ever.[206] While the judiciary has grown, it may still struggle to keep pace.[207] And certain aggregation mechanisms have made it even easier to bring claims that would otherwise go ignored.[208] For these reasons, judges might favor policies combatting the ease with which individuals may sue, especially in cases where no appreciable harm has befallen them.

Spokeo and *TransUnion* advanced the *Lujan* injury in fact framework by highlighting the concreteness and particularity elements of an injury in the context of mere statutory harms.[209] When a statute with a minimum damages provision grants a cause of action, the Court will only adjudicate the claim if the plaintiff has suffered a concrete and particularized injury.[210] The disagreement within the Court arises once such statutory harms come into play.[211] The Court will only adjudicate claims rooted in procedural injuries if there also exists an injury in fact which is concrete and particularized.[212] So what does that mean for digital privacy harms?

Returning to the *Licea* case, had the party exception not granted the court an escape hatch,[213] how should the standing analysis have been decided on appeal? In that case, the alleged harm stemmed from the recording and transmission of the presumably innocuous contents of chat box messages to a third party.[214] The information was not particularly sensitive, and no negative economic effects followed the disclosure.[215] The Court indicated in *TransUnion* that false personal information compiled and merely stored within a company's own

205. *See* NEIL GORSUCH & JANIE NITZE, OVER RULED: THE HUMAN TOLL OF TOO MUCH LAW 14 (2024).

206. *Federal Judicial Caseload Statistics 2022*, U.S. CTS., https://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2022 [https://perma.cc/TM7B-GEFL] (last visited Mar. 8, 2024).

207. Merritt McAlister, Adalberto Jordán & Kimberly J. Mueller, *What Can Be Done About Backlogs?*, 107 JUDICATURE 51, 51–52 (2023).

208. *See* KLONOFF, MDL, *supra* note 9.

209. *See* TransUnion, LLC v. Ramirez, 594 U.S. 413, 423 (2021); Spokeo, Inc. v. Robins, 578 U.S. 330, 341 (2016).

210. *TransUnion*, 594 U.S. at 423.

211. *Id.*

212. *Id.*

213. Licea v. Am. Eagle Outfitters, Inc., 659 F. Supp. 3d 1072, 1085 (C.D. Cal. Mar. 7, 2023).

214. *Id.* at 1076.

215. *Id.*

database would not constitute a concrete injury.[216] However, once published and accessed by others, the Court would consider the individual to whom the false information pertains to be harmed in a concrete fashion.[217] With the common law analog of libel,[218] the reputational nature of the information becomes important for the standing analysis, since the Court indicated it would consider Congress's judgment alongside similar common law claims to determine whether an injury confers standing.[219]

In *Licea*, the transmission to a third party resembles publishing.[220] However, since the information was not inherently harmful to one's reputation (unlike an assertion that the individual was on a terrorist watch list),[221] it does not have a clear analogy to the common law claim of libel.[222] Further, the information was not widely distributed.[223] When one's information is published, it presumably becomes available to the public, and becomes viewable at will. But mere transmission to a third party can hardly rise to the level of publication.[224] What if the third party never retransmits the data? What if the third party never even uses the data? In such a case, the collection of data would largely resemble the mere presence of incorrect information on the nonpublic records in *TransUnion*, which could not generate standing prior to publication.[225] Admittedly, the *Licea* plaintiffs would have a stronger case insofar as their information was actually transmitted (if only once).[226] However, the transmission of the data was equally violative of plaintiffs' statutory rights, as was the negligent creation of false profiles in *TransUnion*.[227] Where the majority of *TransUnion* plaintiffs could not allege a concrete injury, neither would those suffering similar digital privacy violations be likely to achieve standing under the Court's current test for intangible injuries.[228] So, the court in *Licea* may have been wrong to find standing satisfied.[229]

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216. *TransUnion*, 594 U.S. at 442.
217. *Id.*
218. *Id.* at 437.
219. *Id.*
220. *Licea*, 659 F. Supp. 3d at 1076.
221. *TransUnion*, 594 U.S. at 420.
222. *Licea*, 659 F. Supp. 3d at 1076.
223. *TransUnion*, 594 U.S. at 420.
224. *See Licea*, 659 F. Supp. 3d at 1077; *TransUnion*, 594 U.S. at 437.
225. *TransUnion*, 594 U.S. at 442.
226. *Licea*, 659 F. Supp. 3d at 1076.
227. *TransUnion*, 594 U.S. at 442.
228. *Id.*
229. *Licea*, 659 F. Supp. 3d at 1078.

Therefore, it is likely that the Court's current standing doctrine will require Ninth Circuit courts (and all others) to deny many claims based on procedural harms stemming from digital privacy violations.[230] For the reasons stated in Part II, this might be a good policy outcome where it would stop frivolous aggregated litigation.[231] Notably, the Thomas view would compel a different result.[232] Under Justice Thomas's conception (seemingly endorsed by several other Justices), so long as the legislature specifies that the rights it creates are personal in nature, plaintiffs will be able to bring suit for the violation of those rights.[233] As previously shown, this version of a standing test could lead to more lawsuits, greater judicial inefficiency, and a higher risk of litigation blackmail against companies.[234] Nevertheless, by framing the test in a manner easily implementable by Congress, the legislatures could draft statutes with these potential costs in mind.

The concerns posed by aggregate litigation over digital privacy harms, like the suits brought under CIPA, might weigh in favor of a more limited standing doctrine. As shown, the current *TransUnion* formulation, if faithfully applied, should limit access to federal courts for nonconcrete harms.[235] The Thomas approach, though perhaps more rooted in history, would allow statutes like CIPA to generate a flood of litigation over newly defined privacy injuries.[236] Such litigation carries the risks described in Part II, namely that unmeritorious aggregated suits might still yield generous settlements. But, by giving legislatures more discretion to create enforceable private rights, it would also place the responsibility to account for these costs with the legislature—and, from an originalist perspective which generally shirks policy-oriented judicial analyses, perhaps that is where it belongs.

VI. CONCLUSION

Statutes enforcing digital privacy rights, like CIPA, carry a risk of abuse when aggregate litigation becomes a cudgel with which to coerce unmerited settlement. Companies likely cannot employ strategies like the Grim Trigger to deter such suits, making the suits more dangerous.[237] Though class actions and the rise of digital harms

230. *See id.*
231. *See supra* Part I.
232. *See TransUnion*, 594 U.S. at 443 (Thomas, J., dissenting).
233. *Id.* at 450.
234. *See supra* Part II; Olthoff, *supra* note 48.
235. *See TransUnion*, 594 U.S. at 424–25.
236. *See id.* at 450 (Thomas, J., dissenting).
237. *See* discussion *supra* Part II.

may increase the likelihood of costly, even coercive aggregate litigation, the Court's current standing requirements, as interpreted in *TransUnion*, stand as a potential bar for the vindication of many intangible, digital privacy harms.[238] From a policy perspective, this approach has considerable merit. With the current state of aggregate litigation, allowing plaintiffs to pursue statutory damages for miniscule or nonexistent harms runs the risk of over-deterring companies and opening the door to settlement blackmail. Requiring litigants to show actual harm mitigates this risk and protects the courts from being overrun with claims. However, as Justice Thomas has articulated, interpreting standing to bar certain intangible harms without common law analogs effectively infringes on Congress's ability to create new causes of action.[239] Because technology might continue to develop and cause harms in ways that defy analogy to common law injuries, this concern could impose a significant cost.

The standing requirement has been justified by overtures to judicial restraint, so the fact that it now aggrandizes the Court's determination of an injury over Congress's carries some irony. This is especially true since Congress has the power to strip the Court's jurisdiction over certain claims.[240] Given the historical evidence that common law and early US courts deferred to Congress to create vindicable rights, perhaps the Justice Thomas approach will win the day.[241] If the Court indeed looked to the nature of the right at issue—whether it is an individual right or a duty owed to many—it is possible that the undesirable outcomes described in Part II could come to pass. However, this approach would grant legislatures fairer notice of the effect that their laws will have when they confer causes of action and could better inform the framing of rights as communal or individual, based on the legislature's best judgment.

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238. *See* discussion *supra* Part IV.

239. *See* discussion *supra* Part V.

240. *See* U.S. CONST. art. III.

241. *See TransUnion*, 594 U.S. at 450 (Thomas, J., dissenting).

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