How Close Is Close Enough: Examining the Concrete Impact of TransUnion on Statutory Data Privacy Violations

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ABSTRACT

Article III's case-or-controversy requirement, which necessitates that cases assert a concrete injury in fact, has barred litigants seeking to bring claims in federal court. In 2021, TransUnion LLC v. Ramirez *further heightened the concreteness requirement for allegations of "mere statutory violations," forcing litigants to assert a "close relationship" between the statutory harm and a historically recognized harm. Such analysis may bar litigants from asserting claims under data privacy statutes, which have often created new and amorphous injuries. This Note aims to explore the "concrete" impact of* TransUnion *on the ability of litigants asserting statutory data privacy claims to satisfy Article III's standing requirement.*

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This paper empirically analyzes the result of TransUnion *by analyzing over 570 cases before and after the decision. It considers data privacy cases with statutory private rights of action for the three years preceding and succeeding* TransUnion*, from 2018 to 2024. This study found that there was a difference in the overall rate of success of establishing Article III standing pre- and post-*TransUnion*, with a drop in the rate of judges finding a concrete injury in fact from 63% to 57%. This study also highlights the disparate approaches taken by different circuits in interpreting and operationalizing the* TransUnion *analysis. Additionally, this study found that different statutory causes of action have had varying rates of success before and after* TransUnion*. Finally, this empirical study further demonstrates the relationship between the success rate of asserting standing and the selection of the analogous historical harm. In addition to its empirical analysis, this paper identifies key potential considerations for legislators aiming to craft statutes for new data privacy harms and litigants seeking to assert claims in federal courts.*

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I.
INTRODUCTION

In 2021, after the *TransUnion LLC v. Ramirez* Court detailed requirements for litigants seeking to sue in federal court,[1] scholars wondered if the Court took "a sledge hammer to . . . statutory damages"[2] and "gut[ted] privacy law enforcement,"[3] and questioned what standing means after *TransUnion.*[4] This case was criticized for limiting Congressional powers to draft legislation and potentially narrowing plaintiffs' ability to find relief in federal courts for a wide range of harms.[5]

In order to bring a lawsuit in federal court, plaintiffs must prove that they have met the standing requirement derived from Article III of the Constitution, which requires that the federal judicial power only extend to "cases or controversies."[6] This doctrine has emerged over the past century, as legislatures "created many new novel and expansive causes of action that in turn have required greater judicial focus on the requirements of Article III."[7] Although the Court has further articulated the contours of the standing doctrine, data privacy cases raise special considerations, particularly after *TransUnion*, which has been interpreted to apply stricter constraints on standing because of its requirement that an intangible harm be "closely related" to a harm traditionally recognized by the courts.[8] However, many data privacy harms have not been traditionally legally cognizable outside of statutory recognition.[9] Instead, federal and state legislatures have drafted privacy protection statutes that range from coverage on specific sectors to wide-ranging protection.[10] Because these new statutory causes of action are sometimes untethered from harms traditionally recognized by the courts, plaintiffs may be unable to access federal courthouses if they are not able to meet the Article III standing requirements after *TransUnion*.

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1. TransUnion LLC v. Ramirez, 594 U.S. 413 (2021).
2. *See* Mike Masnick, *Did the Supreme Court Just Take a Sledge Hammer to Copyright's Statutory Damages*, TECHDIRT (June 30, 2021), https://www.techdirt.com/2021/06/30/did-supreme-court-just-take-sledge-hammer-to-copyrights-statutory-damages/.
3. Theodore Claypoole, *Did the US Supreme Court Just Gut Privacy Law Enforcement?*, LEXOLOGY (July 1, 2021), https://www.lexology.com/library/detail.aspx?g=08d27f04-183c-4521-b67f-e0d369270d63.
4. Erwin Chemerinsky, *What's Standing After* TransUnion LLC v. Ramirez, 96 N.Y.U. L. REV. ONLINE 269 (2021).
5. *See, e.g.*, Lauren Young, *How Detrimental is* TransUnion v. Ramirez*, Really? Understanding the Impact on Environmental Law*, 99 WASH. L. REV. 1435 (2024).
6. *See* Lujan v. Defs. of Wildlife, 504 U.S. 555, 559–61 (1992).
7. TransUnion LLC v. Ramirez, 594 U.S. 413, 428 n.1 (2021); Daniel J. Solove & Danielle Keats Citron, *Standing and Privacy Harms: A Critique of* TransUnion v. Ramirez, 101 B.U. L. REV. ONLINE 62, 62 & n.3 (2021).
8. *TransUnion*, 594 U.S. at 417.
9. Danielle Keats Citron & Daniel J. Solove, *Privacy Harms*, 102 B.U. L. Rev. 793, 796 & n.6 (2022).
10. *See infra* Part II.

To investigate whether *TransUnion* affected data privacy litigation and opportunities for litigants to meet the standing requirement, this paper conducts an empirical analysis of data privacy cases before and after *TransUnion*. While two other studies conduct an empirical analysis on standing cases, the first focuses on the time from 2000 to 2020, which predates the *TransUnion* decision,[11] while the second only considers cases between 2021 and 2023 and does not focus on statutory causes of action.[12] This study builds on those analyses by incorporating additional metrics, analyzing the success of certain "analogous harms" arguments raised in response to *TransUnion*'s history requirement, and examining *TransUnion*'s impact on the success rates, by comparing cases from before and after the decision.

In Part II, this Note reviews federal and state data privacy legislation that grants private individuals the right to sue. Part III of this Note outlines the evolution of standing doctrine, highlighting both the doctrinal changes following *TransUnion* and the interaction of standing doctrine with data privacy. Part IV presents the novel results of an empirical study regarding litigants' success in establishing standing for data privacy cases featuring statutory causes of action both pre- and post-*TransUnion*, to understand *TransUnion*'s impact in such cases. The study and coding of over 579 cases looked at the usage and success rates of different statutory causes of action and their analogous historical harms and found that there was: (1) a drop in the rate of judges finding a concrete injury in fact from 63% to 57% after *TransUnion*, (2) a divergence in circuits' implementation of *TransUnion* and the rigor of their historical harm analysis, (3) variation in the success rates of different statutory causes of action before and after *TransUnion*, and (4) a relationship between the success rate of asserting standing and the selection of the analogous historical harm.

II.
DATA PRIVACY LEGISLATION

As data privacy concerns grow, both the federal and state governments should theoretically create legislative solutions to protect privacy. The federal government has neither a singular comprehensive privacy law nor a unified privacy enforcement agency. Instead, federal statutes cover discrete topics such as children's privacy,[13] financial privacy,[14] health privacy,[15] government

11. Christopher Muhawe & Masooda Bashir, *Privacy as Pretense: Empirically Mapping the Gap Between Legislative & Judicial Protections of Privacy*, 2023 ILL. J.L. TECH. & POL'Y 257 (2023).

12. Noelle Wilson & Amanda Reid, *Intangible Harms, Tangible Consequences: Analyzing the Impact of* TransUnion *on Standing to Sue for Data Breach*, 90 MO. L. REV. 477, 509–10 (2025).

13. Children's Online Privacy Protection Act, 15 U.S.C. §§ 6501–06.

14. Fair Credit Reporting Act, 15 U.S.C. §§ 1681–1681u.

15. Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104–191, 110 Stat. 1936 (1996) (codified as amended throughout Titles 18, 26, 29, and 42 of the U.S.C.).

records,[16] robocalls,[17] and others.[18] This patchwork approach to privacy legislation and enforcement leaves states and private actors to fill the gaps.

As of June 15, 2026, twenty-two states have passed comprehensive data privacy laws in the United States, beginning with California's Consumer Privacy Act (CCPA) in 2018.[19] States also have laws that target specific privacy concerns, from Illinois's Biometric Information Privacy Act (BIPA) that targets biometric data usage[20] to specific sections of New Hampshire's, New Jersey's, and Maryland's consumer privacy legislation that have special requirements for the personal data of minors.[21] In addition, litigants have invoked laws not specifically aimed at privacy in bringing privacy lawsuits, such as Unfair and Deceptive Acts and Practices laws, which are in effect in all fifty states.[22]

Although some statutes only offer enforcement authority to government agencies or state attorneys general,[23] others offer private rights of action.[24] Agencies and state attorneys general are resource constrained and may therefore only target larger cases.[25] Private rights of action allow private litigants to fill the enforcement gap that may exist if only agencies and state attorneys general are empowered to bring enforcement actions.[26] Many statutes that offer private rights of action also offer statutory damages,[27] which have been conceptualized as a "bounty system" that encourages private parties to enforce the law.[28] For

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16. Privacy Act, 5 U.S.C. § 552a.

17. Telephone Consumer Protection Act, 47 U.S.C. § 227.

18. *See U.S. Privacy Laws*, ELEC. PRIV. INFO. CTR., https://epic.org/issues/privacy-laws/united-states/.

19. *See US State Privacy Legislation Tracker 2026*, IAPP, https://assets.contentstack.io/v3/assets/bltd4dd5b2d705252bc/blt76d030a1054f612a/us_state_privacy_legislation_tracker.pdf (last visited June 15, 2026).

20. Biometric Information Privacy Act, 740 ILL. COMP. STAT. §§ 14, 15.

21. Lindsey Tonsanger, Jenna Zhang & Diana Lee, *State and Federal Developments in Minors' Privacy in 2024*, COVINGTON & BURLING (Aug. 9, 2024), https://www.insideprivacy.com/childrens-privacy/state-and-federal-developments-in-minors-privacy-in-2024/.

22. Cameron F. Kerry & John B. Morris, *In Privacy Legislation, a Private Right of Action Is Not an All-Or-Nothing Proposition*, BROOKINGS INST. (July 7, 2020), https://www.brookings.edu/articles/in-privacy-legislation-a-private-right-of-action-is-not-an-all-or-nothing-proposition/.

23. *See, e.g.*, FTC Act, 15 U.S.C. §§ 41–58; Florida Digital Bill of Rights, FLA. STAT. § 501.702; Texas Data Privacy and Security Act, TEX. BUS. & COM. CODE ANN. §§ 541.001–541.205.

24. *See, e.g.*, CAL. CIV. CODE § 1798.100; CAL. PENAL CODE §§ 631, 632; § 740 ILL. COMP. STAT 14/1-99.

25. Danielle Keats Citron, *The Privacy Policymaking of State Attorneys General*, 92 NOTRE DAME L. REV. 747, 796 (2016).

26. *Enforcing Privacy Law: Why Private Litigation Is Essential: An Educational Hearing on the Core Pillars of Privacy Before the H. Comm. On Commerce & Econ. Dev. & S. Comm. On Econ. Dev.*, 2025–26 Leg., 78th Sess. 5 (Vt. 2026) (statement of Daniel J. Solove, Professor, Geo. Wash. Univ. L. Sch.).

27. Melanie A. Conroy, Ariel Pardee & Vivek J. Rao, *Enforcing U.S. Consumer Data Privacy Laws Part 3: Private Litigation and Arbitration*, PIERCE ATWOOD LLP (July 11, 2023), https://www.pierceatwood.com/alerts/enforcing-us-consumer-data-privacy-laws-part-3-private-litigation-and-arbitration.

28. Citron & Solove, *supra* note 9, at 797.

example, California's Invasion of Privacy Act (CIPA) provides statutory damages of $5,000 per violation,[29] and BIPA provides $1,000 per negligent violation and $5,000 per intentional or reckless violation.[30] Although claims based on statutory private rights of action can play a key role in the federal privacy protection scheme, satisfying the standing requirement can be a significant hurdle on the way to bringing such claims in federal court.

III.
STANDING DOCTRINE

A. Standing

Article III of the Constitution requires that cases coming before federal courts have standing, which contains three necessary elements: (1) injury in fact, (2) causation, and (3) redressability.[31] To show an injury in fact, the "plaintiff must have suffered . . . an invasion of a legally protected interest which is (a) concrete and particularized . . . and (b) 'actual or imminent.'"[32] It is the burden of the party asserting federal jurisdiction to establish standing.[33] This burden may fall on either a plaintiff seeking federal original jurisdiction,[34] or a defendant removing a claim from state court to federal court.[35]

B. Spokeo, Inc. v. Robins *&* TransUnion LLC v. Ramirez

In the last decade, a pair of cases refined the concreteness requirement for injury in the standing doctrine. Before *Spokeo* and *TransUnion*, the Court had stated that Congress could "creat[e] legal rights, the invasion of which creates standing" and could "elevat[e] to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate at law."[36] However, *Spokeo* and *TransUnion* marked a shift in the way the Court discussed statutory violations.

Spokeo, Inc. v. Robins addressed the elements necessary to meet the "concrete and particularized" prong of the injury in fact requirement.[37] In *Spokeo*, the plaintiff alleged a violation of the Fair Credit Reporting Act for inaccurate information disseminated on Spokeo, a "people search engine," on behalf of himself and similarly situated individuals.[38] Although the Ninth Circuit

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29. CAL. PENAL CODE §§ 637.2(a)(1).
30. 740 ILL. COMP. STAT. §§ 14/20(a).
31. Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992).
32. *Id.*
33. *Id.* at 561.
34. *See, e.g.*, Clapper v. Amnesty Int'l USA, 568 U.S. 398, 411–12 (2013).
35. *See, e.g.*, Roberson v. Maestro Consulting Servs. LLC, 507 F. Supp. 3d 398 (S.D. Ill. 2020).
36. *Lujan*, 504 U.S. at 578; *see also* Linda R.S. v. Richard D., 410 U.S. 614, 617 n.3 (1973) ("Congress may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute").
37. Spokeo, Inc. v. Robins, 578 U.S. 330, 334 (2016).
38. *Id.* at 333.

concluded that the plaintiff had sufficiently alleged injury in fact because his injury was individualized, the *Spokeo* Court vacated the Ninth Circuit's judgment and remanded for further proceedings because the Ninth Circuit had failed to consider the concreteness prong of Article III standing.[39] In describing the concreteness requirements, the *Spokeo* Court articulated the role of the "history and the judgment of Congress" for statutorily created harms.[40] The Court defined concrete harms as "real," not "abstract," and divided its analysis of harms between tangible harms and intangible ones.[41] Tangible harms were sufficiently concrete for Article III purposes.[42] By contrast, an intangible harm would receive different treatment, as a plaintiff does not "automatically satisf[y] the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right."[43] Instead, "bare procedural violation[s], divorced from any concrete harm," could not satisfy the Article III standing requirement.[44] Rather than looking to the mere existence of a statutory right of action, the Court emphasized the importance of conducting a historical analysis of whether the statutory violation bears a "close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts" in concluding whether a party had satisfied Article III standing.[45]

The *TransUnion LLC v. Ramirez* Court applied the principles described in *Spokeo*. The plaintiffs sued TransUnion, a credit reporting agency, for violations under the Fair Credit Reporting Act.[46] They alleged that TransUnion "failed to use reasonable procedures to ensure the accuracy of their credit files" as required by the Fair Credit Reporting Act and included Office of Foreign Assets Control alerts incorrectly labeling some plaintiffs as potential terrorists.[47] Of the class of 8,185 individuals, 1,853 alleged that TransUnion provided such misleading credit reports to third-party businesses, whereas the remaining 6,332 did not allege that their reports were disclosed to others.[48] The Court explained that the outcome of the standing analysis depended on whether information was disclosed to third parties.

TransUnion further elucidated the *Spokeo* requirement of "a close historical or common-law analogue for [the plaintiffs'] asserted injury."[49] The *TransUnion* Court held that these analogs could "include, for example, reputational harms, disclosure of private information, and intrusion upon seclusion" and "may also

39. *Id.* at 340–43.
40. *Id.* at 340.
41. *Id.*
42. *Id.*
43. *Id.* at 341.
44. *Id.*
45. *Id.*
46. TransUnion LLC v. Ramirez, 594 U.S. 413, 417 (2021).
47. *Id.*
48. *Id.*
49. *Id.* at 424.

include harms specified by the Constitution itself."[50] The Court characterized the inquiry as "not requir[ing] an exact duplicate in American history and tradition," but still underscored that "*Spokeo* is not an open-ended invitation for federal courts to loosen Article III based on contemporary, evolving beliefs about what kinds of suits should be heard in federal courts."[51] In addition, in contemplating the role of the courts and Congress, the *TransUnion* Court instructed that "[c]ourts must afford due respect to Congress's decision," but Congress "may not simply enact an injury into existence."[52]

Accordingly, the Court held that the 1,853 class members who faced actual disclosure to third-party businesses sufficiently alleged a "close relationship" to a harm traditionally recognized—the "reputational harm associated with the tort of defamation."[53] However, the Court held that the remaining class members, who did not have their misleading alert disclosed to others, lacked standing.[54] Although the Court did not impose a requirement that the alleged harm bear an exact duplicate to the tort, the Court held that the type of harm protected by defamation was not closely related to "the mere existence of inaccurate information in a database."[55] Instead, because publication was "essential" to a suit for defamation, the remaining class members did not suffer an injury sufficiently close to a harm traditionally recognized.[56]

C. Standing and Data Privacy Complications

Even before *Spokeo* and *TransUnion*, parties in data privacy cases have historically faced difficulty in establishing standing.[57] These challenges stem from the fact that the intangible harms caused by data privacy violations are often difficult to adapt to the court's standing framework. *TransUnion*'s requirement of an analogy to a historically protected right, if read strictly, would functionally close the door to federal litigation of any new rights.[58] Though some privacy harms are contemplated by the traditional tort framework, many harms are not captured. For example, Professors Danielle Keats Citron and Daniel Solove argue that some privacy harms result in small negative consequences that are dispersed amongst a large group of people and "do not fit well into judicial conceptions of harm, which have an individualistic focus and heavily favor

50. *Id.* at 425.
51. *Id.* at 424–25.
52. *Id.* at 425–26.
53. *Id.* at 432.
54. *Id.* at 435.
55. *Id.* at 434 & n.6.
56. *Id.* at 434.
57. *See infra* Section III.C for a discussion of when defendants may attempt to establish standing; *see* Daniel Solove & Danielle K. Citron, *Risk and Anxiety: A Theory of Data Breach Harms*, 96 TEX. L. REV. 737, 749–50 (2018).
58. *See* Chemerinsky, *supra* note 4, at 282–86 (arguing that, read literally, *TransUnion* would have dire ramifications for civil rights and administrative law statutes).

tangible physical and financial injuries that occur immediately."[59] Many privacy harms are not fully knowable, because the range of potential future injuries could be wider.[60] Additionally, privacy invasions can lead to societal harms, such as violations of autonomy or self-expression, that are difficult to capture within a traditional judicial framework.[61] Such large-scale yet dispersed harms are not easily vindicated through traditional harms and thus face difficulty in meeting the requirements of *Spokeo* and *TransUnion*.[62]

IV.
EMPIRICAL STUDY

This empirical study aimed to answer the question: Did *TransUnion* make it more difficult for litigants to establish Article III standing in federal court for statutory data privacy violations? Section A examines the existing literature and identifies a gap in empirical scholarship on standing outcomes in statutory data privacy cases after *TransUnion*. Next, Section B outlines the study's methodology and explains the rationale behind its design. Finally, Section C presents the empirical findings from 579 cases decided between 2018 and 2024.

A. Existing Literature

There are two categories of relevant empirical literature: Some empirical studies discuss how data privacy cases are impacted by Article III standing requirements. Another body of empirical studies examines the impact of *TransUnion* on courts' analysis of standing claims.

There are several empirical studies that examine data privacy and Article III standing requirements. Professors Christopher Muhawe and Masooda Bashir conducted an empirical study of data privacy cases dismissed for lack of injury.[63] They found that in nearly 60% of cases, courts found no injury cognizable under Article III.[64] Further, they found that after *Spokeo*, there was a statistically significant decline in the percentage of cases where the district court found standing, from 45.29% in the pre-*Spokeo* era to 37.50% in the post-*Spokeo* era.[65] However, the study does not include data from after *TransUnion*, as it only examined cases from 2000 to 2020.[66] Another study also considered pre-

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59. Citron & Solove, *supra* note 9, at 797; *see also id.* at 818–19 (explaining that though many privacy harms involve injury to society, these are not often recognized by the courts' analyses of harms).

60. *Id.* at 817.

61. *See generally* Julie Cohen, *What Privacy is For*, 126 HARV. L. REV. 1904 (2013) (discussing the role of privacy on the self).

62. *See* Solove & Citron, *supra* note 7, at 62.

63. Muhawe & Bashir, *supra* note 11.

64. *Id.* at 283.

65. *Id.* at 286–87.

66. *Id.* at 257.

TransUnion cases and similarly examined different courts' varying application of standing requirements in data protection cases.[67]

Another category of papers is more narrowly focused on data breach cases, which are often cases where security is intentionally compromised and data is accessed without authorization, as opposed to the more general category of data privacy cases, which encompasses other forms of privacy harms.[68] Noelle Wilson and Professor Amanda Reid conducted an empirical study analyzing post-*TransUnion* data breach cases to examine how courts have been applying *TransUnion*, finding that 60% of plaintiffs had successfully established injury in fact in cases alleging intangible data breach harms.[69] Other papers consider cases over a broader period of time before *TransUnion*,[70] though only one study looks at cases both before and after *TransUnion*.[71]

The existing empirical studies do not offer an apt comparison before and after *TransUnion*, as their differing methodologies and case selection limit direct comparisons of standing outcomes. Additionally, none of the existing literature examines *TransUnion*'s impact on statutory data privacy violations, where legislatures have explicitly decided to create a private right of action, and only one analyzes cases both before and after *TransUnion*.

B. Methodology

The selection and coding of case opinions were designed to address the research question of whether *TransUnion* impacted courts' treatment of standing doctrine in cases alleging statutory data privacy violations. This methodology also aimed to understand how success rates varied across several factors: (1) different statutes, (2) different analogized "traditionally recognized" harms, and (3) different jurisdictions. Additionally, because the goal was to examine the impact of *TransUnion*, which was decided in June of 2021, the selected time range was 2018 to 2024, so that *TransUnion* would chronologically be in the middle.

I first used Westlaw to acquire a pool of privacy cases in federal courts within the time range that included at least one statutory claim and a decision addressing whether the concrete injury in fact prong of Article III standing was met. There was also experimentation with various search queries to identify a set

67. Thomas D. Haley, *Data Protection in Disarray*, 95 WASH. L. REV. 1193, 1198, 1217–18 (2020) (examining the impact of *Clapper v. Amnesty Int'l USA*, 568 U.S. 398 (2013), on standing decisions).

68. *See* Matthew Kosinski, *What Is a Data Breach?*, IBM (last accessed Oct. 9, 2025), https://www.ibm.com/think/topics/data-breach.

69. Wilson & Reid, *supra* note 12, at 510.

70. *See, e.g.*, Jay P. Kesan & Linfeng Zhang, *When Is a Cyber Incident Likely to Be Litigated and How Much Will It Cost? An Empirical Study*, 27 CONN. INS. L.J. 529 (2021); Sasha Romanosky, David Hoffman & Alessandro Acquisti, *Empirical Analysis of Data Breach Litigation*, 11 J. EMPIRICAL LEGAL STUD. 74 (2014).

71. Charlotte A. Tschider, *Unto the (Data) Breach*, 59 U. RICH. L. REV. 594 (2025).

that recalled enough cases that discussed the requisite issues without bringing in unrelated cases. I began from notable standing cases during this time period (e.g., *Tsao v. Captiva MVP Restaurant Partners, LLC*,[72] *TransUnion*, *Hunstein v. Preferred Collection & Management Services, Inc.*,[73] *Patel v. Facebook, Inc.*[74]) and privacy statutes[75] (such as BIPA or CCPA) and looked at terms that appeared frequently in either. I tested various search queries to optimize for both recall and relevance within the returned list of results.[76] In the end, I used two search queries and evaluated cases that were retrieved by either of them.[77] Both queries contained keywords for statutory violation, privacy, and standing, with filters set to improve the relevance of the matched cases. The first query set a higher numerical threshold for privacy and standing keywords, but a lower threshold for statutory violations. The second query had a lower threshold for a mention of a privacy or data breach, but incorporated a stricter threshold for standing (matching on specific concepts, such as concreteness and injury in fact, rather than any match on standing).

The queries flagged 824 opinions and orders, which were individually examined for a preliminary relevance check. During the relevance check, this set was filtered to those cases which involved specifically data or informational privacy, included at least one statutory claim, and were not overruled or vacated by later appellate review. This narrowing brought the set down to 579 cases, which were then individually read and coded. The coded data included the year of decision, whether the decision pre- or post-dated *TransUnion*, the circuit that the court corresponds to, whether the concreteness prong was met, what analogous theory (e.g., intrusion upon seclusion, defamation, public disclosure of private facts) was discussed, and what claims were brought. If multiple theories for concreteness were advanced and the court allowed standing for some of the claims or some of the plaintiffs, the case was coded as "Yes for some, No for some." However, for the overall tables, these are included in the "Concreteness Found" categories. Because the overarching research question was concerned with the ability to satisfy the concreteness requirement, even a partial success in establishing standing allows a litigant to have some of his

72. Tsao v. Captiva MVP Rest. Partners, LLC, 986 F.3d 1332 (11th Cir. 2021).

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

74. Patel v. Facebook, Inc. 932 F.3d 1264 (9th Cir. 2019).

75. *See infra* Part II.

76. Some initial queries varied in their requirements, including whether cases explicitly cited *TransUnion* and the frequency with which key terms (such as "privacy" or "statutory cause of action") appeared. I evaluated the results for both relevance and recall of major standing cases during the relevant time period, and ultimately chose two queries that included major cases.

77. This study used two queries and initially included all cases that matched for either query. The first query was adv: ATLEAST5("privacy") AND ATLEAST3(standing) AND (("statutory cause #of action") OR ("statutory harm") OR ("statutory violation")), and the second query was adv: ("invasion #of privacy" or "privacy harm" or "data breach") AND ATLEAST2("injury-in-fact") AND (ATLEAST3("statute") OR ("statutory cause #of action") OR ("statutory harm") OR ("statutory violation")) AND ATLEAST3("concrete").

claims heard on the merits in federal court. Finally, I conducted a sanity check to compare the percentage of cases that were hand-coded as satisfying the concreteness requirement and failing the concreteness requirement with the numbers that were coded by Westlaw. Though Westlaw did not provide this information for the large majority of cases, the hand-coded percentages were similar to the percentages from Westlaw.[78] What follows are the tables and charts that present the resulting data, with additional segments based on the factors of: (1) jurisdiction, (2) statute, and (3) historical analogy.

C. Results

Overall, of the 579 analyzed cases, 224 opinions and orders were issued before *TransUnion*, and 355 were issued after. 63.4% of the opinions and orders issued before *TransUnion* satisfied the concreteness requirement, while 56.9% of those issued after *TransUnion* satisfied the requirement.

While the percentage in the years prior to *TransUnion* hovered around the 63% mark, there was a range of success rates after *TransUnion*. Table 1 reports the outcomes, divided by year. The success rate varied year to year, with a sharp decline in 2022 to 47%, the only time the success rate was below 50%, before a rise again in 2023 and 2024. One potential theory for the dip and later rise in the success rate is that in the immediate aftermath of *TransUnion*, courts began interpreting concreteness requirements more strictly, but after time, litigants were then able to adapt and construct better complaints and arguments to surpass the standing hurdle.

Additionally, there were more statutory data privacy cases overall in the three years following the *TransUnion* ruling than there were in the three years preceding it. This rise may have been due to outside factors, such as the passage of new privacy statutes. For example, CCPA only went into effect in 2020,[79] and was one of the earliest state comprehensive data privacy statutes.[80] The prevalence of claims brought under specific statutes will be discussed later in this Section. Additionally, a rise in cyberattacks may account for an increase in litigation.[81]

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78. Westlaw provides this information under the Precision Filter for "Motion Type & Outcome." For the entire date range, Westlaw only coded 53 cases that were dismissed for lack of standing and 60 cases that were not dismissed for lack of standing, out of a total of 820 cases.

79. CAL. CIV. CODE § 1798.100.

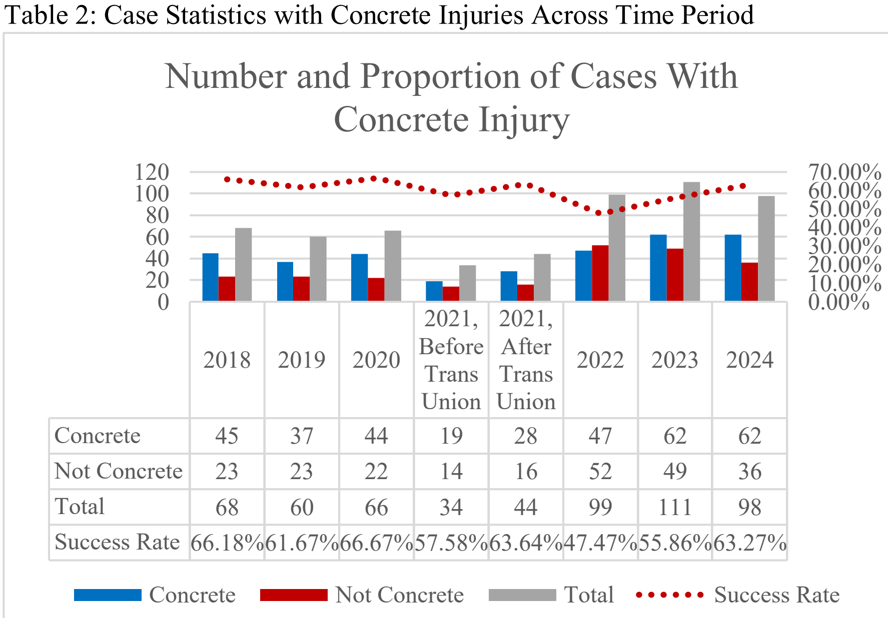
80. *US State Privacy Legislation Tracker 2026*, *supra* note 19.

81. Will Sweeney, *The Rising Tide of Data Privacy Litigation*, FORBES (Jan. 14, 2025), https://www.forbes.com/councils/forbestechcouncil/2025/01/14/the-rising-tide-of-data-privacy-litigation/ ("In the U.S. alone, the number of reported data breaches has jumped from 447 in 2012 to a record-breaking 3,205 in 2023. USA Today notes that 'there were 1,571 data breaches reported in the first half of 2024, a 14% increase compared to the same period last year.'").

Table 1: Distribution of Cases Where Concreteness Was Met by Year

Year	Concreteness Met	Concreteness Not Met	Total Cases	Percentage of Cases with Concreteness Met
2018	45	23	68	66.18%
2019	37	23	60	61.67%
2020	44	22	66	66.67%
2021, Before *TransUnion*	19	14	33	57.58%
2021, After *TransUnion*	28	16	44	63.64%
2022	47	52	99	47.47%
2023	62	49	111	55.86%
2024	62	36	98	63.27%

Table 2: Case Statistics with Concrete Injuries Across Time Period



	2018	2019	2020	2021, Before Trans Union	2021, After Trans Union	2022	2023	2024
Concrete	45	37	44	19	28	47	62	62
Not Concrete	23	23	22	14	16	52	49	36
Total	68	60	66	34	44	99	111	98
Success Rate	66.18%	61.67%	66.67%	57.58%	63.64%	47.47%	55.86%	63.27%

1. *Results by Circuit*

Litigation across circuits has varying rates of success of cases where concreteness was found before and after *TransUnion*. Though there was a decrease in success rates post-*TransUnion* in some circuits, other circuits saw increasing rates of success. Table 3 summarizes the varying concreteness claim success rates across circuits. As the delta difference column shows, there is no consistent change in the percentage of cases finding concreteness across the circuits before and after *TransUnion*. While the largest percentage changes were in circuits with relatively few cases brought (Second, Tenth, and D.C. Circuits, with decreases of 58.3%, 46.2%, and 45.8%, respectively), the large-case-volume circuits also saw relatively large changes in the percentage of cases brought, though in different directions. For example, of the three circuits with the highest volume of cases, the Fourth and the Seventh both saw reductions in the success rates of concreteness claims, with drops of 31.0% and 15.2%, respectively, while the Ninth saw an increase in success by 13.6%. This variation across circuits may be surprising, but some of it may be explained by the uneven interpretation of *TransUnion*. Additionally, some of the differences in results may be more related to the differing distribution of statutory claims brought across circuits, as discussed further in this Section.

Table 3: Concreteness Success Rate by Circuit, Before and After *TransUnion*

Circuit	Pre-*TransUnion*			Post-*TransUnion*			Delta Difference (Change in % of Cases Where Concreteness was Found)
	Cases	Cases Where Concreteness Found	% of Cases Where Concreteness Was Found	Cases	Cases Where Concreteness Found	% of Cases Where Concreteness Was Found	
First	4	3	75.0%	8	7	87.5%	12.5%
Second	7	7	100.0%	36	15	41.7%	(58.3%)
Third	37	24	64.9%	45	19	42.2%	(22.6%)
Fourth	15	11	73.3%	26	11	42.3%	(31.0%)
Fifth	6	6	100.0%	16	14	87.5%	(12.5%)
Sixth	14	9	64.3%	31	21	67.7%	3.5%
Seventh	36	20	55.5%	52	21	40.4%	(15.2%)
Eighth	12	6	50.0%	13	10	76.9%	26.9%
Ninth	50	29	58.0%	81	58	71.6%	13.6%
Tenth	5	5	100.0%	13	7	53.8%	(46.2%)
Eleventh	32	17	53.1%	26	16	61.5%	8.4%
D.C.	6	5	83.3%	8	3	37.5%	(45.8%)

The wide variation by circuit exemplifies the circuit splits that have emerged after *TransUnion*, with circuits coming to different interpretations of the definition of "close relationship," sometimes directly clashing on whether specific statutory provisions constitute a "bare procedural violation" or represent a granting of a substantive right, the violation of which is sufficient to establish a concrete injury on its own.[82] Additionally, courts' analyses of fit with historical analogs vary across circuits. While the Court held in *TransUnion* that there was no requirement for an "exact duplicate" between the alleged injury and traditionally recognized harm, lower courts have diverged in their analysis of what level of fit suffices to satisfy the requirement for a connection.

With the narrowest conception, the Eleventh Circuit in *Hunstein v. Preferred Collection and Management Services, Inc.* held that there needed to be an "element-for-element" fit between the analogous common-law tort and the alleged statutory violation.[83] In *Hunstein*, the plaintiff alleged a violation of the Fair Debt Collection Practices Act (FDCPA) for transmitting personal information to a third-party vendor and attempted to establish a "close relationship" between the statutory violation and the tort of public disclosure of private fact.[84] The court took issue with the plaintiff's complaint, which did not suggest that the communication was likely to reach the public.[85] By contrast, because the tort of disclosure "at its core, requires either actual public disclosure or a substantial certainty that the disclosed information will reach the public at large," the lack of the "essential element" of *actual* public disclosure meant that the relationship could not stand.[86] Thus, the court found that the plaintiff had failed to establish a concrete injury in fact for standing purposes.[87]

Other circuits have taken a much broader view of the type of analysis that can suffice. In *Barclift v. Keystone Credit Services, LLC*, the Third Circuit expressly declined to follow the *Hunstein* element-for-element test, opting instead to use a "kind of harm" analysis to find matches for historical harms based on the type of harm contemplated by the statute.[88] Although the *Barclift* court similarly held that there was no standing,[89] others, using the same looser standard, did find a close fit for *TransUnion* purposes in other cases. In *Garey v. James S. Farrin, P.C.*, the Fourth Circuit reaffirmed that there was no

82. *Cf.* Drazen v. Pinto, 74 F.4th 1336, 1343–44 (11th Cir. 2023) (noting different circuits' approaches to the "close relationship" test). *Compare* Kelly v. RealPage Inc., 47 F.4th 202, 212 (3d Cir. 2022) (rejecting the *TransUnion* inquiry for informational injuries and finding such an injury adequate for standing in a FCRA case), *with* Hansberry v. Bd. of Educ. of Chi., 670 F. Supp. 3d 683, 687 (N.D. Ill. 2023) (declining to find an informational injury adequate for standing in a FCRA case).

83. Hunstein v. Preferred Collection & Mgmt. Servs., 48 F.4th 1236, 1248 (11th Cir. 2022) (en banc).

84. *Id.* at 1240.

85. *Id.* at 1250.

86. *Id.* at 1248.

87. *Id.* at 1250.

88. Barclift v. Keystone Credits Servs., LLC, 93 F.4th 136, 144–45 (3d Cir. 2024).

89. *Id.* at 148.

requirement from *Spokeo* or *TransUnion* that required courts to "'import the elements of common law torts, piece by piece, into any scheme Congress may devise.' Rather, . . . [the court's] inquiry 'focuse[s] on the types of harms protected at common law, not the precise point at which those harms become actionable.'"[90] Using this framework, the court held that the allegation of a statutory violation under the Driver's Privacy Protection Act met the *TransUnion* requirement because the statutewas aimed "squarely at 'the right of the plaintiff . . . to be let alone.'"[91] Finally, the Second Circuit has also rejected the element-for-element test, stating that the court makes no "demands that a plaintiff adequately plead *every* element of a common-law analog to satisfy the concreteness requirement."[92]

Interestingly, these variations in the application of *TransUnion* do not necessarily correspond to the success rates of concreteness claims across the different circuits. While the Eleventh Circuit has the strict "element-for-element" test, it has seen an increase in success rates by 8.4% after *TransUnion*. By contrast, the Second, Third, and Fourth Circuits, which adopted a looser analysis for comparing fit with historical analogs, have all seen a decline in the success rates of concreteness by 58.3%, 22.6%, and 31.0%, respectively.

2. *Results by Statute*

Overall, the impact of *TransUnion* on the finding of concreteness for specific data privacy statutes was mixed, with some having a higher percentage of successful standing assertions and others having a lower percentage. Table 4 summarizes the varying rates of success across the statutes that plaintiffs most commonly brought cases under.

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90. Garey v. James S. Farrin, P.C., 35 F.4th 917, 922 (4th Cir. 2022) (quoting Krakauer v. Dish Network, LLC, 925 F.3d 643, 653–54 (4th Cir. 2019)).

91. *Id.* at 922 (quoting William L. Prosser, *Privacy*, 48 CALIF. L. REV. 383, 389 (1960)).

92. Salazar v. Nat'l Basketball Ass'n, 118 F.4th 533, 542 n.6 (2d Cir. 2024).

Table 4: Concreteness Success Rate by Statute, Before and After *TransUnion*

Statute	Pre-*TransUnion*			Post-*TransUnion*			Delta Difference (Change in % of Cases Where Concrete-ness was Found)
	Cases	Cases with Concrete-ness Found	% of Cases with Concrete-ness Found	Cases	Cases with Concrete-ness Found	% of Cases with Concrete-ness Found	
FDCPA[93]	32	23	71.9%	98	24	24.5%	(47.4%)
FCRA[94]	62	29	46.8%	35	21	60.0%	13.2%
TCPA[95]	56	44	78.6%	37	33	89.2%	10.6%
CIPA[96]	9	8	88.9%	35	22	62.9%	(26.0%)
BIPA[97]	22	13	59.1%	17	9	52.9%	(6.1%)
FACTA[98]	14	1	7.1%	4	1	25.0%	17.9%
ECPA[99]	2	2	100%	15	12	80.0%	(20.0%)
CCPA[100]	2	1	50%	12	11	91.7%	41.7%
DPPA[101]	2	2	100%	10	7	70%	(30.0%)
CCRA[102]	6	5	83.3%	5	5	100%	16.7%
SCA[103]	7	1	85.7%	5	5	100%	14.2%
VPPA[104]	1	1	100%	10	10	100%	0%
PWESCA[105]	0	0	N/A	10	4	40%	N/A

Almost all of the statutes that appeared in at least ten cases saw a double-digit change in the percentage of cases where concreteness was found, with the exception of BIPA, which saw a 6.1% drop in the percentage of cases where concreteness was found, and the Video Privacy Protection Act (VPPA),[106] which saw no change. The rise in the number of CCPA cases post-*TransUnion* is logical given that its efficacy date was only a year and a half before the *TransUnion*

93. Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. §§ 1692–1692p.
94. Fair Credit Reporting Act (FCRA), 15 U.S.C. §§ 1681–1681u.
95. Telephone Consumer Protection Act (TCPA), 47 U.S.C. § 227.
96. California Invasion of Privacy Act (CIPA), CAL. PENAL CODE §§ 630–638.
97. Biometric Information Privacy Act (BIPA), 740 ILL. COMP. STAT. § 14.
98. Fair and Accurate Credit Transactions Act (FACTA) of 2003, 15 U.S.C. § 1681.
99. Electronic Communications Privacy Act (ECPA) of 1986, 18 U.S.C. §§ 2510–2523, 2710.
100. California Consumer Privacy Act (CCPA), CAL. CIV. CODE § 1798.150.
101. Driver's Privacy Protection Act (DPPA), 18 U.S.C. §§ 2721–2725.
102. California Customer Records Act (CCRA), CAL. CIV. CODE § 1798.81.5.
103. Stored Communications Act (SCA), 18 U.S.C. §§ 2701–2712.
104. Video Privacy Protection Act (VPPA), 18 U.S.C. § 2710.
105. Pennsylvania Wiretapping and Electronic Surveillance Control Act (PWESCA), 18 PA. CONS. STAT. § 5702 (2025).
106. 18 U.S.C. § 2710.

decision was issued.[107] However, the rise in the number of cases involving the Electronic Communications Privacy Act (ECPA) and the VPPA post-*TransUnion* is interesting, given that both statutes were originally passed in the late 1980s, perhaps suggesting the adaptability of some statutes to modern technological innovations.[108] Some of these changes in the success rate of concreteness claims and the number of cases brought in federal court can be explained by a more detailed look at specific cases. The following Sections examine in detail some of the statutes referenced in the largest number of cases.

a) The Fair Debt Collection Practices Act

The FDCPA[109] had the most drastic change in the rate of success after *TransUnion*, with a drop in the concreteness success rate of 47.4%. This decrease in success rate differed across circuits, as shown in Table 5, though many circuits only saw a small number of FDCPA cases. While changes in concreteness success rates have varied by circuit, *TransUnion's* effect on FDCPA claims is anomalous in its consistency: Courts in all but three circuits were more likely to find that the concreteness requirement was not satisfied.

107. CAL. CIV. CODE § 1798.150.
108. Electronic Communications Privacy Act (ECPA) of 1986, 18 U.S.C. §§ 2510–2523, 2710.
109. 15 U.S.C. §§ 1692–1692p.

Table 5: Concreteness Success Rate for FDCPA Cases, Before and After *TransUnion*

Circuit	Pre-*TransUnion*			Post-*TransUnion*			Delta Difference (Change in % of Cases Where Concreteness was Found)
	Cases	Cases with Concreteness Found	% of Cases with Concreteness Found	Cases	Cases with Concreteness Found	% of Cases with Concreteness Found	
First	0	0	N/A	1	1	100.0%	N/A
Second	1	1	100%	17	1	5.9%	(94.1%)
Third	11	10	90.9%	19	4	21.1%	(69.8%)
Fourth	1	0	0%	9	2	22.2%	22.2%
Fifth	1	1	100%	4	3	75.0%	(25.0%)
Sixth	2	2	100%	9	3	33.3%	(66.7%)
Seventh	4	2	50%	19	2	10.5%	(39.5%)
Eighth	2	1	50%	2	1	50.0%	0.0%
Ninth	4	2	50%	5	3	60.0%	10.0%
Tenth	1	1	100%	7	3	42.9%	(57.1%)
Eleventh	2	0	0.0%	5	1	20.0%	20.0%
D.C.	1	1	100%	1	0	0.0%	(100.0%)

The decline in the success rate of FDCPA cases can be attributed to changes in courts' analysis post-*TransUnion*, which did not recognize analogies to risk of disclosure as sufficiently close without actual allegations of disclosure to third parties.[110]

b) The Video Privacy Protections Act

Passed in 1988, the VPPA originally protected the video viewing histories of individuals who rented from brick-and-mortar video stores.[111] However, the ninefold increase of VPPA claims brought in federal court can be explained by broader court interpretations of "video tape service provider" to include online video services and by the increased targeted litigation surrounding tracking pixel

110. *See, e.g.*, Perez v. I.C. Sys., Inc., No. 21-14883, 2022 WL 17991143 (D.N.J. Dec. 29, 2022); Spitz v. Caine & Weiner Co., No. 23-CV-7853, 2024 WL 69089 (E.D.N.Y. Jan. 5, 2024); Nabozny v. Optio Sols. LLC, 84 F.4th 731 (7th Cir. 2023); Six v. IQ Data Int'l Inc., 673 F. Supp. 3d 1040 (D. Ariz. 2023).

111. Daniel S. Marvin, *When Old Law Meets New Technology: The Video Privacy Protection Act Comes of Age*, N.Y.L.J. (May 8, 2023), https://www.law.com/newyorklawjournal/2023/05/08/when-old-law-meets-new-technology-the-video-privacy-protection-act-comes-of-age.

usage online.[112] Plaintiffs' 100% success rate in asserting standing in federal court, even after *TransUnion*, as well as courts' openness to applying this statute to modern-day technology due to its similarity to traditionally recognized harms, may account for the sharp rise in the number of VPPA cases. For example, in *Salazar v. National Basketball Ass'n*, the Second Circuit held that the "public disclosure of private facts analog" closely fit the facts alleged in a VPPA violation when the "core allegation is that [the plaintiff's] personally identifiable information was exposed to an unauthorized third party. And [the plaintiff] doesn't just allege that his data was *exposed* to a third party; rather, he asserts that it was *disclosed* as a result of an arrangement between" the defendant and a third party, where the defendant uses a tracking pixel to share information.[113] In such cases, the facts easily satisfy the *TransUnion* concreteness requirement.[114] Additionally, in *Pileggi v. Washington Newspaper Publishing Co.*, the District Court for the District of Columbia explainedthat "[p]rior to *TransUnion*, courts 'consistently found that plaintiffs satisf[ied] the concreteness requirement of Article III standing where they allege[d] a deprivation of their privacy rights under the VPPA,' even where no harm beyond the disclosure itself was alleged . . . . *TransUnion* does not mandate a different conclusion."[115] This posture is because violations of the VPPA, namely the "alleged unlawful 'disclosure of [a plaintiff's] information to a third party,'" are sufficiently similar to traditionally recognized harms, such as intrusion upon seclusion or public disclosure of private facts.[116] However, the number of litigants asserting VPPA claims could change in the near future. The Court has recently granted a petition for a writ of certiorari in *Salazar v. Paramount Global*, a case that will address the scope of the VPPA.[117] Although the question presented focuses on the statutory scope of the VPPA, not questions of standing, how the Court interprets the statute may impact the frequency of litigation asserting violations of the statute.[118]

c) The California Invasion of Privacy Act

There was a notable decrease in the percentage of CIPA cases where concreteness was found after *TransUnion*, from 88.9% to 62.9%. Enacted in

112. *See, e.g.*, Salazar v. Nat'l Basketball Ass'n, 118 F.4th 533, 542 (2d Cir. 2024); *see also* Note, *Chapter Three: The Video Privacy Protection Act as a Model Intellectual Privacy Statute*, 131 HARV. L. REV. 1766, 1775–77 (2018) (detailing the VPPA's resilience post-*Spokeo*).

113. *Salazar,* 118 F.4th at 542 (citation omitted).

114. *See id.*

115. Pileggi v. Wash. Newspaper Publ'g Co., No. 23-345, 2024 WL 324121, at *5 (D.D.C. Jan. 29, 2024) (quoting Salazar v. Nat'l Basketball Ass'n, 685 F. Supp. 3d 232, 240 (S.D.N.Y. 2023), *rev'd*, 118 F.4th 533 (2d Cir. 2024)).

116. *Pileggi*, 2024 WL 324121, at *5 (citation omitted).

117. Petition for Writ of Certiorari, Salazar v. Paramount Glob., 2025 WL 2957908 (Oct. 10, 2025) (No. 25-459).

118. The question presented relates to whether a covered consumer, which the statute defines as "any renter, purchaser, or subscriber of goods or services from a video tape service provider," includes a person who subscribes to any goods or services or is limited to a person who subscribes to audiovisual goods or services. *Id.* at *2.

1967, CIPA protects the privacy of confidential communications by prohibiting third-party listening or recording without the consent of the parties.[119] Courts have extended this interpretation to the present day to occasionally include online tracking by websites.[120] Before *TransUnion*, in *In re Facebook, Inc. Internet Tracking Litigation*, the Ninth Circuit explained that CIPA codified "a substantive right to privacy, the violation of which g[ave] rise to a concrete injury sufficient to confer standing."[121]

Post-*TransUnion*, some district courts have acknowledged the tension between the Ninth Circuit's interpretation of the rights conferred by CIPA and the Court's reasoning in *TransUnion*.[122] In *Lightoller v. Jetblue Airways Corp.*, the Southern District of California departed from the Ninth Circuit's interpretation, finding *Facebook* "untenable in light of" *TransUnion*.[123] Thus, "a bare CIPA violation by itself [wa]s insufficient to demonstrate Article III injury in fact" without allegations of a concrete harm that bore a close relationship to the substantive right of privacy.[124] Accordingly, allegations of mere CIPA violations involving tracking of non-personal information, such as "information on flight pricing," did not suffice to fit the common law privacy torts.[125] Such analysis could explain the rise in findings of non-concreteness after *TransUnion*, as the type of statutory harm alleged by CIPA plaintiffs could be more expansive than those traditionally remedied by courts.

However, not all district courts in the Ninth Circuit have adopted the *Lightoller* analysis. For example, in *James v. Walt Disney Co.*, the Northern District of California found that the alleged tracking information was sufficiently personal to implicate a legitimate privacy interest, directly rebuking the notion that *TransUnion* in effect overruled *Facebook*: "Nothing about *TransUnion* guts the above holding in *Facebook*, particularly because *Facebook* postdates *Spokeo*, the precedent on which *TransUnion* largely relied."[126] The court in *James* disavowed *Lightoller*'s broad interpretation, instead holding that data such as "webpages viewed, searches conducted, [or] purchase behavior" all constituted sufficiently personal information, particularly when the "collection of

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119. CAL. PENAL CODE §§ 630–638.55; *see also id.* § 630 (explaining that the legislative intent of CIPA was "to protect the right of privacy of the people").

120. *See, e.g.*, *In re* Facebook, Inc. Internet Tracking Litig., 956 F.3d 589, 598 (9th Cir. 2020) (finding liability under CIPA to protect a consumer's privacy interest against online tracking of Facebook profiles); *In re* Meta Pixel Healthcare Litig., 647 F. Supp. 3d 778, 783, 798–99 (N.D. Cal. 2022) (finding that the analysis for a CIPA violation is the same as that under the federal Wiretap Act and that the elements were met for interceptions of internet transmissions containing medical information); Smith v. Google, LLC, 735 F. Supp. 3d 1188 (N.D. Cal. 2024).

121. *In re* Facebook, 956 F.3d at 598.

122. *See, e.g.*, Byars v. Sterling Jewelers, Inc., No. 5:22-cv-01456, 2023 WL 2996686, at *3 (C.D. Cal. Apr. 5, 2023).

123. Lightoller v. Jetblue Airways Corp., No. 23-cv-00361-H, 2023 WL 3963823, at *3 (S.D. Cal. June 12, 2023).

124. *Id.*

125. *Id.* at *4.

126. James v. Walt Disney Co., 701 F. Supp. 3d 942, 949 (N.D. Cal. 2023).

information [wa]s not anonymized," even though that information was less personal than the information about a person's likes and dislikes at issue in *Facebook*.[127] Courts' varying treatment of CIPA claims could be attributed to confusion after *TransUnion* regarding what qualifies as a sufficiently close relationship for the purpose of satisfying the concreteness bar. In both *Lightoller* and *James*, there was a clear statutory violation, but differences based on the degree of personal information exposed led to a dismissal for lack of standing in one instance[128] and a discussion of the merits in the other.[129]

d) Additional Statutory Analysis

Some less frequently cited statutes face direct challenges from the mode of analysis in *TransUnion*. One such example is South Carolina's Financial Identity Fraud and Identity Theft Protection Act.[130] This statute directly contemplates a private right of action as well as the specified harm—it bans "requir[ing] a consumer to use his social security number or a portion of it containing six digits or more to access an Internet web site, unless a password or unique personal identification number or other authentication device is also required to access the Internet web site."[131] In *O'Leary v. TrustedID, Inc.*, the Fourth Circuit held that the harm contemplated by he statute was not alone sufficient to find a concrete harm after *TransUnion*.[132] After a data breach, Equifax utilized TrustedID, a subsidiary, to inform customers of whether they were impacted by the breach.[133] However, TrustedID required that users input six digits of their SSNs to access TrustedID's website in order to learn whether or not they were impacted by the breach.[134] Additionally, TrustedID didn't use any other security precautions listed in the Act, such as a password, unique personal identification number, or another authentication device.[135] Despite this clear statutory violation, the court still did not find a concrete harm valid for Article III standing, though it noted that it was "certainly odd that TrustedID failed to comply with the five-digit SSN cutoff."[136] The court reaffirmed the notion that a statutory violation was an "intangible harm" which, "standing alone, typically won't suffice under Article III—unless there's separate harm."[137] The court then analyzed whether the proposed analogous privacy harm provided a close relationship to a traditional or common-law analog, but rejected the plaintiff's assertion of a connection

127. *Id.* at 950–52 (disagreeing with a characterization of *Lightoller* as holding that "non-anonymized information on, e.g., websites visited or search terms used is not sufficiently personal").
128. *Lightoller*, 2023 WL 3963823, at *5.
129. *James*, 701 F. Supp. 3d at 965.
130. S.C. CODE ANN. § 37-20-180.
131. *Id.* § 37-20-180(A)(4).
132. O'Leary v. TrustedID, Inc., 60 F.4th 240, 242 (4th Cir. 2023).
133. *Id.* at 241.
134. *Id.*
135. *Id.*
136. *Id.* at 246.
137. *Id.* at 243.

between the statute's described harm and to both traditional harms of intrusion upon seclusion and public disclosure of private facts, due to the court's finding that there was a lack of factual allegations connecting the claims to either theory.[138] In this case, despite the clear statutory violation, the lack of Article III standing prevented the vindication of such statutory rights in federal court.

In the surveyed cases, courts have additionally looked to legislative history on occasion to determine whether the alleged statutory violation bears a "close relationship" to an appropriate historical harm. In *Hernandez v. Noom, Inc.*, the plaintiff alleged a violation of the Maryland Wiretapping and Electronic Surveillance Act (MWESA) over embedded computer code that intercepted and recorded website visitors actions, such as "mouse movements, clicks, keystrokes (such as text being entered into an information field or text box), URLs of web pages visited, and/or other electronic communications in real-time," which allowed website operators to later "access the recordings and view a visual reenactment."[139] The court discussed MWESA's "two-fold purpose: 1) to be a useful tool in crime detection and 2) to assure that interception of private communications is limited," which it distinguished from the "right 'to be let alone'" found in a different case.[140] Because this formulation of the statute's purpose did not contemplate privacy, the court found that there was no common-law analog and that a statutory violation of MWESA alone was insufficient to establish injury in fact.[141] Additionally, in *Floyd v. Insight Global LLC*, the plaintiff sought relief under a violation of Washington State's Equal Pay and Opportunities Act.[142] In 2022, the Washington Legislature amended the statute to require employers to disclose compensation information when a position is posted as available.[143] The legislature's stated purpose was to "allow[] a discussion at the start of the process instead of after an offer has been made, which will increase the ability to negotiate pay."[144] The plaintiff had submitted an online job application through an online portal that did not contain a wage scale or salary range, in violation of the statute.[145] In its Article III standing analysis, the court noted that "[t]he failure to provide information, unlike a privacy violation, has no obvious analogue in the history of American courts."[146] Instead, while "non-disclosure of information can give rise to an injury in fact, the non-disclosure is not an injury in and of itself."[147] Rather, by analyzing the

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138. *Id.* at 245–46.

139. Hernandez v. Noom, Inc., No. 1:23-cv-00641, 2023 WL 8934019, at *1 (D. Md. Dec. 27, 2023).

140. *Id.* at *6.

141. *Id.* at *8.

142. Floyd v. Insight Glob. LLC, No. 23-cv-1680, 2024 WL 2133370, at *1 (W.D. Wash. May 10, 2024).

143. WASH. REV. CODE § 49.58.110(4).

144. H.B. REP. ESSB 5761, 67th Leg., Reg. Sess., at 2 (Wash. 2022).

145. *Floyd*, 2024 WL 2133370, at *3.

146. *Id.* at *7.

147. *Id.* at *6.

legislative history and the revisions to the text of the statute, the court found that the type of harm that the legislature sought to protect was the "risk of wasting time and effort only to learn that the job doesn't pay enough."[148] As a result, the court found that the plaintiff had failed to establish standing.[149]

3. Selected Results Cross-Applying Historical Analogy and Statute

Because of the high volume of cases brought both before and after *TransUnion*, and the clear learnings regarding the importance of selecting an appropriate corresponding historical harm for a statute, I analyze the FDCPA on its own. After *TransUnion*, courts failed to find standing in almost all FDCPA cases where litigants raised a theory of the historical harm of disclosure, but did find standing in instances when litigants raised invasion of privacy, informational injury, or intrusion upon seclusion as an analog. In fact, the success ratio with disclosure analogies is even lower than the ratio when no analogies are made, as summarized in Table 6.

This disparity in success rates, given the analogous harm, demonstrates the importance of selecting the correct historical analogy. A potential explanation for the low rate of success for claims analogizing to disclosure is that courts often require the element of publicity, which is an important element of the tort of disclosure. But in FDCPA cases, plaintiffs often do not allege that a specific third party has seen the communication, and courts in those cases often do not find standing without such an allegation.[150] By contrast, the general invasion of privacy tort or intrusion upon seclusion do not require publicity. When plaintiffs instead choose to select those torts to analogize to, courts in such cases may act as the court did in *Peters v. Lockhart Morris & Montgomery, Inc*. In *Peters*, a consumer debt collector sought to collect debt via mail rather than the plaintiff's preferred method of email.[151] There, the court found that even a single unwanted mail served as an intrusion into her private solitude and would be enough to satisfy concreteness even if it did not rise to the degree required at common law, as the FDCPA appears to "prevent the kinds of harm associated with invasion of privacy torts like intrusion upon seclusion."[152] Thus, the selection of the correct analogous harm, even with similar facts, can determine the chance of successfully showing standing under statutes such as the FDCPA.

148. *Id.* at *7.

149. *Id.* at *8.

150. *See, e.g.*, Barclift v. Keystone Credits Servs., LLC, 93 F.4th 136, 145–47 (3d Cir. 2024); Hunstein v. Preferred Collection & Mgmt. Servs., 48 F.4th 1236, 1248 (11th Cir. 2022) (en banc).

151. Peters v. Lockhart Morris & Montgomery, Inc., No. 24-00085, 2024 WL 4182925, at *1 (W.D. Okla. Sept. 2024).

152. *Id.* at *3 (quoting Leichliter v. Optio Sols., LLC, 672 F. Supp. 3d 1165, 1172 (W.D. Okla. 2023)).

Table 6: Concreteness Success Rate by Analogy for FDCPA Cases, Before and After *TransUnion*

Tort	Pre-*TransUnion*			Post-*TransUnion*			Delta Difference
	Cases	Cases with Concrete-ness Found	% of Cases with Concrete-ness Found	Cases	Cases with Concrete-ness Found	% of Cases with Concrete-ness Found	
Disclosure	1	1	100.0%	42	1	2.4%	(97.6%)
Intrusion Upon Seclusion	2	2	100.0%	28	14	50.0%	(50.0%)
Invasion of Privacy	11	9	81.8%	14	6	42.9%	(39.0%)
None	14	7	50.0%	9	0	0%	(50%)
Fraudulent Misrep-resentation	1	0	0.0%	6	2	33.3%	33.3%
Information-al Injury	4	3	75.0%	3	1	33.3%	(41.7%)

V.
DISCUSSION

By looking specifically at cases where statutory rights of action were raised, this study seeks to answer the question: Did *TransUnion* make it more difficult for litigants to assert standing in statutory data privacy cases? The results suggest that courts have been less likely to find standing, even if they apply the analysis unevenly. This Section discusses the implications of the results.

A. Crafting Legislation to Maximize Success

In order to surpass standing limitations for statutes, the takeaways from the empirical study are instructive. Legislators should look to statutes with a high rate of success in standing arguments (such as the CCPA or the VPPA) and avoid language similar to those with a lower rate of success (such as the FDCPA).[153]

In order to bypass standing limitations, legislators should ensure that the statutory language and substantive privacy protections are specifically focused on individuals' privacy rights. For example, the CCPA, which had a high concreteness success rate after *TransUnion*, included specific privacy rights that

153. *See* Table 4.

were geared towards individuals.[154] Such specific and individual-focused drafting may provide easier analogies between statutory harms and traditional harms, which are often meant to address individualized injuries. In *Wynne v. Audi of America*, the court countered the assertion that there was no violation other than a procedural one, based in part on the language of CCPA.[155] While the court acknowledged that the CCPA provided a "private right of action that is tied to a defendant's failure to protect California residents' personal information," there existed a direct harm because such an action "may only be brought upon the 'unauthorized access and exfiltration, theft, or disclosure' of the individual's information."[156] In other words, the statutory violation "is actionable only in the event that the private information is disclosed, resulting in an individual's loss of 'control over their personal information' and violation of their right to privacy."[157] This gating function can indicate when a plaintiff can successfully file a statutory claim in any venue and may also serve to increase the likelihood that a plaintiff is able to satisfy Article III standing requirements.

Furthermore, variation amongst circuits in the analytical method to compare harms is also an important consideration for federal legislators.[158] In circuits such as the Eleventh, the stricter "element-by-element" test may necessitate fewer potential analogs. By contrast, the Third or Fourth Circuits may be more receptive to arguments based on the kind of harm rather than a strict matching test. If federal legislators wish to provide their constituents with a forum to vindicate their statutory privacy rights, they must draft statutes with *TransUnion*'s standing requirements in mind. In order to ensure that private citizens can have their claims heard in federal court, legislators should clearly articulate that their statutory harms are tied to specific historical harms, such as intrusion upon seclusion or public disclosure of private facts.

Additionally, courts sometimes consider clear legislative intent when evaluating the relationship of alleged harms to common-law analogs.[159] When statutes are clear about the privacy interest they intend to serve and the contemplated historical injury, litigants may be better situated to show how statutory violations can satisfy concreteness for injury in fact. In addition, such

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154. *See California Consumer Privacy Act*, CAL. DEP'T OF JUST., OFF. OF THE ATT'Y GEN., https://oag.ca.gov/privacy/ccpa (last updated Mar. 13, 2024) (listing the individual's right to know, right to delete, right to opt-out, right to non-discrimination, right to correct, and right to limit the use and disclosure of personal information).

155. Wynne v. Audi of Am., No. 21-cv-08518, 2022 WL 2916341, at *5 (N.D. Cal. July 25, 2022).

156. *Id.* (quoting CAL. CIV. CODE § 1798.150(a)(1)).

157. *Wynne*, 2022 WL 2916341, at *5 (citing Eichenberger v. ESPN, Inc., 876 F.3d 979, 983 (9th Cir. 2017)).

158. *See infra* Section IV.C.1.

159. *See infra* Section IV.C.2(d).

clarity can help demonstrate that statutes intended for a specific mode of privacy harm can adapt to and incorporate technological changes, like the VPPA.[160]

For litigants, the difference in success rates for statutory claims based on the analogous harms demonstrates the importance of selecting the correct harm. The ability of a litigant to vindicate their claim in federal court depends on a fact-specific inquiry and the ability to draw a connection to a historical harm recognized by the court.

B. Federalism Concerns in State and Federal Law

Policymakers seeking to allow litigants to assert rights in federal court must also be concerned with standing limitations. However, while a lack of Article III standing is a barrier to the success of plaintiffs' claims, it need not be the end-all be-all of the litigation. Instead, plaintiffs can look to state courts, which are not beholden to the same constitutional standing requirement.[161]

State policymakers may view state courts as an adequate forum for vindicating privacy rights conceptualized in their statutes. First, states have traditionally been the forum for disputes over privacy. At least ten states have explicitly enshrined the right to privacy in their constitution, unlike the notable gap in the federal Constitution.[162] These constitutional texts contemplate that states may be a suitable forum for litigation on privacy matters. In addition, the invasion of privacy tort is a matter of state common law.[163] Within the empirical study, a number of statutory causes of action were paired with state tort law claims—forty-one cases involved pairings with an intrusion upon seclusion claim, and forty-three cases involved pairings with a general invasion of privacy claim. For example, in *Rodriguez v. FastMed Urgent Care, P.C.*, the plaintiffs advanced a violation of the ECPA in addition to the intrusion upon seclusion claim.[164] There, the court found that the plaintiffs' specific allegations of injury, such as the disclosure of individually identifiable health information, were sufficient violations of privacy to satisfy the Article III injury in fact requirement.[165] Such pairings may demonstrate the appropriateness of state court for addressing issues of data privacy. Because state policymakers likely

160. *See, e.g.*, Hernandez v. Noom, Inc., No. 1:23-cv-00641, 2023 WL 8934019, at *1 (D. Md. Dec. 27, 2023); Schumacher v. SC Data Ctr., Inc., 33 F.4th 504, 511 (8th Cir. 2022).

161. *See* ASARCO Inc. v. Kadish, 490 U.S. 605, 617 (1989).

162. Larry W. Thomas, *The Right to Privacy Under State Constitutions*, *in* LEGAL ISSUES CONCERNING TRANSIT AGENCY USE OF ELECTRONIC CUSTOMER DATA 36 (2017); *see generally* William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977) (explaining how state courts often extend protections to citizens and cover gaps in federal law); Mark Silverstein, *Privacy Rights in State Constitutions: Models for Illinois?*, 1989 U. ILL. L. REV. 215 (1989) (explaining how state constitutions can adopt privacy rights for its citizens).

163. Prosser, *supra* note 91, at 386–89 (describing how many states have adopted privacy torts into their common law); *see also* Lior Jacob Strahilevitz, *Reunifying Privacy Law*, 98 CALIF. L. REV. 2007 (2010) (advocating for a reunification of the state common law and invasion of privacy).

164. Rodriguez v. FastMed Urgent Care, P.C., 741 F. Supp. 3d 352, 357 (E.D.N.C. 2024).

165. *Id.* at 361.

contemplate remedies in state court for state statutory violations, the inability of plaintiffs to access federal court due to *TransUnion*'s heightened requirements presents a lesser issue.

However, federal statutes are different. There may be federalism concerns regarding the correct balance of power between state and federal governments if federal statutes can only be vindicated in state courts. First, some states have their own standing requirements, which may follow from federal standing but contain their own exceptions.[166] These state standing requirements may place geographic boundaries on plaintiffs' ability to bring claims of federal statutory violations.[167] In addition, this inability to bring statutory violations before federal courts may lead to a lack of uniformity in the application of federal law.[168] Although state courts must enforce rights provided by federal law,[169] this potentially only applies to interpretations by the Supreme Court, not to lower court decisions.[170] The post-*TransUnion* world—where federal statutory violations that are not tied to traditional harms must be litigated in state court—could lead to an uneven application of federal law and a disparate ability of plaintiffs to successfully bring claims. In such cases, state courts may not be preferred forums for vindicating federal privacy rights.

C. Further Research

First, due to the efforts to optimize relevance within the surveyed set, there were limitations on recall. There are certainly more cases involving concreteness and statutory violations during this time period that did not match the queries

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166. *See, e.g.*, Kristen Elia, *Ohio's Standing Requirements and the Unworkable Public-Rights Exception*, 86 U. CIN. L. REV. 1019, 1019 (2018) ("Ohio is an example of a state that follows federal standing but has carved out an exception to the general, or 'traditional,' standing requirements."); M. Ryan Harmanis, Note, *States' Stances on Public Interest Standing*, 76 OHIO ST. L.J. 729 (2015) (discussing public interest standing in state courts); Alicia Bannon, *A Primer on Standing in State Courts*, STATE CT. REP. (Aug. 22, 2024), https://statecourtreport.org/our-work/analysis-opinion/primer-standing-state-courts.

167. Note, *Standing in the Way: The Courts' Escalating Interference in Federal Policymaking*, 136 HARV. L. REV. 1222, 1236–37 (2023) ("On one hand, cases are stuck in the forum typically thought to favor plaintiffs, and defendants lose their normal control over whether a case is removed to federal court. On the other hand, plaintiffs face an even clearer-cut version of the one-sided appeal problem. If defendants lose in the state court system, they can appeal to the Supreme Court; if plaintiffs lose, they go home."); *see also* Thomas B. Bennett, *The Paradox of Exclusive State-Court Jurisdiction over Federal Claims*, 105 MINN. L. REV. 1211, 1215 (2021).

168. *See* Peter N. Salib & David K. Suska, *The Federal-State Standing Gap: How to Enforce Federal Law in Federal Court Without Article III Standing*, 26 WM. & MARY BILL RTS. J. 1155, 1208 (2018) ("Uniformity in federal law matters. Uniformity reduces forum shopping and allows parties to confidently conform their activities to a known interpretation of the law. Without uniformity in federal law, parties can find themselves subject to one legal rule, should a plaintiff sue in one jurisdiction, and another, should it sue elsewhere.").

169. *See* Testa v. Katt, 330 U.S. 386, 393–94 (1947) (holding that state policy disagreements are invalid grounds for refusing to enforce rights provided by federal law).

170. *See* Johnson v. Williams, 568 U.S. 289, 305 (2013) ("But the views of the federal courts of appeals do not bind the California Supreme Court when it decides a federal constitutional question, and disagreeing with the lower federal courts is not the same as ignoring federal law.").

due to certain filters applied to keyword matches. A more comprehensive study of all the cases during this time period could provide further insights.

Second, a future path of exploration involves expanding the timeframe to include pre-*Spokeo* cases. While *TransUnion* applied the "close relationship" rule and set out new guidelines, *Spokeo* was the first Supreme Court case to describe the rule. Extending the timeframe to incorporate cases from before *Spokeo* could lead to insights into whether *Spokeo* changed the rates of courts finding concrete injury and how any changes compare to *TransUnion*'s impact.

Third, another area for potential exploration is categorization based on the party seeking jurisdiction in federal court. In some cases where the defendant sought removal to federal court, the plaintiff challenged standing by asserting that they lacked an Article III injury in fact.[171] These led to interesting arguments from both parties—in such cases, plaintiffs had to assert that they lacked a concrete injury for Article III purposes yet sufficiently stated a cause of action.[172] Defendants were in a slightly easier position, as they could argue that plaintiffs had Article III standing but would still lose on the merits.[173] However, these arguments may skew the results of the current empirical study, as neither party may be making the arguments closest to the actual fact pattern due to concerns about downstream effects.

VI.
CONCLUSION

This empirical study aimed to examine data privacy cases brought through claims of statutory private rights of action between 2018 and the present day, to analyze the impact of *TransUnion*, the usage and success rates of different statutes, and the effects of analogous harms on the likelihood of finding concreteness. This study found that *TransUnion* did have a slight effect on the overall rate of concrete injury in fact being found. This study additionally clarified the importance of selecting the correct analogous harm given the statutory violation to improve the odds of successfully asserting standing. Moreover, this study displayed the disparate approaches taken by different circuits that have led to varying rates of finding standing after *TransUnion*. Finally, the study's results led to insights about potential avenues going forward for legislators and litigants seeking to create and vindicate statutory private rights of action. Overall, this empirical study demonstrated the importance of precise statutory language and tailored analogies to traditional harms in privacy protection legislation and usage by litigants who seek the vindication of statutory data privacy rights in federal courts.

171. *See, e.g.*, Roberson v. Maestro Consulting Servs. LLC, 507 F. Supp. 3d 998 (S.D. Ill. 2020).
172. *See id.*
173. *Id.* at 1007, 1016.