COMMENT

THE DOWNSTREAM CONSEQUENCES OF *TRANSUNION LLC V. RAMIREZ*: WHY 5 U.S.C. § 2954 PLAINTIFFS HAVE ARTICLE III STANDING CONSISTENT WITH LOWER COURTS' INTERPRETATION OF *TRANSUNION*

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The Supreme Court, in TransUnion LLC v. Ramirez*, created additional standing hurdles by requiring plaintiffs to identify a common law historic-analogue when alleging a statutory harm. In doing so, the Court arguably limited informational standing—a unique Article III standing theory whereby plaintiffs may establish an injury for failure to receive information—because informational injuries did not exist at common law.*

*This Comment asks whether informational standing survives in a post-*TransUnion *universe, using 5 U.S.C. § 2954 and lower courts' interpretation of* TransUnion *for guidance. The statute, § 2954, comes to light in a string of litigation involving the potential illegality of former president Trump's lease of the Old Post Office Building in Washington, DC.*

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This Comment argues that § 2954 plaintiffs can sufficiently establish "downstream consequences" from their failure to receive information and therefore suffer an informational injury consistent with Article III. Additionally, this Comment recommends that lower courts differentiate between TransUnion*'s "historic-analogue test" and "downstream consequences" test when deciding whether plaintiffs have an informational injury to ensure the survival of informational standing.*

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INTRODUCTION

Over the span of nearly one hundred years, since its adoption in 1928, only seven cases have cited to 5 U.S.C. § 2954.[1]

Known as the "Rule of Seven"[2] or the "Seven Member Rule,"[3] 5 U.S.C. § 2954 provides a mechanism for a minority group of at least seven members of the House of Representatives or five members of the Senate to obtain records from an executive agency as it relates to Congress's oversight function.[4] Section 2954 was adopted in response to *McGrain v. Daugherty*,[5] in which the Supreme Court held that Congress's "power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function."[6]

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1. *See* Soucie v. David, 448 F.2d 1067, 1071 n.9 (D.C. Cir. 1971) (citing § 2954 in reference to executive privilege); Leach v. Resol. Tr. Corp., 860 F. Supp. 868, 876 n.7 (D.D.C. 1994) (proposing alternative procedures in which small groups of congressmembers can request information without awaiting formal action by citing § 2954); Waxman v. Evans, No. CV014530LGB, 2002 WL 32377615, at *10 (C.D. Cal. Jan. 18, 2002) (interpreting the plain language of § 2954 and holding that its language does not raise constitutional doubts nor produce an absurd result); Waxman v. Thompson, No. CV 04-3467, 2006 WL 8432224, at *16 (C.D. Cal. July 24, 2006) (concluding that the plaintiffs lack standing); Cummings v. Murphy, 321 F. Supp. 3d 92, 113 (D.D.C. 2018) (same); Maloney v. Murphy, 984 F.3d 50, 70 (D.C. Cir. 2020) (holding that the plaintiffs sufficiently established standing); Maloney v. Carnahan, 45 F.4th 215 (D.C. Cir. 2022); *see also* Bradford C. Mank, *Do Seven Members of Congress Have Article III Standing to Sue the Executive Branch?: Why the D.C. Circuit's Divided Decision in* Maloney v. Murphy *was Wrongly Decided in Light of Two Prior District Court Decisions and Historical Separation-of-Powers Jurisprudence*, 74 RUTGERS U. L. REV. 721, 723 (2022) (noting that *Maloney v. Murphy* marks the first time a federal court of appeals substantively addressed whether members of Congress had Article III standing to sue under § 2954).

2. BEN WILHELM, TODD GARVEY & CHRISTOPHER M. DAVIS, CONG. RSCH. SERV., RL30240, CONGRESSIONAL OVERSIGHT MANUAL 72 (2022).

3. *See, e.g.*, *Cummings*, 321 F. Supp. 3d at 95 (explaining that the "Seven Member Rule" is a moniker and used as political parlance when referring to § 2954).

4. *See* 5 U.S.C. § 2954 ("An Executive agency, on request of the Committee on Government Operations of the House of Representatives, or of any seven members thereof . . . shall submit any information requested of it relating to any matter within the jurisdiction of the committee."); *Cummings*, 321 F. Supp. 3d at 96–97 (explaining that § 2954 is clear insofar as it "gives members of the House Oversight Committee the right to request information from Executive agencies, so long as the information sought falls within the Committee's jurisdiction and at least seven members join in the request"); Louis Fisher, *Congressional Access to Information: Using Legislative Will and Leverage*, 52 DUKE L.J. 323, 363 (2002) (suggesting that the "statutory language [of § 2954] is broad," but the legislative history of § 2954 "can be read to limit the request for agency information," leaving uncertainty as to the precise scope of information the members can demand).

5. 273 U.S. 135 (1927).

6. *Id.* at 174.

McGrain arose after the Attorney General of the United States failed to prosecute certain individuals in violation of antitrust laws, prompting the Senate to form an investigatory committee, which included powers to issue subpoenas.[7] The Court reasoned that a legislative body, lacking adequate information, could not effectively legislate without the very information that Congress is supposed to respond to and use to enact laws accordingly.[8]

Not only did § 2954 respond to concerns over access to information, but it also addressed how to increase efficiency regarding the receival of information from federal agencies and performance of legislative duties as it related to oversight.[9] For example, before the passage of § 2954, the U.S. Code contained 128 statutes, strewn throughout, mandating that various federal agencies submit reports and information to Congress.[10] Congress replaced the reporting requirements with § 2954.[11] Section 2954 uniquely permits a small group of legislators to make individual judgments regarding information requests.[12] Conversely, Congress's institutional subpoena power requires formal authorization by Congress, a Chamber of Congress, or a committee.[13]

Section 2954's lack of litigation does not equate to a lack of importance.[14] In May of 2023, the Supreme Court granted certiorari to

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7. *Id.* at 151–52. *But see* Maloney v. Murphy, 984 F.3d 50, 55 (D.C. Cir. 2020) (noting that "[§] 2954 is distinct from Congress's institutional authority to request or subpoena documents and witnesses" because "[t]hose measures require formal authorization by Congress, a Chamber of Congress, or a committee," whereas "an information request under [§] 2954 can be made by just a small group of legislators").

8. *McGrain*, 273 U.S. at 175.

9. *See* H.R. REP. NO. 70-1757, at 6 (1928) ("To save any question as to the right of the House of Representatives to have furnished any of the information contained in the reports proposed to be abolished, a provision has been added to the bill requiring such information to be furnished to the Committee on Expenditures in the Executive Departments or upon the request of any seven members thereof.").

10. *See Murphy*, 984 F.3d at 55 (citing Act of May 29, 1929, Pub. L. No. 70-611, 45 Stat. 986, 986–96).

11. *See supra* note 9 and accompanying text.

12. *See Murphy*, 984 F.3d at 55–56 (comparing § 2954 to Congress's subpoena power).

13. *See* JANE A. HUDIBURG, CONG. RSCH. SERV., R44247, A SURVEY OF HOUSE AND SENATE COMMITTEE RULES ON SUBPOENAS 1 (2021) (outlining the rules governing Congress's subpoena power).

14. *See, e.g.*, Petition for Writ of Certiorari, Carnahan v. Maloney, 143 S. Ct. 2653 (2023) (No. 22-425) (filed by Solicitor General Counsel of Record Elizabeth B. Prelogar on behalf of petitioner Robin Carnahan, the Administrator of the General

consider "[w]hether individual Members of Congress have Article III standing to sue an executive agency to compel it to disclose information that the Members have requested under 5 U.S.C. [§] 2954."[15]

While § 2954 piqued Solicitor General Prelogar and the Supreme Court's interest, the hope of settling legal questions surrounding § 2954 was short lived after the respondents dismissed their complaint.[16] The Supreme Court dismissed the case for procedural reasons, thus declining to rule on the merits and leaving the question of whether plaintiffs have standing to sue under 5 U.S.C. § 2954 open.[17]

Importantly, in the petition for writ of certiorari, the petitioner cited to *TransUnion LLC v. Ramirez*.[18] In *TransUnion*, the Supreme Court added additional standing hurdles for plaintiffs alleging a statutory harm by requiring plaintiffs to "identif[y] a close historical or

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Services Administration); *see also* Michael R. Dreeben, *Case Selection and Review at the Supreme Court: Statement for the Presidential Commission on the Supreme Court of the United States*, WHITE HOUSE 1, 15 (June 25, 2021), https://www.whitehouse.gov/wp-content/uploads/2021/06/Dreeben-Statement-for-the-Presidential-Commission-on-the-Supreme-Court-6.25.2021.pdf (suggesting that the Supreme Court almost always grants petitions for writs of certiorari when the Solicitor General seeks review); Margaret Meriwether Cordray & Richard Cordray, *The Solicitor General's Changing Role in Supreme Court Litigation*, 51 B.C. L. REV. 1323, 1326 (2010) (calling the Solicitor General "the country's most influential litigator").

15. Petition for Writ of Certiorari, *supra* note 14, at I.

16. *See* Petitioner's Suggestion of Mootness at 1, Carnahan v. Maloney, 143 S. Ct. 2653 (2023) (No. 22-425) (arguing that the respondents' notice of voluntary dismissal prevents the Court from reviewing the judgment and thus urges the Court to instead vacate the judgment of the court of appeals and remand with instructions to dismiss the complaint with prejudice); Respondents' Response to Suggestion of Mootness at 1, Carnahan v. Maloney, 143 S. Ct. 2653 (2023) (No. 22-425) (agreeing with petitioner that the Court should vacate the decision in light of the respondents' dismissal of their complaint, "which reflects their intention to abandon their claim and moots the appeal that gives rise to the proceedings" before the Court); Carnahan v. Maloney, 143 S. Ct. 2653, 2653 (2023) (mem.) (vacating the judgment and remanding the case to the U.S. Court of Appeals for the D.C. Circuit with instructions to dismiss). Justice Jackson dissented from the vacatur "and would instead dismiss the writ of certiorari as improvidently granted." *Carnahan*, 143 S. Ct. at 2653 (Jackson, J., dissenting).

17. *See Carnahan*, 143 S. Ct. at 2653 (explaining that the Supreme Court did not rule on the merits, which means it did not decide the question of whether Members of Congress have Article III standing to sue under § 2954).

18. 141 S. Ct. 2190 (2021); Petition for Writ of Certiorari, *supra* note 14, at 8 ("This Court has implemented Article III's case-or-controversy requirement largely through the doctrine of Article III." (quoting *TransUnion*, 141 S. Ct. at 2203)); *see* Respondents' Brief in Opposition at 20, *Carnahan*, 143 S. Ct. 2653 (No. 22-425) (arguing that the petitioner's use of *TransUnion* "undermines its cause").

common-law analogue for their asserted injury."[19] However, before the Supreme Court decided *TransUnion*, the lower courts had already considered whether plaintiffs have standing to sue under § 2954.[20] For example, the D.C. Circuit held in *Maloney v. Murphy*[21] that individual members of Congress have standing to sue under § 2954.[22] Therefore, the question remains—does the holding of *Maloney* withstand *TransUnion*'s Article III standing barriers?

This Comment addresses 5 U.S.C. § 2954 and its relation to Supreme Court Article III standing jurisprudence, with an emphasis on informational standing. This Comment argues that *Maloney* is consistent with *TransUnion* because § 2954 plaintiffs can sufficiently establish suffering "downstream consequences" from their failure to receive information.[23] Accordingly, the plaintiffs have suffered an informational injury consistent with Article III injury-in-fact requirements.[24] Additionally, this Comment recommends that lower courts should differentiate *TransUnion*'s "historic-analogue test" from the "downstream consequences" test when deciding whether plaintiffs have an informational injury. This ensures that *TransUnion*'s "close historical or common-law analogue" requirement does not threaten to upend informational standing.

Part I of this Comment provides background on Article III standing, informational standing, and relevant cases. Section I.A provides a brief overview on the constitutional requirements of standing. Section I.B defines informational injuries and explains the origins of informational standing, highlighting multiple landmark cases. Section I.C discusses the Supreme Court's recent decision in *TransUnion* and explains how lower courts have applied and interpreted its holding. Section I.D uses *Maloney* to illustrate the intersection of Article III standing and informational standing.

Section II.A analyzes the dangers of applying the "historic-analogue" test to informational standing cases and accordingly argues that lower

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19. 141 S. Ct. at 2204.

20. *See* cases cited *supra* note 1.

21. 984 F.3d 50 (D.C. Cir. 2020).

22. *Maloney*, 984 F.3d at 70; *see infra* Section I.D for background on *Maloney*.

23. This Comment will consistently refer to the requirement set forth in *TransUnion* as the "downstream consequences" test. *See TransUnion*, 141 S. Ct. at 2214 (requiring that plaintiffs who have suffered an informational injury identify "'downstream consequences' from failing to receive the required information" (quoting Trichell v. Midland Credit Mgmt., Inc., 964 F.3d 990, 1004 (11th Cir. 2020))).

24. *See infra* Section I.A (discussing Article III standing requirements).

courts should differentiate between the "historic-analogue" test and "downstream consequences" test. Next, Section II.B shows that the *Maloney* decision falls within informational standing jurisprudence and courts should thus analyze it under the "downstream consequences" test. Finally, Section II.C argues that the *Maloney* plaintiffs can sufficiently establish downstream consequences tied to their role on the Oversight Committee; however, this may not apply to all future § 2954 plaintiffs.

I. BACKGROUND

A. An Overview of Article III Standing

"For the last forty years, perhaps no procedural doctrine has had more influence on the course of constitutional adjudication in federal courts than the set of often mystifying rules known as 'standing to sue.'"[25] Standing comes from Article III of the Constitution, which states that federal judicial power extends to all "cases" and "controversies" arising under the Constitution and laws of the United States.[26] The federal judiciary cannot hear a case simply because it seeks to resolve a certain question; rather, federal courts must have authority (jurisdiction) to hear a dispute between parties, which arises when a "case" or "controversy" exists.[27]

25. Evan Tsen Lee & Josephine Mason Ellis, *The Standing Doctrine's Dirty Little Secret*, 107 NW. U. L. REV. 169, 170 (2012).

26. *See* U.S. CONST. art. III, § 2 ("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 all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to *Controversies* between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects." (emphasis added) (footnote omitted)).

27. *See* Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 471 (1982) (calling the case or controversy a "bedrock requirement"); *see also* Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 882 (1983) (explaining that "[i]n more pedestrian terms," standing "is an answer to the very first question that is sometimes rudely asked when one person complains of another's actions: 'What's it to you?'").

A plaintiff must satisfy three constitutional requirements to establish standing.[28] First, the plaintiff must have suffered an injury-in-fact.[29] Second, the injury must be fairly traceable.[30] Third, the injury must be redressable, which means that a court can provide a remedy.[31] While this three-part test may seem simple, the standing doctrine is extremely complex.[32]

In *Spokeo, Inc. v. Robins*,[33] the Supreme Court considered whether an intangible harm satisfies the injury-in-fact requirement, the first prong of standing's test.[34] An intangible harm is neither a monetary harm nor a physical harm; rather, it is a statutory harm whereby a plaintiff seeks to ensure a defendant's compliance with a regulation or statute.[35] For example, in *Spokeo*, the respondent, Robins, filed a federal class-action against the petitioner, Spokeo, Inc., after discovering that his profile generated by Spokeo contained inaccurate information, violating the

28. *See, e.g.*, Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992) ("Over the years, our cases have established that the irreducible constitutional minimum of standing contains three elements.").

29. *See id.* (defining an "injury in fact" as "an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical").

30. *See id.* (defining a fairly traceable injury as one in which "a causal connection between the injury and the conduct complained of" exists).

31. *See id.* at 561 (explaining that redressability requires that the injury must be "'likely,' as opposed to merely 'speculative'" and that it will be "redressed by a favorable decision").

32. *See* Elizabeth Earle Beske, *Charting a Course past* Spokeo *and* TransUnion, 29 GEO. MASON L. REV. 729, 731 (2022) ("No one would defend Article III standing as coherent or tidy."); F. Andrew Hessick, *Standing, Injury in Fact, and Private Rights*, 93 CORNELL L. REV. 275, 276 (2008) ("Although seemingly simple on its face, this doctrine has produced an incoherent and confusing law of federal courts."); Elizabeth Magill, *Standing for the Public: A Lost History*, 95 VA. L. REV. 1131, 1132 (2009) (noting that the standing doctrine "is widely regarded to be a mess").

33. 578 U.S. 330 (2016).

34. *See id.* at 333 (asking "whether respondent Robins has standing to maintain an action in federal court against petitioner Spokeo under the Fair Credit Reporting Act").

35. *See id.* at 340–41 (explaining that concrete injuries can be derived from statutory violations); *e.g.*, TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2204 (2021) (listing intangible harms as, for example, "reputational harms, disclosure of private information, and intrusion upon seclusion"). *But see TransUnion*, 141 S. Ct. at 2224 (Thomas, J., dissenting) (pointing out that there is no specific guidance on how courts are supposed to pick which harms are tangible and which are intangible).

Fair Credit Reporting Act of 1970[36] (FCRA).[37] In the lower court proceeding, Robins argued to the Ninth Circuit that the misinformation caused harm to his employment prospects, which cost him money and caused emotional distress.[38] Here, Robin's injury was intangible because Spokeo violated his statutory right, created by the FCRA, by failing to accurately report consumer information.[39]

In *Spokeo*, Justice Alito emphasized that an "injury in fact must be both concrete *and* particularized."[40] Justice Alito also distinguished between tangible and intangible injuries, stating that "[a]lthough tangible injuries are perhaps easier to recognize, we have confirmed in many of our previous cases that intangible injuries can nevertheless be concrete."[41] In addition to clarifying the concreteness and particularization requirements of standing, Justice Alito attempted to emphasize the importance of history.[42] He explained that because the case-or-controversy requirement is rooted in historical practice, "it is instructive to consider whether an alleged intangible harm has a close

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36. 15 U.S.C. § 1681.

37. *See id.* § 1681e(b) (requiring "that consumer reporting agencies adopt reasonable procedures for meeting the needs of commerce for consumer credit, personnel, insurance, and other information in a manner which is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information in accordance with the requirements of this subchapter"); § 1681n (creating civil liability for anyone who fails to comply with the FCRA); *Spokeo*, 578 U.S. at 333 (explaining that "Spokeo operates a 'people search engine'").

38. *See* Robins v. Spokeo, Inc., 742 F.3d 409, 411 (9th Cir. 2014) (noting that Robins was unemployed at the time he filed his first amended complaint).

39. *Spokeo*, 578 U.S. at 333, 336; *see Robins*, 742 F.3d at 411 ("When, as here, the statutory cause of action does not require proof of actual damages, a plaintiff can suffer a violation of the statutory right without suffering actual damages.").

40. *See Spokeo*, 578 U.S. at 340, 342–43 (emphasis added) (refusing to take a position as to the Ninth Circuit's ultimate conclusion—whether Robins adequately alleged an injury-in-fact—because the Ninth Circuit improperly applied the concreteness and particularization requirements to Robins' case by requiring particularness or concreteness, not both).

41. *Id.* at 340. *But see id.* at 341 (noting that "Congress' role in identifying and elevating intangible harms does not mean that a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right").

42. *See id.* at 340 (instructing courts that when "determining whether an intangible harm constitutes injury in fact, both history and the judgment of Congress play important roles"). *But see* Craig Konnoth & Seth F. Kreimer, *Spelling out* Spokeo, 165 U. PA. L. REV. ONLINE 47, 55 (2016) (calling Alito's focus on history "artificial" for failing to engage with historical statutory analogies to the FCRA).

relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit."[43]

By adding a historical element to Article III standing analysis, *Spokeo* paved the way for *TransUnion*.[44] Indeed, legal scholars have characterized *Spokeo* as "pay[ing] homage to history."[45] Similarly, Justice Kavanaugh capitalized on Justice Alito's emphasis on history and the important role it plays in determining whether an intangible harm constitutes an injury-in-fact.[46] Overall, *Spokeo* has had profound effects on the injury-in-fact requirement, specifically regarding informational injuries.[47]

B. Informational Standing: Article III Evolves to Include Informational Injuries

Informational standing involves an informational injury whereby one party is harmed by the other party's failure to turn over requested information.[48] For example, if the government were to deny a Freedom of Information Act[49] (FOIA) request, a plaintiff has standing to sue.[50]

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43. *Spokeo*, 578 U.S. at 340–41.

44. *See* TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2204 (2021) (using *Spokeo* as the foundation for the "historic-analogue" test because of *Spokeo*'s instructions guiding courts to assess "whether the alleged injury to the plaintiff has a 'close relationship' to a harm 'traditionally' recognized as providing a basis for a lawsuit in American courts").

45. Konnoth & Kreimer, *supra* note 42, at 54.

46. *See supra* note 44 and accompanying text.

47. *See, e.g.*, Konnoth & Kreimer, *supra* note 42, at 58 ("Readers, litigants, and lower courts are left to ponder whether Justice Alito's majority here is leaving open the possibility that, in future cases, the Court will treat some informational harm as a mere threshold injury—insufficient to establish Article III standing unless such informational harm is linked to a more concrete sequelae. . . . On its face, however, *Spokeo* is an acknowledgment that, in the information age, statutory duties regarding information disclosure can generally be enforced by their intended beneficiaries."); Bradford C. Mank, *The Supreme Court Acknowledges Congress' Authority to Confer Informational Standing in* Spokeo, Inc. v. Robins, 94 WASH. U. L. REV. 1377, 1389 (2017) ("The clear implication of the *Spokeo* decision is that a plaintiff has a concrete injury if the government denies him information that he specifically requests pursuant to an informational statute such as FOIA.").

48. *See* Zivotofsky *ex rel.* Ari Z. v. Sec'y of State, 444 F.3d 614, 617–18 (D.C. Cir. 2006) (holding that "[t]he requester is injured-in-fact for standing purposes because he did not get what the statute entitled him to receive").

49. 5 U.S.C. § 552.

50. *See Zivotofsky*, 444 F.3d at 617 (explaining that "[a]nyone whose request for specific information has been denied has standing to bring an action" and that the requester's circumstances surrounding the request "are irrelevant to his standing").

FOIA was signed into law in 1966 and created a statutory scheme allowing the public to request agency records.[51] Congress enacted FOIA to increase government accountability.[52] Over time, Congress passed additional laws that required disclosure of information to the public, such as the Physician Payments Sunshine Act[53] (Sunshine Act) and the Federal Advisory Committee Act[54] (FACA).[55] FACA imposes numerous requirements upon advisory committees, such as requiring that advisory committees provide minutes, records, and reports to the public so long as the requested information does not fall under a FOIA exemption.[56]

Since 1952, the President, acting through the Department of Justice (DOJ), has requested advice from the American Bar Association Standing Committee on the Federal Judiciary ("ABA Committee") regarding judicial nominations.[57] In recommending candidates for nomination, the ABA Committee created both formal reports and ratings to send to the DOJ.[58] However, the public could not access formal reports. Instead, the ratings were only made public at request

51. *See* NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 220–22 (1978) (examining the history of FOIA).

52. *See* Opinion, *FOIA at 50*, WASH. POST (July 3, 2016, 7:36 PM), https://www.washingtonpost.com/opinions/foia-at-50/2016/07/03/6283af88-3fb0-11e6-a66f-aa6c1883b6b1_story.html (explaining that FOIA is a "vital tool for keeping government open and honest" and that "the principle of holding government to account is at the bedrock of U.S. democracy"); *Freedom of Information Act*, HISTORY.COM (Aug. 21, 2018), https://www.history.com/topics/1960s/freedom-of-information-act (explaining that FOIA is intended to increase transparency); U.S. DEP'T OF JUST., UNITED STATES DEPARTMENT OF JUSTICE GUIDE TO THE FREEDOM OF INFORMATION ACT: PROCEDURAL REQUIREMENTS 1 (2021), https://www.justice.gov/oip/page/file/1199421/dl?inline [https://perma.cc/HJ8T-JEE7] (stating that FOIA "establishes a statutory scheme for the public to use in making requests for agency records and imposes requirements on agencies to make such records promptly available").

53. 5 U.S.C. § 552(b)(c).

54. *See* 5 U.S.C. App. § 10(b) (subjecting FACA to 5 U.S.C. § 552).

55. *Id.*

56. *Id.*

57. Wash. Legal Found. v. U.S. Dep't of Just., 691 F. Supp. 483, 488 (D.D.C. 1988).

58. *See Supreme Court Evaluation Process*, AM. BAR ASS'N, https://www.americanbar.org/groups/committees/federal_judiciary/ratings/supreme-court-evaluation-process (last visited Aug. 6, 2024) (listing the procedures by which the ABA Standing Committee on the Federal Judiciary evaluates the professional qualifications of nominees to the Supreme Court, focusing on, for example, the nominee's integrity, professional competence, and judicial temperament).

of the Senate Judiciary Committee and after the candidate was nominated.[59]

In *Public Citizen v. United States Department of Justice*,[60] the Washington Legal Foundation ("WLF") sued the DOJ after the ABA Committee refused to comply with WLF's request for ABA Committee reports, minutes of its meetings, and names of potential judicial nominees the ABA Committee was considering.[61] Public Citizen moved to intervene as a party plaintiff, arguing that the DOJ's utilization of the ABA Committee fell within the scope of FACA and thus required the DOJ to comply with FACA disclosure requirements.[62] The U.S. District Court for the District of Columbia held that "the President's interests in preserving confidentiality and freedom of consultation in selecting judicial nominees" outweighed the purposes of FACA.[63]

The Supreme Court, rejecting the district court's opinion and instead agreeing with decisions recognizing informational injuries under FOIA, held that the plaintiffs had standing to request and receive information pursuant to the FACA.[64] Consequentially, *Public Citizen* recognized that the denial of rights that statutes confer upon the public constitute an injury for purposes of Article III standing.[65]

Nine years later, in *FEC v. Akins*,[66] a group of general election voters, seeking information for which they believed the Federal Elections Campaign Act of 1971[67] (FECA) entitled them, filed a complaint with the Federal Elections Committee (FEC), asking the FEC to find that the American Israeli Public Affairs Committee (AIPAC) violated

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59. *See* Pub. Citizen v. U.S. Dep't of Just., 491 U.S. 440, 445 (1989) (outlining the ABA Standing Committee procedure before the Supreme Court decided *Public Citizen*).

60. 491 U.S. 440 (1989).

61. *Id.* at 447.

62. *See id.* at 448 (explaining the procedural history).

63. *See* Wash. Legal Found. v. U.S. Dep't of Just., 691 F. Supp. 483, 486, 496 (1988) (reasoning that because Article II of the Constitution specifically mandates and gives power to the President to nominate judicial nominees with advice and consent of the Senate, the constitutional concerns outweighed any statutory concerns).

64. *Pub. Citizen*, 491 U.S. at 449 (explaining that the Court's "decisions interpreting [FOIA] have never suggested that those requesting information under it need show more than that they sought and were denied specific agency records").

65. *See* Mank, *supra* note 47, at 1383 ("In its 1989 *Public Citizen* decision, the Supreme Court recognized that the government's denial of information that the public is entitled to by statute constitutes a sufficient injury for Article III standing, although the Court did not fully explore the boundaries of informational standing.").

66. 524 U.S. 11, 24 (1998).

67. 52 U.S.C. § 30101.

FECA.[68] FECA imposes extensive recordkeeping and disclosure requirements upon groups that fall under FECA's definition of political committee.[69] The voters argued that AIPAC fell within FECA's definition of a political committee and thus had to make information about its members, contributors, and expenditures public.[70]

In *Akins*, the Supreme Court went further than it did in *Public Citizen* and held that an informational injury was sufficiently concrete to constitute an injury-in-fact.[71] Justice Breyer, writing for the majority, explained that the injury-in-fact suffered by the respondents "consist[ed] of their inability to obtain information," which FECA required AIPAC to make public.[72] Citing *Public Citizen*, Justice Breyer acknowledged that the Supreme Court had previously held that "when the plaintiff fails to obtain information which must be publicly disclosed pursuant to a statute," a plaintiff suffers an injury-in-fact.[73] Thus, the respondents were injured from their failure to receive "particular information about campaign-related activities."[74] Overall, by recognizing that informational injuries satisfy Article III standing requirements, *Akins* and *Public Citizen* have been imperative in shaping informational standing analyses.

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68. *Akins*, 524 U.S. at 16.

69. *See id.* at 14–15 (explaining that the recordkeeping and disclosure requirements include registering with the FEC, appointing a treasurer, keeping the names and addresses of contributors, tracking the amount and purpose of disbursements, and filing complex reports that includes all donors giving in excess of $200 a year).

70. *Id.* at 15–16.

71. *Compare* Pub. Citizen v. U.S. Dep't of Just., 491 U.S. 440, 449 (1989) (holding that, in regards to informational standing, when "an agency denies requests for information under [FOIA], refusal to permit appellants to scrutinize the ABA Committee's activities to the extent FACA allows constitutes a sufficiently distinct injury to provide standing to sue"), *with Akins*, 524 U.S. at 24–25 (concluding that "the informational injury at issue here, directly related to voting, the most basic of political rights, is sufficiently concrete and specific such that the fact that it is widely shared does not deprive Congress of constitutional power to authorize its vindication in the federal courts").

72. *Akins*, 524 U.S. at 21.

73. *See id.* (citing *Pub. Citizen*, 491 U.S. at 449); *see also* Kimberly N. Brown, *What's Left Standing? FECA Citizen Suits and the Battle for Judicial Review*, 55 KAN. L. REV. 677, 690 (2007) ("Because the FECA required the disclosure of information, the deprivation of such information established standing. This holding presupposes that Congress is empowered to legislate an 'injury' previously unknown to the law." (footnote omitted)).

74. *Akins*, 524 U.S. at 22.

C. Making Sense of TransUnion LLC v. Ramirez *and Its Impact on Informational Standing*

In 2021, the Supreme Court decided *TransUnion* in a five-four opinion authored by Justice Kavanaugh, where Justice Kavanaugh revisited the relationship between intangible harms and the concreteness requirement.[75] Accordingly, *TransUnion* focuses on the first of the three standing requirements—injury-in-fact.[76] The facts of *TransUnion* are outlined below.

TransUnion is a credit reporting agency.[77] The FCRA regulates consumer reporting agencies, such as TransUnion, which compile and disseminate consumer's personal information.[78] The FCRA allows consumers to bring a cause of action for certain violations of the Act.[79] The plaintiffs alleged that TransUnion failed to adhere to three FCRA requirements.[80] The U.S. Treasury Department's Office of Foreign Assets Control (OFAC) maintains a list of terrorists, drug traffickers, and other serious criminals who pose a threat to national security.[81] In 2002, TransUnion introduced a product called the "OFAC Name Screen Alert," created "to help businesses avoid transacting with individuals on OFAC's list."[82]

Sergio Ramirez, the class-representative, "learned the hard way" that he was an individual incorrectly identified on the OFAC list.[83] Mr. Ramirez sought to buy a car and when the dealership ran a credit check, the salesperson discovered that Mr. Ramirez was on the OFAC

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75. TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2200 (2021) (starting the opinion by stating "[n]o concrete harm, no standing").

76. *See, e.g.*, Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992) (listing the three constitutional standing requirements: injury-in-fact, traceability, and redressability).

77. *See* TransUnion, https://www.transunion.com (last visited Nov. 16, 2023).

78. *TransUnion*, 141 S. Ct. at 2200; *see* 15 U.S.C. § 1681(a) (seeking to promote "fair and accurate credit reporting").

79. *See* § 1681(a) ("Any person who willfully fails to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer . . . .").

80. *TransUnion*, 141 S. Ct. at 2200–01 (alleging that TransUnion failed to comply with the FCRA's requirement mandating consumer reporting agencies to: (1) "follow reasonable procedures to assure maximum possible accuracy;" (2) to "disclose to the consumer '[a]ll information in the consumer's file at the time of the request;'" and (3) to "[compel] consumer reporting agencies to 'provide to a consumer, with each written disclosure by the agency to the consumer' a 'summary of rights.'") (quoting 15 U.S.C. §§ 1681e(b), 1681g(a)(1), 1681g(c)(2)).

81. *Id.* at 2201.

82. *Id.*

83. *Id.*

list.[84] The salesperson refused to sell the car to Mr. Ramirez because his name was—falsely—on a "terrorist list."[85] Mr. Ramirez sued TransUnion alleging three violations of the FCRA.[86] First, that TransUnion failed to follow reasonable procedures in ensuring "the accuracy of information in his credit file."[87] Second, that when Mr. Ramirez requested the credit information, "TransUnion failed to provide him with *all* [necessary] information" by failing to include that he was on the OFAC list.[88] Finally, TransUnion failed "to provide him with a summary of his rights."[89]

The plaintiffs, a class of 8,185 members, sued TransUnion under the FCRA, alleging that TransUnion failed to use reasonable procedures to ensure the accuracy of their credit files and, in turn, falsely indicated the class members were a "potential match" on a list maintained by the United States Treasury Department's Office of Foreign Assets Control of terrorists, drug traffickers, and other criminals.[90] The Court separated this class into two separate subclasses.[91] The first group consisted of 1,853 class members, like Mr. Ramirez, whom TransUnion provided credit reports containing false OFAC alerts to third-party businesses.[92] Conversely, TransUnion had not provided the misleading credit reports to third parties to the remaining 6,332 class members.[93]

84. *See id.* at 2201–02 (TransUnion eventually removed Mr. Ramirez's name from the OFAC list).

85. *Id.* at 2201.

86. *Id.* at 2202.

87. *See id.* (noting that only the first mailing failed to include the fact that he was on the OFAC list; however, the second mailing corrected this error and included the necessary information). The second mailing, though, did not include the summary of his rights. *Id.*; *see also* 15 U.S.C. § 1681e(b) (regulating the accuracy of the credit report).

88. *TransUnion*, 141 S. Ct. at 2202; *see* § 1681g(a)(1) (outlining what consumer reporting agencies must disclose upon request from the consumer).

89. *TransUnion*, 141 S. Ct. at 2202; *see* § 1681g(b) (listing exceptions to § 1681g(a)).

90. *See TransUnion*, 141 S. Ct. at 2200–01 (noting that it is generally unlawful to conduct business with any person on the OFAC list (citing 31 C.F.R. pt. 501, App. A (2020)); *Guide to OFAC Sanctions List*, COMPLY ADVANTAGE (July 26, 2023) https://complyadvantage.com/insights/ofac-sanctions [https://perma.cc/HHM4-WSWV] (explaining that OFAC sanctions impose the following restrictions on individuals: investment bans, asset freezes, and travel bans).

91. *See TransUnion*, 141 S. Ct. at 2200.

92. *See id.* at 2202 (explaining that the parties stipulated before trial that of the 8,185 members, only 1,854 members of the class "had their credit reports disseminated by TransUnion to potential creditors").

93. *See id.* at 2198 (noting even though TransUnion had yet to share the misleading reports during the relevant time period, it nevertheless created the misleading reports).

Simply, the Court divided the class members based on which members actually had their misleading credit report sent to a third party.[94]

TransUnion argued that because the reports only labeled the plaintiffs as a "potential match" rather than an actual "terrorist," the class members failed to establish that they suffered a harm with a close relationship to American defamation law.[95] However, the Court rejected TransUnion's argument and held that the 1,854 class members whose credit reports were sent to a third party suffered a concrete injury-in-fact under Article III because the harm resulting from the misleading credit report "b[ore] a sufficiently close relationship to the harm from a false and defamatory statement."[96] Justice Kavanaugh took the opportunity to narrow the concrete requirement discussed in *Spokeo* by adding a historical element to the inquiry.[97] Specifically, Kavanaugh stated that the concrete injury "inquiry asks whether plaintiffs have identified a *close historical or common-law analogue* for their asserted injury."[98] Here, the Court recognized that American common law long understood that when a person is subjected to "hatred, contempt, or ridicule" from a defamatory statement published to a third-party, the person is injured.[99] Therefore, the misleading credit reports flagging the plaintiffs as a "potential match," causing ridicule and contempt, was analogous to common-law defamation.[100]

On the other hand, the Court held that the remaining 6,332 class members did not suffer a concrete harm and thus did not have standing under Article III.[101] The Court reasoned that because

94. *Id.* at 2202.

95. *See id.* at 2208–09 (explaining that under American law, defamatory statements injure a person when the statement subjects them to "hatred, contempt, or ridicule" and is published to a third party) (first citing Milkovich v. Lorain J. Co., 497 U.S. 1, 13 (1990); then citing Gertz v. Robert Welch, Inc., 418 U.S. 323, 349 (1974); and then citing the RESTATEMENT OF TORTS § 559 (AM. L. INST., 1938)).

96. *See id.* at 2209 (setting for the rule that when "looking to whether a plaintiff's asserted harm has a 'close relationship' to a harm traditionally recognized as providing a basis for a lawsuit in American courts, we do not require an exact duplicate").

97. *See id.* at 2204 (although Kavanaugh adds to the *Spokeo* standing requirements, he also notes that "*Spokeo* does not require an exact duplicate in American history and tradition"); Mank, *supra* note 1, at 735 (arguing that while "[the] *TransUnion* case did not overrule the *Spokeo* decision," it narrowed the Court's approach to informational standing).

98. *TransUnion*, 141 S. Ct. at 2204 (emphasis added); *see* Dinerstein v. Google, 73 F.4th 502, 521 (7th Cir. 2023) (referring to this requirement as the "historic-analogue test").

99. *TransUnion*, 141 S. Ct. at 2208–09.

100. *Id.*

101. *Id.* at 2211.

TransUnion had not disseminated their credit reports to a third-party, only a risk of future harm existed, and "[the] mere risk of future harm" does not satisfy the concreteness requirement.[102] Justice Kavanaugh again brought up the close "historical or common-law analogue" analysis and mentioned that traditionally, courts have not recognized "the mere existence of inaccurate information" as providing the basis of a lawsuit without actual dissemination of that information.[103]

In a separate part of the opinion, the Court addressed informational standing.[104] While not discussed by any of the parties or lower courts, an amicus curiae brief filed on behalf of the United States supporting neither party mentioned informational standing.[105] Nevertheless, Justice Kavanaugh capitalized on the United States' argument from the amicus brief and significantly narrowed informational standing by requiring plaintiffs alleging an informational injury to identify "downstream consequences" from failing to receive requested information.[106] In other words, "[a]n asserted informational injury that causes no adverse effects cannot satisfy Article III."[107] Further, because the plaintiffs in *TransUnion* did not allege that they failed to receive required information, the Court refused to apply *Public Citizen* and

102. *See id.* at 2210–11 (explaining that "[the] mere risk of future harm, standing alone, cannot qualify as a concrete harm—at least unless the exposure to the risk of future harm itself causes a *separate* concrete harm"). The plaintiffs failed to demonstrate that the risk of future harm materialized, i.e., by showing the likelihood of disclosure to a third-party. *Id.*

103. *Id.* at 2209.

104. *Id.* at 2214.

105. *See* Brief for the United States as Amicus Curiae Supporting Neither Party at 9, 25, *TransUnion*, 141 S. Ct. 2190 (No. 20-297) (arguing that under the Supreme Court's informational standing precedent, the class members suffered a concrete and particularized injury even though these precedents "do not suggest that a plaintiff automatically satisfies Article III requirements simply because an alleged statutory violation leads indirectly to a diminution in the information that is available to the public"). Notably, Solicitor General Prelogar was counsel on record on this brief. *See supra* notes 16–18 and accompanying text (discussing Solicitor General Prelogar in reference to *Carnahan v. Maloney*).

106. *See TransUnion*, 141 S. Ct. at 2214 (explaining that the plaintiffs in this case failed to establish an informational injury because they failed to demonstrate "for example, that the alleged information deficit hindered their ability to correct erroneous information before it was later sent to third parties").

107. *See id.* (quoting Trichell v. Midland Credit Mgmt., Inc., 964 F.3d 990, 1004 (11th Cir. 2020)).

Akins.[108] Instead, the Court emphasized that the plaintiffs "argued only that they received [the required information] *in the wrong format*."[109] *TransUnion* raised questions regarding the proper standing analysis for intangible harms and informational injuries.[110] In the aftermath of *TransUnion*, lower courts methodically interpret and apply *TransUnion* staying true to the Supreme Court's holding, despite its lack of clarity.[111]

1. *Lower courts' application of* TransUnion

The Court in *TransUnion* provided a significant change to the injury-in-fact requirement for intangible injuries through the implementation of the "historic-analogue" test and for informational injuries through the "downstream consequences" test but provided little guidance on the application of the two tests.[112] Lower courts have generally applied the "historic analogue" test in intangible harm cases.[113] On the other hand, most lower courts have applied the "downstream consequences" test solely to cases involving informational injuries.[114] Thus, the lower courts apply different tests

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108. *Id. But see* Kelly v. RealPage Inc., 47 F.4th 202, 212 (3d Cir. 2022) (finding that *TransUnion* did not cast doubt on *Public Citizen* or *Akins*, but rather reaffirmed "their continued viability"); Laufer v. Looper, 22 F.4th 871, 881 (10th Cir. 2022) (upholding *Public Citizen* and *Akins* as consistent with *TransUnion*); Grae v. Corrs. Corp. of Am., 57 F.4th 567, 570 (6th Cir. 2023) (explaining that *TransUnion* is not contrary to *Public Citizen* and *Akins*).

109. *TransUnion*, 141 S. Ct. at 2214.

110. *See* Daniel J. Solove & Danielle Keats Citron, *Standing and Privacy Harms: A Critique of* TransUnion v. Ramirez, 101 B.U. L. REV. ONLINE 62, 66–67 (2021) ("In essence, for the majority in *TransUnion*, the test for whether an injury is sufficiently 'concrete' (and hence sufficient for standing) is how close it approximates injury recognized by courts in the past. Where is the line to be drawn? . . . In addition to the vagueness of the test, another problem is the difficulty in getting a clear read of the common law.").

111. *Infra* Section II.A.1.

112. *See TransUnion*, 141 S. Ct. at 2204, 2214; *see also* Hunstein v. Preferred Collection & Mmgt. Servs., Inc., 17 F.4th 1016, 1024 (11th Cir. 2021) (posing the question "[i]f . . . Article III doesn't require a precise fit between an alleged intangible harm and a common-law tort, what *does* it require?"); *cf.* Erwin Chemerinsky, *What's Standing After* TransUnion LLC v. Ramirez, 96 N.Y.U. L. REV. ONLINE 269, 271 (2021) ("[A]fter *TransUnion*, it is unclear whether suits to enforce [FOIA] still will be allowed. Because there was neither a common-law right to access documents nor a tradition of such a right before the statute, it is questionable whether suits to enforce it are allowed under Justice Kavanaugh's approach.").

113. *See infra* Section II.C.

114. *See infra* Section II.B.

depending on the type of injury to avoid a simultaneous application of the tests.[115]

In analyzing *TransUnion*, legal scholars have reflected upon the implications of the two tests. American legal scholar Erwin Chemerinsky reflected on the importance of separating the two tests by noting that informational standing lacks common-law analogues.[116] He stated that because there was no common-law right to access documents, nor would there be a constitutional right under *TransUnion*.[117] Rather, "Congress, through legislation, created this statutory right, and its infringement has always been deemed an injury sufficient for standing," but that this remained unclear after *TransUnion*.[118] Similarly, other legal scholars note that "the Court misunderstands another aspect of the nature of common law—it is far from static."[119] Nevertheless, most lower courts, perhaps intuitively, have interpreted *TransUnion* consistently.[120]

2. The "downstream consequences" test applied

After *TransUnion*, lower courts across the country interpreted and applied the "downstream consequences" test to informational injuries. For example, in *Kelly v. RealPage Inc.*,[121] the Third Circuit interpreted *TransUnion* as being consistent with informational standing

115. *But see* Thome v. Sayer L. Grp., P.C., 567 F. Supp. 3d 1057, 1076–77 (N.D. Iowa 2021) (applying both the "downstream consequences" test and the "historic-analogue test" to an intangible injury analysis and interpreting *TransUnion* to suggest that all alleged injuries without downstream consequences are not concrete); Vaughan v. Fein, Such, Kahn & Shepard, P.C., No. 21-16013, 2022 WL 2289560, at *4 (D.N.J. June 24, 2022) (interpreting *TransUnion* to require that a plaintiff must establish downstream consequences to allege concrete injuries in any case, not just in cases concerning informational injuries).

116. Erwin Chemerinsky is a prominent constitutional legal scholar and Dean of the UC Berkeley School of Law. Chemerinsky, *supra* note 112, at 271.

117. *Id.*

118. *Id.* at 270–71. *But see* Cass R. Sunstein, *Informational Regulation and Information Standing:* Akins *and Beyond*, 147 U. PA. L. REV. 613, 618 (1999) ("Informational regulation is far from new to American law. At common law, sellers of goods and services face certain obligations of disclosure; thus, a failure to convey relevant information may violate the common law of contract or tort.").

119. *See* Solove & Citron, *supra* note 110, at 67 (referring to privacy torts, which are now widely recognized today, but that was "a long process of fits and starts" and that "[c]hange in the common law is messy and inconsistent").

120. *See infra* Sections I.C.2–3 (discussing the lower courts' application of the "downstream consequences" test and the "historic-analogue" test from *TransUnion*).

121. 47 F.4th 202 (3d Cir. 2022).

jurisprudence.[122] In *Kelly*, the appellants sued RealPage, Inc., a consumer reporting agency, after the appellants' rental applications were denied based on false information contained within consumer reports created by RealPage.[123] Like the plaintiffs in *TransUnion*, the appellants in *Kelly* sued under the FCRA's disclosure requirements.[124] The Third Circuit framed the standing analysis in terms of whether the plaintiffs sufficiently established "downstream consequences" and found that RealPage's omission of information impaired the plaintiffs' ability to secure public housing, thus establishing adverse effects.[125] The Third Circuit interpreted *TransUnion* as merely reiterating standing precedent rather than "working a sea change to its informational injury jurisprudence."[126] In other words, to state a cognizable informational injury, a plaintiff still had to allege that in failing to receive information, the omission led to adverse effects, "and such consequences have a nexus to the interest Congress sought to protect."[127]

Other circuits, like the Second, Tenth, and Sixth Circuits, similarly apply the "downstream consequences" test in an informational standing analysis.[128] The Second Circuit uses the "downstream

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122. *See id.* at 210–11 (holding that the plaintiffs sufficiently alleged a concrete injury based on RealPage's failure to disclose information).

123. *Id.* at 205.

124. *Id.* at 207–08.

125. *See id.* at 214 (finding the RealPage's report erroneously included two DUI convictions and a misdemeanor conviction).

126. *Id.*

127. *Compare id.* (interpreting the "downstream consequences" test as having a nexus to the interest that Congress sought to protect), *with* TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2214 (2021) (holding simply that "the plaintiffs have identified no 'downstream consequences' from failing to receive the required information" but not mentioning Congress), *and* Spokeo, Inc. v. Robins, 578 U.S. 330, 341 (2016) ("[B]ecause Congress is well positioned to identify intangible harms that meet minimum Article III requirements, its judgment is also instructive and important.").

128. *See, e.g.*, Harty v. West Point Realty, Inc., 28 F.4th 435, 444 (2d Cir. 2022) (holding that the plaintiff did not sufficiently establish downstream consequences and thus lacked standing because he merely made a boilerplate assertion that the defendant's website violated the Americans with Disabilities Act rather than showing an interest in using the information beyond bringing the lawsuit); Laufer v. Looper, 22 F.4th 871, 881 (10th Cir. 2022) (holding that the plaintiff did not sufficiently establish downstream consequences, having failed to prove that defendants' failure to provide the information she requested resulted in an injury); Grae v. Corrs. Corp. of Am., 57 F.4th 567, 570 (6th Cir. 2023) ("Since *TransUnion*, the courts of appeals have consistently recognized that, to have standing, a plaintiff claiming an informational

consequences" test when determining whether a plaintiff sufficiently alleged an informational injury sufficient for Article III standing.[129] The Tenth Circuit insisted that a plaintiff identify adverse effects in an informational injury case, like the plaintiffs in *Public Citizen* and *Akins*, such as an interest in using the information beyond bringing the lawsuit.[130] The Sixth Circuit summarized informational standing requirements by stating that "a chorus of precedent all sings the same tune: to have standing, litigants must have suffered adverse effects from the denial of information."[131]

3. *The "historic-analogue" test applied*

Conversely, when faced with a statutory harm or intangible harm analysis, lower courts have applied *TransUnion*'s "close historical or common-law analogue" approach adopted from *Spokeo*.[132] For example, while the Eleventh, Eighth, Tenth, and Seventh Circuits vary in how strictly they have applied the "historic-analogue" test, they nevertheless consistently applied it to cases involving intangible harms.[133] *Dinerstein v. Google, LLC*[134] involved claims related to privacy, breach of contract, consumer-fraud, and tortious interference with contract.[135] The Seventh Circuit centered the standing analysis for these claims around *TransUnion* and whether Dinerstein's asserted injuries were sufficiently analogous to a particular common-law analogue.[136] Interpreting *TransUnion* to require courts "to nail down a particular common-law analogue," the Seventh Circuit asked "whether any of the recognized privacy torts [were] sufficiently analogous to Dinerstein's asserted injury," to establish a concrete injury.[137] Even

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injury must have suffered adverse effects from the denial of access to information."). *But see* Laufer v. Acheson Hotels, LLC, 50 F.4th 259, 271 n.4 (1st Cir. 2022) (calling the *TransUnion* "downstream-consequences-needed-for-informational-injury proviso" dictum), *vacated sub nom.* Acheson Hotels, LLC v. Laufer, 601 U.S. 1 (2023).

129. *Harty*, 28 F.4th at 444.

130. *Looper*, 22 F.4th at 881.

131. *Grae*, 57 F.4th at 571.

132. *See Spokeo*, 578 U.S. at 340–41 (explaining that "[b]ecause the doctrine of standing derives from the case-or-controversy requirement, and because that requirement is grounded in historical practice, it is instructive to consider whether an alleged intangible harm has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts").

133. *See supra* note 128 for a description of the circuit cases.

134. 73 F.4th 502 (7th Cir. 2023).

135. *Id.* at 512.

136. *Id.* at 513.

137. *Id.*

though the court recognized four traditional privacy tort theories, because Dinerstein failed to identify a case in which a court allowed a plaintiff "to bring a public-disclosure tort premised on the dissemination of anonymized information," the Seventh Circuit held that Dinerstein failed to establish Article III standing.[138] The court could not infer that an injury existed in the first place because the caselaw was too sparse.[139] Overall, because the court could not locate a historical record for a tort claim based on the dissemination of anonymized information, Dinerstein's claim failed.[140]

Moreover, the court in *Dinerstein* held that the plaintiff misinterpreted *Spokeo* and *TransUnion*.[141] Namely, the plaintiff misinterpreted the "common-analogue" test to simply require that plaintiffs show that a court has a historical record of a case instead of showing that the plaintiff actually suffered an injury.[142] In other words, the plaintiff thought as long as courts had traditionally recognized a breach of contract claim, as in *Dinerstein*, that alone was sufficient to establish an injury-in-fact even if the plaintiff failed to allege an injury resulting from the breach of contract.[143] Thus, the Seventh Circuit clarified that "*Spokeo* and *TransUnion* put an end to federal courts hearing claims premised on *nonexistent* injuries—regardless of historical pedigree."[144] Accordingly, the Seventh Circuit held that a modern injury with a "close relationship" did not suffice to establish a concrete injury, but instead held that a historical record "is necessary, but not sufficient, to satisfy the Article III concreteness requirement."[145] However, because *TransUnion* is new, not all circuits have had the opportunity to apply the *TransUnion* tests in either an

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138. *Id.*

139. *See id.* ("Indeed, while the relevant caselaw is sparse, we [are] skeptical that this alleged factual scenario would give rise to any injury at all—let alone one concrete enough to support Article III standing.").

140. *Id.*

141. *Id.* at 519.

142. *See id.* at 521 (explaining that "a historical record is no talisman").

143. *Id.* at 519.

144. *See id.* at 521–22 (clarifying that an injury does not turn into a concrete injury just because the harm has historically been regarded as a legal injury at common-law, namely that "a breach of contract alone—without any actual harm—is purely an injury in law, not an injury in fact[, a]nd it therefore falls short of the Article III requirements for a suit in federal court").

145. *See id.* at 521. Even though the plaintiff sufficiently established the common-law analogue for his breach of contract claim, he failed to allege an injury in fact, and thus his claim does not "satisfy the Article III concreteness requirement." *Id.*

informational standing or intangible harm case.[146] Therefore, questions remain regarding informational standing and pre-*TransUnion* decisions, like the *Maloney* case outlined below.[147]

D. The Intersection of Article III and Informational Standing as Seen Through Maloney v. Murphy

All the previously discussed concepts come together in the string of *Murphy* litigation.[148] The litigation starts with *Cummings v. Murphy*,[149] where the plaintiffs, seventeen minority members of the House Oversight Committee, sued the General Services Administration (GSA) for failure to respond to requests concerning a lease agreement with Trump Old Post Office LLC pursuant to 5 U.S.C. § 2954.[150] In 2013, GSA entered into a lease agreement with Trump Old Post Office LLC.[151] The lease contained a provision prohibiting elected officials of the United States Government from sharing or benefitting from the lease.[152] Article 37.19 of the lease stated that "[n]o . . . elected official of the Government of the United States . . . shall be admitted to any share or part of this Lease, or to any benefit that may arise therefrom."[153] Thus, when Donald Trump was elected president of the United States, various members of the House Oversight Committee became concerned of a potential breach of contract.[154] Accordingly, the House Oversight Committee sent a letter to the then-GSA Administrator, Denise Turner Roth, requesting various documents

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146. *See, e.g.*, Maloney v. Murphy, 984 F.3d 50, 54 (D.C. Cir. 2020) (deciding whether § 2954 plaintiffs had standing before *TransUnion*).

147. *Infra* Section I.D.

148. *Murphy* litigation refers to: Cummings v. Murphy, 321 F. Supp. 3d 92 (D.D.C. 2018), *reversed sub nom.* Maloney v. Murphy, 984 F.3d 50 (D.C. Cir. 2020), *vacated sub nom.* Carnahan v. Maloney, 143 S. Ct. 2653 (2023) (mem.); Respondents' Brief in Opposition, *supra* note 18; and Reply Brief for the Petitioner, *Carnahan*, 143 S. Ct. 2653 (No. 22-425).

149. 321 F. Supp. 3d 92 (D.D.C. 2018).

150. *Id.* at 95–96.

151. *See id.* at 95–97 (noting that at the time of the litigation, then-President Trump, Ivanka Trump, Donald Trump Jr., and Eric Trump owned Trump Old Post Office LLC).

152. *See id.* at 97 (quoting Article 37.19 of the lease between GSA and Trump Old Post Office LLC).

153. *Id.*

154. *See* Letter from Elijah E. Cummings, Ranking Member, Comm. on Oversight and Gov't Reform, to Denise Turner Roth, Adm'r of the Gen. Servs. Admin., (Dec. 14, 2016) (addressing "the imminent breach-of-lease and conflict-of-interest issues created by President-elect Donald Trump's lease with" GSA and the Trump International Hotel in Washington, D.C.).

associated with the lease.[155] For example, Ranking Member Cummings and other minority members of the House Oversight Committee requested documents containing legal interpretations of Article 37.19 of the Old Post Office lease and documents "relating to funds received from any foreign country, foreign entity, or foreign source."[156]

After several failed attempts, Cummings, joined by seventeen other members of the House Oversight Committee, specifically invoked § 2954 for the first time.[157] Ranking Member Cummings and other members of the House Oversight Committee continued to renew their demands for records until November 2, 2017, when the plaintiffs commenced the action against GSA's administrator.[158] The requesters brought the lawsuit not only because GSA's refusal to comply with § 2954 deprived them of information which they were entitled to, but also the "refusal . . . thwart[ed] [each Member's] ability to" recommend to the House of Representatives, among other things, actions that should be taken "to cure any existing conflict of interest, mismanagement, or irregularity in federal contracting."[159]

Judge Mehta held that the plaintiffs lacked standing to sue GSA under 5 U.S.C. § 2954.[160] Rather than focusing on standing through an informational injury analysis—as in *Public Citizen* and *Akins*—the court focused the injury-in-fact question on whether the plaintiffs suffered a

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155. *Cummings*, 321 F. Supp. 3d at 97; *see* Letter from Elijah E. Cummings, Ranking Member, Comm. on Oversight and Gov't Reform, to Denise Turner Roth, Adm'r of the Gen. Servs. Admin., (Nov. 30, 2016), (requesting information about how GSA "plans to address the imminent breach-of-lease and conflict of interest issues created by President-elect Donald Trump's lease with the U.S. Government for the Trump International Hotel Building in Washington, D.C.").

156. *Cummings*, 321 F. Supp. 3d at 97–99.

157. *Id.* at 98; *see* Letter from Elijah E. Cummings, Ranking Member, Comm. on Oversight and Gov't Reform, to Saul Japson, Acting Assoc. Adm'r of the Gen. Servs. Admin., (Feb. 8, 2017) (requesting "*unredacted*, *complete* copies of the documents [previously] requested [in the plaintiffs'] January 23, 2017 letter" (emphasis added)).

158. *See Cummings*, 321 F. Supp. 3d at 98–100 (seeking a declaration that the defendant's failure to provide the requested information violates 5 U.S.C. § 2954 and requesting that the court order defendant to comply with the document requests).

159. *See id.* at 98–100 (listing the thwarted activities alleged by the plaintiffs, including the claim that GSA's deviation from "prior practice to honor requests made under the Seven Member Rule" undermined Congress's "duty to perform oversight").

160. *See id.* at 118 (holding that the "[p]laintiffs lack standing under Article III to seek judicial enforcement of their requests for information . . . under 5 U.S.C. § 2954" and thus granting the defendant's motion to dismiss).

personal or institutional injury under the framework of *Raines v. Byrd*.[161]

In *Raines*, six members of Congress who had voted against the Line Item Veto Act brought suit in the U.S. District Court for the District of Columbia, seeking injunctive relief and declaratory judgment, claiming that the Act violated the Constitution.[162] The plaintiffs explained that the Act injured them directly and concretely in their official capacities.[163] However, the Supreme Court rejected this contention and held that because the members failed to allege an individual injury, their injury was only an institutional one—"wholly abstract and widely dispersed"—and thus had not suffered a personal injury for purposes of Article III standing.[164] In *Cummings*, the District Court for the District of Columbia held that "the personal/institutional injury distinction made in *Raines* . . . rests at the heart of this case."[165] Instead of relying on informational precedent—like *Public Citizen* and *Akins*—the court distinguished § 2954 because § 2954 involved members of Congress—like *Raines*—as opposed to members of the public.[166]

On appeal, after reviewing the questions of standing *de novo*, the U.S. Court of Appeals for the District of Columbia reversed the lower court holding and instead found that the "Requesters" asserted an informational injury sufficient for Article III standing.[167] Specifically, the circuit court found that the Requesters' injury was sufficiently

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161. *See* Raines v. Byrd, 521 U.S. 811, 815–16, 820–26 (1997) (holding that members of Congress adversely affected by the Line Item Veto Act could not bring an action challenging any of the Act's provisions because the legislators lacked standing to bring suit for failing to suffer a personal injury); *Cummings*, 321 F. Supp. 3d at 107 (explaining that the "personal/institutional injury distinction made in *Raines* . . . rests at the heart of this case"). *But see* Powell v. McCormack, 395 U.S. 486, 489 (1969) (holding that legislators had standing to sue when the U.S. House of Representatives refused the seat of Adam Clayton Powell, Jr. for making false reports about various expenses and salary payments).

162. *See Raines*, 521 U.S. at 814–16 (explaining that the plaintiffs specifically alleged that the Line Item Veto Act unconstitutionally expanded the President's powers and violated the bicameral passage and presentment clauses of the Constitution).

163. *See id.* at 816 (describing the alleged injury).

164. *Id.* at 829–30.

165. *Cummings*, 321 F. Supp. 3d at 107.

166. *See id.* (adding that, even though the court disagreed that *Public Citizen* and *Akins* controlled in this case, the outcome would nevertheless change if the court had relied on such cases).

167. *See* Maloney v. Murphy, 984 F.3d 50, 56, 59 (D.C. Cir. 2020) (referring to the plaintiffs collectively as "Requesters").

concrete and particularized.[168] The court reasoned that the Requesters alleged a concrete and particularized injury-in-fact because: (1) they identified a deprivation of information they were legally entitled to receive under § 2954, and (2) the deprivation was complete and felt by the Requesters.[169] Finally, Judge Millett disagreed with the district court and instead held that the Requesters suffered a personal injury rather than an institutional injury.[170] Judge Millett reasoned that the "Requesters' injury is a horse of a different color" because rather than asserting "an injury to the institutional powers or functions that 'damages all members of'" the House equally, the injury the Requesters claim is the denial of information to which the individual members are specifically entitled to.[171] The Requesters suffered a personal injury because they were denied a right they individually held as a minority group of seven seeking requested information.[172] Moreover, Judge Millett likened the Seven Member Rule to FOIA.[173]

However, Senior Circuit Judge Ginsburg, in the dissent, disagreed with Judge Millett's reasoning, explaining that the cases were

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168. *See id.* (concluding that GSA's "failure to provide information to which the Requesters are statutorily entitled is a quintessential form of concrete and particularized injury within the meaning of Article III"); *cf.* Spokeo, Inc. v. Robins, 578 U.S. 330, 340 (2016) (holding that an intangible harm may nevertheless be concrete).

169. *See Maloney*, 984 F.3d at 61 (explaining that informational injury cases require the plaintiff to demonstrate that they suffered in "being denied access to information" and it was "the type of harm that Congress sought to prevent by requiring disclosure" (citing Friends of Animals v. Jewell, 828 F.3d 989, 992 (D.C. Cir. 2016)).

170. *See id.* at 61 ("Section 2954 confers its informational right directly on these specific legislators so that they personally can properly perform their roles on oversight committees. In denying their requests for information due to them under that statute . . . the GSA 'thwart[ed]' their individual ability to understand what the GSA is up to with respect to the Old Post Office lease." (citation omitted)).

171. *See id.* at 64 ("The [thirty-four] other members of the Committee [on Oversight and Government Reform] who never sought the information suffered no deprivation when it was withheld. Neither did the nearly 400 other Members of the House who were not on the Committee suffer any informational injury.").

172. *See id.* at 62 (clarifying that personal injuries for a legislator are "not limited to injuries suffered in a purely private capacity" but rather when it "harms the legal rights of the individual legislator," as distinct "from injuries to the institution in which they work or to legislators as a body").

173. *See id.* at 60 (explaining that "[t]he language in [§] 2954 mirrors the operative provisions" in the Freedom of Information Act); *cf.* Pub. Citizen v. U.S. Dep't of Just., 491 U.S. 440, 449 (1989) (using decisions recognizing standing under FOIA to reach its ultimate conclusion that the plaintiffs had standing to sue under FACA); FEC v. Akins, 524 U.S. 11 (1998) (analyzing an analogous provision of FECA which similarly provided that "each report under the [statutory] section shall disclose" certain information to the public).

"fundamentally different."[174] Judge Ginsburg argued that even though the plaintiffs sufficiently alleged a concrete harm, they failed to allege a particularized harm.[175] Thus, where Judge Ginsburg and Judge Millett fundamentally differed was on the issue of congressional standing rather than informational standing, as both agreed that the denial of information constituted a sufficient injury-in-fact for Article III standing purposes.[176] The central holding from *Maloney* made clear that "the Requesters . . . asserted an informational injury that is sufficient for Article III standing."[177]

Because the D.C. Circuit decided *Maloney* before the Supreme Court decided *TransUnion*, the question remains whether the Requesters would have standing in a post-*TransUnion* world. Part II answers this question by relying on lower courts' interpretations of *TransUnion*.[178] As long as the lower courts apply the "downstream consequences" test solely to informational standing cases, the *Maloney* plaintiffs have standing.[179] Their "downstream consequences" result from GSA's failure to comply with § 2954, thus thwarting the plaintiff's ability to fulfil their constitutionally recognized oversight roles directly tied to their ability to legislate effectively.[180]

II. ANALYSIS

This Comment will analyze § 2954 in light of the Supreme Court's decision in *TransUnion*. Specifically, Part II argues that lower courts should continue down the same path and apply the "downstream consequences" test solely to informational standing cases.[181] *Maloney* is

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174. *See Maloney*, 984 F.3d at 70 (Ginsburg, J., dissenting) (explaining that the Requesters "claim a statute enacted in 1928 and never successfully invoked in litigation gives each of them a personal right to exercise the investigative powers of the House of Representatives").

175. *See id.* at 71 (citing the central holding of *Spokeo* in that the denial of a statutory right to information is a concrete injury); Spokeo, Inc. v. Robins, 578 U.S. 330, 339 (2016) ("Particularization is necessary to establish injury in fact, but it is not sufficient. An injury in fact must also be 'concrete.'").

176. *See Maloney*, 984 F.3d at 74 (Ginsburg, J., dissenting) (explaining that just because § 2954 "delegates authority to certain [m]embers [of Congress] to request information from an [e]xecutive [a]gency does not mean it confers a right personal to each of them").

177. *Id.* at 70 (majority opinion).

178. *Infra* Part II.

179. *Infra* Section II.A.

180. *Infra* Section II.C.

181. *Infra* Section II.A.

consistent with *TransUnion* because § 2954 plaintiffs have suffered an informational injury.[182] Consequentially, § 2954 plaintiffs sufficiently pass the "downstream consequences" test because the failure to receive information in *Maloney* resulted in the plaintiffs' inability to conduct their congressional oversight duties.[183]

A. Lower Courts Should Differentiate Between the "Common-Analogue" and "Downstream Consequences" Tests to Avoid Upending Informational Standing

Lower courts should distinguish the "downstream consequences" test from the "historic-analogue" test because it protects informational standing and is consistent with the central holding of *TransUnion*.[184] This Comment demonstrates the necessity of distinguishing the two tests by first applying the "historic-analogue" test alone, then by applying both the "historic-analogue" and "downstream consequences" tests together, and finally by applying the "downstream consequences" test to informational injuries.[185] The application of the tests shows that the only way to resolve the concerns that *TransUnion* dismantled regarding informational standing is to apply the "downstream consequences" test alone to informational injuries.[186]

First, *Dinerstein* demonstrates the danger of misapplying the *TransUnion* tests.[187] *Dinerstein* is an appropriate case for this analysis because of the Seventh Circuit's interpretation of the "historic-analogue" test.[188] Specifically, the Seventh Circuit employed the strictest application of *TransUnion*'s "historic-analogue" test when it interpreted it to require courts to "*nail down a particular* common-law analogue."[189] Thus, even though the Seventh Circuit correctly applied the "historic-analogue" test to an intangible harm—rather than an

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182. *Infra* Section II.B.
183. *Infra* Section II.C.
184. *See* Chemerinsky, *supra* note 112, at 270 (explaining that "if taken literally," the Court's holding in *TransUnion* "would mean that a federal law creating a legal right may be enforced in federal court only if it safeguards a right that was protected historically or at common law").
185. *Infra* Section II.A.
186. *Id.*
187. *See supra* Section I.C.3. (discussing *Dinerstein* and the "historic-analogue" test); TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2204, 2214 (defining both tests).
188. Dinerstein v. Google, LLC, 73 F.4th 502, 513, 521 (7th Cir. 2023).
189. *Id.* at 513 (emphasis added); *see also* Perry v. Newsom, 18 F.4th 622, 632 (9th Cir. 2021) ("An analogy to a traditionally recognized cause of action does not relieve a complainant of its burden to demonstrate an injury.").

informational injury—as this Comment recommends, the strict application is nevertheless a ripe tool to analyze the dangers of misapplying the two tests.[190]

Despite identifying four traditional tort theories comparable to Dinerstein's theory, the Seventh Circuit nevertheless declined to find standing merely because Dinerstein failed to identify a case about "the dissemination of anonymized information."[191] In other words, without identifying an identical traditional tort theory—despite acknowledging *four* comparable traditional tort theories—the court could not "nail down a particular common-law analogue" and accordingly refused to find that Dinerstein had standing.[192] What if this had been a FOIA case where the Seventh Circuit applied the "historic-analogue" test? The Seventh Circuit would not be able to "nail down a particular common-law analogue" for a FOIA suit, let alone any informational injury, because there was no common-law right to access documents; thus, the plaintiff would not have standing.[193] One would be hard-pressed to find one similar common-law analogue to FOIA, let alone four similar analogues, like in *Dinerstein*. If the Seventh Circuit was not willing to find standing in *Dinerstein*, after recognizing four comparable common-law tort theories, then it seems like a fantasy to think that the Seventh Circuit would recognize standing in any informational injury case.

What if the D.C. Circuit had decided *Maloney* using the Seventh Circuit's strict interpretation of the "historic-analogue" test, requiring the D.C. Circuit to "nail down a particular common-law analogue" of the plaintiff's asserted injury?[194] One might argue that FOIA and Sunshine Statutes are particular common-law analogues because courts have long recognized their validity.[195] However, this argument likely fails for two reasons. First, § 2954 applies to members of Congress rather than private individuals, and, therefore, likely would not be particular enough under the Seventh Circuit's strict "historic-

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190. *Dinerstein*, 73 F.4th at 513–14.
191. *Id.* at 513 (emphasis omitted).
192. *Id.* at 513–14 (noting that although Dinerstein's breach of contract claim satisfied the "historic-analogue" test, Dinerstein nevertheless lacked standing because he failed to allege injuries resulting from the breach of contract).
193. *See* Chemerinsky, *supra* note 112, at 270–71.
194. *See supra* notes 132–40 and accompanying text.
195. *See supra* notes 52–54 and accompanying text.

analogue" test.[196] Second, even if it were sufficiently particular another problem arises because informational injuries lack historical analogues in their entirety.[197] Therefore, misinterpreting *TransUnion* and only applying the "historic-analogue" test to informational injury cases confirms Chemerinsky's fear, that because there was no common-law right to access documents—let alone by members of Congress—courts could stop enforcing suits arising under informational statutes like FOIA.[198] Because plaintiffs inevitably lack standing to sue under the "historic-analogue" test, courts need to apply another test if informational injuries are to survive *TransUnion*.[199]

Rather than solely applying the "historic-analogue" test, what if a lower court applied the "historic-analogue" test in conjunction with the "downstream consequences" test?[200] Imagine instead that the Seventh Circuit heard a case involving an informational injury, like the one Justice Kavanaugh suggested in *TransUnion*, where a plaintiff demonstrated "that the alleged information deficit hindered their ability to correct erroneous information before it was later sent to third parties."[201] Under this example, a plaintiff establishes "downstream consequences" by their inability to correct erroneous information before the information is later sent to third parties.[202] Accordingly, if the Seventh Circuit applies both the "historic-analogue" and "downstream consequences" tests, the plaintiff has passed the "downstream consequences" test.[203] Under Justice Kavanaugh's "downstream consequences" test, the plaintiff clearly suffered an informational injury. Nevertheless, the Seventh Circuit, in also applying the "historic-analogue" test, would have to dismiss the claim for lack of standing because a historical record is necessary to establish

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196. *See* 5 U.S.C. § 2954 (conferring authority on members of the U.S. House of Representatives or Senate and specific congressional committees to request information from executive agencies, rather than private individuals).

197. *See* Chemerinsky, *supra* note 112, at 270–71.

198. *See id.* (explaining instead that even though "Congress, through legislation, created this statutory right, and its infringement has always been deemed an injury sufficient for standing," that without a common-law analogue, after *TransUnion*, "it is unclear whether suits to enforce the Freedom of Information Act still will be allowed").

199. Chemerinsky, *supra* note 112, at 270–71.

200. *See supra* Section I.C for an explanation of the two tests.

201. *See* TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2214 (2021) (providing an example of how the plaintiffs could have successfully satisfied the "downstream consequences" test).

202. *Id.*

203. *Id.*

standing, but informational injuries do not have a clear historical record.

This presents a Catch-22 for informational injury plaintiffs: either they satisfy the "downstream consequences" test but fail under the "historic-analogue" test, or they fail under the "historic-analogue" test in its entirety.[204] Informational injuries thus fail if a court applies both the "downstream consequences" and "historic-analogue" tests at the same time. Therefore, the only remaining test to keep informational standing alive is the "downstream consequences" test.

Because informational plaintiffs lack standing under the "historic-analogue" test alone and the "historic-analogue" test in conjunction with the "downstream consequences" test, the only test that allows informational plaintiffs to succeed is applying the "downstream consequences" test alone. Luckily for informational plaintiffs, lower courts, like the Seventh Circuit, only apply the "historic-analogue" test to intangible injuries.[205] For example, the Second, Third, Sixth, and Tenth Circuits all applied the "downstream consequences" test solely to informational plaintiffs.[206] Otherwise, a plaintiff asserting an informational injury—or any injury not recognized at common law—would not survive the Seventh Circuit's strict interpretation of this test.[207]

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204. *See* *Catch-22*, MERRIAM-WEBSTER.COM, https://www.merriam-webster.com/dictionary/catch-22 [https://perma.cc/45GK-S6DM] (defining catch-22 as "a problematic situation for which the only solution is denied by a circumstance inherent in the problem or by a rule" or "an illogical, unreasonable, or senseless situation"). *See generally* JOSEPH HELLER, CATCH-22 (1961) (origin of the common phrase "catch-22").

205. *See, e.g.*, Harty v. W. Point Realty, Inc., 28 F.4th 435, 444 (2d Cir. 2022) (holding that the plaintiff lacked standing because he merely made a "boilerplate assertion" that the defendant's website violated the Americans with Disabilities Act rather than showing the downstream consequences of the website's non-compliance beyond the violation itself); Laufer v. Looper, 22 F.4th 871, 881 (10th Cir. 2022) (holding that the plaintiff did not sufficiently establish that she suffered an injury from the inability to access the information from the Elk Run Inn because she did not show plans to use the information she sought); Grae v. Corrs. Corp. of Am., 57 F.4th 567, 570 (6th Cir. 2023) ("Since *TransUnion*, the courts of appeals have consistently recognized that, to have standing, a plaintiff claiming an *informational injury* must have suffered adverse effects from the denial of access to information." (emphasis added)).

206. *Harty*, 28 F.4th at 444; *Looper*, 22 F.4th at 881; *Grae*, 57 F.4th at 570.

207. *See* Joseph P. Teknus, Note, *Standing Up to* TransUnion*: How FDCPA Plaintiffs Can Satisfy* TransUnion*'s Heightened Concrete Injury Standard*, 108 CORNELL L. REV. 233, 251 (2022) ("If plaintiffs' injuries were concrete only when they exactly matched a common law harm, then Congress could never create new causes of action to protect

Surprisingly, despite the lack of guidance, the lower courts have, for the most part, consistently applied *TransUnion* in such a way as to not undermine informational standing.[208] When restricting the "downstream consequences" test solely to informational injuries, courts do not stray from the holding in *TransUnion*.[209] Unlike other recent cases where the Court explicitly overruled precedent or a test, *TransUnion* merely stated that the plaintiffs failed to identify "downstream consequences," not that the plaintiffs could not establish an informational injury full stop because informational injuries do not satisfy Article III standing requirements.[210] Further, Justice Kavanaugh favorably cited to *Public Citizen* and *Akins* in the *TransUnion* opinion, suggesting that the Court did not intend to upend informational standing.[211] Instead, the Court merely concluded that *Public Citizen* and *Akins* did not control here because the plaintiffs "did not allege that they failed to receive any required information"—only that they failed to receive it in the *correct format*.[212] These factors all lead to one conclusion: the majority in *TransUnion* did not intend to upend informational standing.[213] Consequentially, if the "downstream consequences" test is the only test from *TransUnion* that preserves informational standing, then lower courts should continue to apply this test, and only this test, in informational injury cases.[214] It seems that not only is the "downstream consequences" test the only way that

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rights that did not exist at common law. Such an expansive reading of *TransUnion* would undermine . . . over a half-century's worth of civil rights, environmental, labor, and transparency laws.").

208. *See supra* notes 113–20 and accompanying text (discussing the potential consequences of applying the historic-analogue test to informational injuries).

209. *Compare* TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2214 (2021), *with* Kelly v. RealPage Inc., 47 F.4th 202, 214 (3d Cir. 2022), *and Harty*, 28 F.4th at 444.

210. *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2242 (2022) (stating explicitly "[w]e hold that *Roe* and *Casey* must be overruled"); Students for Fair Admissions, Inc. v. President and Fellows of Harvard Coll., 143 S. Ct. 2141 (2023) (stating explicitly in regard to affirmative action in higher education that "[w]e have never permitted admissions programs to work in that way, and we will not do so today").

211. *TransUnion*, 141 S. Ct. at 2214.

212. *Id.*

213. *See Kelly*, 47 F.4th at 213 (noting that *TransUnion* does not require plaintiffs to "prove that they would do anything with the information once disclosed, nor did *TransUnion* suggest that a plaintiff's failure to act on the information, if disclosed, would be dispositive").

214. *See supra* Section II.A.

informational injuries survive in a post-*TransUnion* world, but maybe the better test overall by avoiding the messiness that is common-law.[215]

B. Maloney v. Murphy *Withstands Lower Courts' Interpretation of* TransUnion *Because It Involves an Informational Injury*

Consistent with the lower courts' interpretation of *TransUnion*, if *Maloney* involves informational standing, then the "downstream consequences" test is the proper test to determine whether the plaintiffs sufficiently allege a concrete injury.[216] It follows, then, that because *Maloney* involves informational standing, the proper analysis is the "downstream consequences" test.[217]

The D.C. Circuit explained that because the Requesters are the ones who sought the information from GSA, and were denied the information, Congress gave them the right to receive under § 2954.[218] Thus, the Requesters "suffered a concrete and particularized injury by the GSA's denial" of information.[219] Further, the Court compared the Requesters' injury to those suffered by a FOIA plaintiff, another classic example of an informational injury.[220]

However, it is not enough to merely establish that the Requesters failed to receive information to which they were entitled; § 2954 plaintiffs must also establish "downstream consequences" from the failure to receive information.[221]

215. *See* Solove & Citron, *supra* note 110, at 67 (characterizing the common law as "a mutt" because "it is an amalgamation of ideas from various sources, only some of which are judicial decisions" and "is cobbled together in a more eclectic and ad hoc manner").
216. *See supra* Section II.A.
217. *See* Maloney v. Murphy, 984 F.3d 50, 61 (D.C. Cir. 2020) (calling the right conferred by § 2954 an "informational right").
218. *Id.* at 64.
219. *Id.* at 65.
220. *See id.* at 61 (explaining that "[t]he right to request information under [§] 2954 is on all fours, for standing purposes, with the informational right conferred by" FOIA, and that "like FOIA, [§] 2954's informational right is meant to empower individuals to" compel transparency from the government).
221. *See* TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2214 (2021) (suggesting that plaintiffs seeking to assert an informational injury must establish "downstream consequences" from the failure to receive information).

C. Maloney v. Murphy *Satisfies the "Downstream Consequences" Test Because the Denial of Information Hindered the Requesters' Ability to Fulfill Their Professional Duties as Committee Members*

Justice Kavanaugh gave little by way of guidance to the "downstream consequences" test; however, the lower courts provided guidance through their interpretations of the "downstream consequences" test.[222] Moreover, Justice Kavanaugh's example of a "downstream consequence" from *TransUnion* does not apply in this case because *Maloney* did not involve third-party businesses receiving and using false information.[223] Instead, *Maloney* involves the Requesters' inability to fulfill their congressional duties.[224] Thus, this Comment must turn to the lower courts for guidance.[225]

According to the Second Circuit, a plaintiff must do more than make a "boilerplate assertion" and "show . . . an 'interest in using the information . . . beyond bringing [the] lawsuit.'"[226] Similarly, the Third Circuit established three requirements for an informational plaintiff.[227] First, an informational plaintiff "must establish a nexus among the omitted information to which she has entitlement."[228] Second, the plaintiff must show that the harm actually caused violation.[229] Third, the plaintiff must establish "the 'concrete interest' that Congress identified as 'deserving of protection' when it created the disclosure requirement."[230] The Tenth Circuit asserts an extremely

222. *See id.* at 2214 (providing only one example whereby the plaintiffs in this case could have established "downstream consequences" by demonstrating that "the alleged information deficit hindered their ability to correct erroneous information before it was later sent to third parties").

223. *See id.* (explaining, by way of a hypothetical, how the remaining class members could have sufficiently established standing).

224. *Contra Maloney*, 984 F.3d at 54 (D.C. Cir. 2020) (involving members of Congress who sought to compel information from GSA under § 2954).

225. *E.g.*, Harty v. West Point Realty, Inc., 28 F.4th 435, 444 (2d Cir. 2022); Kelly v. RealPage Inc., 47 F.4th 202, 214 (3d Cir. 2022); Laufer v. Looper, 22 F.4th 871, 881 (10th Cir. 2022).

226. *Harty*, 28 F.4th at 444 (quoting *Looper*, 22 F.4th at 881).

227. *See Kelly*, 47 F.4th at 213 (explaining that even though the Third Circuit establishes different requirements for establishing informational injuries "the upshot is the same").

228. *Id.* at 213.

229. *Id.*

230. *Id.* (citing Tailford v. Experian Info. Sols., Inc., 26 F.4th 1092, 1100 (9th Cir. 2022)).

low bar, explaining that adverse effects are satisfied when the information sought has "some relevance" to the plaintiffs.[231]

First, looking to the Second Circuit's interpretation, the plaintiffs in *Maloney* must make more than a "boilerplate assertion" by showing "an 'interest in using the information beyond bringing [the] lawsuit.'"[232] The *Maloney* plaintiffs survive under the Second Circuit's interpretation.[233] The Requesters established an interest in using the information beyond bringing the lawsuit because GSA's denial of information was directly tied to Congress's oversight functions and ability to effectively perform such functions.[234] As the D.C. Circuit stated, "the Requesters sought the information covered by Section 2954 in this case to inform and equip them personally to fulfill their professional duties as Committee members."[235] The Seven Member Rule directly relates to Congress's ability—and responsibility—to perform oversight on the Executive Branch.[236] The Supreme Court has consistently upheld and reinforced the importance of congressional oversight.[237] In reinforcing the importance of congressional oversight, the Supreme Court inadvertently supports the *Maloney* plaintiffs' interest in using the information beyond bringing a lawsuit by fulfilling their oversight duties.[238]

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231. *See Looper*, 22 F.4th 871 at 881 (citing Griffin v. Dep't of Labor Fed. Credit Union, 912 F.3d 649, 654 (4th Cir. 2019)).

232. Harty v. West Point Realty, Inc., 28 F.4th 435, 444 (2d Cir. 2022) (quoting *Looper*, 22 F.4th at 881).

233. *See id.*

234. *See* Maloney v. Murphy, 984 F.3d 50, 55 (D.C. Cir. 2020) (explaining that § 2954 uniquely focuses on governmental oversight and accountability).

235. *Id.* at 64.

236. *Id.* at 55.

237. *See, e.g.*, Watkins v. United States, 354 U.S. 178, 187 (1957) (holding that the "power of the Congress to conduct investigations is inherent in the legislative process[,] . . . is broad[, and] comprehends probes into departments of the Federal Government to expose corruption, inefficiency[,] or waste"); Barenblatt v. United States, 360 U.S. 109, 111 (1959) (holding that "[t]he scope of the power of inquiry . . . is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution"); Trump v. Mazars USA, LLP, 140 S. Ct. 2019, 2031 (2020) (holding that Congress's power to investigate is essential and that "[w]ithout information, Congress would be . . . unable to legislate 'wisely or effectively'" (quoting McGrain v. Daugherty, 273 U.S. 135, 175 (1927)); *see also* TODD GARVEY, CONG. RSCH. SERV., IF10015, CONGRESSIONAL OVERSIGHT AND INVESTIGATIONS (2022) ("[T]he Supreme Court has firmly established that such power [to conduct oversight and investigations] is so essential to the legislative function as to be implied from the general vesting of legislative powers in Congress in Article I of the Constitution.").

238. *See* cases cited *supra* note 237.

Similarly, the *Maloney* plaintiffs survive under the Third Circuit's interpretation of the "downstream consequences" test.[239] First, there is a nexus between the failure to receive the requested information from GSA and the concrete interest that Congress has identified as deserving of protection in creating § 2954.[240] Namely, § 2954 was enacted to protect Congress's oversight and investigatory function.[241] Without the information requested under § 2954, GSA hindered the Requesters' ability to perform oversight—the interest Congress sought to protect.[242] Moreover, Congress sought to create efficiency in enacting § 2954, which GSA hindered by failing to comply with the requests as seen in the months of back and forth and ultimately years of litigation.[243] Finally, the *Maloney* plaintiffs suffered "downstream consequences" under the Tenth Circuit's extremely low bar, as GSA's failure to provide requested information has more than "some relevance" to the plaintiffs' inability to fulfill their congressional oversight roles.[244]

Overall, the *Maloney* plaintiffs have Article III standing pursuant to the lower courts' interpretation of *TransUnion*'s "downstream consequences" test.[245] Therefore, if *Maloney* were decided in a post-*TransUnion* world, the D.C. Circuit would likely still hold that the Requesters have standing to sue. Specifically, the *Maloney* plaintiffs establish "downstream consequences" from GSA's failure to comply with § 2954 because it hinders their ability to fulfill their constitutionally-recognized oversight roles.[246]

CONCLUSION

This Comment did not explore the potential implications of *Alexander v. Sandoval*,[247] where the Supreme Court drastically limited implied rights of action.[248] If Congress did not intend for a statute to

239. *Supra* notes 226–29 and accompanying text.
240. *Supra* notes 9–13 and accompanying text.
241. *Supra* notes 9–13 and accompanying text; *see* GARVEY, *supra* note 237 (listing three main purposes of oversight: (1) programmatic purposes such as "investigating waste, fraud, and abuse;" (2) political purposes; and (3) institutional purposes such as "checking the power of the executive branch").
242. *Supra* notes 2–13 and accompanying text.
243. *Supra* notes 2–13 and accompanying text.
244. *Supra* note 231 and accompanying text.
245. *Supra* Section II.C.
246. *Supra* note 234 and accompanying text.
247. 121 S. Ct. 1511 (2001).
248. *Id.* at 1515.

create a personal remedy, then there can be no private right of action.[249] Therefore, the question remains whether § 2954 creates a private right of action.

Despite its lack of clarity and guidance, lower courts have surprisingly managed to apply *TransUnion* in a consistent and an appropriate way.[250] This Comment urges lower courts to apply the "downstream consequences" test in conjunction with informational standing cases.[251] Conversely, lower courts should continue to use the "historic-analogue" test in cases where there is an intangible injury, so long as courts continue to distinguish this test as inapplicable to cases that involve an informational injury.[252] In doing so, not only do the lower courts stay consistent with the *TransUnion* holding, but also simultaneously protect informational standing.[253] In the future, so long as § 2954 plaintiffs allege adequate downstream consequences by establishing that the failure to receive information hinders their ability to effectively legislate, they will have informational standing.[254] Accordingly, if *Maloney* were decided today, it should survive *TransUnion* because GSA's failure to comply with the § 2954 requests hindered the Requesters' ability to perform their congressional oversight role, thus establishing "downstream consequences."[255]

249. *See* Zivotofsky *ex rel.* Ari Z. v. Sec'y of State, 444 F.3d 614, 617 (D.C. Cir. 2006) (stating that rights created through congressional statutes confer standing for injuries that would otherwise lack standing).
250. *Supra* Section I.C.1.
251. *Supra* Section II.A.
252. *Supra* Section II.A.
253. *Supra* Section II.A.
254. *Supra* Section II.C.
255. *Supra* Section II.C.