Article III Standing in the Roberts Court

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I. INTRODUCTION

Although the U.S. Supreme Court has reduced the number of merits cases it considers over time, it nevertheless devotes a disproportionate percentage of its total cases to matters involving standing—i.e., which matters may be brought in federal court. The amount of time allocated to these types of cases underscores the importance of standing in the federal court system. Article III of the U.S. Constitution concerns the Judiciary, and it provides that "the judicial Power" of the United States "shall extend to" certain "Cases" or "Controversies." The "Cases" or "Controversies" requirement imposes a significant restriction on federal court jurisdiction through limiting standing. This limitation is highly consequential, as, among other things, it stops the federal judiciary from issuing advisory opinions. On a more practical level, however, it also mandates that certain cases stay in the state court judicial system. The first portion of this article will provide an overview of standing doctrine, including an examination of its early roots. It will also consider the limitations on standing found in Article III of the U.S. Constitution. The article will then consider the elements needed to establish standing under Article III. The article will examine a series of important Article III standing decisions issued by the U.S. Supreme Court during the tenure of Chief Justice John Roberts, including *Spokeo, Inc. v. Robins* and *TransUnion LLC v. Ramirez*. Finally, the article will consider the potential impact of recent decisions going forward, including the types of Article III cases we are likely to see percolating up to the U.S. Supreme Court in the near future.

II. AN OVERVIEW OF STANDING

As an initial matter, Article III standing has repeatedly been described by the U.S. Supreme Court as a "bedrock requirement."[1] It has similarly been explained that "No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies."[2] This makes sense in a federal system with federal courts of limited jurisdiction, as it functions to limit the power of the judiciary. Yet, for such a bedrock requirement, courts (including the U.S. Supreme Court) have continued to wrestle with its application. This has continued to be true for the U.S. Supreme Court during the tenure of Chief Justice Roberts, who assumed the office of Chief Justice of the United States on September 29, 2005. The U.S. Supreme Court has taken up questions concerning Article III standing repeatedly during his tenure as Chief Justice. On a basic level, Article III standing determines who can sue in federal court—a highly consequential issue that can affect whether claims can be heard, the remedies available, and (potentially) the ultimate outcome of the case. During the Roberts Court, standing (and arguments over whether Article III standing exists in specific cases) has made its way into some of the most controversial cases over time.

On a basic level, standing is simply defined as "[a] party's right to make a legal claim or seek judicial enforcement of a duty or right."[3] It has both constitutional and prudential requirements. In general, to have standing in federal court a plaintiff must show: (1) that the challenged conduct has caused the plaintiff an actual injury, and (2) that the interest sought to be protected is within the zone of interests meant to be regulated by the statutory or constitutional guarantee in question.[4] In considering the meaning of "standing," the U.S. Supreme Court characterized Article III standing in the following manner: "Have the appellants alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions? This is the gist of the question of standing."[5] It has also been stated that "standing doctrines are employed to refuse to determine the merits of a legal claim, on the ground that even though the claim may be correct the litigant advancing it is not properly situated to be entitled to its judicial determination."[6] Whether this statement (and its associated implications) are correct can be debated. However, when considering standing, courts nevertheless focus on the party *making* the claim—*not* the claim itself or the merits of the claim.[7]

Notably, "standing" is not an ancient legal maxim; rather, it has more-recent roots. Specifically, the roots of standing have been described in the following manner:

> The word standing is rather recent in the basic judicial vocabulary and does not appear to have been commonly used until the middle of our own century. No authority that I have found introduces the term with proper explanations and apologies and announces that henceforth standing should be used to describe who may be heard by a judge. Nor was there any sudden adoption by tacit consent. The word appears here and there, spreading very gradually with no discernible pattern. Judges and lawyers found themselves using the term and did not ask why they did so or where it came from.[8]

In any event, the concept of standing is widespread and an important issue in many cases. And, as discussed below, it has been reconsidered in many cases during the Roberts Court. The next section will consider the specific elements of Article III standing.

III. ELEMENTS OF ARTICLE III STANDING

Article III of the U.S. Constitution provides that federal courts have the "judicial Power" to resolve only "Cases" or "Controversies."[9] To establish standing, "[t]he plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision."[10] The U.S. Supreme Court has described this as an "irreducible constitutional minimum," which means that it is the absolute baseline requirement for federal jurisdiction that cannot be lowered by Congress or the courts.[11] Thus, emphasizing its role and the importance in the federal judicial system. Each element is considered in turn below.

First, the injury-in-fact requirement has been described as "the '[f]irst and foremost' of standing's three elements."[12] In considering this element, the U.S. Supreme Court has repeatedly stressed that Congress cannot circumvent Article III by statutorily granting a plaintiff the right to sue when he or she would not otherwise possess standing under Article III.[13] This point is consequential, as many of the Article III standing cases discussed below involve private rights of action created by Congress and statutory violations.

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To establish an injury in fact, which is the first and foremost of the standing requirements, "a plaintiff must show that he or she suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'"[14] For an injury to be "particularized," it "must affect the plaintiff in a personal and individual way."[15] In addition to being "particularized," an injury in fact must also be "concrete." The U.S. Supreme Court explained the meaning of a "concrete" injury, as follows:

> A "concrete" injury must be "de facto"; that is, *it must actually exist*. When we have used the adjective "concrete," we have meant to convey the usual meaning of the term—*"real," and not "abstract."* Concreteness, therefore, is quite different from particularization…. "Concrete" is not, however, necessarily synonymous with "tangible." Although tangible injuries are perhaps easier to recognize, we have confirmed in many of our previous cases that intangible injuries can nevertheless be concrete…. In determining whether an intangible harm constitutes injury in fact, both history and the judgment of Congress play important roles. *Because the doctrine of standing derives from the case-or-controversy requirement, and because that requirement in turn is grounded in historical practice, it is instructive to consider whether an alleged intangible harm has a close relation-*

> *ship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts*.[16]

This is notable because the U.S. Supreme Court stressed the role of tradition in analyzing this element.

The second element requires that the claim be traceable to the challenged conduct of the defendant.[17] This is an element of causation. As described by the U.S. Supreme Court in one opinion, "there must be causation—a fairly traceable connection between the plaintiff's injury and the complained-of conduct of the defendant."[18] Likewise, the injury forming the basis of the plaintiff's claim cannot result from the independent action of some third party who is not before the court.[19]

The third and final element is redressability—i.e., a likelihood that the requested relief will redress the alleged injury.[20] In explaining how redressability should be considered, the U.S. Supreme Court in *Steel Co. v. Citizens for a Better Environment* distinguished a cognizable claim, as follows:

> By the mere bringing of his suit, every plaintiff demonstrates his belief that a favorable judgment will make him happier. But although a suitor may derive great comfort and joy from the fact that the United States Treasury is not cheated, that a wrongdoer gets his just deserts, or that the Nation's laws are faithfully enforced, that psychic satisfaction is not an acceptable Article III remedy because it does not redress a cognizable Article III injury. *Relief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court; that is the very essence of the redressability requirement*.[21]

In so doing, the U.S. Supreme Court underscored that a plaintiff must have an actual injury that can actually be redressed in the lawsuit.

In addition to the above three elements, relevant case law is clear that "[t]he plaintiff *must* establish standing at the time *suit is filed* and cannot manufacture standing afterwards."[22] Thus, the beginning of the case is the time to determine whether standing exists. However, the Article III standing inquiry "remains open to review at all stages of the litigation," evening during an ultimate appeal.[23] Stated another way, the controversy forming the basis of standing must exist at all stages of the litigation but cannot be manufactured later.[24]

It is also worth noting that Article III standing can neither be waived nor assumed.[25] Courts *must* also raise Article III standing *sua sponte*, where necessary, before considering other issues, including prudential standing issues.[26] [27] The same is true for appellate court review. As explained by one court, "Merely because a party appears in the district court proceedings does not mean that the party automatically has standing to appeal the judgment rendered by that court."[28] Rather, a plaintiff must establish both constitutional and prudential standing requirements.[29] In the next section of this article, we will consider specific cases involving Article III standing that were decided during the Roberts Court.

IV. LEADING CASES DURING THE ROBERTS COURT

As is made clear by the prior sections, Article III standing is important in our federal Constitutional system and is an important part of limiting the role of federal courts in our federal system.[30] It is also easy to see how the concrete and particularized requirements have also led to disputes. This section will examine several important cases concerning Article III standing issued by the Roberts Court.

A. *Spokeo*

In *Spokeo, Inc. v. Robins*,[31] the courts considered standing to bring a cause of action under the Fair Credit Reporting Act (FCRA). The FCRA requires, among other things, that consumer reporting agencies "follow reasonable procedures to assure maximum possible accuracy of" consumer reports.[32] It also imposes civil liability for willful noncompliance on "[a]ny person who willfully fails to comply with any requirement [of the Act] with respect to any consumer."[33]

Spokeo, Inc. (Spokeo) operates a "people search engine," which conducts a computerized search in a wide variety of databases and provides information about the subject of the search when someone inputs a person's name, phone number, or email address.[34] Spokeo performed such a search on Thomas Robins.[35] However, some of the information it gathered and then disseminated was not correct.[36] After learning of the inaccuracies, Robins filed a complaint on his own behalf and on behalf of a class of similarly situated individuals in the U.S. District Court for the Central District of California, alleging that Spokeo had willfully failed to comply with the FCRA.[37] The District Court dismissed Robins's complaint for lack of standing, and he appealed to the U.S. Court of Appeals for the Ninth Circuit.[38]

The Ninth Circuit reversed the dismissal, concluding that he "had alleged that Spokeo violated *his* statutory rights, not just the statutory rights of other people, and, second, that Robins's personal interests in the handling of his credit information are individualized rather than collective."[39] Based on these conclusions, the Ninth Circuit concluded that Robins had adequately alleged an injury in fact.[40] The case was appealed to the U.S. Supreme Court.[41]

The U.S. Supreme Court considered whether Robins had standing to maintain an action in federal court against Spokeo under the FCRA.[42] Ultimately, in a 6-2 majority opinion authored by Justice Samuel Alito, the U.S. Supreme Court determined that the Ninth Circuit's analysis was incorrect and vacated its decision, stating:

> This analysis was incomplete. As we have explained in our prior opinions, the injury-in-fact requirement requires a plaintiff to allege an injury that is both "concrete and particularized." The Ninth Circuit's analysis focused on the second characteristic (particularity), but it overlooked the first (concreteness). We therefore vacate the decision below and remand for the Ninth Circuit to consider *both* aspects of the injury-in-fact requirement.[43]

In explaining its rationale, the U.S. Supreme Court focused on the distinction between "concreteness" and "particularization," which it stated "the Ninth Circuit failed to fully appreciate," as it failed to consider "whether the particular procedural violations

alleged in this case entail a degree of risk sufficient to meet the concreteness requirement."[44] Accordingly, the judgment of the Ninth Circuit was vacated, and the case was remanded.[45]

Notably, Justice Clarence Thomas wrote a separate concurring opinion to explain how the injury-in-fact requirement applies to different types of rights.[46] As explained by Justice Thomas: "Common-law courts more readily entertained suits from private plaintiffs who alleged a violation of their own rights, in contrast to private plaintiffs who asserted claims vindicating public rights. Those limitations persist in modern standing doctrine."[47] Accordingly, Congress cannot create a new *private* right of action for the enforcement of a *public* right without the plaintiff showing a concrete harm particular to him.[48]

Justice Ruth Bader Ginsburg wrote a dissent, which was joined by Justice Sonia Sotomayor, that argued that because Robins alleged particularized harm, it was therefore unnecessary for him to meet a sperate particularity requirement.[49] Accordingly, she would have affirmed the Ninth Circuit's judgment.[50]

B. *Thole*

In *Thole v. U.S. Bank N.A.*,[51] the courts considered Article III standing for a class action lawsuit brought under the Employee Retirement Income Security Act of 1974 (ERISA). James Thole and others brought a class action lawsuit under ERISA against U.S. Bank N.A. and others (collectively, U.S. Bank) over alleged mismanagement of a defined benefit pension plan.[52] The U.S. District Court for the District of Minnesota dismissed the case because the plaintiffs lacked Article III standing.[53] The Eighth Circuit affirmed the dismissal, and the U.S. Supreme Court granted certiorari.[54]

In a majority opinion authored by Justice Brett Kavanaugh, who was joined by Chief Justice Roberts and Justices Thomas, Alito, and Neil Gorsuch, the U.S. Supreme Court affirmed the decision of the Eighth Circuit on ground that the plaintiffs lacked Article III standing.[55] The U.S. Supreme Court rejected four arguments put forth by Thole for standing: (1) that an ERISA defined-benefit plan participant possesses an equitable or property interest in the plan, meaning in essence that injuries to the plan are by definition injuries to the plan participant; (2) that they possess standing as representatives of the plan itself; (3) that ERISA affords the Secretary of Labor, fiduciaries, beneficiaries, and participants—including participants in a defined-benefit plan—a general cause of action to sue for restoration of plan losses and other equitable relief; and (4) that if defined-benefit plan participants may not sue to target perceived fiduciary misconduct, no one will meaningfully regulate plan fiduciaries.[56] However, the U.S. Supreme Court concluded that none of Thole's theories support Article III standing.[57]

Ultimately, the U.S. Supreme Court summarized their position, including that Thole would receive the same benefits whether he wins or loses, as follows:

> Courts sometimes make standing law more complicated than it needs to be. There is no ERISA exception to Article III. And under ordinary Article III standing analysis, the plaintiffs lack Article III standing for a simple, commonsense reason: *They have received all of their vested pension benefits so far, and they are legally entitled to receive the same monthly payments for the rest of their lives. Winning or losing this suit would not change the plaintiffs' monthly pension benefits*. The plaintiffs have no concrete stake in this dispute and therefore lack Article III standing.[58]

Accordingly, the majority affirmed the judgment of the Eighth Circuit.[59] In so doing, they focused on the basics of Article III standing rather than specifics principles of ERISA.[60]

Justice Thomas, with whom Justice Gorsuch joined, issued a separate concurring opinion.[61] In general, Justice Thomas opined that the U.S. Supreme Court's precedents unnecessarily complicate issues by requiring analogies to trust law. Rather, according to Justice Thomas: "There is thus no need to analogize petitioners' complaint to trust law actions, derivative actions, *qui tam* actions, or anything else. We need only recognize that the private rights that were allegedly violated do not belong to petitioners under ERISA or any contract."[62]

Finally, Justice Sotomayor, with whom Justices Ginsburg, Stephen Breyer, and Elena Kagan joined, wrote a dissenting opinion to state her opinion that the majority's conclusion conflicted with common sense and longstanding precedent.[63] After writing a lengthy opinion, Justice Sotomayor concluded her dissent by summarizing her criticism of the majority's opinion, as follows:

> The Constitution, the common law, and the Court's cases confirm what common sense tells us: People may protect their pensions. "Courts," the majority surmises, "sometimes make standing law more complicated than it needs to be." Indeed. Only by overruling, ignoring, or misstating centuries of law could the Court hold that the Constitution requires beneficiaries to watch idly as their supposed fiduciaries misappropriate their pension funds. I respectfully dissent.[64]

As is clear from this dissenting opinion, there was a sharp divide among the Justices' understanding of Article III standing with both sides couching their arguments in terms of precedent and authority.

C. *Trump*

In *Trump v. New York*,[65] the courts considered the standing required to challenge President Donald Trump's memorandum regarding the 2020 census. Every ten years, the United States "undertakes an 'Enumeration' of its population 'in such Manner' as Congress 'shall by Law direct.'"[66] Congress gives the Secretary of Commerce and the President "functions to perform in the enumeration and apportionment process."[67] The President issued a memorandum to the Secretary regarding the 2020 census, which declared a policy that excluded aliens of unlawful immigrant status from the apportionment base.[68] To implement this policy "to the maximum extent feasible and consistent with the discretion delegated to the executive branch, the President ordered the Secretary, in preparing his § 141(b) report, to provide information permitting the President, to the extent practicable, to exercise the President's discretion to carry out the policy."[69] The Secretary was directed to "include such

information in addition to a tabulation of population according to the criteria promulgated by the Census Bureau for counting each State's residents."[70] A number of states, local governments, organizations, and individuals challenged the President's memorandum in the U.S. District Court for the Southern District of New York.[71]

The District Court held that the plaintiffs had Article III standing because the memorandum "was chilling aliens and their families from responding to the census, thereby degrading the quality of census data used to allocate federal funds and forcing some plaintiffs to divert resources to combat the chilling effect."[72] The Government appealed, and the case percolated up to the U.S. Supreme Court.[73]

The U.S. Supreme Court began its analysis by examining Article III standing, stating that "an actual controversy must exist not only at the time the complaint is filed, but through all stages of the litigation."[74] Notably, the plaintiffs conceded that "any chilling effect from the memorandum dissipated upon the conclusion of the census response period" and sought to "substitute an alternative theory of a 'legally cognizable injury' premised on threatened impact of an unlawful apportionment on congressional representation and federal funding."[75] The U.S. Supreme Court concluded that the case does not "present a dispute 'appropriately resolved through the judicial process.'"[76] In reaching this conclusion, the majority examined two related doctrines of justiciability, which originated in Article III's case-or-controversy requirement.[77] First, a plaintiff must demonstrate that they have standing, "including 'an injury that is concrete, particularized, and imminent rather than conjectural or hypothetical.'"[78] Second, the case must also be ripe, meaning that it is not "dependent on 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'"[79] The U.S. Supreme Court stated that the present case was filled with "contingencies and speculation" that impede judicial review.[80] The majority further stated that judicial resolution of this matter was premature, pursuant to the standing and ripeness inquiries.[81] Ultimately, the U.S. Supreme Court concluded there was no standing that had been shown, and the case was not yet ripe.[82] Accordingly, it vacated the District Court's decision and remanded the case with instructions to dismiss for lack of jurisdiction.[83]

In a dissenting opinion authored by Justice Breyer, with whom Justices Sotomayor and Kagan joined, he argued that standing has been shown, that there is a justiciable controversy, and that controversy is ripe for resolution.[84] The dissent argues that the harm is "clear on the face of the policy."[85] Essentially, implementing the memorandum will lead to the "very 'representational and funding injuries' that the plaintiffs seek to avoid."[86] As explained by Justice Breyer in his dissent:

> The Government does not deny that, if carried out, the policy will harm the plaintiffs. Nor does it deny that it will implement that policy imminently (to the extent it is able to do so). Under a straightforward application of our precedents, the plaintiffs have standing to sue. The question is ripe for resolution. And, in my view, the plaintiffs should also prevail on the merits. The plain meaning of the governing statutes, decades of historical practice, and uniform interpretations from all three branches of Government demonstrate that aliens without lawful status cannot be excluded from the decennial census solely on account of that status. The Government's effort to remove them from the apportionment base is unlawful, and I believe this Court should say so.[87]

D. *Carney*

In *Carney v. Adams*,[88] the courts considered whether a plaintiff had standing to appeal Delaware's political balance requirement. The Delaware Constitution contains a political balance requirement that is applicable to membership on all five courts: the Supreme Court of Delaware, the Chancery Court, the Superior Court, the Family Court, and the Court of Common Pleas.[89] It requires that "no more than a bare majority of judges on any of these courts 'shall be of the same political party.'"[90] The Court calls this the "bare majority" requirement.[91] It also requires that the remaining members of the Supreme Court of Delaware, the Chancery Court, and the Superior Court, "shall be of the other major political party."[92] The Court calls this the "major party" requirement.[93] Ultimately, the five courts are subject to the "bare majority" requirement while three of them are also subject to the "major party" requirement.[94]

Plaintiff, a newly registered political independent, sued Delaware's governor in the U.S. District Court of the District of Delaware. *Id*. He claimed that Delaware's political balance requirements "violated his First Amendment right to freedom of association by making him ineligible to become a judge unless he rejoined a major political party."[95] The District Court held that Plaintiff had standing to challenge the "major party" and "bare majority" requirements.[96] The Third Circuit affirmed in part and reversed in part but found that Plaintiff had standing to challenge the "major party" requirement but not the "bare majority" requirement because the "bare majority" requirement "does not preclude independents from eligibility for any vacancy."[97] The Third Circuit held that the "major party" requirement violates the First Amendment and is "not severable from the 'bare majority' requirement."[98] The Third Circuit ultimately concluded that both requirements were invalid.[99] The U.S. Supreme Court granted certiorari and asked the parties to address whether Plaintiff had demonstrated Article III standing to bring this lawsuit.[100]

The U.S. Supreme Court began its opinion by examining standing, which requires an injury in fact "that must be 'concrete and particularized,' as well as 'actual or imminent.'"

The U.S. Supreme Court began its opinion by examining standing, which requires an injury in fact "that must be 'concrete and particularized,' as well as 'actual or imminent.'"[101] The injury in fact cannot be "conjectural or hypothetical."[102] Furthermore, there is no standing when a "grievance … amounts to nothing more than an abstract and generalized harm to a citizen's interest in the proper application of the law."[103] The U.S. Supreme Court concluded that Plaintiff suffered a "generalized grievance."[104] He

argued that the "major party" requirement prevents him from having "his judicial application considered for three of Delaware's courts."[105] The U.S. Supreme Court noted that, to prove this kind of harm, Plaintiff must at least show that "he is likely to apply to become a judge in the reasonably foreseeable future if Delaware did not bar him because of political affiliation."[106] Yet, Plaintiff can only show this if he is "able and ready" to apply for a judicial vacancy in the imminent future.[107] Plaintiff ultimately failed to show that he was "able and ready" to apply for a judgeship.[108] "Consequently, he has failed to show that 'personal,' 'concrete,' and 'imminent' injury upon which our standing precedents insist."[109] Accordingly, the U.S. Supreme Court reversed and remanded the matter to the Third Circuit with instruction to dismiss the case.[110]

Justice Sotomayor agreed that the plaintiff failed to demonstrate Article III standing, but she wrote a separate concurring opinion to note the need for separate constitutional analysis for "major party" requirement and the "bare majority" requirement and to claim that they are severable from one another.[111]

E. *TransUnion*

In *TransUnion LLC v. Ramirez*,[112] the courts considered whether a plaintiff was concretely harmed by the defendant's statutory violation under the FCRA for purposes of Article III standing. TransUnion, LLC (TransUnion) is a large credit reporting agency, which compiles both personal and financial information to create consumer reports on individual consumers.[113] TransUnion then sells the compiled reports to other entities—like banks, landlords, and car dealerships—who use them to evaluate creditworthiness.[114] TransUnion introduced an add-on product called OFAC Name Screen Alert, which helped businesses avoid transacting business with individuals on the U.S. Treasury Department's Office of Foreign Assets Control (OFAC) list.[115] The OFAC list consists of terrorists, drug traffickers, and other serious criminals, and it is usually unlawful to transact business with anyone on the list.[116]

For businesses who opted into the OFAC Name Screen Alert, TransUnion would conduct its ordinary credit check of the consumer but then it would use third-party software to compare the consumer's name against the OFAC list.[117] When the first and last name matched a name on the OFAC list, TransUnion would place an alert on the credit report indicating that the consumer's name was a "potential match" to a name on the OFAC list.[118] TransUnion only used first and last names when screening names on the OFAC list, which resulted in many false positives.[119] As would ultimately be stated by the U.S. Supreme Court: "Thousands of law-abiding Americans happen to share a first and last name with one of the terrorists, drug traffickers, or serious criminals on OFAC's list of specially designated nationals."[120]

Sergio Ramirez sought to buy a car on February 27, 2011, at a Nissan dealership in Dublin, California.[121] A credit check by the dealership with TransUnion included an alert that stated the "input name matches name on the OFAC database."[122] Nissan refused to sell him a car, since "his name was on a 'terrorist list.'"[123] Ramirez's wife purchased the car in her name.[124] TransUnion eventually removed the OFAC alert from his credit file.[125]

In 2012, Ramirez sued TransUnion in the U.S. District Court for the Northern District of California for three violations of the FCRA, alleging TransUnion (1) failed to follow reasonable procedures to ensure accuracy of information in his credit file; (2) failed to provide him with all the information in his credit file upon request;[126] and (3) violated its obligation to provide him with a summary of his rights with each written disclosure.[127] Ramirez sought statutory and punitive damages for the above violations.[128] He also sought to certify a class of all people in the United States to whom TransUnion sent a mailing during the period from January 1, 2011, to July 26, 2011, that was similar in form to the second mailing that Ramirez received.[129] TransUnion opposed certification; however, the District Court certified the class.[130] Before trial, the parties stipulated that the class contained 8,185 members, but that only 1,853 members of the class had their credit reports disseminated to potential creditors between January 1, 2011 to July 26, 2011.[131] The District Court ruled that all 8,185 class members had Article III standing.[132]

At trial, Ramirez testified about his experience at the Nissan dealership, but he did not present evidence about the experiences of other members of the class.[133] The jury returned a verdict for the plaintiffs and awarded each class member $984.22 in statutory damages and $6,353.08 in punitive damages.[134] TransUnion appealed to the U.S. Court of Appeals for the Ninth Circuit.[135]

In relevant part, the Ninth Circuit held that all class members had Article III standing to recover damages for all three claims alleged.[136] However, it reduced the punitive damages awarded to each class member.[137] One of the Ninth Circuit judges, Judge Mary Margaret McKeown, dissented because she argued only class members whose reports were disseminated to third parties had Article III standing.[138] "In her view, the remaining 6,332 class members did not suffer a concrete injury sufficient for standing. As to the two claims related to the mailings, Judge McKeown would have held that none of the 8,185 class members other than the named plaintiff Ramirez had standing as to those claims."[139] TransUnion appealed to the U.S. Supreme Court.[140]

The U.S. Supreme Court granted certiorari to consider whether the 8,185 class members have Article III standing as to their three claims.[141] In a majority opinion authored by Justice Kavanaugh and joined by Chief Justice Roberts and Justices Alito, Gorsuch, and Barrett, the majority reversed the decision of the Ninth Circuit and remanded the case for the Ninth Circuit to reconsider the class certification.[142] In reaching this decision, the U.S. Supreme Court first examined the requirements of Article III standing.[143] As explained by the U.S. Supreme Court, "to establish standing, a plaintiff must show (i) that he suffered an injury in fact that is concrete, particularized, and actual or imminent; (ii) that the injury was likely caused by the defendant; and (iii) that the injury would likely be redressed by judicial relief."[144] "If 'the plaintiff does not claim to have suffered an injury that the defendant caused and the court can remedy, there is no case or controversy for the federal court to resolve.'"[145] Moreover, "Requiring a plaintiff to demonstrate a concrete and particularized injury caused by the defendant and redressable by the court ensures that federal courts decide only 'the rights of individuals,' and that federal courts exercise 'their proper function in a limited and separated government.'"[146]

In considering what makes a harm concrete for the purposes of Article III, the majority explained history and tradition serve as a "meaningful guide" to the types of cases that

satisfy the Constitution's standing requirements.[147] Moreover, the U.S. Supreme Court explained:

> [C]ertain harms readily qualify as concrete injuries under Article III. The most obvious are traditional tangible harms, such as physical harms and monetary harms. If a defendant has caused physical or monetary injury to the plaintiff, the plaintiff has suffered a concrete injury in fact under Article III…. Various intangible harms can also be concrete. Chief among them are injuries with a close relationship to harms traditionally recognized as providing a basis for lawsuits in American courts. Those include, for example, reputational harms, disclosure of private information, and intrusion upon seclusion. And those traditional harms may also include harms specified by the Constitution itself.[148]

Ultimately, the U.S. Supreme Court held that only the 1,853 individuals who had their credit reports provided to third parties had standing. In explaining its rationale, the U.S. Supreme Court explained: "Under longstanding American law, a person is injured when a defamatory statement 'that would subject him to hatred, contempt, or ridicule' is published to a third party."[149] Here, TransUnion provided third parties with credit reports containing OFAC alerts that labeled the class members as potential terrorists, drug traffickers, or serious criminals.[150] Based on this label, "[t]he 1,853 class members therefore suffered a harm with a 'close relationship' to the harm associated with the tort of defamation."[151] "We have no trouble concluding that the 1,853 class members suffered a concrete harm that qualifies as an injury in fact."[152] On the other hand, the U.S. Supreme Court concluded that "[t]he mere presence of an inaccuracy in an internal credit file, if it is not disclosed to a third party, causes no concrete harm."[153] Accordingly, the U.S. Supreme Court reversed and remanded the case.[154]

Justice Thomas, who was joined by Justices Breyer, Sotomayor, and Kagan, authored a dissenting opinion that argued injury in law to a private right (such as trespass on land) has historically been sufficient to establish "injury in fact" for standing purposes.[155] For those claims, courts have not required any showing of actual damage.[156] In contrast, "where an individual sued based on the violation of a duty owed broadly to the whole community, such as the overgrazing of public lands, courts required 'not only *injuria* [legal injury] but also *damnum* [damage].'"[157] Stated another way, in Justice Thomas's view, any violation of an individual right created by Congress gives rise to Article III standing.[158] According to the dissent, each class member in this case demonstrated violation of their private rights.[159] Moreover, the dissent took issue with the majority's focus on concrete harm, stating:

> Rejecting this history [concerning the Congress's actions in creating the FCRA], the majority holds that the mere violation of a personal legal right is not—and never can be—an injury sufficient to establish standing. What matters for the Court is only that the injury in fact be concrete. *No concrete harm, no standing.* That may be a pithy catchphrase, but it is worth pausing to ask why "concrete" injury in fact should be the sole inquiry. After all, it was not until 1970—180 years after the ratification of Article III—that this Court even introduced the injury in fact (as opposed to injury in law) concept of standing.[160]

Finally, the dissent argued that many people (including Congress, the President, the jury, the District Court, and the Ninth Circuit) all "think that a person is harmed when he requests and is sent an incomplete credit report, or is sent a suspicious notice informing him that he may be a designated drug trafficker or terrorist, or is *not* sent anything informing him of how to remove this inaccurate red flag."[161]

Justice Kagan, who was joined by Justices Breyer and Sotomayor, drafted her own dissenting opinion to express her disagreement in one part from Justice Thomas's dissent.[162] First, Justice Kagan stated that Justice Thomas's view is that any violation of an individual right created by Congress gives rise to Article III standing.[163] However, in her view, she explained:

> Article III requires for concreteness only a "real harm" (that is, a harm that "actually exist[s]") or a "risk of real harm." And as today's decision definitively proves, Congress is better suited than courts to determine when something causes a harm or risk of harm in the real world. For that reason, *courts should give deference to those congressional judgments*.[164]

Accordingly, Justice Kagan joined Justice Thomas's dissent but qualified that one point regarding deference to Congress.

F. *Whole Woman's Health*

In *Whole Woman's Health v. Jackson*,[165] the court considered standing to bring a claim under the Texas Heartbeat

Act. In 2021, Texas passed the Texas Heartbeat Act, also known as S.B. 8, which "prohibits physicians from 'knowingly performing or inducing an abortion on a pregnant woman if the physician detected a fetal heartbeat for the unborn child' unless a medical emergency prevents compliance."[166] The Act is enforced through private civil actions "culminating in injunctions and statutory damages awards against those who perform or assist prohibited abortions."[167] After its adoption, a number of abortion providers set out to test its constitutionality.[168] Some providers filed a pre-enforcement action in federal court, alleging that the Act violates the Constitution and sought an injunction disallowing certain defendants from taking action to enforce the statute.[169] A private defendant moved to dismiss the case, alleging lack of standing.[170] The U.S. District Court for the Western District of Texas denied his motion, but he filed an interlocutory appeal to the U.S. Court of Appeals for the Fifth Circuit.[171] The U.S. Supreme Court granted certiorari before judgment in this case to determine whether, under our precedents, certain abortion providers can pursue a pre-enforcement challenge to a recently enacted Texas statute.[172]

The private defendant argued that the petitioners do not have standing to sue him because "he possesses no intention to file an S.B. 8 suit against them."[173] In so doing, he provided sworn declarations attesting as such.[174] The U.S. Supreme Court found that, on the record before them, the petitioners are unable to establish "personal injury fairly traceable to [the private defendant's] allegedly unlawful conduct."[175] The court summarized that "[e]very Member of the court accepts that the only named private-individual defendant…should be dismissed."[176] In summarizing the U.S. Supreme Court's decision and stressing the importance of standing, the majority opinion stated: "[O]ne thing this Court may never do is disregard the traditional limits on the jurisdiction of federal courts just to see a favored result win the day. At the end of that road is a world in which '[t]he division of power' among the branches of Government 'could exist no longer, and the other departments would be swallowed up by the judiciary.'"[177] Accordingly, the District Court's decision was affirmed in part and reversed in part, and the case was remanded for further proceedings.[178]

"[O]ne thing this Court may never do is disregard the traditional limits on the jurisdiction of federal courts just to see a favored result win the day.

There were multiple concurrences in part issued by members of the U.S. Supreme Court. Relevant here was Justice Thomas's opinion concurring in part and dissenting in part.[179] Therein, Justice Thomas explained that he would hold that the petitioners do not have Article III standing because "abortion providers lack standing to assert the putative constitutional rights of their potential clients."[180] Furthermore, he did not think that the petitioners have not shown "injury or redressability for many of the same reasons they cannot satisfy *Ex Parte Young*."[181] As to injury, Justice Thomas stated that petitioners have not shown that there is a likelihood of enforcement by any respondent, nor that such enforcement is "certainly impending."[182] Finally, Justice Thomas stated that the petitioners seek a declaration that the law is unlawful, even though no respondent can or will enforce it.[183] Accordingly, this amounts to an impermissible advisory opinion, which does not meet the requirements of redressability.[184]

G. *Uzuegbunam*

In *Uzuegbunam v. Preczewski*,[185] the court considered redressability in the context of free speech claims. In 2016, Chike Uzuegbunam engaged in conversation with students and handed out religious literature at a public college in which he was enrolled.[186] Uzuegbunam was informed by a campus police officer that campus policy prohibited the distribution of religious materials in that area, and he was advised to stop.[187] Uzuegbunam complied, then visited the college's Director of the Office of Student integrity to learn more about the campus policy.[188] This Director was "directly responsible for promulgating and enforcing the policy."[189] Plaintiff asked the Director if he could speak about his religion if he ceased distributing materials, but the Director declined and explained that Plaintiff could speak about his religion or distribute materials in only the two designated "free speech expression areas," with the required permit. Plaintiff applied for and received the required permit, and after doing so, proceeded to speak on campus.[190] Plaintiff was again told to stop by a campus police officer because there had been complaints about his speech.[191] According to campus policy, it is prohibited to use the free speech zone to say "anything that 'disturbs the peace and/or comfort of person(s)."[192] Plaintiff was told that he would face disciplinary action if he continued, so he complied. Both Plaintiff and another student who shares his faith elected not to speak about religion.[193]

Plaintiff and the other student sued various college officials in charge of enforcing the campus's speech policies, arguing that they were violating the First Amendment.[194] After the campus abandoned the challenged policies, injunctive relief was no longer available to the students, though they argued that their case was "still live" because they also sought nominal damages.[195] The case was dismissed by the District Court, holding that their claim for nominal damages was not sufficient by itself to establish standing.[196] The Eleventh Circuit Affirmed, and the U.S. Supreme Court granted certiorari to determine whether "a plaintiff who sues over a completed injury and establishes the first two elements of standing…can establish the third by requesting only nominal damages."[197]

The Court stated that there is no dispute that Plaintiff established the first two elements to satisfy Article III standing: (1) an injury in fact (2) that is fairly traceable to the challenged conduct.[198] The question before the U.S. Supreme Court is whether nominal damages "can redress the constitutional violation that [Plaintiff] alleges occurred when campus officials enforced the speech policies against him."[199]

The Court first looked to the type of relief awarded at common law, examining the actions of early and later courts.[200] The Court ultimately concluded that a request for nominal damages "satisfies the redressability element of standing where a plaintiff's claim is based on a completed violation of a legal right" because such damages were available at common law in similar circumstances.[201]

Chief Justice Roberts dissented, stating that anything learned from the common law must be "tempered by differences

in constitutional design."[202] The dissent continued that, in order to satisfy Article III, "redress must alleviate the plaintiff's alleged injury in some way, either by compensating the plaintiff for a past loss or by preventing an ongoing future harm."[203] The dissent stated that "[n]ominal damages do not serve these ends where a plaintiff alleges only a completed violation of his rights."[204] Ultimately, the dissent stated that nominal damages cannot "preserve a live controversy where a case is otherwise moot."[205]

H. *Students for Fair Admission*

In *Students for Fair Admission, Inc. v. President and Fellows of Harvard College*,[206] the courts considered nonprofit organizational Article III standing when challenging race-based admissions. Harvard College (Harvard) has a selective application process that involves taking into account the race of applicants.[207] Similarly, the University of North Carolina (UNC) has a highly selective admissions process, which also takes race and ethnicity into account as a factor.[208] Students for Fair Admissions (SFFA), a nonprofit with the purpose of "defend[ing] human and civil rights secured by law, including the rights of individuals to equal protection under the law, filed lawsuits against Harvard and UNC, alleging that their race-based admissions programs violated Title VII of the Civil Rights Act of 1964 and the Equal Protection Clause of the Fourteenth Amendment.[209]

In the Harvard case, the District Court concluded that the admissions program was aligned with their precedents with regards to the use of race in college admissions, and the First Circuit affirmed.[210] Additionally, in the UNC case, the District Court concluded that the admissions program was permissible under the Equal Protection Clause.[211] The U.S. Supreme Court granted certiorari in the Harvard case and certiorari before judgment in the UNC case.[212]

The U.S. Supreme Court rejected UNC's argument that SFFA lacks standing to bring its claims because "it is not a 'genuine' membership organization."[213] The Court goes on to describe the limitations of Article III of the Constitution, what is required to state a case or controversy under Article III, and what that, in turn, requires.[214]

In cases where Plaintiff is an organization, Article III's standing requirements can be satisfied in two ways.[215] First, "the organization can claim that it suffered an injury in its own right or, alternatively, it can assert 'standing solely as the representatives of its members.'"[216] The second approach is referred to as "representational or organizational standing."[217] In order to invoke it, an organization must prove that "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit."[218]

Respondents did not contend that SFFA did not satisfy the aforementioned three-part test, nor did the U.S. Supreme Court.[219] Instead, they are argued that they were not a "genuine 'membership organization'" when it filed suit, and for that reason, "it could not invoke the doctrine of organizational standing in the first place."[220] The *Hunt* decision, according to Respondents, demonstrated that "groups qualify as genuine membership organizations only if they are controlled and funded by their members."[221] They argued that, because SFFA's members did not do either of those things, SFFA could not represent its members for purposes of Article III standing.[222]

The Court concluded that the membership analysis provided for in *Hunt* was not applicable to these cases and distinguished the present cases from *Hunt* because "SFFA is indisputably a voluntary membership organization with identifiable members – it is not, as in *Hunt*, a state agency that concededly has no members."[223] The Article III obligations were satisfied because SFFA complied with the standing requirements demanded of organizational plaintiffs in *Hunt*.[224]

I. *Biden*

In *Biden v. Nebraska*,[225] the court considered Article III standing in the context of President Joe Biden's loan forgiveness program. The Higher Education Act of 1965 (Education Act) was enacted for the purpose of increasing educational opportunities and "assist[ing] in making available the benefits of postsecondary education to eligible students … in institutions of higher education."[226] Title IV of the Act restructured federal financial aid mechanisms and established three types of federal student loans, specifically: Direct Loans, Perkins Loans, and Federal Family Education Loans.[227] In addition to specifying the terms and conditions attached to the loans, the Education Act also authorizes the Secretary to cancel or reduce loans, "but only in certain limited circumstances and to a particular extent."[228]

One week after the President declared COVID-19 pandemic a national emergency on March 13, 2020, then-Secretary of Education Betsy DeVos announced that she would be suspending loan repayments and interest accrual for all federally held student loans.[229] A week after that, Congress enacted the Coronavirus Aid, Relief, and Economic Security Act, which required the Secretary to "extend the suspensions through the end of September 2020."[230] Before the expiration of that extension, the President directed the Secretary to "effectuate appropriate waivers of and modifications to" the Education Act, in light of the national emergency, to keep such suspensions alive through the end of the year.[231] Months after that, the Secretary extended the suspensions further, "broaden[ing] eligibility for federal financial assistance, and waiv[ing] certain administrative requirements."[232]

In August 2022, weeks before President Biden announced that the pandemic was over, the Department of Education announced that it "was once again issuing 'waivers and modifications' under the Act–this time to reduce and eliminate student debts directly."[233] The Office of General Counsel issued a memorandum which determined that the HEROES Act "grants the Secretary authority that could be used to effectuate a program of targeted loan cancellation directed at addressing the financial harms of the COVID-19 pandemic."[234] Accordingly, the Secretary issued his proposal to cancel student debt under the act, and, months later, published the required notice of his waivers and modifications in the Federal Register.[235]

As a result, six states moved for a preliminary injunction, arguing that the plan exceeded the Secretary's statutory authority.[236] The District Court held, however, that the states had no standing to challenge the plan, and the suit was dismissed.[237] After the states appealed, the Eighth Circuit issued a nationwide preliminary injunction pending resolution of the appeal.[238] The Court "concluded that Missouri likely had standing through the Missouri Higher Education Loan Authority (MOHELA or

Authority), a public corporation that holds and services student loans."[239] Additionally, it concluded that the "state's challenge raised 'substantial' questions on the merits and that the equities favored maintaining the status quo pending further review."[240]

In addressing whether the States had standing to challenge the legality of the Secretary's Program, the U.S. Supreme Court reviewed Article III of the Constitution and its requirements.[241] The Court concluded that the Secretary's plan harms MOHELA, and accordingly, directly injures Missouri – which confers standing on that State.[242] In further explaining the majority's rationale, the U.S. Supreme Court explained:

> By law and function, MOHELA is an instrumentality of Missouri: It was created by the State to further a public purpose, is governed by state officials and state appointees, reports to the State, and may be dissolved by the State. The Secretary's plan will cut MOHELA's revenues, impairing its efforts to aid Missouri college students. This acknowledged harm to MOHELA in the performance of its public function is necessarily a direct injury to Missouri itself…. The Secretary's plan harms MOHELA in the performance of its public function and so directly harms the State that created and controls MOHELA. Missouri thus has suffered an injury in fact sufficient to give it standing to challenge the Secretary's plan. With Article III satisfied, we turn to the merits.[243]

Accordingly, the U.S. Supreme Court determined that Article III standing was satisfied.[244]

On the other hand, Justice Kagan authored a dissent, which was joined by Justices Sotomayor and Ketanji Brown Jackson.[245] In relevant part, Justice Kagan argued that the U.S. Supreme Court's first overreach in this case was the fact that they decided it at all, as she argues Article III standing was absent.[246] According to Justice Kagan, the six states have no personal stake in the loan forgiveness plan—i.e., "[t]hey are classic ideological plaintiffs."[247] She then argues that Missouri and MOHELA are two different legal entities, so there should not be standing for Missouri to bring the case.[248] According to Justice Kagan, "The majority's opinion begins by distorting standing doctrine to create a case fit for judicial resolution."[249] Accordingly, she dissents.[250]

J. *Department of Education*

In the *Department of Education v. Brown*,[251] the court considered Article III standing in the context of President Biden's loan forgiveness program. In August 2022, "the Secretary of Education announced a large-scale student-loan forgiveness program" in which he pledged to "discharge hundreds of billions of dollars in student-loan debt owed by millions of borrowers."[252] The relief available to a borrower depended on various criteria, which included their income and the type of loan they hold.[253] Respondents, two brothers who did not qualify for the maximum relief available under the Plan, sued to enjoin the Plan.[254] They argued that the Department of Education "promulgated the Plan without following mandatory procedures known as (1) negotiated rulemaking and (2) notice and comment."[255] The District Court held for the Respondents, and the U.S. Supreme Court granted certiorari before judgment in order to consider this case alongside *Biden v. Nebraska*.[256]

The U.S. Supreme Court began by describing *Biden v. Nebraska*.[257] It then described how the plaintiffs objected to certain elements of the Plan, including the Plan's "limitation to federally held loans" and to "the additional relief it doles out based on prior Pell Grants, with no regard for current income."[258] The U.S. Supreme Court noted, however, that since the Department "did not engage in negotiated rulemaking or notice and comment… [the plaintiffs] had no formal opportunity to voice their views on the Plan prior to its adoption."[259]

The U.S. Supreme Court concluded that they, ultimately, "do not address [the plaintiffs'] argument that the Department failed to observe proper procedures in promulgating the Plan" as they have an "obligation to assure" themselves of litigants' standing under Article III before turning to the merits of a case.[260] The U.S. Supreme concluded that the plaintiffs failed to establish that any injury they suffer from "not having their loans forgiven is fairly traceable to the Plan." For that reason, a unanimous court held that the plaintiffs lacked Article III standing.[261]

K. *Acheson Hotels*

In *Acheson Hotels, LLC v. Laufer*,[262] the court considering Article III standing in the context of an Americans with Disabilities Act (ADA) tester case. Deborah Laufer, who used a wheelchair, was a public accommodations tester who had sued hundreds of hotels for alleged violations of the ADA.[263] As stated by the U.S. Supreme Court, "As the sheer number of lawsuits suggests, she does not focus her efforts on hotels where she has any thought of staying, much less booking a room. Instead, Laufer systematically searches the web to find hotels that fail to provide accessibility information and sues to force compliance with the [ADA]."[264] "Ordinarily, the hotels settle her claims and pay her attorney's fees. But some have resisted, arguing that Laufer is not injured by the absence of information about rooms she has no plans to reserve."[265] This matter was one such case where standing was challenged. Through bringing so many cases, Laufer singlehandedly created a circuit split, as the Second, Fifth, and Tenth Circuits held she lacked standing, but the First, Fourth, and Eleventh Circuits have held that she has standing to bring her claims.[266]

Laufer brought a lawsuit against Acheson Hotels, LLC (Acheson) for its alleged failure to state whether the hotel had rooms accessible to individuals with disabilities, in violation of the ADA.[267] In relevant part, the ADA required places of public lodging to make information about their accessibility available on any reservation portal to those with disabilities.[268] After the U.S. Supreme Court granted certiorari in this case, the U.S. District Court for the District of Maryland suspended Laufer's counsel from practicing law for defrauding hotels by lying in fee petitions and during settlement negotiations.[269] Laufer voluntarily dismissed her suit with prejudice and then filed a suggestion of mootness with the U.S. Supreme Court.[270] The U.S. Supreme Court held off addressing mootness until after oral argument. In an opinion authored by Justice Barrett, the U.S. Supreme Court held that the case was moot.[271]

In considering standing and mootness, the U.S. Supreme Court explained the importance of this case, as follows:

> Acheson … stresses that the difficult standing issue is the reason we took this case. Though Laufer's case is dead, the circuit split is very much alive. This Court has received briefs and heard oral argument. For efficiency's

> sake, Acheson insists that we should settle the issue now rather than repeating the work later. Moreover, Acheson warns that if we dismiss this case for mootness, the standing issue might not come back anytime soon. While Laufer has disavowed the intention to file any more ADA tester suits, others will file in the circuits that sided with her, and hotels will settle, regarding it as pointless to challenge circuit precedent in this Court. Why would any hotel take a case this far, Acheson asks, if the respondent can evade our review by abandoning a claim rather than risking a loss?
>
> We are sensitive to Acheson's concern about litigants manipulating the jurisdiction of this Court. We are not convinced, however, that Laufer abandoned her case in an effort to evade our review. She voluntarily dismissed her pending ADA cases after a lower court sanctioned her lawyer. She represented to this Court that she will not file any others. Laufer's case against Acheson is moot, and we dismiss it on that ground. We emphasize, however, that we might exercise our discretion differently in a future case.[272]

Accordingly, the U.S. Supreme Court vacated the matter and remanded the case the First Circuit with instructions to dismiss the case moot.[273]

Justice Thomas issued a separate opinion concurring in judgment but explaining that Laufer lacks standing and that he would not dismiss the case as moot.[274] First, he begins his opinion by explaining the role and history of the ADA.[275] Moreover, he explains that the Department of Justice promulgated a regulation, known as the Reservation Rule, which requires hotels to "[i]dentify and describe accessible features ... in enough detail to reasonably permit individuals with disabilities to assess independently whether a given hotel or guest room meets his or her accessibility needs."[276] According to Justice Thomas:

> *Laufer lacks standing because her claim does not assert a violation of a right under the ADA, much less a violation of her rights*. Her claim alleges that Acheson Hotels violated the ADA by failing to include on its website the accessibility information that the Reservation Rule requires. Yet, the ADA provides that "[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the ... services ... of any place of public accommodation." In other words, the ADA prohibits only discrimination based on disability—it does not create a right to information…. In contrast to the ADA, the Fair Housing Act explicitly prohibits "represent[ing] to any person because of race ... that any dwelling is not available forinspection, sale, or rental when such dwelling is in fact so available." Accordingly, when [an apartment rental company] told a black tester that no apartments were available but told a white tester that it had vacancies, the Court found that the black tester had standing to sue. The Court explained that the statute created "a legal right to truthful information about available housing." The black tester had been personally denied that truthful information, so she had standing to bring her claim…. Laufer points to the Reservation Rule, alleging that it creates an entitlement to accessibility information. But even assuming a regulation could—and did— create such a right, Laufer asserts no violation of her own rights with regard to that information. *Laufer does not even harbor "'some day' intentions" of traveling to Maine to visit the Coast Village Inn. Her lack of intent to visit the hotel or even book a hotel room elsewhere in Maine eviscerates any connection to her purported legal interest in the accessibility information required by the Reservation Rule.*[277]

Justice Jackson also wrote a concurring opinion, which agreed with the majority that the case was moot, but she wrote separately to express her disagreement with the majority opinion that directs the First Circuit to vacate its prior opinion.[278] Specifically, Justice Jackson argued that this case should be resolved on mootness but that "the Court goes further."[279] According to her, "In my view, when mootness ends an appeal, the question of what to do with the lower court's judgment, if anything, raises a separate issue that must be addressed separately."[280]

L. *Alliance for Hippocratic Medicine*

In *Food & Drug Administration v. Alliance for Hippocratic Medicine*,[281] the U.S. Supreme Court issued a unanimous opinion authored by Justice Kavanaugh that turned on the limits of Article III standing. The Alliance for Hippocratic Medicine and affiliated physicians challenged the FDA's decisions in 2016 and 2021 to relax regulatory restrictions on mifepristone, arguing that those actions increased the likelihood that physicians opposed to abortion would encounter patients experiencing complications from the drug or would otherwise be forced to act against their conscience.[282] The district court agreed with the plaintiffs and enjoined FDA's approval.[283] In relevant part, the district court held that the plaintiff's possessed Article III standing.[284] FDA appealed to the Fifth Circuit, which initially stayed the district court's order.[285] Ultimately, the Fifth Circuit affirmed the district court in part and vacated its decision in part.[286] In relevant part the Fifth Circuit concluded that the individual doctors and the pro-life medical associations had standing.[287] Ultimately, the case percolated up to the U.S. Supreme Court.[288]

In *Food & Drug Administration v. Alliance for Hippocratic Medicine*, the U.S. Supreme Court issued a unanimous opinion authored by Justice Kavanaugh that turned on the limits of Article III standing.

The threshold question considered by the U.S. Supreme Court is whether the plaintiffs had standing to sue under Article III of the Constitution.[289] However, the U.S. Supreme Court rejected the plaintiffs' claims of standing.[290] Justice Kavanaugh emphasized in the Court's opinion that the plaintiffs neither prescribe nor use mifepristone, and thus FDA's regulatory changes did not regulate or compel them in any way.[291] As explained, "Under Article III of the Constitution, a plaintiff 's desire to make a drug less available *for others* does not establish standing to sue."[292] According to the majority, "conscience injury" can constitute a

concrete injury in fact for purposes of Article III; however, federal statutes already shield medical professionals from being forced to participate in abortion-related procedures, severing any causal link between the FDA's actions and the alleged injury.[293] Likewise, the asserted increase in the likelihood of treating patients with complications was deemed too speculative and attenuated to constitute a concrete, particularized injury.[294]They also summarily rejected the doctors suing in a representative capacity to vindicate their patients' injuries or potential future injuries because "[t]he third-party standing doctrine does not allow doctors to shoehorn themselves into Article III standing simply by showing that their patients have suffered injuries or may suffer future injuries."[295]

The Court also foreclosed the medical association's reliance on associational standing because, "[l]ike an individual, an organization may not establish standing simply based on the 'intensity of the litigant's interest' or because of strong opposition to the government's conduct."[296] Stated another way, "[a]n organization cannot manufacture its own standing" by simply expending money, as that "would mean that all the organizations in America would have standing to challenge almost every federal policy they dislike, provided they spend a single dollar opposing those policies."[297] On the other hand, the majority opinion contrasted simple advocacy with instances where standing was found when actions "directly affected" and interfered with an organization's "core business activities."[298]

In concluding that the plaintiffs lacked Article III standing, the U.S. Supreme Court reaffirmed the principle that standing doctrine is not a mere technicality but a structural limit rooted in the separation of powers.[299] As Justice Kavanaugh wrote in the Court's unanimous opinion, "The plaintiffs have sincere legal, moral, ideological, and policy objections to elective abortion and to FDA's relaxed regulation of mifepristone. But under Article III of the Constitution, those kinds of objections alone do not establish a justiciable case or controversy in federal court."[300] Accordingly, the U.S. Supreme Court reversed and remanded the case.[301]

Although Justice Thomas joined the Court's opinion in full because it followed prior precedent, he nevertheless authored a separate concurring opinion to stress the issues with associational standing.[302] As explained in his concurrence, Justice Thomas does not believe that association standing can be reconciled with the doctrine component of Article III.[303] Although not challenged by either party, he suggests that "In an appropriate case, however, the Court should address whether associational standing can be squared with Article III's requirement that courts respect the bounds of their judicial power."[304] Only time will tell if anyone accepts Justice Thomas's invitation to revisit associational standing.

V. CONCLUSIONS

As discussed in detail above, Article III standing can neither be waived nor assumed.[305] Moreover, courts must raise Article III standing *sua sponte*, where necessary, before considering other issues, including prudential standing issues.[306] The same is true for appellate court review. Thus, Article III standing is a true preliminary (and paramount) question in litigation. Nevertheless, dismissal of a case for lack of Article III standing is not a decision on the merits. Accordingly, a plaintiff can refile the matter in state court—assuming limitations have not run. This raises implications for both plaintiffs and defendants. On one hand, if a case is dismissed from federal court, a plaintiff may be barred from refiling in state court. On the other hand, lack of Article III standing might move certain types of claims into state court for litigation. For example, Justice Thomas considered this possibility in his *TransUnion* dissent, explaining:

> Today's decision might actually be a pyrrhic victory for TransUnion. The Court does not prohibit Congress from creating statutory rights for consumers; it simply holds that federal courts lack jurisdiction to hear some of these cases. That combination may leave state courts—which are not bound by the limitations of a case or controversy or other federal rules of justiciability even when they address issues of federal law—as the sole forum for such cases, with defendants unable to seek removal to federal court. By declaring that federal courts lack jurisdiction, the Court has thus ensured that state courts will exercise exclusive jurisdiction over these sorts of class actions.[307]

As expressed by Justice Thomas, the current state of Article III standing jurisprudence could lead to more state court litigation in consumer cases, even when the intent of Congress may have been different. It remains unclear whether his concerns about a "pyrrhic victory" will become prophetic. Nevertheless, as outlined above, Article III standing is an important concept to our Nation's federal system. The Roberts Court has continued to return to this concept over time. Yet, more questions remain—such as those raised in *Acheson*. Likewise, some questions have percolated up to the U.S. Supreme Court before becoming moot before being resolved. Accordingly, questions concerning Article III standing remain unresolved but of paramount importance to whether a case can be brought (or remain) in federal court. Since more questions still remain, it is likely we will continue to see more decisions concerning Article III standing in the near future. However, only time will tell what the U.S. Supreme Court specifically says concerning Article III standing.

Article III standing is a true preliminary (and paramount) question in litigation.

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1 *Raines v. Byrd*, 521 U.S. 811, 818 (1997) (quoting *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 471 (1982)).
2 *Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 26, 37 (1976).
3 *Standing*, Black's Law Dictionary (11th ed. 2019).
4 *Id.*
5 *Baker v. Carr*, 369 U.S. 186, 204 (1962).
6 13A Fed. Prac. & Proc. Juris. § 3531 (3d ed.).
7 *Id.*
8 *Standing*, Black's Law Dictionary (11th ed. 2019) (quoting Joseph Vining, *Legal Identity* 55 (1978)).
9 U.S. Const. art. III §§ 1-2.
10 *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016).
11 *Id.*
12 *Id.* (quoting *Steel Co. v. Citizens for Better Environment*, 523 U.S. 83, 103 (1998)).
13 *Id.* (discussing cases); *see also Raines v. Byrd*, 521 U.S. 811, 820 (1997) ("It is settled that Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing."); Gladstone, *Realtors v. Village of Bellwood*, 441 U.S. 91, 100 (1979) ("In no event ... may Congress abrogate the Art. III minima").
14 *Spokeo*, 578 U.S. at 339 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (internal quotation marks omitted)).
15 *Id.* (citations omitted).
16 *Id.* at 340-41 (emphasis added).
17 *Id.* at 338.
18 *Steel Co.*, 523 U.S. at 103 (citing *Simon*, 426 U.S. at 41-42).
19 *Simon*, 426 U.S. at 41-42.
20 *Id.* at 45-46.
21 523 U.S. at 106-07 (emphasis added).
22 *Pennell v. Global Trust Mgmt.*, 990 F.3d 1041, 1044 (7th Cir. 2021) (internal quotations omitted and emphasis added).
23 *Nat'l Org. for Women, Inc. v. Scheidler*, 510 U.S. 249, 255 (1994).
24 *Shiyang Huang v. Equifax Inc. (In re Equifax Customer Data Sec. Breach Litig.)*, 999 F.3d 1247 (11th Cir. 2021) (citing *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975)).
25 *Morgan v. Huntington Ingalls, Inc.*, 879 F.3d 602, 606 (5th Cir. 2018) (citing *Rohm & Hass Texas, Inc. v. Ortiz Bros. Insulation, Inc.*, 32 F.3d 205, 207 (5th Cir. 1994)).
26 *SEC v. Forex Asset Mgmt., LLC*, 242 F.3d 325, 328 (5th Cir. 2001) ("Judge Benavides contends that this case should be decided on the basis of Lanham Act prudential standing rather than Article III constitutional standing, because the parties did not have an opportunity to brief the latter. This issue ignores the fundamental point that wherever possible, Article III standing must be addressed before all other issues because it determines the court's fundamental power even to hear the suit. In the absence of Article III standing, we have no right to opine on issues of prudential standing.") (internal citations and quotation marks omitted).
27 Under the Prudential-Standing Doctrine, "even if a party has Article III standing, prudential rules should govern the determination whether a party should be granted standing to sue." *Prudential-Standing Doctrine*, Black's Law Dictionary (11th ed. 2019). Such prudential standing rules include that a plaintiff who asserts an injury must come within the "zone of interest" arguably protected by the Constitution or a statute, a party may assert only his or her own rights and cannot raise the claims of a third party who is not before the court, and that a plaintiff cannot sue if the alleged injury is a generalized one widely shared with others. *Id.*
28 *Morgan*, 879 F.3d at 606 (quoting *Rohm & Hass*, 32 F.3d at 208).
29 *Bennett v. Spear*, 520 U.S. 154, 162 (1997) ("The question of standing 'involves both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise.'") (citation omitted).
30 This is not an exhaustive list of cases.
31 578 U.S. 330 (2016).
32 15 U.S.C. § 1681e(b).
33 15 U.S.C. § 1681n(a).
34 *Id.* at 333.
35 *Id.*
36 *Id.*
37 *Id.* at 333, 336.
38 *Id.* at 333-34.
39 *Id.* (internal citations and quotation omitted).
40 *Id.* at 334.
41 *Id.*
42 *Id.* at 333.
43 *Id.* at 334 (internal citations omitted).
44 *Id.* at 342-43.
45 *Id.*
46 *Id.* at 343 (Thomas, J., concurring).
47 *Id.*
48 *Id.* at 348.
49 *Id.* at 349-52 (Ginsburg, J., dissenting).
50 *Id.*
51 140 S. Ct. 1615 (2020).
52 *Id.* at 1618.
53 *Id.* at 1619.
54 *Id.*
55 *Id.*
56 *Id.* at 1619-21.
57 *Id.* at 1621.
58 *Id.* (emphasis added).
59 *Id.*
60 *See id.*
61 *Id.* at 1622 (Thomas, J., concurring).
62 *Id.* at 1623.
63 *Id.* at 1623 (Sotomayor, J., dissenting).
64 *Id.* at 1637 (internal citations omitted).
65 141 S. Ct. 530 (2020) (per curiam).
66 *Id.* at 533.
67 *Id.* at 533-34.
68 *Id.*
69 *Id.* at 534 (internal quotation marks omitted).
70 *Id.*
71 *Id.*
72 *Id.*
73 *Id.*
74 *Id.* (quoting *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 90-91 (2013)).
75 *Id.* at 534-535.
76 *Id.* at 535.
77 *Id.*
78 *Id.*
79 *Id.*
80 *Id.*
81 *Id.* at 546.
82 *Id.* at 536-537.
83 *Id.*
84 *Id.* at 538 (Breyer, J., dissenting).
85 *Id.*
86 *Id.*

87 *Id*. at 537.
88 592 U.S. 53 (2020).
89 *Id*.
90 *Id.* at 56.
91 *Id*.
92 *Id*.
93 *Id*.
94 *Id*.
95 *Id*.
96 *Id*. at 56-57.
97 *Id*.
98 *Id*. at 57.
99 *Id*.
100 *Id*. at 58.
101 *Id*. at 58.
102 *Id*.
103 *Id*.
104 *Id*. at 60.
105 *Id*.
106 *Id*.
107 *Id*.
108 *Id*. at 64.
109 *Id*. at 66.
110 *Id.*
111 *Id*. at 67 (Sotomayor, J., concurring).
112 594 U.S. 413 (2021).
113 *Id*. at 419.
114 *Id.*
115 *Id*.
116 *Id.*
117 *Id*. at 419.
118 *Id*. at 419-20.
119 *Id*. at 420.
120 *Id*.
121 *Id*.
122 *Id*.
123 *Id*.
124 *Id*.
125 *Id.*
126 The initial copy provided did not include the OFAC alert. However, it was included in a second mailing provided one day later.
127 *TransUnion*, 594 U.S. at 420. TransUnion's second mailing, which included the OFAC alert, did not contain a summary of Ramirez's rights.
128 *Id*.
129 *Id.*
130 *Id.*
131 *Id*.
132 *Id*.
133 *Id*.
134 *Id*.
135 *Id*. at 422.
136 *Id*.
137 *Id*.
138 *Id*.
139 *Id.*
140 *Id.*
141 *Id*.
142 *Id.* at 442.
143 *Id.*
144 *Id*. at 423 (citing *Lujan*, 504 U.S. at 560-61).
145 *Id.* (quoting *Casillas v. Madison Avenue Assocs., Inc*., 926 F.3d 329, 333 (CA7 2019) (Barrett, J.)).
146 *Id*. at 421 (internal citations omitted).
147 *Id*. at 424.
148 *Id*. (internal citations omitted).
149 *Id.*
150 *Id.*
151 *Id*.
152 *Id.*
153 *Id*. at 434.
154 *Id*. at 442.
155 *Id*. at 447 (Thomas, J., dissenting).
156 *Id*.
157 *Id*. (citation omitted).
158 *See id.* at 448-49.
159 *Id.* at 449.
160 *Id*. at 450 (internal quotation marks and citations omitted and emphasis added).
161 *Id*. at 460 (emphasis in original).
162 *Id*. at 460 (Kagan, J., dissenting).
163 *Id.* at 462.
164 *Id*. (internal citations omitted and emphasis added).
165 595 U.S. 30 (2021).
166 *Id.* at 35.
167 *Id.* at 36.
168 *Id.*
169 *Id.*
170 *Id.* at 37.
171 *Id.* at 37-38.
172 *Id.* at 35. The Supreme Court noted in their opinion that "[b]ecause this Court granted certiorari before judgment, we effectively stand in the shoes of the Court of Appeals." *Id.* at 38.
173 *Id.* at 48.
174 *Id.*
175 *Id.*
176 *Id.* at 51.
177 *Id.*
178 *Id*.
179 *Id.* at 51 (Thomas, J., concurring).
180 *Id*. at 51 n.1.
181 *Id.*
182 *Id.*
183 *Id.*
184 *Id.*
185 141 S.Ct. 792 (2021).
186 *Id.* at 796.
187 *Id.*
188 *Id.*
189 *Id.*
190 *Id.*
191 *Id.*
192 *Id.*
193 *Id.*
194 *Id.*
195 *Id.*
196 *Id.*
197 *Id.*
198 *Id.*
199 *Id.*
200 *Id.*
201 *Id.* at 802.
202 *Id.* at 804.
203 *Id.* at 807.
204 *Id.*
205 *Id.*
206 600 U.S. 181 (2023).

207 *Id.*
208 *Id*.
209 *Id*.
210 *Id*.
211 *Id*.
212 *Id*.
213 *Id*.
214 *Id*. at 199.
215 *Id*.
216 *Id*. (quoting *Warth v. Seldin*, 422 U.S. 490, 511 (1975)).
217 *Id.*
218 *Id*. (quoting *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977)).
219 *Id*.
220 *Id*. at 200.
221 *Id*.
222 *Id*.
223 *Id*. at 201.
224 *Id*.
225 143 S. Ct. 2355 (2023).
226 *Id.* at 2362 (quoting 20 U.S.C. § 1070(a)).
227 *Id*.
228 *Id*. at 2363.
229 *Id*. at 2364.
230 *Id*.
231 *Id*.
232 *Id*.
233 *Id*.
234 *Id*.
235 *Id.* at 2364-65.
236 *Id*. at 2365.
237 *Id*.
238 *Id*.
239 *Id*.
240 *Id*. at 2365.
241 *Id*. at 2365-66.
242 *Id*. at 2366 ("The plan's harm to MOHELA is also a harm to Missouri.").
243 *Id*. at 2366-68.
244 *Id.*
245 *Id*. at 2384 (Kagan, J., dissenting).
246 *Id*. at 2385.
247 *Id.* at 2384.
248 *Id.* at 2400.
249 *Id.*250 *Id.*
251 600 U.S. 551 (2023).
252 *Id.*
253 *Id*. at 556.
254 *Id*.
255 *Id*.
256 *Id*.
257 *Id*. at 558. The facts of *Biden v. Nebraska* are discussed above.
258 *Id*. at 559.
259 *Id*.
260 *Id*. at 560.
261 *Id*. at 560-61.
262 601 U.S. 1 (2023).
263 *Id*. at 3.
264 *Id*.
265 *Id.*
266 *Id.* at 3.
267 *Id*.
268 *Id.*
269 *Id*. at 3-4.
270 *Id*. at 4.
271 *Id*. at 3, 5.
272 *Id.* at 5 (internal citations omitted).
273 *Id.*
274 *Id*. at 5 (Thomas, J., concurring).
275 *Id*. at 5-6.
276 *Id*. at 6-7 (quoting 28 C.F.R. § 36.302(e)(1)(ii) (2022)).
277 *Id.* at 11-12 (internal citations omitted and emphasis added).
278 *Id.* at 27 (Jackson, J., concurring).
279 *Id.*
280 *Id.*
281 602 U.S. 367 (2024).
282 *Id.* at 377.
283 *Id.*
284 *Id.*
285 *Id.*
286 *Id.*
287 *Id*. at 377-78.
288 *Id*. at 378.
289 *Id.*
290 *Id.* at 397.
291 *Id*. at 374.
292 *Id.* (emphasis in original).
293 *Id.* at 378.
294 *Id.* at 390.
295 *Id*. at 393 n.5.
296 *Id*. at 394 (citations omitted).
297 *Id.* at 394-95.
298 *Id.* at 395.
299 *Id*. at 378, 396-97.
300 *Id*. at 396.
301 *Id*. at 397.
302 *Id.* at 397 & 403 (Thomas, J., concurring).
303 *Id.* at 404 (Thomas, J., concurring).
304 *Id*. at 405 (Thomas, J., concurring).
305 *Morgan*, 879 F.3d at 606.
306 *Forex Asset Mgmt.*, 242 F.3d at 328.
307 *TransUnion*, 594 U.S. at 459 (Thomas, J., Dissenting) (internal citations and quotation marks omitted).