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Legal Sidebar

# Standing to Sue for Informational Injuries

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Some statutes authorize private parties to file a lawsuit seeking information. The Freedom of Information Act (FOIA) is a prominent example. FOIA provides that federal agencies "shall make available to the public [certain] information," and it grants federal courts "jurisdiction to . . . order the production of any agency records improperly withheld." According to the Department of Justice (DOJ), members of the public file hundreds of FOIA lawsuits each year.

Courts have described lawsuits brought under FOIA and similar laws as suits that "seek[] to vindicate a statutory right to information." Even when Congress creates a right to information, though, a private party who files a lawsuit in federal court must meet the standing requirements imposed by Article III of the U.S. Constitution. One of those constitutional requirements is that the party suing has to have suffered a concrete injury. Suits to enforce informational rights therefore require courts to decide when the "denial of information" amounts to a sufficiently concrete injury to support constitutional standing.

That question has divided the federal courts of appeal (i.e., created a "circuit split"). Some courts have held that a plaintiff alleging an informational injury must "assert 'downstream consequences'" that result from the denial of information, causing harm to the plaintiff. Other courts have held that a plaintiff need only allege that they did not receive "information which must be publicly disclosed pursuant to a statute." For the latter group of courts, no additional injury is required.

This Legal Sidebar analyzes the circuit split. It begins with a discussion of cases in which the Supreme Court has found standing to sue for informational injuries. It then analyzes more recent Supreme Court case law that addresses Article III's concrete injury requirement, and it describes how courts have applied the recent case law in informational injury cases. The Sidebar concludes by examining some considerations for Congress.

## Background on Standing for Informational Injuries

Under Article III, federal courts can resolve only "cases" and "controversies." To establish that a case or controversy exists in any private lawsuit, the plaintiff bringing the suit must establish (1) that they suffered an actual or imminent, concrete, and particularized injury (2) that was likely caused by the defendant and (3) that would likely be redressed by judicial relief.

Current law makes clear that plaintiffs asserting informational injuries can satisfy these standing requirements in some cases. In 1989, the Supreme Court decided that the plaintiffs in *Public Citizen v.*

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*Department of Justice* had standing to bring a lawsuit against DOJ and the American Bar Association (ABA) under the Federal Advisory Committee Act (FACA). FACA imposes certain requirements on "advisory committees" that offer advice or recommendations to the federal government. Among other things, covered advisory committees must make available to the public records, reports, meeting minutes, and other documents. In *Public Citizen*, the plaintiffs alleged that DOJ solicits advice from the ABA when making judicial nominations. They asked the court to declare that DOJ's use of the ABA's advice is covered by FACA and to order DOJ and the ABA to comply with FACA's disclosure requirements.

The ABA argued that the plaintiffs lacked standing to bring their suit, but the Supreme Court rejected the argument. "Refusal to permit appellants to scrutinize the ABA Committee's activities to the extent FACA allows," the Court explained, "constitutes a sufficiently distinct injury to provide standing to sue." The Court compared the injury underlying plaintiffs' FACA claim to the type of injury that permits courts to decide a FOIA case: "Our decisions interpreting the Freedom of Information Act have never suggested that those requesting information under it need show more than that they sought and were denied specific agency records. . . . There is no reason for a different rule here."

In a later case, *Federal Election Commission v. Akins*, the Supreme Court held that certain voters had standing to challenge the Federal Election Commission's decision that an organization was not subject to disclosure requirements applicable to "political committees." Again, the Court's injury inquiry turned on access to information. According to the Court, the voters' "'injury in fact' . . . consists of their inability to obtain information"—such as donor lists and campaign-related expenditures—that, they allege, federal law "requires [to be] public."

In both *Public Citizen* and *Akins*, therefore, the Supreme Court held that denial of information can give rise to standing.

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

In 2016 and 2021, the Supreme Court decided two cases that clarified which types of injuries are sufficiently "concrete" to satisfy Article III's injury requirement. In the 2016 case—*Spokeo, Inc. v. Robins*—the Court explained that, for intangible harms, Congress creating a statutory cause of action does not necessarily mean persons aggrieved by violations of the statute suffer a concrete injury that satisfies Article III. The Court said Congress's "judgment is . . . instructive and important." Courts should, however, also "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" when evaluating whether a plaintiff has suffered a concrete harm. As a result, "a bare procedural violation" of a statute "divorced from any concrete harm" does not satisfy Article III, but a statutory violation coupled with "the risk of real harm" can give rise to standing.

In *TransUnion LLC v. Ramirez*, decided in 2021, the Supreme Court applied these principles to a class of plaintiffs who alleged that a credit reporting agency "failed to use reasonable procedures to ensure the accuracy of their credit files." The plaintiffs claimed this procedural failure violated the Fair Credit Reporting Act (FCRA), and a jury returned a verdict in their favor. The Supreme Court, however, determined that only some members of the plaintiff-class had standing to bring their claims. Reiterating that "Article III standing requires a concrete injury even in the context of a statutory violation," the Court analyzed the extent to which the credit reporting agencies' failure to use accuracy-ensuring procedures harmed the members of the plaintiff class. The Court then asked whether the harms had "a 'close relationship' to a harm traditionally recognized as providing a basis for a lawsuit in American courts."

For some *TransUnion* class members, inaccurate credit reports had been disseminated by the reporting agency to third parties. As a result of these disclosures, the third parties received credit reports erroneously "containing OFAC alerts that labeled the class members as potential terrorists, drug traffickers, or serious criminals." The Court held that these plaintiffs "suffered a harm with a 'close relationship' to the harm associated with the tort of defamation" and that defamation is traditionally recognized as a basis for a lawsuit. These class members, the Court concluded, suffered concrete injuries and had standing to bring their claims.

For the remaining class members, the defendant credit reporting agency maintained, but did not disseminate, credit reports with false information. Defamation generally requires publication of the defamatory information. Maintaining credit reports internally did not, therefore, bear the same close relationship to defamation as disseminating false reports, the Court said. Instead, "the mere existence of inaccurate information in a database" had "no historical or common-law analog." Even if maintaining false reports violated the FCRA, the Court concluded, the class members whose reports were never disseminated had not suffered a concrete injury that could "confer Article III standing."

# Informational Injuries After *TransUnion*

In *TransUnion*, the Supreme Court did not overrule *Public Citizen* or *Akins*. It distinguished both informational injury cases for three reasons. First, the Court explained, the plaintiffs in *TransUnion* "did not allege that they failed to receive any required information," so they were not asserting the kind of injury that was at issue in *Public Citizen* or *Akins*. Second, *Public Citizen* and *Akins* "involved denial of information subject to public-disclosure or sunshine laws that entitle all members of the public to certain information." The FCRA, at issue in *TransUnion*, is not in the Court's view a "public-disclosure law." Third, the Court wrote, the *TransUnion* plaintiffs "identified no 'downstream consequences' from failing to receive the required information. . . . They did not demonstrate, for example, that the alleged information deficit hindered their ability to correct erroneous information before it was later sent to third parties." As a result, *Public Citizen* and *Akins* remain good law that binds lower courts, but neither case governed the standing analysis in *TransUnion*.

When deciding informational injury cases after *TransUnion*, however, courts of appeals have disagreed about how to apply the Supreme Court's reasons for distinguishing *Public Citizen* and *Akins*. As the U.S. Court of Appeals for the Fifth Circuit (Fifth Circuit) explained, "The 'downstream consequences' sentence" in *TransUnion*, "seems ambiguous." On the one hand, "it might be read to reference only a defect in the *TransUnion* plaintiffs' claims of injury but not to include the 'sunshine laws' covered by *Akins* and *Public Citizen*." On the other hand, "it could be deemed a defect in that theory even if applied to *Akins* and *Public Citizen*." In other words, did the *TransUnion* Court mean plaintiffs must assert either a violation of a sunshine law or downstream consequences to establish standing? Or did the Court mean that all plaintiffs alleging informational injuries must have suffered downstream consequences to have standing?

One circuit split on this issue involves the public disclosure provision of the National Voter Registration Act of 1993 (NVRA). The NVRA requires, among other things, that states must disclose certain information related to their maintenance of voter lists, when requested to do so. The statute also includes a private right of action that applies to persons who are "aggrieved by a violation" of the NVRA.

After *TransUnion*, the Fifth Circuit held that a plaintiff has standing to sue for disclosure of information under the NVRA only if that plaintiff "can assert 'downstream consequences'" from the failure to disclose required information. The Fifth Circuit interpreted *TransUnion* as "generally reject[ing] . . . an unlimited 'informational injury' approach to standing." Instead, in the Fifth Circuit's view, plaintiffs must assert downstream consequences to show a sufficient injury "even in public disclosure-based cases" like *Public Citizen* and *Akins*. The U.S. Court of Appeals for the Third Circuit adopted a similar interpretation of *TransUnion* in an NVRA case, holding that "a plaintiff asserting an informational injury" must, after *TransUnion*, "establish a nexus among a downstream consequence, his alleged harm, and the interest

Congress sought to protect." The U.S. Courts of Appeals for the Sixth Circuit (Sixth Circuit) and Eighth Circuit followed suit.

The U.S. Court of Appeals for the Ninth Circuit (Ninth Circuit) has applied the alternative interpretation of *TransUnion*'s reasoning to the NVRA. Rejecting the Fifth Circuit's view "that *TransUnion* established an 'adverse effects' or 'downstream consequences' requirement for all informational injuries," the Ninth Circuit held that the "total denial of information under a sunshine statute, as in *Akins* and *Public Citizen*, is itself already a concrete injury in fact." In *TransUnion*, the Ninth Circuit explained, the Supreme Court was addressing multiple standing theories. The Supreme Court addressed downstream consequences "only *after* [it] had concluded that *Akins* and *Public Citizen* did not control" because, in the Ninth Circuit's view, asserting a violation of a public disclosure law and asserting adverse effects are two distinct ways a plaintiff can establish standing. The disclosure provision in the NVRA is "a sunshine provision," the Ninth Circuit concluded, so plaintiffs asserting a violation of it "need not allege any additional harm" beyond the denial of information "to establish Article III standing."

This disagreement about how *TransUnion*'s reasoning applies to informational injuries has also played out across other causes of action. The Sixth Circuit, for example, has held that a party lacked standing to intervene in a securities fraud suit to seek the disclosure of documents because "the mere denial of information is insufficient to support standing." The U.S. Court of Appeals for the Fourth Circuit, on the other hand, decided that a plaintiff had standing to sue under Title III of the Americans with Disabilities Act and explained that "the need for 'downstream consequences' and 'adverse effects' . . . does not extend to the type of informational injury presented in *Public Citizen* and *Akins*."

As a result of this circuit split, whether or not a plaintiff must establish standing by alleging downstream consequences caused by the denial of information covered by a public disclosure law currently varies depending on the circuit in which the plaintiff filed the lawsuit.

# Considerations for Congress

Article III's standing requirements apply whenever a plaintiff brings a lawsuit under a statutorily authorized private right of action, and Congress does not have the power to change the constitutional requirements through legislation. Congress does, however, have several options for addressing the constitutional injury requirement in statutes about informational rights.

First, Congress could incorporate an injury requirement into the elements of any new private right of action. The Privacy Act, for example, provides a right of action for certain statutory violations when the violations "have an adverse effect on [the] individual" suing. The Supreme Court has explained that the "the reference in [the Privacy Act] to 'adverse effect' acts as a term of art identifying a potential plaintiff who satisfies the injury-in-fact and causation requirements of Article III standing."

Second, Congress could authorize lawsuits in state courts. State courts are not bound by Article III's standing limitations and may hear many suits brought under federal causes of action. Plaintiffs who have not suffered a concrete injury under *TransUnion* may still be able to file suits in certain state courts.

Third, instead of providing a private right of action to enforce an informational right, Congress could authorize a federal agency to bring enforcement actions. Courts have held that the government does not "need[] a concrete interest to establish its standing to sue on behalf of the public."

Federal agency enforcement and state court suits may, however, be less effective when the informational right at issue is a right to compel federal officers or agencies to disclose information, such as the informational rights provided in FOIA. Federal agencies rarely sue other federal agencies (although courts do consider such suits justiciable in certain circumstances). In addition, state courts' authority to enjoin federal officers is "unsettled." Commentators have suggested that that the question raises a "whole panoply of difficulties" and characterize the issue "complicated" and "thorny."

Fourth, Congress could wait for additional litigation. Future cases could provide more insight about how difficult it will be for plaintiffs to establish "downstream consequences" from informational injuries. In the Fifth Circuit's decision holding that plaintiffs asserting informational injuries must assert downstream consequences, one judge wrote separately to suggest that "*TransUnion* may not ultimately prove all that difficult for plaintiffs who wish to assert their statutory rights to public information." That judge found it "hard to imagine a plaintiff who is willing to go through the trouble to file a lawsuit to obtain public information—yet is unable to attach a simple affidavit noting why the plaintiff needs that information." The Sixth Circuit's explanation of why, in its view, the plaintiffs in *Public Citizen* and *Akins* "had suffered adverse effects" may suggest that circuit's required showing is also not a high bar. According to the Sixth Circuit, the plaintiffs in those cases "were denied information that would have helped them 'evaluate candidates for public office'" or "participate more effectively in the judicial selection process." Plaintiffs asserting informational injuries may be able to articulate similar consequences in many cases.

That does not mean that all plaintiffs will necessarily clear the bar. In an NVRA case, a different Sixth Circuit panel held that the plaintiff organization's allegations about downstream consequences—that the defendant's failure to produce requested records prevented the organization from "engaging in its research, educational, and remedial activities" and "impaired the accumulation of institutional knowledge"—were insufficient. These downstream consequences, the court said, were not specific enough to establish standing. More information about which injuries will and will not satisfy the standing requirement in circuits that require downstream consequences to assert violations of sunshine laws may be fleshed out in additional litigation.

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