INDEPENDENT REVIEW PROCESS

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION
ICDR CASE NO. 01-20-0000-6787

NAMECHEAP, INC.

And

INTERNET CORPORATION FOR ASSIGNED
NAMES AND NUMBERS

INDEX TO LEGAL AUTHORITIES SUBMITTED WITH ICANN'S POST-HEARING BRIEF

EXHIBIT	DESCRIPTION
SUBMITTED LEGAL AUTHORITIES	
RLA-6	*Carney v. Adams*, 141 S.Ct. 493 (2020).
RLA-7	*Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).
RLA-8	*Mitchell v. Superior Court*, 37 Cal.3d 591 (1984).
RLA-9	*TransUnion LLC v. Ramirez*, 141 S.Ct. 2190 (2021).
RLA-10	*United States v. Wilson*, 503 U.S. 329 (1992).
RLA-11	Cal. Corp. Code § 309.

RLA-6

141 S.Ct. 493
Supreme Court of the United States.

John C. CARNEY, Governor
of Delaware, Petitioner
v.
James R. ADAMS

No. 19-309
|
Argued October 5, 2020
|
Decided December 10, 2020

Synopsis

Background: Attorney, who was registered as a political independent, brought action against Delaware's Governor, challenging under the First Amendment right to association the provisions of the Delaware Constitution limiting judgeships on state courts to a bare majority of applicants from one of the two major political parties, and requiring the rest of the judges on some of those courts to be applicants from the other major political party. The United States District Court for the District of Delaware, Mary Pat Thynge, Chief United States Magistrate Judge, 2017 WL 6033650 and 2018 WL 2411219, entered summary judgment in attorney's favor, and granted a stay pending appeal, 2018 WL 3105113. Governor appealed. On rehearing, the United States Court of Appeals for the Third Circuit, Fuentes, Circuit Judge, 922 F.3d 166, affirmed in part and reversed in part. Certiorari was granted.

Holdings: The Supreme Court, Justice Breyer, held that:

[1] attorney's generalized grievance did not satisfy the injury-in-fact element for Article III standing, and

[2] attorney did not show that he was able and ready to apply for a judgeship in the imminent future.

Reversed; judgment vacated; remanded with instructions.

Justice Sotomayor filed a concurring opinion.

Justice Barrett took no part in the consideration or decision of the case.

Procedural Posture(s): Petition for Writ of Certiorari; On Appeal; Motion for Summary Judgment.

West Headnotes (10)

[1] Constitutional Law Advisory Opinions

Federal Courts Nature of dispute; concreteness

Article III, in granting federal courts the power to decide "Cases" or "Controversies," requires that a case embody a genuine, live dispute between adverse parties, thereby preventing the federal courts from issuing advisory opinions. U.S. Const. art. 3, § 2, cl. 1.

34 Cases that cite this headnote

[2] **Federal Civil Procedure** In general; injury or interest

Federal Civil Procedure Causation; redressability

Federal Courts Nature of dispute; concreteness

The doctrine of standing implements the "Cases" or "Controversies" requirement in Article III by insisting that a litigant prove that he has suffered a concrete and particularized injury that is fairly traceable to the challenged conduct, and is likely to be redressed by a favorable judicial decision. U.S. Const. art. 3, § 2, cl. 1.

44 Cases that cite this headnote

[3] **Federal Civil Procedure** In general; injury or interest

Article III standing requires an injury in fact that must be concrete and particularized, as well as actual or imminent, and it cannot be conjectural or hypothetical. U.S. Const. art. 3, § 2, cl. 1.

49 Cases that cite this headnote

[4] **Federal Civil Procedure** Rights of third parties or public

A grievance that amounts to nothing more than an abstract and generalized harm to a citizen's interest in the proper application of the law does not count as an injury in fact, and it consequently does not show Article III standing. U.S. Const. art. 3, § 2, cl. 1.

19 Cases that cite this headnote

[5] **Federal Civil Procedure** Rights of third parties or public

A plaintiff cannot establish the injury-in-fact element for Article III standing by asserting an abstract general interest common to all members of the public, no matter how sincere or deeply committed the plaintiff is to vindicating that general interest on behalf of the public. U.S. Const. art. 3, § 2, cl. 1.

13 Cases that cite this headnote

[6] **Constitutional Law** Civil Remedies and Procedure

Constitutional Law Particular Issues and Applications

Federal Civil Procedure Rights of third parties or public

If Article III standing could be based on a plaintiff's interest in vindicating an abstract general interest on behalf of the public, it would significantly alter the allocation of power at the national level, with a shift away from a democratic form of government, because contradictions would arise if a democracy were to permit general oversight of the elected branches of government by a nonrepresentative, and in large measure insulated,

judicial branch. U.S. Const. art. 3, § 2, cl. 1.

3 Cases that cite this headnote

[7] **Federal Civil Procedure** In general; injury or interest

The plaintiff bears the burden of establishing Article III standing as of the time the plaintiff brought the lawsuit, and of maintaining it thereafter. U.S. Const. art. 3, § 2, cl. 1.

12 Cases that cite this headnote

[8] **Constitutional Law** First Amendment in General

Even if attorney, who was registered as a political independent, felt sincerely and strongly that Delaware's laws should comply with the federal Constitution, his generalized grievance, which was shared with all Delaware citizens, was not a concrete, particularized, and imminent injury-in-fact, as would be required for Article III standing to challenge under the First Amendment right to association the provisions of the Delaware Constitution limiting judgeships on state courts to a bare majority of applicants from one of the two major political parties, and requiring the rest of the judges on some of those courts to be applicants from the other major political party. U.S. Const. art. 3, § 2, cl. 1; U.S. Const. Amend. 1; Del. Const. art. 4, § 3.

3 Cases that cite this headnote

[9] **Constitutional Law** First Amendment in General

For attorney, who was registered as a political independent, to show a concrete, particularized, and imminent injury-in-fact, as would be required for Article III standing to challenge under the First Amendment right to association the provision of the Delaware Constitution limiting judgeships on some state courts to applicants from one of the two major political parties, attorney was required to at least show that he was likely to apply to become a judge in the reasonably foreseeable future if Delaware did not bar him because of political affiliation. U.S. Const. art. 3, § 2, cl. 1; U.S. Const. Amend. 1; Del. Const. art. 4, § 3.

6 Cases that cite this headnote

[10] **Constitutional Law** First Amendment in General

Assertions by attorney, who was registered as a political independent, that he wanted to be, and would apply to be, a judge on a Delaware court, in the absence of any evidence that he was able and ready to apply in the imminent future, were insufficient to show a concrete, particularized, and imminent injury-

in-fact, as would be required for Article III standing to challenge under the First Amendment right to association the provision of the Delaware Constitution limiting judgeships on some state courts to applicants from one of the two major political parties. U.S. Const. art. 3, § 2, cl. 1; U.S. Const. Amend. 1; Del. Const. art. 4, § 3.

8 Cases that cite this headnote

West Codenotes

Negative Treatment Vacated
Del. Const. art. 4, § 3.

***495** *Syllabus* [*]

[*] The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

Delaware's Constitution contains a political balance requirement for appointments to the State's major courts. No more than a bare majority of judges on any of its five major courts "shall be of the same political party." Art. IV, § 3. In addition, on three of those courts, those members not in the bare majority "shall be of the other major political party." *Ibid.* Respondent James R. Adams, a Delaware lawyer and political independent, sued in Federal District Court, claiming that Delaware's "bare majority" and "major party" requirements violate his First Amendment right to freedom of association by making him ineligible to become a judge unless he joins a major political party. The District Court held that Adams had standing to challenge both requirements and that Delaware's balancing scheme was unconstitutional. The Third Circuit affirmed in part and reversed in part. It held that Adams did have standing to challenge the major party requirement, because it categorically excludes independents from becoming judges on three courts, but that he lacked standing to challenge the bare majority requirement, which does not preclude independents from eligibility for any vacancy.

Held: Because Adams has not shown that he was "able and ready" to apply for a judicial vacancy in the imminent future, he has failed to show a "personal," "concrete," and "imminent" injury necessary for Article III standing. Pp. 498 – 503.

(a) Two aspects of standing doctrine are relevant here. First, standing requires an " 'injury in fact' " that must be "concrete and particularized," as well as " 'actual or imminent.' " *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351. Second, a grievance that amounts to nothing more than an abstract and generalized harm to a citizen's interest in the proper application of the law does not count as an "injury in fact" and does not show standing. *Hollingsworth* v. *Perry*, 570 U.S. 693, 706, 133 S.Ct. 2652, 186 L.Ed.2d 768. Pp. 498 – 499.

(b) Adams has not shown the necessary "injury in fact." To establish that he will suffer a concrete, particularized, and imminent injury beyond a generalized grievance, Adams must at least show that he is likely to apply to become a judge in the reasonably foreseeable future, if he were not barred because of political affiliation. He can show this only if he is " 'able and ready' " to apply. See *Gratz* v. *Bollinger*, 539 U.S. 244, 262, 123 S.Ct. 2411, 156 L.Ed.2d 257. Adams' only supporting evidence is two statements he made that he wanted to be, and would apply to be, a judge on any of Delaware's five courts. Those statements must be considered in the context of the record. Pp. 498 – 501.

(c) The record evidence fails to show that, at the time he commenced the lawsuit, Adams was "able and ready" to apply for a judgeship in the reasonably foreseeable future. First, Adams' statements stand alone, without any other supporting evidence, like efforts to determine possible judicial openings or other such preparations. Second, the context suggests an abstract, generalized grievance, not an actual desire to become a judge. For example, Adams did not apply for numerous existing judicial vacancies while he was a registered Democrat and eligible for those vacancies. He then read a law review article arguing that Delaware's judicial eligibility requirements unconstitutionally excluded independents, changed his political affiliation to independent, and filed this lawsuit shortly thereafter. Third, a holding that Adams' few words of general intent were sufficient to show an "injury in fact" would significantly weaken the longstanding legal doctrine preventing this Court from providing advisory opinions. Finally, precedent supports the conclusion that an injury in fact requires an intent that is concrete. See, *e.g.*, *Lujan*, *supra*. And arguably similar cases in which standing was found all contained more evidence that the plaintiff was "able and ready" than Adams has provided. See, *e.g.*, *Adarand Constructors, Inc.* v. *Pena,* 515 U.S. 200, 115 S.Ct. 2097, 132 L.Ed.2d 158. Pp. 501 – 503.

922 F.3d. 166, vacated and remanded.

BREYER, J., delivered the opinion of the Court, in which all other Members joined, except BARRETT, J., who took no part in the consideration or decision of the case. SOTOMAYOR, J., filed a concurring opinion.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Attorneys and Law Firms

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Opinion

Justice BREYER delivered the opinion of the Court.

***496** This case concerns a Delaware constitutional provision that requires that

appointments to Delaware's major courts reflect a ***497** partisan balance. Delaware's Constitution states that no more than a bare majority of members of any of its five major courts may belong to any one political party. Art. IV, § 3. It also requires, with respect to three of those courts, that the remaining members belong to "the other major political party." *Ibid.*

The plaintiff, a Delaware lawyer, brought this lawsuit in federal court. He claimed that Delaware's party-membership requirements for its judiciary violate the Federal Constitution. We agreed to consider the constitutional question, but only if the plaintiff has standing to raise that question. We now hold that he does not.

I

The Delaware Constitution contains a political balance requirement applicable to membership on all five of its courts: the Supreme Court, the Chancery Court, the Superior Court, the Family Court, and the Court of Common Pleas. The provision says that no more than a bare majority of judges on any of these courts "shall be of the same political party." *Ibid.* (We shall call this requirement the "bare majority" requirement.) The Delaware Constitution also contains a second requirement applicable only to the Supreme Court, the Chancery Court, and the Superior Court. It says that the remaining members of those three courts (those not in the bare majority) "shall be of the other major political party." *Ibid.* (We shall call this the "major party" requirement.) Thus, all five courts are subject to the "bare majority" requirement, and three of the five courts are additionally subject to the "major party" requirement.

On February 21, 2017, plaintiff-respondent James R. Adams sued Delaware's Governor, John Carney, in Federal District Court. Adams, then a newly registered political independent, claimed that both of 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.

Governor Carney moved to dismiss for lack of standing, and Adams filed an amended complaint in an attempt to rectify the problem. App. 1–2, 17–18. After discovery largely centered on Adams' history and intentions in seeking a judgeship, the parties cross-moved for summary judgment. Governor Carney argued (1) that Adams lacked standing to assert his constitutional claim, and (2) that, in any event, the requirements were constitutional. Adams argued only that he was entitled to summary judgment on the merits because the political balance requirements made independents like him ineligible for a judgeship.

The District Court denied Governor Carney's summary judgment motion. *Id.,* at 165; App. to Pet. for Cert. 83a. It held that Adams had standing to challenge both the "major party" requirement for membership on the Supreme Court, the Chancery Court, and the Superior Court and the "bare majority" requirement for membership on the Family Court and the Court of Common Pleas. App. 173–175; App. to Pet. for Cert. 70a–72a. It then granted

summary judgment to Adams on the merits, App. 165; App. to Pet. for Cert. 83a, holding that Delaware's balancing scheme as a whole was unconstitutional, App. 175–181; App. to Pet. for Cert. 75a–81a.

Governor Carney appealed to the United States Court of Appeals for the Third Circuit. The appellate court affirmed in part and reversed in part. *Adams* v. *Governor of Del.*, 922 F.3d 166 (2019). Like the District Court, it held that Adams had standing to challenge the major party requirement, *id.,* at 175, but unlike the District ***498** Court, it held that Adams did not have standing to challenge the bare majority requirement (in any of the five courts), *id.,* at 174–175. The court held that the bare majority requirement itself does not preclude independents from eligibility for any vacancy. *Ibid.*

The court then focused on the major party requirement, which applies only to three of the five courts. Did that constitutional provision bar independent voters from becoming judges on those courts? If so, was that bar constitutional? If not, was that provision severable from the rest of the Delaware Constitution's political balance provisions, in particular, from the bare majority requirement as applied to the Supreme Court, the Chancery Court, and the Superior Court?

The Third Circuit concluded that the major party requirement categorically excludes independents and members of third parties from becoming judges on the Supreme Court, the Chancery Court, and the Superior Court. 922 F.3d at 182–183. It held that the major party requirement consequently violates the Federal Constitution's First Amendment. *Ibid.* And it held that the major party requirement is not severable from the bare majority requirement. *Id.,* at 183–184. The Circuit concluded that both requirements (as applied to those three courts) are invalid. *Ibid.*

Governor Carney then filed a petition for a writ of certiorari. He asked us to consider, first, whether the major party requirement is constitutional and, then, if it is not, whether it is severable from the bare majority requirement. Pet. for Cert. i. We granted his petition but asked that the parties first address the question whether Adams has demonstrated Article III standing to bring this lawsuit.

II

A

[1] **[2]** This case begins and ends with standing. The Constitution grants Article III courts the power to decide "Cases" or "Controversies." Art. III, § 2. We have long understood that constitutional phrase to require that a case embody a genuine, live dispute between adverse parties, thereby preventing the federal courts from issuing advisory opinions. See *Flast* v. *Cohen*, 392 U.S. 83, 96–97, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968); *Coleman* v. *Miller*, 307 U.S. 433, 460, 59 S.Ct. 972, 83 L.Ed. 1385 (1939) (opinion of Frankfurter, J.) ("[I]t was not for courts to pass upon ... abstract, intellectual problems but only if a concrete, living contest between adversaries called for the arbitrament of law"). The doctrine of standing implements this requirement by

insisting that a litigant "prove that he has suffered a concrete and particularized injury that is fairly traceable to the challenged conduct, and is likely to be redressed by a favorable judicial decision." *Hollingsworth* v. *Perry*, 570 U.S. 693, 704, 133 S.Ct. 2652, 186 L.Ed.2d 768 (2013); *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560–561, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992).

[3] **[4]** Two aspects of standing doctrine are relevant here. First, standing requires an " 'injury in fact' " that must be "concrete and particularized," as well as " 'actual or imminent.' " *Id.,* at 560, 112 S.Ct. 2130. It cannot be " ' "conjectural or hypothetical." ' " *Ibid.* Second, a grievance that amounts to nothing more than an abstract and generalized harm to a citizen's interest in the proper application of the law does not count as an "injury in fact." And it consequently does not show standing. *Hollingsworth, supra,* at 706, 133 S.Ct. 2652; see also *Lance* v. *Coffman*, 549 U.S. 437, 439–441, 127 S.Ct. 1194, 167 L.Ed.2d 29 (2007) (*per curiam*) (describing this ***499** Court's "lengthy pedigree" in refusing to serve as a forum for generalized grievances).

[5] **[6]** In other words, a plaintiff cannot establish standing by asserting an abstract "general interest common to all members of the public," *id.,* at 440, 127 S.Ct. 1194, "no matter how sincere" or "deeply committed" a plaintiff is to vindicating that general interest on behalf of the public, *Hollingsworth, supra,* at 706–707, 133 S.Ct. 2652. Justice Powell explained the reasons for this limitation. He found it "inescapable" that to find standing based upon that kind of interest "would significantly alter the allocation of power at the national level, with a shift away from a democratic form of government." *United States* v. *Richardson*, 418 U.S. 166, 188, 94 S.Ct. 2940, 41 L.Ed.2d 678 (1974) (concurring opinion). He added that "[w]e should be ever mindful of the contradictions that would arise if a democracy were to permit general oversight of the elected branches of government by a nonrepresentative, and in large measure insulated, judicial branch." *Ibid.*; see also *Schlesinger* v. *Reservists Comm. to Stop the War*, 418 U.S. 208, 222, 94 S.Ct. 2925, 41 L.Ed.2d 706 (1974); *Warth* v. *Seldin*, 422 U.S. 490, 500, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975). Cf. *Federal Election Comm'n* v. *Akins*, 524 U.S. 11, 21–25, 118 S.Ct. 1777, 141 L.Ed.2d 10 (1998) (finding standing where a group of voters suffered *concrete,* though widespread, harm when they were prevented from accessing publicly disclosable voting-related material).

B

[7] We here must ask whether Adams established that, at the time he filed suit, Delaware's major party provision caused him a concrete, particularized "injury in fact" over and above the abstract generalized grievance suffered by all citizens of Delaware who (if Adams is right) must live in a State subject to an unconstitutional judicial selection criterion. We have examined the record that was before the District Court at summary judgment, keeping in mind that Adams bears the burden of establishing standing as of the time he brought this lawsuit and maintaining it thereafter. *Lujan, supra,* at 561, 112 S.Ct. 2130 (plaintiff bears the burden of proving

standing); *Friends of the Earth, Inc.* v. *Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 191, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000) (standing is assessed "at the time the action commences"); *id.*, at 189, 120 S.Ct. 693 (" 'The requisite personal interest that must exist at the commencement of the litigation ... must continue throughout its existence' "); see also *Lujan, supra,* at 569, n. 4, 112 S.Ct. 2130. And we conclude that Adams did not show the necessary "injury in fact."

[8] Adams suffered a "generalized grievance" of the kind we have just described. He, like all citizens of Delaware, must live and work within a State that (in his view) imposes unconstitutional requirements for eligibility on three of its courts. Lawyers, such as Adams, may feel sincerely and strongly that Delaware's laws should comply with the Federal Constitution. Accord, *Hollingsworth,* 570 U.S., at 706, 133 S.Ct. 2652. But that kind of interest does not create standing. Rather, the question is whether Adams will suffer a " 'personal and individual' " injury beyond this generalized grievance—an injury that is concrete, particularized, and imminent rather than "conjectural or hypothetical." *Id.*, at 705–706, 133 S.Ct. 2652.

[9] Adams says he has. He claims that Delaware's major party requirement in fact prevents him, a political independent, from having his judicial application considered for three of Delaware's courts. To prove this kind of harm, however, Adams ***500** 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. And our cases make clear that he can show this only if he is " 'able and ready' " to apply. See *Gratz* v. *Bollinger*, 539 U.S. 244, 262, 123 S.Ct. 2411, 156 L.Ed.2d 257 (2003); *Northeastern Fla. Chapter, Associated Gen. Contractors of America* v. *Jacksonville*, 508 U.S. 656, 666, 113 S.Ct. 2297, 124 L.Ed.2d 586 (1993). We have examined the summary judgment record to determine whether Adams made this showing. And, as we have said, we conclude that he has not.

[10] The only evidence supporting Adams is two statements he made in his deposition and in his answer to interrogatories that he wants to be, and would apply to be, a judge on any of Delaware's five courts. He said:

> "I would apply for any judicial position that I thought I was qualified for, and I believe I'm qualified for any position that would come up ... [o]n any of the courts. I would feel less comfortable on Chancery than any other court. I would feel most comfortable on Superior Court, Family Court, Court of Common Pleas, state Supreme Court based on my background, experience, and what I have done in my career." App. 34.

He added in his answer to interrogatories:

> "Adams ... would seriously consider and apply for any judicial position for which he feels he is qualified.... Adams believes that he meets the minimum qualifications to apply for any judicial officer position." *Id.*, at 62–63.

Those statements, however, must be considered in the context of the record, which contains evidence showing that, at the time he brought

this lawsuit, Adams was not "able and ready" to apply.

First, the record showed that, between 2012 and 2016, during which time Adams was a practicing lawyer and a registered Democrat, Delaware's five courts had a combined total of 14 openings for which Adams, then a Democrat, would have been eligible. *Id.,* at 51–56, 144–164. Yet he did not apply for any of them. When deposed during discovery, Adams said that in 2014 he had wanted to apply for a Supreme Court or Superior Court judgeship. *Id.,* at 35, 43–46, 62. Adams said that he could not do so because only Republicans were eligible for those positions that year. *Ibid.* He was wrong about that. In particular, there were three vacancies on those two courts in 2014 for which he, as a Democrat, was eligible. *Id.,* at 51–54. Adams later conceded that he had indeed been eligible to apply for those vacancies, but he had not done so. *Id.,* at 43–46.

Second, on December 31, 2015, after roughly 12 years as a lawyer for the Delaware Department of Justice, Adams retired. *Id.,* at 32, 58. In February 2016, Adams changed his bar membership from "Active" to "Emeritus" status. *Id.,* at 61. He then returned to "Active" status in January 2017. *Ibid.* In his deposition, he stated that at about that same time in the "[b]eginning of the year, January/February," he read a law review article arguing that Delaware's judicial eligibility requirements were unconstitutional because they excluded independents. *Id.,* at 38; see Friedlander, Is Delaware's "Other Major Political Party" Really Entitled to Half of Delaware's Judiciary? 58 Ariz. L. Rev. 1139 (2016). Adams called the article's author and said, " 'I just read your Law Review ... article. I'd like to pursue this.' " App. 38. The author suggested several attorneys who might handle the matter. *Ibid.*

Third, shortly thereafter, on February 13, 2017, Adams changed his political affiliation ***501** from Democrat to unaffiliated independent. *Id.,* at 67. Before that, he had been a Democrat his "whole life" and actively involved in the Delaware Democratic Party. *Id.,* at 41. Leaving the party made it less likely that he would become a judge. But doing so made it possible for him to vindicate his view of the law as set forth in the article.

Fourth, after Adams became a political independent on February 13, 2017, he filed this lawsuit eight days later on February 21. *Id.,* at 1.

Fifth, Adams said in his answer to interrogatories that he "has no knowledge of what judicial positions may become open in the next year." *Id.,* at 62.

Sixth, other than the act of filing the lawsuit itself, the summary judgment record contains no evidence of conversations or other actions taken by Adams suggesting that he was "able and ready" to apply for a judgeship.

During his deposition, Adams provided explanations for this negative evidence. He said that his failure to apply for available judgeships at the time when he was eligible reflected his lack of interest in being a judge at that time. He was then content to work at the Department of Justice. *Id.,* at 35; Brief for Respondent 17–18. Adams added that his return from retirement to "Active" bar membership in 2017 showed that he decided on becoming a judge later in life and

after a change in administration at the Delaware Department of Justice. App. 33. (Adams did not explain his failure to apply in 2014, though, when, he said, he *was* interested in a judgeship.) Adams further explained that his contemporaneous change of political affiliation was because he "tend[s] to be much more progressive and liberal than [D]emocrats in Delaware." *Id.,* at 41. Although he had been a lifelong Democrat, and actively involved with the Delaware Democratic Party, he said then that he "probably consider[s]" himself "more of a Bernie [Sanders] independent." *Id.,* at 42. Finally, in Adams' view, the lack of other evidence proves little or nothing about his intentions.

C

This is a highly fact-specific case. In our view, three considerations, taken together, convince us that the record evidence fails to show that, at the time he commenced the lawsuit, Adams was "able and ready" to apply for a judgeship in the reasonably foreseeable future. First, as we have just laid out, Adams' words "I would apply ... " stand alone without any actual past injury, without reference to an anticipated timeframe, without prior judgeship applications, without prior relevant conversations, without efforts to determine likely openings, without other preparations or investigations, and without any other supporting evidence.

Second, the context offers Adams no support. It suggests an abstract, generalized grievance, not an actual desire to become a judge. Indeed, Adams' failure to apply previously when he was eligible, his reading of the law review article, his change of party affiliation, and his swift subsequent filing of the complaint show a desire to vindicate his view of the law, as articulated in the article he read.

Third, if we were to hold that Adams' few words of general intent—without more and against all contrary evidence—were sufficient here to show an "injury in fact," we would significantly weaken the longstanding legal doctrine preventing this Court from providing advisory opinions at the request of one who, without other concrete injury, believes that the government is not following the law. Adams did not show that he was "able and ready" to apply for a vacancy in the reasonably imminent ***502** future. Adams has not sufficiently differentiated himself from a general population of individuals affected in the abstract by the legal provision he attacks. We do not decide whether a statement of intent alone under other circumstances could be enough to show standing. But we are satisfied that Adams' words alone are not enough here when placed in the context of this particular record.

Precedent supports the conclusion that an injury in fact requires an intent that is concrete. In *Lujan*, for example, organizations dedicated to wildlife conservation sought to enjoin enforcement of a federal regulation that they believed would unlawfully harm endangered species. *Lujan,* 504 U.S. at 563–564, 112 S.Ct. 2130. The organizations' members had previously visited the species' habitats abroad, and they said that they intended to return to those foreign habitats in the future. *Ibid.* This Court recognized that having to view a species-impoverished habitat could constitute a cognizable injury. *Id.,* at 562–563, 112 S.Ct.

2130. But it pointed out that the plaintiffs had not described any concrete plans to visit those habitats, nor had they said when they would do so. *Id.,* at 563–564, 112 S.Ct. 2130. The Court said that the organizations had set forth only " 'some day' intentions." *Id.,* at 564, 112 S.Ct. 2130. And "some day intentions" do "not support a finding of the 'actual or imminent' injury that our cases require." *Ibid.*

For another thing, arguably similar cases in which this Court has found standing all contained more evidence that the plaintiff was "able and ready" than Adams has provided here. In *Adarand Constructors, Inc.* v. *Pena*, 515 U.S. 200, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995), for example, a subcontractor challenging a race-based program for allocating contracts established standing by showing that it "bids on every guardrail project in Colorado," that the defendant "is likely to let contracts involving guardrail work ... at least once per year in Colorado," and that the plaintiff "is very likely to bid on each such contract." *Id.,* at 212, 115 S.Ct. 2097.

In *Associated Gen. Contractors,* 508 U.S. at 666, 113 S.Ct. 2297, the Court held that an association of contractors had standing to attack as unlawful a race-based set-aside program for awarding contracts. The contractors showed that they were "able and ready to bid on [future] contracts," for it was undisputed that they had "regularly bid on construction contracts in Jacksonville, and that they would have bid on contracts set aside pursuant to the city's ordinance were they so able." *Id.,* at 666, 668, 113 S.Ct. 2297. The Court noted that it "must assume that [these allegations] are true" because they were not challenged in any way. *Id.,* at 668–669, 113 S.Ct. 2297.

In *Gratz,* 539 U.S. at 262, 123 S.Ct. 2411, we held that a plaintiff had standing to attack as unlawful a university's affirmative action admissions policy. The plaintiff had applied for admission to the university as a freshman applicant in the recent past and been rejected. *Ibid.* He said he intended to apply to transfer to the university in the near future, should the university cease using affirmative action in its transfer admissions process. *Ibid.* And the university had a "rolling" transfer program open for application each year, so there was no doubt that the plaintiff 's injury was imminent. *Id.,* at 256, 123 S.Ct. 2411. The Court therefore concluded that he was " 'able and ready' " to apply as a transfer student. *Id.,* at 262, 123 S.Ct. 2411. Unlike Adams, none of these plaintiffs relied on a bare statement of intent alone against the context of a record that shows nothing more than an abstract generalized grievance. Rather, each introduced at least ***503** some evidence that, *e.g.,* they had applied in the past, there were regular opportunities available with relevant frequency, and they were "able and ready" to apply for them.

By way of contrast, our precedents have also said that a plaintiff need not "translat[e]" his or her "desire for a job ... into a formal application" where that application would be merely a "futile gesture." *Teamsters* v. *United States*, 431 U.S. 324, 365–366, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977); see also *Sporhase* v. *Nebraska ex rel. Douglas*, 458 U.S. 941, 944, n. 2, 102 S.Ct. 3456, 73 L.Ed.2d 1254 (1982). And

we have said that an "aggrieved party 'need not allege that he would have obtained the benefit but for the [unlawful] barrier in order to establish standing.' " *Adarand Constructors, supra,* at 211, 115 S.Ct. 2097; see also *Gratz, supra,* at 262, 123 S.Ct. 2411; *Associated Gen. Contractors, supra,* at 666, 113 S.Ct. 2297. We do not here depart from or modify these or any other of the precedents to which we have referred.

Rather, our holding follows from a straightforward application of precedent to the particular summary judgment record before us. And, as we have explained, in the context set forth by the evidence, Adams has not shown that he was "able and ready" to apply in the imminent future. Consequently, he has failed to show that "personal," "concrete," and "imminent" injury upon which our standing precedents insist.

For these reasons, we reverse the Third Circuit's decision in respect to standing, vacate the judgment, and remand with instructions to dismiss the case.

It is so ordered.

Justice BARRETT took no part in the consideration or decision of this case.

Justice SOTOMAYOR, concurring.

I agree that respondent Adams did not demonstrate Article III standing to bring this suit. Because the constitutional questions in this case will likely be raised again, I write separately to highlight two important considerations that may inform their answers.

First, there are potentially material differences between two separate rules the Delaware Constitution imposes on its courts: the "major party" requirement and the "bare majority" requirement. Bare majority requirements preclude any single political party from having more than a bare majority of the seats in a public body. Such requirements have existed in various forums for roughly 150 years, currently feature in a large number of public bodies, and have been shown to help achieve ideological diversity. Major party requirements like Delaware's, by contrast, preclude anyone who is not a member of the two major political parties from serving in a public body. They are far rarer than their bare majority cousins, and they arguably impose a greater burden on First Amendment associational rights. These differences may require distinct constitutional analyses.

Second, that possibility, in turn, raises the question whether Delaware's major party and bare majority requirements are severable from one another, such that one requirement could remain even if the other were constitutionally unenforceable. It is worth noting that federal courts are not ideally positioned to address such a sensitive issue of state constitutional law. They may therefore be well advised to consider certifying such a question to the State's highest court. See *Leavitt* v. *Jane L.*, 518 U.S. 137, 139, 116 S.Ct. 2068, 135 L.Ed.2d 443 (1996) (*per curiam*) ("Severability [of a state statute] is of course a matter of state law"); ***504** *Hooper* v. *Bernalillo County Assessor*, 472 U.S. 612, 624, 105 S.Ct. 2862, 86 L.Ed.2d 487 (1985) ("It is for the New Mexico courts to decide, as a matter of state law, whether the state legislature would

have enacted the statute without the invalid portion"); see also *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 77, 117 S.Ct. 1055, 137 L.Ed.2d 170 (1997) (encouraging certification of "novel or unsettled questions of state law" to "hel[p] build a cooperative judicial federalism" (internal quotation marks omitted; alteration in original)); *Elkins* v. *Moreno*, 435 U.S. 647, 662, n. 16, 98 S.Ct. 1338, 55 L.Ed.2d 614 (1978) (certifying a question of state law *sua sponte* because it was "one in which state governments have the highest interest"). Certification may be especially warranted in a case such as this, where invalidating a state constitutional provision would affect the structure of one of the State's three major branches of government.

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RLA-7

112 S.Ct. 2130
Supreme Court of the United States

Manuel LUJAN, Jr., Secretary
of the Interior, Petitioner
v.
DEFENDERS OF WILDLIFE, et al.

No. 90–1424
|
Argued Dec. 3, 1991.
|
Decided June 12, 1992.

Synopsis

Environmental groups brought action challenging regulation of the Secretary of the Interior which required other agencies to confer with him under the Endangered Species Act only with respect to federally funded projects in the United States and on the high seas. The United States District Court for the District of Minnesota, Donald D. Alsop, Chief Judge, dismissed for lack of standing, 658 F.Supp. 43. The Court of Appeals for the Eighth Circuit reversed, 851 F.2d 1035. The District Court entered judgment in favor of environmental groups, 707 F.Supp. 1082, and the Court of Appeals affirmed, 911 F.2d 117. On certiorari, the Supreme Court, Justice Scalia, held that: (1) plaintiffs did not assert sufficiently imminent injury to have standing, and (2) plaintiffs' claimed injury was not redressable.

Reversed and remanded.

Justice Kennedy filed an opinion concurring in part and concurring in the judgment in which Justice Souter joined.

Justice Stevens filed an opinion concurring in the judgment.

Justice Blackmun dissented and filed an opinion in which Justice O'Connor joined.

West Headnotes (19)

[1] Constitutional Law Separation of Powers

Constitution's central mechanism of separation of powers depends largely upon common understanding of what activities are appropriate to legislatures, to executives, and to courts. U.S.C.A. Const. Art. 1, § 1; Art. 2, § 1, cl. 1; Art. 3, § 1 et seq.

29 Cases that cite this headnote

[2] Federal Civil Procedure In general; injury or interest

Though some of its elements express merely prudential considerations that are part of judicial self-government, core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III. U.S.C.A. Const. Art. 3, § 1 et seq.

2224 Cases that cite this headnote

[3] Federal Civil Procedure In general; injury or interest

Federal Civil Procedure Causation; redressability

Federal Civil Procedure Rights of third parties or public

Irreducible constitutional minimum of standing requires that plaintiff have suffered an injury in fact, which is an invasion of a legally protected interest which is concrete and particularized and actual or imminent rather than conjectural or hypothetical; that there be a causal connection between the injury and conduct complained of so that the injury is fairly traceable to the challenged action of the defendant and not the result of the independent action of some third party who is not before the court; and that it be likely, as opposed to merely speculative, that injury will be redressed by a favorable decision.

19025 Cases that cite this headnote

[4] **Federal Civil Procedure** In general; injury or interest

In order for injury to be "particularized," it must affect the plaintiff in a personal and individual way.

2102 Cases that cite this headnote

[5] **Federal Civil Procedure** In general; injury or interest

Party invoking federal jurisdiction bears the burden of establishing elements of standing.

5443 Cases that cite this headnote

[6] **Federal Civil Procedure** In general; injury or interest

Federal Civil Procedure Pleading

Elements of standing are not merely pleading requirements but, rather, are an indispensable part of the plaintiff's case, and each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, with the manner and degree of evidence required at successive stages of litigation.

2806 Cases that cite this headnote

[7] **Federal Civil Procedure** In general; injury or interest

Federal Civil Procedure Burden of proof

At the pleading stage, general factual allegations of injury resulting from defendant's conduct may suffice to establish standing; in response to summary judgment motion, plaintiff can no longer rest on mere allegations but must set forth by affidavit or other evidence the specific facts which will be taken as true for purposes of summary judgment; at the final stage, those facts, if controverted,

must be supported adequately by the evidence adduced at trial. Fed.Rules Civ.Proc.Rule 56(e), 28 U.S.C.A.

3819 Cases that cite this headnote

[8] Federal Civil Procedure Causation; redressability

When plaintiff's asserted injury arises from the government's allegedly unlawful regulation or lack of regulation of someone else, causation and redressability required for standing hinge on response of the regulated or regulable third party to the government action or inaction and on the response of others as well.

1456 Cases that cite this headnote

[9] Environmental Law Cognizable interests and injuries, in general

Desire to use or observe animal species, even for purely aesthetic purposes, is a cognizable interest for standing purposes.

189 Cases that cite this headnote

[10] Federal Civil Procedure Burden of proof

To survive summary judgment motion for dismissal of suit under Endangered Species Act for lack of standing, environmental groups had to submit affidavits or other evidence showing, through specific facts, not only that listed species were in fact being threatened by funded activities abroad but, also that one or more of the groups' members would thereby be directly affected, apart from their special interest in the subject. Endangered Species Act of 1973, § 11(g), as amended, 16 U.S.C.A. § 1540(g).

200 Cases that cite this headnote

[11] Environmental Law Organizations, associations, and other groups

Affidavits in which members of organizations stated that they had previously traveled to places in the world where projects being funded by the Agency for International Development (AID) were taking place and that they hoped to be able to return and observe endangered species in those locations did not show that damage to species from the projects would produce imminent injury to them, and organizations thus did not have standing to challenge regulation of the Secretary of the Interior requiring that other agencies consult under the Endangered Species Act only with respect to actions in the United States or on the high seas. Endangered Species Act of 1973, § 7(a)(2), as amended, 16 U.S.C.A. § 1536(a)(2).

114 Cases that cite this headnote

[12] **Federal Civil Procedure** In general; injury or interest

Imminence of injury is demanded for standing even when the alleged harm does not depend upon affirmative actions of third parties which are beyond the plaintiff's control.

823 Cases that cite this headnote

[13] **Environmental Law** Cognizable interests and injuries, in general

"Ecosystem nexus," under which a person who uses any part of a continuous ecosystem may be considered adversely affected by activity, does not provide basis for standing to challenge the activity.

66 Cases that cite this headnote

[14] **Environmental Law** Other particular parties

Persons seeking to challenge regulation of the Secretary of the Interior which required other agencies to consult under the Endangered Species Act only with respect to federally funded projects in the United States and on the high seas, and not in other countries, could not obtain standing under a "animal nexus" approach, whereby anyone who has an interest in studying or seeing the endangered animals anywhere on the globe has standing, or under a "vocational nexus" approach, under which anyone with a professional interest in the animals can sue. Endangered Species Act of 1973, § 7(a)(2), as amended, 16 U.S.C.A. § 1536(a)(2).

63 Cases that cite this headnote

[15] **Environmental Law** Organizations, associations, and other groups

Harm allegedly suffered by members of environmental groups as result of federal funding of projects in other countries which might threaten endangered species could not be redressed in action against Secretary of the Interior challenging his regulation which required consultation under the Endangered Species Act by other governmental agencies only with respect to funding of projects in the United States and on the high seas, and groups thus lacked standing, as other agencies denied the authority of the Secretary to order consultation and would not be bound by an order and action to which they were not a party. (Per Justice Scalia with the Chief Justice and two Justices concurring and two Justices concurring in part and in the judgment.) Endangered Species Act of 1973, § 7(a)(2), as amended, 16 U.S.C.A. § 1536(a)(2).

103 Cases that cite this headnote

[16] **Federal Civil Procedure** Causation; redressability

Existence of federal jurisdiction ordinarily depends upon facts as they exist when the complaint is filed, and later participation in a suit by those parties necessary for plaintiffs' injury to be redressed will not give plaintiffs standing when their injury was not redressable by any of the parties to the suit at the time that it was filed. (Per Justice Scalia with the Chief Justice and two Justices concurring and two Justices concurring in part and in the judgment.)

2385 Cases that cite this headnote

[17] **Environmental Law** Other particular parties

Members of environmental groups who asserted injury due to lack of opportunity to observe endangered species as a result of projects in other countries partially funded by the Agency for International Development (AID) did not show an injury which would be redressable as a result of challenge to regulation of the Secretary of the Interior which required AID to consult under the Endangered Species Act only with respect to projects in the United States and on the high seas where AID provided less than 10% of the funding for project about which plaintiffs complained and there was nothing to indicate that the project would be suspended or do less harm to endangered species if that funding were eliminated. (Per Justice Scalia with Chief Justice and two Justices concurring and two Justices concurring in part and in judgment.) Endangered Species Act of 1973, § 7(a)(2), as amended, 16 U.S.C.A. § 1536(a)(2).

363 Cases that cite this headnote

[18] **Environmental Law** Other particular parties

Persons challenging regulation of the Secretary of the Interior requiring other agencies to consult with him under the Endangered Species Act only with respect to funding of projects in the United States and on the high seas did not have standing on basis of the "citizen-suit" provision of the Endangered Species Act. Endangered Species Act of 1973, §§ 7(a)(2), 11(g), as amended, 16 U.S.C.A. §§ 1536(a)(2), 1540(g).

38 Cases that cite this headnote

[19] **Federal Civil Procedure** Rights of third parties or public

Plaintiff raising only a generally available grievance about government, and claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and

tangibly benefits him than it does the public at large does not state an Article III case or controversy. U.S.C.A. Const. Art. 3, § 1 et seq.

943 Cases that cite this headnote

**2133 *Syllabus* *

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

Section 7(a)(2) of the Endangered Species Act of 1973 divides responsibilities regarding the protection of endangered species between petitioner Secretary of the Interior and the Secretary of Commerce, and requires each federal agency to consult with the relevant Secretary to ensure that any action funded by the agency is not likely to jeopardize the continued existence or habitat of any endangered or threatened species. Both Secretaries initially promulgated a joint regulation extending § 7(a)(2)'s coverage to actions taken in foreign nations, but a subsequent joint rule limited the section's geographic scope to the United States and the high seas. Respondents, wildlife conservation and other environmental organizations, filed an action in the District Court, seeking a declaratory judgment that the new regulation erred as to § 7(a)(2)'s geographic scope and an injunction requiring the Secretary of the Interior to promulgate a new rule restoring his initial interpretation. The Court of Appeals reversed the District Court's dismissal of the suit for lack of standing. Upon remand, on cross-motions for summary judgment, the District Court denied the Secretary's motion, which renewed his objection to standing, and granted respondents' motion, ordering the Secretary to publish a new rule. The Court of Appeals affirmed.

**2134 *Held:* The judgment is reversed, and the case is remanded.

911 F.2d 117, (CA 8 1990), reversed and remanded.

Justice SCALIA delivered the opinion of the Court, except as to Part III–B, concluding that respondents lack standing to seek judicial review of the rule. Pp. 2135–2140, 2142–2146.

(a) As the parties invoking federal jurisdiction, respondents bear the burden of showing standing by establishing, *inter alia,* that they have suffered an injury in fact, *i.e.,* a concrete and particularized, actual or imminent invasion of a legally protected interest. To survive a summary judgment motion, they must set forth by affidavit or other evidence specific facts to support their claim. Standing is particularly difficult to show here, since third parties, rather than respondents, are the object of the Government action or inaction to which respondents object. Pp. 2135–2137.

*556 b) Respondents did not demonstrate that they suffered an injury in fact. Assuming that they established that funded activities abroad threaten certain species, they failed

to show that one or more of their members would thereby be directly affected apart from the members' special interest in the subject. See *Sierra Club v. Morton,* 405 U.S. 727, 735, 739, 92 S.Ct. 1361, 1366, 1368, 31 L.Ed.2d 636. Affidavits of members claiming an intent to revisit project sites at some indefinite future time, at which time they will presumably be denied the opportunity to observe endangered animals, do not suffice, for they do not demonstrate an "imminent" injury. Respondents also mistakenly rely on a number of other novel standing theories. Their theory that any person using any part of a contiguous ecosystem adversely affected by a funded activity has standing even if the activity is located far away from the area of their use is inconsistent with this Court's opinion in *Lujan v. National Wildlife Federation,* 497 U.S. 871, 110 S.Ct. 3177, 111 L.Ed.2d 695. And they state purely speculative, nonconcrete injuries when they argue that suit can be brought by anyone with an interest in studying or seeing endangered animals anywhere on the globe and anyone with a professional interest in such animals. Pp. 2137–2140.

(c) The Court of Appeals erred in holding that respondents had standing on the ground that the statute's citizen-suit provision confers on all persons the right to file suit to challenge the Secretary's failure to follow the proper consultative procedure, notwithstanding their inability to allege any separate concrete injury flowing from that failure. This Court has consistently held that a plaintiff claiming only a generally available grievance about government, unconnected with a threatened concrete interest of his own, does not state an Article III case or controversy. See, *e.g., Fairchild v. Hughes,* 258 U.S. 126, 129–130, 42 S.Ct. 274, 275, 66 L.Ed. 499. Vindicating the public interest is the function of the Congress and the Chief Executive. To allow that interest to be converted into an individual right by a statute denominating it as such and permitting all citizens to sue, regardless of whether they suffered any concrete injury, would authorize Congress to transfer from the President to the courts the Chief Executive's most important constitutional duty, to "take Care that the Laws be faithfully executed," Art. II, § 3. Pp. 2142–2146.

SCALIA, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, III–A, and IV, in which REHNQUIST, C.J., and WHITE, KENNEDY, SOUTER, and THOMAS, JJ., joined, and an opinion with respect to Part III–B, in which REHNQUIST, C.J., and WHITE and THOMAS, JJ., joined. KENNEDY, J., filed an opinion concurring in part and concurring in the judgment, in which SOUTER, J., joined, *post,* p. 2146. STEVENS, J., filed an opinion concurring in the judgment, *post,* ****2135 *557** p. 2147. BLACKMUN, J., filed a dissenting opinion, in which O'CONNOR, J., joined, *post,* p. 2151.

Attorneys and Law Firms

Edwin S. Kneedler argued the cause for petitioner. With him on the briefs were Solicitor General Starr, Acting Assistant Attorney General Hartman, Deputy Solicitor General Wallace, Robert L. Klarquist, David C. Shilton, Thomas L. Sansonetti, and Michael Young.

Brian B. O'Neill argued the cause for respondents. With him on the brief were Steven C. Schroer and Richard A. Duncan.*

* Terence P. Ross, Daniel J. Popeo, and Richard A. Samp filed a brief for the Washington Legal Foundation et al. as amici curiae urging reversal.

Briefs of amici curiae urging affirmance were filed for the City of Austin et al. by William A. Butler, Angus E. Crane, Michael J. Bean, Kenneth Oden, James M. McCormack, and Wm. Robert Irvin; for the American Association of Zoological Parks & Aquariums et al. by Ronald J. Greene and W. Hardy Callcott; for the American Institute of Biological Sciences by Richard J. Wertheimer and Charles M. Chambers; and for the Ecotropica Foundation of Brazil et al. by Durwood J. Zaelke.

A brief of amici curiae was filed for the State of Texas et al. by Patrick J. Mahoney, Dan Morales, Attorney General of Texas, Will Pryor, First Assistant Attorney General, Mary F. Keller, Deputy Attorney General, and Nancy N. Lynch, Mary Ruth Holder, and Shannon J. Kilgore, Assistant Attorneys General, Grant Woods, Attorney General of Arizona, Winston Bryant, Attorney General of Arkansas, Daniel E. Lungren, Attorney General of California, Robert A. Butterworth, Attorney General of Florida, Michael E. Carpenter, Attorney General of Maine, Frank J. Kelley, Attorney General of Michigan, Hubert H. Humphrey III, Attorney General of Minnesota, Robert J. Del Tufo, Attorney General of New Jersey, Robert Abrams, Attorney General of New York, Lee Fisher, Attorney General of Ohio, and Jeffrey L. Amestoy, Attorney General of Vermont, Victor A. Kovner, Leonard J. Koerner, Neal M. Janey, and Louise H. Renne.

Opinion

Justice SCALIA delivered the opinion of the Court with respect to Parts I, II, III–A, and IV, and an opinion with respect to Part III–B, in which THE CHIEF JUSTICE, Justice WHITE, and Justice THOMAS join.

This case involves a challenge to a rule promulgated by the Secretary of the Interior interpreting § 7 of the Endangered ***558** Species Act of 1973 (ESA), 87 Stat. 884, 892, as amended, 16 U.S.C. § 1536, in such fashion as to render it applicable only to actions within the United States or on the high seas. The preliminary issue, and the only one we reach, is whether respondents here, plaintiffs below, have standing to seek judicial review of the rule.

I

The ESA, 87 Stat. 884, as amended, 16 U.S.C. § 1531 *et seq.,* seeks to protect species of animals against threats to their continuing existence caused by man. See generally *TVA v. Hill,* 437 U.S. 153, 98 S.Ct. 2279, 57 L.Ed.2d 117 (1978). The ESA instructs the Secretary of the Interior to promulgate by regulation a list of those species which are either endangered or threatened under enumerated criteria, and to define the critical habitat of these species. 16 U.S.C. §§ 1533, 1536. Section 7(a)(2) of the Act then provides, in pertinent part:

> "Each Federal agency shall, in consultation with and with the assistance of the Secretary [of the Interior], insure that any action authorized, funded, or carried out by such agency ... is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical." 16 U.S.C. § 1536(a)(2).

In 1978, the Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS), on behalf of the Secretary of the Interior and the Secretary of Commerce respectively, promulgated a joint regulation stating that the obligations imposed by § 7(a)(2) extend to actions taken in foreign nations. 43 Fed.Reg. 874 (1978). The next year, however, the Interior Department began to reexamine its position. Letter from Leo Kuliz, Solicitor, Department of the Interior, to Assistant Secretary, Fish and Wildlife and Parks, Aug. 8, 1979. A revised joint regulation, reinterpreting ***559** § 7(a)(2) to require consultation only for actions taken in the United States or on the high seas, was proposed in 1983, 48 Fed.Reg. 29990, and promulgated in 1986, 51 Fed.Reg. 19926; 50 CFR 402.01 (1991).

Shortly thereafter, respondents, organizations dedicated to wildlife conservation and other environmental causes, filed this action against the Secretary of the Interior, seeking a declaratory judgment that the new regulation is in error as to the geographic scope of § 7(a)(2) and an injunction requiring the Secretary to promulgate a new regulation restoring the initial interpretation. The District Court granted the Secretary's motion to dismiss for lack of standing. *Defenders of Wildlife v. Hodel,* 658 F.Supp. 43, 47–48 (Minn.1987). The Court of Appeals for the Eighth Circuit reversed by a divided vote. *Defenders of Wildlife v. Hodel,* 851 F.2d 1035 (1988). On remand, the Secretary moved for summary judgment on the standing issue, and respondents moved for summary judgment on the merits. The District Court denied the Secretary's motion, on the ground that the Eighth Circuit had already determined the standing question in this case; it granted respondents' merits motion, and ordered the Secretary to publish a revised regulation. *Defenders of Wildlife v. Hodel,* 707 F.Supp. 1082 (Minn.1989). The Eighth Circuit affirmed. 911 F.2d 117 (1990). We granted certiorari, 500 U.S. 915, 111 S.Ct. 2008, 114 L.Ed.2d 97 (1991).

II

[1] **[2]** While the Constitution of the United States divides all power conferred upon ****2136** the Federal Government into "legislative Powers," Art. I, § 1, "[t]he executive Power," Art. II, § 1, and "[t]he judicial Power," Art. III, § 1, it does not attempt to define those terms. To be sure, it limits the jurisdiction of federal courts to "Cases" and "Controversies," but an executive inquiry can bear the name "case" (the Hoffa case) and a legislative dispute can bear the name "controversy" (the Smoot–Hawley controversy). Obviously, then, the Constitution's central mechanism of separation of powers depends ***560** largely upon

common understanding of what activities are appropriate to legislatures, to executives, and to courts. In The Federalist No. 48, Madison expressed the view that "[i]t is not infrequently a question of real nicety in legislative bodies whether the operation of a particular measure will, or will not, extend beyond the legislative sphere," whereas "the executive power [is] restrained within a narrower compass and ... more simple in its nature," and "the judiciary [is] described by landmarks still less uncertain." The Federalist No. 48, p. 256 (Carey and McClellan eds. 1990). One of those landmarks, setting apart the "Cases" and "Controversies" that are of the justiciable sort referred to in Article III—"serv[ing] to identify those disputes which are appropriately resolved through the judicial process," *Whitmore v. Arkansas,* 495 U.S. 149, 155, 110 S.Ct. 1717, 1722, 109 L.Ed.2d 135 (1990)—is the doctrine of standing. Though some of its elements express merely prudential considerations that are part of judicial self-government, the core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III. See, *e.g., Allen v. Wright,* 468 U.S. 737, 751, 104 S.Ct. 3315, 3324, 82 L.Ed.2d 556 (1984).

[3] **[4]** Over the years, our cases have established that the irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized, see *id.,* at 756, 104 S.Ct., at 3327; *Warth v. Seldin,* 422 U.S. 490, 508, 95 S.Ct. 2197, 2210, 45 L.Ed.2d 343 (1975); *Sierra Club v. Morton,* 405 U.S. 727, 740–741, n. 16, 92 S.Ct. 1361, 1368–1369, n. 16, 31 L.Ed.2d 636 (1972);[1] and (b) "actual or imminent, not 'conjectural' or 'hypothetical,' " *Whitmore, supra,* 495 U.S., at 155, 110 S.Ct., at 1723 (quoting *Los Angeles v. Lyons,* 461 U.S. 95, 102, 103 S.Ct. 1660, 1665, 75 L.Ed.2d 675 (1983)). Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be "fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court." ***561** *Simon v. Eastern Ky. Welfare Rights Organization,* 426 U.S. 26, 41–42, 96 S.Ct. 1917, 1926, 48 L.Ed.2d 450 (1976). Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision." *Id.,* at 38, 43, 96 S.Ct., at 1924, 1926.

1 By particularized, we mean that the injury must affect the plaintiff in a personal and individual way.

[5] **[6]** **[7]** The party invoking federal jurisdiction bears the burden of establishing these elements. See *FW/PBS, Inc. v. Dallas,* 493 U.S. 215, 231, 110 S.Ct. 596, 608, 107 L.Ed.2d 603 (1990); *Warth, supra,* 422 U.S., at 508, 95 S.Ct., at 2210. Since they are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.,* with the manner and degree of evidence required at the successive stages of the litigation. See *Lujan v. National Wildlife Federation,* 497 U.S. 871, 883–889, 110 S.Ct. 3177, 3185–3189, 111 L.Ed.2d 695 (1990); *Gladstone, Realtors v. Village of Bellwood,* 441 U.S. 91, 114–115, and

n. 31, 99 S.Ct. 1601, 1614–1615, and n. 31, 60 L.Ed.2d 66 (1979); **2137 *Simon, supra,* 426 U.S., at 45, n. 25, 96 S.Ct., at 1927, and n. 25; *Warth, supra,* 422 U.S., at 527, and n. 6, 95 S.Ct., at 2219, and n. 6 (Brennan, J., dissenting). At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we "presum[e] that general allegations embrace those specific facts that are necessary to support the claim." *National Wildlife Federation, supra,* 497 U.S., at 889, 110 S.Ct., at 3189. In response to a summary judgment motion, however, the plaintiff can no longer rest on such "mere allegations," but must "set forth" by affidavit or other evidence "specific facts," Fed.Rule Civ.Proc. 56(e), which for purposes of the summary judgment motion will be taken to be true. And at the final stage, those facts (if controverted) must be "supported adequately by the evidence adduced at trial." *Gladstone, supra,* 441 U.S., at 115, n. 31, 99 S.Ct., at 1616, n. 31.

[8] When the suit is one challenging the legality of government action or inaction, the nature and extent of facts that must be averred (at the summary judgment stage) or proved (at the trial stage) in order to establish standing depends considerably upon whether the plaintiff is himself an object of the action (or forgone action) at issue. If he is, there is ordinarily little question that the action or inaction has *562 caused him injury, and that a judgment preventing or requiring the action will redress it. When, however, as in this case, a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of *someone else,* much more is needed. In that circumstance, causation and redressability ordinarily hinge on the response of the regulated (or regulable) third party to the government action or inaction —and perhaps on the response of others as well. The existence of one or more of the essential elements of standing "depends on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict," *ASARCO Inc. v. Kadish,* 490 U.S. 605, 615, 109 S.Ct. 2037, 2044, 104 L.Ed.2d 696 (1989) (opinion of KENNEDY, J.); see also *Simon, supra,* 426 U.S., at 41–42, 96 S.Ct., at 1925, 1926; and it becomes the burden of the plaintiff to adduce facts showing that those choices have been or will be made in such manner as to produce causation and permit redressability of injury. *E.g., Warth, supra,* 422 U.S., at 505, 95 S.Ct., at 2208. Thus, when the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily "substantially more difficult" to establish. *Allen, supra,* 468 U.S., at 758, 104 S.Ct., at 3328; *Simon, supra,* 426 U.S., at 44–45, 96 S.Ct., at 1927; *Warth, supra,* 422 U.S., at 505, 95 S.Ct., at 2208.

III

We think the Court of Appeals failed to apply the foregoing principles in denying the Secretary's motion for summary judgment. Respondents had not made the requisite demonstration of (at least) injury and redressability.

A

[9] **[10]** Respondents' claim to injury is that the lack of consultation with respect to certain funded activities abroad "increas[es] the rate of extinction of endangered and threatened species." Complaint ¶ 5, App. 13. Of course, the desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for purpose of ***563** standing. See, *e.g., Sierra Club v. Morton,* 405 U.S., at 734, 92 S.Ct., at 1366. "But the 'injury in fact' test requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured." *Id.,* at 734–735, 92 S.Ct., at 1366. To survive the Secretary's summary judgment motion, respondents had to submit affidavits or other evidence showing, through specific facts, not only that listed species were in fact being threatened by ****2138** funded activities abroad, but also that one or more of respondents' members would thereby be "directly" affected apart from their " 'special interest' in th[e] subject." *Id.,* at 735, 739, 92 S.Ct., at 1366, 1368. See generally *Hunt v. Washington State Apple Advertising Comm'n,* 432 U.S. 333, 343, 97 S.Ct. 2434, 2441, 53 L.Ed.2d 383 (1977).

[11] **[12]** With respect to this aspect of the case, the Court of Appeals focused on the affidavits of two Defenders' members—Joyce Kelly and Amy Skilbred. Ms. Kelly stated that she traveled to Egypt in 1986 and "observed the traditional habitat of the endangered nile crocodile there and intend[s] to do so again, and hope[s] to observe the crocodile directly," and that she "will suffer harm in fact as the result of [the] American ... role ... in overseeing the rehabilitation of the Aswan High Dam on the Nile ... and [in] develop [ing] ... Egypt's ... Master Water Plan." App. 101. Ms. Skilbred averred that she traveled to Sri Lanka in 1981 and "observed th[e] habitat" of "endangered species such as the Asian elephant and the leopard" at what is now the site of the Mahaweli project funded by the Agency for International Development (AID), although she "was unable to see any of the endangered species"; "this development project," she continued, "will seriously reduce endangered, threatened, and endemic species habitat including areas that I visited ... [, which] may severely shorten the future of these species"; that threat, she concluded, harmed her because she "intend[s] to return to Sri Lanka in the future and hope[s] to be more fortunate in spotting at least the endangered elephant and leopard." *Id.,* at 145–146. When Ms. Skilbred was asked ***564** at a subsequent deposition if and when she had any plans to return to Sri Lanka, she reiterated that "I intend to go back to Sri Lanka," but confessed that she had no current plans: "I don't know [when]. There is a civil war going on right now. I don't know. Not next year, I will say. In the future." *Id.,* at 318.

We shall assume for the sake of argument that these affidavits contain facts showing that certain agency-funded projects threaten listed species—though that is questionable. They plainly contain no facts, however, showing how damage to the species will produce "imminent" injury to Mses. Kelly and Skilbred. That the women "had visited" the areas of the projects before the projects commenced proves nothing. As we have said in a related context, " 'Past exposure to illegal conduct does not in itself

show a present case or controversy regarding injunctive relief ... if unaccompanied by any continuing, present adverse effects.' " *Lyons,* 461 U.S., at 102, 103 S.Ct., at 1665 (quoting *O'Shea v. Littleton,* 414 U.S. 488, 495–496, 94 S.Ct. 669, 676, 38 L.Ed.2d 674 (1974)). And the affiants' profession of an "inten[t]" to return to the places they had visited before —where they will presumably, this time, be deprived of the opportunity to observe animals of the endangered species—is simply not enough. Such "some day" intentions—without any description of concrete plans, or indeed even any specification of *when* the some day will be—do not support a finding of the "actual or imminent" injury that our cases require. See *supra,* at 2136. [2]

2 The dissent acknowledges the settled requirement that the injury complained of be, if not actual, then at least *imminent*, but it contends that respondents could get past summary judgment because "a reasonable finder of fact could conclude ... that ... Kelly or Skilbred will soon return to the project sites." *Post,* at 2152. This analysis suffers either from a factual or from a legal defect, depending on what the "soon" is supposed to mean. If "soon" refers to the standard mandated by our precedents—that the injury be "imminent," *Whitmore v. Arkansas,* 495 U.S. 149, 155, 110 S.Ct. 1717, 1723, 109 L.Ed.2d 135 (1990)—we are at a loss to see how, as a factual matter, the standard can be met by respondents' mere profession of an intent, some day, to return. But if, as we suspect, "soon" means nothing more than "in this lifetime," then the dissent has undertaken quite a departure from our precedents. Although "imminence" is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes—that the injury is " ' "*certainly* impending," ' " *id.,* at 158, 110 S.Ct., at 1725 (emphasis added). It has been stretched beyond the breaking point when, as here, the plaintiff alleges only an injury at some indefinite future time, and the acts necessary to make the injury happen are at least partly within the plaintiff's own control. In such circumstances we have insisted that the injury proceed with a high degree of immediacy, so as to reduce the possibility of deciding a case in which no injury would have occurred at all. See, *e.g., id.,* at 156–160, 110 S.Ct., at 1723–1726; *Los Angeles v. Lyons,* 461 U.S. 95, 102–106, 103 S.Ct. 1660, 1665–1667, 75 L.Ed.2d 675 (1983). There is no substance to the dissent's suggestion that imminence is demanded only when the alleged harm depends upon "the affirmative actions of third parties beyond a plaintiff's control," *post,* at 2153. Our cases *mention* third-party-caused contingency, naturally enough; but they also mention the plaintiff's failure to show that he will soon expose *himself* to the injury, see, *e.g., Lyons, supra,* at 105–106, 103 S.Ct., at 1666–1667; *O'Shea v. Littleton,* 414 U.S. 488, 497, 94 S.Ct. 669, 676, 38 L.Ed.2d 674 (1974); *Ashcroft v. Mattis,* 431 U.S.

171, 172–173, n. 2, 97 S.Ct. 1739, 1740 n. 2, 52 L.Ed.2d 219 (1977) (*per curiam*). And there is certainly no reason in principle to demand evidence that third persons will take the action exposing the plaintiff to harm, while *presuming* that the plaintiff himself will do so.

Our insistence upon these established requirements of standing does not mean that we would, as the dissent contends, "demand ... detailed descriptions" of damages, such as a "nightly schedule of attempted activities" from plaintiffs alleging loss of consortium. *Post,* at 2153. That case and the others posited by the dissent all involve *actual* harm; the existence of standing is clear, though the precise extent of harm remains to be determined at trial. Where there is no actual harm, however, its imminence (though not its precise extent) must be established.

****2139** **[13]** ***565** Besides relying upon the Kelly and Skilbred affidavits, respondents propose a series of novel standing theories. The first, inelegantly styled "ecosystem nexus," proposes that any person who uses *any part* of a "contiguous ecosystem" adversely affected by a funded activity has standing even if the activity is located a great distance away. This approach, as the Court of Appeals correctly observed, is inconsistent with our opinion in *National Wildlife Federation,* which held that a plaintiff claiming injury from environmental damage ***566** must use the area affected by the challenged activity and not an area roughly "in the vicinity" of it. 497 U.S., at 887–889, 110 S.Ct., at 3188–3189; see also *Sierra Club,* 405 U.S., at 735, 92 S.Ct., at 1366. It makes no difference that the general-purpose section of the ESA states that the Act was intended in part "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved," 16 U.S.C. § 1531(b). To say that the Act protects ecosystems is not to say that the Act creates (if it were possible) rights of action in persons who have not been injured in fact, that is, persons who use portions of an ecosystem not perceptibly affected by the unlawful action in question.

[14] Respondents' other theories are called, alas, the "animal nexus" approach, whereby anyone who has an interest in studying or seeing the endangered animals anywhere on the globe has standing; and the "vocational nexus" approach, under which anyone with a professional interest in such animals can sue. Under these theories, anyone who goes to see Asian elephants in the Bronx Zoo, and anyone who is a keeper of Asian elephants in the Bronx Zoo, has standing to sue because the Director of the Agency for International Development (AID) did not consult with the Secretary regarding the AID-funded project in Sri Lanka. This is beyond all reason. Standing is not "an ingenious academic exercise in the conceivable," *United States v. Students Challenging Regulatory Agency Procedures (SCRAP),* 412 U.S. 669, 688, 93 S.Ct. 2405, 2416, 37 L.Ed.2d 254 (1973), but as we have said requires, at the summary judgment stage, a factual showing of perceptible harm. It is clear that the person who observes or works with a particular animal threatened by a federal decision is facing perceptible harm, since the very subject of his interest will no longer exist.

It is even plausible—though it goes to the outermost limit of plausibility—to think that a person who observes or works with animals ****2140** of a particular species in the very area of the world where that species is threatened by a federal decision is facing such harm, since some animals that ***567** might have been the subject of his interest will no longer exist, see *Japan Whaling Assn. v. American Cetacean Society,* 478 U.S. 221, 231, n. 4, 106 S.Ct. 2860, 2866, n. 4, 92 L.Ed.2d 166 (1986). It goes beyond the limit, however, and into pure speculation and fantasy, to say that anyone who observes or works with an endangered species, anywhere in the world, is appreciably harmed by a single project affecting some portion of that species with which he has no more specific connection. [3]

3 The dissent embraces each of respondents' "nexus" theories, rejecting this portion of our analysis because it is "unable to see how the distant location of the destruction *necessarily* (for purposes of ruling at summary judgment) mitigates the harm" to the plaintiff. *Post,* at 2154. But summary judgment must be entered "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett,* 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). Respondents had to adduce facts, therefore, on the basis of which it could reasonably be found that concrete injury to their members was, as our cases require, "certainly impending." The dissent may be correct that the geographic remoteness of those members (here in the United States) from Sri Lanka and Aswan does not "*necessarily* " prevent such a finding—but it assuredly does so when no further facts have been brought forward (and respondents have produced none) showing that the impact upon animals in those distant places will in some fashion be reflected here. The dissent's position to the contrary reduces to the notion that distance *never* prevents harm, a proposition we categorically reject. It cannot be that a person with an interest in an animal automatically has standing to enjoin federal threats to that species of animal, anywhere in the world. Were that the case, the plaintiff in *Sierra Club,* for example, could have avoided the necessity of establishing anyone's use of Mineral King by merely identifying one of its members interested in an endangered species of flora or fauna at that location. Justice BLACKMAN's accusation that a special rule is being crafted for "environmental claims," *post,* at 2154, is correct, but *he* is the craftsman.
Justice STEVENS, by contrast, would allow standing on an apparent "animal nexus" theory to all plaintiffs whose interest in the animals is "genuine." Such plaintiffs, we are told, do not have to visit the animals because the animals are analogous to family members. *Post,* at 2148–2149, and n. 2. We decline to join Justice STEVENS in this Linnaean leap. It is unclear to us what constitutes

a "genuine" interest; how it differs from a "nongenuine" interest (which nonetheless prompted a plaintiff to file suit); and why such an interest in animals should be different from such an interest in anything else that is the subject of a lawsuit.

***568** B

Besides failing to show injury, respondents failed to demonstrate redressability. Instead of attacking the separate decisions to fund particular projects allegedly causing them harm, respondents chose to challenge a more generalized level of Government action (rules regarding consultation), the invalidation of which would affect all overseas projects. This programmatic approach has obvious practical advantages, but also obvious difficulties insofar as proof of causation or redressability is concerned. As we have said in another context, "suits challenging, not specifically identifiable Government violations of law, but the particular programs agencies establish to carry out their legal obligations ... [are], even when premised on allegations of several instances of violations of law, ... rarely if ever appropriate for federal-court adjudication." *Allen,* 468 U.S., at 759–760, 104 S.Ct., at 3329.

[15] The most obvious problem in the present case is redressability. Since the agencies funding the projects were not parties to the case, the District Court could accord relief only against the Secretary: He could be ordered to revise his regulation to require consultation for foreign projects. But this would not remedy respondents' alleged injury unless the funding agencies were bound by the Secretary's regulation, which is very much an open question. Whereas in other contexts the ESA is quite explicit as to the Secretary's controlling authority, see, *e.g.,* 16 U.S.C. § 1533(a)(1) ("The Secretary shall" promulgate regulations determining endangered species); § 1535(d)(1) ****2141** ("The Secretary is authorized to provide financial assistance to any State"), with respect to consultation the initiative, and hence arguably the initial responsibility for determining statutory necessity, lies with ***569** the agencies, see § 1536(a)(2) ("*Each Federal agency shall,* in consultation with and with the assistance of the Secretary, insure that any" funded action is not likely to jeopardize endangered or threatened species) (emphasis added). When the Secretary promulgated the regulation at issue here, he thought it was binding on the agencies, see 51 Fed.Reg. 19928 (1986). The Solicitor General, however, has repudiated that position here, and the agencies themselves apparently deny the Secretary's authority. (During the period when the Secretary took the view that § 7(a)(2) did apply abroad, AID and FWS engaged in a running controversy over whether consultation was required with respect to the Mahaweli project, AID insisting that consultation applied only to domestic actions.)

[16] Respondents assert that this legal uncertainty did not affect redressability (and hence standing) because the District Court itself could resolve the issue of the Secretary's authority as a necessary part of its standing inquiry. Assuming that it is appropriate to resolve an issue of law such as this in connection with a threshold standing inquiry, resolution by the District Court would not have remedied respondents' alleged injury anyway,

because it would not have been binding upon the agencies. They were not parties to the suit, and there is no reason they should be obliged to honor an incidental legal determination the suit produced.[4] The ***570** Court of Appeals tried to finesse this problem by simply proclaiming that "[w]e are satisfied that an injunction requiring the Secretary to publish [respondents' desired] regulatio[n] ... would result in consultation." *Defenders of Wildlife,* 851 F.2d, at 1042, 1043–1044. We do not know what would justify that confidence, particularly when the Justice Department (presumably after consultation with the agencies) has taken the ****2142** position that the regulation is not binding.[5] The ***571** short of the matter is that redress of the only injury in fact respondents complain of requires action (termination of funding until consultation) by the individual funding agencies; and any relief the District Court could have provided in this suit against the Secretary was not likely to produce that action.

4 We need not linger over the dissent's facially impracticable suggestion, *post,* at 2154–2155, that one agency of the Government can acquire the power to direct other agencies by simply claiming that power in its own regulations and in litigation to which the other agencies are not parties. As for the contention that the other agencies will be "collaterally estopped" to challenge our judgment that they are bound by the Secretary of the Interior's views, because of their participation in this suit, *post,* at 2155–2156: Whether or not that is true now, it was assuredly not true when this suit was filed, naming the Secretary alone. "The existence of federal jurisdiction ordinarily depends on the facts *as they exist when the complaint is filed.*" *Newman–Green, Inc. v. Alfonzo–Larrain,* 490 U.S. 826, 830, 109 S.Ct. 2218, 2222, 104 L.Ed.2d 893 (1989) (emphasis added). It cannot be that, by later participating in the suit, the State Department and AID retroactively created a redressability (and hence a jurisdiction) that did not exist at the outset.

The dissent's rejoinder that redressability *was* clear at the outset because the *Secretary* thought the regulation binding on the agencies, *post,* at 2156, n. 4, continues to miss the point: The *agencies* did not *agree* with the Secretary, nor would they be bound by a district court holding (as to this issue) in the Secretary's favor. There is no support for the dissent's novel contention, *ibid.,* that Rule 19 of the Federal Rules of Civil Procedure, governing joinder of indispensable parties, somehow alters our longstanding rule that jurisdiction is to be assessed under the facts existing when the complaint is filed. The redressability element of the Article III standing requirement and the "*complete* relief" referred to by Rule 19 are not identical. Finally, we reach the dissent's contention, *post,* at 2156, n. 4, that by refusing to waive our settled rule for purposes of this case we have made "federal subject-matter jurisdiction ... a one-way street

running the Executive Branch's way." That is so, we are told, because the Executive can dispel jurisdiction where it previously existed (by either conceding the merits or by pointing out that nonparty agencies would not be bound by a ruling), whereas a plaintiff cannot retroactively create jurisdiction based on postcomplaint litigation conduct. But *any* defendant, not just the Government, can dispel jurisdiction by conceding the merits (and presumably thereby suffering a judgment) or by demonstrating standing defects. And permitting a defendant to point out a pre-existing standing defect late in the day is not remotely comparable to permitting a plaintiff to *establish* standing on the basis of the defendant's litigation conduct occurring after standing is erroneously determined.

5 Seizing on the fortuity that the case has made its way to *this* Court, Justice STEVENS protests that no agency would ignore "an authoritative construction of the [ESA] by this Court." *Post,* at 2149. In that he is probably correct; in concluding from it that plaintiffs have demonstrated redressability, he is not. Since, as we have pointed out above, standing is to be determined as of the commencement of suit; since at that point it could certainly not be known that the suit would reach this Court; and since it is not likely that an agency would feel compelled to accede to the legal view of a district court expressed in a case to which it was not a party; redressability clearly did not exist.

[17] A further impediment to redressability is the fact that the agencies generally supply only a fraction of the funding for a foreign project. AID, for example, has provided less than 10% of the funding for the Mahaweli project. Respondents have produced nothing to indicate that the projects they have named will either be suspended, or do less harm to listed species, if that fraction is eliminated. As in *Simon,* 426 U.S., at 43–44, 96 S.Ct., at 1926–1927, it is entirely conjectural whether the nonagency activity that affects respondents will be altered or affected by the agency activity they seek to achieve. [6] There is no standing.

6 The dissent criticizes us for "overlook[ing]" memoranda indicating that the Sri Lankan Government solicited and required AID's assistance to mitigate the effects of the Mahaweli project on endangered species, and that the Bureau of Reclamation was advising the Aswan project. *Post,* at 2157–2158. The memoranda, however, contain no indication whatever that the projects will cease or be less harmful to listed species in the absence of AID funding. In fact, the Sri Lanka memorandum suggests just the opposite: It states that AID's role will be to *mitigate* the " 'negative impacts to the wildlife,' " *post,* at 2157, which means that the termination of AID funding would *exacerbate* respondents' claimed injury.

IV

[18] The Court of Appeals found that respondents had standing for an additional reason: because they had suffered a "procedural injury." The so-called "citizen-suit" provision of the ESA provides, in pertinent part, that "any person may commence ***572** a civil suit on his own behalf (A) to enjoin any person, including the United States and any other governmental instrumentality or agency ... who is alleged to be in violation of any provision of this chapter." 16 U.S.C. § 1540(g). The court held that, because § 7(a)(2) requires interagency consultation, the citizen-suit provision creates a "procedural righ[t]" to consultation in all "persons"—so that *anyone* can file suit in federal court to challenge the Secretary's (or presumably any other official's) failure to follow the assertedly correct consultative procedure, notwithstanding his or her inability to allege any discrete injury flowing from that failure. 911 F.2d, at 121–122. To understand the remarkable nature of this holding one must be clear about what it does *not* rest upon: This is not a case where plaintiffs are seeking to enforce a procedural requirement the disregard of which could impair a separate concrete interest of theirs (*e.g.,* the procedural requirement for a hearing prior to denial of their license application, or the procedural requirement for an environmental impact statement before a federal facility is constructed next door to them).[7] Nor is it simply a case where concrete injury has been ****2143** suffered by many persons, as in mass fraud or mass tort situations. Nor, finally, is it the ***573** unusual case in which Congress has created a concrete private interest in the outcome of a suit against a private party for the government's benefit, by providing a cash bounty for the victorious plaintiff. Rather, the court held that the injury-in-fact requirement had been satisfied by congressional conferral upon *all* persons of an abstract, self-contained, noninstrumental "right" to have the Executive observe the procedures required by law. We reject this view.[8]

7 There is this much truth to the assertion that "procedural rights" are special: The person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy. Thus, under our case law, one living adjacent to the site for proposed construction of a federally licensed dam has standing to challenge the licensing agency's failure to prepare an environmental impact statement, even though he cannot establish with any certainty that the statement will cause the license to be withheld or altered, and even though the dam will not be completed for many years. (That is why we do not rely, in the present case, upon the Government's argument that, *even if* the other agencies were obliged to consult with the Secretary, they might not have followed his advice.) What respondents' "procedural rights" argument seeks, however, is quite different from this: standing for persons who have no concrete interests affected —persons who live (and propose to

live) at the other end of the country from the dam.

8 The dissent's discussion of this aspect of the case, *post,* at 2157–2160, distorts our opinion. We do *not* hold that an individual cannot enforce procedural rights; he assuredly can, so long as the procedures in question are designed to protect some threatened concrete interest of his that is the ultimate basis of his standing. The dissent, however, asserts that there exist "classes of procedural duties ... so enmeshed with the prevention of a substantive, concrete harm that an individual plaintiff may be able to demonstrate a sufficient likelihood of injury just through the breach of that procedural duty." *Post,* at 2159. If we understand this correctly, it means that the Government's violation of a certain (undescribed) class of procedural duty satisfies the concrete-injury requirement by itself, without any showing that the procedural violation endangers a concrete interest of the plaintiff (apart from his interest in having the procedure observed). We cannot agree. The dissent is unable to cite a single case in which we actually found standing solely on the basis of a "procedural right" unconnected to the plaintiff's own concrete harm. Its suggestion that we did so in *Japan Whaling Assn. v. American Cetacean Soc.,* 478 U.S. 221, 106 S.Ct. 2860, 92 L.Ed.2d 166 (1986), and *Robertson v. Methow Valley Citizens Council,* 490 U.S. 332, 109 S.Ct. 1835, 104 L.Ed.2d 351 (1989), *post,* at 2158–2159, is not supported by the facts. In the former case, we found that the environmental organizations had standing because the "whale watching and studying of their members w [ould] be adversely affected by continued whale harvesting," see 478 U.S., at 230–231, n. 4, 106 S.Ct., at 2866, n. 4; and in the latter we did not so much as mention standing, for the very good reason that the plaintiff was a citizens' council for the area in which the challenged construction was to occur, so that its members would obviously be concretely affected, see *Methow Valley Citizens Council v. Regional Forester,* 833 F.2d 810, 812–813 (CA9 1987).

[19] We have consistently held that a plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that ***574** no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy. For example, in *Fairchild v. Hughes,* 258 U.S. 126, 129–130, 42 S.Ct. 274, 275, 66 L.Ed. 499 (1922), we dismissed a suit challenging the propriety of the process by which the Nineteenth Amendment was ratified. Justice Brandeis wrote for the Court:

"[This is] not a case within the meaning of ... Article III.... Plaintiff has [asserted] only the right, possessed by every citizen, to require that the Government be administered according to law and that the public moneys be not wasted. Obviously this general right

does not entitle a private citizen to institute in the federal courts a suit....” *Ibid.*

In *Massachusetts v. Mellon,* 262 U.S. 447, 43 S.Ct. 597, 67 L.Ed. 1078 (1923), we dismissed for lack of Article III standing a taxpayer suit challenging the propriety of certain federal expenditures. We said:

> “The party who invokes the power [of judicial review] must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally.... Here the parties plaintiff have no such case.... [T]heir complaint ... is merely that officials of the executive department of the government are executing and will execute ****2144** an act of Congress asserted to be unconstitutional; and this we are asked to prevent. To do so would be not to decide a judicial controversy, but to assume a position of authority over the governmental acts of another and co-equal department, an authority which plainly we do not possess.” *Id.,* at 488–489, 43 S.Ct., at 601.

In *Ex parte Lévitt,* 302 U.S. 633, 58 S.Ct. 1, 82 L.Ed. 493 (1937), we dismissed a suit contending that Justice Black's appointment to this Court violated the Ineligibility Clause, Art. I, § 6, cl. 2. ***575** “It is an established principle,” we said, “that to entitle a private individual to invoke the judicial power to determine the validity of executive or legislative action he must show that he has sustained or is immediately in danger of sustaining a direct injury as the result of that action and it is not sufficient that he has merely a general interest common to all members of the public.” 302 U.S., at 634, 58 S.Ct., at 1. See also *Doremus v. Board of Ed. of Hawthorne,* 342 U.S. 429, 433–434, 72 S.Ct. 394, 396–397, 96 L.Ed. 475 (1952) (dismissing taxpayer action on the basis of *Mellon*).

More recent cases are to the same effect. In *United States v. Richardson,* 418 U.S. 166, 94 S.Ct. 2940, 41 L.Ed.2d 678 (1974), we dismissed for lack of standing a taxpayer suit challenging the Government's failure to disclose the expenditures of the Central Intelligence Agency, in alleged violation of the constitutional requirement, Art. I, § 9, cl. 7, that “a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.” We held that such a suit rested upon an impermissible “generalized grievance,” and was inconsistent with “the framework of Article III” because “the impact on [plaintiff] is plainly undifferentiated and ‘common to all members of the public.’ ” *Richardson, supra,* at 171, 176–177, 94 S.Ct., at 2944, 2946. And in *Schlesinger v. Reservists Comm. to Stop the War,* 418 U.S. 208, 94 S.Ct. 2925, 41 L.Ed.2d 706 (1974), we dismissed for the same reasons a citizen-taxpayer suit contending that it was a violation of the Incompatibility Clause, Art. I, § 6, cl. 2, for Members of Congress to hold commissions in the military Reserves. We said that the challenged action, “standing alone, would adversely affect only the generalized interest of all citizens in constitutional governance.... We reaffirm *Levitt* in holding that standing to sue may not be predicated upon an interest of th[is] kind....” *Schlesinger, supra,* at 217, 220, 94 S.Ct., at 2930, 2932. Since *Schlesinger* we have on

two occasions held that an injury amounting only to the alleged violation of a right to have the Government act in accordance with law was not judicially cognizable because ***576** " 'assertion of a right to a particular kind of Government conduct, which the Government has violated by acting differently, cannot alone satisfy the requirements of Art. III without draining those requirements of meaning.' " *Allen,* 468 U.S., at 754, 104 S.Ct., at 3326; *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.,* 454 U.S. 464, 483, 102 S.Ct. 752, 764, 70 L.Ed.2d 700 (1982). And only two Terms ago, we rejected the notion that Article III permits a citizen suit to prevent a condemned criminal's execution on the basis of " 'the public interest protections of the Eighth Amendment' "; once again, "[t]his allegation raise [d] only the 'generalized interest of all citizens in constitutional governance' ... and [was] an inadequate basis on which to grant ... standing." *Whitmore,* 495 U.S., at 160, 110 S.Ct., at 1725.

To be sure, our generalized-grievance cases have typically involved Government violation of procedures assertedly ordained by the Constitution rather than the Congress. But there is absolutely no basis for making the Article III inquiry turn on the source of the asserted right. Whether the courts were to act on their own, or at the invitation of Congress, in ignoring the concrete injury requirement described in our cases, they would be discarding a principle fundamental ****2145** to the separate and distinct constitutional role of the Third Branch —one of the essential elements that identifies those "Cases" and "Controversies" that are the business of the courts rather than of the political branches. "The province of the court," as Chief Justice Marshall said in *Marbury v. Madison,* 5 U.S. (1 Cranch) 137, 170, 2 L.Ed. 60 (1803), "is, solely, to decide on the rights of individuals." Vindicating the *public* interest (including the public interest in Government observance of the Constitution and laws) is the function of Congress and the Chief Executive. The question presented here is whether the public interest in proper administration of the laws (specifically, in agencies' observance of a particular, statutorily prescribed procedure) can be converted into an individual right by a statute that denominates it as such, and ***577** that permits all citizens (or, for that matter, a subclass of citizens who suffer no distinctive concrete harm) to sue. If the concrete injury requirement has the separation-of-powers significance we have always said, the answer must be obvious: To permit Congress to convert the undifferentiated public interest in executive officers' compliance with the law into an "individual right" vindicable in the courts is to permit Congress to transfer from the President to the courts the Chief Executive's most important constitutional duty, to "take Care that the Laws be faithfully executed," Art. II, § 3. It would enable the courts, with the permission of Congress, "to assume a position of authority over the governmental acts of another and co-equal department," *Massachusetts v. Mellon,* 262 U.S., at 489, 43 S.Ct., at 601, and to become " 'virtually continuing monitors of the wisdom and soundness of Executive action.' " *Allen, supra,* 468 U.S., at 760, 104 S.Ct., at 3329 (quoting *Laird v. Tatum,* 408 U.S. 1, 15, 92 S.Ct. 2318, 2326, 33 L.Ed.2d 154 (1972)). We have always rejected that vision of our role:

> "When Congress passes an Act empowering administrative agencies to carry on

> governmental activities, the power of those agencies is circumscribed by the authority granted. This permits the courts to participate in law enforcement entrusted to administrative bodies only to the extent necessary to protect justiciable individual rights against administrative action fairly beyond the granted powers.... This is very far from assuming that the courts are charged more than administrators or legislators with the protection of the rights of the people. Congress and the Executive supervise the acts of administrative agents.... But under Article III, Congress established courts to adjudicate cases and controversies as to claims of infringement of individual rights whether by unlawful action of private persons or by the exertion of unauthorized administrative power." *Stark v. Wickard,* 321 U.S. 288, 309–310, 64 S.Ct. 559, 571, 88 L.Ed. 733 (1944) (footnote omitted).

***578** "Individual rights," within the meaning of this passage, do not mean public rights that have been legislatively pronounced to belong to each individual who forms part of the public. See also *Sierra Club,* 405 U.S., at 740–741, n. 16, 92 S.Ct., at 1369, n. 16.

Nothing in this contradicts the principle that "[t]he ... injury required by Art. III may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing.' " *Warth,* 422 U.S., at 500, 95 S.Ct., at 2206 (quoting *Linda R. S. v. Richard D.,* 410 U.S. 614, 617, n. 3, 93 S.Ct. 1146, 1148, n. 3, 35 L.Ed.2d 536 (1973)). Both of the cases used by *Linda R. S.* as an illustration of that principle involved Congress' elevating to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law (namely, injury to an individual's personal interest in living in a racially integrated community, see *Trafficante v. Metropolitan Life Ins. Co.,* 409 U.S. 205, 208–212, 93 S.Ct. 364, 366–368, 34 L.Ed.2d 415 (1972), and injury to a company's interest in marketing its product free from competition, see *Hardin v. Kentucky Utilities Co.,* 390 U.S. 1, 6, 88 S.Ct. 651, 654, 19 L.Ed.2d 787 (1968)). As we said in *Sierra Club,* "[Statutory] broadening [of] the categories of injury that may be alleged in support ****2146** of standing is a different matter from abandoning the requirement that the party seeking review must himself have suffered an injury." 405 U.S., at 738, 92 S.Ct., at 1368. Whether or not the principle set forth in *Warth* can be extended beyond that distinction, it is clear that in suits against the Government, at least, the concrete injury requirement must remain.

* * *

We hold that respondents lack standing to bring this action and that the Court of Appeals erred in denying the summary judgment motion filed by the United States. The opinion of the Court of Appeals is hereby reversed, and the cause is remanded for proceedings consistent with this opinion.

It is so ordered.

***579** Justice KENNEDY, with whom Justice SOUTER joins, concurring in part and concurring in the judgment.

Although I agree with the essential parts of the Court's analysis, I write separately to make several observations.

I agree with the Court's conclusion in Part III–A that, on the record before us, respondents have failed to demonstrate that they themselves are "among the injured." *Sierra Club v. Morton,* 405 U.S. 727, 735, 92 S.Ct. 1361, 1366, 31 L.Ed.2d 636 (1972). This component of the standing inquiry is not satisfied unless

> "[p]laintiffs ... demonstrate a 'personal stake in the outcome.' ... Abstract injury is not enough. The plaintiff must show that he 'has sustained or is immediately in danger of sustaining some direct injury' as the result of the challenged official conduct and the injury or threat of injury must be both 'real and immediate,' not 'conjectural' or 'hypothetical.' " *Los Angeles v. Lyons,* 461 U.S. 95, 101–102, 103 S.Ct. 1660, 1665, 75 L.Ed.2d 675 (1983) (citations omitted).

While it may seem trivial to require that Mses. Kelly and Skilbred acquire airline tickets to the project sites or announce a date certain upon which they will return, see *ante,* at 2138, this is not a case where it is reasonable to assume that the affiants will be using the sites on a regular basis, see *Sierra Club v. Morton, supra,* 405 U.S., at 735, n. 8, 92 S.Ct., at 1366, n. 8, nor do the affiants claim to have visited the sites since the projects commenced. With respect to the Court's discussion of respondents' "ecosystem nexus," "animal nexus," and "vocational nexus" theories, *ante,* at 2139–2140, I agree that on this record respondents' showing is insufficient to establish standing on any of these bases. I am not willing to foreclose the possibility, however, that in different circumstances a nexus theory similar to those proffered here might support a claim to standing. See *Japan Whaling Assn. v. American Cetacean Society,* 478 U.S. 221, 231, n. 4, 106 S.Ct. 2860, 2866, n. 4, 92 L.Ed.2d 166 (1986) ("[R]espondents ... undoubtedly have alleged a sufficient 'injury in fact' in that ***580** the whale watching and studying of their members will be adversely affected by continued whale harvesting").

In light of the conclusion that respondents have not demonstrated a concrete injury here sufficient to support standing under our precedents, I would not reach the issue of redressability that is discussed by the plurality in Part III–B.

I also join Part IV of the Court's opinion with the following observations. As Government programs and policies become more complex and farreaching, we must be sensitive to the articulation of new rights of action that do not have clear analogs in our common-law tradition. Modern litigation has progressed far from the paradigm of Marbury suing Madison to get his commission, *Marbury v. Madison,* 5 U.S. (1 Cranch) 137, 2 L.Ed. 60 (1803), or Ogden seeking an injunction to halt Gibbons' steamboat operations, *Gibbons v. Ogden,* 22 U.S. (9 Wheat.) 1, 6 L.Ed. 23 (1824). In my view, Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before, ****2147** and I do not read the Court's opinion to suggest a contrary view. See *Warth v. Seldin,* 422 U.S. 490, 500, 95 S.Ct. 2197, 2205, 45 L.Ed.2d 343 (1975); *ante,* at 2145–2146. In exercising this power, however, Congress must at the very least identify the injury it seeks to vindicate and relate the injury to the class of persons entitled to bring suit. The citizen-suit provision of the Endangered Species Act does

not meet these minimal requirements, because while the statute purports to confer a right on "any person ... to enjoin ... the United States and any other governmental instrumentality or agency ... who is alleged to be in violation of any provision of this chapter," it does not of its own force establish that there is an injury in "any person" by virtue of any "violation." 16 U.S.C. § 1540(g)(1)(A).

The Court's holding that there is an outer limit to the power of Congress to confer rights of action is a direct and necessary consequence of the case and controversy limitations found in Article III. I agree that it would exceed those limitations if, at the behest of Congress and in the absence ***581** of any showing of concrete injury, we were to entertain citizen suits to vindicate the public's nonconcrete interest in the proper administration of the laws. While it does not matter how many persons have been injured by the challenged action, the party bringing suit must show that the action injures him in a concrete and personal way. This requirement is not just an empty formality. It preserves the vitality of the adversarial process by assuring both that the parties before the court have an actual, as opposed to professed, stake in the outcome, and that "the legal questions presented ... will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action." *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472, 102 S.Ct. 752, 758, 70 L.Ed.2d 700 (1982). In addition, the requirement of concrete injury confines the Judicial Branch to its proper, limited role in the constitutional framework of Government.

An independent judiciary is held to account through its open proceedings and its reasoned judgments. In this process it is essential for the public to know what persons or groups are invoking the judicial power, the reasons that they have brought suit, and whether their claims are vindicated or denied. The concrete injury requirement helps assure that there can be an answer to these questions; and, as the Court's opinion is careful to show, that is part of the constitutional design.

With these observations, I concur in Parts I, II, III–A, and IV of the Court's opinion and in the judgment of the Court.

Justice STEVENS, concurring in the judgment.
Because I am not persuaded that Congress intended the consultation requirement in § 7(a)(2) of the Endangered Species Act of 1973 (ESA), 16 U.S.C. § 1536(a)(2), to apply to activities in foreign countries, I concur in the judgment of reversal. I do not, however, agree with the Court's conclusion ***582** that respondents lack standing because the threatened injury to their interest in protecting the environment and studying endangered species is not "imminent." Nor do I agree with the plurality's additional conclusion that respondents' injury is not "redressable" in this litigation.

I

In my opinion a person who has visited the critical habitat of an endangered species

has a professional interest in preserving the species and its habitat, and intends to revisit them in the future has standing to challenge agency action that threatens their destruction. Congress has found that a wide variety of endangered species of fish, wildlife, and plants are of "aesthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people." ****2148** 16 U.S.C. § 1531(a)(3). Given that finding, we have no license to demean the importance of the interest that particular individuals may have in observing any species or its habitat, whether those individuals are motivated by esthetic enjoyment, an interest in professional research, or an economic interest in preservation of the species. Indeed, this Court has often held that injuries to such interests are sufficient to confer standing, [1] and the Court reiterates that holding today. See *ante,* at 2137.

1 See, *e.g., Sierra Club v. Morton,* 405 U.S. 727, 734, 92 S.Ct. 1361, 1365, 31 L.Ed.2d 636 (1972); *United States v. Students Challenging Regulatory Agency Procedures (SCRAP),* 412 U.S. 669, 686–687, 93 S.Ct. 2405, 2415–2416, 37 L.Ed.2d 254 (1973); *Japan Whaling Assn. v. American Cetacean Society,* 478 U.S. 221, 230–231, n. 4, 106 S.Ct. 2860, 2866, n. 4, 92 L.Ed.2d 166 (1986).

The Court nevertheless concludes that respondents have not suffered "injury in fact" because they have not shown that the harm to the endangered species will produce "imminent" injury to them. See *ante,* at 2138. I disagree. An injury to an individual's interest in studying or enjoying a species and its natural habitat occurs when someone (whether it be the Government or a private party) takes action that harms that species and habitat. In my judgment, ***583** therefore, the "imminence" of such an injury should be measured by the timing and likelihood of the threatened environmental harm, rather than—as the Court seems to suggest, *ante,* at 2138–2139, and n. 2—by the time that might elapse between the present and the time when the individuals would visit the area if no such injury should occur.

To understand why this approach is correct and consistent with our precedent, it is necessary to consider the purpose of the standing doctrine. Concerned about "the proper—and properly limited—role of the courts in a democratic society," we have long held that "Art. III judicial power exists only to redress or otherwise to protect against injury to the complaining party." *Warth v. Seldin,* 422 U.S. 490, 498–499, 95 S.Ct. 2197, 2205, 45 L.Ed.2d 343 (1975). The plaintiff must have a "personal stake in the outcome" sufficient to "assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult ... questions." *Baker v. Carr,* 369 U.S. 186, 204, 82 S.Ct. 691, 703, 7 L.Ed.2d 663 (1962). For that reason, "[a]bstract injury is not enough. It must be alleged that the plaintiff 'has sustained or is immediately in danger of sustaining some direct injury' as the result of the challenged statute or official conduct.... The injury or threat of injury must be both 'real and immediate,' not 'conjectural,' or 'hypothetical.' " *O'Shea v. Littleton,* 414 U.S. 488, 494, 94 S.Ct. 669, 675, 38 L.Ed.2d 674 (1974) (quoting *Golden v.*

Zwickler, 394 U.S. 103, 109–110, 89 S.Ct. 956, 960, 22 L.Ed.2d 113 (1969)).

Consequently, we have denied standing to plaintiffs whose likelihood of suffering any concrete adverse effect from the challenged action was speculative. See, *e.g., Whitmore v. Arkansas,* 495 U.S. 149, 158–159, 110 S.Ct. 1717, 1724–1725, 109 L.Ed.2d 135 (1990); *Los Angeles v. Lyons,* 461 U.S. 95, 105, 103 S.Ct. 1660, 1665, 75 L.Ed.2d 675 (1983); *O'Shea,* 414 U.S., at 497, 94 S.Ct., at 676. In this case, however, the likelihood that respondents will be injured by the destruction of the endangered species is not speculative. If respondents are genuinely interested in the preservation of the endangered species and intend to study or observe these animals in the future, their injury will occur as soon as the animals are destroyed. Thus the only potential ***584** source of "speculation" in this case is whether respondents' intent to study or observe the animals is genuine.[2] In my view, Joyce Kelly and Amy Skilbred have ****2149** introduced sufficient evidence to negate petitioner's contention that their claims of injury are "speculative" or "conjectural." As Justice BLACKMUN explains, *post,* at 2152–2153, a reasonable finder of fact could conclude, from their past visits, their professional backgrounds, and their affidavits and deposition testimony, that Ms. Kelly and Ms. Skilbred will return to the project sites and, consequently, will be injured by the destruction of the endangered species and critical habitat.

[2] As we recognized in *Sierra Club v. Morton,* 405 U.S., at 735, 92 S.Ct. at 1366, the impact of changes in the esthetics or ecology of a particular area does "not fall indiscriminately upon every citizen. The alleged injury will be felt directly only by those who use [the area,] and for whom the aesthetic and recreational values of the area will be lessened...." Thus, respondents would not be injured by the challenged projects if they had not visited the sites or studied the threatened species and habitat. But, as discussed above, respondents did visit the sites; moreover, they have expressed an intent to do so again. This intent to revisit the area is significant evidence tending to confirm the genuine character of respondents' interest, but I am not at all sure that an intent to revisit would be indispensable in every case. The interest that confers standing in a case of this kind is comparable, though by no means equivalent, to the interest in a relationship among family members that can be immediately harmed by the death of an absent member, regardless of when, if ever, a family reunion is planned to occur. Thus, if the facts of this case had shown repeated and regular visits by the respondents, cf. *ante,* at 2146 (opinion of KENNEDY, J.), proof of an intent to revisit might well be superfluous.

The plurality also concludes that respondents' injuries are not redressable in this litigation for two reasons. First, respondents have sought only a declaratory judgment that the Secretary of the Interior's regulation interpreting § 7(a)(2) to require consultation only for agency actions in the United States or on the high seas is invalid and an injunction requiring

him to promulgate a new regulation requiring consultation for agency actions abroad as well. But, the plurality opines, even if respondents succeed and a new regulation is ***585** promulgated, there is no guarantee that federal agencies that are not parties to this case will actually consult with the Secretary. See *ante,* at 2140–2142. Furthermore, the plurality continues, respondents have not demonstrated that federal agencies can influence the behavior of the foreign governments where the affected projects are located. Thus, even if the agencies consult with the Secretary and terminate funding for foreign projects, the foreign governments might nonetheless pursue the projects and jeopardize the endangered species. See *ante,* at 2142. Neither of these reasons is persuasive.

We must presume that if this Court holds that § 7(a)(2) requires consultation, all affected agencies would abide by that interpretation and engage in the requisite consultations. Certainly the Executive Branch cannot be heard to argue that an authoritative construction of the governing statute by this Court may simply be ignored by any agency head. Moreover, if Congress has required consultation between agencies, we must presume that such consultation will have a serious purpose that is likely to produce tangible results. As Justice BLACKMUN explains, *post,* at 2156–2157, it is not mere speculation to think that foreign governments, when faced with the threatened withdrawal of United States assistance, will modify their projects to mitigate the harm to endangered species.

II

Although I believe that respondents have standing, I nevertheless concur in the judgment of reversal because I am persuaded that the Government is correct in its submission that § 7(a)(2) does not apply to activities in foreign countries. As with all questions of statutory construction, the question whether a statute applies extraterritorially is one of congressional intent. *Foley Bros., Inc. v. Filardo,* 336 U.S. 281, 284–285, 69 S.Ct. 575, 577, 93 L.Ed. 680 (1949). We normally assume that "Congress is primarily concerned with domestic conditions," *id.,* at 285, 69 S.Ct., at 577, and therefore presume that " 'legislation of Congress, unless a ***586** contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States,' " ****2150** *EEOC v. Arabian American Oil Co.,* 499 U.S. 244, 248, 111 S.Ct. 1227, 1230, 113 L.Ed.2d 274 (1991) (quoting *Foley Bros.,* 336 U.S., at 285, 69 S.Ct., at 577).

Section 7(a)(2) provides, in relevant part:

> "Each Federal agency shall, in consultation with and with the assistance of the Secretary [of the Interior or Commerce, as appropriate[3]], insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an 'agency action') is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected

States, to be critical, unless such agency has been granted an exemption for such action by the Committee pursuant to subsection (h) of this section...." 16 U.S.C. § 1536(a)(2).

[3] The ESA defines "Secretary" to mean "the Secretary of the Interior or the Secretary of Commerce as program responsibilities are vested pursuant to the provisions of Reorganization Plan Numbered 4 of 1970." 16 U.S.C. § 1532(15). As a general matter, "marine species are under the jurisdiction of the Secretary of Commerce and all other species are under the jurisdiction of the Secretary of the Interior." 51 Fed.Reg. 19926 (1986) (preamble to final regulations governing interagency consultation promulgated by the Fish and Wildlife Service and the National Marine Fisheries Service on behalf of the Secretary of the Interior and the Secretary of Commerce).

Nothing in this text indicates that the section applies in foreign countries.[4] Indeed, the only geographic reference in ***587** the section is in the "critical habitat" clause,[5] which mentions "affected States." The Secretary of the Interior and the Secretary of Commerce have consistently taken the position that they need not designate critical habitat in foreign countries. See 42 Fed.Reg. 4869 (1977) (initial regulations of the Fish and Wildlife Service and the National Marine Fisheries Service on behalf of the Secretary of the Interior and the Secretary of Commerce). Consequently, neither Secretary interprets § 7(a)(2) to require federal agencies to engage in consultations to ensure that their actions in foreign countries will not adversely affect the critical habitat of endangered or threatened species.

[4] Respondents point out that the duties in § 7(a)(2) are phrased in broad, inclusive language: "Each Federal agency" shall consult with the Secretary and ensure that "any action" does not jeopardize "any endangered or threatened species" or destroy or adversely modify the "habitat of such species." See Brief for Respondents 36; 16 U.S.C. § 1536(a)(2). The Court of Appeals correctly recognized, however, that such inclusive language, by itself, is not sufficient to overcome the presumption against the extraterritorial application of statutes. 911 F.2d 117, 122 (CA8 1990); see also *Foley Bros., Inc. v. Filardo,* 336 U.S. 281, 282, 287–288, 69 S.Ct. 575, 578–579, 93 L.Ed. 680 (1949) (statute requiring an 8–hour day provision in " '[e]very contract made to which the United States ... is a party' " is inapplicable to contracts for work performed in foreign countries).

[5] Section 7(a)(2) has two clauses which require federal agencies to consult with the Secretary to ensure that their actions (1) do not jeopardize threatened or endangered species (the "endangered species clause"), and (2) are not likely to destroy or adversely affect the habitat of such species (the "critical habitat clause").

That interpretation is sound, and, in fact, the Court of Appeals did not question it.[6] There is, moreover, no indication that Congress intended to give a different geographic scope to the two

clauses in § 7(a)(2). To the contrary, Congress recognized that one of the "major causes" of extinction of ***588** endangered species is the "destruction of ****2151** natural habitat." S.Rep. No. 93–307, p. 2 (1973); see also H.Rep. No. 93–412, p. 2 (1973), U.S.Code Cong. & Admin.News 1973, pp. 2989, 2990; *TVA v. Hill,* 437 U.S. 153, 179, 98 S.Ct. 2279, 2294, 57 L.Ed.2d 117 (1978). It would thus be illogical to conclude that Congress required federal agencies to avoid jeopardy to endangered species abroad, but not destruction of critical habitat abroad.

6 Instead, the Court of Appeals concluded that the endangered species clause and the critical habitat clause are "severable," at least with respect to their "geographical scope," so that the former clause applies extraterritorially even if the latter does not. 911 F.2d, at 125. Under this interpretation, federal agencies must consult with the Secretary to ensure that their actions in foreign countries are not likely to threaten any endangered species, but they need not consult to ensure that their actions are not likely to destroy the critical habitats of these species. I cannot subscribe to the Court of Appeals' strained interpretation, for there is no indication that Congress intended to give such vastly different scope to the two clauses in § 7(a)(2).

The lack of an express indication that the consultation requirement applies extraterritorially is particularly significant because other sections of the ESA expressly deal with the problem of protecting endangered species abroad. Section 8, for example, authorizes the President to provide assistance to "any foreign country (with its consent) ... in the development and management of programs in that country which [are] ... necessary or useful for the conservation of any endangered species or threatened species listed by the Secretary pursuant to section 1533 of this title." 16 U.S.C. § 1537(a). It also directs the Secretary of the Interior, "through the Secretary of State," to "encourage" foreign countries to conserve fish and wildlife and to enter into bilateral or multilateral agreements. § 1537(b). Section 9 makes it unlawful to import endangered species into (or export them from) the United States or to otherwise traffic in endangered species "in interstate or foreign commerce." §§ 1538(a)(1)(A), (E), (F). Congress thus obviously thought about endangered species abroad and devised specific sections of the ESA to protect them. In this context, the absence of any explicit statement that the consultation requirement is applicable to agency actions in foreign countries suggests that Congress did not intend that § 7(a)(2) apply extraterritorially.

Finally, the general purpose of the ESA does not evince a congressional intent that the consultation requirement be applicable to federal agency actions abroad. The congressional findings explaining the need for the ESA emphasize that "various species of fish, wildlife, and plants *in the United States* have been rendered extinct as a consequence ***589** of economic growth and development untempered by adequate concern and conservation," and that these species "are of aesthetic, ecological, educational, historical, recreational, and scientific value to the *Nation and its people.*" §§ 1531(1), (3) (emphasis added). The lack of similar findings about

the harm caused by development in other countries suggests that Congress was primarily concerned with balancing development and conservation goals in this country. [7]

[7] Of course, Congress also found that "the United States has pledged itself as a sovereign state in the international community to conserve to the extent practicable the various species of fish or wildlife and plants facing extinction, pursuant to [several international agreements]," and that "encouraging the States ... to develop and maintain conservation programs which meet national and international standards is a key to meeting the Nation's international commitments...." 16 U.S.C. §§ 1531(4), (5). The Court of Appeals read these findings as indicative of a congressional intent to make § 7(a)(2)'s consultation requirement applicable to agency action abroad. See 911 F.2d, at 122–123. I am not persuaded, however, that such a broad congressional intent can be gleaned from these findings. Instead, I think the findings indicate a more narrow congressional intent that the United States abide by its international commitments.

In short, a reading of the entire statute persuades me that Congress did not intend the consultation requirement in § 7(a)(2) to apply to activities in foreign countries. Accordingly, notwithstanding my disagreement with the Court's disposition of the standing question, I concur in its judgment.

Justice BLACKMUN, with whom Justice O'CONNOR joins, dissenting.

I part company with the Court in this case in two respects. First, I believe that respondents have raised genuine issues of fact—sufficient to survive summary judgment—both as to injury and as to redressability. Second, I question the Court's breadth of language in rejecting standing for "procedural" injuries. I fear the Court seeks to impose fresh limitations on the constitutional **2152 authority of Congress to allow *590 citizen suits in the federal courts for injuries deemed "procedural" in nature. I dissent.

I

Article III of the Constitution confines the federal courts to adjudication of actual "Cases" and "Controversies." To ensure the presence of a "case" or "controversy," this Court has held that Article III requires, as an irreducible minimum, that a plaintiff allege (1) an injury that is (2) "fairly traceable to the defendant's allegedly unlawful conduct" and that is (3) "likely to be redressed by the requested relief." *Allen v. Wright,* 468 U.S. 737, 751, 104 S.Ct. 3315, 3324, 82 L.Ed.2d 556 (1984).

A

To survive petitioner's motion for summary judgment on standing, respondents need not prove that they are actually or imminently harmed. They need show only a "genuine issue" of material fact as to standing. Fed.Rule

Civ.Proc. 56(c). This is not a heavy burden. A "genuine issue" exists so long as "the evidence is such that a reasonable jury could return a verdict for the nonmoving party [respondents]." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). This Court's "function is not [it]self to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Id.,* at 249, 106 S.Ct., at 2511.

The Court never mentions the "genuine issue" standard. Rather, the Court refers to the type of evidence it feels respondents failed to produce, namely, "affidavits or other evidence showing, through specific facts" the existence of injury. *Ante,* at 2137. The Court thereby confuses respondents' evidentiary burden (*i.e.,* affidavits asserting "specific facts") in withstanding a summary judgment motion under Rule 56(e) with the standard of proof (*i.e.,* the existence of a "genuine issue" of "material fact") under Rule 56(c).

***591** 1

Were the Court to apply the proper standard for summary judgment, I believe it would conclude that the sworn affidavits and deposition testimony of Joyce Kelly and Amy Skilbred advance sufficient facts to create a genuine issue for trial concerning whether one or both would be imminently harmed by the Aswan and Mahaweli projects. In the first instance, as the Court itself concedes, the affidavits contained facts making it at least "questionable" (and therefore within the province of the factfinder) that certain agency-funded projects threaten listed species.[1] *Ante,* at 2138. The only remaining issue, then, is whether Kelly and Skilbred have shown that they personally would suffer imminent harm.

1 The record is replete with genuine issues of fact about the harm to endangered species from the Aswan and Mahaweli projects. For example, according to an internal memorandum of the Fish and Wildlife Service, no fewer than eight listed species are found in the Mahaweli project area (Indian elephant, leopard, purple-faced langur, toque macaque, red face malkoha, Bengal monitor, mugger crocodile, and python). App. 78. The memorandum recounts that the Sri Lankan Government has specifically requested assistance from the Agency for International Development (AID) in "mitigating the negative impacts to the wildlife involved." *Ibid.* In addition, a letter from the Director of the Fish and Wildlife Service to AID warns: "The magnitude of the Accelerated Mahaweli Development Program could have massive environmental impacts on such an insular ecosystem as the Mahaweli River system." *Id.,* at 215. It adds: "The Sri Lankan government lacks the necessary finances to undertake any long-term management programs to avoid the negative impacts to the wildlife." *Id.,* at 216. Finally, in an affidavit submitted by petitioner for purposes of this litigation, an AID official states that an AID environmental assessment "showed that the [Mahaweli] project could affect

several endangered species." *Id.,* at 159.

I think a reasonable finder of fact could conclude from the information in the affidavits and deposition testimony that either Kelly or Skilbred will soon return to the project sites, thereby satisfying the "actual or imminent" injury standard. The Court dismisses ****2153** Kelly's and Skilbred's general statements ***592** that they intended to revisit the project sites as "simply not enough." *Ibid.* But those statements did not stand alone. A reasonable finder of fact could conclude, based not only upon their statements of intent to return, but upon their past visits to the project sites, as well as their professional backgrounds, that it was likely that Kelly and Skilbred would make a return trip to the project areas. Contrary to the Court's contention that Kelly's and Skilbred's past visits "prov[e] nothing," *ibid.,* the fact of their past visits could demonstrate to a reasonable factfinder that Kelly and Skilbred have the requisite resources and personal interest in the preservation of the species endangered by the Aswan and Mahaweli projects to make good on their intention to return again. Cf. *Los Angeles v. Lyons,* 461 U.S. 95, 102, 103 S.Ct. 1660, 1665, 75 L.Ed.2d 675 (1983) ("Past wrongs were evidence bearing on whether there is a real and immediate threat of repeated injury") (internal quotation marks omitted). Similarly, Kelly's and Skilbred's professional backgrounds in wildlife preservation, see App. 100, 144, 309–310, also make it likely—at least far more likely than for the average citizen—that they would choose to visit these areas of the world where species are vanishing.

By requiring a "description of concrete plans" or "specification of *when* the some day [for a return visit] will be," *ante,* at 8, the Court, in my view, demands what is likely an empty formality. No substantial barriers prevent Kelly or Skilbred from simply purchasing plane tickets to return to the Aswan and Mahaweli projects. This case differs from other cases in which the imminence of harm turned largely on the affirmative actions of third parties beyond a plaintiff's control. See *Whitmore v. Arkansas,* 495 U.S. 149, 155–156, 110 S.Ct. 1717, 1723, 109 L.Ed.2d 135 (1990) (harm to plaintiff death-row inmate from fellow inmate's execution depended on the court's one day reversing plaintiff's conviction or sentence and considering comparable sentences at resentencing); *Los Angeles v. Lyons,* 461 U.S., at 105, 103 S.Ct., at 1667 (harm dependent on police's arresting plaintiff again ***593** and subjecting him to chokehold); *Rizzo v. Goode,* 423 U.S. 362, 372, 96 S.Ct. 598, 605, 46 L.Ed.2d 561 (1976) (harm rested upon "what one of a small, unnamed minority of policemen might do to them in the future because of that unknown policeman's perception of departmental disciplinary procedures"); *O'Shea v. Littleton,* 414 U.S. 488, 495–498, 94 S.Ct. 669, 675–677, 38 L.Ed.2d 674 (1974) (harm from discriminatory conduct of county magistrate and judge dependent on plaintiffs' being arrested, tried, convicted, and sentenced); *Golden v. Zwickler,* 394 U.S. 103, 109, 89 S.Ct. 956, 960, 22 L.Ed.2d 113 (1969) (harm to plaintiff dependent on a former Congressman's (then serving a 14–year term as a judge) running again for Congress). To be sure, a plaintiff's unilateral control over his or her exposure to harm does not *necessarily* render the harm nonspeculative. Nevertheless,

it suggests that a finder of fact would be far more likely to conclude the harm is actual or imminent, especially if given an opportunity to hear testimony and determine credibility.

I fear the Court's demand for detailed descriptions of future conduct will do little to weed out those who are genuinely harmed from those who are not. More likely, it will resurrect a code-pleading formalism in federal court summary judgment practice, as federal courts, newly doubting their jurisdiction, will demand more and more particularized showings of future harm. Just to survive summary judgment, for example, a property owner claiming a decline in the value of his property from governmental action might have to specify the exact date he intends to sell his property and show that there is a market for the property, lest it be surmised he might not sell again. A nurse turned down for a job on grounds of her race had better be prepared to show on what date she was prepared to start work, that she had arranged daycare for her child, and that she ****2154** would not have accepted work at another hospital instead. And a Federal Tort Claims Act plaintiff alleging loss of consortium should make sure to furnish this Court with a "description of concrete plans" for her nightly schedule of attempted activities.

***594** 2

The Court also concludes that injury is lacking, because respondents' allegations of "ecosystem nexus" failed to demonstrate sufficient proximity to the site of the environmental harm. *Ante,* at 2139. To support that conclusion, the Court mischaracterizes our decision in *Lujan v. National Wildlife Federation,* 497 U.S. 871, 110 S.Ct. 3177, 111 L.Ed.2d 695 (1990), as establishing a general rule that "a plaintiff claiming injury from environmental damage must use the area affected by the challenged activity." *Ante,* at 2139. In *National Wildlife Federation,* the Court required specific geographical proximity because of the particular type of harm alleged in that case: harm to the plaintiff's visual enjoyment of nature from mining activities. 497 U.S., at 888, 110 S.Ct., at 3188. One cannot suffer from the sight of a ruined landscape without being close enough to see the sites actually being mined. Many environmental injuries, however, cause harm distant from the area immediately affected by the challenged action. Environmental destruction may affect animals traveling over vast geographical ranges, see, *e.g., Japan Whaling Assn. v. American Cetacean Society,* 478 U.S. 221, 106 S.Ct. 2860, 92 L.Ed.2d 166 (1986) (harm to American whale watchers from Japanese whaling activities), or rivers running long geographical courses, see, *e.g., Arkansas v. Oklahoma,* 503 U.S. 91, 112 S.Ct. 1046, 117 L.Ed.2d 239 (1992) (harm to Oklahoma residents from wastewater treatment plant 39 miles from border). It cannot seriously be contended that a litigant's failure to use the precise or exact site where animals are slaughtered or where toxic waste is dumped into a river means he or she cannot show injury.

The Court also rejects respondents' claim of vocational or professional injury. The Court says that it is "beyond all reason" that a zoo "keeper" of Asian elephants would have standing to contest his Government's participation in the eradication of all the

Asian elephants in another part of the world. *Ante,* at 2139. I am unable to see how the distant location of the destruction *necessarily* (for purposes of ruling ***595** at summary judgment) mitigates the harm to the elephant keeper. If there is no more access to a future supply of the animal that sustains a keeper's livelihood, surely there is harm.

I have difficulty imagining this Court applying its rigid principles of geographic formalism anywhere outside the context of environmental claims. As I understand it, environmental plaintiffs are under no special constitutional standing disabilities. Like other plaintiffs, they need show only that the action they challenge has injured them, without necessarily showing they happened to be physically near the location of the alleged wrong. The Court's decision today should not be interpreted "to foreclose the possibility ... that in different circumstances a nexus theory similar to those proffered here might support a claim to standing." *Ante,* at 2146 (KENNEDY, J., concurring in part and concurring in judgment).

B

A plurality of the Court suggests that respondents have not demonstrated redressability: a likelihood that a court ruling in their favor would remedy their injury. *Duke Power Co. v. Carolina Environmental Study Group, Inc.,* 438 U.S. 59, 74–75, and n. 20, 98 S.Ct. 2620, 2630–2631, and n. 20, 57 L.Ed.2d 595 (1978) (plaintiff must show "substantial likelihood" that relief requested will redress the injury). The plurality identifies two obstacles. The first is that the "action agencies" (*e.g.,* AID) cannot be required to undertake consultation with petitioner Secretary, because they are not directly bound as parties to the suit and are otherwise not indirectly ****2155** bound by being subject to petitioner Secretary's regulation. Petitioner, however, officially and publicly has taken the position that his regulations regarding consultation under § 7 of the Act are binding on action agencies. 50 CFR § 402.14(a) (1991).[2] And he has previously ***596** taken the same position in this very litigation, having stated in his answer to the complaint that petitioner "admits the Fish and Wildlife Service (FWS) was designated the lead agency for the formulation of regulations concerning section 7 of the [Endangered Species Act]." App. 246. I cannot agree with the plurality that the Secretary (or the Solicitor General) is now free, for the convenience of this appeal, to disavow his prior public and litigation positions. More generally, I cannot agree that the Government is free to play "Three–Card Monte" with its description of agencies' authority to defeat standing against the agency given the lead in administering a statutory scheme.

2 This section provides in part:

> "(a) *Requirement for formal consultation.* Each Federal agency shall review its actions at the earliest possible time to determine whether any action may affect listed species or critical habitat. If such a determination is made,

> formal consultation is required....”
>
> The Secretary's intent to make the regulations binding upon other agencies is even clearer from the discussion accompanying promulgation of the consultation rules. See 51 Fed.Reg. 19928 (1986) (“Several commenters stated that Congress did not intend that the Service interpret or implement section 7, and believed that the Service should recast the regulations as ‘nonbinding guidelines' that would govern only the Service's role in consultation.... The Service is satisfied that it has ample authority and legislative mandate to issue this rule, and believes that uniform consultation standards and procedures are necessary to meet its obligations under section 7”).

Emphasizing that none of the action agencies are parties to this suit (and having rejected the possibility of their being indirectly bound by petitioner's regulation), the plurality concludes that “there is no reason they should be obliged to honor an incidental legal determination the suit produced.” *Ante,* at 2141. I am not as willing as the plurality is to assume that agencies at least will not try to follow the law. Moreover, I wonder if the plurality has not overlooked the extensive involvement from the inception of this litigation by the Department of State and AID.[3] Under ***597** principles of collateral estoppel, these agencies are precluded from subsequently relitigating the issues decided in this suit.

[3] For example, petitioner's motion before the District Court to dismiss the complaint identified four attorneys from the Department of State and AID (an agency of the Department of State) as “counsel” to the attorneys from the Justice Department in this action. One AID lawyer actually entered a formal appearance before the District Court on behalf of AID. On at least one occasion petitioner requested an extension of time to file a brief, representing that “ ‘[a]n extension is necessary for the Department of Justice to consult with ... the Department of State [on] the brief.’ ” See Brief for Respondents 31, n. 8. In addition, AID officials have offered testimony in this action.

> “[O]ne who prosecutes or defends a suit in the name of another to establish and protect his own right, or who assists in the prosecution or defense of an action in aid of some interest of his own, and who does this openly to the knowledge of the opposing party, is as much bound by the judgment and as fully entitled to avail himself of it as an estoppel against an adverse party, as he would be if he had been a party to the record.” *Souffront v. Compagnie des Sucreries de Puerto Rico,* 217 U.S. 475, 487, 30 S.Ct. 608, 612, 54 L.Ed. 846 (1910).

This principle applies even to the Federal Government. In *Montana v. United States,* 440 U.S. 147, 99 S.Ct. 970, 59 L.Ed.2d 210 (1979), this Court held that the Government was estopped from relitigating in federal court the constitutionality of Montana's gross receipts tax, because that issue previously had

been litigated in state court by an individual contractor whose litigation had been financed and controlled by the Federal Government. "Thus, although not a party, the United States plainly had a sufficient 'laboring **2156 oar' in the conduct of the state-court litigation to actuate principles of estoppel." *Id.,* at 155, 99 S.Ct., at 974. See also *United States v. Mendoza,* 464 U.S. 154, 164, n. 9, 104 S.Ct. 568, 574, n. 9, 78 L.Ed.2d 379 (1984) (Federal Government estopped where it "constituted a 'party' in all but a technical sense"). In my view, the action agencies have had sufficient "laboring oars" in this litigation since its inception to be bound from subsequent *598 relitigation of the extraterritorial scope of the § 7 consultation requirement.[4] As a result, I believe respondents' injury would likely be redressed by a favorable decision.

4 The plurality now suggests that collateral-estoppel principles can have no application here, because the participation of other agencies in this litigation arose *after* its inception. Borrowing a principle from this Court's statutory diversity jurisdiction cases and transferring it to the constitutional standing context, the Court observes: " 'The existence of federal jurisdiction ordinarily depends on the facts *as they exist when the complaint is filed*' ". *Ante,* at 2141, n. 4 (quoting *Newman–Green, Inc. v. Alfonzo–Larrain,* 490 U.S. 826, 830, 109 S.Ct. 2218, 2222, 104 L.Ed.2d 893 (1989)). See also *Mollan v. Torrance,* 9 Wheat. 537, 539, 6 L.Ed. 154 (1824) (Marshall, C.J.). The plurality proclaims that "[i]t cannot be" that later participation of other agencies in this suit retroactively created a jurisdictional issue that did not exist at the outset. *Ante,* at 2141, n. 4.

The plurality, however, overlooks at least three difficulties with this explanation. In the first place, assuming that the plurality were correct that events as of the initiation of the lawsuit are the only proper jurisdictional reference point, were the Court to follow this rule in this case there would be no question as to the compliance of other agencies, because, as stated at an earlier point in the opinion: "When the Secretary promulgated the regulation at issue here, he thought it was binding on the agencies." *Ante,* at 2141. This suit was commenced in October 1986, just three months after the regulation took effect. App. 21; 51 Fed.Reg. 19926 (1986). As the plurality further admits, questions about compliance of other agencies with the Secretary's regulation arose only by later participation of the Solicitor General and other agencies in the suit. *Ante,* at 2141. Thus, it was, to borrow the plurality's own words, "assuredly not true when this suit was filed, naming the Secretary alone," *ante,* at 2141, n. 4, that there was any question before the District Court about other agencies being bound.

Second, were the plurality correct that, for purposes of determining redressability, a court may look only to facts as they exist when the complaint is filed, then the Court by implication would render a nullity part of Rule 19 of the Federal Rules of Civil Procedure. Rule 19 provides in part for the joinder

of persons if "in the person's absence complete relief cannot be accorded among those already parties." This presupposes nonredressability at the outset of the litigation. Under the plurality's rationale, a district court would have no authority to join indispensable parties, because it would, as an initial matter, have no jurisdiction for lack of the power to provide redress at the outset of the litigation.

Third, the rule articulated in *Newman–Green* is that the existence of federal jurisdiction "*ordinarily*" depends on the facts at the initiation of the lawsuit. This is no ironclad *per se* rule without exceptions. Had the Solicitor General, for example, taken a position during this appeal that the § 7 consultation requirement does in fact apply extraterritorially, the controversy would be moot, and this Court would be without jurisdiction.

In the plurality's view, federal subject-matter jurisdiction appears to be a one-way street running the Executive Branch's way. When the Executive Branch wants to dispel jurisdiction over an action against an agency, it is free to raise at any point in the litigation that other nonparty agencies might not be bound by any determinations of the one agency defendant. When a plaintiff, however, seeks to preserve jurisdiction in the face of a claim of nonredressability, the plaintiff is not free to point to the involvement of nonparty agencies in subsequent parts of the litigation. The plurality does not explain why the street runs only one way—why some actions of the Executive Branch subsequent to initiation of a lawsuit are cognizable for jurisdictional purposes but others simply are not.

More troubling still is the distance this one-way street carries the plurality from the underlying purpose of the standing doctrine. The purpose of the standing doctrine is to ensure that courts do not render advisory opinions rather than resolve genuine controversies between adverse parties. Under the plurality's analysis, the federal courts are to ignore their *present* ability to resolve a concrete controversy if at some distant point in the past it could be said that redress could not have been provided. The plurality perverts the standing inquiry.

***599** The second redressability obstacle relied on by the plurality is that "the [action] agencies generally supply only a fraction of the funding for a foreign project." *Ante,* at 2142. What this Court might "generally" take to be true does not eliminate the existence of a genuine issue of fact to withstand ****2157** summary judgment. Even if the action agencies supply only a fraction of the funding for a particular foreign project, it remains at least a question for the finder of fact whether threatened withdrawal of that fraction would affect foreign government conduct sufficiently to avoid harm to listed species.

The plurality states that "AID, for example, has provided less than 10% of the funding for the Mahaweli project." *Ibid.* The plurality neglects to mention that this "fraction" amounts to $170 million, see App. 159, not so paltry a sum for a

country of only 16 million people with a gross national product of less than $6 billion in 1986 when respondents filed ***600** the complaint in this action. Federal Research Division, Library of Congress, Sri Lanka: A Country Study (Area Handbook Series) xvi-xvii (1990).

The plurality flatly states: "Respondents have produced nothing to indicate that the projects they have named will ... do less harm to listed species, if that fraction is eliminated." *Ante,* at 2142. As an initial matter, the relevant inquiry is not, as the plurality suggests, what will happen if AID or other agencies stop funding projects, but what will happen if AID or other agencies comply with the consultation requirement for projects abroad. Respondents filed suit to require consultation, not a termination of funding. Respondents have raised at least a genuine issue of fact that the projects harm endangered species and that the actions of AID and other United States agencies can mitigate that harm.

The plurality overlooks an Interior Department memorandum listing eight endangered or threatened species in the Mahaweli project area and recounting that "[t]he Sri Lankan government has requested the assistance of AID in mitigating the negative impacts to the wildlife involved." App. 78. Further, a letter from the Director of the Fish and Wildlife Service to AID states:

> "The Sri Lankan government lacks the necessary finances to undertake any long-term management programs to avoid the negative impacts to the wildlife. The donor nations and agencies that are financing the [Mahaweli project] will be the key as to how successfully the wildlife is preserved. If wildlife problems receive the same level of attention as the engineering project, then the negative impacts to the environment can be alleviated. This means that there has to be long-term funding in sufficient amounts to stem the negative impacts of this project." *Id.,* at 216.

***601** I do not share the plurality's astonishing confidence that, on the record here, a factfinder could only conclude that AID was powerless to ensure the protection of listed species at the Mahaweli project.

As for the Aswan project, the record again rebuts the plurality's assumption that donor agencies are without any authority to protect listed species. Kelly asserted in her affidavit —and it has not been disputed—that the Bureau of Reclamation was "overseeing" the rehabilitation of the Aswan project. *Id.,* at 101. See also *id.,* at 65 (Bureau of Reclamation publication stating: "In 1982, the Egyptian government ... requested that Reclamation serve as its engineering advisor for the nine-year [Aswan] rehabilitation project").

I find myself unable to agree with the plurality's analysis of redressability, based as it is on its invitation of executive lawlessness, ignorance of principles of collateral estoppel, unfounded assumptions about causation, and erroneous conclusions about what the record does not say. In my view, respondents have satisfactorily shown a genuine issue of fact as to whether their injury would likely be redressed by a decision in their favor.

II

The Court concludes that any "procedural injury" suffered by respondents is insufficient to confer standing. It rejects the view that the "injury-in-fact requirement [is] satisfied by congressional conferral upon *all* persons of an abstract, self-contained, noninstrumental ****2158** 'right' to have the Executive observe the procedures required by law." *Ante,* at 2143. Whatever the Court might mean with that very broad language, it cannot be saying that "procedural injuries" *as a class* are necessarily insufficient for purposes of Article III standing.

Most governmental conduct can be classified as "procedural." Many injuries caused by governmental conduct, therefore, are categorizable at some level of generality as ***602** "procedural" injuries. Yet, these injuries are not categorically beyond the pale of redress by the federal courts. When the Government, for example, "procedurally" issues a pollution permit, those affected by the permittee's pollutants are not without standing to sue. Only later cases will tell just what the Court means by its intimation that "procedural" injuries are not constitutionally cognizable injuries. In the meantime, I have the greatest of sympathy for the courts across the country that will struggle to understand the Court's standardless exposition of this concept today.

The Court expresses concern that allowing judicial enforcement of "agencies' observance of a particular, statutorily prescribed procedure" would "transfer from the President to the courts the Chief Executive's most important constitutional duty, to 'take Care that the Laws be faithfully executed,' Art. II, § 3." *Ante,* at 2145. In fact, the principal effect of foreclosing judicial enforcement of such procedures is to transfer power into the hands of the Executive at the expense—not of the courts—but of Congress, from which that power originates and emanates.

Under the Court's anachronistically formal view of the separation of powers, Congress legislates pure, substantive mandates and has no business structuring the procedural manner in which the Executive implements these mandates. To be sure, in the ordinary course, Congress does legislate in black-and-white terms of affirmative commands or negative prohibitions on the conduct of officers of the Executive Branch. In complex regulatory areas, however, Congress often legislates, as it were, in procedural shades of gray. That is, it sets forth substantive policy goals and provides for their attainment by requiring Executive Branch officials to follow certain procedures, for example, in the form of reporting, consultation, and certification requirements.

The Court recently has considered two such procedurally oriented statutes. In *Japan Whaling Assn. v. American Cetacean Society,* 478 U.S. 221, 106 S.Ct. 2860, 92 L.Ed.2d 166 (1986), the Court examined a ***603** statute requiring the Secretary of Commerce to certify to the President that foreign nations were not conducting fishing operations or trading which "diminis[h] the effectiveness" of an international whaling convention. *Id.,* at 226, 106 S.Ct., at 2864. The Court expressly found standing to sue. *Id.,* at 230–231, n. 4, 106 S.Ct., at 2865–2866, n. 4. In *Robertson v. Methow Valley Citizens Council,* 490 U.S.

332, 348, 109 S.Ct. 1835, 1844, 104 L.Ed.2d 351 (1989), this Court considered injury from violation of the "action-forcing" procedures of the National Environmental Policy Act (NEPA), in particular the requirements for issuance of environmental impact statements.

The consultation requirement of § 7 of the Endangered Species Act is a similar, action-forcing statute. Consultation is designed as an integral check on federal agency action, ensuring that such action does not go forward without full consideration of its effects on listed species. Once consultation is initiated, the Secretary is under a duty to provide to the action agency "a written statement setting forth the Secretary's opinion, and a summary of the information on which the opinion is based, detailing how the agency action affects the species or its critical habitat." 16 U.S.C. § 1536(b)(3)(A). The Secretary is also obligated to suggest "reasonable and prudent alternatives" to prevent jeopardy to listed species. *Ibid.* The action agency must undertake as well its own "biological ****2159** assessment for the purpose of identifying any endangered species or threatened species" likely to be affected by agency action. § 1536(c)(1). After the initiation of consultation, the action agency "shall not make any irreversible or irretrievable commitment of resources" which would foreclose the "formulation or implementation of any reasonable and prudent alternative measures" to avoid jeopardizing listed species. § 1536(d). These action-forcing procedures are "designed to protect some threatened concrete interest," *ante,* at 2143, n. 8, of persons who observe and work with endangered or threatened species. That is why I am mystified by the Court's unsupported conclusion that "[t]his is not a case where plaintiffs ***604** are seeking to enforce a procedural requirement the disregard of which could impair a separate concrete interest of theirs." *Ante,* at 2142.

Congress legislates in procedural shades of gray not to aggrandize its own power but to allow maximum Executive discretion in the attainment of Congress' legislative goals. Congress could simply impose a substantive prohibition on Executive conduct; it could say that no agency action shall result in the loss of more than 5% of any listed species. Instead, Congress sets forth substantive guidelines and allows the Executive, within certain procedural constraints, to decide how best to effectuate the ultimate goal. See *American Power & Light Co. v. SEC,* 329 U.S. 90, 105, 67 S.Ct. 133, 142, 91 L.Ed. 103 (1946). The Court never has questioned Congress' authority to impose such procedural constraints on Executive power. Just as Congress does not violate separation of powers by structuring the procedural manner in which the Executive shall carry out the laws, surely the federal courts do not violate separation of powers when, at the very instruction and command of Congress, they enforce these procedures.

To prevent Congress from conferring standing for "procedural injuries" is another way of saying that Congress may not delegate to the courts authority deemed "executive" in nature. *Ante,* at 2145 (Congress may not "transfer from the President to the courts the Chief Executive's most important constitutional duty, to 'take Care that the Laws be faithfully executed,' Art. II, § 3"). Here Congress seeks not to delegate "executive" power but only to strengthen the

procedures it has legislatively mandated. "We have long recognized that the nondelegation doctrine does not prevent Congress from seeking assistance, within proper limits, from its coordinate Branches." *Touby v. United States,* 500 U.S. 160, 165, 111 S.Ct. 1752, 1756, 114 L.Ed.2d 219 (1991). "Congress does not violate the Constitution merely because it legislates in broad terms, leaving a certain degree of discretion to executive *or judicial actors*." *Ibid.* (emphasis added).

***605** Ironically, this Court has previously justified a relaxed review of congressional delegation to the Executive on grounds that Congress, in turn, has subjected the exercise of that power to judicial review. *INS v. Chadha,* 462 U.S. 919, 953–954, n. 16, 103 S.Ct. 2764, 2785–2786, n. 16, 77 L.Ed.2d 317 (1983); *American Power & Light Co. v. SEC,* 329 U.S., at 105–106, 67 S.Ct. at 142–143. The Court's intimation today that procedural injuries are not constitutionally cognizable threatens this understanding upon which Congress has undoubtedly relied. In no sense is the Court's suggestion compelled by our "common understanding of what activities are appropriate to legislatures, to executives, and to courts." *Ante,* at 2136. In my view, it reflects an unseemly solicitude for an expansion of power of the Executive Branch.

It is to be hoped that over time the Court will acknowledge that some classes of procedural duties are so enmeshed with the prevention of a substantive, concrete harm that an individual plaintiff may be able to demonstrate a sufficient likelihood of injury just through the breach of that procedural duty. For example, in the context of the NEPA requirement of environmental-impact statements, ****2160** this Court has acknowledged "it is now well settled that NEPA itself does not mandate particular results [and] simply prescribes the necessary process," but "*these procedures are almost certain to affect the agency's substantive decision.*" *Robertson v. Methow Valley Citizens Council,* 490 U.S., at 350, 109 S.Ct., at 1846 (emphasis added). See also *Andrus v. Sierra Club,* 442 U.S. 347, 350–351, 99 S.Ct. 2335, 2337, 60 L.Ed.2d 943 (1979) ("If environmental concerns are not interwoven into the fabric of agency planning, the 'action-forcing' characteristics of [the environmental-impact statement requirement] would be lost"). This acknowledgment of an inextricable link between procedural and substantive harm does not reflect improper appellate factfinding. It reflects nothing more than the proper deference owed to the judgment of a coordinate branch—Congress—that certain procedures are directly tied to protection against a substantive harm.

***606** In short, determining "injury" for Article III standing purposes is a fact-specific inquiry. "Typically ... the standing inquiry requires careful judicial examination of a complaint's allegations to ascertain whether the particular plaintiff is entitled to an adjudication of the particular claims asserted." *Allen v. Wright,* 468 U.S., at 752, 104 S.Ct., at 3325. There may be factual circumstances in which a congressionally imposed procedural requirement is so insubstantially connected to the prevention of a substantive harm that it cannot be said to work any conceivable injury to an individual litigant. But, as a general matter, the courts owe substantial deference to Congress' substantive purpose in imposing a certain procedural requirement. In

all events, "[o]ur separation-of-powers analysis does not turn on the labeling of an activity as 'substantive' as opposed to 'procedural.' " *Mistretta v. United States,* 488 U.S. 361, 393, 109 S.Ct. 647, 665, 102 L.Ed.2d 714 (1989). There is no room for a *per se* rule or presumption excluding injuries labeled "procedural" in nature.

III

In conclusion, I cannot join the Court on what amounts to a slash-and-burn expedition through the law of environmental standing. In my view, "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." *Marbury v. Madison,* 1 Cranch 137, 163, 2 L.Ed. 60 (1803).

I dissent.

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RLA-8

37 Cal.3d 591, 691 P.2d
642, 208 Cal.Rptr. 886
Supreme Court of California

GARY A. MITCHELL et al., Petitioners,
v.
THE SUPERIOR COURT OF FRESNO COUNTY, Respondent; SHELL OIL COMPANY et al., Real Parties in Interest

S.F. No. 24727.
Dec 20, 1984.

SUMMARY

Plaintiffs brought an action against several entities who manufactured, marketed, and distributed the chemical dibromochloropropane (DBCP), alleging contamination of the ground water near their home and seeking damages for the intentional infliction of emotional distress, accompanied by personal injuries, property damage, and other monetary losses. In response to an interrogatory and in answer to subsequent questions at her deposition, one of the plaintiffs stated that she had discussed DBCP with her attorneys. Defendants sought to elicit details about the nature and content of any warnings, as well as information or documents she received from her attorneys regarding the health effects of DBCP. Plaintiff's attorney invoked the attorney-client privilege and instructed plaintiff not to answer. The superior court granted defendants' motion for an order to compel answers to these questions.

The Supreme Court issued a writ of mandate ordering the superior court to vacate its order compelling discovery. The court held that the information sought by defendants clearly fell within the purview of the attorney-client privilege. The court further held that plaintiff, when she stated that she had discussed DBCP with her attorneys, did not waive the attorney-client privilege under Evid. Code, § 912, by disclosing "a significant part of the communication." Finally, the court held that plaintiff did not impliedly waive the attorney-client privilege by tendering a cause of action for emotional distress, since plaintiff did not put the information gained through otherwise privileged communications with her attorney directly at issue, and since disclosure of such communications was not necessary for a fair adjudication of her claim for emotional distress. Finally, the court held that, under the circumstances, public policy considerations weighed ultimately in favor of preserving the attorney-client privilege. (Opinion by Broussard, J., expressing the unanimous view of the court.) ***592**

HEADNOTES

Classified to California Digest of Official Reports

(1)
Witnesses § 13--Privileged Relationships and Communications--Attorney and Client
The attorney-client privilege authorizes a client to refuse to disclose, and to prevent others from disclosing, confidential communications between attorney and client (Evid. Code, § 950 et seq). The fundamental purpose behind the privilege is to safeguard the confidential relationship between clients and their attorneys so as to promote full and open discussion of

the facts and tactics surrounding individual legal matters. In other words, the public policy fostered by the privilege seeks to insure the right of every person to freely and fully confer and confide in one having knowledge of the law, and skilled in its practice, in order that the former may have adequate advice and a proper defense.

(2)
Witnesses § 13--Privileged Relationships and Communications--Attorney and Client.
Although exercise of the attorney-client privilege may occasionally result in the suppression of relevant evidence, the Legislature has determined that these concerns are outweighed by the importance of preserving confidentiality in the attorney-client relationship. The privilege is given on grounds of public policy in the belief that the benefits derived therefrom justify the risk that unjust decisions may sometimes result from the suppression of relevant evidence.

(3)
Witnesses § 13--Privileged Relationships and Communications--Attorney and Client--Scope.
In California the attorney-client privilege encompasses not only oral or written statements, but additionally actions, signs, or other means of communicating information. Furthermore, the privilege covers the transmission of documents which are available to the public, and not merely information in the sole possession of the attorney or client. In this regard, it is the actual fact of the transmission which merits protection, since discovery of the transmission of specific public documents might reveal the transmitter's intended strategy.

(4)
Witnesses § 13--Privileged Relationships and Communications--Attorney and Client--Scope of Privilege.
The attorney-client privilege is one which our judicial system has carefully safeguarded with only a few specific exceptions. ***593**

(5)
Discovery and Depositions § 34--Protections Against Improper Discovery--Attorney-client Privilege--Action for Intentional Infliction of Emotional Distress.
In an action against a chemical manufacturer and others alleging contamination of the ground water near plaintiffs' home by the chemical dibromochloropropane (DBCP) and seeking damages for the intentional infliction of emotional distress, the trial court improperly ordered one of the plaintiffs to answer deposition questions about the nature and content of any warnings, as well as information and documents she received from her attorneys regarding the health effects of DBCP. Each of the questions presupposed a communication between attorney and client in which the attorney warned the client about the effects of DBCP, and could not be answered without impliedly affirming that such conversation had occurred. Thus, the questions involved information transmitted between plaintiff and her attorney in the course of their relationship as client and lawyer, as well as advice given by the attorney in the course of such professional relationship.

(6)
Discovery and Depositions § 34--Protections Against Improper Discovery--Attorney-client Privilege--Waiver.
In an action against a number of entities that manufactured, marketed, and distributed the chemical dibromochloropropane (DBCP), alleging contamination of the ground water near plaintiffs' home by DBCP and seeking damages for the intentional infliction of emotional distress, in which defendants sought to compel one of the plaintiffs to answer deposition questions relating to warnings given her by her attorneys, plaintiff, by stating in response to an interrogatory and subsequent questions at deposition that she had discussed DBCP with her attorneys, did not waive the attorney-client privilege by disclosing "a significant part of the communication" (Evid. Code, § 912). The mere disclosure of the fact that a communication between a client and attorney has occurred does not amount to a disclosure of the specific content of that communication, and as such does not necessarily constitute a waiver of the privilege. Plaintiff's answers, while revealing the existence of her attorney-client relationship, at most affirmed that she had discussed certain warnings with her attorneys, but in no way revealed a significant part of the substance of those discussions.

(7)
Discovery and Depositions § 34--Protections Against Improper Discovery--Attorney-client Privilege--Implied Waiver by Bringing Action for Emotional Distress.
In an action against entities who had manufactured, marketed, and distributed the chemical dibromochloropropane (DBCP), alleging contamination of the ground water near plaintiffs' home and seeking damages for the intentional infliction of emotional distress, accompanied by personal injuries, property damage, ***594** and other monetary losses, in which defendants sought to compel one of the plaintiffs to answer deposition questions relating to warnings given her by her attorneys about the effects of DBCP, plaintiff did not impliedly waive the attorney-client privilege by tendering a cause of action for emotional distress. Plaintiff did not put the information gained through otherwise privileged communications with her attorneys directly at issue, and the disclosure of such communications was not necessary for a fair adjudication of her claim for emotional distress. Finally, public policy considerations, under the circumstances, weighed ultimately in favor of preserving the attorney-client privilege.

[See **Cal.Jur.3d,** Evidence, § 442; **Am.Jur.2d,** Witnesses, § 225.]

COUNSEL
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No appearance for Respondent.

Sedgwick, Detert, Moran & Arnold, Stephen W. Jones, Berridge R. Marsh, Marie Sovey Silveira, Hardin, Cook, Loper, Engel & Bergez, Gennaro A. Filice III, Matthew S. Conant, O'Connor, Cohn, Dillon & Barr, Mark Oium, Glenn A. Friedman, Landels, Ripley & Diamond, James A. Bruen, Stephen C. Lewis and Deborah J. Schmall for Real Parties in Interest.

BROUSSARD, J.

Petitioners, plaintiffs below, seek a writ of mandate ordering respondent superior court to vacate its order compelling plaintiff Bette Gae Mitchell to answer certain questions propounded to her by defendant real parties in interest at her deposition, which she declined to answer on instructions of counsel. The principal issues presented by this case ***595** are whether defendants' questions seek information protected by the attorney-client privilege and, if so, whether plaintiff has waived that privilege in pursuing the present action. For reasons outlined herein, we will conclude that the information sought by defendants is covered by the attorney-client privilege and that no waiver thereof has occurred.

Statement of Facts

The relevant facts of the case were accurately set forth by Justice Martin of the Court of Appeal and are summarized here in essentially verbatim form.

Gary A. Mitchell and Bette Gae Mitchell are two of more than one hundred plaintiffs who reside near the Thompson-Hayward Chemical Plant near Fresno, California. Petitioners and the other plaintiffs have filed lawsuits alleging contamination of the air and ground water in the vicinity of their homes. Plaintiffs allege the underground aquifer has been contaminated by the chemical dibromochloropropane (DBCP) which was used as an agricultural soil fumigant to kill microscopic, parasitic root worms known as nematodes. They sued a number of entities who manufactured, marketed and distributed DBCP and other involved chemicals.

Plaintiffs' second amended complaint seeks compensatory and punitive damages based upon seven causes of action for personal injuries and property damage, including one for intentional infliction of emotional distress. Plaintiffs assert that the water contamination has caused them "considerable emotional pain, anguish and distress, since they are aware that DBCP and the other chemicals are highly toxic and carcinogenic and can produce sterility and genetic damage."

In the course of discovery, defendant T.H. Agriculture and Nutrition Company, Inc. propounded a number of interrogatories to plaintiff Bette Gae Mitchell. The interrogatories and answers relevant to the instant case are selectively reprinted below:

"Interrogatory No. 29:

"Have you ever read or heard any warnings of any kind about DBCP? If so, please state as to each such warning:

"a. Was it written or oral?

"b. The specific nature of the warning; ***596**

"c. The name and address of the person or organization who issued the warning;

"d. The date(s) you read or heard the warning(s);

"e. The name and address of the custodian of all written warnings."

"Answer to Interrogatory No. 29:

"a. Written and oral.

"b. Physician recommended filter for well to avoid cancer in family members; Dept. of Health recommended same; media articles stating link between DBCP and cancer, infertility and defects.

"c. Robert W. Lusk, M.D., 6700 North First St., Suite 114, Fresno, Ca. 93710. Cal. Dept. of Health Services, 5545 E. Shields, Fresno, Ca. 93727. *Fresno Bee* articles. 'American Health,' magazine article, July-August 1982 issue. Attorneys, covered by attorney-client privilege.

"d. Approximately May of 1981 to present.

"e. Myself.

"

. . . . . ."

"Interrogatory no. 36:

"Have you ever discussed with any person (other than with your attorney, in private) any warnings of any kind about possible dangers or side effects which could result from exposure to DBCP? If so, for each such discussion state:

"a. The location where the discussion occurred;

"b. The date of the discussion;

"c. The names and addresses of all persons present;

"d. The topics discussed;

"e. The contents of the warnings that were discussed;

"f. Whether the warning(s) was(were) written or oral; ***597**

"g. The name of the person or organization who issued the warning(s) and the date the warning(s) was(were) issued;

"h. If any notes or other written memoranda referring to the discussion exist, please identify and provide the name and address of the present custodian."

"Answer:

"36. Have discussed with friends, family, neighbors, physicians, attorneys; cannot recall dates on specific discussions."

In March and May 1983, defendants took the deposition of Bette Gae Mitchell. During her deposition she stated that all the sources of information she had about DBCP contributed to her distress, as evidenced by the following questions propounded to her and her answers:

"Q. Is it true that all of the various sources of information that you have about DBCP have contributed in one way or another to the emotional distress that you suffer over the presence of DBCP in your water?

"Mr. Kramer: Which sources are you alluding to?

"The Witness: You're talking about all the sources I've ever had?

"Mr. Conant: Right.

"A. Have they contributed to my emotional—you're talking about the letters I've gotten from the State and everything?

"Q. I'll include those.

"A. Well, yes, because it's all pertaining to me. And that's my only way of finding out anything, is reading it or seeing it or something." 4

During the course of that deposition, defendant sought information about the dates, times and other circumstances of Bette Mitchell's conferences with her attorneys. Defendants sought to elicit details about the nature and content of any warnings, as well as information or documents she received from her attorneys regarding the health effects of DBCP. As to each of these 21 questions, plaintiff's attorney invoked the attorney-client privilege and instructed Bette Mitchell not to answer.

On August 9, 1983, defendant Shell Oil Company moved for an order to compel answers to the questions which Bette Mitchell declined to answer ***598** on instructions of counsel. Defendants contended that these questions were critical to the issues of emotional distress causation and were either not privileged from the outset, or alternatively, that any privilege that existed had been waived. The superior court granted the motion to compel answers to each of the following questions:

"Question No. 1: What percentage of your—of the warnings that you have received have come from your attorneys?

"Question No. 2: When did you receive warnings from your attorneys with respect to the DBCP?

"Question No. 3: On how many different occasions did you receive warnings from your attorneys with respect to DBCP?

"Question No. 4: On those occasions when you received warnings from your attorneys with respect to DBCP, who was present?

"Question No. 5: When did you first meet Mr. Kramer here?

"Question No. 6: Is it true that your attorneys warned you about DBCP from May of 1981 to present, as is indicated in subpart D of your answers to interrogatories?

"Question No. 7: Did your attorneys warn you orally or in writing concerning DBCP?

"Question No. 10: And what, in fact, did your attorneys tell you when they warned you about DBCP?

"Question No. 12: And is it true that the warnings that your attorneys gave you about DBCP contributed to that anxiety?

"Question No. 13: One of the sources of information you have about DBCP is information that you gained from your attorneys; is that correct?

"Question No. 15: Mrs. Mitchell, have you received any written information from your attorney about health effects of DBCP?

"Question No. 16: Have you received any written information from your attorney about the potential of DBCP to cause cancer in humans?

"Question No. 17: Have you received any written information from your attorney about the potential of DBCP to cause cancer in animals? ***599**

"Question No. 19: Have you received any other relevant information from your attorney about the potential for DBCP to cause cancer in humans?

"Question No. 20: Have you received any other relevant information from your attorneys about the human health effects of DBCP?"

The court indicated that questions 1 through 7, 12 and 13 had nothing to do with the content of the communication and were not subject to the privilege in any event. The court further indicated questions 10, 16, 17, 19 and 20 related to the content of a communication, but that the privilege had been waived.

The Attorney-client Privilege

(1) The attorney-client privilege has been a hallmark of Anglo-American jurisprudence for almost 400 years. (McCormick, Evidence (2d ed. 1972) § 87, pp. 175-179; 8 Wigmore, Evidence (McNaughton rev., 1961) § 2290, pp. 542-545; *Pritchard v. U.S.* (6th Cir. 1950) 181 F.2d 326, 328, affd. (1950) 339 U.S. 974 [94 L.Ed. 1380, 70 S.Ct. 1029]; *Baird v. Koerner* (9th Cir. 1960) 279 F.2d 623, 629 [95 A.L.R.2d 303].) The privilege authorizes a client to refuse to disclose, and to prevent others from disclosing, confidential communications between attorney and client. (Evid. Code, § 950 et seq.)[1] Clearly, the fundamental purpose behind the privilege is to safeguard the confidential relationship between clients and their attorneys so as to promote full and open discussion of the facts and tactics surrounding individual legal matters. (*People v. Flores* (1977) 71 Cal.App.3d 559, 563 [139 Cal.Rptr. 546].) In other words, the public policy fostered by the privilege seeks to insure "the right of every person to freely and fully confer and confide in one having knowledge of the law, and skilled in its practice, in order that the former may have adequate advice and a proper defense." (*Baird v. Koerner, supra*, 279 F.2d at p. 629.)

1 The privilege is set forth in Evidence Code section 954 as follows:
"Subject to Section 912 and except as otherwise provided in this article, the client, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between

client and lawyer if the privilege is claimed by:
"(a) The holder of the privilege;
"(b) A person who is authorized to claim the privilege by the holder of the privilege; or
"(c) The person who was the lawyer at the time of the confidential communication, but such person may not claim the privilege if there is no holder of the privilege in existence or if he is otherwise instructed by a person authorized to permit disclosure."

(2) Although exercise of the privilege may occasionally result in the suppression of relevant evidence, the Legislature of this state has determined that these concerns are outweighed by the importance of preserving confidentiality in the attorney-client relationship. As this court has stated: ***600** "The privilege is given on grounds of public policy in the belief that the benefits derived therefrom justify the risk that unjust decisions may sometimes result from the suppression of relevant evidence." (*City & County of S.F. v. Superior Court* (1951) 37 Cal.2d 227, 235 [231 P.2d 26, 25 A.L.R.2d; accord *People* v. *Canfield* (1974) 12 Cal.3d 699, 705 [117 Cal.Rptr. 81, 527 P.2d 633].)

(3) In California the privilege has been held to encompass not only oral or written statements, but additionally actions, signs, or other means of communicating information. (*Ex Parte McDonough* (1915) 170 Cal. 230, 234 [149 P. 566]; *Estate of Kime* (1983) 144 Cal.App.3d 246, 255 [193 Cal.Rptr. 718].) Furthermore, the privilege covers the transmission of documents which are available to the public, and not merely information in the sole possession of the attorney or client. In this regard, it is the actual fact of the transmission which merits protection, since discovery of the transmission of specific public documents might very well reveal the transmitter's intended strategy. (*In re Jordan* (1974) 12 Cal.3d 575, 580 [116 Cal.Rptr. 371, 526 P.2d 523].) (4) While it is perhaps somewhat of a hyperbole to refer to the attorney-client privilege as "sacred,"[2] it is clearly one which our judicial system has carefully safeguarded with only a few specific exceptions.

2 See *People* v. *Kor* (1954) 129 Cal.App.2d 436, 447 [277 P.2d 94] (Shinn, J., conc.).

(5) In the case at bar, defendants contend that much of the information which they sought to discover through their questions to plaintiff Bette Mitchell was not privileged from the outset since it did not involve "confidential communications between client and lawyer." The trial court agreed with regard to at least nine of the questions put to Ms. Mitchell at her deposition, questions 1 through 7, 12 and 13 (quoted *ante*, at p. 598).

Evidence Code section 952 defines the term "confidential communication between client and lawyer" as "information transmitted between a client and his lawyer in the course of that relationship and in confidence by a means which, so far as the client is aware, discloses the information to no third persons other than those who are present to further the interest of the client in the consultation or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which

the lawyer is consulted, and includes a legal opinion formed and the advice given by the lawyer in the course of that relationship." ***601**

In the present matter, all of the questions directed to plaintiff Bette Mitchell, with the exception of questions Nos. 4 and 5,[3] can only properly be characterized as *within* the scope of "confidential communications" protected by the attorney-client privilege. Each of these questions presuppose a communication between attorney and client, in which the attorney warned the client about the effects of DBCP, and cannot be answered without impliedly affirming that such conversation occurred. Thus, these questions clearly involved information transmitted between Ms. Mitchell and her attorney in the course of their relationship as client and lawyer, as well as advice given by Mr. Kramer to his client in the course of such professional relationship.

3 Question No. 5 is *not* covered by the attorney-client privilege since it merely asks the date on which Ms. Mitchell first met her attorney. (*Coy v. Superior Court* (1962) 58 Cal.2d 210, 219 [23 Cal.Rptr. 393, 373 P.2d 457, 9 A.L.R.3d 678].) Question No. 4 would be exempted from the privilege only to the extent that it was intended to discover whether the communications between Ms. Mitchell and her attorney were not made in confidence (i.e., whether they were intentionally made in the presence of nonprivileged parties). To the extent that the question seeks any information about their confidential communications, it is covered by the privilege.

Real parties' further contention that their inquiries about warnings to Ms. Mitchell from her attorney are not privileged since they involve "factual information" as opposed to "legal advice" must similarly be rejected. Neither the statutes articulating the attorney-client privilege nor the cases which have interpreted it make any differentiation between "factual" and "legal" information. (*In re Jordan* (1974) 12 Cal.3d 575, 580 [116 Cal.Rptr. 371, 526 P.2d 523]; *In re Navarro* (1979) 93 Cal.App.3d 325, 328-329 [155 Cal.Rptr. 522].) Moreover, Ms. Mitchell's counsel clearly transmitted information about DBCP to his client in the context of investigating, preparing and prosecuting a lawsuit, not simply in an abstract lecture to a friend on the health effects of that particular chemical. In sum, the sought after information clearly falls within the purview of the attorney-client privilege.

Waiver of the Privilege

(6) Having thus established that virtually all of real parties' questions to plaintiff at her deposition would ordinarily be covered by the attorney-client privilege, we must next inquire whether any waiver of this privilege has occurred. Evidence Code section 912 specifically provides that waiver of the attorney-client privilege, as well as other recognized privileges, occurs when any holder of the privilege "has disclosed a significant part of the communication or has consented to such disclosure made by anyone. ..." Defendants have contended that by stating in response to an interrogatory and subsequent questions at deposition that she discussed DBCP with her

attorneys, plaintiff has waived the attorney-client privilege by disclosing "a ***602** significant part of the communication." Such a contention, however, cannot be sustained. Relevant case law makes it clear that mere disclosure of the fact that a communication between client and attorney had occurred does *not* amount to disclosure of the specific content of that communication, and as such does not necessarily constitute a waiver of the privilege.

In *People v. Perry* (1972) 7 Cal.3d 756 [103 Cal.Rptr. 161, 499 P.2d 129] (disapproved on other grounds in *People v. Green* (1980) 27 Cal.3d 1, 34 [164 Cal.Rptr. 1, 609 P.2d 468]), this court stressed that the waiver of a psychotherapist-patient privilege under Evidence Code section 912 required that the holder disclose a significant part of the communication. In *Perry*, counsel for defendant sought permission to review psychotherapy records pertaining to the treatment of the principal prosecution witness, while the Mental Health Department asserted the privilege on the witness' behalf. In rejecting defendants' argument that the witness had waived the privilege under Evidence Code section 912, we stated: "[I]n the trial court, Perry's counsel argued that Diana waived her psychotherapist privilege by giving certain testimony on cross-examination. We have reviewed the statements Diana made at trial and are satisfied that she did not disclose a significant part of any communication with any psychotherapist. At most, her testimony disclosed that she had consulted two psychiatrists; she did not reveal the substance of her consultations. Mere admission that a psychotherapist-patient relationship exists does not disclose 'a significant part of the communication.' (See *In re Lifschutz* (1970) 2 Cal.3d 415 [85 Cal.Rptr. 829, 467 P.2d 557, 44 A.L.R.3d 1].)" (*People v. Perry, supra*, 7 Cal.3d at pp. 782-783.) In the present matter, plaintiff's answers, while revealing the existence of her attorney-client relationship, *at most* affirmed that she had discussed certain warnings with her attorneys, and in no way revealed a significant part of the substance of those discussions.

Recently, in *Travelers Ins. Companies v. Superior Court* (1983) 143 Cal.App.3d 436 [191 Cal.Rptr. 871], the Court of Appeal found no waiver of the attorney-client privilege under section 912 in a legal malpractice action. There, plaintiff served various interrogatories on defendant and also served a request for production of documents on Travelers, seeking its entire claims file on the malpractice dispute. In holding that the sought-after communications between defendant and his client insurance company were in fact privileged, the Court of Appeal emphasized that while defendant had acknowledged discussing the matter with his client, his answers had not reached the point of substantial disclosure at which the privilege had ceased to operate. As the Court of Appeal correctly noted: "Relatively few reported cases interpret Section 912, subdivision (a); none is definitive on the question before us. The answer turns, of course, on determination of *whether Klein's answers were wide enough in scope and deep enough in substance* ***603** *to constitute 'a significant part of the communication.' We think not. His answers, at most, were preliminary and foundational—and quite vague. He did not provide the specifics the interrogatories were doubtless intended to produce. Any really*

'significant part of the communication' required by the statute remained unsupplied." (143 Cal.App.3d at 444; see *People v. Kor, supra*, 129 Cal.App.2d at p. 447; italics added.)

In a similar vein, it is readily apparent that plaintiff here did not waive her attorney-client privilege through her mere acknowledgment of the fact that she had discussed warnings about DBCP with her attorney. This meager admission did not disclose any of the actual substance or content of those discussions, and as in *Travelers*, the client's answers did not reveal the very specifics which the interrogatories were designed to produce. In this context, we are not persuaded that plaintiff's responses disclosed "a significant part of the communication" with her attorneys, for such a conclusion would require considerably more depth and specificity than were present in Ms. Mitchell's answers. As such, we do not find any waiver of the attorney-client privilege under Evidence Code section 912.

Implied Waiver of Privilege

(7) Although Evidence Code section 912 represents the only conceivable basis for finding a statutory waiver of privilege in this matter, defendants submit an additional contention as to why they are entitled to full discovery of communications between plaintiff and her attorneys. In short, they argue that there has been an implied waiver of the attorney-client privilege because plaintiff has tendered a cause of action for emotional distress, and all evidence relevant to this issue should therefore be discoverable. In so contending, defendants suggest that the only way to ascertain the genuineness and legitimacy of plaintiff's claim for emotional distress damages is by exploring her discussions with her attorneys relating to the health effects of DBCP. The trial court generally agreed with this reasoning in finding a waiver of the privilege. Essentially, it held that by seeking damages for emotional distress based on the harmful effects of DBCP, plaintiff put the information from her attorneys at issue, since such information might help determine the genuineness and reasonableness of her claim (*Molien v. Kaiser Foundation Hospitals* (1980) 27 Cal.3d 916 [167 Cal.Rptr. 831, 616 P.2d 813, 16 A.L.R.4th 518]). [4] ***604**

4 At the hearing on the motion to compel answers, the following exchange occurred between the court and plaintiff's counsel:
"Mr. Kramer: Your Honor, if I said to my client, if I gave her advice about a legal opinion—for example, DBCP is defective, which is legal advice—would the defendants have the right to get to that?
"The Court: If that contributes to her emotional distress.
"Mr. Kramer: Well, it's legal advice given to my client which, in my mind, is strictly privileged. I'm just afraid I can't even talk to my clients anymore about their case, about what's in their water. And I believe that deteriorates the attorney-client privilege incredibly.
"The Court: If what you tell the client is going to be an element of damage, it's discoverable in my opinion.
"Mr. Kramer: I understand your position.
"The Court: You can't have damages based on something that is secret.

> "Mr. Kramer: But isn't that for the jury to ascertain, her emotional distress? The defendants will put on their evidence as to DBCP, plaintiff will put their experts on as to the risks of DBCP, plaintiff will state what she believes about DBCP; and won't it be up to the jury to weigh that evidence and make a final conclusion?
> "The Court: Maybe, but the defendants have an absolute right, in my opinion, to discover the sources of that information and what the information was. Just like if you're going to rely on it as a basis for damage, the jury is going to have to be informed."

Defendants cite a number of California cases as supporting the proposition that "fundamental fairness" may require disclosure of otherwise privileged information or communications where plaintiff has placed in issue a communication which goes to the heart of the claim in controversy. While we do not disagree with this general proposition, we do not find it applicable to the facts of the instant matter and distinguish each of the cases relied upon by real parties.

In re Lifschutz (1970) 2 Cal.3d 415 [85 Cal.Rptr. 829, 467 P.2d 557, 44 A.L.R.3d 1], involved a suit for civil assault in which a plaintiff who claimed emotional distress disclosed at deposition that he had received psychiatric treatment from Dr. Lifschutz. When defendant subpoenaed the doctor for deposition, the latter refused to answer any questions relating to his treatment of the plaintiff. The trial court ruled that because the plaintiff, by instituting the pending litigation, had tendered as an issue his mental and emotional condition, the statutory psychotherapist-patient privilege (Evid. Code, § 1010 et seq.) should not apply. This court subsequently affirmed that determination. However, unlike the instant matter, the court's ruling was based on a *specific statutory exception* to the psychotherapist-patient privilege—the patient-litigant exception, which is set forth in Evidence Code section 1016.[5] There is no such specific statutory exception applicable to the attorney-client privilege in the case at bar. Indeed, since we have already found that the attorney-client privilege was not waived under section 912 or any other statutory exception set forth in the Evidence Code, real parties' reliance on *In re Lifschutz*, which involved a different privilege and a specific statutory exception thereto, is unfounded.

5 Evidence Code section 1016 provides in pertinent part: "There is no privilege under this article as to a communication relevant to an issue concerning the mental or emotional condition of the patient if such issue has been tendered by: (1) The patient; (b) Any party claiming through or under the patient; ..."

Similarly, *Fremont Indemnity Co. v. Superior Court* (1982) 137 Cal.App.3d 554 [187 Cal.Rptr. 137] offers no substantiation to the arguments of real parties. In that case, plaintiff brought a civil action against his ***605** insurer to recover under a fire insurance policy and alleged bad faith refusal to settle this claim by the insurance company. During the course of discovery, plaintiff was indicted for arson and refused to give his deposition,

asserting his constitutional privilege against self-incrimination. The *Fremont* court ordered plaintiff to answer or abandon his claim, noting the following language from *Wilson* v. *Superior Court* (1976) 63 Cal.App.3d 825, 830 [134 Cal.Rptr. 130]: "... 'the gravamen of [his] lawsuit is so inconsistent with the continued assertion of [a] privilege as to compel the conclusion that the privilege has in fact been waived.'" (137 Cal.App.3d at p. 559.) In *Fremont*, the court correctly characterized the sought-after testimony as "vitally relevant" to an issue (arson) which was necessarily raised by plaintiff's claim. Discovery of this information was clearly essential to a fair resolution of the case, since a finding of arson would have provided a complete defense for defendant insurers. Such cannot be said for the testimony in question in the case at bar, for as we shall see, it does not go to the heart of plaintiff's claim for emotional distress. Thus, the basis for the court's ruling in *Fremont* is simply not applicable here.

In like manner, real parties' reliance on *Merritt v. Superior Court* (1970) 9 Cal.App.3d 721 [88 Cal.Rptr. 337] is equally misplaced. *Merritt* involved a lawsuit against an insurance company for bad faith refusal to settle within policy limits. It was brought by the injured plaintiff as assignee of the insured's cause of action, and it alleged that counsel for the insurer had so confused plaintiff's counsel as to disable plaintiff from settling the case within policy limits. The insurer sought discovery of certain communications by plaintiff's attorney during preparation of the underlying lawsuit. The *Merritt* court upheld disclosure on the ground that plaintiff had placed in issue the decisions, conclusions and mental state of his then attorney by alleging that this attorney's confusion led to the failure to settle. Since plaintiff was necessarily forced to prove his case by reference to the mental state of his counsel, the defendant was entitled to inquire into communications relating to that state.

Subsequent cases, however, have properly distinguished *Merritt* "as being limited in its application to the *one situation* in which a client has placed in issue the *decisions, conclusions, and mental state of the attorney who will be called as a witness to prove such matters*." (*Estate of Kime, supra*, 144 Cal.App.3d at p. 259, citing *Lohman* v. *Superior Court* (1978) 81 Cal.App.3d 90 [146 Cal.Rptr. 171]; *Miller* v. *Superior Court* (1980) 111 Cal.App.3d 390 [168 Cal.Rptr. 589]; *Schlumberger Ltd. v. Superior Court* (1981) 115 Cal.App.3d 386 [171 Cal.Rptr. 413].) (First italics added.) In the instant matter, the state of mind of plaintiff's attorneys is clearly not at issue, and plaintiff has no need to prove her case by reference to the conclusions or mental state of her counsel. *Merritt* is thus unquestionably inapposite. ***606** In sum, defendants' contention that plaintiff should be required to disclose otherwise privileged communications with her attorneys on the grounds of an implied waiver of such privilege does not find support in the case law on which real parties themselves rely. [6]

6 Two other cases cited by real parties, *Newson v. City of Oakland* (1974) 37 Cal.App.3d 1050 [112 Cal.Rptr. 890] and *Wilson* v. *Superior Court, supra*, 63 Cal.App.3d 825 are also inapposite to the case at bench. Among the several reasons for this conclusion is the fact

> that both cases involve a plaintiff's claims of privilege as to income tax returns, and, income tax returns, unlike attorney-client communications, are not covered by a specific *statutory* privilege.

Plaintiff, on the other hand, has pointed out several cases which limit the implied waiver principle under circumstances analogous to those present in the instant matter. These cases have declined to find a waiver of the attorney-client privilege where the substance of the protected communication is not itself tendered in issue, but instead simply represents one of several forms of indirect evidence in the matter. Plaintiff correctly contends that her case does not involve the withholding of crucial evidence on the central issue tendered by the party claiming privilege, noting that she will attempt to prove her emotional distress claim without reference to confidential communications with her attorneys. She further correctly argues that her various claims have *not* put into issue her attorneys' state of mind and that in fact the real issues are *her* knowledge and state of mind, evidence of which may be ascertained directly from her, without an examination of the information on DBCP transmitted by her attorneys. In examining these contentions, we turn first to the cases on which plaintiff relies.

In *Miller v. Superior Court, supra*, 111 Cal.App.3d 390, plaintiff brought a malpractice action against her former attorney. Defendant raised a statute of limitations defense and in discovery asked plaintiff about her communications with other attorneys following the alleged malpractice. Defendant's intention was to discover the content of plaintiff's communications with these other attorneys on the grounds that those communications would tend to show the point at which plaintiff became aware of the necessary facts for her claim. Plaintiff named seven attorneys she had consulted but refused to disclose the content of her communications. In reversing a trial court's order compelling plaintiff to answer, the Court of Appeal concluded that discovery was improper, relying on the analogous case of *Lohman v. Superior Court, supra*, 81 Cal.App.3d 90, to substantiate its analysis: "We distinguished *Merritt* on the ground that there the plaintiff specifically put in issue his counsel's state of mind, whereas in *Lohman* it was only the plaintiff's knowledge which was placed in issue. The same distinction applies here. Petitioner Florrie Miller's state of knowledge is clearly in issue and may be proved by any competent evidence available to real parties. However, the ***607** mere fact that her state of mind is in issue does not cause a waiver of her privilege concerning confidential communications between her and attorneys she consulted after the alleged malpractice. There is no statutory waiver in such circumstances, and no basis for creating a nonstatutory waiver. To do so would create an intolerable burden upon the attorney-client privilege, making it very difficult for the parties to the relationship to openly discuss matters which might eventually lead to litigation." (111 Cal.App.3d 390, 394-395.)

Similarly, in the case at bench, Ms. Mitchell's knowledge about the health hazards of DBCP is both relevant and discoverable, but the content of what she was told by her attorneys has not been put in issue and remains protected by the attorney-client privilege.

In an equally relevant case, *Schlumberger, Ltd. v. Superior Court, supra*, 115 Cal.App.3d 386, a legal malpractice defendant sought discovery of the communications between plaintiff and the attorneys he later engaged to minimize the damage from defendant's malpractice and to prosecute the malpractice claim. Defendant there contended that the advice given by plaintiff's present attorneys bore directly on the issue of damages, because, defendant argued, the damages sued for resulted not from his own failings but rather from the advice and actions of current counsel. In rejecting this argument and upholding the privilege, the Court of Appeal emphasized: "Privileged communications do not become discoverable because they are related to issues raised in the litigation .... If tendering the issue of damages in a malpractice action waived the privilege, there would be no privilege, and Evidence Code section 954 would be meaningless." (115 Cal.App.3d at p. 393.)

Schlumberger is particularly relevant to our consideration of the instant matter because real parties here have strongly suggested that much of plaintiff's alleged damages for emotional distress resulted from fear induced by the advice and actions of her counsel. We note, however, that plaintiff never has claimed that information supplied by her counsel caused her emotional distress. Indeed, her complaint alleged only that the contamination of the Mitchells' ground water and air caused grievous personal injuries and severe emotional distress. The complaint further alleged that the toxic substances contaminated their dwellings, reducing the value of the property and rendering it unfit for human habitation or farming. Clearly, neither these allegations nor plaintiff's mere acknowledgment that she had discussed warnings about DBCP with her attorneys put those privileged communications at issue.

Defendants apparently contend, however, that plaintiff, by alleging a cause of action for emotional distress, has thereby rendered discoverable ***608** the source and substance of *all* information which she has received about DBCP. They argue that such discovery is necessary in order to determine the "genuineness" of plaintiff's claim for emotional distress.

Plaintiff, while acknowledging that the reasonableness and genuineness of her fears is a legitimate concern, particularly in assessing the amount of damages, submits that the issue can be properly litigated without such a broad invasion of the attorney-client privilege. We agree. As plaintiff correctly contends, the principal measure of reasonableness is whether her fears square with scientifically proven or suspected effects of DBCP, a relatively objective test which can be applied by a trier of fact without delving into all her sources of information or misinformation. Moreover, defendants will have ample opportunity to show why plaintiff's fears are unreasonable or exaggerated and to exploit any gaps in the evidence as to her sources of information. Additionally, even if the communications in question were potentially relevant to the issue of damages, the attorney-client privilege would still operate to exclude them. As we noted above, courts and legislatures have long recognized that the privilege will at times shield from view otherwise relevant evidence.

This court has no intention of abandoning that principle here.

Both parties urge that *Molien v. Kaiser Foundation Hospitals, supra*, 27 Cal.3d 916 and *Rodrigues v. State* (1970) 52 Hawaii 156 [472 P.2d 509] support their respective positions. Significantly, both *Molien* and *Rodrigues* involved claims for *negligent* infliction of emotional distress, *unaccompanied by physical injury*, whereas plaintiff's claim here is for *intentional* infliction of emotional distress, accompanied by personal injuries, property damage and other monetary losses. In *Molien*, this court distinguished intentional infliction of emotional distress thusly: "Finally, intentional torts will support an award of damages for emotional distress alone, but only in cases involving 'extreme and outrageous intentional invasions of one's mental and emotional tranquility.' (*Alcorn v. Anbro Engineering, Inc., supra*, 2 Cal.3d at p. 498.) As we explained in *State Rubbish, etc. Assn. v. Siliznoff* (1952) 38 Cal.2d 330, 338 [240 P.2d 282], *it is outrageous conduct that serves to insure that the plaintiff experienced serious mental suffering and convinces the courts of the validity of the claim*." (27 Cal.3d at p. 927, italics added.)[7] ***609**

7 Similarly in *Rodrigues v. State, supra*, the Hawaii Supreme Court stated: "Of course, the modern cases have abandoned the parasitic approach where the infliction of mental distress is an *intentional* act, *relying on the element of outrage in such cases as a guarantee of genuine and serious mental distress*." (52 Hawaii 156, 171, italics in original and italics added.)

In addition, in *Newby v. Alto Riviera Apartments* (1976) 60 Cal.App.3d 288 [131 Cal.Rptr. 547], the court held that plaintiff had presented substantial evidence to support her claim for intentional infliction of mental distress, citing Restatement Second of Torts, section 46, comment k, and stating: "The language [of the Restatement] emphasizes *the need to 'look for more in the way of outrage as a guarantee that the claim is genuine*' .... [¶] Appellant presented substantial evidence that respondents' behavior was outrageous in that they acted knowingly and unreasonably with the intention to inflict mental distress. ... The total course of conduct exhibited by respondents meets the tests of outrageous conduct ...." (60 Cal.App.3d at pp. 296-298, italics added.)

Such language strongly suggests that it is evidence of *defendant's conduct* which guarantees the "genuineness" of a claim for emotional distress. In this vein, it should thus be noted that plaintiff here will bear the burden of producing such evidence regarding defendants' conduct, and that such proof will undoubtedly focus on objective scientific and expert evidence, as opposed to any confidential communications which plaintiff had with her attorneys.

Molien further distinguished cases where emotional distress is the only damage claimed from those where, as in the instant matter, emotional distress is merely one of several causes of action: "Another [assurance of the validity of the claim] arises when the plaintiff

asserts an independent cause of action apart from personal injury. ... 'Obviously, where, as here, the claim is actionable and has resulted in substantial damages apart from those due to mental distress, the danger of fictitious claims is reduced, and we are not here concerned with mere bad manners or with trivialities but tortious conduct resulting in substantial invasions of clearly protected interests.' [Citations.]" (27 Cal.3d at p. 927, italics added.)

In sum, we do not find that plaintiff has put the information gained through otherwise privileged communications with her attorneys directly at issue, nor do we find that disclosure of such communications will be necessary to a fair adjudication of her claim for emotional distress.

Public Policy Considerations

Finally, both parties have suggested that the public policies of this state provide support for their respective positions. While we agree with the importance of balancing these competing interests, the circumstances of this matter weigh ultimately in favor of preserving the attorney-client privilege. First, we note that disclosure of the sought-after confidential communications may carry significant implications not only for the attorney-client privilege but also for the attorney work-product doctrine.[8] Plaintiff's attorneys ***610** here have consistently maintained that permitting the discovery sought by real parties will function primarily to reveal much of their investigative efforts on behalf of their clients as well as significant aspects of their trial strategy. While this remains a matter of speculation at this point, we fully recognize the importance of safeguarding the confidentiality of an attorney's files and work efforts and permit examination of such material only in exceptional circumstances. (*Hickman v. Taylor* (1947) 329 U.S. 495, 511 [91 L.Ed. 451, 462, 67 S.Ct. 385]; *Popelka, Allard, McCowan & Jones v. Superior Court* (1980) 107 Cal.App.3d 496, 501 [165 Cal.Rptr. 748].)

8 The attorney work-product doctrine is codified at Code of Civil Procedure section 2016, subdivision (g), which provides: "It is the policy of this state (i) to preserve the rights of attorneys to prepare cases for trial with that degree of privacy necessary to encourage them to prepare their cases thoroughly and to investigate not only the favorable but the unfavorable aspects of such cases and (ii) to prevent an attorney from taking undue advantage of his adversary's industry or efforts."

In a related vein, we take note of plaintiff's contention that permitting discovery in the case at bar will have important ramifications for the attorney-client privilege and work-product doctrine in many other cases which involve claims for emotional distress. If discovery were granted here, it is logical to expect that in most personal injury cases where emotional distress is alleged by reason of feared future consequences, defense counsel would seek to discover whether those potential consequences had been discussed between client and counsel and if so, whether that discussion had contributed to plaintiff's distress. Since it is likely that such discussions do in fact occur in most cases, the door would then be open

for broad discovery of previously privileged communications. While such discovery would nominally be intended to produce evidence relating to the damages issue, it might very well reveal much of plaintiff's investigative efforts and trial strategy. Limitations on the scope of this discovery would be very difficult to fashion.

Moreover, the mere knowledge of such potential discovery would place significant burdens on any attorney representing a plaintiff with an emotional distress claim. Such an attorney might be very reluctant to even discuss potential future consequences with a client—a subject which is part and parcel of the normal attorney-client relationship—for fear that such discussion would afford a defendant broad discovery of otherwise privileged information. If an attorney cannot freely express opinions and impart knowledge on all issues on which he or she is consulted, the value of that attorney's services to the client is substantially diminished. Clearly, therefore, the situation described above would portend a substantial and unwarranted invasion of both the attorney-client privilege and the work-product doctrine.

Furthermore, to permit discovery of the attorney-client communications in this instance raises an equally troubling concern. Such a holding would potentially uphold a harassment tactic whereby defendants such as these are able to shift the focus of the case from damages caused by chemical pollutants to damages caused by allegedly inflammatory or false information provided by self-serving attorneys. Although real parties here do not explicitly impugn the motives of plaintiff's lawyers, the implications of their arguments ***611** are unmistakably clear. In other similar cases, defendant chemical manufacturers have contended that plaintiffs' injuries were caused not by exposure to toxic chemicals but rather by hysteria induced by plaintiffs' doctors. Once again, this technique not only obfuscates many of the substantive issues in a case but also frequently places the wrong "defendant" on trial. Quite simply, such tactics should not be tolerated in the courts of this state.

After weighing the various legal and policy arguments propounded by the parties, we are persuaded that to permit discovery of the confidential communications here would constitute an unwarranted abrogation of the attorney-client privilege—a privilege which is fundamental to the free and open exchange of information and advice between lawyers and their clients, and more broadly to the proper functioning of our judicial system. We thus conclude that the information sought by defendant real parties, with the limited exception of Questions 4 and 5 as discussed above, is covered by the attorney-client privilege and that no waiver of that privilege has occurred. Let a writ of mandate issue, ordering respondent superior court to vacate its order compelling discovery.

Bird, C. J., Mosk, J., Kaus, J., Reynoso, J., Grodin, J., and Lucas, J., concurred.

The petition of real parties in interest for a rehearing was denied February 14, 1985, and the opinion was modified to read as printed above. ***612**

End of Document

RLA-9

141 S.Ct. 2190
Supreme Court of the United States.

TRANSUNION LLC, Petitioner
v.
Sergio L. RAMIREZ

No. 20-297
|
Argued March 30, 2021
|
Decided June 25, 2021

Synopsis

Background: Class of 8,185 consumers with alerts in their credit files maintained by credit reporting agency, indicating that the consumer's name was a "potential match" to a name on a list maintained by the United States Treasury Department's Office of Foreign Assets Control (OFAC) of terrorists, drug traffickers, and other serious criminals, brought action against agency under the Fair Credit Reporting Act (FCRA), alleging that agency failed to use reasonable procedures to ensure the accuracy of their credit files, that for 1,853 of the class members, agency provided misleading credit reports to third-party businesses, and that certain mailings sent to them by agency contained formatting defects. Following certification of class, 301 F.R.D. 408, and denial of agency's motions to decertify class, 2016 WL 6070490, for summary judgment, 2017 WL 1133161, and for leave to file motion for reconsideration, 2017 WL 2403812, trial was held, after which jury returned a verdict in consumers' favor, awarding statutory and punitive damages of more than $60 million for three willful violations of the statute. Agency moved for judgment as matter of law, or in the alternative, for a new trial, remittitur, or an amended judgment. The United States District Court for the Northern District of California, Jacqueline Scott Corley, United States Magistrate Judge, 2017 WL 5153280, denied agency's motions. Agency appealed. The United States Court of Appeals for the Ninth Circuit, Murguia, Circuit Judge, 951 F.3d 1008, affirmed in relevant part. Certiorari was granted.

Holdings: The Supreme Court, Justice Kavanaugh, held that:

[1] under Article III, only those plaintiffs who have been concretely harmed by a defendant's statutory violation may sue that private defendant over that violation in federal court;

[2] consumers whose credit reports containing alerts were disseminated to third-party businesses suffered a concrete injury in fact, as required for Article III standing;

[3] mere existence of misleading alerts in consumers' credit files that were not disseminated to third-party businesses did not constitute a concrete injury, for purposes of Article III standing;

[4] risk of future harm to consumers as a result of misleading alerts in their credit files, which had not been disseminated to third-party businesses, did not supply basis for Article III standing to seek retrospective damages; and

[5] consumers other than named plaintiff lacked Article III standing to pursue claims against

agency for breach of obligation under the FCRA to provide them with complete credit files upon request.

Reversed and remanded.

Justice Thomas filed a dissenting opinion, in which Justices Breyer, Sotomayor, and Kagan joined.

Justice Kagan filed a dissenting opinion, in which Justices Breyer and Sotomayor joined.

Procedural Posture(s): Petition for Writ of Certiorari; On Appeal; Judgment.

West Headnotes (50)

[1] **Constitutional Law** Separation of Powers

The law of Article III standing is built on a single basic idea: the idea of separation of powers. U.S. Const. art. 3, § 2, cl. 1.

3 Cases that cite this headnote

[2] **Federal Civil Procedure** In general; injury or interest

Federal Courts Case or Controversy Requirement

Article III confines the federal judicial power to the resolution of "Cases" and "Controversies." U.S. Const. art. 3, § 2, cl. 1.

6 Cases that cite this headnote

[3] **Federal Civil Procedure** In general; injury or interest

Federal Courts Case or Controversy Requirement

For there to be a case or controversy under Article III, the plaintiff must have a personal stake in the case, in other words, standing. U.S. Const. art. 3, § 2, cl. 1.

28 Cases that cite this headnote

[4] **Federal Civil Procedure** In general; injury or interest

Federal Civil Procedure Causation; redressability

To establish Article III 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. U.S. Const. art. 3, § 2, cl. 1.

112 Cases that cite this headnote

[5] **Federal Courts** Injury, harm, causation, and redress

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, under Article III. U.S. Const. art. 3, § 2, cl. 1.

27 Cases that cite this headnote

[6] **Constitutional Law** Separation of Powers

Federal Civil Procedure In general; injury or interest

Federal Civil Procedure Causation; redressability

Requiring a plaintiff to demonstrate a concrete and particularized injury caused by the defendant and redressable by the court to have Article III standing ensures that federal courts decide only the rights of individuals, and that federal courts exercise their proper function in a limited and separated government. U.S. Const. art. 3, § 2, cl. 1.

7 Cases that cite this headnote

[7] **Federal Courts** Nature of dispute; concreteness

Under Article III, federal courts do not adjudicate hypothetical or abstract disputes. U.S. Const. art. 3, § 2, cl. 1.

6 Cases that cite this headnote

[8] **Federal Courts** Case or Controversy Requirement

Federal courts do not possess a roving commission to publicly opine on every legal question.

6 Cases that cite this headnote

[9] **Constitutional Law** Encroachment on Legislature

Constitutional Law Encroachment on Executive

Federal Courts Limited jurisdiction; jurisdiction as dependent on constitution or statutes

Federal courts do not exercise general legal oversight of the Legislative and Executive Branches, or of private entities.

4 Cases that cite this headnote

[10] **Constitutional Law** Advisory Opinions

Federal courts do not issue advisory opinions; they instead decide only matters of a judiciary nature.

6 Cases that cite this headnote

[11] **Federal Courts** Case or Controversy Requirement

Under Article III, a federal court may resolve only a real controversy with real impact on real persons. U.S. Const. art. 3, § 2, cl. 1.

7 Cases that cite this headnote

[12] **Federal Civil Procedure** In general; injury or interest

Article III requires that, to have standing, the plaintiff 's injury in fact must be concrete, that is, real, and not abstract. U.S. Const. art. 3, § 2, cl. 1.

92 Cases that cite this headnote

[13] **Federal Civil Procedure** In general; injury or interest

Inquiry into whether the alleged injury to a plaintiff has a close relationship to a harm traditionally recognized as providing a basis for a lawsuit in American courts, to determine whether it is a concrete injury, as required for Article III standing, does not require an exact duplicate in American history and tradition, but it is not an open-ended invitation for federal courts to loosen Article III based on contemporary, evolving beliefs about what kinds of suits should be heard in federal courts. U.S. Const. art. 3, § 2, cl. 1.

92 Cases that cite this headnote

[14] **Federal Civil Procedure** In general; injury or interest

Certain harms readily qualify as "concrete injuries" under Article III; the most obvious are traditional tangible harms, such as physical harms and monetary harms. U.S. Const. art. 3, § 2, cl. 1.

29 Cases that cite this headnote

[15] **Federal Civil Procedure** In general; injury or interest

If a defendant has caused physical or monetary injury to the plaintiff, the plaintiff has suffered a concrete injury in fact under Article III. U.S. Const. art. 3, § 2, cl. 1.

115 Cases that cite this headnote

[16] **Federal Civil Procedure** In general; injury or interest

Various intangible harms can be concrete, as required for Article III standing; chief among them are injuries with a close relationship to harms traditionally recognized as providing a basis for lawsuits in American courts, including, 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. U.S. Const. art. 3, § 2, cl. 1.

65 Cases that cite this headnote

[17] **Federal Civil Procedure** In general; injury or interest

Courts must afford due respect to Congress's decision to impose a statutory prohibition or obligation on a defendant, and to grant a plaintiff a cause of action to sue over the

defendant's violation of that statutory prohibition or obligation; in that way, Congress may elevate to the status of legally cognizable injuries concrete, de facto injuries that were previously inadequate in law.

11 Cases that cite this headnote

[18] Federal Civil Procedure In general; injury or interest

For purposes of Article III standing, even though Congress may elevate harms that existed in the real world before Congress recognized them to actionable legal status, it may not simply enact an injury into existence, using its lawmaking power to transform something that is not remotely harmful into something that is. U.S. Const. art. 3, § 2, cl. 1.

5 Cases that cite this headnote

[19] Federal Civil Procedure In general; injury or interest

Article III standing requires a concrete injury even in the context of a statutory violation. U.S. Const. art. 3, § 2, cl. 1.

36 Cases that cite this headnote

[20] Federal Civil Procedure In general; injury or interest

Congress's creation of a statutory prohibition or obligation and a cause of action does not relieve courts of their responsibility to independently decide whether a plaintiff has suffered a concrete harm under Article III any more than, for example, Congress's enactment of a law regulating speech relieves courts of their responsibility to independently decide whether the law violates the First Amendment. U.S. Const. art. 3, § 2, cl. 1; U.S. Const. Amend. 1.

15 Cases that cite this headnote

[21] Federal Civil Procedure In general; injury or interest

Courts cannot treat an injury as "concrete" for Article III purposes based only on Congress's say-so. U.S. Const. art. 3, § 2, cl. 1.

5 Cases that cite this headnote

[22] Federal Civil Procedure In general; injury or interest

For Article III standing purposes, an important difference exists between (i) a plaintiff 's statutory cause of action to sue a defendant over the defendant's violation of federal law, and (ii) a plaintiff 's suffering concrete harm because of the defendant's violation of federal law; Congress may enact legal prohibitions and obligations, and Congress may create causes of action for plaintiffs to sue defendants who violate those legal prohibitions or obligations, but under Article III, an

injury in law is not an injury in fact. U.S. Const. art. 3, § 2, cl. 1.

34 Cases that cite this headnote

[23] Federal Civil Procedure In general; injury or interest

Under Article III, only those plaintiffs who have been concretely harmed by a defendant's statutory violation may sue that private defendant over that violation in federal court. U.S. Const. art. 3, § 2, cl. 1.

46 Cases that cite this headnote

[24] Federal Courts Injury, harm, causation, and redress

Article III grants federal courts the power to redress harms that defendants cause plaintiffs, not a freewheeling power to hold defendants accountable for legal infractions. U.S. Const. art. 3, § 2, cl. 1.

9 Cases that cite this headnote

[25] Federal Civil Procedure In general; injury or interest

The public interest that private entities comply with the law cannot be converted into an individual right by a statute that denominates it as such, and that permits all citizens, or, for that matter, a subclass of citizens who suffer no distinctive concrete harm, to sue.

1 Cases that cite this headnote

[26] Constitutional Law Encroachment on Executive

Federal Civil Procedure In general; injury or interest

A regime where Congress could freely authorize unharmed plaintiffs to sue defendants who violate federal law not only would violate Article III but also would infringe on the Executive Branch's Article II authority. U.S. Const. art. 3, § 2, cl. 1.

[27] Constitutional Law Nature and scope in general

Constitutional Law Nature and scope in general

The court accepts the displacement of the democratically elected branches when necessary to decide an actual case, but otherwise, the choice of how to prioritize and how aggressively to pursue legal actions against defendants who violate the law falls within the discretion of the Executive Branch, not within the purview of private plaintiffs and their attorneys; private plaintiffs are not accountable to the people and are not charged with pursuing the public interest in enforcing a defendant's general compliance with regulatory law.

[28] **Constitutional Law** Separation of Powers

Federal Civil Procedure In general; injury or interest

The concrete-harm requirement to Article III standing is essential to the Constitution's separation of powers. U.S. Const. art. 3, § 2, cl. 1.

13 Cases that cite this headnote

[29] **Constitutional Law** Constitutionality of Statutory Provisions

The fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution.

[30] **Federal Civil Procedure** In general; injury or interest

The party invoking federal jurisdiction bears the burden of demonstrating that they have standing.

13 Cases that cite this headnote

[31] **Federal Civil Procedure** Representation of class; typicality; standing in general

Every class member must have Article III standing in order to recover individual damages in a class action. U.S. Const. art. 3, § 2, cl. 1.

41 Cases that cite this headnote

[32] **Federal Civil Procedure** In general; injury or interest

Federal Civil Procedure Representation of class; typicality; standing in general

Article III does not give federal courts the power to order relief to any uninjured plaintiff, class action or not. U.S. Const. art. 3, § 2, cl. 1.

14 Cases that cite this headnote

[33] **Federal Civil Procedure** In general; injury or interest

Plaintiffs must maintain their personal interest in the dispute at all stages of litigation to maintain standing.

5 Cases that cite this headnote

[34] **Federal Civil Procedure** In general; injury or interest

A plaintiff must demonstrate standing with the manner and degree of evidence required at the successive stages of the litigation; therefore, in a case that proceeds to trial, the specific facts set forth by the plaintiff to support standing must be supported adequately by the evidence adduced at trial.

16 Cases that cite this headnote

[35] Federal Civil Procedure In general; injury or interest

Standing is not dispensed in gross; rather, plaintiffs must demonstrate standing for each claim that they press and for each form of relief that they seek, for example, injunctive relief and damages.

32 Cases that cite this headnote

[36] Federal Civil Procedure Consumers, purchasers, borrowers, and debtors

Finance, Banking, and Credit Credit reporting

Consumers whose credit reports, which indicated that their name was a "potential match" to a name on a list maintained by United States Treasury Department's Office of Foreign Assets Control (OFAC) of terrorists, drug traffickers, and other serious criminals, were disseminated to third-party businesses, suffered a concrete injury in fact, as required to have Article III standing to bring class action seeking statutory and punitive damages from credit reporting agency, under Fair Credit Reporting Act (FCRA), for failure to use reasonable procedures to ensure accuracy of credit files; consumers suffered harm with a close relationship to that associated with defamation, even though reports merely identified a consumer as a "potential match," which was not technically false, as harm from being labeled a "potential terrorist" bore a close relationship to harm from being labeled a "terrorist." U.S. Const. art. 3, § 2, cl. 1; Consumer Credit Protection Act §§ 607, 616(a), 15 U.S.C.A. §§ 1681e(b), 1681n(a).

10 Cases that cite this headnote

[37] Libel and Slander Injury from Defamation

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.

5 Cases that cite this headnote

[38] Federal Civil Procedure Consumers, purchasers, borrowers, and debtors

Finance, Banking, and Credit Credit reporting

Mere existence of misleading alerts in consumers' credit files maintained by credit reporting agency, indicating that the consumer's name was a "potential match" to a name on a list maintained by the United States Treasury Department's Office of Foreign Assets Control (OFAC) of terrorists, drug traffickers, and other serious criminals, did not constitute a "concrete injury," for purposes of Article III standing to

bring class action seeking statutory and punitive damages from credit reporting agency, under Fair Credit Reporting Act (FCRA), for failure to use reasonable procedures to ensure accuracy of credit files, where allegedly inaccurate or misleading information sat in a company database, and was not disclosed to a third party; consumers' harm was roughly the same, legally speaking, as if someone wrote a defamatory letter and then stored it in her desk drawer, that is, such information did not harm anyone. U.S. Const. art. 3, § 2, cl. 1; Consumer Credit Protection Act §§ 607, 616(a), 15 U.S.C.A. §§ 1681e(b), 1681n(a).

13 Cases that cite this headnote

[39] Federal Courts Presentation of Questions Below or on Review; Record; Waiver

Consumers whose credit reports, which indicated that their name was a "potential match" to a name on a list maintained by United States Treasury Department's Office of Foreign Assets Control (OFAC) of terrorists, drug traffickers, and other serious criminals, were not disseminated to third-party businesses, forfeited for certiorari review on issue of Article III standing their argument that credit reporting agency "published" their information internally, for example, to employees within agency and to vendors that printed and sent mailings that consumers received, where consumers raised argument for first time to the Supreme Court. U.S. Const. art. 3, § 2, cl. 1.

[40] Federal Civil Procedure Consumers, purchasers, borrowers, and debtors

Finance, Banking, and Credit Credit reporting

Credit reporting agency's internal publication of credit files for consumers, containing alerts indicating that the consumer's name was a "potential match" to a name on a list maintained by the United States Treasury Department's Office of Foreign Assets Control (OFAC) of terrorists, drug traffickers, and other serious criminals, did not bear a sufficiently close relationship to the traditional defamation tort to satisfy the concrete injury requirement for Article III standing to bring class action seeking statutory and punitive damages from credit reporting agency, under Fair Credit Reporting Act (FCRA), for failure to use reasonable procedures to ensure accuracy of credit files, absent evidence that the files were actually read and not merely processed. U.S. Const. art. 3, § 2, cl. 1; Consumer Credit Protection Act §§ 607, 616(a), 15 U.S.C.A. §§ 1681e(b), 1681n(a).

5 Cases that cite this headnote

[41] **Federal Civil Procedure** Consumers, purchasers, borrowers, and debtors

Finance, Banking, and Credit Credit reporting

Risk of future harm to consumers as a result of misleading alerts in their credit files maintained by credit reporting agency, which had not been disseminated to third-party businesses, indicating that the consumer's name was a "potential match" to a name on a list maintained by the United States Treasury Department's Office of Foreign Assets Control (OFAC) of terrorists, drug traffickers, and other serious criminals, did not satisfy the concrete injury requirement for Article III standing to bring class action seeking retrospective damages from credit reporting agency, under Fair Credit Reporting Act (FCRA), for failure to use reasonable procedures to ensure accuracy of credit files; consumers did not demonstrate that risk of future harm materialized, that there was sufficient likelihood that agency would disseminate the information, or that they suffered some other injury, such as emotional injury, from mere risk that credit reports would be provided to third parties. U.S. Const. art. 3, § 2, cl. 1; Consumer Credit Protection Act §§ 607, 616(a), 15 U.S.C.A. §§ 1681e(b), 1681n(a).

26 Cases that cite this headnote

[42] **Injunction** Injury, Hardship, Harm, or Effect

A person exposed to a risk of future harm may pursue forward-looking, injunctive relief to prevent the harm from occurring, at least so long as the risk of harm is sufficiently imminent and substantial.

26 Cases that cite this headnote

[43] **Federal Civil Procedure** In general; injury or interest

Injunction Persons entitled to apply; standing

A plaintiff must demonstrate standing separately for each form of relief sought; therefore, a plaintiff 's standing to seek injunctive relief does not necessarily mean that the plaintiff has standing to seek retrospective damages.

27 Cases that cite this headnote

[44] **Federal Civil Procedure** In general; injury or interest

In a suit for damages, the mere risk of future harm, standing alone, cannot qualify as a concrete harm, for purposes of Article III standing, at least unless the exposure to the risk of future harm itself causes a separate concrete harm. U.S. Const. art. 3, § 2, cl. 1.

74 Cases that cite this headnote

[45] Libel and Slander Presumption as to damage; special damages

Libel and Slander Weight and Sufficiency

Libel and slander per se require evidence of publication, and for those torts, publication is generally presumed to cause a harm, albeit not a readily quantifiable harm.

1 Cases that cite this headnote

[46] Federal Civil Procedure Consumers, purchasers, borrowers, and debtors

Finance, Banking, and Credit Credit reporting

Other than named plaintiff, there was no evidence of harm to class of consumers with alerts in their credit files maintained by credit reporting agency, indicating that their name was a "potential match" to a name on a list maintained by United States Treasury Department's Office of Foreign Assets Control (OFAC) of terrorists, drug traffickers, and other serious criminals, as result of incorrect format of mailings to consumers, and thus, consumers other than named plaintiff lacked Article III standing to pursue claims against agency for breach of obligation under Fair Credit Reporting Act (FCRA) to provide them with complete credit files upon request; there was no evidence that any other class member opened mailings, or that they were confused, distressed, or relied on mailings in any way. U.S. Const. art. 3, § 2, cl. 1; Consumer Credit Protection Act § 609, 15 U.S.C.A. § 1681g(a)(1), (c)(2).

4 Cases that cite this headnote

[47] Finance, Banking, and Credit Disclosures to consumer

The Fair Credit Reporting Act's (FCRA) disclosure and summary-of-rights requirements are designed to protect consumers' interests in learning of any inaccuracies in their credit files so that they can promptly correct the files before they are disseminated to third parties. Consumer Credit Protection Act § 609, 15 U.S.C.A. § 1681g(a)(1), (c)(2).

8 Cases that cite this headnote

[48] Federal Civil Procedure Consumers, purchasers, borrowers, and debtors

Finance, Banking, and Credit Credit reporting

Risk of future harm to consumers with alerts in their credit files maintained by credit reporting agency, indicating that their name was a "potential match" to a name on a list maintained by United States Treasury Department's Office of Foreign Assets Control (OFAC) of terrorists, drug traffickers, and other serious criminals, as result

of incorrect format of mailings to consumers, did not support Article III standing to pursue class action retrospective damages claims against agency for breach of obligation under Fair Credit Reporting Act (FCRA) to provide them with complete credit files upon request; consumers did not explain how the formatting error prevented them from contacting agency to correct any errors before misleading credit reports were disseminated to third-party businesses. U.S. Const. art. 3, § 2, cl. 1; Consumer Credit Protection Act § 609, 15 U.S.C.A. § 1681g(a)(1), (c)(2).

5 Cases that cite this headnote

[49] Federal Civil Procedure Consumers, purchasers, borrowers, and debtors

Finance, Banking, and Credit Credit reporting

Consumers with alerts in their credit files maintained by credit reporting agency, indicating that their name was a "potential match" to a name on list maintained by United States Treasury Department's Office of Foreign Assets Control (OFAC) of terrorists, drug traffickers, and other serious criminals, did not suffer a concrete informational injury as a result of incorrect format of mailings to consumers, as would support Article III standing to pursue class action claims against agency for breach of obligation under Fair Credit Reporting Act (FCRA) to provide complete credit files upon request; consumers did not allege that they failed to receive required information, only that they received it in the wrong format, and they identified no downstream consequences from failing to receive the information. U.S. Const. art. 3, § 2, cl. 1; Consumer Credit Protection Act § 609, 15 U.S.C.A. § 1681g(a)(1), (c)(2).

6 Cases that cite this headnote

[50] Federal Civil Procedure In general; injury or interest

An asserted informational injury that causes no adverse effects cannot satisfy Article III's concrete injury requirement to standing. U.S. Const. art. 3, § 2, cl. 1.

22 Cases that cite this headnote

***2197** *Syllabus* [*]

[*] The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

The Fair Credit Reporting Act regulates the consumer reporting agencies that compile

and disseminate personal information about consumers. 15 U.S.C. § 1681 *et seq.* The Act also creates a cause of action for consumers to sue and recover damages for certain violations. § 1681n(a). TransUnion is a credit reporting agency that compiles personal and financial information about individual consumers to create consumer reports and then sells those reports for use by entities that request information about the creditworthiness of individual consumers. Beginning in 2002, TransUnion introduced an add-on product called OFAC Name Screen Alert. When a business opted into the Name Screen service, TransUnion would conduct its ordinary credit check of the consumer, and it would also use third-party software to compare the consumer's name against a list maintained by the U. S. Treasury Department's Office of Foreign Assets Control (OFAC) of terrorists, drug traffickers, and other serious criminals. If the consumer's first and last name matched the first and last name of an individual on OFAC's list, then 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. At that time, TransUnion did not compare any data other than first and last names.

A class of 8,185 individuals with OFAC alerts in their credit files sued TransUnion under the Fair Credit Reporting Act for failing to use reasonable procedures to ensure the accuracy of their credit files. The plaintiffs also complained about formatting defects in certain mailings sent to them by TransUnion. The parties stipulated prior to trial that only 1,853 class members (including the named plaintiff Sergio Ramirez) had their misleading credit reports containing OFAC alerts provided to third parties during the 7-month period specified in the class definition. The internal credit files of the other 6,332 class members were not provided to third parties during the relevant time period. The District Court ruled that all class members had Article III standing on each of the three statutory claims. The jury returned a verdict for the plaintiffs and awarded each class member statutory damages and punitive damages. A divided panel of the Ninth Circuit affirmed in relevant part.

Held: Only plaintiffs concretely harmed by a defendant's statutory violation have Article III standing to seek damages against that private defendant in federal court. Pp. 2202–2214.

(a) Article III confines the federal judicial power to the resolution of "Cases" and "Controversies" in which a plaintiff has a "personal stake." *Raines v. Byrd*, 521 U.S. 811, 819–820, 117 S.Ct. 2312, 138 L.Ed.2d 849. To have Article III standing to sue in federal court, a plaintiff must show, among other things, that the plaintiff suffered concrete injury in fact. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–561, 112 S.Ct. 2130, 119 L.Ed.2d 351. Central to assessing concreteness is whether the asserted harm has a "close relationship" to a harm "traditionally" recognized as providing a basis for a lawsuit in American courts. *Spokeo, Inc.* v. *Robins*, 578 U. S. 330, 340, 136 S.Ct. 1540, 194 L.Ed.2d 635. That inquiry asks whether plaintiffs have identified a close historical or common-law analogue for their asserted injury. Physical or monetary harms readily qualify as concrete injuries under Article III, and various intangible harms—like reputational harms—can also be concrete. *Ibid.*

"Article III standing requires a concrete injury even in the context of a statutory violation." *Ibid*. The Court has rejected the proposition that "a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right." *Id.*, at 341, 136 S.Ct. 1540. An injury in law is not an injury in fact. Pp. 2202–2207.

(b) The Court applies the fundamental standing requirement of concrete harm to this case. Pp. 2207–2214.

(1) In their reasonable-procedures claim, all 8,185 class members maintain that TransUnion did not do enough to ensure that misleading OFAC alerts labeling them as potential terrorists were not included in their credit files. See § 1681e(b). TransUnion provided third parties with credit reports containing OFAC alerts for 1,853 class members (including the named plaintiff Ramirez). Those 1,853 class members therefore suffered a harm with a "close relationship" to the harm associated with the tort of defamation. *Spokeo*, 578 U. S., at 341, 136 S.Ct. 1540. 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. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 13, 110 S.Ct. 2695, 111 L.Ed.2d 1. The Court has no trouble concluding that the 1,853 class members suffered a concrete harm that qualifies as an injury in fact

The credit files of the remaining 6,332 class members also contained misleading OFAC alerts, but the parties stipulated that TransUnion did not provide those plaintiffs' credit information to any potential creditors during the designated class period. The mere existence of inaccurate information, absent dissemination, traditionally has not provided the basis for a lawsuit in American courts. The plaintiffs cannot demonstrate that the misleading information in the internal credit files itself constitutes a concrete harm.

The plaintiffs advance a separate argument based on their exposure to the risk that the misleading information would be disseminated in the future to third parties. The Court has recognized that material risk of future harm can satisfy the concrete-harm requirement in the context of a claim for injunctive relief to prevent the harm from occurring, at least so long as the risk of harm is sufficiently imminent and substantial. See *Spokeo*, 578 U. S., at 341–342, 136 S.Ct. 1540 (citing *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 133 S.Ct. 1138, 185 L.Ed.2d 264). But TransUnion advances a persuasive argument that the mere risk of future harm, without more, cannot qualify as a concrete harm in a suit for damages. The 6,332 plaintiffs did not demonstrate that the risk of future harm materialized. Nor did those plaintiffs present evidence that the class members were independently harmed by their exposure to the risk itself. The risk of future harm cannot supply the basis for their standing. Pp. 2208–2213.

(2) In two other claims, all 8,185 class members complained about formatting defects in certain mailings sent to them by TransUnion. But the plaintiffs have not demonstrated that the format of TransUnion's mailings caused them a harm with a close relationship to a harm traditionally

recognized as providing a basis for a lawsuit in American courts. See *Spokeo*, 578 U. S., at 341, 136 S.Ct. 1540.

The plaintiffs argue that TransUnion's formatting violations created a risk of future harm, because consumers who received the information in the dual-mailing format were at risk of not learning about the OFAC alert in their credit files and thus not asking for corrections. The risk of future harm on its own is not enough to support Article III standing for their damages claim. In any event, the plaintiffs here made no effort to explain how the formatting error prevented them asking for corrections to prevent future harm.

The United States as *amicus curiae* asserts that the plaintiffs suffered a concrete "informational injury" from TransUnion's formatting violations. See *Federal Election Comm'n v. Akins*, 524 U.S. 11, 118 S.Ct. 1777, 141 L.Ed.2d 10; *Public Citizen v. Department of Justice*, 491 U.S. 440, 109 S.Ct. 2558, 105 L.Ed.2d 377. But the plaintiffs here did not allege that they failed to receive any required information. They argued only that they received the information in the wrong format. Moreover, an asserted informational injury that causes no adverse effects does not satisfy Article III. Pp. 2212–2214.

951 F.3d 1008, reversed and remanded.

KAVANAUGH, J., delivered the opinion of the Court, in which ROBERTS, C. J., and ALITO, GORSUCH, and BARRETT, JJ., joined. THOMAS, J., filed a dissenting opinion, in which BREYER, SOTOMAYOR, and KAGAN, JJ., joined. KAGAN, J., filed a dissenting opinion, in which BREYER and SOTOMAYOR, JJ., joined.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Opinion

Justice KAVANAUGH delivered the opinion of the Court.

***2200** To have Article III standing to sue in federal court, plaintiffs must demonstrate, among other things, that they suffered a concrete harm. No concrete harm, no standing. Central to assessing concreteness is whether the asserted harm has a "close relationship" to a harm traditionally recognized as providing a basis for a lawsuit in American courts—such as physical harm, monetary harm, or various intangible harms including (as relevant here) reputational harm. *Spokeo, Inc.* v. *Robins*, 578 U. S. 330, 340–341, 136 S.Ct. 1540, 194 L.Ed.2d 635 (2016).

In this case, a class of 8,185 individuals sued TransUnion, a credit reporting agency, in federal court under the Fair Credit Reporting Act. The plaintiffs claimed that TransUnion failed to use reasonable procedures to ensure the accuracy of their credit files, as maintained internally by TransUnion. For 1,853 of the class members, TransUnion provided misleading credit reports to third-party businesses. We conclude that those 1,853 class members have demonstrated concrete reputational harm and thus have Article III standing to sue on the reasonable-procedures claim. The internal credit files of the other 6,332 class members were *not* provided to third-party businesses during the relevant time period. We conclude that those 6,332 class members have not demonstrated concrete harm and thus lack Article III standing to sue on the reasonable-procedures claim.

In two other claims, all 8,185 class members complained about formatting defects in certain mailings sent to them by TransUnion. But the class members other than the named plaintiff Sergio Ramirez have not demonstrated that the alleged formatting errors caused them any concrete harm. Therefore, except for Ramirez, the class members do not have standing as to those two claims.

Over Judge McKeown's dissent, the U. S. Court of Appeals for the Ninth Circuit ruled that all 8,185 class members have standing as to all three claims. The Court of Appeals approved a class damages award of about $40 million. In light of our conclusion that (i) only 1,853 class members have standing for the reasonable-procedures claim and (ii) only Ramirez himself has standing for the two formatting claims relating to the mailings, we reverse the judgment of the Ninth Circuit and remand the case for further proceedings consistent with this opinion.

I

In 1970, Congress passed and President Nixon signed the Fair Credit Reporting Act. 84 Stat. 1127, as amended, 15 U.S.C. § 1681 *et seq*. The Act seeks to promote "fair and accurate credit reporting" and to protect consumer privacy. § 1681(a). To achieve those goals, the Act regulates the consumer reporting agencies that compile and disseminate personal information about consumers.

The Act "imposes a host of requirements concerning the creation and use of consumer reports." *Spokeo, Inc.* v. *Robins*, 578 U. S. 330,

335, 136 S.Ct. 1540, 194 L.Ed.2d 635 (2016). Three of the Act's requirements are relevant to this case. *First*, the Act requires consumer reporting agencies to "follow reasonable procedures to assure maximum possible accuracy" in consumer reports. § 1681e(b). *Second*, the Act provides that consumer reporting agencies must, upon request, disclose to the consumer "[a]ll information in the consumer's file at the time of the request." § 1681g(a)(1). *Third*, the Act compels consumer reporting agencies to "provide to a ***2201** consumer, with each written disclosure by the agency to the consumer," a "summary of rights" prepared by the Consumer Financial Protection Bureau. § 1681g(c)(2).

The Act creates a cause of action for consumers to sue and recover damages for certain violations. The Act provides: "Any person who willfully fails to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer" for actual damages or for statutory damages not less than $100 and not more than $1,000, as well as for punitive damages and attorney's fees. § 1681n(a).

TransUnion is one of the "Big Three" credit reporting agencies, along with Equifax and Experian. As a credit reporting agency, TransUnion compiles personal and financial information about individual consumers to create consumer reports. TransUnion then sells those consumer reports for use by entities such as banks, landlords, and car dealerships that request information about the creditworthiness of individual consumers.

Beginning in 2002, TransUnion introduced an add-on product called OFAC Name Screen Alert. OFAC is the U. S. Treasury Department's Office of Foreign Assets Control. OFAC maintains a list of "specially designated nationals" who threaten America's national security. Individuals on the OFAC list are terrorists, drug traffickers, or other serious criminals. It is generally unlawful to transact business with any person on the list. 31 C.F.R. pt. 501, App. A (2020). TransUnion created the OFAC Name Screen Alert to help businesses avoid transacting with individuals on OFAC's list.

When this litigation arose, Name Screen worked in the following way: When a business opted into the Name Screen service, TransUnion would conduct its ordinary credit check of the consumer, and it would also use third-party software to compare the consumer's name against the OFAC list. If the consumer's first and last name matched the first and last name of an individual on OFAC's list, then 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. TransUnion did not compare any data other than first and last names. Unsurprisingly, TransUnion's Name Screen product generated many false positives. 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.

Sergio Ramirez learned the hard way that he is one such individual. On February 27, 2011, Ramirez visited a Nissan dealership in Dublin, California, seeking to buy a Nissan

Maxima. Ramirez was accompanied by his wife and his father-in-law. After Ramirez and his wife selected a color and negotiated a price, the dealership ran a credit check on both Ramirez and his wife. Ramirez's credit report, produced by TransUnion, contained the following alert: "***OFAC ADVISOR ALERT - INPUT NAME MATCHES NAME ON THE OFAC DATABASE." App. 84. A Nissan salesman told Ramirez that Nissan would not sell the car to him because his name was on a " 'terrorist list.' " *Id.,* at 333. Ramirez's wife had to purchase the car in her own name.

The next day, Ramirez called TransUnion and requested a copy of his credit file. TransUnion sent Ramirez a mailing that same day that included his credit file and the statutorily required summary of rights prepared by the CFPB. The mailing did not mention the OFAC alert in Ramirez's file. The following day, TransUnion sent Ramirez a second mailing —a letter alerting him that his name was considered a ***2202** potential match to names on the OFAC list. The second mailing did not include an additional copy of the summary of rights. Concerned about the mailings, Ramirez consulted a lawyer and ultimately canceled a planned trip to Mexico. TransUnion eventually removed the OFAC alert from Ramirez's file.

In February 2012, Ramirez sued TransUnion and alleged three violations of the Fair Credit Reporting Act. *First*, he alleged that TransUnion, by using the Name Screen product, failed to follow reasonable procedures to ensure the accuracy of information in his credit file. See § 1681e(b). *Second*, he claimed that TransUnion failed to provide him with *all* the information in his credit file upon his request. In particular, TransUnion's first mailing did not include the fact that Ramirez's name was a potential match for a name on the OFAC list. See § 1681g(a)(1). *Third*, Ramirez asserted that TransUnion violated its obligation to provide him with a summary of his rights "with each written disclosure," because TransUnion's second mailing did not contain a summary of Ramirez's rights. § 1681g(c)(2). Ramirez requested statutory and punitive damages.

Ramirez 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. TransUnion opposed certification. The U. S. District Court for the Northern District of California rejected TransUnion's argument and certified the class. 301 F.R.D. 408 (2014).

Before trial, the parties stipulated that the class contained 8,185 members, including Ramirez. The parties also stipulated that only 1,853 members of the class (including Ramirez) had their credit reports disseminated by TransUnion to potential creditors during the period from January 1, 2011, to July 26, 2011. The District Court ruled that all 8,185 class members had Article III standing. 2016 WL 6070490, *5 (Oct. 17, 2016).

At trial, Ramirez testified about his experience at the Nissan dealership. But Ramirez did not present evidence about the experiences of other members of the class.

After six days of trial, the jury returned a verdict for the plaintiffs. The jury awarded each class member $984.22 in statutory damages and $6,353.08 in punitive damages for a total award of more than $60 million. The District Court rejected all of TransUnion's post-trial motions.

The U. S. Court of Appeals for the Ninth Circuit affirmed in relevant part. 951 F.3d 1008 (2020). The court held that all members of the class had Article III standing to recover damages for all three claims. The court also concluded that Ramirez's claims were typical of the class's claims for purposes of Rule 23 of the Federal Rules of Civil Procedure. Finally, the court reduced the punitive damages award to $3,936.88 per class member, thus reducing the total award to about $40 million.

Judge McKeown dissented in relevant part. As to the reasonable-procedures claim, she concluded that only the 1,853 class members whose reports were actually disseminated by TransUnion to third parties had Article III standing to recover damages. 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.

We granted certiorari. 592 U. S. ——, 141 S.Ct. 972, 208 L.Ed.2d 504 (2020).

***2203** II

The question in this case is whether the 8,185 class members have Article III standing as to their three claims. In Part II, we summarize the requirements of Article III standing—in particular, the requirement that plaintiffs demonstrate a "concrete harm." In Part III, we then apply the concrete-harm requirement to the plaintiffs' lawsuit against TransUnion.

A

[1] The "law of Art. III standing is built on a single basic idea—the idea of separation of powers." *Raines v. Byrd*, 521 U.S. 811, 820, 117 S.Ct. 2312, 138 L.Ed.2d 849 (1997) (internal quotation marks omitted). Separation of powers "was not simply an abstract generalization in the minds of the Framers: it was woven into the document that they drafted in Philadelphia in the summer of 1787." *INS v. Chadha*, 462 U.S. 919, 946, 103 S.Ct. 2764, 77 L.Ed.2d 317 (1983) (internal quotation marks omitted).

[2] **[3]** Therefore, we start with the text of the Constitution. Article III confines the federal judicial power to the resolution of "Cases" and "Controversies." For there to be a case or controversy under Article III, the plaintiff must have a " 'personal stake' " in the case—in other words, standing. *Raines*, 521 U.S., at 819, 117 S.Ct. 2312. To demonstrate their personal stake, plaintiffs must be able to sufficiently answer the question: " 'What's it to you?' " Scalia, The Doctrine of Standing as an Essential Element of the Separation of Powers, 17 Suffolk U. L. Rev. 881, 882 (1983).

[4] **[5]** To answer that question in a way sufficient 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. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–561, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). 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." *Casillas v. Madison Avenue Assocs., Inc.*, 926 F.3d 329, 333 (CA7 2019) (Barrett, J.).

[6] **[7]** **[8]** **[9]** **[10]** 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," *Marbury v. Madison*, 1 Cranch 137, 170, 5 U.S. 137, 2 L.Ed. 60 (1803), and that federal courts exercise "their proper function in a limited and separated government," Roberts, Article III Limits on Statutory Standing, 42 Duke L. J. 1219, 1224 (1993). Under Article III, federal courts do not adjudicate hypothetical or abstract disputes. Federal courts do not possess a roving commission to publicly opine on every legal question. Federal courts do not exercise general legal oversight of the Legislative and Executive Branches, or of private entities. And federal courts do not issue advisory opinions. As Madison explained in Philadelphia, federal courts instead decide only matters "of a Judiciary Nature." 2 Records of the Federal Convention of 1787, p. 430 (M. Farrand ed. 1966).

[11] In sum, under Article III, a federal court may resolve only "a real controversy with real impact on real persons." *American Legion* v. *American Humanist Assn.*, 588 U. S. ——, ——, 139 S.Ct. 2067, 2103, 204 L.Ed.2d 452 (2019).

***2204** B

[12] The question in this case focuses on the Article III requirement that the plaintiff 's injury in fact be "concrete"—that is, "real, and not abstract." *Spokeo, Inc.* v. *Robins*, 578 U. S. 330, 340, 136 S.Ct. 1540, 194 L.Ed.2d 635 (2016) (internal quotation marks omitted); see *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158, 134 S.Ct. 2334, 189 L.Ed.2d 246 (2014); *Summers v. Earth Island Institute*, 555 U.S. 488, 493, 129 S.Ct. 1142, 173 L.Ed.2d 1 (2009); *Lujan*, 504 U.S., at 560, 112 S.Ct. 2130; *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 220–221, 94 S.Ct. 2925, 41 L.Ed.2d 706 (1974).

[13] What makes a harm concrete for purposes of Article III? As a general matter, the Court has explained that "history and tradition offer a meaningful guide to the types of cases that Article III empowers federal courts to consider." *Sprint Communications Co. v. APCC Services, Inc.*, 554 U.S. 269, 274, 128 S.Ct. 2531, 171 L.Ed.2d 424 (2008); see also *Steel Co. v. Citizens for Better Environment*, 523 U.S. 83, 102, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998). And with respect to the concrete-harm requirement in particular, this Court's opinion in *Spokeo* v. *Robins* indicated that courts should assess whether the alleged injury to the plaintiff has a "close relationship" to a harm "traditionally" recognized as providing a basis for a lawsuit in American courts. 578 U. S., at

341, 136 S.Ct. 1540. That inquiry asks whether plaintiffs have identified a close historical or common-law analogue for their asserted injury. *Spokeo* does not require an exact duplicate in American history and tradition. But *Spokeo* is not an open-ended invitation for federal courts to loosen Article III based on contemporary, evolving beliefs about what kinds of suits should be heard in federal courts.

[14] **[15]** As *Spokeo* explained, certain 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.

[16] 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. *Id.*, at 340–341, 136 S.Ct. 1540. Those include, for example, reputational harms, disclosure of private information, and intrusion upon seclusion. See, *e.g., Meese v. Keene*, 481 U.S. 465, 473, 107 S.Ct. 1862, 95 L.Ed.2d 415 (1987) (reputational harms); *Davis v. Federal Election Comm'n*, 554 U.S. 724, 733, 128 S.Ct. 2759, 171 L.Ed.2d 737 (2008) (disclosure of private information); see also *Gadelhak v. AT&T Services, Inc.*, 950 F.3d 458, 462 (CA7 2020) (Barrett, J.) (intrusion upon seclusion). And those traditional harms may also include harms specified by the Constitution itself. See, *e.g., Spokeo*, 578 U. S., at 340, 136 S.Ct. 1540 (citing *Pleasant Grove City v. Summum*, 555 U.S. 460, 129 S.Ct. 1125, 172 L.Ed.2d 853 (2009) (abridgment of free speech), and *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993) (infringement of free exercise)).

[17] **[18]** In determining whether a harm is sufficiently concrete to qualify as an injury in fact, the Court in *Spokeo* said that Congress's views may be "instructive." 578 U. S., at 341, 136 S.Ct. 1540. Courts must afford due respect to Congress's decision to impose a statutory prohibition or obligation on a defendant, and to grant a plaintiff a cause of action to sue over the defendant's violation of that statutory prohibition or obligation. See *id.*, at 340–341, 136 S.Ct. 1540. In that way, Congress ***2205** may "elevate to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law." *Id.*, at 341, 136 S.Ct. 1540 (alterations and internal quotation marks omitted); see *Lujan*, 504 U.S. at 562–563, 578, 112 S.Ct. 2130; cf., *e.g., Allen v. Wright*, 468 U.S. 737, 757, n. 22, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984) (discriminatory treatment). But even though "Congress may 'elevate' harms that 'exist' in the real world before Congress recognized them to actionable legal status, it may not simply enact an injury into existence, using its lawmaking power to transform something that is not remotely harmful into something that is." *Hagy v. Demers & Adams*, 882 F.3d 616, 622 (CA6 2018) (Sutton, J.) (citing *Spokeo*, 578 U. S., at 341, 136 S.Ct. 1540).

[19] Importantly, this Court has rejected the proposition that "a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person

to sue to vindicate that right." *Spokeo*, 578 U. S., at 341, 136 S.Ct. 1540. As the Court emphasized in *Spokeo*, "Article III standing requires a concrete injury even in the context of a statutory violation." *Ibid.*

[20] **[21]** Congress's creation of a statutory prohibition or obligation and a cause of action does not relieve courts of their responsibility to independently decide whether a plaintiff has suffered a concrete harm under Article III any more than, for example, Congress's enactment of a law regulating speech relieves courts of their responsibility to independently decide whether the law violates the First Amendment. Cf. *United States v. Eichman*, 496 U.S. 310, 317–318, 110 S.Ct. 2404, 110 L.Ed.2d 287 (1990). As Judge Katsas has rightly stated, "we cannot treat an injury as 'concrete' for Article III purposes based only on Congress's say-so." *Trichell v. Midland Credit Mgmt., Inc.*, 964 F.3d 990, 999, n. 2 (CA11 2020) (sitting by designation); see *Marbury*, 1 Cranch, at 178; see also *Raines*, 521 U.S., at 820, n. 3, 117 S.Ct. 2312; *Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 26, 41, n. 22, 96 S.Ct. 1917, 48 L.Ed.2d 450 (1976); *Muskrat v. United States*, 219 U.S. 346, 361–362, 31 S.Ct. 250, 55 L.Ed. 246 (1911).

[22] **[23]** **[24]** For standing purposes, therefore, an important difference exists between (i) a plaintiff 's statutory cause of action to sue a defendant over the defendant's violation of federal law, and (ii) a plaintiff 's suffering concrete harm because of the defendant's violation of federal law. Congress may enact legal prohibitions and obligations. And Congress may create causes of action for plaintiffs to sue defendants who violate those legal prohibitions or obligations. But under Article III, an injury in law is not an injury in fact. Only those plaintiffs who have been *concretely harmed* by a defendant's statutory violation may sue that private defendant over that violation in federal court. As then-Judge Barrett succinctly summarized, "Article III grants federal courts the power to redress harms that defendants cause plaintiffs, not a freewheeling power to hold defendants accountable for legal infractions." *Casillas*, 926 F.3d at 332.

To appreciate how the Article III "concrete harm" principle operates in practice, consider two different hypothetical plaintiffs. Suppose first that a Maine citizen's land is polluted by a nearby factory. She sues the company, alleging that it violated a federal environmental law and damaged her property. Suppose also that a second plaintiff in Hawaii files a federal lawsuit alleging that the same company in Maine violated that same environmental law by polluting land in Maine. The violation did not personally harm the plaintiff in Hawaii.

***2206** Even if Congress affords both hypothetical plaintiffs a cause of action (with statutory damages available) to sue over the defendant's legal violation, Article III standing doctrine sharply distinguishes between those two scenarios. The first lawsuit may of course proceed in federal court because the plaintiff has suffered concrete harm to her property. But the second lawsuit may not proceed because that plaintiff has not suffered any physical, monetary, or cognizable intangible harm traditionally recognized as providing a basis for a lawsuit in American courts. An uninjured plaintiff who sues in those

circumstances is, by definition, not seeking to remedy any harm to herself but instead is merely seeking to ensure a defendant's "compliance with regulatory law" (and, of course, to obtain some money via the statutory damages). *Spokeo,* 578 U. S., at 345, 136 S.Ct. 1540 (THOMAS, J., concurring) (internal quotation marks omitted); see *Steel Co.*, 523 U.S., at 106–107, 118 S.Ct. 1003. Those are not grounds for Article III standing. [1]

1 The lead dissent notes that the terminology of injury in fact became prevalent only in the latter half of the 20th century. That is unsurprising because until the 20th century, Congress did not often afford federal "citizen suit"-style causes of action to private plaintiffs who did not suffer concrete harms. For example, until the 20th century, Congress generally did not create "citizen suit" causes of action for private plaintiffs to sue the Government. See Magill, Standing for the Public, 95 Va. L. Rev. 1131, 1186–1187 (2009). Moreover, until *Abbott Laboratories v. Gardner*, 387 U.S. 136, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967), a plaintiff often could not bring a pre-enforcement suit against a Government agency or official under the Administrative Procedure Act arguing that an agency rule was unlawful; instead, a party could raise such an argument only in an enforcement action. Likewise, until the 20th century, Congress rarely created "citizen suit"-style causes of action for suits against private parties by private plaintiffs who had not suffered a concrete harm. All told, until the 20th century, this Court had little reason to emphasize the injury-in-fact requirement because, until the 20th century, there were relatively few instances where litigants without concrete injuries had a cause of action to sue in federal court. The situation has changed markedly, especially over the last 50 years or so. During that time, Congress has created many novel and expansive causes of action that in turn have required greater judicial focus on the requirements of Article III. See, *e.g.*, *Spokeo, Inc.* v. *Robins*, 578 U. S. 330, 136 S.Ct. 1540, 194 L.Ed.2d 635 (2016); *Summers v. Earth Island Institute*, 555 U.S. 488, 129 S.Ct. 1142, 173 L.Ed.2d 1 (2009); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992).

[25] As those examples illustrate, if the law of Article III did not require plaintiffs to demonstrate a "concrete harm," Congress could authorize virtually any citizen to bring a statutory damages suit against virtually any defendant who violated virtually any federal law. Such an expansive understanding of Article III would flout constitutional text, history, and precedent. In our view, the public interest that private entities comply with the law cannot "be converted into an individual right by a statute that denominates it as such, and that permits all citizens (or, for that matter, a subclass of citizens who suffer no distinctive concrete harm) to sue." *Lujan*, 504 U.S., at 576–577, 112 S.Ct. 2130. [2]

[2] A plaintiff must show that the injury is not only concrete but also particularized. But if there were no concrete-harm requirement, the requirement of a particularized injury would do little or nothing to constrain Congress from freely creating causes of action for vast classes of *unharmed* plaintiffs to sue any defendants who violate any federal law. (Congress might, for example, provide that everyone has an individual right to clean air and can sue any defendant who violates any air-pollution law.) That is one reason why the Court has been careful to emphasize that concreteness and particularization are separate requirements. See *Spokeo*, 578 U. S., at 339-40, 136 S.Ct. 1540; see generally Bayefsky, Constitutional Injury and Tangibility, 59 Wm. & Mary L. Rev. 2285, 2298–2300, 2368 (2018).

***2207** **[26]** **[27]** A regime where Congress could freely authorize *unharmed* plaintiffs to sue defendants who violate federal law not only would violate Article III but also would infringe on the Executive Branch's Article II authority. We accept the "displacement of the democratically elected branches when necessary to decide an actual case." Roberts, 42 Duke L. J., at 1230. But otherwise, the choice of how to prioritize and how aggressively to pursue legal actions against defendants who violate the law falls within the discretion of the Executive Branch, not within the purview of private plaintiffs (and their attorneys). Private plaintiffs are not accountable to the people and are not charged with pursuing the public interest in enforcing a defendant's general compliance with regulatory law. See *Lujan*, 504 U.S., at 577, 112 S.Ct. 2130.

[28] **[29]** In sum, the concrete-harm requirement is essential to the Constitution's separation of powers. To be sure, the concrete-harm requirement can be difficult to apply in some cases. Some advocate that the concrete-harm requirement be ditched altogether, on the theory that it would be more efficient or convenient to simply say that a statutory violation and a cause of action suffice to afford a plaintiff standing. But as the Court has often stated, "the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution." *Chadha*, 462 U.S., at 944, 103 S.Ct. 2764. So it is here. [3]

[3] The lead dissent would reject the core standing principle that a plaintiff must always have suffered a concrete harm, and would cast aside decades of precedent articulating that requirement, such as *Spokeo*, *Summers*, and *Lujan*. *Post,* at 2219–2220 (opinion of THOMAS, J.). As we see it, the dissent's theory would largely outsource Article III to Congress. As we understand the dissent's theory, a suit seeking to enforce "general compliance with regulatory law" would not suffice for Article III standing because such a suit seeks to vindicate a duty owed to the whole community. *Spokeo*, 578 U. S., at 345, 136 S.Ct. 1540 (THOMAS, J., concurring) (internal quotation marks omitted). But under the dissent's

theory, so long as Congress frames a defendant's obligation to comply with regulatory law as an obligation owed to *individuals*, any suit to vindicate that obligation suddenly suffices for Article III. Suppose, for example, that Congress passes a law purporting to give all American citizens an individual right to clean air and clean water, as well as a cause of action to sue and recover $100 in damages from any business that violates any pollution law anywhere in the United States. The dissent apparently would find standing in such a case. We respectfully disagree. In our view, unharmed plaintiffs who seek to sue under such a law are still doing no more than enforcing general compliance with regulatory law. And under Article III and this Court's precedents, Congress may not authorize plaintiffs who have not suffered concrete harms to sue in federal court simply to enforce general compliance with regulatory law.

III

We now apply those fundamental standing principles to this lawsuit. We must determine whether the 8,185 class members have standing to sue TransUnion for its alleged violations of the Fair Credit Reporting Act. The plaintiffs argue that TransUnion failed to comply with statutory obligations (i) to follow reasonable procedures to ensure the accuracy of credit files so that the files would not include OFAC alerts labeling the plaintiffs as potential terrorists; and (ii) to provide a consumer, upon request, with his or her complete credit file, including a summary of rights.

[30] **[31]** **[32]** **[33]** **[34]** **[35]** Some preliminaries: As the party invoking federal jurisdiction, the plaintiffs bear the burden of demonstrating that they have standing. See ***2208** *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). Every class member must have Article III standing in order to recover individual damages. "Article III does not give federal courts the power to order relief to any uninjured plaintiff, class action or not." *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 466, 136 S.Ct. 1036, 194 L.Ed.2d 124 (2016) (ROBERTS, C. J., concurring).[4] Plaintiffs must maintain their personal interest in the dispute at all stages of litigation. *Davis v. Federal Election Comm'n*, 554 U.S. 724, 733, 128 S.Ct. 2759, 171 L.Ed.2d 737 (2008). A plaintiff must demonstrate standing "with the manner and degree of evidence required at the successive stages of the litigation." *Lujan*, 504 U.S., at 561, 112 S.Ct. 2130. Therefore, in a case like this that proceeds to trial, the specific facts set forth by the plaintiff to support standing "must be supported adequately by the evidence adduced at trial." *Ibid.* (internal quotation marks omitted). And standing is not dispensed in gross; rather, plaintiffs must demonstrate standing for each claim that they press and for each form of relief that they seek (for example, injunctive relief and damages). *Davis*, 554 U.S., at 734, 128 S.Ct. 2759; *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 185, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000).

[4] We do not here address the distinct question whether every class member must demonstrate standing *before* a court certifies a class. See, *e.g.*, *Cordoba v. DIRECTV, LLC*, 942 F.3d 1259, 1277 (CA11 2019).

A

We first address the plaintiffs' claim that TransUnion failed to "follow reasonable procedures to assure maximum possible accuracy" of the plaintiffs' credit files maintained by TransUnion. 15 U.S.C. § 1681e(b). In particular, the plaintiffs argue that TransUnion did not do enough to ensure that OFAC alerts labeling them as potential terrorists were not included in their credit files.

Assuming that the plaintiffs are correct that TransUnion violated its obligations under the Fair Credit Reporting Act to use reasonable procedures in internally maintaining the credit files, we must determine whether the 8,185 class members suffered concrete harm from TransUnion's failure to employ reasonable procedures. [5]

[5] For purposes of this case, the parties have assumed that TransUnion violated the statute even with respect to those plaintiffs whose OFAC alerts were never disseminated to third-party businesses. But see *Washington v. CSC Credit Servs. Inc.*, 199 F.3d 263, 267 (CA5 2000). We take no position on that issue.

1

[36] Start with the 1,853 class members (including the named plaintiff Ramirez) whose reports were disseminated to third-party businesses. The plaintiffs argue that the publication to a third party of a credit report bearing a misleading OFAC alert injures the subject of the report. The plaintiffs contend that this injury bears a "close relationship" to a harm traditionally recognized as providing a basis for a lawsuit in American courts—namely, the reputational harm associated with the tort of defamation. *Spokeo, Inc.* v. *Robins*, 578 U. S. 330, 341, 136 S.Ct. 1540, 194 L.Ed.2d 635 (2016).

[37] We agree with the plaintiffs. 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. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 13, 110 S.Ct. 2695, 111 L.Ed.2d 1 (1990) (internal quotation marks omitted); ***2209** *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974); see also Restatement of Torts § 559 (1938). TransUnion provided third parties with credit reports containing OFAC alerts that labeled the class members as potential terrorists, drug traffickers, or serious criminals. The 1,853 class members therefore suffered a harm with a "close relationship" to the harm associated with the tort of defamation. We have no trouble concluding that the 1,853 class members suffered a concrete harm that qualifies as an injury in fact.

TransUnion counters that those 1,853 class members did not suffer a harm with a "close relationship" to defamation because the OFAC alerts on the disseminated credit reports were only misleading and not literally false. See *id.*, § 558. TransUnion points out that the reports merely identified a consumer as a "*potential* match" to an individual on the OFAC list—a fact that TransUnion says is not technically false.

In looking to whether a plaintiff 's asserted harm has a "close relationship" to a harm traditionally recognized as providing a basis for a lawsuit in American courts, we do not require an exact duplicate. The harm from being labeled a "potential terrorist" bears a close relationship to the harm from being labeled a "terrorist." In other words, the harm from a misleading statement of this kind bears a sufficiently close relationship to the harm from a false and defamatory statement.

In short, the 1,853 class members whose reports were disseminated to third parties suffered a concrete injury in fact under Article III.

2

The remaining 6,332 class members are a different story. To be sure, their credit files, which were maintained by TransUnion, contained misleading OFAC alerts. But the parties stipulated that TransUnion did not provide those plaintiffs' credit information to any potential creditors during the class period from January 2011 to July 2011. Given the absence of dissemination, we must determine whether the 6,332 class members suffered some other concrete harm for purposes of Article III.

[38] The initial question is whether the mere existence of a misleading OFAC alert in a consumer's internal credit file at TransUnion constitutes a concrete injury. As Judge Tatel phrased it in a similar context, "if inaccurate information falls into" a consumer's credit file, "does it make a sound?" *Owner-Operator Independent Drivers Assn., Inc. v. United States Dept. of Transp.*, 879 F.3d 339, 344 (CADC 2018).

Writing the opinion for the D. C. Circuit in *Owner-Operator*, Judge Tatel answered no. Publication is "essential to liability" in a suit for defamation. Restatement of Torts § 577, Comment *a*, at 192. And there is "no historical or common-law analog where the mere existence of inaccurate information, absent dissemination, amounts to concrete injury." *Owner-Operator*, 879 F.3d at 344–345. "Since the basis of the action for words was the loss of credit or fame, and not the insult, it was always necessary to show a publication of the words." J. Baker, An Introduction to English Legal History 474 (5th ed. 2019). Other Courts of Appeals have similarly recognized that, as Judge Colloton summarized, the "retention of information lawfully obtained, without further disclosure, traditionally has not provided the basis for a lawsuit in American courts," meaning that the mere existence of inaccurate information in a database is insufficient to confer Article III standing. *Braitberg v. Charter Communications, Inc.*, 836 F.3d 925, 930 (CA8 2016); see *Gubala v. Time Warner Cable, Inc.*, 846 F.3d 909, 912 (CA7 2017).

***2210** **[39]** **[40]** The standing inquiry in this case thus distinguishes between (i) credit files that consumer reporting agencies maintain internally and (ii) the consumer credit reports that consumer reporting agencies disseminate to third-party creditors. The mere presence of an inaccuracy in an internal credit file, if it is not disclosed to a third party, causes no concrete harm. In cases such as these where allegedly inaccurate or misleading information sits in a company database, the plaintiffs' harm is roughly the same, legally speaking, as if someone wrote a defamatory letter and then stored it in her desk drawer. A letter that is not sent does not harm anyone, no matter how insulting the letter is. So too here. [6]

6 For the first time in this Court, the plaintiffs also argue that TransUnion "published" the class members' information internally—for example, to employees within TransUnion and to the vendors that printed and sent the mailings that the class members received. That new argument is forfeited. In any event, it is unavailing. Many American courts did not traditionally recognize intra-company disclosures as actionable publications for purposes of the tort of defamation. See, *e.g.*, *Chalkley v. Atlantic Coast Line R. Co.*, 150 Va. 301, 326–328, 143 S.E. 631, 638–639 (1928). Nor have they necessarily recognized disclosures to printing vendors as actionable publications. See, *e.g.*, *Mack v. Delta Air Lines, Inc.*, 639 Fed.Appx. 582, 586 (CA11 2016). Moreover, even the plaintiffs' cited cases require evidence that the defendant actually "brought an idea to the perception of another," Restatement of Torts § 559, Comment *a*, p. 140 (1938), and thus generally require evidence that the document was actually read and not merely processed, cf. *Ostrowe v. Lee*, 256 N.Y. 36, 38–39, 175 N.E. 505, 505–506 (1931) (Cardozo, C. J.). That evidence is lacking here. In short, the plaintiffs' internal publication theory circumvents a fundamental requirement of an ordinary defamation claim—publication—and does not bear a sufficiently "close relationship" to the traditional defamation tort to qualify for Article III standing.

[41] Because the plaintiffs cannot demonstrate that the misleading information in the internal credit files itself constitutes a concrete harm, the plaintiffs advance a separate argument based on an asserted *risk of future harm*. They say that the 6,332 class members suffered a concrete injury for Article III purposes because the existence of misleading OFAC alerts in their internal credit files exposed them to a material risk that the information would be disseminated in the future to third parties and thereby cause them harm. The plaintiffs rely on language from *Spokeo* where the Court said that "the risk of real harm" (or as the Court otherwise stated, a "material risk of harm") can sometimes "satisfy the requirement of concreteness." 578 U. S., at 341–342, 136 S.Ct. 1540 (citing *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 133 S.Ct. 1138, 185 L.Ed.2d 264 (2013)).

[42] To support its statement that a material risk of future harm can satisfy the concrete-harm requirement, *Spokeo* cited this Court's

decision in *Clapper*. But importantly, *Clapper* involved a suit for *injunctive relief*. As this Court has recognized, a person exposed to a risk of future harm may pursue forward-looking, injunctive relief to prevent the harm from occurring, at least so long as the risk of harm is sufficiently imminent and substantial. See *Clapper*, 568 U.S., at 414, n. 5, 133 S.Ct. 1138; *Los Angeles v. Lyons*, 461 U.S. 95, 102, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983); see also *Gubala*, 846 F.3d, at 912.

[43] But a plaintiff must "demonstrate standing separately for each form of relief sought." *Friends of the Earth*, 528 U.S., at 185, 120 S.Ct. 693. Therefore, a plaintiff 's standing to seek injunctive relief does not necessarily mean that the plaintiff has standing to seek retrospective damages.

[44] TransUnion advances a persuasive argument that in a suit for damages, the ***2211** mere risk of future harm, standing alone, cannot qualify as a concrete harm—at least unless the exposure to the risk of future harm itself causes a *separate* concrete harm. Brief for Petitioner 39, n. 4; Tr. of Oral Arg. 36.[7] TransUnion contends that if an individual is exposed to a risk of future harm, time will eventually reveal whether the risk materializes in the form of actual harm. If the risk of future harm materializes and the individual suffers a concrete harm, then the harm itself, and not the pre-existing risk, will constitute a basis for the person's injury and for damages. If the risk of future harm does *not* materialize, then the individual cannot establish a concrete harm sufficient for standing, according to TransUnion.

7 For example, a plaintiff 's knowledge that he or she is exposed to a risk of future physical, monetary, or reputational harm could cause its own current emotional or psychological harm. We take no position on whether or how such an emotional or psychological harm could suffice for Article III purposes—for example, by analogy to the tort of intentional infliction of emotional distress. See Reply Brief 14; Tr. of Oral Arg. 30. The plaintiffs here have not relied on such a theory of Article III harm. They have not claimed an emotional distress injury from the risk that a misleading credit report might be sent to a third-party business. Nor could they do so, given that the 6,332 plaintiffs have not established that they were even aware of the misleading information in the internal credit files maintained at TransUnion.

Consider an example. Suppose that a woman drives home from work a quarter mile ahead of a reckless driver who is dangerously swerving across lanes. The reckless driver has exposed the woman to a risk of future harm, but the risk does not materialize and the woman makes it home safely. As counsel for TransUnion stated, that would ordinarily be cause for celebration, not a lawsuit. *Id.,* at 8. But if the reckless driver crashes into the woman's car, the situation would be different, and (assuming a cause of action) the woman could sue the driver for damages.

[45] The plaintiffs note that *Spokeo* cited libel and slander *per se* as examples of cases where, as the plaintiffs see it, a mere risk of

harm suffices for a damages claim. But as Judge Tatel explained for the D. C. Circuit, libel and slander *per se* "require evidence of *publication*." *Owner-Operator*, 879 F.3d, at 345. And for those torts, publication is generally presumed to cause a harm, albeit not a readily quantifiable harm. As *Spokeo* noted, "the law has long permitted recovery by certain tort victims *even if their harms may be difficult to prove or measure*." 578 U. S., at 341, 136 S.Ct. 1540 (emphasis added). But there is a significant difference between (i) an actual harm that has occurred but is not readily quantifiable, as in cases of libel and slander *per se*, and (ii) a mere risk of future harm. By citing libel and slander *per se*, *Spokeo* did not hold that the mere risk of future harm, without more, suffices to demonstrate Article III standing in a suit for damages.

Here, the 6,332 plaintiffs did not demonstrate that the risk of future harm materialized—that is, that the inaccurate OFAC alerts in their internal TransUnion credit files were ever provided to third parties or caused a denial of credit. Nor did those plaintiffs present evidence that the class members were independently harmed by their exposure to the risk itself—that is, that they suffered some other injury (such as an emotional injury) from the mere risk that their credit reports would be provided to third-party businesses. Therefore, the 6,332 plaintiffs' argument for standing for their damages claims based on an asserted risk of future harm is unavailing.

Even apart from that fundamental problem with their argument based on the risk ***2212** of future harm, the plaintiffs did not factually establish a sufficient risk of future harm to support Article III standing. As Judge McKeown explained in her dissent, the risk of future harm that the 6,332 plaintiffs identified —the risk of dissemination to third parties —was too speculative to support Article III standing. 951 F.3d 1008, 1040 (CA9 2020); see *Whitmore v. Arkansas*, 495 U.S. 149, 157, 110 S.Ct. 1717, 109 L.Ed.2d 135 (1990). The plaintiffs claimed that TransUnion could have divulged their misleading credit information to a third party at any moment. But the plaintiffs did not demonstrate a sufficient likelihood that their individual credit information would be requested by third-party businesses and provided by TransUnion during the relevant time period. Nor did the plaintiffs demonstrate that there was a sufficient likelihood that TransUnion would otherwise intentionally or accidentally release their information to third parties. "Because no evidence in the record establishes a serious likelihood of disclosure, we cannot simply presume a material risk of concrete harm." 951 F.3d, at 1040 (opinion of McKeown, J.).

Moreover, the plaintiffs did not present any evidence that the 6,332 class members even *knew* that there were OFAC alerts in their internal TransUnion credit files. If those plaintiffs prevailed in this case, many of them would first learn that they were "injured" when they received a check compensating them for their supposed "injury." It is difficult to see how a risk of future harm could supply the basis for a plaintiff 's standing when the plaintiff did not even know that there was a risk of future harm.

Finally, the plaintiffs advance one last argument for why the 6,332 class members are similarly situated to the other 1,853 class members and

thus should have standing. The 6,332 plaintiffs note that they sought damages for the entire 46-month period permitted by the statute of limitations, whereas the stipulation regarding dissemination covered only 7 of those months. They argue that the credit reports of many of those 6,332 class members were likely also sent to third parties outside of the period covered by the stipulation because all of the class members requested copies of their reports, and consumers usually do not request copies unless they are contemplating a transaction that would trigger a credit check.

That is a serious argument, but in the end, we conclude that it fails to support standing for the 6,332 class members. The plaintiffs had the burden to prove at trial that their reports were actually sent to third-party businesses. The inferences on which the argument rests are too weak to demonstrate that the reports of any particular number of the 6,332 class members were sent to third-party businesses. The plaintiffs' attorneys could have attempted to show that some or all of the 6,332 class members were injured in that way. They presumably could have sought the names and addresses of those individuals, and they could have contacted them. In the face of the stipulation, which pointedly failed to demonstrate dissemination for those class members, the inferences on which the plaintiffs rely are insufficient to support standing. Cf. *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 226, 59 S.Ct. 467, 83 L.Ed. 610 (1939) ("The production of weak evidence when strong is available can lead only to the conclusion that the strong would have been adverse").

In sum, the 6,332 class members whose internal TransUnion credit files were not disseminated to third-party businesses did not suffer a concrete harm. By contrast, the 1,853 class members (including Ramirez) whose credit reports were disseminated ***2213** to third-party businesses during the class period suffered a concrete harm.

B

We next address the plaintiffs' standing to recover damages for two other claims in the complaint: the disclosure claim and the summary-of-rights claim. Those two claims are intertwined.

[46] **[47]** In the disclosure claim, the plaintiffs alleged that TransUnion breached its obligation to provide them with their complete credit files upon request. According to the plaintiffs, TransUnion sent the plaintiffs copies of their credit files that omitted the OFAC information, and then in a second mailing sent the OFAC information. See § 1681g(a)(1). In the summary-of-rights claim, the plaintiffs further asserted that TransUnion should have included another summary of rights in that second mailing—the mailing that included the OFAC information. See § 1681g(c)(2). As the plaintiffs note, the disclosure and summary-of-rights requirements are designed to protect consumers' interests in learning of any inaccuracies in their credit files so that they can promptly correct the files before they are disseminated to third parties.

In support of standing, the plaintiffs thus contend that the TransUnion mailings were

formatted incorrectly and deprived them of their right to receive information in the format required by statute. But the plaintiffs have not demonstrated that the format of TransUnion's mailings caused them a harm with a close relationship to a harm traditionally recognized as providing a basis for a lawsuit in American courts. See *Spokeo*, 578 U. S., at 341, 136 S.Ct. 1540. In fact, they do not demonstrate that they suffered any harm *at all* from the formatting violations. The plaintiffs presented no evidence that, other than Ramirez, "a single other class member so much as *opened* the dual mailings," "nor that they were confused, distressed, or relied on the information in any way." 951 F.3d, at 1039, 1041 (opinion of McKeown, J.) (emphasis added). The plaintiffs put forth no evidence, moreover, that the plaintiffs would have tried to correct their credit files—and thereby prevented dissemination of a misleading report—had they been sent the information in the proper format. *Ibid.* Without any evidence of harm caused by the format of the mailings, these are "bare procedural violation[s], divorced from any concrete harm." *Spokeo*, 578 U. S., at 341, 136 S.Ct. 1540. That does not suffice for Article III standing. [8]

8 The District Court and the Court of Appeals concluded that Ramirez (in addition to the other 8,184 class members) had standing as to those two claims. In this Court, TransUnion has not meaningfully contested Ramirez's individual standing as to those two claims. We have no reason or basis to disturb the lower courts' conclusion on Ramirez's individual standing as to those two claims.

[48] The plaintiffs separately argue that TransUnion's formatting violations created a risk of future harm. Specifically, the plaintiffs contend that consumers who received the information in this dual-mailing format were at risk of not learning about the OFAC alert in their credit files. They say that they were thus at risk of not being able to correct their credit files before TransUnion disseminated credit reports containing the misleading information to third-party businesses. As noted above, the risk of future harm on its own does not support Article III standing for the plaintiffs' damages claim. In any event, the plaintiffs made no effort here to explain how the formatting error prevented them from contacting TransUnion to correct any errors before misleading credit reports were disseminated to third-party ***2214** businesses. To reiterate, there is no evidence that "a single other class member so much as opened the dual mailings," "nor that they were confused, distressed, or relied on the information in any way." 951 F.3d, at 1039, 1041 (opinion of McKeown, J.).

[49] **[50]** For its part, the United States as *amicus curiae*, but not the plaintiffs, separately asserts that the plaintiffs suffered a concrete "informational injury" under several of this Court's precedents. See *Federal Election Comm'n v. Akins*, 524 U.S. 11, 118 S.Ct. 1777, 141 L.Ed.2d 10 (1998); *Public Citizen v. Department of Justice*, 491 U.S. 440, 109 S.Ct. 2558, 105 L.Ed.2d 377 (1989). We disagree. The plaintiffs did not allege that they failed to receive any required information. They argued only that they received it *in the*

wrong format. Therefore, *Akins* and *Public Citizen* do not control here. In addition, those cases involved denial of information subject to public-disclosure or sunshine laws that entitle all members of the public to certain information. This case does not involve such a public-disclosure law. See *Casillas v. Madison Avenue Assocs., Inc.*, 926 F.3d 329, 338 (CA7 2019); *Trichell v. Midland Credit Mgmt., Inc.*, 964 F.3d 990, 1004 (CA11 2020). Moreover, the plaintiffs have identified no "downstream consequences" from failing to receive the required information. *Trichell*, 964 F.3d at 1004. 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. An "asserted informational injury that causes no adverse effects cannot satisfy Article III." *Ibid.*

* * *

No concrete harm, no standing. The 1,853 class members whose credit reports were provided to third-party businesses suffered a concrete harm and thus have standing as to the reasonable-procedures claim. The 6,332 class members whose credit reports were not provided to third-party businesses did not suffer a concrete harm and thus do not have standing as to the reasonable-procedures claim. As for the claims pertaining to the format of TransUnion's mailings, none of the 8,185 class members other than the named plaintiff Ramirez suffered a concrete harm.

We reverse the judgment of the U. S. Court of Appeals for the Ninth Circuit and remand the case for further proceedings consistent with this opinion. In light of our conclusion about Article III standing, we need not decide whether Ramirez's claims were typical of the claims of the class under Rule 23. On remand, the Ninth Circuit may consider in the first instance whether class certification is appropriate in light of our conclusion about standing.

It is so ordered.

Justice THOMAS, with whom Justice BREYER, Justice SOTOMAYOR, and Justice KAGAN join, dissenting.

TransUnion generated credit reports that erroneously flagged many law-abiding people as potential terrorists and drug traffickers. In doing so, TransUnion violated several provisions of the Fair Credit Reporting Act (FCRA) that entitle consumers to accuracy in credit-reporting procedures; to receive information in their credit files; and to receive a summary of their rights. Yet despite Congress' judgment that such misdeeds deserve redress, the majority decides that TransUnion's actions are so insignificant that the Constitution prohibits consumers from vindicating their rights in federal court. The Constitution does no such thing.

***2215** I

For decades, the Treasury Department's Office of Foreign Assets Control (OFAC) has compiled a list of "Specially Designated Nationals." The list largely includes terrorists and drug traffickers, among other unseemly types. And, as a general matter, Americans

are barred from doing business with those listed. In the wake of the September 11 attacks, TransUnion began to sell a new (and more expensive) type of credit report that flagged whether an individual's name matched a name found on that list.

The system TransUnion used to decide which individuals to flag was rather rudimentary. It compared only the consumer's first and last name with the names on the OFAC list. If the names were identical or similar, TransUnion included in the consumer's report an "OFAC ADVISOR ALERT," explaining that the consumer's name matches a name on the OFAC database. See, *e.g.,* 951 F.3d 1008, 1017, 1019 (CA9 2020) (" 'Cortez' would match with 'Cortes' "). TransUnion did not compare birth dates, middle initials, Social Security numbers, or any other available identifier routinely used to collect and verify credit-report data. *Id.*, at 1019, n. 2.

In 2005, a consumer sued. TransUnion had sold an OFAC credit report about this consumer to a car dealership. The report flagged her —Sandra Jean Cortez, born in May 1944— as a match for a person on the OFAC list: Sandra Cortes Quintero, born in June 1971. TransUnion withheld this OFAC alert from the credit report that Cortez had requested. And despite Cortez's efforts to have the alert removed, TransUnion kept the alert in place for years.

After a trial, the jury returned a verdict in the consumer's favor on four FCRA claims, two of which are similar to claims at issue here: (1) TransUnion failed to follow reasonable procedures that would ensure maximum possible accuracy, 15 U.S.C. § 1681e(b); and (2) TransUnion failed to provide Cortez all information in her file despite her requests, § 1681g(a). See *Cortez v. Trans Union, LLC*, 617 F.3d 688, 696–706 (CA3 2010). The jury awarded $50,000 in actual damages and $750,000 in punitive damages, and it also took the unusual step of including on the verdict form a handwritten note urging TransUnion to "completely revam[p]" its business practices. App. to Brief for Respondent 2a. The District Court reduced the punitive damages award to $100,000, which the Third Circuit affirmed on appeal, stressing that TransUnion's failure to, "at the very least, compar[e] birth dates when they are available," was "reprehensible." 617 F.3d, at 723.

But TransUnion "made surprisingly few changes" after this verdict. 951 F.3d, at 1021. It did not begin comparing birth dates. Or middle initials. Or citizenship. In fact, TransUnion did not compare *any* new piece of information. Instead, it hedged its language saying a consumer was a " 'potential match' " rather than saying the person was a " 'match.' " *Ibid.* And instead of listing matches for similar names, TransUnion required that the first and last names match exactly. Unsurprisingly, these reports kept flagging law-abiding Americans as potential terrorists and drug traffickers. And equally unsurprising, someone else sued.

That brings us to this case. Sergio Ramirez visited a car dealership, offered to buy a car, and negotiated the terms. The dealership then ran a joint credit check on Ramirez and his wife. The salesperson said that the check revealed that Ramirez was on " 'a terrorist list,' " so the

salesperson refused to close the deal with him. *Id.,* at 1017.

***2216** Ramirez requested and received a copy of his credit report from TransUnion. The report purported to be "complete and reliable," but it made no mention of the OFAC alert. See App. 88–91. TransUnion later sent a separate " 'courtesy' " letter, which informed Ramirez that his "TransUnion credit report" had "been mailed to [him] separately." *Id.*, at 92. That letter informed Ramirez that he was a potential match to someone in the OFAC database, but it never revealed that any OFAC information was present on his credit report. See *id.*, at 92–94. TransUnion opted not to include with this letter a description of Ramirez's rights under the FCRA or any information on how to dispute the OFAC match. 951 F.3d, at 1018. The letter merely directed Ramirez to visit the Department of Treasury's website or to call or write TransUnion if Ramirez had any additional questions or concerns.

Ramirez sued, asserting three claims under the FCRA: TransUnion willfully failed to follow reasonable procedures to assure maximum possible accuracy of the information concerning him, § 1681e(b); TransUnion willfully failed to disclose to him all the information in his credit file by withholding the true version of his credit report, § 1681g(a)(1); and TransUnion willfully failed to provide a summary of rights when it sent him the courtesy letter, § 1681g(c)(2).

Ramirez also sought to represent a class of individuals who had received a similar OFAC letter from TransUnion. "[E]veryone in the class: (1) was falsely labeled ... a potential OFAC match; (2) requested a copy of his or her credit report from TransUnion; and (3) in response, received a credit-report mailing with the OFAC alert redacted and a separate OFAC Letter mailing with no summary of rights." *Id.*, at 1022.

The jury found in favor of the class on all three claims. And because it also determined that TransUnion's misconduct was "willfu[l]," § 1681n(a), the jury awarded each class member $984.22 in statutory damages (about $8 million total) and $6,353.08 in punitive damages (about $52 million total).

TransUnion appealed, arguing that the class members lacked standing. The Ninth Circuit disagreed, explaining that "TransUnion's reckless handling of OFAC information exposed every class member to a real risk of harm to their concrete privacy, reputational, and informational interests protected by the FCRA." *Id.,* at 1037. [1]

1 TransUnion also contends that Ramirez's claims and defenses are not typical of those of the class. The Court declines to reach that question because its jurisdictional holding is dispositive. *Ante*, at 2214. In my view, the District Court did not abuse its discretion in certifying the class given the similarities among the claims and defenses at issue.

II

A

Article III vests "[t]he judicial Power of the United States" in this Court "and in such inferior Courts as the Congress may from time to time ordain and establish." § 1. This power "shall extend to *all* Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority." § 2 (emphasis added). When a federal court has jurisdiction over a case or controversy, it has a "virtually unflagging obligation" to exercise it. *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976).

The mere filing of a complaint in federal court, however, does not a case (or controversy) make. Article III "does not extend the judicial power to every violation of the ***2217** constitution" or federal law "which may possibly take place." *Cohens v. Virginia*, 6 Wheat. 264, 405, 5 L.Ed. 257 (1821). Rather, the power extends only "to 'a case in law or equity,' in which a *right*, under such law, is asserted." *Ibid.* (emphasis added).

Key to the scope of the judicial power, then, is whether an individual asserts his or her own rights. At the time of the founding, whether a court possessed judicial power over an action with no showing of actual damages depended on whether the plaintiff sought to enforce a right held privately by an individual or a duty owed broadly to the community. See *Spokeo, Inc.* v. *Robins*, 578 U. S. 330, 344–346, 136 S.Ct. 1540, 194 L.Ed.2d 635 (2016) (THOMAS, J., concurring); see also *Thole* v. *U. S. Bank N. A.*, 590 U. S. ——, —— – ——, 140 S.Ct. 1615, 1618-19, 207 L.Ed.2d 85 (2020) (same); 3 W. Blackstone, Commentaries on the Laws of England 2 (J. Chitty ed. 1826); 4 *id.*, at 5. Where an individual sought to sue someone for a violation of his private rights, such as trespass on his land, the plaintiff needed only to allege the violation. See *Entick* v. *Carrington*, 2 Wils. K. B. 275, 291, 95 Eng. Rep. 807, 817 (K. B. 1765). Courts typically did not require any showing of actual damage. See *Uzuegbunam* v. *Preczewski*, 592 U. S. ——, —— – ——, 141 S.Ct. 792, 798-99, 209 L.Ed.2d 94 (2021). But 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]." *Spokeo*, 578 U. S., at 346, 136 S.Ct. 1540 (THOMAS, J., concurring) (citing *Robert Marys's Case*, 9 Co. Rep. 111b, 112b, 77 Eng. Rep. 895, 898–899 (K. B. 1613); brackets in original).

This distinction mattered not only for traditional common-law rights, but also for newly created statutory ones. The First Congress enacted a law defining copyrights and gave copyright holders the right to sue infringing persons in order to recover statutory damages, even if the holder "could not show monetary loss." *Muransky v. Godiva Chocolatier, Inc.*, 979 F.3d 917, 972 (CA11 2020) (Jordan, J., dissenting) (citing Act of May 31, 1790, § 2, 1 Stat. 124–125). In the patent context, a defendant challenged an infringement suit brought under a similar law. Along the lines of what TransUnion argues here, the infringer contended that "the making of a machine cannot be an offence, because no action lies, except for actual damage, and

there can be no actual damages, or even a rule for damages, for an infringement by making a machine." *Whittemore v. Cutter*, 29 F.Cas. 1120, 1121 (No. 17,600) (CC Mass. 1813). Riding circuit, Justice Story rejected that theory, noting that the plaintiff could sue in federal court merely by alleging a violation of a private right: "[W]here the law gives an action for a particular act, the doing of that act imports of itself a damage to the party" because "[e]very violation of a right imports some damage." *Ibid.*; cf. *Gayler v. Wilder*, 10 How. 477, 494, 13 L.Ed. 504 (1851) (patent rights "did not exist at common law"). [2]

2 The "public rights" terminology has been used to refer to two different concepts. In one context, these rights are " 'take[n] from the public' "—like the right to make, use, or sell an invention—and " 'bestow[ed] ... upon the' " individual, like a "decision to grant a public franchise." *Oil States Energy Services, LLC* v. *Greene's Energy Group, LLC*, 584 U. S. ——, —— – ——, 138 S.Ct. 1365 1372-74, 200 L.Ed.2d 671 (2018). Disputes with the Government over these rights generally can be resolved "outside of an Article III court." *Id.*, at —— – ——, 138 S.Ct. at 1374. Here, in contrast, the term "public rights" refers to duties owed collectively to the community. For example, Congress owes a duty to all Americans to legislate within its constitutional confines. But not every single American can sue over Congress' failure to do so. Only individuals who, at a minimum, establish harm beyond the mere violation of that constitutional duty can sue. Cf. *Fairchild v. Hughes*, 258 U.S. 126, 129–130, 42 S.Ct. 274, 66 L.Ed. 499 (1922) ("Plaintiff has only the right, possessed by every citizen, to require that the Government be administered according to law and that the public moneys be not wasted. Obviously this general right does not entitle a private citizen to institute in the federal courts a suit to secure by indirection a determination whether a statute, if passed, or a constitutional amendment, about to be adopted, will be valid").

***2218** The principle that the violation of an individual right gives rise to an actionable harm was widespread at the founding, in early American history, and in many modern cases. See *Uzuegbunam*, 592 U. S., at —— – ——, 141 S.Ct. at 798-99 (collecting cases); *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373, 102 S.Ct. 1114, 71 L.Ed.2d 214 (1982) ("[T]he actual or threatened injury required by Art. III may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing" (citing cases; brackets and internal quotation marks omitted)). And this understanding accords proper respect for the power of Congress and other legislatures to define legal rights. No one could seriously dispute, for example, that a violation of property rights is actionable, but as a general matter, "[p]roperty rights are created by the State." *Palazzolo v. Rhode Island*, 533 U.S. 606, 626, 121 S.Ct. 2448, 150 L.Ed.2d 592 (2001). In light of this history, tradition, and common practice, our test should be clear: So long as a "statute fixes a minimum of recovery ..., there would seem to be no doubt

of the right of one who establishes a technical ground of action to recover this minimum sum without any specific showing of loss." T. Cooley, Law of Torts *271.[3] While the Court today discusses the supposed failure to show "injury in fact," courts for centuries held that injury in law to a private right was enough to create a case or controversy.

3 Etymology is also a helpful guide. The word "injury" stems from the Latin "*injuria*," which combines "in" (expressing negation) and "jus" (right, law, justice). See Barnhart Dictionary of Etymology 529 (1988).

B

Here, each class member established a violation of his or her private rights. The jury found that TransUnion violated three separate duties created by statute. See App. 690. All three of those duties are owed to individuals, not to the community writ large. Take § 1681e(b), which requires a consumer reporting agency to "follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates." This statute creates a duty: to use reasonable procedures to assure maximum possible accuracy. And that duty is particularized to an individual: the subject of the report. Section 1681g does the same. It requires an agency to "clearly and accurately disclose" to a consumer, upon his request, "[a]ll information in the consumer's file at the time of the request" and to include a written "summary of rights" with that "written disclosure." §§ 1681g(a), (c)(2). Those directives likewise create duties: provide all information in the consumer's file and accompany the disclosure with a summary of rights. And these too are owed to a single person: the consumer who requests the information.

Were there any doubt that consumer reporting agencies owe these duties to specific individuals—and not to the larger community—Congress created a cause of action providing that "[a]ny person who ***2219** willfully fails to comply" with an FCRA requirement "with respect to any *consumer* is liable to *that consumer*." § 1681n(a) (emphasis added). If a consumer reporting agency breaches any FCRA duty owed to a specific consumer, then that individual (not all consumers) may sue the agency. No one disputes that each class member possesses this cause of action. And no one disputes that the jury found that TransUnion violated each class member's individual rights. The plaintiffs thus have a sufficient injury to sue in federal court.

C

The Court chooses a different approach. Rejecting this history, 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.' " *Ante,* at 2203–2204. "No concrete harm, no standing." *Ante,* at 2200, 2214.

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. *Sierra v. Hallandale Beach*, 996 F.3d 1110, 1117 (CA11 2021) (Newsom, J., concurring). And the concept then was not even about constitutional standing; it concerned a *statutory* cause of action under the Administrative Procedure Act. See *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 153, 90 S.Ct. 827, 25 L.Ed.2d 184 (1970) (explaining that the injury-in-fact requirement "concerns, apart from the 'case' or 'controversy' test, the question whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question").

The Court later took this statutory requirement and began to graft it onto its constitutional standing analysis. See, *e.g., Warth v. Seldin*, 422 U.S. 490, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975). But even then, injury in fact served as an *additional* way to get into federal court. Article III injury still could "exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing.' " *Id.*, at 500, 95 S.Ct. 2197 (quoting *Linda R. S. v. Richard D.*, 410 U.S. 614, 617, n. 3, 93 S.Ct. 1146, 35 L.Ed.2d 536 (1973)). So the introduction of an injury-in-fact requirement, in effect, "represented a substantial broadening of access to the federal courts." *Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 26, 39, 96 S.Ct. 1917, 48 L.Ed.2d 450 (1976). A plaintiff could now invoke a federal court's judicial power by establishing injury by virtue of a violated legal right *or* by alleging some *other* type of "personal interest." *Ibid.*

In the context of public rights, the Court continued to require more than just a legal violation. In *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992), for example, the Court concluded that several environmental organizations lacked standing to challenge a regulation about interagency communications, even though the organizations invoked a citizen-suit provision allowing " 'any person [to] commence a civil suit ... to enjoin any person ... who is alleged to be in violation of ' " the law. See *id.*, at 558, 571–572, 112 S.Ct. 2130; 16 U.S.C. § 1540(g). Echoing the historical distinction between duties owed to individuals and those owed to the community, the Court explained that a plaintiff must do more than raise "a generally available grievance about government—claiming only harm to his and every citizen's interest ***2220** in proper application of the Constitution and laws." 504 U.S. at 573, 112 S.Ct. 2130. "Vindicating the *public* interest (including the public interest in Government observance of the Constitution and laws) is the function of Congress and the Chief Executive." *Id.*, at 576, 112 S.Ct. 2130. " 'The province of the court,' " in contrast, " 'is, solely, to decide on the rights of individuals.' " *Ibid.* (quoting *Marbury v. Madison*, 1 Cranch 137, 170, 2 L.Ed. 60 (1803)).

The same public-rights analysis prevailed in *Summers v. Earth Island Institute*, 555 U.S. 488, 129 S.Ct. 1142, 173 L.Ed.2d 1 (2009). There, a group of organizations sought to prevent the United States Forest Service from enforcing regulations that exempt certain

projects from notice and comment. *Id.*, at 490, 129 S.Ct. 1142. The Court, again, found that the mere violation of the law "without some concrete interest that is affected by the deprivation—a procedural right *in vacuo*—is insufficient to create Article III standing." *Id.*, at 496, 129 S.Ct. 1142. But again, this was rooted in the context of public rights: " 'It would exceed Article III's limitations if, at the behest of Congress and in the absence of any showing of concrete injury, we were to entertain citizen suits to vindicate the *public's* nonconcrete interest in the proper administration of the laws.' " *Id.*, at 497, 129 S.Ct. 1142 (emphasis added; brackets omitted).

In *Spokeo*, the Court built on this approach. Based on a few sentences from *Lujan* and *Summers*, the Court concluded that a plaintiff does not automatically "satisf[y] the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right." *Spokeo*, 578 U. S., at 341, 136 S.Ct. 1540. But the Court made clear that "Congress is well positioned to identify intangible harms that meet minimum Article III requirements" and explained that "the violation of a procedural right granted by statute *can be* sufficient in some circumstances to constitute injury in fact." *Id.*, at 341, 342, 136 S.Ct. 1540 (emphasis added).

Reconciling these statements has proved to be a challenge. See *Sierra*, 996 F.3d at 1116–1117 (Newsom, J., concurring) (collecting examples of inconsistent decisions). But "[t]he historical restrictions on standing" offer considerable guidance. *Thole*, 590 U. S., at ——, 140 S.Ct., at 1622 (THOMAS, J., concurring). A statute that creates a public right plus a citizen-suit cause of action is insufficient by itself to establish standing. See *Lujan*, 504 U.S., at 576, 112 S.Ct. 2130.[4] A statute that creates a private right and a cause of action, however, *does* gives plaintiffs an adequate interest in vindicating their private rights in federal court. See *Thole*, 590 U. S., at ——, 140 S.Ct. at 1622 (THOMAS, J., concurring); *Spokeo*, 578 U. S., at —— – ——, 136 S.Ct. 1540 (same); see also *Muransky*, 979 F.3d, at 970–972 (Jordan, J., dissenting); *Huff v. TeleCheck Servs., Inc.*, 923 F.3d 458, 469 (CA6 2019) ("Article III standing may draw a line between private and public rights"); *Bryant v. Compass Group USA, Inc.*, 958 F.3d 617, 624 (CA7 2020) (the *Spokeo* concurrence "drew a useful distinction between two types of injuries").

4 But see Caminker, Comment, The Constitutionality of *Qui Tam* Actions, 99 Yale L. J. 341, 342, n. 3 (1989) ("Six statutes [enacted by the First Congress] imposed penalties and/or forfeitures for conduct injurious to the general public and expressly authorized suits by private informers, with the recovery being shared between the informer and the United States"); *McCulloch v. Maryland*, 4 Wheat. 316, 317, 321–322, 4 L.Ed. 579 (1819) (reviewing "an action of debt brought by the defendant in error ... who sued as well for himself as for the State of Maryland ... to recover certain penalties").

The majority today, however, takes the road less traveled: "[U]nder Article III, an ***2221** injury in law is not an injury in fact." *Ante,* at 2205; but see *Webb v. Portland Mfg.*

Co., 29 F.Cas. 506, 508 (No. 17,322) (CC Me. 1838) ("The law tolerates no farther inquiry than whether there has been the violation of a right"). No matter if the right is personal or if the legislature deems the right worthy of legal protection, legislatures are constitutionally unable to offer the protection of the federal courts for anything other than money, bodily integrity, and anything else that this Court thinks looks close enough to rights existing at common law. See *ante*, at 2204. The 1970s injury-in-fact theory has now displaced the traditional gateway into federal courts.

This approach is remarkable in both its novelty and effects. Never before has this Court declared that legal injury is *inherently* insufficient to support standing.[5] And never before has this Court declared that legislatures are constitutionally precluded from creating legal rights enforceable in federal court if those rights deviate too far from their common-law roots. According to the majority, courts alone have the power to sift and weigh harms to decide whether they merit the Federal Judiciary's attention. In the name of protecting the separation of powers, *ante*, at 2203, 2207, this Court has relieved the legislature of its power to create and define rights.

5 See, *e.g.*, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 578, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992) ("Nothing in this contradicts the principle that the injury required by Art. III may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing" (internal quotation marks, brackets, and ellipsis omitted)); *Warth v. Seldin*, 422 U.S. 490, 514, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975) ("Congress may create a statutory right or entitlement the alleged deprivation of which can confer standing to sue even where the plaintiff would have suffered no judicially cognizable injury in the absence of statute"); *Linda R. S. v. Richard D.*, 410 U.S. 614, 617, n. 3, 93 S.Ct. 1146, 35 L.Ed.2d 536 (1973) ("Congress may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute").

III

Even assuming that this Court should be in the business of second-guessing private rights, this is a rather odd case to say that Congress went too far. TransUnion's misconduct here is exactly the sort of thing that has long merited legal redress.

As an initial matter, this Court has recognized that the unlawful withholding of requested information causes "a sufficiently distinct injury to provide standing to sue." *Public Citizen v. Department of Justice*, 491 U.S. 440, 449, 109 S.Ct. 2558, 105 L.Ed.2d 377 (1989); see also *Havens Realty Corp.*, 455 U.S., at 374, 102 S.Ct. 1114. Here, TransUnion unlawfully withheld from each class member the OFAC version of his or her credit report that the class member requested. And TransUnion unlawfully failed to send a summary of rights. The majority's response is to contend that the plaintiffs actually did not allege that they failed to receive any required information; they

alleged only that they received it in the "*wrong format*." *Ante*, at 2213.

That reframing finds little support in the complaint, which alleged that TransUnion "fail[ed] to include the OFAC alerts ... in the consumer's own files which consumers, as of right, may request and obtain," and that TransUnion did "not advise consumers that they may dispute inaccurate OFAC alerts." Class Action Complaint in No. 3:12–cv–00632, ECF Doc. 1 (ND Cal.), p. 5. It also finds no footing in the record. Neither the mailed credit report nor separate letter provide any indication that a person's report is marked with an OFAC alert. See, *e.g.,* App. 88–94.

***2222** Were there any doubt about the facts below, we have the helpful benefit of a jury verdict. The jury found that "Defendant TransUnion, LLC willfully fail[ed] to clearly and accurately disclose OFAC information in the written disclosures it sent to members of the class." *Id.*, at 690. And the jury found that "Defendant TransUnion, LLC willfully fail[ed] to provide class members a summary of their FCRA rights with each written disclosure made to them." *Ibid.* I would not be so quick as to recharacterize these jury findings as mere "formatting" errors. *Ante*, at 2200, 2213–2214; see also U. S. Const., Amdt. 7 ("no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law").

Moreover, to the extent this Court privileges concrete, *financial* injury for standing purposes, recall that TransUnion charged its clients extra to receive credit reports with the OFAC designation. According to TransUnion, these special OFAC credit reports are valuable. Even the majority must admit that withholding something of value from another person—that is, "monetary harm"—falls in the heartland of tangible injury in fact. *Ante*, at 2200, 2204. Recognizing as much, TransUnion admits that its clients would have standing to sue if they, like the class members, did not receive the OFAC credit reports they had requested. Tr. of Oral Arg. 9.

And then there is the standalone harm caused by the rather extreme errors in the credit reports. The majority (rightly) decides that having one's identity falsely and publically associated with terrorism and drug trafficking is itself a concrete harm. *Ante*, at 2208–2209. For good reason. This case is a particularly grave example of the harm this Court identified as central to the FCRA: "curb[ing] the dissemination of false information." *Spokeo*, 578 U. S., at 342, 136 S.Ct. 1540. And it aligns closely with a "harm that has traditionally been regarded as providing a basis for a lawsuit." *Id.*, at 341, 136 S.Ct. 1540. Historically, "[o]ne who falsely, and without a privilege to do so, publishes matter defamatory to another in such a manner as to make the publication a libel is liable to the other," even though "no special harm or loss of reputation results therefrom." Restatement of Torts § 569, p. 165 (1938).

The question this Court has identified as key, then, is whether a plaintiff established "a degree of risk" that is "sufficient to meet the concreteness requirement." *Spokeo,* 578 U. S., at 343, 136 S.Ct. 1540. Here, in a 7-month period, it is undisputed that nearly 25 percent of the class had false OFAC-flags sent to potential creditors. Twenty-five percent over

just a 7-month period seems, to me, "a degree of risk sufficient to meet the concreteness requirement." *Ibid.* If 25 percent is insufficient, then, pray tell, what percentage is?

The majority deflects this line of analysis by all but eliminating the risk-of-harm analysis. According to the majority, an elevated risk of harm simply shows that a concrete harm is *imminent* and thus may support only a claim for injunctive relief. *Ante*, at 2210–2211, 2213–2214. But this reworking of *Spokeo* fails for two reasons. First, it ignores what *Spokeo* said: "[Our opinion] does not mean ... that the risk of real harm cannot satisfy the requirement of concreteness." *Spokeo*, 578 U. S., at 341, 136 S.Ct. 1540. Second, it ignores what *Spokeo* did. The Court in *Spokeo* remanded the respondent's claims for statutory damages to the Ninth Circuit to consider "whether the ... violations alleged in this case entail a degree of risk sufficient to meet the concreteness requirement." *Id.,* at 342–343, 136 S.Ct. 1540. The theory that risk of harm matters only for injunctive ***2223** relief is thus squarely foreclosed by *Spokeo* itself.

But even if risk of harm is out, the Ninth Circuit indicated that every class member may have had an OFAC alert disclosed. According to the court below, TransUnion not only published this information to creditors for a quarter of the class but also "communicated about the database information and OFAC matches" with a third party. 951 F.3d, at 1026; cf. *Cortez*, 617 F.3d, at 711 (TransUnion cannot avoid FCRA liability "by simply contracting with a third party to store and maintain information"). Respondent adds to this by pointing out that TransUnion published this information to vendors that printed and sent the mailings. See Brief for Respondent 16; see also App. 161 (deposition testimony explaining that "a printed credit report ... would have been sent through our print vendor through the mail and delivered to the consumer requesting the file disclosure); *id.,* at 545 (trial testimony identifying three different print-vendor companies that worked with TransUnion during the relevant time period). In the historical context of libel, publication to even a single other party could be enough to give rise to suit. This was true, even where the third party was a telegraph company,[6] an attorney,[7] or a stenographer who merely writes the information down.[8] Surely with a harm so closely paralleling a common-law harm, this is an instance where a plaintiff "need not allege any additional harm beyond the one Congress has identified." *Spokeo*, 578 U. S., at 342, 136 S.Ct. 1540 (emphasis deleted).

6 *Munson v. Lathrop*, 96 Wis. 386, 389, 71 N.W. 596, 597 (1897) ("The writing of the message, and the delivery of it by him to the [telegraph] company for transmission, as mentioned, was a publication of the same").

7 *Hedgepeth v. Coleman*, 183 N.C. 309, 312–313, 111 S.E. 517, 519 (1922) ("[I]t has been held that the publication was sufficient where the defendant had communicated the defamatory matter to the plaintiff 's agent, or attorney; or had read it to a friend before posting it to the plaintiff; or had procured it to be copied, or sealed in the form of a letter addressed to the plaintiff and left in the

house of a neighbor by whom it was read; or had caused it to be delivered to and read by a member of the plaintiff 's family").

8 *Rickbeil v. Grafton Deaconess Hospital*, 74 N.D. 525, 542, 23 N.W.2d 247 (1946) ("We hold that the dictating of this letter by the manager to the stenographer and her transcription of her notes into the written instrument constitutes publication within the purview of the law of libel: whether the relationship be that of master and servant or of coemployees of a corporation"); see also *Larimore v. Blaylock*, 259 Va. 568, 573, 528 S.E.2d 119, 122 (2000) (rejecting an argument of "absolute protection of the 'intracorporate immunity doctrine' " for defamatory statements); but see *Swindle v. State*, 10 Tenn. 581, 582 (1831) (" 'A personal libel is published when it arrives to the person *against whom it is written*, pursuant to the design of the author, or is made known to any other person, by any means to which the dissent of the author is not necessarily implied' " (emphasis added)).

But even setting aside everything already mentioned—the Constitution's text, history, precedent, financial harm, libel, the risk of publication, and actual disclosure to a third party—one need only tap into common sense to know that receiving a letter identifying you as a potential drug trafficker or terrorist is harmful. All the more so when the information comes in the context of a credit report, the entire purpose of which is to demonstrate that a person can be trusted.

And if this sort of confusing and frustrating communication is insufficient to establish a real injury, one wonders what could rise to that level. If, instead of falsely identifying Ramirez as a potential drug trafficker or terrorist, TransUnion had ***2224** flagged him as a "potential" child molester, would that alone still be insufficient to open the courthouse doors? What about falsely labeling a person a racist? Including a slur on the report? Or what about openly reducing a person's credit score by several points because of his race? If none of these constitutes an injury in fact, how can that possibly square with our past cases indicating that the inability to "observe an animal species, even for purely esthetic purposes, ... undeniably" is? *Lujan*, 504 U.S., at 562, 112 S.Ct. 2130; see also *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 183, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000) ("plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons for whom the aesthetic and recreational values of the area will be lessened" (internal quotation marks omitted)); *Summers*, 555 U.S., at 494, 129 S.Ct. 1142 ("[I]f ... harm in fact affects the recreational or even the mere esthetic interests of the plaintiff, that will suffice"). Had the class members claimed an aesthetic interest in viewing an accurate report, would this case have come out differently?

And if some of these examples do cause sufficiently "concrete" and "real"—though "intangible"—harms, how do *we* go about picking and choosing which ones do and

which do not? I see no way to engage in this "inescapably value-laden" inquiry without it "devolv[ing] into [pure] policy judgment." *Sierra*, 996 F.3d, at 1129 (Newsom, J., concurring). Weighing the harms caused by specific facts and choosing remedies seems to me like a much better fit for legislatures and juries than for this Court.

Finally, it is not just the harm that is reminiscent of a constitutional case or controversy. So too is the remedy. Although statutory damages are not necessarily a proxy for unjust enrichment, they have a similar flavor in this case. TransUnion violated consumers' rights in order to create and sell a product to its clients. Reckless handling of consumer information and bungled responses to requests for information served a means to an end. And the end was financial gain. "TransUnion could not confirm that a single OFAC alert sold to its customers was accurate." 951 F.3d, at 1021, n. 4. Yet thanks to this Court, it may well be in a position to keep much of its ill-gotten gains. [9]

9 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," *ASARCO Inc. v. Kadish*, 490 U.S. 605, 617, 109 S.Ct. 2037, 104 L.Ed.2d 696 (1989)—as the sole forum for such cases, with defendants unable to seek removal to federal court. See also Bennett, The Paradox of Exclusive State-Court Jurisdiction Over Federal Claims, 105 Minn. L. Rev. 1211 (2021). 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.

* * *

Ultimately, the majority seems to pose to the reader a single rhetorical question: Who could possibly 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? The answer is, of course, legion: Congress, the President, the jury, the District Court, ***2225** the Ninth Circuit, and four Members of this Court.

I respectfully dissent.

Justice KAGAN, with whom Justice BREYER and Justice SOTOMAYOR join, dissenting.

The familiar story of Article III standing depicts the doctrine as an integral aspect of judicial restraint. The case-or-controversy requirement of Article III, the account runs, is "built on a single basic idea—the idea of separation of powers." *Allen v. Wright*, 468 U.S. 737, 752, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984). Rigorous standing rules help safeguard

that separation by keeping the courts away from issues "more appropriately addressed in the representative branches." *Id.*, at 751, 104 S.Ct. 3315. In so doing, those rules prevent courts from overstepping their "proper—and properly limited—role" in "a democratic society." *Warth v. Seldin*, 422 U.S. 490, 498, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975); see *ante*, at 2203–2204 (THOMAS, J., dissenting).

After today's decision, that story needs a rewrite. The Court here transforms standing law from a doctrine of judicial modesty into a tool of judicial aggrandizement. It holds, for the first time, that a specific class of plaintiffs whom Congress allowed to bring a lawsuit cannot do so under Article III. I join Justice THOMAS's dissent, which explains why the majority's decision is so mistaken. As he recounts, our Article III precedents teach that Congress has broad "power to create and define rights." *Ante*, at 2206–2207; see *Spokeo, Inc.* v. *Robins*, 578 U. S. 330, 341, 136 S.Ct. 1540, 194 L.Ed.2d 635 (2016); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 578, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992); *Warth*, 422 U.S., at 500, 95 S.Ct. 2197. And Congress may protect those rights by authorizing suits not only for past harms but also for the material risk of future ones. See *Spokeo*, 578 U. S., at 341–343, 136 S.Ct. 1540; *ante*, at 2207–2208 (THOMAS, J., dissenting). Under those precedents, this case should be easy. In the Fair Credit Reporting Act, Congress determined to protect consumers' reputations from inaccurate credit reporting. TransUnion willfully violated that statute's provisions by preparing credit files that falsely called the plaintiffs potential terrorists, and by obscuring that fact when the plaintiffs requested copies of their files. To say, as the majority does, that the resulting injuries did not " 'exist' in the real world" is to inhabit a world I don't know. *Ante*, at 2204–2205. And to make that claim in the face of Congress's contrary judgment is to exceed the judiciary's "proper—and properly limited—role." *Warth*, 422 U.S., at 498, 95 S.Ct. 2197; see *ante*, at 2205–2207 (THOMAS, J., dissenting).

I add a few words about the majority's view of the risks of harm to the plaintiffs. In addressing the claim that TransUnion failed to maintain accurate credit files, the majority argues that the "risk of dissemination" of the plaintiffs' credit information to third parties is "too speculative." *Ante*, at 2211–2212. But why is it so speculative that a company in the business of selling credit reports to third parties will in fact sell a credit report to a third party? See also *ante*, at 2207–2208 (THOMAS, J., dissenting) (noting that "nearly 25% of the class" already had false reports "sent to potential creditors"). And in addressing the claims of faulty disclosure to the plaintiffs, the majority makes a set of curious assumptions. According to the majority, people who specifically request a copy of their credit report may not even "*open[ ]* " the envelope. *Ante*, at 2215 (emphasis in original). And people who receive multiple opaque mailings are not likely to be "confused." *Ibid.*; but see *Niz-Chavez* v. *Garland*, 593 U. S. ——, ——, 141 S.Ct. 1474, 1485, —— L.Ed.2d —— (2021) (explaining that a "series of letters," "each containing ***2226** a new morsel of vital information," is likely to perplex recipients). And finally, people who learn that their credit files label them potential terrorists would not "have tried to correct" the error. *Ante*, at 2213. Rather than accept those suppositions, I sign up with Justice THOMAS: "[O]ne need only

tap into common sense to know that receiving a letter identifying you as a potential drug trafficker or terrorist is harmful." *Ante*, at 2223.

I differ with Justice THOMAS on just one matter, unlikely to make much difference in practice. In his view, any "violation of an individual right" created by Congress gives rise to Article III standing. *Ante*, at 2203. But in *Spokeo*, this Court held that "Article III requires a concrete injury even in the context of a statutory violation." 578 U. S., at 341, 136 S.Ct. 1540. I continue to adhere to that view, but think it should lead to the same result as Justice THOMAS's approach in all but highly unusual cases. As *Spokeo* recognized, "Congress is well positioned to identify [both tangible and] intangible harms" meeting Article III standards. *Ibid.* Article III requires for concreteness only a "real harm" (that is, a harm that "actually exist[s]") or a "risk of real harm." *Ibid.* 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. Overriding an authorization to sue is appropriate when but only when Congress could not reasonably have thought that a suit will contribute to compensating or preventing the harm at issue. Subject to that qualification, I join Justice THOMAS's dissent in full.

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RLA-10

112 S.Ct. 1351
Supreme Court of the United States

UNITED STATES, Petitioner
v.
Richard WILSON.

No. 90–1745.
|
Argued Jan. 15, 1992.
|
Decided March 24, 1992.

Synopsis
Defendant was convicted in the United States District Court for the Middle District of Tennessee, L. Clure Morton, Senior District Judge of Hobbs Act violation, and he appealed. The Court of Appeals for the Sixth Circuit, 916 F.2d 1115, remanded for resentencing, and certiorari was granted. The Supreme Court, Justice Thomas, held that under statute giving defendant convicted of federal crime right to be credited for time spent in official detention before sentence begins, Attorney General was required to compute credit after defendant had begun to serve his sentence.

Reversed.

Justice Stevens filed dissenting opinion in which Justice White joined.

Opinion on remand, 997 F.2d 208.

West Headnotes (4)

[1] **Sentencing and Punishment** 🔑 Presentence confinement

Under statute giving defendant convicted of federal crime right to be credited for time spent in official detention before sentence begins, Attorney General was required to compute credit after defendant had begun to serve his sentence, rather than district court at time of sentencing. 18 U.S.C.A. § 3585(b).

2677 Cases that cite this headnote

[2] **Sentencing and Punishment** 🔑 Presentence confinement

Statute giving defendant convicted of federal crime right to receive credit for time spent in official detention before sentence begins does not authorize district court to award credit at sentencing. 18 U.S.C.A. § 3585(b).

2335 Cases that cite this headnote

[3] **Statutes** 🔑 Tense, mood, and voice

Congress' use of a verb tense is significant in construing statutes.

100 Cases that cite this headnote

[4] Sentencing and Punishment Prior Confinement

Under amended statute governing detention credit, Attorney General must continue to compute credit for time spent in official detention as he did under former statute. 18 U.S.C.A. §§ 3585(b), 3621(a); 18 U.S.C.(1982 Ed.) § 3568.

1549 Cases that cite this headnote

**1351 *Syllabus* *

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

In sentencing respondent Wilson to prison for violating the Hobbs Act, the District Court denied his request for credit under 18 U.S.C. § 3585(b) for the time he had spent in presentence detention by Tennessee authorities. After a state trial court credited such time against his prison term for state-law convictions, the Court of Appeals reversed the District Court's ruling, holding that he had a right to federal credit and that the District Court should have awarded it to him.

Held: It is the Attorney General who computes the amount of the § 3585(b) credit after the defendant has begun to serve his sentence. Pp. 1352–1356.

(a) Effective in 1987, § 3585(b)—which specifies, *inter alia,* that "*[a] defendant shall be given credit* toward [his] term of imprisonment for any time he has spent in official detention prior to the date the sentence commences," **1352 if such time "has not been credited against another sentence" (emphasis added)—replaced a statute which had provided, among other things, that *"[t]he Attorney General shall give any such person credit"* (emphasis added). Under the predecessor statute, the Attorney General, through the Bureau of Prisons (BOP), computed the amount of credit after taking custody of the sentenced federal offender. Pp. 1352–1354.

(b) Section 3585(b) does not authorize a district court to compute the credit at sentencing. By stating crucial verbs in the past and present perfect tenses, the section indicates that the computation must occur after the defendant begins his sentence. A sentencing court, therefore, cannot apply the section. Indeed, the District Court here could not have made the necessary computation at sentencing, since the credit is based on how much time a defendant "has spent" (not "will have spent") prior to beginning his sentence. The court did not then know when the state-court proceedings would end or when the federal authorities would take Wilson into custody, and only could have speculated about the amount of time that he would spend in detention. Moreover, it is immaterial that such detention "ha[d] not been credited" against a state sentence at the time of Wilson's federal sentencing, since basing the award of credit on the relative

timing of sentencing proceedings would result in arbitrary awards. P. 1354.

***330** c) In light of the sentencing court's inability to compute the credit, the Attorney General must continue to make the calculation as he did in the past, even though § 3585(b) no longer mentions him. The offender has a right to certain jail-time credit under the section, and BOP must know how much of a sentence remains in order to fulfill its statutory duty of administering the sentence. Congress' conversion of the former statute's active language into the passive voice in § 3585(b) is a slim ground for presuming an intention to change well-established procedures for determining the credit. Pp. 1354–1355.

(d) The general presumption that Congress contemplates a change whenever it amends a statute is overcome in this case by the foregoing analysis. Because the statute was entirely rewritten, and because any other interpretation would require this Court to stretch § 3585(b)'s language, it is likely that the former reference to the Attorney General was simply lost in the shuffle. This interpretation does not render the 1987 revision meaningless, since Congress altered the predecessor statute in at least three other ways. Pp. 1355–1356.

916 F.2d 1115, reversed.

THOMAS, J., delivered the opinion of the Court, in which REHNQUIST, C.J., and BLACKMUN, O'CONNOR, SCALIA, KENNEDY, and SOUTER, JJ., joined. STEVENS, J., filed a dissenting opinion, in which WHITE, J., joined, *post,* p. 1356.

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Opinion

Justice THOMAS delivered the opinion of the Court.

A defendant convicted of a federal crime has a right under 18 U.S.C. § 3585(b) to receive credit for certain time spent in official detention before his sentence begins. In this case, we must decide whether the District Court calculates the credit at the time of sentencing or whether the Attorney General computes it after the defendant has begun to serve his sentence.

***331** I

In the summer and early fall of 1988, respondent Richard Wilson committed several crimes in Putnam County, Tennessee. The precise details of these crimes do not concern us here. It suffices to state that Tennessee authorities arrested Wilson on October 5, 1988, and held him in jail pending ****1353** the outcome of federal and state prosecutions. After certain preliminary proceedings, Wilson eventually pleaded guilty to various federal and state criminal charges.

On November 29, 1989, the United States District Court for the Middle District of Tennessee sentenced Wilson to 96 months' imprisonment for violation of the Hobbs

Act, 18 U.S.C. § 1951. The District Court denied Wilson's request for credit for time served during his presentence state custody. On December 12, 1989, a Tennessee trial court sentenced Wilson to several years' imprisonment for robbery and two other felonies. In contrast to the District Court, the state court granted Wilson 429 days of credit toward his state sentence. Later that day, Tennessee authorities transferred Wilson to federal custody, and he began serving his federal sentence.

Wilson appealed the District Court's refusal to give him credit for the time that he had spent in state custody. Reversing the District Court, the United States Court of Appeals for the Sixth Circuit held that Wilson had a right to credit and that the District Court should have awarded it to him. 916 F.2d 1115 (1990). We granted certiorari, 502 U.S. 807, 112 S.Ct. 48, 116 L.Ed.2d 26 (1991), and now reverse.

II

[1] The Attorney General, through the Bureau of Prisons (BOP), has responsibility for imprisoning federal offenders. See 18 U.S.C. § 3621(a). From 1966 until 1987, a provision codified at 18 U.S.C. § 3568 (1982 ed.) required the Attorney General to award federal prisoners credit for certain time ***332** spent in jail prior to the commencement of their sentences. This provision, in part, stated:

> "*The Attorney General shall give any such person credit* toward service of his sentence for any days spent in custody in connection with the offense or acts for which sentence was imposed." Pub.L. 89–465, § 4, 80 Stat. 217 (emphasis added).

The Attorney General implemented this provision by computing the amount of credit after taking custody of the sentenced federal offender. Although the federal courts could review the Attorney General's determination, the sentencing court did not participate in computation of the credit. See, *e.g., United States v. Morgan,* 425 F.2d 1388, 1389–1390 (CA5 1970).

In the Sentencing Reform Act of 1984, 18 U.S.C. § 3551 *et seq.,* which became effective in 1987, Congress rewrote § 3568 and recodified it at § 3585(b). Unlike its predecessor, § 3585(b) does not mention the Attorney General. Written in the passive voice, it states:

> "*A defendant shall be given credit* toward the service of a term of imprisonment for any time he has spent in official detention prior to the date the sentence commences—
>
> "(1) as a result of the offense for which the sentence was imposed; or
>
> "(2) as a result of any other charge for which the defendant was arrested after the commission of the offense for which the sentence was imposed;

"that has not been credited against another sentence." 18 U.S.C. § 3585(b) (emphasis added).

In describing the defendant's right to receive jail-time credit in this manner, the provision has created doubt about whether district courts now may award credit when imposing a sentence. The question has significance in this case ***333** because the final clause of § 3585(b) allows a defendant to receive credit only for detention time "that has not been credited against another sentence." When the District Court imposed Wilson's 96–month sentence on November 29, 1989, Wilson had not yet received credit for his detention time from the Tennessee courts. However, by the time the Attorney General imprisoned Wilson on December 12, 1989, the Tennessee trial court had awarded Wilson 429 days of credit. As a result, Wilson could receive a larger credit if the statute permitted crediting at sentencing, and ****1354** thus before the detention time had been credited against another sentence.

The United States argues that it is the Attorney General who computes the amount of the credit after the defendant begins his sentence and that the Court of Appeals erred in ordering the District Court to award credit to Wilson. Wilson counters that § 3585(b) authorizes the District Court to compute the amount of the credit at sentencing. We agree with the United States.

A

[2] **[3]** We do not accept Wilson's argument that § 3585(b) authorizes a district court to award credit at sentencing. Section 3585(b) indicates that a defendant may receive credit against a sentence that "*was imposed.*" It also specifies that the amount of the credit depends on the time that the defendant "*has spent* " in official detention "prior to the date the sentence commences." Congress' use of a verb tense is significant in construing statutes. See, *e.g., Otte v. United States,* 419 U.S. 43, 49–50, 95 S.Ct. 247, 252–253, 42 L.Ed.2d 212 (1974); *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.,* 484 U.S. 49, 63–64, n. 4, 108 S.Ct. 376, 384, n. 4, 98 L.Ed.2d 306 (1987). By using these verbs in the past and present perfect tenses, Congress has indicated that computation of the credit must occur after the defendant begins his sentence. A district court, therefore, cannot apply § 3585(b) at sentencing.

Federal defendants do not always begin to serve their sentences immediately. In this case, the District Court sentenced ***334** Wilson on November 29, 1989, but Wilson did not begin his sentence until December 12, 1989. At sentencing, the District Court only could have speculated about the amount of time that Wilson would spend in detention prior to the commencement of his sentence; the court did not know when the state-court proceedings would end or when the federal authorities would take Wilson into custody. Because § 3585(b) bases the credit on how much time a defendant "has spent" (not "will have spent") prior to beginning his sentence, the District Court could not compute the amount of the credit at sentencing.

The final phrase of § 3585(b) confirms this interpretation. As noted above, it authorizes

credit only for time that "has not been credited against another sentence." Wilson argues that this phrase does not prevent him from receiving credit because his official detention "ha[d] not been credited" against the state sentence when the District Court imposed the federal sentence. Under this logic, however, if the District Court had sentenced Wilson a few weeks later than it did, he would not have received credit under § 3585(b). This interpretation of the statute would make the award of credit arbitrary, a result not to be presumed lightly. See *United States v. Turkette,* 452 U.S. 576, 580, 101 S.Ct. 2524, 2527, 69 L.Ed.2d 246 (1981) (absurd results are to be avoided). We can imagine no reason why Congress would desire the presentence detention credit, which determines how much time an offender spends in prison, to depend on the timing of his sentencing. For these reasons, we conclude that § 3585(b) does not authorize a district court to compute the credit at sentencing.

B

[4] We agree with the United States that the Attorney General must continue to compute the credit under § 3585(b) as he did under the former § 3568. When Congress writes a statute in the passive voice, it often fails to indicate who must take a required action. This silence can make the ***335** meaning of a statute somewhat difficult to ascertain. See, *e.g., E.I. du Pont de Nemours & Co. v. Train,* 430 U.S. 112, 128, 97 S.Ct. 965, 975, 51 L.Ed.2d 204 (1977); *Gladstone, Realtors v. Village of Bellwood,* 441 U.S. 91, 102–103, 99 S.Ct. 1601, 1609–1610, 60 L.Ed.2d 66 (1979). Yet, even though § 3585(b) no longer mentions the Attorney ****1355** General, we do not see how he can avoid determining the amount of a defendant's jail-time credit.

After a district court sentences a federal offender, the Attorney General, through the BOP, has the responsibility for administering the sentence. See 18 U.S.C. § 3621(a) ("A person who has been sentenced to a term of imprisonment ... shall be committed to the custody of the Bureau of Prisons until the expiration of the term imposed"). To fulfill this duty, the BOP must know how much of the sentence the offender has left to serve. Because the offender has a right to certain jail-time credit under § 3585(b), and because the district court cannot determine the amount of the credit at sentencing, the Attorney General has no choice but to make the determination as an administrative matter when imprisoning the defendant.

Crediting jail time against federal sentences long has operated in this manner. After Congress enacted § 3568 in 1966, the BOP developed detailed procedures and guidelines for determining the credit available to prisoners. See Federal Prison System Program Statement No. 5880.24 (Sept. 5, 1979) and Federal Bureau of Prisons Operations Memorandum No. EMS DM 154–89 (Oct. 23, 1989), Apps. B and C to Brief for United States (stating BOP's procedures for computing jail-time credit determinations); see also *United States v. Lucas,* 898 F.2d 1554 (CA11 1990). Federal regulations have afforded prisoners administrative review of the computation of their credits, see 28 CFR §§ 542.10–542.16 (1990); *Lucas, supra,* at 1556, and prisoners have been able to seek

judicial review of these computations after exhausting their administrative remedies, see *United States v. Bayless,* 940 F.2d 300, 304–305 (CA8 1991); ***336** *United States v. Flanagan,* 868 F.2d 1544, 1546 (CA11 1989); *United States v. Martinez,* 837 F.2d 861, 865–866 (CA9 1988). Congress' conversion of an active sentence in § 3568 into a passive sentence in § 3585(b) strikes us as a rather slim ground for presuming an intention to change these well-established procedures. "It is not lightly to be assumed that Congress intended to depart from a long established policy." *Robertson v. Railroad Labor Bd.,* 268 U.S. 619, 627, 45 S.Ct. 621, 624, 69 L.Ed. 1119 (1925).

C

Wilson argues that our conclusion conflicts with the familiar maxim that, when Congress alters the words of a statute, it must intend to change the statute's meaning. See *Russello v. United States,* 464 U.S. 16, 23–24, 104 S.Ct. 296, 300–301, 78 L.Ed.2d 17 (1983). He asserts that, by removing the explicit reference to the Attorney General when it enacted § 3585(b), Congress expressed a desire to remove the Attorney General from the process of computing sentences. Otherwise, Wilson contends, Congress would have had no reason to modify the provision as it did. We have no difficulty with the general presumption that Congress contemplates a change whenever it amends a statute. In this case, however, we find that presumption overcome by our conclusions that the District Court cannot perform the necessary calculation at the time of sentencing and that the Attorney General, in implementing the defendant's sentence, cannot avoid computing the credit.

We candidly acknowledge that we do not know what happened to the reference to the Attorney General during the revision. We do know that Congress entirely rewrote § 3568 when it changed it to its present form in § 3585(b). It rearranged its clauses, rephrased its central idea in the passive voice, and more than doubled its length. In view of these changes, and because any other interpretation would require us to stretch the meaning of the words that § 3585(b) now includes, we think it likely that the former reference to the Attorney General was simply lost in the shuffle.

***337** Our interpretation of § 3585(b), however, does not render the 1987 revision meaningless. Congress altered § 3568 in at least three ways when it enacted § 3585(b). First, Congress replaced the term "custody" with the term "official detention." Second, Congress ****1356** made clear that a defendant could not receive a double credit for his detention time. Third, Congress enlarged the class of defendants eligible to receive credit. Under the old law, a defendant could receive credit only for time spent in custody in connection with "the offense ... for which sentence was imposed." Under the new law, a defendant may receive credit both for this time and for time spent in official detention in connection with "any other charge for which the defendant was arrested after the commission of the offense for which the sentence was imposed." In light of these revisions, and for the foregoing reasons, we conclude that the Attorney General may continue to compute the amount of the credit. The judgment of the Court of Appeals is

Reversed.

Justice STEVENS, with whom Justice WHITE joins, dissenting.

Today's rigid interpretation of a remedial statute is not supported by the text, legislative history, or underlying policies of the statute. In *Crandon v. United States,* 494 U.S. 152, 158, 110 S.Ct. 997, 1001, 108 L.Ed.2d 132 (1990), this Court said that "[i]n determining the meaning of [a] statute, we look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy." The Court has failed to do this today. The statute at issue, 18 U.S.C. § 3585(b), gives the convicted defendant a right to have his term of imprisonment shortened by the amount of time he has already spent in either federal or state custody as a result of ***338** his offense, provided that the time has not already been credited against another sentence. [1]

1 Title 18 U.S.C. § 3585(b) provides:

> "(b) CREDIT FOR PRIOR CUSTODY.—A defendant shall be given credit toward the service of a term of imprisonment for any time he has spent in official detention prior to the date the sentence commences—
>
> "(1) as a result of the offense for which the sentence was imposed; or
>
> "(2) as a result of any other charge for which the defendant was arrested after the commission of the offense for which the sentence was imposed;
>
> "that has not been credited against another sentence."

The defendant's right to the full credit authorized by the statute is obviously an important right. Both the Attorney General and the sentencing judge have a duty to respect and protect that right. Moreover, it is clear that in the event there is a dispute between the parties over the right to a credit, the dispute must be resolved by the court. No one contends that the Attorney General has unreviewable discretion to determine the appropriate credit in any case. [2]

2 Prior to 1987, when the statute assigned the initial responsibility for determining the length of the credit to the Attorney General, it was settled that his determination was subject to judicial review after the prisoner exhausted his administrative remedies. See *Chua Han Mow v. United States,* 730 F.2d 1308, 1313 (CA9 1984), cert. denied, 470 U.S. 1031, 105 S.Ct. 1403, 84 L.Ed.2d 790 (1985).

In most cases, the calculation of the credit is a routine, ministerial task that will not give rise to any dispute. [3] Occasionally, however, as this case demonstrates, there may be a legitimate difference of opinion either about the meaning of the statute or about the relevant facts. [4] Such a dispute ***339** must, of course, be resolved by the judge. The only question that remains, then, is *when* the judge shall resolve the issue—at the time of sentencing, when the defendant is represented ****1357** by counsel, or at some

later date, after the defendant has begun to serve his sentence.

[3] As respondent acknowledged, "the arithmetical task of figuring out the exact date an offender will finish serving his sentence" "is essentially an administrative ministerial function." Tr. of Oral Arg. 4; see also *id.,* at 10, 21, 52.

[4] Typically the dispute centers on whether the questioned time was "official detention" or whether the time has already been "credited" to another sentence. See, *e.g., United States v. Beston,* 936 F.2d 361 (CA8 1991) (*per curiam*); *United States v. Chalker,* 915 F.2d 1254 (CA9 1990); *United States v. Woods,* 888 F.2d 653 (CA10 1989), cert. denied, 494 U.S. 1006, 110 S.Ct. 1301, 108 L.Ed.2d 478 (1990).

The credit at issue in this case was a period of almost 14 months that respondent had spent in state custody before he entered into a plea agreement with the federal prosecutor.[5] Prior to the amendment of § 3585(b),[6] which became effective in 1987, the statute—at least as construed by the Sixth Circuit where this case arose—did not authorize a credit for time spent in state custody. See *United States v. Blankenship,* 733 F.2d 433, 434 (1984).[7] Consistent with that preamendment practice, the District Court denied respondent's request for credit for the 14 months that he had spent in state custody.[8] There are two points that emerge from that ***340** ruling: First, the District Court erroneously construed the amended statute, and second, the legal question that the District Court decided was ripe for decision at the time of sentencing.

[5] In the District Court, the Government did not take any position with respect to respondent's request for jail credit, stating that "as to defense's petition that the time spent incarcerated on state charges for the crimes which occurred prior to the federal conspiracy, that's up to the court and the government takes no position as to that." Tr. 86. In the Court of Appeals, however, the Government contended that respondent was not entitled to the credit. See Brief for Appellee in No. 89–6583 (CA6), pp. 14–15.

[6] Before § 3585 became effective, 18 U.S.C. § 3568 (1982 ed.) governed credit for presentence time spent in official detention.

[7] See also *United States v. Garcia–Gutierrez,* 835 F.2d 585, 586 (CA5 1988) (construing former § 3568).

[8] "IT IS THE JUDGMENT OF THIS COURT THAT defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of:

> "Ninety six months (96), which includes an upward departure of thirty-three months. Defendant is unable to pay a fine, or the cost of his incarceration or supervised release. Defendant will not be given any credit for the time spent in state custody." Record, Doc. No. 56.

> The Government defended this ruling in its brief to the Court of Appeals, arguing:
> "Although there is some authority that a defendant is entitled to credit for time served in state custody once a federal detainer has been lodged, the state confinement must be the product of action by federal law enforcement officials. *United States v. Garcia–Gutierrez,* 835 F.2d 585, 586 (5th Cir.1988); *United States v. Harris,* 876 F.2d 1502, 1506 (11th Cir.1989), *cert. denied,* [493 U.S. 1005, 110 S.Ct. 569, 107 L.Ed.2d 563] (1989). The federal detainer must be the exclusive reason a prisoner in state custody has not been released on bail. *United States v. Blankenship,* 733 F.2d 433, 434 (6th Cir.1984)." Brief for Appellee in No. 89–6583, pp. 14–15.

In its opinion today, the Court emphasizes the fact that the state court later awarded respondent credit for his 14 months in pretrial detention, arguing that he therefore would not have been entitled to a federal credit if the federal determination had been made after the state sentence was imposed. See *ante,* at 1353, 1354–1355. This argument is misleading for three reasons. First, if the Federal District Court had granted respondent's request, it seems unlikely that the state court would also have allowed the credit. Second, although the Court assumes that the risk of a double credit could be avoided by postponing the credit determination until after the convicted defendant begins to serve his federal sentence, that assumption is erroneous because state proceedings frequently do not terminate until after a defendant begins to serve his federal sentence or, indeed, in some cases, until after the defendant has been released from federal custody. Third, when a correct federal sentence, including a correct credit for pretrial custody, has been imposed, the subsequent action of a state court concerning the amount of punishment for any state offenses the defendant may have committed is purely a matter of state concern.

In this case, for example, if the Federal Sentencing Guidelines had prescribed a sentence of less than 14 months, and if the District Court, or indeed the Attorney General, had awarded respondent the proper credit, and therefore released him from custody, it would be bizarre to conclude that ***341** the Federal Government should rearrest ****1358** him if a Tennessee court subsequently decided to give him the same credit because he would already have served almost 14 months in custody, thus fulfilling his federal sentence. The possibility that a state court will allow the same credit that a federal court allows exists whenever a state sentence is imposed after the federal credit determination is made, whether it is made by the trial judge or by the Attorney General and whether it is made at the sentencing hearing or at the commencement of the federal sentence. The *likelihood* that the state court will allow a second credit after a federal credit has been allowed seems remote no matter when or by whom the federal determination is made. More importantly, the existence of a hypothetical risk of double credits in rare cases involving overlapping state and federal jurisdiction is not a sufficient reason for refusing to give effect to the plain language of the statute in cases in which no such problem is presented.

I

The Court's entire analysis rests on an incorrect premise. The Court assumes that the statute mandates one of two starkly different procedures: *Either* the credit determination must *always* be made by the Attorney General after the defendant has begun to serve his sentence, *or* it must *always* be made by the sentencing judge at the time of sentencing. Neither of these procedures is compelled by the statutory text. An ordinary reading of the statute's plain language ("[a] defendant *shall be given* credit toward the service of a term of imprisonment...") suggests that the judge has ample authority to delegate the task of calculating the credit to a probation officer or to the prosecutor, subject, of course, to judicial review, or to make it himself in the first instance. Surely there is nothing in the statutory text that purports to deprive the judge of discretion to follow whichever procedure seems best suited to the particular facts of a given case. The text, which uses the passive voice, does not specify who ***342** will make the decision about jail credit. Certainly we should give effect to Congress' choice of words, and understand that the text, as written, does not identify a particular decisionmaker, and therefore, the appropriate decisionmaker may be *either* the judge or the Attorney General depending on the circumstances. [9]

9 Those Courts of Appeals that have recognized the shared role of the sentencing judge and the Attorney General in the decision to award jail credit include the Ninth Circuit and the Eighth Circuit. See, *e.g.*, *United States v. Chalker,* 915 F.2d, at 1258; *United States v. Beston,* 936 F.2d, at 363.

The statute does indicate that the decision should be made after "the sentence was imposed" and that the credit shall include time spent in official detention "prior to the date the sentence commences" even if some of that time is after the sentencing hearing. If, as is true in most cases, the convicted defendant begins to serve his sentence immediately after it is imposed, it is perfectly consistent with the text in such cases to have the judge determine the credit at the conclusion of the sentencing hearing. Even if the commencement of the sentence is postponed until a later date, an order specifying the amount of the credit to which the defendant was then entitled, and directing that an additional credit be given if appropriate, would also conform to the statutory text. The statute does not prohibit the judge from resolving the issue at any time after the sentence has been imposed. [10] In short, the text does not ****1359** mandate any particular procedure that must be followed in every case.

10 "Instead, we conclude that by failing to specify to whom such power was vested, Congress intended the Attorney General and the district courts to have concurrent authority to grant credit for time served. As a practical matter, our holding will give to the district court, in its discretion, the initial opportunity to grant credit for time previously served. We believe this result to be fully compatible with Congress' intent in passing the Comprehensive Crime Control Act of 1984. The Senate

> Report, in discussing the sentencing provisions of the Act, specifically decried the lack of certainty and finality under the pre-Guidelines sentencing system to the effect that 'prisoners often do not really know how long they will spend in prison until the very day they are released.' *Crime Control Act,* S.Rep. No. 225, 98th Cong., 2d Sess. at 49, *reprinted in* 1984 U.S.Code Cong. & Admin.News at 3182, 3232. Allowing the district court, in its discretion, to compute credit time when the sentence is imposed furthers this congressional purpose by informing one convicted of a crime at the outset of their sentence precisely how long they will spend in prison." *United States v. Chalker,* 915 F.2d, at 1258 (footnotes omitted).

***343** Although Congress' use of the passive voice clearly leaves open the question of who the decisionmaker is with respect to jail credit, the placement of § 3585 in Subchapter D–Imprisonment, in which "the court" is called upon to determine the sentence, § 3581, impose the sentence, § 3582, include a term of supervised release, § 3583, and determine whether the term is to run concurrently or consecutively in the case of multiple sentences, § 3584, clearly points to the judge as the person who is to calculate credit, § 3585, in the first instance. Congress could have made this perfectly clear by repeating the phrase "the court" in § 3585, but that was made almost unnecessary by placing § 3585 in a subchapter in which the court clearly had responsibility for every action that needed to be taken, but could also delegate actions to the appropriate authorities.

II

The Court's textual argument amounts to nothing more than an assertion that because *sometimes* all issues relating to the credit determination will not be ripe for decision at the time of sentencing, the trial court *never* has authority to make the credit determination even in cases that are ripe for decision.[11] Because this reasoning is so plainly flawed, the ***344** Court's holding must rest on its understanding of the legislative history. The history on which the Court relies includes no relevant comments in the Committee Reports or the debates. It consists only of the fact that prior to 1987 the statute directed the Attorney General to make the credit determination. See *ante,* at 1353. It seems to me, however, that that smidgen of history merely raises the issue without answering it. The fact that Congress carefully rewrote the relevant section in a way that makes the defendant's right significantly more valuable tends to support the conclusion that the changes in language were deliberate and should not be ignored. See *Union Bank v. Wolas,* 502 U.S. 151, 112 S.Ct. 527, 116 L.Ed.2d 514 (1991); *United States Railroad Retirement Bd. v. Fritz,* 449 U.S. 166, 179, 101 S.Ct. 453, 461, 66 L.Ed.2d 368 (1980). Recognizing the district court's authority to enter an appropriate order at the conclusion of the sentencing hearing is entirely consistent with a congressional purpose to enhance the value of this right.

11 Certainly there are some credit issues that can arise that are ripe for decision

at the time of the sentencing hearing. What constitutes "official detention" is one such issue. It is also an issue on which the Courts of Appeals are currently divided. For example, in *Moreland v. United States,* 932 F.2d 690, 692 (1991), the Eighth Circuit agreed with Moreland that he should receive credit for the time he spent at a community treatment center; however, in *United States v. Insley,* 927 F.2d 185, 186 (1991), the Fourth Circuit held that Insley's conditions of release did not constitute custody for purposes of credit; in *Ramsey v. Brennan,* 878 F.2d 995, 996 (1989), the Seventh Circuit would not credit the time that Ramsey spent in a halfway house while awaiting trial, and in *United States v. Woods,* 888 F.2d, at 656, the Tenth Circuit held that Woods was not entitled to credit for the time he spent at a residential treatment center when he was out on bond. In each of these cases, the issue was ripe for decision at the sentencing hearing.

III

No statutory policy would be adversely affected by recognizing the district court's authority to make the initial credit determination in appropriate cases, and in fact, two important policies would be served. First, as the Court of Appeals for the Ninth Circuit has observed, see n. 10, *supra,* allowing the district court, in its discretion, to compute ****1360** the credit when the sentence is imposed furthers the interest in providing prisoners with prompt, accurate, and precise information about the time they must spend in prison. This policy is expressly identified in the Senate Report describing ***345** the value of a procedure "whereby the offender, the victim, and society all know the prison release date at the time of the initial sentencing by the court, subject to minor adjustments based on prison behavior called 'good time.' " S.Rep. No. 98–225, p. 46 (1983), U.S.Code Cong. & Admin.News 1984, pp. 3182, 3229. [12]

12 As the Senate Report made clear, one objective of the Act was to redress the situation in which "prisoners often do not really know how long they will spend in prison until the very day they are released." S.Rep. No. 98–225, at 49.

Second, and of even greater importance, allowing the district court to make the credit determination furthers the interest in uniform and evenhanded sentencing that is the centerpiece of the entire Sentencing Reform Act of 1984. When there are disputed issues that must be resolved by a judge, an adversarial proceeding, in which the parties are represented by counsel and the proceeding takes place in open court and on the record, is the best guarantee of a fair and accurate decision. [13] The convicted defendant is represented by trial counsel at the time of sentencing, but usually must fend for himself after he is incarcerated. Committing the decision to the Attorney General after the defendant has begun to serve his sentence, particularly if he must serve his sentence in some facility remote from the district of conviction, can only minimize the effective participation of defense counsel. Indeed, it may generate meritless *pro se* claims for credit that could be avoided by

prompt consideration at sentencing, as well as complicate and delay the disposition of meritorious claims. A flexible approach that allows the judge to decide when, and how, the credit determination ***346** should be made is fully consistent with the purposes of the statute and with its text. [14]

13 Several States have recognized the advantages of assigning to the court the task of calculating jail credit. See Fla.Stat. § 921.161 (1991) ("A sentence of imprisonment shall not begin to run before the date it is imposed, but the court imposing a sentence shall allow a defendant credit for all of the time he spent in the county jail before sentence. The credit must be for a specified period of time and shall be provided for in the sentence"); see also Cal.Penal Code Ann. § 2900.5(d) (West Supp.1992); Mass.Gen.Laws § 279:33A (1990).

14 The information required for the sentencing judge to make a credit determination could easily become part of the information that is routinely provided to the judge in the presentence report. Such a report already contains the convicted offender's prior criminal history, which includes much of the information necessary to decide whether he is eligible for credit for time in custody. The report could contain the amount of jail credit the person is entitled to, and if there are other sentences pending or unserved, a recommendation whether the current sentence should be concurrent or consecutive to any prior sentences.

For the foregoing reasons, I would affirm the judgment of the Court of Appeals.

All Citations

503 U.S. 329, 112 S.Ct. 1351, 117 L.Ed.2d 593, 60 USLW 4244

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RLA-11

West's Annotated California Codes
Corporations Code (Refs & Annos)
Title 1. Corporations
Division 1. General Corporation Law (Refs & Annos)
Chapter 3. Directors and Management (Refs & Annos)

West's Ann.Cal.Corp.Code § 309

§ 309. Performance of duties by director; liability

Currentness

(a) A director shall perform the duties of a director, including duties as a member of any committee of the board upon which the director may serve, in good faith, in a manner such director believes to be in the best interests of the corporation and its shareholders and with such care, including reasonable inquiry, as an ordinarily prudent person in a like position would use under similar circumstances.

(b) In performing the duties of a director, a director shall be entitled to rely on information, opinions, reports or statements, including financial statements and other financial data, in each case prepared or presented by any of the following:

(1) One or more officers or employees of the corporation whom the director believes to be reliable and competent in the matters presented.

(2) Counsel, independent accountants or other persons as to matters which the director believes to be within such person's professional or expert competence.

(3) A committee of the board upon which the director does not serve, as to matters within its designated authority, which committee the director believes to merit confidence,

so long as, in any such case, the director acts in good faith, after reasonable inquiry when the need therefor is indicated by the circumstances and without knowledge that would cause such reliance to be unwarranted.

(c) A person who performs the duties of a director in accordance with subdivisions (a) and (b) shall have no liability based upon any alleged failure to discharge the person's obligations as a director. In addition, the liability of a director for monetary damages may be eliminated or limited in a corporation's articles to the extent provided in paragraph (10) of subdivision (a) of Section 204.

Credits

(Added by Stats.1975, c. 682, § 7, eff. Jan. 1, 1977. Amended by Stats.1976, c. 641, § 9.5, eff. Jan. 1, 1977; Stats.1987, c. 1201, § 7; Stats.1987, c. 1203, § 2, eff. Sept. 27, 1987.)

West's Ann. Cal. Corp. Code § 309, CA CORP § 309
Current with urgency legislation through Ch. 16 of 2022 Reg.Sess. Some statute sections may be more current, see credits for details.

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